Australian Government

Australian Law Reform Commission

Family Law for the Future — An Inquiry into the Family Law System

FINAL REPORT

ALRC Report 135

March 2019

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This Final Report reflects the law as at 5 March 2019.

The Australian Law Reform Commission (ALRC) was established on 1 January 1975 by the *Law Reform Commission Act 1973* (Cth) and reconstituted by the *Australian Law Reform Commission Act 1996* (Cth).

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Australian Government

Australian Law Reform Commission

The Hon Christian Porter MP
Attorney-General of Australia
Parliament House
Canberra ACT 2600

31 March 2019

Dear Attorney-General

Review of the Family Law System

On 27 September 2017, the Australian Law Reform Commission received Terms of Reference to undertake an inquiry into the family law system. On behalf of the Members of the Commission involved in this Inquiry, and in accordance with the *Australian Law Reform Commission Act 1996* (Cth), I am pleased to present you with the Final Report on this reference, *Family Law for the Future—An Inquiry into the Family Law System* (ALRC Report 135, 2019).

Yours sincerely,

The Hon Justice SC Derrington

President

Contents

Terms of Reference

Review of the family law system

I, Senator the Hon George Brandis QC, Attorney-General of Australia, having regard to:

- the fact that, despite profound social changes and changes to the needs of families in Australia over the past 40 years, there has not been a comprehensive review of the *Family Law Act 1975* (Cth) (the Act) since its commencement in 1976;
- the greater diversity of family structures in contemporary Australia;
- the importance of ensuring the Act meets the contemporary needs of families and individuals who need to have resort to the family law system;
- the importance of affording dignity and privacy to separating families;
- the importance of public understanding and confidence in the family law system;
- the desirability of encouraging the resolution of family disputes at the earliest opportunity and in the least costly and harmful manner;
- the paramount importance of protecting the needs of the children of separating families;
- the pressures (including, in particular, financial pressures) on courts exercising family law jurisdiction;
- the jurisdictional intersection of the federal family law system and the state and territory child protection systems, and the desirability of ensuring that, so far as is possible, children's matters arising from family separation be dealt with in the same proceedings;
- the desirability of finality in the resolution of family disputes and the need to ensure compliance with family law orders and outcomes;
- the benefits of the engagement of appropriately skilled professionals in the family law system

REFER to the Australian Law Reform Commission (ALRC) for inquiry and report, pursuant to ss 20(1) of the *Australian Law Reform Commission Act 1996* (Cth), a consideration of whether, and if so what, reforms to the family law system are necessary or desirable, in particular in relation to the following matters:

- the appropriate, early and cost-effective resolution of all family law disputes;
- the protection of the best interests of children and their safety;
- family law services, including (but not limited to) dispute resolution services;
- family violence and child abuse, including protection for vulnerable witnesses;
- the best ways to inform decision makers about the best interests of children, and the views held by children in family disputes;

- collaboration, coordination, and integration between the family law system and other Commonwealth, state and territory systems, including family support services and the family violence and child protection systems;
- whether the adversarial court system offers the best way to support the safety of families and resolve matters in the best interests of children, and the opportunities for less adversarial resolution of parenting and property disputes;
- rules of procedure, and rules of evidence, that would best support high quality decision making in family disputes;
- mechanisms for reviewing and appealing decisions;
- families with complex needs, including where there is family violence, drug or alcohol addiction or serious mental illness;
- the underlying substantive rules and general legal principles in relation to parenting and property;
- the skills, including but not limited to legal, required of professionals in the family law system;
- restriction on publication of court proceedings;
- improving the clarity and accessibility of the law; and
- any other matters related to these Terms of Reference.

I further request that the ALRC consider what changes, if any, should be made to the family law system; in particular, by amendments to the *Family Law Act* and other related legislation.

Scope of the reference

The ALRC should have regard to existing reports relevant to:

- the family law system, including on surrogacy, family violence, access to justice, child protection and child support; and
- interactions between the Commonwealth family law system and other fields, including family law services, the state and territory domestic and family violence, child protection, and child support systems, including the ALRC Family Violence Report 114.

Consultation

The ALRC should consult widely with family law, family relationship and social support services, health and other stakeholders with expertise and experience in the family law and family dispute resolution sector. The ALRC should produce consultation documents to ensure experts, stakeholders and the community have the opportunity to contribute to the review.

Timeframe for reporting

The ALRC should provide its report to the Attorney-General by 31 March 2019.

Participants

Australian Law Reform Commission

President

The Hon Justice SC Derrington

Commissioner in Charge

The Hon Justice SC Derrington (from 6 November 2018)

Professor H Rhoades (until 5 November 2018)

Part-time Commissioners

The Hon Justice J Middleton, Federal Court of Australia

The Hon J Faulks

Mr G Sinclair

Dr A Bickerdike (from 29 June 2018)

The Hon C Edwardes AM GAICD (from 12 December 2018)

The Hon M May AM QC (from 12 December 2018)

General Counsel

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Dr Julie MacKenzie (until 15 January 2019)

Ms Sallie Mclean (from 21 December 2018 until 22 February 2019)

Mr Stephen Still (until 11 January 2019)

Mr Richard Pelvin (from 14 January 2019)

Senior Legal Officers

Mr Micheil Paton (from 10 September 2018)

Ms Lisa Zehetner (from 4 June 2018)

Legal Officers

Ms Sarah Dobinson

Ms Genevieve Murray (from 8 January 2019)

Ms Mira Green (from 14 January 2019)

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Ms Jackie Brady, Executive Director, Family & Relationship Services Australia, Canberra, ACT

Mr Michael Brandenburg, Strategy Manager, No To Violence/Men's Referral Service, Melbourne, Victoria

Her Hon Judge Amanda Chambers, Judge of the County Court of Victoria and President of the Children's Court of Victoria

The Hon Professor Richard Chisholm AM, former Judge of the Family Court of Australia, Canberra, ACT

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Ms Sandra Elhelw-Wright, Women's Chair, Federation of Ethnic Communities' Councils of Australia; Policy Officer, ACT Human Rights Commission

Professor Belinda Fehlberg, Melbourne Law School, University of Melbourne

Dr Stewart Fenwick, CEO and Principal Registrar of the Federal Circuit Court of Australia, Melbourne, Victoria

The Hon Mary Finn, former Judge of the Appeals Division of the Family Court of Australia, Canberra, ACT

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Ms Louise Glanville, Managing Director, Victoria Legal Aid

Magistrate Anne Goldsbrough, Magistrates' Court of Victoria

Ms Pamela Hemphill, Executive Director, Out-of-Home Care, Department for Child Protection (SA)

Dr Victoria Hovane, Study Director, Family and Community Safety for Aboriginal and Torres Strait Islander Peoples Study, The Australian National University, Canberra, ACT

Ms Wendy Kayler-Thomson, Partner, Accredited Family Law Specialist, Forte Family Lawyers, Melbourne, Victoria

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Ms Angela Lynch, CEO, Women's Legal Service Qld

Ms Emma Malone, Clinical Psychologist, Carinity Communities - Talera, Brisbane (from end of June 2018)

Ms Corina Martin, CEO, Aboriginal Family Law Services (WA)

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Acknowledgements

The ALRC gratefully acknowledges:

- the contribution of the Hon Professor Richard Chisholm AM, who kindly provided his expertise in the consideration of specific legislative amendments required as part of this Review
- the support provided to the ALRC by the Australia Institute of Family Studies (AIFS) in the conduct of this Review of the Family Law System through the secondment of Senior Research Fellow, Dr Rae Kaspiew
- the support provided to the ALRC by the Attorney-General's Department in the conduct of this Review of the Family Law System through the provision of additional resources and the secondment of Stephen Still, Richard Pelvin and Lisa Zehetner.

Glossary

ACCO	Aboriginal Community Controlled Organisation
AHRC	Australian Human Rights Commission, formerly known as the Human Rights and Equal Opportunities Commission
AIFS	Australian Institute of Family Studies
ALRC	Australian Law Reform Commission
ALRC and NSWLRC Family Violence Report	*Family Violence—A National Legal Response* (ALRC Report 114, NSWLRC Report 128, 2010)
CAG	Council of Attorneys-General
CCS	Children's Contact Service
CLC	Community Legal Centre
COAG	Council of Australian Governments
Constitution	*Commonwealth of Australia Constitution Act 1900*
CPD	Continuing Professional Development
CRC	*United Nations Convention on the Rights of the Child*
Family Court	Family Court of Australia
'family courts'	Includes the Family Court of Australia, the Federal Circuit Court of Australia, and the Family Court of Western Australia
Family Law Act	*Family Law Act 1975* (Cth)
Family Law Regulations	*Family Law Regulations 1984* (Cth)
Family Law Rules	*Family Law Rules 2004* (Cth)
'family law system'	In this Report, refers collectively to the family courts and all family law and post-separation services, including family relationship services (such as government funded family counselling services, post-separation parenting programs, and Children's Contact Services (CCSs)), as well as legal aid commissions, the community legal sector, and private services.

FASS	Family Advocacy and Support Service
FDR	Family Dispute Resolution—an of out-of-court process in which parties to a dispute are assisted by professionals such as mediators or specialist dispute resolution practitioners to identify issues, share relevant information, explore and test possible solutions, and to put agreements in writing.
FDRP	Family Dispute Resolution Practitioner
Federal Circuit Court	Federal Circuit Court of Australia
Federal Circuit Court Act	*Federal Circuit Court of Australia Act 1999* (Cth)
Federal Circuit Court Rules	*Federal Circuit Court Rules 2001* (Cth)
Federal Court	Federal Court of Australia
FRC	Family Relationship Centre
LADR	Legally Assisted Dispute Resolution—an out-of-court process similar to FDR, but where the parties' legal advisors are also present to assist during negotiations.
NSWLRC	New South Wales Law Reform Commission
Parens patriae	A legal doctrine which holds the state responsible for protecting citizens who are unable to act on their own behalf, such as children. It grants the state authority to intervene against abusive or negligent parents or guardians.
SPLA *Family Violence Report*	House of Representatives Standing Committee on Social Policy and Legal Affairs, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (2017)
Tell Us Your Story	In addition to consultations and public submissions, this Inquiry provided a confidential online portal where participants could share their personal experiences with the family law system.

Recommendations

4. Closing the Jurisdictional Gap

Recommendation 1 The Australian Government should consider options to establish state and territory family courts in all states and territories, to exercise jurisdiction concurrently under the *Family Law Act 1975* (Cth), as well as state and territory child protection and family violence jurisdiction, whilst also considering the most efficient manner to eventually abolish first instance federal family courts.

Recommendation 2 The Australian Government should work with state and territory governments to develop and implement a national information sharing framework to guide the sharing of information about the safety, welfare, and wellbeing of families and children between the family law, family violence, and child protection systems. The framework should include:

- the legal framework for sharing information;
- relevant federal, state, and territory court documents;
- child protection records;
- police records;
- experts' reports; and
- other relevant information.

Recommendation 3 The Australian Government, together with state and territory governments, should consider expanding the information sharing platform as part of the National Domestic Violence Order Scheme to include family court orders and orders made under state and territory child protection legislation.

5. Children's Matters

Recommendation 4 Section 60B of the *Family Law Act 1975* (Cth) should be repealed.

Recommendation 5 Section 60CC of the *Family Law Act 1975* (Cth) should be amended so that the factors to be considered when determining parenting arrangements that promote a child's best interests are:

- what arrangements best promote the safety of the child and the child's carers, including safety from family violence, abuse, or other harm;
- any relevant views expressed by the child;
- the developmental, psychological, and emotional needs of the child;

- the benefit to the child of being able to maintain relationships with each parent and other people who are significant to the child, where it is safe to do so;
- the capacity of each proposed carer of the child to provide for the developmental, psychological, and emotional needs of the child, having regard to the carer's ability and willingness to seek support to assist with caring; and
- anything else that is relevant to the particular circumstances of the child.

Recommendation 6 The *Family Law Act 1975* (Cth) should be amended to provide that in determining what arrangements promote the best interests of an Aboriginal or Torres Strait Islander child, a court must consider the child's opportunities to connect with, and maintain the child's connection to, the child's family, community, culture, and country.

Recommendation 7 Section 61DA of the *Family Law Act 1975* (Cth) should be amended to replace the presumption of 'equal shared parental responsibility' with a presumption of 'joint decision making about major long-term issues'.

Recommendation 8 Section 65DAA of the *Family Law Act 1975* (Cth), which requires the courts to consider, in certain circumstances, the possibility of the child spending equal time, or substantial and significant time with each parent, should be repealed.

Recommendation 9 Section 4(1AB) of the *Family Law Act 1975* (Cth) should be amended to provide a definition of ***member of the family*** that is inclusive of any Aboriginal or Torres Strait Islander concept of family that is relevant in the particular circumstances of the case.

Recommendation 10 Combined rules for the Family Court of Australia and the Federal Circuit Court of Australia should provide for proceedings to be conducted under Pt VII Div 12A of the *Family Law Act 1975* (Cth) by judges of both courts. Both courts should be adequately resourced to carry out the statutory mandate in s 69ZN(1) of the *Family Law Act 1975* (Cth).

7. A Simplified Approach to Property Division

Recommendation 11 The *Family Law Act 1975* (Cth) should be amended to:

- specify the steps that a court will take when considering whether to make an order to alter the interests of the parties to the relationship in any property; and
- simplify the list of matters that a court may take into account when considering whether to make an order to alter the interests of the parties to the relationship in any property.

Recommendation 12 The *Family Law Act 1975* (Cth) should be amended to include a presumption of equality of contributions during the relationship.

Recommendation 13 The *Family Law Act 1975* (Cth) should be amended to provide that the relevant date to ascertain the value of the parties' rights, interests, and liabilities in any property is the date of separation, unless the interests of justice require otherwise.

Recommendation 14 The family courts and the Australian Financial Complaints Authority should develop a protocol for dealing with jurisdictional overlap with respect to debts of parties to family law proceedings. The protocol should provide that:

- disputes about the enforceability of a debt against one or both parties under the *National Consumer Credit Protection Act 2009* (Cth) are dealt with by the Australian Financial Complaints Authority; and
- disputes about the reallocation of a debt between parties to a family law proceeding are dealt with by the family courts.

Recommendation 15 The *Privacy Act 1988* (Cth) and the *National Consumer Credit Protection Act 2009* (Cth) should be amended to provide that when a court has ordered that one party (Party A) be responsible for a joint debt and indemnify the other party (Party B) against any default, credit providers are prohibited from making an adverse credit report against Party B to any credit reporting business as a consequence of the subsequent actions of Party A.

Recommendation 16 The *Family Law Act 1975* (Cth) should be amended to provide a presumption that the value of superannuation assets accumulated during a relationship are to be split evenly between the parties.

Recommendation 17 The *Family Law Act 1975* (Cth) should be amended to simplify the process for splitting superannuation including:

- developing template superannuation splitting orders for commonly made superannuation splits; and
- when the applicant is suffering economic hardship, requiring superannuation trustees to limit the fees they charge members and their former spouse for services provided in connection with property settlement under Pt VIII to the actual cost of providing those services.

Recommendation 18 The *Family Law Act 1975* (Cth) should be amended so that:

- the spousal maintenance provisions and provisions relating to the division of property are dealt with separately under the legislation; and
- access to interim spousal maintenance is enhanced by the use of Registrars to consider urgent applications.

Recommendation 19 The *Family Law Act 1975* (Cth) should be amended to include a statutory tort of family violence that would provide remedies consistent with existing common law remedies.

Recommendation 20 The *Family Law Act 1975* (Cth) should be amended to extend s 69ZX to property settlement proceedings.

8. Encouraging Amicable Resolution

Recommendation 21 The *Family Law Act 1975* (Cth) should be amended to:

- require that parties take genuine steps to attempt to resolve their property and financial matters prior to filing an application for court orders; and
- specify that a court must not hear an application unless the parties have lodged a genuine steps statement.

A failure to make a genuine effort to resolve a matter should have costs consequences.

Recommendation 22 Regulation 25 of the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth), which refers to 'equality of bargaining power between the parties', should be amended to refer to the 'equality of bargaining power between the parties, including an imbalance in knowledge of relevant financial arrangements'.

Recommendation 23 The *Family Law Act 1975* (Cth) should be amended to require Family Dispute Resolution Providers to provide a certificate to the parties in all matters where some or all of the issues in dispute have not been resolved.

Recommendation 24 Sections 10H and 10J of the *Family Law Act 1975* (Cth), which provide for confidentiality and inadmissibility of discussions and material in Family Dispute Resolution in relation to parenting matters, should be extended to Family Dispute Resolution for property and financial matters. The legislation should provide an exception for a sworn statement in relation to income, assets, superannuation balances, and liabilities that each party signs at the start of Family Dispute Resolution, which should be admissible.

Recommendation 25 The *Family Law Act 1975* (Cth) should be amended to clearly set out the disclosure obligations of parties, and the consequences for breach of those obligations.

9. Arbitration

Recommendation 26 The *Family Law Act 1975* (Cth) and the *Child Support (Assessment) Act 1989* (Cth) should be amended to increase the scope of matters which may be arbitrated, whether or not upon referral from a court. Those matters should include all financial issues, including child maintenance and child support, subject to limitations. Appropriate occasions for arbitration would not include disputes:

- relating to enforcement;

- under ss 79A or 90SN of the *Family Law Act 1975* (Cth) (subject to limitations); and
- in which a litigation guardian has been appointed.

Recommendation 27 The *Family Law Act 1975* (Cth) should be amended to remove the opportunity for a party to object to registration of an arbitral award, while maintaining appropriate safeguards for the integrity of registered awards.

Recommendation 28 The *Family Law Act 1975* (Cth) should be amended to allow some children's matters to be arbitrated. Appropriate occasions for arbitration in children's matters would not include disputes:

- relating to international relocation;
- relating to medical procedures of a nature requiring court approval;
- relating to contravention matters;
- in which an Independent Children's Lawyer has been appointed; and
- involving family violence which satisfy ss 102NA(1)(b) and (c) of the *Family Law Act 1975* (Cth).

Recommendation 29 The *Family Law Act 1975* (Cth) should be amended to provide that upon application by an arbitrator, or by a party to an arbitration, a court has power to make directions at any time regarding the further conduct of the arbitration, including power to make a direction terminating the arbitration (whether or not the arbitration was referred from a court).

10. Case Management: Efficiency and Accountability

Recommendation 30 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 so as to minimise harm to children and their families.

Recommendation 31 The *Family Law Act 1975* (Cth) should impose a statutory duty on parties, their lawyers, and third-parties to cooperate amongst themselves, and with the courts, to assist in achieving the overarching purpose. Breach of the duty will have costs consequences for the person who fails to act in accordance with the overarching purpose.

Recommendation 32 The *Family Law Act 1975* (Cth) should be amended to provide the courts with a power to make an order requiring a litigant to seek leave of the court prior to making further applications and serving them on the other party where the court is satisfied that such an order is appropriate for the protection of the respondent and/or any children involved in the proceedings, having regard to the overarching purpose of family law practice and procedure.

Recommendation 33 Section 45A of the *Family Law Act 1975* (Cth) should be amended to provide that the courts' powers of summary dismissal may be exercised where the court is satisfied that it is appropriate to do so, having regard to the overarching purpose of family law practice and procedure.

Recommendation 34 The family courts should consider promulgating a joint Practice Note for Case Management which describes the courts' approaches to the family law practice and procedure provisions.

Recommendation 35 The *Family Law Act 1975* (Cth) should be amended to provide for the appointment and protection of referees in the same terms as provided for in ss 54A and 54B of the *Federal Court of Australia Act 1976* (Cth).

Recommendation 36 Section 117 of the *Family Law Act 1975* (Cth) should be amended to:

- remove the general rule that each party to proceedings under the Act bears his or her own costs; and
- articulate the scope of the courts' power to award costs.

Recommendation 37 The *Family Law Act 1975* (Cth) should be amended to provide courts with an express statutory power to exclude evidence of 'protected confidences'. In determining whether to exclude evidence of protected confidences the court must:

- be satisfied that it is likely that harm would or might be caused, directly or indirectly, to a protected confider, and the nature and extent of the harm outweighs the desirability of the evidence being given; and
- ensure that in parenting proceedings, the best interests of the child is the paramount consideration when deciding whether to exclude evidence of protected confidences.

11. Compliance with Children's Orders

Recommendation 38 The *Family Law Act 1975* (Cth) should be amended to require parties to meet with a Family Consultant to assist their understanding of the final parenting orders made by a court following a contested hearing.

Recommendation 39 The *Family Law Act 1975* (Cth) should be amended to provide that:

- in all parenting proceedings for final orders, the courts must consider whether to make an order requiring the parties to see a Family Consultant for the purposes of receiving post-order case management; and
- the appointed Family Consultant has the power to seek that the courts place the matter in a contravention list or to recommend that the court make additional orders directing a party to attend a post-separation parenting program.

Recommendation 40 The *Family Law Regulations 1984* (Cth) should be amended to require leave to appeal interim parenting orders. Leave should only be granted where:

- the decision is attended by sufficient doubt to warrant it being reconsidered; and
- substantial injustice would result if leave were refused, supposing the decision to be wrong.

Recommendation 41 The *Family Law Act 1975* (Cth) should be amended to explicitly state that when a new parenting order is sought, and there is already a final parenting order in force, the court must consider whether:

- there has been a change of circumstances that, in the opinion of the court, is significant; and
- it is in the best interests of the child for the order to be reconsidered.

Recommendation 42 Part VII Div 13A of the *Family Law Act 1975* (Cth) should be redrafted to achieve simplification, and to provide for:

- a power to order that a child spend additional time with a person;
- a power to order parties to attend relevant programs at any stage of proceedings; and
- a presumption that a costs order will be made against a person found to have contravened an order.

12. Support Services in the Courts

Recommendation 43 The *Family Law Act 1975* (Cth) should be amended to:

- replace 'family consultants' with 'court consultants'; and
- redraft s 11A to include a comprehensive list of functions that court consultants would provide to children, families, and the courts.

Recommendation 44 Section 68LA(5) of the *Family Law Act 1975* (Cth) should be amended to include a specific duty for Independent Children's Lawyers to comply with the *Guidelines for Independent Children's Lawyers*, as promulgated from time to time and as endorsed by the family courts.

Recommendation 45 The Australian Government should ensure the availability of Indigenous Liaison Officers in court registries where they are required.

Recommendation 46 The *Family Law Act 1975* (Cth) should be amended to include a supported decision making framework for people with disability consistent with recommendations from the ALRC Report 124, *Equality, Capacity and Disability in Commonwealth Laws*.

Recommendation 47 The *Family Law Act 1975* (Cth) should include provisions for the appointment of a litigation representative where a person with disability is unable to conduct the litigation. These provisions should be consistent with the recommendations of the ALRC Report 124, *Equality, Capacity and Disability in Commonwealth Laws*.

Recommendation 48 The Australian Government should work with state and territory governments to facilitate the appointment of statutory authorities as litigation representatives in family law proceedings.

13. Building Accountability and Transparency

Recommendation 49 Section 115 of the *Family Law Act 1975* (Cth) should be amended to expand the Family Law Council's responsibilities to include:

- monitoring and regular reporting on the performance of the family law system;
- conducting inquiries into issues relevant to the performance of any aspect of the family law system, either of its own motion or at the request of government; and
- making recommendations to improve the family law system, including research and law reform proposals.

Recommendation 50 The Family Law Council should establish a Children and Young People's Advisory Board, which would provide advice and information about children's experiences of the family law system to inform policy and practice.

Recommendation 51 Relevant statutes should be amended to require that future appointments of all federal judicial officers exercising family law jurisdiction include consideration of the person's knowledge, experience, skills, and aptitude relevant to hearing family law cases, including cases involving family violence.

Recommendation 52 The Law Council of Australia should work with state and territory regulatory bodies for legal practitioners to develop consistent requirements for legal practitioners undertaking family law work to complete annually at least one unit of continuing professional development relating to family violence.

Recommendation 53 The Australian Government Attorney-General's Department should develop a mandatory national accreditation scheme for private family report writers.

Recommendation 54 The *Family Law Act 1975* (Cth) should be amended to:

- require any organisation offering a Children's Contact Service to be accredited; and
- make it an offence to provide a Children's Contact Service without accreditation.

14. Legislative Clarity

Recommendation 55 The *Family Law Act 1975* (Cth) and its subordinate legislation should be comprehensively redrafted.

Recommendation 56 Privacy provisions that restrict publication of family law proceedings to the public, currently contained in s 121 of the *Family Law Act 1975* (Cth), should be redrafted.

16. Secondary Interventions

Recommendation 57 The Family Advocacy and Support Service's social support services should be expanded to provide case management to clients who are engaged with the family law system.

Recommendation 58 The Australian Government should work with Legal Aid Commissions in each state and territory to expand the Family Advocacy and Support Service to court locations that have a demonstrable need and to ensure the provision of adequate and appropriate services.

Recommendation 59 Family Relationship Centres should be expanded to provide case management to clients with complex needs who are engaged with the family law system.

Recommendation 60 The Australian Government should work with Family Relationship Centres to develop services, including:

- financial counselling services;
- mediation in property matters;
- legal advice and Legally Assisted Dispute Resolution services; and
- Children's Contact Services.

Outcomes

Implementation of the recommendations in this Report will improve the family law system. These recommendations will:

- promote an integrated court response to family law matters, child protection matters, and matters involving family violence, providing better protection to individual litigants and their children;
- assist parties to understand the family law legislation and to resolve their disputes under the umbrella of the law, improving the consistency and fairness of negotiated outcomes;
- assist parties and the courts to arrive at parenting orders that best promote the best interests of the child;
- assist parties to understand and comply with parenting orders, reducing conflict and thus contributing to the welfare of children;
- increase the proportion of separated couples who are able to resolve their parenting matters and property and financial matters outside the courts through a process that ensures fairness and reduces ongoing conflict;
- reduce acrimony, cost, and delay in the adjudication of family law disputes through the courts; and
- ensure that families who seek assistance from the family law system with legal and other support needs receive that support in a coordinated and efficient manner.

Figures and Tables

Figures

Tables

1. Framing the Inquiry

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The Inquiry

1.1 On 17 August 2017, the then Attorney-General of Australia, Senator the Honourable George Brandis QC, asked the Australian Law Reform Commission (ALRC) to conduct an extensive independent review of the family law system, commencing from 1 October 2017. The Terms of Reference set the focus for the Inquiry against the background of: the greater diversity of family structures in contemporary Australia; the paramount importance of protecting the needs of children of separating families; the desirability of encouraging the resolution of family disputes at the earliest opportunity, and in the least costly and harmful manner; the desirability of ensuring that children's matters arising from family separation be dealt with in the same proceedings; the desirability of finality in the resolution of family disputes, and the need to ensure compliance with family law orders and outcomes; and the benefits of the engagement of appropriately skilled professionals in the family law system.

1.2 Despite profound social changes and changes to the needs of families over the past 40 years, there has not been a comprehensive review of the *Family Law Act 1975* (Cth) (the *Family Law Act*) since the *Report of the Joint Select Committee on the Family Law Act*, chaired by the Hon Philip Ruddock, in 1980.[1] It has, however, been

1 Commonwealth of Australia, *Family Law in Australia: Report of the Joint Select Committee on the Family Law Act* (Australian Government Publishing Service, Canberra, 1980).

amended by over 115 different Acts of the Commonwealth Parliament[2] and has grown to almost 800 pages in length. It is accompanied by the *Family Law Rules*, the *Family Law Regulations*, the *Federal Circuit Court Act*, the *Federal Circuit Court Rules*, and the Practice Directions of both the Federal Circuit Court and the Family Court. As currently presented, this legislative regime does not meet the contemporary needs of those who must resort to the family law system, either with or without the assistance of lawyers. There are enormous pressures on courts exercising family law jurisdiction, including structural pressures, caused by the jurisdictional intersection of the federal family law system and the state and territory child protection systems and family violence laws, and systemic pressures, caused by increased workloads and reduced resources. There is little public understanding of, or confidence in, the current family law system.

1.3 The Terms of Reference require the ALRC to consider whether, and if so what, reforms to the family law system are necessary or desirable, in particular by amendments to the *Family Law Act* and related legislation, in relation to 14 particular matters which fall broadly into the following themes:

a. protection of vulnerable parties, including: protection of the best interests of children and their safety; family violence and child abuse (including protection for vulnerable witnesses); collaboration, coordination, and integration between the family law system and other Commonwealth, state, and territory systems (including family support services and family violence and child protection systems); the best ways to inform decision makers about the best interests of, and views held by, children; families with complex needs (including where there is family violence, drug or alcohol addiction, or serious mental illness);

b. improving dispute resolution processes (including court proceedings), including: appropriate procedures for the early and cost-effective resolution of all family law disputes; opportunities for less adversarial resolution of parenting and property disputes; by improving the clarity and accessibility of the law including in relation to the underlying substantive rules and general legal principles governing parenting and property matters;

c. enhancing the integrity of the family law system, including: the rules of procedure and evidence that would best support high quality decision making in family disputes; mechanisms for reviewing and appealing decisions; restriction on publication of court proceedings;

d. family law services, including: necessary services in addition to dispute resolution services; skills required of professionals (but not limited to legal) in the family law system.

2 The most recent being the *Family Law Amendments (Family Violence and Cross-Examination of Parties) Act 2018* (Cth), No. 159 of 2018, 10 December 2018.

1.4 A number of matters affecting the family law system were excluded from the ALRC's Terms of Reference. These include the operation of the child support scheme, the re-structure of the Family Court and the Federal Circuit Court (as proposed in the Federal Circuit and Family Court of Australia Bill 2018 (Cth) and the Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018 (Cth)), and matters of state and territory responsibility, such as the specific workings of the various child protection systems within each state and territory. It was, however, necessary to consider the interaction between those systems and the family law system in addressing the specific term of reference requiring consideration of the collaboration, coordination, and integration between the family law system and other Commonwealth, state, and territory systems.

1.5 The ALRC is acutely aware that, given the breadth of the matters it was asked to inquire into, and the timeframe by which to do so, there will be disappointment amongst stakeholders where particular issues have been omitted from this Report. There is no single 'bold new initiative' or 'magic wand fix' (such as the establishment of the Child Support Scheme of the 1980s or the establishment of the Family Relationship Centres in the mid-2000s)[3] that is premised on its ability to transform the family law system overnight.

1.6 The ALRC has adopted the approach of identifying the problems with the Australian family law system, as revealed by the stories told through the confidential *Tell Us Your Story* portal, the submissions and consultations to this Inquiry, previous reports and studies, and the academic literature. It has then developed a set of principles by which solutions to the problems could be developed. The ALRC then makes the minimum number of recommendations deemed necessary to provide a dignified and efficient process that resolves disputes between parties to intimate relationships at the lowest financial, emotional, and psychological costs, always giving primacy to the interests of any children affected by those disputes.

Articulation of the problems

1.7 This Inquiry has identified structural and systemic difficulties within the current Australian family law system. The structural difficulties are created by the bifurcated legislative regimes that deal with different aspects of matters that impact on families in modern Australia—a federal regime that deals primarily with parenting and property matters (with a federal court structure in which to adjudicate those matters), and state and territory regimes that are responsible for child protection and domestic violence laws (with state and territory courts vested with jurisdiction to deal with those matters). Those who advocated for a federal family court in 1974 could not have foreseen the insidious growth in the incidence of child abuse and family violence that has occurred in Australia in the ensuing decades.[4] The existing bifurcated model, which requires parties

3 P Parkinson, *Submission 361*.

4 Rae Kaspiew et al, *Experiences of Separated Parents Study (Evaluation of the 2012 Family Violence*

to navigate multiple courts across jurisdictions, fails to meet the needs of children and families across the family law, child protection, and family violence jurisdictions.

1.8 At a systemic level, the current family law system suffers from two major deficiencies. First, the *Family Law Act* itself has, by virtue of over 40 years of constant amendment, become 'impenetrable' for lay people and even many lawyers. The law should be sufficiently transparent and accessible for parties to understand the parameters within which decisions will be made about their children and their property and financial interests. Secondly, the family law system has been deprived of resources to such an extent that it cannot deliver the quality of justice expected of a country like Australia, and to whose family law system other countries once looked and tried to emulate.[5] There is a chronic lack of funding for the appointment and proper training of judicial resources (including judges, judicial registrars – none of whom are currently employed within the courts, and registrars), court-based social services professionals (including Family Consultants and Indigenous Liaison Officers), and legal aid services (including Independent Children's Lawyers). As a consequence, children and families are deprived of sufficient time and attention being given to their matter at all stages of the process, with the obvious risks that this entails. Faith in the system is lost. The lack of resources has been a matter of concern at the highest levels for 30 years. In 1991, in *Harris v Caladine*, Brennan J said:

> It seems the pressures on the Family Court are such that there is no time to pay more than lip service to the lofty rhetoric of s. 43 of the Act … It is a matter of public notoriety that the Family Court has frequently been embarrassed by a failure of government to provide the resources needed to perform the vast functions expected of the Court under the Act. But the Constitution does not bend to the exigencies of a budget and, if the humanly familial relations create a mass of controversies justiciable before the Family Court, Justices must be found to hear and determine them.[6]

The impetus for reform

1.9 The need for structural and systemic reform in the area of family law has been a consistent theme in recent reviews in both Australia[7] and other jurisdictions.[8] Most

Amendments) (Australian Institute of Family Studies, 2015) [2.2.1]. Table 2.5 shows that 42.4% of parents surveyed in the *Survey of Recently Separated Parents* study in 2014 reported no family violence before or during separation. Consequently, 57.6% of parents surveyed in the same 2014 study reported some form of family violence before or during separation.

5 Singapore for example looked particularly to Australia for its recent amendments in 2014, as had the United Kingdom in previous decades.

6 *Harris v Caladine* (1991) 172 CLR 84, 112.

7 See, eg, Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016); House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (2017).

8 See, eg, Action Committee on Access to Justice in Civil and Family Matters, Ottawa, Canada, *Access to Civil & Family Justice: A Roadmap for Change* (2013); Manitoba Family Law Reform Committee, *Modernizing Our Family Law System* (Manitoba Family Law Reform Committee, 2018); Scottish Government, *Review*

recently, it has seen Attorneys-General from Australia, Canada, New Zealand, the United Kingdom and the United States agree to explore ways of better meeting the needs of separating families, including alternatives to judicial proceedings, multi-disciplinary approaches, improved responses to family violence, and tailored approaches for Aboriginal and Torres Strait Islander peoples and culturally diverse communities.[9]

1.10 A desire for 'holistic' change,[10] rather than 'band aids'[11] or 'tinkering',[12] was also a strong theme in the submissions and consultations for this Inquiry. As Caxton Legal Centre expressed this:

> If a family law system was to be designed afresh, it is unlikely its designers would arrive at the current system.[13]

1.11 The stories submitted through the confidential *Tell Us Your Story* portal revealed a profound level of dissatisfaction with the family law system. The ALRC was told of the distress caused by protracted litigation and the apparent inability to enforce parenting orders once they were made. There were many criticisms of the legal profession. The ALRC is not the appropriate body to inquire into the veracity of complaints about individual legal professionals but has been conscious throughout this Inquiry of what changes could be made within the system to ensure that the public is better served by the legal profession as a whole.

1.12 At the same time there was an acknowledgement that Australia's family law system has 'a proud history of innovation',[14] and that many of its initiatives should be retained and enhanced (or, in some cases, reinstated). Not least amongst these innovations was the establishment of a specialist multi-disciplinary court, incorporating the creation of an in-house counselling section staffed by psychologists and social workers with child welfare expertise, and the requirement to place the interests of children at the forefront of parenting disputes. This was followed by the establishment of mediation as a fundamental part of the system, and provision for less adversarial trial proceedings in child-related proceedings.

1.13 Underpinning these responses are a number of interconnected themes that were outlined in the Discussion Paper: a focus on families, not the system; advancing the safety and wellbeing of children and families; collaborative and coordinated service

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of Part 1 of the Children (Scotland) Act 1995 and Creation of a Family Justice Modernisation Strategy: A Consultation (2018).

9 Quintet Meeting of Attorneys-General, 'Official Communique' (2018).

10 Australian Dispute Resolution Advisory Council Inc (ADRAC), *Submission 12*; Fitzroy Legal Service and Darebin Community Legal Centre, *Submission 7*.

11 Lone Fathers Association of Australia, *Submission 99*.

12 Bravehearts Foundation Ltd, *Submission 148*. See also Professor B Smyth, *Submission 104*; Lone Fathers Association of Australia, *Submission 99*; Relationships Australia, *Submission 11*.

13 Caxton Legal Centre, *Submission 51*.

14 Fitzroy Legal Service and Darebin Community Legal Centre, *Submission 7*; Family Court of Australia, *Submission 68*.

delivery; accessibility for all families; non-adversarial approaches; valuing children and young people; and building community trust.

Process of reform

1.14 The ALRC was asked to consult widely with family law, family relationship and social support services, health, and other stakeholders with experience in the family law and the family dispute resolution sector. The ALRC was also directed to have regard to existing reports relevant to:

a. the family law system, including on surrogacy, family violence, access to justice, child protection, and child support;[15] and

b. interactions between the Commonwealth family law system and other fields including family law services, the state and territory domestic and family violence, child protection, and child support systems, including the ALRC and NSWLRC *Family Violence Report*.

1.15 The ALRC published an Issues Paper in March 2018. The Issues Paper asked 47 questions about a range of matters raised by the Terms of Reference, including about the appropriate role and objectives of the contemporary family law system; whether legislative changes are needed to ensure the law is clear and comprehensible for the people who need to use it; whether the system's processes for resolving and deciding disputes are well adapted to meet the needs of separating families; and how best to support the involvement of children and young people in the family law system. Those questions are included at Appendix D.

1.16 The ALRC invited people to participate in the Inquiry in a number of ways. This included an invitation to make a submission in response to the questions in the Issues Paper or the Terms of Reference.

1.17 The ALRC received 480 submissions in response to this invitation from across a broad spectrum of stakeholders. These included individuals who have used the family law system, and organisations and professionals associated with it, including legal assistance services, family law practitioners, family relationships services, alternative dispute resolution professionals, specialist family violence services, psychologists, social work and psychiatry peak bodies, disability organisations, children's commissions, researchers and academics, among others. Around half of these submissions are publicly available on the ALRC website. The remaining submissions are confidential. A list of those submissions is included at Appendix F and those that are not confidential are available on the ALRC website.

1.18 In addition to the request for submissions, the ALRC invited people with recent experience of the family law system to confidentially tell us about their experience via a

15 The Terms of Reference did not, however, include issues relating to surrogacy or child support. The ALRC considers that issues relating to surrogacy in Australian law require a separate inquiry.

specially created *Tell Us Your Story* portal on the Inquiry website. The ALRC received close to 800 contributions to this website.

1.19 The ALRC also conducted consultations with more than 100 individuals and organisations around the country, including in each capital city and across regional and rural locations, such as Albury/Wodonga, Mt Gambier, Alice Springs, the Gold Coast, Cairns, Townsville, Wollongong, and Newcastle. In addition, with the assistance of state Children's Commissions and the Young People's Family Law Advisory Group in South Australia, the ALRC heard from several groups of children and young people about their views on the issues in our Inquiry. A list of those consultations is included at Appendices A–C.

1.20 On 2 October 2018, the ALRC released a Discussion Paper in which it made 124 proposals and asked a number of additional questions. A list of those proposals and questions is included at Appendix E.

1.21 Subsequent to the release of the Discussion Paper, formal submissions were invited. The ALRC also conducted a number of further consultations, including with the Family Justice Courts of Singapore and the Family Court of New Zealand.

1.22 The ALRC received 263 submissions in response to the Discussion Paper. A list of those submissions is included at Appendix F and those that are not confidential are available on the ALRC website.

1.23 The ALRC has also been informed by the family law and practice of other jurisdictions where appropriate. In particular, the ALRC has had regard to the *Report of the Committee for Family Justice Reform* established by the Chief Justice of Singapore in 2013 and the reforms that flowed from that Report, the Law Commission of New Zealand's *Review of the Property (Relationships) Act 1976: Preferred Approach*,[16] and also to the more recent *Recommendations of the Independent Panel Examining the 2014 Family Justice Reforms in New Zealand*, which were made public on 23 January 2019.

1.24 In preparing this Report and in reaching its Recommendations, the ALRC has been assisted greatly by the numerous individuals, many of whom have shared their most personal and difficult stories, and institutional representatives who have shared their experiences of the family law system and their considerable insights. The ALRC has also derived considerable assistance from the Advisory Committee that was established at the outset of this Inquiry.

16 New Zealand Law Commission, *Review of the Property (Relationships) Act 1976: Preferred Approach: Te Arotake i Te Property (Relationships) Act 1976: He Aronga i Mariu Ai*, Issues Paper 44, 1 November 2018.

Overarching principles

1.25 In formulating its Recommendations, the ALRC has been guided by the following overarching principles:

Principle One: It is essential to the efficacy of the family law system that there are integrated pathways to adjudication, through which both public and private law jurisdiction can be exercised—to protect children and vulnerable parties, and to regulate interpersonal relationships.

Principle Two: It is essential to the rule of law that the substantive and procedural law is clear, coherent, and enforceable so as to enable families to resolve the issues arising after separation (without exacerbating parties' exposure to litigation) in a just, timely, and cost-effective manner that is reasonable in, and proportionate to, the circumstances of the case.

Principle Three: It is essential to the integrity of the family law system that all those who work within the family law system (including judges, registrars, lawyers, and the wide range of medical and social science professionals), are equipped with the skills and the tools necessary to achieve outcomes that are in the best interests of children and fair to the parties, and which are designed to promote conciliation and reduce contention at every step.

Principle Four: The substantive law should be drafted in a manner that assists both lay people and lawyers to locate and apply the law so as to facilitate the resolution of issues arising after separation as quickly and cost effectively as possible.

Principle One: Integrated pathways to adjudication

1.26 The *Family Law Act* was enacted at a time when its role was envisaged to be one dealing primarily with private law disputes between parties to a marriage. In the Second Reading Speech, the then Attorney-General, Senator Murphy said:

> I believe it to be in support of the family that there should be provisions to enable a marriage that has irretrievably broken down to be dissolved and proper provision made for any children of that family, for fair adjustment of property interests, and for equitable maintenance on the basis of need, all in proceedings that are intended to avoid exacerbating relations between the parties.[17]

Neither Senator Murphy, nor his parliamentary colleagues, could have foreseen at that time the shift in the family law system's role bringing, as it has, new responsibilities

17 Commonwealth, *Parliamentary Debates*, Senate, 3 April 1974, 640 (Lionel Murphy).

for safeguarding the wellbeing and safety of children, and all family members, from the increased prevalence of family violence and other risk issues affecting children and families. By contrast with the matters of private law on which the *Family Law Act* was largely premised, questions of serious risk to children have historically been viewed as matters of public law addressed through respective state and territory child protection law. Family violence is, similarly, a matter for state and territory legislative regimes.

1.27 In this context, there have been growing concerns about the separation of the federal family law and state and territory child protection and family violence systems, and the risks to children's safety associated with this situation. Concerns about this issue have been raised in a number of reports.[18] Despite the recommendations made by the Family Law Council in 2016,[19] building on its 2002 recommendation for the adoption of a 'one court principle',[20] there has been little progress towards the creation of a nationally streamlined, coherent, and integrated approach to meeting the needs of children and families across the family law, child protection, and family violence jurisdictions.

1.28 In its Interim Report, the Family Law Council drew attention to certain proceedings that were initially commenced in the Family Court in 2011.[21] There were competing applications for parenting orders, allegations of extreme family violence, and multiple notifications to the Department of Community Services resulting in steps being taken in the Children's Court to remove the children from both parents. As at the date of the Interim Report, the family had been involved in litigation for four years, proceedings had taken place in the Family Court, the Children's Court, and other state courts, and the matter had variously come before six different judicial officers. Such a pattern of proceedings is not uncommon and, in some cases, the outcomes are even more destructive for the children involved. It is illustrative of structural and systemic problems that are not conducive to resolving disputes at the lowest financial, emotional, psychological costs.

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18 Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System: Interim Report* (30 June 2015); Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System*: *Final Report* (30 June 2016); Queensland Special Taskforce on Domestic and Family Violence, *Not Now, Not Ever* (2015); Centre for Innovative Justice, *Opportunities for Early Intervention: Bringing perpetrators of family violence into view* (March 2015); Senate Finance and Public Administration Committee, *Domestic Violence in Australia* (March 2015), the *National Framework for Protecting Australia's Children 2009-2020*, and the *National Plan to Reduce Violence against Women and their Children 2010-2022*; Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A National Legal Response*, ALRC 114; NSWLRC 128 (2010).

19 Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System: Final Report* (30 June 2016).

20 Family Law Council, *Family Law and Child Protection: Final Report* (September 2002) rec 13.

21 Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System: Interim Report* (30 June 2015) 37-39.

1.29 The following Recommendations respond to these issues:

State Family Courts

Recommendation 1 The Australian Government should consider options to establish state and territory family courts in all states and territories, to exercise jurisdiction concurrently under the *Family Law Act 1975* (Cth), as well as state and territory child protection and family violence jurisdiction, whilst also considering the most efficient manner to eventually abolish first instance federal family courts.

Information sharing

Recommendation 2 The Australian Government should work with state and territory governments to develop and implement a national information sharing framework to guide the sharing of information about the safety, welfare, and wellbeing of families and children between the family law, family violence, and child protection systems. The framework should include:

- the legal framework for sharing information;
- relevant federal, state, and territory court documents;
- child protection records;
- police records;
- experts' reports; and
- other relevant information.

Recommendation 3 The Australian Government, together with state and territory governments, should consider expanding the information sharing platform as part of the National Domestic Violence Order Scheme to include family court orders and orders made under state and territory child protection legislation.

Principle Two: Clear, coherent, enforceable law and resolution of disputes in a just, timely, and cost-effective manner that is reasonable and proportionate

1.30 As Justice O'Brien observed in 2010:

> A law that cannot be understood by the people affected by it – or worse still lends itself to being misunderstood – is a bad law. That is particularly so when we are talking about a law which affects families and children.[22]

1.31 Despite the very many amendments to the *Family Law Act* since its inception, all designed to improve and clarify aspects of family law, there is little clarity or certainty about what in fact the law is in relation to many aspects of family law. This is particularly true in relation to fundamental questions that concern the vast majority of people who

22 The Hon Justice R O'Brien, 'Simplifying the system: Family Law challenges – can the system ever be simple?' (Speech, Second Family Law System Conference, 20-21 July 2010).

must resort to the law in order to determine their disputes: namely, how decisions will be made about children post-separation, and how the law deals with the property and financial matters of separating couples.

1.32 The 2006 amendments to Pt VII of the *Family Law Act* are a clear example. Those amendments introduced the presumption of 'equal shared parental responsibility', interpreted by many to be a presumption of 'equal shared care.' Again, as observed by O'Brien J, the widespread nature of that misunderstanding has a number of effects, including leading unrepresented parties to believe they have no choice but to agree to equal time and to enter into informal agreements based on a misapprehension of the law.

1.33 Even if parties are not under a misapprehension as to the effect of the presumption, it remains difficult for them to determine what order a court would be likely to make in the event that they cannot agree about parenting arrangements themselves. The decision making pathway applicable to both interim and final parenting orders involves, on its face, 11 steps, which are not elucidated in the legislation but rather in a decision of the Full Court of the Family Court.[23] However, as Judge Riethmuller has observed in an article wryly entitled 'Deciding Parenting Cases under Part VII – 42 Easy Steps', the parenting provisions of the current version of the *Family Law Act* are 'practically impenetrable for the average person and present serious challenges to any lawyer'.[24] For parties who are able to engage lawyers, the convoluted and complex decision making pathway, that must be arrived at through an understanding of the combination of legislation and case law, adds significantly to the time and cost of any parenting matter, and ultimately to the overall delays within the courts. Judges are of course required to write a judgment, which demonstrates the thought process by which they analysed the multifarious factors to reach the decision and which, if any step is overlooked, becomes susceptible to appeal.

1.34 A further difficulty for parties in the context of matters relating to children arises when a child's family does not conform to the model envisaged by the *Family Law Act*. The current definition of 'parent' for the purposes of Pt VII is limited to the child's biological or adoptive parents, or is reliant on the deeming provisions relating to children born as a result of artificial conception procedures or under surrogacy arrangements,[25] and the *Family Law Act* assumes that a child has two of these. The *Family Law Act* does not contemplate the increasing number of children who live in step-families, blended families, sole-parent families, same-sex families, in kinship care arrangements or within the increasing number of new and emerging migrant communities, many of whom take a collectivist approach to child rearing.[26]

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23 *Goode & Goode* [2006] Fam CA 1346 [82].

24 Judge G Riethmuller, 'Deciding Parenting Cases under Part VII – 42 easy steps' (2015) 24 *Australian Family Lawyer* 1, 2. He observes that the original Part VII started at less than 2,700 words but now exceeds 47,000 words.

25 *Tobin v Tobin* (1999) FLC 92-848 [45]; *Family Law Act 1975* (Cth) ss 60H and 60HB.

26 Helen Rhoades, 'Children, families and the law – A view of the past with an eye to the future' in Alan Hayes and Daryl Higgins (eds), *Families, policy and the law: Selected essays on contemporary issues for Australia* (Australian Institute of Family Studies, 2014) 172.

1.35 Once orders are made in relation to children, parties may need support in understanding the orders to assist them in complying with the orders, particularly in the period immediately following the issuing of the orders. Family & Relationship Services Australia reported that 'parents often find it difficult to interpret orders, partly because of the complex language used but also because of the high levels of conflict they are experiencing.'[27] Very high conflict families may need additional support over a longer period of time.

1.36 It is also important, particularly in high conflict families, that the ability to appeal interim orders is controlled. The ability to appeal on unmeritorious grounds can be utilised as a form of systems abuse, providing an abuser with another weapon with which to harass the other party. Nevertheless, parties may need to bring new applications about parenting arrangements when, for example, changes in relationships, living arrangements, financial circumstances, and serious accidents or health issues make existing orders impractical or inappropriate.

1.37 The following Recommendations respond to these issues:

Children's orders

Recommendation 4 Section 60B of the *Family Law Act 1975* (Cth) should be repealed.

Recommendation 5 Section 60CC of the *Family Law Act 1975* (Cth) should be amended so that the factors to be considered when determining parenting arrangements that promote a child's best interests are:

- what arrangements best promote the safety of the child and the child's carers, including safety from family violence, abuse, or other harm;
- any relevant views expressed by the child;
- the developmental, psychological, and emotional needs of the child;
- the benefit to the child of being able to maintain relationships with each parent and other people who are significant to the child, where it is safe to do so;
- the capacity of each proposed carer of the child to provide for the developmental, psychological, and emotional needs of the child, having regard to the carer's ability and willingness to seek support to assist with caring; and
- anything else that is relevant to the particular circumstances of the child.

27 Family & Relationship Services Australia, *Submission 407*.

Recommendation 6 The *Family Law Act 1975* (Cth) should be amended to provide that in determining what arrangements promote the best interests of an Aboriginal or Torres Strait Islander child, a court must consider the child's opportunities to connect with, and maintain the child's connection to, the child's family, community, culture, and country.

Recommendation 7 Section 61DA of the *Family Law Act 1975* (Cth) should be amended to replace the presumption of 'equal shared parental responsibility' with a presumption of 'joint decision making about major long-term issues'.

Recommendation 8 Section 65DAA of the *Family Law Act 1975* (Cth), which requires the courts to consider, in certain circumstances, the possibility of the child spending equal time, or substantial and significant time with each parent, should be repealed.

Definition of family

Recommendation 9 Section 4(1AB) of the *Family Law Act 1975* (Cth) should be amended to provide a definition of ***member of the family*** that is inclusive of any Aboriginal or Torres Strait Islander concept of family that is relevant in the particular circumstances of the case.

Supporting compliance with parenting orders

Recommendation 38 The *Family Law Act 1975* (Cth) should be amended to require parties to meet with a Family Consultant to assist their understanding of the final parenting orders made by a court following a contested hearing.

Recommendation 39 The *Family Law Act 1975* (Cth) should be amended to provide that:

- in all parenting proceedings for final orders, the courts must consider whether to make an order requiring the parties to see a Family Consultant for the purposes of receiving post-order case management; and
- the appointed Family Consultant has the power to seek that the courts place the matter in a contravention list or to recommend that the court make additional orders directing a party to attend a post-separation parenting program.

Recommendation 42 Part VII Div 13A of the *Family Law Act 1975* (Cth) should be redrafted to achieve simplification, and to provide for:

- a power to order that a child spend additional time with a person;
- a power to order parties to attend relevant programs at any stage of proceedings; and
- a presumption that a costs order will be made against a person found to have contravened an order.

Leave

Recommendation 40 The *Family Law Regulations 1984* (Cth) should be amended to require leave to appeal interim parenting orders. Leave should only be granted where:

- the decision is attended by sufficient doubt to warrant it being reconsidered; and
- substantial injustice would result if leave were refused, supposing the decision to be wrong.

Recommendation 41 The *Family Law Act 1975* (Cth) should be amended to explicitly state that when a new parenting order is sought, and there is already a final parenting order in force, the court must consider whether:

- there has been a change of circumstances that, in the opinion of the court, is significant; and
- it is in the best interests of the child for the order to be reconsidered.

1.38 The law in relation to the division of property and other financial matters is no less complex than that in relation to parenting matters. The *Family Law Act* prescribes that a court must not make an order altering existing title or rights in respect of property unless it is just and equitable to do so. In considering whether any order should then be made, the court is required to take into account six matters, as well as an additional 19 matters, dealt with in another section concerned with spousal maintenance, should they be considered relevant. There is, however, no guidance in the legislation as to how those factors are to be considered in reaching the final result. It is left to judicial discretion.[28] Most families have small asset pools. They do not necessarily want to spend limited resources on a trial to see how the discretion might be exercised in their particular case. It should be possible for separating parties to obtain some guidance from the legislation as to what a reasonable division of their property interests might be, including superannuation and liabilities.

1.39 There remains uncertainty too about the application of the decision of the Full Court of the Family Court in *Kennon & Kennon*[29] in which it held that courts were able to adjust a party's property interests in circumstances where the court determined that family violence had made the contribution of the person who experienced violence more difficult. The precise way in which the test was framed has made it difficult for later courts to apply.[30] In any event, the legal principle on which this decision was based has been a matter of much academic conjecture and it is difficult to articulate the jurisprudential basis of the test. Further, as there is no legislative recognition of the relevance of family violence to the division of property, unrepresented litigants are in a different position

28 *Mallett v Mallett* (1984)156 CLR 605; *Norbis v Norbis* (1986) 161 CLR 513 [6]–[7]; P Parkinson, 'Why are decisions on family property so inconsistent?' (2016) 90 *Australian Law Journal* 498.

29 *Kennon & Kennon* (1997) 22 Fam LR 1.

30 See, eg, *Farina & Lofts* [2019] FamCA 27.

to those who have sought legal advice and have been made aware of the possibility of running a '*Kennon*' case.

1.40 The following Recommendations respond to these issues:

Division of property

Recommendation 11 The *Family Law Act 1975* (Cth) should be amended to:

- specify the steps that a court will take when considering whether to make an order to alter the interests of the parties to the relationship in any property; and
- simplify the list of matters that a court may take into account when considering whether to make an order to alter the interests of the parties to the relationship in any property.

Recommendation 12 The *Family Law Act 1975* (Cth) should be amended to include a presumption of equality of contributions during the relationship.

Recommendation 13 The *Family Law Act 1975* (Cth) should be amended to provide that the relevant date to ascertain the value of the parties' rights, interests, and liabilities in any property is the date of separation, unless the interests of justice require otherwise.

Recommendation 14 The family courts and the Australian Financial Complaints Authority should develop a protocol for dealing with jurisdictional overlap with respect to debts of parties to family law proceedings. The protocol should provide that:

- disputes about the enforceability of a debt against one or both parties under the *National Consumer Credit Protection Act 2009* (Cth) are dealt with by the Australian Financial Complaints Authority; and
- disputes about the reallocation of a debt between parties to a family law proceeding are dealt with by the family courts.

Recommendation 15 The *Privacy Act 1988* (Cth) and the *National Consumer Credit Protection Act 2009* (Cth) should be amended to provide that when a court has ordered that one party (Party A) be responsible for a joint debt and indemnify the other party (Party B) against any default, credit providers are prohibited from making an adverse credit report against Party B to any credit reporting business as a consequence of the subsequent actions of Party A.

Recommendation 16 The *Family Law Act 1975* (Cth) should be amended to provide a presumption that the value of superannuation assets accumulated during a relationship are to be split evenly between the parties.

Recommendation 17 The *Family Law Act 1975* (Cth) should be amended to simplify the process for splitting superannuation including:

- developing template superannuation splitting orders for commonly made superannuation splits; and
- when the applicant is suffering economic hardship, requiring superannuation trustees to limit the fees they charge members and their former spouse for services provided in connection with property settlement under Pt VIII to the actual cost of providing those services.

Recommendation 18 The *Family Law Act 1975* (Cth) should be amended so that:

- the spousal maintenance provisions and provisions relating to the division of property are dealt with separately under the legislation; and
- access to interim spousal maintenance is enhanced by the use of Registrars to consider urgent applications.

Statutory tort of family violence

Recommendation 19 The *Family Law Act 1975* (Cth) should be amended to include a statutory tort of family violence that would provide remedies consistent with existing common law remedies.

Recommendation 20 The *Family Law Act 1975* (Cth) should be amended to extend s 69ZX to property settlement proceedings.

1.41 The procedural law is also essential in assisting parties to resolve their disputes in a timely and cost-efficient manner. It is the obligation of the courts and the legal profession to ensure that legal work is undertaken efficiently and effectively. Legal costs often effectively exclude one or both parties involved in an acrimonious breakdown of their relationship from having meaningful access to justice. This is contrary to the understanding of the rule of law in this country.

1.42 Restricting, or inhibiting, litigation through procedural devices is consistent with the principles that the courts are required to apply, as provided for in s 43 of the *Family Law Act*, and in particular the exhortation to have regard to assisting the parties 'to consider reconciliation or **the improvement of their relationship to each other and to their children**'[31]. The intervention of the court ought to be the last resort for disputing families. It is accepted that the law should not be quick to intrude into family relationships which are so intimate and private in nature. Nevertheless, it has been accepted that the law must also be interventionist to some extent, demanding that parties cooperate for the welfare of their children. The 2006 amendment requiring parties to make a genuine effort to resolve a dispute about parenting matters before applying for an order is an example of

31 Ibid s 43(1)(d) (emphasis added)

this interventionist approach.[32] There is no similar requirement in the *Family Law Act* for parties to attempt FDR before filing an application for orders in relation to property and financial matters. When the requirement was introduced for parenting matters, there was a 25% reduction in court filings and parties generally reported higher levels of positive satisfaction with FDR than with litigation.[33] A policy shift to support greater use of non court-based mechanisms in order to support families to use a lower-cost, lower-conflict avenue for property and financial matters is generally thought to be desirable.

1.43 A large number of stakeholders advocate for the adopting of a similar approach in property and financial matters to that which already exists in parenting matters. Some have, however, argued that private rights to litigate should not be taken away lightly and mandatory FDR in property and financial matters is strongly opposed by the major organisation representing the interests of private legal practitioners.[34] Speaking in a commercial context, where the rights are very much more of a private nature (and do not have the protective responsibility required of the family law even in matters that do not concern children), the Hon Kenneth Hayne AC QC said:

> [It] is as well to state some obvious and well accepted propositions about why we should want to restrict litigiousness. Restricting litigiousness, or at least limiting the amount of contested litigation, must be one of the fundamental aims of any developed legal system. Anyone who has had direct experience of litigation knows all too well the costs that it exacts from the participants. Those costs are not limited to time and money. The costs in time and money are real and obvious, but the emotional cost of litigation for those who participate in it is often equally pressing. Very few relish the experience of litigation. Few show or maintain an eagerness to go to law or a fondness for the process. Often, the pendency of litigation affects other activities. If a business is sued, it may have to provide against the possibility of loss and what is provided cannot be applied to other purposes. Pending litigation can therefore limit entirely unrelated activities.
>
> The costs of litigation are not borne by only the immediate participants in the process. The provision of a system of courts for the resolution of disputes between citizens, and between citizens and the State, is a fundamental obligation of the government of any society. The public enforcement of laws, ultimately by the application of the power of the State must, therefore, be effected by a State-organised justice system. In turn that requires the provision of judges, support staff, courtrooms and all the other apparatus of a modern court system. That is expensive. It is a cost that falls on society as a whole, and society, rightly, expects that the justice system will be conducted as efficiently as possible.[35]

1.44 Restricting litigiousness in the family law sphere is, however, about much more than the efficient use of resources, important though that is. Dissuading parties from

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32 *Family Law Act 1975* (Cth) s 60I (inserted by No 46 of 2006, Sch 1, Pt 1 [11]).

33 R Kaspiew et al, *Experiences of Separated Parents Study (Evaluation of the 2012 Family Violence Amendments* (Australian Institute of Family Studies, 2015).

34 Law Council of Australia, *Submission 417*.

35 The Hon Kenneth Hayne AC QC, 'Restricting Litigiousness' (Speech, 13th Commonwealth Law Conference, Melbourne, 13 April 2003).

leaping into litigation enables them to be connected to the suite of social science and medical support services that many parties need at the time of the breakdown of a relationship.

1.45 There is of course also a mid-way point between FDR or mediation and engaging the processes of the court. Parties have the option of private adjudication through the use of arbitration, an underutilised process in family law. The reasons for that are many but parties should have the full suite of dispute resolution options available to them, tailored to the particular needs of the jurisdiction.

1.46 The following Recommendations respond to these issues:

Pre-filing steps for property matters

Recommendation 21 The *Family Law Act 1975* (Cth) should be amended to:

- require that parties take genuine steps to attempt to resolve their property and financial matters prior to filing an application for court orders; and
- specify that a court must not hear an application unless the parties have lodged a genuine steps statement.

A failure to make a genuine effort to resolve a matter should have costs consequences.

Recommendation 22 Regulation 25 of the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth), which refers to 'equality of bargaining power between the parties', should be amended to refer to the 'equality of bargaining power between the parties, including an imbalance in knowledge of relevant financial arrangements'.

Recommendation 23 The *Family Law Act 1975* (Cth) should be amended to require Family Dispute Resolution Providers to provide a certificate to the parties in all matters where some or all of the issues in dispute have not been resolved.

Recommendation 24 Sections 10H and 10J of the *Family Law Act 1975* (Cth), which provide for confidentiality and inadmissibility of discussions and material in Family Dispute Resolution in relation to parenting matters, should be extended to Family Dispute Resolution for property and financial matters. The legislation should provide an exception for a sworn statement in relation to income, assets, superannuation balances, and liabilities that each party signs at the start of Family Dispute Resolution, which should be admissible.

Recommendation 25 The *Family Law Act 1975* (Cth) should be amended to clearly set out the disclosure obligations of parties, and the consequences for breach of those obligations.

Strengthening arbitral processes

Recommendation 26 The *Family Law Act 1975* (Cth) and the *Child Support (Assessment) Act 1989* (Cth) should be amended to increase the scope of matters which may be arbitrated, whether or not upon referral from a court. Those matters should include all financial issues, including child maintenance and child support, subject to limitations. Appropriate occasions for arbitration would not include disputes:

- relating to enforcement;
- under ss 79A or 90SN of the *Family Law Act 1975* (Cth) (subject to limitations); and
- in which a litigation guardian has been appointed.

Recommendation 27 The *Family Law Act 1975* (Cth) should be amended to remove the opportunity for a party to object to registration of an arbitral award, while maintaining appropriate safeguards for the integrity of registered awards.

Recommendation 28 The *Family Law Act 1975* (Cth) should be amended to allow some children's matters to be arbitrated. Appropriate occasions for arbitration in children's matters would not include disputes:

- relating to international relocation;
- relating to medical procedures of a nature requiring court approval;
- relating to contravention matters;
- in which an Independent Children's Lawyer has been appointed; and
- involving family violence which satisfy ss 102NA(1)(b) and (c) of the *Family Law Act 1975* (Cth).

Recommendation 29 The *Family Law Act 1975* (Cth) should be amended to provide that upon application by an arbitrator, or by a party to an arbitration, a court has power to make directions at any time regarding the further conduct of the arbitration, including power to make a direction terminating the arbitration (whether or not the arbitration was referred from a court).

1.47 Once parties have engaged the court processes, it should be incumbent on all involved in that process, including the parties themselves, to ensure that the proceedings (and any alternative dispute resolution processes) are conducted in a way that is consistent with facilitating the just resolution of the dispute according to law and as quickly and efficiently as possible. Rule 1.04 of the *Family Law Rules* provides that the main purpose of the *Rules* is 'to ensure that each case is resolved in a just and timely manner at a cost to the parties and the court that is reasonable in the circumstances of the case.'[36]

36 *Family Law Rules 2004* (Cth) r 1.04.

1.48 In other jurisdictions, 'overarching' or 'main purpose' provisions are contained in the primary legislation, rather than in subordinate legislation.[37] The overarching purpose provisions are accompanied by an express power to impose a costs order on a party, the party's lawyer, or other relevantly interested party, if they act in a manner that frustrates the overarching purpose. At present, there is no specific power to order costs linked directly to the frustration of the main purpose of the *Family Law Rules*.

1.49 The conduct of proceedings in a manner that is consistent with facilitating the just resolution of disputes depends in no small measure on robust case management. In family law cases, where emotions run high and the parties' perceptions of justice might be diametrically opposed, it is perhaps more difficult than in commercial cases to hold parties to timelines and procedural compliance. Nonetheless, whilst the granting of indulgences or adjournments may seem like 'justice' from a compassionate court to the party who seeks them, the other party is likely to see it as an 'injustice' in the context of a long and painful process. Parties and their legal representatives must assume that the court will manage proceedings consistent with the overarching purpose.

1.50 The key objective of case management is to reduce costs and delay so that there are: fewer issues in contention; in relation to those issues, no greater factual investigation than justice requires; and as few interlocutory applications as necessary for the just and efficient disposition of matters. Case management practices differ as between the Family Court and the Federal Circuit Court, and even amongst individual judges. Consistent case management practices across both courts are likely to facilitate the more efficient disposition of matters by reducing confusion and complexity.

1.51 Consistent with facilitating the just resolution of disputes, there must also be appropriate procedures in place to enforce the orders of the court, absent which the entire process is rendered nugatory.

1.52 The following recommendations respond to these issues:

Overarching purpose

Recommendation 30 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 so as to minimise harm to children and their families.

Recommendation 31 The *Family Law Act 1975* (Cth) should impose a statutory duty on parties, their lawyers, and third-parties to cooperate amongst themselves, and with the courts, to assist in achieving the overarching purpose. Breach of the duty will have costs consequences for the person who fails to act in accordance with the overarching purpose.

37 *Civil Procedure Act 2005* (NSW) s 56; *Civil Procedure Act 2010* (Vic) s 10; *Federal Court of Australia Act 1976* (Cth) ss 37M and 37N.

Misuse of process

Recommendation 32 The *Family Law Act 1975* (Cth) should be amended to provide the courts with a power to make an order requiring a litigant to seek leave of the court prior to making further applications and serving them on the other party where the court is satisfied that such an order is appropriate for the protection of the respondent and/or any children involved in the proceedings, having regard to the overarching purpose of family law practice and procedure.

Recommendation 33 Section 45A of the *Family Law Act 1975* (Cth) should be amended to provide that the courts' powers of summary dismissal may be exercised where the court is satisfied that it is appropriate to do so, having regard to the overarching purpose of family law practice and procedure.

Case management

Recommendation 34 The family courts should consider promulgating a joint Practice Note for Case Management which describes the courts' approaches to the family law practice and procedure provisions.

Referees

Recommendation 35 The *Family Law Act 1975* (Cth) should be amended to provide for the appointment and protection of referees in the same terms as provided for in ss 54A and 54B of the *Federal Court of Australia Act 1976* (Cth).

Costs

Recommendation 36 Section 117 of the *Family Law Act 1975* (Cth) should be amended to:

- remove the general rule that each party to proceedings under the Act bears his or her own costs; and
- articulate the scope of the courts' power to award costs.

Protected confidences

Recommendation 37 The *Family Law Act 1975* (Cth) should be amended to provide courts with an express statutory power to exclude evidence of 'protected confidences'. In determining whether to exclude evidence of protected confidences the court must:

- be satisfied that it is likely that harm would or might be caused, directly or indirectly, to a protected confider, and the nature and extent of the harm outweighs the desirability of the evidence being given; and
- ensure that in parenting proceedings, the best interests of the child is the paramount consideration when deciding whether to exclude evidence of protected confidences.

Principle Three: Skills and tools necessary to achieve best outcomes for children and families

1.53 Parties to family court proceedings, be they in the Family Court or the Federal Circuit Court, are entitled to expect that the courts will apply the principles enshrined in s 43 of the *Family Law Act*. There is a significant body of evidence that adversarial court processes exacerbate conflict and trauma and are not in the best interests of children.[38] The Family Court is empowered to use a less adversarial approach to the resolution of family law matters that is child focused, protective of children and parties who are exposed to child abuse or family violence, quasi-inquisitorial, interdisciplinary, less formal, accessible to self-represented litigants, and connected with relevant support services. Nevertheless, there is little evidence that the Family Court is exercising this power and the Federal Circuit Court has never been empowered to adopt the Less Adversarial Trial procedures in Div 12A of Pt VII of the *Family Law Act*.

1.54 Further, the proper application of the principles in s 43 depends in large measure on the support provided to the parties through both court based and non-court based services including family counsellors, FDRPs, Family Consultants, and Independent Children's Lawyers. Some of these services have existed since the inception of the Family Court but their roles have changed. In some cases they have been diminished, and funding has not been maintained at the level required to support the number of families who require the services.

1.55 Concerns have been expressed by many stakeholders about the role of Family Consultants, whose role has largely been reduced to that of 'report writer', despite the breadth of functions prescribed in s 11A of the *Family Law Act* (of which report writing is but one).[39] They no longer have the capacity to undertake the breadth of clinical practice which the role initially comprehended. Further, the lack of resourcing has resulted in the need to outsource report writing to practitioners who are not within the court system and who therefore lack the oversight and clinical peer review that exists amongst the court-based Family Consultants. There is some evidence of a lack of trust in the current method of obtaining reports. It is appropriate to review the scope of functions undertaken by Family Consultants and to rename the position to reflect the primary nature of the role.

1.56 Although not contained in the *Family Law Act*, there is evidence that the engagement of Indigenous Liaison Officers in some court registries has been beneficial for improving access to family law justice for Aboriginal and Torres Strait Islander people.

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38 Relationships Australia, *Submission 324*.

39 The other functions include assisting and advising people involved in the proceedings; assisting and advising courts and giving evidence; helping people to resolve disputes; advising the court about appropriate family counsellors, family dispute resolution practitioners, and courses, programs and services to which the court can refer the parties.

1.57 Concerns have also arisen in relation to the role of the Independent Children's Lawyer, whose role is prescribed in s 68LA of the *Family Law Act*. In the Discussion Paper, an additional role was proposed, namely that of 'Children's Advocate'. On balance, the ALRC is persuaded that introducing an additional professional role within an already crowded suite of professional services within the family law system may do more harm than good. It recommends that the *Guidelines for Independent Children's Lawyers* (2013) be given statutory recognition in Div 10 of Pt VII to ensure that all Independent Children's Lawyers understand the full scope of their obligations upon appointment to represent a child and how those obligations interact with the overarching purpose of the *Family Law Act*.

1.58 There is currently no provision in the *Family Law Act* for supported decision making for people with disability. Rather, the Rules of the family courts make provision for the appointment of a case guardian or litigation guardian, which represents a form of substituted decision making. Supported decision making provides people with disability with appropriate supports to retain and exercise their legal capacity and reach decisions in accordance with their will, preference, and rights. Substituted decision making, by contrast, removes the legal capacity of people with disability and appoints a substitute decision maker, who may act on a 'best interest' standard or a 'substituted judgement' standard.

1.59 The following Recommendations respond to these issues:

Less adversarial processes

Recommendation 10 Combined rules for the Family Court of Australia and the Federal Circuit Court of Australia should provide for proceedings to be conducted under Pt VII Div 12A of the *Family Law Act 1975* (Cth) by judges of both courts. Both courts should be adequately resourced to carry out the statutory mandate in s 69ZN(1) of the *Family Law Act 1975* (Cth).

Enhanced support for children and families

Recommendation 43 The *Family Law Act 1975* (Cth) should be amended to:

- replace 'family consultants' with 'court consultants'; and
- redraft s 11A to include a comprehensive list of functions that court consultants would provide to children, families, and the courts.

Recommendation 44 Section 68LA(5) of the *Family Law Act 1975* (Cth) should be amended to include a specific duty for Independent Children's Lawyers to comply with the *Guidelines for Independent Children's Lawyers*, as promulgated from time to time and as endorsed by the family courts.

Recommendation 45 The Australian Government should ensure the availability of Indigenous Liaison Officers in court registries where they are required.

Supported decision making

Recommendation 46 The *Family Law Act 1975* (Cth) should be amended to include a supported decision making framework for people with disability consistent with recommendations from the ALRC Report 124, *Equality, Capacity and Disability in Commonwealth Laws*.

Recommendation 47 The *Family Law Act 1975* (Cth) should include provisions for the appointment of a litigation representative where a person with disability is unable to conduct the litigation. These provisions should be consistent with the recommendations of the ALRC Report 124, *Equality, Capacity and Disability in Commonwealth Laws*.

Recommendation 48 The Australian Government should work with state and territory governments to facilitate the appointment of statutory authorities as litigation representatives in family law proceedings.

1.60 It is also essential that those engaged in the provision of services to people at a time of vulnerability and when their interpersonal relationships are most fragile have the necessary skills and training not only to support those who rely on them, but also to ensure that they themselves are able to continue to work within the family law system, as far as possible, free from the detrimental impact of vicarious trauma.

1.61 It is equally important that those who are compelled to access the family justice system have confidence in the people and institutions whose role it is to assist them, whether through the provision of medical and social services, or by adjudicating their disputes.

1.62 There must be sufficient and appropriate services to assist parties before, or in lieu of, entering the court system. When parties do enter the court system there must be integrated duty legal services and support services for families in all courts.

1.63 The following recommendations respond to these issues:

Recommendation 49 Section 115 of the *Family Law Act 1975* (Cth) should be amended to expand the Family Law Council's responsibilities to include:

- monitoring and regular reporting on the performance of the family law system;
- conducting inquiries into issues relevant to the performance of any aspect of the family law system, either of its own motion or at the request of government; and

- making recommendations to improve the family law system, including research and law reform proposals.

Recommendation 50 The Family Law Council should establish a Children and Young People's Advisory Board, which would provide advice and information about children's experiences of the family law system to inform policy and practice.

Recommendation 51 Relevant statutes should be amended to require that future appointments of all federal judicial officers exercising family law jurisdiction include consideration of the person's knowledge, experience, skills, and aptitude relevant to hearing family law cases, including cases involving family violence.

Recommendation 52 The Law Council of Australia should work with state and territory regulatory bodies for legal practitioners to develop consistent requirements for legal practitioners undertaking family law work to complete annually at least one unit of continuing professional development relating to family violence.

Recommendation 53 The Australian Government Attorney-General's Department should develop a mandatory national accreditation scheme for private family report writers.

Recommendation 54 The *Family Law Act 1975* (Cth) should be amended to:

- require any organisation offering a Children's Contact Service to be accredited; and
- make it an offence to provide a Children's Contact Service without accreditation.

Recommendation 57 The Family Advocacy and Support Service's social support services should be expanded to provide case management to clients who are engaged with the family law system.

Recommendation 58 The Australian Government should work with Legal Aid Commissions in each state and territory to expand the Family Advocacy and Support Service to court locations that have a demonstrable need and to ensure the provision of adequate and appropriate services.

Recommendation 59 Family Relationship Centres should be expanded to provide case management to clients with complex needs who are engaged with the family law system.

Recommendation 60 The Australian Government should work with Family Relationship Centres to develop services, including:

- financial counselling services;
- mediation in property matters;
- legal advice and Legally Assisted Dispute Resolution services; and
- Children's Contact Services.

Principle Four: Drafting to facilitate resolution

1.64 When first enacted, the *Family Law Act* was 80 pages long and comprised 123 sections numbered sequentially. As observed earlier,[40] the *Family Law Act* has now been amended by over 115 different Acts of the Commonwealth Parliament and has grown to almost 800 pages in length. Sequential numbering has been replaced by alphabetisation within many sections, making it almost impossible to navigate.

1.65 The following Recommendations respond to this principle:

Recommendation 55 The *Family Law Act 1975* (Cth) and its subordinate legislation should be comprehensively redrafted.

Recommendation 56 Privacy provisions that restrict publication of family law proceedings to the public, currently contained in s 121 of the *Family Law Act 1975* (Cth), should be redrafted.

40 Above [1.2].

2. The Family Law System in Context

Contents

The family law system in Australia

2.1 The Terms of Reference did not articulate what is contemplated by the term '**family law system**'. The ALRC has interpreted the term to refer collectively to the family courts (the Family Court of Australia (Family Court), the Family Court of Western Australia and the Federal Circuit Court of Australia (Federal Circuit Court)) and all family law and post-separation services, including family relationships services (such as government funded family counselling services, post-separation parenting programs, and Children's Contact Services (CCSs)), as well as legal aid commissions, the community legal sector, and private legal services.

2.2 It is, however, somewhat of a misnomer to describe this collection of courts and legal and social service providers as a 'family law system'. As was observed by the Family Law Pathways Advisory Group in 2001, it was not designed as a system and does not always operate coherently.[1] The *Family Law Act* is not a comprehensive legislative framework for Australian family law, as it deals almost exclusively with matters arising *after* the breakdown of an intimate relationship. At the time of drafting the original bill, the term 'Family Law' was chosen because it was more meaningful to non-lawyers than 'matrimonial causes', and because 'family law' had become the accepted generic title for the area of law.[2]

2.3 The Australian family law system is more confined than others, such as Singapore or New Zealand (which are both unitary legal systems). In those jurisdictions the family courts deal with a full suite of family-related cases including divorce and related matters

1 Family Law Pathways Advisory Group, *Out of the Maze: Pathways to the Future for Families Experiencing Separation* (2001) [1.7].

2 Kep Enderby, 'The Family Law Act: Background to the Legislation' (1975) 1(1) *University of New South Wales Law Journal* 10, 17.

but also extending to matters including adoption and guardianship, juvenile justice, probate and succession, the status of children and parentage, and elder abuse.

A brief history

2.4 Although the nature of the issues confronting modern relationships has changed significantly over recent decades, the legal response to the breakdown of marriages (the only legally recognised intimate relationships until this century) has generated dissatisfaction for centuries.[3] Increasing public dissatisfaction with the inadequacy of the matrimonial causes law in England led to a Royal Commission in 1850. The Royal Commission of 1850 led to the *Matrimonial Causes Act 1857* (UK), which was largely adopted by the then Australian colonial governments.[4] The current agitation for a Royal Commission of Inquiry into the Australian family law system demonstrates that the difficult issues that surround the breakdown of relationships are timeless.

2.5 At Federation, s 51 of the *Constitution* conferred power on the Australian Parliament to make laws with respect to marriage, and with respect to divorce and matrimonial causes; and in relation thereto, parental rights and the custody and guardianship of infants.[5] These powers were included with the specific purpose 'to abolish the varied and conflicting divorce laws which prevail in the States, and to establish uniformity in the causes for which divorce may be granted throughout the Commonwealth'.[6] Despite this, no federal legislation concerning divorce was passed until 1945. The *Matrimonial Causes Act 1945* (Cth) was, however, of limited application.[7] It was not until the *Matrimonial Causes Act 1959* (Cth), which came into effect in 1961, that there were uniform divorce laws throughout Australia. This Act was almost immediately criticised for retaining the requirement that divorce litigants seeking relief must subject each other 'to the humiliation of proving misconduct by one or other, by drawn out and expensive proceedings.'[8]

2.6 The *Family Law Act*, which came into force on 5 January 1976, was premised on the need to reform the divorce law to 'eliminate fault, simplify procedures and reduce costs'.[9] It instituted two major changes to Australian divorce law: 'the introduction of

3 Ibid 11.

4 *Matrimonial Causes Act 1858* (SA); *Matrimonial Causes Act 1860* (Tas); *Matrimonial Causes Act 1861* (Vic); *Divorces and Matrimonial Causes Act 1863* (WA); *Matrimonial Causes Jurisdiction Act 1864* (Qld); *Matrimonial Causes Act 1873* (NSW).

5 *Commonwealth of Australia Constitution Act 1900.*

6 RE O'Connor and IA Isaacs, 'The Australasian Federal Convention Debates, Sydney 1897' in John Quick and Robert Randolph Garran (eds), *The Annotated Constitution of the Commonwealth of Australia* (Angus & Robertson, Melville & Mullen, 1901) 610.

7 Being concerned to enable Australian women married to overseas servicemen or another person from overseas to institute divorce proceedings in Australia, and to provide that a person domiciled anywhere in Australia may institute divorce proceedings in the State or Territory where he or she is currently resident. Its jurisdictional scope was extended by the *Matrimonial Causes Act 1955* (Cth), which was later replaced by the *Matrimonial Causes Act 1959* (Cth).

8 Enderby, above n 2, 15.

9 Ibid 16.

no-fault divorce, and the establishment of a specialist multi-disciplinary court for the resolution of family disputes, the Family Court of Australia'.[10] As Professor Rhoades has observed, no-fault divorce was the 'centrepiece' of the Act. Under the new Act, the only ground for granting a divorce was based on evidence showing the parties had separated for at least 12 months. This replaced the many 'matrimonial offences' listed in the *Matrimonial Causes Act 1959* (Cth), such as adultery.[11] The *Family Law Act* also incorporated a number of features which remain significant in the context of this Inquiry, including:[12] the general principle that, in the absence of a court order, each party to the marriage is the guardian of their children and that they share custody; provision for a compulsory conference with a welfare officer over custody arrangements for children; provisions for the enforcement of custody and access orders; powers in relation to property rights; the circumstances in which a court was permitted to make an order for costs; and a requirement to take into account the wishes of a child.

2.7 As to the second of the major reforms, the Senate Standing Committee on Constitutional and Legal Affairs considered that the Family Court would be 'essential to give substance to reconciliation provisions' of the *Family Law Act*.[13] The Committee envisioned that the Family Court would:

- deal exclusively with family law matters;
- be a 'helping court';
- be composed of judges appointed specifically for their suitability for dealing with family law matters; and
- employ ancillary staff including welfare officers, marriage counsellors, and legal advisors.[14]

This proposal was in large measure justified because 'existing courts had been found to be unsuitable and ill-equipped to deal sympathetically and helpfully with the particular problems of family disputes'.[15] Finally, the Committee anticipated that the family courts would be housed in a relatively informal setting, in order to create an inclusive environment.[16] The *Family Law Act* originally provided that neither the judge hearing the proceedings nor counsel were to robe.[17] The Committee emphasised that the court would

10 Helen Rhoades, 'Children, Families and the Law: A View of the Past with an Eye to the Future' in Alan Hayes and Daryl Higgins (eds), *Families, policy and the law: Selected essays on contemporary issues for Australia* (Australian Institute of Family Studies, 2014) 170.

11 Ibid.

12 Using the language of the *Family Law Act* as it was enacted in 1975.

13 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Report on the Law and Administration of Divorce and Related Matters and the Clauses of the Family Law Bill 1974* (Parliamentary Paper, No 133, October 1974) [44].

14 Ibid [33]–[43].

15 Enderby, above n 2, 27.

16 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Report on the Law and Administration of Divorce and Related Matters and the Clauses of the Family Law Bill 1974* (Parliamentary Paper, No 133, October 1974) [38]–[39]. See also Enderby, above n 2, 29–30.

17 *Family Law Act 1975* (Cth) s 97(4). This section was repealed in 1988.

encourage conciliation and apply the judicial powers of the court '*only as a last resort*'.[18]

2.8 The much anticipated character of the new Family Court did not survive. The reasons for this are complex. They include a continual decline in adequate resources for the Court, including for the appointment of sufficient judges, judicial registrars and registrars, and for the appointment of the essential ancillary staff to fulfil the goal of creating a 'helping court' (counsellors, social workers, psychologists, and Indigenous Liaison Officers).[19] There was also a reversal of attitude to the appropriateness of greater informality, both in relation to the conduct of proceedings and the type of premises, following a series of fatal attacks on Family Court judges and their family members.[20]

2.9 The workload of the Family Court was significantly expanded when, between 1986 and 1990, all states except Western Australia referred their legislative powers over ex-nuptial children to the Commonwealth. The Family Court was thereby given jurisdiction in relation to ex-nuptial children, except powers over state welfare and child protection, juvenile justice and adoption.

2.10 The Federal Circuit Court, originally the Federal Magistrates' Court, was established in 1999 to provide a simple and accessible alternative to litigation in the Family Court (and the Federal Court of Australia).[21] The objects of the Federal Circuit Court also require it to operate as informally as possible, to use streamlined powers, and to encourage the use of a range of dispute resolution processes.[22] Unlike the Family Court, there is no requirement that judges appointed to the Federal Circuit Court have any particular suitability to deal with family law matters.[23] Due to the Federal Circuit Court's broad jurisdiction in relation to both matters of general federal law, as well as family law, it has been impracticable to house the Court in the informal surroundings envisaged by the Senate Committee. Many Federal Circuit Court judges around the country cannot even be housed in the same building as the Family Court.

2.11 The rapid societal changes throughout the seventies and eighties quickly overtook what had been a progressive and forward-thinking approach to the law relating to marriage breakdown. The *Family Law Act* required further amendment in 2009 to enable the family courts to deal, in the one proceeding, with both financial and child-related matters arising for separated de facto couples,[24] rather than just child-related matters. Like many countries around the world, Australian society also suffers from

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18 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Report on the Law and Administration of Divorce and Related Matters and the Clauses of the Family Law Bill 1974* (Parliamentary Paper, No 133, October 1974 [35]. Emphasis added.

19 See Chapter 3.

20 Shurlee Swain, *Born in Hope: The Early Years of the Family Court of Australia* (University of New South Wales Press, 2012).

21 *Federal Circuit Court of Australia Act 1999* (Cth).

22 Ibid s 3(2).

23 Ibid sch 1 pt 1 'Appointment of Judges'.

24 This followed referrals of power over de facto property and financial matters by the state and territories except Western Australia.

significant rates of family violence[25] and child abuse,[26] which have become the focus of many family law disputes.[27] Child protection and family violence are matters of state and territory responsibility. There is a significant disconnect between the family law and child protection systems. The jurisdictional conflicts create confusion, duplication, wasted resources, and barriers to access to justice.

2.12 At the time, it made sense that Commonwealth heads of power (marriage, and divorce and matrimonial causes) underpinned the *Family Law Act* to establish a federal family court.[28] However, contemporary challenges call into question the appropriateness and effectiveness of a federal mechanism for the resolution of family law disputes which involve complex matters of both state and federal law. The current approach also hinders the development of a more holistic approach to what might properly be considered to fall within the scope of a modern family law system, particularly regarding modern notions of parents and families, and different cultural understandings of family.

A public health approach to family law

2.13 The submissions to this Inquiry demonstrated that the changing nature of the system's workload, and the challenges it poses for service delivery, are well understood within the family law system. Victoria Legal Aid, for instance, noted that the system is under 'increasing pressure' in response to the changing 'complexity of the issues and needs of families utilising the family law system' and the 'prevalence of family violence and other risk issues affecting children and families'.[29]

2.14 In response to these shifts, stakeholders suggested that a central part of redeveloping the family law system should involve a move away from inward-looking approaches towards practices that emphasise collaborative and integrated service delivery, including with services and courts outside the family law system.[30] The submissions also suggested that this shift has complicated the view that post-separation disputes are primarily a 'legal problem'. As Marrickville Legal Centre noted:

> The dynamics involved in family conflict have complex emotional, cultural, social, health and economic underpinnings. Characterisation of family conflict as a 'legal

25 One in six women and one in twenty men have experienced violence by a cohabiting partner: Peta Cox, *Violence Against Women: Additional Analysis of the Australian Bureau of Statistics' Personal Safety Survey* (Australia's National Research Organisation for Women's Safety, 2015) 33.

26 One in 35 Australian children receives child protection services: Australian Institute of Health and Welfare, 'Child Protection Australia 2017-18' (Australian Institute of Health and Welfare, 2019).

27 Rae Kaspiew et al, *Court Outcomes Project (Evaluation of the 2012 Family Violence Amendments)* (Australian Institute of Family Studies, 2015) 41–50.

28 *Commonwealth of Australia Constitution* Act *1900* (Cth) ss 51(xxi), (xxii).

29 Victoria Legal Aid, *Submission 61*.

30 See, eg, Yourtown, *Submission 204*; Uniting, *Submission 162*; Anglicare WA, *Submission 152*; FMC Mediation and Counselling, *Submission 135*; Interrelate, *Submission 126*; L Bowen, *Submission 123*; Resolution Institute, *Submission 70*; Relationships Australia South Australia, *Submission 62*; Victoria Legal Aid, *Submission 61*; Family & Relationship Services Australia, *Submission 53*; Caxton Legal Centre, *Submission 51*; The Royal Australian and New Zealand College of Psychiatrists, *Submission 18*.

> problem' does not assist, and frequently exacerbates, dispute. Successful design and implementation of post-separation arrangements, for child issues particularly, if the parents cannot arrange this themselves, requires the co-ordinated input of a range of expertise (from psychologists, social workers, independent financial consultants, addiction specialists, cultural and community representatives and others).[31]

2.15 As well as emphasising the need for a multi-disciplinary approach, the submissions recognised that many families will need support to navigate other legal systems outside the family law system.[32] For example, the submission from Fitzroy Legal Service and Darebin Community Legal Centre described how clients of their practice

> commonly present with multiple, overlapping and interconnected issues including parenting, family violence, child protection and migration, as well as underlying problems such as homelessness/housing stress, mental health issues, drug use, and involvement in the criminal law system.[33]

2.16 Stakeholders suggested that this complexity will require family law professionals to work in partnership with other service systems and sectors, both within and beyond the boundaries of the family law system,[34] in order to respond to families in a flexible and person-centred way.[35]

2.17 Relationships Australia submitted:

> With this review, Australia has a once-in-a-generation opportunity to identify and implement an approach that better reflects:
>
> - community expectations about co-parenting
> - the evolved understanding of how parental conflict and family violence affects children
> - the focus on safety and necessity of effective harm prevention, and
> - the contemporary awareness of the agency of children and young people.[36]

2.18 The ALRC agrees. In its Discussion Paper, the ALRC proposed a public health approach to frame changes to the family law system.[37] A public health approach aims to prevent or reduce a particular social problem, such as child harm, by identifying risk indicators and developing mechanisms for responding to them. This approach aims to prevent problems from occurring in the first place, to quickly respond to problems if they do occur, to minimise any long-term effects, and prevent reoccurrence. In Australia,

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31 Marrickville Legal Centre, *Submission 137*.

32 See, eg, Bravehearts Foundation Ltd, *Submission 148*; The Benevolent Society, *Submission 86*; Family Court of Australia, *Submission 68*; Setting the Record Straight for the Rights of the Child, *Submission 28*; Queensland Family and Child Commission, *Submission 16*.

33 Fitzroy Legal Service and Darebin Community Legal Centre, *Submission 7*.

34 See, eg, Yourtown, *Submission 204*; Victoria Legal Aid, *Submission 61*.

35 See, eg, Anglicare WA, *Submission 152*; FMC Mediation and Counselling, *Submission 135*; Drummond Street Services, *Submission 20*.

36 Relationships Australia National, *Submission 317*.

37 Australian Law Reform Commission, *Review of the Family Law System*, Discussion Paper No 86 (2018) 13.

all governments have recognised the public health model as the appropriate framework to ensure the safety and wellbeing of children, as set out in the *National Framework for Protecting Australia's Children*.[38] In the context of this Inquiry, the particular social problem to be addressed is the increased risk to parties to intimate relationships, and their children, upon separation. These risks include: exacerbation of financial disadvantage; increased exposure of children to conflict and abuse; increased incidence of family violence; inability of parents to adopt parenting behaviours that are consistent with positive wellbeing outcomes for children; and inability of parents to address their own behaviours that negatively affect parental care. Relationships Australia suggested that such a model should give rise to a new paradigm—a Family Wellbeing System—rather than a family law system.[39]

2.19 A public health approach comprises three levels of intervention: primary, secondary, and tertiary.

2.20 Primary interventions, such as public awareness and education campaigns, are delivered to the whole community in order to provide support before problems occur. Typically delivered in community settings, such as schools, community health centres, and the media, they may focus, for example, on changing cultural norms or social attitudes through public education about positive parenting practices or legal rights and policies, including those relating to property rights on separation.[40] Primary interventions aim to shift the risk profile positively for the entire relevant population.[41] In the child protection domain, this means aiming to have fewer children in need of more intensive secondary or tertiary services, such as removal from their family by child protection agencies.

2.21 Secondary interventions target populations with a higher risk of harm, using the research evidence of risk indicators to identify appropriate strategies. In the child protection space, for example, risk indicators for child harm can include poverty, parental mental health issues, parental conflict, family violence, and parental drug or alcohol misuse. Secondary interventions, therefore, might include the delivery of programs to support parents living in disadvantaged areas.

2.22 Tertiary interventions are designed to reduce the long-term implications of harm and prevent a reoccurrence. In child protection matters, tertiary services target families where child abuse or neglect has already occurred or is believed to have occurred. These are generally out-of-home care services provided by statutory child protection agencies that aim to ensure the safe care of children who are unable to remain living with their parents, as well as therapeutic services to support recovery from trauma.

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38 Council of Australian Governments, *Protecting Children Is Everyone's Business: National Framework for Protecting Australia's Children 2009–2020* (2014).

39 Relationships Australia National, *Submission 317*.

40 Daryl J Higgins, 'A Public Health Approach to Enhancing Safe and Supportive Family Environments for Children' (2015) 96 *Family Matters* 39, 40.

41 Ibid 45.

2.23 In applying this lens to the family law system, it is important to emphasise that the vast majority of separated parents report positive relationships with their former partner,[42] as well as positive levels of wellbeing for themselves[43] and their children.[44] While financial stress is a factor that affects many separated parents,[45] most separating families work out their post-separation parenting,[46] and many their property arrangements,[47] with little or no reliance on the family law system.

2.24 As observed by many stakeholders, including Relationships Australia,[48] the majority of families do not use the court process for parenting arrangements. Most either make their own arrangements, or access a range of services, including FDR. From a public health perspective, therefore, it is evident that many separating families will only require support of a primary nature, such as clear information about the law and how to get advice if needed.

2.25 However, AIFS research indicates that some separating families will need a greater level of assistance from the family law system, and that these families are more likely to be dealing with a mix of complex issues. For example, this research shows that significant proportions of family law system clients who use its formal dispute resolution pathways (that is, who access FDR, lawyers, or the courts) are affected by characteristics associated with risk and vulnerability, particularly among those who engage with the courts.[49]

2.26 Given the evidence that issues such as family violence, mental illness and substance abuse are key risk factors for poor outcomes for children,[50] it is evident that the family law system is delivering services to many families at a time of heightened vulnerability. On this basis, interaction with the family law system offers a critical opportunity for intervention with families that can potentially reduce the factors that might compromise a child's wellbeing.

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42 Rae Kaspiew et al, *Experiences of Separated Parents Study (Evaluation of the 2012 Family Violence Amendments)* (Australian Institute of Family Studies, 2015) 15, 22; Lixia Qu et al, 'Post-Separation Parenting, Property and Relationship Dynamics after Five Years' (Attorney General's Department (Cth), 2014) 14.

43 Kaspiew et al, above n 42, 162.

44 Ibid 137–8; Qu et al, above n 42, 137.

45 Kaspiew et al, above n 42, 11.

46 Ibid 71.

47 Qu et al, above n 42, 98.

48 Relationships Australia National, *Submission 317*.

49 Rae Kaspiew et al, 'Evaluation of the 2012 Family Violence Amendments: Synthesis Report' (Australian Institute of Family Studies, 2015) 16.

50 Leah Bromfield et al, *Issues for the Safety and Wellbeing of Children in Families with Multiple and Complex Problems: The Co-Occurrence of Domestic Violence, Parental Substance Misuse, and Mental Health Problems* (Australian Institute of Family Studies, 2010) 11.

A law reform response

2.27 The ALRC considers that the broad family law system, as the paradigm is currently framed, should focus on strengthening its primary and secondary responses, to ensure that information and advice is widely available and that support services are easily accessible. At the primary level, it encourages the Australian Government to consider working with appropriate organisations across the sector to develop a national education and awareness campaign to promote public awareness of the law and sources of information, advice and support for separating families and children. It also encourages the Australian Government to consider working with service providers across the sector to strengthen referral relationships between those already within the family law system and universal services for people affected by violence, such as health services and police. These matters are discussed in Chapter 15.

2.28 At the secondary level, it encourages the Australian Government to revisit the level of resourcing provided to the existing network of 65 FRCs (which have only operated for 10 years), and to expand and appropriately fund the FASS, to reduce the risk of people 'falling through the gaps' between different services, sectors and jurisdictions. In its Discussion Paper, the ALRC proposed the establishment of 'Families Hubs' – essentially offering a more holistic 'one-stop shop' than is currently provided by the FRCs.[51] Many stakeholders supported this concept; others were more cautious or were opposed for a variety of reasons. These matters are discussed in Chapter 16. The ALRC makes no specific recommendations regarding whether 'Families Hubs' should be pursued either in addition to or in lieu of existing service providers, as this is essentially a question of social, rather than legal, policy. It does, however, make recommendations to expand, and resource appropriately, the FRCs and the FASS.

2.29 During the Inquiry, attention was also drawn to the workforce issues which currently exist, and which are expected to increase, as pressures on the system intensify.[52] Stakeholders highlighted the desirability of the creation of a workforce capability plan to support the growth of a professional workforce that is able to acquire and maintain core competencies. The ALRC discusses workforce issues in Chapter 13.

2.30 Important though these initiatives are, they sit within the broader conceptualisation of a family 'wellbeing' system, which is underpinned by the family law. They are the 'clinical and social services'[53] that support separating families. As such, they do not lend themselves readily to law reform. The law cannot, and cannot be expected to, provide a solution to the complex emotional, cultural, social, health, and economic issues that underlie the breakdown of an intimate relationship. The ALRC agrees that the notion of 'complex needs' in family law is not intrinsically linked to legal complexity, and that 'funnelling families with … co-occurring psycho-social needs into the courts' is a failure

51 Australian Law Reform Commission, *Review of the Family Law System*, Discussion Paper No 86 (2018) Proposal 4–1.
52 Ibid ch 10.
53 Relationships Australia National, *Submission 317*.

to respond properly to the needs of the family.[54] A law reform commission has neither the expertise nor the mandate to address the underlying matters of human behaviour and circumstance that cause this complexity (such as mental health, homelessness, poverty, substance misuse, violence, and criminality).

2.31 The law is, however, the last resort when primary and secondary levels of intervention have not assisted parties to resolve their disputes—a proposition which seems to be accepted even by stakeholders who reject the current legal paradigm.[55] The ALRC has therefore focused its attention at the tertiary level.

2.32 Marriage relationships, and even more clearly de facto relationships,[56] are fundamentally matters of private law. However, the protective jurisdiction of the courts, particularly in the child protection and family violence legislation of the states and territories, is fundamentally public law. This is evident in the obligations imposed on the family courts to prioritise the best interests of the child and to take into account family violence in both parenting and property matters, as well as the inherent *parens patriae* jurisdiction of the state Supreme Courts. Traditionally in matters of private law, legal processes should only be employed where there is a dispute between the parties. However, the distinction between the laws regulating relationships and laws of protection is largely illusory. This is readily apparent in matters of family violence. As Judges of the Family Court of New Zealand explained in their submission to the most recent review of New Zealand family law:

> The overriding principle that guides decision makers in parenting and guardianship disputes is the welfare and best interests of the child, of which the foremost component is protection of the child's safety from all forms of violence. This means the laws which prima facie concern relationship regulation are also protective in nature. There are vulnerabilities and risk even in parenting and guardianship disputes which do not concern violence or neglect.[57]

2.33 One of the most difficult issues raised in this Inquiry is the extent to which it remains appropriate for parenting matters to be resolved through the exercise of judicial power by a court constituted under Chapter III of the *Constitution*.[58] Relationships Australia considered that:

> The adversarial, court-centric process is an artefact of time when the main objective was to provide a private and dignified process of legal separation. It was fit for purpose at a time when there was no expectation that separated spouses would have an ongoing co-parenting relationship.[59]

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54 Ibid.
55 Ibid.
56 Not being dependent on any constitutional, or legislative, underpinning.
57 Submission of the Judges of the Family Court of New Zealand to the Independent Panel Examining the 2014 Family Justice Reforms, 16 November 2018, [10].
58 *Commonwealth of Australia Constitution Act 1900.*
59 Relationships Australia National, *Submission 317*.

2.34 As noted earlier, the majority of people resolve their on-going parenting arrangements without resort to court processes. There is no imperative for parties to engage with court processes unless they are unable to resolve their differences with or without the assistance of non-court processes such as counselling or FDR. A court may be called on to make a decision when parenting matters remain contested, and there is a dispute between the parents as to the best interests of the child,[60] or where the child also wishes to express a view. These are not decisions of an administrative nature—they remain decisions that require the exercise of judicial power. In a constitutional democracy comprised of executive, legislative, and judicial arms of government, a court is the only institution, consistent with the doctrine of the separation of powers, that can deliver justice and protection to children and families without compromise.

2.35 It is accepted that the principles of a protective jurisdiction require a dispute resolution process that tends more towards the inquisitorial model than the purely adversarial model. However, the adversarial aspects of family court proceedings that exist are also important. They enable stringent testing of the evidence before the court—a process that is essential where a decision will have a lifelong effect on children and their parents or caregivers. In many respects, the family courts have eschewed the traditional adversarial approach to the determination of family law disputes. First, whilst the parties to a matter before the family courts are adversaries by definition, the courts' focus in parenting proceedings is the child or children of the relationship.[61] The legislation requires that the children are the 'winners', not merely parties. There are very few examples in other types of civil litigation where a non-party is so protected. This is enforced and supported by the overarching obligation on legal practitioners to promote the non-litigious resolution of the dispute between the parties.[62] Secondly, in a purely adversarial process, the parties decide what evidence they wish to put before the court and the court's decision must be based only on findings of fact arising out of the evidence before it. The family courts, in contrast, can exercise any power in child-related proceedings of its own motion.[63] For example, the judge can seek independent evidence and direct how such evidence is to be adduced.[64] Thirdly, family court judges can have an Independent Children's Lawyer appointed, whose role is to form an independent view of what is in the best interests of the child, and to act in the proceedings in what that lawyer believes to be in the best interests of the child.[65] Judges can also designate a Family Consultant in relation to the proceedings.[66] Finally, the family courts may make an order in child-related proceedings requiring a state or territory agency to provide the court with documents or information relating to information about suspected child abuse or

60 *M v M* (1988) 166 CLR 69 [19]–[20].
61 *Family Law Act 1975* (Cth) ss 60CA, 69ZN(3).
62 This obligation is currently contained in the *Family Law Rules 2004* (Cth) sch 1 r 6(1). The ALRC recommends moving this provision to the *Family Law Act 1975* (Cth).
63 *Family Law Act 1975* (Cth) s 69ZP.
64 Ibid pt VII div 12A.
65 Ibid s 68L.
66 Ibid s 69ZS.

family violence affecting the child.[67] The exercise of these powers is underpinned by the principles which must be applied by courts as prescribed in s 43 of the *Family Law Act*:

> The Family Court shall, in the exercise of its jurisdiction under this Act, and any other court exercising jurisdiction under this Act shall, in the exercise of that jurisdiction, have regard to:
>
> …
>
> (c) the need to protect the rights of children and to promote their welfare;
>
> (ca) the need to ensure protection from family violence; ...

2.36 Stakeholders have suggested a variety of multi-disciplinary tribunal models, akin to guardianship tribunals, mental health tribunals, or the proposed Parent Management Hearings Panel pilot, as alternatives to the current dispute resolution processes.[68] The ALRC remains unpersuaded that the additional complexity of another layer of decision making within the family law system is desirable. Even assuming the establishment of such models, there will remain circumstances in which parties will be unhappy with the resolution proposed by such a tribunal and a mechanism for appeals to a court would need to be established, adding yet another layer to family law dispute resolution processes. There is no easy solution that will enable fraught disputes that have arisen in an emotionally charged context to be resolved by legal processes with which all parties will be happy. There is little alternative to calling on the exercise of judicial power when parties wish to assert their property rights and, most importantly, in circumstances where parties are unable themselves (or with multi-disciplinary assistance) to make appropriate decisions which prioritise the interests of their children over their own interests.

2.37 That is not to say that court processes and procedures cannot be improved, or that practitioners and judges cannot be better educated and equipped, to reduce the conflict that currently permeates family court proceedings. The ALRC therefore makes recommendations to amend the substantive and procedural family law to better protect vulnerable parties, to facilitate access to a range of appropriate dispute resolution processes, and to restore trust in the system with the aim of reducing, as far as possible, the negative impact of legal processes on separating families. The ALRC proposes a harm minimisation approach.

Related inquiries

2.38 Since the inception of the *Family Law Act* and the creation of the Family Court, there have been numerous inquiries into the family law system. Cognate jurisdictions

67 Ibid s 69ZW.

68 See, eg, Relationships Australia National, *Submission 317*; CatholicCare Diocese of Broken Bay, *Submission 197*; Victoria Legal Aid, *Submission 61*; Drummond Street Services, *Submission 20*.

have engaged in similar inquiries into their own family law systems.[69] More recent inquiries in Australia have focused on the intersection between family violence and family law.

Australian Law Reform Commission – Matrimonial Property (1987)

2.39 In 1987, the ALRC reported on the law governing the property rights of parties to a marriage.[70]

2.40 The ALRC proposed a number of substantive changes to the provisions of the *Family Law Act* governing division of property post-separation. The recommended amendments notably included the introduction of a starting point of equal sharing of the value of the parties' property (with provision for adjustment for special circumstances and future disparities).[71]

Family Law Pathways Advisory Group – Out of the Maze (2001)

2.41 In 2001, the Family Law Pathways Advisory Group proposed a more integrated family law system, which would reduce reliance on courts by supporting families to make informed decisions regarding parenting arrangements and family dispute resolution.[72]

2.42 The report recommended that an integrated family law system should: educate the community and professionals; ensure accessibility of information; provide appropriate assessment and referral for families entering the system; provide services to assist dispute resolution and decision making; and provide ongoing support to families.[73]

2.43 The report recommended the development of a national code of conduct for family lawyers, which would include a 'commitment to actively promote non-adversarial dispute resolution'.[74] It also recommended 'multidisciplinary education' for all judges and magistrates exercising family law jurisdiction, as well as competency-based training for all legal and non-legal professionals, mediators, counsellors, and client contact staff working in the family law system.[75]

2.44 The Advisory Group further recommended that the Council of Australian Governments urgently explore options to improve coordination between levels of

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69 Examples include Scottish Government, *Review of Part 1 of the Children (Scotland) Act 1995 and Creation of a Family Justice Modernisation Strategy: A Consultation* (2018); New Zealand Law Commission, *Dividing Relationship Property: Time for Change?* (Issues Paper 41, 2017); Justice Annemarie Bonkalo, *Family Legal Services Review* (Ministry of Justice (Canada), 2016); *Family Justice Review Final Report* (Ministry of Justice (UK), 2011).

70 Australian Law Reform Commission, *Matrimonial Property*, Report No 39 (1987).

71 Ibid 157–163.

72 Family Law Pathways Advisory Group, above n 1, ES1.

73 Ibid ES1–ES2, ES6.

74 Ibid ES8, rec 4.

75 Ibid ES7–ES8, rec 4.

government, in particular to allow cases involving family law, violence, and child abuse to be dealt with as one matter.[76]

House of Representatives Standing Committee on Family and Community Affairs – Every Picture Tells a Story (2003)

2.45 In 2003, the House of Representatives Standing Committee on Family and Community Affairs (the Committee) inquired into matters relating to the child support formula and parenting orders. The Committee, headed by Kay Hull MP, delivered its report in December 2003.[77]

2.46 The Committee observed that 'there was widespread community dissatisfaction with the current family law process.'[78]

2.47 The Committee noted the negative effect of adversarialism in family law and made recommendations aimed at 'radically reshaping the system so that ... decision making in a legal context is non-adversarial and litigation is avoided as much as possible.'[79]

2.48 The Committee also noted the issue of jurisdictional fragmentation, observing that where issues of family violence and child protection arise concurrently with family law issues there are risks of 'gaps and duplication'.[80]

2.49 The Committee recommended the establishment of a Commonwealth Families Tribunal with power to decide disputes about shared parenting responsibility and property matters by agreement of the parents.[81] It recommended that the Tribunal include an investigative arm with powers to investigate allegations of violence and child abuse.[82]

2.50 The Committee emphasised the importance of maximising opportunities for the participation of children in decisions that affect them, and recommended that the proposed Families Tribunal be designed to facilitate this.[83]

2.51 The Committee further recommended the introduction of a rebuttable presumption of equal shared parental responsibility,[84] coupled with a presumption against shared parental responsibility in cases where there is entrenched conflict, family violence, substance abuse, or established child abuse.[85]

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76 Ibid ES24, rec 28.
77 House of Representatives Standing Committee on Family and Community Affairs, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation* (Commonwealth of Australia, 2003).
78 Ibid 65.
79 Ibid 66. See, eg, recs 11, 12, 17 and 20.
80 Ibid 72.
81 Ibid rec 12.
82 Ibid rec 16.
83 Ibid [4.134]–[4.139], [4.158].
84 Ibid rec 1.
85 House of Representatives Standing Committee on Family and Community Affairs, above n 77, rec 2.

The Hon Professor Chisholm AM – Family Courts Violence Review (2009)

2.52 In 2009, the Hon Professor Chisholm AM reviewed 'the appropriateness of the legislation practices and procedures in relation to matters before the federal family courts where issues of family violence arise'.[86]

2.53 Chisholm observed that '[t]here are few more difficult or more important challenges for the family law system than dealing with cases where family violence is an issue.'[87]

2.54 Recommendations from this report included:

- legislative amendments to mandate an initial risk identification and assessment by the court;[88]
- a review of the funding available to a range of actors in the family law system to maximise their ability to reduce the risk of family violence;[89] and
- measures to improve the understanding of family violence among family law professionals and judicial officers.[90]

2.55 Chisholm noted that the 2006 amendments to the *Family Law Act*—which implemented some of the 2003 Standing Committee's recommendations on parenting matters—had generated confusion and unintended consequences, particularly in respect of equal shared parental responsibility.[91]

2.56 The report therefore proposed amendments to clarify and simplify the relevant provisions, and focus the attention of parties on the interests of children.[92]

2.57 Though noting that it fell outside the Terms of Reference of the Inquiry, Chisholm also recognised the 'vexed issue' of the interaction between family court proceedings and family violence orders issued by state and territory courts.[93]

Family Law Council – Family Violence Report (2009)

2.58 In 2009, the Family Law Council responded to the Attorney-General's request for 'advice on practical strategies to improve the coordination between the family law and the State and Territory family violence systems'.[94]

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86 Richard Chisholm, *Family Courts Violence Review* (Commonwealth of Australia, 2009).
87 Ibid 4.
88 Ibid rec 2.3.
89 Ibid rec 4.1.
90 Ibid 166–7. See recs 4.3, 4.4 and 4.6.
91 Ibid 7–9.
92 Ibid rec 3.1–3.8.
93 Ibid 80.
94 Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009) 18.

2.59 The Family Law Council noted the risk of inconsistency between state and territory family violence orders and family court orders in relation to children.[95] It observed that '[t]here is inadequate communication, coordination or information sharing between courts and authorities despite significant overlap.'[96]

2.60 The report recommended, among other things, the creation of a national database of court orders,[97] and measures to improve understanding of family violence among all persons working in the family law system.[98]

2.61 The report noted the need to clarify misconceptions around equal shared parental responsibility and recommended legislative amendments to address this.[99]

Australian Law Reform Commission and NSW Law Reform Commission – Family Violence: A National Legal Response (2010)

2.62 In 2010, the ALRC and the NSW Law Reform Commission (NSWLRC) produced a report on the interaction between state and territory laws regarding family/domestic violence and child protection, and the (federal) *Family Law Act.*

2.63 The ALRC and NSWLRC recommended measures to address jurisdictional fragmentation, including the establishment of a national register of court orders and the expansion of information-sharing arrangements,[100] as well as substantive legislative amendments.

2.64 The ALRC and NSWLRC also recommended measures to encourage state and territory magistrates to exercise family law jurisdiction,[101] particularly in specialist family violence courts.[102] These recommendations were coupled with an endorsement of the expansion of specialised family violence courts within existing courts in state and territory jurisdictions.[103]

2.65 Recommendations also addressed improving the training of family law professionals and judicial officers in respect of family violence.[104]

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95 Ibid 57.
96 Ibid 60.
97 Ibid rec 5.
98 Ibid 40. See recs 2, 3.
99 Ibid rec 13.
100 Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010) recs 30–16, 30–17, 30–18.
101 See, eg, ibid recs 16–1, 16–2, 16–3, 16–8.
102 Ibid rec 32–2.
103 Ibid rec 32–1.
104 Ibid recs 31–1,31–2, 31–3, 31–4, 31–5.

Family Law Council – Aboriginal and Torres Strait Islander and Culturally and Linguistically Diverse Clients Reports (2012)

2.66 In 2012, the Family Law Council delivered two reports to the Attorney-General. These reports made recommendations on improving the family law system's capacity to meet the needs of Aboriginal and Torres Strait Islander clients,[105] and clients from culturally and linguistically diverse backgrounds.[106]

2.67 Recommendations from both reports included:

- community education programs;[107]
- the promotion of cultural competency among family law professionals;[108] and
- building a more diverse workforce in the family law system.[109]

2.68 The Family Law Council also endorsed funding more positions for Indigenous Family Consultants and Indigenous Family Liaison Officers.[110]

Productivity Commission – Access to Justice Report (2014)

2.69 In 2014, the Productivity Commission reported on access to justice arrangements in civil matters—focusing on constraining costs and promoting access to justice and equality before the law.[111]

2.70 Volume 2, Chapter 24 of the report dealt with the family law system, which the Productivity Commission described as 'complex and fragmented'.[112]

2.71 The Productivity Commission noted that access to justice challenges in the family law system are particularly great in respect of:

- families experiencing complex issues, particularly family violence;[113] and
- low-value property disputes.[114]

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105 Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (2012).

106 Family Law Council, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds* (2012).

107 Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (2012) rec 1; Family Law Council, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds* (2012) rec 1.

108 Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (2012) rec 2; Family Law Council, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds* (2012) rec 2.

109 Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (2012) rec 5; Family Law Council, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds* (2012) rec 4.

110 Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (2012) rec 6.

111 Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 2, 2014).

112 Ibid 846.

113 Ibid 855.

114 Ibid 870.

2.72 The Productivity Commission noted that jurisdictional fragmentation continued to present a barrier to justice for families experiencing family violence and child safety issues. It endorsed consideration of options for significant jurisdictional and structural change.[115]

2.73 The Productivity Commission also endorsed clarification of the legislative provisions governing property division and the introduction of mandatory family dispute resolution for property and financial matters.[116]

Special Taskforce on Domestic and Family Violence in Queensland – Not Now, Not Ever Report (2015)

2.74 The Special Taskforce on Domestic and Family Violence in Queensland (the Taskforce) was established in 2014. The Hon Dame Quentin Bryce AD CVO chaired the Taskforce. Its final report made recommendations to the Queensland Government to inform the development of a domestic and family violence strategy.[117]

2.75 The Taskforce reported that issues associated with navigating the intersection between family law and family violence proceedings represented a significant concern for individuals.[118] It endorsed the establishment of specialist domestic violence courts and recommended that these courts exercise jurisdiction in respect of child protection and limited family law matters.[119]

2.76 The Taskforce also recommended increasing and improving training of magistrates and family law professionals in relation to family violence.[120]

Family Law Council – Families with Complex Needs Reports (2015 and 2016)

2.77 In 2014, the Attorney-General asked the Family Law Council to consider the intersection between the family law and child protection systems. The Family Law Council produced an Interim Report in 2015,[121] before delivering its Final Report in 2016.[122]

2.78 The Interim Report identified the 'need to redevelop the justice system in a way that maximises its effectiveness for families with multiple and complex needs.'[123] The Family

115 Ibid 869, rec 24.3.
116 Ibid 874–7, recs 24.4, 24.5.
117 Queensland Special Taskforce on Domestic and Family Violence, Queensland Government, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (2015).
118 Ibid 275.
119 Ibid 284, recs 96–99.
120 Ibid 288–92, recs 103–110.
121 Family Law Council, *Interim Report to the Attorney-General in Response to the First Two Terms of Reference on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (2015).
122 Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016).
123 Family Law Council, *Interim Report to the Attorney-General in Response to the First Two Terms of Reference on Families with Complex Needs and the Intersection of the Family Law and Child Protection*

Law Council recommended measures to support the exercise of family law jurisdiction by children's courts and magistrates courts,[124] as well as improving information sharing and national consistency in responding to family violence and child protection.[125]

2.79 The Final Report recommended measures to enhance collaboration and information sharing between the family law system and other relevant sectors. The Final Report also called for implementation of the Family Law Council's 2012 recommendations in respect of Aboriginal and Torres Strait Islander and culturally and linguistically diverse families.[126]

Council of Australian Governments Advisory Panel on Reducing Violence against Women and their Children (2016)

2.80 In 2016, the Council of Australian Governments (COAG) Advisory Panel on Reducing Violence against Women and their Children (the Advisory Panel) delivered its Final Report.[127] The report was designed to inform the Third Action Plan of the *National Plan to Reduce Violence against Women and their Children 2010–2022.*

2.81 The Advisory Panel's recommendations included:

- a national risk assessment framework for violence against women and their children;[128]
- enhanced information sharing;[129] and
- expansion of models of co-location and integration that include courts, agencies, and services.[130]

2.82 The Advisory Panel noted that 'positive outcomes' have been reported in respect of existing models of collaboration and co-location, such as specialised family violence court divisions.[131]

Victorian Royal Commission into Family Violence (2016)

2.83 In 2015, the Victorian Government established a Royal Commission into Family Violence. The final report was delivered in March 2016.[132]

2.84 Volume IV, Chapter 24 of the report dealt with the intersection between family violence and the family law system. The Commission reported that the issue of jurisdictional fragmentation was a key theme of the evidence it heard.[133]

Systems (2015) 99.
124 Ibid 100–103.
125 Ibid 105–107.
126 Family Law Council, above n 122, rec 16.
127 COAG Advisory Panel on Reducing Violence against Women and their Children, *Final Report* (2016).
128 Ibid rec 6.1.
129 Ibid recs 6.4, 6.5.
130 Ibid rec 6.5.
131 Ibid 118.
132 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016).
133 Victoria, Royal Commission into Family Violence, *Report and Recommendations, Volume IV* (2016) ch 24,

2.85 Noting that it had received evidence that magistrates have been reluctant to exercise their powers under the *Family Law Act,* the Royal Commission reiterated that magistrates should be encouraged to exercise these powers.[134] Further, it recommended amendment of the *Children, Youth and Families Act 2005* (Vic) to clarify that the Children's Court of Victoria has the same jurisdiction to make *Family Law Act* parenting orders as the Magistrates' Court.[135]

2.86 The Royal Commission also recommended that the Victorian Government:

- pursue the creation of a national database for orders and other relevant court documents;[136]
- pursue the development of a national family violence risk assessment framework and tool;[137] and
- advocate for reforms that reduce fragmentation of jurisdictions in cases involving family violence.[138]

Social Policy and Legal Affairs Committee Family Violence Report (2017)

2.87 In 2017, the House of Representatives Standing Committee on Social Policy and Legal Affairs (the SPLA Committee) made recommendations on how the family law system can better support and protect those affected by family violence.[139]

2.88 The SPLA Committee identified, and made recommendations to address, a number of key challenges of the current family law system's response to family violence. These challenges included: the inappropriateness of the adversarial system for resolving family law disputes; the inaccessibility of the system for most families; and the exposure of families to greater risk of harm as a result of jurisdictional fragmentation.[140]

2.89 Recommendations by the SPLA Committee included:

- the development of a national family violence risk assessment tool;[141]
- expansion of information sharing;[142]
- the adoption of the Family Law Council's recommendations in 2012 in relation to improving the family law system's capacity to meet the needs of Aboriginal and Torres Strait Islander people and culturally and linguistically diverse families;[143]

190.

134 Ibid 191.

135 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) rec 133.

136 Ibid rec 134.

137 Ibid.

138 Ibid rec 129.

139 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (2017).

140 Ibid 47–48.

141 Ibid rec 2.

142 Ibid rec 6.

143 Ibid recs 24, 25, citing; Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (2012); Family Law Council, *Improving the Family Law System for Clients from*

- mandatory ongoing family violence training for family law professionals;[144] and
- encouraging state and territory magistrates to exercise family law jurisdiction, particularly in specialist family violence courts.[145]

2.90 The SPLA Committee also proposed amendments to the legislative provisions governing property division in order to better accommodate persons who have experienced family violence, and separated couples with small value property pools.[146]

2.91 It also urged the ALRC to consider the removal of the presumption of equal shared parental responsibility, and to develop amendments to Pt VII of the *Family Law Act*, which governs parenting arrangements.[147]

Other Relevant Reports

2.92 In addition to those already listed, many other reports have exposed issues across the family law system. In 2005, the Ministerial Taskforce on Child Support recommended a range of new measures to improve the assessment and administration of child support.[148] In 2016, the SPLA Committee delivered its findings on the need for regulatory reform in relation to surrogacy.[149] These and many other issues have been considered in numerous reports by the ALRC, the Family Law Council, and other public and private institutions:

- Australian Law Reform Commission, *Equality before the Law: Women's Equality*, Report No 69 (1994).
- Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Improving Legal Frameworks*, Report No 117 (2012).
- Australian Law Reform Commission, *For the Sake of the Kids: Complex Contact Cases and the Family Court*, Report No 73 (1995).
- Australian Law Reform Commission, *Managing Discovery of Documents in Federal Courts*, Report No 115 (2011).
- Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000).
- Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997).

Culturally and Linguistically Diverse Backgrounds (2012).

144 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 139, rec 28.

145 Ibid recs 10, 11.

146 Ibid recs 13–18.

147 Ibid rec 19.

148 Department of Social Services (Cth), *In the Best Interests of Children: Report of the Ministerial Taskforce on Child Support* (2005). See also House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *From Conflict to Cooperation: Inquiry into the Child Support Program* (2015).

149 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Surrogacy Matters: Inquiry into the Regulatory and Legislative Aspects of International and Domestic Surrogacy Arrangements* (2016).

- Australian National Audit Office, *Implementation of the Family Relationship Centres Initiative* (Attorney-General's Department, Department of Families, Housing, Community Services and Indigenous Affairs, Audit Report No.1, 2010-11).
- Carson, R et al, *Children and Young People in Separated Families: Family Law System Experiences and Needs* (Australian Institute of Family Studies, 2018).
- Carson, R et al, *Direct Cross-Examination in Family Law Matters: Incidence and Context of Direct Cross-Examination Involving Self-Represented Litigants* (Australian Institute of Family Studies, 2018).
- Chisholm, R, *Information-Sharing in Family Law & Child Protection: Enhancing Collaboration* (Commonwealth of Australia, 2013).
- Chisholm, R, *The Sharing of Experts' Reports between the Child Protection System and the Family Law System* (Commonwealth of Australia, 2014).
- Family Law Council, *Arbitration in Family Law* (1988).
- Family Law Council, *Child Contact Orders: Enforcement and Penalties* (1998).
- Family Law Council, *Collaborative Practice in Family Law* (2006).
- Family Law Council, *Family Law and Child Protection: Final Report* (2002).
- Family Law Council, *Improving Post-Order Parenting Processes* (2007).
- Family Law Council, *Pathways for Children: A Review of Children's Representation in Family Law* (2004).
- Family Law Council, *Recognition of Traditional Aboriginal and Torres Strait Islander Child-Rearing Practices, Response to Recommendation 22: Pathways Report, Out of the Maze* (2004).
- Family Law Council, *Relocation, Report to the Attorney-General* (2006).
- Family Law Council, *Report on Parentage and the Family Law Act* (2013).
- Family Law Council, *The Answer from an Oracle: Arbitrating Family Law Property and Financial Matters* (Discussion Paper, 2007).
- Kaspiew, R et al, *Evaluation of the 2006 Family Law Reforms* (Australian Institute of Family Studies, 2009).
- Kaspiew, R et al, *Independent Children's Lawyers Study* (Australian Institute of Family Studies, Final Report, 2nd ed, 2014).
- KPMG, *Future Focus of the Family Law Services: Final Report* (Report prepared for Attorney-General's Department (Cth), 2016).
- KPMG, *Review of the Performance and Funding of the Federal Court of Australia, the Family Court of Australia and the Federal Circuit Court of Australia* (Attorney-General's Department (Cth), 2014).
- McIntosh, JE, Long, CM and Wells, YD, *Children Beyond Dispute: A Four Year Follow up Study of Outcomes from Child Focused and Child Inclusive Post-Separation Family Dispute Resolution: Final Report* (Attorney-General's Department (Cth), 2009).

- McIntosh, JE et al, *Post Separation Parenting Arrangements and Developmental Outcomes for Infants and Children* (Family Transitions, 2010).
- Moloney, L et al, *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A Pre-reform Exploratory Study* (Australian Institute of Family Studies, 2007).
- Parkinson, P et al, *Shared Care Parenting Arrangements Since the 2006 Family Law Reforms* (Attorney-General's Department (Cth) and Social Policy Research Centre, 2010).
- PwC, *Review of Efficiency of the Operation of the Federal Courts: Final Report* (Report prepared for Attorney-General's Department (Cth), 2018).
- Semple, D and the Attorney-General's Department, *Future Governance Options for Federal Family Law Courts in Australia: Striking the Right Balance* (2008).

3. The Family Law System: The Data

Contents

Introduction

3.1 Most families that separate resolve their parenting and property issues without recourse to the family law system—up to 70% of separating families provide for parenting arrangements independent of the family law system,[1] and up to 40% of parents settle the division of their property through discussion.[2]

1 Lixia Qu et al, 'Post-Separation Parenting, Property and Relationship Dynamics after Five Years' (Attorney-General's Department (Cth), 2014) xvi.

2 Ibid xvii: one fifth of those couples do so without using any 'mechanism'. The proportion of couples who finalise property division without assistance may be considerably higher for separating couples without children.

3.2 This chapter summarises the available data regarding the number of families that do enter the family law system. It presents the key characteristics of matters before the Family Court and the Federal Circuit Court,[3] and outlines the way matters before the courts are likely to resolve.

3.3 Of those matters that enter the system, the data indicate that:

- **most matters are litigated in the Federal Circuit Court, where over half are seeking parenting orders**: The Court had over 17,000 applications for final orders in 2017/18, with 51% pertaining to parenting orders. The Family Court had 2427 final order applications, with half of those seeking financial orders only.[4]
- **the vast majority of matters that enter the family law system will settle:** Consent order applications were lodged in the Family Court six times more than applications for final orders,[5] and up to 84% of final order applications in the Family Court settled before judgment.[6] In the Federal Circuit Court, 70% of finalised matters in 2017/18 resolved through settlement.[7]
- **matters still spend a long time in the system:** Over one-third of all matters spent longer than one year in the courts, with around 20% of matters spending more than two years in the family law system.[8]
- **over one-third of all matters that proceed to trial will settle on the 'steps of the court':** In 2017/18, 41% of matters that proceeded to trial in the Family Court settled at trial, meaning that at some point during trial, but before judgment, the parties came to an agreement.[9]
- **unrepresented litigants are more likely to take a matter to trial:** The proportion of self-represented litigants increased sharply when matters that proceeded to trial were isolated from the proportion of unrepresented litigants in all matters.[10]
- **appeals rarely progress, and over half that do progress are dismissed by the court**: Appeals are frequently withdrawn or abandoned—54% did not proceed in 2017/18. Of those that did proceed, 55% were dismissed by the court in 2017/18, with 66% dismissed in 2016/17.[11] Close to half of all appellants were self-represented.[12]
- **family violence and abuse is a sustained and growing issue for the family courts**: There has been an increase in the number and proportion of matters in the Family Court where a notice of risk was filed, and almost half (45%) of all

3 And the Western Australian equivalents as noted.
4 See Table 3.2 and Figures 3.2, 3.3.
5 See Figure 3.1.
6 See Figure 3.7.
7 See [3.58].
8 See Figure 3.12.
9 See Figure 3.7.
10 See Figures 3.9, 3.10.
11 See Table 3.5.
12 See [3.68]–[3.72].

final order applications in the Federal Circuit Court were referred to child welfare agencies.[13]

- **use and output of Family Consultants and specialist services for children has decreased**: The number of Family Reports produced by Family Consultants to provide evidence to the courts and the number of referrals to Family Consultants to assist families with appropriate services has decreased, as have court orders to appoint Independent Children's Lawyers to matters.[14]

About the data

3.4 This chapter draws from administrative and empirical datasets. The administrative data comprises statistics collected by, and reported on, by the family courts in their annual reports, as well as data provided by the courts to the ALRC (where possible published data has been used). This data represents 'slice in time' statistics, taken at a reporting date in the financial year—the data does not trace matters from filing through to resolution, although a matter may be represented in the data more than once (for example, a final order application may also be counted in the number of interim or consent order applications if the matter moved through those steps in the time-period).

3.5 Court data usually presents matters that were filed with the courts and matters that were finalised in the time-period. Unless otherwise noted, this chapter generally refers to matters that were filed with the courts.

3.6 Court administrative data does not and cannot collect all information relevant to the characteristics of family law matters. For example, while court data can show the number of Notices of Risk that have been filed, it is acknowledged that these notices do not represent all matters where family violence may be present.[15] To help fill some of these gaps, the ALRC has referred to some quantitative empirical studies produced by AIFS, including the *Experiences of Separated Parents Study (Evaluation of the 2012 Family Violence Amendments)* (ESPS).[16]

3.7 Statistics produced by National Legal Aid and available through their website are also referred to, as is data collected by KPMG for its report on family law services.[17]

Limitations of the data

3.8 Family law matters can be messy. Things change, court filings are amended, and interim orders are sought. The family courts are divided into two chief jurisdictions: the Federal Circuit Court and the Family Court, which generally hears complex or

13 See [3.93]–[3.94].
14 See Tables 3.10, 3.11.
15 Family Court of Australia, *Annual Report 2017–2018,* 34.
16 Rae Kaspiew et al, *Experiences of Separated Parents Study (Evaluation of the 2012 Family Violence Amendments)* (Australian Institute of Family Studies, 2015).
17 KPMG, *Future Focus of the Family Law Services: Final Report* (Report prepared for Attorney-General's Department (Cth), 2016).

serious matters or appeals of family law matters. The Federal Circuit Court has a large workload and things can move quickly—not all judgments are published, and not all data is recorded or reported. It is not normally possible to trace the history of one (or many) matters.

3.9 Western Australia operates its own family courts system, which reports its data separately—although appeals from the Western Australian family courts to the Family Court are captured in the Family Court data (although not reported separately). In this chapter, Western Australian data is generally presented independently of the Family Court and Federal Circuit Court data (excepting in Legal Aid data).

3.10 These and other factors can render the data somewhat imprecise. To fine-tune the published data, the ALRC received further statistics directly from the courts. Generally, court-provided data presented four financial years (2014/15–2017/18) while annual report data provides a five year overview.

3.11 The data shows the case loads of the courts, the proportion of matters that have taken a particular pathway, and the average length of time that it takes to move through the system. This chapter presents data that relates to the steps that separating families or couples take in the family law system, including:

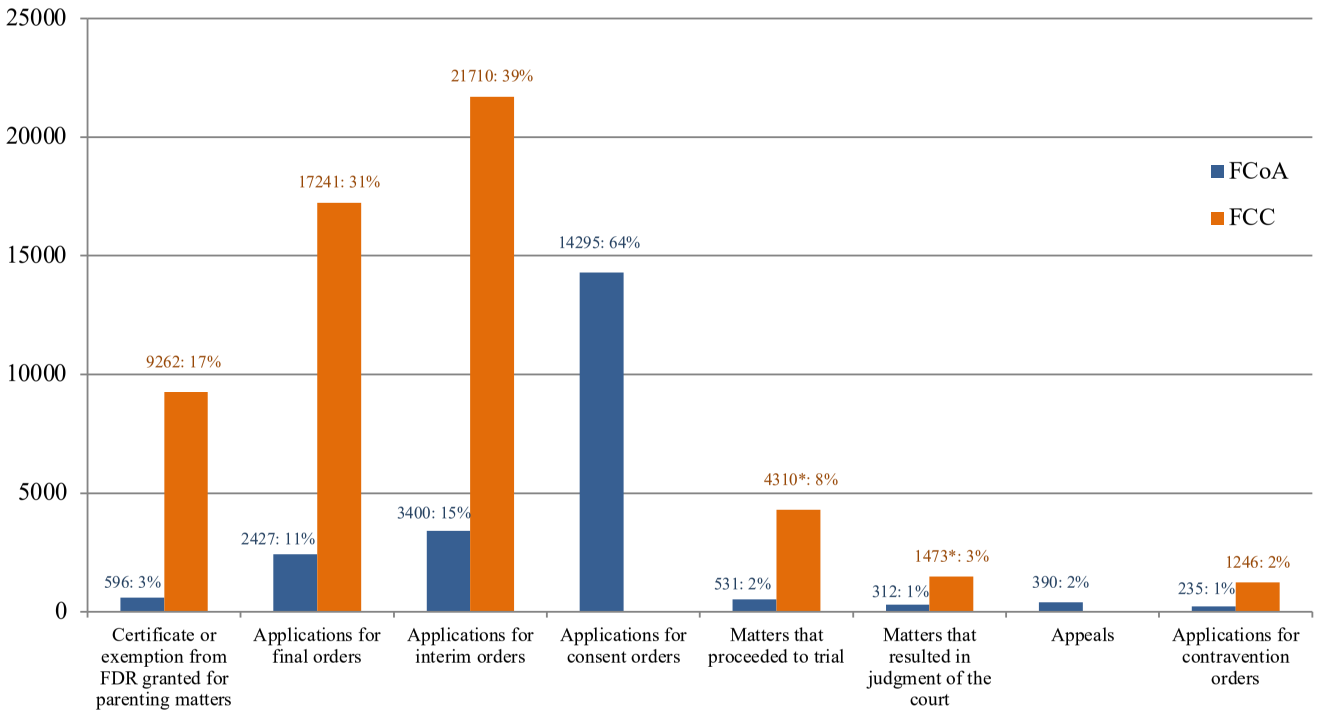
- mandatory pre-action procedures;
- filing an initiating application in the family courts;
- seeking interim court orders;
- final court orders;
- appeals of final/interim orders; and
- consent orders.

3.12 The data also seeks to provide a snapshot of family court and support services, which are integral to the operation of the family law system.

Snapshot of the case load of the family courts

3.13 Figure 3.1 presents a snapshot of the work of the Family Court and Federal Circuit Court. Each element of the snapshot is further examined in the material that follows.

Figure 3.1: Snapshot of the number of matters and percent of all matters they represent in the family law system by jurisdiction—Family Court and the Federal Circuit Court (2017/18)



Source: Family Court of Australia, Annual Report 2017/18; Federal Circuit Court of Australia, Annual Report 2017/18. The number of matters that proceeded to trial/judgment in the Federal Circuit Court is an estimate only, reflecting the percent of matters to trial reported and the number of published judgments. Excludes divorce applications.

Family dispute resolution

3.14 Separated couples who cannot agree on property division are required to undergo pre-action procedures, including attending dispute resolution or undergoing written negotiations before they file their matter with the court.[18] Families who dispute parenting arrangements and wish to apply to the court for a parenting order *must* attend an FDR conference prior to filing an initiating application with the court,[19] unless exempt.[20] Pre-action procedures are distinct from court ordered mediation that can follow the filing of a matter with the courts.

3.15 Families who are not exempt must attend or attempt to attend an FDR process.[21] To litigate parenting matters in the courts, a party who is not exempt must produce a s 60I certificate[22] to show that: it was not appropriate for the person to attempt FDR;[23] the person attempted dispute resolution but was unsuccessful;[24] or the person did not genuinely attempt to resolve the matter.[25] This certificate must be filed with an initiating application (final order application) in matters regarding parenting.

3.16 FDR is further discussed in Chapter 8.

FDR resulting in s 60I certificates

3.17 The ESPS indicates that approximately 39% of FDR users reach an agreement, and 24% are issued with s 60I certificates.[26] The number of certificates filed with the courts in 2017/18 is presented in Table 3.1 below.

Table 3.1: Certificates and exemptions granted permitting parenting matters to be litigated in the family courts (2017/18)

Jurisdiction	Certificates	Exemptions	Total
Family Court	324	272	**596**
Federal Circuit Court	5313	4049	**9362**
Total	5637	4321	**9958**

Source: Federal Circuit Court of Australia, Private correspondence, 22 January 2019.

3.18 The number of certificates/exemptions lodged with the courts has remained consistent in recent years, with 9413 filed in the Federal Circuit Court in 2014/15 which

18 *Family Law Rules 2004* (Cth) r 1.05, sch 1, unless exempt: these pre action procedures do not apply in the Federal Circuit Court.
19 *Family Law Act 1975* (Cth) s 60I.
20 *Family Law Rules 2004* (Cth) sch 1.
21 *Family Law Act 1975* (Cth) s 60I(9).
22 Ibid s 60I(7).
23 Ibid s 60I(8)(aa).
24 Ibid ss 60I(8)(a), 60I(8)(b), 60I(8)(d).
25 Ibid s 60I(8)(c).
26 Kaspiew et al, above n 16, Table 4.12.

remained steady until 2017/18. A slight decrease was experienced in the Family Court, with 745 lodged in 2014/15.[27]

Matters filed in the courts

3.19 Data on matters that are filed in the courts can be collected at different stages in court proceedings. This section outlines the number of applications filed for:

- final orders in the Family Court and Federal Circuit Court and some characteristics of those applications;
- interim orders sought in the Family Court and Federal Circuit Court;
- divorce applications lodged in the Federal Circuit Court;
- consent orders lodged in the Family Court and some characteristics of those applications;
- appeals filed with the Family Court and the outcome of such appeals; and
- contravention order applications filed in the Family Court and Federal Circuit Court and some characteristics of those applications.

3.20 This section also outlines the way that matters resolve once trial has begun, and presents the attrition rate of matters as they proceed through the Family Court (this data was unavailable for the Federal Circuit Court).

Final order applications

3.21 A matter is initiated in the courts through a final order application, which outlines what orders a party is seeking. A final order application must be filed with, or prior to, any interim or interlocutory applications.

Table 3.2: Number of final order applications filed in Family Court and the Federal Circuit Court (2013/14—2017/18)

Jurisdiction	2013/14	2014/15	2015/16	2016/17	2017/18	Total
Family Court	2955	2936	3017	2748	2427	14,083
Federal Circuit Court	17,584	17,685	17,523	17,791	17,241	87,824
Total	**20,539**	**20,621**	**20,540**	**20,539**	**19,668**	**101,907**

Source: Family Court of Australia, Annual Report 2017/18, 25; Federal Circuit Court, Annual Report 2017/18, 48.

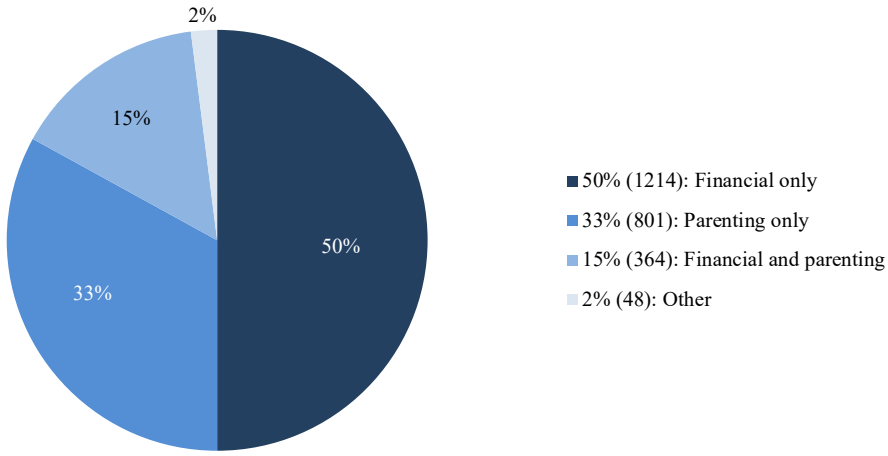
3.22 The number of filings in both courts remained consistent over a five year period, with a visible drop in the 2017/18 financial year.

27 Federal Circuit Court of Australia, Private correspondence, 22 January 2019.

Issues in final order applications

3.23 The majority of final orders filed in Family Court in 2017/18 related to financial orders only, that is, the division of income and assets including spousal maintenance. The proportion of issues sought has remained substantially the same from 2014/15 to 2017/18.[28]

Figure 3.2: The issues in final order applications filed in the Family Court (2017/18)



Source: Family Court of Australia, Annual Report 2017/18, Figure 3.2, 22, 25.

3.24 In the Family Court, 50% (1214) of final orders were filed for financial matters; 33% (801) were filed for parenting matters, 15% (364) were filed for both financial and parenting and 2% were filed for other orders, including validity, nullity and special medical procedures.[29]

3.25 Recommendations that aim to decrease the number of final order applications for financial matters are outlined in Chapters 6, 7, 8, and Chapter 13.

3.26 The majority of issues sought in final orders are reversed in matters filed in the Federal Circuit Court where parenting only matters are the majority—the proportion of which has also remained consistent since 2013/14.[30]

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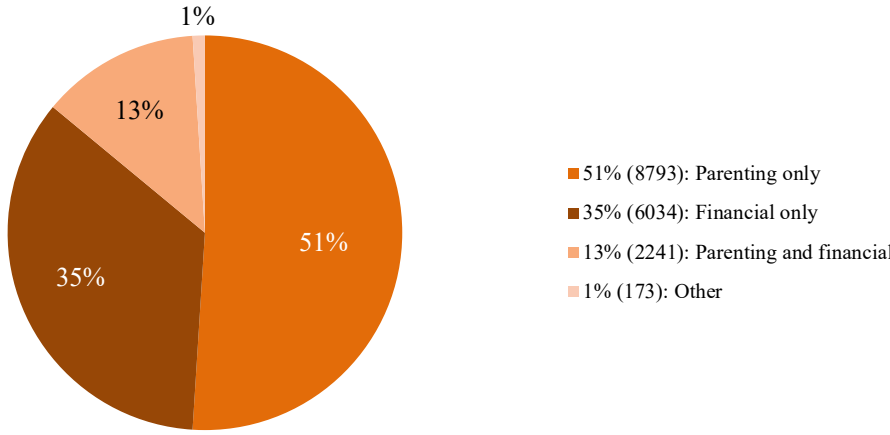
28 Family Court of Australia, above n 15, Figure 3.2, 22. See also: Family Court of Australia, *Annual Report 2016–17*, Figure 3.2, 28; Family Court of Australia, *Annual Report 2015–16*, Figure 3.3, 44; Family Court of Australia, *Annual Report 2014–15*, Figure 3.3, 53; Family Court of Australia, *Annual Report 2013–14*, Figure 3.3, 59.

29 The number of matters was derived from the number of total final order applications lodged with the court in the time period.

30 Federal Circuit Court of Australia, *Annual Report 2017–18,* Figure 3.6, 49. See also: Federal Circuit Court of Australia, *Annual Report 2016–17*, Figure 3.6, 51; Federal Circuit Court of Australia, *Annual Report 2015–16*, Figure 3.6, 54; Federal Circuit Court of Australia, *Annual Report 2014–15*, Figure 3.6, 54;

Figure 3.3: The issues in final order applications filed in the Federal Circuit Court (2017/18)



Source: Federal Circuit Court of Australia, Annual Report 2017/18, Figure 3.6, 48, 49.

3.27 Final order applications lodged in the Federal Circuit Court in 2017/18 comprised: 51% (8793) parenting orders; 35% (6034) financial orders; 13% (2241) both parenting and financial; and 1% (173) other applications.[31]

Applications for interim orders

3.28 Applicants for final orders may also apply for one or multiple interim orders—accounting for an increase in interim order applications from final order applications in both courts. The number of interim order applications has remained steady over the five year period.

Federal Circuit Court of Australia, *Annual Report 2013-14*, Figure 3.6, 46.

31 The number of matters was derived from the number of total final order applications lodged with the court in the time period.

Table 3.3: Number of interim order applications filed in Family Court and the Federal Circuit Court (2013/14—2017/18)

Jurisdiction	2013/14	2014/15	2015/16	2016/17	2017/18	Total
Family Court	3419	3476	3616	3469	3400	17,380
Federal Circuit Court	20,286	21,112	21,521	22,050	21,710	106,679
Total	**23,705**	**24,588**	**25,137**	**25,519**	**25,110**	**124,059**

Source: Family Court of Australia, Annual Report 2017/18, 26; Federal Circuit Court, Annual Report 2017/18, 48.

3.29 Interim applications may relate to parenting matters, financial matters, or both as well as other matters. The proportion of interim applications by subject matter is set out in Table 3.4 below.

Table 3.4: Type of interim applications filed in Family Court and the Federal Circuit Court (1 July 2018 and 1 March 2019)

Interim Applications				
Type	**Federal Circuit Court**		**Family Court**	
Other	2801	20%	609	32%
Children	6791	50%	600	32%
Property	3167	23%	562	30%
Children & Property	941	7%	119	6%
Total	13700	100%	1890	100%

Source: Private Correspondence from the Registry of Family Court of Australia and Federal Circuit Court (12 March 2009).

Divorce applications

3.30 Divorce applications are filed in the Federal Circuit Court.[32] In 2017/18, 45,190 applications for divorce were filed with the court. The number of divorce applications was consistent across the five year period. Of the 2017/18 applications, 77% were filed on line via 'eFile'.[33]

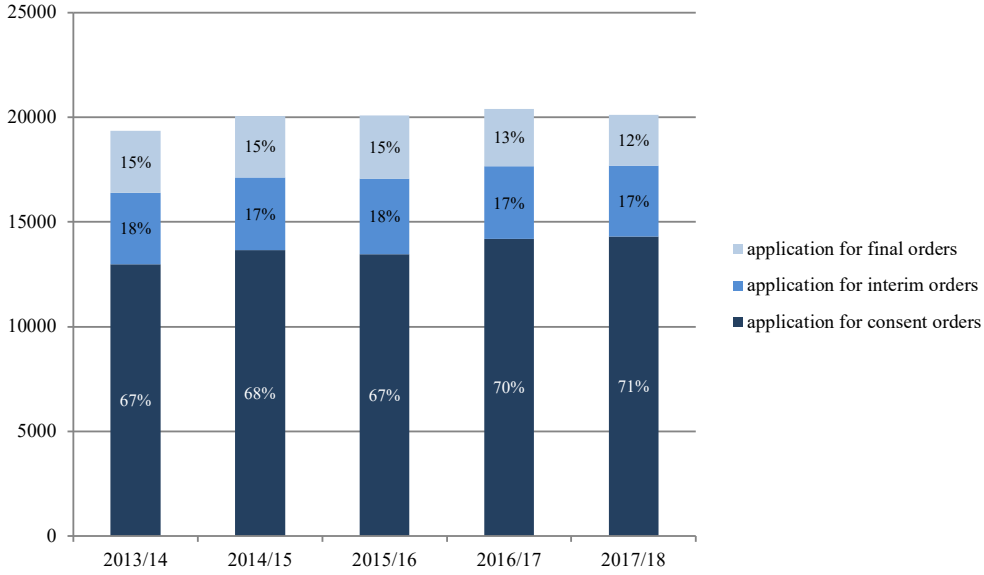
Applications for consent orders

3.31 Applications for consent orders are filed in the Family Court and are the most common applications in that jurisdiction. These applications reflect situations where the parties have come to an agreement and seek to have it endorsed by the Court. Applications are generally considered by registrars of the court.

32 *Family Law Act 1975* (Cth) Pt VI.
33 Federal Circuit Court of Australia, *Annual Report 2017–2018*, 53, 54.

3.32 In 2017/18, applications for consent orders constituted 64% (14,295) of applications or case types filed in the Family Court.[34] Of all applications for orders, consent applications constituted 71%.

Figure 3.4: Number and percentage of applications for orders filed in the Family Court (2013/14–2017/18)



Source: Family Court of Australia, Annual Report 2017/18, 25–27. Excludes 'Other' orders applications (including Hague, contempt and contravention applications).

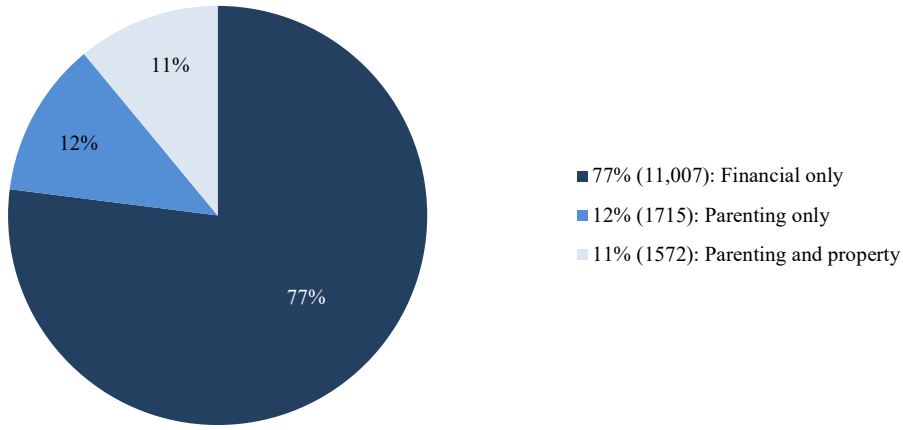
3.33 The proportion and number of consent applications to the Family Court has increased slightly over the time-period examined, starting at 67% (12,988) of all applications in 2013/14 and 2015/16 (13,458), 68% (13,662) of 2014/15 and 70% (14,182) of all applications for orders in 2016/17.

Issues in consent orders

3.34 The vast majority of consent order applications concern an application to approve an agreement related to property division only.

34 Family Court of Australia, above n 15, Figure 3.7.

Figure 3.5: Constitution of consent order applications in the Family Court (2017/18)



Source: Federal Circuit Court of Australia, Private correspondence, 22 January 2019

3.35 The constitution of consent order applications has stayed consistent over a four year time period. In 2017/18 (above) 77% (11,007) of applications were for financial division, 12% were for parenting agreements, and 11% for parenting and financial. The proportions were the same for 2016/17, with the proportion of property matters only slightly decreasing in 2015/16 (76%: 10,214) and 2014/15 (75%: 10,250).[35]

Rejected applications for consent orders

3.36 In the 2017/18 financial year, the vast majority of consent orders were approved by the Family Court. Only 1.6% of consent order applications were dismissed. This figure does not include applications which were requisitioned or not accepted for filing.

Appeals against court orders

3.37 Parties to a family law matter can appeal against interim and final court orders.[36] An appeal of decisions of the Federal Circuit Court or Family Court exercising original jurisdiction under the *Family Law Act*, and the WA equivalents,[37] lies to the Full Court of the Family Court (unless the Chief Judge considers it appropriate for a single judge to hear the appeal).

Notices of appeal filed in the Family Court

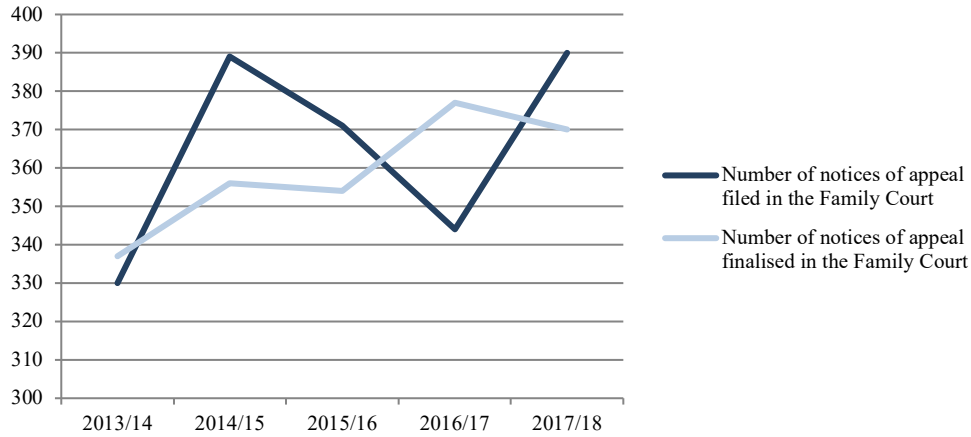
3.38 Of appeals filed in the Family Court in 2017/18 (390), 48% (189) were from decisions of the Family Court (including the Family Court of WA) and 52% (201) were

35 Federal Court of Australia, Private correspondence, 22 January 2019.
36 *Family Law Act 1975* (Cth) pt x.
37 Western Australian Magistrates Court and the Family Court Western Australia.

from the Federal Circuit Court or Western Australian Magistrate's Court. Of those latter appeals, 24% (48) were dealt with by a single judge of the Family Court.[38]

3.39 On average, 365 notices to appeal are filed with the court annually, and 359 are finalised.[39]

Figure 3.6: Number of notices of appeal filed and finalised by the Family Court (2013/14–2017/18)



Source: Federal Circuit Court of Australia, Annual Report 2017/18, Table 3.4.

3.40 While the number of notices that were filed varied, the number of finalised matters has generally increased steadily over time from 337 to 370. The number of notices of appeal filed in the Court increased by 18% (60) from 2013/14 to 2017/18, while the number of appeals that were finalised by the court increased 10% (33).

Outcomes of appeals in Family Court

3.41 In 2017/18, up to 50% of appeals were withdrawn or abandoned without hearing.[40]

3.42 In 2017/18, appeals to the Family Court were resolved as follows:

- 27% (101): withdrawn
- 27% (101): dismissed by the court
- 23% (86): abandoned
- 22% (82): allowed[41]

38 Family Court of Australia, above n 15, Figure 4.2, 45; Federal Circuit Court of Australia, above n 33, Table 3.4.
39 Federal Circuit Court of Australia, above n 33, Table 3.4.
40 Family Court of Australia, above n 15, 45.
41 Ibid Table 4.1.

3.43 Accordingly, just under half of all appeals were resolved by an order of the Court—with the rest withdrawing or abandoning the matter.

3.44 Over the five year time period, 26% (468) of all appeals were allowed by the court, 28% (503) were dismissed, with the remaining 46% abandoned or withdrawn prior to hearing. The proportion of appeals that were successful has decreased by 10% over the five year time period (with a corresponding 7% increase on appeals that were dismissed by the Court).

Table 3.5: Proportion and number of appeals that were allowed or dismissed by the Family Court (2013/14–2017/18)

Outcome	2013/14	2014/15	2015/16	2016/17	2017/18	Total
Allowed	109	112	96	69	82	**468**
	(32%)	(31%)	(27%)	(18%)	(22%)	**(26%)**
Dismissed	69	96	99	138	101	**503**
	(20%)	(27%)	(28%)	(37%)	(27%)	**(28%)**

Source: Family Court of Australia, Annual Report 2017/18, Table 4.1; Federal Circuit Court of Australia, Annual Report 2017/18, Table 3.4.

Leave to appeal

3.45 Not all matters are able to be appealed as of right. Participants must seek leave to appeal all interlocutory matters, excluding child welfare matters (parenting orders) and certain orders of the court, including non-publication orders and orders dismissing an application. Leave must also be sought to appeal from the refusal of a family court to make a decree or order.[42]

3.46 Recommendations that aim to decrease appeals of interim orders in some instances are outlined in Chapter 11.

Contravention applications

3.47 Contravention applications are used by parties to seek an order from the court imposing consequences for a breach of a court order—such as breach of a parenting or property order. Contravention applications are distinct from 'applications in a case', which are used when a party seeks interlocutory, interim, or procedural orders.

42 *Family Law Act 1975* (Cth) s 94AA; *Family Law Regulations 1984* (Cth) reg 15A.

Table 3.6: Number of contravention applications filed in the Family Court and proportion that were for child and financial orders (2014/15–2017/18)

Applications	2014/15	2015/16	2016/17	2017/18	Total
Contravention of child order	205 (85%)	229 (85%)	236 (87%)	205 (87%)	875 (86%)
Contravention of financial order	34 (14%)	38 (14%)	35 (12%)	30 (13%)	137 (13%)
Contravention of both child and financial order	2	1	1	0	4
Total	**241**	**268**	**272**	**235**	**1016**

Source: Federal Circuit Court of Australia, Private correspondence, 28 November 2018.

3.48 In the Family Court, the vast majority of contravention order applications pertained to contravention of a child order. This was mirrored in the Federal Circuit Court, except that in that court the number of contravention applications has slowly decreased over time and within the same period the proportion of financial order contravention applications has slowly increased.

Table 3.7: Number of contravention applications filed in the Federal Circuit Court and proportion that were for child and financial orders (2014/15–2017/18)

Applications	2014/15	2015/16	2016/17	2017/18	Total
Contravention of child order	1269 (80%)	1169 (78%)	1107 (77%)	938 (75%)	4483 (78%)
Contravention of financial order	327 (20%)	329 (22%)	333 (23%)	308 (25%)	1297 (22%)
Total	**1596**	**1498**	**1440**	**1246**	**5780**

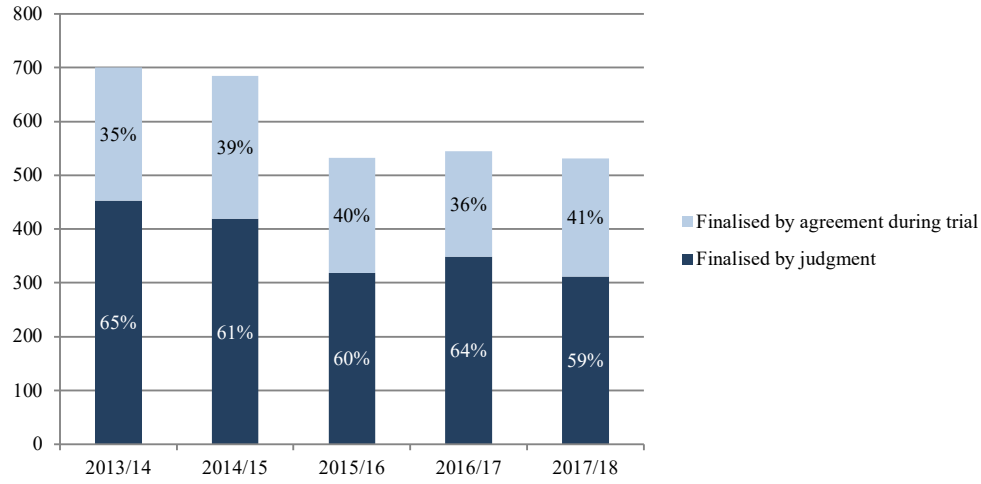
Source: Federal Circuit Court of Australia, Private correspondence, 28 November 2018.

3.49 Issues related to contravention orders and compliance are discussed in Chapter 11.

Matters that resolve at trial

3.50 In 2017/18, 41% (219) of matters that proceeded to trial in the Family Court settled at trial—at some point during trial and before judgment, the parties came to an agreement. Matters that settle 'on the steps of the court' are likely to have been litigated for an extended period, have generated high costs for participants, and to have used court resources, such as registrar-run cost and conciliation conferences and judges' time at interim hearings and at trial prior to settling.

Figure 3.7: Cases finalised at trial by agreement or judgment of the court, Family Court (2013/14–2017/18)



Source: Family Court of Australia, Annual Report 2017/18, Figure 3.4.

3.51 Over the five year period, an average of 38% of matters that proceeded to trial in the Family Court settled during the trial period and prior to judgment. Of all matters that went to trial, the number and proportion that resulted in a judgment of the court during the time period were:

- 2017/18: 312 (59%)
- 2016/17: 349 (64%)
- 2015/16: 319 (60%)
- 2014/15: 419 (61%)
- 2013/14: 453 (65%)

3.52 The Federal Circuit Court provided 1473 written judgments for family law matters in 2017/18 (this figure includes both final and interim orders). Not all final orders of the Federal Circuit Court are published. As the court notes, a 'significant number of the Court's decisions are delivered ex-tempore at the conclusion of the hearing or soon after'.[43]

3.53 The ALRC makes recommendations that aim to prevent matters that are likely to settle from proceeding through to trial in Chapter 8.

43 Federal Circuit Court of Australia, above n 33, 78.

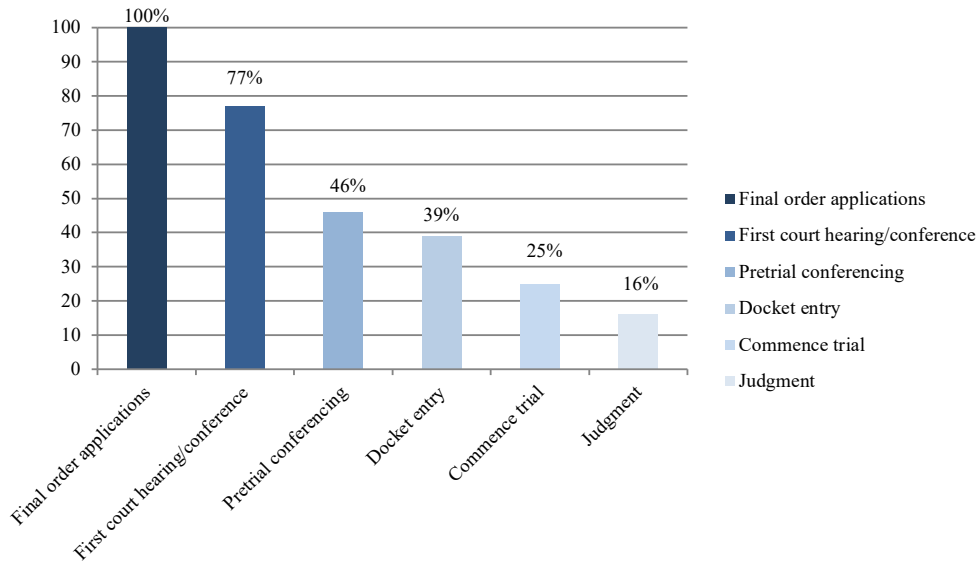
Dismissed proceedings

3.54 In the period 1 July 2018 to 1 March 2019, 0.5% of final order applications were dismissed in the Federal Circuit Court and 0.3% of final order applications were dismissed in the Family Court.

Attrition

3.55 Matters may exit the family court system because they were settled, vacated or dismissed by the courts. The Family Court reports on attrition rates in that court, outlined in Figure 3.8 below.

Figure 3.8: Attrition in the Family Court (2017/18)



Source: Family Court of Australia, Annual Report 2017/18, Figure 3.3

3.56 Of final order applications lodged and finalised in the Family Court, 77% proceeded to a first court hearing or conference, 46% remained for pre-trial conference, 39% for docket entry, 25% went to trial and 16% of all final order applications resolved by judgment.

3.57 Accordingly, 84% of matters lodged in the Family Court resolved by ways other than an order of the court, with the majority seeking consent orders on an agreement.

3.58 In the Federal Circuit Court, 70% (12,520) of finalised matters settled in 2017/18.[44]

44 Federal Circuit Court of Australia, Private correspondence, 22 January 2019.

Participants in the family law system

3.59 The family law courts systems are dependent on judges and registrars to conduct the work of the court, which is in turn supported by lawyers, family consultants, and other services. This section provides a snapshot of the number of participants in the system, and how this may have changed over time (where available).

Decision makers

Judges

3.60 The number of judges in the Family Court has decreased over the last decade, while the number in the Federal Circuit Court has increased.

3.61 The number of judges in the Family Court remained consistent over a recent two-year period (2017/18: 33; 2016/17: 32). Ten years ago, however, the court had 18% (a total of 39) more judges than in 2017/18.[45] This is reversed in the Federal Circuit Court, where the number of judges has increased 33% since 2007/8—from 52 to 69 judges.

Registrars

3.62 The registry staff remained fairly stable over the decade though the composition has changed slightly. There are now no Judicial Registrars but three Senior Registrars instead of one.

Table 3.8: Number of registrars in the Family Court and Federal Circuit Court in 2008/9 and 2018/19

	Staff of Family Court and Federal Circuit Court	
	2008-09	2018-19
Judicial Registrars	2	0
Senior Registrars	1	3
Registrars	39	33

Source: Federal Circuit Court of Australia, Private correspondence, 12 March 2019. Numbers have been rounded to the nearest whole number. Note the Federal Circuit Court was in 2008-09 known as the Federal Magistrates Court.

Provision of legal services

Grants of legal aid

3.63 Grants of legal aid are available for some family law matters. A grant of legal aid to applicants in family law matters may be available for parenting matters and parenting/financial matters in some instances.[46] Grants of legal aid are dependent on means testing

45 Family Court of Australia, above n 15.

46 Legal Aid Commissions received funding in 2018 to pilot legally assisted FDR for small value financial matters: National Legal Aid, *Submission 297*.

and the issues in dispute. Grants are available for parenting matters for FDR and for court proceedings when the applicant has received a s 60I certificate or the matter is urgent.[47]

3.64 In 2017/18, Legal Aid received 36,578 applications for grants of legal aid for Commonwealth family law matters.[48] In the same time period, 7636 grants of legal aid were allocated for family dispute resolution conferences, with an average of 7923 grants for family dispute resolution conferences across the five-year time period.[49]

Independent Children's Lawyers

3.65 An Independent Children's Lawyer is a lawyer appointed by court orders and assigned to act in the best interests of the child.[50] An Independent Children's Lawyer is not the child's legal representative, and is not obliged to take instructions from the child. An Independent Children's Lawyer is an impartial participant whose role is to ensure that the views of the child are 'fully put before the court'.[51] Independent Children's Lawyers are discussed in Chapter 12.

3.66 Means or merit tests are not applied to the determination of a grant of legal aid for an Independent Children's Lawyer, although parents may be required to contribute to costs.[52]

3.67 The number of orders for Independent Children's Lawyer appointments in a matter has slightly decreased over time.

Table 3.9: The number of orders for Independent Children's Lawyers made by the Family Court and the Federal Circuit Court (2014/15–2017/18)[53]

Jurisdiction	2014/15	2015/16	2016/17	2017/18
Family Court	269	303	280	208
Federal Circuit Court	3038	2942	2931	2942
Total	**3307**	**3245**	**3211**	**3150**

Source: Federal Circuit Court of Australia, Private correspondence, 22 January 2019

Unrepresented litigants

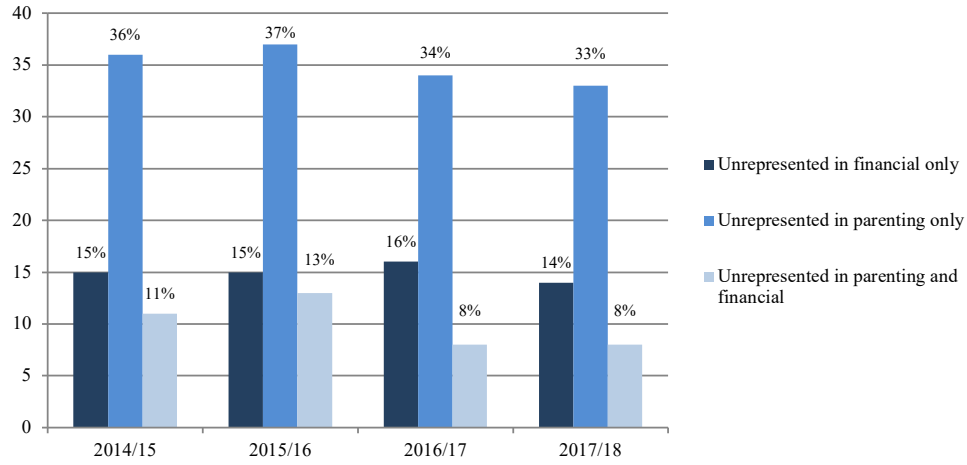
3.68 In Figure 3.9, 'unrepresented' or 'self-represented' litigants refers to matters where one or more parties were unrepresented at some time in the litigation.

3.69 In all matters (whether finalised by consent orders, trial, or other) that were finalised in the Family Court, parties were most likely to be unrepresented in parenting

47 See, eg, Legal Aid NSW Policy Online, 'Family Law Matters—When Legal Aid is Available', ch 5.
48 See National Legal Aid, 'Applications – Received for Financial Year 2018–2019', *National Legal Aid Statistics Report* (2019) <www.nla.legalaid.nsw.gov.au/nlareports>. Includes Western Australia.
49 Includes Western Australia.
50 *Family Law Act 1975* (Cth) s 68LA.
51 *Family Law Act 1975* (Cth) ss 68LA (4), 68LA(5).
52 See, eg, Legal Aid NSW, 'Guidelines: Family Law Matters' [2.4].
53 These figures are outside of the Court's usual reporting and care should be taken when using the figures.

matters. Between 30% and 35% of all parenting matters finalised in the Family Court involved one or more unrepresented party. Around 15% of financial matters had an unrepresented litigant, while around 10% of litigants in parenting/financial matters were unrepresented in the time period.

Figure 3.9: Percentage of self-represented litigants in all finalised matters in the Family Court (2014/15–2017/18)

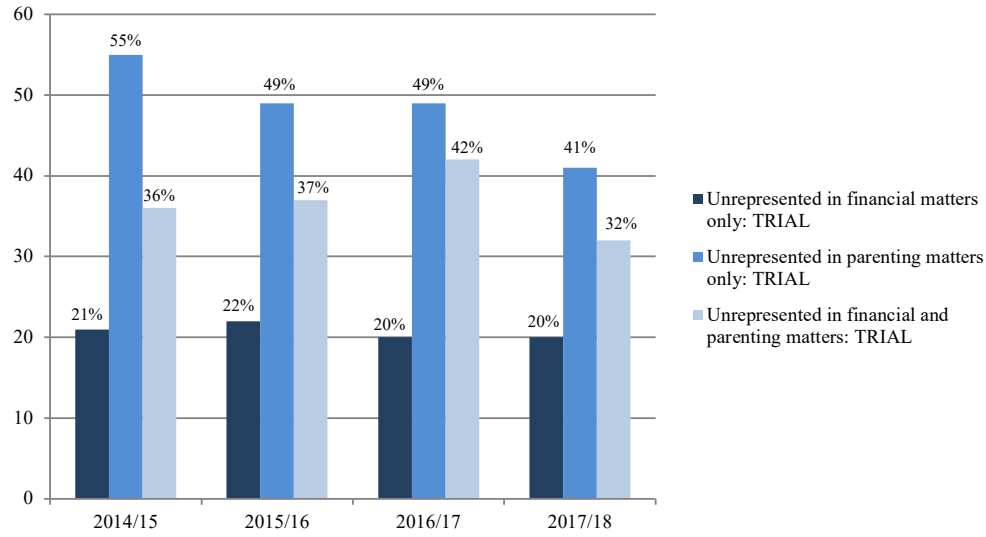


Source: Federal Circuit Court of Australia, Private correspondence, 22 January 2019

3.70 The percentage of self-represented litigants rises sharply when the data isolates only the matters that went to trial. Once at trial, around half of all parenting matters, and over one third of parenting/financial matters involved an unrepresented litigant.[54]

54 See also Family Court of Australia, above n 15, Figures 3.15, 3.16.

Figure 3.10: Percentage of self-represented litigants in trials in the Family Court (2014/15–2017/18)



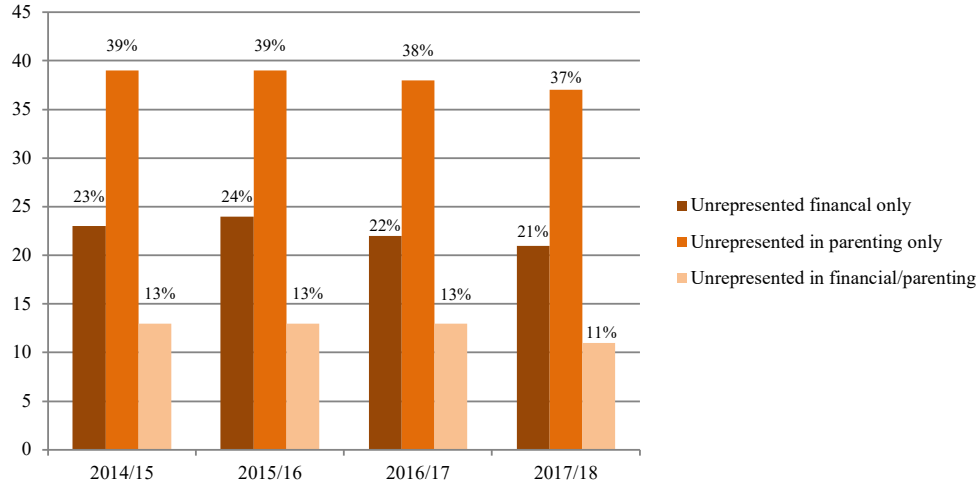
Source: Federal Circuit Court of Australia, Private correspondence, 22 January 2019

3.71 The proportion of self-represented litigants in trial matters is replicated in matters that are heard on appeal in the Family Court. In 2017/18, 46% of appellants were unrepresented—an increase since 2013/14 when 30% of appellants were unrepresented.[55]

3.72 Data on self-represented litigants in the Federal Circuit Court is only available for 'all matters' (trial matters are not isolated). A similar pattern appears for Federal Circuit Court as for all matters in the Family Court.

55 Ibid 46.

Figure 3.11: Percentage of self-represented litigants in trials in the Federal Circuit Court (2014/15–2017/18)



Source: Federal Circuit Court of Australia, Private correspondence, 22 January 2019

Court services

Family Consultants

3.73 Family Consultants were created under Pt III of the *Family Law Act* to assist and advise parties, and to help parties resolve their disputes. Family Consultants are also required to assist and advise the courts through the giving of evidence to the courts and advising courts on appropriate family counsellors, family dispute resolution practitioners, and courses, programs and services to which the court can refer the parties to the proceedings.[56] Courts can direct a person to attend a Family Consultant under s 11F of the *Family Law Act*—known as a s 11F event. In 2008/9 there were 68 Family Consultants in the courts (Family Court of Australia and Federal Magistrates Court) and in 2018/19 there were 76 Family Consultants in the Courts (Family Court of Australia and Federal Circuit Court).[57]

3.74 Family Consultants give evidence to the courts via Family Reports. These are longer reports prepared pursuant to *Family Law Act* s 62G as part of the preparation of a matter for trial. Court data captures the number of Family Reports completed on request of the court. It does not include reports privately funded by the parties.

56 *Family Law Act 1975* (Cth) s 11A.

57 Federal Circuit Court of Australia, Private correspondence, 12 March 2019. Numbers have been rounded to the nearest whole number.

Table 3.10: Number of Family Report and s 11F events completed in the Family Court and the Federal Circuit Court (2014/15–2017/18)

Jurisdiction and type	2014/15	2015/16	2016/17	2017/18
Federal Circuit Court: Family reports completed (s 62G)	3987	3975	3816	3150
Federal Circuit Court: s 11F events completed	4822	4981	4966	4770
Family Court: Family reports completed (s 62G)	311	331	281	258
Family Court: S 11F events completed	460	451	418	300
Total	**9580**	**9738**	**9481**	**8478**

Source: Federal Circuit Court of Australia, Private correspondence, 22 January 2019

3.75 The output of family consultants has decreased over time: the number of completed family reports decreased in the Family Court by 17% (53) and 21% (837) in the Federal Circuit Court since 2014/15. Section 11F events have held steady over the time period in the Federal Circuit Court, but use of these referrals decreased 35% (160) in the Family Court over the time period.

3.76 The roles and responsibilities of family consultants are discussed in Chapter 12.

Family law support services

3.77 Family law support services comprise mandatory and voluntary support services that aim to assist families through separation in various ways, and to avoid litigation. These include:

- Family Relationship Centres: information, advice and referrals to families, and provide FDR services.
- Family Dispute Resolution (including regional FDR): FDR and regional FDR outside of FRC.
- Family Law Counselling: support for couples and families to manage relationship issues.
- Post Separation Co-operative Parenting/Parenting Order Program: assists regional families and families in high conflict situations.
- Children's Contact Services: assist with transfer of children and provide supervised contact where needed.
- Supporting Children after Separation: supports wellbeing of children in separated families.

3.78 There are also telephone advice lines and online tools to assist families to find out about the range of services available.[58] The above list excludes FASS, which provides

58 KPMG, above n 17, Table 5.

legal and social services support to separating families experiencing family violence. FASS is discussed in Chapter 16.

3.79 In *Future Focus of Family Law Services* (2016), KPMG presented data regarding these services from 2014/15. This data is reproduced in Table 3.11 below.

Table 3.11: Family Law Services, scope and use (2014/15)

Family law service	No of clients (2014)**	No of outlets	No of providers	% family law service funding*	Average wait time (weeks)
Family Relationship Centres	80,148	65	34	49%	3.7
Family Dispute Resolution	16,917	60	34	8%	3.0
Regional Family Dispute Resolution	7900		25	4%	2.6
Family Law Counselling	8543	40	38	10%	1.2
Post Separation Cooperative Parenting/Parenting Order Program	19,102	48	30	10%	2.0/3.5
Children's Contact Services	49,047	65	37	10%	7.9
Supporting Children after Separation	11,566	18	12	4%	1.4

*Source: KPMG, Future Focus of the Family Law Services: Final Report (Report prepared for Attorney-General's Department (Cth), 2016), Table 5, Table 7, Table 8, Figure 6, Table 15: *excludes 5% funding for advice line, **includes registered and estimated unregistered clients.*

3.80 Family Law Services are discussed in Chapter 15 and Chapter 16. Accreditation of people employed within CCSs is recommended and discussed in Chapter 13.

Aboriginal and Torres Strait Islander users of the family court system

3.81 On average, 4% of either applicants or respondents to final order applications filed in the Federal Circuit Court identified as an Aboriginal or Torres Strait Islander person between 2013/14 and 2017/18.[59]

3.82 In 2017/18, approximately 2094 Aboriginal or Torres Strait Islander people received a grant of legal aid for a family law matter, constituting 6% of all grants of legal aid in Commonwealth family law matters. Of the 2094 grants, 70% of recipients were female.[60]

3.83 Services and provision for Aboriginal and Torres Strait Islander participants in the family law system are discussed in Chapter 5 and Chapter 12.

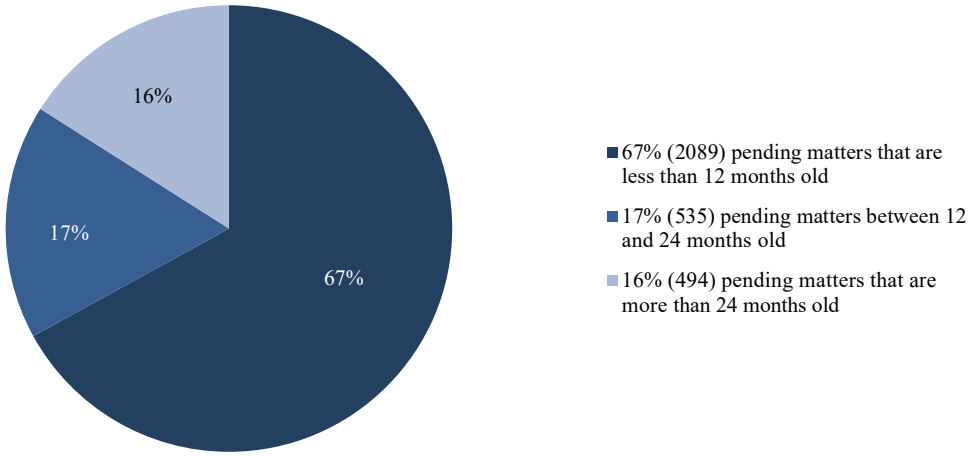
59 Federal Circuit Court of Australia, Private correspondence, 28 November 2018.

60 See National Legal Aid, 'ATSI for Financial Year 2018-2019', *National Legal Aid Statistics Report* (2019) <www.nla.legalaid.nsw.gov.au/nlareports >.

Court delay

3.84 In June 2018, 3118 proceedings were pending in the Family Court. Of these 67% (2089) were less than 12 months old—meaning 33% (1029) had been filed more than 12 months previously, with 48% (494) of these filed over 24 months previously. There has been a 5% increase in the proportion of matters that are older than 12 months—rising from 28% in 2013/14.[61]

Figure 3.12: Age of pending matters in the Family Court (June 2018)



Source: Family Court of Australia, Annual Report 2017/18, Figure 3.4, 43, 50

3.85 The Federal Circuit Court disposed of 62% of matters within 12 months. In 2018, the Court had 17,088 family law matters pending, and reported a median time to finalise of 15.2 months.[62]

3.86 Strategies to streamline the output of the courts are discussed in Chapter 10.

Family violence and abuse

3.87 Family violence is prevalent in family law proceedings that are filed with the courts. In the past 10 years, an empirical profile of separated families, including those that use the family law system was developed through a series of studies conducted by AIFS.[63] These studies indicate that family violence, including physical hurt and

61 Family Court of Australia, above n 15, Figures 2.11, 3.5.
62 Federal Circuit Court of Australia, above n 15, Figure 3.4, 43, 50.
63 Rae Kaspiew et al, *Evaluation of the 2006 Family Law Reforms* (Australian Institute of Family Studies, 2009); Qu et al, above n 1; Kaspiew et al, above n 16.

emotional abuse, is reported by approximately 60% of separated parents prior to and during separation. [64]

3.88 Up to 70% of parents also report that children have been exposed to family violence,[65] and nearly one in five parents report that they have safety concerns for themselves and/or their children as a result of ongoing contact with the other parent.[66] These experiences can be sustained after separation, with 5–17% of parents surveyed five years after separation reporting safety concerns.[67]

3.89 Among parents who use courts to resolve their parenting issues, 85% report a history of emotional abuse and more than half (54%) report physical hurt from their former partner.[68] These patterns are similar among parents who use lawyer led negotiation to resolve parenting arrangement but physical hurt is less common in this group (39%).[69] Lower proportions of parents who use FDR to resolve parenting issues report emotional abuse (73.7%) and physical hurt (27%).[70] Safety concerns are also prevalent to different extents among court users (46%), parents who use lawyers to resolve their issues (34%) and those who use FDR (26%).[71]

3.90 Recommendations to assist parties experiencing family violence or abuse are contained in Chapters 5 and 8. There is a recommendation to create a statutory tort of family violence is outlined in Chapter 7. Support services are discussed in Chapter 16.

Notices of Risk

3.91 The Family Court and the Federal Circuit Court provide mandatory forms to alert the courts to allegations of child abuse and family violence or the risk thereof. These have different procedures in the different courts.

3.92 The Family Court requires parties to file a Notice of Child Abuse, Family Violence or Risk of Family Violence when allegations of child abuse are raised (which must be referred to a prescribed child welfare authority) or when allegations of abuse or family violence are relevant to whether the court should grant or refuse a parenting order (which may be referred to a prescribed child welfare authority).[72]

64 Kaspiew et al, above n 16, 14.
65 Ibid 41–42.
66 Ibid 43–45.
67 Qu et al, above n 1, 32.
68 Rae Kaspiew et al, *Evaluation of the 2012 Family Violence Amendments: Synthesis Report* (Australian Institute of Family Studies, 2015) 16.
69 Ibid.
70 Ibid.
71 Ibid.
72 *Family Law Act 1975* (Cth) ss 67Z, 67ZBA; *Family Law Rules 2004* (Cth) 2.04D(1)(a).

3.93 There were 715 Notices of Risk filed with the Family Court in 2017/18. The number of notices filed with the Court grew 68% over the time period, starting with 426 in 2013/14.[73] In 2017/18, Notices of Risk were filed in 30% of matters.

Table 3.12: Notices of Risk filed in the Family Court, the percentage of final order matters, and the percentage of Notices of Risk referred to child welfare (2013/14–2017/18)

	2013/14	2014/15	2015/16	2016/17	2017/18	Total
Notice of Child Abuse, Family Violence or Risk of Family Violence	426	470	630	653	715	2894
% of final order cases	14%	16%	21%	24%	30%	-
Referred to child welfare authority	unknown	390 (83%)	475 (75%)	443 (68%)	440 (62%)	1748+

Source: Family Court of Australia, Annual Report 2017/18, Figure 3.18, 3.19; Federal Circuit Court of Australia, Private correspondence, 22 January 2019.

3.94 The Federal Circuit Court requires all parties to a final order application seeking parenting orders to file a Notice of Risk to indicate whether risks are or are not alleged,[74] so all final order filings for parenting matters are accompanied by a Notice of Risk. The notice requires parties to answer two questions: whether there are allegations of child abuse and/or whether there are allegations of family violence. All matters that allege child abuse are referred to the child welfare authority. In 2017/18, the percentage of filings for parenting matters that were referred to a welfare agency was 45% (this has remained steady since the compulsory Notice of Risk was introduced in 2015).

Magellan matters

3.95 Magellan cases involve serious allegations of physical abuse and/or sexual abuse of a child and undergo special case management in the Family Court. The number of Magellan cases that have been commenced in the Family Court decreased over the time period, with 144 matters identified in 2013/14 and 93 in 2017/18.[75] This decrease reflects the tightening of the Magellan definition by the Court to matters of recent alleged abuse, rather than recent allegations of past abuse.[76]

Western Australia: Snapshot

3.96 In Western Australia, family law matters are heard in the Magistrates Court of Western Australia or the Family Court of Western Australia. Data regarding the Family Court of Western Australia is available through annual reports, and statistics from three reporting periods (2014/15; 2016; 2017) are summarised below.

73 Family Court of Australia, above n 15, Figure 3.18.
74 *Federal Circuit Court Rules 2001* (Cth) r 22A.02.
75 Family Court of Australia, above n 15, Figure 3.20.
76 Federal Circuit Court of Australia, Private correspondence, 22 January 2019.

Family Dispute Resolution

3.97 In 2017, both parties had attended FDR in about 15% of cases where an application was made for parenting orders. In all other cases a ground for exemption had been established or a certificate from a family dispute resolution practitioner was filed advising that only one party had attended for FDR or alternatively that FDR was deemed inappropriate.[77]

Applications

3.98 The proportion of orders dealt with by the court has remained consistent for the last three reporting periods. The key difference between the Family Court of Western Australia and Family Court of Australia being the comparatively low number of consent order applications in the Family Court of Western Australia.

Table 3.13: Applications received in the Family Court of Western Australia (2014/15–2017)

Applications	2014/15	2016	2017
Final orders	2858	3068	2834
Interim orders	4767	5264	5059
Divorce	5297	5496	5341
Consent orders	2384	2376	2118
Total	**15,306**	**16,204**	**15,352**

Source: Family Court of Western Australia, Annual Report 2017; Family Court of Western Australia, Annual Report 2016; Family Court of Western Australia, Annual Report 2014/15.

Issues sought

3.99 The majority of final order applications in 2017 were for parenting matters (61%). Correspondingly, the vast majority of consent order applications were for financial orders only (83%).

Appeals

3.100 34 appeals were filed from the Family Court of Western Australia to the Family Court of Australia in 2017. Of the appeals that were finalised in the calendar year:

- 20 were discontinued or abandoned;
- 9 appeals were dismissed; and
- 5 appeals were allowed.[78]

3.101 Accordingly, 36% of appeals that were heard in the Family Court were successful.

77 Family Court of Western Australia, *Annual Report 2017*, 4.
78 Ibid 7.

Self-representation

3.102 In 2017, over half (52%) of applicants for parenting orders were unrepresented, with 25% of applicants for financial orders and 29% of applicants for parenting and financial orders self-represented.[79]

Delay

3.103 For 2017, the median time for finalisation of non-trial matters—the time from final order applications to settlement—was 43 weeks. The median time to trial was 97 weeks. Delay increased 11% from 2016.[80]

Family Consultants and family violence

3.104 Family Consultants attended 1975 hearings and 1102 case assessment conferences. During the conferences, Consultants identified that:

- 85% of attendees were at risk of family or domestic violence;
- 73% were at risk of alcohol or other substance abuse;
- 68% of matters had a risk of child abuse; and
- 64% were likely to be experiencing mental health issues.[81]

ALRC information gathering

3.105 ALRC inquiry processes enable the ALRC to hear from a wide range of stakeholders and users on various topics.

Submissions

3.106 The ALRC received close to 800 confidential stories about people's recent experiences of the family law system via the *Tell Us Your Story* portal on the ALRC website and 331 confidential submissions. These stories spoke of multiple issues and experiences. A number of key themes emerged, including:

- **The family law system is unsafe:** People told us that the system failed to respond adequately to their safety concerns for themselves and their children. Some people told us that the system placed them in unsafe situations, or that professionals failed to respond in a manner that ensured the safety and wellbeing of children and their caregivers and in some cases caused further distress, or even harm.
- **The family law system does not enforce parenting orders adequately:** Many people were unhappy with the lack of means to enforce parenting orders, and many people spent years in protracted litigation in order to seek enforcement of parenting orders.

79 Ibid 4.
80 Ibid 5.
81 Ibid 8.

- **The family law system is overly complex:** Many people found the law and legal processes that apply to family law disputes too complex to understand and engage with. Many felt they could not navigate the system to reach agreement without the assistance of professionals, which left some feeling disempowered.
- **The family law system is expensive:** People told us that the cost of resolving their family law disputes through the courts and associated services was high. Some people told us about the significant impact this cost had on their financial security and that of their children. Others told us that the cost made the system inaccessible to them, particularly when they were ineligible for legal aid.
- **The family law system is slow**: Access to courts and services was so delayed that people told us they had to wait excessive lengths of time to receive assistance or take steps towards resolving their dispute. Many felt frustrated by this, and some said that their disputes escalated and/or they were left in situations that were unsafe for themselves and their children while awaiting access to the courts.
- **The family law system lacks accountability:** People who were unhappy with the outcome of their family law dispute or wished to complain about family law system professionals felt they had limited avenues to do so. Some felt that the system and those who work within it are not accountable to the families they serve.

3.107 The ALRC wishes to thank each person who made a contribution to the inquiry through either a submission or a contribution through the *Tell Us Your Story* portal.

3.108 The ALRC also received over 440 formal submissions to an Issues Paper and Discussion Paper, released in March and October 2018. Submissions provided the ALRC with information regarding the operation of the family law system, the perceived gaps, and issues with current operations and focused areas of concern, including lack of skill-sets to appropriately identify and deal with family violence.

3.109 Submissions to the ALRC were received from the following stakeholder groups.

Table 3.14: Composition of stakeholders who lodged public submissions to the Inquiry into the Family Law System Issues Paper and Discussion Paper (2018)

%	Stakeholder group
22%	Legal providers and services and legal industry bodies, such as law societies
21%	Individuals
10%	Family and relationship services / family support services
8%	Academics
5%	Domestic and family violence organisations
4%	Children and young people organisations / representative bodies
4%	Dispute resolution organisations and practitioners
4%	Professional and services industry bodies
3%	Aboriginal and Torres Strait Islander Legal Services and other Aboriginal and Torres Strait Islander organisations
3%	Judicial, courts, and court services
3%	Parenting and family advocacy groups
2%	Collaborative practice organisations
2%	Disability organisations
2%	LGBTIQ organisations
1%	Children's contact services
1%	Government and government agencies
1%	Human rights bodies
1%	Law students
1%	Organisations for faith communities and/or culturally and linguistically diverse communities
1%	Research bodies
1%	Other

Source: Appendix F.

Consultations

3.110 The ALRC conducted over 175 confidential consultations with stakeholders to the family law system. A list of consultations is presented at Appendices A, B, and C. The composition of consultees is outlined in Table 3.15 below.

Table 3.15: Composition of consultees to the Inquiry into the Family Law System (October 2017–January 2019)

%	Stakeholder
29%	Legal providers and services and legal industry bodies, such as law societies
24%	Judicial, courts, and court services
8%	Family and relationship services / family support services
7%	Government and government agencies
5%	Domestic and family violence organisations
4%	Academics
4%	Aboriginal and Torres Strait Islander Legal Services and other Aboriginal and Torres Strait Islander organisations
4%	Children and young people organisations / representative bodies
2%	Dispute resolution organisations and practitioners
2%	LGBTIQ organisations
2%	Disability organisations
2%	Court-based and private family consultants
1%	Organisations for faith communities and/or culturally and linguistically diverse communities
1%	Research bodies
1%	Collaborative practice organisations
<1%	Parenting and family advocacy groups
<1%	Individuals
<1%	Other

Source: Appendices A, B and C.

3.111 Academics, professionals, and the Family Court have provided further input to the Inquiry through the advisory committee described in the introduction to this Report.

Methodology

3.112 The purpose of holding confidential consultation is to inform the ALRC on the topic area and the need for reform. Confidential consultation is a key part of the ALRC process, which, combined with stakeholder submissions, legal research, and quantitative data, forms the ALRC evidence-base for each inquiry.

3.113 For this Inquiry, consultations with stakeholders were unscripted. The ALRC did not develop a standard set of questions, and each session was 'free flowing'. The ALRC has not quantified the data from consultations.

4. Closing the Jurisdictional Gap

Contents

Introduction

4.1 Since the turn of this century, there has been a raft of inquiries, reviews and reports which have made recommendations to Government about improving the family law system.[1] What is most significant about these previous inquires is that they have all identified substantially the same fundamental issues and have all made substantially the same suite of recommendations over a period now of almost two decades. Apart from minor tinkering, the fundamental challenges and difficulties have not attracted sufficient political will to solve the problems that differently constituted inquiry bodies continue to identify.

4.2 The major themes that emerge from an analysis of 11 inquiries conducted between 2001–2017 are that:

- the family law system does not deal well with violence;[2]
- there needs to be greater information sharing between the family courts and state and territory child protection agencies;[3] and
- matters involving family law, family violence and child abuse need to be dealt with in the same place at the same time.[4]

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1 See Chapter 2, [2.38–2.92].

2 Eight (72%) of the inquiries recommended national mandatory family violence training; five (45%) recommended the development of a national family violence risk assessment tool.

3 Five (45%) of the inquiries recommended greater information sharing; four (36%) recommended a national database of court orders.

4 Four (36%) of the inquiries recommended that state and territory magistrates and children's courts be

4.3 The SPLA *Family Violence Report* expressed deep concern that the family law system can fail to protect and support families from ongoing violence—'Evidence indicates that this can be the result of the very design of the current family law system'.[5] It referred to the 'overwhelming evidence' received highlighting the complexity of navigating multiple jurisdictions, and multiple courts, within the same jurisdiction. It suggested that the ALRC 'might consider the benefits of combining the federal family courts into one court'.[6]

4.4 The structure of the current federal family court system is, however, not within the terms of reference for this Inquiry and the ALRC has not inquired into the Federal Circuit and Family Court of Australia Bill 2018 and the Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018.[7] Both of those Bills were the subject of an inquiry by the Legal and Constitutional Affairs Legislation Committee which reported in February 2019.[8]

4.5 The ALRC was, however, directed by its terms of reference to inquire into collaboration, coordination, and integration between the family law system and other Commonwealth, state and territory systems, including family support services and the family violence and child protection systems, having regard to the jurisdictional intersection of the federal family law system and the state and territory child protection systems. The jurisdictional gaps identified by the various inquiries and reports discussed above, which have serious consequences for children and people who have experienced family violence, will continue to exist whether or not the federal family courts are combined. The ALRC has, consistent with its terms of reference, focused on solutions to the more fundamental difficulty underlying the current system.

4.6 The ALRC considers that the existing jurisdictional framework for the resolution of family law disputes does not provide an appropriate framework for the collaboration, coordination and integration between the family law system and other Commonwealth, state and territory systems, including family support services and the family violence and child protection systems.

4.7 The existing framework also inhibits the possibility for children's matters arising from family separation, at least where family violence and/or child abuse is present, from being dealt with in the same proceedings. The lack of political will to resolve this issue is entirely understandable given that the gravamen of the difficulty lies with the creation

encouraged to exercise family law jurisdiction.

5 House of Representatives Standing Committee on Social Policy and Legal Affairs *A better family law system to support and protect those affected by violence* (December 2017) [3.82].

6 Ibid [3.85].

7 As confirmed by the ALRC President when questioned about the proposed merger of the Family Court of Australia and the Federal Circuit Court; Legal and Constitutional Affairs Legislation Committee, Estimates, *Proof Committee Hansard*, 23 October 2018, 89–90.

8 Senate, Legal and Constitutional Affairs Legislation Committee, *Federal Circuit and Family Court of Australia Bill 2018 [Provisions]; Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018 [Provisions]* (Report, February 2019).

of a federal superior court of record four decades ago (and the subsequent creation of a lower tiered court with essentially identical jurisdiction) that, through no fault of the judges of those courts, may no longer be fit for purpose.

4.8 This is in no way to suggest that specialist family law judges are not essential to the proper administration of justice in family law matters: rather, it is to question the particular court system within which that specialism is situated. The Australian Government has recently stated that state and territory courts are not intended to become the primary fora for resolving family law disputes.[9] Nevertheless, the ALRC urges the Government to give careful consideration to that option.

4.9 The ALRC accepts that this recommendation has consequences of significant magnitude and would, if proceeded with, take significant time to implement. The ALRC therefore makes recommendations that can be implemented in the short-term to improve collaboration between and within jurisdictions for family law matters involving family violence and child abuse, consistent with previous recommendations made in earlier reports.

Devolution of family law jurisdiction

Recommendation 1 The Australian Government should consider options to establish state and territory family courts in all states and territories, to exercise jurisdiction concurrently under the *Family Law Act 1975* (Cth), as well as state and territory child protection and family violence jurisdiction, whilst also considering the most efficient manner to eventually abolish first instance federal family courts.

The idea of a family court in 1974

4.10 As has already been canvassed earlier in this Report,[10] the *Family Law Act* was premised on the need to reform the divorce law to eliminate fault, simplify procedures and reduce costs.[11]

4.11 The justification for the creation of the new court was that existing courts had been found to be unsuitable and ill-equipped to deal sympathetically and helpfully with the particular problems of family disputes.[12]

9 Attorney-General's Department, 'Amendments to the *Family Law Act 1975* to respond to family violence', Public Consultation Paper (December 2016) 4.
10 Chapter 1.
11 The Hon Kep Enderby QC, 'The Family Law Act: Background to the Legislation' [1975] *UNSW Law Journal* 10, 27.
12 Ibid.

But what of family violence?

4.12 At the time when the *Family Law Act* was promulgated, the insidious and increasing scourge of family violence in Australia over the past 40 years could not have been envisaged by its promoters. The Second Reading Speech made only fleeting reference to the possibility of violence—referring to the ability to obtain an injunction 'to restrain a bullying husband from molesting his wife, or using insulting, offensive or humiliating language to her or in front of her, or from going into her bedroom…'. Otherwise, it eschewed 'intolerable conduct, which would deal with the drunken, wife-beating husband' case as a ground of divorce on the basis that 'the conduct would have to be intolerable in the subjective opinion of the applicant'.[13] The only reference to violence in the Explanatory Memorandum appears in the context of the provision for injunctive relief, 'including an injunction against molestation (e.g. where violence is feared)'.[14] It is unlikely that it would have been foreseen that responding to family violence and child abuse would become the 'core business of the federal family courts'.[15] Indeed, it was not until 1995 that the principles, in s 43, to be applied by the courts in exercising their jurisdiction under the *Family Law Act* were amended to include 'the need to ensure safety from family violence'.[16] The principle of 'protection' was substituted for 'safety' by further amendment in 2011.[17]

Twenty years of inquiries

4.13 By the turn of this century, it had become clear that there were substantial concerns in the community about the family law system. In 2001, the Report of the Family Pathways Advisory Group, *Out of the Maze,* recommended as a matter of urgency that COAG consider ways to ensure that: family law, violence and child abuse matters can be dealt with in the same place at the same time; that processes for handling such cases be streamlined; that assessment and resolution be expedited; and that cooperation be improved and promoted between professionals and services working with at-risk families who are involved with the family law system.[18] In proposing its design of an integrated system, that Report emphasised that 'courts will be involved where necessary, in particular where there is family violence, child abuse or abduction, or where attempts at resolution through non-adversarial processes have been unsuccessful.'[19]

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13 Commonwealth, *Parliamentary Debates*, Senate, 3 April 1974, 640 (Lionel Murphy).

14 Family Law Bill 1974 (Cth), Explanatory Memorandum, cl 21.

15 G Paramasivam, Victoria Legal Aid: Evidence to House of Representatives Standing Committee on Social Policy and Legal Affairs, *Inquiry into a better family law system to support those affected by family violence*, Committee Hansard, Melbourne 24 July 2017, 26. See also: Rape & Domestic Violence Services Australia, *Submission 287.*

16 *Family Law Reform Act 1995* (Cth) s 28 inserted subsection (ca) in s 43.

17 *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth) sch 1, pt 1, item 11.

18 Family Law Pathways Advisory Group, *Out of the Maze – Pathways to the future for families experiencing separation* (July 2001) rec 28.

19 Ibid 21.

4.14 The Family Pathways Advisory Group also observed that when child abuse is alleged, there are presently (in 2001) few clear pathways for families trying to protect their children from further abuse. It said:

> Most services for children at risk are at the State and Territory level. The Advisory Group has heard that in some jurisdictions, when proceedings are begun in a federal court with family law jurisdiction, the State child protection agencies frequently withdraw from investigating and pursing allegations under State and Territory law. The child protection authorities appear to take the view that the child's safety would be assured by one parent pursuing private action for parenting orders in the Family Court of Australia. Recent research suggests that cases involving child abuse allegations have become part of the Family Court of Australia's core business in children's matters. The court therefore needs to address the problem, although if the alleged practice is common **it raises questions about the appropriate forum for these cases, as well as resources. Child protection is the responsibility of State and Territory child welfare authorities that are funded to investigate allegations of child abuse. Federal family courts are not funded to manage this responsibility**.[20] (emphasis added)

4.15 It observed further that family violence orders are also primarily the responsibility of state and territory magistrates courts. Whilst family courts have, under s 114, similar jurisdiction to protect victims of violence, this is rarely used. The Advisory Group noted that it had heard much about the potential for this division of jurisdiction to work against the interests of the children and the family as a whole.[21]

4.16 Two years after the *Out of the Maze* Report, the House of Representatives Standing Committee on Family and Community Affairs released its Report, *Every picture tells a story*.[22] In the latter Report, the Committee drew attention to the fragmentation between the various courts dealing with separation, divorce and related matters on the one hand, through Commonwealth jurisdiction, and child protection and domestic violence, through the state and territory jurisdictions, on the other hand. It noted that the 'children involved then fall through the jurisdictional gaps.'[23] The Committee also drew attention to the submission that had been made to it by the Family Law Council which said in relation to the split of jurisdiction between the states and the Commonwealth over child and family law matters:

> We have taken as a given that that split will continue … We regard the split in jurisdiction as one of the most pressing matters affecting children in Australia. There is evidence suggesting that it can lead to terrible outcomes for children.[24]

4.17 The Committee ultimately recommended the creation of a non-adversarial multi-disciplinary tribunal, the 'Families Tribunal,' the original manifestation of the Parenting

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20 Ibid 81.
21 Ibid 101.
22 House of Representatives Standing Committee on Family and Community Affairs, *Every picture tells a story* (December 2003).
23 Ibid [4.20]–[4.23].
24 Ibid [4.24].

Management Tribunal currently before Parliament.[25] The Committee went further, recommending that the role of courts should be limited to:

- enforcement of tribunal orders, when required;
- appeals from the tribunal on specified matters of law only; and
- issues like entrenched conflict, violence, substance abuse and child abuse, including sexual abuse.[26]

4.18 The Committee did not, however, explain why this residual substantive jurisdiction, which lies entirely within the jurisdictions of the states and territories, would still be exercised by the Family Court of Australia. Instead it proposed, some 15 years before the introduction of similar legislation in 2018, the merger of the family law jurisdiction of the then Family Magistrates' Court with the Family Court of Australia.[27]

4.19 The Government did not agree with the Recommendation to establish a Families Tribunal. It considered that the Committee's objectives could be better met through the new network of Family Relationship Centres and through changes to court processes.[28]

4.20 In December 2009, the Family Law Council reported to the Attorney-General on family violence and its intersection with family law.[29] The Family Law Council said:

> The reality for a separating family experiencing contentious issues in respect of parenting capacity is that there is no single judicial forum that can provide them with a comprehensive response to address their disputes, particularly where there are underlying issues of family violence and/or child abuse.[30]

4.21 The Report referred to the research that demonstrated that more than half the cases in the courts contained allegations of family violence and/or child abuse, noting that allegations of violence appeared to be 'core' business in family law disputes that were litigated in the Family Court and that such allegations were largely of a serious nature.[31] It observed that often

> these issues are not amenable to resolution outside a judicial determination and that trend poses a significant dilemma for a jurisdiction that has the obligation to make decisions that are in the child's best interest but is at the same time reliant on agencies working outside the federal jurisdiction to assist it in providing the relevant information in respect of these important factors.[32]

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25 Ibid rec 12.
26 Ibid [4.62].
27 Ibid [4.130].
28 Australian Government, 'A new family law system – Government response to *Every picture tells a story*' (June 2005) 12.
29 Family Law Council, *Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues* (December 2009).
30 Ibid 48.
31 Ibid 51.
32 Ibid.

4.22 It recommended that the Attorney-General address the referral of powers to federal family courts so that in determining a parenting application federal courts have concurrent jurisdiction with that of state courts to deal with all matters in relation to children including, where relevant, family violence, child protection and parenting orders.[33] It also made recommendations to improve communication between states, territories and federal authorities.[34]

4.23 In October of 2010, the ALRC and the NSWLRC issued their Report on *Family Violence–A National Legal Response*. In discussing the interactions between family violence and family law matters, the Commissions noted the several submissions to that Inquiry which characterised victims' experiences of negotiating the various legal systems as a form of further abuse and victimisation, 'in which victims are often required to retell their story to different courts, lawyers and counsellors working across different jurisdictions.'[35] The Commissions also observed that victims who feel that they have successfully obtained protection from family violence by obtaining a protection order find that the protection order can be overruled by a family court order.[36] They also noted the 'clear jurisdictional gap' in the power of federal family courts to respond to family violence arises where a case involves allegations of child abuse and the court wishes to make an order giving parental responsibility to the child protection agency because there is no other viable option for the child.[37]

4.24 Nevertheless, the Commissions indicated they were 'disinclined' to recommend a general reference of child welfare powers to federal family courts, as had been recommended by the Family Law Council in the *Family Violence Report*.

4.25 The ALRC and the NSWLRC made a number of recommendations directed at amendments to state and territory family violence legislation, or enhancing the jurisdiction of state and territory courts, to facilitate the interaction between family violence and family law, including a limited referral of powers allowing federal courts to confer parental rights and duties on a child protection agency in a limited class of case.[38] The Commissions considered that 'wherever possible, matters involving children should be dealt with in one court.'[39] In June 2013, the Australian Government indicated that those recommendations would be addressed in a national response through the Standing Council on Law and Justice.[40] The Commissions had also recommended that the Commonwealth, state and territory governments should ensure ongoing and responsive

33 Ibid rec 7.
34 Ibid rec 12.
35 Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC 114; NSWLRC 128 (2010) [15.93].
36 Ibid.
37 Ibid 59.
38 Australian Law Reform Commission and NSW Law Reform Commission, above n 35 recs 16–1, 16–2, 16–3,16–5, 16–6, 16–7, 16–10, 16–11, 16–12, 16–3, 19–2.
39 Ibid 60.
40 Australian Government, 'Government Response to the Australian and NSW Law Reform Commissions': *Family Violence – a national legal response*' (June 2013) 1.

collaboration between agencies and organisations.[41] The Government responded that it was working with states and territories on a collaboration project to improve the interface between the child protection and family law systems.[42]

4.26 In their submission to the ALRC and the NSWLRC in 2010, the Magistrates' Court and the Children's Court of Victoria said:

> Currently the pathways to resolution of parenting arrangements following intervention order proceedings can be unclear and ad hoc. Despite family violence being a cross jurisdictional issue, the state/territory family violence jurisdictions and the federal family law jurisdictions often operate in silos. This results in duplication as parties attend multiple court dates in different courts, get advice from different lawyers (family violence duty lawyers and then family lawyers) and re-litigate the same issues in different forums. This system is not effective or efficient and it does not maximise safety. Such a system creates opportunities for the process itself to become a tool of further abuse. It creates the potential for inconsistent orders. There is a concern that family violence can get minimised along the way.[43]

4.27 The silos continue to exist. Almost 10 years later, in their submission to this current Inquiry, the Magistrates' Court and the Children's Court of Victoria said the 'role of state courts in the federal/state jurisdictional divide should be given careful consideration.'[44] They reiterated the importance of re-examining the areas in where magistrates courts are best suited to meeting the current needs of separating families for a family law response and where it is better dealt with in the federal family law system, noting that the outcome should be 'to deliver the right combination of specialist skills and experience, which promote the best interests of families in a simpler, less costly and more accessible court environment.'[45]

4.28 In 2014, there was yet further consideration of the issues arising from the interaction and overlap between jurisdictions, this time by the Productivity Commission in its Report, *Access to Justice Arrangements*.[46] The Productivity Commission noted the recommendations that had been made by the ALRC and the NSWLRC aimed at expanding the jurisdictions of federal, state and territory courts responding to family law, family violence, and child protection issues so as to enable families to resolve their legal issues in the same court, as far as practicable, consistent with the constitutional division of powers. It had become clear by this point in time that the Australian and state and territory governments disagreed in principle with some of those earlier recommendations.[47]

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41 Australian Law Reform Commission and NSW Law Reform Commission, above n 35 (2010) rec 29–2.
42 Australian Government, above n 40 (June 2013) 24.
43 Ibid [15.94].
44 Magistrates' Court and the Children's Court of Victoria, ***Submission 419.***
45 Ibid.
46 Productivity Commission 2014, *Access to Justice Arrangements* (Inquiry Report No 72).
47 Ibid 866–7.

4.29 The Productivity Commission commented positively on the considerable work that was being undertaken across the system in the form of agreements, protocols, and memoranda of understanding between agencies and service providers and between the family courts and state and territory child welfare agencies. It said, however, that 'reform of current constitutional arrangements relating to family law, family violence and child protection would lead to better outcomes'.[48] It recommended that the Law Crime and Community Safety Council should consider options for jurisdictional and structural change to further address the problems caused by the constitutional division of jurisdiction in the areas of family law, child protection and family violence.[49]

4.30 When considering the intersection of domestic and family violence with family law, the Special Taskforce on Domestic and Family Violence in Queensland (the Taskforce) in its 2015 Report, *Not Now, Not Ever*, listed matters that were raised repeatedly during that inquiry, including:

- Family law orders for contact made in the federal family court jurisdiction, being inconsistent with Domestic Violence Orders, made in the State Magistrates Courts;
- The family law courts placing significant value on the relationship between a parent and child, even in the context of family violence and child abuse, and without consideration of the key principle of the best interests of the child;
- Violence towards the mother being assessed by the family law courts as separate from issues of risk and safety for children or not taken seriously at all;
- Family law orders being ignored by Magistrates in domestic and family violence proceedings;
- Magistrates ordering parties to discuss parenting issues outside the court room before dealing with the domestic and family violence matter;
- Parents afraid of appearing as a 'difficult parent' to the family court if they do not allow contact between the child and the perpetrator;
- Magistrates being reluctant to use their powers under section 78 of the *Domestic and Family Violence Protection Act 2012* to revive, vary, discharge or suspend a family law order allowing contact between a respondent and child that may be restricted under the proposed Domestic Violence Order;
- State police being reluctant to enforce injunctions made in the family court preventing contact between the perpetrator and the child on the basis that it was a federal court order; and
- Federal police being reluctant to enforce the family law injunction as the offence took place in the state and not a territory.[50]

4.31 Many submissions to this current Inquiry raised the same, or similar, issues.[51]

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48 Ibid 869.

49 Ibid rec 24.3.

50 Queensland Special Taskforce on Domestic and Family Violence, Queensland Government, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (2015) 270.

51 Domestic Violence Prevention Centre Gold Coast Inc, *Submission 383;* Domestic and Family Violence Death Review and Advisory Board, *Submission 377;* Hume Riverina Community Legal Service, *Submission*

4.32 The Taskforce received advice from Crown Law and Kathryn McMillan QC (the Advice) on options to reduce or eliminate any duplication, gaps and inconsistencies between family law issues and domestic and family violence. The Advice considered two options for reform: the Federal one-Court model, whereby states and territories refer power to the Commonwealth to make laws with respect to domestic and family violence to the Commonwealth (and potentially child protection and youth justice–although that is not as straightforward) and the State one-Court model, whereby state and territory courts are invested with jurisdiction to deal with both family law and domestic and family violence, and other state and territory matters such as child protection and youth justice.[52]

4.33 The latter model is not dissimilar to the Family Court of Western Australia (although that court does not exercise all possible family-related jurisdiction) and largely reflects the proposals of the Family Law Council and the ALRC and the NSWLRC referred to above. The Advice was concerned to emphasise the resource implications of either option and the political sensitivities. It therefore recommended a more modest state-based model for specialist domestic violence courts that would exercise the same family law jurisdiction as is currently exercised by the state and territory magistrates courts but within a specialised context. The Taskforce recommended that the Queensland Government establish specialist domestic violence courts in legislation with jurisdiction to deal with all related domestic and family violence and criminal/breach proceedings.[53] It also recommended that the Queensland Government consider providing for related family law children's matters (by consent) and child protection proceedings to be dealt with by the same court.[54]

4.34 The Family Law Council returned to the issues of jurisdictional fragmentation in two reports prepared at the request of the Attorney-General, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems*: Interim Report (June 2015) and Final Report (June 2016). In the Interim Report, the Family Law Council concluded from its review of the research data and submission that there are two aspects of the current legal system that impede the protection of children:

- the increasingly public law nature of the parenting order work of the family courts, which were designed to deal with private law matters; and
- the separation of courts and systems dealing with parenting orders, child protection, and family violence matters.[55]

4.35 It pointed to the research conducted by the AIFS, which showed that family law judicial officers regularly adjudicate parenting matters with multiple risk factors

294; National Family Violence Prevention Legal Services Forum, *Submission 293*; Women's Legal Service Queensland, *Submission 286*; Domestic Violence Victoria, *Submission 284*.

52 Queensland Special Taskforce on Domestic and Family Violence in Queensland, above n 50, 278.

53 Ibid rec 96.

54 Ibid rec 98.

55 Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (Interim Report, June 2015) 95.

involving a combination of family violence, child abuse, drug and alcohol dependency, and/or serious mental illness. This challenges the foundational assumption of a clear distinction between the work of the family courts and child protection systems. The Council noted that the family law system has no independent investigative body akin to a child protection department and the family courts have no capacity to compel a child protection department to intervene in a family law case or to investigate the court's concerns. It concluded that these features of the family law system raise questions about the capacity of the family courts, which were designed to deal with private disputes, to assess and manage risk to children in families with complex needs.[56]

4.36 As had already been raised in previous reports, the Council also drew attention to the fact that parenting disputes, child protection, and family violence are dealt with by three separate jurisdictions. It observed that although these jurisdictions have operated in parallel for many years, there is now a pressing need for greater collaboration to ensure that children at risk do not 'fall through the gap' between the private family law system and the protections offered by state and territory magistrates courts and child protection systems.[57]

4.37 In ss 60CI–60CF, the *Family Law Act* makes provisions for informing the family court of relevant family violence and child protection orders of state and territory courts. Submissions to the Council nevertheless raised issues of inconsistent orders because of a lack of awareness of previous orders.[58] It was noted that, even when a client's lawyer is made aware of previous proceedings, it can take some time to obtain formal approval for the release of relevant reports, in addition to the evidentiary challenges in placing the material before the court.[59] There is of course an added difficulty when litigants are self-represented and are unaware of the statutory provisions. These matters had previously been considered by the Hon Professor Richard Chisholm AM in his reports on *Information-Sharing in Family Law and Child Protection – Enhancing Collaboration* and *The Sharing of Experts' Reports between the Child Protection System and the Family Law System*.[60]

4.38 A number of submissions had been made in the course of the Council's inquiry about children being left unprotected because of a reluctance by state and territory magistrates to use s 68R of the *Family Law Act* to vary family court orders when making family violence protection orders. Section 68R sits within Div 11 of Pt VII of the *Family Law Act*, which Division contains a number of sections[61] designed to resolve inconsistencies between family violence orders and injunctions, and arrangements (parenting orders) that provide for a child to spend time with a person. The Council

56 Ibid 96.
57 Ibid 98.
58 Ibid 39.
59 Ibid.
60 Richard Chisholm, *Information-Sharing in Family Law and Child Protection – Enhancing Collaboration* (Commonwealth of Australia, 2013); Richard Chisholm, *The Sharing of Experts' Reports between the Child Protection System and the Family Law System* (Commonwealth of Australia, 2014).
61 *Family Law Act 1975* (Cth) ss 68N–68T.

noted misunderstandings of family court orders on the part of magistrates, particularly in regional areas, that have left children unprotected.[62] These very same concerns had already been raised by the ALRC and the NSWLRC in 2010.[63]

4.39 The Council made a number of recommendations directed at enhancing the capacity of courts to exercise multiple jurisdictions. These included:

> that s 69J and s 69N of the *Family Law Act* be amended to remove any doubt that children's courts, no matter how constituted, are able to make family law orders under Part VII of the *Family Law Act* in the same circumstances that are currently applicable to courts of summary jurisdiction
>
> a. that the Government implement the relevant part of Recommendation 16-5 of the ALRC and NSWLRC's 2010 report, namely that s 68T of the *Family Law Act* be amended to provide that where a state or territory court, in proceedings to make an interim protection order under s 68R […] that parenting order has effect until:
>
> i. the date specified in the order;
>
> ii. the interim protection order expires; or
>
> iii. further order of the court
>
> b. that a national data base of court orders be developed to include orders from the Family Court of Australia, the Family Court of Western Australia, the Federal Circuit Court of Australia, state and territory children's courts, state and territory magistrates' courts and state and territory mental health tribunals
>
> c. that there be a memorandum of understanding by state and territory child protection agencies and the federal family courts
>
> d. that state and territory child protection department practitioners be co-located in federal family court registries.

4.40 By the time of its Final Report, 12 months later, the Council had received strong stakeholder support for the recommendations made in its Interim Report.[64] It made a further recommendation that, to further support the capacity of state and territory courts to undertake family law work, the National Judicial College of Australia develop a continuing joint professional development program in family law for judicial officers from the state and territory children's courts and magistrates courts.[65] It recommended further, if that recommendation were accepted, the monetary limit on the jurisdiction of state and territory magistrates courts to divide the property of parties to a marriage or a de facto relationship be increased.[66]

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62 Family Law Council, above n 55, 41.
63 Australian Law Reform Commission and NSW Law Reform Commission, above n 35, [16.30].
64 Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (Final Report, June 2016) 8.
65 Ibid rec 15(1).
66 Ibid rec 15(2).

4.41 In December of 2017, the SPLA Committee delivered its *Family Violence Report*.[67] The SPLA Committee acknowledged that the ALRC's Inquiry into the Family Law System was also in progress but considered that 'there is a chronic and critical need for reform both immediately, and in the medium-term, neither of which can be provided by the [ALRC's] review.'[68]

4.42 The SPLA Committee also considered that the system of two federal courts with concurrent jurisdiction should be simplified, having regard to the 'overwhelming evidence' received highlighting the complexity of navigating multiple jurisdictions, and multiple courts within the same jurisdiction.[69] The Report referred to the recommendations of the joint ALRC and NSWLRC Report of 2010 and the Victorian Royal Commission into Family Violence in 2016, which emphasised the need for improved collaboration between and within jurisdictions. It recommended that state and territory magistrates be encouraged to exercise family law jurisdiction, particularly in specialist family violence courts and courts which deal with a high number of family violence matters.[70]

A commitment to change or just another inquiry?

4.43 The various inquiries and reports over several decades, and especially those within the last 20 years, have all identified similar structural and systemic problems in the family law system. They have all recommended improved inter-jurisdictional collaboration and cooperation through a variety of protocols, information sharing agreements, and the conferral of enhanced family law jurisdiction on state and territory courts. In spite of those recommendations, the submissions to this Inquiry suggest that little progress has been made in protecting children and vulnerable parties from the 'jurisdictional gap'.[71] Relationships Australia observed that 'it is a rare point of consensus that current arrangements, criss-crossing multiple Acts, jurisdictions and courts, are not supportive of Australia meeting its obligations to children'.[72]

4.44 Bravehearts said:

- Information sharing and cross-border jurisdictional blackspots leave children exposed to dangerous situations and to 'known' sex offenders
- The responsibility of child protection, child sexual assaults and serious harm lies with the State authorities and Courts not the Family courts

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67 House of Representatives Standing Committee on Social Policy and Legal Affairs, above n 5.
68 Ibid [3.89].
69 Ibid [3.85].
70 Ibid [4.270], rec 10.
71 Family Law Practitioners' Association of Tasmania, *Submission 415*; Monash Gender and Family Violence Prevention Centre (MGVPC), *Submission 411*; Safe Steps Family Violence Response Centre, *Submission 408*; CASA Forum Victorian Centres Against Sexual Assault, *Submission 404*; Fighters Against Child Abuse Australia, *Submission 393*; Townsville Community Legal Service, *Submission 370;* Fitzroy Legal Service and Darebin Community Legal Service, *Submission 336*; Women's Legal Service Qld, *Submission 286*; Domestic Violence Victoria, *Submission 284*; Centre for Excellence in Family Welfare, *Submission 283*; Bravehearts, *Submission 279*; Relationships Australia Victoria, *Submission 267*.
72 Relationships Australia, *Submission 317*.

- States are abrogating their responsibilities to the Commonwealth
- It is common practice for state Police and Child Protection authorities to refuse to act on matters which are before the Federal Family Court, leaving the decisions around child safety to Federal court personnel who have no experience or expertise to respond effectively and responsibly in the best interests of the child.[73]

4.45 Fitzroy Legal Service and Darebin Community Legal Service provided the following case study:

> Vincent and Mary had a parenting plan about their daughter, Sophie. The parenting plan said that Sophie lived with Vincent. Subsequent to the parenting plan, Mary applied for and was granted a Family Violence Intervention Order (FV IVO) against Vincent. The FV IVO did not permit any contact between Vincent and Sophie unless in accordance with the exceptions, which included the parenting plan. Victoria Police served Vincent with the FV IVO, took Sophie and told Mary to collect Sophie from the police station. Neither Vincent nor Mary knew what was happening because they do not speak English and interpreters were not used. Neither Mary nor Vincent showed Victoria Police the parenting plan because they thought Victoria Police would already know about it. Mary and Vincent both assumed Victoria Police had made a decision that Sophie had to live with Mary and that they had to follow that decision.[74]

4.46 Safe Steps submitted:

> The ability of federal family court orders to "trump" state-based family violence orders, in combination with the system's frequent failure to identify family violence prior to interim parenting orders being issued often puts victim survivors and children at risk.[75]

4.47 The recommendations that have already been made by previous inquiries to confer family law jurisdiction (or greater jurisdiction) on state and territory magistrates and children's courts is a partial solution to the problem of jurisdictional fragmentation. Some people, however, remain sceptical of this approach given the specialised nature of the family law jurisdiction and the reluctance already shown on the part of state and territory courts to exercise their existing jurisdiction.[76]

4.48 However, there are a number of other options available to produce a 'one court' solution:

- creation of a national child protection system, through state referrals of power, to allow federal courts to hear child protection matters;[77]
- amendment of the Commonwealth Constitution to permit cross-vesting by state and territory courts to federal courts of child protection or family violence issues where a matter is otherwise before them;[78]

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73 Bravehearts, *Submission 279*.
74 Fitzroy Legal Service and Darebin Community Legal Service, *Submission 336*.
75 Safe Steps, Family Violence Response Centre, *Submission 408*.
76 See, eg, Queensland Law Society, *Submission 221*.
77 For a discussion of the potential challenges raised by pursuing this option, see Family Law Council, above n 55, 68–9.
78 Ibid 45–8 for a discussion of cross-vesting in the family law context.

- exercise of *Family Law Act* powers jurisdiction by state and territory magistrates courts and state and territory children's courts;
- creation of state family courts, as exists in Western Australia, in all other states and territories; and
- the devolution of the exercise of judicial power in family law to appropriate courts within the existing state court hierarchies, leaving the Family Court of Australia and the Federal Circuit Court with no residual family law jurisdiction, except at appellate level.

The exercise of children's court matters by federal family courts

4.49 The first of these options was considered by the Family Law Council, first in its 2009 *Family Violence Report* and then again in 2015 in its Interim Report on *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems*.[79] In the latter report, the Family Law Council noted that, with the exception of the Family Court of Western Australia, which is a state court, the process of enabling the family courts to exercise the jurisdiction of state and territory courts would require a referral of relevant powers from these jurisdictions to the Commonwealth. The exercise of children's court powers by a family court would also be dependent on an application being made by a child protection department. It is unusual for family law notifications to become the subject of protective applications by a child protection department.[80]

4.50 The Family Law Council observed that there are several potential benefits of enabling the family courts to exercise the powers of state and territory children's courts where a child protection department decides to bring protective proceedings after a family law matter has commenced. These include the continuity of location and having a single judicial officer with knowledge of the family's circumstances determining both issues. It also drew attention, however, to the number of significant challenges to enabling the federal family courts to exercise the powers of state and territory children's courts, including the constitutional barriers.[81]

4.51 The Commonwealth parliament derives its power from two main sources for the purposes of the *Family Law Act*. First are the two primary constitutional heads of power in ss 51(xxi) and (xxii) (the marriage and matrimonial causes powers),[82] and matters incidental to those powers.[83]

4.52 The second source of power is derived from s 51(xxxvii) of the *Constitution*, pursuant to which states may refer legislative powers to the Commonwealth that would otherwise remain within the exclusive purview of the states. In the family law context, the states (excluding Western Australia) have referred legislative powers to

79 Ibid.
80 Ibid 102.
81 Ibid.
82 *Commonwealth of Australia Constitution Act 1900* s 51(xxi) – 'marriage'; and s 51(xxii) – 'divorce and matrimonial causes: and in relation thereto, parental rights and the custody and guardianship of infants'.
83 *Commonwealth of Australia Constitution Act 1900* s 51(xxxix).

the Commonwealth on a number of occasions during the history of the *Family Law Act*. This includes a referral of powers in the 1980s with respect to the 'maintenance, custody and guardianship of, and access to' ex nuptial children.[84] Notably, however, this reference was drafted to specifically exclude child welfare (child protection) law.[85] This area remains within the legislative purview of the states.

4.53 The *Family Law Act* contains its own child welfare power, which provides the family courts with 'jurisdiction to make orders relating to the welfare of children'.[86] The power is used primarily to authorise 'special medical procedures' where the young person's parents are not able to provide lawful consent to this treatment.[87] The power has been described as 'similar to the *parens patriae* jurisdiction' enjoyed by State and Territory Supreme Courts,[88] which is discussed further below. However, in *Minister for Immigration, Multicultural and Indigenous Affairs v B ('MIMIA v B')*,[89] the High Court of Australia ruled that, unlike the *parens patriae* jurisdiction, the welfare power in the *Family Law Act* cannot be relied upon to bind third parties in furtherance of the child's welfare.[90] The *Family Law Act*'s welfare power, therefore, is not available to support the making of child protection orders by the family courts.[91] The scope of this power has been read down by the High Court such that family courts are unable to use this power in a way akin to the care and protection jurisdiction of the states and territories,[92] that is, so as to make orders vesting parental responsibility for a child in a child protection department without the department's consent.[93]

4.54 Quite apart from the constitutional barriers to this proposal, the Family Law Council also drew attention to a number of submissions to its 2015 Inquiry that expressed concerns about the family courts exercising children's courts powers including: the impact it would have on the ability of child protection departments to perform their primary function if they were required to provide support for proceedings in the family court; the conflict between the difference in foci between child protection practices and the philosophy of the family courts to support families; the lack of expertise in the family

84 *Commonwealth Powers (Family Law – Children) Act 1986* (NSW), *1986* (Vic), *1986* (SA), *1987* (Tas), *1990* (Qld). The referrals were adopted by the Commonwealth and enacted in the *Family Law Amendment Act 1987* (Cth), which commenced operation on 1 April 1988.

85 Ibid. For a discussion of this process, see R Chisholm, 'Children and the Family Law Act: The 1988 Changes' (1988) 11 *UNSW Law Journal* 153.

86 *Family Law Act 1975* (Cth) s 67ZC. Since the states did not refer power on this point, only children of marriages fall within the ambit of the welfare power due to constitutional constraints: *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218.

87 *Secretary, Department of Health and Community Services v JWB and SMB ('Marion's Case')* (1992) 175 CLR 218.

88 Ibid 256 (Mason CJ, Dawson, Toohey and Gaudron JJ).

89 *Minister for Immigration, Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365.

90 See also *Secretary of the Department of Human Services v Ray ('Ray's case')* (2010) 45 Fam LR 1.

91 See on this point, the Hon Justice R Benjamin, 'Public Law Issues in Public Law System: Child Protection and Family Law' (2015) 5 *Family Law Review* 102, 105–6.

92 *Minister for Immigration, Multicultural and Indigenous Affairs v B ('MIMIA v B')* (2004) 219 CLR 365.

93 *Secretary of the Department of Human Services v Ray ('Ray's case')* (2010) 247 FLR 455.

courts to manage matters involving child sexual abuse; and the costs and delays in the family courts.[94]

4.55 A further concern with conferring additional power on the federal family courts has been raised in this current Inquiry, that of the limited geographical reach of the federal family courts. In particular, ATSILS (Qld) drew attention to Queensland, which is Australia's most de-centralised state and the only state or territory where approximately half its population lives outside the capital. It noted that the Family Court has registries at Brisbane, Rockhampton, Mackay, Townsville and Cairns and that the Federal Circuit Court operates at 11 locations. By contrast, the District Court in Queensland has permanent registries in Brisbane, Mackay, Townsville, Cairns, Beenleigh, Ipswich, Maroochydore and Southport. It also circuits to almost three times the number of Federal Circuit Court locations, sitting at over 29 centres throughout Queensland with local Magistrates Court staff performing the registry duties at those times. ATSILS also noted that there are 75 permanently staffed Magistrates Court registries and the magistrates circuit to approximately 80 locations. The submission points to the significant cost and logistical difficulties for parties seeking to access family courts outside the south-east and mid-coast regions.[95]

4.56 The ALRC and NSWLRC had not supported a general referral of child welfare powers to the family courts but only of a more limited power allowing family courts to confer parental rights and duties on a child protection agency in cases where there is no other viable protective carer.[96] In 2015, the Family Law Council concluded that addressing the protective needs of children in families affected by multiple and complex concerns will require each of the relevant systems and services to work together in a collaborative way. It no longer considered that a referral of powers from the states and territories was a solution.[97] The ALRC agrees.

The accrued jurisdiction

4.57 There is also, potentially, scope for the exercise of accrued jurisdiction by the Family Court in child protection matters. Accrued jurisdiction refers to the ability of federal courts to exercise what would otherwise be non-federal jurisdiction when the matter before the court comprises both federal and non-federal aspects.

4.58 Section 33 of the *Family Law Act* provides:

> To the extent that the Constitution permits, jurisdiction is conferred on the Court in respect of matters not otherwise within the jurisdiction expressed by this Act or any law to be conferred on the Court that are associated with matters (including matters before the Court upon an appeal) in which the jurisdiction of the Court is invoked or that arise in proceedings (including proceedings upon an appeal) before the Court.

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94 Family Law Council, above n 55, 62–4.
95 ATSILS (Qld), *Submission 384*.
96 Australian Law Reform Commission and NSW Law Reform Commission, above n 35, [19.98].
97 Family Law Council, above n 55, 102.

4.59 It is well established that the Federal Court of Australia has accrued jurisdiction and that it has played an important function in broadening the Court's power and in preventing jurisdictional disputes. As Kenny J has explained, according to accepted principle, a party invoking the jurisdiction of a federal court must show that the subject-matter of the claim is a matter within the court's jurisdiction.[98] The doctrine applies when a non-federal claim is joined with a non-severable (and non-colourable)[99] federal claim arising out of a common substratum of facts. The High Court has held that whether or not a non-federal claim is severable is a matter of practical judgment.[100] This has had the result that related non-federal claims are rarely defeated for want of jurisdiction. Importantly, in the family law context, the doctrine can apply to claims against third parties.[101]

4.60 Although there is no High Court authority dealing directly with the accrued jurisdiction of the Family Court, it was held by the Full Family Court in *Warby v Warby* that such jurisdiction did exist.[102] The accrued jurisdiction has since been applied by the Family Court in other cases, most of which have, however, involved property disputes. Professor Fehlberg et al have observed that accrued jurisdiction is currently available to the family courts in two kinds of cases:

> First, it permits the courts to resolve matters beyond the scope of the *Family Law Act* in a dispute between parties to a marriage (for example, contract or tort issues not considered to be property proceedings arising out of the marital relationship ...). Second, it permits the courts to determine issues involving third parties whose property interests are bound up with the property of the parties to the marriage.[103]

4.61 The Family Court has, however, been reluctant to use the accrued jurisdiction in relation to child protection. In the decision of the Full Court of the Family Court of Australia in *Secretary of the Department of Health and Human Services v Ray*, the Full Court upheld an appeal against an order by Benjamin J joining the Tasmanian Minister in parenting proceedings.[104]

4.62 At first instance, Benjamin J found that it was likely that neither the child's parents nor 'available members of family' were suitable to have parental responsibility. In those circumstances, his Honour exercised the Family Court's accrued jurisdiction, pursuant to s 33 of the *Family Law Act* to enliven powers under state legislation to make orders for parental responsibility against the Secretary of the Tasmanian Department of Health

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98 The Hon Justice S C Kenny, 'The Evolving Jurisdiction of the Federal Court of Australia – Administering Justice in a Federal System' (Speech, 40th Anniversary of the Federal Court Act Canada, Ottawa, 28 October 2011).

99 'Colourable' in this context carries with it a notion of abuse of process.

100 *Fencott v Muller* (1983) 152 CLR 570, 608.

101 *Stohl Aviation v Electrum Finance Pty Ltd* (1984) 5 FCR 187, 191–3; *Obacelo Pty Ltd v Taveraft Pty Ltd* (1985) 5 FCR 210, 215–7.

102 (2001) 28 Fam LR 443.

103 B Fehlberg, R Kaspiew, J Millbank, F Kelly & J Behrens, *Australian Family Law: The Contemporary Context* (2nd ed, Oxford University Press, 2015) 51.

104 (2010) 247 FLR 455.

and Human Services and also to make welfare orders to meet the possible needs of the children under the relevant State legislation.

4.63 In upholding the Appeal, the Full Court was not persuaded either that the *parens patriae* jurisdiction of the Court could require the Secretary to assume parental responsibility for the children against his will, or that accrued jurisdiction was available in the absence of 'some dispute or claim or proceeding ... pending at State law'.[105]

4.64 Although Benjamin J, writing extra-curially, has expressed the view that this decision effectively closes the door on the use of the accrued *parens patriae* jurisdiction by family courts,[106] the Chief Justice of the Federal Court of Australia, has questioned the reasoning of the Full Court of the Family Court and suggested that the justiciable controversy in question in fact 'encompassed the proper party to fulfil the parenting responsibilities', that such party could indeed be the State, and that there was no apparent reason why there needed to be proceedings on foot in the state jurisdiction in order for there to be a single matter attracting the operation of the doctrine of accrued jurisdiction.[107]

4.65 Should the opportunity arise for the Full Court of the Family Court of Australia to revisit the exercise of the accrued jurisdiction by family courts, it may be that the federal family courts would be in position to ameliorate some of the consequences of the jurisdictional gap in a great many cases involving issues of child protection and indeed violence under state domestic and family violence legislation.

Amendment of the Commonwealth Constitution to permit cross-vesting

4.66 The *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth) (the *Cross-Vesting Act*) came into force on 1 July 1988, with identical reciprocal legislation subsequently passed in all states and the Northern Territory.[108] The cross-vesting scheme purported to do two things. The first was to vest State and Territory Supreme Courts with the civil jurisdiction of the Federal Court and the Family Court of Australia,[109] and to vest the Federal and Family Courts with the full jurisdiction of State and Territory Supreme Courts.[110] The second was to make provision for the transfer of proceedings between these courts.[111] The *Cross-Vesting Act* is of no assistance to matters that might be considered for transfer as between the Federal Circuit Court and the state and territory magistrates' courts.

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105 Ibid [93]–[94].

106 The Hon Justice R Benjamin, above n 91, 107.

107 Chief Justice JLB Allsop AO, '"Accrued" Jurisdiction and the Family Court' (Paper, Family Court of Australia Judges' Conference, Melbourne, 8 November 2013).

108 *Jurisdiction of Courts (Cross-Vesting) Act 1987* of Victoria, New South Wales, South Australia, Tasmania, Western Australia, Queensland and the Northern Territory. See for a discussion of the scheme, D Kovacs, 'Cross-Vesting of Jurisdiction New Solutions or New Problems?' (1987–88) 16 *Melbourne University Law Review* 669.

109 With the exception of certain trade practices legislation.

110 Explanatory Memorandum, Jurisdiction of Courts (Cross-Vesting) Bill 1987, [3].

111 Ibid [6].

4.67 Further, direct transfers between state and territory children's courts and the Family Court of Australia are not contemplated by s 5 of the *Cross-Vesting Act*. In order to achieve this, proceedings commenced in a children's court would first need to be transferred to the Supreme Court of the relevant state or territory for the purposes of a transfer to the Family Court.[112] This was the process employed in *Re Karen and Rita.*[113]

4.68 However, in 1999, the High Court of Australia in *Re Wakim: Ex parte McNally ('Re Wakim')*[114] held that insofar as the cross-vesting legislation purported to vest state judicial power in the Federal and Family Courts, the scheme was constitutionally invalid. The vesting of federal civil jurisdiction in state courts, on the other hand, remains valid as such conferral of power is specifically contemplated in Chapter III of the *Constitution*.[115] Hence, state and territory Supreme Courts remain able to exercise federal family law jurisdiction, but as a result of the High Court's ruling in *Re Wakim*, the Family Court is not able to exercise the legislative powers of state and territory courts. This means that the possibility of a combined hearing of child protection and parenting matters in the Family Court, as occurred in *Re Karen and Rita* in 1995, is no longer available.

4.69 While the decision in *Re Wakim* means that it is no longer possible for state and territory Supreme Courts to transfer child protection matters to the Family Court, transfers from the Family Court to the Supreme Courts remain available. The Supreme Courts have an inherent *parens patriae* jurisdiction that may be used to protect the welfare of children.[116] The modern jurisdiction of *parens patriae* in Australia has been described as 'wide-ranging and far-reaching', extending 'as far as necessary for the protection and education of the child'.[117] It has no limits besides needing a nexus to a child's welfare and is therefore theoretically unlimited.[118] It may be invoked for broad matters including 'custody, protection of property, health problems, religious upbringing and protection against harmful associations' and in this way may exceed the power of parents.[119] In the High Court's decision in *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)*, Brennan J provided the following description of this jurisdiction:

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112 Under s 8 of the relevant state or territory cross-vesting legislation. See on this problem, Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process* (1997), [15.30].

113 (1995) 19 Fam LR 528.

114 (1999) 198 CLR 511.

115 *Commonwealth of Australia Constitution Act 1900* ss 71 & 77(iii). Section 77 (iii) provides: '[w]ith respect to any of the matters mentioned in the last two sections the Parliament may make laws: … investing any court of a State with federal jurisdiction'. See the decision of Gummow and Hayne JJ: *Re Wakim; Ex parte McNally & Anor* [1999] HCA 27, [121].

116 The *parens patriae* jurisdiction has been described as 'a power of the Sovereign to protect persons who from their legal disability stand in need of protection': *Director General, New South Wales Department of Community Services v Services v Y* [1999] NSWSC 644 [88]–[89]. For a discussion of its origins, see J Seymour, 'Parens Patriae and Wardship Powers: Their Nature and Origins' (1994) 14(2) *Oxford Journal of Legal Studies* 159.

117 The Hon Justice PLG Brereton, 'The Origins and Evolution of the *Parens Patriae* Jurisdiction' (Lecture on Legal History, Sydney Law School, 5 May 2017) 8.

118 Ibid.

119 *Re X* [1975] 1 All ER 697 (Latey J).

> The *parens patriae* jurisdiction has become essentially protective in nature and protective orders may be made either by the machinery of wardship or by ad hoc orders which leave the guardianship and custody of the child otherwise unaffected. The court is thus vested with a jurisdiction to supervise parents and other guardians and to protect the welfare of children.[120]

4.70 However, while the power is 'extremely broad', it is also said to be 'exercised with restraint, only in exceptional cases'.[121] It has been found that the court will need 'some clear justification for a court's intervention to set aside the primary parental responsibility for attending to the welfare of the child'.[122] Examples where the jurisdiction has been invoked include 'the performance of medical procedures (where consent by or on behalf of a child has not been forthcoming) including vaccination, involuntary admission and treatment for anorexia nervosa, abortion, sterilisation of an intellectually disabled child for reasons which were not therapeutic, parentage testing, and even indefinite protective detention and restraint'.[123]

4.71 One question that arises in the context of child protection matters is whether the child protection legislation of a particular state purports to extinguish the inherent *parens patriae* jurisdiction of the Supreme Court. The Family Law Council expressed the view that the *parens patriae* jurisdiction remains available to be used in this context by the Supreme Courts of all states and territories[124] except Western Australia.[125] In *Re Madison*, the NSW Supreme Court expressly relied on the *parens patriae* jurisdiction when making an order that the father of the child and the Minister have 'joint parental responsibility' pending the final determination of proceedings that were before the NSW Children's Court.[126] Similarly, in *Re Beth,* the Supreme Court of Victoria confirmed that neither the *Children, Youth and Families Act 2005* (Vic) nor the *Disability Act 2006* (Vic) exclude the court from exercising its *parens patriae* jurisdiction.[127]

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120 *Marion's Case,* above n 87, 280.

121 Brereton, above, n 117, 9. See eg, *Re Victoria* (2002) 29 Fam LR 157 (Palmer J); *Frances and Benny* [2005] NSWSC 1207, [18].

122 *Marion's Case*, above n 87, 280.

123 Brereton, above n 117, 8–9. See eg, *Director-General, Department of Community Services; Re Jules* [2008] NSWSC 1193; *Re W* [1992] 3 WLR 758; *Re C* [1997] 2 FLR 190; *DoCS v Y* [1999] NSWSC 644; *K v Minister for Youth and Community Services* [1982] 1 NSWLR 311; *Marion's Case* (1992) 175 CLR 218; *In re L (An Infant)* [1968] P 119; *Re C* [1997] 2 FLR 180; *Re Thomas* [2009] NSWSC 217; *Re Sally* [2009] NSWSC 1141.

124 In relation to South Australia see *Children, Youth & Women's Health Services Inc v YJL MHL and TL (By his next friend)* [2010] SASC 175, [34]–[35] affirmed by *Women's and Children's Health Network Inc v M, Cn* [2013] SASC 16, [13]. In relation to the Northern Territory, see *Warbrooke v McGregor* [2001] NTSC 18, [19]. In relation to Queensland, see *State of Queensland v B* [2008] QSC 231, [3] and *Re Suppressed* [2013] QSC 334 that cites with approval the decision in *State of Queensland v B* and the NSW case of *DoCS v Y* [1999] NSWSC 644 (30 June 1999). In relation to Tasmania, see *J v J* (1982) 8 Fam LR 551. In relation to NSW, see *Re Madison* [2014] NSWSC 1874. In relation to Victoria, see *Re Beth* (2013) 42 VR 124.

125 *PVS v Chief Executive Officer, Department for Child Protection* [2010] WASC 172 [21].

126 [2014] NSWSC 1874 [94], [103]: s 247 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) provides that '[n]othing in this Act limits the jurisdiction of the Supreme Court'.

127 (2013) 42 VR 124. See also the analysis of this case in M Gorton and R Laufer, 'Re Beth – the Powers of the Supreme Courts to Deal with Children' (2013) 21(6) *Australian Health Law Bulletin* 372.

4.72 These cases provide examples of circumstances in which a state Supreme Court has used its *parens patriae* jurisdiction to place a child or children into the care of a child protection department, in a similar way to orders made under care and protection legislation by a children's court.[128] As such, they suggest there may be some scope for proceedings to be transferred from the Family Court to a Supreme Court for the purposes of a combined hearing of family law proceedings and child protection concerns but this is likely to be rare.

4.73 The procedure for constitutional reform requires the proposed law for alteration of the *Constitution* to be passed by an absolute majority of both Houses of Parliament.[129] The proposal is then subject to a referendum. In order to achieve amendment, a majority of voters in a majority of states must agree to the amendment, as well as an absolute majority of voters across Australia. Of the 44 referenda that have occurred since Federation, only eight have succeeded in effecting constitutional change.

4.74 The limited scope for the use of the cross-vesting power in child protection matters, and the costs to litigants who were inclined to pursue such an option, suggests that this is not a matter in which governments would be inclined to invest political capital in the context of a referendum.

Exercise of Family Law Act jurisdiction by state and territory magistrates' courts and children's courts

4.75 Section 69J of the *Family Law Act* vests state and territory 'courts of summary jurisdiction' with federal jurisdiction to make parenting orders under the *Family Law Act* in certain circumstances. This includes the power to make consent parenting orders. However, s 69N of the *Family Law Act* provides that where the orders sought by a parent are contested, the court of summary jurisdiction must transfer the proceedings to a family court unless the parties consent to the matter being heard (on an interim basis) in the state court. Courts of summary jurisdiction are also limited to determining property matters by consent unless they fall under a certain dollar value.[130]

4.76 As recently as December 2017, there have been calls for the Attorney-General to work with state and territory counterparts to encourage state and territory magistrates to exercise their existing family law jurisdiction, particularly in specialist family violence courts and courts which deal with a high number of family violence matters.[131] In addition, the recommendation made by the SPLA Committee to increase the jurisdictional limit on state and territory magistrates courts hearing family law property disputes has already been enacted, [132] and amendments to the *Family Law Act* enable the prescription of state and territory children's courts in Commonwealth regulations as having the same

128 *DoCS v Y* [1999] NSWSC 644.
129 *Constitution* s128.
130 Being $20,000 (until regulations are made under the *Family Law Amendment (Family Violence and Other Measures) Act 2018* (Cth). See *Family Law Act 1975* (Cth) ss 46(1), 69J.
131 House of Representatives Standing Committee on Social Policy and Legal Affairs, above n 5, rec 10.
132 Ibid, rec 17; *Family Law Amendment (Family Violence and Other Measures) Act 2018* (Cth) s 4.

jurisdiction in family law parenting matters as that held by state and territory courts of summary jurisdiction under Pt VII of that Act.[133]

4.77 The exercise of federal jurisdiction by state and territory magistrates courts and state and territory children's courts was also considered by the Family Law Council in its Interim Report *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems*.[134] It pointed to the significant potential benefits for families given that state and territory magistrates courts are often the first point of contact with the legal system for families with complex needs.

4.78 In particular, the Family Law Council noted the potential benefits for children where the matter is already before the children's court and a parent or kinship carer needs orders for (sole) parental responsibility to support their care of the children. Enabling children's court judicial officers to exercise *Family Law Act* powers in this situation would mean that the parent or carer could obtain parenting orders in the court with which they are familiar. As such, it would also address the issue of the barriers to access to the family courts, such as concerns about the cost, pace and formality of proceedings in the family courts and the need to prosecute risk concerns in a family law context. The uncertainty as to whether, and if so to what extent, the jurisdiction extended to state and territory children's courts has, subject to the promulgation of regulations, been resolved by the amendments contained in s 6 of the *Family Law Amendment (Family Violence and Other Measures) Act 2018* (Cth).

4.79 In their submission to this Inquiry, the Magistrates' Court of Victoria and the Children's Court of Victoria expressed support for the exercise of family law jurisdiction by the Children's Court in appropriate cases but was concerned about the significant resourcing implications.[135] It urged a trial of the exercise of jurisdiction in a limited class of cases and noted that to date the Commonwealth had declined to fully fund a pilot to determine demand and future modelling.[136]

4.80 Another difficulty raised by the two courts was the requirement for the state and territory courts to use the *Family Law Rules*,[137] which is problematic because of the inconsistencies with the local rules of court.[138]

4.81 The submission of the Magistrates' Court of Victoria and the Children's Court of Victoria is consistent with information received in the course of this Inquiry and with submissions to the SPLA *Family Violence Report* that suggest that magistrates have been very reluctant to exercise their family law powers.[139] Submissions to that Inquiry

133 *Family Law Amendment (Family Violence and Other Measures) Act 2018* (Cth) s 6.
134 Family Law Council, above n 55, 102.
135 Magistrates' Court of Victoria and Children's Court of Victoria, *Submission 419.*
136 Ibid.
137 *Family Law Act 1975* (Cth) s 123.
138 Magistrates' Court of Victoria and Children's Court of Victoria, *Submission 419*.
139 House of Representatives Standing Committee on Social Policy and Legal Affairs, above n 5, [4.133]; Victorian Judicial Advisory Group, *Submission 333*; Hume Riverina Community Legal Service, *Submission*

identified a number of impediments including: lack of expertise and knowledge of family law, which it acknowledged as complex; resourcing and lack of time in busy courts; and structural impediments including the requirement for consent, the monetary limit on property matters and the 21 day limit on a state or territory court's variation of a family law order.[140]

4.82 Several recent inquires have recommended the expansion of specialist family violence courts throughout the states.[141] Specialist family violence courts now exist in most states and territories although there is no single model.[142] Such courts provide a 'one judge, one family' model, allowing a single magistrate to exercise multiple jurisdictions where appropriate to address the range of legal needs of clients affected by family violence. This includes powers to determine family violence protection matters, criminal matters related to family violence and family law matters to the extent that family law jurisdiction is conferred on state and territory courts under Pt VII of the *Family Law Act*.

4.83 In their 2010 report, the ALRC and NSWLRC took the view that 'the specialisation of key individuals and institutions is crucial to improving the interaction' of the different legal frameworks governing family violence in Australia.[143] The Commissions recommended state and territory governments establish or further develop specialised courts with powers to determine family violence protection matters, criminal matters related to family violence and family law matters to the extent that family law jurisdiction is conferred on state and territory courts.[144] They also recommended mainstreaming the conceptual framework of these courts.[145]

4.84 Similarly, in 2015, the Queensland Special Taskforce on Domestic and Family Violence recommended a greater use of specialised family violence courts in that State with power to deal with interim family law matters. This included a recommendation that the Queensland Government consider providing these courts with child protection jurisdiction.[146]

What change is needed?

4.85 It is apparent from the foregoing that there have been numerous attempts to remedy the jurisdictional gap in family law that exists within the framework of our federation. The approach taken in 1975, to establish a federal family court, addressed the then need to change the approach to divorce, and its consequences, that had developed in the state

294; National Family Violence Prevention Legal Services, *Submission 293*; Marrickville Legal Centre, *Submission 412*; Domestic Violence Victoria, *Submission 284*.

140 House of Representatives Standing Committee on Social Policy and Legal Affairs, above n 5, [4.133].

141 Australian Law Reform Commission and NSW Law Reform Commission, above n 35; Family Law Council, above n 55, 101–2; House of Representatives Standing Committee on Social Policy and Legal Affairs, above n 5, rec 11; Queensland Special Taskforce on Domestic and Family Violence, above n 50.

142 Family Law Council, above n 55, 81.

143 Australian Law Reform Commission and NSW Law Reform Commission, above n 35, [32.1].

144 Ibid recs 32–1 and 32–2.

145 Ibid rec 32–4.

146 Queensland Special Taskforce on Domestic and Family Violence, above n 50, recs 96, 97, 98.

courts under the jurisdiction of the *Matrimonial Causes Act*—the existing courts had been found to be unsuitable and ill-equipped to deal sympathetically and helpfully with the particular problems of family disputes.

4.86 The nature of the underlying problems of family disputes has changed. As the data shows, the overwhelming nature of contemporary family disputes that require court adjudication is that they are overshadowed by family violence, child abuse, drug and alcohol issues, and serious mental health issues.[147] It is therefore not surprising that, of the various solutions canvassed above and recommended by numerous inquiries, almost all involve an expansion of state and territory jurisdiction to exercise *Family Law Act* powers and to invest in specialist domestic violence courts within the states and territories. It is difficult to avoid the conclusion that, in 2019, the existing courts are unsuitable and ill-equipped to deal with the particular contemporary problems of family disputes.

Expansion of state family courts or the devolution of the exercise of all family law power to the states and territories

4.87 The *Family Law Act* allows for federal family law jurisdiction to be vested in state family courts and provides a mechanism for the establishment of State Family Courts.[148] The *Family Law Act* confers on State Family Courts that same jurisdiction as that exercised by the Family Court of Australia, provides that funding for their establishment and administration, including for counselling facilities and services, must be provided by the Commonwealth government,[149] and imposes requirements for appointment similar to those for Family Court judges.[150] It is therefore already legislatively possible to have a state court that concurrently exercises state jurisdiction (including over child protection and family violence) and federal jurisdiction over family law, and related matters, such as child support.

4.88 Upon the enactment of the *Family Law Act*, it was expected that a number of states would want to establish state-based courts to hear family law matters. However, the only state family court established under these provisions has been the Family Court of Western Australia (FCWA). Established in 1976, the FCWA exercises jurisdiction under the *Family Law Act* and under the *Family Court Act 1997* (WA). The judges of the FCWA hold equivalent federal commissions. It has been noted that the FCWA model has allowed it to act as 'one court' in matters of both state and federal jurisdiction.[151]

4.89 In evidence to the Senate Legal and Constitutional Affairs Legislation Committee, the then Chief Judge of the FCWA, the Hon Chief Justice Stephen Thackray, described the Family Court system in Western Australia in this way:

147 Chapter 3.
148 *Family Law Act 1975* (Cth) s 41(1).
149 Ibid.
150 Ibid s 41(4)(b).
151 See, eg, 'Family Court's Silver Jubilee' (2001) 28(7) *Brief* 16.

> We already have the unified family law system in WA because all family law cases in Western Australia are filed in Perth in the Family Court of Western Australia. We then divide up the work between our five judges and 10 specialist family law magistrates, depending on the complexity of the matter. Although our family law magistrates are appointed formally as magistrates of our [Western Australian (WA)] state Magistrates Court, the law provides that they are in fact subject to the direction of the person who holds my office. So the Chief Judge of the Family Court of Western Australia directs the work of the family law magistrates. So although as a matter of law they are two courts, in reality they are one.
>
> One court has the great advantage of being able to exercise both state and federal jurisdiction, so we are able to deal with the whole range of family law matters, whether they are federal or state. So we deal with standard parenting-property settlement matters for both married couples and de facto couples. We deal with adoptions. We deal with surrogacy matters. We occasionally make restraining orders. Most importantly, we can deal with the care and protection jurisdiction, which in other states is generally exclusively dealt with by a Children's Court.
>
> In WA we are unique in that we have only one file in each matter, we have one set of rules, the forms are all the same, there's a single point of entry, and cases move seamlessly between the magistrates and the judges throughout the course of a matter, depending on the complexity and convenience.[152]

4.90 Although the FCWA has not frequently exercised child protection powers,[153] a recent review of the *Children and Community Services Act 2004* (WA) has recommended that, in principle, all child protection matters should be heard in a specialist division of the FCWA.[154] The creation of state family courts is not, therefore, a substitute for the creation of a single national child protection system, but it would not prevent it if referrals of power made that possible at a future date. The resulting federal jurisdiction could be conferred on the state family courts.

4.91 The ALRC urges the Australian Government, as a matter of priority, to explore with state and territory governments the possibility of encouraging them all to establish state family courts. Whilst the FCWA operates as an entirely separate Court, there does not seem to be any legislative imperative that would prevent a state or territory from deeming a division of its existing court hierarchy a state family court for the purposes of the *Family Law Act*. Different models should be explored that will produce different resourcing implications.

4.92 Once state family courts have been established throughout the states and territories, there will no longer be a need for trial division federal family courts and the Australian Government is urged to consider the most effective and cost efficient way of abolishing those courts. The ALRC considers that it will be important to maintain a federal appellate

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152 Senate, Legal and Constitutional Affairs Legislation Committee, above n 8, [1.31].

153 Government of Western Australia, Department of Communities, 'Statutory Review of the Children and Community Services Act 2004' (Government of Western Australia, Department of Communities, 2017) 84.

154 Ibid rec 27.

family court to ensure consistency of jurisprudence across the country and considers that such a court could be a division of the Federal Court of Australia.

4.93 The ALRC does not recommend that legislative responsibility for family law be returned or devolved to the states and territories, only the exercise of family law jurisdiction by state and territory courts.

4.94 The existing legislative provisions in the *Family Law Act* provide that, for the establishment of State Family Courts:

- the Commonwealth must fund the establishment and administration of those courts, including the provision of counselling facilities;[155]
- Judges are to be appointed to the court only with the approval of the Attorney-General of the Commonwealth;[156]
- Judges appointed to the courts must by reason of training, experience and personality, be suitable persons to deal with matters of family law and cannot hold office beyond the age of 70 years;[157] and
- appropriate family counselling and family dispute resolution services, and family consultants, will be available to that court.[158]

None of these requirements should be weakened.

4.95 In addition to those matters that are already required by the *Family Law Act*, a number of other matters need to be explored. These include:

- legislative amendments at the state and territory level to create the court (or division of the existing court) and confer it with state jurisdiction, as well as federal jurisdiction under the *Family Law Act*;
- alternatively, were the jurisdiction to be devolved to the existing state and territory courts, legislative amendments at Commonwealth level to extend the family law jurisdiction to the state and territory trial courts;
- if the latter model were to considered, how a specialist family law division within the existing state and territory courts might best be supported;
- the desirability of maintaining a Federal Family Court of Appeal to ensure a consistent national approach to family law;
- the inconsistency of split avenues of appeals, with child protection and family violence matters being subject to state appeal pathways, and federal family law matters following a federal appeal pathway;
- transitional arrangements, including for existing federal family law judicial officers (ideally, federal judicial officers in each state would be offered dual

155 *Family Law Act 1975* (Cth) s 41(1).
156 Ibid s 41(4)(a).
157 Ibid s 41(4)(b).
158 Ibid s 41(4)(c)

commissions to allow them to immediately commence decision making in the new courts);

- the consequences for Aboriginal and Torres Strait Islander people of one jurisdiction for the exercise of child protection powers;
- how national consistency in practice can be maintained—for example, through national training programs;
- how to ensure early and strong integration with state services, including child protection agencies, the police, and state-funded service providers;
- whether existing arrangements for managing family relationship services should continue to be administered nationally or should be devolved to the states to facilitate tighter integration with state-funded services; and
- how best to use existing Commonwealth court infrastructure to support State Family Courts with a dual-commissioned judiciary into the future.

4.96 State and territory regimes, and the FCWA, have demonstrated the ability to be responsive to the fundamental issues underlying contemporary family law problems through, for example, the creation of specialist domestic and family violence lists, and the recent proposal in Western Australia to establish a specialist child protection list. They also have the experience of developing culturally secure court processes for Aboriginal and Torres Strait Islander peoples, such as the Children's Koori Court in Victoria and the Murri Courts in Queensland.[159] They are connected to their state and territory welfare and protection agencies and authorities in a way that, even with the best intentions of protocols and MOUs, is extremely difficult to achieve at a federal level. Moreover, state and territory courts of summary jurisdiction exist in communities that rarely have access to a federal court and higher level courts circuit more regularly and to more locations than is possible for federal courts.[160]

4.97 Although careful economic modelling of any proposal needs to be undertaken, it is not envisaged that the abolition of a federal family court structure will result in any savings to the Commonwealth. The Commonwealth will be required to provide adequate resources for the exercise of family law jurisdiction by the state and territory courts. In the longer term, however, the creation of a one-court model within each state and territory should yield significant benefits (both fiscal and health-related) to those who are required to use the courts to resolve their family law disputes and, most importantly, their children.

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159 This is important given that the rate of Aboriginal and Torres Strait Islander Children on care and protection orders has increased from 59.2 per 100,000 children in 2012–13 to 68.5 in 2017–18 whilst the non-indigenous rate has increased only slightly and remains much lower: from 5.2–5.8 to 6.7: Australian Institute of Health and Welfare, *Child protection Australia 2012–13* (Child Welfare Series, No 58, 2014) 2; Australian Institute of Health and Welfare, *Child protection Australia 2017–18* (Child Welfare Series, No 70, 2018) 44.

160 ATSILS (Qld), *Submission 384.*

Commissioner Faulks' dissenting view

An alternative to Recommendation 1

4.98 Many submissions to the Commission complained of the confusion that people felt about their involvement in the family law system that may have required them to attend different courts for different aspects of the issues they were facing in family law, child protection and family violence.

4.99 Essentially, much of the "first aid" processes about violence occur in the state magistrates courts. Child protection matters (which may result in a child is being placed in care apart from his or her parents) are typically heard in Children's Courts (which may be magistrates courts acting in that capacity.) These are state or territory courts because the law involved is state or territory law.

4.100 Inter-parental disputes about children and disputes about the division of property between parties to an intimate relationship which has broken down and most financial matters between them, are dealt with either in the Commonwealth Family Court of Australia or the Commonwealth Federal Circuit Court.

4.101 Confusion is added by the fact that at least until the proposed reforms in the parliament are implemented, both of the federal family courts have similar jurisdiction but different forms and Rules. The restructuring of the federal family courts was not part of the terms of reference for the Commission. However, in passing, it is important to note that a highly desirable side-effect of the proposed amalgamation would be the unification of Rules and forms and procedures of the two courts.

Options

4.102 There are a number of options about how the problems referred to above might be ameliorated:

a. The states might transfer all law-making power about family violence and child protection to the Commonwealth.

b. The Commonwealth could transfer to the states the whole of its jurisdiction to hear maters of divorce and family law and children. This would require a Constitutional amendment.

c. As a variation of b. above, the Commonwealth could transfer to the states (as suggested in the report by the Commission) its jurisdiction in family law to be exercised in state Family Courts (SFCs). This was an option recognised in 1975 when the *Family Law Act* came into existence and is exemplified in the state Family Court of Western Australia.

The difficulties which the Commission's preferred approach might encounter

4.103 In the Commission's approach the Commonwealth would retain legislative responsibility, as at present, about financial and the children matters between parents or partners to a relationship under the *Family Law Act*. However, the hearing of those matters would be exercised by a state court.

4.104 It is contemplated by the Commission that the existing judges of the federal family courts would receive SFC commissions and would essentially, continue to operate from their existing premises.

4.105 This proposal although potentially permitting the new SFC judges to exercise jurisdiction in matters of family violence and/or child protection would not necessarily reduce the confusion for litigants.

4.106 It seems difficult to imagine that the State judges and magistrates at present hearing these matters would be drawn into the SFCs in the short-term – or potentially even in the long-term.

4.107 If those state magistrates courts could become part of an SFC, is it appropriate for the Commonwealth (as it is proposed by the Commission) to impose court Rules on state Magistrates exercising state jurisdiction? I acknowledge that a precedent for the Commonwealth laws being heard in state courts with some procedural control from the Commonwealth existed under the former *Matrimonial Cause Act* with its Commonwealth regulations. But this seems anomalous.

4.108 The risk is that there would be eight different sets of Rules of court for at least some of the procedures the parties may undertake. (It must be conceded that this is the situation as it presently exists. However, the net effect of the proposed reform would not necessarily achieve any diminution in diversity.)

4.109 There is a prototype for the proposed arrangement in the state Family Court of Western Australia. In Western Australia, there have been recent initiatives to bring both the protective jurisdiction and the family law jurisdictions closer together. It is also true that issues about family violence and to some extent child protection issues have become more prevalent in recent times. However, it is apparent that even after 42 years the proposed one-stop court arrangement has not been completely achieved in the one state which has had that arrangement.

4.110 It is proposed that the cost of the Commission's proposed solution is to be borne by Commonwealth. The cost will be diminished if the existing court structures are capable of being adapted to the proposal. It is hard to see however that all of this reorganisation would not be accompanied by significant Commonwealth and state expenditure.

4.111 In addition, none of the existing judges of the Family Court of Australia or the Federal Circuit Court of Australia could be obliged to accept the state commission or to

move to the new structure. It may reasonably be expected that most will do so because of their commitment to making the justice system work.

4.112 On the other hand, if a number (or worse a significant number) of judges declined to move to the new structure there would be potential for there being not only domestic violence courts and child protection courts and two federal courts but rather eight state family courts, and at least in the short-term, eight separate courts dealing with family violence, eight separate courts dealing with child protection and in parallel with the SFCs, one (or two) federal family courts. This would not appear to reduce confusion and diversity.

An alternative proposal

4.113 I suggest an alternative: to recognise that the problems are essentially continuity, support and the relieving of confusion – and remedy those problems while essentially leaving the existing court structures as they are.

4.114 If the pathways from one court to another were to be simplified and supported for litigants, this would have the potential of preserving the existing institutions with their various strengths but ensuring that the litigants are relieved from much of the confusion and repetition they currently face.

4.115 This will involve a triage at the first-aid points (such as in the court hearings for apprehended domestic violence orders or in the courts hearing applications under the child protection jurisdiction of the various states and territories).

4.116 If as a result of the triage or with the intervention or assistance of FASS, the state court is asked by the parties to make orders, by consent, about other matters of family law, it should do so. Those courts have that power at present.

4.117 If on the other hand, the parties require more specialised assistance to resolve their disputes, it would be of great assistance if the magistrate were able to investigate with parties at the time of that magistrate's intervention, the issues of the parties requiring determination or resolution and to make such orders as would facilitate the parties' getting to where they can best obtain that assistance as straight-forwardly and as speedily as possible.

4.118 That assessment or triage would possibly require additional training for the magistrates, but it is well within their capabilities. This process itself will be further assisted by the enhancement of the FASS process, as is recommended by the Commission in Recommendation 57-58.

4.119 In such an event, the parties' file should "travel with parties" – ideally, electronically. An analogy in the health system, is the proposed computerisation and centralisation accessibility of client/patient records.

4.120 The lawyers engaged in FASS (as the review of the pilot scheme showed), had the great advantage of being involved in both state and federal jurisdictions. They were shown in the review to be able to smooth the pathways, to reduce the confusion and to increase the provision of needed information to the litigants.

4.121 When the parties are first before the family courts, an increased role for registrars with the assistance of family (Court) consultants in assessment of need and triage will smooth the path for the disputants.

4.122 At the present time the wide geographic distribution of state magistrates courts means that those who have a need for an apprehended violence order or to seek Orders under the various Care and Protection Acts of the states and territories frequently have a proximate court to attend.

4.123 To ensure access to justice, these courts would need to retain jurisdiction to hear these matters. The magistrates involved would not necessarily be appointed with the specialised attributes the Commission recommends should pertain to all judicial officers who deal with 'family law'. This would not be an impediment to their having training and support in the triage process. The parties would receive the 'first-aid' they need where they need it and assistance to better understand how where and when they will obtain the specialised help they need to resolve the matters flowing from their relationship breakdown. The magistrates would continue to provide their important role, not just in family law related matters, but in children's criminal matters and state civil and criminal matters.

Cost of the alternative suggested

4.124 For any improvement in accessibility to the family law system, some federal expenditure will be necessary. Nothing can be accomplished without additional resourcing.

4.125 The alternative proposal would necessarily involve some additional Commonwealth expenditure. There would need for an increase in the training for state magistrates. (That process already been commenced although not necessarily with this orientation). There would be additional cost in the extension and enhancement of the FASS system. There should also be an enhancement of the Family Relationship Centres to provide a wider ability to assist disputants to resolve their difficulties without further (or any) litigation. Further, there should be additional registrars in the federal family courts to conduct complementary triage and to give directions once matters are in those courts. The Commission's proposed enhancement of the role of family consultants (to be Court Consultants) should result in their becoming part of such triage providing support for the children and children's issues.

4.126 However, these are expenditures which should be incurred in any event if the process of family law is to be made more accessible.

4.127 The proposal does not remove the possibility that children will still fall though the gaps in the system. It does not have the appeal of the single façade to the court structure. That façade is however, somewhat illusory as behind it there would still remain the separate entities to deal with the multi-facetted problems of those emerging from relationships which have broken down.

4.128 What it does do is to acknowledge the strengths of the existing system, provide a plan for the amplification and improvement of those strengths and to provide a workable plan (with less cost) to ensure that those who need access to the court obtain the assistance they require, where and when they need it.

Information sharing

4.129 The federal family courts have limited investigative powers to follow up allegations made in family law proceedings that indicate potential risks to the parties, their children and third parties. The federal family courts are reliant on receiving information from state and territory courts and agencies about risks to families and children to inform decision making and better protect against risk. In particular, the federal family courts often require information from child protection departments and police in order to arrive at appropriate orders.

4.130 The sharing of this information with federal family courts is limited by statutory provisions at the state and territory level that prescribe the circumstances in which information may be shared, and with which agencies.[161]

4.131 State and territory courts and agencies may also benefit from receiving information that has been admitted into evidence in federal family court proceedings to assist them in identification and management of risks. Information that may be of assistance to courts and agencies in other systems is not restricted to documentation that has been admitted into evidence. It is important however that the sharing of such information is subject to safeguards to ensure that only information relating to risk which is of probative value is shared.

4.132 It is also crucial that there are clear understandings between professionals within systems about how to interpret any information they receive and how that information can be used.

4.133 Currently, where responsibilities for families and children are divided between jurisdictions, there are no coercive powers available to enforce information sharing between courts and entities across jurisdictions about high risk families. There are some significant barriers that exist to information sharing between systems, including:

161 See, eg, *Family Violence Protection Act 2008* (Vic), pt 5A.

- the large number of interfaces between courts, bodies and agencies across the systems and the significant number of stakeholders involved in information sharing across systems;
- differing laws and legal frameworks in the various jurisdictions;
- the perceived and real barriers to information sharing presented by privacy and confidentiality provisions; and
- the lack of understanding by professionals about the legal frameworks in other jurisdictions and corresponding obligations they impose on professionals in those systems, including different thresholds for assessing risk.

4.134 To date, it appears that information sharing between systems has been significantly reliant upon facilitative legislative provisions and good relationships between stakeholders within and across jurisdictions.

4.135 Nationally and within jurisdictions, governments and key stakeholders have taken action to improve information sharing and collaboration between the systems in an attempt to minimise the impacts caused by the jurisdictional gap, including:

- co-location of child protection practitioners in family court registries;[162]
- implementation of information sharing agreements between stakeholders in the systems, in particular the family courts and child protection departments;
- convening of collaboration meetings between key stakeholders in the systems facilitated by the Commonwealth Attorney-General's Department;[163]
- establishment of the Council of Attorneys-General Family Violence Working Group (CAG Family Violence Working Group) to develop measures to improve the interaction between the systems, including improving information sharing;[164] and
- in-principle acceptance by the Australian Government of the recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse that the Australian, state and territory governments should develop an information exchange scheme to share information about the safety and wellbeing of children.[165]

4.136 On 5 March 2019, the Australian Government announced that $11 million of funding has been allocated to improving information sharing between the family law system and the state and territory child protection and family violence systems. The funding is intended to improve the ability of those systems to promptly identify and respond to risks, and prioritise the safety of domestic violence victims. This includes

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162 This has occurred in Victoria (Melbourne) and Western Australia (Perth).

163 Attorney-General's Department (Cth), 'Family law and child protection collaboration', <www.ag.gov.au>.

164 Attorney-General's Department (Cth), 'Family violence', <www.ag.gov.au>.

165 See Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, (Final Report, 2017) recs 8.6–8.8; Attorney-General's Department (Cth), *Australian Government Response to the Royal Commission into Institutional Responses to Child Sexual Abuse* (2018).

placing state and territory child protection and family safety officials in federal family courts across Australia (as proposed by the ALRC in the Discussion Paper)[166] and the scoping of a national technological solution to facilitate the prompt sharing of targeted information between these systems. The funding is part of the Australian Government's $328 million funding package to support the Fourth Action Plan 2019–2022 of the *National Plan to Reduce Violence against Women and their Children 2010–2022*.[167]

4.137 In recent years, there have also been a number of recommendations in reports aimed at addressing barriers to information sharing between the family law, family violence and child protection systems.[168]

4.138 The ALRC acknowledges the valuable role that initiatives in this area play in promoting the safety, welfare and wellbeing of families. However, the ALRC is of the view that information sharing is no panacea to the problems caused by the jurisdictional gap, regardless of how efficient and effective information sharing is between the systems. This has been recognised in submissions to this Inquiry, particularly with reference to information sharing being able to 'fix' how the family law system deals with issues of family violence.[169]

4.139 Efforts to improve responsiveness to family violence disclosures are welcomed but information sharing 'will not solve systemic problems such as delays or inexperience in responding to family violence'.[170]

4.140 Pending the Australian Government's considering options to establish further State Family Courts as recommended at Recommendation 1, the ALRC is recommending the following reforms that could be implemented without delay to facilitate more timely and efficient responses to identifying and managing high risk families:

- the development and implementation of a national information sharing framework; and

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166 Australian Law Reform Commission, *Review of the Family Law System*, Discussion Paper No 86 (2018) Proposal 6–12.

167 See Australian Government, 'Our Investment in Women's Safety', *Department of Social Services*, <www.dss.gov.au>; Attorney-General for Australia the Hon Christian Porter MP, 'Strengthening Family Safety by Enhancing Communication between Family Law Courts and States and Territories' (Media Release, 5 March 2019), <www.attorneygeneral.gov.au>.

168 Australian Law Reform Commission and NSW Law Reform Commission, above n 35; Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (2017); Family Law Council, above n 55; House of Representatives Standing Committee on Social Policy and Legal Affairs, above n 5; Richard Chisholm, *Information-Sharing in Family Law & Child Protection: Enhancing Collaboration* (Commonwealth of Australia, 2013); Richard Chisholm, *The Sharing of Experts' Reports between the Child Protection System and the Family Law System* (Commonwealth of Australia, 2014); Victoria, Royal Commission into Family Violence, *Report and Recommendations, Volume IV* (2016).

169 Australian Women Against Violence Alliance (AWAVA), *Submission 379*; Women's Legal Services Australia, *Submission 366*; Women's Legal Service NSW, *Submission 340*; National Family Violence Prevention Legal Services Forum, *Submission 293*; Domestic Violence Victoria, *Submission 284*.

170 Carolyn Jones, (2016) *Sense and Sensitivity: Family law, Family Violence and Confidentiality* (Sydney: Women's Legal Service NSW) 40, cited in Women's Legal Service NSW, *Submission 340*.

- expansion of the National Domestic Violence Order Scheme to include family court orders and orders issued under state and territory child protection legislation.

Information sharing framework

Recommendation 2 The Australian Government should work with state and territory governments to develop and implement a national information sharing framework to guide the sharing of information about the safety, welfare, and wellbeing of families and children between the family law, family violence, and child protection systems. The framework should include:

- the legal framework for sharing information;
- relevant federal, state, and territory court documents;
- child protection records;
- police records;
- experts' reports; and
- other relevant information.

4.141 The benefits of a national information sharing framework include:

- shared understandings of, and commitment to, information sharing and collaboration; and
- streamlined and timely information sharing practices and processes.

4.142 The ALRC supports the inclusion of information sharing principles and guidance about the following matters in an information sharing framework:

- the purpose and relevance of sharing information;
- what information should be shared;
- circumstances when information should be shared;
- mechanisms for information sharing, including technological solutions;
- how information that is shared can be used;
- who is able to share information;
- roles and responsibilities of professionals in the system in relation to information sharing;
- interagency education and training;
- interagency collaboration; and
- monitoring and evaluation of information sharing initiatives.

4.143 The ALRC acknowledges that work is currently being undertaken by the Council of Attorneys-General (CAG) Family Violence Group to improve information sharing between the family law, family violence and child protection systems.

4.144 Participants noted the work underway to develop a proposed framework for the appropriate sharing of court orders, judgments, transcripts and other documents between the family law, family violence and child protection systems. Participants agreed for the Family Violence Working Group to continue its work on this topic and report back to the Council of Attorneys-General in the second half of 2019.[171]

Building on existing initiatives

4.145 There is a clear commitment that the CAG Family Violence Working Group will develop an information sharing regime for relevant court orders, judgments and transcripts. However, it is not clear what recommendations for reforms, if any, will be made for the sharing of other information such as information held by police and child protection agencies. Accordingly, the recommendation for a national information sharing framework is intended to complement and build upon the work currently being done by the CAG Family Violence Working Group and also any reforms being implemented in response to the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse.[172]

4.146 The ALRC notes that the development of a national information sharing framework should also be informed by, and appropriately interface with, state-based information sharing schemes. There has been significant work undertaken in some jurisdictions to improve information sharing. For example, a Family Violence Information Sharing Scheme has been established in Victoria[173] in response to recommendations made by the Royal Commission into Family Violence for improving information sharing to keep victims of violence safe and hold perpetrators accountable. The scheme authorises the sharing of information between prescribed information sharing entities for family violence risk assessment and risk management.

4.147 The Victorian Government has also established the Child Information Sharing Scheme which 'allows authorised organisations and professionals who work with children, young people and their families to share information with each other to promote children's wellbeing and safety'.[174] The scheme commenced on 27 September 2018 for organisations in the first phase. The Family Violence Information Sharing Scheme and the Child Information Sharing Scheme are designed to be complementary.

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171 Attorney-General's Department (Cth), 'Family violence', <www.ag.gov.au>.

172 The 23 November 2018 Council of Attorneys-General communiqué reported that, 'Participants noted that all Australian governments are continuing to work together to progress the implementation of the Royal Commission's recommendations requiring national coordination. Participants also noted that all governments have committed to report on progress in implementing the Royal Commission's recommendations, through five consecutive annual reports, beginning in December 2018': Council of Attorneys-General, 'Communiqué 23 November 2018', <www.ag.gov.au>.

173 The Victorian Family Violence Information Sharing Scheme has been created by Part 5A of the *Family Violence Protection Act 2008* (Vic) and the *Family Violence Protection (Information Sharing and Risk Management) Regulations 2018*.

174 All Victorian children and young people aged 0-18 years are covered by this new scheme. See Victorian Government, 'Child Information Sharing Scheme', <www.vic.gov.au>.

Stakeholder views on an information sharing framework

4.148 There was support in submissions for the implementation of a national information sharing framework.[175]

4.149 There was also support for use of the following mechanisms to facilitate information sharing between the systems:

- information sharing agreements;[176]
- brief summaries of child protection department or police involvement with a child and family to be provided to family courts;[177]
- in cases where a party has been referred to the family courts by a child protection department, that department provide recommendations to the court about parenting arrangements;[178]
- access to the Commonwealth Courts Portal for relevant professionals in the family violence and child protection systems;[179] and
- access for family courts and appropriate bodies and agencies in the family law system to relevant inter-jurisdictional and intra-jurisdictional child protection and family violence information sharing platforms.[180]

4.150 Some submissions raised concerns about issues, including:

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175 See, eg, Interrelate Limited, *Submission 416*; Safe Steps Family Violence Response Centre, *Submission 408*; Australian Institute of Family Studies, *Submission 396*; M Morris and K Halford, *Submission 344*; Relationships Australia National, *Submission 317*; Centre for Excellence in Child and Family Welfare, *Submission 283*; Uniting, *Submission 268*.

176 See, eg, Family Law Practitioners' Association of Western Australia (Inc), *Submission 410*; Relationships Australia National, *Submission 317*; Australian Association of Social Workers, *Submission 295*; NATSILS, *Submission 290*; Relationships Australia Victoria, *Submission 267*. The Hon Professor Richard Chisholm AM developed a model agreement for information sharing between the family courts, child protection agencies and legal aid commissions. This model agreement is intended to assist in the formulation of agreements between these parties while allowing the parties to mould the agreement to meet their jurisdictional needs: Chisholm, *Information-Sharing in Family Law & Child Protection: Enhancing Collaboration*, above n 168.

177 In some jurisdictions arrangements are in place for a 'snapshot' document providing information about the involvement a child and family have had with a system. For example, the *Children and Young Persons (Care and Protection) Act 1998* (NSW) provides for the Federal Circuit Court of Australia to request and receive a 'Person History' document. See, eg, Family Law Practitioners' Association of Western Australia (Inc), *Submission 410*; CASA Forum Victorian Centres Against Sexual Assault, *Submission 404*; Relationships Australia National, *Submission 317*; Relationships Australia Victoria, *Submission 267*.

178 See, eg, L Laing, C Humphreys, S Heward-Belle and G Ovenden, *Submission 352*; Macarthur Legal Centre, *Submission 346*; Women's Legal Service NSW, *Submission 340*; Relationships Australia National, *Submission 317*; UnitingCare Queensland, *Submission 312*.

179 See, eg, Relationships Australia National, *Submission 317*; Relationships Australia Victoria, *Submission 267*. Both ATSILS Qld and the Family Law Practitioners' Association of WA submitted that access should be restricted to information about existing family court orders: Family Law Practitioners' Association of Western Australia (Inc), *Submission 410*; ATSILS (QLD), *Submission 384*.

180 See, eg, Relationships Australia National, *Submission 317*; Relationships Australia Victoria, *Submission 267*.

- information sharing breaching parties' confidentiality and privacy and the prioritisation of parties' consent;[181]
- the sharing of experts' reports[182] and health records;[183]
- ensuring only appropriate information is shared;
- ensuring the receiver of information understands how to interpret shared information and its relevance to the decision they are making;[184]
- ensuring procedural fairness;[185]
- allowing untested child protection records to be shared and potentially be admitted into evidence in family law proceedings;[186] and
- exposing family victims to further harm if information is shared inappropriately.[187]

4.151 The ALRC recognises that safeguards will need to be put in place to mitigate any risks of inappropriate information being shared and information being shared inappropriately.

4.152 Domestic Violence Victoria made recommendations about what matters could be included in a legal framework.[188] The ALRC notes these recommendations could assist in minimising some potential risks of information sharing, including: provision of highly prescribed roles and responsibilities for organisations captured under the scheme; mandating and monitoring workforce training in family violence informed risk assessment for relevant staff; support by a national risk management framework; and prescribing robust, independent, governance mechanisms to implement, monitor and evaluate the information sharing scheme.[189]

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181 See, eg, Family & Relationship Services Australia (FRSA), *Submission 407*; Australian Women Against Violence Alliance (AWAVA), *Submission 379*; Women's Legal Services Australia, *Submission 366*; SA Commissioner for Children and Young People, *Submission 360*; Relationships Australia National, *Submission 317*; National Family Violence Prevention Legal Services Forum, *Submission 293*; Domestic Violence Victoria, *Submission 284*; Australian Psychological Society, *Submission 281*. Fitzroy Legal Service and Darebin Community Legal Service submitted that there should be a review of existing information sharing schemes to discern what consent and disclosure requirements should be implemented: Fitzroy Legal Service and Darebin Community Legal Service, *Submission 336*. The Australian Psychological Society suggested that the information sharing framework should be supplemented with an information security and sharing framework to safeguard security of information more broadly in the family law system: Australian Psychological Society, *Submission 281*.

182 See, eg, Women's Legal Service NSW, *Submission 340*; Australian Psychological Society, *Submission 281*.

183 See, eg, CASA Forum Victorian Centres Against Sexual Assault, *Submission 404*; Aboriginal Justice Caucus Working Group on Family Violence, *Submission 381*; Women's Legal Service NSW, *Submission 340*; National Family Violence Prevention Legal Services Forum, *Submission 293*; NATSILS, *Submission 290*; Domestic Violence Victoria, *Submission 284*; Australian Psychological Society, *Submission 281*; The Royal Australian and New Zealand College of Psychiatrists, *Submission 280*; Association of Family and Conciliation Courts Australian Chapter, *Submission 258*.

184 See Australian Women Against Violence Alliance (AWAVA), *Submission 379*.

185 Victoria Legal Aid noted the need to train family law judicial officers and professionals in state child protection documentation and processes: Victoria Legal Aid, *Submission 375*.

186 See, eg, ATSILS (QLD), *Submission 384*; Victoria Legal Aid, *Submission 375*.

187 See, eg, Victoria Legal Aid, *Submission 375*.

188 Domestic Violence Victoria, *Submission 284*.

189 Ibid.

4.153 The ALRC recognises that protections may need to be applied to certain records. The ALRC recommends that the courts have power to exclude evidence of 'protected confidences' in certain circumstances. This recommendation should be taken into consideration in the development of a national information sharing framework.

4.154 Some submissions from Aboriginal and Torres Strait Islander organisations stressed the need to ensure that increased information sharing did not have detrimental impacts upon Aboriginal and Torres Strait Islander families accessing the family law system.[190] The National Family Violence Prevention Legal Service submitted that:

> There is the risk that information sharing provisions between the family law system and state and territory child protection and family violence systems... could lead to an (actual or perceived) increase in child protection scrutiny over Aboriginal and Torres Strait Islander families. The perception and fear that information could be shared with child protection may mean that Aboriginal and Torres Strait Islander women choose not to access much-needed support and therefore such reforms may unintentionally push family violence further underground – leaving vulnerable women and children at further risk.[191]

Legislative reform to support information sharing

4.155 A successful national information sharing framework is reliant upon a supportive legal framework. Currently, there is no uniformity in state and territory child protection and family violence legislation for the sharing of information with courts and relevant bodies and agencies in the family law system. Some state and territory legislative provisions are facilitative of information sharing with family law entities[192] while others expressly prohibit the sharing of information and impose penalties for the unauthorised sharing of information.[193]

4.156 Several reports in recent years have made recommendations for legislative reform to remove barriers to information sharing between the family law, family violence and child protection systems.[194]

4.157 The ALRC endorses state and territory child protection, family violence and other relevant legislation being amended to:

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190 See, eg, National Family Violence Prevention Legal Services Forum, *Submission 63*; Koori Caucus Working Group on Family Violence, *Submission 50*. NATSILS observed that information sharing needed to be done in a culturally sensitive way: NATSILS, *Submission 290*. Victoria Legal Aid also highlighted the need for culturally safe sharing of information about Aboriginal and Torres Strait Islander peoples: Victoria Legal Aid, *Submission 375*.

191 National Family Violence Prevention Legal Services Forum, *Submission 293*.

192 See, eg, *Children and Young Persons (Care and Protection) Act 1998* (NSW) ch 16A.

193 See, eg, *Children, Youth and Families Act 2005* (Vic) s 552, which imposes penalties for the unlawful sharing of Children's Court Clinic Reports.

194 Australian Law Reform Commission and NSW Law Reform Commission, above n 35, recs 30–3, 30–4, 30–9, 30–10, 30–11, 30–12, 30–13; Richard Chisholm, *Information-Sharing in Family Law & Child Protection: Enhancing Collaboration*, above n 168; Richard Chisholm, *The Sharing of Experts' Reports between the Child Protection System and the Family Law System*, above n 168; Family Law Council, above n 55, rec 5.

- remove any provisions that prevent state and territory agencies from disclosing relevant information, including experts' reports, to courts, bodies and agencies in the family law system in appropriate circumstances; and
- include provisions that explicitly authorise state and territory agencies to disclose relevant information to courts, bodies and agencies in the family law system in appropriate circumstances.

4.158 The relevant agencies can be identified though the recommended national information sharing framework.

Model legislative approaches

4.159 Chapter 16A of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) provides a model of facilitative information sharing legislative provisions. It allows information to be exchanged between prescribed bodies despite other laws that prohibit or restrict the disclosure of personal information.[195] The federal family courts are prescribed bodies for the purposes of this legislation.[196] Judge Harman[197] has recognised the benefits of these liberal information sharing provisions and the Hon Professor Chisholm AM has commented that it, 'would assist very substantially if states would introduce legislation along the lines of that of New South Wales providing for information sharing between Child Protection and the family courts'.[198]

4.160 The ALRC notes that the legislation establishing the Family Violence Information Sharing Scheme and the Child Information Sharing Scheme in Victoria would also provide useful models for consideration by states and territories.

4.161 There was support in submissions for states and territories to amend all applicable legislation, including family violence and child protection legislation, to facilitate the sharing of relevant information about families and children with entities in the family law system, in appropriate circumstances.[199]

4.162 National Legal Aid argued that one of the requirements for enhancing collaboration and information sharing is 'legislative underpinnings that allow or facilitate information sharing'.[200] CASA Forum submitted that: 'Victoria's experience in developing family violence and child information sharing frameworks points to the need for a clear

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195 A prescribed body may request another prescribed body to provide the requesting agency with any information held by the other body that relates to the safety, welfare or wellbeing of a particular child or young person or class of children or young persons: *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 245D.

196 *Children and Young Persons (Care and Protection) Regulation 2012* (NSW) reg 8.

197 Judge Harman, 'Practical Issues in Evidence Gathering in Interim Parenting Procedures' (2018) 27(1) *Australian Family Lawyer*.

198 Chisholm, *Information-Sharing in Family Law & Child Protection: Enhancing Collaboration*, above n 168, 44.

199 See, eg, Australian Institute of Family Studies, *Submission 396*; Relationships Australia National, *Submission 317*; Bravehearts Foundation Ltd, *Submission 279*.

200 National Legal Aid, *Submission 163*.

legislative foundation...'.[201] Relationships Australia Victoria argued that it is critical that Men's Behaviour Change Programs be included as relevant agencies in any legislative amendments, noting that 'these providers include family safety practitioners who are consistently assessing and sharing information about safety and risk with family violence systems and court systems throughout a significant time period'.[202]

4.163 There was also support in the submissions for state and territory legislation requiring police to inform family courts if a person applies for a gun licence and discloses that they are involved in family law proceedings.[203] This proposal was, however, strongly rejected by some stakeholders.[204] The ALRC recommends that further consideration be given to amendments in these terms by the Australian, state and territory governments.

4.164 The ALRC recognises that it is also critical that the *Family Law Act* enables family courts to share information with state and territory family violence and child protection systems when appropriate. Section 121(9)(aa) was inserted into the *Family Law Act* to make it clear that s 121 (Restriction on publication of court proceedings) does not apply in relation to the communication of any documents to authorities of states and territories that have responsibilities relating to the welfare of children and which are prescribed in the regulations. The ALRC recommend that s 121 be redrafted to provide greater clarity.[205] As part of that redrafting, the ALRC considers that it should be clearer that the section does not restrict sharing of information with professional regulators, government agencies, family relationship services, and service providers for children in connection with the agency's or organisation's provision of service to the family or a family member.

Expansion of the National Domestic Violence Order Scheme

Recommendation 3 The Australian Government, together with state and territory governments, should consider expanding the information sharing platform as part of the National Domestic Violence Order Scheme to include family court orders and orders issued under state and territory child protection legislation.

4.165 Expanding the scope of the National Domestic Violence Order Scheme (NDVOS) to include family court orders and orders issued under state and territory child protection

201 CASA Forum Victorian Centres Against Sexual Assault, *Submission 404*.
202 Relationships Australia Victoria, *Submission 267*.
203 See, eg, Shoalcoast Community Legal Centre Inc., *Submission 372*; Women's Legal Service NSW, *Submission 340*; Victorian Judicial Advisory Group in Family Violence (JAGFV), *Submission 333*; Uniting, *Submission 268*.
204 See Liberal Democratic Party, *Submission 314*; Sporting Shooters' Association of Australia, *Submission 275*.
205 Chapter 14.

legislation would have significant benefits for identifying and managing risk issues relating to families, including:

- allowing family courts to have immediate access to current and enforceable family violence orders without the need to rely upon subpoenas or evidence filed by the parties–this would be particularly valuable in urgent matters when issues of risk are raised;
- allowing family courts to have timely information about whether any current orders exist for the care and protection of children made under child protection legislation; and
- allowing professionals in the child protection system to have timely information about the existence of any family court orders.

4.166 NDVOS was introduced in November 2017. All family violence orders that have been issued since 25 November 2017 have automatic national recognition and enforceability. There is no longer a requirement for victims to apply to register these orders in other jurisdictions for them to be enforceable.[206] The scheme includes a secure web portal that allows local courts nationally to access information on orders held in the National Police Reference System.

4.167 In Western Australia a scheme for the sharing of orders between systems is already in place. The family consultants in the Family Court of Western Australia can immediately access the database of the Magistrates Court of Western Australia, enabling access to information about violence restraining orders, criminal convictions and pending charges.[207] Family Consultants are able to provide information obtained from the database directly to the specialist Family Law Magistrates, parties and their representatives in the Child Related Proceedings List.[208] The Family Court of Western Australia also has an information sharing arrangement with the Department for Communities and Legal Aid Western Australia, which enables the court to be able to quickly access information from the Department for Communities (and share information with the Department and Legal Aid) about children who are the subject of Family Court proceedings in certain circumstances.[209]

4.168 Several reports have made recommendations for a national database to include family violence, family court and state and territory child protection orders.[210] Submissions supported a national database of court orders,[211] with particular support being given to

206 Australian Criminal Intelligence Commission, 'Domestic violence', <www.acic.gov.au>; Australian Government Attorney-General's Department, 'National Domestic Violence Order Scheme', <www.ag.gov.au/ndvos>.

207 Family Court of Western Australia, *Submission 311*.

208 Ibid.

209 Ibid.

210 Family Law Council, above n 55, rec 5; House of Representatives Standing Committee on Social Policy and Legal Affairs, above n 5, rec 6; Victoria, Royal Commission into Family Violence, *Report and Recommendations, Volume IV* (2016) rec 134.

211 See, eg, Springvale Monash Legal Service, *Submission 161*; Centre for Excellence in Child and Family Welfare, *Submission 102*; CatholicCare Sydney, *Submission 79*; Family Court of Australia, *Submission*

the expansion of the National Domestic Violence Order Scheme.[212] Monash Gender and Family Violence Prevention Centre submitted that

> Specifically, we support Proposal 11-4 [in the Discussion Paper] as it relates to the sharing of family court orders. Our research on family violence risk indicates that family court orders and/or proceedings are a family violence risk factor. The sharing of information about family court orders and/or proceedings will enhance risk assessment and risk management.[213]

4.169 Relationships Australia National submitted that it

> supports this proposal, and would urge all governments to act with expedition and urgency in implementing it. We concur with the view of Women's Legal Services Australia that issues of timeliness and accuracy will need to be considered.[214]

4.170 The National Family Violence Prevention Legal Service submitted that its members see value in family court and child protection orders being included

> so as to give a complete a picture of the orders in place relevant to risk issues. For example, inaccurate information about arrangements for children could have been given by parties to IVO proceedings which would be relevant to family law proceedings. However, we emphasise the need for ongoing monitoring and strategies to ensure that family court orders remain up to date, with the onus on the courts issuing the orders to register them.[215]

4.171 The ALRC acknowledges that, as part of the $11 million of funding the Australian Government (announced on 5 March 2019) to improve information sharing between the family law and child protection and family violence systems, there will be scoping of a national technological solution to facilitate the prompt sharing of targeted information between these systems.

68; National Family Violence Prevention Legal Services Forum, *Submission 63*; Law Council of Australia, *Submission 43*; Relationships Australia, *Submission 11*.

212 See, eg, Monash Gender and Family Violence Prevention Centre (MGFVPC), *Submission 411*; Family Law Practitioners' Association of Western Australia (Inc), *Submission 410*; Safe Steps Family Violence Response Centre, *Submission 408*; Relationships Australia National, *Submission 317*; National Family Violence Prevention Legal Services Forum, *Submission 293*; Relationships Australia Victoria, *Submission 267*; Association of Family and Conciliation Courts Australian Chapter, *Submission 258*.

213 Monash Gender and Family Violence Prevention Centre (MGFVPC), *Submission 411*.

214 Relationships Australia National, *Submission 317*.

215 National Family Violence Prevention Legal Services Forum, *Submission 293*.

5. Children's Matters

Contents

Introduction

5.1 In this Chapter, the ALRC recommends a number of amendments to Pt VII to promote the best interests of the child in family law matters. These amendments include: reducing and simplifying the factors to be taken into account in determining which arrangements are most likely to promote a child's best interests; removing mandatory consideration of particular arrangements, including equal shared time; amending the presumption of equal shared parental responsibility; and ensuring the definition of 'family member' is appropriate to Aboriginal and Torres Strait Islander people. The ALRC also recommends that the Less Adversarial Trial approach should be reinvigorated and applied in all family courts.

5.2 Part VII provides the family courts with a wide power to make such orders about children's care and living arrangements, parental responsibility, and other matters relevant to a child's welfare ('parenting orders') as it thinks proper. In making parenting orders,

Pt VII provides that the best interests of the child must be the paramount consideration. However, the current law imposes on courts a complex set of requirements (sometimes described as a 'pathway') to determine what is in the child's best interests.

5.3 The character of parenting matters in the courts has changed over the past two decades, with complex factors such as family violence becoming much more prominent. A survey of cases conducted by the Family Court in 2003 found that, in considering the best interests of children, factors relating to risk of harm were unlikely to be of high or medium importance.[1]

5.4 In contrast, a 2014 AIFS Study found that 53.7% of parents who used the courts as their resolution pathway in 2014 reported physical violence was relevant to their situation prior to separation.[2] Parents who used the court as their resolution pathway reported a mean of three complex factors and 38.1% reported four or more complex factors.[3]

5.5 Parents who used other resolution pathways (for example intra-party discussions, lawyers, FDR and mediation) reported a lower mean number of complex factors, and were less likely to report four or more complex factors.[4]

5.6 These findings suggest that the legislative framework needs to support agreement making and decision making in a variety of contexts and for families with diverse needs. Court-based decision making applies to the smallest volume of families in each annual cohort, but these families also have the highest concentrations of complex psycho-social needs. Such families are also present in all the other formal and informal pathways identified by AIFS in lesser concentrations.[5]

5.7 The legislation needs to provide a decision making framework for judicial decision making, and a guide for parenting decisions made outside the court. In doing so, the aim should always be that any decisions should safeguard the best interests of the child.

5.8 Practitioners and judicial officers have indicated in consultations that there are a number of problems with the existing framework and that the legislative provisions can

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1 The survey was conducted by a random selection of 91 cases between Jan–June 2003. It considered which paragraphs of s 68F of the *Family Law Act* were considered to be of 'medium or high' importance in judicially determined cases. Factors relating to child protection were identified only in a minority of cases (protection from harm, 38.5% of cases; family violence event, 24.2% of cases; family violence orders, <10% of cases). Meanwhile the top three criteria (nature of the relationship, likely effect on a child's circumstances, and attitudes expressed by parents) were each considered of high or medium importance in over 60% of cases. These data can be found in Figure 1.2 of the House of Representatives Standing Committee on Family and Community Affairs, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation* (Commonwealth of Australia, 2003). The data were originally provided by the Family Court of Australia in Submission 1550 to that inquiry.

2 Rae Kaspiew et al, *Evaluation of the 2012 Family Violence Amendments: Synthesis Report* (Australian Institute of Family Studies, 2015) 16, Table 2.2.

3 Ibid 16. These factors were: problems with alcohol or drug use, gambling, social media use and pornography, as well as mental ill-health, emotional abuse, physical violence and safety concerns for themselves and their children as a result of ongoing contact with the other parent.

4 Ibid.

5 Ibid.

operate in a way that diverts attention from the best interests of children.[6] In the matter of *Zabini & Zabini,* Warnick J described applying the best interests framework in interim matters as causing 'a dilemma of labyrinthine complexity to arise'.[7] Judge Riethmuller outlined the complexities of the pathway in an article entitled 'Deciding Parenting Cases under Part VII — 42 Easy Steps'.[8]

5.9 Previous reports have recommended reconsideration of the current pathway. The Interim Report of the Family Law Council on *Families with Complex Needs* recommended that Pt VII of the *Family Law Act* be amended to provide a simplified decision making framework for interim parenting matters.[9] The SPLA *Family Violence Report* recommended that the ALRC develop amendments to Pt VII of the *Family Law Act*, and specifically consider removing the presumption of equal shared parental responsibility.[10]

5.10 In addition to the substantive law, there are significant concerns that the procedures used in the family courts are overly adversarial, are intimidating for litigants, and exacerbate conflict. The creation of the Family Court was intended to provide separating families with a specialist court process that was 'different in character from other areas of civil law'.[11] Reflecting the then government's recognition that family law deals with issues of emotional rather than commercial concern, the *Family Law Act* provided that proceedings should be conducted 'without undue formality', and with an emphasis on helping separated couples with their relationship issues, and not just their legal problems.[12]

5.11 In light of this, the Family Court initiated an internal reform process in 2002 to address ongoing concerns about the adverse impacts of the adversarial process in children's matters. Known as the Children's Cases Program (CCP), and later the Less Adversarial Trial (LAT), this innovation was championed by then Chief Justice Alastair Nicholson, who indicated an intention to trial a more 'active and inquisitorial' approach

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6 See also Helen Rhoades, 'Rewriting Part VII of the Family Law Act' (2015) 24(3) *Australian Family Lawyer* 3.

7 *Zabini & Zabini* [2010] FamCAFC 10, [3].

8 Judge G Riethmuller, 'Deciding Parenting Cases under Part VII—42 Easy Steps' (2015) 24(3) *Australian Family Lawyer* 38.

9 Family Law Council, *Interim Report to the Attorney-General in Response to the First Two Terms of Reference on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (2015) rec 2.

10 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (December, 2017) rec 19.

11 Margaret Harrison, *Finding a Better Way: A Bold Departure from the Traditional Common Law Approach to the Conduct of Legal Proceedings* (Family Court of Australia, 2007) 9. See also Joint Select Committee on the Family Law Act, Parliament of Australia, *Family Law in Australia: Report of the Joint Select Committee on the Family Law Act Volume 1* (1980) [7.7].

12 Helen Rhoades, 'The Family Court of Australia: Examining Australia's First Therapeutic Jurisdiction' (2010) 20 *Journal of Judicial Administration* 67, 69. See also Diana Bryant and John Faulks, 'The "Helping Court" Comes Full Circle: The Application and Use of Therapeutic Jurisprudence in the Family Court of Australia' (2007) 17 *Journal of Judicial Administration* 93.

to children's matters[13] that would reduce the scope for litigation to be conducted 'as a forensic war'.[14] Following a positive evaluation of the CCP pilot, the LAT approach to case management was codified in the *Family Law Act*.[15]

5.12 However, submissions to this Inquiry, including from the Family Court, indicate that the use of Div 12A by judges has waned over time, and that it is now rarely used in most court registries. Several submissions suggested that one way of addressing the problems for families described above would be to reinvigorate the use of Div 12A in cases involving families with complex needs.[16]

Legislative framework

5.13 Part VII of the *Family Law Act* provides a framework for determining parenting arrangements after separation. Part VII provides the family courts with a wide power to make such orders about children's care and living arrangements, parental responsibility, and other matters relevant to a child's welfare ('parenting orders') as it thinks proper.[17] In making parenting orders, Pt VII provides that the best interests of the child must be the paramount consideration.[18]

5.14 However, the current law imposes a complex pathway for decision making by the courts when determining what arrangements will best promote the child's best interests. The ALRC recommends a number of changes to simplify, clarify, and improve the pathway to ensure it best reflects the objective that the best interests of the child are paramount in parenting matters.

5.15 Much of the current framework for determining what is in the best interests of a child was added to the *Family Law Act* by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth).

5.16 Further amendments made in 2011[19] prioritised the safety of the child in parenting matters but were explicitly intended to retain the substance of the 2006 amendments.[20]

5.17 Currently, the *Family Law Act* provides a number of steps that a court must follow in order to apply the principle that the best interests of a child be paramount to the decision.

5.18 These steps include:[21]

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13 Harrison, above n 11, 34.
14 Ibid ix.
15 *Family Law Act 1975* (Cth) pt VII div 12A.
16 Women's Legal Services Australia, *Submission 45*; Australian Bar Association, *Submission 13*.
17 *Family Law Act 1975* (Cth) s 65D.
18 Ibid s 60CA.
19 *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth).
20 Explanatory Memorandum, Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011.
21 A more thorough outline of the pathway can be found in Judge G Riethmuller, above n 8.

- the court must consider specified factors (comprising two 'primary considerations' about the child's safety and meaningful relationships with both parents, and 13 'additional considerations') and make findings about them if possible;[22]
- the court must decide whether the legislative presumption of equal shared parental responsibility applies or is rebutted;[23]
- if the court makes or proposes to make an order for equal shared parental responsibility, it must consider whether the child spending equal time with each of the parents would be in the best interests of the child, and whether it would be 'reasonably practicable'. If it is, the court must then consider making an order that the child spend equal time with each of the parents;[24]
- if the court makes (or proposes to make) an order that provides for equal shared parental responsibility but does not make an order for equal time, the court must then consider whether the child spending 'substantial and significant time' with each parent would be in the child's best interests, and whether it is 'reasonably practicable'. If it is, the court must consider making such an order;[25] and
- if neither equal time nor substantial and significant time is considered to be in the child's best interests, the court may make such orders as the court decides are in the best interests of the child.[26]

5.19 Submissions to this Inquiry expressed a number of concerns about this pathway, including that:

- it is complex and repetitive,[27] which has increased costs for clients and has created productivity issues for the courts;
- it has created community confusion by having a presumption of equal shared parental responsibility, which is commonly misunderstood as being a presumption of equal shared time;[28]
- the requirement that parents must jointly make decisions provides scope for conflict in the absence of clear information about which decisions do not require consultation;[29]
- insufficient weight is given to the views of the child in decision making;[30] and
- greater emphasis should be placed on ensuring the safety of the child, and of the child's carers.[31]

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22 *Family Law Act 1975* (Cth) s 60CC(1).
23 Ibid s 61DA.
24 Ibid s 65DAA(1).
25 Ibid s 65DAA(2).
26 Ibid s 65DAA; *Goode & Goode* [2006] FamCA 1346. However, the pathway does not necessarily need to be analysed in this order: *Starr & Duggan* [2009] FamCAFC 115, [35].
27 See, eg, CatholicCare Victoria Tasmania (CCVT), ***Submission 115***.
28 See, eg, Queensland Law Society, ***Submission 221***.
29 See, eg, Aboriginal Legal Service of Western Australia, ***Submission 64***.
30 See, eg, Centre for Excellence in Child and Family Welfare, ***Submission 102***.
31 See, eg, Queensland Family and Child Commission, ***Submission 16***.

5.20 For example, the Law Council of Australia submitted that the

> 'legislative pathway' currently mandated under the Act results in the family courts needing to undertake a significant number of steps before reaching a consideration of the subject child's best interests. It is best interests that ought to be the primary focus of any dispute under the Act and the route to determining them should be direct, rather than one that is convoluted, misunderstood by the public, and based on a rebuttable presumption.[32]

5.21 Submissions also emphasised the need to make safety an overriding consideration in all family law decision making.[33]

5.22 A review of the 2006 amendments conducted in 2009 found that the provisions were 'seen by lawyers and judicial officers to be complex and cumbersome to apply in advice-giving and decision making practice.'[34] The review also raised the concern

> that the complexity of the new provisions, together with the presumption of equal shared parental responsibility have to some extent diverted attention from the primacy of the best interests of the child, particularly in negotiations over parenting arrangements.[35]

5.23 The ALRC recommends a reshaped decision making framework for parenting orders. This includes:

- retaining the paramountcy principle in its current form;
- removing the objects and principles provisions;
- collapsing the different tiers of considerations within the best interests factors;
- clarifying, simplifying, and amending the list of considerations for determining what is in the child's best interests;
- amending the presumption of equal shared parental responsibility to be a presumption of joint decision making about major long-term issues; and
- removing mandatory consideration of particular arrangements including equal time.

The paramount importance of the child's best interests

5.24 In the Discussion Paper, the ALRC proposed that safety should be included as a part of the principle that the best interests of the child must be paramount ('the paramountcy principle'). However, the ALRC has not been persuaded that any change is required.

5.25 The paramountcy principle underpins the *Family Law Act*'s emphasis on children's needs, rather than parents' rights. It is also consistent with Australia's obligations under

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32 Law Council of Australia, *Submission 43*.
33 See, eg, Gowland Legal, *Submission 141*.
34 Rae Kaspiew et al, *Evaluation of the 2006 Family Law Reforms* (Australian Institute of Family Studies, 2009) 366.
35 Ibid E4.

the CRC, which requires the best interests of the child to be 'a primary consideration' in any proceedings regarding the child.[36] Submissions supported maintaining the child focus of the Act, and retaining the paramountcy principle.[37] For example, Relationships Australia submitted that 'above all, … the wellbeing of children remains paramount (and, as a corollary, will prevail over the rights and interests of adults)'.[38]

5.26 The family law system increasingly deals with families with complex needs, including those that represent a risk to the child's safety. As a result, safety is now a key consideration in much family law decision making.[39] There was significant support for the elevation of safety to be part of the paramountcy principle,[40] however a number of submissions raised concerns about this change. For example, National Legal Aid submitted that:

> Best interests encompasses safety and to separate it out may imply it is not a component of best interests. This has the potential to raise a range of issues, including the role of child protection authorities and appropriate benchmarks for intervention, and the question of what else might not be encompassed by best interests.
>
> NLA is concerned that this proposed amendment has the capacity to complicate interpretation of the legislation rather than to simplify it which is the aim suggested in Proposal 3-1.[41]

5.27 The concern about unintended consequences was expressed in other submissions.[42] As the ALRC noted in the Discussion Paper, the proposal to include safety in the paramountcy principle was not envisaged to represent a significant legal change because safety is logically already an important aspect of best interests. Moreover, there is some precedent in other legal systems for similar constructions. For example, in New Zealand, the *Care of Children Act 2004* (NZ) provides that the 'child's welfare and best interests' is the paramount consideration.[43]

5.28 Other submissions raised the concern that explicitly including safety in the paramountcy principle has the unfortunate effect of suggesting that the child's safety is a separate consideration to the child's best interests and raises questions about the interplay of the two concepts.[44]

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36 *Convention on the Rights of the Child*, opened for signature 20 December 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 3.1.

37 See, eg, Victoria Legal Aid, *Submission 61*.

38 Relationships Australia, *Submission 11*.

39 For submissions on safety as the paramount consideration see, eg, Centacare Family and Relationship Services (CFRS), *Submission 125*.

40 See, eg, Interact Support Inc, *Submission 389*; Australian Dispute Resolution Advisory Council (ADRAC), *Submission 386*; National Family Violence Prevention Legal Services Forum, *Submission 293*.

41 National Legal Aid, *Submission 297*.

42 Relationships Australia National, *Submission 317*; The Hon M Finn, *Submission 308*; Law Council of Australia, *Submission 285*.

43 *Care of Children Act 2004* (NZ) s 4.

44 See, Family Court of Australia, *Submission 400*.

5.29 On balance, the ALRC recommends that the objective of prioritising safety is better served by retaining the paramountcy principle in its current form. The risks of confusion and unintended consequences outweigh the value of signposting safety in the paramountcy principle.

Principles and objects

Recommendation 4 Section 60B of the *Family Law Act 1975* (Cth) should be repealed.

5.30 Legislation commonly includes objects provisions which are designed to assist with statutory interpretation. These may be used by courts and other users of the legislation to assist them to resolve ambiguities or other interpretive difficulties in line with the intentions of Parliament.[45] They do not form part of the substantive law. There are no objects for the *Family Law Act* as a whole, although principles for decision making under the Act are provided for in s 43. However, Pt VII, s 60B of the Act provides both 'objects' and what are said to be 'principles' underlying those objects.

5.31 Section 60B substantially overlaps with s 60CC (the best interests factors), but is inconsistent in a number of respects. As noted by the Hon Professor Chisholm AM, the existing form of s 60B appears to have had limited practical effect and could 'easily be omitted'.[46]

5.32 Objects provisions are intended to promote clarity and consistent application of an Act. In the Discussion Paper, the ALRC proposed new objects and principles for Pt VII, which were intended:

- to clearly identify to readers of the legislation the values and approach that are embodied in the legislation; and
- to assist with legislative interpretation of provisions about parenting arrangements.

5.33 Many submissions supported the proposed principles.[47] However, it was also clear from submissions that the interaction between the objects and principles, and the substantive law, was unclear. Many submissions appeared to assume that the principles would directly affect decision making, which is not the case.[48] Further, as some

45 See *Maldera & Orbel* [2014] FamCAFC 135, [75].

46 Richard Chisholm, 'Re-Writing Part VII of the Family Law Act: A Modest Proposal' (2015) 24(3) *Australian Family Lawyer* 17, 10–11.

47 Women's Legal Services Australia, *Submission 366*; NATSILS, *Submission 290*; Resolution Institute, *Submission 260*.

48 See, eg, Rape & Domestic Violence Services Australia, *Submission 287*; Association of Family and Conciliation Courts Australian Chapter, *Submission 258*.

submissions pointed out, the principles contained significant repetition and overlap with the best interests factors,[49] and may be confusing.[50] As the Hon Mary Finn explained,

> if the aim is, as it should be, to simplify the law concerning family breakdown, then such provisions should be removed from the FLA.
>
> If such provisions use identical concepts to those used in the operative provisions of the Act, they are unnecessary verbiage. If they introduce arguably additional concepts to the operative provisions, they can lead to confusion and unnecessary debate.[51]

5.34 Some elements of the principles have an effect that is consistent with the common law principles of statutory interpretation. For example, where a statute is ambiguous, it should be interpreted in a manner consistent with Australia's obligations under international conventions.[52] Given these common law principles, those elements of s 60B that relate to international law may not materially affect the interpretation of the provisions of Pt VII.

5.35 Noting this confusion, the similarity between the principles and the best interests factors, and the limited legal effect of the principles, the ALRC considers that removal of the objects and principles would reduce confusion and enhance the clarity of Pt VII. The ALRC considers that simplification of the core decision making pathway in Pt VII should instead be pursued to promote clarity of the considerations to be applied in making parenting decisions.

Simplifying and clarifying judicial decision making

5.36 Submissions and academic commentators have criticised the complexity of the decision making framework in Pt VII of the *Family Law Act*.[53] These include concerns about:

- the lengthy, complex, and repetitive list of factors to be considered in determining a child's best interests in s 60CC;[54]
- the confusion caused by the distinction between 'primary' and 'additional' considerations in s 60CC;[55]

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49 National Legal Aid, *Submission 297*.
50 Z Rathus, *Submission 298*.
51 The Hon M Finn, *Submission 308*.
52 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287. See, generally, Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) [102]–[103].
53 See, eg, Z Rathus, *Submission 92*.
54 See Australian Dispute Resolution Advisory Council Inc (ADRAC), *Submission 12*. See also Helen Rhoades et al, 'Another Look at Simplifying Part VII' (2014) 28 *Australian Journal of Family Law* 114.
55 See, eg, Relationships Australia, *Submission 11*.

- the requirement to assess a child's best interests multiple times (in the context of the presumption of equal shared parental responsibility, the provisions for care-time arrangements, and generally in terms of the proposed arrangements);[56] and
- the overall complexity of the decision making framework, and the risk that it distracts from an overall consideration of the best interests of the child.[57]

5.37 It is critical that legislative guidance on making decisions about the care of children is as simple and easy to understand as possible. This is particularly important to:

- assist people without legal representation to understand their obligations under the Act and how the court will make decisions about children;
- avoid misunderstandings about what the guidance contained in the Act means;
- reduce the length and complexity of legal documents required for proceedings, thereby reducing costs to litigants, and reducing delay; and
- reduce the length and complexity of judgments in parenting cases and enhance their comprehensibility for litigants.

5.38 The ALRC proposes that this decision making framework should be replaced with a simpler framework that:

- emphasises the paramount importance of the best interests of the child;
- provides core factors to be applied in determining what is most consistent with a child's best interests, with an emphasis on safety, while recognising that other factors may be relevant to a particular case; and
- emphasises that parenting arrangements should be shaped around the circumstances of the particular child.

5.39 The current and recommended decision making pathways are shown at Appendix J of the Report.[58] For care-time arrangements, the ALRC recommends that decision and agreement making should focus on the best interests of children, taking into consideration a more concise list of factors, and any other matters that are relevant. In relation to parental responsibility, the ALRC recommends that the practical effect of the current law be preserved, but that the presumption of equal shared parental responsibility be replaced with a presumption of joint decision making about major long-term issues. The link between a court's decision on parental responsibility and the matters it must consider in relation to care-time arrangements should be removed.

5.40 It is important that parents, carers, and other decision makers are provided with appropriate guidance about what arrangements may be most consistent with the best interests of children. As discussed later in this chapter, the ALRC recommends that evidence-based explanatory material should be developed to assist parents and carers in

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56 See, eg, Victorian Women Lawyers, *Submission 84*. See also Rhoades et al, above n 54, 125.
57 Rhoades et al, above n 54, 128.
58 See Appendix J, Figure 1 and Figure 2. See also Judge Riethmuller, above n 8.

considering what arrangements might best support the child's best interests in particular situations.

5.41 The approach recommended by the ALRC would be less complex and prescriptive about the steps to be taken in determining what is most likely to be consistent with the best interests of the child. However, judicial officers will still be required to provide adequate reasons for their decisions, which will allow scrutiny and appeal of decisions where clear errors have been made.[59] In practical terms, a simplification of the decision making framework may make it easier for judicial officers, in their reasons for orders, to focus on explaining to parties why they have made a particular decision, rather than on ensuring that their judgment is appeal-proof by addressing all elements of the current decision making pathway.

Simplifying the best interests factors

Recommendation 5 Section 60CC of the *Family Law Act 1975* (Cth) should be amended so that the factors to be considered when determining parenting arrangements that best promote a child's best interests are:

- what arrangements best promote the safety of the child and the child's carers, including safety from family violence, abuse, or other harm;
- any relevant views expressed by the child;
- the developmental, psychological, and emotional needs of the child;
- the benefit to the child of being able to maintain relationships with each parent and other people who are significant to them, where it is safe to do so;
- the capacity of each proposed carer of the child to provide for the developmental, psychological, and emotional needs of the child, having regard to the carer's ability and willingness to seek support to assist them with caring; and
- anything else that is relevant to the particular circumstances of the child.

5.42 When the *Family Law Act* was first enacted, it provided very limited guidance on how the best interests of the child were to be determined. Over successive amendments, a list of factors was inserted, expanded, and eventually restructured into separate lists of 'primary' and 'additional' considerations.

5.43 Section 60CC currently provides the factors that a court must take into account in determining best interests, comprising:

59 For example, errors such as failure to take into account a relevant consideration, taking into account an irrelevant consideration, or an error of law.

- two primary considerations: the benefit to the child of a meaningful relationship with both parents, and the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect, or family violence;
- thirteen additional considerations; and
- any other matter that is relevant.

5.44 The 2011 family violence amendments inserted a provision specifying that protection from harm should be given greater weight than maintaining relationships in the event of a conflict.[60]

5.45 Although there is support for the Act to provide factors which are to be considered in determining children's best interests,[61] academic commentary and submissions have made a number of criticisms of s 60CC. One criticism is of the division of the best interests factors into a hierarchy of primary and additional factors. The ACT LGBTIQ Ministerial Advisory Council argued that this

> division is not supported by international human rights law which recognises that all the rights of the child, as outlined in the *Convention on the Rights of the Child*, together constitute the best interests of the child and must be treated holistically.[62]

5.46 The Hon Professor Chisholm AM has similarly argued that it is 'unhelpful for the law to speak in terms of the twin pillars [primary and additional considerations]. All the circumstances must be considered and evaluated in each case.'[63]

5.47 Other submissions recommended that other considerations, such as connection to culture for Aboriginal and Torres Strait Islander children, should be elevated to primary considerations.[64] AIFS also pointed to evidence that despite s 60CC(2A), which provides that greater weight must be given to the protection from harm than to a meaningful relationship with both parents, lawyers and non-legal professionals are not confident that appropriate weight is being given to protection from harm, and analysis of judgments shows that the provision has limited effect.[65]

5.48 A further issue with s 60CC is the number of factors that are explicitly stated as potentially relevant. Chisholm has previously proposed a redraft that would reduce this list from 15 to 10 factors.[66]

5.49 The sheer number of factors to be considered is confusing, increases legal costs and delays, and does not necessarily capture the issues that are particularly relevant to a

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60 *Family Law Act 1975* (Cth) s 60CC(2A).
61 See, eg, Victoria Legal Aid, *Submission 61*.
62 ACT LGBTIQ Ministerial Advisory Council, *Submission 193*.
63 Chisholm, above n 46, 14.
64 National Family Violence Prevention Legal Services Forum, *Submission 63*.
65 Australian Institute of Family Studies, *Submission 206*.
66 Chisholm, above n 46, 4–5. Many submissions supported Chisholm's suggested amendments, eg, Queensland Law Society, *Submission 221*; Marrickville Legal Centre, *Submission 137*; Family Court of Australia, *Submission 68*; Relationships Australia, *Submission 11*.

case. The ALRC considers that it is not possible or desirable to capture all of the myriad circumstances that may be relevant to a decision about parenting arrangements in the legislation. The existing list of factors identifies issues that may be relevant but does not provide any useful context that would assist readers of the *Family Law Act* to apply them to their own particular circumstances.

5.50 The *Court Outcomes Project* considered how frequently different factual issues were raised in family law cases, pre and post the 2012 reforms.[67] The study showed that the most commonly raised issues, particularly in judicially determined matters, were those related to the safety of the child.[68] Others raised commonly were issues relating to the parent/child relationship[69] and parenting capacity.[70]

5.51 The ALRC proposes that the approach to providing guidance on determining what is most consistent with the best interests of a child should be reconfigured. The reconfigured list should remove the two-tier structure of 'primary' and 'additional' considerations and focus on a core list of considerations that are likely to be relevant to a large majority of matters. This approach will provide much clearer guidance for parents and others outside of a court-based decision making context, providing them with more meaningful assistance in working out what arrangements to put in place.

5.52 The ALRC recommends that six factors should be explicitly retained in a reconfigured s 60CC, and the legislative prioritisation should be abandoned. Generally speaking, the recommended factors are consistent with the most commonly present factors in the *Court Outcomes Project*.[71] The Australian Psychological Society has developed a position paper that lists considerations that provide conditions for promoting child wellbeing during and after parental separation.[72] The selected considerations also substantially reflect the priorities expressed by participants in a 2018 AIFS study of children and young people from separated families.[73] The ALRC's selected considerations are informed by this paper and the AIFS Study and reflect factors that the ALRC considers will best serve the child's welfare and development.

5.53 Submissions were generally supportive of the similar list provided in the Discussion Paper to this Inquiry, with a range of specific suggestions.[74] Some adjustments have been made to that list to reflect concerns raised in submissions.

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67 See tables 3.14 and 3.15 of Rae Kaspiew et al, *Court Outcomes Project (Evaluation of the 2012 Family Violence Amendments)* (Australian Institute of Family Studies, 2015).

68 Eg, for judicially determined matters (pre-reform%/post-reform%): Parental family violence (52/65), protection from abuse (30.5/42.3), parental alcohol/substance misuse (38.3/42.2).

69 For judicially determined matters (pre-reform%/post-reform%): Facilitated other parent's relationship (25.7/24.4), parental engagement with child (23.0/13.1), child's right to a meaningful relationship (9.6/11.5).

70 For judicially determined matters: pre-reform 32.3%, post-reform 28.2%.

71 Kaspiew et al, above n 67.

72 Australian Psychological Society, *Child Wellbeing After Parental Separation: Position Statement* (2018).

73 Rachel Carson et al, *Children and Young People in Separated Families: Family Law System Experiences and Needs* (Australian Institute of Family Studies, 2018) 29–43.

74 Although some submissions preferred the best interests factors proposed by Chisholm in his paper on simplifying Part VII: see, eg, P Parkinson, *Submission 341*.

Safety

5.54 While the order of considerations has no legal effect, a number of submissions noted concerns that the order of considerations could suggest priority.[75] For example, having the safety of the child as anything but the first consideration could be interpreted as the safety of the child being subject to any prior considerations. This concern is particularly relevant when parties outside a court process attempt to apply the *Family Law Act* to their own circumstances without assistance from a legal practitioner.

5.55 As such, safety for the child, and for the child's carers, has been moved to the first consideration. Safety is included as a consideration due to the evidence of the high degree of risk factors that exist in family law cases, particularly in cases where parents use more formal pathways to resolve their dispute,[76] and the strong support in submissions for safety to be a key factor in decision making about children.[77] In its position paper the Australian Psychological Society notes as one factor to safeguard a child's wellbeing, 'the necessity of avoiding exposure of children to risk factors, especially high conflict and emotional, verbal or physical violence, given overwhelming evidence of negative effects'.[78] A 'safe and secure living environment' was also identified as a key issue in the post-separation context by children and young people in the AIFS 2018 study.[79]

5.56 Submissions raised some concerns that 'safety of the child' was perhaps not broad enough to protect the child from various types of harm.[80] It is the view of the ALRC that the concepts of 'safety' and 'harm' are broad enough in their ordinary meaning to cover each of those specific concerns. Further, even if expressed inclusively, inclusion of qualifiers such as 'including psychological harm' or 'including family violence' risks the concepts of 'safety' and 'harm' being narrowly interpreted outside of the explicit inclusions.

Child's views

5.57 The views expressed by the child are included as the next consideration because of the fundamental importance of the child's voice being heard. Several research studies

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75 See, eg, Interact Support Inc, *Submission 389*; The Hon M Finn, *Submission 308*; National Legal Aid, *Submission 297*.

76 See the analysis of complex issues and family law pathways in Rae Kaspiew et al, above n 2.

77 See eg, Interrelate Limited, *Submission 416*; CASA Forum Victorian Centres Against Sexual Assault, *Submission 404*; P Easteal and L Young, *Submission 394*; Fighters Against Child Abuse Australia (FACAA), *Submission 393*; Interact Support Inc, *Submission 389*; Yourtown, *Submission 388*; Women's Legal Services Australia, *Submission 366*; J Kirkpatrick, *Submission 343*; Swaab, *Submission 332*; D Cooper, *Submission 320*; Relationships Australia National, *Submission 317*; Z Rathus, *Submission 298*; National Family Violence Prevention Legal Services Forum, *Submission 293*; NATSILS, *Submission 290*; Rape & Domestic Violence Services Australia, *Submission 287*; Domestic Violence Victoria, *Submission 284*; Centre for Excellence in Child and Family Welfare, *Submission 283*.

78 Australian Psychological Society, above n 72, 3.

79 Rachel Carson et al, above n 73, 29.

80 See eg, Interact Support Inc, *Submission 389*; Relationships Australia National, *Submission 317*; and Z Rathus, *Submission 298*; Rape & Domestic Violence Services Australia, *Submission 287*; Women's Legal Service NSW, *Submission 218*.

have shown this factor is given insufficient emphasis in current family law system practice.[81] Prioritisation of children's views is consistent with the AIFS 2018 finding that children and young people 'expressed a strong desire for their parents and other adults to listen to their point of view throughout the process of separation and beyond'.[82] As suggested in some submissions,[83] this consideration is listed after safety (and not as the first item in the list as it appeared in Discussion Paper Proposal 3–5), to discourage excessive reliance on the child's voice where it may be unsafe to do so.

Significant relationships

5.58 The consideration of the benefit to the child of being able to maintain significant relationships with each of the child's parents and with others with whom the child has a relationship that is significant to the child is intended to replace the existing consideration of the benefit to the child of having a meaningful relationship with both of the child's parents.

5.59 The Australian Psychological Society highlighted the importance of maintenance of parental relationships (where safe) for a child's welfare. It expressed its support for 'parenting arrangements that respect each parent's continued shared responsibility for children and enable children to maintain a meaningful relationship with both parents, even if one is non-resident, provided it is safe to do so'.[84]

5.60 Children and young people in the AIFS 2018 study also 'expressed their need for supportive and understanding parental relationships and multiple social and emotional supports'.[85]

5.61 As compared with the existing s 60CC(2A), the recommended wording reflects that there are other meaningful relationships that may be relevant considerations. For example, relationships with grandparents or siblings may be particularly relevant in some cases. The new wording is also intended to remove the presumption that a relationship with a parent is necessarily in the child's interest even when the child has had no relationship with the parent to that point. The maintenance of significant relationships will likely be a factor in all cases, and is a relatively common factor in judicially determined cases.[86]

Child's needs and parental capacity

5.62 The developmental, psychological, and emotional needs of the child are likely to be relevant in a very large proportion of cases, as is the capacity of proposed carers to

81 In the Court Outcomes Project in the evaluation of the 2012 family violence amendments, it was raised as a significant factual issue in 8.3% of pre-reform cases and 7.9% of the post-reform samples: Kaspiew et al, above n 67. See also Rae Kaspiew et al, *Independent Children's Lawyers Study* (Australian Institute of Family Studies, Final Report, 2nd edn, 2014); Rachel Carson et al, above n 73.

82 Rachel Carson et al, above n 73, 29.

83 See, eg, Interact Support Inc, *Submission 389*; The Hon M Finn, *Submission 308*.

84 Australian Psychological Society, above n 72, 3.

85 Rachel Carson et al, above n 73, 29.

86 Kaspiew et al, above n 67.

provide for these needs. The Australian Psychology Society listed developmental needs as one of the important factors in protecting a child's wellbeing and noted that it

> supports developmentally appropriate care and parenting arrangements following separation. Arrangements must be tailored around parental capacity to provide warm, responsive and supportive relationships, and take into account the child's developmental stage, wishes, needs, concerns, and capacities to cope with change.[87]

5.63 Submissions raised the concern that this consideration could unfairly discriminate against parents with a disability, due to public perception that parents with a disability were less capable parents.[88] To mitigate this concern, the clause 'ability and willingness to seek support to assist them with caring' has been included in the Recommendation.

5.64 The effect of that clause is not limited to parents with a disability. It is relevant in all cases where a parent faces obstacles to providing support for the developmental, psychological, and emotional needs of a child, but is able and willing to seek support to address that difficulty. This is also intended to address the perverse situation where a person who has experienced family violence is considered to have lower parenting capacity due to unresolved trauma from family violence.

Anything else relevant

5.65 As noted, it is not possible to describe in advance all of the circumstances that may be relevant to a child. The final factor allows anything else that is relevant to the particular circumstances of the child to be taken into account. This provision provides flexibility to ensure that the decision making pathway can be adapted to the particular circumstances of a child. Importantly, if something is raised by the parties as relevant to the best interests of the child, judicial officers will be required to consider this matter if it is, in fact, relevant.

5.66 Simplification of the list therefore avoids parties feeling that they must provide evidence about irrelevant factors to ensure that they have addressed each of the items in s 60CC. However, it does not prevent any of the matters that currently appear in s 60CC being raised if they are relevant.

87 Australian Psychological Society, above n 72, 2–3.

88 See, eg, People with Disability Australia, *Submission 409*; Office of the Public Advocate, *Submission 405*; Australian Women Against Violence Alliance (AWAVA), *Submission 379*.

Aboriginal and Torres Strait Islander culture

Recommendation 6 The *Family Law Act 1975* (Cth) should be amended to provide that in determining what arrangements best promote the best interests of an Aboriginal or Torres Strait Islander child, a court must consider the child's opportunities to connect with, and maintain the child's connection to, the child's family, community, culture and country.

5.67 In addition to the best interests factors, the ALRC also recommends that specific consideration regarding culture should be required for Aboriginal and Torres Strait Islander children. Ensuring that an Aboriginal or Torres Strait Islander child maintains the child's connection to family, community, culture and country is of fundamental importance for Aboriginal and Torres Strait Islander people. The National Family Violence Prevention Legal Services argued that this specific recognition was important, because connection

> to culture is a foundational right for Aboriginal and Torres Strait Islander children, not simply one among thirteen 'additional considerations'...
>
> A specific provision in the Act is a key mechanism to ensure that a child's Aboriginal and Torres Strait Islander status, cultural rights and other cultural issues are brought to the attention of judicial officers determining the child's best interests at an early stage.[89]

5.68 Similarly, the Aboriginal Justice Caucus Working Group on Family Violence noted that 'connection to culture is a significant protective factor for the wellbeing of children and their families'.[90]

5.69 A number of submissions recommended that there be a general best interests factor for culture, applying to children from all backgrounds.[91] Maintenance of cultural connections is, as these submissions argue, potentially relevant for all children. In line with the ALRC's approach to simplification of the best interests factors, this consideration will be able to be taken into account, where relevant, as one of the other relevant factors alluded to in the proposed list of factors. In relation to Aboriginal and Torres Strait Islander people, it is important to acknowledge and take account of the significant impact that governmental decisions about children have had in the past, through, for example, the Stolen Generations,[92] and to ensure that these experiences are not repeated.

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89 National Family Violence Prevention Legal Services Forum, *Submission 293*.

90 Aboriginal Justice Caucus Working Group on Family Violence, *Submission 381*.

91 For Kids Sake, *Submission 421*; Family Law Practitioners' Association of Western Australia (Inc), *Submission 410*; Family Law Reform Coalition, *Submission 355*.

92 See particularly, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Human Rights and Equal Opportunity Commission, 1997) pt 3.

5.70 The ALRC accordingly recommends that legislation should provide that, in considering the best interests of an Aboriginal or Torres Strait Islander child, there be a requirement that this connection be considered.

5.71 When considering children's connections to family, community, culture, and country, it is important that courts are assisted to make informed decisions on these issues. In many cases involving Aboriginal and Torres Strait Islander children, it may be appropriate for a cultural report to be prepared. A cultural report could include information about the obligations of various family members in raising children, and a cultural plan setting out how the child's connection with kinship networks and country might be maintained, with reference to the care arrangements being considered in the proceedings. Similar recommendations have been made by the Family Law Council,[93] and in the SPLA *Family Violence Report*.[94] As described by Victorian Aboriginal Legal Services, the aims of these reports 'should not only be to provide the court with a better understanding of the unique circumstances and experiences of the Aboriginal family, but also to provide a greater voice for the Aboriginal family in court'.[95] Submissions broadly supported the use of cultural reports and included a range of views on when they might be appropriate.[96]

5.72 The ALRC considers that cultural reports should be ordered when sought by either party, or by any Independent Children's Lawyer, or where it would be in the best interests of the child in the opinion of the court. The Discussion Paper to this Inquiry canvassed the issue of who should be appointed to write cultural reports, and subsequent consultations and submissions highlighted the fundamental importance and sensitivity of this issue.[97] The ALRC recommends further consultation with Aboriginal and Torres Strait Islander organisations and community members across the country to identify a number of appropriate cultural report writers in each region.

Clarifying parental decision making provisions

Recommendation 7 Section 61DA of the *Family Law Act 1975* (Cth) should be amended to replace the presumption of 'equal shared parental responsibility' with a presumption of 'joint decision making about major long-term issues'.

93 Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016) rec 16.

94 Rec 24.

95 Victorian Aboriginal Legal Service, *Submission 101*.

96 See, eg, ATSILS (Qld), *Submission 384*; Shoalcoast Community Legal Centre Inc, *Submission 372*; National Legal Aid, *Submission 297*; National Family Violence Prevention Legal Services Forum, *Submission 293*; NATSILS, *Submission 290*; Domestic Violence Victoria, *Submission 284*; Association of Family and Conciliation Courts Australian Chapter, *Submission 258*; Women's Legal Service NSW, *Submission 218*.

97 See, eg, Shoalcoast Community Legal Centre Inc, *Submission 372*; Relationships Australia National, *Submission 317*; UnitingCare Queensland, *Submission 312*; National Legal Aid, *Submission 297*; NATSILS, *Submission 290*; Uniting, *Submission 268*; Women's Legal Service NSW, *Submission 218*.

5.73 Section 61DA of the *Family Law Act*, which contains the presumption of equal shared parental responsibility when making parenting orders, was inserted by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth).[98] The amendments contained in this Act were made in response to the 2003 report of the House of Representatives Standing Committee on Family and Community Affairs - *Every Picture tells a Story.*[99]

5.74 The report recommended a presumption of shared parental responsibility as the Committee was 'committed to an approach which is based on a principle that both parents should remain involved in their children's lives and maximises the time children spend with each parent.'[100]

5.75 A review of the 2006 amendments found that there was no evidence of significant changes in the extent to which orders for shared parental responsibility are made.[101] However, it also identified that there was a 'strong trend, pre-dating the reforms, for legal decision making power to be allocated to both parents'.[102]

5.76 The SPLA *Family Violence Report* specifically recommended the removal of the presumption of equal shared parental responsibility.[103] The Committee made this recommendation due to concerns that the structure of Pt VII was not giving due weight to child safety. The Committee was also concerned that despite the exception, presumptions of equal shared parental responsibility and orders for equal time were being inappropriately applied in cases involving family violence. The Committee further noted that they expected this matter would be further considered by the ALRC.

5.77 In the Discussion Paper to this Inquiry, the ALRC proposed removing the term 'parental responsibility' and replacing it with the term 'decision making responsibility'. This was intended to partially address the concern that the term 'shared parental responsibility' was commonly misunderstood to mean equal time, particularly by self-represented litigants.[104] While this approach received some support,[105] other submissions

98 *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) s 13.

99 House of Representatives Standing Committee on Family and Community Affairs, above n 1.

100 Ibid, [2.34]

101 Rae Kaspiew et al, *Evaluation of the 2006 Family Law Reforms–Summary Report* (Australian Institute of Family Studies, 2009) 191.

102 Ibid, 363.

103 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 10.

104 See, eg, Kaspiew et al, above n 34, 212; Bruce M Smyth and Richard Chisholm, 'Shared-Time Parenting After Separation in Australia: Precursors, Prevalence, and Postreform Patterns' (2017) 55(4) *Family Court Review* 586, 589.

105 See, eg, Interrelate Limited, *Submission 416*; Gadens, *Submission 412*; CASA Forum Victorian Centres Against Sexual Assault, *Submission 404*; Community Legal Centres NSW, *Submission 385*; Women's Legal Services Australia, *Submission 366*; J Kirkpatrick, *Submission 343*; Hume Riverina Community Legal Service, *Submission 294*; NATSILS, *Submission 290*; Marrickville Legal Centre, *Submission 288*; Rape & Domestic Violence Services Australia, *Submission 287*; Relationships Australia Victoria, *Submission 267*; Dr D Tustin, *Submission 266*.

expressed serious concerns. A common concern was that 'parental responsibility' encompassed a broader range of issues than simply decision making.[106]

5.78 Submissions identified that there is particular confusion about the concept of parental responsibility. For the purposes of Pt VII, the *Family Law Act* defines parental responsibility as 'all the duties, powers, responsibilities and authority which, by law, parents have in relation to children'.[107] The common law, as well as state, territory, and federal legislation about these matters is complex. As noted by the Alternative Dispute Resolution Advisory Council, parental responsibility 'is a very difficult concept to explain, both in relation to what it means and as to how it can work in the context of a relationship breakdown'.[108] In broad terms, parental responsibility encompasses:

- duties to care for and control the child, and to maintain the child;[109] and
- powers to make a range of decisions about the child including about education, religion, medical treatment, and name, as well as day-to-day decisions about the care, welfare, and development of the child.[110]

5.79 Case law indicates that these powers are 'conferred on parents ... for the benefit of the child and not for the benefit of parents'.[111] In the absence of a court order, both parents have parental responsibility.[112] In proceedings before a court, there is currently a presumption that equal shared parental responsibility is in the best interests of the child, in the absence of abuse or family violence.[113] The Act provides that, where an order for equal shared parental responsibility has been made, 'major long-term decisions' must be made jointly, and that parents must consult each other and genuinely attempt to reach agreement on these matters.[114]

5.80 There are a number of aspects of these provisions that are potentially confusing. The definition of parental responsibility requires an understanding of the law of parental powers and is not likely to be understood by many readers of the legislation. However, as noted, parental responsibility is primarily about decision making about children, rather than care-time arrangements, and is focused on duties and powers, rather than rights. The *Family Law Act* emphasises this by stating that the presumption of equal shared parental responsibility 'does not provide for a presumption about the amount of time the child

106 See, eg, P Easteal and L Young, *Submission 394*; R Carroll, *Submission 289*; Resolution Institute, *Submission 260*.

107 *Family Law Act 1975* (Cth) ss 4, 61B.

108 Australian Dispute Resolution Advisory Council Inc (ADRAC), *Submission 12*.

109 The duty to maintain the child is imposed by statutes, such as the *Child Support (Assessment) Act 1989* (Cth) and the *Family Law Act 1975* (Cth) ss 64B(2)(f), (5), pt VII div 7.

110 Belinda Fehlberg et al, *Australian Family Law: The Contemporary Context* (Oxford University Press, 2nd ed, 2015) 292.

111 *Secretary, Department of Health and Community Services v JWB and SMB ('Marion's case')* (1992) 175 CLR 218, 316 (McHugh J).

112 *Family Law Act 1975* (Cth) s 61C.

113 Ibid s 61DA.

114 Ibid ss 65DAC and 65DAE. See also *B & B & Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FamCA 451, [9.29].

spends with each of the parents'.[115] Despite this, submissions to this Inquiry suggest that many people believe that the presumption of equal shared parental responsibility is, in effect, a presumption of equal shared time.[116]

5.81 Furthermore, submissions indicated significant confusion about the result of an order for equal shared parental responsibility. The principal consequences in the legislation of such an order are requirements for particular care-time arrangements to be considered with an overriding best interests requirement,[117] and that major long-term decisions must be made jointly following a process of consultation.[118] Some submissions indicated that this had made little practical difference to the way parents regarded their responsibilities.[119] Other submissions indicated that confusion arises in relation to how parents must consult each other about decisions.[120] No consultation is required for day-to-day decisions made by the parent caring for a child at a particular time.[121]

5.82 Notwithstanding this, individual submissions indicated that many understood that consultation or joint decision making was required on a much broader range of decisions. This may partly be because provisions on parental responsibility are not consolidated in the Act into one place. In particular, provisions about consultation on major long-term decisions are found in a separate division of the legislation to the provisions establishing the concept and presumption of parental responsibility.

5.83 Parental decision making can shape a child's experiences and development in profound ways. Decisions made by a parent on education, health, religion, culture, and association can affect a child's life on a fundamental level. These major decisions can be a key area of disagreement between parents, and thus must be dealt with in the Act. In the Discussion Paper to this Inquiry, the ALRC proposed:

- replacing the term 'parental responsibility' with one that is easier for readers to understand (for example, 'decision making responsibility'); and
- maintaining the provision that each parent has parental responsibility for a child unless this position is altered by a court order but removing the terminology of a presumption.

5.84 Submissions on the proposal were mixed. Some submissions strongly supported use of a term that would cause less confusion amongst parents.[122] Others, however, argued that the term parental responsibility is widely understood,[123] or that the concept is

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115 *Family Law Act 1975* (Cth) note to s 61DA(2).
116 See, eg, National Family Violence Prevention Legal Services Forum, *Submission 63*; Domestic Violence Legal Workers Network of WA, *Submission 33*; Peninsula Community Legal Centre, *Submission 30*.
117 *Family Law Act 1975* (Cth) s 65DAA.
118 Ibid s 65DAC.
119 Caxton Legal Centre, *Submission 51*.
120 See, eg, Australian Psychological Society, *Submission 55*.
121 *Family Law Act 1975* (Cth) s 65DAE.
122 See, eg, Interrelate Limited, *Submission 416*; CASA Forum Victorian Centres Against Sexual Assault, *Submission 404*.
123 Family Law Practitioners Association Qld, *Submission 368*; The Hon M Finn, *Submission 308*.

broader than decision making,[124] and that a further change of terminology was likely to cause further confusion. Some of these submissions preferred maintenance of the current term, while Interact Support and the Law Society of South Australia recommended 'long-term decision making responsibility' as an alternative.[125]

5.85 It appears that the primary basis for confusion is the presumption of equal shared parental responsibility, rather than the general concept of parental responsibility. Although the equal shared parenting provision refers to parental responsibility, rather than care, submissions and consultations confirmed widespread confusion outside of family law system professionals about its meaning. This is despite provisions later in the Act clarifying its application as requiring joint decision making about major long-term issues.

5.86 The ALRC supports the idea that a presumption of shared parental responsibility serves as a good starting point for negotiations between parents and recommends that the concept be retained. The ALRC also agrees in principle with the existing exceptions to that presumption, but recommends redrafting the exceptions as set out in Appendix G.

5.87 However, the wording of the presumption should be clarified to avoid the confusion surrounding the term 'equal shared parental responsibility' and the conflation with equal time. The ALRC recommends that, to reduce confusion, s 61DA be redrafted to refer to 'joint decision making on major long-term issues'.

5.88 In practice, this would reflect the effect of orders that are currently made for equal shared parental responsibility, while eliminating most causes of misunderstanding of the provision. To further reinforce this, the content of current sections 65DAC and 65DAE, which clarify the effect of an order for equal shared parental responsibility, should be co-located with the provision creating the presumption. Similarly, the definition of 'major long-term issue', which is currently found in s 4 of the *Family Law Act*, should also be co-located.[126]

Requirements to consider particular care arrangements

Recommendation 8 Section 65DAA of the *Family Law Act 1975* (Cth), which requires the courts to consider, in certain circumstances, the possibility of the child spending equal time, or substantial and significant time with each parent, should be repealed.

124 P Easteal and L Young, *Submission 394*; Australian Dispute Resolution Advisory Council (ADRAC), *Submission 386*; Resolution Institute, *Submission 260*.

125 Interact Support Inc, *Submission 389*; Law Council of Australia, *Submission 285*.

126 See, eg, Family Court of Australia, *Submission 68*.

5.89 Where a court makes an order for equal shared parental responsibility, s 65DAA of the *Family Law Act* requires the court to then consider whether equal time, or failing that, substantial and significant time, is in the best interests of the child, and is reasonably practicable.

5.90 The presumption of equal shared parental responsibility was intended to promote parental involvement in children's lives and to provide a

> preferred starting point of parental equality for negotiation of potential parenting arrangements after separation outside the courts. It would also be a starting point for court consideration of the same questions when negotiation has been unsuccessful. The presumption is rebutted by evidence or circumstances that make the preferred starting point inappropriate for the family concerned.[127]

5.91 Since the 2006 family law amendments, it has become increasingly clear that this legal presumption and its associated influence on care-time arrangements is not consistent with social practices in relation to post separation parenting, both in the context of shared decision making and shared care-time.[128]

Research evidence on parenting patterns

5.92 An evaluation of the 2006 amendments found that while there was an increase in shared time after the introduction of the amendments, this change was the continuation of an existing trend towards shared time and suggested further evidence would be required to show that this trend had increased in momentum as a result of these amendments.[129] A later study suggested that the 2006 amendments did not increase the take-up of shared time arrangements.[130] Professors Smyth and Chisholm came to a similar conclusion:

> In Australia, shared-time arrangements in the general population of separating parents gradually increased early this century but appear to have plateaued in recent years.
>
> Legislation to encourage shared-time parenting did not result in a marked increase in the prevalence or incidence of these arrangements. Nor did subsequent family violence amendments that give greater weight to protecting children from harm lead to a marked decline in shared time. Consent orders for shared time without litigation have increased steadily over the past decade.[131]

5.93 Shared decision making is only reported by a substantial minority, not a majority, of separated parents. In 2014, between 35% and 45% of separated parents in a near nationally representative sample reported that both parents were involved equally in

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127 House of Representatives Standing Committee on Family and Community Affairs, above n 1, [2.2]

128 Rae Kaspiew et al, *Experiences of Separated Parents Study (Evaluation of the 2012 Family Violence Amendments)* (Australian Institute of Family Studies, 2015) 16, 20.

129 Kaspiew et al, above n 34.

130 Ruth Weston et al, 'Shared Care Time—An Increasingly Common Arrangement' (2011) 88(Aug) *Family Matters*.

131 Smyth and Chisholm, above n 99, 586.

decision making in relation to education, health care, religion/cultural ties, sporting, or social activities. Otherwise, most report that decisions are mainly made by the mother.[132]

5.94 Shared care-time arrangements continue to apply only to a minority of children in separated families. The most common patterns in parenting arrangements among separated families involve the children spending most time with their mother and seeing their father, including spending overnight time, on a regular basis. These patterns are reported by about 64% of separated parents.[133]

5.95 In court orders, the AIFS *Court Outcomes Study* shows that court orders for shared parental responsibility remain common,[134] and have increased since 2006, broadly reflecting an emphasis on shared parental responsibility in the legislation and in legal culture that pre-dates the 2006 family law reforms.[135] Orders made by consent are more likely to involve shared parental responsibility (more than 90%) than orders made by judicial determination (39.8%).[136]

5.96 In relation to time arrangements in court orders, most children in the sample (69.4%) had court orders for majority time with their mother and 22.2% had orders for shared time (defined as any division of nights in the range of 35–47% with one parent and 53–65% with the other).[137]

5.97 The maintenance of patterns involving majority time with mothers in post-separation contexts is consistent with evidence of the continuing persistence of a gendered pattern in work and parenting patterns in the population at large. In Australia, men with children tend to be more engaged with the workforce than women with children.[138] Women on the other hand are more likely to spend time with children.[139] This balance means it is generally harder for men to spend time with children either before or after separation, making shared care less practical.

5.98 In his submission, Professor Smyth addresses the nexus between work and family balances in contemporary life and the challenges for sharing care after separation:

> Australia has become one of the most work-orientated, high income countries in the world. Although many families in Australia enjoy a relatively high standard of living

132 Kaspiew et al, above n 123, 20.

133 Rae Kaspiew et al, above n 2, 16. See also Elizabeth Keogh, Bruce Smyth and Alex Masardo, 'Law Reform for Shared-Time Parenting after Separation: Reflections from Australia' (2018) 30 *Singapore Academy of Law Journal* 518; Lixia Qu et al, 'Post-Separation Parenting, Property and Relationship Dynamics after Five Years' (Attorney General's Department (Cth), 2014).

134 Kaspiew et al, above n 67, 57.

135 Kaspiew et al, above n 34, 187.

136 Kaspiew et al, above n 67, 59.

137 Ibid Table 3.27.

138 In 2014–15 men with children 0–5 had a 93.7% labour force participation rate, women 59.7%. Among parents whose youngest child was 6–14 the participation rate was 92.5% men to 77.7% women. Australian Bureau of Statistics, *4125.0 - Gender Indicators, Australia, Feb 2016* (February 2016).

139 Australian Institute of Family Studies, *Growing Up in Australia: The Longitudinal Study of Australian Children* (Annual Statistical Report 2017).

> as a consequence, many are also struggling to balance work and family life. Parenting children across two households (often with reduced financial resources) adds additional layers of complexity to work-life balance post separation.[140]

5.99 The ALRC does not support the entrenchment of gender biases in law. It also acknowledges Smyth's characterisation of this 'father absence' as a significant social problem in Australia.[141] This social problem has persisted since the 2006 family reforms, with children who never see their father representing 11% of children in a 2008 sample of separated families,[142] and 9% in a 2014 sample.[143]

Influences on child wellbeing

5.100 Against this background, and in light of professionals' concerns about the legislative structure (see Chapter 14), it is relevant to consider whether the present legislative arrangements promote child wellbeing in considering any policy justifications for retention or reform.

5.101 In this context, it is important to acknowledge that the literature on the influences on outcomes for children is vast and the measurement of outcomes is complex. In the post-separation area particularly, methods and interpretations can be contested.[144]

5.102 At a broad level, studies based on population level samples demonstrate that poorer outcomes for children are linked with: financial disadvantage,[145] exposure to inter-parental conflict and family violence,[146] and problematic parenting.[147] There is no strong link between post-separation parenting arrangements (in other words, the amount of time children spend with each parent) and child wellbeing per se.[148]

5.103 Recent syntheses of the body of Australian and international research that more specifically examines child wellbeing and post-separation parenting arrangements highlight a range of child, parent, and family-related variables that may influence

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140 Professor B Smyth, *Submission 104*.
141 Ibid.
142 Kaspiew et al, above n 34, 119.
143 Kaspiew et al, above n 123, 16.
144 Judith Cashmore and Patrick Parkinson, 'Parenting Arrangements for Young Children: Messages from Research' (2011) 25(3) *Australian Journal of Family Law* 236; Keogh, Smyth and Masardo, above n 128, 540; Jennifer E McIntosh, Marsha Kline Pruett and Joan B Kelly, 'Parental Separation and Overnight Care of Young Children, Part II: Putting Theory into Practice' (2014) 52(2) *Family Court Review* 256.
145 Diana Warren, 'Low-Income and Poverty Dynamics – Implications for Child Outcomes' (Social Policy Research Paper No 47, Department of Social Services (Cth), 2017).
146 See, eg, Rae Kaspiew et al, 'Domestic and Family Violence and Parenting: Mixed Method Insights into Impact and Support Needs: Final Report' (Horizons Research Report 04/2017, Australia's National Research Organisation for Women's Safety, 2017).
147 Killian Mullan and Daryl Higgins, 'A Safe and Supportive Family Environment for Children: Key Components and Links to Child Outcomes' (Occasional Paper 52, Australian Institute of Family Studies, 2014).
148 Australian Psychological Society, above n 72, 15; Qu et al, above n 128, 152.

whether particular arrangements promote wellbeing in particular circumstances.[149] The Australian Psychological Society Position Statement concludes that factors

> including logistics and resources, how parents get along, and the extent to which the parenting arrangements are responsive to children's developmental needs and temperament are critical to whether shared parenting is beneficial to children.[150]

5.104 Reflecting on the research evidence on shared time arrangements and legislative policy for post-separating parenting, Ms Keogh, Professor Smyth and Dr Masardo observe that shared

> time arrangements - or indeed any parenting arrangement - can confer benefits for children, but can also involve risks, especially in the context of safety concerns, entrenched parental hatred, or where children are infants or very young.[151]

5.105 Together with the evidence on the adverse impact of conflict and family violence on child wellbeing, these conclusions point to the need for an individualised assessment. This indicates a legislative policy position requiring assessment of equal time, or substantial and significant time, where orders for shared decision making are made, may not be consistent with prioritising children's wellbeing.

5.106 In its list of factors for promoting child wellbeing during and after parental separation, the Australian Psychological Society 'supports care arrangements that maintain as much normality in the child's life as possible'.[152]

Problems with the presumption and associated provisions

5.107 In contrast to the approach suggested by the Australian Psychological Society, a presumption of equal shared time can lead to parents focusing on the quantity of time allotted rather than the arrangement that best serves the interests of the child. As described by Keogh, Smyth and Masardo, shared time, it is argued, can 'foster co-parenting and provide the best position from which to be child responsive. It can also encourage a "child-halving" and "spreadsheet parenting" mentality'. [153]

5.108 The requirement to consider 50/50 shared time was criticised in many submissions as introducing an unnecessary additional step in the process for determining care-time arrangements.[154] It was also alleged to detract from a focus on what is actually in the child's best interests,[155] including diverting the court's attention away from a focus

149 Australian Psychological Society, above n 72; Bruce Smyth et al, 'Shared-Time Parenting: Evaluating the Risks and Benefits to Children' in *Parenting plan evaluations: Applied research for the family court* (Oxford University Press, 2nd ed, 2016) 118.

150 Australian Psychological Society, above n 72, 15.

151 Keogh, Smyth and Masardo, above n 128, 542.

152 Australian Psychological Society, above n 72.

153 Keogh, Smyth and Masardo, above n 128, 543.

154 The Family Court noted that it seems to require equal time, or substantial and significant time, to be considered even when neither party are seeking it: Family Court of Australia, *Submission 68*.

155 See, eg, N Ciffolilli, *Submission 168*; Marrickville Legal Centre, *Submission 137*; CatholicCare Victoria Tasmania (CCVT), *Submission 115*; Women's Law Centre of WA, *Submission 40*.

on the child's safety needs.[156] Other submissions suggested that it provides scope for exacerbating conflict.[157]

5.109 Academic commentators have also displayed concern about the presumption. Chisholm removed the presumption in his 2015 proposed rewrite of Pt VII saying that the

> *draft does not privilege or favour any particular parenting arrangements, by way of provisions creating a presumption, or a requirement that the court 'consider' any particular outcome.* The reason for this is simple: the 'paramount consideration' principle logically requires that the weight to be given to any considerations depends on their importance for the child in the particular situation. Giving artificial weight of preference to any particular outcome involves a departure from that fundamental principle.[158]

5.110 Stakeholders suggested that a strong community perception remains that the *Family Law Act* provides a presumption of equal shared care. This is supported by the findings of a research project conducted in 2013, which found that while lawyers 'were seeing fewer clients who share this misunderstanding, this is still a regular feature of legal practice'.[159]

5.111 There are a number of reasons that this misunderstanding may exist.[160] The explicit link between the presumption of equal shared parental responsibility and the requirement to consider equal or substantial and significant time likely helps perpetuate the misunderstanding.

5.112 The 2009 evaluation of the 2006 amendments found lawyers 'who had indicated that family violence was an issue in half or more of their matters were more likely to indicate that fathers were more likely to expect equal time'.[161] Some submissions also suggested that this misperception of the law may cause victims of family violence to agree to inappropriate and unsafe arrangements.[162]

5.113 Further, as the Family Court argued, it is not clear why the legislation requires consideration of equal time, or substantial and significant time, if neither parent is seeking it:

> The court, when considering competing proposals by parents or others exercising parental responsibility will consider equal time or substantial and significant time if one of the parties proposes it (or of the court's own motion provided procedural fairness

156 See, eg, Women's Legal Services Australia Submission No 6 to SPLA Committee, Parliament of Australia, Inquiry into *A Better Family Law System* (April 2017) 26.
157 See, eg, S Christie, *Submission 216*; Women's Law Centre of WA, *Submission 40*.
158 Chisholm, above n 46.
159 Rhoades et al, above n 54, 133.
160 Helen Rhoades, John Dewar and Nareeda Lewers, 'Can Part VII of the Family Law Act Do What Is Asked of It?' (2014) 4(150) *Family Law Review* 155; Kaspiew et al, above n 34, 212.
161 Kaspiew et al, above n 34, 211.
162 See, eg, Women's Legal Service Victoria, *Submission 213*.

> is given to the parties). There is no utility in considering either equal or substantial and significant time otherwise.[163]

5.114 Given this limited utility, it is difficult to justify retention of a provision that leads to misunderstandings about care-time arrangements, increases the complexity of judgments, and likely increases legal costs. The presumption also leads to a focus on the quantity of contact with a child rather than on the extent to which that contact improves the child's wellbeing. To the extent that shared time would improve the outcome for a specific child, it can be considered to feed in to the best interests of the child and does not require a separate presumption.

5.115 The ALRC recommends that the legislation should make it clear that in determining what arrangements for the care of a child will best promote the child's best interests, the court must determine, on all of the material before it, what is best for the particular child in their particular circumstances.

Improved guidance material

5.116 It is important that parents and other decision makers be provided with the best information possible to help them to work out what is most consistent with the best interests of their children. The s 60CC factors have, to some extent, guided practice and decision making in this area. However, to the extent they do so, they do it without explanation of what each of the factors mean, or examples of how they might be relevant to a family's particular circumstances.

5.117 This information gap is particularly problematic because only a small proportion of family law matters are resolved by courts. The AIFS evaluation of the 2012 family violence amendments showed that over 80% of families do not resolve their matters through mediation, counselling, family dispute resolution, the courts, or lawyers, and only 9% required the assistance of a lawyer or a court to ultimately resolve their arrangements.[164] It is therefore not possible to rely on parents being provided with the help of a professional to understand how the factors in the legislation apply to their circumstances.

5.118 As Interrelate noted, parents may struggle to develop appropriate parenting arrangements post-separation, as separated parents

> often struggle to reach agreement on the appropriate care arrangements for their children. ...[P]arents who separate are generally not well informed as to age-appropriate care arrangements and the significant body of research on this topic generally is not available or publicised for public consumption.[165]

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163 Family Court of Australia, *Submission 68*.
164 Kaspiew et al, above n 123, 71.
165 Interrelate Limited, *Submission 416*.

5.119 To ensure that parties are provided with information about how to work out parenting arrangements that are in their child's best interests, the ALRC recommends that amendments to the legislation should be accompanied by an extensive, evidence-based resource to assist parents. This resource could complement existing guidance on developing parenting orders provided by the publication *Parenting Orders: What You Need to Know*.[166]

5.120 Detailed guidance material should assist both parents who are working out post-separation parenting arrangements without professional help and family dispute resolution practitioners who are assisting parents. The guidance material will provide access to significantly more useful and comprehensive information about what may or may not be relevant to the best interests of a child than could be set out in legislation.

5.121 Submissions supported this resource being based on empirical evidence, validated by social science research, and should be developed and kept up to date by a respected body with significant knowledge and experience of research on children's matters, and emphasised the need to involve or consult a range of experts, including family law system professionals.[167]

Aboriginal and Torres Strait Islander concepts of family

Recommendation 9 Section 4(1AB) of the *Family Law Act 1975* (Cth) should be amended to provide a definition of ***member of the family*** that is inclusive of any Aboriginal and Torres Strait Islander concept of family that is relevant in the particular circumstances of the case.

5.122 There is long-standing recognition that Aboriginal and Torres Strait Islander notions of family and kinship encompass a wider range of individuals and obligations[168] than are presently recognised in the definition of family member in the *Family Law Act*.[169]

5.123 In 1986, the ALRC observed in its *Recognition of Aboriginal Customary Laws Report* that 'Australian law is based on a different, and in some respects narrower understanding of the family than is the case in Aboriginal societies'.[170] It further observed

166 Attorney-General's Department (Cth), *Parenting Orders—What You Need to Know* (2016).
167 See, eg, Relationships Australia National, *Submission 317*; National Legal Aid, *Submission 297*.
168 See, eg, Stephen Ralph, 'The Best Interests of the Aboriginal Child in Family Law Proceedings' (1998) 12(2) *Australian Journal of Family Law*.
169 *Family Law Act 1975* (Cth) s 4(1AB).
170 Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (1986) 166.

that under kinship systems among different groups, persons 'other than the parents will play, and be expected to play, an important role in "growing-up children".'[171]

5.124 Notions of kinship and associated obligations vary considerably among different Aboriginal and Torres Strait Islander groups around Australia.[172]

5.125 As the Discussion Paper noted, the definition of family member in the *Family Law Act* presently covers a range of relationships based on legal marriage, cohabitation, and adoption involving inter-generational (grandparent, parent, child) and intra-generational (sibling) relationships. The definition of family member is engaged in the application of various parts of the *Family Law Act*, including in the application of parenting orders provisions,[173] the definition of family violence,[174] and provisions in relation to family violence orders.[175] The definition of family member also potentially impacts financial matters, particularly through the definition of family violence and the *Kennon* principle.[176] If Recommendation 19 (which proposes a statutory tort of family violence) is implemented, it would also engage with the definition of family member.

5.126 There was significant support in submissions, to the extent that this point was addressed, for the revision of the application of the definition to Aboriginal and Torres Strait Islander children and parties from an Aboriginal and Torres Strait Islander perspective.[177] In particular, submissions advocated for an approach that would mean the definition would be culturally appropriate for the circumstances of each particular case.[178]

5.127 Some submissions pointed to examples in state and territory frameworks that supported assessment of the question according to the customs of the particular kinship network involved in a particular case. The National Aboriginal and Torres Strait Islander Legal Services submission raised the example of the *Children and Community Services Act 2004* (WA), which provides that for Aboriginal and Torres Strait Islander children the matter is to be determined consistent with 'customary law or tradition of the child's community'.[179]

5.128 Further, submissions from Aboriginal Community Controlled Organisations and other organisations argued strongly for the question to be determined from the perspective of 'Aboriginal and Torres Strait Islander communities, organisations, and

171 Ibid 171.
172 National Family Violence Prevention Legal Services Forum, *Submission 293*; Secretariat of National Aboriginal and Islander Child Care Inc, *Working and Walking Together: Supporting Family Relationship Services to Work with Aboriginal and Torres Strait Islander Families and Organisations* (SNAICC, 2010).
173 *Family Law Act 1975* (Cth) s 60CC(3).
174 Ibid s 4AB.
175 Ibid ss 60CF, 60CH, 60CI.
176 For a discussion of the *Kennon* principle refer to Chapter 6.
177 Australian Law Reform Commission, *Review of the Family Law System*, Discussion Paper No 86 (2018) prop 9-8.
178 NATSILS, *Submission 290*.
179 Ibid; *Children and Community Services Act 2004* (WA) s 3.

peak bodies with relevant expertise to reflect the diversity of Aboriginal and Torres Strait Islander families, cultures and contemporary experiences across Australia'. [180]

5.129 On this basis, the ALRC considers that a presumption that accommodates an appropriate approach in the individual circumstances of each case, having regard to the particular approach to kinship in the child's (where parenting orders are under consideration) or adult's (where family violence may be under consideration) kinship network is warranted. This approach accommodates both the diversity of Aboriginal and Torres Strait Islander notions of kinship and the need for the question to be determined according to the norms of a particular community or communities in individual cases.

5.130 The ALRC considers the application of a presumption to this effect should support appropriate outcomes for the majority of cases. Where this question may be subject to contest, the matter should be determined by a cultural report.

5.131 This approach recognises the strong support in submissions for the views of Aboriginal and Torres Strait Islander groups and communities to inform this question. It offers the opportunity for a more flexible and tailored approach than inclusion of a particular statutory formula.

A less adversarial approach

Recommendation 10 The combined rules for the Family Court of Australia and the Federal Circuit Court should provide for proceedings to be conducted under Pt VII Div 12A of the *Family Law Act 1975* (Cth) by judges of both courts and both courts should be adequately resourced to carry out the statutory mandate in s 69ZN(1) of the *Family Law Act 1975* (Cth).

5.132 A recurring theme in the submissions to this Inquiry, and in those of previous inquiries, is that an adversarial court process is inappropriate for resolving family law disputes.[181] The Centre for Excellence in Child and Family Welfare identified that

180 Interact Support Inc, *Submission 389*; UnitingCare Queensland, *Submission 312*; National Legal Aid, *Submission 297*; National Family Violence Prevention Legal Services Forum, *Submission 293*; NATSILS, *Submission 290*; Australian Psychological Society, *Submission 281*.

181 No to Violence, *Submission 398*; P Easteal and L Young, *Submission 394*; Fighters Against Child Abuse Australia (FACAA), *Submission 393*; Australian Dispute Resolution Advisory Council (ADRAC), *Submission 386*; Family Law Reform Coalition, *Submission 355*; MELCA, *Submission 337*; Victorian Association of Collaborative Professionals, *Submission 328*; Australian Association of Collaborative Professionals, *Submission 326*; Relationships Australia National, *Submission 317*; UnitingCare Queensland, *Submission 312*; Marrickville Legal Centre, *Submission 288*; Rape & Domestic Violence Services Australia, *Submission 287*; Domestic Violence Victoria, *Submission 284*; Centre for Excellence in Child and Family Welfare, *Submission 283*; Relationships Australia Victoria, *Submission 267*; Attorney-General's Department, *Submission 256* .

'Australian children and their families are currently being let down by a family law system that is adversarial, costly and traumatic.'[182]

5.133 The Terms of Reference for this Inquiry directed the ALRC to consider whether the adversarial court system offers the best way to support the safety of families and resolve matters in the best interests of children, and the opportunities that exists for less adversarial approaches in the context of post-separation family disputes.[183] This Term of Reference is almost identical to the terms given to the ALRC in 1995 when it was asked to review the adversarial system of litigation before courts and tribunals exercising federal jurisdiction.[184] The concerns are not new.

5.134 As observed by the Hon Justice G L Davies in 2000,

> the adversarial model was premised on the assumption that civil litigation was essentially a private matter. The parties were left to conduct proceedings as they saw fit and according to their own timetable. The judge assumed a passive role… The responsibility was upon the parties alone to identify the issues in dispute, and it was for the party making an assertion to prove it, without assistance from his or her opponent. The judge, being the impartial arbiter, was left with the job of determining the contest according to what was presented to her or him. The judges could not transgress beyond the issues and evidence presented by the parties.[185]

5.135 This common law model of trial adjudication is often contrasted with the 'inquisitorial' system used in civil law countries and in which judges actively control most aspects of the litigation process. This control includes:

- identifying the issues in dispute;
- initiating the proceedings;
- determining the nature of the evidence relied on to support or refute the claim; and
- who should provide the evidence.

5.136 However, there has been a partial convergence between the two systems: 'No country now operates strictly within the prototype models of an adversarial or inquisitorial system. The originators of those systems, England, France and Germany, have modified their own, and exported different versions of their respective systems.'[186]

5.137 In the period between the ALRC receiving the Terms of Reference for this Inquiry and the date of this Report, the Australian Government introduced to Parliament the Family Law Amendment (Parenting Management Hearings) Bill 2017 (Cth). The Explanatory Memorandum to the Bill states that the purpose of the Bill is to provide self-

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182 Centre for Excellence in Child and Family Welfare, *Submission 283*.

183 Terms of Reference.

184 Australian Law Reform Commission, *Review of the Adversarial System of Litigation: Rethinking Family Law Proceedings*, Issues Paper No 22 (1997).

185 The Hon Justice GL Davies, 'Justice in the 21st Century' (2000) 10 *Journal of Judicial Administration* 53.

186 Australian Law Reform Commission, *Review of the Federal Civil Justice System*, Discussion Paper No 62 (1999) [2.24]. See also Australian Law Reform Commission, *Review of the Adversarial System of Litigation: Rethinking Family Law Proceedings*, Issues Paper No 22 (1997).

represented litigants with a more flexible and inquisitorial alternative to the court process for resolving disputes. Its key features included that:

- it would be an independent statutory authority that would conduct hearings and make binding administrative determinations in respect of parenting arrangements for children in what was described as a more user-friendly and less-adversarial forum than the traditional court system;
- hearings would be conducted by an expert, multi-disciplinary panel;
- panel members would have greater control over hearings, directing lines of enquiry and the focus of the hearing;
- hearings will be a consent-based forum; and
- legal representation would be allowed with leave.[187]

5.138 Following the passage of the Bill, a pilot program is to operate, initially in Parramatta, and then at one other location. The Government allocated $12.7 million over four years to implement the measure.[188]

5.139 In March 2018, the Senate Committee for Legal and Constitutional Affairs recommended minor amendments to the Bill and that it otherwise be passed.[189] The Bill has not progressed, although it had been assumed that the ALRC would have been in a position to comment on the pilot program. The ALRC had also asked in the Discussion Paper whether changes were needed to the model.[190]

5.140 Some of the submissions advocating for a less adversarial approach to family law specifically refer to the desirability of an inquisitorial model, as proposed in the Family Law Amendment (Parenting Management Hearings) Bill 2017.[191] Many also referred to the desirability of interdisciplinarity in any dispute resolution model,[192] and to the need to take a 'problem-solving' approach.[193]

5.141 The Family Court has been conscious of the inappropriateness of pure adversarial approaches to the resolution of family law disputes since its inception. The very establishment of the Family Court was premised on the acceptance of the belief that existing courts had been found to be unsuitable and ill-equipped to deal sympathetically and helpfully with the particular problems of family disputes.[194] From its inception in

187 Explanatory Memorandum, Family Law Amendment (Parenting Management Hearings) Bill 2017 (Cth).
188 Ibid.
189 Senate Standing Committee on Legal and Constitutional Affairs, *Family Law Amendment (Parenting Management Hearings Bill 2017* (2018).
190 Australian Law Reform Commission, above n 172, q 6-3.
191 No to Violence, *Submission 398*; P Easteal and L Young, *Submission 394*; UnitingCare Queensland, *Submission 312*; Domestic Violence Victoria, *Submission 284*.
192 P Easteal and L Young, *Submission 394*; MELCA, *Submission 337*; UnitingCare Queensland, *Submission 312*; Rape & Domestic Violence Services Australia, *Submission 287*; Domestic Violence Victoria, *Submission 284*; Attorney-General's Department, *Submission 256*.
193 Relationships Australia National, *Submission 317*; UnitingCare Queensland, *Submission 312*; Relationships Australia Victoria, *Submission 267*; Attorney-General's Department, *Submission 256*.
194 Kep Enderby, 'The Family Law Act: Background to the Legislation' (1975) 1(1) *University of New South*

1976, the Family Court introduced a number of significant changes to its procedures, ranging from the introduction (and subsequent removal) of pleadings, the introduction and development of case management guidelines, differential case management, the special management of complex cases, and the trial management of child abuse cases (the Magellan program).

5.142 The increase in self-represented litigants in the Family Court in the early 1990s was a catalyst for the examination of the Court's trial procedures. In an address to a legal aid forum in 1999, the then Chief Justice noted that the decline in legal aid funding had led to the negative effects of increased self-representation. These effects include:

- increased opportunities for delay;
- a reduction in settlement opportunities;
- an exacerbation of hostilities between the parties; and
- a reluctance to comply with orders or post separation arrangements.

5.143 The Chief Justice identified increases in the numbers of unrepresented appellants as having a negative effect on the development of family law jurisprudence.[195] The requirement in an adversarial system that the parties are responsible for putting their case to the court is underpinned by an assumption that the parties are capable of discharging the responsibilities imposed on them by the system.

5.144 It was also the case that, throughout the 1990s and early 2000s, the very foundation of the civil litigation process was under intense scrutiny in many common law countries following Lord Woolf's Report on *Access to Civil Justice in England and Wales* (the Woolf Reforms).[196] Although the Woolf Reforms were not directed specifically at the family law jurisdiction, his observations are pertinent:

> The defects I identified in our present system were that it is too expensive in that the costs often exceed the value of the claim; too slow in bringing cases to a conclusion and too unequal: there is a lack of equality between the powerful, wealthy litigant and the under-resourced litigant.[197]

5.145 The recommendations of the Woolf Reforms were directed at avoiding litigation wherever possible, but also sought to make unavoidable litigation less adversarial and less costly, the process less complex, permit fewer delays, and incorporate more definite timelines. The reforms also sought to encourage greater predictability and include processes more sensitive to the need for proportionality in matching costs to the nature and size of the dispute.[198] The Woolf Reforms were influential to many of the changes

Wales Law Journal 10.

195 The Hon Chief Justice Nicholson, 'Legal Aid and a Fair Family Law System' (Speech, Legal Aid Forum Towards 2010, 1999).

196 The Rt Hon the Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HSMO London, 1996).

197 Ibid [2].

198 The reform process in relation to costs has been carried on by the Rt Hon Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (December 2009).

to civil procedure rules and case management processes that occurred throughout the Australian legal system in the 1990s and 2000s, including those taking place in the Family Court.

5.146 In 2004, after several years of research and planning, the Family Court introduced its Children's Cases Program (CCP). This program was the precursor to the Less Adversarial Trial provisions in Div 12 A of Pt VII, that were inserted into the *Family Law Act* in July 2006 following the *Every Picture Tells a Story* Report.[199] Section 69ZN sets out five principles that the Court is required to follow when hearing children's matters or where the parties have consented (in property matters) to the application of Div 12A. The obligation on the Court is mandatory and applies both to the performance of duties and the exercise of powers and in making decisions about the conduct of child-related proceedings.[200] The principles are:

1. The Court is to consider the needs of any child concerned and the impact that the conduct of the proceedings may have on the child in determining the conduct of the proceedings.[201]
2. The Court is to actively direct, control, and manage the conduct of the proceedings.[202]
3. The proceedings are to be conducted in a way that will safeguard:
    i. The child concerned against family violence, child abuse and child neglect; and
    ii. The parties to the proceedings against family violence.[203]
4. The proceedings are, as far as possible, to be conducted in a way that will promote cooperative and child-focused parenting by the parties.[204]
5. The proceedings are to be conducted without undue delay and with as little formality, and legal technicality and form, as possible.[205]

5.147 Additional features of the Less Adversarial Trial model were also incorporated into the model. These included:

- several methods by which children may be heard by the Court in a manner that is consistent with their views including through a family consultant or expert report but also by means of judicial interview;[206] and

199 House of Representatives Standing Committee on Family and Community Affairs, above n 1.
200 *Family Law Act 1975* (Cth) s 67N(1).
201 Ibid s 67N(3).
202 Ibid s 67N(4).
203 Ibid s 67N(5).
204 Ibid s 67N(6).
205 Ibid s 67N(7).
206 Family Court of Australia, *Practice Direction 2 of 2006: Child-related proceedings (Division 12A) Practice Direction 2 of 2006*; subsequently revoked by Family Court of Australia, *Practice Direction 3 of 2009 (Revocation of Children's Cases Program and Child-related proceedings (Division 12A) Practice*

- the role of the family consultant including:
    - providing a mediation input and social science perspective in the court room;
    - supporting the less adversarial dynamic in the court room;
    - promoting a collaborative approach to hearing the dispute;
    - providing a neutral, conceptual, and evidenced-based commentary on the social science perspectives of the issues raised by the parties and their lawyers; and
    - facilitating references to community based organisations when parties required ongoing support or confidential counselling.[207]

5.148 The CCP had been the subject of two evaluative reports in 2006 by Professor Hunter[208] and Dr McIntosh.[209] Hunter's report identified some instances where she perceived that the CCP was failing to take sufficient account of the interests of both women and children who had experienced family violence. More positively, she reported that the CCP cases had fewer case events and involved fewer subpoenas, affidavits, and expert reports than the control group cases. They were also finalised in half the time taken by the control group, an outcome she attributed to the nature of the court process rather than any differences in the characteristics of the cases. She also reported that the CCP process was less adversarial and better designed to be more child focused than the traditional process. CCP parties were significantly more satisfied with both the process and the outcomes of their cases than were those in the control group. The process was also more friendly to self-represented litigants and the role adopted by the Family Consultants was described as valuable.

5.149 McIntosh reported that CCP parents were far more satisfied with their children's living arrangements and were much more likely than the mainstream group to perceive that their children were happier. CCP parents reported less difficulty with contact problems, and fewer disagreements with their former partner. However, there were still high levels of acrimony for both groups. One important area in which the parents in the two groups diverged was in the awareness CCP parents had about the impacts of their conflict on their children. McIntosh also observed that, three months post-court, the CCP group reported significantly lower acrimony and lower conflict in contrast to the mainstream group. The CCP group reported better emotional functioning of their children and far greater satisfaction of parents and children with the post-court living arrangements. She concluded that 'it appears that the CCP pilot has successfully traversed the middle ground between the application of 'black letter law' and mediation processes which are inherently therapeutic'.[210]

Directions).

207 Harrison, above n 11, 50–52.

208 Rosemary Hunter, 'Child-Related Proceedings under Pt VII Div12A of the Family Law Act: What the Children's Cases Pilot Program Can and Can't Tell Us' (2006) 20 *Australian Journal of Family Law* 227.

209 J McIntosh, 'Children's Cases Pilot Project: An exploratory study of impacts on parenting capacity and child wellbeing – Final Report to the Family Court of Australia' (March 2006).

210 Ibid 38.

5.150 Despite the positive attributes of the Less Adversarial Trial process, it is now rarely used, and has never been part of the processes of the Federal Circuit Court. The Family Court has commented that over time

> the positive impact of the amendments has been diminished as there are an insufficient number of family consultants to fulfil this role, judges have insufficient time to allocate to such hearings and delays mean appointments with family consultants and such hearings cannot be scheduled early enough in the dispute to lessen the chances of an intractable dispute worsening.[211]

5.151 A close examination of the existing provisions for Less Adversarial Trials reveals that, properly resourced and implemented, they largely correspond with the essential components of the multi-disciplinary panels or tribunals proposed in submissions. In particular, they are expressly child-focused, quasi-inquisitorial, focused on safeguarding children and parties from family violence, designed to promote cooperative child-focused parenting, and are to be conducted without undue delay. Multi-disciplinary expertise is provided either by Family Consultants, or by the ability of the court to appoint an assessor, pursuant to s 102B of the *Family Law Act*, in any field of expertise deemed necessary, to assist with the hearing and determination of proceedings. The appointment of an assessor would assist a judge to interpret the specialist expert evidence provided by the Family Consultant or any expert called by the parties. Importantly, the original role of the Family Consultants in the initial years of the establishment of the process also included the external service-referral function. Some submissions urged better resourcing to enable the reinvigoration of the Less Adversarial Trial process.[212]

5.152 Apart from resourcing issues, it is possible that judicial officers have felt constrained to utilise their powers fully under Div 12A because of concerns about the nature of the judicial power vested in courts constituted under Chapter III of the Constitution.[213] In the context of the present discussion, the concern that arises is the extent to which the alteration of some adversarial features of federal civil litigation conflicts with the exercise of judicial power.

5.153 The extent to which adversarial processes are a necessary feature of judicial power has not been fully settled. In 1976, the High Court held that judges exercising judicial power should not favour an inquisitorial process over adversarial proceedings. In *R v Watson; Ex parte Armstrong*, the trial judge, in the course of interlocutory proceedings, directed a party to provide an affidavit detailing her financial position when neither party had requested this course of action. On appeal, the High Court held that the judge's intervention in the proceedings indicated a basic misconception as to the role of the Family Court. The High Court held that any discretion exercised by Family Court judges must be in accordance with the exercise of judicial power and the duty to act judicially.[214]

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211 Family Court of Australia, *Submission 400*.
212 Ibid; Law Council of Australia, *Submission 285*.
213 The Hon Justice J Edelman, 'Chief Justice French, Judicial Power, and Chapter III of the Commonwealth Constitution' (Speech, WA Bar Association Colloquium, 24 November 2016).
214 *R v Watson* (1976) 136 CLR 248.

However, the majority did not impugn the provision of the Family Law Act that allowed the Court 'with the consent of the parties to the proceedings' to dispense with such procedures and formalities as it sees fit'.[215]

5.154 With reference to trial practices, the High Court has endorsed the adoption of certain non-adversarial features of civil litigation, particularly case management. In *Queensland v J L Holdings Pty Ltd*, Kirby J said case management

> is now an essential feature of the administration of justice, the importance of which is likely to increase in the years ahead. But whilst it remains in judicial hands it is a function which must be performed with flexibility and with an undiminished commitment to afford all who come to the courts a manifestly just trial of their disputes.[216]

5.155 The Federal Court of Australia has developed extensive case management practices that are

> based on both the court and the profession recognising and fulfilling mutually important responsibilities in conducting litigation as a form of problem solving, rather than fee generation.[217]

5.156 In *Money Max International Pty Ltd (Trustee) v QBE Insurance Group Ltd*,[218] the Full Federal Court of Australia considered whether an order for a common fund in a class action involved the exercise of judicial power where, arguably, there was no extant dispute. The Full Court characterised the power sought to be exercised as within its supervisory function to protect the interests of class members 'not unlike the protective jurisdictions that a Court may have, such as with persons under a disability'.[219] The federal family courts' protective jurisdiction provides a strong foundation for the courts to modify proceedings appropriately within the exercise of the judicial power.

5.157 There should also be no concern that the use of assessors is somehow inimical to the exercise of judicial power.[220] They continue to be used in the United Kingdom to provide cross-disciplinary expertise in the admiralty jurisdiction, particularly in cases concerning issues of navigation and seamanship, although are no longer a feature of Australian admiralty practice.[221] They are also used in competition law cases where Heerey J found that the use of an assessor was conformable with the exercise of federal judicial power.[222] The task of an assessor was explained most clearly by Viscount Simon

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215 Ibid [12].

216 *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146; *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175.

217 Chief Justice JLB Allsop AO, 'Class Actions' (Speech, Law Council of Australia, 13 October, 2006).

218 *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* (2016) 245 FCR 191.

219 Ibid [171]-[175].

220 Chief Justice JLB Allsop AO, 'The judicial disposition of cases: dealing with complex and specialised factual material,' *Bar News* (Summer 2009-2010) 75.

221 SC Derrington and JM Turner QC, *The Law and Practice of Admirality Matters* (Oxford University Press, 2nd ed, 2016) 238.

222 *Genetic Institute Inc v Kirin-Amgen Inc (No 2)* (1997) 78 FCR 368. An application for leave to appeal to the Full Court was refused: *Genetics Institute Inc v Kirin-Amgen Inc* (1999) 92 FCR 106, 118.

in *Richardson v Redpath, Brown & Co*, in which a medical assessor assisted the judge in dealing with a workers' compensation claim. Viscount Simon said to

> treat a medical assessor, or indeed any assessor, as though he were an unsworn witness in the special confidence of the judge, whose testimony cannot be challenged by cross examination and perhaps cannot even be fully appreciated by the parties until judgement is given, is to misunderstand what the true functions of an assessor are. He is an expert available for the judge to consult if the judge requires assistance in understanding the effect and meaning of technical evidence. He may, in proper cases, suggest to the judge questions which the judge himself might put to an expert witness with a view to testing the witness's view or to making plain his meaning. The judge may consult him in case of need as to the proper technical inferences to be drawn from proved facts, or as to the extent of the difference between apparently contradictory conclusions in the expert field…It would seem desirable in cases where the assessor's advice, within its proper limits, is likely to affect the judge's conclusion, for the latter to inform the parties before him what is the advice which he had received.[223]

5.158 The modern approach to case management and the role of the courts to ensure that all litigation is conducted efficiently with both the interests of the parties, and the broader public interest in the appropriate management of publicly funded court systems, would suggest that family court judicial officers should have little concern that the use of less adversarial processes could be considered anathema to the exercise of judicial power.

5.159 The ALRC considers that Div 12A of Pt VII of the *Family Law Act* provides the legislative framework for a less adversarial approach to the resolution of family law matters. The approach would be:

- child and family focused;
- protective of children and parties who are exposed to child abuse or family violence;
- quasi-inquisitorial;
- interdisciplinary;
- less formal;
- accessible to self-represented litigants; and
- connected with relevant support services.

5.160 Adequate resourcing and appropriate education of the profession is needed to ensure the success of the regime. The Family Court is required, by virtue of s 69ZN, to give effect to the principles that underpin this legislative framework. It cannot comply with its statutory mandate unless it is provided with adequate resources.

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223 *Richardson v Redpath, Brown & Co* [1944] AC 62, 70-71.

6. The Case for Reforming the Division of Property

Contents

Introduction

6.1 This chapter builds the case for reforms to the property settlement provisions in the *Family Law Act,* which are set out in the subsequent chapter. It examines the provisions of the *Family Law Act* that deal with how property and financial issues are resolved following relationship breakdown.

6.2 The research data shows that the assets of most separating couples in Australia are relatively few and low in value. In the Longitudinal Study of Separated Families (LSSF), most parents reported asset pools of less than $300,000[1] and most asset pools are not complicated, consisting of fewer than three asset types in their property pool, with the most common asset types being the family home and superannuation.[2]

6.3 Nevertheless, the research also shows that of those parents in low (less than $40,000) and low-medium ($40,000-$139,000) asset pool ranges, significant minorities (37.9% and 18.3% respectively) nominate that no specific pathway is used to reach agreement on division of their property, a significantly higher proportion than those in the higher asset pool ranges.[3]

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1 Lixia Qu et al, 'Post-Separation Parenting, Property and Relationship Dynamics after Five Years' (Attorney-General's Department (Cth), 2014) 92.

2 Ibid 94.

3 Ibid 99. For an asset pool of $140,000–$299,000, the proportion was 8%; $300,000–$499,000, 7%; above $500,000, 2.9%.

6.4 As was observed by the Productivity Commission in its *Access to Justice* Report, avoiding the use of formal services for low value property disputes may be a proportionate and appropriate response. However, for others, lack of access to affordable legal and financial advice and dispute resolution services may be a significant factor that leads to 'questions about the appropriateness of agreements or outcomes' reached in these cases.[4] There are often significant power imbalances between separating parties. Such imbalances may arise in respect of parties' knowledge of the financial assets that may form part of the asset pool or one party's willingness to prolong a state of conflict. Where there is a significant power imbalance, separating parties are less likely to reach a fair outcome in the absence of a third-party intermediary, such as a mediator, arbitrator, or court.

6.5 Median household wealth in 2015–16 was $527,000 and the median household disposable income was $853 per week.[5] Even couples with relatively significant asset pools can find the costs of lawyers and private litigation prohibitive. Solicitors' fees range from an average of $300 per hour for a small firm to upwards of $800 per hour in a top-tier or specialist family law practice. One very experienced practitioner gave evidence to the SPLA Committee confirming that some family lawyers do charge upwards of $600 per hour but noting that a significant number would charge much less.[6] The courts themselves have commented recently on litigation costs in two cases. In the first, total costs exceeded $4.5 million with final hearing costs of over $28,000 per day,[7] and in the second, the total costs exceeded the net assets available for distribution.[8]

6.6 The *Family Law Act* should provide a clear and easily understood framework that provides sufficient guidance for courts, legal advisers, and the public on the factors that are to be considered when adjusting the property and financial interests of parties on the breakdown of a relationship. Such a framework should assist parties to negotiate a division of their assets that is just to both parties and in the best interests of any children of the parties, without resort to formal dispute resolution processes. A clearer and simplified framework should reduce conflict and improve satisfaction with property settlement outcomes.

6.7 Specific issues in relation to property such as superannuation, bankruptcy, and debt are discussed in this chapter, along with binding financial agreements, spousal maintenance, and family violence. All of these issues are considered integral to a broad discussion of the need for reform of the way in which property division is provided for under the *Family Law Act.*

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4 Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 2, 2014) 872.

5 Australian Bureau of Statistics, '6523.0 – Household Income and Wealth, Australia, 2015–16' (2017) <www.abs.gov.au/household-income>.

6 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (2017) para 3.34.

7 *Riemann & Riemann (No 5)* [2017] FamCA 986.

8 *Salway & Fegley* [2017] FamCA 410.

Property settlement

6.8 The *Family Law Act* provides the family courts with broad powers to adjust property interests and make orders for spousal maintenance between current or formerly married couples, and between former partners from de facto relationships. The provisions relating to married and de facto couples are very similar, though not identical.[9] In a recent High Court case, Gordon J summarised the property settlement provisions of the *Family Law Act* in the following terms:

> In property settlement proceedings, s 79 in Pt VIII provides that a court may make such order as it considers appropriate altering the interests of the parties to the marriage in the property. However, the court must not make an order under s 79 unless it is satisfied that in all the circumstances it is just and equitable to make the order and, in considering what order (if any) should be made in property settlement proceedings, the court must take into account certain matters. Those matters include the financial and non-financial contributions, both direct and indirect, by the parties to the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage; the effect of any proposed order on the earning capacity of either party to the marriage; any other order made under the *Family Law Act* affecting a party to the marriage; and the matters referred to in s 75(2), so far as they are relevant.[10]

6.9 Professor Parkinson AM has argued that Australia's approach to property division on separation is unique, as there is 'no other family property legislation in the Western world which is both so expansive in its scope and yet so vague about its purposes.'[11]

6.10 The *Family Law Act* provides two key powers to judicial officers in relation to parties to a current or former marriage and parties to a former de facto relationship: a power to declare the title or rights that a party has in respect of property;[12] and a power to alter the interests of the parties in property.[13] Orders may be made that affect third parties in certain circumstances.[14] 'Property' is interpreted broadly to include all the property of the parties, including both legal and equitable interests, and tangible property as well as intangible property such as shares.[15] The *Family Law Act* also provides detailed provisions allowing for the division of superannuation interests.[16]

6.11 The power to alter property interests is framed broadly as a power to 'make such order as [the court] considers appropriate'.[17] However, this power may only be exercised where the court is satisfied 'that, in all the circumstances, it is just and equitable to

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9 Compare *Family Law Act 1975* (Cth) pt VIII in respect of married couples and pt VIIIAB in respect of de facto couples.

10 *Commissioner of Taxation v Tomaras* (2018) 362 ALR 253, [57] (citations omitted).

11 Patrick Parkinson, 'Quantifying the Homemaker Contribution in Family Property Law' (2003) 31 *Federal Law Review* 1, 6.

12 *Family Law Act 1975* (Cth) ss 78, 90SL.

13 Ibid ss 79, 90SM.

14 Ibid ss 90AE, 90TA.

15 *Re Duff* (1977) 15 ALR 476, 483–5.

16 *Family Law Act 1975* (Cth) pt VIIIB div 3.

17 Ibid ss 79(1), 90SM(1).

make the order'.[18] The court's discretion must also be exercised in accordance with legal principles, including those prescribed by the *Family Law Act* itself.[19] Importantly,

> Australia is not a community property jurisdiction. Property rights are altered neither by cohabitation nor by marriage. The starting point in any case is to identify legal and equitable title to the assets. Then the question to be asked is whether the parties' rights in those assets should be altered. The right to apply under section 79 or section 90SM of the Act gives no entitlement to an interest in property held in the name of another prior to any order of a court. It is not a proprietary chose in action.[20]

6.12 Thus, the starting point under Australian law is that legal and equitable interests prevail on separation unless the court is satisfied that, in all the circumstances, justice and equity require an adjustment.

6.13 In summary, in considering an application to alter property interests, the court must:

- identify the existing legal and equitable interests of the parties in the property;
- consider whether it would be just and equitable to make an order altering those interests; and
- if it is just and equitable to do so, consider what orders should be made, taking into account the factors listed in s 79(4),[21] which incorporate the 'future needs' factors set out in s 75(2).[22]

6.14 Section 79(4) of the *Family Law Act* includes seven key factors to be considered including:

- the financial contributions to the acquisition, conservation or improvement of property;
- the non financial contributions to the acquisition, conservation or improvement of property;
- the contributions to the welfare of the family including any contribution made in the capacity of homemaker or parent;
- the effect of the proposed order on any earning capacity of the parties;
- the relevant matters contained in section 75(2) with respect to the future needs of the parties;
- any other order under the Act affecting a party to the marriage or a child of the marriage; and
- any child support assessment.

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18 Ibid ss 79(2), 90SM(3). See *Stanford v Stanford* (2012) 247 CLR 108, [35] (French CJ, Hayne, Kiefel and Bell JJ).

19 *Stanford v Stanford* (2012) 247 CLR 108, [38] (French CJ, Hayne, Kiefel and Bell JJ).

20 Patrick Parkinson, 'Family Property Division and the Principle of Judicial Restraint' (2018) 41(2) *University of New South Wales Law Journal* 380, 386.

21 *Family Law Act 1975* (Cth) s 90SM(4) for de facto relationships.

22 Ibid s 90SF(3) for de facto relationships.

6.15 Section 75(2) sets out a list of factors to be considered in respect of the future needs of the parties including:

- the age and state of health of the parties;
- income and financial resources;
- care of a child;
- duration of the marriage;
- provision for a standard of living that in all the circumstances is reasonable;
- parental responsibilities; and
- any other fact or circumstance that the interests of justice require to be taken into account.

6.16 The complexity of these provisions, particularly the lengthy list of factors with no clear hierarchy, does not assist readers to understand the process that a court would use to arrive at a just and equitable division of property. In 2014, the Productivity Commission noted that the provisions, and associated court processes, were a particular barrier to access to justice and considered that it was timely for the Australian Government to consider whether the property provisions in the *Family Law Act* should be clarified to make it easier and cheaper for people to work out their entitlements and come to fair agreements about their division property.[23] The ALRC concurs.

6.17 Parkinson has also criticised the lack of explicit 'quantification principles' in the Act.[24] According to Parkinson, a 'principle of quantification is one that explains how the result, dividing the property of the parties, has been reached'.[25] He has also argued that 'the inconsistency and incoherence of family property law has consistently been the elephant in the room'.[26]

6.18 Associate Professor Young and Dr Goodie have highlighted a range of common situations that have been treated differently by the courts based on the individual circumstances in each case.[27] While providing individual justice in those cases, as required by law, such a discretionary approach does not provide guidance to separating couples on how such issues are routinely to be considered as a matter of law. These include:

- the treatment of initial contributions, and how the length of the relationship affects the weight given to those initial contributions in any overall contribution assessment;[28]

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23 Productivity Commission, above n 5, 874.
24 Patrick Parkinson, above n 11, 7.
25 Ibid 6.
26 Patrick Parkinson, 'Why Are Decisions on Family Property so Inconsistent?' (2016) 90 *Australian Law Journal* 498, 499.
27 Lisa Young and Jo Goodie, 'Is There a Need for More Certainty in Discretionary Decision Making in Australian Family Property Law?' (2018) 32 *Australian Journal of Family Law* 162.
28 See, eg, *Cabbell v Cabbell* [2009] FAMCAFC 205; *Re Pierce* (1998) 24 Fam LR 377; *Williams v Williams* [2007] FamCA 313; *Meredith v Allen* [2014] FamCAFC 223.

- whether the assessment of contribution should be conducted on an asset by asset basis, or globally, considering the property as a single pool to which the parties have contributed;[29]
- how inheritances should be treated,[30] where relevant 'facts may include: the identity of the testator, what contributions were made, and by whom, to the receipt of the inheritance (such as working on a farm), when the inheritance was received, and what was done with it'.[31]
- how gifts received by one of the parties to the relationship are to be dealt with,[32] a matter which is increasingly relevant given the growing practice of parents assisting individuals and their partner to purchase property;[33] and
- how to deal with 'wastage': deliberate or inappropriate diminution of assets.[34]

6.19 Nevertheless, they do not consider that there is a case for reform of the substantive law, arguing that:

> Reform might be appropriate where the law is in a state of confusion or operating unfairly, or if perhaps there were evidence of problematic inconsistency in decision making. The mere fact that there is a difference of opinion as to how individual cases might be resolved, is not sufficient justification for wholesale reform in a discretionary system.[35]

Empirical data on property settlement under the *Family Law Act*

6.20 Post-separation property settlement raises complex issues, not least of which is that, for most separating families, the available assets are not sufficient to meet the costs of two newly formed households, particularly where there are dependent children. The available empirical research identified that only 12.1% of separated parents reported net assets of between $300,000 and $499,000 and only 10.9% reported more than $500,000.[36] The majority of separating parents have fewer than three assets types in their property pool, with the most common asset types being the family home and superannuation.[37]

6.21 There is a significant body of research, including the Longitudinal Study of Separated Parents referred to previously, which indicates that separation has a significantly greater adverse impact on women, particularly those with children.[38] There

29 See, eg, *Norbis v Norbis* (1986) 161 CLR 513; *Re Antmann* (1980) 6 Fam LR 560; *Re McLay* (1996) 20 Fam LR 239; *Re Gill* (1984) 9 Fam LR 969; *Re Lenehan* (1987) 11 Fam LR 615; *Re McMahon* (1995) 19 Fam LR 99; *Re Zyk* (1995) 19 Fam LR 797.

30 See, eg, *Re Bonnici* (1991) 105 FLR 102; *Calvin v McTier* (2017) 57 Fam LR 1.

31 Lisa Young and Jo Goodie, above n 27, 179.

32 See, eg, *Kessey v Kessey* (1994) 18 Fam LR 149; *Barton & Barton* [2009] FMCAfam 1293; *Re Gosper* (1987) FLR 90 1. A perennial question is whether a gift was made or simply a loan: *Re Petersens* (1981) 7 Fam LR 402.

33 Australian Law Reform Commission, *Elder Abuse—A National Legal Response*, Report No 131 (2017).

34 See, eg, *Kowaliw v Kowaliw* [1981] FLC ¶91; *Harper & Harper* [2017] FCCA 3309.

35 Lisa Young and Jo Goodie, above n 27, 185.

36 Qu et al, above n 1, 92.

37 Ibid 94.

38 For a brief survey of this research, see Belinda Fehlberg and Lisa Sarmas, 'Australian Family Property

is also the more recent quantitative analysis of first instance decisions by Dr Christopher Turnbull (2017).[39]

6.22 The Longitudinal Study of Separated Parents shows patterns in the use of different pathways for property settlement.[40] Parents interviewed for the study were asked about the main pathway they used to resolve their property issues. Approximately 60% of couples resolved their property arrangements through discussions, or it 'just happened', 29% of couples used a lawyer, 4% used mediation, and 7% used the courts.[41] These data indicate a greater use of lawyer and court pathways than for children's cases, but it is still a minority that use lawyer led pathways for settlement.

6.23 On average, mothers received 57% of the property pool.[42] However, there was significant variation among couples, with analysis showing the variables affecting the share of property received being:

- the size of the asset pool;
- who initiated the separation, and who left the house—with the person who initiated the separation receiving a smaller share of the property;
- a history of family violence—with experiencing family violence being associated with receiving a lower share of property division; and
- care-time arrangements—with parents who had majority care of a child receiving a higher share of the property pool.[43]

6.24 The finding about the effects of family violence on property settlement outcomes is consistent with other research about the economic effects of family violence.[44]

6.25 The evidence from the Longitudinal Study of Separated Families study showed that a majority (62%) of parents who finalised arrangements under the current regime thought that the outcome they received was fair.[45]

6.26 The empirical research thus provides some insight into the dynamics of property division after separation. It suggests the property settlement regime under the *Family*

Law: "Just and Equitable" Outcomes?' (2018) 32 *Australian Journal of Family Law* 81, 88–91. See also David De Vaus et al, 'The Economic Consequences of Divorce in Australia' (2014) 28(1) *International Journal of Law Policy and the Family* 26.

39 Christopher Turnbull, *Family Law Property Settlements: Principled Law Reform for Separated Families* (PhD Thesis, Queensland University of Technology, 2017).

40 Qu et al, above n 1, 98–9.

41 Ibid, 98.

42 Ibid, 102. See also Rae Kaspiew and Lixia Qu, 'Property division after separation: Recent research evidence' (2016) 30(1) *Australian Journal of Family Law* 1. The LSSF finding is consistent with Dr Christopher Turnbull's finding of 55%: Dr C Turnbull, *Submission 48*.

43 Qu et al, above n 1, 104.

44 See, eg, Rochelle Braaf and Isobelle Barrett Meyering, *Seeking Security: Promoting Women's Economic Wellbeing Following Domestic Violence* (Australian Domestic & Family Violence Clearinghouse, 2011). See also Belinda Fehlberg and Christine Millward, *Family violence and financial outcomes after parental separation* (AIFS, 2014).

45 Qu et al, above n 1, 108.

Law Act needs to be tailored primarily to the needs of the average Australian separating couple, whose assets are relatively small in number and value. At the same time, the *Family Law Act* must provide a framework for the resolution of more complex and high value disputes in a fair and equitable manner.

Prescription v discretion

6.27 There has been a long-running debate in Australia about whether the current discretionary system for family law property settlement should be retained, or whether it would be fairer to move to a more prescriptive or formulaic approach. It was a matter considered by the ALRC in its review of Matrimonial Property in 1987, in which it concluded that:

> The need to take account of post separation circumstances makes a high degree of flexibility essential. An assessment of the economic effects of marriage and its breakdown upon each of the parties and their children must be based on the particular facts of each case. It cannot be precise and it cannot be controlled by a general legislative formula.[46]

6.28 A number of overseas family law systems take a less discretionary approach to this issue. The legislation in some countries employs default rules, such as a presumption of equal sharing. This approach has been adopted, for example, in New Zealand.[47] Similarly, other jurisdictions use a 'community of property' approach, where property acquired during the relationship is presumed to be jointly owned, but property acquired before or after the relationship belongs solely to the person who acquired it.[48]

6.29 In 2014, the Productivity Commission recommended that the review of the property provisions in the *Family Law Act* should consider introducing presumptions about splitting property as currently applies in New Zealand.[49] The New Zealand approach is presently being reviewed by the Law Commission of New Zealand which has expressed a preliminary view, after reviewing submissions to its first Issues Paper, that the *Property (Relationships) Act 1976* (NZ) should continue to provide that each partner is entitled to share equally in all relationship property (that is the family home, the family chattels, and any other relationship property) subject to limited exceptions.[50] The Law Commission referred to the discretionary approach used in Australia, England and Wales, and Ireland and observed that whilst this provides an individualised form of justice, the disadvantage of the approach is that 'the law is less predictable, which can hinder efficient resolution of property disputes and lead to protracted and expensive litigation'.[51]

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46 Australian Law Reform Commission, *Matrimonial Property*, Report 39 (1987) [270].
47 *Property (Relationships) Act 1976* (NZ) s 11.
48 *Family Law Act 1990* (Ontario) s 4, definition of 'net family property'.
49 Productivity Commission, above n 4, 874.
50 New Zealand Law Commission, *Review of the Property (Relationships) Act 1976: Preferred Approach (*November 2018), [3.15].
51 Ibid [3.14].

6.30 Many submissions argued in favour of a more formulaic, or presumption-based, approach to property settlement, particularly those from organisations concerned with non-court based resolution mechanisms. For example, the Australian Dispute Resolution Advisory Council (ADRAC) argued that the

> legislation in this area is complicated and on the face of it does not provide clear guidance as to how the court is to exercise their powers. ... The reported case law regarding the application of the legislation is vast and inconsistent. This results in a great variety of interpretation, uncertainty and range of advice as to rights and entitlements in this area.[52]

6.31 It argued that the legislation should include a series of rebuttable presumptions relating to such matters as the retention of sole ownership of property owned prior to the relationship, joint responsibility for debts incurred during the relationship, equal sharing of assets acquired during the relationship, and joint responsibility for resourcing the expenses and special needs of the children of the relationship.

6.32 Proponents of such an approach argued that such a system would reduce time and costs.[53]

6.33 A number of submissions to this Inquiry argued for a community of property approach, which provides that only assets acquired during the marriage are joint property and those assets acquired prior to the marriage remain the sole property of the party that acquired them.[54] The Law Council, however, expressed concern that such an approach would cause detriment to women who typically enter marriage with fewer assets, and may have foregone education and training opportunities to raise children.[55] The Law Council also noted the extra cost and time associated with tracing and assessing property values over substantial time periods.[56]

6.34 By contrast, other submissions supported the current discretionary approach to property settlement.[57] It was argued that the current approach allows better for the specific circumstances of each family to be taken into account, while providing enough guidance through case law to inform bargaining in the shadow of the law.[58] Lander & Rogers submitted that, notwithstanding the discretionary nature of the system, there is 'some degree of common knowledge as to how property settlements are determined by

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52 Australian Dispute Resolution Advisory Council Inc (ADRAC), *Submission 12*.

53 R Kerr, *Submission 174*; Relationships Australia Victoria, *Submission 129*; Resolution Institute, *Submission 70*; Victoria Legal Aid, *Submission 61*; Australian Dispute Resolution Advisory Council Inc (ADRAC), *Submission 12*.

54 M Derry, *Submission 237*; R Kerr, *Submission 174*; Relationships Australia Victoria, *Submission 129*; L Bowen, *Submission 123*; Drummond Street Services, *Submission 20*; R Stanfield, *Submission 19*.

55 Law Council of Australia, *Submission 43*.

56 Ibid.

57 See, eg, P Easteal and L Young, *Submission 394*; National Legal Aid, *Submission 163*; Farrar Gesini Dunn, *Submission 140*; Women's Legal Service Victoria, *Submission 100*; Hunter Community Legal Centre, *Submission 81*; Family Court of Australia, *Submission 68*; Law Council of Australia, *Submission 43*; D Bryant, *Submission 35*; Australian Bar Association, *Submission 13*.

58 Law Council of Australia, *Submission 43*.

the law—perhaps a byproduct of the high "divorce rate" in our community is a broad social communication of relevant legal issues'.[59]

6.35 The Family Court of Australia drew attention to the unintended consequences that might flow from a prescriptive regime, particularly in relation to de facto couples:

> It is axiomatic to say that married couples know they are married, and that there is a specific legal system which will determine their financial dispute when and if required. However, many partners who reside together do not know or do not appreciate that they are in a de facto relationship until sometime after the breakdown of the relationship when a court declares that they were in a de facto relationship. Indeed, many people choose not to get married to avoid the consequence of that status. It is then one thing to apply the current discretionary system to determine the financial dispute, but plainly it would be an injustice to apply a rule-based system to those couples which in effect prescribes what property is in and what property is out; that would be a great surprise to many of these couples.[60]

6.36 Others raised concerns that in order to cater adequately for the diversity of Australian families, the required list of exemptions, factors to rebut presumptions, and other considerations that would be contained in a prescriptive system would lead to a system that is more, not less, complex than the existing discretionary system.[61] Some of the jurisprudence from New Zealand supports those concerns.[62]

Specific aspects of property to be considered

6.37 Any discussion of how to reform the property settlement provisions in the *Family Law Act* must consider a number of specific issues that go to the heart of whether a property division is fair. This section provides the context for a number of issues that are the subject of reform recommendations in the next chapter.

6.38 The first issue relates to debt, namely how the liabilities of a separated couple are to be divided between the parties and how to calculate that division are important questions in many property settlements. Often a critical issue is how to deal with joint debts where one party has had the benefit of those funds. Related to debt is the question of what happens when one of the parties is bankrupt or becomes bankrupt during proceedings. As a matter of public policy, the key factor is the balancing of the interests of the unsecured creditors of the bankrupt spouse with the interests of the non-bankrupt spouse.

6.39 The second issue is the treatment of superannuation, which, given its general inaccessibility prior to the preservation age, raises complex questions as to the

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59 Lander & Rogers Lawyers, *Submission 198*.

60 Family Court of Australia, *Submission 68*.

61 Lander & Rogers Lawyers, *Submission 198*; Victorian Women Lawyers, *Submission 84*; Hunter Community Legal Centre, *Submission 81*; Family Court of Australia, *Submission 68*; Law Council of Australia, *Submission 43*.

62 See, eg, *Bowden v Bowden* [2016] NZHC 1201; *Simon v Wright* [2013] NZHC 1809; *de Malmanche v de Malmanche* [2002] 2 NZLR 838; *Joseph v Johansen* (1993) 10 FRNZ 302.

appropriate treatment of superannuation on separation. Given that caring responsibilities are typically, but not always, borne by women, and can have a lifelong impact on earnings, property division on or following separation can be an important mechanism for addressing deficiencies in the accumulation of superannuation.

6.40 A third issue is Binding Financial Agreements (BFAs), which enable parties to set out the terms of any property settlement between themselves in certain circumstances and otherwise 'oust' the jurisdiction of the family courts to make a determination as to what is just and equitable in accordance with the provisions of the *Family Law Act*.[63] The extent to which BFAs should be permitted, and the safeguards that should be provided to protect vulnerable parties being taken advantage of, are discussed below.

6.41 Spousal maintenance is primarily about income support, as opposed to the division of property. Nevertheless, the same statutory factors under s 75(2) of the Act must be considered when dividing property and when considering an award of spousal maintenance. Orders for spousal maintenance, whilst rare, remain an important tool under the *Family Law Act* to provide for the financial needs of a party who is incapable of being adequately self-supporting. The context for reform of spousal maintenance in Chapter 7 is discussed below.

6.42 As set out earlier in this Report, people experiencing family violence are some of the most vulnerable users of the family law system and often have some of the most complex needs. Achieving a fair division of property in the context of a relationship featuring family violence can be fraught. Those affected by family violence may suffer longer-term financial disadvantage.[64] The need to better take into account family violence when dividing property and otherwise compensate for the harm of family violence is also discussed in this chapter.

Debts

6.43 Part VIIIAA, which covers debts, was added to the *Family Law Act* in 2003.[65] Orders that the court can make under Pt VIIIAA include:

- an order directed to a creditor of both parties to substitute one party for both parties in relation to the debt owed to the creditor;
- an order directed to a creditor of one party to substitute the other party, or both parties, for that party in relation to the debt owed to the creditor; and
- an order directed to a creditor of both parties that the proportional liability of the parties in relation to the debt owed to the creditor be altered.[66]

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63 *Family Law Act 1975* (Cth) ss 71A, 90SA.

64 Rae Kaspiew et al, 'Domestic and Family Violence and Parenting: Mixed Method Insights into Impact and Support Needs: Final Report' (Australia's National Research Organisation for Women's Safety, 2017) 76–77.

65 *Family Law Amendment Act 2003* (Cth) sch 6.

66 *Family Law Act 1975* (Cth) s 90AE(1).

6.44 These provisions provide the family courts with a broad discretion to make orders that affect debt.

6.45 Gordon J explained the court's powers to make orders that affect debt in the following terms:

> First, for the purposes of Pt VIIIAA *only*, s 90AD(1) provides that a debt owed by a party to a marriage is "to be treated as property for the purposes of paragraph (ca) of the definition of matrimonial cause" in s 4(1) of the *Family Law Act*. ... Having expanded the jurisdiction of the court over those debts, Pt ... VIIIAA confers powers to make orders directed to, or altering the rights, liabilities or property interests of, a third party.[67]

6.46 However, a number of limitations apply to these powers. Most importantly, the limitations include that:

- it must not be foreseeable when the order is made that to make the order would result in the debt not being paid in full; and
- the creditor must be accorded procedural fairness in relation to the making of the order.[68]

6.47 Gordon J thus observed that

> it is difficult to identify a circumstance where any order would be made under s 79 if it diminished the ability of any creditor to recover a debt owed to them by one or both parties to the marriage.[69]

6.48 A number of submissions called for amendments to the existing provisions in the *Family Law Act* that prevent the courts from reallocating debts where it may reduce the likelihood that the debt is repaid in full.[70] However, the ALRC considers that s 90AE(3)(b) provides an important protection for creditors and notes that there are a number of remedies available outside family law where liability for a debt has unfairly accrued.

Unsecured debts

6.49 There are often situations before the courts where one party seeks to rely on an unsecured liability to reduce the value of the pool available for division. There are also loans between family members where there are genuine questions about the circumstances in which it was agreed that the loan is to be repaid, if at all.

6.50 A typical approach has been to deduct all debts of the separating parties from the property pool before the court considers what alteration, if any, to make under s 79 to the net pool. Ms Sarmas and Professor Fehlberg have critiqued a net assets-based approach to property division:

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67 *Commissioner of Taxation v Tomaras* (2018) 362 ALR 253, [67].
68 *Family Law Act 1975* (Cth) s 90AE(3).
69 *Commissioner of Taxation v Tomaras* (2018) 362 ALR 253, [63].
70 Women's Legal Service Victoria (WLSV), *Submission 413*; Victorian Judicial Advisory Group in Family Violence (JAGFV), *Submission 333*.

> while the starting point of deducting liabilities from assets reflects the accepted legal approach in the case of secured liabilities, it is an approach that is highly questionable in the case of unsecured debts. This is because it, in effect, gives priority to the interests of unsecured creditors over the interests of the non-debtor spouse, yet has no clear legislative basis in the *Family Law Act* and is contrary to the position that would operate in property and trusts law.[71]

6.51 There is also difficulty surrounding the question of how unsecured debts are to be valued. In *Re Biltoft,* the Court ruled that it may not take into account or ascribe a reduced value to liabilities that:

- are vague or uncertain;
- are unlikely to be enforced; or
- were unreasonably incurred by one party.[72]

Joint debts

6.52 The Women's Legal Service Victoria report, *Small Claims, Large Battles* has explored in some depth the issues that arise from joint debt:

> Women may be chased by creditors for mortgage repayments, car loans, personal loans and credit card debts, even where they do not have the benefit of the home, the car, the loan monies, or the credit card purchases. To avoid liability for a debt incurred, the contract with the lender would need to be altered, but this cannot usually be done without the consent of the other party and the creditor. The fear of bankruptcy or a negative credit rating means many women continue to service joint debts even when they have little means to do so.[73]

6.53 Submissions have highlighted that s 90AE(3)(b) makes it difficult for a party to a family law proceeding to seek to have a joint debt reallocated to the other party or split into individual debts. Instead, it is relatively common for the family law courts to leave a joint debt in place as between the parties to the family law proceedings and the creditor.[74] The court may, at the same time, allocate sole responsibility for the repayment of the joint debt to one member of the separated couple. The court will usually require the party who is allocated responsibility for the debt to indemnify the other party against non-payment.[75] However, as the debt remains a joint debt, if it is not repaid, both parties remain liable to the creditor and the party seeking to rely on the indemnity would need to initiate court proceedings to enforce it.[76]

6.54 For some individuals involved in, or contemplating family law proceedings, a critical issue may actually be the enforceability at law of the joint debt against them. The

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71 Lisa Sarmas and Belinda Fehlberg, 'Bankruptcy and the Family Home: The Impact of Recent Developments' (2016) 40 *Melbourne University Law Review* 288, 304–5.

72 *Re Biltoft* (1995) 126 FLR 385, 399.

73 Women's Legal Service Victoria, *Small Claims, Large Battles: Achieving Economic Equality in the Family Law System* (2018) 29.

74 Ibid 30.

75 Ibid.

76 Ibid; Economic Abuse Reference Group, *Submission 272*.

National Consumer Credit Protection Act 2009 (Cth) (*National Credit Act*) imposes a suite of procedural and substantive obligations on credit providers when providing credit and when a debtor raises economic hardship concerns, which may occur in the context of family violence.[77]

6.55 Where there are questions about the enforceability of a joint debt, it may be important for those questions to be resolved as a threshold issue rather than seeking to allocate responsibility for the debt between the parties to family law proceedings.

Bankruptcy

6.56 Since 2005, the family courts have had jurisdiction to alter interests in the property of a party that has vested in a bankruptcy trustee.[78] Where a party is bankrupt or becomes bankrupt prior to the property matters being finally determined, under s 79(11) the court must, on the application of the bankruptcy trustee, join the trustee as a party to the proceeding where the interests of the bankrupt's creditors may be affected by a property settlement order.[79]

6.57 While bankruptcy trustees must be joined when the tests in s 79(11) are enlivened, as Sarmas and Fehlberg highlight:

> Trustees are not able to initiate *Family Law Act* s 79 proceedings, making it more likely that they are 'on the back foot' in the litigation process in the sense that they cannot initiate cases where they have a strong chance of success.[80]

6.58 However, the 2005 amendments did add to the range of factors to be considered, including 'the effect of any proposed order on the ability of a creditor of a party to recover the creditor's debt, so far as that effect is relevant'.[81]

6.59 Accordingly, as the Full Court held in *Lemnos*,[82] the effect of the 2005 amendments

> is that the interests of unsecured creditors do not automatically prevail over the interests of the non-bankrupt spouse and that the legislation requires the Court to balance their competing claims in the exercise of the wide discretion conferred by s 79.[83]

6.60 Sarmas and Fehlberg suggest that the law is unclear as it pertains to the approach to be followed by courts determining cases involving trustees and non-bankrupt spouses. They recommend the following approach:

> (1) identifying existing interests in property;

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77 See, eg, *National Consumer Credit Protection Act 2009* (Cth) ch 3. Some lenders have developed internal guidelines and policies for persons involved in family law proceedings.
78 *Bankruptcy and Family Law Legislation Amendment Act 2005* (Cth).
79 See also *Family Law Act 1975* (Cth) s 90SM(14) in respect of de facto partners.
80 Lisa Sarmas and Belinda Fehlberg, above n 71, 319.
81 *Family Law Act 1975* (Cth) s 75(2)(ha).
82 *Trustee of the Property of Lemnos, A Bankrupt & Lemnos* (2009) FLC ¶93–394.
83 Ibid [200].

> (2) if s 79 discretion is exercised, altering the property interests in favour of the non-bankrupt spouse under s 79, taking into account the respective contributions and the additional considerations including under s 75(2) as they relate to the spouses; and
>
> (3) *then* considering the position of the trustee or unsecured creditors in the context of s 75(2)(ha), and only in circumstances where there is culpability of the non-bankrupt/non-debtor spouse in relation to the incurring of the liability in the terms set out in [*Parsons v McBain* (2001) 109 FCR 120].[84]

Superannuation

6.61 In 2001, the *Family Law Act* was amended to facilitate the splitting of superannuation interests by agreement or court order. Prior to these amendments, property matters were sometimes adjourned for lengthy periods until superannuation interests vested and could be split. These reforms were implemented, in part, by deeming superannuation interests as property for the purposes of the *Family Law Act*.[85] The *Family Law Act* and the *Family Law (Superannuation) Regulations 2001* (Cth), and a number of detailed determinations,[86] together allow superannuation interests to be identified, valued, and divided between the parties to a family law matter.

6.62 Notwithstanding these changes to the law, submissions confirmed that separating couples find superannuation splitting very difficult, particularly without legal assistance.[87] Lifetime superannuation savings for men and women are unequal. For example, the median superannuation balance for men aged 60–64 in 2015–16 was $110,000, compared with $36,000 for women.[88] Women typically retire with a superannuation balance significantly lower than men.

6.63 Women's Legal Service Victoria found that a superannuation fund with approximately 250,000 members made 59 family law superannuation splits in 2016–2017, while another fund with approximately 240,000 members made just 48 splits.[89] It argues that the superannuation splits are generally not sought by separating parties with higher wealth because they are able to 'offset' the value of the superannuation within a broader property division and thus avoid the need to deal with the complexity

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84 Lisa Sarmas and Belinda Fehlberg, above n 71, 323 (emphasis in original).

85 *Family Law Act 1975* (Cth) s 90XC. Previously superannuation interests were considered a financial resource.

86 Including methods and factors for valuing certain superannuation interests (the *Family Law (Superannuation) (Methods and Factors for Valuing Particular Superannuation Interests) Approval 2003* (Cth)), annual interest rate adjustment determinations (see, eg, the *Family Law (Superannuation) (Interest Rate for Adjustment Period) Determination 2018* (Cth)), and various determinations about provision of information for certain schemes (see, eg, the *Family Law (Superannuation) (Provision of Information — Commonwealth Superannuation Scheme) Determination 2004* (Cth)).

87 See, eg, Victorian Women Lawyers, *Submission 84*; Domestic Violence Legal Workers Network of WA, *Submission 33*.

88 Ross Clare, 'Superannuation Account Balances by Age and Gender' (Association of Superannuation Funds of Australia Limited, 2017) 5.

89 Women's Legal Service Victoria, above n 73, 28.

of superannuation splitting.[90] Where superannuation is the most valuable asset and there are few, if any, assets outside superannuation this is not possible.

Binding financial agreements

6.64 Binding financial agreements, or BFAs, were introduced into the *Family Law Act* in 2000.[91] Statutory recognition of BFAs was necessary to allow them to oust the jurisdiction of the family courts because the courts have held that common law contracts cannot do so.[92] The rationale for the introduction of BFAs given by the Attorney-General, the Hon Daryl Williams QC, in his second reading speech was:

> to encourage people to agree about how their matrimonial property should be distributed in the event of, or following, separation. Agreements will allow people to have greater control and choice over their own affairs in the event of marital breakdown.[93]

6.65 Situations in which BFAs were anticipated to be of utility included subsequent marriages, rural properties, and family businesses.[94]

6.66 Under the current provisions, both married and de facto couples are able to settle their financial affairs by way of a BFA. A BFA may be entered into before, during or after a relationship;[95] and may set out how part or all of the parties' property or financial resources, and maintenance, should be dealt with in the event that the marriage or relationship ends.[96]

6.67 Assuming a BFA is validly made, its effect is to 'oust' the jurisdiction of the family courts to make orders adjusting the parties' property in accordance with the provisions of the *Family Law Act*.[97] Because of this effect, the Act provides a number of safeguards to protect parties who enter into a BFA. These include:

- strict requirements for entry into the agreement, including a requirement that each party sign the agreement, receive independent legal advice about how the agreement affects their rights and the advantages and disadvantages of entering into it, receive a statement stating that this advice has been received, and provide that statement to the other party;[98] and
- provisions allowing the courts to set aside a BFA on certain grounds such as where a party's agreement was obtained by fraud or there has been a material change of circumstances since the agreement was made.[99] A recent case illustrating this

90 Ibid.
91 *Family Law Amendment Act 2000* (Cth) sch 2.
92 *Hyman v Hyman* [1929] AC 601.
93 Commonwealth, *Parliamentary Debates*, House of Representatives, 22 September 1999, 10151–4 (Daryl Williams QC).
94 Ibid.
95 *Family Law Act 1975* (Cth) ss 90B–90D, 90UB–90UD.
96 See, eg, ibid s 90B(2).
97 Ibid ss 71A, 90SA.
98 Ibid ss 90G, 90UJ.
99 Ibid ss 90K, 90UM.

was *Thorne v Kennedy*, where the High Court found that a financial agreement was voidable due to both undue influence and unconscionable conduct in the circumstances leading up to the agreement being entered into.[100]

6.68 The ALRC is not aware of any empirical data on the number of financial agreements that have been entered into. However, anecdotally, BFAs made at the beginning of, or during, a relationship are not common.

6.69 Submissions indicated a range of views about BFAs. The Hon Mary Finn submitted that '[b]inding financial agreements have been yet another cause of confusion and cost in the jurisdiction'.[101] In contrast, law firm Gadens submitted that:

> The existence of such Agreements once properly entered into not only allows parties to such Agreements the freedom to determine their own financial affairs on relationship breakdown but they can also provide certainty and comfort of outcome to both parties, as well as avoid costly and time consuming litigation.[102]

6.70 The underlying tension in the BFA provisions was described by the Law Council of Australia as being

> the balancing, on the one hand, of the desirability of allowing adults to regulate the financial terms of their relationships (and the benefit thereby of reducing the need for those couples to access state-funded services upon the breakdown of their relationships) versus the recognition that most [pre-nuptial] BFAs favour one party over the other and many produce outcomes that would not be considered 'just and equitable' pursuant to s 79.[103]

6.71 These tensions were borne out in other submissions. Among some sectors of the legal profession there is a strong view that BFAs have failed to achieve their intention of providing certainty. For example, the Aboriginal and Torres Strait Islander Legal Service Queensland commented that: 'our view is that BFAs are currently of little utility and provide no certainty to anyone who enters into one. Some lawyers will simply not prepare them because the legislation is too technical and BFAs can easily fail.'[104]

6.72 Submissions and recent media reports have also highlighted that many lawyers have come to view BFAs as an unacceptable professional liability risk and now refuse to draft them.[105]

6.73 Nonetheless, one group of family lawyers submitted that no substantive changes to the provisions governing BFAs are needed.[106] They contend that the professional

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100 *Thorne v Kennedy* (2017) 350 ALR 1.
101 Hon M Finn, *Submission 308*.
102 Gadens, *Submission 412*.
103 Law Council of Australia, *Submission 43*.
104 ATSILS Qld, *Submission 42*. See also S Christie, *Submission 216*; M Kaye, *Submission 215*.
105 See, eg, U Chowdhury, A Rimovetz, E Post and S Davis, *Submission 183*; Natasha Bita, 'Prenups Too Risky for Legal Eagles' *Sunday Telegraph*, 26 August 2018.
106 C Blanchfield et al, *Submission 420*.

concerns of lawyers who refuse to draft BFAs could instead be addressed through the development of best practice guidelines.[107]

6.74 Some submissions also raised concerns about unequal power dynamics in bargaining for BFAs. Women's Legal Services Australia, for example, observed that BFAs are 'particularly used against culturally and linguistically diverse women who have limited or no English, little understanding of their legal rights, limited support and no understanding of the Australian legal system or laws'.[108]

6.75 The High Court has confirmed that BFAs can be set aside due to undue influence and unconscionable conduct,[109] and many of the concerns identified in submissions, relate to situations involving these factors.

Spousal maintenance

6.76 Spousal maintenance can be agreed between the parties, or can be court ordered. The *Family Law Act* provides the family courts with a broad discretion to make orders for spousal maintenance.[110] Spousal maintenance may be payable where one party has the capacity to pay, and the other party is incapable of supporting themselves adequately without maintenance due to caring for a child of the relationship who is under 18, an inability to work due to age or disability, or any other adequate reason.[111] As a result, spousal maintenance is not available where the economically stronger party does not have the capacity to pay, even if their financial situation is significantly stronger than that of the other party.

6.77 The Act provides a number of factors (the 'future needs' factors) that should be taken into account in determining whether a person is eligible for maintenance, and, if so, which orders should be made about maintenance.[112] These consist of 19 matters, including:

- the age and state of health of each of the parties;
- the income, property, and financial resources of each of the parties, and the physical and mental capacity of each of them for employment;
- whether either party has the care or control of a child of the relationship under 18 years of age;
- responsibilities to support any other person;
- eligibility for benefits or pensions; and
- a standard of living that in all the circumstances that is reasonable.

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107 Ibid.
108 Women's Legal Services Australia Submission No 6 to SPLA Committee, Parliament of Australia, Inquiry into *A Better Family Law System* (April 2017) 38.
109 *Thorne v Kennedy* (2017) 350 ALR 1.
110 *Family Law Act 1975* (Cth) s 74(1).
111 Ibid s 72(1).
112 Ibid s 75(2).

6.78 Spousal maintenance orders are, anecdotally, rare and are made primarily on an interim basis.[113] Submissions raised a number of circumstances where there is an ongoing need for spousal maintenance provisions, including for individuals who have travelled to Australia on partner visas and are ineligible for government support, as well as individuals who have suffered family violence. For both categories, there are concerns about the practical accessibility of spousal maintenance.

6.79 Comparative research suggests that spousal maintenance is relatively rare in Australia when compared with cognate jurisdictions such as New Zealand, Canada, Scotland, and England and Wales. Part of the reason for this may be s 81 of the *Family Law Act* which provides that 'the court shall, as far as practicable, make such orders as will finally determine the financial relationships between the parties to the marriage and avoid further proceedings between them.'

6.80 Accordingly, there has been a strong judicial preference to address future need through appropriate property adjustments rather than a spousal maintenance award. While financial independence is clearly desirable in most cases, there is concern that the apparent aversion to spousal maintenance in ordinary cases is particularly disadvantageous for women when there are few assets of the relationship but the other party has substantial income and income earning capacity.

Addressing the consequences of family violence

6.81 The *Family Law Act* does not explicitly provide for family violence to be considered as part of property settlement or the need for spousal maintenance. Several submissions supported the specific reference to family violence in the list of matters that courts must consider in determining the division of property.[114]

6.82 Nevertheless, when considering a division of property the court may, in 'exceptional' cases, take family violence into account when assessing the parties' contributions pursuant to s 79 of the *Family Law Act*.[115] The court said in *Kennon* that an adjustment will be made to address family violence where the person experiencing family violence establishes that a course of violent conduct occurred during the marriage and that the violence either:

- had a significant adverse impact upon that party's contributions to the marriage; or

113 Grant Riethmuller and Robin Smith 'Spousal Maintenance: Is it Time to Roast this Old Chestnut?', (Paper, 13th National Family Law Conference, Adelaide, 7 April 2008) 1–2, cited in Belinda Fehlberg et al, *Australian Family Law: The Contemporary Context* (Oxford University Press, 2nd ed, 2015) 605; Juliet Behrens and Bruce Smyth, 'Spousal Support in Australia: A Study of Incidence and Attitudes' (Working Paper No 16, Australian Institute of Family Studies, February 1999) 7.

114 Queensland Council of Social Service (QCOSS), *Submission 378*; Women's Legal Services Australia, *Submission 366*; Domestic Violence NSW, *Submission 363*; Rape & Domestic Violence Services Australia, *Submission 287*.

115 *Kennon & Kennon* (1997) 22 Fam LR 1.

- made his or her contributions significantly more arduous than it ought to have been.[116]

6.83 Prior to *Kennon,* the consequences of violence were also taken into account in considering adjustments on account of health matters or diminished earning capacity.[117]

6.84 Many submissions supported amendment to the *Family Law Act* to better account for the impact of family violence in the context of property division.[118] This has previously been recommended by the House of Representatives Standing Committee on Social Policy and Legal Affairs,[119] the Family Law Council,[120] and the ALRC's 1994 *Equality Before the Law* report.[121]

Shortcomings in the law

6.85 People experiencing family violence are some of the most vulnerable users of the family law system. Research suggests that those affected by family violence struggle to achieve a fair division of property under the *Family Law Act*[122] and may suffer long-term financial disadvantage.[123] Women's Legal Services Australia reported that women who have experienced family violence may elect not to seek property orders to avoid 'provoking' further violence, especially where their partner is unwilling to negotiate.[124] A significant proportion of women who have left a violent relationship have difficulty obtaining a property settlement[125] and seven in ten also leave property or assets behind.[126]

6.86 An adjustment in accordance with *Kennon* is rarely made and even when it is applied, it generally results in relatively modest adjustments to property divisions. Analysis by Professors Easteal, Warden and Young found only 57 reported judgments in which a *Kennon* argument was raised between 2006 and 2012.[127] Family violence

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116 Ibid 24.

117 *In the Marriage of Barkley* (1976) 11 ALR 403; *In the Marriage of Hack* [1980] FLC 90.

118 National Legal Aid, *Submission 163*; Springvale Monash Legal Service, *Submission 161*; Marrickville Legal Centre, *Submission 137*; NSW Young Lawyers Family Law Committee, Law Society of NSW, *Submission 108*; Women's Legal Services Australia, *Submission 45*; Safe Steps Family Violence Response Centre, *Submission 15*.

119 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 6, 178.

120 Family Law Council, *Letter of Advice to the Attorney-General: Violence and Property Proceedings* (2001).

121 Australian Law Reform Commission, *Equality before the Law: Justice for Women*, Report No 69 (1994) rec 9.6.

122 Kaspiew and Qu, above n 42; Women's Legal Service Victoria, above n 73.

123 Kaspiew et al, above n 64, 76–77. While some survivors of family violence may recover compensation through state programs for victims of crime, there is limited access because the legislation fails to recognise the dynamics of family violence: Emma Smallwood, 'Stepping Stones: Legal Barriers to Economic Equality after Family Violence' (Women's Legal Service Victoria, 2015) 55.

124 Women's Legal Services Australia, Submission No 6 to House of Representatives Standing Committee on Social and Legal Affairs, Parliament of Australia, *Parliamentary Inquiry into a Better Family Law System to Support and Protect Those Affected by Family Violence* (27 April 2017) 36.

125 Emma Smallwood, above n 123, 36.

126 Peta Cox, *Violence Against Women: Additional Analysis of the Australian Bureau of Statistics' Personal Safety Survey* (Australia's National Research Organisation for Women's Safety, 2015) 3.

127 Patricia Easteal, Catherine Warden and Lisa Young, 'The Kennon "Factor": Issues of Indeterminacy and

was found by the court to have occurred in 72% (41) of these matters, and a property adjustment for violence was made in 42% (24 cases).[128] Where the court specified the adjustment that they were making in accordance with *Kennon*, the average adjustment was 7.3%, with the most common adjustment made being 10%.[129]

6.87 Moreover, the approach has been criticised:

> The *Kennon* factor… is a complex combination of vague phrases and it is not surprising then that, possibly like some legal practitioners, there are judicial officers who appear to be unclear about the test in general and whether it fits the facts in a particular case… [T]he *Kennon* principle leaves too many grey areas resulting in judicial indeterminacy with diverse interpretation of its wording.[130]

6.88 The process of accounting for family violence through the lens of contributions may appear contrived when compared with an approach that focuses on compensating for the harm caused. The quantum of damages expressed as a proportion of the asset pool has been criticised as incorporating an element of arbitrariness. As Parkinson notes, the 'absence of a principle of quantification results in an absence of consistency in how to quantify outcomes.'[131]

Floodgates' (2014) 28 *Australian Journal of Family Law* 1, 9.

128 Ibid 10–11.

129 Ibid 12.

130 Ibid 24.

131 Parkinson, above n 26, 509.

7. A Simplified Approach to Property Division

Contents

Introduction

7.1 This chapter builds on the previous chapter in which the case for reform is set out. In this chapter, the ALRC recommends that the property division provisions be amended to specify the steps that a court must take in considering an order to alter the property interests of the parties to a relationship and to stipulate that the date of assessment of the value of the assets and liabilities be the date of separation. The ALRC suggests that parties seeking to reach property settlements under the *Family Law Act* would be assisted by the inclusion of a statutory presumption that the parties made equal contributions during the relationship, with limited exceptions. Such a presumption would reduce conflict and focus the parties' attention on the adjustment necessary to take account of each party's future economic circumstances.

7.2 In relation to superannuation interests, the ALRC recommends legislative amendments to make splitting superannuation interests easier, and the introduction of a presumption that superannuation benefits accumulated during a relationship will be shared equally.

7.3 The ALRC further recommends amendments to: clarify the treatment of unsecured debts; facilitate access to dispute resolution where liability for a joint debt is in question; and to restrict adverse credit reporting in limited circumstances.

7.4 The ALRC recommends disentangling the statutory provisions relating to property settlement from those relating to spousal maintenance, with separate factors for assessment included in the Act. Recommendations also address the need to facilitate access to interim spousal maintenance when it is most needed.

7.5 With regard to family violence, the ALRC recommends amending the *Family Law Act* to provide for a cause of action in which compensation for harm caused by family violence can be pursued, explicitly reversing the effect of the decision in *Kennon & Kennon*.[1] This includes removing evidentiary barriers to raising claims of family violence and the extension of the Less Adversarial Trial to property and financial matters when appropriate.

A clearer approach to property settlement

Recommendation 11 The *Family Law Act 1975* (Cth) should be amended to:

- specify the steps that a court will take when considering whether to make an order to alter the interests of the parties to the relationship in any property; and
- simplify the list of matters that a court may take into account when considering whether to make an order to alter the interests of the parties to the relationship in any property.

Recommendation 12 The *Family Law Act 1975* (Cth) should be amended to include a presumption of equality of contributions during the relationship.

7.6 In line with recommendations for legislative simplification in Chapter 14, the ALRC recommends that core provisions of Pt VIII be redrafted to clearly set out the analytical steps involved in property settlement proceedings.[2]

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1 (1997) 22 Fam LR 1.

2 Simplifying pt VIII had strong support in submissions. See, eg, Queensland Council of Social Service (QCOSS), *Submission 378*; Family Law Practitioners Association Qld, *Submission 368*; Macarthur Legal Centre, *Submission 346*; Moores and MELCA, *Submission 222*; S Christie, *Submission 216*; Lander & Rogers Lawyers, *Submission 198*; National Legal Aid, *Submission 163*; Relationships Australia Victoria, *Submission 129*; Drummond Street Services, *Submission 20*.

7.7 The recommendation retains judicial discretion, recognising the importance of providing judicial officers with the scope to order a division of property that is just and equitable in each individual case.

7.8 As discussed in relation to Recommendation 18 below, the ALRC recommends separating the provisions relating to property settlement from those relating to spousal maintenance. The revised list of need factors with respect to property settlement should include:

- the caring responsibilities for any children of the relationship;
- the income earning capacity of each of the parties;
- the age and state of health of the parties; and
- the effect of any adjustment for need on the ability of a creditor of a party to recover the creditor's debt, so far as that effect is relevant.

7.9 The presumption of equality of contributions could be displaced when there is evidence that a party has:

- wasted assets;
- deliberately or unreasonably damaged property;
- accumulated liabilities for his or her own benefit;
- received compensation awards for pain and suffering or economic loss which have not been dissipated during the relationship and are otherwise traceable; or
- received inheritances and gifts.

7.10 The recommended approach to property division is to:

1. ascertain the existing legal and equitable rights and interests, and liabilities, of the parties in their property;
2. presume equality of contributions unless a statutory exception applies; and
3. determine what adjustment should be made in favour of either party having regard to any matter that is relevant to the particular circumstances of the parties, including:
    a. the caring responsibilities for any children of the relationship;
    b. the income earning capacity of each of the parties;
    c. the age and state of health of the parties; and
    d. the effect of any adjustment on the ability of a creditor of a party to recover the creditor's debt, so far as that effect is relevant.

Equality of contribution

7.11 A key concern that emerged from consultations and submissions was that there is a high degree of uncertainty within the community about the current legal regime for

property settlement post-separation. This confusion was also reflected in the personal accounts provided by members of the public through the confidential *Tell Us Your Story* portal and in confidential submissions.

7.12 A common understanding of the conceptual basis for the current regime remains elusive.[3] It cannot simply be that leaving the parties' interests in property as they are would be unfair or unjust without any consistent rationale for the basis of that assessment. Dr Turnbull has therefore called for reforms that clearly disclose the theoretical basis for altering the property interests of parties upon separation.[4]

7.13 The recommendation to move away from an assessment of the relative contributions of the parties and instead start with equal contributions is not new. Commentators and submissions noted that, prior to the 1984 High Court decision in *Mallet v Mallet*,[5] the Family Court had developed a starting point or guideline that, in a long marriage, consideration would usually start from the position of equality of contributions.[6] However, in *Mallet v Mallet*, the majority of the High Court held that there was no statutory basis for such a starting point. Gibbs CJ held:

> the Parliament has not provided, expressly or by implication, that the contribution of one party as a homemaker or parent and the financial contribution made by the other party are deemed to be equal, or that there should, on divorce, either generally, or in certain circumstances, be an equal division of property, or that equality of division should be the normal or proper starting point for the exercise of the court's discretion. Even to say that in some circumstances equality should be the normal starting point is to require the courts to act on a presumption which is unauthorized by the legislation.[7]

7.14 In 1987, whilst eschewing a prescriptive approach to the ultimate division of matrimonial property, the ALRC had nevertheless concluded that the starting point for assessing the value of each party's property interests should be a rule of equal sharing of the value of the parties' property. Departure from the starting point of equal sharing would be permitted in limited circumstances, including: where one party brought significant property into the marriage, or acquired it by way of gift or inheritance; or where appropriate in light of child care responsibilities post separation.[8]

7.15 The ALRC had observed that, with respect to property division under the *Family Law Act*

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3 Christopher Turnbull, 'Family Law Property Settlements: A Liberal Theoretical Framework for Law Reform' (2019) 18(2) *QUT Law Review* 246, 250; Patrick Parkinson, 'Why Are Decisions on Family Property so Inconsistent?' (2016) 90 *ALJ* 498, 523.

4 Turnbull, above n 3.

5 (1984) 156 CLR 605.

6 Moores and MELCA, *Submission 222*; Christopher Turnbull, *Family Law Property Settlements: Principled Law Reform for Separated Families* (PhD Thesis, Queensland University of Technology, 2017), 140–141.

7 *Mallet v Mallet* (1984) 156 CLR 605, 610.

8 Australian Law Reform Commission, *Matrimonial Property*, Report No 39 (1987) 157–8.

> a major weakness of the present law is its emphasis on the assessment of the parties' respective contributions to the acquisition, conservation or improvement of property, and to the welfare of the family.[9]

7.16 It added that the assessment of respective contributions:

> involves invidious and value-laden assessments of each spouse's performance in the marriage; its conceptual basis is unclear and it engenders expense, delay and bitterness, while not influencing the outcome in the general run of cases.[10]

7.17 In a joint submission, private law firms Moores and MELCA submitted that:

> In our view, having a legislated 50/50 starting point for contribution analysis would take 10% to 20% out of the complexity, length and associated legal costs in connection with contested property cases. It is so common during negotiations and court processes that we argue over very little – and that is what the legislation requires us to do![11]

7.18 In addition to legal resources being spent disproportionately over very small differences in contributions, Moores and MELCA highlight that:

> Perhaps even more importantly, the effect of introducing a 50/50 presumption would be that much of the criticism by one party of the other about their supposedly inadequate contributions would be removed from most affidavit material and from most trials. This is highly recommended given the ongoing need to maintain a level of workable relationship after separation in all families, especially where there are children, whether they are minors or adults at the time of the dispute.[12]

7.19 Professor Parkinson AM has noted that:

> The idea of equality has had a powerful gravitational effect when assessing contributions even in cases where one party has brought property into the relationship or received it through an inheritance. There is no presumption of equality, nor a starting point to this effect; but where there was no significant pre-marital property, and no inheritances or damages awards, a conclusion of equality of contribution has been all but inevitable. In *Waters and Jurek*, Fogarty J stated that in 'the majority of property cases little difficulty is encountered in the contribution step and increasingly in the general run of cases the conclusion is likely to be one of equality or thereabouts'. [13]

7.20 Similarly, Professor Fehlberg has previously identified a partnership theme in Full Court decisions,[14] though this has waned in recent times.[15] Fehlberg suggested the

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9 Ibid 140.
10 Ibid 142.
11 Moores and MELCA, *Submission 222*.
12 Ibid.
13 Patrick Parkinson, 'Family Property Division and the Principle of Judicial Restraint' (2018) 41(2) *University of New South Wales Law Journal* 380, 384 (citations omitted).
14 Belinda Fehlberg, '"With All My Worldly Goods I Thee Endow?": The Partnership Theme in Australian Matrimonial Property Law' (2005) 19 *International Journal of Law, Policy and the Family* 176.
15 Turnbull, above n 6.

partnership theme reflected 'a commitment to equality and to sharing implicit in the notion of marriage as a joining of lives.'[16] Importantly:

> The partnership theme has usually (but not always) arisen in cases involving long, first marriages during which spouses have adopted gendered roles. It has been used to justify more favourable (but not necessarily equal) outcomes for wives who have fulfilled the role of homemaker and parent to their ultimate economic disadvantage post-divorce.[17]

7.21 In considering the policy rationale for the alteration of separating couples' property interests, it should be acknowledged that intimate relationships are increasingly diverse. While in 1987 the ALRC was concerned only with matrimonial property, the *Family Law Act* now also deals with the division of property following the breakdown of de facto relationships. Parkinson has also highlighted the changes in the nature of intimate relationships in Australia since the *Family Law Act* was passed.[18] In addition to the rise of de facto relationships, increasing divorce rates means that second and subsequent marriages are more common. Parkinson's research demonstrates that a starting point of equality may be disadvantageous in the context of certain relationships, particularly where financial resources have not been pooled and there has not been an expectation created that the parties will financially support each other.[19] The concerns that the effect of such a change might have unintended consequences for de facto couples who have chosen not to get married to avoid the consequences, or assumptions, of that status was highlighted by the Family Court of Australia.[20]

7.22 Parkinson has suggested that it 'is parenthood, not marriage or cohabitation per se, which justifies significant wealth transfers between people following the breakdown of intimate relationships'.[21] Parkinson observes that parenthood effects a change in the relationship of a couple, regardless of their marital status, 'which requires limitations to be placed upon their assertion of individualised financial autonomy'.[22] In such circumstances an adjustment of property interests is required to reflect the non-financial contributions of the primary caregiver, their ongoing financial needs, and the long-term economic implications of interrupted workforce participation.[23] In these circumstances a property division that commences from a qualitative assessment of individual contributions to property and the relationship risks becoming arbitrary, counterproductive, and unfair.

7.23 The ALRC's attention was also drawn to research that highlights that childless divorced women are financially disadvantaged when compared with divorced men;[24] and

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16 Belinda Fehlberg, above n 14, 178, quoting; Patrick Parkinson, 'Quantifying the Homemaker Contribution in Family Property Law' (2003) 31 *Federal Law Review* 1, 8.
17 Belinda Fehlberg, above n 14, 177–8.
18 Parkinson, above n 13, 398–9.
19 Parkinson, above n 16, 8–10.
20 Family Court of Australia, *Submission 68*.
21 Parkinson, above n 16, 15.
22 Ibid 14.
23 Ibid.
24 National Centre for Social and Economic Modelling, *For Richer, For Poorer: Divorce in Australia* (Income and Wealth Report Issue 39, 2016) 6–10.

that the role division in many relationships, even in the absence of children, contributes to this disadvantage. Fehlberg has previously argued that:

> A starting point of equal sharing may also be more advantageous for women who have experienced domestic violence, who are currently around three times less likely as women who report no violence to indicate receipt of a minor share of the total property (meaning less than a 40 percent share)...[25]

7.24 The Family Law Council had previously supported reforms to property settlement that included a presumption of equality of contributions.[26]

7.25 The Law Council of Australia was adamantly opposed to any changes to the discretionary regime in relation to the division of property, including any presumption of equal contributions.[27]

7.26 Individual contributors to this Inquiry, who had been through the family law system, raised concerns that there was no obvious starting point for negotiations and that there was no clear 'standard approach' to property division. According to these individuals, the lack of clarity around entitlements often contributed to protracted litigation. A number of contributors, many of whom were particularly disadvantaged, indicated that they had given up on a property settlement for a range of reasons. One of those was that it was not clear what they were entitled to under the law. Difficulties with disclosure of financial interests together with an ambiguous legal framework often combined to make individuals determine that it 'was too hard' to pursue a property settlement. A presumption of a 50/50 split of contributions would have at least given those individuals a starting point in negotiations.

7.27 Accordingly, the ALRC recommends that there be a presumption of equal contributions during the relationship. This change, if implemented, should be accompanied by an education campaign to explain the operation of the law, particularly for de facto couples who may not be aware that their relationship status has an impact on their property entitlements.

Factors relevant to an adjustment for future economic need

7.28 The ALRC recommends a simplified list of factors which a court may take into account when considering what order (if any) should be made in property settlement proceedings. The simplified list directs parties' attention to matters relevant to their future financial needs.

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25 Belinda Fehlberg, above n 14, 193. More recent studies indicate that seven in ten women who experience family violence leave property or assets behind and 90% have difficulties obtaining a property settlement: Emma Smallwood, 'Stepping Stones: Legal Barriers to Economic Equality after Family Violence' (Women's Legal Service Victoria, 2015) 36; Peta Cox, *Violence Against Women: Additional Analysis of the Australian Bureau of Statistics' Personal Safety Survey* (Australia's National Research Organisation for Women's Safety, 2015) 3.

26 Family Law Council, Submission to Attorney-General's Department (Cth) Discussion Paper *Property and Family Law: Options for Change*, 1999.

27 Law Council of Australia, *Submission 43*.

7.29 It is recommended that the list of factors be prefaced with the broad discretionary power to consider any matter that is relevant to the particular circumstances of the parties, given that it is simply not possible to prescribe a list of factors that will adequately account for the myriad circumstances that characterise the diverse array of modern Australian families. The matters listed direct the parties' attention to four broad circumstances that are likely to be relevant to the vast majority of separating couples: future needs having regard to caring responsibilities for children; differential income earning capacity; issues attributable to age and health; and obligations to third-party creditors.

7.30 This recommendation makes no change to the substantive law; any of the matters currently required to be considered by a court under s 79(4), including those specified in s 79(2) may be relevant to the particular circumstances of the matter before the court. Many others not listed may also be relevant. The removal of a prescriptive list of matters that 'shall be considered' will have the consequence, however, that the failure on the part of a judicial officer to mention every matter listed, albeit irrelevant in the circumstances, will no longer be susceptible to a claim of appellable error. Judgments should consequently become shorter and appeals fewer.

Caring responsibilities

7.31 A focus on the need for adjustment because of the income earning capacity differential caused by caring responsibilities for children of the relationship is likely to be a relevant factor for most separating parents.

7.32 Currently mothers with dependent children on average achieve a property settlement of between 55% and 57%.[28] Accordingly, there is legitimate concern that a presumption of equality of contributions would lead to 50/50 as the outcome, which would see many women doing worse than is currently the case.

7.33 Fehlberg, Sarmas and Morgan have cautioned that the focus on formal equality in family law has been particularly disadvantageous for women.[29] They note that 'private transfers alone cannot be expected to fully resolve post-separation poverty and often there is little property to divide'.[30] Nevertheless 'property division under the FLA remains an important strategy, even in low asset cases'.[31]

7.34 In this regard, Fehlberg, Sarmas and Morgan note research that suggests that following the 2006 shared parenting amendments there has been a reduction in mothers'

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28 Rae Kaspiew and Lixia Qu, 'Property Division after Separation: Recent Research Evidence' (2016) 30(1) *Australian Journal of Family Law* 1, 19; Lixia Qu et al, 'Post Separation Parenting, Property and Relationship Dynamics after Five Years' (Attorney-General's Department (Cth), 2014), 102; Dr C Turnbull, *Submission 48*.

29 Belinda Fehlberg, Lisa Sarmas and Jenny Morgan, 'The Perils and Pitfalls of Formal Equality in Australian Family Law Reform' (2018) 46 *Federal Law Review* 367.

30 Ibid 387.

31 Ibid 388.

share of the property by about 7% (from 63% to 57%).[32] They also highlight that in the mid 1990s

> more significant adjustments of around 10–15 per cent on the basis of economic disparity between the parties began to be made, to take account of women's usually greater responsibilities for caring for children before and after separation, leading to diminution in their income earning capacity but not that of their male counterparts.[33]

7.35 Similarly, Parkinson has argued that:

> A law that provided for the equal division of the assets acquired in the course of the marriage without any further adjustment to compensate for the homemaker contribution would not lead to gender equity at all in cases where the assets acquired were relatively modest. Conversely, where the marriage partnership is very successful in a financial sense, then an approach of equal sharing of the fruits of that partnership may suffice not only to reward the homemaker contribution but to compensate for it.[34]

7.36 The ALRC considers that, as a general proposition, any diminution of the proportion of a property settlement received by the parent who has the greater parenting responsibility, would be an unacceptable outcome of any law reform process and that the law should be seeking to provide for the financial burden of separation to be shared fairly and not just evenly.

7.37 The ALRC suggests that a legislative regime that is clear and simple should facilitate an understanding that 50/50 relates to contributions only, and that the law provides for an adjustment to address future economic need. Moreover, this change should be accompanied by an education campaign to highlight the new legal regime for property settlement.

7.38 The amended legislation should provide guidance as to how an adjustment should be calculated. The ALRC suggests that the adjustment should be calculated by having regard to the income earning capacity of the parties at separation and making allowance to enable the party with the lower income to adjust to the loss of the combined financial resources over time. The greater the length of the relationship the greater the time needed to adjust.

7.39 The New Zealand Law Commission has recently made a proposal with respect to spousal maintenance that could be adapted to a model for an income earning capacity adjustment as part of the property division. The New Zealand Law Commission proposed that:

> People who have children, have been together for 10 years or more, or who have built or sacrificed careers because of the relationship should be eligible for Family Income

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32 Belinda Fehlberg, Lisa Sarmas and Jenny Morgan, 'The Perils and Pitfalls of Formal Equality in Australian Family Law Reform' (2018) 46 *Federal Law Review* 367, 391, citing Rae Kaspiew et al, 'Evaluation of the 2006 Family Law Reforms' (Report, Australian Institute of Family Studies, December 2009) 225.

33 Ibid.

34 Parkinson, above n 16, 19.

> Sharing Arrangements or "FISAs". Under a FISA, the partners would be required to share their combined income for a limited period after they separate, to ensure the economic advantages and disadvantages from the relationship are shared more fairly.[35]

7.40 In many cases there would be insufficient assets in the property pool to enable an adjustment to interests that would fully account for income earning capacity difference in the way the New Zealand Law Commission envisages, though in many cases adjusting for the income differential would greatly assist the more disadvantaged party to adjust post separation.

7.41 The income earning capacity of one or other parties may, however, be affected by a variety of other factors unrelated to caring responsibilities. These include the impact of family violence on a party's ability to maximise his or her earning capacity, the effects of drug or alcohol abuse, addictions, physical incapacity, or mental illness. It is likely that, in very many families, one or more of these factors may be relevant considerations and it is important that income earning capacity is recognised as a common adjustment factor.

Date of separation or date of hearing?

Recommendation 13 The *Family Law Act 1975* (Cth) should be amended to provide that the relevant date to ascertain the value of the parties' rights, interests, and liabilities in any property is the date of separation, unless the interests of justice require otherwise.

7.42 The ALRC recommends that the date of separation should be used as the basis for calculations in respect of property division. Currently, the law is generally that the relevant date is the date of hearing.[36] There have, however, been a number of cases where this approach has been modified, in part, where there has been a lottery win or significant inheritance after separation, but before the hearing date.[37] In *Calvin v McTier,*[38] the Full Court quoted with approval the following paragraph from the judgment of Finn J in *Farmer and Bramley*:[39]

> if it was to be determined that a majority of the community considered that one spouse should, as a general rule, have no entitlement to share in property either by good fortune or good management acquired after separation by the other spouse, then the Act would need to be amended to make this clear. As the Act currently stands, the jurisdiction conferred by s 79(1) to alter the interests of spouses in property extends without

35 New Zealand Law Commission, *Review of the Property (Relationships) Act 1976: Preferred Approach: Te Arotake i Te Property (Relationships) Act 1976: He Aronga i Mariu Ai*, Preferred Approach Paper: Frequently Asked Questions (2018) 2.

36 *Farmer v Bramley* (2000) 27 Fam LR 316.

37 *Mackie v Mackie* [1981] FLC 91-069; *Zyk v Zyk* [1995] FLC 92-644; *Conti v Conti* [2012] FamCA 290; *Miklic v Miklic* [2010] FamCA 741.

38 (2017) 57 Fam LR 1.

39 (2000) 27 Fam LR 316.

limitation to all the property which either spouse is entitled "whether in possession or reversion" (s 4).[40]

7.43 The rationale for altering the legal and equitable title of separated parties under the *Family Law Act* is that the nature of their relationship was such as to make reliance on legal and equitable title unjust. If the relationship is the basis for the alteration of property interests, it is consistent, as a matter of policy, for the date of separation to be the date on which property interests are valued. This is also consistent with an approach that suggests parties need to be encouraged to commence their separate financial lives as soon as practicable following separation.

7.44 Using the date of separation as the date of division would also avoid complicated 'add backs' and calculations of 'notional property' which the courts routinely consider where one party's actions post separation have led to a diminution of assets.[41] If the date of separation is used as the date of calculating asset values, any diminution of assets or accumulation of debt post separation by one party is clearly their sole responsibility.[42]

7.45 Following separation parties may sell their joint property and individually buy a property for themselves. If, by the date of the hearing, one property goes up in value and the other goes down, under the current law, the party with the house that had gone up in value may be required to effectively compensate the other party if the court were to award a 50/50 split of the assets. This recommendation would avoid such an outcome.

7.46 In addition, there is a degree of arbitrariness occasioned by the date of hearing as the date for division. That date will be influenced by a range of factors extrinsic to the relationship and the conduct of the parties, including the vagaries of court resources and timetabling.

Debts

Unsecured debts

7.47 As set out in the previous chapter, a typical approach when arriving at a determination of the relative contributions to, and liabilities incurred in relation to, the parties' property has been to deduct all debts of the separating parties from the property pool before a court considers what alteration, if any, to make under s 79 to the net pool. It was put to the ALRC in consultations that the starting position for unsecured debts should be that the debt remains the responsibility of the party who incurred the debt. The issue of unsecured debt is not an easy one to resolve. It would seem fair that a party to proceedings who has accumulated a significant gambling debt should remain solely responsible for that debt. It seems less fair to hold a parent, who has accumulated

40 *Calvin v McTier* (2017) 57 Fam LR 1, [46] quoting ibid [57].

41 See generally *Mackie v Mackie* [1981] FLC 91-069; *Re Zyk* (1995) 19 Fam LR 797; *Farmer v Bramley* (2000) 27 Fam LR 316; *Eufrosin & Eufrosin* [2014] FamCAFC 191; *Mahon & Mahon* [2015] FCCA 510.

42 If a party were to deprive the other of assets, following separation but prior to a court hearing, that they would otherwise be entitled to, the costs consequences of that behaviour should be visited on that party.

significant debt on a personal credit card to meet the costs of providing for the children, individually responsible for the debt.

7.48 As set out in paragraph 7.9, Recommendation 11 effectively adopts an 'add back' approach to both wastage and debt. That is, the unreasonable accumulation of unsecured debt is an exception to the presumption of equality of contributions. Recommendation 13 in relation to the valuation date for assessing property division ensures that, in most circumstances, debts accumulated post separation remain the sole responsibility of the party that accrued the debt.

7.49 In many cases concerning unsecured debts, the question of whether it should be taken into account in reducing the value of the pool available for distribution will be a factual one rather than a legal one: is there an unsecured debt and what is its value? In many circumstances involving intra-family loans, the debt should only be considered as part of the calculation for the division of property if the creditor has joined proceedings and has successfully substantiated their claim. In all cases, the party claiming the existence of an unsecured debt should be required to substantiate that claim.

Joint debts

Jurisdictional clarification

Recommendation 14 The family courts and the Australian Financial Complaints Authority should develop a protocol for dealing with jurisdictional overlap with respect to debts of parties to family law proceedings. The protocol should provide that:

- disputes about the enforceability of a debt against one or both parties under the *National Consumer Credit Protection Act 2009* (Cth) are dealt with by the Australian Financial Complaints Authority; and
- disputes about the reallocation of a debt between parties to a family law proceeding are dealt with by the family courts.

7.50 This recommendation recognises that currently there is concurrent jurisdiction between the Australian Financial Complaints Authority and the family courts with respect to joint debts. Parties would benefit from clarity about the most appropriate forum for resolving joint debt issues.

7.51 This recommendation should enable individuals who are contemplating, or involved in, family law proceedings where liability for joint debt is a key issue, to utilise a speedier, less expensive and less adversarial pathway for dispute resolution. It will also enable individuals to avail themselves of an existing forum that has developed expertise and jurisprudence around the *National Consumer Credit Protection Act 2009* (Cth).

7.52 The threshold question of whether a debt is truly a joint debt should be resolved by the AFCA in the first instance. For separating couples with no or few assets, resolving

the liability for the debt with the creditor may be the most pressing issue and there may be no need to initiate or continue family law proceedings if the joint debt issue is resolved satisfactorily.

7.53 In addition, for persons who have experienced family violence, joint debt has been highlighted as 'one of those most difficult issues for victims to resolve with financial institutions'.[43] Clarifying AFCA's role may facilitate access to the most appropriate forum.

AFCA dispute resolution process

7.54 A person may lodge a complaint against a 'financial services firm'[44] with AFCA to partially or wholly absolve themselves from a joint debt or 'joint facilities.'

7.55 The AFCA external dispute resolution scheme is authorised under the *Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018* (Cth) and aims to resolve complaints lodged by consumers against financial firms who are members of the scheme in a way that is fair, efficient, timely, and independent.[45] It is designed to ensure that complainants have access to an external resolution scheme—free of charge[46]—which has the expertise to deal with their complaint and make a fair determination.[47]

7.56 A complaint will be considered to be within AFCA's jurisdiction provided it meets the requirements of its Rules.[48] With respect to the issue of joint debt, AFCA and its predecessors, the Financial Ombudsman Service and the Credit and Investment Ombudsman, have dealt with a range of complaints involving circumstances where a consumer:

1. disagrees with their partner about how a joint debt should be repaid;
2. has been coerced or pressured by their partner to enter into a loan that is not for their benefit;
3. is unaware that a loan has been taken out in their name by their partner;
4. has signed a guarantee under duress or was misled prior to signing a guarantee;
5. wishes to split or sever a joint loan following relationship breakdown, to the detriment of their partner;

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43 Victoria, Royal Commission into Family Violence, *Report and Recommendations, Volume IV* (2016) 103.

44 AFCA is not available as a forum to resolve issues of debt owing for household services, eg utility companies.

45 *Corporations Act 2001* (Cth) s 1051(4)(b).

46 Ibid s 1051(2)(d).

47 A determination by AFCA will be binding on members of the scheme but not on complainants: Ibid s 1051(4)(e).

48 Australian Financial Complaints Authority, *Complaint Resolution Scheme Rules* (2018) sec B.

6. is experiencing financial hardship post separation and their partner refuses to engage in discussions about hardship and/or ceases to make repayments;

7. has discovered their partner has made withdrawals or transactions from a joint account without their knowledge or consent, causing or exacerbating financial hardship;

8. has had their privacy breached by the financial services firm, placing the consumer at significant risk of continued family violence; and

9. has had their credit rating affected by the actions of their partner.[49]

7.57 At present, it is possible for a person to lodge a complaint with AFCA against an Australian financial services firm with respect to a joint liability, including complaints made under the National Credit Code. However, the Economic Abuse Reference Group submitted that 'only a small minority of bank customers' are pursuing complaints through AFCA.[50]

7.58 A particular challenge for separating couples is that AFCA may exercise its discretion to not hear a complaint. According to its Rules, if AFCA forms the view that there is a 'more appropriate place to deal with the complaint, such as a court, tribunal, another dispute resolution scheme, or the Office of the Australian Information Commissioner' it may refuse to accept the complaint.[51] Submissions suggest that this occurs when persons who have commenced or intend to commence family law proceedings seek to access dispute resolution through AFCA.[52]

7.59 This is of particular concern as access to AFCA is free for consumers. This can be advantageous when considering the high cost of seeking a property order from the family courts and the unavailability of legal aid or other legal assistance where the separating couple's assets exceed a threshold.[53] In relation to the issue of joint debt specifically, submissions report that it is expensive for couples to join a third party to their family law proceedings under s 90AE of the *Family Law Act*.[54] Further, seeking an order of this nature exposes parties to the legal costs of third party creditors, with no guarantee that the debt issue will be resolved in their favour.[55]

7.60 While it is foreseeable that this recommendation could lead to individuals having to navigate two dispute resolution fora—AFCA and the family court system—on balance,

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49 Australian Financial Complaints Authority, *The AFCA Approach to Joint Facilities and Family Violence*, 3.
50 Economic Abuse Reference Group, *Submission 272*.
51 Australian Financial Complaints Authority, *Complaint Resolution Scheme Rules* (2018) r C.2.2(a).
52 Economic Abuse Reference Group, *Submission 272*.
53 Townsville Community Legal Service, *Submission 159*; Caxton Legal Centre, *Submission 51*; Victoria, Royal Commission into Family Violence, *Report and Recommendations, Volume IV* (2016) 109, citing Owen Camilleri, Tanya Corrie and Shorna Moore, 'Restoring Financial Safety: Legal Responses to Economic Abuse' (Research Report, Good Shepherd and Wyndham Legal Service, 2015) 12.
54 Economic Abuse Reference Group, *Submission 272*.
55 Women's Legal Service Victoria, *Small Claims, Large Battles: Achieving Economic Equality in the Family Law System* (2018) 30.

the ALRC considers the benefit of AFCA's specialist knowledge of consumer credit law is of such benefit to outweigh the additional burden of a multiplicity of proceedings.

Adverse credit reporting

Recommendation 15 The *Privacy Act 1988* (Cth) and the *National Consumer Credit Protection Act 2009* (Cth) should be amended to provide that when a court has ordered that one party (Party A) be responsible for a joint debt and indemnify the other party (Party B) against any default, credit providers are prohibited from making an adverse credit report against Party B to any credit reporting business as a consequence of the subsequent actions of Party A.

7.61 Credit reporting in Australia is regulated by Pt IIIA of the *Privacy Act 1988* (Cth), supported by the *Privacy Regulation 2013* (Cth) and the Privacy (Credit Reporting) Code 2014. Following the 2013 reforms to the *Privacy Act 1988* (Cth),[56] the current framework allows for comprehensive, efficient credit reporting while ensuring that the privacy of individuals is respected.[57] As such, the legal framework aims to protect individuals' personal information, ensure credit providers have sufficient personal information to assist them in making robust decisions about providing credit, and assist credit providers to meet their responsible lending obligations under the *National Consumer Credit Protection Act 2009* (Cth).

7.62 Typically, credit which is held by individuals and is not intended for business or commercial usage will be deemed 'consumer credit'. Consumer credit will include credit granted by a credit provider, such as a bank, that is primarily or wholly used for personal, family, or household purposes, including the management of residential investment properties.[58] Credit providers access and use 'credit information' held by credit reporting bodies to establish a person's creditworthiness and to assist in the collection of overdue payments from consumers, subject to limitations in the *Privacy Act 1988* (Cth). The definition of credit information is quite broad, and includes (but is not limited to) information concerning identification, consumer credit liability, repayment history, default history, new credit arrangements, court proceedings, personal insolvency, and information requests made to credit providers—all of which can be used by credit reporting bodies to generate a credit rating.[59]

7.63 As noted above, in circumstances where a court considers that s 90AE(3)(b) of the *Family Law Act* prohibits disturbing the existing joint liability because it is foreseeable that any alteration will make the debt less likely to be paid in full, the court may make

56 *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (Cth) sch 2.
57 *Privacy Act 1988* (Cth) s 2A(e).
58 Ibid s 6(1).
59 Ibid s 6N.

orders reallocating responsibility for the joint debt between the parties. Generally, one party will become solely responsible for the debt and is required to indemnify the other party in the event of default.[60] This leaves both parties jointly and individually liable for the debt. This means that if the party ordered to repay the debt by the family courts fails to do so, the creditor may still seek recovery from the other party and make an adverse credit report in the event of default.

7.64 Victoria Legal Aid submitted that the current approach of the courts to reallocate the responsibility for the joint debt to one party is inadequate, as it leaves the other party reliant on a personal indemnity to protect against default.[61] The Economic Abuse Reference Group emphasised that this approach effectively places the party who has been determined to not be responsible for the debt in the position of guarantor for the liability and creates challenges concerning enforceability.[62] Non-payment of debt can occur as part of a cycle of abuse: '[a]buse is thus perpetuated through the medium of this lingering debt and the real threat to women's credit ratings, which impedes on their economic recovery'.[63]

7.65 Adverse credit reports can have significant consequences for an individual, including restricting future access to credit and increasing the cost of any credit obtained. Visiting the consequences of default on a party not responsible for the default is unfair and inconsistent with the deterrent purpose underlying credit risk reporting.

Bankruptcy

7.66 The amendments recommended in this chapter in relation to the property settlement provisions of the *Family Law Act*, are likely to be relevant to cases where a party is bankrupt. In particular, the presumption of 50/50 as to contributions may change the outcome compared to the current approach where financial and non-financial contributions are evaluated and assessed. However, in practice this may not have as large an impact as first thought. According to Sarmas and Fehlberg:

> a 50:50 split of equity in the family home is not unusual, although this will depend on the circumstances — for example, if there are dependent children it is possible that a trustee will agree to the non-bankrupt spouse retaining a greater share.[64]

7.67 The question of needs adjustments under s 75(2), raises complex policy questions in the context of bankruptcy. On the one hand, the trustee is entitled to no more property than the bankrupt's property (legal or equitable) and the bankrupt's legal and equitable interests are subject to lawful adjustment under the *Family Law Act*. On the other hand, if a needs adjustment is made, there is a transfer of the bankrupt's property to the non-

60 Women's Legal Service Victoria, above n 55, 30; Economic Abuse Reference Group, *Submission 272*.
61 Victoria Legal Aid, *Submission 61*.
62 Economic Abuse Reference Group, *Submission 272*.
63 Women's Legal Services Australia, Submission No 6 to SPLA *Family Violence Report* (April 2017).
64 Lisa Sarmas and Belinda Fehlberg, 'Bankruptcy and the Family Home: The Impact of Recent Developments' (2016) 40 *Melbourne University Law Review* 288, 320.

bankrupt spouse to the disadvantage of the bankrupt's creditors. The ALRC recommends that the substance of s 75(2)(ha) be included in the revised list of need factors for property division reflecting that a balance must be struck.[65]

Superannuation

Recommendation 16 The *Family Law Act 1975* (Cth) should be amended to provide a presumption that the value of superannuation assets accumulated during a relationship are to be split evenly between the parties.

Recommendation 17 The *Family Law Act 1975* (Cth) should be amended to simplify the process for splitting superannuation including:

- developing template superannuation splitting orders for commonly made superannuation splits; and
- when the applicant is suffering economic hardship, requiring superannuation trustees to limit the fees they charge members and their former spouse for services provided in connection with property settlement under Pt VIII to the actual cost of providing those services.

Statutory presumptions

7.68 Recommendation 16 provides that with respect to superannuation, the starting point for those with accumulation plans should be that the value of superannuation accumulated during the relationship should be split 50/50 between the parties.[66] The value of superannuation will be considered when assessing the contributions of the parties to the property of the relationship and any adjustment will be made in the ordinary course of the court's consideration of what, if any, adjustment for future needs should be made.

7.69 The presumption of a 50/50 split should be able to be rebutted in limited circumstances, including where a party has elected to receive non-superannuation assets in lieu of superannuation assets. The presumption of equality of contributions would only apply to the superannuation accumulated during the relationship. This reflects that, for many couples, superannuation will be the only significant pre-relationship asset. In all other respects, superannuation should be treated in the same way as other property.

65 See [7.8].

66 Defined benefit plans and pensions would require more complex rules but the effect should be the same—to share in the value of the superannuation acquired during the relationship.

Template orders

7.70 The Women's Legal Service Victoria *Small Claims, Large Battle*s Report suggests that:

> A more accessible family law system would remove procedural and legal complexities associated with superannuation splitting.[67]

7.71 Recommendation 17 is designed to provide procedural simplification by including template splitting orders that would form a schedule to the superannuation regulations. The template orders would address common scenarios including splitting superannuation on a lump sum or percentage basis, deal with superannuation interests that are in the growth phase or the payment phase, and deal with accumulation funds as well as defined benefit funds. The template orders would be implementable by agreement between the parties or by court order. The use of the template orders would be covered by a deeming provision with the effect that procedural fairness requirements are deemed to have been met if the template orders have been utilised.

7.72 The complexity of superannuation splitting is partly occasioned by the use of trust structures, and partly by the different requirements of individual superannuation trustees in terms of the drafting of splitting orders. While most superannuation funds provide guidance and instructions on how to prepare a splitting order, few provide illustrative examples. Complexity is also brought about by the requirements to provide superannuation trustees with procedural fairness in circumstances where they do not have a substantive interest in whether a member's superannuation interest is split; unlike a creditor who may have a genuine concern if a debt is reapportioned.

7.73 Before applying for a court order to split a superannuation interest, the party seeking the order must provide 'procedural fairness' to the superannuation trustees. That is, they must provide trustees with the draft orders so the trustees can indicate any objections or foreshadow any problems they might have with complying with the orders. If there are errors in the draft order provided to the fund, it must be amended and sent to the fund again for checking, which can cause delay in already lengthy processes.

Fees

7.74 Fees charged by superannuation funds can be significant. As part of its *Small Claims, Large Battles* project, Women's Legal Service Victoria sought information from the largest superannuation funds and found that

> [t]he average fee charged for processing requests for information was $52, and ranged from no fee to $187. The average fee for complying with super splitting orders was $64 and ranged from no fee to $492.[68]

67 Women's Legal Service Victoria, above n 55, 28.
68 Ibid 27.

7.75 At a time of significant financial stress, and for lower income households, these fees may impose hardship. These fees appear disproportionate to the cost to the trustee of implementing a superannuation split given the minimal resources that would be required to administer the split. Accordingly, the ALRC recommends that the *Family Law Act* be amended to require superannuation fund trustees to offer those suffering economic hardship a reduced fee for providing information and putting a superannuation split into effect. That reduced fee should be no more than the actual cost of providing the service.

Disclosure

7.76 It is apparent from submissions that one of the greatest barriers to superannuation splitting is practical difficulties around accessing information about superannuation. Accordingly, in the Discussion Paper, the ALRC proposed that the Australian Government should develop a tool, with appropriate safeguards, to enable a party to identify the superannuation accounts held by their former partner from Australian Tax Office (ATO) records, with necessary amendments to the taxation law to support this.[69]

7.77 This proposal was consistent with recommendations in the SPLA *Family Violence Report* that the Australian Government develop an administrative mechanism to identify superannuation assets, and simplification of procedures, including forms.[70]

7.78 On 20 November 2018, the Government announced the Women's Economic Security Package which included funds to develop an electronic information sharing mechanism between the ATO and the family courts to allow the superannuation assets held by relevant parties during family law proceedings to be identified swiftly and more accurately.[71] The mechanism will allow courts to access information about superannuation holdings directly from the ATO in circumstances where a party has failed to disclose this information in court proceedings.

7.79 In addition to the development of an information technology system for this information sharing, the initiative requires an amendment to the *Taxation Administration Act 1953* (Cth). Schedule 1, Div 355 prohibits disclosure of information about tax affairs except where the 'public benefit derived from the disclosure outweighs the privacy interests of the entity' concerned (Div 355-1). This amendment will allow information to be disclosed to the courts. The ALRC welcomes these reforms and suggests that they will make a significant difference to parties seeking to ascertain their former partner's superannuation entitlements where they have refused to disclose that information.

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69 Australian law Reform Commission, *Review of the Family Law System,* Discussion Paper No 86 (2018) proposal 3–17.

70 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (2017) rec 15.

71 Commonwealth of Australia, 'Greater Choice for Australian Women: Women's Economic Security Statement' (2018) 40 <https://www.pmc.gov.au/resource-centre/office-women/womens-economic-security-statement-2018>.

7.80 Suggestions for disclosure support in some submissions went beyond the scope of the mechanism presently under development. Victoria Legal Aid called for information gathering powers, similar to those exercised by the Child Support Registrar under s 120 of the *Child Support (Registration and Collection) Act 1988* (Cth), to be made available to courts and delegated to registrars.[72] Women's Legal Service Victoria suggested that if the ATO information sharing scheme presently under development is established, it should be 'extended to cover all other financial information that the ATO has at its disposal where there is non-compliance'.[73]

7.81 Several of the recommendations in this report are likely to produce a shift in the dynamics of negotiating property and financial matter outcomes, including the overarching purpose obligation, the genuine steps statements, and the disclosure recommendations. Following the implementation of the new powers allowing the courts to access ATO information regarding superannuation, and subject to positive evaluation, the ALRC recommends that the initiative be expanded more broadly to the information the ATO holds regarding sources of income.

Binding financial agreements (BFAs)

7.82 BFAs cannot be considered separately from the property division provisions of the *Family Law Act*. Uncertainty and lack of clarity in those provisions encourages many parties, particularly those with significant wealth, to consider BFAs as a way of avoiding uncertainty as to how the court would divide their property upon separation. At the same time, the lack of clarity in Pt VIII also makes it difficult for any party who is asked to sign a BFA to assess how the financial terms compare to their entitlements under the *Act* and a likely award from the courts on separation. Accordingly, the ALRC considers that the primary attention of reform efforts should be on providing certainty and clarity to Pt VIII of the Act through Recommendations 11–17.

Spousal maintenance

Separating property division from spousal maintenance

Recommendation 18 The *Family Law Act 1975* (Cth) should be amended so that:

- the spousal maintenance provisions and provisions relating to the division of property are dealt with separately under the legislation; and
- access to interim spousal maintenance is enhanced by the use of Registrars to consider urgent applications.

72 Victoria Legal Aid, *Submission 61*.
73 Women's Legal Service Victoria, *Submission 100*.

7.83 The desirability of untangling the property division provisions from the spousal maintenance provisions has long been recognised. In 1987, the ALRC recommended that the cross references between property division and spousal maintenance (s 79(4) and s 75(2)) should be removed and the factors for future need with respect to property division separated from the factors for spousal maintenance.[74]

7.84 Recommendation 18 provides for the spousal maintenance provisions to be redrafted to more clearly set out the process for assessing spousal maintenance. This should include removing the cross-reference between property provisions and spousal maintenance provisions. The factors the ALRC considers relevant to the assessment of future needs as part of property division provisions are set out above at paragraph 7.8.

7.85 There was broad support in the submissions for separate consideration of property division and spousal maintenance. The Association of Family and Conciliation Courts Australian Chapter submitted that

> users of the FLA, many of whom are self-represented, might benefit from the provisions regarding spousal maintenance being grouped more sequentially and under a clearer and more dedicated section to improve usability of the FLA.[75]

7.86 Women's Legal Service Queensland similarly supported this approach.[76] Fehlberg had an alternative view:

> Perhaps consideration might be given to having the same FLA provisions apply to both property and maintenance, like England and Wales? This approach would have the advantage of simplifying the legislation, raising the profile of maintenance, and increasing the likelihood that maintenance would be considered and ordered.[77]

7.87 There was broad support in the submissions for an explicit recognition of the relevance of family violence to a person's need for spousal maintenance. For example, the Caxton Legal Centre noted that their

> concern is for the client who experiences disadvantage whilst their ex-partner has capacity to pay support. This scenario usually arises when there is family and domestic violence including in the form of financial abuse. The person who is the victim of family violence is usually self-represented due to their lack of access to finances. Usually their need for financial support is both urgent and ongoing.[78]

7.88 A course of violent conduct during a relationship could have an impact on a person's ability to be adequately self-supporting after separation. Such an impact might flow from a range of different factors including trauma, physical disability, or a controlling partner who prevents a person from engaging with education and/or outside

74 Australian Law Reform Commission, *Matrimonial Property*, Report No 39 (1987).
75 Association of Family and Conciliation Courts Australian Chapter, *Submission 258*.
76 Women's Legal Service Queensland, *Submission 286*.
77 B Fehlberg, *Submission 319*.
78 Caxton Legal Centre, *Submission 51*. See also Women's Legal Service Queensland, *Submission 286*.

work that would have otherwise been economically empowering post separation. Many of these impacts would be relevant under the existing future needs factors.

Interim spousal maintenance

7.89 Marrickville Legal Centre highlighted the critical importance of interim spousal maintenance, noting that the 'period directly after separation is a time of great hardship for many women and children'.[79] The Law Council of Australia noted that changes to allow urgent interim spousal maintenance claims to be dealt with quickly are desirable.[80] Often the greatest need is for urgent spousal maintenance where one party to a relationship/marriage has no other means of support. Simpler legislation, coupled with presumptions of an entitlement in prescribed circumstances, would support greater access to spousal maintenance for those with the greatest need.

7.90 Submissions raised a number of circumstances where there may be an urgent or ongoing need for spousal maintenance, including where a parent is unable to return to work after separation due to caring responsibilities,[81] and where one party has a disability that prevents them from working.[82]

7.91 A number of submissions supported the explicit acknowledgement of the situation of individuals in Australia on temporary or partner visas, without other means of support due to restrictions on accessing government support.[83] The Migrant Women's Lobby Group of South Australia commented that for culturally and linguistically diverse women,

> particularly those who are victims of domestic violence and are on visas under the sponsorship of the husband, if proper financial provisions are not made to protect them these women would be left in dire straits penniless and homeless.[84]

7.92 Submissions also suggested that the entitlement to urgent spousal maintenance should expressly include family violence, particularly where the violent conduct has contributed to the inability of the person to be self-supporting.[85]

7.93 The provision conferring a right to spousal maintenance is very broad. If a party is unable to support herself or himself adequately, because of having the care and control of a child under 18, because of age or physical or mental incapacity for appropriate gainful employment, **or for any other adequate reason**, a liability to maintain that party arises, to the extent that the other party is reasonably able to provide maintenance

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79 Marrickville Legal Centre, *Submission 288*.
80 Law Council of Australia, *Submission 43*. See also Victorian Women Lawyers, *Submission 84*.
81 Interact Support Inc, *Submission 107*; Victoria Legal Aid, *Submission 61*.
82 Victoria Legal Aid, *Submission 61*.
83 See, eg, CatholicCare Diocese of Broken Bay, *Submission 197*; Australasian Centre for Human Rights and Health, *Submission 31*.
84 Migrant Women's Lobby Group of SA, *Submission 38*.
85 National Legal Aid, *Submission 163*; Gowland Legal, *Submission 141*; L Bowen, *Submission 123*; NSW Young Lawyers Family Law Committee, Law Society of NSW, *Submission 108*; Victoria Legal Aid, *Submission 61*; Women's Legal Services Australia, *Submission 45*; Domestic Violence Victoria, *Submission 23*.

(emphasis added).[86] The ALRC is not persuaded that there is any need to amend the existing provisions to specifically enumerate other circumstances which would already fall clearly within the notion of 'any other adequate reason'. The existing law covers the field. Further, the inclusion of additional particular factors within s 72(1) would also be inconsistent with the overall approach to reform in this Report to simplify the legislation.

7.94 The Law Institute of Victoria supported greater use of Registrars to manage and resolve urgent applications.[87] Similarly, the Law Council of Australia said

> a single-entry system with Registrars triaging matters at the point of entry would allow urgent spouse maintenance matters to be listed quickly. There is often urgency and significant impacts on financially weaker spouses, generally women and the children of the family, if financial support is cut off.[88]

7.95 The available empirical data indicates that spousal maintenance, when it is ordered, is often considered only in the context of more formal legal dispute resolution, such as court processes.[89] It is possible that difficulty with accessing courts where parties have been unable to reach agreement on maintenance has led to a decline in the number of orders, particularly for interim maintenance, given the time critical nature of that form of relief. Previous practice in the courts was for urgent interim spousal maintenance applications to be heard and determined by a Registrar, in a relatively fast and cost-effective way. Accordingly, restoring this practice could enhance access to interim spousal maintenance.

7.96 The role, and resourcing, of Registrars in both the Family Court of Australia and the Federal Circuit Court is discussed further in Chapter 10. The ALRC suggests the provision of increased funding for the appointment of Registrars and, in particular, the encouragement of the use of Registrars to deal with urgent applications for spousal maintenance. The ALRC considers that the utilisation of Registrars, coupled with the recommended enhanced roles of the Family Relationship Centres and the extensions to the Family Advocacy Support Services (FASS), will achieve the reform objective of enabling those who require urgent spousal maintenance orders to obtain such orders as expeditiously as possible.

Commissioner Sinclair's dissenting view

7.97 Commissioner Sinclair disagreed with Recommendations 12 and 16 with respect to equality of contributions during the relationship. The Commissioner emphasised that each property matter needs to be considered individually based on the facts and circumstances of the case and not based on any preconceived notion that contributions were in fact equal. Each case is different.

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86 *Family Law Act 1975* (Cth) s 72(1).

87 Law Institute of Victoria, *Submission 387*.

88 Law Council of Australia, *Submission 43*. See also Relationships Australia National, *Submission 317*.

89 Juliet Behrens and Bruce Smyth, 'Spousal Support in Australia: A Study of Incidence and Attitudes' (Working Paper No 16, Australian Institute of Family Studies, February 1999) 13.

7.98 Moving to a presumption of equality of contributions would not, in fact, simplify the property settlement regime under the *Family Law Act,* as a system of presumptions with exceptions creates complexity rather than simplification and potentially increases litigation. It is also not clear why the law should treat contributions at the date of cohabitation and post separation differently to that which occurred during the relationship.

7.99 In the Commissioner's extensive experience as a practitioner, equality of contributions as the starting point of negotiations or the agreed outcome of negotiations was not common.

7.100 The Commissioner also opposed Recommendation 13 which proposes that the relevant date to ascertain the value of the parties' rights, interests and liabilities in any property is the date of separation and not the date of the hearing as is currently the case. In the Commissioner's view, changes in the value of property which accrue during the period between separation and the hearing date are relevant to the fair and just division of property at the time of the hearing. The Commissioner was also concerned about increased cost and delay in proceedings, due to disputes over the factual date of separation and the added difficulty and costs of retrospective property valuations.

A compensatory framework for family violence

Recommendation 19 The *Family Law Act 1975* (Cth) should be amended to include a statutory tort of family violence that would provide remedies consistent with existing common law remedies.

Recommendation 20 The *Family Law Act 1975* (Cth) should be amended to extend s 69ZX to property settlement proceedings.

7.101 The economic impact of family violence is not adequately addressed under the *Family Law Act.* Empirical evidence indicates less favourable property outcomes for parties who have experienced family violence and infrequent adjustments for family violence under the *Kennon* principle.[90]

7.102 In light of this, the ALRC recommends that the *Family Law Act* be amended to acknowledge the relevance of family violence to the economic circumstances of the party who has suffered violence. This would be achieved by the express inclusion within the *Family Law Act* of a tort of family violence giving rise to the ability to claim compensation for both physical and psychiatric injury and any consequent economic loss.

7.103 This recommendation would have the effect of a statutory reversal of *Kennon* and provide a principled approach to the assessment of compensation for family violence.

90 *Kennon & Kennon* (1997) 22 Fam LR 1.

7.104 In the Discussion Paper, the ALRC had proposed amendments to codify the *Kennon* approach of adjusting contributions in the division of matrimonial property.[91]

7.105 Several submissions, however, questioned whether codifying the *Kennon* approach would result in any meaningful difference in division of property proceedings. Rape & Domestic Violence Services Australia expressed concern that the infrequency of *Kennon's* application and the modest value of the adjustment would not be ameliorated by inclusion in statute.[92] Similarly, Women's Legal Services Australia raised concerns regarding the relationship between the evidentiary and emotional challenges of raising a *Kennon* argument and the value of any ensuing adjustment.[93] The Family Law Practitioners Association Queensland also questioned whether codifying *Kennon* was necessary given courts already take the case into account in division of property proceedings.[94]

7.106 The ALRC considers that a compensatory framework represents a more principled approach. Addressing family violence through the lens of contributions inevitably produces a calculation of damages based upon a percentage of the parties' combined wealth. This effectively means that damages are determined in relation to wealth as opposed to the harm caused. An adjustment of 5% to recognise violence where the asset pool is $5 million produces a vastly different outcome as compared with the same adjustment in the context of a $400,000 asset pool.

7.107 The move to an approach based on principles of compensation acknowledges the circumstances of relationship-generated economic disadvantage.[95] It is not a reinstatement of the fault principle which underpinned divorce law for so long. Rather, it allows the court to consider the economic consequences of family violence by reference to the particular circumstances of the victim of the violence, and not by reference to the property the parties have accumulated during the course of the relationship. Moreover, a compensatory framework is consistent with practices in comparable jurisdictions, including Canada and the United States.[96]

Existing common law torts inadequate

7.108 To be effective, a tort for family violence must recognise that the harm comprises a cumulative pattern of abuse, domination, coercive control, and violence over the course of the relationship. Under the tort of family violence, a person can bring a claim for the entire history of combined physical and emotional abuse, or indeed in respect of a single incident.

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91 Australian Law Reform Commission, *Review of the Family Law System*, Discussion Paper No 86 (2018) proposal 3–11.

92 Rape & Domestic Violence Services Australia, *Submission 287*.

93 Women's Legal Services Australia, *Submission 366*.

94 Family Law Practitioners Association Qld, *Submission 368*.

95 P Easteal and L Young, *Submission 394*.

96 Georgina Carson and Michael Stangarone, 'Tort Claims in Family Law—The Frontier' (2010) 29(3) *Canadian Family Law Quarterly* 253; Peter Nygh, 'Family Violence and Matrimonial Property Settlement' (1999) 13(1) *Australian Journal of Family Law* 10, 15.

7.109 Under s 119 of the *Family Law Act*, parties to a marriage are no longer barred by spousal immunity from bringing proceedings in contract or tort against the other party. In addition to the statutory tort, people experiencing family violence would continue to be able to bring a common law tort action. However, the court in *Kennon* recognised the difficulties in pursuing damages for family violence at common law. As Baker J notes in *Kennon:*

> The basis of a claim in tort for damages for assault and battery is compensation for specific provable incidents. It is not a remedy designed to adequately capture the dynamic of a relationship that involves ongoing domestic violence.[97]

7.110 Including a specific tort of family violence addresses this concern by recognising that the harms follow from a course of conduct and by setting as the relevant point in time the last act of family violence (or such time at which the complainant discovered or should have reasonably discovered the harm).[98]

7.111 Moreover, explicitly locating the tort within Pt VIII of the *Family Law Act* establishes clear jurisdiction for the family courts to hear the claim at the same time as property settlement proceedings. Several submissions noted that parties should be able to seek compensation within property proceedings in order to avoid having to bring a separate expensive civil proceeding, with the associated financial and psychological costs.[99]

7.112 Creating a specific tort of family violence also allows society to communicate its opprobrium of this type of abuse through the law. In enacting legislation that sets out a tort for domestic violence, the State of California acknowledged that these

> acts merit special consideration as torts, because the elements of trust, physical proximity, and emotional intimacy necessary to domestic relationships in a healthy society makes participants in those relationships particularly vulnerable to physical attack by their partners.[100]

7.113 The recognition of the harm inflicted by family violence may also promote recovery by conferring special designation on the harm suffered.

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97 *Kennon & Kennon* (1997) 22 Fam LR 1, 60. See also Nygh, above n 96, 15–17.

98 A closely related issue is that of statutes of limitation. Not only might the common law torts fail to adequately capture the suffering that arises as a result of a course of conduct, but specific claims may be time barred once the person leaves the abusive relationship and decides to bring a tortious claim. Legislation in most Canadian jurisdictions has addressed this concern by removing the limitations period for tortious actions in cases involving family violence. See, eg, *Limitation Act*, SBC 2012, c 13 s 3(1)(k); *Limitations Act*, SO 2002, c 24 s 16(h.2); *Limitations Act*, RSA 2000, c L-12 s 3.1(1)(c).

99 Family Law Practitioner's Association of Tasmania (FLPAT), *Submission 415*; P Easteal and L Young, *Submission 394*; B Fehlberg, *Submission 319*. Submissions also raised the need for clarification regarding whether a common law tort claim for assault or battery can be brought before the family courts under accrued jurisdiction. See also Law Council of Australia, *Submission 285*.

100 *California Assembly Bill No 1933 An Act to Add Section 1708.6 to the Civil Code, Relating to Domestic Violence 2002* (ch 193) s 1(b).

> [D]omestic violence torts offer victims an empowering paradigm in which to locate their harms. Some victims know only that they suffer depression, low self-esteem, and pain resulting from the perpetrator's abuse, but assume that previous poor responses from the legal system will be repeated. Upon learning that a de-lineated category of tort is devoted specifically to the panoply of their harms, victims may feel empowered to use the legal system to hold their batterers accountable.[101]

7.114 While the adversarial nature and stress of the litigation can be counter-therapeutic for some people,[102] including the tort within property settlement will avoid additional proceedings and minimise the time and costs associated with bringing a claim.

A new tort of family violence

7.115 The ALRC recommends the tort of family violence contain the following elements:

1. A person who engages in family violence may be held liable in tort.
2. A person is liable for the tort of family violence if the plaintiff proves both of the following elements:
   a. violent, threatening, or other behaviour by a person that coerces or controls the plaintiff, or causes the plaintiff to be fearful; and
   b. that the abuse was committed by a person in the context of a marriage or a de facto relationship with the plaintiff.
3. Family violence may be established with reference to a pattern of behaviour.
4. The tort of family violence does not include the use of reasonable force to protect oneself or others from harm.
5. A person who commits an act of family violence upon another is liable to that person for damages, including, but not limited to, general damages, special damages, aggravated damages, and punitive damages.
6. The court, in an action pursuant to this section, may grant to a successful plaintiff equitable relief, an injunction, costs, and any other relief that the court deems proper.
7. Any award of damages shall be omitted from the calculation of the family's net worth in orders relating to the division of property of the marriage or of the de facto relationship.
8. The time for commencement of an action under this section shall be the later of:
   a. three years from the date of the last act of family violence by the defendant against the plaintiff; and

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101 Sarah Buel, 'Access to Meaningful Remedy: Doctrinal Obstacles in Tort Litigation Against Domestic Violence Offenders' (2004) 83 *Oregon Law Review* 945, 1020.

102 Camille Carey, 'Domestic Violence Torts: Righting a Civil Wrong' (2014) 62 *Kansas Law Review* 695, 744.

b. three years from the date the plaintiff discovers or reasonably should have discovered that an injury or illness resulted from an act of family violence by the defendant against the plaintiff.

7.116 When determining damages for the tort of family violence, the courts will be able to draw on well-settled principles in analogous common law actions. A person might suffer actual loss in the form of physical or psychiatric injury, property damage or other economic loss as a result of family violence. Regardless of the type of harm or the tort, the general principle in tort law is that the role of compensatory damages is to place a plaintiff, so far as money can do, in the position he or she would have been in had the tort not been committed.[103] While damages cannot undo personal or psychiatric injury, they can compensate for the financial losses flowing from the injury and provide a measure of solace for the wrong that has occurred.[104]

7.117 The ALRC does not suggest a monetary range for general damages in actions for family violence. The quantum of damages may be difficult to assess due to the often intangible nature of the harm and the difficulty in determining future consequences of the violence. Courts will likely look at damages awarded in comparable cases for other torts. Damages must be commensurate to the harm and should avoid trivialising the individual's injury. It is of course always open to Government to consider a statutory cap on the damages that may be awarded. It is common for there to be caps on damages for non-economic loss, as for example in defamation law.

Challenges in bringing claims of family violence

7.118 Section 69ZN of the *Family Law Act* recognises the need to protect parties in child-related proceedings where family violence is present. Section 69ZX empowers the court to take a range of actions to facilitate the giving of evidence to give effect to the principle of protecting parties in proceedings where family violence is present. The insidious features of family violence that arise in the context of child-related proceedings are also present in the context of property division. For this reason, the ALRC endorses the recommendation of the SPLA *Family Violence Report* to extend these statutory safeguards to property division proceedings where allegations or findings of family violence are present.[105]

7.119 Allowing the courts greater control over evidentiary matters will help to ensure relevant evidence of family violence comes before the courts. For example, s 69ZX(e) permits courts to 'ask questions of, and seek evidence or the production of documents or other things from, parties, witnesses and experts on matters relevant to the proceedings'.

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103 *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39 (Lord Blackburn); *Harriton v Stephens* (2006) 226 CLR 52, [166] (Hayne J); *Butler v Egg Pulp Marketing Board* (1966) 114 CLR 185, 191 (Talyor and Owen JJ).

104 Siewert Lindenbergh, 'Damages as a Remedy for Infringements upon Privacy' in Katja Ziegler (ed), *Human Rights and Private Law: Privacy as Autonomy* (Hart Publishing, 2007) 98.

105 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 70, [5.86].

This will encourage courts to be proactive in identifying family violence through evidence from apprehended violence orders, police reports, medical reports, child protection orders, and related criminal convictions.[106]

7.120 These changes would complement the best practices highlighted in the National Domestic and Family Violence Bench Book, which provides guidance for judicial decision making in cases involving family violence. Challenges associated with bringing claims of family violence will also be reduced with the benefit of greater information sharing between police, courts, child welfare and health authorities, and support and referral services.

7.121 In addition to the explicit inclusion of family violence in statutory provisions relating to the division of property, people who have experienced family violence who are unable—or who have a diminished capacity—to work will also benefit from the recommendation of a presumption of equal contributions. Under the current model, a spouse whose contributions have been negatively impacted by family violence starts from a point of reduced contribution and must satisfy the court that their contribution should be adjusted upward on account of the violence. Any adjustment for domestic violence under the new model would start from a presumption of a 50/50 share in contribution.

Statutory inclusion of family violence will encourage fairer outcomes

7.122 An issue of particular concern raised in the Discussion Paper is whether explicit acknowledgement of the relevance of family violence would have adverse consequences for dispute resolution and litigation, both in terms of increased conflict in negotiations and increased complexity of proceedings. Notwithstanding this risk, there are a number of arguments in favour of explicitly recognising family violence in the *Family Law Act*.

7.123 From an access to justice point of view, stating the relevance of violence in the *Family Law Act* will mean that unrepresented parties are more likely to become aware of its potential relevance to their matter. Moreover, the risk of decreased settlement rates, or of increased legal costs for litigated matters, must be weighed against the benefit of bargaining in the shadow of a clear legal framework in relation to the relevance of family violence. Over time this may have the effect of encouraging settlement and better outcomes for people affected by family violence.

7.124 This conclusion is strengthened by the evidence that people experiencing family violence face a number of barriers to achieving appropriate property settlements in the present environment. Clear statutory provisions will assist in ameliorating some of these barriers. Greater identification of family violence in the settlement process is also desirable in order to allow appropriate safety planning, and to ensure that power imbalances are addressed in mediation and court processes.

106 The provisions may also be used to minimise re-traumatisation insofar as the courts are able to make orders in relation to who is able to give evidence and how evidence is given.

8. Encouraging Amicable Resolution

Contents

Introduction

8.1 This chapter advances recommendations designed to provide families with greater support to use proportionate resolution mechanisms, and to support the principle that the intervention of the court ought to be the last resort, in most cases, for disputing families.

8.2 The ALRC considers that there is scope to increase the proportion of both parenting matters, and property and financial matters, that are dealt with away from the family courts. In relation to parenting matters, more than four in ten proceed to court without having been assessed for FDR. The majority of property and financial matters settle at the doors of the courts. These patterns suggest that with stronger legislative encouragement to avoid courts, and greater availability of FDR and, for more complex matters, LADR, more families could resolve their issues without litigation.

8.3 The 2006 family law reforms made FDR a mandatory requirement (with exceptions) for parenting matters, and increased the availability of community-based FDR services in FRCs. These measures have been associated with increased stakeholder confidence in FDR as a resolution mechanism. There are also strengthening calls for

LADR to be used in situations where families with more complex issues may not be suitable for FDR but should not be channelled into a court pathway either.

8.4 This chapter examines the potential for greater use of FDR and LADR in property matters and sets out legislative reform to support a shift toward greater use of these procedures.

8.5 The recommendations in this chapter entail legislative change that would impose an obligation on parties to take genuine steps to resolve property and financial matters and parenting matters before filing a court application. A corresponding obligation on courts not to hear a matter unless a party has satisfied the genuine steps requirement or established entitlement to an exception is also recommended.

8.6 Further recommendations support these measures by adapting the legislative framework for FDR for property and financial matters. Suitability for FDR should include consideration of the parties' relative levels of knowledge of financial arrangements as part of assessing whether an imbalance of power exists. Additionally, recommendations provide for a revision of the categories of certificates that may be issued by FDRPs under the *Family Law Act* if FDR has not resulted in an agreement.

8.7 To strengthen FDR and LADR as viable alternatives to court for a greater proportion of separated couples, the ALRC makes recommendations to reinforce the importance of disclosure both in court proceedings and in other resolution processes.

Financial circumstances of separated families

8.8 As detailed in Chapter 6, many separated families[1] have limited financial resources and uncomplicated financial arrangements. Accounts of individuals provided to this Inquiry indicate significant dismay, even despair, about the high costs of litigation, its adversarial quality, and the adverse impact this has on them and their children in financial and wellbeing terms.

Resolution pathways

8.9 FDR has become the most commonly used formal pathway for parenting matters, with 9.9% of separating parents using this method, compared with 6.5% using lawyers and 3.4% using courts.[2] For property and financial matters however, parents are half as likely to use FDR, three times more likely to use lawyers and twice as likely to use courts.[3]

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1 Available empirical evidence focuses on parents. There is little empirical evidence of this nature in relation to former couples without dependent children.

2 Rae Kaspiew et al, *Experiences of Separated Parents Study (Evaluation of the 2012 Family Violence Amendments)* (Australian Institute of Family Studies, 2015) 71; Australian Law Reform Commission, *Review of the Family Law System*, Discussion Paper No 86 (2018) 103–4.

3 Lixia Qu et al, 'Post-Separation Parenting, Property and Relationship Dynamics after Five Years' (Attorney General's Department (Cth), 2014) 98.

8.10 Even among former couples with very modest asset pools—$40,000 or less—the use of lawyers and courts is more common than the use of FDR.[4] The submission from AIFS indicates that further analysis of these data demonstrates underuse of this low-cost pathway by the group that is likely to benefit most from using it: those who have lower educational attainment and lower socio-economic status.[5]

8.11 In both parenting and property matters, AIFS research indicates that FDR operates in a way that is more consistent with families' needs than either lawyer-led negotiation or court proceedings. In relation to parenting, more parents gave positive evaluations for FDR on a range of measures, including whether the process worked for them and the children (as separate questions), than for lawyers and court proceedings, even among parents who reported a history of physical violence at the hands of their former partner.[6] It should also be noted however, that this pathway has lower concentrations of families with complex psycho-social needs than the other two formal pathways.[7]

8.12 In relation to property and financial matters, AIFS research shows that of the pathways assessed (mediation/FDR, lawyer-led negotiation, and courts) those who had used mediation/FDR were the most likely to report that an outcome was 'fair'. Those who had used courts were least likely to do so.[8]

Pre-filing requirements and settlement rates

Parenting

8.13 The legislative amendments introduced in 2006 to strengthen FDR in children's matters require parents to attempt FDR prior to lodging a court application,[9] with certain exceptions.[10] The exceptions include circumstances of urgency, or where a party is able to reasonably establish that family violence or child abuse has occurred or there are risks that it may occur.[11]

8.14 The reforms prompted an increase in the use of FDR, and a 25% drop in court filings in parenting matters.[12] However, data on the extent to which matters proceed to courts with certificates under the exemptions[13] suggest that there is further potential still to enhance the use of FDR and LADR in parenting matters. As noted in Chapter 3, data provided to the ALRC indicates that in the 2017/18 financial year, 56% of all

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4 Australian Institute of Family Studies, *Submission 396*.
5 Ibid.
6 Kaspiew et al, above n 2, 127.
7 Rae Kaspiew et al, *Evaluation of the 2012 Family Violence Amendments: Synthesis Report* (Australian Institute of Family Studies, 2015) 16.
8 Qu et al, above n 3, 179.
9 *Family Law Act 1975* (Cth) s 60I(7).
10 Ibid s 60I(9).
11 Ibid s 60I(9).
12 Rae Kaspiew et al, 'Family Law Court Filings 2004–05 to 2012–13' (Research Report No 30, Australian Institute of Family Studies, 2015).
13 *Family Law Act 1975* (Cth) s 60I(9).

applications for final orders in parenting matters were lodged with certificates indicating a matter was unsuitable for FDR, and 43% were lodged pursuant to the exemptions.[14]

8.15 Even though they commence along a litigation pathway, a significant proportion of parenting matters do not proceed to a judicial determination: in 2017/18, 58% of the 10,066 applications for final parenting only orders settled without a judicial determination.[15]

Property and financial matters

8.16 In contrast with children's matters, the *Family Law Act* does not require parties to attempt FDR prior to lodging a court application for property or financial matters. Rather, what are known as 'pre-action procedures' are contained in the *Family Law Rules*.[16] These Rules require parties to make a 'genuine effort' to resolve a dispute by negotiation, conciliation, arbitration, or counselling, and by exchanging a notice of intention to claim and exploring options for settlement by correspondence. Submissions indicated that compliance with these requirements is in practice limited.[17]

8.17 In any event, the pre-action procedures do not apply in the Federal Circuit Court. The *Federal Circuit Court Rules* do however provide for conciliation conferences attended by each party and their lawyers after a court action is instigated. [18] The Rules require a genuine effort to reach agreement and specify that costs orders may be made where matters remain unresolved.[19]

8.18 While only 58% of children's matters that commence a litigation pathway ultimately settle, the settlement rate for property and financial matters is much higher at 80% (out of 7,386).[20] The settlement rates of property and financial matters between the Family Court and the Federal Circuit Court differ. In the Family Court, 68% of 1,234 matters involving property and financial applications (without parenting matters) settled in 2017/18. In the Federal Circuit Court, 82% (out of 6,152) settled.[21]

8.19 It is not possible to assess the reasons for these patterns without empirical research. Relevant issues may include the level of complexity of the Family Court cases compared with the Federal Circuit Court cases or the different approaches to case management applied in the two courts.

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14 Federal Circuit Court of Australia, Private correspondence, 22 January 2019.
15 Ibid.
16 *Family Law Rules 2004* (Cth), sch 1.
17 NSW Young Lawyers Family Law Committee, Law Society of NSW, *Submission 108*.
18 *Federal Circuit Court Rules 2001* (Cth) r 10.05(1).
19 Ibid r 10.05(4) and r 10.05(5).
20 Federal Circuit Court of Australia, Private correspondence, 22 January 2019.
21 In the minority of matters that involved both property and parenting matters, settlement patterns are slightly lower and the differential pattern in settlement rates between the courts are slightly higher: Family Court: 56% out of 405 matters in 2017/18; and Federal Circuit Court: 76% out of 2,504 matters.

8.20 In 2017/18, 2503 conciliation conferences were conducted in the Federal Circuit Court, of which 36% reached settlement.[22] The Federal Circuit Court also funds mediation where an application for final orders is made and timely mediation in the client's location is required.[23] Relationships Australia Victoria is contracted to provide this service, which has national coverage through the Relationships Australia network. It describes the model applied as a 'lawyer-assisted conciliation model'.[24] The number of cases applying this model has grown from 220 in 2014/15 to 476 in 2017/18. In that period, the settlement rate has varied from 74% to 68%.

Consent orders

8.21 The Family Court has a process whereby orders made by consent, without commencing litigation, may be presented to the court for endorsement. The court needs to be satisfied that parenting orders are in the child's best interests[25] and property and financial orders are just and equitable.[26] Such applications may reflect the outcome of lawyer-led negotiation processes or FDR processes. As noted in Chapter 3, property and financial matters are more commonly involved in these applications than children's matters. In 2017/18, 12,616 of the agreements presented for endorsement involved property and financial matters, compared with only 1,684 for parenting issues. A minority of orders (1,575) involved both issues.

Dispute resolution and models

8.22 Following the 2006 family law reforms, the availability of community-based services for FDR in parenting matters expanded significantly. Government funded FRCs and other community organisations are now substantial providers of low cost FDR services for parenting arrangements.

8.23 The FDR models offered in FRCs entail intake and assessment phases, interviews with each party separately, and then joint FDR sessions. The FRC operating frameworks provide for a free one-hour joint session, with up to two subsequent sessions available free of charge to clients earning less than $50,000 or who are on health and social security benefits.[27] For clients over that income level, second and third sessions are available at $30 per hour. Where interpreters are required, fourth and fifth hours of FDR are available on the same fee arrangements. FRCs have individual fee policies that may allow the provision of further sessions on a paid basis.

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22 Federal Circuit Court of Australia, 'Federal Circuit Court Annual Report 2017–18' (Federal Circuit Court of Australia, 2018).
23 Ibid.
24 Andrew Bickerdike and John Corvan, 'Effective Community Based, Court Ordered, Lawyer Assisted Property Conciliation' (at the Australian Institute of Family Studies Conference, Melbourne, 25 July 2018).
25 *Family Law Act 1975* (Cth) s 60CA.
26 Ibid s 79(2).
27 'Operational Framework for Family Relationship Centres' (Department of Social Services, 2017).

8.24 Originally, FRC operating frameworks were based on the exclusion of lawyers from the centres. This was relaxed in 2009 when the government funded a program for CLCs and FRCs to partner to offer advice, information, and, to a limited extent, legally assisted FDR.

8.25 Over time, closer relationships have developed between some FRCs, CLCs, and other legal assistance providers. Clients may be encouraged to seek legal advice to support an FDR process. A Protocol for the provision of legal assistance in FRCs has supported these arrangements and was updated in 2017 to allow lawyers to continue to act for clients if a matter is not resolved in FDR and proceeds to court.[28] Parties undertaking FDR (and their private lawyer if they have one) sign a 'statement of good faith' on entering an FDR process which prevents them from instigating litigation or threatening to do so for the duration of the process.[29]

8.26 As the family law system has evolved, the application of FDR has become increasingly sophisticated, with the development of specialist models in a range of areas, such as the pilots for legally assisted and culturally appropriate dispute resolution in eight FRCs.[30] These pilots are currently being evaluated.

8.27 Prior to 2006, the application of FDR in family violence cases was considered inappropriate for various reasons, including the likelihood that the family violence would have created a power imbalance that compromised the ability of the parties to negotiate on an equal footing.[31]

8.28 Research evidence and practice experience demonstrates that now, even in cases involving family violence, FDR is regularly used[32] and produces outcomes that are acceptable to a significant proportion of clients.[33] Some cases require safeguards such as shuttle mediation where the parties are not in the same room.

8.29 Nonetheless, there are also concerns that FDR may be inappropriately used in some family violence cases, particularly where screening processes are inadequate,[34] and may produce outcomes that are unsafe for children and caregivers.[35] It is clear that sophisticated clinical decisions are required in determining whether or not to attempt FDR where family violence is or has been involved.

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28 Ibid 18.
29 Ibid.
30 Attorney General's Department, 'Attorney General's Department Submission to the Parliamentary Inquiry into a Better Family Law System' (Parliament of the Commonwealth of Australia, 2017) 6.
31 Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence - A National Legal Response: Final Report* (ALRC Report 114, NSWLRC 128, Australian Law Reform Commission and NSW Law Reform Commission, 2010) [21.30]–[21.39].
32 Kaspiew et al, above n 2, 73.
33 Ibid 127.
34 Kaspiew et al, above n 7, 33.
35 Domestic Violence NSW, *Submission 44*.

8.30 Where family violence cases are screened out of FDR,[36] these families are not able to access this low-cost resolution avenue.[37] Some proceed to court, incurring the associated expenses, but not all do. Research commissioned by Interrelate showed that of 756 clients who had been issued with a certificate permitting them to proceed to file an application, only half lodged court applications for parenting orders.[38] A number of stakeholders expressed concerns about what happens to clients and their children in this position, given that they may not have the means or desire to access court processes.

8.31 As FDR has become more widely accessed, there is increasing acceptance among stakeholders that FDR should be available to clients affected by family violence, provided that appropriate safeguards are in place to mitigate safety risks and power imbalances. Increasingly, LADR models involving not only lawyers but also support workers for both parties have been seen as a viable alternative to court processes for these cases.[39]

8.32 FDR continues to develop. Recently, the Department of Social Services commissioned the development of an outcomes measurement tool to enable consistent and ongoing evaluation and service improvement of FDR in FRCs.[40] The tool is designed to assess performance in domains that mirror the benchmarks established for FDR in FRCs: conflict and communication; parenting capacity; child health and wellbeing; family safety; increased parenting agreements; and reduced disputes.

8.33 Other recent developments include pilots for legally assisted and culturally appropriate dispute resolution in eight FRCs, funded by the Attorney-General's Department.[41] These FRCs are located in catchment areas where the population has concentrations of communities from culturally and linguistically diverse backgrounds or Aboriginal and Torres Strait Islander communities, but these groups are under-represented in the client base of the FRC. The pilots are intended to increase engagement with FRCs among these groups. The interim evaluation of the pilots has highlighted the diverse nature of client needs in the pilot, that clients may present in crisis situations initially with a complex mixture of mental health, drug and alcohol issues, and family violence.[42]

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36 Kaspiew et al, above n 2, 73.

37 Women's Legal Service NSW, *Sense and Sensitivity: Family Law, Family Violence and Confidentiality* (2016) 4.

38 Bruce Smyth et al, 'Certifying Mediation: A Study of Section 60I Certificates' (CRSM Working Paper 2/2017, University of Canberra and Interrelate) 65.

39 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (2017) 89; Women's Legal Service Victoria, *Small Claims, Large Battles: Achieving Economic Equality in the Family Law System* (2018) 37.

40 Elizabth Clancy et al, 'Report: Family Dispute Resolution Evaluation - An Outcome Measurement Tool Development Project' (Deakin University and drummond street services, 2017).

41 Attorney General's Department, 'Attorney General's Department Submission to the Parliamentary Inquiry into a Better Family Law System', above n 30, 6.

42 Siobhan McDonnell, 'Legally Assisted Culturally Appropriate FDR in Indigenous, Refugee and Migrant Families' (Canberra, November 2018).

The SPLA *Family Violence Report* recommended that subject to a positive evaluation of these pilots, the Australian Government should expand the availability of LADR.[43]

8.34 LADR is seen by many stakeholders, particularly those concerned with the interests of vulnerable parties, as a viable alternative to court for matters involving a history of family violence.[44] LADR for parenting arrangements is provided in Legal Aid Commissions, in partnerships between some Community Legal Centres and Family Relationship Centres, and by some other community based agencies such as Centacare.[45] Legal Aid Commissions are the main provider of LADR services: National Legal Aid's submission indicated that it conducted 7,543 conferences across Australia in 2017–18 with a settlement rate of 81%.[46] LADR in Legal Aid Commissions is available where at least one party is eligible for legal aid, sometimes on a partial cost recovery basis.

8.35 One provider of LADR, Victoria Legal Aid, cited data indicating that its family dispute resolution service had provided 1,044 LADR interventions in 2016–17, with a settlement rate (some or all issues resolved on an interim or final basis for VLA purposes) of 83%. Most of these interventions (70%) involved LADR without any court engagement. The balance (30%) involved LADR for matters where court proceedings had been instigated. A history or risk of family violence was identified in 88% of cases. The Victoria Legal Aid model provides case-managed LADR for clients who would otherwise be screened out of a dispute resolution process. The respective roles of professionals involved were described in this way:

- the case manager conducts screening and ongoing risk assessment, links families into appropriate supports, and manages their safety during the dispute resolution conference;
- lawyers provide clients with 'advocacy, direct legal advice, and support through a process in which they may otherwise be disadvantaged. Lawyers balance the interests of their clients with the "best interests of the child" legislation. This involves "reality testing" proposals in terms of whether they are child focused and providing clients with information about how a matter may be considered in the court'; and
- the chairpersons draw on their legal or social science backgrounds to direct focus on the child and reality test the workability of any arrangement considered.[47]

Property and financial matters

8.36 The service infrastructure for FDR and LADR for property and financial matters is less developed than for parenting matters. FDR and LADR for property and financial

43 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 39, rec 4.
44 Australian Law Reform Commission, *Review of the Family Law System*, Discussion Paper No 86 (2018) 121–3.
45 Family & Relationship Services Australia (FRSA), *Submission 407*.
46 National Legal Aid, *Submission 297*.
47 Victoria Legal Aid, *Submission 375*.

matters are available on a limited basis, although funding has recently been expanded. The Australian Government's Women's Economic Security Package was announced in November 2018. It has provided $50.4 million in new funding for family law property mediation services, including $13 million each year to be provided to the 65 FRCs across Australia on an ongoing basis.[48] Legal Aid Commissions will receive $10.3 million for a two-year trial of lawyer-assisted mediation in each state and territory.[49] The trial will support families with asset pools of up to $500,000 (excluding debt) to resolve their property disputes.

8.37 Some agencies offer FDR in property and financial matters outside of the FRC framework. For example, Relationships Australia offers property mediation on a self-funded basis, with an hourly rate determined according to income levels.[50] This service handles 2,000–3,000 matters a year involving property, with about 600 exclusively involving property matters (without parenting issues). Clients using this service are advised to seek legal advice. A study of 1,700 clients of this service described in the Family Relationships Services Australia submission showed that three quarters of the asset pools involved were under $1 million and a quarter were under $200,000, including 8% that comprised a net debt.[51]

Other negotiation based approaches

8.38 Other self-funded pathways are available to separated families in parenting and property and financial matters. They include private mediation,[52] and lawyer-led negotiation in the shadow of the court.

8.39 Another mode of self-funded dispute resolution offered by private practitioners is collaborative practice. The distinctive features of this mode of practice are:

- a written contract by lawyers and parties not to instigate litigation while a collaborative practice process is in train; and
- an agreement that if the process does not produce an outcome, the lawyers and other professionals involved will not continue to act for the parties if litigation is commenced ('the disqualification provision').[53]

48 Attorney General's Department, 'Women's Economic Security Package Family Law Property Mediation - Family Relationship Centres' (2018).

49 Attorney General's Department, 'Women's Economic Security Package: Lawyer-Assisted Family Law Property Mediation - Legal Aid Commission Trial'.

50 Relationships Australia National, *Submission 317*.

51 Family & Relationship Services Australia (FRSA), *Submission 407*.

52 This refers to mediation provided by mediators accredited under the National Mediator Standards Board regime rather than the FDRP accreditation regime: see further Chapter 13.

53 Law Council of Australia, 'Australian Collaborative Practice Guidelines for Lawyers' (Law Council of Australia).

8.40 While collaborative practice appeared promising,[54] the evidence suggests that the development of collaborative law has been uneven. In the ACT, for example, initial enthusiasm for the approach waned[55] but there are now signs of renewed interest.[56]

8.41 A recent study has concluded that collaborative practice is 'still in its infancy in Australia'[57] and has highlighted a number of tensions and challenges, including the disqualification provision.[58] From a client perspective, an unsuccessful collaborative practice process means that the time and money invested in the process could be wasted, to at least the extent of any preparation that could not then be used for court purposes.

8.42 Some submissions to this Inquiry, primarily those from organisations and practices concerned with providing collaborative practice, argued for greater legislative support for the model in Australia[59] and suggested it has advantages for clients.[60] The ALRC is not persuaded that collaborative practice should be treated differently from ordinary negotiation.

Family violence

8.43 Following the 2006 family law reforms, research evidence on family violence among separated families has increased significantly. Although much of this evidence focuses on children's matters, it also provides important insights relating to property and financial matters.

8.44 Key findings include the extent of financial abuse as a form of family violence,[61] links between a history of family violence, protracted resolution processes, and lower property and financial division outcomes,[62] and evidence that negotiation of property arrangements is a potential factor that can heighten risk of violence.[63]

8.45 Noting these findings, the ALRC's recommendations recognise that FDR and other non-court based mechanisms may be appropriate for many but not all former couples

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54 Family Law Council, *Collaborative Practice in Family Law* (2006).

55 Henry Kha, 'Evaluating Collaborative Law in the Australian Context' (2015) 26 *Australian Dispute Resolution Journal* 178, 182.

56 Collaborative Practice Canberra, *Submission 160*.

57 Marilyn Scott and Pauline Collins, 'The Challenges for Collaborative Lawyers in Providing CP Processes' (2017) 31 *Australian Journal of Family Law* 27.

58 Ibid 44.

59 Australian Association of Collaborative Professionals, *Submission 144*.

60 See, eg, Collaborative Professionals (NSW) Inc, *Submission 201*; MELCA, *Submission 155*.

61 Rae Kaspiew et al, 'Domestic and Family Violence and Parenting: Mixed Method Insights into Impact and Support Needs: Final Report' (Horizons Research Report 04/2017, Australia's National Research Organisation for Women's Safety, 2017).

62 Rae Kaspiew and Lixia Qu, 'Property Division after Separation: Recent Research Evidence' (2016) 30(1) *Australian Journal of Family Law* 1; Lixia Qu, Lawrie Moloney and Rae Kaspiew, 'Characteristics of Separated Parents Who Remain Fearful or in High Conflict: Towards Better-Targeted Legal and Service Responses' (Presentation at the Australian Institute of Family Studies 2016 Conference, Melbourne, 7 July 2016).

63 Kaspiew et al, above n 2, 42.

attempting to resolve property and financial matters, and that screening, risk assessment, and risk management are as important in this context as they are in children's matters.

Greater use of non-court avenues for property and financial matters

8.46 The recommendations in this section support greater use of FDR and other non-court based mechanisms for resolving property and financial matters. The recommendations are also intended to strengthen court scrutiny of parties' compliance with pre-filing requirements in relation to both property and financial matters and parenting matters.[64]

8.47 The different legislative elements of the overall scheme recommended by the ALRC consist of the following:

- an obligation that parties take genuine steps to attempt to resolve their property and financial matters prior to lodging a court application, with some exceptions;
- the maintenance of the existing requirement that parents attempt FDR prior to lodging an application for parenting orders;[65]
- an obligation on courts not to hear applications for parenting orders and/or property and financial orders unless each party has filed a statement setting out the steps taken to resolve the dispute, or why their matter should be heard pursuant to the exceptions to the genuine steps requirement, or the existing requirement to attempt FDR;[66]
- amendment of the guidance for assessment of suitability[67] to include reference to an imbalance of knowledge in relation to financial arrangements;
- amendment of the FDR certificate categories to support the issue of certificates in property and financial matters and parenting matters; [68] and
- extension of the FDR confidentiality and admissibility provisions to property and financial matters, with the exception of a sworn statement of income, assets, superannuation balances, and liabilities that each party signs at the start of negotiation.[69]

64 This is consistent with the policy direction set out in the Australian Law Reform Commission, *Review of the Family Law System*, Discussion Paper No 86 (2018) 105–8.
65 *Family Law Act 1975* (Cth) ss 60I(1) and 60I(7).
66 Ibid s 60I.
67 *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) reg 25.
68 *Family Law Act 1975* (Cth) s 60I(8).
69 Ibid ss 10H and 10J.

Genuine steps obligations

Recommendation 21 The *Family Law Act 1975* (Cth) should be amended to:

- require that parties take genuine steps to attempt to resolve their property and financial matters prior to filing an application for court orders; and
- specify that a court must not hear an application unless the parties have lodged a genuine steps statement.

A failure to make a genuine effort to resolve a matter should have costs consequences.

Obligation on parties–property and financial matters

8.48 Recommendation 21 imposes an obligation on parties to take genuine steps to resolve their property and financial matters prior to lodging a court application.[70] This approach leaves open a variety of possible avenues for fulfilling the requirement, including, but not limited to, FDR and lawyer-led negotiation.

8.49 Several stakeholders argued strongly that parties should be required to attempt FDR before applying to the court,[71] mirroring the position of earlier reports.[72]

8.50 Other submissions considered that the pre-filing steps should not to be restricted to FDR.[73] The ALRC agrees that a more a flexible approach would be appropriate, given the diversity in the needs and circumstances of separated couples. Many families need access to low cost, low conflict mechanisms,[74] but for others, lawyer-led and court pathways may be more appropriate for a range of reasons, including personal dynamics, such as family violence, and legal and forensic complexity.[75]

8.51 Consistent with accounts of individuals provided to this Inquiry, AIFS research indicates that the predominant need among separated parents is for cost-effective, proportionate resolution pathways that do not drain limited financial pools.[76] Consequently, this Recommendation, together with Recommendations 22–24, aims to support greater use of FDR, including through greater availability of services, while retaining access to courts where this is proportionate and justified.

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70 Proposal 5–3 in the *Review of the Family Law System* Discussion Paper 86 was that the requirement to attempt FDR in the *Family Law Act 1975* (Cth) s 60I should be extended to property and financial matters with different exceptions than those for parenting matters.

71 Australian Dispute Resolution Advisory Council (ADRAC), *Submission 386*; Macarthur Legal Centre, *Submission 346*; Relationships Australia National, *Submission 317*; Women's Legal Service Victoria, *Submission 213*.

72 Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 2, 2014); Women's Legal Service Victoria, above n 39.

73 See, eg, Law Council of Australia, *Submission 285*.

74 Australian Institute of Family Studies, *Submission 396*.

75 Law Council of Australia, *Submission 285*.

76 Qu et al, above n 3, ch 6.

8.52 Steps toward greater availability of services have been taken since the release of the Discussion Paper. The Federal Government's Women's Economic Security Package has provided new funding for property law mediation services and a LADR trial for property matters up to $500,000 in Legal Aid Commissions.

8.53 Many submissions supported a policy shift away from court-based services by encouraging greater use of FDR, particularly for property and financial matters. [77]

8.54 Among the supporting arguments raised by stakeholders were:

- the need for dispute resolution mechanisms that are proportionate to the asset pools involved, and do not necessitate engagement with an adversarial process, particularly for people who have experienced family violence and may otherwise just 'walk away from relationships without a "fair and equitable" split of property, simply because the other party refuses to negotiate and the cost of legal proceedings is prohibitive';[78]
- evidence from international and local research that non-adversarial mediation type processes have higher levels of satisfaction among clients;[79]
- mediation-type processes are less likely to exacerbate conflict in a context where ongoing relationships between parties are inevitable due to the presence of children from the relationship;[80]
- the advantages for families in being able to use similar processes and the same agency for parenting and property and financial FDR, rather than being channelled into multiple pathways;[81] and
- the expected reduction of applications filed in the courts.[82]

8.55 A limited number of submissions criticised the proposed requirement to attempt FDR (though not necessarily the broader policy aim of avoiding court action). For example, the Law Council of Australia argued that pre-filing requirements for property and financial matters should not be the same as for parenting matters in requiring attendance at FDR because of the different issues raised—namely:

- imbalance in knowledge about financial arrangements between the parties;
- greater scope for legal and forensic complexity in property and financial matters in relation to issues such as valuation methodologies, taxation laws, interpretation of financial statements and trust deeds, and stamp duty laws;

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77 Australian Dispute Resolution Advisory Council (ADRAC), *Submission 386*; Victoria Legal Aid, *Submission 375*; Relationships Australia National, *Submission 317*; National Legal Aid, *Submission 297*; R Carroll, *Submission 289*; Marrickville Legal Centre, *Submission 288*.

78 Macarthur Legal Centre, *Submission 346*. See also Z Rathus, *Submission 298*; Women's Legal Service Victoria, *Submission 213*.

79 Relationships Australia National, *Submission 317*.

80 Ibid.

81 Interrelate Limited, *Submission 416*.

82 Association of Family and Conciliation Courts Australian Chapter, *Submission 258*.

- the greater need for legal assistance in property and financial disputes than in parenting matters; and
- that the most cost-effective way of preparing for mediation is for lawyers to be engaged in preparatory steps in relation to disclosure, identifying the asset pool, and identifying the assets in dispute.[83]

8.56 The ALRC considers that these issues (other than an imbalance about financial arrangements) are likely to occur among a minority of former couples with high value asset pools and complicated financial arrangements, but they do not reflect the majority. To accommodate this diversity, the recommendation therefore does not restrict appropriate pre-filing steps to FDR, but rather requires the parties to take 'genuine steps' to resolve their disputes prior to filing a court application. Information asymmetry can be addressed through the FDR process.

Exceptions to the genuine steps requirement

8.57 The ALRC recommends some exceptions to the genuine steps requirement. They are formulated so as not to impede expeditious access to courts when required. They also provide access to the courts for matters involving complex asset pools and/or complex ownership structures, and where non-disclosure or fraud is alleged.

The ALRC recommends the following exceptions:

- urgency, including where orders in relation to the ownership or disposal of assets are required or a party needs access to financial resources for day to day needs;
- the complexity of the asset pool, including circumstances involving third party interests (apart from superannuation trustees), but excluding those wholly owned by the parties;
- where there is an imbalance of power, including as a result of family violence which affects the capacity of a party to be able to negotiate;
- where there are reasonable grounds to believe non-disclosure may be occurring;
- where one party has attempted to delay or frustrate the resolution of the matter; and
- where there are allegations of fraud.

8.58 These exceptions are largely based on those set out in the *Family Law Rules* Schedule 1. Submissions raised a range of conceptual and specific issues in relation to the exceptions.

8.59 A number of stakeholders argued for the exceptions to be drawn as narrowly as possible to avoid creating loopholes that would undermine the policy aim of requiring non-court based resolution of property and financial matters.[84]

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83 Law Council of Australia, *Submission 285*.
84 See, eg, Marrickville Legal Centre, *Submission 288*.

8.60 In the context of people who have experienced family violence, National Legal Aid raised the point that an exception in this regard should not mean mandatory exclusion but rather provide clients with a choice 'to elect not to participate, should they wish to rely on the exception'.[85]

8.61 As with family violence, each of the exceptions, apart from the one in relation to consent orders, deals with circumstances that mean decisions about the application of the exception will be a matter of degree. Their application will take in to account the context of the circumstances in each case, rather than operating as a bright-line distinction. Stakeholder feedback informed the drafting of some aspects of the exceptions:

- the exception in relation to third party interests excludes those wholly owned by one or both parties from the exception, reflecting a suggestion by Partnerships Victoria[86] and another submission suggesting the proposed exception may be too wide;[87]
- the ground in relation to an imbalance of power has been clarified to emphasise impact of capacity to negotiate rather than power imbalance;[88]
- the fraud ground was amended to make it clear that the fraud relates to the matters in dispute;[89] and
- the ground in relation to consent orders is included for consistency with the existing pre-action procedures.

Genuine steps obligation on courts

8.62 The ALRC recommends a legislative obligation on courts not to hear an application for property and financial matters unless the parties have a lodged a 'genuine steps' statement at the time of filing an application.[90] This approach is modelled in part on the approach taken in the *Civil Dispute Resolution Act 2011* (Cth).[91]

8.63 In order to improve alignment between property and financial matters and parenting matters, the recommendation extends the requirement to parenting matters as well. This should mean that courts place significant scrutiny on the extent to which parties have complied with the 'genuine steps' requirement in relation to property and financial matters (recommended) and the existing requirement to attempt FDR prior to lodging a court application in parenting matters. Where an exception is claimed either under the exceptions to parties' genuine steps obligation or the existing requirement to attempt FDR,[92] this should be specified in the genuine steps statement.

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85 National Legal Aid, *Submission 297*
86 Partnerships Victoria, *Submission 307*.
87 Relationships Australia Victoria, *Submission 267*.
88 Ibid.
89 R Carroll, *Submission 289*.
90 Australian Law Reform Commission, *Review of the Family Law System*, Discussion Paper No 86 (2018) Proposal 5–4.
91 *Civil Dispute Resolution Act 2011* (Cth) s 6.
92 *Family Law Act 1975* (Cth) s 60I.

8.64 Courts already have powers to take a party's behaviour in the conduct of proceedings into account in making costs orders under the *Family Law Act*, so this element of the proposal is not a significant change.[93] Having this power clearly specified in the legislation in the context of the genuine effort requirement will support its implementation, by providing an explicit financial disincentive to litigation where it is not warranted.

8.65 The submissions demonstrate that engagement or non-engagement with court and other processes in relation to property and financial matters can have a tactical character.[94] Specifying costs consequences for such behaviour will mitigate the possibility that these proposals might have the unintended consequence of creating further opportunities to misuse processes.

8.66 The requirement to complete a genuine steps statement will focus the attention of applicants and respondents, and their lawyers, on the potential consequences of failing to attempt to resolve a matter, particularly in circumstances where a party has refused, manipulated, or not responded to efforts to initiate a resolution process, including FDR or LADR.

8.67 The court forms developed to support this approach should set out clearly the potential costs implications of court findings that the genuine effort and disclosure requirements had not been complied with.

How may the genuine steps requirement be satisfied?

8.68 The practical impact of the genuine steps requirement will be that parties will need to attempt to resolve their property and financial disputes without using courts in the first instance, unless an exception applies. The requirement is non-prescriptive as to the mechanism that can be used, leaving open options such as FDR, LADR, mediation provided by a non-FDR qualified mediator, or steps involving lawyers, which may involve exchange of correspondence or a process of negotiation.

8.69 Where one or both parties has attempted to use FDR, the mechanism for evidencing this will be a certificate. Where other mechanisms are used, each party would describe the steps taken on court forms developed for that purpose. The Federal Court of Australia has a separate form for applicants and respondents to complete. [95] The respondent is able to indicate whether or not he or she agrees with the genuine steps statement of the applicant. Assessment as to whether the steps were adequate would be a matter of consideration for the court. Where a party had refused to engage in a dispute resolution process, such as FDR, scrutiny should be applied to the motivation behind this.

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93 *Family Law Act 1975* (Cth) s 117(2A).

94 Law Council of Australia, *Submission 285*; Uniting, *Submission 162*; Peninsula Community Legal Centre, *Submission 30*.

95 *Federal Court Rules 2011* (Cth): Applicant's genuine steps statement: Form 16, r 8.02. Respondent's genuine steps statement Form 11, r 5.03.

8.70 Courts will need to determine whether the genuine steps test has been satisfied on a case by case basis taking into account the individual circumstances of the case.

Adapting the legislative framework for FDR

8.71 Although the ALRC has adopted a non-restrictive approach to the processes that can be used to satisfy the genuine steps approach, it remains of the view that the extension of FDR and LADR services for property and financial matters should be supported.[96] There are several justifications for this: these are low-cost, low conflict options; there is an existing network of providers that can be expanded; the qualification requirements for FDRPs are more rigorous than those for mediators (and should be enhanced for property and financial matters) and families should have greater opportunity to use the same process, and potentially the same agency and professional, for both property and financial matters and parenting matters. Additionally, the screening, intake, assessment and referral processes for FDR offer significant opportunities for identifying and addressing complex problems, such as family violence and other risk factors. Given evidence that the negotiation of property and financial matters can be associated with heightened risk of family violence, this kind of assistance may be particularly important.[97]

8.72 Accordingly, the ALRC makes recommendations intended to support further application of FDR and LADR in property and financial matters. These recommendations concern the assessment of suitability for FDR, the certificate categories that should be applied in property and financial matters and parenting matters and legislative provisions in relations to confidentiality and admissibility.

Time limits for filing proceedings in property and financial matters

8.73 The *Family Law Act* requires that proceedings for property and financial orders be instigated within twelve months of a divorce becoming final[98] or for de facto former partners, two years from the date of separation.[99] Outside of these time limits, courts have the discretion to grant leave to file applications on hardship grounds.[100] The ALRC sought stakeholder views on whether these periods should be extended in light of the proposals to extent the requirement to attempt FDR prior to lodging a court application in property and financial matters.[101]

8.74 Stakeholder views on this question were mixed. Legal organisations, such the Law Council of Australia[102] and National Legal Aid,[103] opposed lifting the time limits. Both of

96 Australian Law Reform Commission, *Review of the Family Law System* Discussion Paper 86 (2018), 104–109.
97 Kaspiew et al, above n 2, 42.
98 *Family Law Act 1975* (Cth) s 44(3).
99 *Family Law Act 1975* (Cth) s 44(5).
100 *Family Law Act 1975* (Cth) s 44(4).
101 Australian Law Reform Commission, *Review of the Family Law System*, Discussion Paper No 86 (2018) Question 5–2.
102 Law Council of Australia, *Submission 285*.
103 National Legal Aid, *Submission 297*.

these submissions suggested it would be unwise to disturb the policy intent behind the time limits; namely the 'clean-break' principle embodied in *Family Law Act* s 81, which imposes on courts an obligation to 'finally determine the financial relationships between the parties'.

8.75 ADRAC and organisations concerned with delivering FDR services favoured the relaxation[104] or removal of time limits.[105] A primary concern in these submissions was allowing the parties time to recover somewhat from separation and be emotionally ready for the negotiation of financial arrangements.[106]

8.76 Empirical evidence indicates that about two-thirds of separated parents work out property division within one to two years of separation.[107] The other third report longer time frames and this is associated with higher levels of net assets.[108]

8.77 The ALRC is not persuaded that there is any need to change the existing time limits, particularly given the ability to apply for leave to extend those limits.

Assessment of suitability

Recommendation 22 Regulation 25 of the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth), which refers to 'equality of bargaining power between the parties', should be amended to refer to the 'equality of bargaining power between the parties, including an imbalance in knowledge of relevant financial arrangements'.

8.78 The ALRC recommends the factors that guide an assessment of suitability for FDR[109] should be moved from subordinate legislation to the *Family Law Act*.[110] This is consistent with the overall aims of clarity and transparency, provides reinforcement of the importance of this assessment process, and has stakeholder support.[111]

8.79 Regulation 25 of the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) imposes an obligation on FDRPs to assess the parties and be satisfied that FDR is appropriate. The assessment entails consideration of whether the ability of each party to negotiate freely in the dispute is affected by any of these matters:

104 Relationships Australia National, *Submission 317*.
105 See, eg, Resolution Institute, *Submission 260*.
106 See, eg, Interact Support Inc, *Submission 389*; Resolution Institute, *Submission 260*.
107 Qu et al, above n 3, 96.
108 Ibid 98.
109 *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) reg 25.
110 Australian Law Reform Commission, *Review of the Family Law System*, Discussion Paper No 86 (2018) Proposal 5–1.
111 Interrelate Limited, *Submission 416*; Interact Support Inc, *Submission 389*; Australian Dispute Resolution Advisory Council (ADRAC), *Submission 386*; Relationships Australia National, *Submission 317*.

- a history of family violence (if any) among the parties;[112]
- the likely safety of the parties;[113]
- the equality of bargaining power among the parties;[114]
- the risk that a child may suffer abuse;[115]
- the emotional psychological and physical health of the parties;[116] and
- any other matter that the FDRP considers relevant to the proposed FDR.[117]

8.80 These considerations form the basis of intake and suitability assessments by FDRPs, which entail an individualised and nuanced clinical assessment of whether FDR is a suitable process in any given matter. As the discussion in the preceding section indicates, for several of these factors, especially family violence, equality of bargaining power and emotional, physical and psychological health, the assessment requires the consideration of the extent to which these factors might be present and would compromise the FDR process. Of themselves, they are not necessarily a disqualifying factor, and varied models, such as co-mediation, shuttle mediation, and legally assisted mediation, may be applied when more complicated factors may be present.

8.81 The ALRC recommends that 'including an imbalance in knowledge of relevant financial arrangements' be added to the consideration relating to equality of bargaining power.[118] Given that the expansion of legislative encouragement to use FDR for property and financial matters is a central part of the recommendations for reform, the ALRC considers that it is important to reinforce consideration of this issue in this context.

8.82 This approach balances the views of stakeholders who were in favour of additional consideration along these lines[119] being included against those who considered this issue was already covered in equality of bargaining power.[120]

8.83 A concern underpinning some positions of the latter group was that this consideration would operate as an exclusionary factor. Partnerships Victoria, for example, argued that the proposal could have the effect of running 'the risk of increasing the people for whom it is thought that FDR is inappropriate, possibly unnecessary'.[121]

8.84 Rather than viewing respective levels of knowledge as an exclusionary factor, other submissions argued that consideration of this issue would also place focus on the

112 *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) reg 25(2)(a).
113 Ibid reg 25(2)(b).
114 Ibid reg 25(2)(c).
115 Ibid reg 25(2)(d).
116 Ibid reg 25(2)(e).
117 Ibid reg 25(2)(f).
118 Ibid reg 25(2)(c).
119 See, eg, Australian Dispute Resolution Advisory Council (ADRAC), *Submission 386*.
120 See, eg, Partnerships Victoria, *Submission 307*.
121 Ibid.

need to incorporate other steps—such as obtaining legal advice and providing a referral to an LADR process.[122]

8.85 The ALRC emphasises that it is not intended that that the consideration of relative levels of knowledge of financial arrangements should operate in an exclusionary way. Rather, the intention in referring to it in the context of assessing equality of bargaining power is to ensure that it is given priority in conducting suitability assessments for FDR in property and financial matters, so steps can be taken to address the imbalance in knowledge as part of preparing for FDR. The other recommendations in this chapter support this approach.

Certificates

8.86 The *Family Law Act* provides for five categories of certificates that an FDRP may issue when one or both parties have attempted to instigate an FDR process which has not resulted in an agreement.[123] These certificates evidence a party's attempt to comply with the requirement to attempt FDR prior to lodging a court application for parenting orders.

8.87 In addition to proposing certificate categories for FDR in property and financial matters,[124] the Discussion Paper asked whether the certificate categories for children's matters should be revised. It further questioned whether there should be alignment between the approaches for children's matters and parenting and property matters.[125] There was strong support for both a review and an alignment.[126]

8.88 The ALRC considers that the certificates have an important role to play in the overall design of the scheme to strengthen FDR. In light of concern expressed by stakeholders that the genuine steps requirement could be manipulated in property and financial matters and that the FDR requirement can be manipulated in children's matters, certificate categories provide one mechanism for discouraging the behaviour by drawing attention to a party's refusal to respond to an invitation to attempt FDR.

8.89 The ALRC makes specific suggestions for certificate categories, having regard to the design of the overall scheme to strengthen FDR and evidence in research and submissions. The recommendations in this section are based on alignment in the certificate categories for parenting and property and financial matters, although an additional category for property and financial matters is suggested.

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122 Australian Dispute Resolution Advisory Council (ADRAC), *Submission 386*; Interrelate Limited, *Submission 416*.

123 *Family Law Act 1975* (Cth) s 60I(8).

124 Australian Law Reform Commission, *Review of the Family Law System*, Discussion Paper No 86 (2018) Proposal 5–5.

125 Ibid Question 5–1.

126 Interrelate Limited, *Submission 416*; Interact Support Inc, *Submission 389*; Australian Dispute Resolution Advisory Council (ADRAC), *Submission 386*; Relationships Australia National, *Submission 317*; UnitingCare Queensland, *Submission 312*; Family Life, *Submission 309*; Partnerships Victoria, *Submission 307*.

Recommendation 23 The *Family Law Act 1975* (Cth) should be amended to require Family Dispute Resolution Providers to provide a certificate to the parties in all matters where some or all of the issues in dispute have not been resolved.

Alignment

8.90 In general, the notion of alignment between the processes for parenting matters and property and financial matters received support from stakeholders.[127] Resolution Institute, for example, noted that its members suggested that:

> aligning these two processes would reduce the time wasted by the courts, help to ensure that applications made to court meet the legal requirements and that the reasons given on certificates add value to court proceedings. All too often currently, there are reports that certificates are used simply as a filing requirement.[128]

Certificate categories

8.91 Submissions to the Issues Paper, together with research, raised a range of issues and concerns with the certificate categories provided for in the *Family Law Act*.[129]

8.92 The *Family Law Act* provides for the following certificate types to be issued in children's matters:

- that the party attended FDR but the other party refused or failed to attend; [130]
- that the party did not attend FDR with the practitioner and other parties because the matter was considered unsuitable having had regard to reg 25 of the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth);[131]
- that the party attended FDR with the practitioner and the other party or parties and all attendees made a genuine effort to resolve the issue or issues;[132]
- that the party attended FDR with the practitioner and the other party or parties but that person, the other party or another party did not make a genuine effort to resolve the issue or issues;[133]
- that the party commenced FDR with the practitioner and the other party or parties but that having regard to reg 25 of the *Family Law (Family Dispute Resolution*

127 Interact Support Inc, *Submission 389*; Relationships Australia National, *Submission 317*; Family Life, *Submission 309*.
128 Resolution Institute, *Submission 260*.
129 Australian Law Reform Commission, *Review of the Family Law System* Discussion Paper 86 (2018) 112–4.
130 *Family Law Act 1975* (Cth) s 60I(8)(a).
131 Ibid s 60I(8)(aa).
132 Ibid s 60I(8)(b).
133 Ibid s 60I(8)(c).

Practitioners) Regulations 2008, the practitioner did not consider it appropriate to continue.[134]

8.93 The *Family Law Act* provides that the court may take the kind of certificate into account in considering whether to make an order referring parties to FDR or in determining whether to award costs against a party. [135]

8.94 Research evidence and responses in submissions demonstrate some complexity in decision making about certificate types among FDR practitioners.[136] Research on the practices of FDRPs indicates that although the suitability assessment[137] was a prominent consideration in their decision making, other influences were also relevant. These included concern about the impact of particular types of certificates for clients, fear of complaints, organisational policy, and children's best interests. There were particular concerns about the genuine effort category particularly because of the potential ramifications for costs orders. The research showed that in practice, this type of certificate was issued rarely compared to the other types.[138]

8.95 Submissions also raised concerns about the efficacy and purpose of certificates and the five categories in the legislation. The concerns related to the complexities involved in making professional judgements in relation to the type of certificate that should be issued and doubts as to whether courts pay attention to the type of certificate.[139]

8.96 Further problems raised in submissions included the influence of the categories, including the 'no genuine effort' designation, on dynamics between clients or between the FDR practitioner and a client's legal representative.[140] Relationships Australia South Australia indicated that the genuine effort categories gave rise to a significant number of complaints. [141] Uniting, for example, indicated:

> To state a person did not make a genuine effort requires a subjective assessment which cannot be easily tested in court given rules around confidentiality and admissibility. Moreover, requiring mediators to make such statements is contrary to the principles of mediation. This type of certificate is most likely to escalate conflict, lead to complaint, and potentially places other parties at risk.[142]

8.97 Some submissions suggested that certificates were viewed by some lawyers as a mere 'tick a box' procedural step to access the courts, rather than as supporting substantive

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134 Ibid s 60I(8)(d).
135 Ibid ss 13C and 117.
136 Smyth et al, above n 38, xii.
137 *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) reg 25.
138 Bruce Smyth et al, above n 38, 44.
139 See, eg, CatholicCare Victoria Tasmania (CCVT), *Submission 115*; T Murdock, Dispute Management Australia, *Submission 46*.
140 M Brandon, *Submission 184*; Uniting, *Submission 162*; FMC Mediation and Counselling, *Submission 135*; CatholicCare Victoria Tasmania (CCVT), *Submission 115*; T Murdock, Dispute Management Australia, *Submission 46*.
141 Relationships Australia South Australia, *Submission 62*.
142 Uniting, *Submission 162*.

efforts to resolve disputes and assist parents.[143] Another submission indicated that 'refusal to attend' certificates were being issued when the parties were each attempting to organise FDR but with different organisations, one private and one publicly subsidised. If one party refused to pay for private mediation, then the private mediator would issue a certificate that would allow their client to proceed to court.[144] Other circumstances identified as not being covered by the existing categories included lack of participation due to waiting times, lack of availability of a party for a period, and lack of agreement on where or when a joint session should take place.[145]

Certificate categories for both property and financial matters and parenting matters

8.98 In light of submissions to the Discussion Paper, the ALRC recommends the following certificate categories should be applicable to both parenting matters, and property and financial matters:

- the person to whom the certificate was issued had attempted to initiate an FDR process but the other party had not responded or failed to attend;
- the party to whom the certificate was issued attended for assessment and the matter was assessed as not suitable for FDR having had regard to the new equivalent of reg 25 of the *Family Law (Family Dispute Resolution Practitioners) Regulations (2008)* (Cth) ('*the Regulations*');
- both parties attended for assessment and the matter was assessed as not suitable for FDR having had regard to the new equivalent of reg 25 of the *Regulations*;
- the parties had commenced FDR and the process had been terminated having had regard to the new equivalent of reg 25 of the *Regulations*;
- the FDR commenced and concluded with either no resolution or partial resolution of the issues in dispute.

8.99 These certificate categories are based on two issues: recording the attendance or non-attendance of the parties for FDR and recording the outcome of the assessment for suitability. Each of these matters comes within the scope of the FDRPs own knowledge and practice obligations. The ground indicating that one party did not attend is a refinement of the existing ground in *Family Law Act* s 60I(8)(a). The other two grounds relate to the 'suitability' assessment and circumstances where there has been an assessment either of the party attempting to initiate the FDR process or of both parties, and an 'unsuitable assessment' has been made.[146]

8.100 The categories should assist courts to understand whether the parties had attempted to comply with their genuine steps obligations in relation to property and financial matters or the requirement to attend FDR for parenting matters.

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143 See, eg, NSW Young Lawyers Family Law Committee, Law Society of NSW, *Submission 108*.
144 D Cooper, *Submission 165*.
145 CatholicCare Victoria Tasmania (CCVT), *Submission 115*.
146 *Family Law Act 1975* (Cth) s 60I(8)(aa).

8.101 These certificate categories do not include a genuine effort ground. Primarily, this is to mitigate the risk of this ground exacerbating conflict between the parties. It also recognises FDRP concerns about the difficult nature of this assessment, given that it requires a subjective assessment on the part of a practitioner of a subjective state on the part of a client.

8.102 A further new certificate category recommended provides a ground stating that FDR produced either a partial resolution or no resolution for issues in dispute. Partial resolution would provide evidence of compliance with the genuine steps requirement, the requirement to attempt FDR and the aspect of the overarching purpose obligations that requires parties to resolve or narrow the issues in dispute.

Specific category for property and financial matters

8.103 In addition, a specific certificate category should be applicable to property and financial matters:

- both parties attended for assessment and the matter was assessed as not suitable for FDR having had regard to the new equivalent of reg 25 of the *Regulations* (Recommendation 22), specifically, the FDRP was concerned about an imbalance in knowledge of the parties' financial arrangements.

8.104 This certificate category is based on the new consideration in the assessment for suitability. The wording of this certificate category is intended to support the disclosure requirements, consistent with suggestions from organisations such as ADRAC along these lines.[147]

8.105 It provides FDRPs with an explicit basis for not conducting FDR if they are not satisfied that full disclosure has occurred. This certificate category supports the costs consequences for non-disclosure and should provide a disincentive for non-disclosure. However, in itself it would not be evidence of non-disclosure and this would still need to be established in litigation.

8.106 Unlike genuine effort, this certificate category goes to the FDRP's own assessment of the circumstances, and is not intended to have forensic weight in a court process. It simply signals to the parties and the court, in a preliminary way, that it would be counter to the FDRP's obligations to conduct FDR on the basis of the state of disclosure to which the FDRP is privy.

8.107 Given the costs and other consequences of non-disclosure under Recommendation 25, the existence of this certificate category should not operate as an incentive for a party not to provide full disclosure in FDR in order to access a court pathway. Rather, it supports FDRPs to make and communicate an assessment that is consistent with their own obligations. As a question of fact, non-disclosure would need to be tested in later

147 Australian Dispute Resolution Advisory Council (ADRAC), *Submission 386*; National Legal Aid, *Submission 297*.

court proceedings. Where an FDR participant seeks legal advice, as they are generally encouraged to do, they will be informed of the consequences of non-disclosure and encouraged to comply with their obligations.

Admissibility and confidentiality of FDR in property and financial matters

Recommendation 24 Sections 10H and 10J of the *Family Law Act 1975* (Cth), which provide for confidentiality and inadmissibility of discussions and material in Family Dispute Resolution in relation to parenting matters, should be extended to Family Dispute Resolution for property and financial matters. The legislation should provide an exception for a sworn statement in relation to income, assets, superannuation balances, and liabilities that each party signs at the start of Family Dispute Resolution, which should be admissible.

8.108 Communications occurring in family dispute resolution are confidential[148] and inadmissible[149] in court processes, subject to certain exceptions. The main exceptions in relation to confidentiality relate to compliance with state and territory laws,[150] circumstances where the person (or courts or holders of parental responsibility for minors) making the communication consent to its disclosure,[151] and circumstances involving risk of harm, criminal activity and property damage.[152]

8.109 The principal exceptions to inadmissibility concern admissions and disclosures that indicate a child has been abused or is at risk of abuse.[153]

8.110 Given the recommendations to strengthen encouragement to attempt FDR to property and financial matters, it is necessary to address the questions of confidentiality and inadmissibility of FDR in this context. Although the confidentiality and inadmissibility provisions have been the subject of some debate,[154] changes to the existing position have not been canvassed in this Inquiry. On this basis, it would be inappropriate to recommend

148 *Family Law Act 1975* (Cth) s 10H.
149 Ibid s 10J.
150 Ibid s 10H(2).
151 Ibid s 10H(3).
152 Ibid s 10H(4)(a)–(e).
153 Ibid s 10J(2).
154 The Hon Judge T Altobelli and the Hon Chief Justice D Bryant, 'Has Confidentiality in Family Dispute Resolution Reached Its Use-by Date?' in *Families, policy and the law* (Australian Institute of Family Studies, 2014); The Hon Judge J Harman, 'An Imperfect Protection: Attitudes of Family Dispute Resolution Practitioners to Confidentiality' (2017) 29(1) *Bond Law Review* Article 4; The Hon Judge J Harman, 'The Intersection of Family Violence and Family Dispute Resolution: Implications for Evidence Gathering and Mediation Confidentiality' [2019] *Australian Journal of Family Law*.

anything other than the maintenance of the existing position, with a limited amendment in relation to a 'sworn statement of assets, liabilities and income'.

8.111 This recommendation is intended to support the implementation of FDR in property and financial matters through supporting disclosure, including through ensuring that parties provide disclosure and are aware of their obligations and the consequences of non-compliance in this regard.

8.112 The statement should be on a pro forma document that includes a statement indicating:

- the nature of the party's disclosure obligations and the consequences for non-compliance;
- the consequences of a court's finding that a party has not made a genuine effort to resolve their dispute, including providing full disclosure, if a matter proceeds to court; and
- that they may wish to obtain legal advice if they have not already done so.

Supporting more FDR and LADR

8.113 The material considered in this Inquiry has demonstrated the significant role that FDR and LADR play in supporting the resolution of post-separation disputes. Since the FDR regime for parenting matters was strengthened in 2006, these have become increasingly important pathways for the resolution of parenting matters. The ALRC considers that these pathways warrant expansion both for parenting and property and financial matters.

8.114 Many submissions reflect significant stakeholder support for an increased role for LADR as a preferable alternative to court in circumstances where a matter may involve issues that render FDR unsuitable, even with measures such a co-mediation or a shuttle approach.[155]

8.115 Both FDR and LADR have the potential to provide flexible and accessible options for parenting and property and financial matters in a range of geographic areas and to a range of groups and communities. For this potential to be realised, however, a number of issues require detailed consideration.

8.116 The ALRC suggests that the Attorney-General's Department (Cth) should work with relevant stakeholders, including FDR/LADR providers and user groups, including Aboriginal Controlled Community Organisations and groups concerned with the interests of culturally and linguistically diverse communities and LGBTIQ groups, to support the further development of FDR and LADR. This process should identify how the supply

155 Interrelate Limited, *Submission 416*; Interact Support Inc, *Submission 389*; Women's Legal Services Australia, *Submission 366*; Domestic Violence Victoria, *Submission 284*; Wirringa Baiya Aboriginal Women's Legal Centre, *Submission 164*. But some submitters were cautious: see, eg, Inner City Legal Service, *Submission 382*.

of appropriate FDR and LADR models can be increased and develop guidelines for the application of LADR.

Families with complex needs

8.117 It is clear that care and flexibility are required in developing and delivering FDR and LADR models for families presenting with complex psychosocial issues. A core point in submissions on this issue was that even families with complex issues could be supported to resolve their matters in FDR, or more particularly LADR, if the models were developed to cater for them. As a result of an insufficient supply of these models, families who could otherwise be supported to resolve their matters through LADR are being channelled into court pathways.[156]

8.118 Submissions indicate that further development of these models should consider the following issues:

- the management of funding arrangements for different elements of the model, such as case management;[157]
- involvement of services with expertise in family violence in the development and application of screening, assessment, and support procedures and guidelines: 'Screening and assessment tools which are appropriately validated and assess for non-physical coercive controlling behaviours should also be used';[158]
- models involving two FDRPs and potentially other support services, as well as post-separation information and education sessions and, in some cases, post-order parenting programs;[159]
- the development of guidelines as to when LADR should be conducted, including in family violence cases, and which LADR model should be applied;[160]
- flexibility in the number of FDR or LADR sessions offered, without an arbitrary cap. Fitzroy and Darebin Community Legal Service argued that such caps 'force families to agree to inequitable resolutions or to initiate proceedings when it would be more appropriate for further mediation conferences to occur';[161] and
- greater availability of FDR and particularly LADR for matters already on a litigation pathway,[162] with clear guidelines in relation to referrals from courts.[163]

FDR and LADR for property and financial matters

8.119 The earlier discussion briefly outlined the present availability of FDR and LADR for property and financial matters. Submissions noted a range of constraints on the ability

156 Relationships Australia National, *Submission 317*.
157 Ibid.
158 Domestic and Family Violence Death Review and Advisory Board, *Submission 377*.
159 Partnerships Victoria, *Submission 307*.
160 Interact Support Inc, *Submission 389*.
161 Fitzroy Legal Service and Darebin Community Legal Service, *Submission 336*.
162 Ibid.
163 Interact Support Inc, *Submission 389*.

of FRCs, CLCs, and Legal Aid Commissions to offer FDR in property and financial matters.

8.120 These constraints primarily related to the focus on children's matters in their service agreements and funding arrangements, with property matters generally only being dealt with in certain circumstances if they are ancillary to a children's matter.[164] Brimbank Melton Community Legal Centre said, for example:

> Most CLC's do not offer property advice nor assistance with legally assisted family dispute resolution for property matters as their funding does not permit the provision of assistance in property matters. This leaves many people with small property pools who cannot afford a private lawyer with no option but to self-represent which puts further pressure on them and on the courts. For vulnerable non-English speakers with small property pools self-representation is not an option and there is no access to justice at all.[165]

8.121 A systematic examination of existing constraints on the ability of these organisations to provide these services, either on a means tested, cost recovery, or fee for service basis, is required.

8.122 While some submissions indicated that the need for easily accessible, means tested, fee for service models was clearly evident,[166] others flagged challenges that need to be addressed. Partnerships Victoria, for example, said the fee structure and charter for FRCs would require significant review to ensure that clients who could afford to pay were required to.[167]

8.123 Victoria Legal Aid raised challenges in relation to cost recovery models, based on its experience with cost recovery when the application of the means test to grants of assistance resulted in financial contributions being required: 'although VLA tries to recover any assessed financial contributions which are put in place as a condition of a grant of legal assistance for family law matters, including for FDR, in practice VLA has difficulty recovering contributions'.[168]

8.124 Other submitters, including those in the legal assistance sector, raised the need for greater funding for legal aid commissions and community legal centres to support FDR and LADR for property and financial matters, and the associated need for lawyer training in this area.[169]

8.125 A group of academics referred to relevant evidence from their recent study, saying that:

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164 See, eg, Interrelate, *Submission 126*; Victoria Legal Aid, *Submission 56*.
165 Brimbank Melton Community Legal Centre *Submission 76*.
166 Macarthur Legal Centre, *Submission 346*.
167 Partnerships Victoria, *Submission 307*.
168 Victoria Legal Aid, *Submission 375*.
169 See, eg, Women's Legal Service Victoria, *Submission 213*.

> lawyer assisted mediation has benefits by providing an important safety buffer for clients where violence is a factor and increasing the chance of an agreement being reached. However, access to legal representation is unaffordable for many litigants in these cases. Thus we strongly support ... funding agreements for the provision of legal representation to parties in property cases.[170]

8.126 The submissions also indicated some significant practice issues needed to be addressed. These included how the involvement of lawyers[171] and other professionals, such as financial advisers and counsellors, should be managed in FDR and LADR models.[172]

Appropriate models for diverse client groups

8.127 The submissions also highlighted a need for models and approaches to be developed in ways that ensure they meet the needs of Aboriginal and Torres Strait Islander people, culturally and linguistically diverse groups, LGBTIQ groups, and people with disability. Submissions endorsed the notion that these groups should be involved in the development and delivery of appropriate FDR and LADR models.[173]

8.128 In relation to Aboriginal and Torres Strait Islander groups, submissions from those groups advocated for Aboriginal Community Controlled Organisations to be responsible for, or closely engaged with, the development and delivery of FDR and LADR for these communities.[174]

8.129 The National Aboriginal and Torres Strait Islander Legal Services submission referred to the diversity among these groups, arguing for community led initiatives:

> Specially targeted resolution processes between Aboriginal and Torres Strait Islander families or parties should be developed flexibly so as to provide a place-based and culturally safe framework for parties. ... [A] single model will not work for every Aboriginal and Torres Strait Islander person due to the diversity of our people across Australia. There are current dispute resolution models that have been developed in co-design with community and these are largely successful.[175]

8.130 The National Family Violence Prevention Legal Services Forum expressed the view that standard models of FDR delivered in FRCs were inappropriate for Aboriginal and Torres Strait Islander women. Its submission expressed a preference for LADR, delivered in a way that ensures Aboriginal and Torres Strait Islander 'women have access to specialist and culturally safe legal assistance and support from an FVPLS before, during, and after their engagement with a dispute resolution process.' It also highlighted

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170 J Howieson, R Carroll, S Murray, I Murray, L Young, L Jarvis, D Hansen, F Lester, *Submission 261*.
171 Partnerships Victoria, *Submission 307*; Resolution Institute, *Submission 260*.
172 Interact Support Inc, *Submission 389*.
173 See, eg, Relationships Australia National, *Submission 317*.
174 National Family Violence Prevention Legal Services Forum, *Submission 293*; NATSILS, *Submission 290*; Koori Caucus Working Group on Family Violence, *Submission 50*.
175 NATSILS, *Submission 290*.

the need to increase the availability of such services in regional areas, noting that in parts of Queensland, the nearest LADR service was 350km away.[176]

Disclosure obligations

8.131 One of the most important issues in property and financial proceedings is identifying assets, income and liabilities. For this reason, disclosure obligations are fundamental to a fair and transparent process in negotiating agreements out of court or decision making in court. Studies[177] and submissions[178] suggest that non-disclosure of assets and income can be associated with financial abuse and misuse of systems and processes. The Law Society of South Australia submitted that:

> Many practitioners have reported being forced to issue proceedings on behalf of their client as the result of one party failing to provide disclosure to the other and for the sole purpose to obtain discovery. A failure to provide disclosure can have a significant impact upon the progress of a matter and create significant (and unnecessary) delay and can often further marginalise a disadvantaged party. For example, practitioners report that it is common for a party to attend to obtain advice with little or minimal knowledge about the other party's financial affairs. This may be as a result of an element of financial control in the relationship or may simply be a product of naturally assumed or aligned roles within the relationship where one party has managed and controlled the finances and the other has had little involvement and therefore the knowledge of the financial situation.[179]

Recommendation 25 The *Family Law Act 1975* (Cth) should be amended to clearly set out the disclosure obligations of parties, and the consequences for breach of those obligations.

8.132 The duty of disclosure is contained in the *Family Law Rules* and the *Federal Circuit Court Rules*, although it is expressed differently in the two sets of rules.[180] Whilst it is conceivable that unrepresented parties will find their way to the rules of court at some point in the proceedings, it is more likely that their attention will be drawn in the first instance to the *Family Law Act*.

8.133 Consistent with the principles that the law should be clear, coherent and enforceable, and drafted in manner that is accessible to the parties, the ALRC recommends that the disclosure obligations, and the consequences for breach of those obligations,

176 National Family Violence Prevention Legal Services Forum, *Submission 293*.
177 Prue Cameron, 'Relationship Problems and Money: Women Talk about Financial Abuse' (Wire Women's Information, 2015); Kaspiew et al, 'Domestic and Family Violence and Parenting: Mixed Method Insights into Impact and Support Needs: Final Report', above n 61; Women's Legal Service Victoria, above n 39.
178 See, eg, Women's Legal Service Victoria, *Submission 100*.
179 Law Society of South Australia, *Submission 88*.
180 *Family Law Rules 2004* (Cth) r 13.01; *Federal Circuit Court Rules 2001* (Cth) r 24.03.

should be set out transparently and accessibly in the *Family Law Act*.[181] The provisions should make it clear that the obligations apply to FDR, arbitration and other facilitative dispute resolution processes, as well as court proceedings. They should also set out the corresponding duty of legal practitioners or family dispute resolution practitioners to advise parties of their duties.[182]

8.134 The Family Court did not consider that any change to the current regime was necessary,[183] but many stakeholders argued that disclosure obligations, and the consequence of breach, would be better placed in the primary statute.[184]

8.135 The duty on advisers is essential to ensuring matters are conducted in accordance with the overarching purpose.[185] As Gadens submitted,

> while any experienced family lawyer already should know and ought clearly advise their client about the duty of disclosure and all that it entails, there is a lack of clarity that allows some parties to fail to disclose, or delay disclosure, and thus gain a tactical advantage (sometimes perceived rather than actual) around the process by which disclosure is to be made.[186]

8.136 It is important that all lawyers and FDRPs understand their responsibility to advise clients about the duty of disclosure. Placing that obligation in the *Family Law Act*, rather than in the *Family Law Rules*[187] as is currently the case, will emphasise the importance of the obligation.

8.137 Existing mechanisms to support disclosure include the courts' power to impose punishment for contempt of court, or to take the non-disclosure into account in considering costs.[188] Although there is jurisprudence to the effect that non-disclosure may be taken into account in apportioning the property pool,[189] the ALRC recommends that it be expressly referred to in the legislation.[190] The ALRC considers that these consequences should be placed clearly and accessibly in the *Family Law Act*. [191]

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181 Australian Law Reform Commission, *Review of the Family Law System*, Discussion Paper No 86 (2018) Proposal 5–6.
182 Ibid Proposal 5–8.
183 Family Court of Australia, *Submission 68.*
184 Gadens, *Submission 412*; Family Law Practitioners' Association of Western Australia (Inc), *Submission 410*; Interact Support Inc, *Submission 389*; Australian Dispute Resolution Advisory Council (ADRAC), *Submission 386*; Relationships Australia National, *Submission 317*; UnitingCare Queensland, *Submission 312*; Family Court of Western Australia, *Submission 311*; National Legal Aid, *Submission 297*; Caxton Legal Centre, *Submission 292*; Resolution Institute, *Submission 260*; South Australian Bar Association, *Submission 121*; Law Society of South Australia, *Submission 88*.
185 Women's Legal Service Victoria, *Submission 413;* Safe Steps, *Submission 408*; Relationships Australia National, *Submission 317*; Robert Kerr, *Submission 174.*
186 Gadens, *Submission 412*
187 *Family Law Rules 2004* (Cth) r 1.08(2).
188 See, eg, *Family Law Act 1975* (Cth) s 117(2A)(c); *Family Law Rules 2004* (Cth) r 13.14.
189 *Weir & Weir* [1992] FamCA 69.
190 See also C Turnbull, *Submission 348*.
191 Australian Law Reform Commission, *Review of the Family Law System*, Discussion Paper No 86 (2018) Proposal 5–7.

8.138 There was a broad range of views as to whether there should be civil or criminal penalties for non-disclosure, as had been posited in the Discussion Paper.[192] There was some support for the imposition of civil and criminal penalties for breach of disclosure obligations.[193] However most of those who responded to this issue considered that the existing mechanisms are sufficient[194] but require greater application by courts,[195] or a greater use of case management to reduce the tactical advantage of no, slow, or incomplete disclosure. [196] Professor Robyn Carroll observed that there was no 'shortage of legal consequences that can be used to respond to non-disclosure. More important to consider are how to detect non-disclosure and ensure there is compliance in FDR and court proceedings'.[197]

8.139 Others expressed concern that civil or criminal penalties would have adverse consequences for the party affected by the non-disclosure by compromising the non-disclosing party's capacity to provide financial support for the family, especially for vulnerable and disadvantaged clients, such as those affected by family violence.[198]

8.140 The ALRC considers that the existing mechanisms available to the family courts, coupled with the enhanced case management powers underpinned by the recommended legislative provisions in relation to the overarching obligation of family law practice and procedure provisions,[199] arm the family courts with sufficient power to enforce the disclosure obligations and to impose appropriate remedies when necessary.

8.141 It is also recommended that the costs consequences for failure to disclose be referred to expressly in the legislation.

192 Ibid Question 5–2.
193 Victoria Legal Aid, *Submission 375*; Lander & Rogers Lawyers, *Submission 357*.
194 National Legal Aid, *Submission 297*; Law Council of Australia, *Submission 285*.
195 Interact Support Inc, *Submission 389*; Law Council of Australia, *Submission 285* representing South Australian Bar Association position.
196 Victoria Legal Aid, *Submission 375*; Women's Legal Services Australia, *Submission 366*.
197 R Carroll, *Submission 289*.
198 Caxton Legal Centre, *Submission 292*; Domestic Violence Victoria, *Submission 284*.
199 Chapter 10.

9. Arbitration

Contents

Introduction

9.1 This chapter outlines a number of recommendations which aim to increase the use of arbitration in appropriate family law disputes. Arbitration has the potential to help relieve the workload of the courts and provide parties with immediate access to adjudication. Parties also benefit from quick delivery of the award, as most arbitration agreements provide for a timeframe of around 28 days from the conclusion of the hearing. However, arbitration has not been much used,[1] partly due to perceptions about the legislative structure, and concerns about the status of arbitral awards. Submissions and consultations were broadly supportive of a greater use of arbitration, and of an enhanced legislative framework to support it.[2]

1 Family Court of Australia, *Submission 68*; Explanatory Statement, *Family Law Amendment (Arbitration and Other Measures) Rules 2015* (Cth).

2 See, eg, S Christie, *Submission 216*; CatholicCare Diocese of Broken Bay, *Submission 197*; National Legal Aid, *Submission 163*; Springvale Monash Legal Service, *Submission 161*; R Alexander, *Submission 131*; Inner City Legal Centre, *Submission 124*; NSW Young Lawyers Family Law Committee, Law Society of NSW, *Submission 108*; Bar Association of Queensland, *Submission 80*; Resolution Institute, *Submission 70*; Family Court of Australia, *Submission 68*; Australian Psychological Society, *Submission 55*; Caxton Legal Centre, *Submission 51*; ATSILS Qld, *Submission 42*; Australian Institute of Family Law Arbitrators and Mediators, *Submission 41*; D Bryant, *Submission 35*; Relationships Australia, *Submission 11*.

9.2 Arbitration has been described as involving

> the appointment of an independent arbitrator, often chosen by the parties, to rule on their dispute according to the terms of reference they give [the arbitrator]. This can only be done by agreement, before or after the dispute arises, but where it is done the arbitrator has authority to make an award which is binding on the parties and enforceable by the process of the courts.[3]

9.3 Recommendations include increasing the scope of matters which may be arbitrated, removing the opportunity to object to registration of an award, clarifying that superannuation splits may be effected by an arbitral award, and providing courts with additional powers to make directions regarding the conduct of an arbitration process.

9.4 Some submissions suggested that courts should be empowered to order compulsory arbitration in appropriate cases, while others suggested that arbitration could be extended to include appropriate children's matters. For reasons set out in this chapter, no recommendations for change are made with respect to compulsory arbitration. It is suggested that in limited circumstances there could be arbitration in relation to children's issues.

9.5 Some submissions and consultations suggested that it is primarily a change in legal practitioners' mindsets which is required to increase the use of arbitration, and that greater education and awareness for legal practitioners regarding arbitration may be more effective than further legislative reform.[4] Some have noted that the introduction of ch 26B to the *Family Law Rules 2004* (Cth) in 2016 significantly improved the legislative framework.[5] Others suggested that further enhancements would be beneficial, and some of those suggestions are reflected in this chapter.

9.6 Provisions regulating arbitration in family law matters are currently spread across various divisions of primary legislation,[6] regulations,[7] and rules of court,[8] which creates confusion and hinders awareness and understanding of the provisions. As part of an overall legislative simplification and redrafting process, co-locating provisions regulating arbitration is likely to increase legal practitioner awareness and understanding of the provisions, as well as making the law easier to access and apply. One submission suggested re-locating to court rules those provisions currently contained in regulations.[9] This would more closely reflect the legislative approach taken to arbitration provisions

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3 *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia (*2013) 251 CLR 533, [45] quoting Lord Bingham of Cornhill, *The Rule of Law* (2010) 86.

4 See Inner City Legal Centre, *Submission 124;* D Bryant, *Submission 35*; P Theobald, *Submission 6*. See also Family Law Council, *Letter of Advice to the Attorney-General on Arbitration of Family Law Property and Financial Matters* (2008).

5 See, eg, N Jackson, *Submission 397*; Patrick Parkinson, 'Family Law: Arbitration in Family Property Proceedings: Exploring the Potential' [2016] (21) *LSJ: Law Society of NSW Journal* 78.

6 See, eg, *Family Law Act 1975* (Cth) pt II div 4 and pt IIIB div 4.

7 *Family Law Regulations 1984* (Cth) pt V.

8 *Family Law Rules 2004* (Cth) ch 26B. Note that the provisions relating to arbitration in pt 27 of the *Federal Circuit Court Rules 2001* (Cth) do not apply in family law proceedings.

9 Australian Institute of Family Law Arbitrators and Mediators, *Submission 41*.

applicable in the Federal Court of Australia, and would make the provisions easier to navigate.

Financial matters

Recommendation 26 The *Family Law Act 1975* (Cth) and the *Child Support (Assessment) Act 1989* (Cth) should be amended to increase the scope of matters which may be arbitrated, whether or not upon referral from a court. Those matters should include all financial issues, including child maintenance and child support, subject to limitations. Appropriate occasions for arbitration would not include disputes:

- relating to enforcement;
- under ss 79A or 90SN of the *Family Law Act 1975* (Cth) (subject to limitations); and
- in which a litigation guardian has been appointed.

9.7 The *Family Law Act* includes two different lists of the types of financial disputes which can be arbitrated for the purposes of the Act, the first relating to arbitration upon a referral from a court ('section 13E arbitration' (court-ordered arbitration)), and the second relating to arbitration not referred from a court ('relevant property or financial arbitration'),[10] which could be described as private arbitration. The list of matters which may be arbitrated as 'relevant property or financial arbitration' is more extensive than those listed under 'section 13E arbitration'. There is no discernible purpose for maintaining such a distinction.

9.8 The ALRC recommends that the Act should instead include only one list of the types of financial disputes which may be arbitrated, which applies whether or not a court has made an order for the parties to participate in arbitration. This would reduce the complexity of the provisions and is likely to promote uptake of arbitration.

9.9 Some financial aspects of relationship separation are currently excluded from arbitration under the *Family Law Act* (whether or not court-referred), such as adult child maintenance and child support. In addition, the Act is currently ambiguous in relation to superannuation splits on the basis of an arbitral award. Expanding the scope of family law arbitration to include all financial issues consequent on relationship breakdown, subject to limits set out in this chapter, is likely to further improve the attraction of arbitration for litigants and their lawyers.

10 *Family Law Act 1975* (Cth) s 10L.

Distinctions between court-ordered and other arbitration

9.10 When arbitration was first introduced into the *Family Law Act* in 1991, there was no distinction between the types of matters which could be arbitrated, irrespective of whether the arbitration was court-referred or not.[11] The amending legislation which introduced these distinctions was not accompanied by any explanation as to the purpose of the distinctions.[12] It has been suggested that these distinctions were made for historical reasons and no longer have utility.[13] They have also been described as 'an anomaly'.[14] There is no apparent reason in principle why the issues to be decided in court-referred arbitration should be more restricted in comparison to disputes which parties may elect to arbitrate of their own initiative. Providing for one consolidated list was supported in submissions.[15]

9.11 Currently, 'section 13E arbitration' provides for court-referred arbitration of proceedings under Pt VIII or Pt VIIIAB of the Act (other than proceedings relating to a Pt VIIIAB financial agreement). This means that proceedings relating to division of property and spousal maintenance for married and de facto couples may be arbitrated upon a referral from a court.

9.12 In contrast, 'relevant property or financial arbitration' (private arbitration) may relate to matters under Pt VIII, Pt VIIIA, Pt VIIIAB, Pt VIIIB or s 106A of the Act.[16] This effectively includes a number of additional types of disputes beyond what can be arbitrated upon referral from a court, such as disputes relating to financial agreements between married and de facto couples, superannuation, and instruments to be signed by order of a court.

9.13 The position in relation to superannuation is complex. Part VIIIB of the Act relates to superannuation interests. Part VIIIB is included in the scope of 'relevant property or financial arbitration' (private arbitration) but is not referred to in the scope of 'section 13E arbitration' (court-ordered arbitration). However, it has been suggested that it is 'likely' that a 'section 13E arbitration' can permissibly result in an award splitting superannuation interests, because the Act provides that in property division proceedings a court can also make orders splitting superannuation interests.[17] This ambiguity would be addressed by removing the existing distinction between the types of matters which can be arbitrated.

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11 *Courts (Mediation and Arbitration) Act 1991* (Cth) s 5.

12 Explanatory Memorandum, Family Legislation Amendment Bill 2005 (Cth); Explanatory Memorandum, Family Law Amendment (De Facto Financial Measures and Other Measures) Bill 2008 (Cth).

13 Parkinson, above n 5.

14 The Hon Justice G Watts, 'Arbitrations in Family Law' (Paper, University of New South Wales, Sydney, 25 November 2016).

15 Australian Institute of Family Law Arbitrators and Mediators, *Submission 41*.

16 *Family Law Act 1975* (Cth) s 10L(2)(b)(i).

17 The Hon Justice G Watts, above n 14, citing s 90MS of the *Family Law Act 1975* (Cth).

9.14 Consultations and submissions indicated that superannuation fund trustees are sometimes reluctant to implement a superannuation split on the basis of an arbitral award, and prefer the certainty of a court order.[18] Removing the distinctions discussed above may assist in this regard. In addition, amending the object of Pt VIIIB of the Act to explicitly refer to arbitral awards may further promote confidence. The object currently refers only to superannuation splits 'either by agreement or by court order'.[19] An avoidance of doubt provision could also be inserted to clarify that references to a 'court' or to 'proceedings' or to an 'order' in Div 3 and Div 5 of Pt VIIIB of the *Family Law Act* include reference to an 'arbitrator', 'arbitration' and 'registered arbitral award' respectively.

All financial issues following separation

9.15 Parties are currently not able to arbitrate all financial issues following a separation. Some submissions suggested the permissible scope should be expanded.[20] The Family Law Council has also noted that the scope of arbitration is significantly narrower than it recommended in a report released shortly before the introduction of arbitration into the *Family Law Act*.[21]

9.16 For example, there is currently no provision for arbitration of disputes under Pt VII Div 7 of the Act for payment of maintenance in relation to children for whom an application for assessment of child support could not be made, such as children who are over 18 years old and are engaged in studies or have special needs. All proceedings under Pt VII are currently excluded from arbitration in the lists. It is recommended that child maintenance disputes be included in the list of matters which may be arbitrated. Consultations with the Australian Institute of Family Law Arbitrators and Mediators ('AIFLAM') demonstrated strong support for such an amendment.

9.17 Similarly, child support disputes are not currently able to be arbitrated. In cases where an application for administrative assessment has been made and there is a dispute about that assessment, child support legislation provides for a series of mechanisms for reviewing and appealing such assessments, including departure applications, internal objections, and applications to tribunals and courts.[22] This Inquiry has not specifically examined those existing processes, as they fall outside the Terms of Reference, but there was no suggestion from stakeholders that arbitration is necessary to address any defect in those processes. Rather, arbitration is most likely to be an appropriate dispute resolution mechanism where parties agree that the child support formula should not apply (for example, to accommodate payment of private education fees), and where the

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18 Relationships Australia National, *Submission 317*; Law Council of Australia, *Submission 43*; Australian Institute of Family Law Arbitrators and Mediators, *Submission 41*.

19 *Family Law Act 1975* (Cth) s 90XA.

20 See, eg, Victorian Association of Collaborative Professionals, *Submission 91*.

21 Family Law Council, *The Answer from an Oracle: Arbitrating Family Law Property and Financial Matters* (Discussion Paper, 2007), citing Family Law Council, *Arbitration in Family Law* (1988).

22 See, eg, *Child Support (Assessment) Act 1989* (Cth) pts 6A and 7; *Child Support (Registration and Collection) Act 1988* (Cth) pts VII, VIIA and VIII.

parties require adjudication regarding the amount or method of payment. Child support issues could then be arbitrated alongside other financial issues resulting from the parties' separation as one part of the broader dispute.

9.18 Parties should be able to choose to have child support issues determined by an arbitrator if they agree that the award will become a child support agreement. Either party should be entitled to apply for registration of the arbitral award with the agency responsible for administering the child support legislation and enforcing payment. The registered arbitral award should have the same status as either a 'binding child support agreement' or a 'limited child support agreement' at the election of the parties as specified in the arbitration agreement.[23] The *Child Support (Assessment) Act 1989* (Cth) should explicitly provide for this possibility.

9.19 Currently, spousal maintenance payments may be collected and enforced by the Department of Human Services on behalf of the payee if the liability for spousal maintenance arises under a court order, but not under an arbitral award. Namely, under the *Child Support (Registration and Collection) Act 1988* (Cth) a 'registrable maintenance liability' includes a spousal maintenance liability arising under a court order, but does not explicitly include a liability arising under an arbitral award.[24] The provision should be amended to enable a registered arbitral award relating to spousal maintenance to also be a 'registrable maintenance liability'.

9.20 One submission suggested that the *Family Law Act* should be clear that arbitral awards can apply to third parties.[25] Where the third party is a party to the arbitration agreement (for example, where the third party is formally a party in associated court proceedings and has consented to arbitration of the dispute), there is unlikely to be doubt that the award could apply to the third party. Where the third party is not a party to the arbitration agreement, but the conditions set out in s 90AE of the Act are satisfied (such as according the third party procedural fairness), it is appropriate that an arbitral award is able to bind the third party. The ALRC recommends that the list of matters which can be arbitrated explicitly include reference to s 90AE, and that s 90AE include references to arbitration awards as well as court orders.

9.21 Although the scope of matters for arbitration could helpfully be expanded as outlined above, there remain some disputes which should be determined by courts, rather than by arbitration. For public policy reasons, the Family Law Council has recommended that legislation should explicitly exclude from arbitration disputes relating to enforcement, and disputes in which any party is under a legal disability.[26] The ALRC endorses this approach and recommends that it be legislated. Enforcement (whether of court orders, overseas decrees or an arbitral award) is properly the responsibility of

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23 These terms are defined in the *Child Support (Assessment) Act 1989* (Cth) pt 6 div 1A.

24 *Child Support (Registration and Collection) Act 1988* (Cth) s 18.

25 Australian Institute of Family Law Arbitrators and Mediators, *Submission 41*.

26 Family Law Council, *Letter of Advice to the Attorney-General on Arbitration of Family Law Property and Financial Matters* (2008); Family Law Council, *The Answer from an Oracle*, above n 21.

public institutions such as courts. Similarly, it is the appropriate role of courts to ensure protection of parties under a legal disability (including children and parties where there has been the appointment of a case guardian or litigation guardian). Finally, courts are the appropriate forum for a dispute about whether or not an earlier court order should be set aside under ss 79A or 90SN of the Act. However, it should be permissible to arbitrate where the parties agree that an order should be set aside (for example, circumstances have arisen since the making of the order which make it impracticable) but the parties remain in dispute about what new orders should be made.

9.22 One submission suggested that arbitral awards should include injunctions.[27] Injunctions are provided for primarily in s 114 in Pt XIV of the *Family Law Act*. Part XIV of the Act is not included in the list of matters which may be arbitrated. The Family Law Council recommended against injunctive powers for arbitrators.[28] Injunctive powers are appropriately exercised by courts, and the ALRC does not recommend that such powers be bestowed upon arbitrators. Should such orders be necessary in the course of an arbitration, an application could be made to a court.

Stamp duty

9.23 Several submissions sought greater clarity regarding the application of state and territory stamp duty exemptions to arbitral awards.[29] This has also been identified as an issue in commentaries.[30] Consultations with the AIFLAM indicated this is a key issue affecting arbitration. Although there are various provisions in the *Family Law Act* which purport to exempt various instruments executed for family law purposes from stamp duty,[31] there are concerns about the constitutional validity of those provisions. In practice, state and territory offices rely on state and territory legislation in determining whether or not a particular instrument is exempt from duty. Consequently, different approaches are taken in each state and territory and there is often uncertainty about whether the purported exemptions are intended to apply specifically to arbitral awards as distinct from court orders and binding financial agreements. A nationally consistent approach to the application of stamp duty exemptions to asset transfers pursuant to arbitral awards is likely to increase confidence in, and use of, arbitration processes. The ALRC recommends that the Australian Government work together with state and territory governments to apply clear and nationally consistent exemptions for instruments executed pursuant to family law arbitral awards.

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27 Victorian Association of Collaborative Professionals, *Submission 91*.

28 Family Law Council, *The Answer from an Oracle*, above n 21.

29 NSW Young Lawyers Family Law Committee, Law Society of NSW, *Submission 108*; Queensland Law Society, *Submission 66*; Law Council of Australia, *Submission 43*; Australian Institute of Family Law Arbitrators and Mediators, *Submission 41*.

30 Justice Gary Watts, 'Arbitrations in Family Law' (Paper, University of New South Wales, Sydney, 25 November 2016); Wolters Kluwer, *Australian Family Law & Practice Premium Commentary* (2019) 44–750; Parkinson, above n 5.

31 *Family Law Act 1975* (Cth) ss 90, 90L, 90WA.

Awards by consent

9.24 In arbitration, as in court litigation, it is not uncommon for matters to settle by consent before the arbitrator determines an award. It is currently not clear whether arbitrators are empowered to make an arbitral award based on the consent of the parties, nor whether courts should register such awards like any other. The situation is not explicitly addressed in primary or subordinate legislation. Consultations with the courts and the AIFLAM in particular indicated that there is confusion and inconsistency regarding the procedure in such circumstances. The benefits to parties of settling matters by consent apply equally to arbitration as they do to litigation. Parties should be encouraged to settle matters by consent including at all stages of arbitration, and any disincentives to settlement should be removed wherever possible.

9.25 Currently, some Registrars are reluctant to register an arbitral award made by consent which does not contain reasons demonstrating that there has been some consideration that the award is just and equitable. Parties have sometimes been required to complete an Application for Consent Orders at further expense, incorporating details of their financial position and the effect of the proposed orders. This process reduces the level of privacy and confidentiality in arbitration, and additionally entails the risk that one party may withdraw their consent before the orders are made by the court.

9.26 The ALRC recommends that in property and financial matters, arbitrators should be specifically empowered to make an arbitral award based on the consent of the parties. The arbitrator should be required to provide short written reasons as to why the arbitrator considers the consent arrangement to be just and equitable on the basis of material available to the arbitrator. Parties should be explicitly entitled to then seek registration of such an award in a court on the same basis as any other arbitral award in property and financial matters. The existing provisions in the *Family Law Act* appear sufficient to allow for such a process. These recommended provisions could therefore be included in subordinate legislation, rather than primary legislation.

Registration of awards

Recommendation 27 The *Family Law Act 1975* (Cth) should be amended to remove the opportunity for a party to object to registration of an arbitral award, while maintaining appropriate safeguards for the integrity of registered awards.

9.27 The *Family Law Act* provides that a party may register an arbitral award with a court and that a registered award 'has effect as if it were a decree made by that court.'[32] Regulations provide that an application for registration of an award must be served on each other party, and that a party may 'bring to the attention of the court any reason

32 Ibid s 13H.

why the award should not be registered.'[33] No guidance is provided as to what may be a proper reason for a court to decline to register an award, which has led to uncertainty about the status and finality of an arbitral award.

9.28 Some possible valid grounds for objection to registration have been canvassed in case law[34] and commentary.[35] They note that many situations which might lead a court to decline registration of an award are likely in any event to enable a party to have the award set aside under s 13K of the *Family Law Act*, primarily on grounds of lack of due process or procedural fairness. Alternatively, the same circumstances may enable a party to have the award reviewed on a question of law under s 13J of the Act. It is not likely that there would be occasion to decline registration of an award for reasons which would not fall within the set aside or review provisions, noting also the qualifications required for arbitrators.[36] It has also been noted that there is a lack of guidance as to the status of an unregistered award, and the appropriate course of action in the event that registration of an award is declined.

9.29 In order to increase certainty around the status of an arbitral award, and clarify the circumstances in which an award may not be enforced by a court, the ALRC recommends that the opportunity to object to registration be removed. Concerns regarding the award should instead be the subject of an application to set aside (s 13K) or review (s 13J) the award. Implementation and enforcement of a contested award could be stayed pending the outcome of the application to set aside or review the award. Consultations with the AIFLAM and the Family Law Section of the Law Council of Australia indicated strong support for this Recommendation.

9.30 The requirement to give notice to all other parties before applying to register an award should be maintained. For arbitrations referred by a court order, the party seeking to register the award should be required to attest that the document submitted is the final version of the arbitral award made in accordance with the court's referral. For other arbitrations, the party seeking to register the award should be required to attest to the material facts demonstrating why the award is registrable under the Act. In both scenarios, the party seeking to register the award should be required to submit a copy of the relevant arbitration agreement.

Review of an award

9.31 The *Family Law Act* provides that a party to a registered award may apply for 'review of the award, on questions of law'.[37] There is some uncertainty as to the precise meaning of this phrase, and some have suggested that the grounds for review of an

33 *Family Law Regulations 1984* (Cth) reg 67Q.
34 *Braddon & Braddon* [2018] FCCA 1845; *Pavic & Pavic* [2018] FCCA 3386.
35 Patrick Parkinson, 'Family Property Arbitration: Exploring the New Potential' (Paper, ESFLPG Weekend, Katoomba, June 2016).
36 *Family Law Act 1975* (Cth) s 10M; *Family Law Regulations 1984* (Cth) reg 67B.
37 *Family Law Act 1975* (Cth) s 13J.

arbitral award are arguably narrower than the grounds of appeal against a trial judgment, which has made some lawyers reluctant to recommend arbitration to their clients.[38]

9.32 For example, in appeals from orders made by judges of either court under Pt X of the Act, the appellate court 'shall have regard to the evidence given in the proceedings out of which the appeal arose and has power to draw inferences of fact and, in its discretion, to receive further evidence upon questions of fact'.[39] Arguably this power to have regard to factual issues is broader than a power to review on questions of law alone. However, commentators have also noted that the lines between questions of law and fact are frequently blurred,[40] and have questioned whether there is in reality any difference between the power to review an arbitral award and the power to appeal against a first instance judgment.[41] Case law has established that an appellate court must be satisfied that an appellable error has occurred before the appellate court interferes with a discretionary trial judgment.[42]

9.33 Equivalent provisions applicable in the Federal Court of Australia refer to 'a review, on a question of law'.[43] Arbitration legislation in the United Kingdom similarly provides for 'an appeal to the court on a question of law'.[44] Case law in the international commercial context has held that an award may not be reviewable even on a question of law, primarily based on the consent of the parties to submit themselves to the decision of the arbitrator.[45] In addition, it has also been noted that litigants may in fact prefer the finality of limited review rights.[46]

9.34 Consultations with the AIFLAM and the Family Law Section of the Law Council of Australia indicated strong support for the provisions in the *Family Law Act* to be amended to provide for the same rights of appeal as from a trial judgment. In particular, it seems that the different expression as to the basis of the appeal has caused confusion and added to the reticence to arbitrate. The wider remedies available on a successful appeal against a trial judgment are more suited to family law arbitration than might be the case for commercial arbitration.[47]

9.35 On balance, the ALRC recommends amending s 13J of the *Family Law Act* to provide for the same grounds of appeal from an arbitral award as for an appeal from a

38 Family Law Council, *Letter of Advice to the Attorney-General*, above n 26; Parkinson, above n 35; Law Council of Australia, *Submission 43*; Australian Institute of Family Law Arbitrators and Mediators, *Submission 41*.

39 *Family Law Act 1975* (Cth) s 93A.

40 Jennifer Batrouney, *The Distinction between Questions of Fact and Questions of Law in Section 44 Appeals to the Federal Court* (20 May 2014) <http://www.fedcourt.gov.au/digital-law-library/seminars/tax-bar-association/jennifer-batrouney>.

41 Wolters Kluwer, above n 30, 58–830.

42 *House v The King* (1936) 55 CLR 499; *Allesch v Maunz* (2000) 203 CLR 172.

43 *Federal Court of Australia Act 1976* (Cth) s 53AB(2).

44 *Arbitration Act 1996* (UK) s 69(1).

45 *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* (2013) 251 CLR 533.

46 Parkinson, above n 35.

47 Compare the powers contained in ss 13J and 94(2) of the *Family Law Act 1975* (Cth).

trial judgment. A court should also have the same powers and remedies available when reviewing an arbitral award as it does when hearing an appeal from a trial judgment.

Children's matters

Recommendation 28 The *Family Law Act 1975* (Cth) should be amended to allow some children's matters to be arbitrated. Appropriate occasions for arbitration in children's matters would not include disputes:

- relating to international relocation;
- relating to medical procedures of a nature requiring court approval;
- relating to contravention matters;
- in which an Independent Children's Lawyer has been appointed; and
- involving family violence which satisfy ss 102NA(1)(b) and (c) of the *Family Law Act 1975* (Cth).

9.36 A number of submissions suggested that legislation should provide for arbitration of appropriate children's matters as well as financial matters.[48] Several agreed that cases involving, for example, alleged child abuse or family violence would not be appropriate, and that a number of additional processes may be required to enable arbitration in children's matters to proceed safely, to incorporate the views of children, and to appropriately screen for risk of violence or harm. In addition, there may be limitations on the types of children's matters which can permissibly be arbitrated, given the traditional *parens patriae* jurisdiction of courts, which parents may not be able to 'contract out of" by way of an arbitration agreement. Consultations with the AIFLAM indicated that some members supported arbitration of children's matters, while others held some concerns.

9.37 There is no doubt that arbitration involving children's issues would necessarily be consensual. However, it is also clear for reasons set out below that children's issues would need to be referred by a court for arbitration, and then supervised by the court.

9.38 The ALRC recommends that legislation explicitly provide for arbitration of children's matters in limited circumstances. The method for an arbitral award taking effect as a decree of the court should be different from financial cases. Courts should retain a supervisory role in children's cases so that the award would need to be placed before the court by the parties in terms of a consent order with sufficient supporting material to satisfy the court that such orders are in the children's best interests. For

48 See, eg, Family Law Reform Coalition, *Submission 355*; Dr D Thorp, *Submission 305*; CatholicCare Diocese of Broken Bay, *Submission 197*; D Cooper, *Submission 165*; Springvale Monash Legal Service, *Submission 161*; Anglicare WA, *Submission 152*; Grandparents Victoria, *Submission 138*; CPSU, *Submission 136*; Interrelate, *Submission 126*; Women's Legal Service Victoria, *Submission 100*; Victorian Association of Collaborative Professionals, *Submission 91*; NSW Young Lawyers, *Submission 68*; Australian Psychological Society, *Submission 55*; Relationships Australia, *Submission 11*; P Theobald, *Submission 6*.

example, supporting material could be contained in documents already on the court file, may include written reasons for the arbitral award, and may include any family report which has been obtained.

9.39 There are a number of sensitivities in relation to arbitration of children's matters. For example, Australia has international obligations under the CRC regarding matters affecting children. The extent to which the state must remain involved in decisions regarding the best interests of children must therefore be considered. Private arbitration of children's matters without sufficient oversight by state institutions such as courts could be seen as incompatible with the state's obligation to ensure that decisions are made in accordance with the Convention. Secondly, the *Constitution* reserves particular adjudicative roles for federal courts under Chapter III. Any scheme providing for arbitration needs to ensure that it is not bestowing judicial functions on a non-judicial body.[49] Thirdly, courts have traditionally held a *parens patriae* jurisdiction overseeing matters of children's welfare, including additional powers beyond what a child's parent may be entitled to authorise.[50] An arbitration scheme should not undermine the unique authority of courts in this regard.

9.40 Accordingly, the ALRC recommends that arbitration of children's matters should only proceed upon a referral (order) from a court, and not simply of the parties' own volition. A specific judge could maintain some control over the matter, including ultimately making orders to confirm the arrangements. Secondly, a court should only order parties to arbitrate a children's matter where all parties consent to the order. Thirdly, a court should only order parties to arbitrate a children's matter where the court considers that the matter is an appropriate matter for arbitration. Guidance on this issue should be provided in legislation as set out below. Fourthly, an arbitral award in relation to a children's matter should not take effect by way of registration (as occurs in financial cases), but rather should only become an order of the court after a court has reviewed the matter and satisfied itself that the orders should be made.

9.41 Upon determination of an award, the matter should be referred back to the referring court. The court should consider whether the terms of the award are appropriate based on the available supporting material, and satisfy itself that an order in those terms should be made by consent, in accordance with the consent of the parties to have the matter determined by arbitration. If any party disagrees with the making of the order in the terms of the award, that party should be entitled to appeal the order under Pt X of the *Family Law Act*. If a party subsequently seeks a variation to the order, that party should be required to apply to court and satisfy the relevant requirements which are proposed to be codified in Recommendation 47.

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49 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; *Brandy v Human Rights & Equal Opportunity Commission* (1995) 183 CLR 245.

50 *Secretary, Department of Health and Community Services v JWB and SMB (Marion's case)* (1992) 175 CLR 218.

9.42 Appropriate occasions for arbitration would not include:

- special medical procedures;
- cases involving family violence which satisfy the criteria set out in s 102NA(1)(b) and (c) of the *Family Law Act*;
- contravention applications under Pt VII Div 13A of the Act;
- international relocation;
- applications for the return of a child to or from a country which is not a signatory to the 1980 *Hague Convention on the Civil Aspects of International Child Abduction*; and
- applications under the 1980 *Hague Convention on the Civil Aspects of International Child Abduction*.

9.43 The Family Law Council recommended in 1988 that legislation provide for arbitration of a wide range of children's matters, including guardianship, custody, access and welfare matters. It suggested principles for cases which may be inappropriate for arbitration, including 'where one or more of the parties to proceedings is under a legal disability' (for example, a party is a minor or has an intellectual capacity issue), 'where allegations of child abuse are in issue', where a separate representative has been appointed for a child, and where proceedings relate to enforcement.[51] The Family Law Arbitration Children Scheme established in the United Kingdom also provides for a list of children's matters which are excluded from the scope of the scheme.[52]

9.44 A judge considering whether to refer a particular matter to arbitration should have regard to:

- the best interests of the child, including how the child's views are to be communicated to the arbitrator;[53] and
- the allegations made by each party.

9.45 The prescribed requirements for arbitrators currently contained in reg 67B of the *Family Law Regulations* should be amended to provide specific requirements for arbitrators of children's matters.[54] At a minimum, arbitrators in children's matters should have completed the AIFLAM arbitration course and should comply in all respects with the standards required by the AIFLAM as an Accredited Specialist Arbitrator.

9.46 Legislation should explicitly empower an arbitrator of a children's matter to terminate an arbitration and refer the matter back to the referring court should issues

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51 Family Law Council, *Arbitration in Family Law*, above n 21, 60.

52 Institute of Family Law Arbitrators, 'Family Law Arbitration Children Scheme: Arbitration Rules' (3rd ed, 2018) art 2.2.

53 See, eg, Attorney-General's Department, *Submission 256* ; MELCA, *Submission 155*.

54 For example, arbitrators in children's matters should have and maintain competencies relating to cases involving family violence, including assessment of risk, consistent with Recommendations 51 and 52 in this Report.

emerge during the course of the arbitration which are inconsistent with the referral made by the judge.

9.47 Relationships Australia submitted that if arbitration is to incorporate children's matters, appropriate services should conduct 'pre-arbitration education sessions' to help focus parents on children's needs and respectful communication, as currently occurs before other alternative dispute resolution processes.[55]

Power to make directions

Recommendation 29 The *Family Law Act 1975* (Cth) should be amended to provide that upon application by an arbitrator, or by a party to an arbitration, a court has power to make directions at any time regarding the further conduct of the arbitration, including power to make a direction terminating the arbitration (whether or not the arbitration was referred from a court).

9.48 Currently, in relation to both court-ordered and private arbitration courts are empowered to make orders 'appropriate to facilitate the effective conduct of the arbitration'.[56] The legislation does not explicitly provide for such orders to be made on application of an arbitrator, rather than a party. Regulations provide that such an application may be made by a party or jointly by all parties.[57] There may be circumstances in which an arbitrator identifies a need for particular directions about the conduct of an arbitration, although no party is able or intending to make such an application to court. Legislation should be amended to explicitly provide power for directions to be made on application of an arbitrator, and should specify that such directions may be made at any stage of an arbitration process.

9.49 There is no explicit power for a court to terminate an arbitration process once it has commenced, whether or not the arbitration was referred from a court. It has been suggested that it is questionable whether a court has such a power, although the issue is untested.[58] Regulations provide that the arbitration agreement (or notice of arbitration) must set out circumstances in which the arbitration process may be terminated,[59] and that an arbitrator must terminate an arbitration if the arbitrator considers that 'a party to an arbitration does not have the capacity to take part in the arbitration'.[60] The *Federal Circuit Court Rules 2001* (Cth) provide that a court may end an arbitration at any time,

55 Relationships Australia, *Submission 11*.
56 *Family Law Act 1975* (Cth) ss 13E(2) and 13F.
57 *Family Law Regulations 1984* (Cth) reg 67E.
58 Patrick Parkinson, *The Practicalities of Arbitration in Family Property Cases (Interview)* <benchtv.com.au/presenter/professor-patrick-parkinson-am/>.
59 *Family Law Regulations 1984* (Cth) regs 67F(3)(g) and 67G.
60 Ibid reg 67L.

and does not specify whether this can be on application of an arbitrator or a party (noting these provisions do not apply to family law matters).[61]

9.50 The Family Law Council in 1988 made similar recommendations, including that:

- 'the Court have power to revoke an order for arbitration before the making of an award on the application of either party, showing a change in circumstance since the order was made';[62] and
- an arbitrator may refer a matter back to court for further consideration if the arbitrator considers it necessary or appropriate. The court may then 'revoke an order for arbitration or give directions as to the conduct of the arbitration'.[63]

9.51 Enabling courts to terminate an arbitration process after its commencement would protect parties against being compelled to proceed with a flawed or unfair arbitration process. Previous reports have suggested that a court should only exercise power to terminate an arbitration process in 'special circumstances',[64] and not simply because one party has changed their mind about wanting to arbitrate the dispute.

Compulsory arbitration

9.52 Several submissions suggested that courts should have power to order parties to arbitrate a dispute (or part of a dispute) without the consent of the parties, primarily because arbitration is otherwise likely to remain underutilised.[65] Other submissions and several consultations considered that arbitration should remain consensual on constitutional or principled grounds.[66]

9.53 When arbitration was introduced into the *Family Law Act* in 1991, the court was given power to order parties to participate in arbitration irrespective of their consent.[67] However, these provisions were never used because the requisite regulations and rules were not introduced. In 2000, legislative amendments removed the power to order non-consensual arbitration in part due to concerns about the constitutional validity of such a power in light of a decision of the High Court of Australia.[68]

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61 *Federal Circuit Court Rules 2001* (Cth) r 27.03(1)(a).

62 Family Law Council, *Arbitration in Family Law*, above n 21, rec 41, p xi.

63 Ibid recs 43–44. Note that the Family Law Council did not recommend that parties should have the power to apply to court for directions.

64 Family Law Council, *Letter of Advice to the Attorney-General*, above n 26.

65 Family Law Reform Coalition, *Submission 355*; CatholicCare Diocese of Broken Bay, *Submission 197*; Chidambara Raj C B, *Submission 177*; National Legal Aid, *Submission 163*; Victorian Association of Collaborative Professionals, *Submission 91*; Resolution Institute, *Submission 70*; Family Court of Australia, *Submission 68*; ATSILS Qld, *Submission 42*; Australian Dispute Resolution Advisory Council Inc (ADRAC), *Submission 12*.

66 Association of Family and Conciliation Courts Australian Chapter, *Submission 232*; Relationships Australia, *Submission 11*.

67 *Family Law Act 1975* (Cth) s 19D (since renumbered and amended).

68 *Brandy v Human Rights & Equal Opportunity Commission* (1995) 183 CLR 245.

9.54 Recommendations for compulsory arbitration have been made previously; for example the Family Law Council in 2008 reported that such a model may have merit but was not supported by key stakeholders at the time.[69] The report noted potential constitutional problems with non-consensual arbitration, and suggested they might be overcome for example by permitting a right of hearing *de novo*. This would mean that arbitration could become simply an additional step in the overall litigation process, rather than an alternative to litigation.

9.55 The ALRC considers that there remain potential constitutional and principled reasons why parties should not be compelled to participate in an arbitration process rather than a court process. Delimiting appropriate cases for compulsory referral to arbitration would also be difficult. There may also be practical difficulties in ensuring the productive engagement of parties in an arbitration process to which they had not consented. The ALRC does not recommend courts be empowered to order compulsory arbitration.

Funding for existing models

9.56 The Issues Paper to this Inquiry raised the issue of arbitration in the context of the reported success of the Legal Aid Queensland model for small asset pools. Many submissions supported the expansion of the model.[70] The Family Law Council also noted the success and utility of this initiative.[71] National Legal Aid indicated that it would expand the model to other states if it were resourced to do so.[72] A number of submissions noted the prohibitive costs of arbitration or advocated for increased public funding for arbitration services.[73] The ALRC endorses the Legal Aid Queensland arbitration model as a low-cost and efficient way for separating couples with modest assets to access adjudication, and encourages government to provide resources for a significant expansion of the model across Australia.

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69 Family Law Council, *Letter of Advice to the Attorney-General*, above n 26.

70 S Christie, *Submission 216*; CatholicCare Diocese of Broken Bay, *Submission 197*; Victorian Association of Collaborative Professionals, *Submission 91*; Bar Association of Queensland, *Submission 80*; Caxton Legal Centre, *Submission 51*.

71 Family Law Council, *The Answer from an Oracle*, above n 21.

72 National Legal Aid, *Submission 163*.

73 Family Law Reform Coalition, *Submission 355*; Springvale Monash Legal Service, *Submission 161*; Resolution Institute, *Submission 70*; ATSILS Qld, *Submission 42*; P Theobald, *Submission 6*.

10. Case Management: Efficiency and Accountability

Contents

Introduction

10.1 As has been detailed in earlier chapters, this Inquiry is the latest in a long line of inquiries into the family law system. Many of those earlier inquiries have reached broad agreement that the adversarial nature of courts operating within the family law system is inappropriate for resolving family law disputes.[1] In part this is because adversarial litigation tends to escalate hostility and costs, which has the potential to have lasting negative consequences for the parties involved and their children. Adversarial litigation, traditionally, was left entirely to the parties with the court taking no interest in its progress unless an issue was put before it by the litigants. Reasons for the costs, complexity, and delay in civil litigation include the intricacy of the substantive laws, the conduct of the legal profession, and the conduct of the courts.

1 Family Law Pathways Advisory Group, *Out of the Maze: Pathways to the Future for Families Experiencing Separation* (2001); House of Representatives Standing Committee on Family and Community Affairs, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation* (Commonwealth of Australia, 2003); House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (2017).

10.2 In previous chapters, the ALRC has made recommendations to simplify the intricacies of some aspects of the substantive law, particularly in relation to children's matters,[2] and property and financial matters.[3] The ALRC has also made recommendations to strengthen and promote the use of alternative resolution processes to minimise the need for parties to resort to court processes.[4] In this chapter, the ALRC makes recommendations that the courts deal with family law matters in a way that ensures, as far as possible, that court processes do not unduly exacerbate existing conflict and trauma.

10.3 The available data demonstrates that the majority of separating families resolve their disputes with minimal assistance,[5] or through engagement with the wide range of dispute resolution services available throughout the community.[6] The ALRC has not been persuaded that the creation of a tribunal in substitution for a court will result in the appropriate delivery of justice and protection to children and families without compromise, nor that there is any merit in adding an additional layer of adjudicative process to an already overly complex system.[7]

10.4 The ALRC recommends amending the *Family Law Act* to provide that the overarching purpose of the family law practice and procedure provisions is to facilitate the just resolution of disputes according to law, as quickly, inexpensively, and efficiently as possible, and with the least acrimony so as to minimise harm to children and families. Failure to so act would see parties, their lawyers, and other intervening third-parties personally responsible for costs. Positioning the overarching obligation in the primary statute, rather than in the rules of family courts as is the current position, will assist in ensuring that all parties involved in the court process understand the importance of the overarching obligation to both court proceedings and any other dispute resolution processes.

10.5 In order to ensure that parties who are compelled to litigate, for whatever reason, are able to have their disputes resolved in a just, timely, and cost-effective manner that is reasonable in, and proportionate to, the circumstances of the case, the ALRC recommends amendments to the *Family Law Act* and the promulgation of a joint Practice Note to govern the fundamental principles of case management of the Family Court and the family law jurisdiction of the Federal Circuit Court.[8]

2 Chapter 5.
3 Chapter 7.
4 Chapter 8.
5 See Chapter 3.
6 Chapter 8.
7 See Chapter 2, [2.36].
8 The Family Court of Western Australia has its own existing case management regime.

10.6 The ALRC makes further recommendations:

- to ensure that judges have robust case management tools at their disposal to reduce costs and delays in family law litigation;
- to supplement those case management tools by an amendment to the *Family Law Act* to make clear to parties, and their lawyers, that the family courts will make orders for costs where it is appropriate to do so;
- to empower judges to require a party who is causing harm to another party through the use of court processes in a manner that is inconsistent with the overarching purpose to seek leave to use those processes; and
- to empower judges to exercise summary dismissal powers where there has been an egregious failure by a party to comply with the overarching purpose of family law practice and procedure.

Overarching purpose of family law practice and procedure provisions

Recommendation 30 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 so as to minimise harm to children and their families.

Recommendation 31 The *Family Law Act 1975* (Cth) should impose a statutory duty on parties, their lawyers, and third-parties to cooperate amongst themselves, and with the courts, to assist in achieving the overarching purpose. Breach of the duty will have costs consequences for the person who fails to act in accordance with the overarching purpose.

10.7 These Recommendations seek to enhance the family courts' ability to ensure that family law proceedings (and any alternative dispute resolution processes) are conducted in a way that is consistent with facilitating the just resolution of the dispute according to law, as quickly and efficiently as possible, and with the least acrimony.

10.8 As has been observed by many stakeholders, highly adversarial processes are unlikely to ever be the most suitable means for adjudicating the question of what is in the best interests of a child.[9] During its joint inquiry with the AHRC, the ALRC heard concerns that adversarial processes are 'dominated by legal strategising by competing parties to maximise their chances of winning the case … [and] [t]he interests of the child

9 Relationships Australia National, *Submission 317*; Australian Psychological Society, *Submission 55*; Rachel Carson et al, *Children and Young People in Separated Families: Family Law System Experiences and Needs* (Australian Institute of Family Studies, 2018).

often get lost between the warring parties.'[10] The potential for court proceedings and other family law system processes to be misused to maintain a dynamic of abuse is also a critical issue in family law proceedings.[11]

10.9 Nevertheless, some people are simply unable to resolve their disputes by any other means and require the adjudication of a court.[12] Such decisions require the exercise of judicial power, in accordance with the law. This process necessarily involves being able to test the evidence that is before the court in circumstances where any decision made will have a lifelong effect on children and their parents or caregivers.

10.10 Once parties are within the court system, they are entitled to expect that their matter will be dealt with as quickly and efficiently as possible, and in a manner that is fair to all parties. The SPLA Committee reported in 2017 that 'delays of nine to 24 months between filing an application and commencement of a trial' are occurring in some Family Court and Federal Circuit Court registries, and that delays may be even longer in regional and remote areas of Australia.[13] Stakeholders raised a number of concerns associated with the present delays, including:

- the potential for children and parents to spend long periods living in limbo while waiting for trial;[14]
- the safety risks to parties and children arising from delayed resolution of disputes that involve protective concerns, including contributing to homelessness;[15]
- the scope for delay and uncertainty to exacerbate conflict;[16] and
- the potential for clients to consent to outcomes that fall short of the security and protection a court order could provide.[17]

10.11 Following Lord Woolf's report on access to justice in 1996,[18] there have been reforms to other categories of civil litigation intended to manage demand for a very expensive public resource (courts) and to deter and sanction poor behaviour by litigants and their professional advisors. Currently, r 1.04 of the *Family Law Rules* provides that the 'main purpose' of the Rules is to ensure that each case is resolved in a just and timely

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10 Australian Law Reform Commission and Human Rights and Equality Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) [4.25].

11 See, eg, House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 1.

12 See Chapter 1.

13 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 1, [3.22], [8.65]; and see Chapter 3.

14 Family Law Reform Coalition, *Submission 355*; C Peterson, *Submission 318*.

15 Interact Support Inc, *Submission 389*; ATSILS (QLD), *Submission 384*; Women's Legal Service NSW, *Submission 340*.

16 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 1; Community Legal Centres NSW, *Submission 385*; Macarthur Legal Centre, *Submission 346*; Relationships Australia National, *Submission 317*; Relationships Australia Victoria, *Submission 267*.

17 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 1; Law Council of Australia, *Submission 43*.

18 The Rt Hon the Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HSMO London, 1996).

manner at a cost to the parties and the court that is reasonable in the circumstances of the case. Further provision is made in rr 1.06–1.08 as to how the main purpose is to be achieved. Similarly, the 'object' of the *Federal Circuit Court Rules* is 'to assist the just, efficient, and economical resolution of proceedings.'[19]

10.12 The *Family Law Rules* relevantly state that to achieve the main purpose, the Family Court 'applies these Rules in a way that ... is proportionate to the issues in a case and their complexity, and the likely costs of the case,' and that 'promotes the saving of costs'.[20] Parties and their lawyers are also responsible for promoting and achieving the main purpose.[21] An order for costs may be made against a lawyer in certain circumstances.[22]

10.13 Since those Rules were promulgated, almost every Australian jurisdiction has introduced a provision to provide clear legislative direction and support to judges to confidently employ case management powers.[23] In the case of the Federal Court, in 2009, ss 37M, 37N and 37P were inserted into the *Federal Court of Australia Act 1976* (Cth) to provide a statutory foundation for case management powers. This was to avoid any restrictive interpretation by courts of what is in the best interest of justice, consequent upon the High Court's decision in *Queensland v J L Holdings Pty Ltd*,[24] and to ensure judges are not overly cautious about considering the need to effectively and efficiently manage the court's overall workload. Section 43 of the *Federal Court of Australia Act 1976* (Cth) was also amended to give greater clarity and flexibility to the types of costs orders available to the Court. One of the express aims of the amendments was to improve access to justice.[25]

10.14 Since the decision of the High Court in *Aon Risk Services Australia Ltd v Australian National University*,[26] it is clear that close attention must be given to the courts' role in ensuring that modern and flexible principles of case management are brought to bear in the resolution of disputes. This is made a statutory requirement in the jurisdictions mentioned previously by reason of the overarching purpose provisions. The family courts should have the benefit of the same statutory requirement to underpin their case management powers.

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19 *Federal Circuit Court Rules 2001* (Cth) r 1.03(1).
20 *Family Law Rules 2004* (Cth) r 1.07.
21 Ibid r 1.08; see also *Federal Circuit Court Rules 2001* (Cth) r 1.03(4).
22 *Family Law Rules 2004* (Cth) r 19.10; see also *Federal Circuit Court Rules 2001* (Cth) r 21.07.
23 *Federal Court of Australia Act 1976* (Cth) ss 37M, 37N; *Civil Procedure Act 2010* (Vic) s 10; *Civil Procedure Act 2005* (NSW) s 56; *Court Procedures Act 2004* (ACT) s 5A. Other jurisdictions have made provision in their rules of court: *Uniform Civil Procedure Rules 1999* (Qld) r 5; *Supreme Court Civil Rules 2006* (SA) r 3.
24 (1997) 189 CLR 146.
25 Explanatory Memorandum, Access to Justice (Civil Litigation Reforms) Amendment Bill 2009 (Cth).
26 (2009) 239 CLR 175.

10.15 As has been observed by Lee J of the Federal Court:[27]

> So-called "revolutions" only work if parties recognise the fact that there has to be a change: reality has to match rhetoric. The time has now long passed where the role of the courts is only to focus on the interests of the immediate parties to a dispute. As King CJ observed in *United Motors Retail Ltd v Australian Guarantee Corporation Ltd* '...a party is entitled to his day in court but not to somebody else's day in court.'[28]

10.16 There should be no misapprehension that an overarching purpose provision is nothing more than a 'motherhood' statement. There is now a large body of case law, including decisions of the High Court, that explain how a consideration by a court of the overarching purpose will be the starting (and in many cases the finishing) point in the court's application of any civil practice and procedure provision, in a way which best promotes the quick, inexpensive, and efficient resolution of the proceedings.[29]

10.17 The ALRC recommends providing a stronger statutory foundation for the case management powers of the family courts by including provisions that: prescribe the content of the overarching purpose; require parties, lawyers, and third-parties to act consistently with the overarching purpose; and stipulate the costs consequences of failing to do so. Such an approach has been proposed previously by the Hon Justice Benjamin AM.[30]

10.18 Consistent with the principle that the law should be clear, coherent, and enforceable, and drafted in a manner that is accessible to the parties, the ALRC recommends that the statutory duty on parties, their lawyers, and third parties to comply with the overarching purpose of family law practice and procedure and case management should be expressly stated in the *Family Law Act*.

10.19 To maintain consistency across federal jurisdictions, these provisions should be modelled on the provisions in the *Federal Court of Australia Act 1976* (Cth) with appropriate modifications specific to family law. The proposed modifications specific to family law case management are:

- including as an element of the overarching purpose to facilitate the just resolution of disputes **with the least acrimony**;
- including as an objective of the overarching purpose the consideration of **the best interests of any child** involved in the proceedings when considering how proceedings are being conducted;
- including **FDR** within the scope of the obligation; and

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27 *Kadam v MiiResorts Group 1 Pty Ltd (No 4)* (2017) 252 FCR 298, [48].

28 (1991) 58 SASR 156, 158.

29 See, eg, *Specsavers Pty Ltd v The Optical Superstore Pty Ltd* (2012) 208 FCR 78; *Kadam v MiiResorts Group 1 Pty Ltd (No 4)* (2017) 252 FCR 298; *UBS AG v Tyne* (2018) 360 ALR 184; *Rozenblit v Vainer* (2018) 356 ALR 26; *Bitar Pty Ltd v Hebbel Constructions Pty Ltd* [2019] NSWCA 39.

30 The Hon Justice Benjamin AM, 'Possible Solutions to Excessive Delay and Costs in the Family Courts' (Paper, 16 January 2018).

- requiring any **person who provides financial assistance** or other assistance to any party in so far as that person exercises any direct control, indirect control, or any influence over the conduct of a family law proceeding before the court (including negotiations for settlement) **to take account of the duty** imposed on the party and/or the party's lawyer and assist the party and/or lawyer to comply with their duties.

10.20 Including, as an element of the overarching purpose, specific reference to resolving disputes with 'the least acrimony' will alert parties and their lawyers to the reality that criticism, abuse, and adversarial language in correspondence is inconsistent with the overarching purpose. Effective family law practitioners can assist parties towards reducing trauma and pain, and support sound judgement in reaching outcomes that are in the best interests of the children and the parties. Conversely, a very adversarial lawyer is likely to do more harm.

10.21 The inclusion within the overarching purpose of a consideration of the best interests of any child when considering how proceedings are being conducted acknowledges the vast array of social science research which reveals the damage that is done to children in the context of contentious proceedings between their parents. It is also consistent with the recommendation made by the ALRC and the AHRC in 1997 that, unless the Act expressly states otherwise, the best interests of the child should be a primary consideration in all actions of a court under the *Family Law Act* concerning children.[31] That recommendation was made in recognition that the then s 65 (now s 60CA) of the *Family Law Act*, which requires a court when making a parenting order to regard the best interests of the child as the paramount consideration, may be too narrow. In particular, doubt had been expressed as to whether the court has the ability to consider the best interests of the child in determining procedural issues.[32]

10.22 It was also a recognition that the current provisions may not go far enough to establish, consistent with Art 3 of the CRC, that the child's best interests should be at least a primary consideration in all decisions concerning them. Parties and their lawyers need to be cognisant of the impact of all aspects of proceedings on children. As was explained by one child:

> Sometimes, my needs might be different from yours. When this happens, I'd be really grateful if you might put aside your own needs and think honestly about mine, and what could help. There was this guy called Bowlby, who said *the job of parents is to be bigger, stronger, wiser and kind*. That about sums up what I'm asking for.[33]

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31 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, above n 10, rec 135.

32 The Hon Justice Richard Chisholm, 'Assessing the Impact of the Family Law Reform Act 1995' (1996) 10(3) *Australian Journal of Family Law* 183.

33 Christina Sadowski and Jennifer E McIntosh, 'On Laughter and Loss: Children's Views of Shared Time, Parenting and Security Post-Separation' (2016) 23(1) *Childhood* 69, 84 (emphasis added).

10.23 The need to include FDR within the scope of the overarching purpose is driven by the current statutory requirement for parties to engage in FDR before filing proceedings in relation to parenting matters. This will enable the court to have greater oversight over the manner in which those processes are conducted. Parties and practitioners will need to consider their compliance with the overarching purpose when seeking a certificate, or certifying how FDR has been attempted and, in particular, the content of any 60I certificate issued in relation to that process.

10.24 The final proposed requirement—that any person who provides financial assistance or other assistance to any party in so far as that person exercises any direct control, indirect control, or any influence over the conduct of a family law proceeding before the court (including negotiations for settlement) takes account of the duty imposed on the party and/or the party's lawyer and assists the party and/or lawyer to comply with their duties—is an important protection, particularly for more vulnerable parties. There are circumstances in which interested parties—parents of a litigant, new partners, well-meaning friends—are not merely providing funds for the proceedings, but are actively directing the party to act in a particular way under the spectre of losing financial support. Further, third-party litigation funders are increasingly funding contentious family court proceedings.[34]

10.25 Whilst the common law of Australia is clear that 'an order for costs should be made against a non-party if the interests of justice require that it be made',[35] the ALRC considers that s 117 of the *Family Law Act* should be amended to expressly cover persons who provide financial or other assistance, in so far as that person exercises any direct control, indirect control, or any influence over the conduct of a family law proceeding.

Misuse of processes and systems

10.26 Stakeholders raised the issue of behaviour involving engagement, and non-engagement, with various family law and other systems and processes to achieve ends other than those for which the processes are designed, in the context of family violence. Higher court use and higher rates of unsuccessful engagement with FDR are associated with patterns of violence marked as part of a pattern of coercive control.[36] Research and analysis over a long period of time has highlighted a range of behaviours that can occur in this context, with submissions providing examples of: [37]

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34 Eg, IMF Bentham, Woodsford Litigation Funding. There is also a capital raising exercise currently being undertaken by a law firm which aims to become Australia's first ASX listed family law firm.

35 *Knight v FP Special Assets Ltd* (1992) 174 CLR 178, 192–193 (Mason CJ and Deane J); *Selig v Wealthsure Pty Ltd* (2015) 255 CLR 661 [43].

36 Lixia Qu, Lawrie Moloney and Rae Kaspiew, 'Characteristics of Separated Parents Who Remain Fearful or in High Conflict: Towards Better-Targeted Legal and Service Responses' (Presentation at the Australian Institute of Family Studies 2016 Conference, Melbourne, 7 July 2016).

37 Australian Law Reform Commission, *For the Sake of the Kids: Complex Contact Cases and the Family Court*, Report No 73 (1995); Owen Camilleri, Tanya Corrie and Shorna Moore, 'Restoring Financial Safety: Legal Responses to Economic Abuse' (Good Shepherd Australia New Zealand and Wyndham Legal Service, 2015); Domestic and Family Violence Death Review Board, *2016–2017 Annual Report* (2017);

- manipulation in engagement with Family Relationship Centre services either prior to lodging a court application or when mandated by a court order;[38]
- refusing to attend meetings, rescheduling meetings, or refusing to sign documents;[39]
- seeking preliminary advice to create a conflict of interest and prevent the other party from obtaining legal advice, using litigation to waste the resources of the other party, and using the threat of indemnity costs to intimidate the other party;[40]
- repeated engagement with parenting orders programs over issues that have been dealt with by other services over a number of years;[41]
- instigating and re-instigating legal proceedings in multiple courts, including applications for final orders and for enforcement of parenting orders in the family courts;[42]
- repeated applications to the court in the same matter, including in relation to recovery orders;[43]
- prolonging court proceedings by requiring adjournments and challenging interim and procedural determinations, sometimes with the intent to and effect of exhausting legal funding (legal aid or private resources), also known as 'burning off';[44]
- making cross-applications in proceedings for personal protection orders;[45]
- using processes in one court to obtain an advantage in another, for example, using family court processes to gain evidence that is also relevant to a criminal matter;[46]
- self-representing in court to create opportunities to personally cross-examine victims about family violence, sexual abuse allegations, and other sensitive issues;[47]

Miranda Kaye, Julie Stubbs and Julie Tolmie, 'Domestic Violence and Child Contact Arrangements' (2003) 17(1) *Australian Journal of Family Law* 93; Lesley Laing, 'No Way to Live: Women's Experiences of Negotiating the Family Law System in the Context of Domestic Violence' (Faculty of Education and Social Work, University of Sydney, 2010).

38 Anglicare WA, *Submission 152*.

39 Australian Psychological Society, *Submission 55*.

40 Interrelate, *Submission 126*; Bar Association of Queensland, *Submission 80*; Alice Springs Women's Shelter, Submission No 121 to SPLA Committee, Parliament of Australia, Inquiry into *A Better Family Law System* (April 2017).

41 CatholicCare Victoria Tasmania (CCVT), *Submission 115*.

42 *Caffell & Falcon* [2013] FCCA 1652 provides an example of this dynamic. This case reportedly involved 56 court appearances over a period of eight years, commencing when the parties' daughter was two years old.

43 Women's Legal Services Australia, *Submission 45*.

44 Australian Institute of Judicial Administration, *National Domestic and Family Violence Bench Book*; Interrelate, *Submission 126*.

45 Heather Douglas, 'Legal Systems Abuse and Coercive Control' (2018) 18(1) *Criminology and Criminal Justice*; Heather Douglas and Robyn Fitzgerald, 'Legal Processes and Gendered Violence: Cross-Applications for Domestic Violence Protection Orders' (2013) 36(1) *UNSW Law Journal* 56.

46 Rae Kaspiew et al, 'Domestic and Family Violence and Parenting: Mixed Method Insights into Impact and Support Needs: Final Report' (Horizons Research Report 04/2017, Australia's National Research Organisation for Women's Safety, 2017) 180–182.

47 Ibid.

- using evidence gathering processes, including subpoenas, to obtain access to sensitive personal material such as the victim's therapeutic counselling records or sexual assault service records;[48]
- making multiple notifications to child protection agencies or making notifications to child protection agencies in relation to trivial matters;[49]
- challenging and appealing child support determinations;[50]
- deliberately not engaging or delaying engagement with FDR services to delay resolution or force the other party to self-represent in court;[51] and
- non-disclosure of income and assets in property and financial matters.[52]

10.27 Misuse of processes and systems can impede post-separation re-establishment and recovery from the effects of family violence, as well as compromising parenting capacity and the emotional and other resources available to meet children's needs.[53] It also has significant implications for the efficiency of the system and access to the system for other users with legitimate needs.

The definition of family violence

10.28 In the Discussion Paper, the ALRC proposed that the list of examples of behaviour that may constitute family violence, in s 4AB(2) of the *Family Law Act*, be amended by inserting a new subsection referring to the 'use of systems or processes to cause harm, distress or financial loss'.[54] It also proposed clarifying some terms in the list of examples and including other behaviours, such as emotional and psychological abuse and technology assisted abuse.

10.29 There was a range of opinions expressed in the submissions as to whether it was necessary to amend the 'contextual core' of the definition,[55] and/or increase the list of examples.[56] In relation to the core definition, submissions observed that the definition was arrived at after a comprehensive review aimed at harmonising relevant state, territory, and federal law and there was insufficient evidence that the definition was inadequate.[57] Academic opinion differs in particular as to whether the requirement of coercive control represents an unacceptable barrier to women seeking redress.[58] Domestic Violence

48 Ibid.
49 Uniting, *Submission 162*; Peninsula Community Legal Centre, *Submission 30*.
50 P Theobald, *Submission 6*.
51 Uniting, *Submission 162*; Peninsula Community Legal Centre, *Submission 30*.
52 Women's Legal Service Victoria, *Small Claims, Large Battles: Achieving Economic Equality in the Family Law System* (2018).
53 Kaspiew et al, above n 46.
54 Australian Law Reform Commission, *Review of the Family Law System*, Discussion Paper No 86 (2018) Proposal 8–3.
55 See *Family Law Act 1975* (Cth) s 4AB(1).
56 See Ibid s 4AB(2).
57 ANROWS, *Submission 278*.
58 Zoe Rathus, 'Shifting Language and Meanings between Social Science and the Law: Defining Family Violence' (2013) 36 *UNSW Law Journal* 359; Jane Wangmann, 'Different Types of Intimate Partner Violence: What Do Family Law Decisions Reveal?' 30 *Australian Journal of Family Law* 77; Z Rathus,

Victoria and Women's Legal Service Qld in particular supported the retention of the core definition.[59] NATSILS argued for the removal of 'coercion, control and fear' from the definition.[60]

10.30 Some submissions called for the alignment of the *Family Law Act* with particular state legislation and the inclusion of examples listed in particular state legislation.[61] Others were clearly concerned that there be sufficient consequences, in particular, for misuse of legal and other systems and processes,[62] although some cautioned against including misuse of processes within the definition itself.[63] Many were concerned that the current definition simply did not cover the 'full ambit of family violence modalities' and generally favoured adding to the list of examples.[64] Whilst there was significant alignment in the submissions as to which matters should be included in an expanded list of examples, there was by no means unanimity. Professor Parkinson AM cautioned against 'definition inflation' whereby the core meaning of the definition would be rendered more obscure.[65] Others also cautioned against further amendments in circumstances where the

Submission 298.

59 Women's Legal Service Queensland, *Submission 286*; Domestic Violence Victoria, *Submission 284*.

60 NATSILS, *Submission 290*.

61 CASA Forum Victorian Centres Against Sexual Assault, *Submission 404*; Aboriginal Justice Caucus Working Group on Family Violence, *Submission 381*; LGBTI Legal Service, *Submission 367*; Fitzroy Legal Service and Darebin Community Legal Service, *Submission 336*; Relationships Australia National, *Submission 317*; UnitingCare Queensland, *Submission 312*; National Family Violence Prevention Legal Services Forum, *Submission 293*; Rape & Domestic Violence Services Australia, *Submission 287*; Law Council of Australia, *Submission 285*; Association of Family and Conciliation Courts Australian Chapter, *Submission 258*.

62 Women's Legal Service Victoria (WLSV), *Submission 413*; Monash Gender and Family Violence Prevention Centre (MGFVPC), *Submission 411*; Safe Steps Family Violence Response Centre, *Submission 408*; Women with Disabilities Victoria, *Submission 402*; P Easteal and L Young, *Submission 394*; Queensland Council of Social Service (QCOSS), *Submission 378*; Women's Legal Services Australia, *Submission 366*; Domestic Violence NSW, *Submission 363*; Women's Legal Service NSW, *Submission 340*; Victorian Judicial Advisory Group in Family Violence (JAGFV), *Submission 333*; Relationships Australia National, *Submission 317*; Mallee Family Care, *Submission 310*; National Legal Aid, *Submission 297*; Australian Association of Social Workers, *Submission 295*; Hume Riverina Community Legal Service, *Submission 294*; Rape & Domestic Violence Services Australia, *Submission 287*; Domestic Violence Victoria, *Submission 284;* ANROWS, *Submission 278*; Uniting, *Submission 268*; Dr D Tustin, *Submission 266*; Association of Family and Conciliation Courts Australian Chapter, *Submission 258*.

63 Interact Support Inc, *Submission 389*.

64 Family Law Practitioners' Association of Western Australia (Inc), *Submission 410*; People with Disability Australia, *Submission 409*; Safe Steps Family Violence Response Centre, *Submission 408*; Office of the Public Advocate, *Submission 405*; CASA Forum Victorian Centres Against Sexual Assault, *Submission 404*; No to Violence, *Submission 398*; Australian Institute of Family Studies, *Submission 396*; P Easteal and L Young, *Submission 394*; Australian Women Against Violence Alliance (AWAVA), *Submission 379*; Domestic and Family Violence Death Review and Advisory Board, *Submission 377*; Shoalcoast Community Legal Centre Inc., *Submission 372*; Good Shepherd Australia New Zealand, *Submission 371*; Domestic Violence NSW, *Submission 363*; Baptist Care Australia, *Submission 359*; Women's Legal Service NSW, *Submission 340*; Relationships Australia National, *Submission 317*; UnitingCare Queensland, *Submission 312*; Family Life, *Submission 309*; National Legal Aid, *Submission 297*; Australian Association of Social Workers, *Submission 295*; Women's Legal Service Queensland, *Submission 286*; The Royal Australian and New Zealand College of Psychiatrists, *Submission 280*; Resolution Institute, *Submission 260*.

65 P Parkinson, *Submission 341*.

law is already able to deal appropriately with many behaviours which are reprehensible without calling them 'violence'.[66]

10.31 The definition of 'family violence' which is contained in the *Family Law Act* was amended in 2011.[67] The amendment gave effect to recommendations made by the ALRC and NSWLRC *Family Violence Report*.[68] In that Report, the Commissions took a hybrid approach to the issue of whether the definition of family violence should be the same across state and territory family violence legislation, or merely share a common understanding of what constitutes family violence. The Commissions settled on a consistent contextual core, but acknowledged that in so far as the definition included a non-exhaustive list of examples of physical and non-physical types of conduct, it was more feasible for each state and territory family violence statute to reflect a common understanding of such conduct.[69] This approach would permit states and territories to have the flexibility to incorporate specific types of examples that accommodate local or demographic-specific issues.[70]

10.32 The ALRC and NSWLRC *Family Violence Report* highlighted the range of potentially relevant conduct that is currently identified in existing legislation, or that was proposed to the Commissions.[71] When that range of conduct is considered, in addition to the matters raised with this Inquiry as examples of misuse of processes and systems, and the seemingly inexhaustible capacity of human beings to consider new ways to inflict harm on one another, amendment of the list of examples, which have no legislative force in any event, becomes a Sisyphean task. A list of examples in a federal statute that would accommodate the range of demographic-specific issues across the nation is similarly impossible to conceive. As suggested in that Report, the legislation makes it clear that examples of conduct which may constitute family violence are illustrative and not exhaustive.

10.33 Whilst the ALRC acknowledges that the very wide range of examples of reprehensible behaviour suggested for inclusion in s 4AB(2) will, if they coerce, control, or cause fear, be examples of family violence, it is not persuaded that there will be sufficient utility, as a matter of law, in making amendments to the list of examples in s 4AB(2). Indeed, it is likely that the longer a list of examples becomes, the more likely it is to be assumed that something not on the list is deliberately excluded, regardless of inclusionary words at the beginning, or end, of the list. As was recently explained by the Chief Justice of the Federal Court: '[a]ttempts to define whole concepts concerning human experiential relationships are generally doomed.'[72] The ALRC observes, however,

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66 Family & Relationship Services Australia (FRSA), *Submission 407*; Family Court of Australia, *Submission 400*.

67 *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth).

68 Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010).

69 Ibid [5.170].

70 Ibid [5.171].

71 Ibid [5.177]–[5.212].

72 Chief Justice JLB Allsop AO, 'The Judicialisation of Values' (Speech, Law Council of Australia and

that it is essential that there be continuing professional development in relation to the nuances and emerging forms of family violence by all those who practice within the family law system, including judges.[73]

Responses to misuse of systems and processes

10.34 The family courts should be able to deal with the misuse of systems and processes of the family law system separately from the need to establish that such conduct may also amount to family violence.

10.35 Recommendation 30 proposes a stronger statutory foundation for the family courts' case management powers, including the introduction of an overarching purpose that encompasses resolution of disputes with the least acrimony and consideration of the best interests of the child in the conduct of proceedings. Among the justifications for this recommendation are concerns about misuse of systems and processes. The recommended measures will provide stronger support for addressing use of court processes for illegitimate purposes, including perpetuation of family violence.

10.36 The *Family Law Act* provisions on summary dismissal and vexatious proceedings provide the court with powers to address the misuse of court processes.[74] The scope of these provisions is discussed below. However, the Family Court's submission to this Inquiry drew the ALRC's attention to a gap in the courts' powers to ensure court processes are used appropriately.

Additional power to scrutinise the institution of further proceedings

Recommendation 32 The *Family Law Act 1975* (Cth) should be amended to provide the courts with a power to make an order requiring a litigant to seek leave of the court prior to making further applications and serving them on the other party where the court is satisfied that such an order is appropriate for the protection of the respondent and/or any children involved in the proceedings, having regard to the overarching purpose of family law practice and procedure.

10.37 The submission of the Family Court expressed concern that the vexatious proceedings and summary dismissal powers do not provide sufficient scope for the courts to make appropriate orders in cases where 'one party oppresses the other by repetitive filing of applications and the serving of those applications on the other party'.[75] The Court noted that the respondent to the applications in these cases is often the primary

Federal Court of Australia Joint Competition Law Conference, 30 August 2018) [17].

73 Chapter 13.

74 *Family Law Act 1975* (Cth) ss 45A, 102QB.

75 Family Court of Australia, *Submission 68*.

caregiver of children, and the 'misuse of process can have a deleterious effect on that person's mental status, and consequently their parenting capacity.'[76]

10.38 Under the current provisions, the power to prevent a party from instituting further proceedings is only exercisable where the court is satisfied that a person has frequently instituted or conducted vexatious proceedings in Australian courts or tribunals.[77] The Family Court supported amendments that would ensure that a power to prevent a person from instituting proceedings without leave is exercisable by the courts in circumstances which do not fall within these parameters. In particular, the Family Court proposed that such a power should be exercisable where the court 'forms the view that the further institution of proceedings against that other person may have a detrimental effect on that person's wellbeing or detrimentally affect that person's parenting capacity.'[78]

10.39 The Family Court highlighted the case of *Marsden & Winch*[79] as an example of circumstances that are not adequately addressed by the current powers of the courts.[80] The parties in *Marsden & Winch* had been engaged in 'protracted serial proceedings over many years' over time spent by the child with the father.[81] The trial judge accepted that the mother, who was the primary caregiver of the child, had developed post traumatic stress disorder 'substantially as a result of the persistent litigation.'[82] The trial judge noted the significant effect of the litigation on the psychological health of the mother and accepted that future litigation could affect her psychological health to such an extent that her parenting capacity 'might be seriously compromised.'[83] On appeal the Full Court held that the trial judge did not have the power to make an order restraining the father from serving any application on the mother without leave of the court.[84] The Full Court held that the relevant powers were not exercisable because the proceedings that were before the trial judge, and the preceding proceedings, were not 'vexatious' in the requisite sense.[85]

10.40 *Marsden & Winch* was not decided on the basis of the family courts' current summary dismissal and vexatious proceedings powers.[86] However, the Family Court noted that the lacuna in the courts' powers in relation to circumstances like those in *Marsden & Winch* would not be remedied by the amendments of the *Family Law Amendment (Family Violence and Other Measures) Act 2018* (Cth), as the power to

76 Ibid. See also Australian Psychological Society, *Submission 55*; Kaspiew et al, above n 46 on the potential negative impacts of such proceedings on those involved and their children.
77 *Family Law Act 1975* (Cth) s 102QB(1).
78 Family Court of Australia, *Submission 68*.
79 (2013) 50 FamLR 409.
80 Family Court of Australia, *Submission 68*.
81 *Marsden & Winch* [2012] FamCA 557 [172].
82 Ibid.
83 Ibid.
84 *Marsden & Winch* (2013) 50 FamLR 409 [157]–[158].
85 Ibid [157].
86 The relevant powers in this case were those conferred by the now repealed s 118 of the *Family Law Act* and r 11.04 of the *Family Law Rules 2004* (Cth) (made in accordance with the power under *Family Law Act*, s 123).

make an order restraining a person from instituting further proceedings remains limited to cases where the court is satisfied that a person has frequently instituted or conducted vexatious proceedings in Australian courts or tribunals.

10.41 Section 102Q(1) of the *Family Law Act* specifies that 'vexatious proceedings' include:

(a) proceedings that are an abuse of the process of a court or tribunal;

(b) proceedings instituted in a court or tribunal to harass or annoy, to cause delay or detriment, or for another wrongful purpose;

(c) proceedings instituted or pursued in a court or tribunal without reasonable ground; and

(d) proceedings conducted in a court or tribunal in a way so as to harass or annoy, cause delay or detriment, or achieve another wrongful purpose.

10.42 The case law considering s 102Q(1) has referred with approval to the principles relating to vexatious litigants enunciated by Perram J in *Official Trustee in Bankruptcy & Gargan (No 2)*[87] and adopted by Davies J in *Attorney General (NSW) v Gargan.*[88]

10.43 The Family Court submitted that the concept of 'vexatious proceedings', as defined in s 102Q(1), is

> not sufficiently wide to cover the type of circumstance that arises in cases such as *Marsden & Winch* because:
>
> - They include a focus on the intention of the applicant and not just the effect on the respondent; and
> - Although "detriment" might be wide enough to capture the effect on parenting capacity, that is not explicit and is made less so by the inclusion of the words "or ... another wrongful purpose".[89]

10.44 The ALRC recommends that the *Family Law Act* be amended to provide the family courts with a further power to make an order requiring a litigant to seek the leave of the court prior to making further applications and serving them on the other party, or to make any other order restraining the conduct of a litigant as the court sees fit. This power should be available where the court is satisfied that such an order is appropriate in the circumstances for the protection of the respondent and/or any children involved in the proceedings, having regard to the proposed 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 so as to minimise harm to children and their families.

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87 [2009] FCA 398 [2]–[12].

88 [2010] NSWSC 1192 [8] cited in *Cannon & Acres* [2014] FamCA 104 [449]; *Theophane & Hunt (Final parenting orders)* [2014] FamCA 1038 [203]–[204].

89 Family Court of Australia, *Submission 68*.

10.45 This new power would be available in circumstances that will not meet the specific parameters of 'vexatious proceedings.'[90] The ALRC does not recommend the expansion of the existing parameters of the vexatious proceedings powers. The new power should be contained in a separate provision from the vexatious proceedings and summary dismissal powers, to make clear that the exercise of this new power involves a qualitative assessment that differs from the existing powers. This new power is not concerned with unmeritorious applications per se, but rather is directed to the protection of the other party and any children of the parties.

10.46 The recommended power would provide the family courts with an additional means of advancing the proposed overarching purpose, supplementing costs consequences for parties who fail to act in accordance with the overarching purpose, and the inclusion of failure to act in accordance with the overarching purpose as a ground for summary dismissal. The new power would assist the family courts to minimise harm to children and their caregivers by requiring a litigant whose conduct has been identified as problematic to seek the leave of the court before making further applications.

10.47 Case law confirms that powers to deprive people of access to courts are to be used sparingly.[91] However, the effect of an order under the proposed powers would not be to deny a person access to the court to have legitimate claims heard. Rather, it would effectively introduce a court-supervised 'filter' on the applications made by that person; limiting the applications received by the respondent to those which the court is satisfied meet the threshold requirements for leave to serve.

10.48 Leave to serve an application should be granted where the court is satisfied that the application: is not 'hopeless'; has been brought for a proper purpose; and is consistent with the overarching purpose. It is important that applications for leave are made ex parte—without serving documents on the respondent. This is critical to the protective 'filtering' function of orders made pursuant to this power.

10.49 The power should be exercisable on the application of a party, or at the court's initiative, at any time while proceedings are on foot.

10.50 The power could also be exercised in conjunction with the summary dismissal powers under s 45A. This would occur where the court is satisfied that the proceeding on foot should be dismissed because it has no reasonable prospect of success or if it is satisfied that it is frivolous, vexatious, or an abuse of process; and further is satisfied that, having regard to the overarching purpose, the applicant should be restrained from making further applications without leave of the court.

90 There may be some overlap in the cases where these powers are available.
91 See, eg, *Batistatos v Roads and Traffic Authority of NSW* (2006) 226 CLR 256.

Vexatious proceedings and summary dismissal powers

10.51 There are currently two key provisions in the *Family Law Act* which provide the court with powers to address illegitimate use of court processes.

10.52 First, under s 45A of the *Family Law Act* the court has powers to dismiss a proceeding on foot, in whole or in part, if it concludes it has no reasonable prospect of success or if it is satisfied that it is frivolous, vexatious, or an abuse of process (summary dismissal powers).[92] Section 45A was inserted into the *Family Law Act* by the *Family Law Amendment (Family Violence and Other Measures) Act 2018* (Cth). Previously, the summary dismissal powers were conferred by s 118. Section 45A has replaced s 118 and also consolidates powers that were previously contained in both legislation and court rules.[93] The amended section specifies that to have 'no reasonable prospect of success', the proceedings (or defence) do not have to be 'hopeless' or 'bound to fail'.[94]

10.53 The policy rationale for amendment of the provisions governing summary dismissal powers was to allow 'a court to prevent the use of its courtroom as a tool for perpetrators of family violence to perpetuate violence.'[95]

10.54 Secondly, s 102QB of the *Family Law Act* sets out powers in relation to proceedings where a court is satisfied that 'a person has frequently instituted or conducted vexatious proceedings in Australian courts or tribunals' (vexatious proceedings powers). These powers allow for courts to stay or dismiss all or part of proceedings currently on foot,[96] and to make an order restraining a party from instituting proceedings under the *Family Law Act*.[97] The consequence of such an order is that the person subject to the order must not institute proceedings or serve documents on the party without leave of the court.[98]

10.55 In exercising summary dismissal powers and vexatious proceedings powers, courts are balancing the rights of an individual litigant to have access to courts to have legitimate claims heard and considered in accordance with due process, against the need to protect court processes from abuse.

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92 *Family Law Act 1975* (Cth) s 45A.

93 The relevant provisions were contained in *Family Law Act 1975* (Cth) s 118; *Federal Circuit Court of Australia Act 1999* (Cth) s 17A*; Family Law Rules 2004* (Cth) r 10.12; *Federal Circuit Court Rules 2001* (Cth) r 13.10. In the Federal Circuit Court, s 17A of the *Federal Circuit Court Act 1999* (Cth) will continue to apply.

94 *Family Law Act 1975* (Cth) s 45A(3).

95 Revised Explanatory Memorandum, Family Law Amendment (Family Violence and Other Measures) Bill 2018 (Cth) [74].

96 *Family Law Act 1975* (Cth) s 102QB(2)(a).

97 Ibid s 102QB(2)(b).

98 Ibid s 102QD(1).

Rationalisation

10.56 The ALRC recommends that the powers in these two sets of provisions are rationalised as part of the legislative simplification process.[99] Rather than being located in two different parts of the statute, as they are now,[100] the powers should be located together. The different applications of the provisions should be clear in the legislation: the summary dismissal powers apply to one set of proceedings presently before a decision making body where either the application or response has no reasonable prospect of success, or is frivolous, vexatious, or an abuse of process in whole or part; and the vexatious proceedings powers apply where a person has frequently instituted or conducted vexatious proceedings in Australian courts or tribunals.

Exercise of summary dismissal powers to further overarching purpose

Recommendation 33 Section 45A of the *Family Law Act 1975* (Cth) should be amended to provide that the courts' powers of summary dismissal may be exercised where the court is satisfied that it is appropriate to do so, having regard to the overarching purpose of family law practice and procedure.

10.57 The ALRC recommends that s 45A of the *Family Law Act* be amended to provide that the courts' powers of summary dismissal may be exercised where it considers it is appropriate to do so, having regard to the proposed overarching purpose of family law practice and procedure. This amendment would complement the introduction of costs consequences for parties who fail to act in accordance with the overarching purpose, and the introduction of a power to restrain a party from filing further applications without leave of the court. The introduction of these measures would provide the court with additional means to advance the overarching purpose in the conduct of proceedings, and provide incentives for parties to act in accordance with the overarching purpose.

10.58 Circumstances where it may be appropriate for the court to exercise this power include where there has been an egregious or repeated failure by a party to act in accordance with the overarching purpose.

Case management

Recommendation 34 The family courts should consider promulgating a joint Practice Note for Case Management which describes the courts' approaches to the family law practice and procedure provisions.

99 See Chapter 14.
100 Section 45A is in div 3 of pt V and s 102QB is in div 2 of pt XIB of the *Family Law Act 1975* (Cth).

10.59 The key objective of case management is to reduce costs and delay so that there are: fewer issues in contention; in relation to those issues, no greater factual investigation than justice requires; and as few interlocutory applications as necessary for the just and efficient disposition of matters.

10.60 As was observed by the New South Wales Bar Association, the Family Court was the leading court in the development of case management practices. By 2004, it had developed a very advanced, workable, and effective case management system that was defined by experience from the previous 28 years.[101] The New South Wales Bar Association observes that, subsequent to 2004, this experience has largely been ignored by the Federal Circuit Court and abandoned by the Family Court.[102] Case management practices differ between the Family Court and the Federal Circuit Court, and even amongst individual judges. In the Family Court, case management hearings are considered integral to case management, but they are not presently used in the Federal Circuit Court. The Federal Circuit Court has trialled a number of different approaches to case management in that court. Consistent case management practices across both Courts are likely to facilitate the more efficient disposition of matters by reducing confusion and complexity.

10.61 Consistent with the practice of the Federal Court, the ALRC proposes the promulgation of a joint Practice Note which describes the Family Court and Federal Circuit Courts' approaches to case management. Such a Practice Note makes plain to all involved in the family law jurisdiction:

- the duty of the parties and legal representatives; and
- the duty of the court.

10.62 Clear articulation of both duties recognises that case management and the efficient disposition of cases is a two-way street: 'It is not only about telling the profession what to do or what the Court expects of it; but also what the Court expects of itself and what the profession should expect of the Court.'[103]

10.63 A joint Practice Note should include the following matters:

i. the Courts' approach to the overarching purpose;

ii. any docket system and allocation principles (including between the two courts), particularly having regard to the relative risk of the matter;

iii. commencing proceedings;

iv. the matters which will be dealt with by Judicial Registrars or Registrars, for example: questions of how much time a child is to spend with a non-resident parent where primary care is not in issue; ancillary parenting issues where orders have already been made; spousal maintenance issues;

101 NSW Bar Association, *Submission 373*. For a more detailed history of the development of case management in the Family Court see: Margaret Harrison, *Finding a Better Way: A Bold Departure from the Traditional Common Law Approach to the Conduct of Legal Proceedings* (Family Court of Australia, 2007).

102 NSW Bar Association, *Submission 373*.

103 Chief Justice JLB Allsop AO, 'Class Actions' (Speech, Law Council of Australia, 13 October 2006).

property proceedings in which the referring judge assesses that the family home and superannuation together comprise 75% or more of the parties' assets; consent matters; and enforcement of interim or final orders made by the court;

v. specialist lists, particularly in relation to Magellan cases,[104] high risk domestic violence cases, fast track small property matters, and any other sub-specialty the Courts think appropriate;

vi. urgent applications;

vii. how the Courts will assist the parties with the efficiency of proceedings through the use of technology, including where appropriate, e-lodgement and video link and audio link arrangements; and

viii. the structure and purpose of the first case management hearing including a statement of the Courts' case management imperatives, which might include:

- in child-related proceedings, consideration of how the proceedings are proposed to be conducted consistent with Div 12A of Pt VII and, in particular, consideration of whether any child or children have been given the opportunity to express their views and how this might best be facilitated;
- identifying and narrowing the issues in dispute;
- considering whether any counselling or mediation might still be appropriate at this stage;
- taking to trial only the critical points in issue;
- considering whether the proceeding is more appropriately heard in the Family Court or the Federal Circuit Court;
- considering how best to manage justiciable issues (such as whether some issues, for example valuation, are susceptible to being referred to a referee);
- considering how best to manage lay and expert evidence effectively, including by limiting the expert evidence to a court appointed assessor, and restricting the length and number of lay affidavits;
- setting an appropriately early trial date and maintaining that date;
- reducing the number of potential interlocutory hearings;
- ensuring discovery is managed appropriately;
- considering requiring parties to prepare a costs budget;
- capping the amount of costs recoverable, including those payable to independent experts; and

104 See [10.88] below.

- receiving short-form reasons to facilitate the expeditious delivery of any judgment.

10.64 Elaboration of some of the matters proposed for inclusion in the Practice Note is warranted.

Commencing proceedings

10.65 The Practice Note should provide that, subject to any contrary provision in the rules of court applicable to family law matters, a party commencing a proceeding must file a concise statement of facts. The purpose of such a statement is to bring to the attention of the respondent and the court the key issues and key facts at the heart of the dispute and the essential orders or relief sought from the court.

10.66 The proposal to require a concise statement of facts should not be construed as the reintroduction of pleadings within the family law jurisdiction, whether by stealth or otherwise. Consistent with the practice in the Federal Court, a concise statement of facts:

- must not exceed five pages;
- must be plain, concise, and direct in every regard, omitting unnecessary repetition;
- should do no more than summarise the important facts giving rise to the matter, the orders or relief sought, the primary legal grounds for the relief sought (if necessary), and any alleged harm suffered by the applicant and/or the children interested in the matter.

10.67 When a concise statement is filed, no further material should be filed until the court orders that to be done. Consequently, the procedure enables the first court officer or judicial officer seized of the matter to understand the issues in dispute, to assist the parties to define or narrow the issues appropriately and thereby to limit the affidavit material that is required to be filed. If, but only if, necessary, the respondent may be required to file a concise statement in response.

Matters to be dealt with by Judicial Registrars or Registrars

10.68 Section 26A of the *Family Law Act* provides for the appointment of Judicial Registrars. Appropriately delegated powers exercised by Judicial Registrars are deemed to have been exercised by the court or a judge.[105] The ALRC is aware that there are currently no Judicial Registrars within the family courts. Given the pressure on the family courts and the resourcing required for more judicial appointments, the ALRC urges the Australian Government to consider the appointment of Judicial Registrars.[106]

105 *Family Law Act 1975* (Cth) s 26B(3).
106 Swaab, *Submission 332*.

Contravention matters

10.69 The Practice Note should outline best practice regarding court procedures in instances of non-compliance with parenting orders. This could include the implementation in all registries of Registrar Contravention Lists supported by triage and case management processes conducted by registrars and Family Consultants.

10.70 Registrar Contravention Lists currently operate in the Brisbane (since 1 January 2010), Newcastle (since March 2017), and Melbourne (since May 2018) registries of the Federal Circuit Court.[107] A review completed in December 2014 of the Registrar Contravention List in the Brisbane registry found that since the introduction of that list several years prior, the number of contravention applications filed decreased by approximately 40% per year, and the number of applications listed to a judge decreased by approximately 80% per year.[108] Filing numbers in respect of contravention applications have fallen in all of the locations where the contravention list is in place.

10.71 While there may be some minor local variations, the lists in all registries operate similarly. In these lists, all applications for contravention of parenting orders are referred to the Coordinating Registrar for approval to file. The Registrar's duties include: considering any application for exemption with compliance with s 60I of the *Family Law Act*; checking compliance of the application with the *Federal Circuit Court Rules*; noting procedural irregularities; referring documents back to litigants as appropriate; and discussing, if appropriate, with self-represented litigants whether the nature of their application requires amending. The first court event is a directions list before the Registrar.

10.72 On receipt of an application, the Registrar:

- inquires of the applicant what outcome they are seeking;
- confirms with the client the Court's focus on best interests of the children, which may not be best served by a Contravention Application;
- inquires of the parties whether a resolution of the application is possible without the need for a trial on the issue;
- inquires of the parties whether they would be willing to attend mediation to resolve the issues; and/or
- attempts to assist the parties with a non-trial based resolution.[109]

10.73 Registrar Contravention Lists, which could be supported by triage processes facilitated by Family Consultants and registrars, enable: matters to be dealt with quickly and cost-effectively; court processes to be adapted to the particular circumstances of the parties; a team-based approach allowing for Family Consultants to work with parties to address compliance issues and for registrars and consultants to liaise about possible out-

107 Federal Circuit Court of Australia, Private correspondence, November 2018.
108 Federal Circuit Court of Australia, Private correspondence, March 2019.
109 Ibid.

of-court support service referrals that may assist parties; and effective mechanisms for dealing with applications for contravention of interim parenting orders to be implemented.

10.74 In their submissions, Caxton Legal Centre and National Legal Aid supported new processes for managing applications for contravention orders effectively in parenting cases. Caxton Legal Centre stated that, 'there ought to be a wholly different procedure for dealing with non-compliance.'[110] National Legal Aid submitted that a contravention/enforcement list would assist a timely response to issues that arise in respect of implementation of court orders.[111]

Specialist lists

Small property claims

10.75 The ALRC suggests the Practice Note should also make provision for small claim property matters to be referred to Judicial Registrars or Registrars in cases where a judicial officer makes an initial determination that superannuation and the family home together comprise 75% or more of the parties' assets.[112]

10.76 Many stakeholders were supportive of a small claims property process, in light of a gap in the availability of proportionate resolution mechanisms for low value property matters that are not amenable to resolution through FDR or LADR (Recommendation 21).[113] In these cases parties may simply not pursue their property and financial entitlements,[114] or may pursue their entitlements at a cost that is disproportionate to the assets involved.

10.77 The *Small Claims Large Battles*[115] report by Women's Legal Service Victoria demonstrates that this gap has particularly acute consequences for women affected by family violence. Fair court outcomes are undermined by obstacles such as tactical delay and non-disclosure. This report provided evidence that the cost of court proceedings and legal fees can amount to between 50% and 126% of the asset pool.[116] The SPLA *Family Violence Report* made recommendations for changes to support expeditious resolution of small property claims.[117]

10.78 Amid general support for the idea of a small claims property process in submissions, some stakeholders also noted that the availability of legal assistance for these claims

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110 Caxton Legal Centre, *Submission 51*.
111 National Legal Aid, *Submission 297*.
112 The Hon Justice Benjamin, above n 30.
113 Australian Law Reform Commission, above n 54, Proposals 6–4, 6–5, 6–6. See, eg, Women's Legal Service Victoria (WLSV), *Submission 413*; Community Legal Centres NSW, *Submission 385*; Victoria Legal Aid, *Submission 375*; Fitzroy Legal Service and Darebin Community Legal Service, *Submission 336*; National Legal Aid, *Submission 297*; Caxton Legal Centre, *Submission 292*.
114 See, eg, Macarthur Legal Centre, *Submission 346*.
115 Women's Legal Service Victoria, above n 52.
116 Ibid 5.
117 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 1, rec 14.

should be enhanced for some client groups. This is particularly relevant where the asset pool is too large to qualify for legal aid, but where the cost of legal proceedings would nonetheless be prohibitive.[118]

10.79 Following the release of the Discussion Paper, the Australian Government announced funding to trial a simpler, faster process for small property pool claims of up to $500,000 excluding debt in the federal family courts.[119] Two options are involved in the trials: a process whereby registrars support preparation of consent orders; and a short-form, judge-led process where agreement is not reached. This latter process may include determination on the papers (i.e. without a hearing).[120]

10.80 The small claims property pilots offer an opportunity to trial and assess the strengths and weaknesses of these different options. The Practice Note could be informed by the findings. A number of other recommendations in this report would have the effect of supporting better responses in this context: in combination, the overarching purpose obligations, the genuine steps requirements, the disclosure obligations, and the changes to the costs regime will provide incentives against unhelpful conduct in this context, and tools for judges and lawyers to address it.

10.81 A limited number of submissions raised difficulties with a small claims property process. These included the Law Council of Australia, which questioned how eligibility should be determined and suggested that the proposals would create a second tier of inferior justice.[121] The Law Institute of Victoria called for further consideration of how the list might operate effectively, given the complexities of some small asset pools.[122]

10.82 The ALRC considers these issues can be appropriately managed by courts in the overall framework set out in this chapter.

Priority parenting matters list

10.83 The ALRC suggests the Practice Note should make provision for a priority parenting matters list for cases involving particular complexity and risk, relative to the overall risk profile of the caseload of the courts.[123] The ALRC recognises that the vast majority of parenting matters involve family violence and other risk factors which require an appropriately informed response. However, this approach also recognises that some cases involve factors associated with an increased level of risk that may necessitate a particularly expeditious and intensive response.

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118 See, eg, Victoria Legal Aid, *Submission 375*.

119 Attorney General's Department, 'Women's Economic Security Package: Small Claims Property Pilots' (2018).

120 Ibid.

121 Law Council of Australia, *Submission 285*.

122 Law Institute of Victoria, *Submission 387*.

123 Australian Law Reform Commission, above n 54, Proposal 6–7 concerned the establishment of a specialist list for high risk family violence matters .

10.84 **Risk profile of families that use courts:** Research findings from AIFS indicate a significant risk profile among the families that use courts. As noted above, the majority of parents using the courts to resolve parenting arrangements report emotional and/or physical violence, with 46% reporting safety concerns for themselves or their children (or both) as a result of ongoing contact with the other parent.[124] The AIFS study assessed the prevalence of these factors, along with other indications of complex dynamics, such as mental health problems, gambling, pornography issues, and substance misuse. It found that 38% of parents who used courts reported four or more of these issues.[125]

10.85 An AIFS study based on court files of matters resolved following the 2012 family violence reforms found that allegations of family violence and/or child abuse were present in 70% of matters resolved by judicial determination, and almost 60% of matters resolved by consent after proceedings were initiated but prior to trial.[126] A significant minority of the matters in this sample also had engagement with state and territory family violence systems; almost three in 10 of the matters involving family violence or child abuse allegations also involved a personal protection order.[127] State child protection system engagement was evident in 13% of matters in the sample.[128]

10.86 **Court powers and obligations:** Under Div 12A of Pt VII of the *Family Law Act* (Principles for conducting child related proceedings), courts have significant and flexible case management powers and obligations. The overarching principles require that the needs of the child are prioritised[129] and require courts to safeguard children from exposure to family violence and child neglect.[130] Courts also have a positive obligation to ask the parties whether they consider that a child has been, or is at risk of being, exposed or subjected to family violence, child abuse, or neglect.[131] Each of the family courts requires a Notice of Risk to be filed where such allegations are made, although the Federal Circuit Court requires them to be filed in all cases to ascertain whether or not risk factors are being alleged. Where a Notice indicates risk at a threshold which triggers the courts' mandatory reporting obligations, or the court otherwise has reasonable grounds for suspecting a child has been abused or is at risk of abuse, then notifications must be made to prescribed child welfare authorities.[132]

10.87 As noted in Chapter 3, a significant proportion of parenting matters have Notices of Risk filed and are subsequently referred to child protection authorities. There is no systematic data available on what happens after such referrals. One study, which

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124 Rae Kaspiew et al, *Evaluation of the 2012 Family Violence Amendments: Synthesis Report* (Australian Institute of Family Studies, 2015) 16.
125 Ibid.
126 Rae Kaspiew et al, *Court Outcomes Project (Evaluation of the 2012 Family Violence Amendments)* (Australian Institute of Family Studies, 2015) 45.
127 Ibid 51.
128 Ibid 55.
129 *Family Law Act 1975* (Cth) s 69ZN(2).
130 Ibid s 69ZN(5).
131 Ibid s 69ZQ.
132 Ibid s 67ZA.

considered the co-located child protection practitioner initiative in Victoria, provides some insights.[133] The study showed that children with court-issued child protection notifications to the Department of Health and Human Services had a greater likelihood of the notification proceeding to investigation, lower likelihood of substantiation, and a greater history of involvement with child protection from a younger age, compared with children notified by non-court sources.[134]

10.88 **The Magellan list:** One specialist list for high risk matters operates in the Family Court, but not in the Federal Circuit Court. The Magellan program is 'a streamlined process for the most serious cases alleging child abuse'.[135] The aim of the resource-intensive program is to have selected cases resolved within six months. There is also early and ongoing case management, the appointment of an Independent Children's Lawyer, and an arrangement with the Department of Human Services for an assessment and report on the matter.[136] The cases in the program attract significant procedural and forensic support.

10.89 As outlined in Chapter 3, Magellan cases numbered 93 in 2017/18, representing 8% of the 1165 applications for final orders involving children in that court.[137] Across the Family Court and Federal Circuit Court, a total of some 12,000 final applications for parenting orders were dealt with in that period.[138]

10.90 A recent research project examined the extent to which sexual abuse allegations were substantiated in a sample of 156 published Family Court decisions from 2013–15.[139] In this sample, 65 cases were explicitly identified as Magellan cases, and the balance (91) was not. The study found that Magellan cases were more likely than non-Magellan cases to have findings of substantiated allegations of sexual abuse in the judgment. The authors conclude the reasons for this finding are unclear, but they raise two possible explanations: either 'the most serious and unequivocal cases of abuse are falling into the Magellan system, or it may mean that the training and experience necessary to be involved in the Magellan process ... is leading to a better understanding of CSA [child sex abuse] cases, and less trepidation in making a determination about the risk of CSA in parenting disputes'.[140]

133 Liz Wall et al, 'Evaluation of the Co-Located Child Protection Practitioner Initiative' (Australian Institute of Family Studies, 2015).
134 Ibid 55.
135 Family Court of Australia, *Submission 68*.
136 Daryl Higgins, 'Cooperation and Coordination: An Evaluation of the Family Court of Australia's Magellan Case-Management Model' (Family Court of Australia, 2007).
137 This tally includes final order applications concerning property and children, as well as children only.
138 See Chapter 3.
139 Claire Ferguson et al, 'Allegations of Child Sexual Abuse in Parenting Disputes: An Examination of Judicial Determinations in the Family Court of Australia' (2018) 15(2) *Journal of Child Custody* 93.
140 Ibid 110.

10.91 There was significant support from a range of stakeholders,[141] including the Family Court,[142] for approaches that would improve responses to cases involving family violence. The SPLA *Family Violence Report* recommended that risk assessments be undertaken when a matter is filed[143] and that improved case management of family violence matters should support appropriate triage, active case management, and expedited resolution.[144] It also recommended the expansion of the Magellan list.[145] Women's Legal Services Australia has advocated for 'a specialist response for domestic violence cases in family courts' as part of its *Safety First in Family Law* plan.[146]

10.92 On the question of a specialised list for high risk matters, views in submissions were mixed. Some submissions argued that, rather than a specialised list, the family courts' whole operating model in parenting matters should be adapted for this caseload.[147] The Family Court was one of several institutions that raised concerns about the availability of resources, particularly Family Consultants, being absorbed by a specialist approach at the expense of matters just as worthy of attention. It also raised the concern that parties with family violence issues who were not included in the list may feel the court was 'not taking their safety concerns seriously'.[148]

10.93 In contrast, others suggested there was scope and necessity for a specialised high-risk pathway, in the context of an overall response adapted for matters involving family violence, safety concerns, and other risk related issues.[149]

10.94 Noting the risk profile of the Family Court caseload, and the small proportion of cases that are dealt with in the Magellan process, the ALRC considers that there is both scope and need for a specialised approach. An additional list should be established to include matters that do not meet the Magellan criteria but nonetheless raise issues of risk and complexity warranting a specialised response, particularly where current and dynamic risk issues are identified. The ALRC suggests the Practice Note should provide for an additional list for this purpose.

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141 National Legal Aid, *Submission 163*; Women's Legal Service Queensland, *Submission 158*.

142 Family Court of Australia, *Submission 68*.

143 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 1, rec 3.

144 Ibid rec 5.

145 Ibid rec 21.

146 Women's Legal Services Australia, *Safety First in Family Law: Five Steps to Creating a Family Law System That Keeps Women and Children Safe* (2016).

147 Safe Steps Family Violence Response Centre, *Submission 408*; Victoria Legal Aid, *Submission 375*; Shoalcoast Community Legal Centre Inc., *Submission 372*; Women's Legal Services Australia, *Submission 366*; National Legal Aid, *Submission 297*; National Family Violence Prevention Legal Services Forum, *Submission 293*; Caxton Legal Centre, *Submission 292*; Rape & Domestic Violence Services Australia, *Submission 287*.

148 Family Court of Australia, *Submission 400*.

149 Domestic and Family Violence Death Review and Advisory Board, *Submission 377*; Women's Legal Service Queensland, *Submission 286*.

Case management conferences

10.95 The ALRC suggests the Practice Note should provide for case management conferences for all family law cases. Submissions expressed significant support for a triage process involving registrars and Family Consultants (for parenting matters) to provide case assessment, case management, and both initial and ongoing risk and needs assessment.[150] Such conferences are run by registrars in the Family Court[151] and Family Consultants in the Family Court of Western Australia in parenting matters.[152]

10.96 This approach is compatible with the implementation of the overarching purpose obligations, which also requires a strengthened emphasis on 'managerial judging'.[153] These conferences would support fulfilment of the court's obligation to ensure matters are resolved efficiently and proportionally and with the least acrimony.

10.97 Overall, the material considered in this review supports the direction of front-loading resources to manage court caseloads through case management conferences. Several aspects of the data on court caseload characteristics considered in Chapter 3 suggest that case management conferences would be integral to effectively implementing other recommendations in this review, including the genuine steps requirement and the costs measures. In particular, significant levels of self-representation (about one third of matters) in the family courts, especially in parenting matters that proceed to a trial and in appeals, mean that some matters require active oversight.

10.98 Stakeholders were supportive of the aims of the triage-related proposals put forward in the Discussion Paper.[154] Victoria Legal Aid submitted that the

> current absence of a dedicated case management role within the court contributes to delays in proceedings, poor documentation, a lack of coordinated response for children and families, and other roles in the system taking on case management functions without the appropriate training or resources.[155]

10.99 The Family Court of Western Australia provided detail on its own approach to triage in parenting matters.[156] The elements of the approach include:

- a Child Related Proceedings List (CRP List) for most new parenting cases conducted by a specialist family law magistrate with a family consultant;
- a requirement that all parties file a Case Information Affidavit which operates as an

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150 Australian Law Reform Commission, above n 54, Proposals 6–1, 6–2. Submissions supportive of this direction included: Victoria Legal Aid, *Submission 375*; Partnerships Victoria, *Submission 307*; National Legal Aid, *Submission 297*; Caxton Legal Centre, *Submission 292*; Law Council of Australia, *Submission 285*; Uniting, *Submission 268*.

151 *Family Law Rules 2004* (Cth) r 12.03.

152 Family Court of Western Australia, *Parenting Cases* (16 April 2018) .

153 The Hon Justice Peter McClellan, 'Civil Justice Reform–What Has It Achieved?' [2010] *New South Wales Judicial Scholarship* 5, 7.

154 Australian Law Reform Commission, above n 54, Proposal 6–1, 6–2.

155 Victoria Legal Aid, *Submission 375*. See also National Legal Aid, *Submission 297*; Law Council of Australia, *Submission 285*.

156 Family Court of Western Australia, *Submission 311*.

early risk assessment tool;

- family consultants have access to information from the database of the Magistrates Court of Western Australia through arrangements facilitated by the Western Australian Department of Justice and can access information about violence restraining orders, criminal convictions and pending charges. Similarly, they can access child protection information from the Department for Communities through an information sharing arrangement with the Department for Communities and Legal Aid Western Australia;
- where significant risk issues are identified, family consultants attend a case assessment conference at which the Department for Communities may be present if it already has involvement with the family;
- after the initial assessment processes, cases are streamed to either the docket of the specialist family law magistrate who conducted the initial CRP hearing, or for particularly complex cases, for example where the Department of Communities is involved or potentially severe risk to children or parties is identified, the matter is allocated to a judge for individual case management.[157]

10.100 The findings of an evaluation of the Registrar Intervention Project, undertaken in the Family Court in 2017–18, suggest significant advantages in an active case management approach. The trial involved registrars to encourage settlement (with Family Consultants acting as family dispute resolution practitioners) or narrow the issues in dispute. Of 191 matters included in the trial, 48% were resolved and 33% were partly resolved or otherwise progressed. The evaluation indicated that 239 trial days had been saved and the number of matters awaiting allocation to a judicial docket was reduced by 24%.[158]

Child-related proceedings

10.101 As is discussed in Chapter 11, views about the extent to which children should *participate* in family law processes, as opposed to just being the focus of those processes, have changed considerably since the passage of the *Family Law Act*. Approaches to children's participation in family law processes have been informed by changing understandings of children and child development. There has been a move away from seeing children as 'passive, dependent and less than adults' to 'conceptualisations of children as active social actors in their own lives'.[159] Approaches have also been informed by developments relating to the rights of children.

10.102 The CRC contains a number of rights relating to participation. The most important of these, for the purposes of considering children's participation in family law processes, is the right to be heard. Article 12 of the CRC provides that children who are capable of forming their own views should have the right to 'express those views freely in all matters affecting the child, the views of the child given due weight in accordance with

157 Ibid.

158 Family Court of Australia, 'Registrar Intervention Project Executive Summary' (Family Court of Australia, 2018).

159 E Kay M Tisdall, 'Subjects with Agency? Children's Participation in Family Law Proceedings' (2016) 38(4) *Journal of Social Welfare and Family Law* 362, 362.

the age and maturity of the child'. In relation to judicial and administrative proceedings, Art 12 provides that a child should be 'provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or appropriate body'.[160]

10.103 Section 60CC(3)(a) of the *Family Law Act* requires a court to consider any views expressed by a child in deciding whether to make a particular parenting order in relation to the child. There is a correlative provision in s 60CE which provides that children cannot be required to express a view in relation to any matter.

10.104 The court may inform itself of a child's views: through a family report prepared by a Family Consultant; through an order for the child to have an Independent Children's Lawyer; or by any other means the court thinks appropriate, subject to applicable court rules.[161] Some judges are comfortable speaking directly with children; others are not and indeed consider that to do so would be inconsistent with transparency.[162] The rule which provided expressly that a judge, judicial registrar or magistrate may interview a child was repealed in 2010.[163]

10.105 Significantly, there is no current obligation to ensure that a child has in fact had the opportunity to express his or her views.

10.106 Incorporating an explicit statement in the Practice Note to the effect that, in child-related proceedings, there must be consideration of whether any child or children have been given the opportunity to express their views and how this might best be facilitated, will assist with ensuring that a child has in fact had the opportunity to express his or her views. If the child does not wish to express a view, the court will also be cognisant of that fact. This Recommendation is consistent with the view expressed by the ALRC and AHRC in 1997 that judges deciding family law matters should be encouraged to intervene appropriately to assist the determination of the best interests of the child in Family Court children's matters.[164]

Early fact-finding hearings

10.107 In some instances, parties in parenting matters may raise concerns about a range of issues, including risks to parties and children, which may require urgent consideration at an interim stage prior to trial.

10.108 The family courts have power to make early determinations about issues of fact, including allegations of family violence, [165] but the use of this provision is not

160 *Convention on the Rights of the Child*, opened for signature 20 December 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 12.
161 *Family Law Act 1975* (Cth) s 60CD(2).
162 Family Court of Australia, *Submission 400*.
163 *Family Law Amendment Rules 2010 (No 1)* (Cth) sch 1 [16].
164 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, above n 10, rec 141.
165 *Family Law Act 1975* (Cth) s 69ZR.

widespread.[166] The Family Law Council has suggested that 'it would align with the principles of timeliness and flexibility' if the practice of making early findings of fact about family violence 'were adopted on a more consistent basis', so that parties could be referred to appropriate support and recovery programs.[167] Early fact-finding was an integral part of the Less Adversarial Trials approach.[168]

10.109 Stakeholder views on early fact-finding hearings were mixed. Supporting submissions noted the need to determine issues of risk early to ensure that interim parenting arrangements were safe,[169] and argued that early fact-finding would reduce the proportion of matters that went to trial,[170] and reduce trauma for children and caregivers. Further advantages of early fact-finding hearings that were identified included the capacity to establish appropriate case management, therapeutic services, and safety management strategies.[171] Domestic Violence Victoria was convinced that early determination was essential to address the barriers faced by survivors of family violence in accessing fair, just, and safe outcomes.[172]

10.110 A number of organisations argued against early fact-finding hearings.[173] The main points raised in opposition included:

- the potential for duplication or deferral of other proceedings, such as protection order proceedings or criminal proceedings, in relation to the same matters;[174]
- the risk that the alleged victim would be cross-examined twice[175] or even three times:[176] once in the discrete trial and again at the substantive trial in the family law proceedings, in addition to local court proceedings;[177]
- the addition of a litigation event means extending resolution time-frames and incurring additional costs to the litigants and the system;[178]
- the risk that a person who has experienced family violence may not fully disclose the extent of the violence until well into the process;[179]

166 Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (Final Report, 30 June 2016) 128.
167 Ibid.
168 Rosemary Hunter, 'Child-Related Proceedings under Pt VII Div12A of the Family Law Act: What the Children's Cases Pilot Program Can and Can't Tell Us' (2006) 20 *Australian Journal of Family Law* 227, 233.
169 See also Women's Legal Service Victoria (WLSV), *Submission 413*; Victoria Legal Aid, *Submission 375*.
170 National Legal Aid, *Submission 297*.
171 Ibid; Caxton Legal Centre, *Submission 292*.
172 Domestic Violence Victoria, *Submission 284*.
173 Law Institute of Victoria, *Submission 387*; Fitzroy Legal Service and Darebin Community Legal Service, *Submission 336*; Caxton Legal Centre, *Submission 292*; Law Council of Australia, *Submission 285*; National Legal Aid, *Submission 163*.
174 National Legal Aid, *Submission 297*.
175 Law Council of Australia, *Submission 285*.
176 Caxton Legal Centre, *Submission 292*.
177 Ibid.
178 National Legal Aid, *Submission 297*.
179 Fitzroy Legal Service and Darebin Community Legal Service, *Submission 336*.

- potential for an incident-based approach and the difficulty of isolating family violence from other risk factors, such as mental health or substance addiction concerns;[180] and
- the fact that risk is not static and may vary over time.[181]

10.111 In the context of the overarching purpose, the ALRC considers that early fact-finding hearings should have a role to play in some cases, especially those in the priority parenting matters list. Early determinations in relation to risk issues and engagement with therapeutic services will support the implementation of the overarching purpose. The Practice Note should include guidance to support early fact-finding hearings. There should be scope for arguments against such hearings in any particular case to be considered on a case-by-case basis.

Referees

Recommendation 35 The *Family Law Act 1975* (Cth) should be amended to provide for the appointment and protection of referees in the same terms as provided for in ss 54A and 54B of the *Federal Court of Australia Act 1976* (Cth).

10.112 There is a power in the *Federal Circuit Court Rules* for the court to refer to a Registrar any matter relating to a claim or application before the court for investigation, report and recommendation.[182] There is, however, no wider power in the *Family Law Act* or the rules of either Court to refer questions to a referee, as is provided for in the *Federal Court of Australia Act 1976* (Cth).[183]

10.113 The appointment of a referee is akin to a form of 'special trial'. As explained by Stephen J in *Buckley v Bennell Design & Construction Pty Ltd*,[184] where there is a hearing before a special referee, the court's procedures of adjudication are not abandoned in favour of extra-curial settlement of the dispute; rather, the court directs that for better resolution of the particular proceedings, resort should be had to this special mode of trial which the legislation made available.[185]

10.114 A power to appoint a referee could be of particular assistance to the family courts where difficult questions of valuation are in issue. The ALRC recommends that the *Family Law Act* be amended to provide the family courts with power that is coextensive with that of the Federal Court.

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180 National Legal Aid, *Submission 297*; Caxton Legal Centre, *Submission 292*.
181 National Legal Aid, *Submission 297*.
182 *Federal Circuit Court Rules 2001* (Cth) r 18.01.
183 *Federal Court of Australia Act 1976* (Cth) s 54A.
184 (1978) 140 CLR 1.
185 Ibid 28–38.

Costs budgeting and cost capping

10.115 Within the context of case management, courts exercising family law jurisdiction may wish to consider proactively managing the parties' legal costs, including by making rules of court in relation to costs budgeting and/or cost capping.[186] Section 123(1)(g) of the *Family Law Act* empowers courts to make rules in relation to costs.

10.116 There are currently obligations on legal practitioners to provide prospective costs information in family law proceedings, but there is no express power for the courts to enforce limits on those costs. The *Family Law Rules* currently provide that immediately before particular events in the Family Court, lawyers are obliged to give their clients written notice of the client's actual costs up to that date, the estimated future costs of the client, and any expenses payable to an expert witness.[187] Lawyers must then provide a copy of that notice to the court and each other party at each court event;[188] although in practice this is rarely enforced.[189] In addition, if at any stage an offer of settlement is made in a financial case, lawyers are obliged to tell their clients their actual costs up to that date, and estimate the future costs to complete the case.[190]

10.117 Under the *Family Law Rules*, the Family Court is obliged to 'actively manage each case' in a number of ways including by 'considering whether the likely benefits of taking a step justify the cost of that step'.[191] Courts are empowered to retrospectively certify in relation to a particular court event that it was reasonable to engage a lawyer (including Senior Counsel) as counsel to attend for a party.[192]

10.118 A costs budgeting process was one of the reforms proposed by Lord Justice Jackson in his *Review of Civil Litigation Costs* in the United Kingdom in 2009 (the Jackson Report).[193] For multi-track cases,[194] all parties to civil litigation must file and exchange costs budgets in which they provide an estimate of the costs that are likely to be incurred at each stage of litigation.[195] The court has the discretion to make a costs management order, in which it will record the extent to which the budgets are agreed (or not agreed) between the parties or record the court's approval of a budget, after making necessary changes.[196]

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186 The Hon Justice Benjamin, above n 30.
187 *Family Law Rules 2004* (Cth) r 19.04.
188 Ibid.
189 Family Court of Australia, *Submission 68*.
190 *Family Law Rules 2004* (Cth) r 19.03.
191 Ibid r 1.06.
192 Ibid r 19.50; *Federal Circuit Court Rules 2001* (Cth) r 21.15.
193 The Rt Hon Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (December 2009).
194 Under *Civil Procedure Rules 1998* (UK) SI 1998/3132 r 26.6 the multi-track is the normal track for any claim for which the small claims track or the fast track is not the normal track. It is usually used for cases over £25,000 and those which are not straightforward. From 22 April 2014 the budgeting regime was extended to apply to all Part 7 multi-track cases below £10 million in all courts including the Commercial Court.
195 Ibid r 3.13.
196 Ibid r 3.15.

10.119 The effect of a costs management order is to place the court in control of the parties' budgets in respect of recoverable costs. When considering whether to make a costs order, the court will have regard to the party's last approved or agreed budget and will not depart from it unless there is some good reason to disregard it. The procedure effectively makes cost control a prospective rather than retrospective issue.

10.120 Reflecting on the costs budgeting regime three years after its introduction, Jackson LJ drew the following conclusions:[197]

- It enables both sides to know where they stand financially. They have clarity as to (a) what they will recover if they win and (b) what they will pay if they lose. This is of particular importance to third-party funders.
- Costs management encourages early settlement as parties are made aware of the total cost of litigation and their own exposure.
- It controls costs. This is for two reasons: (i) the very act of preparing a budget, tempers behaviour and (ii) it brings down the actual costs of the litigation for both parties.
- It focuses attention on costs at the outset of litigation.
- It enables the court to get a grip on issues and gives a robustness to Case Management Conferences.
- It engenders fairness by giving the opposition notice of what you are claiming.
- It prevents legal catastrophes.

10.121 Costs management is however not without complaint. In particular, Jackson LJ identifies that the following five issues have emerged as causes of complaint:[198]

- Differing approaches adopted by individual judges and courts.
- Delays in listing costs and case management conferences as a result of the time spent on costs management, leading to a backlog of work.
- No effective mechanism for controlling costs incurred before the first CCMC [Case and Costs Management Conference].
- Difficulties at detailed assessment if costs budgets and bills of costs are in different formats.
- The process of cost management is expensive.

10.122 Central to the reforms to civil litigation costs in the UK following the Jackson Report is the principle of proportionality. This guiding principle is intended to prevent costs becoming disproportionate to the value, complexity and importance of the claim. As a result of the Jackson Report, the test of proportionality in the *Civil Procedure Rules 1998* (UK) was revised. The revised test provides that costs incurred are proportionate if they bear a reasonable relationship to:[199]

(a) the sums in issue in the proceedings;

197 The Rt Hon Lord Justice Jackson, *The Reform of Civil Litigation* (Thomson Reuters, 2016) 131–133.

198 Ibid 134.

199 *Civil Procedure Rules 1998* (UK) SI 1998/3132 r 44.3(5). The *Civil Procedure Rules 1998* (UK) were also amended to provide that the overriding objective is to enable the court to deal with cases justly 'and at proportionate cost'. See r 1.1.

(b) the value of any non-monetary relief in issue in the proceedings;

(c) the complexity of the litigation;

(d) any additional work generated by the conduct of the paying party; and

(e) any wider factors involved in the proceedings, such as reputation or public importance.

10.123 The revised test expressly states that costs which are disproportionate may be disallowed or reduced even if they were reasonably or necessarily incurred.[200]

10.124 Overall, while the process of costs management was initially unpopular with the legal profession and took some time to 'bed down', it does allow the court to control costs from an early stage, and the benefits are reportedly becoming more apparent.[201]

10.125 The Productivity Commission recommended that the ALRC 'should examine the performance of the costs budgeting regime of the English and Welsh courts and recommend in which Australian courts the application of such a regime would be appropriate.'[202]

10.126 Cost budgeting has also been advocated in the context of succession litigation in New South Wales. The relevant statute provides that in family provision cases the court may order that legal costs be paid from the deceased estate, and that regulations may fix the 'maximum costs for legal services' to be paid from the deceased estate. These provisions prevail to the extent of any inconsistency with other legal costs legislation.[203] Currently, regulations do not in fact set any such maximum amount.

10.127 A Practice Note applying specifically to family provision applications in the Supreme Court of New South Wales empowers the Court to make orders 'capping the costs that may be recovered by a party in circumstances including, but not limited to, cases in which the net distributable value of the estate (excluding costs of the proceedings) is less than $500,000.'[204] The Practice Note expresses the Court's expectation that the 'resources of the estate and of the Court will not be used in a manner that is out of proportion to the size of the estate and the provision that may be made.'[205]

10.128 In addition, the *Uniform Civil Procedure Rules 2005* (NSW) provide that a 'court may by order, of its own motion or on the application of a party, specify the maximum costs that may be recovered by one party from another.'[206] It is apparent that such an order may be made at an early stage of proceedings. For example, when making

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200 This contrasts with the previous approach, based on Court of Appeal guidance in *Lownds v Home Office* [2002] 4 All ER 775 under which costs were in effect deemed to be proportionate if they were both necessary and reasonable.

201 The Rt Hon Lord Justice Jackson, above n 197, 137–139.

202 Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 2, 2014) rec 13.3.

203 *Succession Act 2006* (NSW) s 99.

204 Practice Note No. SC EQ 7, Supreme Court - Family Provision (NSW) [24].

205 Ibid [25].

206 *Uniform Civil Procedure Rules 2005* (NSW) r 42.4. See also *Civil Procedure Act 2010* (Vic) s 65C(2)(d) .

an order specifying maximum recoverable costs, the court may also make 'such directions as the court considers necessary to effect the just, quick and cheap: (a) progress of the proceedings to trial or hearing, or (b) trial or hearing of the proceedings.'[207] There is provision for a court to vary the maximum recoverable costs if 'there are special reasons, and it is in the interests of justice to do so'.[208]

10.129 However, Kune J has observed that the power contained in the *Uniform Civil Procedure Rules 2005* (NSW) is 'little used at the commencement of proceedings' and could helpfully be used more often.[209] Referring to the mandatory cost budgeting scheme in the United Kingdom discussed above, Kune J further commented that 'family provision cases fall within that category of litigation in this Court which would especially benefit from the introduction of such a scheme. I respectfully commend consideration of this development to those concerned with law reform.'[210]

10.130 In New Zealand, a less prescriptive but still prospective regime applies in managing costs. Namely, courts have the power at any stage of proceedings to determine in advance the categorisation of proceedings in relation to their complexity. Three levels of complexity are available, namely: 'proceedings of a straightforward nature able to be conducted by counsel considered junior'; 'proceedings of average complexity requiring counsel of skill and experience considered average'; and 'proceedings that because of their complexity or significance require counsel to have special skill and experience'.[211] The level of complexity determines the daily rate of costs recoverable under any costs order.[212] When making any order in relation to costs, courts also assess how much time each relevant step in the proceedings would reasonably have taken: 'a comparatively small amount of time', 'a normal amount of time', or 'a comparatively large amount of time'.[213]

10.131 In the context of family law proceedings in Australia, courts could be empowered to determine at an early stage of proceedings a maximum amount of legal costs which each party is authorised to expend and potentially recover from the other party in the event of a costs order. Furthermore, courts could be explicitly empowered, in appropriate cases, to prospectively order that a lawyer for a party not be entitled to charge or recover from their client any amount above the ordered maximum. In property settlement proceedings, if a party is found to have spent a higher amount on legal costs than the maximum ordered, the additional expenditure above that maximum amount could be notionally 'added back' against that party and ultimately reduce the amount of property that party receives from the asset pool being divided between the parties. However, it is noted that the High Court has emphasised that the *Family Law Act* requires

207 *Uniform Civil Procedure Rules 2005* (NSW) r 42.4(3).
208 Ibid r 42.4(4).
209 *Rogic v Samaan (No 2)* [2018] NSWSC 1573, [42].
210 Ibid [44].
211 *District Court Rules 2014* (NZ) r 14.3. Note these Rules may be applied by the Family Court under the *Family Court Rules 2002* (NZ) and equivalent provisions exist in the *High Court Rules 2016* (NZ).
212 *District Court Rules 2014* (NZ) r 14.2.
213 Ibid r 14.5.

consideration of the '*existing* legal and equitable interests of the parties' in property,[214] which has been interpreted as a caution in relation to the practice of courts 'adding back' legal costs (or other expenditure) as 'notional assets' in the family law asset pool.[215]

10.132 A number of submissions were supportive of effectively 'capping' legal fees in family law litigation.[216] Some submissions suggested that the cap in a particular case could be expressed as a percentage of the net asset pool in financial cases.[217] Lander & Rogers submitted that capping lawyers' hourly rates would not necessarily be effective, but did support a focus on the 'affordability and proportionality' of fees.[218] Relationships Australia submitted that some families may have 'complex needs' but this does not necessarily mean that their case raises complex *legal* issues.[219] Courts may need to be mindful of this distinction when considering the appropriate level of legal cost to be endorsed in a particular cost budget.

10.133 The rules of court could be amended to explicitly provide for the kinds of powers described above, and to clarify the kinds of costs which may be allowable as between parties, and as between practitioner and client, including by reference to the concept of proportionality.

Costs

Recommendation 36 Section 117 of the *Family Law Act 1975* (Cth) should be amended to:

- remove the general rule that each party to proceedings under the Act bears his or her own costs; and
- articulate the scope of the courts' power to award costs.

10.134 A significant distinction between family law proceedings and general civil law proceedings is that in family law, parties are generally (but not always) responsible for paying their own legal costs, regardless of the outcome of the proceedings or the conduct of the parties during the proceedings.[220] In contrast, in general civil law proceedings, costs often 'follow the event', and an order is more frequently made for an unsuccessful party

214 *Stanford v Stanford* (2012) 247 CLR 108.
215 See, eg, *Bevan & Bevan* [2013] FamCAFC 116; *Vass & Vass* [2015] FamCAFC 51; *Calder & Calder* [2016] FamCAFC 36.
216 Family Law Reform Coalition, *Submission 355*; CatholicCare Diocese of Broken Bay, *Submission 197*; For Kids Sake, *Submission 118*; Interact Support Inc, *Submission 107*; Resolution Institute, *Submission 70*; Australian Dispute Resolution Advisory Council Inc (ADRAC), *Submission 12*.
217 See, eg, CPSU, *Submission 136*.
218 Lander & Rogers Lawyers, *Submission 198*.
219 Relationships Australia, *Submission 11*.
220 *Family Law Act 1975* (Cth) s 117 (note the general principle is subject to a number of exceptions).

to contribute to the legal costs of a successful party.[221] The rationale for the costs regime as it was originally conceived was 'to encourage persons to settle their differences'.[222]

10.135 The Family Court was initially set up to be a simple and less complex court with simple rules and informal approaches. Over the years, the nature of the work has changed and the very small percentage of family law disputes not resolved by the parties and that fall to be determined by a court are increasingly complex and lengthy. There are multi-year delays in reaching final hearing, with the consequence of hard fought and expensive interim disputes, coupled with serial applications for litigation funding orders. Legal costs and disbursements incurred by parties in final parenting and property hearings, particularly in Sydney, Brisbane and Melbourne, routinely exceed $300,000 for each party and sometimes exceed $1 million.

10.136 A number of family law judgments comment on the disproportionate nature of legal costs in proceedings, using phrases such as 'obscene',[223] 'eye watering',[224] and 'extraordinary [and] grossly disproportionate to the subject matter of the litigation'.[225] Judges have also commented on particular cases with total costs of over $4.5 million and final hearing costs of over $28,000 per day,[226] total costs which exceed the net assets available for distribution,[227] and questionable retention of senior counsel.[228] Circumstances such as these illustrate that, in those cases that concerned both children and property matters, the best interests of the children cannot have been considered, particularly where there are no assets remaining by which to support the children.[229]

10.137 A brake is needed on the ability of either, or both parties, to unnecessarily engage in expensive legal skirmishes to the detriment of each other and the children without the risk, except in exceptional circumstances, of a costs order being made against them. The recommended amendment may also reduce ambit claims that are sometimes made without fear of the consequences for making such a claim.

10.138 Encouraging judges to enforce compliance with directions, and to make cost orders more frequently in appropriate cases, has been supported in a number of consultations and submissions to this Inquiry,[230] in academic literature,[231] and in reports

221 See, eg, GE Dal Pont, *Law of Costs* (Lexis Nexis, 2nd ed, 2009) 174.
222 Explanatory Memorandum, Family Law Bill 1974 (Cth).
223 *Finazzi & Finazzi* [2012] FamCA 102.
224 *Simic & Norton* [2017] FamCA 1007.
225 *Newport & Newport* [2018] FamCA 472.
226 *Riemann & Riemann (No 5)* [2017] FamCA 986.
227 *Salway & Fegley* [2017] FamCA 410.
228 *Eldred & Eldred (No 2)* [2015] FamCA 188. See also the Hon Justice Benjamin, above n 30.
229 *Salway & Fegley* [2017] FamCA 410.
230 P Easteal and L Young, *Submission 394*; Queensland Council of Social Service (QCOSS), *Submission 378*; MELCA, *Submission 337*; Swaab, *Submission 332*; UnitingCare Queensland, *Submission 312*; National Legal Aid, *Submission 297*; Farrar Gesini Dunn, *Submission 140*; CPSU, *Submission 136*; R Alexander, *Submission 131*; Interrelate, *Submission 126*; For Kids Sake, *Submission 118* (in favour of financial incentives to settle generally); R Davies, *Submission 66*; Victoria Legal Aid, *Submission 61*.
231 Patrick Parkinson, 'Can There Ever Be Affordable Family Law?' (Conference Paper, Current Legal Issues Seminar, Supreme Court of Queensland, 9 May 2017).

canvassing options for reducing legal costs.[232] There was, however, some opposition to the proposed amendment on the basis that the provision was well understood.[233]

10.139 The current Australian position in relation to costs is not unique. In the United Kingdom, courts exercising family law jurisdiction have wide discretion in relation to the award of costs.[234] In family law cases, the court may 'at any time make such order as to costs as it thinks just'.[235] However, costs do not ordinarily follow the event in family law proceedings.[236] An award of costs in family law proceedings may be justified if it is demonstrated that the conduct of the party (before or during the proceedings, including by reference to the manner in which a case has been pursued or defended) has been 'reprehensible or unreasonable'.[237]

10.140 Similarly, in New Zealand it is a matter of discretion whether or not to make a costs order in family law proceedings.[238] The Family Court *may* adopt the rules applicable in general civil proceedings which include the principle that 'a party who fails … should pay costs'.[239] In particular, courts have noted that some cases concerning children 'can be finely balanced and legitimate positions argued by both parties' and that an award of costs 'should be reserved for a case where a parent pursues litigation unreasonably without regard to a child's interests.'[240]

10.141 In the Family Justice Courts of Singapore, costs ordinarily follow the event in family law proceedings as well as in general civil proceedings.[241]

10.142 It is also appropriate that costs of appeals, whether of parenting or property matters, should follow the event. The failure to make meaningful costs orders in respect of unsuccessful appeals does nothing to promote finality and encourages parties to continue in the system through the appeal mechanisms.

10.143 Where an order is made regarding costs, it is ordinarily made against one party and in favour of the other. However, in rare cases, orders for payment of costs can also be made against (or in favour of) non-parties. In particular this may occur in 'circumstances where the non-party has played an active part in the conduct of the litigation and where the non-party ... has an interest in the subject of the litigation.'[242] In the context of family

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232 Productivity Commission, above n 202, rec 12.1; New Zealand Bar Association, *Access to Justice Report* (2018).

233 Family Law Practitioners' Association of Western Australia (Inc), *Submission 410*; Shoalcoast Community Legal Centre Inc., *Submission 372*; Law Council of Australia, *Submission 285*.

234 *Senior Courts Act 1981* (UK) s 51(1); *Re E-R (Child Arrangements)* [2016] EWHC 805 (Fam), [77].

235 *Family Procedure Rules 2010* (UK) SI 2010/2955 r 28.1.

236 *Re E-R (Child Arrangements)* [2016] EWHC 805 (Fam), [77].

237 *Re T (Children: Care Proceedings: Serious Allegations Not Proved)* [2012] UKSC 36, [44].

238 *Care of Children Act 2004* (NZ) s 142; *Property (Relationships) Act 1976* (NZ) s 40; *Family Court Rules 2002* (NZ) r 207(1).

239 *District Court Rules 2014* (NZ) r 14.2(1)(b).

240 *Wheeler & Pagetti* [2016] NZFC 4436. See also *BGD v HMM* [2008] NZFC 36.

241 *Family Justice Rules 2014* (Singapore) r 852.

242 *Knight v FP Special Assets Ltd* (1992) 174 CLR 178, 193 (Mason CJ and Deane J); *Selig v Wealthsure Pty Ltd* (2015) 255 CLR 661 [43].

law proceedings, the power to make such an order has in part relied upon the absence of any reference to 'parties' in the relevant subsection of s 117 of the *Family Law Act*, although reference is made to 'parties' in other subsections of the same section.[243] The legislation should be amended to explicitly clarify the potential for cost orders to be made against non-parties, as a deterrent to non-parties whose conduct has the potential to increase the costs incurred by parties.

10.144 The section should provide that, without limiting the discretion of the court or a judge in relation to costs, the court or a judge may do any of the following:

- make an award of costs at any stage in a proceeding, whether before, during or after any hearing or trial;
- make different awards of costs in relation to different parts of the proceedings;
- order the parties to bear costs in specified proportions;
- award a party costs in a specified sum;
- award costs in favour or against a party whether or not the party is successful in the proceedings;
- order a party's lawyer to bear costs personally;[244]
- order a non-party to bear costs personally;
- order that costs awarded against a party are to be assessed on an indemnity basis or otherwise; and
- do any of the following in proceedings in relation to disclosure in property and financial matters:
    - order the party requesting disclosure to pay in advance for some or all of the estimated costs of disclosure;
    - order the party requesting disclosure to give security for the payment of the costs of disclosure;
    - make an order specifying the maximum cost that may be recovered for giving disclosure or taking inspection.

243 *Re JJT; Ex Parte Victoria Legal Aid* (1998) 195 CLR 184; also discussed in *Hartnett & Sampson (Costs)* [2007] FamCA 1456.

244 Law Council of Australia, *Submission 285*.

Protected confidences

Recommendation 37 The *Family Law Act 1975* (Cth) should be amended to provide courts with an express statutory power to exclude evidence of 'protected confidences'. In determining whether to exclude evidence of protected confidences the court must:

- be satisfied that it is likely that harm would or might be caused, directly or indirectly, to a protected confider, and the nature and extent of the harm outweighs the desirability of the evidence being given; and
- ensure that in parenting proceedings, the best interests of the child is the paramount consideration when deciding whether to exclude evidence of protected confidences.

10.145 The *Family Law Act* should give courts discretion to exclude evidence of 'protected confidences' if harm would, or might, be caused by allowing those records into evidence, and the nature and extent of that harm outweighs the desirability of the evidence being given.

10.146 'Protected confidences' are records of a sensitive therapeutic nature, such as records generated when a person attends a medical, counselling or psychological service, and where the person providing the service ordinarily owes confidentiality to the person receiving the service. There are no special provisions in the *Family Law Act* or court rules that deal with these therapeutic records,[245] although courts have discretion as to whether and how they are admitted.[246]

10.147 However, the power of the court to exclude protected confidences from being admitted into evidence has been given a statutory basis in some jurisdictions. The relevant provisions in state and territory *Evidence Acts* recognise the public interest in ensuring that evidence generated in confidential processes are used in court processes only when evidentiary value outweighs the possibility of harm to the person whose confidence is being breached.[247] As recognised in the Family Court case of *Goldy & Goldy,*[248] provisions in state and territory legislation excluding some protected confidences from

245 Services provided by family counsellors within the meaning of s 10C(1) of the *Family Law Act* attract protections on the basis they are confidential (s 10D of the *Family Law Act*) or inadmissible (s 10E of the *Family Law Act*). The ALRC notes that Rule 15.31 of the *Family Law Rules 2004* (Cth) does provide for particular processes to apply when there is an objection relating to the inspection or copying of 'medical records'.

246 When such documents are produced under a subpoena courts sometimes place restrictions on who may look at them and how they may be used: See, eg, *Douglas & Mauldon* [2015] FCCA 2217.

247 See *Evidence Act 2011* (ACT) s 126B; *Evidence Act 1995* (NSW) pt 3.10 divs 1A–1B; *Evidence Act 1939* (NT) ss 56, 56B; *Evidence Act 1929* (SA) ss 67D, 67E; *Evidence Act 2001* (Tas) s 126B; *Evidence (Miscellaneous Provisions) Act 1958* (Vic) ss 32B, 32C; *Evidence Act 1906* (WA) s 20C.

248 [2011] FamCA 418.

being admitted into evidence apply to family law proceedings by virtue of the *Judiciary Act 1903* (Cth).[249]

10.148 The ALRC made recommendations in the *Uniform Evidence Law Report* to ascribe privilege to professional confidential relationships in uniform *Evidence Acts*.[250] Particularly, the ALRC recommended that any amendments to the *Evidence Act 1995* (Cth) should provide that in family law proceedings concerning children, the best interests of the child should be a paramount consideration and that, where the child is the protected confider, a representative of the child may make the claim for privilege on behalf of the child.

10.149 In family law proceedings parties may seek to issue subpoenas to obtain evidence that may become admissible in proceedings. Subpoenas are a mechanism parties can use to obtain another party's therapeutic records. There are existing discretionary safeguards to prevent the misuse of subpoenas in family law proceedings, including: a subpoena can be only be issued with permission from the court,[251] other than in applications for interim, procedural, ancillary or other incidental proceedings;[252] there are restrictions on the right of parties to examine subpoenaed material in certain circumstances;[253] and there is provision for the material to be initially viewed only by the judge so that weight and relevance may be determined later in proceedings.

10.150 Recommendation 37 relates to the adducing of evidence in family law proceedings, rather than addressing procedural matters relating to the production, inspection or copying of documents produced under subpoena. The ALRC recognises that in many instances the court cannot necessarily determine the probative value of evidence that may be obtained under subpoena without first reviewing the documents.

10.151 Amending the *Family Law Act* to give the courts an express power to exclude protected confidences would strengthen the position of a person who raises objections to the issuing or inspection of material produced under subpoena which is alleged to contain sensitive personal material, and where the sensitivity outweighs its relevance.[254] In addition, an express power to exclude protected confidences would recognise the public interest in ensuring that parties receive therapeutic assistance as required, while further enshrining in legislation that the best interests of the child is the paramount consideration when determining whether to exclude evidence in parenting proceedings.

10.152 The lack of a specific statutory provision protecting confidential processes in family law has raised a range of concerns, including:

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249 See s 79.

250 Australian Law Reform Commission; New South Wales Law Reform Commission; Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC Report No 102 (2006) recs 15.1, 15.2.

251 *Family Law Rules 2004* (Cth) r 15.17(2).

252 Ibid r 15.21.

253 Ibid r 15.31.

254 This was noted by the Family Court of Australia: Family Court of Australia, *Submission 68*.

- that the potential use of such records in court proceedings creates uncertainty about the scope of confidentiality that can genuinely be offered in therapeutic relationships;[255]
- such records are likely to be of limited probative value because they are not produced for forensic purposes;[256]
- people who need therapeutic assistance may be deterred from seeking it because their confidentiality may not be maintained;[257] and
- professionals and organisations who maintain such records may not be aware that they can object to the production of the material.[258]

10.153 Submissions to this Inquiry also raised further concerns about the possibility of sensitive records of adults and children who have experienced abuse or family violence being subpoenaed, and how the use of such records in legal proceedings could cause further trauma.[259] Critically, concerns were raised that access to these records could be sought by perpetrators as a means of perpetuating further abuse.[260]

10.154 The majority of stakeholders supported statutory reform in this area.[261] The Family Court suggested that consideration be given to amending the *Family Law Act* 'generally, or alternatively Division 12A of Part VII ... in parenting cases, to introduce provisions similar to those which exist in Division 1A and Division 1B of Part 3.10 of the *Evidence Act 1995* (NSW).'[262] The Court noted that these provisions protect professional confidentiality, relationship privilege, and sexual assault communications privilege.

10.155 The NSW Bar Association raised a concern that it should not be 'reasonably contemplated that the Court's capacity to make an Order in the best interests of a child

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255 CASA Forum submitted that 'it is essential for any client of a counselling service to be guaranteed confidentiality and protected from further acts of betrayal of trust, and that under no circumstances should an alleged perpetrator of family violence be permitted access to counselling records of the victim of abuse': CASA Forum Victorian Centres Against Sexual Assault, *Submission 404*.

256 Women's Legal Service NSW, *Sense and Sensitivity: Family Law, Family Violence and Confidentiality* (2016) 5; Interrelate Limited, *Submission 416*.

257 See Anglicare SA, *Submission 2*.

258 Women's Legal Service NSW, above n 256; Fitzroy Legal Service and Darebin Community Legal Service, *Submission 336*.

259 See, eg, The Royal Australian and New Zealand College of Psychiatrists, *Submission 18*. Relationships Australia submitted that they share the 'concerns about the use of subpoenas to 'weaponise' medical confidences, as expressed by the Royal Australian and New Zealand College of Psychiatrists; the college emphasises that this is 'exacerbated by the adversarial legal system in which there is an incentive to "win" rather than to resolve conflict': Relationships Australia National, *Submission 317*.

260 See National Legal Aid, *Submission 163*; CatholicCare Sydney, *Submission 79*; National Family Violence Prevention Legal Services Forum, *Submission 63*; Court Network, *Submission 49*; Women's Legal Services Australia, *Submission 45*; Anglicare SA, *Submission 2*.

261 Safe Steps Family Violence Response Centre, *Submission 408*; Family & Relationship Services Australia (FRSA), *Submission 407*; Australian Women Against Violence Alliance (AWAVA), *Submission 379*; Fitzroy Legal Service and Darebin Community Legal Service, *Submission 336*; Relationships Australia National, *Submission 317*; Mallee Family Care, *Submission 310*; National Legal Aid, *Submission 297*; National Family Violence Prevention Legal Services Forum, *Submission 293*; Bravehearts Foundation Ltd, *Submission 279*.

262 Family Court of Australia, *Submission 68*.

would be constrained'.[263] The construction of Recommendation 37 makes it clear that any amendment to the *Family Law Act* should ensure that in parenting proceedings the best interests of the child is the paramount consideration.

10.156 Additional matters for consideration raised by stakeholders included whether the court should be required to consider the availability of less intrusive sources of evidence, such as a short form report by a therapist upon request,[264] or the development of a higher legislative test regarding access of confidential processes when the confider is a child.[265]

10.157 Some stakeholders supported reforms restricting the issuing of subpoenas in relation to evidence of protected confidences without leave of the court.[266] Others observed that subpoenas relating to protected confidences are a useful mechanism for obtaining evidence about the nature and scope of family violence. For example, the NSW Bar Association submitted that:

> In cases where allegations of family violence are made, proper evidence must be available to the Court. Without supporting evidence, legal decision making will take place in the context of widespread factual uncertainty. The Courts already have significant powers to protect confiders, control subpoenas and the admissibility of evidence. Frankly, subpoenas and the material produced in response to them, are often the only sources of reliable or expositive information.[267]

263 NSW Bar Association, *Submission 373*.

264 Women's Legal Services Australia, *Submission 366*.

265 The Central Coast FLPN stated that, 'The rationale behind a more stringent test when the confider is a child is twofold. First, that children are particularly vulnerable in high-conflict parental disputes to procedural exploitation. Second that if children have been able to confide in a professional, and develop a beneficial/therapeutic relationship, the harm from any excavation of that relationship may significantly affect that child's ability to develop those relationships of trust in the future': Central Coast Family Law Pathways Network, *Submission 334*.

266 See, eg, ibid; Relationships Australia National, *Submission 317*; Bravehearts Foundation Ltd, *Submission 279*.

267 NSW Bar Association, *Submission 373*. The Law Council of Australia recognised in its submission that 'to determine the issue the legal representatives and Court would need to read the material in order to argue/determine probative value or other matters': Law Council of Australia, *Submission 285*.

11. Compliance with Children's Orders

Contents

Introduction

11.1 This chapter considers the issue of compliance with children's orders. Stakeholders raised concerns about the high rate of families returning to court following the making of orders,[1] as well as complaints about the costs and stress of responding to (sometimes many) contravention applications, and the need for improved measures to support highly conflicted parties to implement parenting arrangements and develop positive post-order communication.

11.2 Many stakeholders highlighted the tendency for interpersonal conflict to escalate and 'solidify' during court proceedings,[2] leaving parties ill-equipped to manage co-parenting arrangements when the proceedings end.[3] Submissions also noted that there needs to be greater support for families after the making of final orders to support compliance with the orders.[4]

11.3 The ALRC heard from a significant number of people through the confidential *Tell Us Your Story* portal that non-compliance with orders had been a significant issue for them which had caused anguish, led to repeated engagement with, and feelings of frustration about, the family law system. Some submissions also expressed immense frustration, particularly on the part of fathers, who found it difficult to enforce parenting orders.[5]

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1 Rae Kaspiew et al, *Court Outcomes Project (Evaluation of the 2012 Family Violence Amendments)* (Australian Institute of Family Studies, 2015), 41.

2 See, eg, M Packer, *Submission 178*; C Fitzpatrick, E Hooper, C Hooper and J Dmitrovic, *Submission 169*; Fitzroy Legal Service and Darebin Community Legal Centre, *Submission 7*.

3 See, eg, Relationships Australia Victoria, *Submission 129*; Interrelate, *Submission 126*.

4 See, eg, Victoria Legal Aid, *Submission 61*.

5 N Hansen, *Submission 374*.

11.4 It is recognised that exposure to ongoing high levels of parental conflict is a key predictor of poor outcomes for children.[6] Ongoing parental conflict is also a key contributing factor to non-compliance with court orders and returns to court for enforcement proceedings.[7] A 2015 AIFS study showed a high rate of repeat litigation in children's matters, with nearly four in ten judicially determined cases having previously been before the courts.[8]

11.5 This research also suggested that entrenched conflict is characteristic of contravention matters, revealing that few applications for enforcement represent one-off disputes, but tend to be part of an ongoing conflict involving multiple proceedings.[9] In addition, contravention applications often reflect a range of relationships issues, such as unresolved feelings about the breakdown of the marriage, grievances about child support payments or other financial matters, and anxieties about stepparents, rather than simply being a dispute over compliance with parenting orders.[10]

11.6 Any approach to compliance must include, in the first instance, preventative measures—promoting compliance and supporting parents to comply with parenting orders. Recommendations in this chapter are aimed at providing early intervention supports to assist parties to understand the nature and scope of their obligations under the orders, to minimise conflict between parties post final orders and to promote compliance with orders.

11.7 For those cases where non-compliance continues to be an issue the ALRC considers that the *Family Law Act* should explicitly and clearly set out the penalties that may apply in cases of contravention so that parents know the powers courts have to deal with them should they not comply with orders. Recommendation 42 addresses this issue by recommending that Pt VII Div 13A relating to parties who have not complied with children's orders be simplified and redrafted to provide that the court should have additional powers to deal with parties who do not comply with their orders.

11.8 Recommendations also address concerns that parties seek to re-litigate matters after orders have been made, which puts significant strain on both the parties themselves (and their children) and on the court system. These recommendations complement the recommendations in Chapter 10 regarding the strengthening of court powers to minimise harm caused by inappropriate use of court processes.

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6 EM Cummings and PT Davies, *The Guilford Series on Social and Emotional Development. Marital Conflict and Children: An Emotional Security Perspective* (Guilford Press, 2010).

7 Helen Rhoades, 'Contact Enforcement and Parenting Programmes—Policy Aims in Confusion?' (2004) 16 *Child and Family Law Quarterly* 1. For a case study on this, see Fitzroy Legal Service and Darebin Community Legal Centre, *Submission 7*.

8 Kaspiew et al, above n 1, 41.

9 Ibid.

10 Helen Rhoades, above n 7, 2–3.

Supporting compliance with parenting orders

Post-parenting order meetings with Family Consultants

Recommendation 38 The *Family Law Act 1975* (Cth) should be amended to require parties to meet with a Family Consultant to assist their understanding of the final parenting orders made by a court following a contested hearing.

11.9 To promote parties' compliance with parenting orders, the *Family Law Act* should provide that all parties (and their children if appropriate) involved in contested proceedings for final parenting orders must meet with a Family Consultant to have their orders explained to them.

11.10 Failure to follow parenting orders may occur for a number of reasons, not all of which are the result of deliberate non-compliance. One reason may be that parties do not understand the terms of the orders and the obligations they create. This recommendation reflects this understanding and acknowledges that parties who have been involved in final contested parenting proceedings are likely to have high levels of conflict which increases the possibility of non-compliance with orders.

11.11 In October 2017, the Centre for Family Research and Evaluation released an evaluation of the Parenting Orders Program Enforcement Pilot (POPE Pilot).[11] The evaluation examined two existing providers of federally funded Parenting Orders Programs that were funded to trial a POPE Pilot, involving alternative models for families with high and entrenched conflict including family violence.[12] The report states that:

> The intention of this POPE Pilot was [to] provide support to families after they have been given interim or final parenting orders (whether by consent or judicially determined orders), and to divert parents from initiating applications for contraventions of parenting orders, which often occurs within 12 months of the orders being made.[13]

11.12 The Centre's findings included that:

- court orders could be used as leverage for engagement;
- a key element of intervention is clarification of current order interpretations and applications early; and
- including practical strategies for parents in psycho-education is important to assist

11 Elizabeth Clancy et al, *Parenting Orders Program Enforcement Pilot: Evaluation Report* (Centre for Family Research and Evaluation, 2017).

12 The two service agencies were CatholicCare Victoria Tasmania (CCVT), who delivered a Parenting Orders Support Program (POSP) in Dandenong and Geelong and Uniting (previously Unifam), who delivered a Parenting Orders Intervention (POI) program in Parramatta, with the intention of each service seeing 50 families, estimated at including 125 unique clients: Ibid.

13 Ibid.

> them to strengthen their communication and conflict resolution skills and learn how to manage ongoing co-parenting dynamics and issues.[14]

11.13 Submissions and consultations to this Inquiry suggested that a lack of understanding of orders can play a key role in non-compliance and that the period immediately following the issuing of orders is a critical time to support parents to self-manage compliance with their orders.[15] Family & Relationship Services Australia (FRSA) referred to a survey it conducted in November 2018 in which it invited members to comment on 'the experience of families needing to use the courts for parenting orders and to share examples of "what works" to support parents through the process and once orders are in place'.[16] FRSA reported that the critical starting point for helping parents comply with parenting orders is 'clear information about why the orders are needed and what they are intended to achieve'.[17] Further, it submitted that survey respondents noted that

> parents often find it difficult to interpret orders, partly because of the complex language used but also because of the high levels of conflict they are experiencing. Misunderstanding can lead to protracted engagement with the court and/or resulting orders that are impractical or unworkable.[18]

11.14 Dr Morris and Professor Halford suggested that interventions for co-parenting after separation could include a short educational session that outlines the key components of court orders and the repercussions of non-compliance with court orders, the impact of conflict on adults and children, and key strategies for being a child-focused co-parent.[19]

11.15 Relationships Australia Victoria submitted that in their experience

> the period following the issuing of orders presents a window of opportunity to interrupt patterns of entrenched conflict, allowing families to reset, repair, and move towards self-management if provided with the appropriate scaffolding, support, and education.[20]

11.16 The Hon Professor Chisholm AM observed that the present law relies heavily on deterrence, and while acknowledging that there should be a place for this, 'recent research indicates that there are limits to the effectiveness of deterrence'.[21] Chisholm observed that consideration should instead be given to how the family law system 'could draw on recent understanding of human decision making so that the system does a better job of encouraging compliance with parenting orders, and more importantly, facilitating post-order cooperative parenting'.[22] Chisholm suggested that better understandings of how people make decisions could result in orders being accompanied by

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14 Ibid.
15 See, eg, Family & Relationship Services Australia (FRSA), *Submission 407*; Relationships Australia Victoria, *Submission 267*.
16 Family & Relationship Services Australia (FRSA), *Submission 407*.
17 Ibid.
18 Ibid.
19 M Morris and K Halford, *Submission 344*.
20 Relationships Australia Victoria, *Submission 267*.
21 R Chisholm, *Submission 132*.
22 Ibid.

illustrations, perhaps videos, illustrating parents overcoming difficulties and managing to work out ways of complying with parenting orders or agreeing on child-focused adaptations to changing circumstances. The overall impact could be to treat compliance as a given, and help people achieve it.[23]

Post-order case management by Family Consultants

Recommendation 39 The *Family Law Act 1975* (Cth) should be amended to provide that:

- in all parenting proceedings for final orders, the courts must consider whether to make an order requiring the parties to see a Family Consultant for the purposes of receiving post-order case management; and
- the appointed Family Consultant has the power to seek that the courts place the matter in a contravention list or to recommend that the court make additional orders directing a party to attend a post-separation parenting program.

11.17 To promote parties' compliance with final parenting orders, the *Family Law Act* should be amended to require courts to consider whether the parties should be required to see a Family Consultant for the purposes of post-order case management, to assist them in implementing and complying with their orders.

11.18 Post-order case management by Family Consultants could include:

- providing information on children's needs and parenting after separation;
- providing age appropriate information for children on the parenting arrangements in the orders;
- connecting parties and children with appropriate support services;
- counselling parties on issues relating to the implementation of the orders;
- assisting with the resolution of disputes about the implementation of the orders;
- monitoring the family's engagement with support services;
- supervising handovers of children;
- supervising the implementation of the orders; and
- monitoring compliance with the orders, including being required if necessary to report back to the court on particular issues relating to parties' compliance.

11.19 Section 65L of the *Family Law Act* provides that the courts can make a parenting order which is subject to a Family Consultant supervising or assisting compliance by the parties with the order.[24] The form of supervision and assistance under s 65L orders varies

23 Ibid.

24 Section 65L(1)(b) provides that the court can make 'an order requiring a family consultant to give any party to the parenting order such assistance as is reasonably requested by that party in relation to compliance

to suit the particular circumstances of the parties. Section 65L orders have been made to address a range of issues, including: mitigating risks posed by parties;[25] facilitating parties' attendance at drug rehabilitation or other programs;[26] and facilitating changes in parenting arrangements.[27]

11.20 Stakeholders to this Inquiry advised that the use of s 65L orders by the courts has been limited in recent years due to funding and resource constraints.[28]

11.21 It is recommended that the current provisions:

- **be strengthened** by placing a positive obligation on decision makers to consider whether parties should be referred for post-order case management pursuant to final orders;
- **be expanded** so that parties may be ordered to attend upon a Family Consultant for the purposes of post-order case management with the role of Family Consultants being broadened; and
- **include powers** for Family Consultants to seek that the court address matters where there are concerns regarding non-compliance with the orders by the parties.

11.22 Research and reports have recognised the importance of post-order supports for families.[29] The rationale, and need for this support for families has been recognised by former Chief Justice of the Family Court, the Hon Diana Bryant AO QC as follows:

> In my view many families who have their parenting cases determined by a judge (and potentially many who settle their cases before a hearing) would benefit from assistance from a professional after the orders have been made. It is in my experience, naïve to think that parties who have been in conflict for months and years will suddenly be able to communicate well simply because a judge has made final orders. Usually their conflict has a deeper conflictual basis than just the orders that are in dispute in the litigation; that is one of the things that makes family law litigation so complex.
>
> Hence left to their own devices, disputes arise and one or other party wants to vary orders, or does not comply with orders, giving rise to further litigation. I appreciate that this can occur from changes in the circumstances of the parties' post-litigation, but without the means of resolving these issues, they will be left to re-commence the litigation, absent reaching agreement.[30]

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with, and the carrying out of, the parenting order'. Section 65L(2) provides that in 'deciding whether to make a particular order under subsection (1) in relation to a child, a court must regard the best interests of the child as the paramount consideration': *Family Law Act 1975* (Cth).

25 See, eg, *Harridge & Harridge* [2010] FamCA 445.

26 See, eg, *Froth & Schneider* [2011] FAMCA 378; *Carlson & Bowden* [2010] FamCA 432.

27 See, eg, *Stapleton & Hayes* [2008] FamCA 437; *Bilney & Brisco* [2013] FamCA 561; *Baglio & Baglio* [2013] FamCA 105.

28 See Gadens, *Submission 412*; Family Court of Australia, *Submission 400*; NATSILS, *Submission 290*; Law Council of Australia, *Submission 285*; D Bryant, *Submission 35*.

29 See Family Law Council, *Child Contact Orders: Enforcement and Penalties* (1998); Family Law Council, *Improving Post-Order Parenting Processes* (2007); Family Law Pathways Advisory Group, *Out of the Maze: Pathways to the Future for Families Experiencing Separation* (2001).

30 D Bryant, *Submission 35*.

11.23 Bryant further submitted 'that the provision of post-order support services, particularly in cases where the proceedings have been acrimonious, is lacking and has been for many years.'[31] Gadens submitted that in their experience:

> many families who have had their parenting cases determined by a judge, as well as many families who have been able to settle their proceedings by consent, prior to a contested final hearing, would benefit from the support of a professional to navigate the implementation of parenting orders, which requires a shift from the dominance of the conflict to a new understanding between parents where their communication and behaviours are focused on the emotional and physical needs of their children.[32]

11.24 The Australian Government recognised the importance of providing post-order support to families through the Parenting Orders Program–Post Separation Co-operative Parenting Program (POP/PSCPP) as part of the Family Relationship Services Program (FRSP). The POP/PSCPP assists separated or divorced parents experiencing difficulties in resolving or managing conflict, which arise over parenting arrangements for their children. The intended outcomes of these programs include assisting parties to avoid breaching orders in the future.[33]

11.25 As referred to above, the Centre for Family Research and Evaluation released an evaluation report in October 2017 which evaluated two existing providers of federally funded Parenting Orders Programs under the POPE Pilot, involving alternative models for families with high and entrenched conflict including family violence. The overall outcomes of that evaluation showed positive gains for clients.[34]

11.26 Submissions to this Inquiry highlighted some of the current programs being provided by service providers to assist families post parenting orders, with the success of some of those programs being noted.[35]

11.27 There was significant support in submissions for a post-order parenting service.[36] The benefits of post-order supervision identified in submissions and in the research[37] included:

- improved communication between parents;

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31 Ibid.

32 Gadens, *Submission 412*.

33 Australian Government, 'Help for parents after separation', *Family Relationships Online,* <www.familyrelationships.gov.au >.

34 Clancy et al, above n 11.

35 See, eg, Family & Relationship Services Australia (FRSA), *Submission 407*; Mallee Family Care, *Submission 310*; Family Life, *Submission 309*; Law Council of Australia, *Submission 285*.

36 It is noted that submissions in response to the Discussion Paper were primarily responding to the proposal for a new post-order parenting service which was modelled on the parenting coordinator role in overseas jurisdictions. However, the submissions broadly supported the general concept of a post-order parenting service, rather than just the specific model identified in the Discussion Paper. See, eg, Gadens, *Submission 412*; Family & Relationship Services Australia (FRSA), *Submission 407*; Australian Institute of Family Studies, *Submission 396*; N Hansen, *Submission 374*; Women's Legal Services Australia, *Submission 366*; Relationships Australia National, *Submission 317*; National Legal Aid, *Submission 297*; Domestic Violence Victoria, *Submission 284*; Relationships Australia Victoria, *Submission 267*.

37 Clancy et al, above n 11.

- reductions in contravention applications;
- increased levels of trust and respect between parties;
- improvements in personal safety and reduced exposure to family violence for children;
- improvements in mental health and wellbeing for adults and children; and
- improvements in abilities to co-parent.

11.28 Out of court service providers assist parties post orders to manage conflict and co-parent more effectively. The ALRC's recommendation requires Family Consultants to develop referral relationships with service providers who can provide specific supports and programs to parties to assist them in the post-order period.

11.29 The ALRC is recommending that post-order case management be undertaken by Family Consultants because:

- this role has been undertaken by Family Consultants in the past and has been recognised as being successful by stakeholders;
- Family Consultants have the requisite skills to undertake this work and provide both therapeutic and monitoring interventions;
- common and consistent skill sets and training can be assured if post-order case management is provided by Family Consultants;
- Family Consultants can provide post-order case management under the authority of the court;
- Family Consultants have capacity to work with a family throughout proceedings, rather than just post final orders;
- Family Consultants have in-depth understandings of court processes, and the nature and extent of court orders;
- Family Consultants can create linkages with FASS to provide discrete advice or support as required; and
- Family Consultants are uniquely placed to provide feedback to courts in cases where non-compliance with orders may be a concern.

11.30 In Chapter 12, at Recommendation 43, an expanded role for Family Consultants (which includes this post-order case management function) is recommended. The ALRC recognises that funding will need to be provided to the courts to facilitate this expanded role for Family Consultants.

11.31 There was support in submissions and consultations for Family Consultants to undertake post-order case management.[38] The Family Court was of the view that the functions of a post-order parenting service could be conducted by Family Consultants. The Court stated:

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38 See, eg, Community and Public Sector Union (CPSU), *Submission 406*; M Morris and K Halford, *Submission 344*.

> that with an increase in funding and resources family consultants are ideally placed to deliver all other aspects of post-order support, as they have the requisite expertise and, as Court employees, they would bring a level of authority to the role that would enhance party engagement with the service.[39]

11.32 The Law Council of Australia recommended increased resourcing of Child Dispute Services to enable Family Consultants to perform this function and make more orders to be made under section 65L.[40] National Family Violence Prevention Legal Services (NFVPLS) submitted that 'the current s65L provision could be built upon to enable Family Consultants and ALOs [Aboriginal Liaison Officers] involved in the matter to provide post-order oversight and assistance in complex cases, as required'.[41]

11.33 Morris and Halford submitted that Family Consultants 'can assist parents to manage co-parenting orders after they have received their final parenting orders'.[42] The types of roles they identified Family Consultants could undertake included: adjustment counselling to assist parents to individually accept and cope with their newly separated lives; managing different parenting styles and the integration of new partners; monitoring adjustment issues for children of separation; monitoring the family's engagement with their support interventions and assisting them with choosing helpful pathways for improving their family communication, and co-ordinating their parenting between parents.[43]

11.34 Further issues for consideration, include:

- whether the *Family Law Act* should provide that an Independent Children's Lawyer can be appointed to work with an appointed Family Consultant to assist with post-order case management;[44]
- whether the *Family Law Act* should provide guidance to the court about the matters that should be taken into consideration when determining whether to make an order requiring parties to attend upon a Family Consultant for post-order case management; and
- whether parties to consent orders should be able to access the post-order case management service provided by Family Consultants.[45]

11.35 It has been recognised by the courts that there are some difficulties with the finality of orders when s 65L orders are being made. In *Kocsis v Martin*,[46] it was noted that 'a s 65L supervision requirement is almost necessarily predicated on the making of an interim order, or a final order that is potentially subject to review at the period of

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39 Family Court of Australia, *Submission 400*.
40 Law Council of Australia, *Submission 285*.
41 National Family Violence Prevention Legal Services Forum, *Submission 293*.
42 M Morris and K Halford, *Submission 344*.
43 Ibid.
44 See, eg, Law Council of Australia, *Submission 285*.
45 See, eg, R Carroll, *Submission 289*.
46 [2007] FMCAfam 913.

supervision'.[47] The court was, therefore, not in favour of such an order as the court felt that '[o]ngoing litigation is not in the best interests of these children or indeed of the mother and father'.[48]

Leave requirements

Interim parenting orders

Recommendation 40 The *Family Law Regulations 1984* (Cth) should be amended to require leave to appeal interim parenting orders. Leave should only be granted where:

- the decision is attended by sufficient doubt to warrant it being reconsidered; and
- substantial injustice would result if leave were refused, supposing the decision to be wrong.

11.36 The *Family Law Act* provides that leave is required to appeal from prescribed court decrees.[49] The list of prescribed decrees is found in the *Family Law Regulations*.[50] The effect of the current regulations is that leave to apply is required for appeals against all interim orders of the court apart from decrees relating to a 'child welfare matter'.[51] 'Child welfare matter' is a defined term in the regulations that means a matter relating to:

(a) the person or persons with whom a child is to live; or

(b) the person or persons with whom the child is to spend time or communicate; or

(c) any other aspect of parental responsibility, within the meaning of Part VII of the *Family Law Act*, for a child.[52]

11.37 A requirement to seek leave before appealing interim matters is a common (but not universal) feature across appeals courts.[53] The requirement that a person seek leave to appeal in interim matters (including the exclusion of child welfare matters) was first introduced to the *Family Law Act* in the *Law and Justice Legislation Amendment Act 1990* (Cth) on the recommendation of the Family Law Council, and although it has since

47 Ibid [63].
48 Ibid.
49 *Family Law Act 1975* (Cth) s 94AA(1).
50 *Family Law Regulations 1984* (Cth) reg 15A.
51 Ibid reg 15A(1).
52 Ibid reg 15A(2).
53 See, for example *Federal Court of Australia Act 1976* (Cth) s 24(1A)–note the exception in s 24(1C); *Supreme Court Act 1970* (NSW) s 101(2)(e); *Supreme Court Act 1986* (Vic) s 17A (which applies more broadly than just interim matters).

been transferred to the *Family Law Regulations*, the exception for child welfare matters has remained substantially the same since its introduction.

11.38 While there is little discussion of the provision in the explanatory materials surrounding the *Law and Justice Amendment Act 1990* (Cth) the approach was likely informed by the idea that appeals against interim orders in child welfare matters could require urgent consideration to protect the child from abuse or harm. Given the comparatively rapid turn around of family law cases at that time, applicants would be less likely to appeal on matters of minor importance, meaning that appeals would be more likely to relate to matters where a child is at risk. In this context, the added time it would take to assess an application for leave could increase the risk that a child could be harmed before the matter is resolved.

11.39 This is not the reality of the current family law system. In 2017–18 in the Family Court, applicants filed 390 notices of appeal from the various family courts.[54] Family law cases can take months or years to resolve.[55] Interim orders can last for long periods, creating a greater incentive to appeal even minor matters, both to ensure that the party is not substantially disadvantaged for the period of the interim order, but also because interim arrangements can become entrenched to an extent that can affect the content of final orders.

11.40 In addition, the high rate of self-represented litigants,[56] combined with the time frame required for final orders mean that appeals are more likely to be filed in circumstances where there is no reasonable prospect of success.

11.41 The ability to appeal on unmeritorious grounds can also be utilised as a form of systems abuse, providing an abuser with another weapon with which to harass the other party. In 2017–18 in the Family Court of the 370 finalised appeals, 288 (nearly 78%) were dismissed, abandoned or withdrawn.[57]

11.42 It is appropriate that the test for leave should be the same as currently set out in case law for family law interim matters other than child welfare matters and that applies generally to leave applications in the Federal Court. These principles are set out in *Medlow & Medlow*[58] which states that:

> ...the test to be applied in applications for leave to appeal under s 94AA of the Act is whether, in all of the circumstances, the decision is attended by sufficient doubt to warrant it being reconsidered by the Full Court **and** whether substantial injustice would result if leave were refused, supposing the decision to be wrong.

54 Family Court of Australia, *Family Court of Australia 2017–18 Annual Report* (2018) 37.
55 Ibid ch 3.
56 At 30 June 2018 33% of pending applications in the Family Court were over 12 months old: Ibid.
57 Ibid ch 4. See also Chapter 3 of this report.
58 (2016) 306 FLR 183 [57].

11.43 As raised by one submission,[59] the assessment of leave applications will have a resourcing cost for the courts. However, this resourcing cost would be partially mitigated by improved case management of interim appeals cases, the lowered incentive to pursue systems abuse through frivolous and vexatious applications, and a lower number of interlocutory applications progressing to hearing. Resourcing cost could be further mitigated by the adoption of court rules that delegate the assessment of leave applications a single judge of the Appeal Division.

11.44 Requiring parties to apply for leave to appeal interim parenting decisions will have a number of advantages. It will allow the court to better manage the caseload of appeals against interim decisions. The court would be able to dismiss applications that either do not attract sufficient doubt for reconsideration or where there is no substantial injustice from the refusal of leave, saving court time that would otherwise have to be spent in hearings.

11.45 By refusing leave for unmeritorious applications, meritorious appeals will be able to be heard more promptly, lowering the risk of further issues arising in the interim. The assessment process would also allow the court to identify elements of cases that they may wish to fast track, for example where there is a substantial risk of family violence or harm to a child if the interim decision stands.

11.46 For both meritorious and unmeritorious applications for appeals, the faster turn around would allow hearings for final orders to proceed at an earlier date.

Applying for new orders about children

Recommendation 41 The *Family Law Act 1975* (Cth) should be amended to explicitly state that when a new parenting order is sought, and there is already a final parenting order in force, the court must consider whether:

- there has been a change of circumstances that, in the opinion of the court, is significant; and
- it is in the best interests of the child for the order to be reconsidered.

11.47 Parenting orders necessarily reflect the best interests of the child as at the time the order is made. As time passes, orders can become less relevant to the child and parents' circumstances. Many issues, including changes in relationships, living arrangements, and financial circumstances, as well as serious accidents or health issues, can make existing orders impractical or inappropriate.

11.48 The *Family Law Act* provides two different mechanisms for existing orders to be varied or replaced. Parenting plans are written agreements made with the consent of

59 Hon M Finn, *Submission 308*.

the parents of the child[60] that may deal with various matters including where the child is to live, who a child will spend time with, the allocation of parental responsibility and other matters that relate to the care and welfare of the child as well as the process the parents will use to resolve disputes and make further changes to the agreement.[61] Except where the court provides otherwise due to the existence of exceptional circumstances[62] a prior parenting order will be subject to a parenting plan[63], meaning that provisions of a parenting order will be unenforceable to the extent that they have been over-ridden by the parenting plan. Parenting plans provide a low cost, relatively quick method for updating parenting orders without needing to go to court.

11.49 Alternatively, the family courts have the power under the *Family Law Act* to discharge, vary, suspend, or revive earlier parenting orders.[64] The Act does not specify the circumstances in which parties may return to the family courts to seek revision of an order. It is clear, however, that constant re-litigation of decisions about parenting arrangements is unlikely to be in the interests of the child. To address this, case law has established some guidance on the issue, known as the principle in *Rice & Asplund*[65]. In that case, Evatt CJ held that for a court to reconsider a previous order there would need to be 'some changed circumstance that will justify such a step' and that the correct approach was 'a need to establish a significant change'. However, it is unlikely that parents will be aware of this case law.

11.50 The current case law is also open to misunderstanding. Although it is commonly understood as requiring a significant change of circumstances, the case law presents a more nuanced test. In *Marsden & Winch* the Full Court of the Family Court agreed with the observation of Warnick J in *SPL & PLS*[66] that the test is a reflection of a best interests analysis,[67] and stated that the court must look at:

> (1) The past circumstances, including the reasons for the decision and the evidence upon which it was based.
>
> (2) Whether there is a likelihood of orders being varied in a significant way, as a result of a new hearing.
>
> (3) If there is such a likelihood, the nature of the likely changes must be weighed against the potential detriment to the child or children caused by the litigation itself. Thus, for example, small changes may not have sufficient benefit to compensate for the disruption caused by significant re-litigation.[68]

60 *Family Law Act 1975* (Cth) s 63C(1).
61 Ibid s 63C(2).
62 Ibid s 64D(2).
63 Ibid s 64D(1).
64 Ibid s 65D(2).
65 *In the marriage of Rice and Asplund* (1978) 6 FamLR 570.
66 (2008) FLC 93-363, [48], [81].
67 *Marsden & Winch* (2009) 42 FamLR 1, [46]–[47].
68 Ibid [50]. This formulation was cited by the Full Court of the Family Court with approval in *O'Brien & O'Brien* [2017] FamCAFC 219, [21].

11.51 For litigants who are not legally represented, the approach of the current case law is likely to cause confusion.[69] Given the high rate of unrepresented appellants,[70] it is important that the law be as clear on the face of the statute as possible.

11.52 The ALRC considers this is an important issue and recommends that the threshold for a rehearing be clear on the face of the legislation.

11.53 A submission by Interact Support Inc supported this proposal, with the proviso that the recommendation should not impact on the ability of parties to make parenting plans to alter parenting arrangements.[71] Parenting plans are an important and, in cases absent family violence or other complexities that would preclude direct negotiation, preferable approach for parties to resolve issues relating to changes in circumstance. Parenting plans should remain an effective alternative option to applying for a new parenting order. This recommendation is intended to work in conjunction with parenting plans, not replace them.

11.54 Other submissions stated that rather than seeking new parenting orders, parties should be required to go to mediation.[72] Although there is a theoretical requirement to file a s 60I certificate (apart from in circumstances where an exception applies) even where there are pre-existing parenting orders, it is apparent that this practice is not uniform across the registries of the Family Court and the Federal Circuit Court.[73]

11.55 It is important that parties are able to bring new applications about parenting arrangements consequent upon a significant change in the circumstances of the parties, or of the child. It may be necessary to change arrangements to support the best interests of the child.

11.56 Likewise, it is important that parties are able to understand the laws that apply to their circumstances. The *Family Law Act* should be amended to provide that when parties apply for a new order about parenting arrangements, consideration should be given to whether there is a change of circumstances that, in the opinion of the court, is significant, and whether it is safe and in the best interests of the child for the order to be reconsidered.

11.57 In the Discussion Paper, this recommendation included the proposal that leave be required to apply for a new parenting order. However, that would be a departure from the existing situation where it is well settled that the rule in *Rice & Asplund* can be applied at the outset of a hearing or proceedings or at the end of proceedings. Leave is usually associated with appeal cases, and while hearings that reconsider existing parenting orders are in some ways analogous to appeal cases (in that they are reconsidering the

69 D Bryant, *Submission 35*.
70 In 2017–18 46% of appellants were unrepresented, see Family Court of Australia, above n 54, ch 4.
71 Interact Support Inc, *Submission 389*; J Reid, *Submission 345*.
72 J Sturgiss, *Submission 342*.
73 Family Court of Australia, *Compulsory Family Dispute Resolution – Court Procedures and Requirements Fact Sheet* <www.familycourt.gov.au>; Confidential communications with court staff.

order made by a previous court), they are in fact first instance cases that are (at least purportedly) dealing with a different factual situation to the previous case. Dealing with these applications as appeals (by adding a leave requirement) risks disenfranchising these people, particularly if these applications were to be dealt with by registrars. It also removes the judicial discretion to consider *Rice & Asplund* principles at the end of the proceedings when the judge considers it is appropriate, or there is value, in doing so.

11.58 The primary reason given in the Discussion Paper (and referred to in submissions)[74] for adopting a leave requirement was to protect parties from being harassed by multiple applications. The courts already have processes to deal with this kind of harassment,[75] and Recommendation 32 proposes other approaches to strengthen these protections.

Consequences of failure to comply with children's orders

Recommendation 42 Part VII Div 13A of the *Family Law Act 1975* (Cth) should be redrafted to achieve simplification, and to provide for:

- a power to order that a child spend additional time with a person;
- a power to order parties to attend relevant programs at any stage of proceedings; and
- a presumption that a costs order will be made against a person found to have contravened an order.

11.59 A particular area of the *Family Law Act* which would benefit from simplification and redrafting is Pt VII Div 13A relating to parties who have not complied with children's orders.[76]

11.60 The private interest in ensuring compliance with court orders is clear: the person or persons who have obtained court orders have an interest in ensuring that the specific orders are adhered to. There is also a broader public interest in compliance with court orders, described by the High Court as protecting the 'effective administration of justice by demonstrating that the court's orders will be enforced'.[77] In the family law context, the rationale for the court's involvement in enforcing orders has been expressed by Kay J in *D and C (Imprisonment for Breach of Contact Orders)*:

> The primary purpose of enforcement proceedings for non-compliance with an order is to try to ensure compliance with the order … There are circumstances where it is important to uphold the authority of the court and impose a penalty as a specific or general deterrent.[78]

74 See, for example Victorian Judicial Advisory Group in Family Violence (JAGFV), *Submission 333*.
75 *Family Law Act 1975* (Cth) s 45A and pt XIB.
76 See R Chisholm, *Submission 132*, for a history of contravention provisions in the *Family Law Act*.
77 *Australian Meat Industry Employees' Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98, 107.
78 *D & C (Imprisonment for Breach of Contact Orders)* [2004] FamCA 814.

11.61 A parenting order, which has not been altered by a parenting plan may be contravened if a person:

- intentionally fails to comply with the order;
- makes no reasonable attempt to comply with the order;
- intentionally prevents compliance with the order by a person who is bound by it; or
- aids or abets a contravention of the order by a person who is bound by it.[79]

11.62 Contravention applications are sometimes described as 'quasi-criminal'. Division 13A applies the criminal standard of proof to some orders and not to others.[80]

11.63 The court has a range of options for making orders in contravention proceedings, including in cases where a contravention has been alleged and not established. Broadly speaking, these escalate in seriousness as the contravention increases in gravity and according to whether or not there was a reasonable excuse for contravening the order.[81] In all cases where a contravention application has been made, the court has the power to vary the original order.[82] Other orders available depend on the court's findings as to the seriousness of the contravention and include costs orders, community service orders, bonds, fines and imprisonment.[83]

11.64 Division 13A comprises 30 separate provisions and six sub-divisions. Criticisms of Div 13A and how the provisions operate in practice have been raised by the courts. In particular, the complexity of the division has been noted by the courts.[84] In *Gresham v Gresham,* Forrest J described the courts' difficulties with Div 13A as follows:

> This court is constantly required to hear and determine contravention applications brought by litigants who appear without legal representation who have not read and do not know and understand all of the provisions of Div 13A. It is an onerous task for a Judge to have to determine a contravention application, particularly given the complexities of Div 13A, even when assisted by the most capable of legal practitioner.[85]

79 *Family Law Act 1975* (Cth) s 70NAC.
80 Ibid s 70NAF.
81 Subdivision C (ss 70NCA and 70NCB) applies in cases where a contravention has been alleged but not established. Subdivision D (ss 70NDA, 70NDB, 70NDC) applies in cases where a contravention has been established but there is a reasonable excuse for the contravention. Subdivision E (ss 70NEA, 70NEB, 70NEC, 70NECA, 70NED, 70NEF, 70NEG) applies in cases where a contravention has been established without reasonable excuse (in cases of less serious contraventions). Subdivision F (ss 70NFA, 70NFB, 70NFC, 70NFD, 70NFE, 70NFF, 70NFG, 70NFH, 70NFI, 70NFJ) applies in cases where a contravention has been established without reasonable excuse (in cases of more serious contraventions): Ibid.
82 Ibid s 70NBA.
83 Ibid s 70NFB.
84 See, eg, *Sellen & Sellen* [2018] FamCA 891, [5]; *Keightley & Keightley (No 4)* [2010] FamCA 1160; *Yates & Turner* [2009] FamCA 887; *Moulden & Tan (No 2)* [2010] FamCA 927; *Harrel & Hancock-Harrel* [2015] FamCA 362; *Ackersley & Rialto* [2009] FamCA 817; *Gervasis & Purdy* [2009] FamCA 255.
85 *Gresham & Gresham* [2017] FamCA 270, [12].

11.65 Stakeholders to this Inquiry also expressed concern regarding the complexity of the relevant provisions,[86] and the difficulties users have in understanding them.[87] The Family Court observed that Div 13A was of a 'labyrinthine nature', highlighting the distinction between less serious and more serious contraventions; the difference in the standard of proof necessary depending on what penalty is imposed; and the difficulties in respect of procedures when a party fails to enter a bond.[88] Chisholm described the division as 'needlessly complex, difficult to understand, and impossible to defend' and argued that a 'complete revision of this part of the Act is essential'.[89] His submission included a proposed redraft of Div 13A, which is intended to make the division more concise and to provide clarity for lawyers and non-lawyers.[90]

11.66 Some stakeholders also raised concerns regarding the substance of the provisions. Caxton Legal Centre argued that Div 13A requires 'substantial change', noting that it is reported to be a 'toothless tiger'.[91] Chisholm suggested reforms that would provide for: a power to order additional time in contravention proceedings whenever a child has not spent time with a person as a parenting order has required; a power to order parties to attend a post-separation parenting program to be available at any stage of Div 13A proceedings; and the inclusion of a rebuttable presumption favouring a costs order under s 117 against a contravener.[92] The Family Court suggested that any redrafting of Div 13A should consider the particular features of the types of applications that occur regularly, including:

> Contravention applications that are brought in the midst of parenting proceedings which will ultimately be heard by the court where the court might decide that the arrangements which are in the best interests of the children are different from those upon which the contravention application has been based.
>
> Contravention applications that are brought as a point-scoring exercise either in response to a contravention application by the other parent or for some other forensic purpose.
>
> Contravention applications that contain large numbers of counts going back a considerable period in time. When considering what outcome the applicant is seeking to achieve, the question has to be asked whether or not that outcome will be different if 3 counts are dealt with as opposed to 27.[93]

86 R Chisholm, *Submission 132*.
87 Family Court of Australia, *Submission 68*; Caxton Legal Centre, *Submission 51*.
88 Family Court of Australia, *Submission 68*.
89 R Chisholm, *Submission 132*. See also, Richard Chisholm, 'Compliance with Parenting Orders: A Modest Proposal to Re-Draft Division 13A of Part VII' (2018) 27 *Australian Family Lawyer* 19.
90 In addition to simplifying and shortening the provisions, Chisholm included some limited changes of substance in his redraft.
91 Caxton Legal Centre, *Submission 51*.
92 R Chisholm, *Submission 132*.
93 Family Court of Australia, *Submission 68*.

12. Support Services in the Courts

Contents

Introduction

12.1 Many of the provisions of the *Family Law Act* as originally enacted, and as subsequently amended, illustrate how the objectives of informality, privacy, and respect for the dignity of separating couples were translated into legislation. They illustrate Parliament's intention to identify and treat family law as being different in character from other areas of civil law because of the emotional and financial consequences of relationship breakdown, and its public policy impacts on the wider society.

12.2 Parliament's intention is most clearly reflected in the principles contained in s 43 of the Act, which require the court to have regard to considerations which exceed those of the parties to the proceedings before it:

> The Family Court shall, in the exercise of its jurisdiction under this Act, and any other court exercising jurisdiction under this Act shall, in the exercise of that jurisdiction, have regard to:
>
> (a) the need to preserve and protect the institution of marriage as the union of 2 people to the exclusion of all others voluntarily entered into for life;
>
> (b) the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, **particularly while it is responsible for the care and education of dependent children**;

(c) the need to protect the rights of children and to promote their welfare;

(ca) the need to ensure protection from family violence; and

(d) the means available for assisting parties to a marriage to consider reconciliation or the improvement of their relationship to each other and to their children.

12.3 Assistance in achieving these objects was to be found in the distinguishing features of the Family Court, as originally envisaged[1] — namely, that it would:

- deal exclusively with family law matters;
- be a 'helping court';
- be composed of judges appointed specifically for their suitability for dealing with family law matters;
- be housed in suitably informal surroundings; and
- **have attached to it ancillary staff including welfare officers, marriage counsellors and legal advisors**.

12.4 One of the most significant features of the Family Court was the establishment of its in-house counselling service as an integral part of the Court's function. The service was intended to encourage parents to resolve disputes over children without resorting to litigation and with the assistance of Court staff qualified in either social work or psychology.

12.5 The nature of the services the Family Court provides has changed over the years, as has the terminology used to describe those services and the extent to which people are counselled in-house or referred to agencies external to the Court (as provided for in Pt II of the *Family Law Act*). Part III of the *Family Law Act* provides for the provision of in-house services by Family Consultants (originally known as Court Counsellors). In recent years, funding cuts have undermined the ability of Family Consultants to provide a range of services consistent with Parliament's expectations of a family court.

12.6 Another important initiative of the *Family Law Act* was the power given to the court to appoint an Independent Children's Lawyer in proceedings in which the child's best interests or welfare are the paramount or a relevant consideration.[2] An Independent Children's Lawyer may be appointed on the court's own motion or on the application of the child, an organisation concerned with the welfare of children, or any other person.[3] In practice, the court invariably orders such an appointment, which is normally funded by the relevant state or territory legal aid commission. Accordingly, the reduction in funding available to legal aid commissions nationally has diminished the capacity of Independent

1 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Report on the Law and Administration of Divorce and Related Matters and the Clauses of the Family Law Bill 1974* (Parliamentary Paper, No 133, October 1974) [44].
2 *Family Law Act 1975* (Cth) s 68L(1).
3 Ibid s 68L(4).

Children's Lawyers to perform the full suite of duties expected of them to ensure that children have an appropriate voice in family law proceedings.

12.7 Yet another important initiative of the Court, but one never enshrined in legislation, was the engagement of Indigenous Liaison Officers within the Court. The program establishing this initiative was defunded in 2006 and only a small number of these positions remain.

12.8 The ALRC recognises the need to reassert the importance of ancillary staff within the family courts in protecting the rights of children and promoting their welfare, in ensuring protection from family violence, and in assisting parties to improve their relationship to each other and to their children. Therefore, the ALRC recommends that s 11A of the *Family Law Act* be amended to clarify and expand upon the functions of Family Consultants. The ALRC also recommends that the role be renamed to more properly reflect the nature of the role. It will be essential to the successful implementation of this Recommendation that the Australian Government provides sufficient funding to increase the number of Family Consultants within the family courts.

12.9 The ALRC further recommends that s 68LA(5) of the *Family Law Act* be amended to include a provision requiring an Independent Children's Lawyer, in the exercise of the duties in that section, to comply with the *Guidelines for Independent Children's Lawyers*, as promulgated from time to time and as endorsed by the Chief Justice of the Family Court, the Chief Judge of the Federal Circuit Court, and the Chief Judge of the Family Court of Western Australia. Similarly, it will be essential to the successful implementation of this Recommendation that the Australian Government provides sufficient funding to legal aid commissions to support the role of appropriately qualified Independent Children's Lawyers.

12.10 The ALRC also urges the Australian Government to provide sufficient funding to restore the program through which Indigenous Liaison Officers were engaged in each registry of the family courts as appropriate to the needs of that registry.

The importance of such services for children

12.11 Children are clearly a central concern of family law. They are very often at the centre of a dispute between parents or other caregivers about their care arrangements following family separation. The family law system should, on any view, be child-centric. In decisions about care arrangements for children, decision makers must currently regard the best interests of the child as the paramount consideration.[4] Consequently, family law cases do not proceed simply on the basis that they are disputes between parties, but that the orders made should be ones that best promote and protect the interests of the child.[5] Family Consultants, Independent Children's Lawyers, and Indigenous Liaison

4 Ibid s 60CA.
5 *M v M* (1988) 166 CLR 69, 76; *ZP v PS* (1994) 181 CLR 639, 647.

Officers play a critical role in ensuring that children and their interests are best supported, represented, and protected.

12.12 However, views about the extent to which children should *participate* in family law processes, as opposed to just being the focus of those processes, have changed considerably since the passage of the *Family Law Act*. As Relationships Australia observed:

> Children—their voices, fears, questions and interests—were largely absent from the debate on the Family Law Bill in the 1970s. Argument was very much centred around the process of divorce, and how it was experienced by the adult parties to the marriage, in isolation from their roles as parents. … Sensibilities around children's views and voices (independent from those of their parents), and the effects on them of family conflict, are relatively recent. This means that the Act has been 'retrofitted', in an ad hoc way, to attempt to bring real substance to protection of children's views and interests in separation and family dispute resolution, as well as to recognise child protection/ welfare concerns.[6]

12.13 Approaches to children's participation in family law processes have been informed by changing understandings of children and child development. There has been a move away from seeing children as 'passive, dependent and less than adults' to 'conceptualisations of children as active social actors in their own lives'.[7]

12.14 Approaches have also been informed by developments relating to the rights of children. The CRC contains a number of rights relating to participation. The most important of these, for the purposes of considering children's participation in family law processes, is the right to be heard. Article 12 of the CRC provides that children who are capable of forming their own views shall have the right to 'express those views freely in all matters affecting the child, the views of the child given due weight in accordance with the age and maturity of the child.' In relation to judicial and administrative proceedings, art 12 provides that a child shall be 'provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body'.[8]

Participating and protecting

12.15 There was significant support in submissions for facilitating children's participation in family law processes. For example, Anglicare WA said:

> We believe that it is important that children should have the opportunity to participate, be heard, be informed, and be (where possible) consulted about decisions that affect their future. We need to ensure their views are taken into account when decisions are made that affect their future. This includes listening and acting on any safety concerns

6 Relationships Australia, *Submission 11*.

7 E Kay M Tisdall, 'Subjects with Agency? Children's Participation in Family Law Proceedings' (2016) 38(4) *Journal of Social Welfare and Family Law* 362, 362.

8 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 12.

> they have. Children should be seen as reliable witnesses and have their experiences listened to and believed.[9]

12.16 Dr Bell has summarised various rationales for children's participation as:

- Enlightenment: children can make valuable contributions to decision making about matters affecting them because they have a unique perspective on their own lives
- Empowerment: children have the capacity to participate and the right to participate
- Citizenship: according children respect based on their status in society where they are located somewhere between current and future citizens.[10]

12.17 Many submissions to this Inquiry discussed the benefits of children's participation in similar terms. For example, the Youth Affairs Council of South Australia submitted that the

> benefits of greater engagement with children and young people in Court processes for the Family Court are also substantial. Studies suggest that incorporating the views and experiences of children and young people into processes and practices provides a more complete picture of family disputes and the impacts of parental separation.[11]

12.18 Many submissions couched the participation of children in terms of their right to do so. Churches of Christ Care said: 'Children's voices are easily lost in legal processes, and despite legislative guidance, decisions are often made in favour of parental rights and preferences rather than children's rights and preferences.'[12] CatholicCare Sydney submitted that 'many elements of the family law system are directed more towards adults, [and] children's voices are not sufficiently heard. A shift in culture is needed across the sector to genuinely and actively support children's right to be heard.'[13]

12.19 Relationships Australia Victoria also submitted that:

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9 Anglicare WA, *Submission 152*. See also Australian Dispute Resolution Advisory Council (ADRAC), *Submission 386*; Bravehearts Foundation Ltd, *Submission 279*; Association of Family and Conciliation Courts Australian Chapter, *Submission 258*; Australian Human Rights Commission, *Submission 217*; Marrickville Legal Centre, *Submission 137*; Centre for Excellence in Child and Family Welfare, *Submission 102*; Public Advocate and Children & Young People Commissioner, ACT Human Rights Commission, *Submission 87*; Resolution Institute, *Submission 70*; Australian Psychological Society, *Submission 55*; Family & Relationship Services Australia, *Submission 53*; Setting the Record Straight for the Rights of the Child, *Submission 28*; Queensland Family and Child Commission, *Submission 16*; Youth Affairs Council of South Australia, *Submission 5*.

10 Felicity Bell, 'Facilitating the Participation of Children in Family Law Processes' (Southern Cross University, prepared for Legal Aid NSW, 2015) 8.

11 Youth Affairs Council of South Australia, *Submission 5*. See also Relationships Australia National, *Submission 317*; Z Rathus, *Submission 298*; Marrickville Legal Centre, *Submission 288*; Centre for Excellence in Child and Family Welfare, *Submission 283*; The Royal Australian and New Zealand College of Psychiatrists, *Submission 280*; Uniting, *Submission 268*.

12 Churches of Christ Care, *Submission 4*. See also SA Commissioner for Children and Young People, *Submission 360*; Baptist Care Australia, *Submission 359*.

13 CatholicCare Sydney, *Submission 79*. See also, eg, Justice for Children Australia, *Submission 230*; Australian Human Rights Commission, *Submission 217*; M Fernando, *Submission 172*; Public Advocate and Children & Young People Commissioner, ACT Human Rights Commission, *Submission 87*; Resolution Institute, *Submission 70*; D Bryant, *Submission 35*; Queensland Family and Child Commission, *Submission 16*; Churches of Christ Care, *Submission 4*.

> there needs to be more emphasis on children's empowerment in the Australian Family Law system in cases of divorce and separation, especially where parental relationships are conflicted, in contrast to the traditional approach, which has emphasised children's welfare and interests.[14]

12.20 Submissions also suggested that participation contributes to children's and young people's wellbeing, including through a greater sense of control over their own lives. The Youth Affairs Council of South Australia said that participation

> provides other personal benefits for children and young people with evidence suggesting that the increased sense of control felt by children and young people who participate in family law proceedings has a direct correlation with positive psychological and physical health.[15]

12.21 Some stakeholders considered that promoting greater participation by children in family law proceedings is inconsistent with the objective of protecting the best interests of children by shielding them from potentially harmful involvement in proceedings.[16]

12.22 Concerns exist that children are too vulnerable to be placed in the middle of conflict, and that they might be manipulated or influenced by a parent in this process.[17] There are also concerns that children should not be made to feel burdened with the responsibility of decision making about post-separation arrangements for their care—feeling as if they have to choose between parents, for instance.[18] Others expressed a view that the risks outweighed the benefits. For example, Packer submitted that 'conflict is detrimental to the development of children. The court process is, by its very definition a conflict based process and therefore involving children in it is not consistent with considering their wellbeing.'[19] Grandparents Victoria also said that children 'should be kept away from the adversarial elements of court processes as much as possible.'[20]

12.23 This tension between protection and participation is sometimes framed as a contest between competing principles or rights. The protectionist perspective is often aligned with a 'welfare' or 'best interests' approach. In this view, children are seen as vulnerable and in need of protection. There is a concern that 'due to children's positioning as dependent, unequal and inexperienced, asking them for their views and preferences

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14 Relationships Australia Victoria, *Submission 267*; Relationships Australia Victoria, *Submission 129*.

15 Youth Affairs Council of South Australia, *Submission 5*. See also, eg, Australian Human Rights Commission, *Submission 217*; Yourtown, *Submission 204*; M Westby, *Submission 71*; The Royal Australian and New Zealand College of Psychiatrists, *Submission 18*.

16 See, eg, Mallee Family Care, *Submission 310*; Family Life, *Submission 309*; Patrick Parkinson and Judy Cashmore, *The Voice of a Child in Family Law Disputes* (Oxford University Press, 2008) 2–3.

17 Felicity Bell, 'Barriers to Empowering Children in Private Family Law Proceedings' (2016) 30 *International Journal of Law, Policy and the Family* 225, 233–5; Swaab, *Submission 332*.

18 Patrick Parkinson and Judy Cashmore, above n 16, 14.

19 M Packer, *Submission 178*. See also, eg, Families for Children's Rights: The Australian Movement, *Submission 96*.

20 Grandparents Victoria, *Submission 138*.

regarding matters normally viewed as 'adult' may be experienced as stressful, and therefore to the detriment of child welfare'.[21]

12.24 The paramount consideration in determining children's care arrangements under the *Family Law Act* is the best interests of the child.[22] The CRC also enshrines in Article 3 the right of the child to have their best interests treated as a primary consideration.[23] The Committee on the Rights of the Child has suggested that there is no tension between children's welfare or best interests (art 3) and their right to be heard (art 12). Instead, they are complementary

> one establishes the objective of achieving the best interest of the child and the other provides the methodology for reaching the goal of hearing either the child or the children … there can be no correct application of article 3 if the components of article 12 are not respected. Likewise, article 3 reinforces the functionality of article 12, facilitating the essential role of children in all decisions affecting their lives.[24]

12.25 Other commentators agree that a sharp distinction between protection and participation can be overdrawn. Professors Parkinson and Cashmore have argued that, in family law matters, this protection-participation dichotomy is unhelpful: 'The way forward is to abandon the idea that children's best interests can be served by protection from participation, and to find ways of protecting them in participation.'[25]

12.26 Participation may also be a means of developing or promoting a child's agency, when they are supported appropriately. Professor Tisdall, using the language of "thin" and "thick" agency, has suggested that 'many children affected by domestic abuse may have particularly "thin" agency in disputed contact cases but this could be "thickened" with sufficient support for their views to be developed, heard and understood.'[26]

12.27 Where family violence is a factor, there are heightened concerns about child participation increasing risks to the child's safety, despite views that such risks can often be managed.[27] The Magistrates' Court of Victoria and the Children's Court of Victoria

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21 Gillian S Macdonald, 'Hearing Children's Voices? Including Children's Perspectives on Their Experiences of Domestic Violence in Welfare Reports Prepared for the English Courts in Private Family Law Proceedings' (2017) 65 *Child Abuse & Neglect* 1, 4. See also, eg, Karine Hamilton and Pamela Henry, 'The Inclusion of Children in Family Dispute Resolution in Australia: Balancing Welfare versus Rights Principles' (2012) 20(4) *The International Journal of Children's Rights* 584; Jonathan Herring, 'Vulnerability, Children, and the Law' in Michael Freeman (ed), *Law and Childhood Studies* (Oxford University Press, 2012) 243; Stephanie Holt, 'The Voice of the Child in Family Law: A Discussion Paper' (2016) 68 *Children and Youth Services Review* 139.

22 *Family Law Act 1975* (Cth) s 60CA.

23 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 3.

24 Committee on the Rights of the Child, *General Comment No. 12 (2009): The Right of the Child to Be Heard* 51st Sess, UN Doc CRC/C/GC/12 (1 July 2009) 74.

25 Patrick Parkinson and Judy Cashmore, above n 16, 219: See also Resolution Institute, *Submission 260*.

26 Tisdall, above n 7, 374. See also Public Advocate and Children & Young People Commissioner, ACT Human Rights Commission, *Submission 87*.

27 Amanda Shea Hart, 'Child-Inclusive Mediation in Cases of Domestic Violence in Australia' (2009) 27(1) *Conflict Resolution Quarterly* 3, 10–11; National Legal Aid, *Submission 297*.

urged caution with respect to increasing children's participation where family violence is alleged. The Courts noted that s 67 of the *Family Violence Protection Act 2008* (Vic)[28] provides that a child who is an applicant for a family violence intervention order or a respondent, must not give evidence for the purposes of proceedings under the Act unless the court grants leave for the child to do so. The two Courts expressed concerns that proposals

> aimed at increasing the participation of children in family law processes by giving them the opportunity to express their views in court proceedings and FDR processes … might lead to an increasing culture of involving vulnerable children in court processes, which may be damaging.[29]

Children's views about participation

12.28 Children want to have a say in decisions that are made about their care arrangements.[30] Research on children's experiences of family law processes has also suggested that they are unhappy with the level and type of involvement they have had in these processes, and would like to have a greater opportunity to participate. A 2018 study by AIFS (*Children and Young People Study*) into the experiences of children and young people in separated families has summarised the findings of a 'substantial body of family law research both in the Australian and international context'.[31] The study revealed the importance of

> children and young people having an opportunity for their views to be heard and considered in decision making affecting them. In particular, research has highlighted the importance of facilitating these opportunities to be heard, both in relation to matters relevant to deciding the post-separation care and regarding the more general effects of their parents' separation.[32]

12.29 However, this desire to participate is often not realised. The *Children and Young People Study* found that, for a substantial proportion of children and young people

> the approaches adopted by the service professionals with whom they interacted operated in a way that limited their practical impact or effectively marginalised the child or young person's involvement in decision making about parenting arrangements.[33]

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28 There are similar provisions in the *Family Violence Act 2016* (ACT) s 60D; *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 41; *Domestic and Family Violence Protection Act 2012* (Qld) s 148; *Restraining Orders Act 1997*(WA) s 53A.

29 Magistrates Court of Victoria and Children's Court of Victoria, *Submission 419*.

30 Australian Institute of Family Studies, *Growing Up in Australia: The Longitudinal Study of Australian Children* (Annual Statistical Report 2014), 27; Office of the Commissioner for Children and Young People (SA), *What Children and Young People Think Should Happen When Families Separate* (2018) 5; Rachel Carson et al, *Children and Young People in Separated Families: Family Law System Experiences and Needs* (Australian Institute of Family Studies, 2018) 30. See also Yourtown, *Submission 204*; Youth Affairs Council of South Australia, *Submission 5*.

31 Rachel Carson et al, above n 30, 30.

32 Ibid. Similar views were expressed in a study undertaken by the Commissioner for Children and Young People (SA). Office of the Commissioner for Children and Young People (SA), above n 30.

33 Rachel Carson et al, above n 30, 50–1.

12.30 Children and young people also reported having no or limited say in their care arrangements:

> Participating children and young people commonly reported that they were either not consulted by the relevant family law system professionals in their case or, even where there were options to participate, that they were not heard by those professionals.[34]

12.31 The Australian Human Rights Commission echoed this, noting that

> the National Children's Commissioner has received numerous representations from children and young people, and their advocates, about failures by courts and agencies within the family law system to solicit their views in the context of decision making, and to provide them with accessible information about processes and outcomes.[35]

12.32 Accessible information about the family law system is an important building block to support children's participation in the system. The ALRC considers that children should have access to material about the process of family separation and about available legal and other support services. This is discussed further in Chapter 15.

Enhanced support for children and families

Recommendation 43 The *Family Law Act 1975* (Cth) should be amended to:

- replace 'family consultants' with 'court consultants'; and
- redraft s 11A to include a comprehensive list of functions that court consultants would provide to children, families, and the courts.

The current role of Family Consultants in facilitating children's participation

12.33 Section 11A of the *Family Law Act* prescribes the functions of Family Consultants as including:

(a) assisting and advising people involved in the proceedings; and

(b) assisting and advising courts, and giving evidence, in relation to the proceedings; and

(c) helping people involved in the proceedings to resolve disputes that are the subject of the proceedings; and

(d) reporting to the court under sections 55A and 62G; and

(e) advising the court about appropriate family counsellors, family dispute resolution practitioners and courses, programs and services to which the court can refer the parties to the proceedings.

34 Ibid 63.

35 Australian Human Rights Commission, *Submission 217*.

12.34 A Family Consultant is appointed in three ways: under s 18ZH of the *Federal Court of Australia Act 1976* (Cth); pursuant to reg 7 of the *Family Law Regulations*; or under a law of a State in relation to a State Family Court. Family Consultants appointed under the *Federal Court of Australia Act 1976* (Cth) are in-house family consultants. 'Reg 7' Family Consultants are private practitioners who undertake the role on a fee for service basis funded by the courts.

12.35 The role of Family Consultants is essential in child-related proceedings and it is in this context that the scope of their role has been scrutinised. Family Consultants are integral to proceedings in both the Family Court and the Federal Circuit Court. In litigated proceedings, the *Family Law Act* requires the courts to consider any views expressed by a child in deciding whether to make a particular parenting order (or a range of other orders) in relation to the child.[36] The Act also provides that the court may inform itself of a child's views by:

- having regard to anything in a report given to the court by a Family Consultant;
- making an order that the child's interests in the proceedings be independently represented by a lawyer; or
- any other means the court thinks appropriate, subject to applicable court rules.[37]

12.36 A Family Consultant may provide a report (known as a 'family report') to the courts where the care, welfare and development of a child is relevant. Where a Family Consultant has been directed to provide a report under s 62G, the views of the child must be ascertained and those views must be included in the report.[38] This is considered to be a comprehensive assessment for the purpose of assisting the judge and the parties in the making of a final order.

12.37 The courts may also order a report under s 11F, and in doing so may order that it be prepared following a 'Child Inclusive Conference' or a 'Child Dispute Conference'.[39] A Child Inclusive Conference involves a Family Consultant meeting with the adults and the children involved in the proceeding, without lawyers. The conference is intended to give the courts an understanding of the family situation, and particularly of the children's experience. Interviews are conducted by the Family Consultant over half a day. Children are interviewed separately from any adults and are given the opportunity to express their views and wishes, but no child is compelled to do so. A Child Dispute Conference is conducted in the absence of both children and lawyers. Both types of Conference are considered to be preliminary assessments for the purpose of assisting the judge in making interim decisions about risk, case management, and interim care arrangements.

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36 *Family Law Act 1975* (Cth) s 60CC(3)(a).
37 Ibid s 60CD.
38 Ibid s 62G(2), (3A)(a)–(b). Section 62G includes a note stating that a person cannot require a child to express a view in relation to any matter.
39 *Family Law Act 1975* (Cth) s 11F.

12.38 In the Family Court, but not in the Federal Circuit Court, the court may also order the parties to attend a 'Child Responsive Program'.[40] This program involves a series of meetings between a Family Consultant, the parents or other carers and, in most cases, the children. The program focuses on the children's needs and the aim is to help parents and the court understand what the children need and how the court can best deal with the matter. It is premised on the assumption that information about children's experiences can help parents better understand how family separation and family changes affect children. It is hoped that, by involving children early in the court process, parents are helped to understand their children's needs and experiences of the separation, and to consider the best future arrangements for the children.

12.39 When parents cannot agree on the best arrangements for the children, the case proceeds to a Less Adversarial Trial[41] and the same Family Consultant will assist the court with expert opinion and evidence about the children and the family. There has been decreasing use of the Less Adversarial Trial process in recent years, largely because of resourcing issues.

12.40 Family Consultants also play a role in supervising parenting orders, including facilitating exchange (handover) of children.[42] In the Family Court, Family Consultants may also be involved in the Case Management Conferences that were once part of the usual practice of that court but which, again, have fallen into disuse. Case Management Conferences are not used in the Federal Circuit Court.

12.41 It is essential for all those involved in family law proceedings, but particularly for children, that family reports are thorough and prepared as quickly as possible so as to avoid delaying any attempts at settlement and/or the ultimate adjudication of the matter. To do so, Family Consultants need to spend adequate time with families.[43] In some registries, there is more than a 12-week delay before a Family Consultant will be available to meet with a family. Often, this poses an unacceptable risk to children and family members. Resourcing available for in-house Family Consultants has gradually reduced with an increase in outsourcing of reports to 'reg 7' private consultants.

12.42 Many stakeholders called for an increase in funding for the engagement of additional Family Consultants,[44] recognising the important role the Family Consultant

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40 Ibid s 11F.

41 Ibid Pt VII, div 12A; *Family Law Rules 2004* (Cth) r 12.09.

42 *Family Law Act 1975* (Cth) s 65L.

43 Relationships Australia, *Submission 11*; Safe Steps Family Violence Response Centre, *Submission 408*; Australian Institute of Family Studies, *Submission 206*.

44 Family Court of Australia, *Submission 400*; Women's Legal Services Australia, *Submission 366*; Law Council of Australia, *Submission 285*; Association of Family and Conciliation Courts Australian Chapter, *Submission 258*; Women's Legal Service NSW, *Submission 218*; NATSILS, *Submission 157*; Marrickville Legal Centre, *Submission 137*; CPSU, *Submission 136*; R Alexander, *Submission 131*; Aboriginal Legal Service of Western Australia, *Submission 64*; ATSILS Qld, *Submission 42*; D Bryant, *Submission 35*; Relationships Australia, *Submission 11*.

plays in 'ensuring the child's wellbeing'.[45] The importance of appointing Aboriginal and Torres Strait Islander people as Family Consultants was also emphasised.[46]

12.43 Not all stakeholders reported positive experiences with Family Consultants. There were criticisms of: the expertise and relevant experience of some Family Consultants;[47] the lack of consistent standards (particularly as between court-employed consultants and the Reg 7 consultants);[48] a perceived lack of accountability;[49] the degree to which attention was given to children's right to be heard;[50] and calls for greater training (particularly to increase competence in relation to family violence, cultural and linguistic diversity, and disabilities).[51] These matters are discussed further in Chapter 13.

The need for an expanded role to assist children, families, and the courts

12.44 As is apparent from s 11A of the *Family Law Act*, the functions ascribed to Family Consultants are much broader than just report writing. Resourcing constraints have also caused several other functions, many of which were designed particularly to support children, to be abandoned.[52] These include: age-appropriate information sessions for children; seminars for parents on the impact of separation and litigation on children; ad hoc counselling; and triaging of matters in both the Family Court and the Federal Circuit Court.

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45 Dr M Fernando, *Submission 172*. See also Family Court of Western Australia, *Submission 311*; CPSU, *Submission 136*; Victorian Women Lawyers, *Submission 84*; Australian Bar Association, *Submission 13*.

46 Women's Legal Services Australia, *Submission 366*; Women's Legal Service NSW, *Submission 340*; National Family Violence Prevention Legal Services Forum, *Submission 293*; NATSILS, *Submission 290*; Women's Legal Service NSW, *Submission 218*; Aboriginal Legal Service (NSW and ACT), *Submission 210*; NATSILS, *Submission 157*; Federation of Community Legal Centres Victoria, *Submission 65*; Aboriginal Legal Service of Western Australia, *Submission 64*; Koori Caucus Working Group on Family Violence, *Submission 50*.

47 Domestic Violence Victoria, *Submission 284*; Australian Paralegal Foundation, *Submission 228*; NATSIWA, Harmony Alliance and AWAVA, *Submission 122*; M Job and H Meagher, *Submission 110*; Court Network, *Submission 49*; Fitzroy Legal Service and Darebin Community Legal Centre, *Submission 7*.

48 Australian Human Rights Commission, *Submission 217*; CPSU, *Submission 136*; NSW Young Lawyers Family Law Committee, Law Society of NSW, *Submission 108*.

49 Safe Steps Family Violence Response Centre, *Submission 408*; Australian Paralegal Foundation, *Submission 228*; R Singh, *Submission 195*; Court Network, *Submission 49*; Domestic Violence Victoria, *Submission 23*; Drummond Street Services, *Submission 20*.

50 Australian Institute of Family Studies, *Submission 396*; Dr M Fernando and Dr Nicola Ross, *Submission 327*; Relationships Australia National, *Submission 317*; Australian Human Rights Commission, *Submission 217*; Australian Institute of Family Studies, *Submission 206*; Domestic Violence Victoria, *Submission 23*.

51 Safe Steps Family Violence Response Centre, *Submission 408*; Women with Disabilities Victoria, *Submission 402*; Australian Women Against Violence Alliance (AWAVA), *Submission 379*; Women's Legal Services Australia, *Submission 366*; M Morris and K Halford, *Submission 344*; Women's Legal Service NSW, *Submission 340*; Law Council of Australia, *Submission 285*; Association of Family and Conciliation Courts Australian Chapter, *Submission 232*; Australian Human Rights Commission, *Submission 217*; Z Rathus, Dr S Jeffries, Dr H Menih and Professor R Field, *Submission 166*; NATSILS, *Submission 157*; ANROWS, *Submission 156*; Z Rathus, *Submission 92*; Australian Psychological Society, *Submission 55*; Family & Relationship Services Australia, *Submission 53*; Koori Caucus Working Group on Family Violence, *Submission 50*; Court Network, *Submission 49*; Domestic Violence Legal Workers Network of WA, *Submission 33*; Australian Association of Social Workers, *Submission 25*; Relationships Australia, *Submission 11*.

52 Gadens, *Submission 412*.

12.45 A vicious circle has also been created whereby the role itself has been so diminished in breadth that the courts have difficulty in recruiting and retaining professional clinicians with the necessary expertise and experience for this most important role.[53] Many stakeholders commented on the need for a more expansive role for Family Consultants, including: having them assigned to a matter at the commencement of proceedings[54] (or even prior to proceedings being commenced);[55] triaging; case managing matters in conjunction with a Registrar;[56] involving them in the re-introduction of a child to a non-resident parent;[57] diverting cases that are not suitable for FDR to specialised conciliation led jointly by a Registrar and a Family Consultant;[58] advising families and courts on age appropriate parenting arrangements which focus on the developmental needs of children;[59] accessing state child protection and domestic violence databases to provide direct evidence about restraining orders, criminal convictions, and pending charges;[60] assisting children post orders to understand decisions and how their views were taken into account;[61] assisting parents to manage co-parenting orders; monitoring adjustment issues for children; and monitoring the family's engagement with their support interventions.[62] Caxton Legal Centre proposed a significantly expanded role for Family Consultants who would act as 'the pivotal link between families and varying family law systems addressing different family law needs and issues.' It proposed a sliding scale of fees for those with means and that the service should be free for those with limited means.[63]

12.46 The ALRC considers that the following Family (Court) Consultant functions would enable an appropriate service to be provided to children, families, and the court:

- Education function
  - For adults
    - Providing information on children's needs and parenting after separation
    - Providing information on court processes, including family assessments, and service/support options
  - For children

53 P Parkinson, *Submission 341*; National Legal Aid, *Submission 297*.

54 Inner City Legal Centre, *Submission 124*; For Kids Sake, *Submission 118*; ATSILS Qld, *Submission 42*; Domestic Violence Legal Workers Network of WA, *Submission 33*; Australian Bar Association, *Submission 13*.

55 ATSILS (QLD), *Submission 384*; Caxton Legal Centre, *Submission 51*.

56 For Kids Sake, *Submission 421*; Australian Dispute Resolution Advisory Council (ADRAC), *Submission 386*; ATSILS (QLD), *Submission 384*; Australian Women Against Violence Alliance (AWAVA), *Submission 379*; National Legal Aid, *Submission 297*; Law Council of Australia, *Submission 285*; Dr D Tustin, *Submission 266*; CPSU, *Submission 136*; NATSIWA, Harmony Alliance and AWAVA, *Submission 122*; Berry Street, *Submission 26*.

57 ATSILS Qld, *Submission 42*.

58 Association of Family and Conciliation Courts Australian Chapter, *Submission 232*.

59 Australian Bar Association, *Submission 13*.

60 Family Court of Western Australia, *Submission 311*.

61 CPSU, *Submission 136*.

62 Family Court of Australia, *Submission 400*; M Morris and K Halford, *Submission 344*; Law Council of Australia, *Submission 285*; D Bryant, *Submission 35*.

63 Caxton Legal Centre, *Submission 51*.

        - Delivering age appropriate information on court processes, support services, professional roles within the court, and ways in which children's views and wishes can be communicated to the court

- Triage function
    - Undertaking screening for the purpose of risk identification and provision of information for case management planning. Potential risks include family violence, child abuse, mental health issues, substance misuse, and child abduction
- Forensic assessment function
    - Preliminary – limited assessment of the family with the objective of identifying issues, assisting the court with risk and case management, and making child-focused interim decisions
    - Comprehensive – extensive assessment of the family, focusing on the child/ren's views, needs, and relationships in the context of the parties' proposals, for the purpose of assisting the court to make final orders
- Conciliation function
    - Assisting parties to settle or narrow issues related to the dispute currently before the court
        - Reportable – directing and facilitating a discussion between the parties in which the evidence before the court (including the forensic assessment) is considered, and information/education about the child/ren is actively provided, for the purpose of reducing conflict and narrowing issues
        - Privileged – directing and facilitating a discussion about the proposals before the court with the objective being to settle the dispute or narrow the issues. Conducted jointly with a Registrar and with the parties' legal representatives present
- Post-order case management function
    - Reportable and non-therapeutic
    - Interim or final
        - Providing an explanation of the content, intent, and expectation of interim/final orders to adults and/or children (compulsory for final parenting orders made by a court following a contested hearing)
        - Facilitating handovers of children when care has been ordered to change from one party to the other
        - Providing time limited supervision of orders, and monitoring of compliance with orders, for the purpose of reporting to court (if required) in matters involving high risk to children
    - Post-order case management can also include:
        - providing information on children's needs and parenting after separation;
        - providing age appropriate information for children on the parenting arrangements in the orders;
        - connecting parties and children with appropriate support services;
        - counselling parties on issues relating to the implementation of the orders;
        - assisting with the resolution of disputes about the implementation of the orders; and

- monitoring the family's engagement with support services.
- In cases of non-compliance with final orders Family Consultants may:
  - seek that the court place the matter in a contravention list; and
  - recommend that the court make additional orders directing a party to attend a post-separation parenting program

12.47 Whilst none of these functions is inconsistent with those already prescribed by s 11A and s 65L, the ALRC considers that the broad range of functions should be made more explicit and that the role should be renamed 'Court Consultant' to better reflect the range of functions performed. Without the full range of in-house support services for children and families, the courts are hindered in their ability to exercise its jurisdiction as required by s 43.

12.48 Family Consultants play a critical role in supporting children, families, and the courts in family law proceedings. It is therefore essential to the efficacy of the role that there be adequate funding, both for the appointment of appropriately qualified psycho-social professionals and for ongoing training.

Strengthening the role of the Independent Children's Lawyer

Recommendation 44 Section 68LA(5) of the *Family Law Act 1975* (Cth) should be amended to include a specific duty for Independent Children's Lawyers to comply with the *Guidelines for Independent Children's Lawyers*, as promulgated from time to time and as endorsed by the family courts.

The current role of the Independent Children's Lawyer

12.49 An Independent Children's Lawyer may be appointed under s 68L of the *Family Law Act* where it appears to the court that the child's interests in the proceedings ought to be independently represented.[64]

12.50 The scope of the role is also set out in the Act: an Independent Children's Lawyer must form an independent view, based on the evidence available, of what is in the best interests of the child and act in relation to the proceedings in what the Independent Children's Lawyer believes to be the best interests of the child.[65] An Independent Children's Lawyer is not the child's legal representative, and is not obliged to act on the child's instructions in relation to the proceedings.[66] National *Guidelines for Independent*

64 The Full Court of the Family Court identified a non-exhaustive set of criteria for appointments of Independent Children's Lawyers in *Re K* (1994) 17 Fam LR 537. Among the 13 identified factors are allegations of abuse and where there is intractable conflict.

65 *Family Law Act 1975* (Cth) s 68LA(2)(a)–(b).

66 Ibid s 68LA(4)(a)–(b).

Children's Lawyers (2013) (the Guidelines), endorsed by the Chief Justice of the Family Court, the Chief Judge of the Family Court of Western Australia, and the Chief Judge of the Federal Circuit Court, also set out the expectations of the role.[67]

12.51 An Independent Children's Lawyer is appointed to a case by the legal aid commission in the relevant state or territory, either from their own in-house Independent Children's Lawyers or from a panel of private practitioners who can be appointed to this role after completing a period of specialised training.[68]

12.52 Broadly, Independent Children's Lawyers perform three distinct roles in matters in which they are appointed:

- facilitating a child's participation;
- gathering evidence relevant to a child's best interests, such as arranging subpoenas for documents or witnesses, gathering information about relevant personal protection orders, and obtaining family reports;[69] and
- litigation management: acting as an 'honest broker' in litigation, including 'ensuring that the litigation is conducted in a child-focused manner (including from a forensic perspective …), encouraging settlement of a matter where appropriate, and keeping the litigation on track.'[70]

12.53 The Guidelines for Independent Children's Lawyers provide that they should seek to provide a child with the opportunity to express a view in relation to the matter, and that the Independent Children's Lawyer should ordinarily meet with a child.[71] However, research has suggested that there is wide variation in practice and perspectives about whether Independent Children's Lawyers should have direct contact with children in the course of performing their function.[72] Some stakeholders advocated for greater consistency in the approach taken by Independent Children's Lawyers nationally and for more specific direction as to their role.[73]

12.54 The AIFS *Independent Children's Lawyer Study* found that the dominant orientation to practice by Independent Children's Lawyers was to exercise caution in directly meeting with children, and to prefer that evidence of a child's views be obtained through a report prepared by a Family Consultant or single expert witness.[74] This is not

67 National Legal Aid, *Guidelines for Independent Children's Lawyers* (2013).
68 National Legal Aid, *Independent Children's Lawyers* <https://icl.gov.au/>.
69 Rae Kaspiew et al, *Independent Children's Lawyers Study* (Australian Institute of Family Studies, Final Report, 2nd edn, 2014) 58–9.
70 Ibid 53.
71 National Legal Aid, above n 27, [5.3], [6.2]. There are some exceptions to the expectation to meet with the child: where the child is under school age; there are exceptional circumstances, eg, a risk of 'systems abuse' for the child; and where there are significant practical limitations, such as remoteness.
72 Kaspiew et al, above n 69 above 68, 38. See also, eg, Felicity Bell, 'Meetings Between Children's Lawyers and Children Involved in Private Family Law Disputes' (2016) 28(1) *Child and Family Law Quarterly* 5.
73 Queensland Law Society, *Submission 221*; D Cooper, *Submission 165*.
74 Kaspiew et al, above n 69, 38. Doctoral research published in 2017 involving interviews with Independent Children's Lawyers found that 11 out of 14 of the Independent Children's Lawyers study participants, when asked, did not specifically state that it was the role of the Independent Children's Lawyers to ascertain the

consistent with the Guidelines, which provide detailed commentary on how Independent Children's Lawyers are expected to interact with children and convey their views most effectively. The minority orientation to practice, consistent with the Guidelines, involved high levels of contact with children for a range of purposes, including familiarising the child with the Independent Children's Lawyer, explaining the Independent Children's Lawyer's role, and consulting with the child on the proceedings and their views.[75]

12.55 Directly engaging with a child has a participatory rationale—providing the child with information about the role of the Independent Children's Lawyer and the court process and an opportunity to express their views about the process or outcomes. It also has a forensic rationale—evidence of a child's views must be put before the court where that evidence is available.[76]

12.56 The reluctance of Independent Children's Lawyers to meet with children may stem from a lack of clarity about the purpose of the meeting, in addition to a lack of training or sufficient familiarity with the role as stipulated in the Guidelines. Survey data from the AIFS *Independent Children's Lawyer Study* showed that Independent Children's Lawyers typically viewed their role as one focused on evidence gathering, and viewed facilitation of participation by children as the least significant of their roles.[77]

12.57 The cautious approach to engaging with children taken by Independent Children's Lawyers contrasts with the reported expectations of children and young people, as well as parents, who have had experience of family law processes. The AIFS *Independent Children's Lawyers Study* reported that a

> very significant theme in the data from parents/carers and children/young people is their understanding that the role of the Independent Children's Lawyer is meant to support participation. … A significant disjuncture was evident between the understandings of professionals, particularly Independent Children's Lawyers and judges, with their emphasis on the case-management and evidence-gathering aspects of the role, and the understandings and expectations of parents and children/young people. From the perspective of parents, the case-management and evidence-gathering roles are ancillary to an Independent Children's Lawyer function that should be about understanding the child and the child's perspective, and understanding the circumstances of the family.[78]

12.58 AIFS, in its submission to this Inquiry, summarised the findings of its more recent *Children and Young People Study*, reporting that

> [m]ost children and young people who reported engaging with family law system professionals reported feeling negatively towards the court process, the family

child's views: Margaret Voight, *Is a View Different from a Wish? Considering the Child's View in Parenting Disputes in Australian Family Law Matters.* (SJD Thesis, Queensland University of Technology, 2017) 154.

75 Kaspiew et al, above n 69, 39–40.

76 Ibid 37.

77 Ibid 43, 63; Rae Kaspiew et al, 'Getting the Word out: The Role of Independent Children's Lawyers in the Family Law System' (2014) 28 *Australian Journal of Family Law* 29, 37–8.

78 Kaspiew et al, above n 77, 138–9.

> consultant/family report writer and the Independent Children's Lawyer, and dissatisfied with either their level of input to, or awareness of, the decision making process or the final parenting arrangements.[79]

12.59 There was support in submissions for the work of Independent Children's Lawyers.[80] However, many submissions also expressed concerns about a lack of direct engagement by Independent Children's Lawyers with children, and about the level of engagement with Family Consultants.[81] National Family Violence Prevention Legal Services Forum illustrated its concerns with the following case study:

> Ms N is an Aboriginal woman with a teenage daughter who was physically abused by her father, our client's ex-partner. The father denied the allegations of physical abuse and claimed Ms N had fabricated the claims and was deliberately trying to turn the child against him. The daughter was represented during family law proceedings by an Independent Children's Lawyer. Without ever meeting with the child, the Independent Children's Lawyer proposed to the court that the child should have supervised contact with her father. The child was threatening suicide if she had to see the father.[82]

12.60 Many submissions also raised concerns about the quality of the work of Independent Children's Lawyers, often seen to be a consequence of a combination of workload issues and poor training (including a lack of cultural competency), both of which are linked to inadequate funding.[83]

12.61 National Legal Aid, while arguing that Independent Children's Lawyers have a 'pivotal function' in the promotion of the best interests of the child, and while highlighting a number of practice improvements in the work of Independent Children's Lawyers,

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79 Australian Institute of Family Studies, *Submission 206*.

80 Family Court of Australia, *Submission 400*; Women's Legal Services Australia, *Submission 366*; Swaab, *Submission 332*; Dr M Fernando and Dr Nicola Ross, *Submission 327*; M Kaye, *Submission 296*; Caxton Legal Centre, *Submission 292*; NATSILS, *Submission 290*; R Carroll, *Submission 289*; Law Council of Australia, *Submission 285*; National Legal Aid, *Submission 163*; R Alexander, *Submission 131*; Victorian Women Lawyers, *Submission 84*; Family Court of Australia, *Submission 68*; Drummond Street Services, *Submission 20*; People with Disability Australia (PWDA), *Submission 10*.

81 Association of Family and Conciliation Courts Australian Chapter, *Submission 232*; Australian Human Rights Commission, *Submission 217*; Yourtown, *Submission 204*; Dr M Fernando, *Submission 172*; Rape & Domestic Violence Services Australia, *Submission 167*; Uniting, *Submission 162*; Springvale Monash Legal Service, *Submission 161*; Anglicare WA, *Submission 152*; Interact Support Inc, *Submission 107*; Domestic Violence Victoria, *Submission 23*; Relationships Australia, *Submission 11*; Fitzroy Legal Service and Darebin Community Legal Centre, *Submission 7*; Churches of Christ Care, *Submission 4*.

82 National Family Violence Prevention Legal Services Forum, *Submission 63*.

83 For Kids Sake, *Submission 421*; Caxton Legal Centre, *Submission 292*; NATSILS, *Submission 290*; Association of Family and Conciliation Courts Australian Chapter, *Submission 232*; Australian Paralegal Foundation, *Submission 228*; Wirringa Baiya Aboriginal Women's Legal Centre, *Submission 164*; Uniting, *Submission 162*; CPSU, *Submission 136*; R Alexander, *Submission 131*; Interact Support Inc, *Submission 107*; Women's Rights Group, Monash Law Student Society Just Leadership Program, *Submission 105*; Centre for Excellence in Child and Family Welfare, *Submission 102*; Victorian Aboriginal Legal Service, *Submission 101*; Family Inclusion Network Queensland (Townsville), *Submission 78*; Brimbank Melton Community Legal Centre *Submission 76*; Resolution Institute, *Submission 70*; Aboriginal Legal Service of Western Australia, *Submission 64*; National Family Violence Prevention Legal Services Forum, *Submission 63*; Victoria Legal Aid, *Submission 61*; Australian Psychological Society, *Submission 55*; Law Council of Australia, *Submission 43*; ATSILS Qld, *Submission 42*; D Bryant, *Submission 35*; Safe Steps Family Violence Response Centre, *Submission 15*; People with Disability Australia (PWDA), *Submission 10*.

also acknowledged that the demands placed on the role often exceeded the capacity of a single representative to discharge them. It observed that Independent Children's Lawyers may be expected to perform one or more of the following tasks in litigation:

- working closely with a range of therapeutic services including arranging therapy, counselling, contact services, parenting after separation programs, behaviour change programs, mediation;
- managing a range of parenting issues that arise between parties and require Independent Children's Lawyer intervention (particularly in times of significant court delays), i.e. variations to changeover locations, children's refusal to attend contact, proposals for travel, schooling and health disputes;
- implementing matters arising under court orders including requesting random drug testing and analysing results, arranging expert reports, providing orders to schools and other agencies;
- working with child protection agencies over involvement with family, Notices of Risk, investigations, requests for intervention etc.;
- issuing requests for information and subpoenas to obtain as much information about the child from as many relevant sources as possible;
- court ordered tasks such as preparing chronologies, proposed minutes of orders, trial timetables, producing tender and exhibit bundles;
- arranging and attending roundtable conferences and mediations to broker settlements;
- working with the child including arranging regular meetings and communicating to ensure the child's participation is facilitated; and
- working with the child and family post the making of final orders which provide for the Independent Children's Lawyers' discharge within a certain time frame.[84]

12.62 In recognition of this complexity, National Legal Aid submitted that it was time for 'new thinking' about how to allocate the tasks currently assigned to Independent Children's Lawyers.[85]

Avoiding role confusion and duplication

12.63 In the Discussion Paper, the ALRC proposed the creation of a new professional role, a 'Children's Advocate', to support the participation of children in contested proceedings.[86] It was proposed that a Children's Advocate should take on the role of facilitating the involvement of children in family law processes, along the spectrum from informing children about family law processes through to supporting children to express their views and perspectives. The primary expertise of Children's Advocates would be in social science with particular training and expertise in child development and working

84 National Legal Aid, *Submission 163*.
85 Ibid.
86 Australian Law Reform Commission, *Review of the Family Law System*, Discussion Paper No 86 (2018) proposals 7–8 and 7–9.

with children.[87] The role would be additional to that of the Independent Children's Lawyer, whose role was to be refocused to concentrate on its existing evidence-gathering and litigation management functions.[88]

12.64 It was posited that the presently available mechanisms to present children's views—through the appointment of an Independent Children's Lawyer or a family or expert report—present those views as part of a broader assessment of the child's best interests. This has led to concerns about the 'filtering' or distortion of children's views.[89] As Stephanie Young has described:

> A child, if represented, might speak to their independent representative and provide them a view; likewise, a child may also meet with a family expert who might ask and include information about the child's view. The information all then filters through each individual's own experience and emotion and is reproduced in a way that ultimately reflects the particular determination that the individual has made about what is in the best interest of the child.[90]

12.65 Although there was some significant support for the proposal of a Children's Advocate,[91] many were also concerned that the filtering referred to above would be exacerbated through the introduction of yet another professional view.

12.66 Zoe Rathus submitted:

> In respect of the children's advocate I am concerned that this position could combine all of the most problematic elements of a family report writer and an Independent Children's Lawyer. Both positions still appear to involve filtering and interpretation of the children's views. It is unclear what the children's advocate should do if they disagree with the views of a child and do not consider those views to be in the child's best interests. This could create the same kinds of frustrations that children feel when family report writers and Independent Children's Lawyers seemingly betray them by making recommendations which are inconsistent with the child's stated position.[92]

12.67 Others observed: 'it will only lead to more hangers on, more cost and delays and less chance of timely and affordable justice',[93] and that it was likely to 'add to the

87 Ibid [7.70] - [7.79].
88 Ibid proposal 7-10.
89 Patrick Parkinson and Judy Cashmore, above n 16, 60–1.
90 Stephanie Young, 'The Missing Heart of Parenting Disputes in the Australian Family Law System: A Case for a Child-Inclusive Approach to Judicial Decision Making' (2017) 7 *Family Law Review* 116, 124.
91 Safe Steps Family Violence Response Centre, *Submission 408*; CASA Forum Victorian Centres Against Sexual Assault, *Submission 404*; Commissioner for Children and Young People WA, *Submission 391*; Australian Dispute Resolution Advisory Council (ADRAC), *Submission 386*; SA Commissioner for Children and Young People, *Submission 360*; Relationships Australia National, *Submission 317*; Mallee Family Care, *Submission 310*; National Legal Aid, *Submission 297*; Australian Association of Social Workers, *Submission 295*; Anglicare Australia, *Submission 291*; Marrickville Legal Centre, *Submission 288*; Centre for Excellence in Child and Family Welfare, *Submission 283*; Bravehearts Foundation Ltd, *Submission 279*.
92 Z Rathus, *Submission 298*. Similar views were expressed by Dr M Fernando and Dr Nicola Ross, *Submission 327*.
93 Dr D Thorp, *Submission 305*.

emotional harm.'[94] Some criticised the lack of clarity around the three distinct roles that would exist within the system and whether there was sufficient basis to justify the creation of new professional roles to work with children.[95] National Family Violence Prevention Legal Service submitted in its response to the Discussion Paper that

> it is feasible that a child could be simultaneously engaged with a Family Consultant, a children's advocate and a separate legal advocate, in addition to any other counsellors or support services. This may further complicate and stress families, and be overwhelming and potentially re-traumatising for the child.[96]

12.68 A number of stakeholders submitted that the role of the Independent Children's Lawyer should be expanded to incorporate some of the functions included in the proposed role of Children's Advocate and that there be enhanced training and oversight of, and increased funding for, Independent Children's Lawyers.[97]

12.69 Alternatively, were the role of the Family Consultant to be expanded as discussed above, some of the functions proposed for the Children's Advocate would fall within that expanded role. The Family Court observed that:

> Each of the children's advocate functions contained in proposals 7-9 and 7-11, apart from those functions which could only be undertaken by an Independent Children's Lawyer, are functions that are either currently undertaken by family consultants or could be undertaken by family consultants if resources allowed. Indeed, it is the view of the Court that these functions would be better achieved by professionals who are working within the courts, namely a family consultant, than by an additional type of social science professional working in an organisation external to the courts.[98]

12.70 On balance, the ALRC is persuaded that introducing an additional professional role within an already crowded suite of professional services within the family law system may do more harm than good. Instead, the ALRC recommends that the Guidelines be given statutory recognition[99] in Div 10 of Pt VII to ensure that all Independent Children's Lawyers understand the full scope of their obligations upon appointment to represent a child and how those obligations interact with the overarching purpose of the *Family Law Act*. It is essential to the efficacy of the role in acting in the best interests of the child that there be adequate funding, both for the appointment of appropriately qualified lawyers and for ongoing training.[100]

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94 E Schindeler, *Submission 335*.

95 Magistrates Court of Victoria and Children's Court of Victoria, *Submission 419*; Family Law Practitioners' Association of Western Australia (Inc), *Submission 410*; Family Court of Australia, *Submission 400*; P Easteal and L Young, *Submission 394*; Interact Support Inc, *Submission 389*; ATSILS (QLD), *Submission 384*; NSW Bar Association, *Submission 373*; Women's Legal Services Australia, *Submission 366*; National Family Violence Prevention Legal Services Forum, *Submission 293*; Caxton Legal Centre, *Submission 292*; Law Council of Australia, *Submission 285*; Domestic Violence Victoria, *Submission 284*; Association of Family and Conciliation Courts Australian Chapter, *Submission 258*.

96 National Family Violence Prevention Legal Services Forum, *Submission 293*.

97 Swaab, *Submission 332*; Dr M Fernando and Dr Nicola Ross, *Submission 327*.

98 Family Court of Australia, *Submission 400*.

99 Law Society of NSW, *Submission 154*.

100 Women's Legal Services Australia, *Submission 366*; R Carroll, *Submission 289*; Law Council of Australia,

Indigenous Liaison Officers

Recommendation 45 The Australian Government should ensure the availability of Indigenous Liaison Officers in court registries where they are required.

12.71 The importance of Indigenous Liaison Officers to ensuring Aboriginal and Torres Strait Islander children are safe and properly cared for was highlighted by the Law Society of New South Wales, which said:

> The Law Society's view is that for Indigenous families, it is critical to appoint indigenous liaison officers to each court registry, preferably located in community health or other agencies relied on and used by indigenous people, to build the link between the court and community. The system used to have indigenous liaison officers, but their funding stopped when the FRCs [Family Relationship Centres] were set up. In our view this was a retrograde step.[101]

12.72 Prior to 2006, the Family Court employed six Indigenous Liaison Officers who assisted the Court in meeting the needs of Aboriginal and Torres Strait Islander parties. Since the establishment of the Family Relationship Centres following the 2006 reforms to the *Family Law Act*, this role has shifted to community-based agencies and, apart from one remaining Officer in the Cairns Registry, Indigenous Liaison Officers are no longer available to the Court.[102] In relation to Cairns, the Law Society of New South Wales observed

> the only FCC [Federal Circuit Court] indigenous liaison officer employed in either court works with the court and community and provides the link. With his help, a programme called Law Yarn was launched a few months ago initiated by community. It is led by LawRight, a community legal service and delivered in collaboration with Wuchopperen Health Service and Queensland Indigenous Family Violence Legal Service (QIFVLS). Law Yarn helps health workers to yarn with members of remote and urban communities about their legal problems and connect them to legal help. This is a positive example of a health/justice partnership, the holistic approach that the ALRC appears to envisage, but it is an Indigenous community initiative, within an Indigenous framework using Indigenous services.[103]

12.73 Those stakeholders who considered this issue strongly supported the reinstatement of Indigenous Liaison Officers (both male and female) within the Court.[104]

Submission 285; Queensland Law Society, *Submission 221*; Rape & Domestic Violence Services Australia, *Submission 167*; CPSU, *Submission 136*; Women's Rights Group, Monash Law Student Society Just Leadership Program, *Submission 105*; Victorian Aboriginal Legal Service, *Submission 101*; Law Council of Australia, *Submission 43*; D Bryant, *Submission 35*.

101 Law Society of New South Wales, quoted in Law Council of Australia, *Submission 285*.

102 Family Court of Australia, *Submission 68*.

103 Law Society of New South Wales, quoted in Law Council of Australia, *Submission 285*.

104 ATSILS (QLD), *Submission 384*; Victorian Aboriginal Legal Service, *Submission 101*; Family Court of Australia, *Submission 68*; Victoria Legal Aid, *Submission 61*; ATSILS Qld, *Submission 42*.

12.74 The ALRC considers that the Australian Government should provide sufficient funding to restore the program through which Indigenous Liaison Officers were engaged in each registry of the family courts as appropriate to the needs of that registry. This is consistent with Recommendation 6 of the Family Law Council's 2012 Report, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients*.[105]

Supported decision making in the family law system

Recommendation 46 The *Family Law Act 1975* (Cth) should be amended to include a supported decision making framework for people with disability consistent with recommendations from the ALRC Report 124, *Equality, Capacity and Disability in Commonwealth Laws*.

12.75 'Supported decision making' provides people with disability with appropriate supports to retain and exercise their legal capacity and reach decisions in accordance with their will, preference and rights.[106] This is distinct from 'substitute decision making', under which a substitute decision maker is appointed who may act on a 'best interests' standard or a 'substituted judgement' standard.

12.76 There is currently no framework in the *Family Law Act* for supported decision making for people with disability. The rules of the family courts make provision for the appointment of a case guardian or litigation guardian—that is, substitute decision making. This omission is out of step with international law and legal frameworks, including the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD),[107] which prescribes that people with disability have the right to enjoy legal capacity on an equal basis with others.[108] Australia was one of the original state signatories to the CRPD in 2007.[109] The CRPD requires State Parties to:

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105 Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (Report, 2012).

106 It is important when considering supported decision making to distinguish between 'legal capacity' and 'decision making capacity'. Decision making capacity refers to 'a person's cognitive capability to make a decision': Mental Health Australia and the ACT Disability, Aged and Carer Advocacy Service, *Supported Decision Making, Psychosocial Disability and the National Disability Insurance Scheme* (2016) 10. Legal capacity refers to 'a person's right to be recognised as both a holder [legal personhood] and user [legal agency] of legal rights': McSherry, Bernadette, 'Legal Capacity under the Convention on the Rights of Persons with Disabilities' (2012) 20 *Journal of Law and Medicine* 22 cited in; Mental Health Australia and the ACT Disability, Aged and Carer Advocacy Service, 10.

107 *Convention on the Rights of Persons with Disabilities*, Opened for Signature 30 March 2007, 999 UNTS 3 (Entered into Force 3 May 2008).

108 Ibid art 12.

109 Australia ratified the CRPD in July 2008 and the Optional Protocol in 2009. The CRPD entered into force for Australia on 16 August 2008, and the Optional Protocol in 2009. Australia made an Interpretative Declaration upon ratifying the CRPD: *Convention on the Rights of Persons with Disabilities: Declarations and Reservations (Australia)*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008). There are differing views about the effect of Australia's Interpretative Declaration, particularly in

> Reform existing legislation to prohibit discriminatory denial of legal capacity, premised on status-based, functional or outcome-based models. Where appropriate, replace those with models of supported decision making, taking into account universal adult legal capacity without any form of discrimination.[110]

12.77 As outlined in the ALRC Report 124, *Equality, Capacity and Disability in Commonwealth Laws* (*Equality, Capacity and Disability* report),[111] the ALRC has previously considered that the crucial issue is how to advance supported decision making in a federal system. The ALRC recommended that this be achieved through the implementation of a Commonwealth Decision Making Model that was framed by a set of National Decision Making Principles which included:

- all adults have an equal right to make decisions that affect their lives and to have those decisions respected;
- persons who require support in decision making must be provided with access to the support necessary for them to make, communicate and participate in decisions that affect their lives;
- the will, preferences and rights of persons who may require decision making support must direct decisions that affect their lives; and
- laws and legal frameworks must contain appropriate and effective safeguards in relation to interventions for persons who may require decision making support, including to prevent abuse and undue influence.

12.78 Submissions expressed strong support for a supported decision making framework for family law matters,[112] including amendment of the *Family Law Act* to implement the recommendations in the ALRC's *Equality, Capacity and Disability* report.[113] Submissions also pointed to the need:

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relation to the role of substitute decision making: Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014).

110 Committee on the Rights of Persons with Disabilities, *General Comment No. 6*, UN Doc CRPD/C/GC/6 (9 March 2018) [49].

111 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014).

112 See Queensland Law Society, *Submission 221*; Australian Human Rights Commission, *Submission 217*; Advocacy for Inclusion, *Submission 90*; Public Advocate and Children & Young People Commissioner, ACT Human Rights Commission, *Submission 87*; Law Council of Australia, *Submission 43*; Office of the Public Advocate (Vic), *Submission 37*; People with Disability Australia (PWDA), *Submission 10*.

113 See Family Law Practitioners' Association of Western Australia (Inc), *Submission 410*; People with Disability Australia, *Submission 409*; Safe Steps Family Violence Response Centre, *Submission 408*; Family & Relationship Services Australia (FRSA), *Submission 407*; Office of the Public Advocate, *Submission 405*; Women with Disabilities Victoria, *Submission 402*; Advocacy for Inclusion, *Submission 399*; Women's Legal Services Australia, *Submission 366*; Victorian Judicial Advisory Group in Family Violence (JAGFV), *Submission 333*; Relationships Australia National, *Submission 317*; National Legal Aid, *Submission 297*; Law Council of Australia, *Submission 285*; Domestic Violence Victoria, *Submission 284*; The Royal Australian and New Zealand College of Psychiatrists, *Submission 280*; Uniting, *Submission 268*.

- to ensure that the framework complies with the most recent human rights guidance materials on Article 12 of the CRPD[114] and the Australian Government's commitment to the National Disability Strategy;[115]
- for the framework be co-designed by people with disability and disability groups and in consultation with persons who have experiences family violence;[116] and
- for culturally safe supports to be available.[117]

Litigation representatives in family law proceedings

Recommendation 47 The *Family Law Act 1975* (Cth) should include provisions for the appointment of a litigation representative where a person with disability is unable to conduct the litigation. These provisions should be consistent with the recommendations of the ALRC Report 124, *Equality, Capacity and Disability in Commonwealth Laws*.

Recommendation 48 The Australian Government should work with state and territory governments to facilitate the appointment of statutory authorities as litigation representatives in family law proceedings.

12.79 Litigation representatives are appointed when a person does not have capacity to conduct litigation.[118] The test for a person to participate in civil proceedings is different from the capacity test for decision making.[119] The focus of the test is on the capacity of the person to understand they have a legal problem, to seek legal assistance about the problem, to give clear instructions to their lawyers, and to understand and act on the advice which they are given.[120] The test is issue-specific. That is, capacity must be considered in relation to the particular proceedings and their nature and complexity.

12.80 In family law proceedings, the federal family courts' rules provide for the appointment of legal representatives.[121] There is no obligation under common law or the federal family courts' rules for litigation representatives to make decisions that reflect the will, preferences and rights of the person represented. Rather, at common law, a litigation

114 See, People with Disability Australia, *Submission 409*; Australian Women Against Violence Alliance (AWAVA), *Submission 379*.
115 JFA Purple Orange, *Submission 392*.
116 Ibid; Women's Legal Services Australia, *Submission 366*; Domestic Violence Victoria, *Submission 284*.
117 NATSILS, *Submission 290*.
118 Also known as a litigation guardian, case guardian, guardian *ad litem,* next friend, tutor or special representative.
119 At common law, the capacity test for a person to participate in civil proceedings is the same as the test for a person to enter into legal transactions: *Goddard Elliot v Fritsch* [2012] VSC 87. There is a presumption of capacity 'unless and until the contrary is proved': *L v Human Rights and Equal Opportunity Commission* (2006) 233 ALR 432.
120 *Goddard Elliot v Fritsch* [2012] VSC 87.
121 *Family Law Rules 2004* (Cth) r 6.08(1); *Federal Circuit Court Rules 2001* (Cth) r 11.08(1).

representative has a 'duty to see that every proper and legitimate step for that person's representation is taken'—which may be akin to a 'best interests' test.

12.81 A litigation representative has no obligation to consult or to facilitate the participation of the person represented, except to the extent that those duties may be imposed by state or territory guardianship legislation (if the person is also a guardian or administrator).

12.82 A number of submissions highlighted that litigation guardianship is a form of substitute decision making,[122] which is inconsistent with the right to supported decision making enshrined in the CRPD. Therefore, as recognised by the Office of the Public Advocate (Vic), the challenge is to bring Australia's traditional approach to litigation guardianship in line with Australian understandings about the CRPD.[123]

12.83 This can be achieved through a re-conceptualisation of the role and duties of litigation representatives in family law proceedings so that their primary role is to support people with disability to exercise their legal capacity. The recommendations in the *Equality, Capacity and Disability* report provide a good model:

- Recommendation 7–3 which provides that a person needs a litigation representative if the person cannot be supported to: understand the information relevant to the decisions that they will have to make in conducting proceedings, including in giving instructions to their legal practitioner; retain that information to the extent necessary to make those decisions; use or weigh that information as part of a decision making process; or communicate the decisions in some way; and
- Recommendation 7–4 which provides that litigation representatives must: support the person represented to express their will and preferences in making decisions; where it is not possible to determine the will and preferences of the person, determine what the person would likely want based on all the information available; where neither of these are possible, consider the person's human rights relevant to the situation; and act in a manner promoting the personal, social, financial and cultural wellbeing of the person represented. This aligns with a facilitated, rather than a substituted, decision making approach.[124]

12.84 Stakeholders to this Inquiry supported amending the *Family Law Act* in accordance with these recommendations.[125]

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122 See, eg, Advocacy for Inclusion, *Submission 90*; Office of the Public Advocate (Vic), *Submission 37*; People with Disability Australia (PWDA), *Submission 10*.

123 Office of the Public Advocate (Vic), *Submission 37*.

124 Advocacy for Inclusion proposed a model of facilitated decision making be implemented, which would only be used as a last resort. The basis of the facilitated decision making model is that the person's legal capacity is given effect by a decision facilitator, who considers the person's will and preferences and human rights, rather than 'best interests': Advocacy for Inclusion, *Submission 90*.

125 See, eg, People with Disability Australia, *Submission 409*; Family & Relationship Services Australia (FRSA), *Submission 407*; Office of the Public Advocate, *Submission 405*; Family Court of Australia, *Submission 400*; Women's Legal Services Australia, *Submission 366*; National Legal Aid, *Submission 297*; NATSILS, *Submission 290*; Law Council of Australia, *Submission 285*. Advocacy for Inclusion was supportive but

12.85 Providing for appointment of litigation guardians in primary legislation will ensure the reforms are universally adopted; that the provisions appropriately interface with the recommended reforms relating to supported decision making; and that there are clear understandings in the law about the roles and duties of litigation representatives. The ALRC also endorses the development of practice notes by the family courts explaining the duties that litigation representatives have to the person they represent and to the court.

Statutory authorities as litigation representatives

12.86 The ALRC recommends that the Australian Government work with state and territory governments to facilitate the appointment of statutory authorities as litigation representatives. The identified benefits of appointing state and territory authorities to the role include:

- they do not have the potential conflict of interest issues that others, such as family members, may have;
- they have appropriate skill sets for the role; and
- they should be able to be appointed without delay.

12.87 Stakeholders supported this approach.[126] People with Disability Australia noted that state authorities currently operate under a substitute decision making function, and suggested that a supported decision making approach should be used consistently in federal, state and territory jurisdictions if they are to do this work in the family law system.[127]

noted that perhaps the ALRC had not taken the recommendation of supported decision making to its full capacity in this regard: Advocacy for Inclusion, *Submission 399*. Women with Disabilities Victoria stated that further consultation is needed around litigation representatives in family law proceedings: Women with Disabilities Victoria, *Submission 402*.

126 See, eg, Office of the Public Advocate, *Submission 405*; National Legal Aid, *Submission 297*; Marrickville Legal Centre, *Submission 288*. The Family Court of Australia made calls for a properly funded panel of qualified persons to be appointed: Family Court of Australia, *Submission 400*; Family Court of Australia, *Submission 68*.

127 People with Disability Australia, *Submission 409*.

13. Building Accountability and Transparency

Contents

Introduction

13.1 In this chapter, the ALRC makes a suite of recommendations that seek to enhance public and professional confidence in the family law system as a whole.

13.2 In order to enhance system performance, accountability, and transparency in decision making, the ALRC recommends expanding the role of the existing Family Law Council to include monitoring and reporting of the overall functioning of the family law system. The Family Law Council should establish a Children and Young People's Advisory Board in order to receive feedback on children's experiences of the family law system and incorporate children's views into policy and practice development.

13.3 Judges and lawyers are key participants in the family law system. The ALRC recommends that legislation provide for consistent criteria requiring family law and family violence expertise for the appointment of judicial officers, and that any legal practitioner undertaking family law work should be required to complete regular family violence training.[1]

13.4 Other crucial roles within the system include family report writers, FDRPs, and CCSs. The ALRC recommends introducing mandatory accreditation for private family report writers and a publicly available list indicating the particular expertise of each. In light of the recommendation in Chapter 8 that FDPRs should mediate more property and financial matters, this chapter examines what additional skills and qualifications they may require. Finally, the ALRC recommends introducing accreditation for all CCSs,

1 Note that family violence incorporates a wide variety of behaviours as discussed elsewhere in this Report. This includes, but is not limited to, physical assault, child sexual abuse, harassment, and financial abuse.

including private services which are currently not subject to any form of regulation or oversight. This incorporates requirements for staff to hold appropriate qualifications and undergo screening checks.

System oversight

13.5 There is currently no independent entity formally tasked with systematically monitoring the performance of the family law system as a whole and making recommendations for its improved functioning. This affects public confidence in the system and leads to concerns that reform is often driven by anecdote or particular interest groups rather than by analysis of the best available evidence.[2] There is also no existing mechanism for children's views to be taken into consideration at a systemic level.

13.6 As outlined in Chapter 2, the ALRC has interpreted the family law system to include the family courts and all family law and post-separation services, including family relationships services (such as government funded family counselling services, post-separation parenting programs, and CCSs), as well as legal aid commissions, the community legal sector, and private legal services. For the purposes of the discussion in this chapter, it is also necessary to include the role of state and territory courts.

13.7 The work of state and territory agencies responsible for child protection and family violence would also be a legitimate focus of regular systemic oversight. Services that may incidentally engage with separating couples, but that are not specifically targeted at such groups, would not ordinarily be considered part of the family law system; these may include general counsellors, drug and alcohol services, mental health services, health practitioners and the like. Interaction with these services could be the focus of a particular inquiry rather than subject to ongoing systemic oversight.

13.8 No single government agency has oversight of all relevant aspects of the family law system. The Attorney-General's Department has policy and funding responsibilities for a number of relevant family law services. The Department of Human Services has responsibility for child support. The Department of Social Services is responsible for some family services, housing services targeting victims of family violence, and contributes to implementation of the *National Plan to Reduce Violence against Women and their Children 2010–22*.

13.9 In addition, the separation of powers between the executive government and the judiciary means that government departments are limited in the extent to which they can exercise oversight of courts. Furthermore, the advice that government departments provide to Ministers is generally not made available to the public, which inhibits transparency of policy making.

13.10 The Discussion Paper proposed the establishment of a new independent statutory body, the Family Law Commission, as a systemic oversight body including a function

2 See, eg, J Howieson, R Carroll, S Murray, I Murray, L Young, L Jarvis, D Hansen, F Lester, *Submission 261*.

of monitoring system performance.[3] Submissions included mixed responses, generally supportive of some of the proposed functions (particularly systemic oversight) but wary of the cost and additional bureaucracy involved in establishing and maintaining a new body. The ALRC instead recommends expanding the roles of existing bodies to include some of the functions of the proposed Family Law Commission, including systemic oversight.

Expanded role of the Family Law Council

13.11 Section 115 of the *Family Law Act* provides for the establishment of a Family Law Council. Its function is to advise and make recommendations to the Commonwealth Attorney-General in relation to legislation, legal aid, and 'other matters' relating to family law. Recommendations may be made 'of its own motion' or at the request of the Attorney-General. While the Family Law Council's current role is in some ways similar to the roles envisaged in this recommendation, it currently does not have an explicit mandate to continuously monitor and assess the functioning of the overall system. The Council has generally produced reports on particular aspects of the system, rather than on the system as a whole. Given its current role, the Family Law Council is the most appropriate existing body to take on these recommended new roles, which would be in addition to its existing statutory roles.

13.12 The Council's members are appointed by the Attorney-General; they must include a judge of the Family Court, and may include other judges, federal and state public servants, family counsellors, family dispute resolution practitioners and 'other persons as the Attorney-General thinks fit'.[4] The Family Law Council operated continuously from 1976 until 2016, but is currently in abeyance and has not had members appointed since 2016.[5] Implementation of this Recommendation would require the Attorney-General to revive the Council by appointing new members.

3 Australian Law Reform Commission, *Review of the Family Law System*, Discussion Paper No 86 (2018) ch 12.

4 *Family Law Act 1975* (Cth) s 115(2).

5 Australian Government, *Family Law Council* <www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Pages/default.aspx>.

Recommendation 49 Section 115 of the *Family Law Act 1975* (Cth) should be amended to expand the Family Law Council's responsibilities to include:

- monitoring and regular reporting on the performance of the family law system;
- conducting inquiries into issues relevant to the performance of any aspect of the family law system, either of its own motion or at the request of government; and
- making recommendations to improve the family law system, including research and law reform proposals.

13.13 Improved oversight of the family law system is likely to improve both the functioning of the system and public confidence in the system. Regular, systematic, expert review of available information on the performance of the family law system could enable an ongoing evidence-based approach to reform. For example, system oversight could include analysis of current research, data regarding service usage, and information from complaints-handling bodies regarding common complaints about family law system professionals. This analysis, and inquiries into particular systemic issues where warranted, would help to inform, and increase transparency in, decision making. System oversight should examine the interrelationship and interaction between family law services with a focus on the experience of, and outcomes for, separating families.

13.14 The Family Law Council should retain its current status as an expert advisory body with secretariat support from the Attorney-General's Department (Cth), rather than becoming a separate agency with its own bureaucracy. Some increase in resourcing may be necessary for the Attorney-General's Department to provide support for the expanded responsibilities of the Council.

13.15 The Family Law Council should be given an explicit oversight role under the *Family Law Act* in order to increase public confidence in the system and signal the importance of its function. To cement the relevance and expanded responsibilities of the Family Law Council, s 115 of the Act could be amended to provide that the Attorney-General 'must' (rather than 'may') establish a Family Law Council. This would provide for greater certainty and continuity of membership appointments.

13.16 The legislative amendment could establish additional categories of members to ensure that the Family Law Council is equipped to oversee the performance of the multifaceted and cross-disciplinary system as a whole. For example, additional representatives of the family violence sector, the legal profession, and the social science sector could be included. The Australian Psychological Society advocated greater use of social science professional skills in evaluation activities to assist the family law

system to meet its overarching objectives.[6] A forum involving broader representation of stakeholders could further foster development of cross-sectoral working relationships.[7]

13.17 Several organisations have had 'observer status' on the Council in the past, including Family & Relationship Services Australia, the Family Law Section of the Law Council of Australia, and the AIFS.[8] Observer agencies are not provided for in legislation, but their involvement has been approved by the Attorney-General. Observers have contributed to the work of the Council and have participated in discussions, but decisions that cannot be made by consensus are decided by Council members only.[9] This practice of approving observer agencies should continue.

System performance monitoring

13.18 The first order of business for the Family Law Council should be to review the recommendations in this Report and assist government with identifying priorities for an implementation plan. Moving forward, the Family Law Council should work with key stakeholders, including the family courts, the Attorney-General's Department (Cth), and the Department of Social Services (Cth), to develop a mechanism for monitoring system performance on a regular basis. This would include reviewing the government's progress on the implementation plan.

13.19 The monitoring of system performance should also include the regular analysis of data based on administrative sources to assess patterns in family court filings[10] and patterns in the usage of family law services that are funded by the Australian Government.[11] The purpose of this program should be to enable transparent and regular reporting of court and service use that would be available to stakeholders across the system. Analogous programs are carried out in allied areas, such as the annual collation of national data on the performance of state and territory child protection systems by the Australian Institute of Health and Welfare.[12] The Family Law Council has previously reported statistics relating primarily to family law cases in courts, either in standalone reports, or as a section in its Annual Reports.[13] This could be reinvigorated and expanded to encompass non-court services, with additional analysis of the interrelationships between the various elements of the system.

13.20 Submissions were in favour of introducing mechanisms to monitor overall system performance. For example, the Law Council of Australia suggested the role of the Family

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6 Australian Psychological Society, *Submission 281*.
7 Law Council of Australia, *Submission 285*.
8 Australian Government, above n 5.
9 Family Law Council, *Annual Report 2014-15* (2015).
10 See, eg, Rae Kaspiew et al, 'Family Law Court Filings 2004–05 to 2012–13' (Research Report No 30, Australian Institute of Family Studies, 2015).
11 KPMG, *Future Focus of the Family Law Services: Final Report* (Report prepared for Attorney-General's Department (Cth), 2016).
12 Australian Institute of Health and Welfare, *Child Protection Australia 2016–17* (2018).
13 See, eg, Family Law Council, *Annual Report 1995-96* (1996); Family Law Council, *Statistical Snapshot of Family Law 2003-2005* (2007).

Law Council should be expanded to examine the 'health' of the system.[14] The LGBTI Legal Service stated: 'A family law system that continues to respond to the needs of the entire Australian community can only be realised if an enduring oversight and reform mechanism is put in place.'[15] Relationships Australia Victoria submitted that given the multifaceted nature of the system, oversight is necessary in order to monitor outcomes and 'improve and maintain the integrity and coherence of the family law system as a whole'.[16] Professor Robyn Carroll identified a need for 'independent monitoring of the performance of the family law system, including the court system' and emphasised the importance of well-researched decisions.[17] Relationships Australia National strongly urged 'the publication of as much data as possible, to support community awareness and understanding of how the system is serving the community, and where there are areas for improvement.'[18]

13.21 In order to meaningfully monitor and comment on the performance of the system, the Family Law Council would need at an early stage to develop a set of performance indicators against which to assess the system.[19] It is beyond the remit of the ALRC to set out what those performance indicators might be, given the extent to which the family law system extends beyond legal services. However, the overarching principles set out in this report may provide some guidance in relation to performance expectations, particularly regarding the legal elements of the overall system.

Inquiries

13.22 Inquiries provide a valuable tool for authorities to investigate issues that may affect the performance of a system, or clients' experiences of the system. Submissions supported the idea that the Family Law Council should be specifically empowered to conduct inquiries requested by government or of its own motion. Inquiries should focus on systemic concerns affecting multiple organisations or users, rather than investigating individual compliance issues. Inquiries should be capable of giving rise to recommendations to improve the experience of families interacting with the system and the functioning of the system.

13.23 Some matters that could inform the Council's decision whether to conduct an own motion inquiry on a particular topic may include:

- the number of complaints received about a particular issue (see below);
- whether there are systemic implications related to a particular issue;
- whether there is likely to be public interest in a particular issue;
- the number of people that may be affected by a particular issue;

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14 Law Council of Australia, *Submission 285*.
15 LGBTI Legal Service, *Submission 367*.
16 Relationships Australia Victoria, *Submission 267*.
17 R Carroll, *Submission 289*.
18 Relationships Australia National, *Submission 317*.
19 See, eg, Interact Support Inc, *Submission 389*.

- whether there are other reviews recently completed or currently in progress on a particular issue;
- the potential for an inquiry into a particular issue to result in improvements to the system; and
- whether an inquiry into a particular issue is the best and most efficient use of the Council's resources.[20]

These matters should be considered general guidance and should not be used as strict criteria to prevent the Family Law Council from conducting an inquiry on another topic.

13.24 The Family Law Council (via its host agency the Attorney-General's Department) could enter into agreements with relevant professional regulatory bodies to obtain information regarding the numbers and types of complaints to inform its decisions. For example, the Office of the NSW Legal Services Commissioner submitted that it could provide data about complaints against family lawyers to assist system performance monitoring, including outcomes of complaints and compliance audits.[21] Other professional bodies could also provide relevant data to build a more comprehensive picture of issues arising across the range of professions involved in the family law system.

13.25 Relationships Australia submitted that guidance on when an own motion inquiry may be appropriate should be specified in legislation.[22] Legislative provisions for other own motion procedures generally provide very limited or no guidance in this regard and grant wide discretion to the responsible body.[23] Further guidance is often provided by policies developed by the responsible body and may be endorsed by government.[24] Consistent with such approaches, the Family Law Council should develop its own policies in this regard, and seek to have those policies endorsed by the Attorney-General. Inquiries should not relate to the conduct of judges—judicial conduct is considered later in this chapter.

Making recommendations

13.26 In the course of monitoring system performance and conducting inquiries, the Family Law Council should have the power to make recommendations to government about reforms or initiatives that may improve system functioning and advance policy

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20 The review of the Office of the Queensland Ombudsman makes reference to similar considerations when deciding whether to instigate own motion inquiries; Simone Webbe, 'Strategic Review of the Office of the Queensland Ombudsman' (2018).

21 NSW Legal Services Commissioner, *Submission 324*.

22 Relationships Australia National, *Submission 317*.

23 See, eg, *Australian Human Rights Commission Act 1986* (Cth); *Ombudsman Act 1976* (Cth); *Privacy Act 1988* (Cth); *Ombudsmen Act 1975* (NZ).

24 See, eg, Office of the Australian Information Commissioner, *Privacy Regulatory Action Policy* (2018) <https://www.oaic.gov.au/about-us/our-regulatory-approach/privacy-regulatory-action-policy/>; Office of the Ombudsman (NZ), *Wider Administrative Improvement Investigations* <www.ombudsman.parliament.nz/what-we-do/investigations/wider-administrative-improvement-investigations>; Victorian Ombudsman, *Own Motion Enquiries and Investigations* <www.ombudsman.vic.gov.au/About/Our-policies/Policies/Own-Motion-Enquiries-and-Investigations>.

objectives. Recommendations could include specific legislative reforms, or changes to the family law service system.

13.27 The Family Law Council is also likely to identify areas where information is lacking, or where further research would assist in monitoring system performance. The Council should therefore have a specific power to recommend to government prioritisation of particular research projects. It would then be a matter for government to consult with existing research bodies—such as AIFS and Australia's National Research Organisation for Women's Safety—regarding the conduct and resourcing of research. Relationships Australia submitted that such an approach would be preferable to providing an oversight body with power to directly refer research priorities to research bodies.[25] The ALRC recommends that allocation and uptake of research tasks continue to be determined by the existing processes and relationships between government and research bodies.

13.28 Women's Legal Service NSW submitted that government should be required to respond to recommendations for systemic improvements in a timely manner and to publish reasons where government does not accept particular recommendations.[26] While such a measure would promote transparency in decision making at the highest level, the Family Law Council is envisaged as an advisory body, rather than as an accountability body for government. Governments have committed to providing responses within particular timeframes to recommendations of parliamentary committees, which generally conduct public proceedings and have specific mandates in relation to governmental accountability.[27] However, the ordinary practice in relation to advisory bodies is that government decides how to respond to recommendations. The ALRC does not recommend any requirement for government to specifically respond to Family Law Council recommendations.

Advisory Boards

13.29 The ALRC recommends the establishment of a Children and Young People's Advisory Board.[28] Its role would include informing policy and practice development in the family law system. Accordingly, specifically requiring the Family Law Council to be informed by the work of the Children and Young People's Advisory Board would provide a mechanism for incorporating children's views in policy considerations in a consistent and ongoing way.

13.30 Several submissions suggested that additional advisory boards be established to give a voice at a policy level to other groups of service users. For example, some suggested advisory boards to represent Aboriginal and Torres Strait Islander people, culturally and linguistically diverse communities, LGBTIQ people or people with a

25 Relationships Australia National, *Submission 317*. See also National Legal Aid, *Submission 297*.
26 Women's Legal Service NSW, *Submission 340*.
27 Department of the Prime Minister and Cabinet, *Guidelines for the Presentation of Documents to the Parliament* (2017) 8.
28 See below [13.36]-[13.42]

disability communities.[29] There is unquestionably a need to incorporate the views of a diverse cross-section of the community in order to continually improve the responsiveness of the family law system. However, children and young people are directly affected by the vast majority of family law cases (whether or not there is a dispute specifically about children's arrangements) and they currently have very limited opportunities to provide feedback on their experiences or inform policy decisions. The ALRC therefore recommends that government prioritise an advisory board for children and young people in particular.

Proposed Family Law Commission

13.31 The ALRC considered the establishment of a new independent statutory body, the Family Law Commission, which would: monitor system performance; manage training and accreditation of, and complaints against, professionals and agencies; conduct inquiries into the functioning of the system; and promote public education and awareness.[30] After considering feedback on this proposal, the ALRC instead recommends expanding the roles of existing bodies to include some of the functions of the proposed Family Law Commission. The ALRC does not recommend the establishment of a new body, primarily due to concerns about resourcing and overlap with the responsibilities of existing bodies, such as the Family Law Council.

13.32 Submissions incorporated mixed views about the establishment of the Family Law Commission. Some submissions strongly supported a Family Law Commission. For example, the CASA Forum Victorian Centres Against Sexual Assault submitted: 'A central governance body with power to hold the system and practitioners within that system accountable is welcome and will play a critical role in ensuring the vision for reform is realised.'[31] The Victorian Association of Collaborative Professionals anticipated that a specialised Family Law Commission would be 'an important means of establishing and maintaining confidence in the family law system.'[32] Domestic Violence Victoria submitted that the Family Law Commission would be 'a great step towards holding the system to account and [would] help drive many of the proposed reforms.'[33]

13.33 Others gave qualified support. Mallee Family Care expressed in principle support for the Family Law Commission, but also recognised 'a risk that additional red-tape and bureaucracy may be added to the system without necessarily improving outcomes for families and the service system overall.'[34] The Hon Mary Finn stated that various recommendations including the proposed Commission were 'for the most part worthy of

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29 See, eg, Aboriginal Justice Caucus Working Group on Family Violence, *Submission 381*; Australian Women Against Violence Alliance (AWAVA), *Submission 379*; Domestic Violence NSW, *Submission 363*; National Family Violence Prevention Legal Services Forum, *Submission 293*.

30 Australian Law Reform Commission, *Review of the Family Law System*, Discussion Paper No 86 (2018) Proposal 12-1.

31 CASA Forum Victorian Centres Against Sexual Assault, *Submission 404*.

32 Victorian Association of Collaborative Professionals, *Submission 328*.

33 Domestic Violence Victoria, *Submission 284*.

34 Mallee Family Care, *Submission 310*.

support' but required 'recognition of their significant resource implications' and urged that resources not be provided 'at the expense of the already overstretched budget of the Courts.'[35] The Resolution Institute considered there 'may be some value' in establishing the Commission, but it was the proposed functions, rather than the body itself, that it expected would lead to overall improved monitoring and performance of the family law system.[36] Similarly, National Legal Aid expressed in principle support for some of the systemic oversight functions, but raised concerns about challenges of implementation.[37]

13.34 There were also submissions squarely against the proposed Commission. Several focused on the resources that would be required for such a body, and advocated for resources to instead be put towards front-line services.[38] The Family Court urged 'consideration of how existing services, bodies and roles could provide the functions proposed if adequately funded.'[39] The Family Law Practitioners Association Qld was concerned about overlap with existing bodies, segregation of family law professionals from their colleagues, the potential for skilled practitioners to be discouraged from family law work, and the addition of 'another layer of bureaucracy' that would not promote efficiency or effectiveness.[40]

13.35 The proposed roles of the Family Law Commission that met with the most resistance related to accreditation and complaints handling. For example, one submission stated that although 'the intent to provide greater regulation to the overall family law system is laudable', the potential for duplication of existing regulatory roles of professional bodies was concerning.[41] Some submissions specifically supported these roles,[42] but legal professional bodies in particular expressed strong concern about the uncertainty, inefficiency, confusion, regulatory burden, and costs involved in having multiple overlapping accreditation and complaint bodies for professionals.[43] A number of other submissions raised similar objections and generally suggested professional regulation should remain with existing bodies.[44] Consultations outlined concerns that the

35 Hon M Finn, *Submission 308*.
36 Resolution Institute, *Submission 260*.
37 National Legal Aid, *Submission 297*.
38 See, eg, National Family Violence Prevention Legal Services Forum, *Submission 293*; NATSILS, *Submission 290*; Law Council of Australia, *Submission 285*.
39 Family Court of Australia, *Submission 400* (this comment was made in relation to a number of proposals, including the Family Law Commission).
40 Family Law Practitioners Association Qld, *Submission 368*.
41 Association of Family and Conciliation Courts Australian Chapter, *Submission 258*. See also Relationships Australia National, *Submission 317*; Australian Psychological Society, *Submission 281*.
42 See, eg, Better Place, *Submission 425*; Safe Steps Family Violence Response Centre, *Submission 408*; Z Rathus, H Menih, S Jeffries, R Field, *Submission 403*; M Morris and K Halford, *Submission 344*; Relationships Australia National, *Submission 317*; Partnerships Victoria, *Submission 307*; Relationships Australia Victoria, *Submission 267*.
43 Law Institute of Victoria, *Submission 387*; NSW Bar Association, *Submission 373*; NSW Legal Services Commissioner, *Submission 324*; National Legal Aid, *Submission 297*; Law Council of Australia, *Submission 285*; Victorian Legal Services Board and Commissioner, *Submission 277*; Legal Profession Board of Tasmania, *Submission 276*.
44 Family Law Practitioners' Association of Western Australia (Inc), *Submission 410*; Family & Relationship Services Australia (FRSA), *Submission 407*; ATSILS (QLD), *Submission 384*; Family Law Practitioners

Family Law Commission would be overwhelmed by vexatious complaints, a problem also described in research and judgments.[45]

A Children and Young People's Advisory Board

Recommendation 50 The Family Law Council should establish a Children and Young People's Advisory Board, which would provide advice and information about children's experiences of the family law system to inform policy and practice.

13.36 The ALRC supports children's participation in family law matters that affect them, as well as broader participation in system oversight and reform. Providing children and young people with a mechanism through which to participate in the governance of the family law system will assist future policy and practice development to be child-centred. An Advisory Board populated with children and young people will allow them to provide feedback, including on their experiences of the system, and to share ideas for its improvement.

13.37 The organised participation of children and young people in the oversight and development of family law systems has developed in cognate jurisdictions. The Family Justice Young People's Board (FJYPB) was established in England and Wales in 2013, constituting a group of over 50 children and young people aged between seven and 25 years. Members have either had direct experience of the family justice system or have an interest in children's rights and the family courts. The FJYPB primarily works to support the Family Justice Board, which sets the direction of the family justice system and oversees its performance.[46] A similar board of children and young people was recently established in Scotland, modelled on the FJYPB.[47]

13.38 Children and young people's advisory bodies have developed in Australia at the state and territory level. In South Australia, a Young People's Family Law Advisory Group (YPFLAG) was piloted by the South Australian Family Law Pathways Network for an 18-month period in 2016–18.[48] Victoria Legal Aid has established a Young Persons

Association Qld, *Submission 368*; Swaab, *Submission 332*; Mallee Family Care, *Submission 310*; Bravehearts Foundation Ltd, *Submission 279*.

45 Alison O'Neill et al, 'The Views of Psychologists, Lawyers, and Judges on Key Components and the Quality of Child Custody Evaluation in Australia' (2018) 56(1) *Family Court Review* 64; *Stapleton & Bryant* [2017] FamCA 1005.

46 Cafcass, *Family Justice Young People's Board* <www.cafcass.gov.uk/family-justice-young-peoples-board/>; *Family Justice Board* <www.gov.uk/government/groups/family-justice-board>.

47 Children's Hearings Improvement Partnership, *History of the Young People's Board - Our Hearings, Our Voice* <https://www.chip-partnership.co.uk/our-hearings-our-voice/about-us/history-of-the-young-peoples-board/>.

48 Family Law Pathways Network South Australia, *Young Peoples Family Law Advisory Group: A Pilot Project 2016/17—'The Tip of the Iceberg'* (2018).

Advisory Forum to provide feedback and inform the improvement of child protection legal services.[49] In other sectors, young people's voices have also been incorporated into the governance of organisations that work with young people. For example, the National Youth Mental Health Foundation, *headspace*, has a Youth National Reference Group that works with *headspace* to 'ensure young people's voices and opinions remain front and centre.'[50]

13.39 Submissions supported the establishment of a similar federal body to work with the family law system.[51] Relationships Australia suggested that a representative body of this type in the family law system 'composed of people who have lived experience of the system as a child or young person, could be of great value in supporting the development of user-driven services.'[52] Similarly, the Centre for Excellence in Child and Family Welfare submitted that the Advisory Board 'could become a powerful way for children and young people to have direct input into the way the family law system can become more child-centred and child-inclusive.'[53]

13.40 In 2016, the Family Law Council recommended the creation of such a body to assist in the design of child-focused family law services.[54] In 2018, the Office of the Commissioner for Children and Young People, South Australia, suggested that the creation of an advisory board modelled on the FJYPB could provide a mechanism for keeping the focus of the family law system on children and facilitating child-focused improvements to the system.[55] The 2018 evaluation of South Australia's YPFLAG similarly recommended such a body be permanently established and expanded to operate on a national basis.[56]

13.41 The ALRC supports the introduction of a national Children and Young People's Advisory Board for the family law system. The Advisory Board should provide the Family Law Council with advice and information about children's experiences of the family law system to inform policy and practice development. Such an Advisory Board will facilitate the participation of children and young people in the development and

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49 Victoria Legal Aid, *Help Shape Legal Services for Young People* <http://www.legalaid.vic.gov.au/about-us/news/help-shape-legal-services-for-young-people>. See also Victoria Legal Aid, *Submission 61*.

50 headspace, *headspace Youth National Reference Group* <https://headspace.org.au/about-us/>.

51 See, eg, Better Place, *Submission 425*; For Kids Sake, *Submission 421*; Monash Gender and Family Violence Prevention Centre (MGFVPC), *Submission 411*; Family & Relationship Services Australia (FRSA), *Submission 407*; CASA Forum Victorian Centres Against Sexual Assault, *Submission 404*; P Easteal and L Young, *Submission 394*; Fighters Against Child Abuse Australia (FACAA), *Submission 393*; Women's Legal Services Australia, *Submission 366*; L Laing, C Humphreys, S Heward-Belle and G Ovenden, *Submission 352*; Anglicare Australia, *Submission 291*; Marrickville Legal Centre, *Submission 288*; Relationships Australia Victoria, *Submission 267*.

52 Relationships Australia, *Submission 11*.

53 Centre for Excellence in Child and Family Welfare, *Submission 283*.

54 Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (Final Report, 30 June 2016) rec 13.1.

55 Office of the Commissioner for Children and Young People (SA), *What Children and Young People Think Should Happen When Families Separate* (2018) 21–2.

56 Family Law Pathways Network South Australia, 'The Tip of the Iceberg' (Report of Young Peoples Family Law Advisory Group; A Pilot Project 2016/17) 2018, 32–3.

oversight of the family law system and provide a formal mechanism for obtaining feedback from children and young people.

13.42 The Family Law Council should devise a program for recruitment, management and governance of the Board. Some models exist or have been suggested, for example:

- **Recruitment**: Advisory Board members could be identified through a public recruitment process, which may include promotion through relevant websites, specialist children's practitioners or Children's Commissioners. This reflects the approach taken in the UK, Scotland and South Australia.[57] NATSILS highlighted the importance of ensuring the Advisory Board includes representatives of Aboriginal and Torres Strait Islander communities.[58] People with Disability Australia submitted that the Board should include children and young people with disability who have experienced the family law system.[59]
- **Management and governance**: The Advisory Board should be managed or supported by professionals with specialist experience working with children.[60]

Judicial appointments

Recommendation 51 Relevant statutes should be amended to require that future appointments of all federal judicial officers exercising family law jurisdiction include consideration of the person's knowledge, experience, skills, and aptitude relevant to hearing family law cases, including cases involving family violence.

13.43 Appropriate judicial appointments are critical to maintaining public confidence in the family law system and providing optimal outcomes and in-court experiences for litigants. Regardless of the court in which a family law matter is conducted, all family law litigants should have the same level of assurance regarding key attributes of the judicial officer. This Recommendation seeks to strengthen and harmonise federal legislative provisions regarding judicial appointments. If state and territory courts are to play a greater role in exercising federal family law jurisdiction in line with Recommendation 1, the same principles should apply to relevant state and territory judicial officers.

57 See, eg, Children's Hearings Improvement Partnership, *Recruiting Now—Our Hearings, Our Voice* <https://www.chip-partnership.co.uk/2018/09/03/our-hearings-our-voice/>; Family Law Pathways Network South Australia, above n 56, 8–9, 39; Young Wrexham, *The Family Justice Young People's Board (FJYPB) Are Now Recruiting* <http://youngwrexham.co.uk/blog/2018/01/17/the-family-justice-young-peoples-board-fjypb-are-now-recruiting/>.

58 NATSILS, *Submission 290*.

59 People with Disability Australia (PWDA), *Submission 10*.

60 CASA Forum Victorian Centres Against Sexual Assault, *Submission 404*; Anglicare Australia, *Submission 291*.

13.44 As set out below, the limitations of professional development for judicial officers counsels an emphasis on appointment criteria. Consistent appointment criteria are an important means of ensuring appropriate levels of experience and knowledge in relation to the family law system. Moreover, establishing core competencies for judicial officers at the time of appointment is fundamental to ensuring good decision making. A transparent appointment process and complaint mechanism will increase public confidence in the family law courts.

Appointment criteria and professional development

13.45 The need for professional development opportunities for judicial officers in relation to family law is well-recognised. The ALRC has previously recommended 'regular and consistent education and training' on family violence, including for family law judicial officers.[61] Recent reports have made similar recommendations in relation to family violence and trauma-informed practice.[62] Intra-familial child sexual abuse is an additional area of concern requiring enhanced education for judicial officers.

13.46 The Discussion Paper noted the availability of relevant professional development for judicial officers exercising family law jurisdiction such as that offered by the National Judicial College of Australia and the Family Court.[63] However, the use of training to develop family violence competency for judicial officers is limited by the principle of judicial independence, as judicial officers cannot be compelled to attend or participate in training following appointment to the bench.[64] Furthermore, studies have found that some judicial officers face time constraints and other challenges in undertaking what professional development is available, given their high workload.[65] Recognising this, the SPLA *Family Violence Report* suggested that the criteria for judicial appointments are critical.[66] The ALRC agrees.

13.47 The legislative considerations for appointments of federal judicial officers exercising family law jurisdiction are currently inconsistent. Judges of the Family Court are appointed under s 22 of the *Family Law Act*, which provides:

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61 Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010) rec 31-1.

62 COAG Advisory Panel on Reducing Violence against Women and their Children, *Final Report* (2016) rec 1.4; Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (Final Report, 30 June 2016) rec 13; House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (2017) rec 27; Queensland Special Taskforce on Domestic and Family Violence, Queensland Government, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (2015) recs 103-05; Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol VI, recs 215–16.

63 National Judicial College of Australia, *Submission 113*; Family Court of Australia, *Submission 68*.

64 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 62, 285.

65 Shellee Wakefield and Annabel Taylor, 'Judicial Education for Domestic and Family Violence—State of Knowledge Paper' (State of Knowledge Paper Issue 2, ANROWS, June 2015) 7 and 25.

66 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 62, 285.

> (2) A person shall not be appointed as a Judge unless:
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> ...
>
> (b) by reason of training, experience and personality, the person is a suitable person to deal with matters of family law.

13.48 An equivalent provision applies to judges of the Family Court of Western Australia.[67] However, no such provision applies to the Federal Circuit Court,[68] where family law matters constitute the vast majority of the Court's workload.[69]

13.49 The Federal Circuit and Family Court of Australia Bill 2018 (Cth) currently before Parliament retains the requirements of s 22 of the *Family Law Act* in the provisions for appointments to Division 1 of the merged Court, and introduces a new requirement for appointments to Division 2 of the merged Court, namely that a person is not to be appointed unless 'the person has appropriate knowledge, skills and experience to deal with the kinds of matters that may come before the Federal Circuit and Family Court of Australia (Division 2).'[70]

13.50 The National Judicial College of Australia suggests that the current reference in the *Family Law Act* to the 'personality' of the appointee should instead refer to the person's competencies.[71] The ALRC has incorporated this suggestion in the wording of this Recommendation. This is consistent with the approach of the Victorian Royal Commission into Family Violence, which recommended consideration of the appointee's 'knowledge, experience, skills and aptitude' of relevant matters.[72]

Competencies for judicial appointments

13.51 Currently, judges are not legislatively required to have experience or knowledge relating to family violence. The Discussion Paper proposed that judicial appointments 'should include consideration of the person's knowledge, experience and aptitude in relation to family violence.'[73] A number of submissions supported this proposal and several also suggested that competence in family law should be required for judicial officers exercising family law jurisdiction in the Federal Circuit Court.[74] Professor Parkinson AM

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67 *Family Court Act 1997* (WA) s 11.

68 *Federal Circuit Court of Australia Act 1999* (Cth) sch1 cl 1.

69 Federal Circuit Court of Australia, 'Federal Circuit Court Annual Report 2017–18' (Federal Circuit Court of Australia, 2018) 44.

70 Federal Circuit and Family Court of Australia Bill 2018 (Cth) cl 79.

71 National Judicial College of Australia, *Submission 113*.

72 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) rec 214.

73 Australian Law Reform Commission, *Review of the Family Law System*, Discussion Paper No 86 (2018) Proposal 10-8.

74 Monash Gender and Family Violence Prevention Centre (MGFVPC), *Submission 411*; Family Law Practitioners' Association of Western Australia (Inc), *Submission 410*; Safe Steps Family Violence Response Centre, *Submission 408*; Community and Public Sector Union (CPSU), *Submission 406*; CASA Forum Victorian Centres Against Sexual Assault, *Submission 404*; No to Violence, *Submission 398*; P Easteal and L Young, *Submission 394*; Yourtown, *Submission 388*; Australian Dispute Resolution Advisory Council (ADRAC), *Submission 386*; NSW Bar Association, *Submission 373*; Family Law Practitioners

submitted that the same qualifications should apply to all decision makers in parenting matters, and noted that the Family Law Amendment (Parenting Management Hearings) Bill 2017 (Cth) currently before Parliament would require knowledge and experience in dealing with family law and/or family violence.[75] The Explanatory Memorandum states that this is due to the prevalence of family violence among separating couples and the need to respond safely and effectively.[76]

13.52 This Recommendation is consistent with recommendations made in the SPLA *Family Violence Report*,[77] the Royal Commission into Family Violence in relation to appointments of judicial officers in Victoria,[78] and the recent report of the Senate Legal and Constitutional Affairs Legislation Committee on the Federal Circuit and Family Court of Australia Bill 2018 (Cth).[79]

13.53 In addition, it reflects stakeholder expectations that federal judicial officers should have the same core competencies as other family law system professionals.[80] Some submissions suggested that such competencies are especially important for judicial officers, as litigated proceedings often involve clients with the most complex needs, including in relation to family violence.[81]

13.54 Family violence is the most commonly raised factual issue in family law proceedings.[82] In recognition of this prevalence, the ALRC recommends a legislative requirement that judicial officers presiding over family law matters in the family courts be competent in dealing with both family law and family violence.

13.55 Some submissions suggested that the same competencies should be required of state and territory judicial officers exercising family law jurisdiction.[83] The Victorian

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Association Qld, *Submission 368*; Women's Legal Services Australia, *Submission 366*; Women's Legal Service NSW, *Submission 340*; Fitzroy Legal Service and Darebin Community Legal Service, *Submission 336*; Victorian Judicial Advisory Group in Family Violence (JAGFV), *Submission 333*; Swaab, *Submission 332*; J Campbell, *Submission 325*; National Legal Aid, *Submission 297*; Hume Riverina Community Legal Service, *Submission 294*; National Family Violence Prevention Legal Services Forum, *Submission 293*; Rape & Domestic Violence Services Australia, *Submission 287*; Law Council of Australia, *Submission 285*; Domestic Violence Victoria, *Submission 284*; ANROWS, *Submission 278*; Uniting, *Submission 268*; Association of Family and Conciliation Courts Australian Chapter, *Submission 258*.

75 P Parkinson, *Submission 341*.

76 Explanatory Memorandum, Family Law Amendment (Parenting Management Hearings) Bill 2017 (Cth).

77 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 62, 285.

78 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol VI, rec 214.

79 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Federal Circuit and Family Court of Australia Bill 2018, Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018* (2019). In particular, see the discussion on pp 39–46 and rec 3.

80 See, eg, Australian Human Rights Commission, *Submission 217*; Rape & Domestic Violence Services Australia, *Submission 167*; Relationships Australia Victoria, *Submission 129*; Victoria Legal Aid, *Submission 61*.

81 See, eg, National Legal Aid, *Submission 163*; Victoria Legal Aid, *Submission 61*.

82 Rae Kaspiew et al, *Court Outcomes Project (Evaluation of the 2012 Family Violence Amendments)* (Australian Institute of Family Studies, 2015) 49.

83 Victorian Judicial Advisory Group in Family Violence (JAGFV), *Submission 333*; National Family

Royal Commission into Family Violence recommended that when appointing state magistrates, consideration be given to their 'knowledge, experience, skills and aptitude for hearing cases involving family violence, including their knowledge of relevant aspects of federal family law.'[84] The significance of these suggestions will depend on the extent to which family law jurisdiction is devolved to state courts as suggested by Recommendation 1.

Appointment processes

13.56 Judicial appointments in Australia are generally the 'unfettered prerogative of the Executive government' and appointment processes can consequently change based on the preferences of the government of the day.[85] The ALRC has previously recommended the establishment of an 'advisory commission' to advise the Attorney-General on suitable candidates to increase judicial independence and impartiality, as well as promote greater diversity that more closely reflects the ethnic, cultural, and gender makeup of the community.[86]

13.57 While in this Inquiry the ALRC does not recommend any specific process for the appointment of judges exercising family law jurisdiction, the Australian Government should consider more transparent processes for appointing judicial officers generally. Furthermore, to the extent that state and territory courts will increasingly exercise family law jurisdiction, the same principles should apply to appointment processes to those courts. The same principles would apply equally in all areas of law, not just in family law, such that a comprehensive discussion would extend beyond the Terms of Reference for this Inquiry.

13.58 Consultations and submissions to this Inquiry supported more transparent processes for judicial appointments. The Law Council of Australia noted long-standing calls for changes to judicial appointment processes, particularly to achieve 'greater transparency and greater independence from the Executive', and advocated for a process 'less open to political interference'.[87] Some consultations and submissions expressed support for the use of appointment processes that advertise, interview, and assess candidates for judicial appointment as a way to ensure greater diversity on the bench, including the appointment of judicial officers from Aboriginal and Torres Strait Islander and culturally and linguistically diverse communities.[88] For example, the Aboriginal Legal Service of Western Australia suggested that a more transparent process may encourage a wider

Violence Prevention Legal Services Forum, *Submission 293*.

84 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) rec 214.

85 Judicial Conference of Australia, *Judicial Appointments: A Comparative Analysis* (2015), citing *Attorney-General (NSW) v Quin* (1990) 170 CLR 1.

86 Australian Law Reform Commission, *Equality before the Law: Justice for Women*, Report No 69 (1994).

87 Law Council of Australia, *Submission 285*.

88 See on this, Elizabeth Handsley and Andrew Lynch, 'Facing up to Diversity? Transparency and the Reform of Commonwealth Judicial Appointments 2008–13' (2015) 37 *Sydney Law Review* 187.

cross-section of applicants for judicial office.[89] Professors Easteal and Young suggested an advisory committee.[90]

13.59 Domestic Violence Victoria suggested that mandated quotas or targets should be set for appointments of female judges and judges from diverse backgrounds, as part of an overall Institutional Change Framework.[91] National Family Violence Prevention Legal Services Forum advocated for the adoption of a strategy to establish identified judicial positions for Aboriginal and Torres Strait Islander people, noting that increased judicial diversity would require ongoing investment, commitment and, capacity building over the longer term.[92]

13.60 The Judicial Conference of Australia has undertaken a comparative analysis of judicial appointment processes in federal, state, territory, and select foreign jurisdictions, canvassing a variety of practices and processes including advertisements and expressions of interest, public selection criteria, consultation processes, nominations, formal interviews, selection panels, and other independent bodies.[93] Several jurisdictions have taken steps to increase independence and diversity amongst judicial appointments.

13.61 Since 1988, Canada has operated Judicial Advisory Committees which make recommendations about candidates to the responsible Minister. Professional competence and overall merit are the primary qualifications for appointment, and Committees 'must strive to create a pool of candidates that is gender-balanced and reflective of the diversity of each jurisdiction'.[94] In 2006, the United Kingdom established a Judicial Appointments Commission that must make recommendations based on merit, good character, and 'the need to encourage diversity in the range of persons available for selection for appointments.'[95] If the Lord Chancellor considers a recommendation to be unsatisfactory, written reasons must be given as to why.[96] The New Zealand Ministry of Justice publishes a process for appointments to higher courts, with criteria including legal ability, character, and personal skills; candidates should also be 'aware of, and sensitive to, the diversity of modern New Zealand society.'[97] Finally, the Australasian Institute of Judicial Administration has published model criteria for judicial appointments, including: 'Awareness of and respect for the diverse communities which the courts serve and an understanding of differing needs'.[98] The ALRC endorses approaches that explicitly aim for suitably qualified pools of candidates who reflect the diversity of the community.

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89 Aboriginal Legal Service of Western Australia, *Submission 64*.

90 P Easteal and L Young, *Submission 394*.

91 Domestic Violence Victoria, *Submission 284*.

92 National Family Violence Prevention Legal Services Forum, *Submission 293*; ; a similar suggestion was made by the Aboriginal and Torres Strait Islander Women Lawyers' Network in Women's Legal Services Australia, *Submission 366*.

93 Judicial Conference of Australia, above n 86.

94 Office of the Commissioner for Federal Judicial Affairs Canada, *Guide for Candidates* <www.fja.gc.ca/appointments-nominations/guideCandidates-eng.html>.

95 *Constitutional Reform Act 2005* (UK) s 64.

96 Ibid s 95.

97 Ministry of Justice (NZ), *Judicial Protocol* (2014) 4.

98 Australasian Institute of Judicial Administration Incorporated, *Suggested Criteria for Judicial Appointments*

Complaints about judges

13.62 Many submissions supported the proposal in the Discussion Paper to establish an independent body to handle complaints about judicial officers.[99] The Discussion Paper noted the strict constitutional limits on how discipline may be imposed on Commonwealth judicial officers, and noted that no federal judicial officer has ever been dismissed from office by Parliament.[100] It asked whether a Judicial Commission should be established to cover at least federal judicial officers exercising family law jurisdiction. It suggested that such a body could helpfully address complaints particularly regarding judicial conduct which may adversely affect performance of the judge's duties or the reputation of the court, without necessarily warranting removal of the judge from office by Parliament.

13.63 However, several submissions strongly emphasised that a Judicial Commission should not be established only in relation to family law judges, but rather should only be established if it applies to all federal judicial officers.[101] The ALRC agrees. However, the question of the establishment of a body in relation to all federal judicial officers necessitates a broader investigation than is possible in this Inquiry. The ALRC therefore suggests that the issue warrants further consideration by the Australian Government in the broader context of all federal judicial officers.

13.64 The ALRC has previously recommended developing protocols for dealing with complaints.[102] A Senate Inquiry recommended the establishment of a federal judicial commission to consider complaints against judicial officers.[103]

13.65 In 2012, significant reforms were introduced for the handling of complaints against Commonwealth judicial officers. Special powers and immunities were granted to the heads of jurisdiction, or a complaint handler chosen by them, to consider complaints against judicial officers.[104] Powers include temporarily restricting the judicial officer to non-sitting duties or referring matters to Parliament to consider dismissal in appropriate

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(2015) 4.

99 See, eg, Family Law Practitioners' Association of Western Australia (Inc), *Submission 410*; CASA Forum Victorian Centres Against Sexual Assault, *Submission 404*; Family Court of Australia, *Submission 400*; NSW Bar Association, *Submission 373*; Family Law Practitioners Association Qld, *Submission 368*; Family Law Reform Coalition, *Submission 355*; Relationships Australia National, *Submission 317*; Family Court of Western Australia, *Submission 311*; Z Rathus, *Submission 298*; National Legal Aid, *Submission 297*; Law Council of Australia, *Submission 285*; Domestic Violence Victoria, *Submission 284*; Association of Family and Conciliation Courts Australian Chapter, *Submission 258*; CPSU, *Submission 136* (supported by two-thirds of members); For Kids Sake, *Submission 118*; Family Inclusion Network Queensland (Townsville), *Submission 78*; NSW Young Lawyers, *Submission 68*; Women's Legal Services Australia, *Submission 45*.

100 *Australian Constitution* s 72.

101 See, eg, Family Court of Australia, *Submission 400*; NSW Bar Association, *Submission 373*; Swaab, *Submission 332*; J Campbell, *Submission 325*; Family Court of Western Australia, *Submission 311*; Hon M Finn, *Submission 308*; Association of Family and Conciliation Courts Australian Chapter, *Submission 258*.

102 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) recs 11, 12.

103 Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Australia's Judicial System and the Role of Judges* (2009) recs 10, 11.

104 *Courts Legislation Amendment (Judicial Complaints) Act 2012* (Cth).

circumstances.[105] Complaint procedures are outlined on the court websites. However, there is no independent body to receive complaints about federal judicial conduct, nor to review the handling of complaints.

13.66 In the most recent reporting year, the Family Court received 10 complaints about judicial conduct and nine complaints about delays in delivery of judgment.[106] In the same period, the Federal Circuit Court received 32 complaints about judicial conduct and 66 complaints about overdue judgments.[107] Reports do not indicate the outcome of these complaints.

13.67 New South Wales and Victoria have both established judicial commissions with complaints-handling functions. The NSW Commission, established in 1987, deals with complaints about judicial officers and issues of potential incapacity that are referred to it.[108] Although controversial when created, the Judicial Commission of NSW has come to be an accepted part of the regulation of judicial officers in that state.[109] Created in 2017, the Judicial Commission of Victoria handles complaints about judicial officers through a similar process to the NSW Commission. The NSW model received support in submissions.[110]

13.68 Other potential models include the Judicial Appointments and Complaints Ombudsman in the United Kingdom, who is empowered to review the handling of complaints about judicial conduct,[111] and the Canadian Judicial Council, which is authorised to receive complaints and make recommendations including for removal of a judge from office.[112]

105 Ibid. The parliamentary process is set out in the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth).

106 Family Court of Australia, *Family Court of Australia 2017–18 Annual Report* (2018) 38.

107 Federal Circuit Court of Australia, above n 70, 77.

108 *Judicial Officers Act 1986* (NSW) s 14. Other functions include assisting the courts to promote consistency in sentencing (s 8), judicial education (s 9), producing guidelines to assist the Commission and its Conduct Division with conducting its functions (s 10), and providing advice to the Attorney-General on such matters as the Commission thinks appropriate (s 11(1)(a)).

109 Judicial Commission of New South Wales, *Annual Report 2016–17* (2017) 4.

110 NSW Bar Association, *Submission 373*; Family Law Practitioners Association Qld, *Submission 368*; Law Council of Australia, *Submission 285*; Association of Family and Conciliation Courts Australian Chapter, *Submission 258*.

111 *Constitutional Reform Act 2005* (UK) pt 4 ch 3.

112 *Judges Act*, RSC 1985, c J-1 pt II.

Family violence skills for lawyers

Recommendation 52 The Law Council of Australia should work with state and territory regulatory bodies for legal practitioners to develop consistent requirements for legal practitioners undertaking family law work to complete annually at least one unit of continuing professional development relating to family violence.

13.69 A significant proportion of families seeking legal assistance for family law issues are likely to have been affected by family violence.[113] Lawyers are key players within the family law system who are in a position to potentially affect their client's safety or involvement in family violence. This may occur in the course of providing advice and ongoing assistance to separating families in relation to both alternative dispute resolution and litigation. Amending CPD requirements to include mandatory family violence content will contribute to increasing all family lawyers' awareness, sensitivity, and competence in cases involving family violence.

Lawyers' knowledge of family violence

13.70 A number of reports and submissions have identified gaps in some lawyers' knowledge about family violence. For example, the Australian National Research Organisation for Women's Safety cited a recent survey of lawyers, police, advocates and magistrates which found: 'Almost half of the survey respondents believed that 'sometimes' legal professionals had an understanding of the risk factors that predict future domestic and family violence. A third of victim advocates and around one-fifth of the police and lawyers surveyed indicated this was 'rarely' or 'never' the case'.[114]

13.71 The Law Council of Australia submitted that 'not all practitioners who work in family law are cognisant of the complex dynamics relating to family violence such as to enable them to properly identify risk flags relating to family violence or to properly advise someone in those circumstances.'[115] The Victorian Royal Commission into Family Violence heard that many lawyers display a limited understanding of the dynamics of family violence, which can compound victim trauma.[116]

13.72 One submission highlighted a recent research finding that a lack of family property lawyers who have undertaken adequate family violence training contributes

113 Rae Kaspiew et al, *Evaluation of the 2012 Family Violence Amendments: Synthesis Report* (Australian Institute of Family Studies, 2015) xiv.
114 ANROWS, *Submission 278*.
115 Law Council of Australia, *Submission 43*.
116 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 6, 186.

to the inability of service providers to meet the needs of clients experiencing family violence who also have a financial dispute.[117]

13.73 There are a number of other reports that have highlighted relevant gaps in legal practitioner capabilities including: judgemental attitudes and lack of consistency;[118] lack of confidence in detecting and responding to safety issues;[119] and inadequate understanding of the dynamics of family violence and its impact on victims.[120]

Existing CPD requirements

13.74 There is currently no obligation on lawyers undertaking family law work to undertake any training or other professional development in relation to family violence. Some lawyers undertake training voluntarily, but as described by one lawyer: 'it's been something that's evolved, if you will, organically lawyer by lawyer, but it's not systemic and we certainly are not required to do it'.[121]

13.75 The current CPD requirements for legal practitioners differ slightly between the various states and territories, but generally require the completion of 10 units including at least one in each of the following fields: ethics and professional responsibility; practice management and business skills; professional skills; and substantive law.[122]

13.76 Some training in family violence is available within some tertiary legal courses,[123] but generally not in Practical Legal Training courses.[124] Training for admitted lawyers is available, but there are gaps in the offerings. For example, there is limited training tailored for private practitioners, practitioners working exclusively in the family courts, and also a dearth of training about family violence in the legal system as a whole.[125] There have also reportedly been challenges in encouraging some lawyers to attend available training.[126]

13.77 The Family Law Council recently recommended including family violence in the accreditation process for legal practitioners to become family law specialists.[127] The Law

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117 J Howieson, R Carroll, S Murray, I Murray, L Young, L Jarvis, D Hansen, F Lester, *Submission 261*.

118 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 62, 260, 262.

119 Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (Final Report, 30 June 2016) 139.

120 Queensland Special Taskforce on Domestic and Family Violence, Queensland Government, above n 62, 14.

121 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 6, p 188.

122 ACT Law Society, *CPD Guidelines* (2017); *Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015* (NSW) r 6; *Legal Profession Regulations 2014* (NT) sch 2; *Queensland Law Society Administration Rule 2005* (Qld) r 47; *LPEAC Rules 2018* (SA); Law Society of Tasmania, *Practice Guideline No. 4* (2015); *Legal Profession Amendment Rules 2015* (WA) r 13D.

123 C Turnbull, *Submission 348*; Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 6, 187.

124 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 6, 187.

125 Ibid vol 6, 188.

126 Ibid.

127 Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (Final Report, 30 June 2016) rec 11.

Council of Australia also recognises the importance of family violence training, noting that it is presently 'a matter which informs the assessment requirements of the successful completion of Specialist Accreditation in Family Law.'[128]

13.78 The Best Practice Guidelines for Lawyers Doing Family Law Work encourage lawyers to attend courses to help facilitate open discussion with clients about family violence.[129]

Previous reports and submissions

13.79 Submissions supported the use of CPD requirements to improve family violence competency among lawyers practising family law. Some submissions suggested one CPD unit per year is insufficient, particularly given the prevalence of family violence in family law matters, and the wide range of issues relating to family violence.[130] The ALRC considers one unit per year to be adequate as an enforceable minimum for all family lawyers, while recognising that it may be appropriate for some lawyers to choose to complete additional units.

13.80 Previous reports and stakeholders to this Inquiry have made a number of suggestions relating to the appropriate content and nature of family violence CPD. Submissions suggested that family violence training for legal practitioners should include:

- the ability to identify primary aggressors;[131]
- the ability to work with both people who have experienced family violence and people who have perpetrated family violence;[132]
- sexual abuse and trauma;[133]
- child development and family dynamics;[134]
- trauma-informed practice and the impact of trauma on adults and children;[135] and
- developments in family violence research.[136]

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128 Law Council of Australia, *Submission 43*.
129 Family Law Council and Law Council of Australia, *Best Practice Guidelines for Lawyers Doing Family Law Work* (4th ed, 2017) 27.
130 No to Violence, *Submission 398*; Women's Legal Services Australia, *Submission 366*; Women's Legal Service NSW, *Submission 340*; Hume Riverina Community Legal Service, *Submission 294*; National Family Violence Prevention Legal Services Forum, *Submission 293*; Peninsula Community Legal Centre, *Submission 263*.
131 No to Violence, *Submission 32*.
132 Victorian Women Lawyers, *Submission 84*.
133 Women's Domestic Violence Court Advocacy Services NSW, *Submission 153*.
134 Queensland Law Society, *Submission 86*.
135 Western Sydney CLC, *Submission 8*.
136 Victorian Women Lawyers, *Submission 84*.

13.81 Reports have suggested training in:

- 'respecting diversity and ethical conduct for the managing the intersection of domestic violence and family law';[137]
- cultural competency and the disparate impacts of family violence on vulnerable groups;[138]
- family violence and child sexual abuse;[139] and
- trauma informed practice, the dynamics of family violence, and the intersection of family law, child protection and family violence.[140]

13.82 One common theme was the importance of lawyers understanding risk factors associated with further violence.[141] For example, the Law Council of Australia submitted it is 'vital that lawyers practicing in family law be in a position to identify the risk and or existence of family violence in order to enliven assessment, safety planning processes and referrals.'[142] The need to improve the ability of legal practitioners to identify and respond to risk has also been recognised in previous reports.[143]

13.83 Some submissions noted that particular family violence training packages are accredited for professional development purposes for some professions, and advocated that training for lawyers should demonstrate the same rigour, currency and comprehensiveness.[144] Springvale Monash Legal Service recommended that state and territory law societies should consult with specialist family violence organisations to develop mandatory family violence training for family law lawyers.[145]

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137 Queensland Special Taskforce on Domestic and Family Violence, Queensland Government, above n 62, rec 110.

138 Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010) 1465; COAG Advisory Panel on Reducing Violence against Women and their Children, above n 62, rec 1.4; Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (2012); Family Law Council, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds* (2012); House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 62, rec 28.

139 Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (Final Report, 30 June 2016) rec 11.

140 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 62, rec 28.

141 Monash Gender and Family Violence Prevention Centre (MGFVPC), *Submission 411*; Women's Legal Service NSW, *Submission 340*; Women's Legal Service Queensland, *Submission 286*; ANROWS, *Submission 278*; Peninsula Community Legal Centre, *Submission 263*; Law Society of NSW, *Submission 154*; Law Council of Australia, *Submission 43*.

142 Victorian Women Lawyers, *Submission 84*; Family Inclusion Network Queensland (Townsville), *Submission 78*; Law Council of Australia, *Submission 43*.

143 Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010) rec 21-3; Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (Final Report, 30 June 2016) rec 11.

144 See, eg, Women's Legal Services Australia, *Submission 366*; Australian Association of Social Workers, *Submission 295*; National Family Violence Prevention Legal Services Forum, *Submission 293*.

145 Springvale Monash Legal Service, *Submission 161*.

13.84 The ALRC notes that the CAG is also examining 'measures to improve family violence competency of professionals across family violence and family law systems'.[146]

Identifying family lawyers

13.85 There will inevitably be practical challenges involved in identifying and applying additional professional requirements for lawyers undertaking family law work specifically. As identified by the Queensland Law Society, family lawyers 'are not necessarily an easily identifiable cohort, which would make the monitoring of the scheme difficult' as many generalist lawyers undertake family law work, 'particularly in rural and regional areas'.[147] There is no accreditation process for family lawyers other than specialist accreditation, which only a minority of family lawyers attain.

13.86 The wording of this Recommendation is framed to align with the Terms of Reference for this Inquiry by applying only to family law practitioners. The wording of the Recommendation enables regulatory bodies to consider how it might best be implemented. One option would be to require family violence CPD for all lawyers, irrespective of their area of practice. Another option would be to place a condition on practising certificates that a practitioner must not practise in family law unless the practitioner has completed CPD in family violence.

13.87 A number of submissions suggested that mandatory CPD in family violence should apply to all lawyers, whether or not they practise family law specifically.[148] For example, the Law Council of Australia advocated for 'mandatory family violence education for all legal practitioners as part of their continuing legal education requirements, if not on an annual basis then at least on the basis of one hour/unit every 2 years.'[149] The Law Council suggested that training for all lawyers would be of benefit to the community generally, and would also be easier than monitoring which lawyers practise family law from time to time.

13.88 Although family law work may not be the bulk of practice for some generalist legal practitioners, including those in rural and regional areas, family violence competency would be beneficial to these practitioners and their clients in relation to a range of legal matters, including criminal law matters and child protection matters. Provision of training through virtual forms, such as webinars, should be made available to ensure training is accessible to legal practitioners in rural and regional locations.

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146 Commonwealth Attorney-General's Department, *Council of Attorneys-General, Communique November 2018*.

147 Queensland Law Society, *Submission 221*.

148 See, eg, No to Violence, *Submission 398*; Australian Women Against Violence Alliance (AWAVA), *Submission 379*; Family Law Practitioners Association Qld, *Submission 368*; Women's Legal Services Australia, *Submission 366*; Women's Legal Service NSW, *Submission 340*; Hume Riverina Community Legal Service, *Submission 294*; Victorian Legal Services Board and Commissioner, *Submission 277*; Law Society of NSW, *Submission 154*.

149 Law Council of Australia, *Submission 43*.

Accreditation of private family report writers

Recommendation 53 The Australian Government Attorney-General's Department should develop a mandatory national accreditation scheme for private family report writers.

13.89 'Family reports' are independent assessments provided as evidence in children's matters. They assist the court to determine what is in the best interests of the child; may influence the recommendations of Independent Children's Lawyers; may be used as a tool in out-of-court negotiations; and can affect legal aid eligibility.[150] Concerns have been raised regarding the quality and integrity of family reports—particularly those produced by private professionals.[151]

13.90 The family courts can order a family report on matters relevant to the proceedings where the proceedings concern the care, welfare and development of a child.[152] These reports are prepared by court-based family report writers (identified as 'family consultants' in the *Family Law Act)*[153] or by private practitioners engaged by the courts under regulation 7 of the *Family Law Regulations* ('reg 7 family report writers' or 'reg 7 family consultants').[154] Both court-employed and private family report writers are usually social workers or psychologists.[155]

13.91 It is also possible for the court, or parties to proceedings, to appoint a private practitioner to provide expert evidence on a particular matter, such as child abuse or mental health, by way of a written report (an 'expert witness' or 'single expert witness'). In some cases, these reports are similar to family reports, and the practitioner may be referred to as a 'family report writer'.[156] These practitioners, often psychologists or psychiatrists, are governed by pt 15.5 of the *Family Law Rules* and div 15.2 of the *Federal Circuit Court Rules 2001* (Cth) and are sometimes referred to as 'Chapter 15 Experts'.[157]

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150 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 62, 271; Senate Finance and Public Administration References Committee, Parliament of Australia, *Domestic Violence in Australia* (March 2015) 121–2; Women's Legal Services Australia, *Submission 45*.

151 See, eg, CPSU, *Submission 136*. See also House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 62.

152 *Family Law Act 1975* (Cth) s 62G.

153 Ibid s 11B.

154 The ALRC recommends an enhanced role for Family Consultants in Chapter 11.

155 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 62, 270.

156 Attorney-General's Department (Cth), 89.1 Supplementary to Submission No 89 to House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, Parliament of Australia, *A Better Family Law System* (May 2017).

157 The Law Society of New South Wales (New South Wales Young Lawyers Family Law Committee), *A Practitioner's Guide to Family Law* (NSW Young Lawyers, 5th ed, 2015) 120.

13.92 The *Australian Standards of Practice for Family Assessment and Reporting*, developed by the family courts, currently provides minimum standards and best practice guidelines for all report writers, including Chapter 15 Experts.[158] These standards are not binding or enforceable, and there is no formal accreditation or monitoring process for compliance in place.[159]

13.93 Stakeholders to this Inquiry raised concerns about the possible negative outcomes for children in cases where the report writer is not appropriately qualified or expert in the relevant issues, such as an understanding of family violence,[160] trauma and its impacts on adults and children,[161] child abuse,[162] cultural competency,[163] or disability.[164] These concerns were raised in relation to both court-employed and private family report writers, including Chapter 15 Experts. Other concerns raised included the limited time both court-based and reg 7 family report writers spend with families, which may prevent a proper assessment from being carried out,[165] and the cost of privately commissioned expert reports.[166]

13.94 In response to these concerns, some stakeholders suggested returning to a process whereby responsibility for family reports is vested exclusively with court-based Family Consultants.[167] This was also recommended in the SPLA *Family Violence Report*,[168] based on its conclusions that the reports prepared by court-based family report writers are 'generally of better quality' and that the court is able to enforce standards for report writers employed by the court.[169]

13.95 A research team, which analysed family reports since 2015, submitted to this Inquiry that there is insufficient evidence to support a finding as to the relative quality of reports prepared by private *versus* court-based family report writers. The team suggested that, in place of abolishing private family report writers, a 'proper and rigorous'

158 Family Court of Australia, Federal Circuit Court of Australia and Family Court of Western Australia, *Australian Standards of Practice for Family Assessments and Reporting* (2015).

159 Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (Final Report, 30 June 2016) 31; House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 63, 276; Family Court of Australia, *Submission 68*; Women's Legal Services Australia, *Submission 45*.

160 Safe Steps Family Violence Response Centre, *Submission 408*; Women's Legal Services Australia, *Submission 45*; Domestic Violence Victoria, *Submission 23*. See also House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 63.

161 Z Rathus, Dr S Jeffries, Dr H Menih and Professor R Field, *Submission 166*; Women's Legal Services Australia, *Submission 45*.

162 Bravehearts Foundation Ltd, *Submission 148*; Women's Legal Services Australia, *Submission 45*.

163 National Family Violence Prevention Legal Services Forum, *Submission 293*; Brimbank Melton Community Legal Centre *Submission 76*; Women's Legal Services Australia, *Submission 45*.

164 People with Disability Australia (PWDA), *Submission 10*.

165 Safe Steps Family Violence Response Centre, *Submission 408*; National Legal Aid, *Submission 297*.

166 A Peaty, *Submission 351*; P Parkinson, *Submission 341*.

167 Safe Steps Family Violence Response Centre, *Submission 408*; U Chowdhury, A Rimovetz, E Post and S Davis, *Submission 183*; CPSU, *Submission 136*.

168 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 62, rec 22.

169 Ibid 227.

accreditation process be established for private professionals wishing to prepare family reports.[170] Additionally, the research team submitted:

> We certainly believe that it is healthy to have a pool of FRWs [family report writers] who do not work at the courts, in addition to those at the courts. A cohort from private practice, who work in other areas of social science practice, or who undertake therapeutic as well as forensic work, allows a diversity of choice—provided the quality and expertise is assured.[171]

13.96 Introducing a mandatory accreditation scheme with minimum standards for private family report writers who provide reports to the court under reg 7 should enhance public trust in report writers and the quality of their reports, and contribute to the integrity of the family law system.

13.97 A number of other stakeholders to this Inquiry expressed support for an accreditation scheme for private report writers.[172] Some suggested the accreditation scheme should also apply to court-based report writers.[173] The Family Court did not agree and submitted that an accreditation scheme for court-based report writers 'would be unnecessary as the work of Family Consultants is the responsibility of the Courts and it is the role of CDS [Child Dispute Services] to ensure the competency of its workforce.' The Family Court did recognise that:

> An accreditation scheme which allows parties to ascertain that a private report writer has acquired and maintained the required competencies and works to a high standard could greatly assist both litigants and the Court to which the report would be submitted.[174]

13.98 In addition to requiring private family report writers to undergo accreditation, the research team also recommended that they should have access to the training, resources and knowledge base available to court-based report writers.[175]

13.99 Some stakeholders expressed concerns that the introduction of a mandatory accreditation system may dissuade private practitioners from performing the role of family report writers in the family law system, in the context of an already insufficient workforce.[176] It was submitted that the workforce is currently limited due to low remuneration for reg 7 family report writers and exposure to vexatious complaints—reducing the number of experienced practitioners willing to do this work.[177] National Legal Aid suggested that strategies to address these issues should be introduced in

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170 Z Rathus, Dr S Jeffries, Dr H Menih and Professor R Field, *Submission 166*.

171 Z Rathus, H Menih, S Jeffries, R Field, *Submission 403*.

172 See, eg, Ibid; Australian Women Against Violence Alliance (AWAVA), *Submission 379*; National Family Violence Prevention Legal Services Forum, *Submission 293*; Dr D Tustin, *Submission 266*; Women's Domestic Violence Court Advocacy Services NSW, *Submission 153*.

173 Fitzroy Legal Service and Darebin Community Legal Service, *Submission 336*; Association of Family and Conciliation Courts Australian Chapter, *Submission 258*.

174 Family Court of Australia, *Submission 68*.

175 Z Rathus, H Menih, S Jeffries, R Field, *Submission 403*.

176 Mallee Family Care, *Submission 310*; National Legal Aid, *Submission 297*; Law Council of Australia, *Submission 285*.

177 National Legal Aid, *Submission 297*; Law Council of Australia, *Submission 285*.

addition to accreditation; for example, that prior experience be taken into account in any accreditation process.[178]

13.100 The ALRC has identified the Attorney-General's Department (Cth) as the appropriate accreditation body, as it is currently responsible for the accreditation of FDRPs.[179] Previous Inquiries have recommended that an accreditation scheme for report writers be modelled on the existing accreditation system for FDRPs.[180] The ALRC has also recommended that the Attorney-General's Department be responsible for the accreditation of CCSs.

Training and identifying Chapter 15 Experts

13.101 Chapter 15 Experts are excluded from the recommended accreditation scheme for private family report writers. While there are private practitioners who regularly conduct family assessments and provide reports to the family courts in children's matters, there may also be psychiatrists, psychologists, or other practitioners that are called upon to provide evidence to the family courts only in rare circumstances. These experts may be unwilling to undergo an accreditation process before they are able to provide evidence in the family law jurisdiction.

13.102 For those Chapter 15 Experts frequently commissioned by parties or appointed by the court to provide expert evidence in family law children's matters, the Association of Family and Conciliation Courts (AFCC) is currently in consultation with the Attorney-General's Department (Cth) in relation to the development of a national training program for expert report writers.[181] If this training program is progressed, the Attorney-General's Department may consider developing and maintaining a publicly available list of expert report writers who have successfully completed the training, which could include information about their areas of expertise. This would allow parties and their legal representatives to identify appropriately skilled and experienced expert report writers, including in relation to areas of specialisation such as child sexual abuse, mental health or disability, as well as providing surety as to their completion of the recommended training. This would respond to stakeholder concerns about the lack of freely available information about the qualifications, skills and experience of private report writers—aiming to improve transparency and support consumer choice.[182]

13.103 A number of stakeholders supported the creation and maintenance of a publicly available list of accredited private family report writers.[183] The Women's Council for

178 National Legal Aid, *Submission 297*.

179 Attorney-General's Department (Cth), *Becoming a Family Dispute Resolution Practitioner* <www.ag.gov.au/>.

180 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 62, rec 30.

181 Association of Family and Conciliation Courts Australian Chapter, *Submission 258*.

182 See, eg, Women's Council for Domestic and Family Violence Services WA, *Submission 182*; Women's Legal Services Australia, *Submission 45*.

183 Z Rathus, H Menih, S Jeffries, R Field, *Submission 403*; P Easteal and L Young, *Submission 394*; Women's Legal Services Australia, *Submission 366*; Relationships Australia National, *Submission 317*; National

Domestic and Family Violence Services WA submitted that the family law system 'would benefit from … clearer and freely available information on the qualifications, skills and knowledge of Single Expert witness report writers (family report writers)'.[184] A Peaty, a private practitioner who has prepared reports in the family law jurisdiction as an expert witness for 15 years, acknowledged the utility of a publicly available list of accredited private family report writers, adding: 'I believe it would be helpful if the list could indicate what areas the private family report writers have particular expertise in.'[185] Women's Legal Services Australia submitted that 'such a list will not only increase knowledge of those using the system but increase public confidence in the family law system as a whole.'[186]

FDRP accreditation in property and financial matters

13.104 The ALRC's recommendations in Chapter 8 would extend the scheme for FDR in parenting matters to property and financial matters. The FDRP qualification and accreditation requirements are designed primarily for parenting matters with limited focus on property and financial matters.

13.105 The scheme for FDR, including the status of FDRPs held under the *Family Law Act*, was developed in 2006 and has continued to evolve to meet the needs of families who require assistance resolving parenting disputes. The accreditation scheme established under the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) is administered by the Attorney-General's Department.

13.106 In order to become a FDRP individuals must complete a Graduate Diploma of Family Dispute Resolution (CHC81115), with core units including: managing responses to family and domestic violence; supporting the safety of vulnerable parties in family dispute resolution; operating in a family law environment; and working with a child focused approach.[187] The qualification sits at level eight of the ten-level Australian Qualification Framework. In 2012, it was upgraded to require 50 hours of supervised clinical practice. Presently, 2280 FDRPs are accredited under this scheme.[188]

13.107 This FDRP accreditation scheme is one of two mediator accreditation schemes in operation. The other is the National Mediator Accreditation Standards, administered by the Mediator Standards Board. The FDRP scheme encompasses these standards but also includes additional requirements, including units on family violence and working with couples in conflict.[189]

Legal Aid, *Submission 297*; National Family Violence Prevention Legal Services Forum, *Submission 293*; Domestic Violence Victoria, *Submission 284*; Dr D Tustin, *Submission 266*.

184 Women's Council for Domestic and Family Violence Services WA, *Submission 182*.

185 A Peaty, *Submission 351*.

186 Women's Legal Services Australia, *Submission 366*.

187 Training.gov.au, *Qualification Details* <https://training.gov.au/Training/Details/CHC81115>.

188 Attorney-General's Department, 'Annual Report 2017–18' (2018).

189 Tania Sourdin, *Alternative Dispute Resolution* (Thomson Reuters, 5th ed, 2016) 356.

13.108 The ALRC considers that providers of Family Dispute Resolution in property and financial matters should be accredited under the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth), with an appropriate extension of the qualification requirements.

13.109 The Attorney-General's Department should work with the Community Services and Health Industry Skills Council (CSHISC) to expand the Graduate Diploma in Family Dispute Resolution. The Diploma should be extended to include units covering: screening; intake and assessment, including financial abuse, for property and financial matters; the substantive law relating to property and financial matters; and other relevant issues. [190]

13.110 The CSHISC recently made a similar set of recommendations,[191] though submissions to this Inquiry placed greater emphasis on family violence, particularly financial abuse.[192] Consistent with observations in the CSHISC report, one of the areas of divergence before this Inquiry was on the question of whether legal qualifications should be required.[193] Submissions from legal organisations argued legal qualifications should be required,[194] whereas those from community organisation argued against such a requirement.[195]

13.111 Relationships Australia Victoria, which works within an FDR paradigm, emphasised the importance of encouraging clients to seek legal advice to support the development and implementation of an agreement, including through the development of consent orders. This suggests that FDR and legal skill bases can operate in parallel and collaboratively in this context.[196]

13.112 The recommendations in Chapter 8 are based on a non-prescriptive approach to fulfilling the requirements. This approach provides scope for parties to choose how to resolve their property and financial matters and does not preclude the use of lawyers in a mediation, negotiation, or advisory capacity. The discussions in this and other sections acknowledge the importance of informed decisions being made in FDR generally, and in property and financial FDR in particular. At the same time, the ALRC considers it appropriate to strengthen the workforce in property and financial FDR to support a greater proportion of families to use this low cost, low conflict means of resolution.

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190 Gadens, *Submission 412*.

191 Community Services and Health Industry Skills Council, *Scoping Report for the Development of Property and Spousal Maintenance Competencies in Family Dispute Resolution* (2012) 52.

192 Domestic Violence Victoria, *Submission 284*; J Howieson, R Carroll, S Murray, I Murray, L Young, L Jarvis, D Hansen, F Lester, *Submission 261*.

193 Community Services and Health Industry Skills Council, above n 192, 43.

194 See, eg, Gadens, *Submission 412*.

195 See, eg, Relationships Australia National, *Submission 317*.

196 Relationships Australia Victoria, *Submission 267*.

13.113 Many submissions suggested that the existing FDRP qualification offered a sound base for property and financial FDR that could be further developed with specialised content. Submissions identified the following main areas of further focus:

- screening for all forms of family violence, especially financial abuse;[197]
- issues of power in relation to property and financial matters;[198]
- knowledge on how family violence and trauma can impact on property settlement negotiations;[199]
- contemporary legislation and jurisprudence,[200] including disclosure obligations;[201]
- accurate identification and valuation of property, including superannuation interests and debts;[202]
- supporting parties to calculate and seek and incorporate financial and legal advice before a final agreement is made;[203] and
- balance presenting practical options for property division and not providing advice as to the adequacy of the proposed property division, consistent with the obligation not to provide legal or financial advice.[204]

13.114 Submissions also emphasised the need for ongoing training in property and financial matters through an annual CPD requirement.[205]

Accreditation of Children's Contact Services

Recommendation 54 The *Family Law Act 1975* (Cth) should be amended to:

- require any organisation offering a Children's Contact Service to be accredited; and
- make it an offence to provide a Children's Contact Service without accreditation.

13.115 CCSs that are not funded by the Australian Government are not subject to regulatory oversight.[206] Increasing numbers of private organisations and individuals are offering these services to fill a gap—due to low numbers of government funded CCSs and the associated long waitlists to access these services.[207] Consequently, some of the

197 Domestic Violence Victoria, *Submission 284*.
198 Resolution Institute, *Submission 260*.
199 J Howieson, R Carroll, S Murray, I Murray, L Young, L Jarvis, D Hansen, F Lester, *Submission 261*.
200 Relationships Australia National, *Submission 317*.
201 Interrelate Limited, *Submission 416*.
202 Relationships Australia Victoria, *Submission 267*.
203 Ibid.
204 Relationships Australia National, *Submission 317*.
205 UnitingCare Queensland, *Submission 312*.
206 Australian Children's Contact Service Association, *Submission 207*.
207 Interrelate, *Submission 126*; T Quinn, *Submission 75*; Relationships Australia, *Submission 11*; KPMG,

most vulnerable children and families are being provided a crucial safety service by organisations or individuals lacking accreditation or oversight.

13.116 CCSs provide a safe and child-focused place for changeover or supervised contact when children are potentially at risk. This includes supervising the time a child spends with the parent they do not live with when there are concerns about family violence, child abuse (including child sexual abuse), alcohol and other drug misuse, mental health issues, or parental incapacity. They may also assist in reintroducing a parent into a child's life when a child has had little or no contact with that parent for an extended period of time, or facilitate changeover between parents when they are unable to manage this themselves due to intractable conflict or a risk of violence.[208]

13.117 CCSs also provide reports to the family courts when required, comprising a 'written, objective account of a family's time at a service'.[209] The families that use CCSs often present with a range of complex characteristics and needs.[210] One stakeholder described CCSs as 'an essential service for families in high conflict or where there are safety concerns.'[211]

13.118 The Australian Government funds a number of CCSs.[212] Their funding agreements require these services to comply with the 'Children's Contact Services Guiding Principles Framework for Good Practice'[213] (the 'Guiding Principles') and the 'Family and Children Activity Administrative Approval Requirements' (the 'Approval Requirements').[214] The Department of Social Services (Cth) administers the grant agreements with government funded CCSs. The Department of Social Services performs site checks and service audits, and provides a complaints process to clients where matters cannot be resolved with the service provider. No such complaints process is available for clients of private services.[215]

13.119 Stakeholders to this Inquiry raised concerns about the safety and quality of unregulated CCSs.[216] Several identified a need for regulation and accreditation across the

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above n 11, 7. The average wait time to access a Children's Contact Service in 2014–15 was 7.9 weeks, and was as high as 6–9 months in some locations: Ibid 44, 78.

208 Jo Commerford and Cathryn Hunter, 'Children's Contact Services: Key Issues' (CFCA Paper No 35, Australian Institute of Family Studies, 2015).

209 Attorney-General's Department (Cth), *Children's Contact Services Guiding Principles Framework for Good Practice* (2014) 6.

210 Commerford and Hunter, above n 209, 4–5. An Australian study found that 70% of families who used a CCS had at least two serious personal or relationship problems, 45% reported domestic violence and 33% reported alleged or substantiated child abuse: Grania Sheehan et al, 'Children's Contact Services: Expectations and Experience: Final Report' (Attorney-General's Department (Cth), 2005).

211 AC.CARE, *Submission 171*.

212 As at 2014–15 there were 65 government funded service outlets delivering Children's Contact Services: KPMG, above n 11, 20.

213 Attorney-General's Department (Cth), above n 209.

214 Department of Social Services (Cth), *Families and Children Activity Administrative Approval Requirements* (2014).

215 Australian Children's Contact Service Association, *Submission 207*.

216 Australian Children's Contact Service Association, *Submission 207*; Interrelate, *Submission 126*; Domestic

CCS sector, to ensure safe and high-quality services are provided by both government funded and private services.[217] The Australian Children's Contact Services Association (ACCSA)—an independent, voluntary, and non-profit association for CCSs—agreed that a national accreditation system should be established, applying to both government funded and private CCSs. ACCSA suggested the accreditation system should include practice principles, administrative guidelines, and safe environment standards, as well as qualification requirements for CCS practitioners. The accreditation system could draw on the Guiding Principles and Approval Requirements and cover matters including staff supervision, intake and assessment, and complaints management.[218]

13.120 In developing the accreditation system, consideration should be given to the requisite qualifications for CCS practitioners. Currently, practitioners in private services are not required to have any particular qualifications or hold a valid Working with Children Check (WWCC).[219] For practitioners in government funded CCSs, the Approval Requirements require them to hold 'an appropriate degree, diploma or other qualification' and demonstrate an appropriate level of competence for their role.[220] The Guiding Principles require CCS practitioners to undergo police checks and WWCCs, and to comply with professional codes of conduct.[221] The Guiding Principles also require all practitioners to have a high level of relevant skill and suggest completion of a relevant Certificate or Diploma as a best practice consideration.[222]

13.121 A number of stakeholders supported CCS accreditation requirements including appropriate qualifications and valid WWCCs for staff applying to all CCSs.[223] The importance of ensuring that all staff who work with children hold valid WWCCs and are appropriately skilled and supported to ensure children's safety and wellbeing has also been recognised in the *National Principles for Child Safe Organisations*.[224] Some stakeholders suggested a relevant Certificate or Diploma would be an appropriate minimum qualification for CCS practitioners.[225] Others submitted that qualifications of this type were 'simply insufficient', and suggested a minimum qualification of a relevant university degree.[226]

Violence Victoria, *Submission 23*.

217 See, eg, S De Campo and A De Campo, *Submission 395*; Australian Children's Contact Service Association, *Submission 207*; AC.CARE, *Submission 171*; Interrelate, *Submission 126*; NATSIWA, Harmony Alliance and AWAVA, *Submission 122*; CatholicCare Sydney, *Submission 79*; T Quinn, *Submission 75*; Domestic Violence Victoria, *Submission 23*; Relationships Australia, *Submission 11*; Anglicare SA, *Submission 2*.

218 Australian Children's Contact Service Association, *Submission 265*.

219 Australian Children's Contact Service Association, *Submission 207*.

220 Department of Social Services (Cth), above n 214, standard 5.

221 Attorney-General's Department (Cth), above n 209, 10.

222 Ibid 32.

223 See, eg, Australian Women Against Violence Alliance (AWAVA), *Submission 379*; Marrickville Legal Centre, *Submission 288*; National Legal Aid, *Submission 297*.

224 Australian Human Rights Commission, *National Principles for Child Safe Organisations* (2018) 13.

225 Relationships Australia National, *Submission 317*; Domestic Violence Victoria, *Submission 284*.

226 S De Campo and A De Campo, *Submission 395*. See also Australian Children's Contact Service Association, *Submission 265*.

13.122 Section 10A of the *Family Law Act* currently provides that regulations may prescribe Accreditation Rules relating to the accreditation of persons, including family counsellors and family dispute resolution practitioners. To facilitate the accreditation of CCSs, the ARLC recommends that s 10A be amended to enable government to prescribe by regulation Accreditation Rules for service provider organisations, in addition to individual persons.

13.123 The ALRC suggests that the Attorney-General's Department may be the appropriate body to manage the accreditation of these services. The Attorney-General's Department is currently responsible for policy relating to government funded CCSs, and for the accreditation of family dispute resolution practitioners.[227] The ALRC has recommended that the Attorney-General's Department also be responsible for the accreditation of private family report writers.

13.124 An appropriate body would also need to be given responsibility for handling complaints for accredited CCSs, including both government-funded and private services. Consideration would need to be given to whether the Department of Social Services (Cth) could manage these complaints for private services. The ALRC suggests that ACCSA may offer an alternative body for the handling of complaints in relation to non-government funded services.

13.125 To guard against any organisation or individual that has not been accredited offering CCS services to vulnerable children and their families, the ALRC recommends that it should be an offence to provide this service without accreditation. Offences for providing services without accreditation have been used in the regulation of other sectors to ensure standards are met and to maintain public confidence in the sector.[228] Given the important role that CCSs play in ensuring the safety of at-risk children, the ALRC considers it appropriate to include an offence in the recommended CCS accreditation scheme, to ensure public confidence in the ability of all CCSs to provide safe and high quality services.

Workforce capability for the family law system

13.126 As discussed in Chapter 2, the ALRC is a law reform body and, as such, has necessarily sought to limit the recommendations in this Report to its core expertise—the law. There are, of course, a wide range of issues outside the law that impact upon the effectiveness of the family law system. The expertise and professionalism of individuals working in the system is critical. Despite the diversity of professions and specialisations in the system—including lawyers, psychologists, psychiatrists, and social workers, among others—there is no single body responsible for accrediting individuals working in the family law system, nor any specific minimum standards required at a system level.

227 Attorney-General's Department (Cth), above n 179.

228 See, eg, Explanatory Memorandum, Education (Accreditation of Non-State Schools) Bill 2017 (Qld) 9. Section 74 of the *Education (Accreditation of Non-State Schools) Act 2017* (Qld) provides an offence for operating a school that is not accredited, with a maximum penalty of 100 penalty units.

13.127 The ALRC considered a Workforce Capability Plan as part of a series of proposals that included the Family Law Commission.[229] The ALRC has concluded that an overarching plan is neither possible nor appropriate given the jurisdictional constraints and diversity of professionals involved in the family law system.

13.128 Nevertheless, there remains a pressing need to ensure the quality of professional services. Through the confidential *Tell Us Your Story* portal and confidential submissions to the ALRC, many individuals raised concerns about the competency of a range of professionals working in the system.

13.129 Given the breadth of professionals who provide services in the family law system, the ALRC encourages the Australian Government to work with relevant professional registration bodies to identify training or accreditation requirements for members to ensure that they have appropriate expertise to work in the family law system.

13.130 Submissions supported professionals working in the family law system having competency and understanding of topics including:

- family violence;[230]
- identifying and responding to a broader range of risks, including the risk of suicide;[231]
- trauma-informed practice, including an understanding of the impacts of trauma on adults and children;[232]
- child abuse, including child sexual abuse and neglect;[233]

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229 Australian Law Reform Commission, *Review of the Family Law System*, Discussion Paper No 86 (2018) ch 10.

230 See, eg, Monash Gender and Family Violence Prevention Centre (MGFVPC), *Submission 411*; Family & Relationship Services Australia (FRSA), *Submission 407*; CASA Forum Victorian Centres Against Sexual Assault, *Submission 404*; P Easteal and L Young, *Submission 394*; Interact Support Inc, *Submission 389*; Baptist Care Australia, *Submission 359*; NATSILS, *Submission 290*; R Carroll, *Submission 289*; Domestic Violence Victoria, *Submission 284*; National Legal Aid, *Submission 163*; Centacare Family and Relationship Services (CFRS), *Submission 125*; CatholicCare Sydney, *Submission 79*; Family Inclusion Network Queensland (Townsville), *Submission 78*; Australian Psychological Society, *Submission 55*; Women's Legal Services Australia, *Submission 45*; Domestic Violence NSW, *Submission 44*; Domestic Violence Victoria, *Submission 23*.

231 See, eg, Interact Support Inc, *Submission 389*; NATSILS, *Submission 290*; Australian Institute of Family Studies, *Submission 206*; R Tilbrook, *Submission 188*; Centre for Excellence in Child and Family Welfare, *Submission 102*; Lone Fathers Association of Australia, *Submission 99*; Australian Psychological Society, *Submission 55*; Australian Dispute Resolution Advisory Council Inc (ADRAC), *Submission 12*; Western Sydney CLC, *Submission 8*.

232 See, eg, Family & Relationship Services Australia (FRSA), *Submission 407*; CASA Forum Victorian Centres Against Sexual Assault, *Submission 404*; Interact Support Inc, *Submission 389*; Baptist Care Australia, *Submission 359*; NATSILS, *Submission 290*; Domestic Violence Victoria, *Submission 284*; ANROWS, *Submission 278*; Australian Human Rights Commission, *Submission 217*; Uniting, *Submission 162*; Women's Domestic Violence Court Advocacy Services NSW, *Submission 153*; Victoria Legal Aid, *Submission 61*; Australian Psychological Society, *Submission 55*; The Royal Australian and New Zealand College of Psychiatrists, *Submission 18*; Relationships Australia, *Submission 11*.

233 See, eg, Family & Relationship Services Australia (FRSA), *Submission 407*; CASA Forum Victorian Centres Against Sexual Assault, *Submission 404*; Interact Support Inc, *Submission 389*; NATSILS, *Submission 290*; Domestic Violence Victoria, *Submission 284*; Women's Legal Service NSW, *Submission 218*; Women's

- the impact on children of exposure to ongoing conflict;[234]
- cultural competency, in relation to LGBTIQ people, as well as Aboriginal and Torres Strait Islander people and people from culturally and linguistically diverse communities;[235]
- disability awareness;[236]
- child development;[237]
- the intersections and overlaps between the family law, family violence and child protection systems;[238] and
- substance misuse and mental health issues.[239]

13.131 The ALRC recognises that different competencies will be relevant to different professional groups working in the family law system.

Domestic Violence Court Advocacy Services NSW, *Submission 153*; Bravehearts Foundation Ltd, *Submission 148*; Centre for Excellence in Child and Family Welfare, *Submission 102*; Family Inclusion Network Queensland (Townsville), *Submission 78*; Drummond Street Services, *Submission 20*; The Royal Australian and New Zealand College of Psychiatrists, *Submission 18*.

234 See, eg, Interact Support Inc, *Submission 389*; Relationships Australia Victoria, *Submission 129*; CatholicCare Sydney, *Submission 79*; Family & Relationship Services Australia, *Submission 53*; ATSILS Qld, *Submission 42*.

235 See, eg, LGBTI Legal Service, *Submission 367*; NATSILS, *Submission 290*; Domestic Violence Victoria, *Submission 284*; Women's Legal Service NSW, *Submission 218*; Family Inclusion Network Queensland (Townsville), *Submission 78*; Victoria Legal Aid, *Submission 61*; Australian Dispute Resolution Advisory Council Inc (ADRAC), *Submission 12*.

236 See, eg, People with Disability Australia, *Submission 409*; Office of the Public Advocate, *Submission 405*; JFA Purple Orange, *Submission 392*; Domestic Violence Victoria, *Submission 284*.

237 See, eg, Women's Legal Services Australia, *Submission 366*; Relationships Australia National, *Submission 317*; Mallee Family Care, *Submission 310*; The Royal Australian and New Zealand College of Psychiatrists, *Submission 280*.

238 See, eg, Family & Relationship Services Australia (FRSA), *Submission 407*; Interact Support Inc, *Submission 389*; NATSILS, *Submission 290*.

239 See, eg, Australian Dispute Resolution Advisory Council (ADRAC), *Submission 386*; Relationships Australia National, *Submission 317*; Family Life, *Submission 309*; NATSILS, *Submission 290*; The Royal Australian and New Zealand College of Psychiatrists, *Submission 280*; Relationships Australia Victoria, *Submission 267*.

14. Legislative Clarity

Contents

Introduction

14.1 The *Family Law Act* and its subordinate legislation have become complex and difficult to use over many years. Judges, stakeholders and academics have highlighted that this is a barrier to access to justice for unrepresented litigants, may lead to additional costs and delay, and obscures the principal policy goals of the legislation—in particular the best interests of the child as the paramount consideration in decisions about children's arrangements.

14.2 As the Chief Justice of the Federal Court has observed recently, there is a

> modern ... tendency, almost a mania, to deconstruct, to particularise, to define to the point of exhaustion and sometimes incoherence. Often, if not always, this is in the name of certainty and completeness; but it is false certainty ... Deconstruction and particularism plague our statutes, especially Commonwealth drafting.[1]

The *Family Law Act* is a living example and it should not be perpetuated.

14.3 This chapter includes general principles that should be applied to comprehensively redraft this legislation, to improve its usability for all readers. Some examples of redrafted provisions, and a proposed restructure of children's provisions, are contained in Appendices G and H respectively. The chapter also examines the provisions which

1 Chief Justice JLB Allsop AO, 'The Judicialisation of Values' (Speech, Law Council of Australia and Federal Court of Australia Joint Competition Law Conference, 30 August 2018) [17].

prohibit the inclusion of identifying information in any publication of family law proceedings. The ALRC recommends retaining the substance of those provisions but redrafting them to achieve greater clarity.

General comments on drafting family law legislation

14.4 The drafting of family law legislation should be informed by the special circumstances of family law, and in particular the needs of family members. Family law disputes typically involve high emotions and people who are under considerable stress. Many family law litigants are unrepresented, and many will be encountering the family law system for the first time. It is of the greatest importance that the law should be accessible to parents and others involved in family law. Although the legislation will primarily be read and used by lawyers, judicial officers and other professionals, legal and other advisers will be likely to quote key passages or terms in advising clients or applying the law.

14.5 It is therefore particularly important that the legislation should be clear and, as far as possible, easy for people to understand. The general guidelines published by the Office of Parliamentary Counsel are valuable and should be carefully considered.[2] It will not be possible to avoid complexity, but readers should be able to see what rules or principles apply to their situation. This requires attention to both the wording of particular provisions and to the structure of the Act. In particular, people reading the legislation for the first time should readily discover the provisions most relevant to their situation. This means, for example, that provisions setting out how the court determines children's proceedings should be prominent.

14.6 Another point is particularly important in family law. There is now considerable evidence that people's understanding of a situation, their emotions, and their decision making processes, can all be influenced by the way the matter is presented.[3] It seems very likely that this would apply to the wording of legislation. For example, where a law is on a topic that people feel strongly about, and is obscure or prolix, readers are likely to believe that it says what they think it *should* say.

14.7 In relation to children's matters, the underlying principle is that the best interests of the child must be paramount.[4] It is important, therefore, that the language of the legislation should encourage people to focus on the child's best interests, rather than, for example, parents' entitlements.

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2 Office of Parliamentary Counsel, Australian Government, *Drafting Resources* <www.opc.gov.au/drafting-resources>.

3 See, eg, Daniel Kahneman, *Thinking, Fast and Slow* (Farrar, Straus & Giroux, 2011); Richard Thaler and Cass Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (Yale University Press, 2008).

4 *Family Law Act 1975* (Cth) s 60CA.

14.8 This point is not new. In 1995, reflecting experience in the United Kingdom and elsewhere, references to parental 'rights' were replaced by references to parental 'responsibilities', and the traditional terms 'custody' and 'access' were replaced because they were seen as suggesting win-lose interpretations of children's orders.[5]

14.9 More recently, there is evidence of a persistent belief that that there is a rebuttable presumption that parents are entitled to equal time with their children following family breakdown.[6] This misunderstanding may have been influenced by the requirement that, in some circumstances, courts must 'consider' equal time,[7] perhaps combined with references to parents having *equal* parental responsibility. Another contribution to that misunderstanding could have been the intuitive attraction of the idea that providing equal time for each parent is just, and reflects the parents' equal status. However, such a focus on what is just or fair *between parents* tends to suggest that the paramount consideration is justice to parents, rather than the child's best interests.

14.10 It is therefore important that the language of the Act should support, rather than undermine, the legislative intention. In drafting new provisions, the potential for misunderstanding should be addressed by testing reader comprehension during the drafting process, for example, through focus groups, to ensure that the legislation is understood as intended.

Simplifying family law legislation

Recommendation 55 The *Family Law Act 1975* (Cth) and its subordinate legislation should be comprehensively redrafted.

14.11 The family law system, including its legal frameworks, should be designed to be as accessible and comprehensible as possible to all families who need to use it. Submissions have clearly indicated that the *Family Law Act* is currently not meeting this need.[8]

14.12 The Act, when introduced, was a very simple piece of legislation, and was generally easy to follow. It is now hundreds of pages. A common theme in the submissions to this Inquiry concerned the need for the Act to be simplified.[9]

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5 *Family Law Reform Act 1995* (Cth) ss 61C, 64B.

6 Rae Kaspiew et al, *Responding to Family Violence: A Survey of Family Law Practices and Experiences (Evaluation of the 2012 Family Violence Amendments)* (Australian Institute of Family Studies, 2015) 172. See also R Alexander, *Submission 131*.

7 *Family Law Act 1975* (Cth) s 65DAA(1).

8 See, eg, Australian Dispute Resolution Advisory Council (ADRAC), *Submission 386*; Family Court of Western Australia, *Submission 311*; R Carroll, *Submission 289*; Marrickville Legal Centre, *Submission 288*.

9 See, eg, P Easteal and L Young, *Submission 394*; Relationships Australia National, *Submission 317*; Family Court of Western Australia, *Submission 311*; National Legal Aid, *Submission 297*; Law Council of

14.13 The Act, and its subordinate legislation, should be simplified by:

- dividing the legislative provisions between two statutes, one comprising substantive provisions which indicate to parties how their dispute will be determined (Family Law Act), and the other comprising provisions of greater relevance to professionals rather than parties (Family Law (Judicial and Administrative Provisions) Act);
- providing for one set of rules applicable in any court exercising family law jurisdiction;
- simplifying provisions to the greatest extent possible;
- restructuring legislation to assist readability, for example by placing the most important substantive provisions as early as possible;
- redrafting the Act, Regulations and Rules in ordinary English to the extent possible;
- user testing key provisions for reader comprehension during the drafting process, for example, through focus groups, to ensure that the legislation is understood as intended; and
- removing or rationalising overlapping or duplicative provisions as far as possible.

14.14 Submissions,[10] published judgments,[11] and academic commentary[12] suggest that the current complexity of the legislation creates difficulties for people seeking to understand the law, contributes to community misunderstanding of key elements of the law, and poses a significant obstacle to effective participation in court proceedings for the growing number of litigants who are not legally represented. For example, one commentator has described the Act as 'convoluted' and the mandated decision making processes as 'tortuous'.[13]

14.15 Previous reports have also shown that complex legislation is a contributing factor to court delays, and that making decisions in compliance with the provisions of Pt VII of the *Family Law Act*, in particular, has been associated with productivity concerns.[14]

Australia, *Submission 285*; Relationships Australia Victoria, *Submission 267*; Association of Family and Conciliation Courts Australian Chapter, *Submission 258*.

10 See, eg, Interact Support Inc, *Submission 389*; Australian Dispute Resolution Advisory Council (ADRAC), *Submission 386*; Family Court of Western Australia, *Submission 311*; National Legal Aid, *Submission 297*; Marrickville Legal Centre, *Submission 288*.

11 See, eg, *MRR v GR* (2010) 240 CLR; *Aldridge & Keaton* [2009] FamCAFC 229; *Mulvany & Lane* [2009] FamCAFC 76; *Marvel & Marvel (No 2)* [2010] FamCAFC 101; *Reid & Lynch* [2010] FamCAFC 184; *SCVG & KLD* [2014] FamCAFC 42; *Cox & Pedrana* [2013] FamCAFC 48; *Jollie & Dysart* [2014] FamCAFC 149.

12 See, eg, Rae Kaspiew et al, *Experiences of Separated Parents Study (Evaluation of the 2012 Family Violence Amendments)* (Australian Institute of Family Studies, 2015); Richard Chisholm, 'Did the 2006 Amendments Downgrade Non-Parents? *Aldridge & Keaton*' (2010) 24 *Australian Journal of Family Law* 123; Richard Chisholm and Patrick Parkinson, 'Reasonable Practicability as a Requirement: The High Court's Decision in *MRR v GR*' (2010) 24 *Australian Journal of Family Law* 255; Richard Chisholm, 'Avoiding Appellate Errors: Lessons from *Cox & Pedrana*' (2014) 28 *Australian Journal of Family Law* 95.

13 R O'Brien, 'Simplifying the System: Family Law Challenges - Can the System Ever Be Simple?' (2010) 16(3) *Journal of Family Studies* 264, 267.

14 See, eg, Richard Chisholm, *Family Courts Violence Review* (Commonwealth of Australia, 2009) recs 3.1-

State magistrates' courts have also indicated that the complexity of the *Family Law Act* reduces their capacity to exercise family law jurisdiction.[15]

Two statutes

14.16 The *Family Law Act* now regulates a significant range of matters that were not dealt with in detail in the original Act, including obligations of professionals, detailed procedural requirements for applications, and elaborate provisions about how courts may make orders about enforcement. The complexity of the Act, in part, reflects the range of subject matters included in it. Some of those matters, principally the substantive provisions relating to children and financial matters, are of vital importance to separating couples endeavouring to work out how a court might decide a dispute. Other matters are of only fringe relevance to the parties and are instead of interest to various professionals in the system. Two particularly clear examples are the provisions establishing the Family Court, and the provisions establishing AIFS. While such matters have a logical connection with the Act, they will rarely be relevant to people consulting the Act in relation to family law problems.

14.17 Dividing the provisions of the *Family Law Act* between two separate statutes would substantially reduce the length of the relevant Act for parties, and be more in line with normal practice.

14.18 It is ultimately a matter for government and the Office of Parliamentary Counsel to determine precisely which provisions should be included in each of the two recommended statutes. The ALRC suggests including the following in an Act tailored to the primary needs of parties ('the Family Law Act'):

- the substantive provisions regarding children's arrangements and financial matters;
- provisions regarding procedure and evidence which describe for the parties how the court process will go about resolving any dispute;
- the overarching provisions contemplated in Recommendation 30; and
- rights relating to appeals.

14.19 The ALRC suggests including in the other Act ('the Family Law (Judicial and Administrative Provisions) Act') provisions such as those currently contained in:

- Part IA 'Protection of Names';
- Parts II, III, IIIA and IIIB relating to court and non-court based services;
- Part IV 'The Family Court of Australia';

3.8; Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 2, 2014); House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (2017) rec 5.

15 For example, in relation to property jurisdiction, see Magistrates' Court of Victoria, Submission No 56 to the SPLA *Family Violence Report*.

- Part IVA 'Management of the Court';
- Part VII Div 13 'State Territory and overseas orders';
- s 62B regarding courts' obligation to inform people about family services;
- s 70Q 'Certain instruments not liable to duty';
- Part IX 'Intervention';
- Part XIA 'Suppression and non-publication orders';
- Part XII 'Recognition of decrees';
- Part XIIIAA relating to international conventions; and
- Part XIV 'The Australian Institute of Family Studies'.

14.20 Where suggestions are made in this Report for additional provisions to be inserted into the *Family Law Act*, government would need to consider which of these two proposed statutes should host the provision. For example, there are suggestions in this Report that some provisions should be relocated from subordinate legislation to the *Family Law Act*.

Parentage

14.21 In addition to the two statutes recommended here, the ALRC suggests removing provisions defining parentage for the purposes of Commonwealth laws to a separate Parentage Act. It is beyond the scope of this Inquiry to properly consider specific suggestions for substantive change to such provisions, given that they operate well beyond the context of family law. Instead, this section sets out the case for relocating the provisions to separate legislation, and for government to conduct a separate comprehensive review of the provisions.

14.22 The *Family Law Act* contains a number of provisions in relation to parentage, although the term 'parent' is not the subject of extensive definition.[16] These include a set of presumptions as to parentage,[17] and provisions relating to evidence of parentage, such as orders for the carrying out of parentage testing procedures, and provision for the court to make a declaration of parentage that is conclusive evidence of parentage for the purposes of Commonwealth laws.[18]

14.23 The Act also contains a set of parentage provisions—expressed as when a child will be a child of a person—dealing with situations including when a child is born as a result of artificial conception procedures and under surrogacy arrangements.[19] The sections of the Act dealing with artificial conception procedures and surrogacy arrangements involve a complex array of provisions that operate to ascribe parentage either through satisfaction of conditions set out in the Act or as a result of recognising the effect of

16 Section 4 of the Act provides only that, when used in children's matters in relation to a child who has been adopted, 'parent' means an adoptive parent of the child. The Family Court has considered the meaning of 'parent' for the purposes of the Family Law Act, and interpreted it to mean a 'biological' or 'natural' parent: *Tobin & Tobin* [1999] FamCA 446 [42]–[45]; *Donnell & Dovey* [2010] FamCAFC 15 [92].

17 *Family Law Act 1975* (Cth) pt VII div 12 subdiv D.

18 Ibid pt VII div 12 subdiv E.

19 Ibid pt VII div 1 subdiv D.

prescribed state and territory legislation. Provisions in relation to artificial conception procedures in particular have been criticised for the complexity of their drafting.[20]

14.24 The Law Council of Australia supported 'a comprehensive approach' being taken to these issues and noted relevant current litigation in the High Court of Australia.[21] One submission opposed moving parentage provisions to separate legislation on the basis that it would make the process of determining parentage more complicated.[22] Other submissions suggested consideration of jurisdictional issues,[23] and whether court powers to order parentage testing should be retained in the *Family Law Act*.[24] One submission described redrafting these provisions in consultation with states and territories as 'an excellent idea', albeit 'ambitious and challenging'.[25]

14.25 Moving the parentage provisions to separate legislation offers an opportunity to provide a consolidated and coherent approach to these provisions, and to draft them more simply and consistently. It will also offer the opportunity to consider the substantive content of these provisions in relation to:

- consistency with state and territory laws that govern parentage for the purposes of state and territory laws;[26]
- recognition of parentage in non-nuclear family forms, including the recognition of single and multi-parent families and parents under Aboriginal or Torres Strait Islander traditions and customs;[27] and
- recognition of parentage of children born under surrogacy arrangements that cannot be the subject of a parentage order under state and territory surrogacy legislation.[28]

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20 *Aldridge & Keaton* [2009] FamCAFC 229 [22]; Jenni Millbank, 'Resolving the Dilemma of Legal Parentage for Australians Engaged in International Surrogacy' (2013) 27 *Australian Journal of Family Law* 135.

21 Law Council of Australia, *Submission 285*. See *Masson v Parsons* (High Court of Australia, S6/2019, Commenced 7 January 2019).

22 Interact Support Inc, *Submission 389*.

23 NATSILS, *Submission 290*; P Easteal and L Young, *Submission 394*.

24 R Carroll, *Submission 289*.

25 J Campbell, *Submission 325*.

26 The main state and territory laws related to parentage are included in: *Parentage Act 2004* (ACT); *Status of Children Act 1996* (NSW); *Status of Children Act 1978* (NT); *Status of Children Act 1978* (Qld); *Family Relationships Act* 1975 (SA); *Status of Children Act 1974* (Vic); *Family Court Act 1997* (WA).

27 A number of submissions raised questions about the fitness for purpose of existing parentage laws in enabling recognition of the diversity of family forms: see, eg, Australian Human Rights Commission, *Submission 217*; H Robert, *Submission 173*; Rainbow Families Victoria, *Submission 106*; F Kelly, *Submission 60*; ATSILS Qld, *Submission 42*; Women's Legal Services Australia, *Submission 45*; Drummond Street Services, *Submission 20*.

28 This will be the case for children born as a result of commercial surrogacy arrangements. For submissions raising parentage in surrogacy arrangements, see, eg, Surrogacy Australia, *Submission 229*; Australian Human Rights Commission, *Submission 217*; Rainbow Families NSW, *Submission 212*; Australian Dispute Resolution Advisory Council Inc (ADRAC), *Submission 12*. The regulation of surrogacy has previously been the subject of calls for a comprehensive inquiry: see Family Law Council, *Report on Parentage and the Family Law Act* (2013) rec 17; House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Surrogacy Matters: Inquiry into the Regulatory and Legislative*

One set of court rules

14.26 Rules of Court are a form of delegated legislation providing additional detail about court processes in accordance with primary legislation. The *Family Law Act* currently provides for two sets of court rules: 'standard Rules of Court' and 'related Federal Circuit Court Rules'.[29]

14.27 'Standard Rules of Court' (entitled the *Family Law Rules*) are made by the Judges of the Family Court and govern practice and procedure in the Family Court and in 'any other courts exercising jurisdiction under this Act' except the Federal Circuit Court.[30] A Rules Advisory Committee provides advice on request about the making of rules, and may comprise judges of the Family Court, the Family Court of Western Australia, and 'such other persons as are appointed by the Chief Justice of the Family Court of Australia'.[31]

14.28 'Related Federal Circuit Court Rules' are made by the judges of the Federal Circuit Court and apply only to proceedings in the Federal Circuit Court.[32] The *Federal Circuit Court Rules* include provisions which apply only to family law and child support proceedings,[33] and other provisions which apply to other types of proceedings. If in a particular case the *Federal Circuit Court Rules* are 'insufficient or inappropriate', the Court may apply the *Family Law Rules*.[34]

14.29 The two sets of rules have some similarities, but also significant differences. Examples include the absence in the *Federal Circuit Court Rules* of pre-action procedures,[35] or provisions facilitating arbitration in family law disputes.[36] Having two sets of rules for different courts exercising family law jurisdiction increases complexity, duplication, and confusion for professionals and parties. The ALRC recommends that one set of rules be established to cover all disputes in any court exercising family law jurisdiction, including the Federal Circuit Court.

14.30 If family law jurisdiction is to devolve primarily to state courts in line with Recommendation 1 of this Report, the example of the admiralty jurisdiction could be followed. Namely, one set of rules applies in any court exercising admiralty jurisdiction, including state courts. Rules are made by the Governor-General on the advice of a committee appointed by the Attorney-General which includes state and federal judges.[37]

Aspects of International and Domestic Surrogacy Arrangements (2016) rec 3.

29 *Family Law Act 1975* (Cth) s 4.

30 Ibid s 123. Note also the *Family Law Rules 2004* (Cth) are adopted with limited exceptions by the *Family Court Rules 1998* (WA) r 4 and pt 2 div 2.

31 *Family Law Act 1975* (Cth) s 124.

32 *Federal Circuit Court of Australia Act 1999* (Cth) s 81; *Family Law Act 1975* (Cth) s 4, (definition of 'applicable rules of court').

33 *Federal Circuit Court Rules 2001* (Cth) ch 2.

34 Ibid r 1.05.

35 *Family Law Rules 2004* (Cth) sch 1.

36 Ibid ch 26B.

37 *Admiralty Act 1988* (Cth) ss 41–42.

Simplifying provisions

14.31 The complexity of the Act in part reflects how prescriptive its provisions are. In redrafting the Act, a balance must be struck between providing useful guidance on the application of the law and being overly prescriptive. Opportunities for simplification include:

- considering whether particular provisions need to be in legislation, or can be dealt with in some other way, such as through information materials, operational policies, or funding agreements;
- moving detailed operational matters to delegated legislation, or dealing with them through training or the provision of information;
- removal of unused provisions, if they are no longer useful;
- where a provision in the *Family Law Act* is required, considering whether a less detailed and more principles-based approach could be adopted to the drafting of the provision.

14.32 Prescriptive material in legislation is no doubt intended to provide guidance to judges as well as to others involved in the law. The possible benefits of detailed prescription must however be weighed against its limitations and difficulties. Where the substance of the provision is to require the court to apply some general principle or objective, such as treating the child's best interests as the paramount consideration, and where a list of factors includes a catch-all such as 'other matters that the court considers relevant', detailed prescriptions about particular matters may have limited effect. In addition, in the context of cases having complex factual material and arguments, detailed prescriptions may distract those involved from the central task of implementing the main objective, such as ordering a just and equitable redistribution of property, or treating the child's best interests as paramount.[38] Furthermore, detailed prescription adds to the complexity of the Act and the difficulty of understanding it. Appendix G contains some examples of drafting that would minimise excessive prescription.

14.33 The goal should be to ensure that families and unrepresented litigants can easily understand the legal framework that applies to their situation, while allowing professionals to find detail in appropriate locations.

38 See, eg, Jonah Lehrer, *The Decisive Moment* (Cannongate Books, 2009), esp ch 5, "Choking on Thought".

14.34 A large number of submissions supported legislative simplification.[39] One submission emphasised that family law 'should be understandable and usable by the people'.[40] Another submitted that the proposed redrafting, restructuring, and simplification

> would empower those navigating the family law system and particularly those seeking to engage in FDR processes to easily acquire clear information about their legal obligations and responsibilities, rights and entitlements and assist them in the timely, cost-effective and efficient resolution of their disputes, and promote the aim of self-determination wherever possible.[41]

14.35 However, several submissions emphasised the importance of retaining precision regarding the legal meaning of provisions, and also the risk of inadvertently changing the effect of the legislation in the process of redrafting.[42] National Legal Aid submitted that much of the legislative subject matter is 'necessarily complex in nature', and that clarity should take precedence over simplification to ensure consistent judicial application.[43] The ALRC acknowledges that a balance must be achieved between simplification and clarity, and considers that greater simplification is currently a pressing need, given the difficulties outlined in this chapter. Careful drafting and the use of explanatory materials can assist in retaining legal certainty and minimising the risk of inadvertently departing from established jurisprudence.

14.36 Some submissions cautioned that relocating provisions into multiple legislative instruments entails a risk of making the law less accessible, rather than more.[44] Another described a 'tension' between making the *Family Law Act* a 'one stop go-to Act while making it shorter and more approachable'.[45] The ALRC recommends that provisions likely to be frequently of direct relevance to separated couples should be retained in the recommended new Family Law Act, while provisions which contain detail likely to be irrelevant to the vast majority of parties should be relocated to other instruments. In this way, the law should become more accessible to parties, rather than less.

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39 See, eg, For Kids Sake, *Submission 421*; Family & Relationship Services Australia (FRSA), *Submission 407*; Office of the Public Advocate, *Submission 405*; Australian Institute of Family Studies, *Submission 396*; Aboriginal Justice Caucus Working Group on Family Violence, *Submission 381*; Domestic and Family Violence Death Review and Advisory Board, *Submission 377*; Women's Legal Services Australia, *Submission 366*; Baptist Care Australia, *Submission 359*; Family Law Reform Coalition, *Submission 355*; J Kirkpatrick, *Submission 343*; Fitzroy Legal Service and Darebin Community Legal Service, *Submission 336*; Relationships Australia National, *Submission 317*; M Kaye, *Submission 296*; Australian Association of Social Workers, *Submission 295*; National Family Violence Prevention Legal Services Forum, *Submission 293*; NATSILS, *Submission 290*; Australian Psychological Society, *Submission 281*; Association of Superannuation Funds of Australia, *Submission 270*; Uniting, *Submission 268*; Resolution Institute, *Submission 260*.

40 Marrickville Legal Centre, *Submission 288*.

41 Australian Dispute Resolution Advisory Council (ADRAC), *Submission 386.*

42 Interact Support Inc, *Submission 389*; J Campbell, *Submission 325*; Family Court of Western Australia, *Submission 311*; Law Council of Australia, *Submission 285*.

43 National Legal Aid, *Submission 297*. See also P Easteal and L Young, *Submission 394*.

44 J Campbell, *Submission 325*. See also Interact Support Inc, *Submission 389*; Family Law Practitioners' Association of Western Australia (Inc), *Submission 410*.

45 R Carroll, *Submission 289*.

14.37 One submission suggested that the *Family Law Act* should include a list of relevant subordinate legislation to be read in conjunction with the Act; the same numbering style and format should be used in the Act and the subordinate legislation; definitions should be consistent across the Act and subordinate legislation; and cross-references between multiple pieces of subordinate legislation on any particular topic should be minimised.[46] The ALRC agrees.

14.38 Examples of how some key provisions could be redrafted to achieve greater clarity are attached at Appendix G. There is also a discussion regarding the suggested redrafting of Pt VII Div 13A of the Act in Chapter 11.

14.39 Appendix H includes a list of the existing provisions in Pt VII of the *Family Law Act* with suggestions as to whether each provision could be omitted, amended, relocated or maintained.

Restructuring and rationalising the legislation

14.40 The fundamental structure of the *Family Law Act* has not changed significantly since its introduction. However, the increased size of the Act and scope of matters regulated by it has made it increasingly difficult to find the provisions that apply to a particular circumstance. The Family Court of Western Australia described the effect of various amendments made over the years as resulting in an 'unwieldy and difficult-to-navigate piece of legislation', which is 'particularly problematic' given the significant proportion of self-represented parties.[47]

14.41 For example, in Pt VII of the Act, it is frequently necessary to 'jump around' the legislation, as the provisions are not presented in a logical order that assists readers to understand the decision making pathway. Further, the provisions that families are most likely to need (the children's care arrangements provisions) are mid-way through a very lengthy Act. The Law Council of Australia advocated for some caution in restructuring the Act, noting that 'it is not always possible nor appropriate as a matter of proper drafting and construction to simply reorganise the "most important substantive provisions"...even if such provisions can properly be identified'.[48]

14.42 A suggested structure for the provisions relating to children is attached at Appendix H.

14.43 Many submissions supported changes to the Act to improve accessibility, including for self-represented litigants.[49] For example, in commenting on the complexity of the legislation and procedures, one stakeholder noted that the

46 Association of Family and Conciliation Courts Australian Chapter, *Submission 258*.
47 Family Court of Western Australia, *Submission 311*.
48 Law Council of Australia, *Submission 285*.
49 See, eg, Queensland Law Society, *Submission 221*.

> current Australian family law is suitable and accessible for use only by lawyers, and an utterly alien and estranging environment for the balance of the people of Australia that it ostensibly serves.[50]

14.44 A restructuring of the Act should consider:

- placing the provisions that readers are most likely to require close to the front of the Act, and placing the most technical or most rarely used provisions towards the end;
- presenting the key parts of the decision making pathways for the subjects covered by the Act in a clear narrative order, to assist the reader to understand how decision makers analyse what decisions to make;
- grouping related provisions together wherever possible (for example, provisions about parental responsibility should be grouped together); and
- renumbering the Act, and adopting a numbering scheme that can be easily adapted in any future amendments to the Act without becoming illogical or confusing.[51]

14.45 A restructuring of the Act should also consider whether it would be desirable to reduce significant duplication and overlap found in some parts of the Act. For example, substantively similar, but separate, property regimes exist for married and de facto couples, providing almost identical rights, but with provisions ordered and drafted differently.[52] In addition, separate jurisdictional provisions for courts apply for Pt VII, and for the rest of the Act, and are structured very differently.

14.46 In some instances duplication may be necessary to ensure constitutional validity of provisions.[53] Interact Support submitted that sometimes duplication is preferable if it means a particular Part of the Act has a self-contained meaning without needing to refer to other Parts or other legislation.[54]

Comprehensibility of the legislation

14.47 The Act has a wide range of users, from judicial officers to people who will never litigate or seek legal advice, but who nevertheless want to understand the legal principles that apply to assist them to discuss their separation arrangements with their former partner. The current drafting of the Act requires a very high degree of English literacy to understand it, with some provisions requiring a significant familiarity with legal concepts. One theme that arose in submissions was that certain provisions of the Act are frequently misunderstood by readers. [55] Changes should be made to the Act to

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50 Marrickville Legal Centre, *Submission 137*.

51 For example, the *Income Tax Assessment Act 1997* (Cth) uses a system which allows new section numbers to be inserted between existing sections without undermining the numbering scheme.

52 This duplication was noted, for example, by: Family Court of Australia, *Submission 68*; Law Council of Australia, *Submission 43*.

53 Hon M Finn, *Submission 308*.

54 Interact Support Inc, *Submission 389*.

55 See, eg, Grandparents Victoria, *Submission 138*; Marrickville Legal Centre, *Submission 137*.

make it easier for a wider range of readers to understand, including redrafting the Act, Regulations, and Rules in ordinary English to the extent possible.

14.48 The Discussion Paper proposed removing legal Latin from the Act (for example, 'subpoena' and 'affidavit'). The Law Institute of Victoria was particularly concerned that such changes may instead cause additional confusion.[56] For example, relevant stakeholders such as police and schools are used to such terms being used in a variety of areas of law. The ALRC agrees that there may be benefit in retaining particular legal terms of art, including those in Latin, and does not recommend a blanket removal of all terms incorporating Latin.

14.49 The ALRC recommends user testing to ensure that provisions are understood. Drafters, knowing what they intend, can overestimate the capacity of the words to convey their intended meaning.[57] In addition, it can be an instructive exercise for reviewers to require drafters to think through how a court would apply the draft in various fact situations, some of which they may not have had in mind when drafting the provisions.

Privacy provisions

14.50 The *Family Law Act* attempts to strike a balance between the principle of open justice, and public expectations of accountability and transparency that flow from this principle, and the right of children and families to privacy. The principle of open justice is promoted by the requirement in the *Family Law Act* that proceedings will generally be conducted in open court (that is, any member of the public can attend the proceedings),[58] and by the routine publishing of reasons for decision in anonymised form.[59] In contrast, the privacy provisions in the Act can be seen as limiting open justice. These privacy provisions, contained in s 121, are designed to protect the privacy of families and children from sensational and intrusive media reporting of the kind that was common prior to the enactment of the Act.[60]

14.51 The provisions criminalise the publication or dissemination of an account of a family law proceeding that could identify a party, witness or other person associated with the proceeding. Accordingly, it is legal to publish detailed accounts of family law proceedings, provided that the account does not directly or indirectly identify relevant persons. A number of exceptions to the offence are provided, including for publication of case reports, legal professional regulation, and other purposes. The court can also make orders authorising publication of identifying information, and occasionally does so.[61]

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56 Law Institute of Victoria, *Submission 387*.

57 *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365, [2] (Gleeson CJ and McHugh J): 'What is clear to the drafter is not necessarily clear to the reader'.

58 *Family Law Act 1975* (Cth) s 97.

59 At time of publication, decisions were available on the AustLII website at: www.austlii.edu.au.

60 *AH & SS* [2005] FamCA 854.

61 A recent high profile case in which this was done was the 'Baby Gammy' matter: *Farnell & Chanbua* [2016] FCWA 17.

14.52 However, aspects of s 121 cause significant confusion.[62] For example, doubts have been expressed about whether s 121 prevents communication of details of proceedings to professional regulators as part of a complaint, or communications between family law service providers about safety concerns for clients, or even private conversations between individuals. There is a perception that the provision prevents scrutiny of family law decision making, reporting on the deficiencies of the family law system,[63] and victims of family violence from speaking out about their experiences.[64]

14.53 A number of changes should be made to improve the clarity of the provision, and ensure that it does not discourage communications about family law proceedings beyond its intended scope.

Recommendation 56 Privacy provisions that restrict publication of family law proceedings to the public, currently contained in s 121 of the *Family Law Act 1975* (Cth), should be redrafted.

Maintaining privacy protections

14.54 The ALRC does not recommend any substantive changes to the provisions of s 121. It should, however, be redrafted to make the obligations it imposes easier to understand, and to confirm that:

- it is not an offence to provide accounts of proceedings to any professional regulator (not just legal professional regulators), nor for a regulator to use such accounts in connection with their regulatory functions;
- it is not an offence to provide an account of proceedings to a government agency or other organisation in connection with that agency's or organisation's role in providing a service to a particular family or family member;
- the offences only apply to public communications and do not apply to communications which are essentially of a private or personal nature; and
- dissemination on social media or other internet-based media may constitute a prohibited public communication if the potential audience is sufficiently wide in the circumstances.

14.55 The provision has generated significant controversy over many years but was last comprehensively reviewed in the McCall Report in 1997, which recommended the maintenance of privacy provisions, but some relaxation of s 121 in relation to property

62 These ambiguities are explored in depth in Adiva Sifris and Sharon Rodrick, 'The Reach and Efficacy of s 121 of the Family Law Act' (2017) 7 *Family Law Review* 30.

63 Family Law Reform Coalition, *Submission 355*; Bravehearts Foundation Ltd, *Submission 279*.

64 For the latter, see, eg, Centacare Family and Relationship Services (CFRS), *Submission 125*.

proceedings.[65] Similar privacy provisions to s 121 can be found in a number of overseas family law jurisdictions, as well as in child protection and juvenile justice laws in the states and territories of Australia.[66] In England it has been stated that there is 'no more difficult issue in family justice' than the question of appropriate reporting of cases, given concerns about 'secret justice' and 'legitimate expectations of privacy and confidentiality for the family'.[67]

14.56 Although s 121 does place restrictions on commentary about proceedings, anonymised reports of judgments are routinely published. There is no prohibition on comment on family law proceedings, provided individuals are not identified. As noted by the Law Council of Australia, requirements for anonymisation do not prevent individuals from telling their stories. For example, the evidence reported by the Royal Commission into Institutional Abuse was anonymised but still enabled the stories of individuals who had experienced abuse to be made public.[68]

14.57 Prosecutions for breaches of s 121 are very rare. Prosecutions may be initiated only by the Commonwealth Director of Public Prosecutions, and as few as seven prosecutions have been completed involving a proven offence since the offences were introduced into law.[69]

14.58 There is strong support for privacy of family law proceedings across the family law sector, due to the potential impacts on children and families of inappropriate reporting. The reasons for this support are well summarised by the Community and Public Sector Union submission, which notes a 'considerable risk of misinformation, defamation, trial by social media, and present and future trauma for children subject to proceedings' if restrictions on reporting were relaxed.[70] A number of other submissions supported maintaining privacy provisions with drafting amendments for greater clarity.[71]

14.59 A minority of submissions advocated against criminal consequences for public communications about proceedings, stating for example that: 'Public discussion of prominent matters cannot be avoided and criminalising people for conducting a

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65 IWP McCall, 'Publicity in Family Law Cases : Report to the Attorney-General for the Commonwealth on Proposals for Amendments to Family Law Act, Section 121' (Attorney-General's Department, 1997).

66 See, eg, *Family Court Act 1980 (NZ)* s 11B; *Children Act 1989* (UK) Ch 41 s 97; *Child, Youth and Family Services Act 2017* (Ontario) S.O. 2017, c. 14, Sched. 1 s 87; *Children and Young Persons (Care and Protection) Act 1998 (NSW)* s 105; *Children (Criminal Proceedings) Act 1987* (NSW) ss 15A-15G.

67 Sir Nicholas Wall and Bob Satchwell, 'The Family Courts: Media Access and Reporting' (President of the Family Division and the Society of Editors, July 2011).

68 Law Council of Australia, *Submission 43*.

69 Commonwealth Director of Public Prosecutions (CDPP), *Submission 414*.

70 CPSU, *Submission 136*.

71 See, eg, Commonwealth Director of Public Prosecutions (CDPP), *Submission 414*; Gadens, *Submission 412*; Family Law Practitioners' Association of Western Australia (Inc), *Submission 410*; CASA Forum Victorian Centres Against Sexual Assault, *Submission 404*; P Easteal and L Young, *Submission 394*; Interact Support Inc, *Submission 389*; Family Law Practitioners Association Qld, *Submission 368*; LGBTI Legal Service, *Submission 367*; Relationships Australia National, *Submission 317*; National Legal Aid, *Submission 297*; Law Council of Australia, *Submission 285*; Dr D Tustin, *Submission 266*.

conversation is dangerous. Transparency is equally important as privacy. The child's best interests and public confidence and accountability is the key consideration.'[72]

14.60 If the criminal provision were removed, and a breach of privacy entailed only civil consequences, the provision would likely be ineffective in many cases in achieving its purpose. Placing the onus on affected parties to bring civil proceedings for a breach of confidentiality is likely to involve a prohibitive burden, particularly for vulnerable parties at a time of significant stress. Similarly, requiring an affected person to apply for a non-publication order[73] to prevent anticipated disclosures would likely be unduly burdensome. There would be a number of difficulties for a child who wished to take legal action regarding their privacy. It is preferable that a general prohibition applies to all cases, subject to clear exceptions, and that responsibility for investigating and bringing proceedings for breaches remain with a public body such as the Director for Public Prosecutions. Transparency and public confidence can be achieved through accounts of proceedings which do not identify the affected individuals.

14.61 It is arguable that similar privacy provisions should apply equally for the benefit of children and parties involved in family law disputes which are not litigated in court. As discussed elsewhere in this Report, there has been a significant increase in the use of a range of alternative dispute resolution forums for family law disputes, but s 121 of the *Family Law Act* only applies to court proceedings. Many forms of alternative dispute resolution involve confidentiality agreements, and are generally conducted in private. Furthermore, the Act prohibits disclosure of information by family dispute resolution practitioners and family counsellors except in limited circumstances.[74] Stakeholders have not indicated problems with breaches of confidentiality in the context of alternative dispute resolution, and commercial media are less likely to publish stories related to consensual dispute resolution processes. The open, public, and contested nature of court proceedings make them uniquely appropriate for the application of privacy provisions such as those contained in s 121 of the Act.

14.62 It was recommended earlier in this chapter that a number of provisions currently contained in the *Family Law Act* should be relocated to other Acts. Section 121 of the Act currently only applies to proceedings 'under this Act'. The ALRC recommends that a prohibition should continue to apply to all proceedings which are currently brought under the *Family Law Act*, even if some of those proceedings are in future brought under other Acts in accordance with the recommendations in this chapter.

Redrafting

14.63 At present, s 121 is drafted in a form that many readers are likely to find difficult to read and understand. It should be redrafted and simplified to assist readers to understand the scope of the offence. The length of the provision was criticised in submissions as

72 Bravehearts Foundation Ltd, *Submission 279*. See also Family Law Reform Coalition, *Submission 355*.
73 *Family Law Act 1975* (Cth) pt IXA.
74 Ibid s 10D and s 10H.

contributing to difficulties of interpretation, particularly for a layperson.[75] The section currently has 11 sub-sections, many of which incorporate lengthy numbered lists and cross-references to other sub-sections. The provision contains two similarly worded but distinct offences. The language used generally still reflects the historical dominance of traditional forms of media such as television and newspapers, despite having been amended a number of times to extend its operation to newer forms of digital media.

14.64 The Law Council of Australia submitted that including a list of example situations may assist readers to understand the intended scope of the offence.[76] However, the ALRC does not recommend the use of examples in redrafting family law legislation, primarily due to the danger that laypeople reading the examples may infer that the examples constitute the law, rather than simply illustrating the potential effect of the law in a hypothetical situation.

The public

14.65 A critical element of the offence in s 121 as currently drafted is that information must be published or disseminated to the public, or a section of the public. It is unlikely that this was intended to prohibit communications to government agencies, family law service providers, service providers for children, or family violence service providers for the purpose of providing relevant services to a family or family member.[77] There are sometimes compelling reasons, including safety, for information about family law proceedings to be shared with service providers, in accordance with applicable privacy legislation.[78] However, the drafting of the provisions has given rise to some confusion about this.

14.66 Submissions to this Inquiry suggested that it should be clear that information should be able to be shared among services to improve the ability of professionals to collaborate.[79]

14.67 Case law indicates that the offence in s 121 does not prohibit private communications. In *Donnelly v Edelsten*, Morling J held that the phrase 'disseminates to the public'

> should be taken as a reference to widespread communication with the aim of reaching a wide audience. It cannot have been intended by the legislature that the restriction on dissemination should apply, for example, to conversations between a party to Family Court proceedings and a close personal friend.[80]

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75 Gadens, *Submission 412*.

76 Law Council of Australia, *Submission 285*.

77 Richard Chisholm, *Information-Sharing in Family Law & Child Protection: Enhancing Collaboration* (Commonwealth of Australia, 2013) 24.

78 See, eg, *Privacy Act 1988* (Cth) sch 1; *Family Violence Protection Act 2008 (Vic)* pt 5A.

79 In relation to sharing of family reports amongst family law professionals, see especially CatholicCare Victoria Tasmania (CCVT), *Submission 115*.

80 *Donnelly v Edelsten* (1988) 12 Fam LR 294, [296]. Cited with approval in *R Pty Ltd atf the Fletcher Trust & Jones and Anor* [2016] FamCA 928, [37].

14.68 However, material available to the ALRC in this Inquiry demonstrated that some individuals understood this to be the effect of the provision. A more recent case considered that the section would not prohibit communications to persons with 'special interest in the subject-matter of the communication which is substantially greater than, or substantially different from, the interest of members of the public generally'.[81] The ALRC recommends that confusion be minimised by clarifying that the offence of dissemination does not apply to private communications. There is substantial case law considering the meaning of 'private communications' in other legal contexts, including discrimination law.[82] It should be clear in the legislation that communicating with a government agency or a service provider agency about a family or family member in connection with services to be provided does not constitute a public communication and is not an offence.

The exceptions

14.69 Subsection 121(9) contains a list of exceptions to the offences, some of which would appear to describe situations which may not be considered to breach the offence provisions in any event. For example, some of the exceptions involve communication to organisations or individuals who arguably would not be considered 'a section of the public', such as child welfare agencies. The impact of such drafting can be seen in the divergent reasons of the Full Court of the Family Court in *Re: W*.[83] Although the legislation has since been amended to introduce a further exception regarding provision of information to child welfare authorities, this has not addressed the underlying problem of the relationship between the exceptions and the offences. This can be seen in relation to professional regulators.

14.70 Submissions indicated considerable confusion as to whether accounts of proceedings can be provided to professional regulators, or provided by professional regulators to others in connection with the performance of their regulatory functions.[84] A number of submissions particularly supported clarifying that this is not an offence.[85]

14.71 It is unlikely that professional regulators in this context are members of 'the public' for the purposes of s 121 as currently drafted. In relation to provision of information to child welfare authorities, the Full Court of the Family Court has held that 'it is the connection which exists between the information which is sought to be provided to the child welfare authorities and the functions that they perform, which distinguishes them from other persons or organisations in the public.'[86] It is likely that a similar connection

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81 *Hinchcliffe v The Commissioner of the Australian Federal Police* [2001] FCA 1747, [57].

82 See, eg, the discussion in Australian Human Rights Commission, *Federal Discrimination Law* (Australian Human Rights Commission, 2016) 80.

83 *Re: W* [1997] FamCA 8. See also discussion in Sifris and Rodrick, above n 63, 40.

84 See, eg, Women's Legal Services Australia, *Submission 45*.

85 No to Violence, *Submission 398*; Women's Legal Services Australia, *Submission 366*; NSW Legal Services Commissioner, *Submission 324*; Hume Riverina Community Legal Service, *Submission 294*; The Royal Australian and New Zealand College of Psychiatrists, *Submission 280*.

86 *Re: W* [1997] FamCA 8.

exists between the information that would be provided to regulators, and their regulatory functions.

14.72 However, it is important to ensure that people are not inadvertently deterred by privacy provisions from making—or handling—valid complaints. The ALRC therefore recommends as part of the legislative redrafting that there be included an explicit statement that it is not an offence to provide an account of proceedings to any professional regulator, and that a professional regulator is permitted to use that information (including by providing it to others) as necessary in direct connection to their regulatory functions. A clear legislative statement to this effect would be likely to increase public confidence that the family law system is open to appropriate scrutiny by facilitating the regulatory function of relevant professional bodies.

Social media and the internet

14.73 The ALRC recommends explicitly clarifying that s 121 can apply to parties who disseminate identifying information about family law proceedings via social media and other internet-based media. Section 121 already includes prohibitions on publishing 'by electronic means' or 'otherwise disseminating' to a section of the public, and courts have held that this includes publishing material on a website.[87] The Commonwealth Director of Public Prosecutions considered that social media and other internet posts could constitute an offence under the current provisions 'depending on the facts including the medium and actual/potential audience', but supported specifically including 'social media' or related terms to clarify the scope of the provision.[88] For example, juvenile justice legislation in New South Wales includes an explicit prohibition on publication by way of 'electronic broadcast [or] by the Internet'.[89]

14.74 One judge has described the 'derogatory, nasty and cruel' use of social media by some litigants as 'cyber-bullying', 'regularly peppered with disgusting language and equally vile photographs', encouraged by an online audience, and noted they may 'think they are beyond the purview or accountability of the law'.[90]

14.75 Some submissions argued that the wide diversity of internet-based media and forums can make identification and regulation of public communications difficult.[91] The ALRC acknowledges that social media and similar technologies will continue to evolve and pose difficult questions for the law generally, well beyond the family law context. The ALRC suggests that such issues may well require further consideration by the Australian Government, in consultation with state and territory governments and other stakeholders across jurisdictions. In the context of s 121 of the *Family Law Act* at this point in time, such questions are best addressed by prosecutors and courts on the

87 See, eg, *Xuarez & Vitela* [2012] FamCA 574.
88 Commonwealth Director of Public Prosecutions (CDPP), *Submission 414*.
89 *Children (Criminal Proceedings) Act 1987* (NSW), s 15A(2).
90 *Lackey & Mae* [2013] FMCAfam 284.
91 Hon M Finn, *Submission 308*; Bravehearts Foundation Ltd, *Submission 279*.

facts of each situation with the assistance of clearer legislative guidance about the nature of widespread public communications discussed above.

14.76 Other submissions supported an explicit prohibition on sharing information relating to family law proceedings on public digital media platforms,[92] for example because it is commonplace and can pose a safety risk.[93] Others suggested education and legislative clarity to ensure that members of the public are aware of the prohibition, as offences may otherwise be committed out of ignorance.[94] The ALRC recommends that information about s 121 and guidance on appropriate and inappropriate communications about family law disputes be included in the public information and education materials discussed in Chapter 15.

Publication of anonymised judgments

14.77 The family courts have a long-standing practice of publishing anonymised reports of decisions. The Family Court has had a policy since 2007 to publicly publish 'almost all' judgments.[95] In the 2017–18 financial year, the Family Court publicly published 1,170 first instance judgments and 262 Full Court judgments.[96] The Federal Circuit Court commits to publishing 'as many of its judgments as practical', noting that not all its judgments are produced in written form, and that time and resources are required to anonymise judgments before they can be made public.[97] In 2017-18, the Federal Circuit Court produced written reasons in 1,473 family law cases, of which 'approximately 580' were published externally.[98] Family Court of Western Australia Annual Reports do not state the number of judgments published publicly, but a public database is maintained of judgments 'selected by the Family Court of Western Australia as suitable for publication because of their value as legal precedents'.[99]

14.78 Noting this distinction between the practice of the courts, some submissions specifically argued that courts should be mandated by legislation to make public anonymised reasons for judgment.[100] The Law Council of Australia considered it 'vital to enhance public confidence and so as to enable proper consideration of the work of the

92 Community and Public Sector Union (CPSU), *Submission 406*; Family Law Practitioners Association Qld, *Submission 368*; Relationships Australia National, *Submission 317*; Family Life, *Submission 309*; National Legal Aid, *Submission 297*.

93 Uniting, *Submission 268*.

94 Gadens, *Submission 412*; Interact Support Inc, *Submission 389*; Law Council of Australia, *Submission 285*.

95 Lyn Newlands, 'Publishing Family Court Judgments: Problems and Solutions' 24(2) *Journal of Law, Information and Science* 81.

96 Family Court of Australia, *Family Court of Australia 2017–18 Annual Report* (2018) 50.

97 Federal Circuit Court of Australia, *Federal Circuit Court Annual Report 2017–18* (Federal Circuit Court of Australia, 2018) 79.

98 Ibid.

99 Western Australian Government, *ECourts Portal of Western Australia* <ecourts.justice.wa.gov.au/eCourtsPortal/Decisions/Filter/FC/RecentDecisions>.

100 Family Law Practitioners Association Qld, *Submission 368*; Law Council of Australia, *Submission 285*. See also National Legal Aid, *Submission 297*.

family courts'.[101] In contrast, the Family Court described the proposal as 'an affront to the Court' given its existing practice of publication.[102]

14.79 English courts have also grappled with similar issues, acknowledging that

> there is a need for greater transparency in order to improve public understanding of the court process and confidence in the court system. At present too few judgments are made available to the public, which has a legitimate interest in being able to read what is being done by the judges in its name.[103]

14.80 The ALRC considers that the transparency and professional guidance provided by published anonymous judgments is of great importance. An example of the public scrutiny and debate which is enabled by such judgments can be seen in the media exposure given to a recently published judgment in a successful appeal against a prison sentence.[104] The ALRC recognises that resourcing is a relevant consideration determining the quantity of judgments which can be reduced to writing and anonymised, and the speed with which this can be done by the courts. Accordingly, the ALRC encourages government and the courts to provide appropriate resources to enable the efficient anonymisation and publication of as many family law judgments as possible. Priority should be given to publication of judgments of potential legal significance, and judgments relating to final orders, rather than interim orders.

101 Law Council of Australia, *Submission 285*.

102 Family Court of Australia, *Submission 400*.

103 Sir James Munby, 'Transparency in the Family Courts: Publication of Judgments: Practice Guidance' (Family Division of the High Court of England and Wales, 16 January 2014).

104 *Stradford & Stradford* [2019] FamCAFC 25; Michaela Whitbourn, 'Judge Blasted for Jailing Father for 12 Months in Family Law Dispute' *The Sydney Morning Herald*, 19 February 2019; Michael Pelly, 'Hearsay: Lawyers Rush to Aid of Father Jailed by Brisbane Judge' *Australian Financial Review*, 21 February 2019; Ashleigh Stevenson and staff, 'Brisbane Judge's Ruling Overturned by Family Court as a "Gross Miscarriage of Justice"' *ABC News*, 19 February 2019; 'Taxpayers Slugged for Judge's Dud Decisions' *Courier Mail*, 26 February 2019.

15. Primary Interventions

Contents

Introduction

15.1 In this chapter, the ALRC makes suggestions to improve primary interventions for the family law system. As discussed in Chapter 2, primary interventions are delivered to the whole community in order to provide support before problems occur. Typically delivered in community settings, such as schools, community health services and the media, they may focus, for example, on changing cultural norms or social attitudes through public education about positive parenting practices or legal rights and policies.[1] Primary interventions are designed to shift the risk profile positively for the entire relevant population.[2] In the family law system, primary interventions aim to reach Australian families prior to, or early on in family separation, so that families feel empowered to take proactive steps to seek information, advice and support in seeking to reach post-separation agreements. As these interventions are matters of social policy, rather than legal policy, the ALRC makes no formal recommendations.

15.2 The ALRC encourages the Australian Government to develop a national education and awareness campaign. The campaign should raise general awareness of the law governing post-separation parenting and the availability of further information and support, including dispute resolution processes outside of the courts. The campaign should also aim to increase understanding as to the law regarding property division and other financial issues on separation.

15.3 The ALRC also encourages the Australian Government to develop a centralised source of clear, consistent, legally sound and nationally endorsed information about the family law system. This would include detailed information about relevant laws and processes, designed for families seeking to reach agreement post-separation. This information should be available through clear entry points to the family law system, and promoted through the national education and awareness campaign.

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1 Daryl J Higgins, 'A Public Health Approach to Enhancing Safe and Supportive Family Environments for Children' (2015) 96 *Family Matters* 39, 40.

2 Ibid 45.

15.4 The ALRC also suggests the enhancement of referral relationships between family law services and universal services (such as health and education services), and first point of contact services for people who have experienced family violence (such as police). These relationships would assist families, children and young people to access information, advice and support in relation to separation at an early stage.

15.5 In respect of all primary interventions, the ALRC reiterates the recommendation made by the Family Law Pathways Advisory Group in 2001 that the family law system must ensure fair and equitable treatment for all. Policy makers must ensure that they have an understanding of men as well as women, during and following separation, and should take a balanced approach to providing services and developing policies and programs for separated families.[3]

National education and awareness campaign

15.6 The information provided to the ALRC throughout this Inquiry by users of the system suggests confusion as to the substantive law that underpins the family law system and uncertainty as to the services available to assist individuals struggling with a separation—both legal and non-legal services. Accordingly, the ALRC encourages the Australian Government to establish a national public awareness campaign about the family law system. The campaign should raise awareness of the benefits of seeking information, advice and support, and should inform people how these services can be accessed. This approach is consistent with the use of public education campaigns by governments to effect attitudinal change and to raise awareness of sources of support in other areas.[4]

15.7 The campaign should aim to effect changes in the steps people take when contemplating or experiencing separation, before conflicts develop or become entrenched. This responds to findings that many Australians who fail to take steps to resolve their legal problems do so due to poor legal knowledge, and due to a lack of awareness about the range of dispute resolution services that are available to assist them.[5] Raising basic awareness and providing access to information about the role of law in people's lives can empower people to independently take steps to resolve their legal problems.[6] The campaign should promote access points for further information (discussed below) and for out-of-court services, including enhanced Family Relationship Centres as recommended in Chapter 16. It should include basic information about children's best

3 Family Law Pathways Advisory Group, *Out of the Maze: Pathways to the Future for Families Experiencing Separation* (2001) rec 8.

4 See generally Higgins, above n 1; Matthew R Sanders and Ronald J Prinz, 'Using the Mass Media as a Population Level Strategy to Strengthen Parenting Skills' (2008) 37(3) *Journal of Clinical Child & Adolescent Psychology* 609.

5 Christine Coumarelos et al, *Legal Australia-Wide Survey: Legal Need in Australia* (Law and Justice Foundation of NSW, 2012) cited in Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 1, 2014) 152–3.

6 See Department of Justice and Regulation (Vic), *Access to Justice Review: Report and Recommendations* (Victorian Government, Vol 1, 2016) 119.

interests, including the potential harm to children caused by ongoing high levels of interparental conflict,[7] and the importance of taking a child-centred approach to post-separation parenting.

15.8 Stakeholders expressed support for a public education and awareness campaign.[8] A number of stakeholders suggested a need for public education to shift the culture around separation from one which positions the courts and lawyers as the first point of contact for people experiencing separation. These stakeholders suggested raising awareness of the availability and benefits of less adversarial dispute pathways and associated family relationship services.[9]

15.9 Stakeholders also suggested that a national education and awareness campaign could be used to address existing public mistrust in the family law system,[10] and misunderstandings about laws and processes.[11] For example, Macarthur Legal Centre submitted that addressing these misunderstandings through access to information 'should lead to improved access to family law systems and services, more efficient and effective resolution of disputes and safer/fairer outcomes for parents, children and related parties'.[12]

15.10 Other suggestions for the campaign included awareness raising of family violence in the context of family law disputes,[13] and messaging for children and young people to ensure they know where to go to access information and support in relation to family breakdown.[14] Some stakeholders identified the need to accompany the campaign with increased resourcing for service providers, to ensure they are able to meet the increased service demand that may flow from increased public awareness.[15]

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7 See Rae Kaspiew et al, 'Domestic and Family Violence and Parenting: Mixed Method Insights into Impact and Support Needs: Final Report' (Horizons Research Report 04/2017, Australia's National Research Organisation for Women's Safety, 2017) 58–59.

8 See, eg, Family Law Reform Coalition, *Submission 355*; Fitzroy Legal Service and Darebin Community Legal Service, *Submission 336*; Victorian Judicial Advisory Group in Family Violence (JAGFV), *Submission 333*; Brimbank Melton Community Legal Centre (BMCLC), *Submission 322*; Relationships Australia National, *Submission 317*; Partnerships Victoria, *Submission 307*; Caxton Legal Centre, *Submission 292*; Bravehearts Foundation Ltd, *Submission 279*; Uniting, *Submission 268*; Relationships Australia Victoria, *Submission 267*; Resolution Institute, *Submission 260*; For Kids Sake, *Submission 118*.

9 See eg, Centacare Family and Relationship Services (CFRS), *Submission 125*; For Kids Sake, *Submission 118*; Anglicare SA, *Submission 2*. See also MELCA, *Submission 155*; FMC Mediation and Counselling, *Submission 135*.

10 See, eg, Victorian Judicial Advisory Group in Family Violence (JAGFV), *Submission 333*; CatholicCare Sydney, *Submission 79*.

11 See, eg, National Legal Aid, *Submission 163*; Aboriginal Legal Service of Western Australia, *Submission 64*.

12 Macarthur Legal Centre, *Submission 346*.

13 See, eg, Women's Legal Services Australia, *Submission 366*; Victorian Judicial Advisory Group in Family Violence (JAGFV), *Submission 333*; Rape & Domestic Violence Services Australia, *Submission 287*.

14 See, eg, Relationships Australia National, *Submission 317*; Anglicare Australia, *Submission 291*.

15 See, eg, Australian Women Against Violence Alliance (AWAVA), *Submission 379*; Domestic Violence Victoria, *Submission 284*.

15.11 To ensure the national education and awareness campaign is accessible to and inclusive of the diverse range of Australian families, the ALRC suggests it be developed in consultation with relevant community organisations, including Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTIQ and disability organisations. It should also be available in a range of languages and formats. This should include consideration of the content of the campaign, as well as the methods used for public release. Stakeholders generally supported this approach.[16] Organisations working with older people and children and young people should be included in consultations.[17]

15.12 Some stakeholders submitted that consultation would be insufficient to ensure the reach and relevance of the campaign, particularly to Aboriginal and Torres Strait Islander people. The importance of involving Aboriginal and Torres Strait Islander people in the design of the campaign was highlighted, along with the need to deliver the campaign through specialist organisations that are trusted by the community.[18]

15.13 The ALRC also suggests that the Australian Government work with state and territory governments to facilitate the promotion of the national family law education and awareness campaign through relevant agencies and bodies, including through the health and education systems. This draws on the public health approach of providing primary interventions through universal services already working with families and children.[19] Stakeholders recognised this as an important way of reaching families and children early.[20] It is also a valuable method of providing access to information for people experiencing family violence, because they may not be able to seek out information online, nor attend services associated specifically with separation, without facing an elevated risk to their safety.[21] The Association of Family and Conciliation Courts (AFCC) anticipates this would represent a significant advancement for Aboriginal and Torres Strait Islander communities and people living in rural and remote areas.[22] The AFCC submitted that health and education services

> are sometimes the only government services within the local community or region. With respect to Aboriginal and Torres Strait Islander people they are also often trusted resources within local communities that will likely encourage greater engagement within the community.[23]

16 National LGBTI Health Alliance, *Submission 323*; Relationships Australia National, *Submission 317*; Law Council of Australia, *Submission 285*; Global Mobility Immigration Lawyers and Migration Agents, *Submission 257*.

17 Relationships Australia National, *Submission 317*.

18 See, eg, National Family Violence Prevention Legal Services Forum, *Submission 293*; NATSILS, *Submission 290*; Law Council of Australia, *Submission 285*; Association of Family and Conciliation Courts Australian Chapter, *Submission 258*.

19 See Higgins, above n 1, 42. See also M Brandon, *Submission 184*; CatholicCare Sydney, *Submission 79*; Drummond Street Services, *Submission 20*.

20 See, eg, CatholicCare Sydney, *Submission 79*; Drummond Street Services, *Submission 20*; Anglicare SA, *Submission 2*.

21 See, eg, National Legal Aid, *Submission 163*; Australian Association of Social Workers, *Submission 25*.

22 Association of Family and Conciliation Courts Australian Chapter, *Submission 258*.

23 Ibid. See also ATSILS (QLD), *Submission 384*.

Access to information about the family law system

15.14 For families seeking further information to assist in the resolution of their post-separation disputes, the ALRC suggests the development of a centralised source of clear, consistent, legally sound and nationally endorsed information about the family law system. This should include information to guide people wishing to resolve their post-separation parenting and property matters themselves, including clear information on the legal frameworks governing these matters. It should also inform people of the range of processes and forums for resolving disputes, including the differences between them and what to expect if they engage with these processes.

15.15 Submissions support this approach.[24] Stakeholders suggested that this information should:

- help families to understand the law and processes for reaching post-separation agreements;
- answer problem-focused questions from a client perspective; and
- include simple information about what to expect, including timelines and step-by-step guides.[25]

15.16 While information of this type is available in the current family law system, submissions suggested that existing websites, particularly court websites, are difficult to navigate,[26] and that the vast array of possible sources of information can be confusing for the public as well as professionals.[27] Peninsula Community Legal Centre, for example, submitted that information about family law and available services is 'scattered in numerous, disparate locations and is difficult to navigate for many users of the family law system, particularly those who are disadvantaged and with complex needs.'[28]

15.17 Some noted that the lack of clarity on where to access reliable information contributes to people seeking information from unreliable sources, such as family, friends, unofficial websites and social media.[29] For example, Mallee Family Care submitted that many of their clients 'have little knowledge of the family law system, other than what they have heard from friends or relatives, or from what they see on television, which is often not related to Australian law.'[30]

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24 See, eg, National Legal Aid, *Submission 163*; Inner City Legal Centre, *Submission 124*; Federation of Community Legal Centres Victoria, *Submission 65*; Peninsula Community Legal Centre, *Submission 30*; Western Sydney CLC, *Submission 8*.

25 See, eg, Women's Domestic Violence Court Advocacy Services NSW, *Submission 153*; Australian Psychological Society, *Submission 55*.

26 See, eg, Portable, *Submission 338*; Anglicare WA, *Submission 152*; Victorian Aboriginal Legal Service, *Submission 101*; CatholicCare Sydney, *Submission 79*; Western Sydney CLC, *Submission 8*; Churches of Christ Care, *Submission 4*.

27 See, eg, Inner City Legal Centre, *Submission 124*; Family & Relationship Services Australia, *Submission 53*; Peninsula Community Legal Centre, *Submission 30*.

28 Peninsula Community Legal Centre, *Submission 30*.

29 National Legal Aid, *Submission 163*. See also Anglicare SA, *Submission 2*.

30 Mallee Family Care, *Submission 310*.

15.18 Current initiatives to provide Australian families with a centralised source of information relating to the family law system include:

- the Family Relationship Advice Line, which is a national telephone-based service that provides information, referrals and advice to families affected by separation or relationship issues;[31]
- the Family Relationships Online website, which provides information about available services and dispute resolution options, including factsheets in community languages, and a 'find local help' feature to help link people with nearby services;[32] and
- the National Enquiry Centre (NEC), which provides procedural information and assistance to people in relation to matters in the federal family courts. The NEC can be contacted by telephone, email or web-chat.[33]

15.19 While the ALRC heard positive feedback about these services,[34] consultations also indicated that many service providers and members of the public are not aware of these information access points. The family courts also provide information on their websites, though many submissions highlighted the need to update these websites to improve their useability and availability in a variety of languages.[35] The importance of court websites providing accessible and navigable information to users, including information in languages other than English and in Easy English format, has been recognised in other inquiries.[36]

15.20 There is also a range of other information services and resources that have been developed by legal assistance services and family relationships services to assist separating families. For example, legal aid commissions provide a range of information services to the public, and to specific groups within the community. This information is provided in many forms. National Legal Aid is also developing a resource, including a website, with information to help people navigate between the family law, family violence and child protection systems. The resource draws on information from each state and territory and aims to provide accurate legal and referral information.[37] A number of submissions identified a need for information of this kind, relating to family violence in the context of family law and the intersections between the family law, family violence and child protection systems.[38]

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31 Australian Government, *Family Relationships Advice Line* <www.familyrelationships.gov.au/talk-someone/advice-line>. See also Relationships Australia Queensland and Culshaw Miller Lawyers, *Submission 146*.

32 The Hon Christian Porter MP and the Hon Dr David Gillespie MP, 'Relaunch of Family Relationships Online' (Media Release, 15 June 2018). See Australian Government, *Family Relationships Online* <www.familyrelationships.gov.au/>.

33 Family Court of Australia, *Family Law National Enquiry Centre*, <www.familycourt.gov.au>. See also Family Court of Australia, *Submission 68*.

34 See, eg Family Court of Australia, *Submission 68*.

35 See, eg, Portable, *Submission 338*; Relationships Australia National, *Submission 317*.

36 See Department of Justice and Regulation (Vic), above n 6, rec 2.4.

37 National Legal Aid, *Submission 163*.

38 See, eg, Women's Legal Services Australia, *Submission 366*; Victorian Judicial Advisory Group in Family Violence (JAGFV), *Submission 333*; Caxton Legal Centre, *Submission 292*; Rape & Domestic Violence

15.21 A number of submissions suggested a need to consolidate or coordinate existing information services and resources to avoid confusion and duplication.[39] The Productivity Commission identified several benefits of coordinating sources of information and community legal education, including: reducing duplication, improving quality control, making more efficient use of available resources and funding, and making it easier for people to find the information they are looking for.[40]

15.22 In the Discussion Paper, the ALRC proposed addressing these concerns through the development of an information package for the family law system. It was proposed that a standing working group be convened, comprising representatives of relevant government and non-government organisations, to advise on the development of the package and to review and update it on a regular basis.[41] A number of stakeholders expressed support for this approach.[42]

15.23 However, some stakeholders queried whether an information package was the best way to coordinate available information on the family law system. National Legal Aid raised concerns about the ability of a single information package to accommodate jurisdictional differences and respond to the varied needs of people and groups that may require information on the family law system. The time and cost required to continually update the package was also raised as a concern.[43] Other stakeholders expressed concerns about a one-size-fits-all approach.[44]

15.24 National Legal Aid suggested the need to consult with national networks specialising in the provision of community legal education and information, such as National Legal Aid's CLE Network, about alternative ways to coordinate information sources and avoid duplication.[45] In its 2014 report, the Productivity Commission discussed methods for coordinating available information while avoiding a one-size-fits-all approach. It recommended the establishment of Community Legal Education Collaboration Funds and a central database of community legal education for use by varied information and service providers. It was suggested that providers could use the

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Services Australia, *Submission 287*; J Howieson, R Carroll, S Murray, I Murray, L Young, L Jarvis, D Hansen, F Lester, *Submission 261*.

39 See, eg, National Legal Aid, *Submission 163*; Women's Rights Group, Monash Law Student Society Just Leadership Program, *Submission 105*; Australian Psychological Society, *Submission 55*; Peninsula Community Legal Centre, *Submission 30*.

40 Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 1, 2014) 162.

41 Australian Law Reform Commission, *Review of the Family Law System*, Discussion Paper No 86 (2018) proposals 2-5, 2-6, 2-7.

42 See, eg, Women's Legal Service Victoria (WLSV), *Submission 413*; Women's Legal Services Australia, *Submission 366*; Rainbow Families NSW, *Submission 364*; Fitzroy Legal Service and Darebin Community Legal Service, *Submission 336*; Relationships Australia National, *Submission 317*; Family Law Pathways Network Greater Melbourne, *Submission 269*; Uniting, *Submission 268*; Resolution Institute, *Submission 260*.

43 National Legal Aid, *Submission 163*.

44 See, eg, Marrickville Legal Centre, *Submission 288*; Association of Family and Conciliation Courts Australian Chapter, *Submission 258*.

45 National Legal Aid, *Submission 163*.

database to share and coordinate their resources, avoid duplication, and identify any resources that may be out of date.[46]

15.25 To avoid duplication, the Victorian Department of Justice and Regulation recommended that Victoria Legal Aid act as the primary information entry point for information on Victoria's civil justice system.[47] Legal aid commissions have been recognised as well-placed to act as entry points for information and triage,[48] as they are well-known and recognised in the community, compared with other legal assistance providers.[49]

15.26 The ALRC suggests that the Australian Government consider the most effective way of developing a centralised source of clear, consistent, legally sound and nationally endorsed information about the family law system, while ensuring tailored information is also available to meet varied and specific needs. Options may include:

- further development and promotion of the Family Relationships Online website, while resourcing legal aid commissions, community legal centres and other specialist services to develop and maintain up-to-date tailored resources that build on this information; or
- supporting legal aid commissions in each state and territory to act as the information entry point for families experiencing separation, and to coordinate the provision of tailored information by community legal centres and other specialist services. This work could be supported by National Legal Aid's CLE Network.

15.27 A number of stakeholders also identified the need to support any hard-copy or digital information with face-to-face community legal education, provided by legal aid commissions and community legal centres.[50] This has been recognised as particularly important for clients with complex needs or vulnerabilities.[51] A number of stakeholders highlighted the importance of information, including face-to-face community legal education, being provided to Aboriginal and Torres Strait Islander people by specialist services, including Aboriginal Community Controlled Organisations.[52]

15.28 In addition, the ALRC suggests that information about family law processes, and about legal and support services, should be available to children in a range of age-appropriate and culturally appropriate forms. Submissions supported children and young people being provided with age-appropriate information and support services.[53]

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46 Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 1, 2014) rec 5.1.
47 Department of Justice and Regulation (Vic), above n 6, recs 2.1 and 2.3.
48 See, eg, Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 1, 2014) 164–170.
49 Ibid 164 citing Coumarelos et al, above n 5.
50 See, eg, Community Legal Centres NSW, *Submission 385*; Mallee Family Care, *Submission 310*; Hume Riverina Community Legal Service, *Submission 294*.
51 Department of Justice and Regulation (Vic), above n 6, 120–2.
52 See, eg, Women's Legal Services Australia, *Submission 366*; National Family Violence Prevention Legal Services Forum, *Submission 293*.
53 See, eg, For Kids Sake, *Submission 421*; Family Law Practitioners' Association of Western Australia

A number of submissions made suggestions about the type of information that should be available.[54]

15.29 Some submissions referred to information sources that already exist for children and young people about the family law system.[55] For example, the family courts' websites,[56] the Legal Aid NSW 'Best for Kids' website,[57] and National Legal Aid's website about Independent Children's Lawyers.[58]

15.30 Family & Relationships Services Australia recommended that children and young people be given 'the opportunity to provide input and help develop and test information and education packages as well as the proposed awareness campaign.'[59]

Referral relationships with universal services

15.31 The ALRC encourages the Australian Government to work with state and territory governments to support referrals to family law services from universal services that work with children and families. These include schools, childcare facilities and health services. Referral relationships should also be developed between family law services and those services that work with people who have experienced family violence, including police, child protection agencies and specialist family violence services.

15.32 Building referral relationships should enhance the likelihood of universal services referring clients with family law needs to family law services as early as possible.

15.33 AIFS has suggested such an approach may be appropriate for children and young people who typically seek support from health and educational professionals in relation to their experiences of family breakdown.[60] Similarly, research suggests that parents disclose family violence primarily to health system professionals and first point of contact services.[61]

(Inc), *Submission 410*; Family & Relationship Services Australia (FRSA), *Submission 407*; CASA Forum Victorian Centres Against Sexual Assault, *Submission 404*; P Easteal and L Young, *Submission 394*; Interact Support Inc, *Submission 389*; Women's Legal Services Australia, *Submission 366*; Mallee Family Care, *Submission 310*; National Legal Aid, *Submission 297*; Anglicare Australia, *Submission 291*; Marrickville Legal Centre, *Submission 288*; Domestic Violence Victoria, *Submission 284*; Relationships Australia Victoria, *Submission 267*; Resolution Institute, *Submission 260*.

54 See, eg, Family & Relationship Services Australia (FRSA), *Submission 407*; Women's Legal Services Australia, *Submission 366*; Anglicare Australia, *Submission 291*.

55 See, eg, Family Law Practitioners' Association of Western Australia (Inc), *Submission 410*; National Legal Aid, *Submission 297*; Law Council of Australia, *Submission 285*.

56 Family Court of Australia, *Kids & Young People* <www.familycourt.gov.au>; Federal Circuit Court of Australia, *Kids & Young People* <www.federalcircuitcourt.gov.au>.

57 Legal Aid NSW, *Best for Kids* <www.bestforkids.org.au/index.html>.

58 National Legal Aid, *Independent Children's Lawyers* <www.icl.gov.au/>.

59 Family & Relationship Services Australia (FRSA), *Submission 407*.

60 Australian Institute of Family Studies, *Submission 396*.

61 Ibid.

15.34 The potential of such relationships with universal services can be seen in the recent use of health justice partnerships. Health justice partnerships involve partnerships between health and legal assistance services, which bring lawyers into health settings to support health workers in identifying underlying legal issues and linking clients with legal assistance.[62] A number of submissions suggested such an approach could be effective in the family law system.[63]

15.35 Health justice partnerships were created in recognition that legal issues can be caused by, or give rise to, health issues, and that many people seek advice from health services rather than legal services.[64] Many health justice partnerships are being used to create referral relationships to legal advice services for people who have experienced family violence.[65]

15.36 There is also potential to enhance referrals to family law services from first point of contact services for people experiencing family violence in the context of separation, including from state and territory police and child protection agencies. Police are often the first point of contact within the family violence system for people experiencing family violence.[66] As such, police may be well positioned to refer people experiencing separation in the context of family violence to family law services at an early stage.

15.37 Submissions suggested that police practice varies in relation to the provision of appropriate referrals in these circumstances.[67]

15.38 The National Family Violence Prevention Legal Services submitted that:

> At present, Aboriginal and Torres Strait Islander women and children experiencing or at risk of family violence all too frequently receive poor responses from police that ignore, minimise or misunderstand their experiences of violence.[68]

15.39 Family Life also recognised the potential for referral relationships between police and family relationships services to link people who are contemplating or experiencing separation in the context of family violence with appropriate services. The ALRC notes that Family Life is currently developing an information and training package to be provided to police in its local area, including information relevant to each stage of separation. It is envisaged that, when police are called to a situation where family law matters are involved, such as access to children, they will provide information about the services provided through Family Life's Family Relationship Centre (FRC).[69]

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62 Health Justice Australia, *Mapping a New Path: The Health Justice Landscape in Australia* (2017) 1.
63 See, eg, Women's Legal Services Australia, *Submission 45*; Women's Law Centre of WA, *Submission 40*; Peninsula Community Legal Centre, *Submission 30*; Relationships Australia, *Submission 11*; Western Sydney CLC, *Submission 8*.
64 Health Justice Australia, above n 62, 2.
65 Ibid 11.
66 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol III, 1.
67 See, eg, The Benevolent Society, *Submission 86*.
68 National Family Violence Prevention Legal Services Forum, *Submission 293*.
69 Family Life, *Submission 9*.

15.40 The newly established Victorian Orange Door Support and Safety Hubs represent another first point of contact service that could be enhanced through supported referral relationships with family law services. As these hubs conduct intake, screening and assessment of risks and needs, and make referrals for people affected by family violence, they may be well positioned to link people contemplating or experiencing separation with appropriate family law services.

15.41 Victoria Legal Aid stressed that legal assistance providers in Victoria 'already employ a range of triage and other strategies to assist in the early identification of legal and non-legal problems, and to prevent the escalation of legal problems.'[70] Victoria Legal Aid drew attention to the recent *Access to Justice Review* in Victoria, which highlighted the need to direct people to the most appropriate resources or services to resolve their legal problems, regardless of how they first make contact with the justice system.[71] Effective legal triage was identified as a means to do this. The Victorian *Access to Justice Review* recommended that Victoria Legal Aid become the primary entry point for information about legal issues and services in Victoria and expand its Legal Help service.[72] Victoria Legal Aid recommended in its submission to this Inquiry the incorporation or connection of consistent legal triage services into relevant non-legal family support services, supported by online legal triage and referral tools.[73]

15.42 A number of stakeholders suggested that existing Family Law Pathways Networks could play a role in developing and maintaining referral relationships between the family law system and universal services and first point of contact services for people experiencing family violence.[74]

15.43 ATSILS Qld noted the success of the Men's Shed in Mount Druitt which supports men at risk of serious stress and suicide.[75] The Men's Shed runs programs and acts as a referral point. Service providers such as probation and parole, mental health services, and housing and employment services are also available to the men at The Shed. ATSILS Qld submitted:

> The success of The Shed has been recognised in the 2017 Aboriginal Justice award from the New South Wales Law Foundation. We consider this a successful model that achieves a better rate of outreach than some other projects and suggest that this form of outreach be replicated in other states ...[76]

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70 Victoria Legal Aid, *Submission 375*.
71 Ibid citing Department of Justice and Regulation (Vic), above n 6, 151.
72 Department of Justice and Regulation (Vic), above n 6, recs 2.1 and 2.2. In 2017–18, VLA's Legal Help telephone service received over 196,000 calls. Three of the top five matters dealt with by the Legal Help telephone service were family law legal issues. Family violence applications were also in the top five matters.
73 Victoria Legal Aid, *Submission 375*.
74 See, eg, National Legal Aid, *Submission 297*; Greater Brisbane Family Law Pathways Network, *Submission 273*; National Legal Aid, *Submission 163*.
75 ATSILS (QLD), *Submission 384*.
76 Ibid.

15.44 Some stakeholders raised the need to consider particular issues when establishing referral relationships. Women's Legal Services Australia highlighted the need to ensure that service providers in the family law system are sufficiently resourced to respond to the clients that may be referred to them through improved referral relationships.[77]

15.45 The National Family Violence Prevention Legal Services Forum submitted that it is essential

> to ensure that staff in relevant universal services understand the work of FVPLSs, the importance of culturally safe and community controlled services, and how and when to make referrals for Aboriginal and Torres Strait Islander women and their children that recognise and promote their cultural rights.[78]

77 Women's Legal Services Australia, *Submission 366*.

78 National Family Violence Prevention Legal Services Forum, *Submission 293*. See also NATSILS, *Submission 290*.

16. Secondary Interventions

Contents

Introduction

16.1 In this chapter, the ALRC recommends enhancements to secondary interventions in the family law system. The ALRC recommends that the FASS be enhanced to assist families entering the system through the family courts. To ensure families who enter the system through out-of-court family law services have equivalent access to coordinated services, the ALRC also recommends enhancements to FRCs.

16.2 Families who seek assistance from the family law system may have a range of legal and social support needs.[1] This may include a need for housing assistance, financial assistance, and health and therapeutic support, in addition to a need for legal advice and dispute resolution assistance. Some families present with complex needs arising from experiences of family violence, mental illness, or drug or alcohol misuse.[2] These issues can complicate a family's experience of separation, and present barriers to reaching agreement.

16.3 Connecting those family members who are experiencing these or other issues with prompt, appropriate, and coordinated services may increase the likelihood of reaching a lasting agreement. These services can assist family members to address issues that may exacerbate conflict, and increase both their preparedness for legal matters and suitability for FDR. It may also facilitate more efficient and effective use of the court and other family law services, including FDR, and better protect family members, including children, who are engaged in the family law system.

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1 People with family-related legal problems have the highest rate of adverse health and social consequences as compared to people experiencing other types of legal problems. These adverse consequences include financial strain, having to move home, stress-related illness, and physical illness. See Christine Coumarelos et al, *Legal Australia-Wide Survey: Legal Need in Australia* (Law and Justice Foundation of NSW, 2012) 83–7, 90.

2 Rae Kaspiew et al, *Experiences of Separated Parents Study (Evaluation of the 2012 Family Violence Amendments)* (Australian Institute of Family Studies, 2015).

16.4 Addressing service fragmentation by improving the capacity of the family law system to provide integrated legal and social support services has been identified as a priority throughout this and previous inquiries.[3] Options to achieve this include: service co-location, formalised service partnerships, improved referral pathways, and case management. Several submissions preferred enhancing the capacity of existing services to meet client needs through these options, rather than introducing new elements to the resource-scarce family law system, such as Families Hubs as proposed in the Discussion Paper.[4] Case management was highlighted as a particularly valuable and cost-effective way of ensuring that families identify and connect with the multiple services they may require.[5]

The Family Advocacy and Support Service

Recommendation 57 The Family Advocacy and Support Service's social support services should be expanded to provide case management to clients who are engaged with the family law system.

Recommendation 58 The Australian Government should work with Legal Aid Commissions in each state and territory to expand the Family Advocacy and Support Service to court locations that have a demonstrable need and to ensure the provision of adequate and appropriate services.

16.5 In May 2017, the Australian Government launched the FASS in each state and territory. The FASS was designed to provide integrated duty legal services and support services to families affected by family violence in the family courts. The FASS is currently running as a pilot in 23 service locations, including family court registries and circuit locations, with funding until 2019.[6] *An Evaluation of the Family Advocacy and Support Services – Final Report* (FASS Evaluation) was released in October 2018,[7] with decisions about future service delivery to be informed by the evaluation.[8] The FASS Evaluation found it to be 'an effective and important program which fills a gap in both

3 See Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016); House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (2017).

4 See, eg, Victoria Legal Aid, *Submission 375*; Women's Legal Services Australia, *Submission 366*; National Family Violence Prevention Legal Services Forum, *Submission 293*; Rape & Domestic Violence Services Australia, *Submission 287*.

5 See, eg, Better Place, *Submission 425*; Safe Steps Family Violence Response Centre, *Submission 408*; National Legal Aid, *Submission 297*; Rape & Domestic Violence Services Australia, *Submission 287*.

6 Inside Policy, *An Evaluation of the Family Advocacy and Support Services* (2018) 13; House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 3, 144.

7 Inside Policy, *An Evaluation of the Family Advocacy and Support Services* (2018).

8 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 3, 145.

legal and social service provision to family law clients with family violence matters.'[9] It found that the FASS has increased awareness of family violence, increased feelings of support and levels of help-seeking by clients, and contributed to positive legal and social outcomes for clients.[10]

16.6 State and territory legal aid commissions deliver and coordinate each of the FASS services, with each having developed their own service model.[11] Some models provide two duty legal services, to avoid conflict of interest issues in order to assist both parties in a family law dispute. The legal services are provided by legal aid commissions and community legal centres. Some models also provide two social support services. The service providers differ, but typically include a family violence specialist support service for women and an additional support service for men.[12]

16.7 In other models, the FASS is staffed by one legal service and/or one social support service. Some FASS models also have a coordinator or intake/referral officer, who triages and links clients with FASS duty lawyers and support services to meet their legal and non-legal needs.[13]

16.8 Eligibility for one-off duty legal assistance or support through the FASS is not dependent on legal aid eligibility tests. People are eligible for this assistance if they, or a member of their family, have experienced, used, or are alleged to have used family violence and they need legal assistance regarding a family law, child protection, or family violence matter.[14]

16.9 Submissions and stakeholders commended the FASS throughout the course of this Inquiry.[15] Stakeholders identified FASS as an important innovation in the family law system, and advocated for its expansion, both in terms of the service model and to a greater number of registries and circuits.[16]

Expanding the Family Advocacy and Support Service

16.10 The ALRC recommends that the social support services provided by each FASS should be expanded to provide case management to clients in the family law system as required. This will ensure that clients with complex needs who enter the family law

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9 Inside Policy, *An Evaluation of the Family Advocacy and Support Services* (2018) 10.

10 Ibid.

11 Federal Circuit Court of Australia, *Annual Report 2016–17* (2017) 83–5.

12 Inside Policy, *An Evaluation of the Family Advocacy and Support Services* (2018) Appendix C.

13 Ibid.

14 See, eg, Legal Aid ACT, *Domestic and Family Violence: Family Advocacy and Support Services* <http://legalaidact.org.au>; Victoria Legal Aid, *Family Advocacy and Support Services* <www.legalaid.vic.gov.au/get-legal-services-and-advice/free-legal-advice/get-help-court/family-advocacy-and-support-services>.

15 See, eg, NATSIWA, Harmony Alliance and AWAVA, *Submission 122*; Aboriginal Legal Service of Western Australia, *Submission 64*; Australian Psychological Society, *Submission 55*; Women's Legal Services Australia, *Submission 45*; Safe Steps Family Violence Response Centre, *Submission 15*.

16 See, eg, Women's Domestic Violence Court Advocacy Service NSW, *Submission 417*; Marrickville Legal Centre, *Submission 137*; Victoria Legal Aid, *Submission 61*.

system through the courts are connected with appropriate services and do not 'fall through the gaps'.

16.11 This expansion would allow support workers to check in with a client after they have left court and throughout their engagement with the family law system. Case managers could provide warm referrals[17] and advocacy to ensure clients identify and remain connected with appropriate services, and share information with those services with client consent, ensuring relevant information is not lost and to reduce the burden on clients to retell their stories. Support workers could also provide ongoing risk assessment and safety planning as required, and support clients to attend appointments with police, relevant services, or at local court events.

16.12 The FASS Evaluation identified the need for additional resourcing to strengthen the capacity of the FASS social support services to provide casework, or case management.[18] The evaluation noted that while the FASS social support workers are not currently employed to provide case management, most do provide some follow-up support including warm referrals and advocacy.[19] Clients who participated in the evaluation found this type of intensive support very helpful. Support workers, however, raised concerns regarding their capacity to continue providing this additional assistance without appropriate funding. They also noted the risk of burn-out for staff—particularly if the demand for FASS social support services increases.[20]

16.13 Stakeholders strongly supported the expansion of the FASS social support services to ensure that case management is available to clients who require this additional assistance.[21] The Women's Domestic Violence Court Advocacy Service NSW (WDVCAS NSW), which provides the FASS social support services in Sydney, Parramatta, Newcastle, and Wollongong, noted the lack of funding to provide case management as a current gap in the service. Based on their experience providing case management of the type recommended,[22] WDVCAS NSW submitted that expanding the FASS to include case management would:

- increase the focus on early intervention and less adversarial dispute resolution;

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17 A warm referral is 'A referral to a service where the person making the referral facilitates the contact–for example, by introducing and making an appointment for the client': Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol I, 273.

18 Inside Policy, *An Evaluation of the Family Advocacy and Support Services* (2018) 11.

19 Ibid 46.

20 Ibid.

21 See, eg, Better Place, *Submission 425*; Women's Domestic Violence Court Advocacy Service NSW, *Submission 417*; Safe Steps Family Violence Response Centre, *Submission 408*; Victoria Legal Aid, *Submission 375*; Women's Legal Services Australia, *Submission 366*; National Legal Aid, *Submission 297*; Australian Association of Social Workers, *Submission 295*; Relationships Australia Victoria, *Submission 267*; Centre for Innovative Justice, RMIT University, *Submission 109*; Domestic Violence Victoria, *Submission 23*.

22 The Women's Domestic Violence Court Advocacy Service provides case management services in Wagga Wagga and Macarthur, New South Wales. See Allwood & Associates Training and Consulting Group, *Women's Domestic Violence Court Advocacy Program Evaluation Report* (Legal Aid NSW, 2018).

- improve access to appropriate legal advice and early triage into safe dispute resolution pathways;
- improve access to services, including housing, health, and financial assistance;
- improve the safety and wellbeing of clients and their children; and
- reduce the likelihood of protracted family law proceedings.[23]

16.14 In addition, WDVCAS NSW advocated for FASS to be delivered by the same service that delivers court advocacy at the state and territory level, in order to streamline information gathering and management.[24]

16.15 Stakeholders involved in the provision of the current FASS services also noted that clients are not always able to engage with support services at court as they are focused on their legal matter.[25] The introduction of case management was identified as a helpful way of addressing this issue, as it would allow support services to provide follow-up assistance after clients leave the court.[26]

Identifying gaps in service provision

16.16 To ensure that each FASS is operating efficiently and is able to assist both parties to a dispute, the ALRC recommends that the Australian Government should work with the legal aid commissions in each state and territory to identify gaps in each FASS where these exist. The focus in assessing each of the services should be on whether an information and referral officer is required, and whether specialist legal and social support services are available to assist both parties to a dispute.

16.17 The FASS Evaluation found that the availability of legal and social services to assist both sides to a dispute in real time at court was key to the FASS's effectiveness in achieving legal and social outcomes for clients.[27] As detailed above, the availability of two legal and social support services is not consistent across the various FASS models. The FASS Evaluation found that the effectiveness of the FASS would be improved if each location had a second legal service to overcome conflict of interest issues, and if a men's support worker was available in each location to provide social support as required.[28]

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23 Women's Domestic Violence Court Advocacy Service NSW, *Submission 417*.
24 Ibid.
25 Caxton Legal Centre, *Submission 292*; Domestic Violence Victoria, *Submission 284*.
26 Caxton Legal Centre, *Submission 292*.
27 Inside Policy, *An Evaluation of the Family Advocacy and Support Services* (2018) 10.
28 Ibid 11.

16.18 A large number of submissions supported an expansion of the FASS,[29] with several also noting that this would require additional funding.[30] Some also emphasised the importance of ensuring a second support service is available in each location to work with men.[31]

16.19 The FASS Evaluation acknowledged that regional variations for different population groups should be taken into account in future service delivery.[32] The ALRC recognises that each registry and circuit location will have variations in demand and demographics. The demand for service should be considered in determining whether each FASS location has a need for an information and referral officer to assist with intake, screening, triage, and information provision, and two legal and social support services to assist both parties to a dispute.

16.20 Some stakeholders suggested the FASS should be extended beyond assisting clients affected by family violence to assist with drug and alcohol issues, mental health issues, financial issues and risk of homelessness.[33] The FASS Evaluation suggested that outcomes for vulnerable families involved in the family law system could be improved if the at-court services were extended to include support for mental health and drug and alcohol issues.[34] Extending the FASS to provide case management services, as recommended above, should better enable FASS to link clients with additional complex needs with appropriate support services, such as mental health and drug and alcohol services. In identifying gaps in existing FASS services, consideration should be given to whether any additional expansions are required to meet these needs, such as provision of on-site alcohol and other drug services, or housing services at court registries, as provided at the Neighbourhood Justice Centre in Collingwood Victoria.[35]

Identifying additional locations

16.21 The ALRC also recommends that the Australian Government should work with Legal Aid Commissions in each state and territory to identify family court locations that have a demonstrated need for a FASS, including in rural and remote locations. This

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29 Australian Women Against Violence Alliance (AWAVA), *Submission 379*; Victoria Legal Aid, *Submission 375*; Women's Legal Services Australia, *Submission 366*; Victorian Judicial Advisory Group in Family Violence (JAGFV), *Submission 333*; Relationships Australia National, *Submission 317*; Caxton Legal Centre, *Submission 292*; Anglicare Australia, *Submission 291*; Rape & Domestic Violence Services Australia, *Submission 287*; Greater Brisbane Family Law Pathways Network, *Submission 273*; Family Law Pathways Network Greater Melbourne, *Submission 269*; Uniting, *Submission 268*; Relationships Australia Victoria, *Submission 267*; Resolution Institute, *Submission 260*.

30 Magistrates Court of Victoria and Children's Court of Victoria, *Submission 419*; No to Violence, *Submission 398*; Relationships Australia National, *Submission 317*; National Legal Aid, *Submission 297*; Law Council of Australia, *Submission 285*; Domestic Violence Victoria, *Submission 284*.

31 See, eg, Relationships Australia National, *Submission 317*; Caxton Legal Centre, *Submission 292*.

32 Inside Policy, *An Evaluation of the Family Advocacy and Support Services* (2018) 11.

33 See, eg, Caxton Legal Centre, *Submission 292*.

34 Inside Policy, *An Evaluation of the Family Advocacy and Support Services* (2018) 12.

35 The Neighbourhood Justice Centre was commended to the ALRC throughout this Inquiry. See, eg, Law Society of NSW, *Submission 154*; Victoria Legal Aid, *Submission 61*; Fitzroy Legal Service and Darebin Community Legal Centre, *Submission 7*.

should ensure that current need is met through expansion of an existing service that has been identified as an innovative and effective service in the family law system.

16.22 The FASS Evaluation and SPLA *Family Violence Report* both recommended that the FASS should be extended to rural and regional locations.[36] Many submissions to this Inquiry also supported rolling the FASS out to more locations.[37] Women's Legal Services Australia suggested that a roll out of the FASS should involve consultation to ensure responsiveness to local need.[38] CLC NSW similarly submitted the FASS should be tailored to the needs of regional, rural, and remote communities.[39] Mallee Family Care questioned the feasibility of providing a FASS in circuit locations which sit infrequently,[40] and Townsville Community Legal Service cautioned that any expansion of FASS should not replace existing arrangements in registries where these are working well.[41] These concerns should be taken into consideration in the identification of additional court locations in need of a FASS.

16.23 Such consideration may extend to local courts, particularly those exercising family law jurisdiction. Some submissions suggested the expanded FASS should also be available in state and territory courts exercising family violence and/or child protection jurisdictions.[42] The joint submission of the Magistrates' Court of Victoria and the Children's Court of Victoria indicated that the Magistrates' Court would welcome a FASS pilot at various Magistrates' Court locations to support both the Federal Circuit Court on circuit, and the Magistrates' Court in exercising its family law jurisdiction as this is rolled out.[43]

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36 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 3, rec 1; Inside Policy, *An Evaluation of the Family Advocacy and Support Services* (2018) 11.

37 See, eg, Uniting Communities, *Submission 426*; Magistrates Court of Victoria and Children's Court of Victoria, *Submission 419*; No to Violence, *Submission 398*; Australian Women Against Violence Alliance (AWAVA), *Submission 379*; Victoria Legal Aid, *Submission 375*; Victorian Judicial Advisory Group in Family Violence (JAGFV), *Submission 333*; National Legal Aid, *Submission 297*; Caxton Legal Centre, *Submission 292*; Anglicare Australia, *Submission 291*; Rape & Domestic Violence Services Australia, *Submission 287*; Law Council of Australia, *Submission 285*; Domestic Violence Victoria, *Submission 284*; Relationships Australia Victoria, *Submission 267*; Women's Domestic Violence Court Advocacy Services NSW, *Submission 153*; Federation of Community Legal Centres Victoria, *Submission 65*; Peninsula Community Legal Centre, *Submission 30*.

38 Women's Legal Services Australia, *Submission 366*.

39 Community Legal Centres NSW, *Submission 385*.

40 Mallee Family Care, *Submission 310*.

41 Townsville Community Legal Service, *Submission 159*.

42 See, eg, Relationships Australia National, *Submission 317*.

43 Magistrates Court of Victoria and Children's Court of Victoria, *Submission 419*.

Family Relationship Centres

Recommendation 59 Family Relationship Centres should be expanded to provide case management to clients with complex needs who are engaged with the family law system.

Recommendation 60 The Australian Government should work with Family Relationship Centres to develop services, including:

- financial counselling services;
- mediation in property matters;
- legal advice and Legally Assisted Dispute Resolution services; and
- Children's Contact Services.

16.24 Family Relationship Centres (FRCs) were established in 2006 following the *Every Picture Tells a Story* inquiry,[44] as part of a suite of reforms designed to shift the focus of separation 'away from litigation and towards co-operative parenting'.[45] The FRCs formed the centrepiece of these reforms, and were to act as the 'front door' to the family law system for separating families outside of the courts.[46]

16.25 The Operational Framework for FRCs identifies the forms of assistance provided by FRCs as: information; helping families use other services (referrals); and help for separating families (service provision).[47] Submissions to this Inquiry and previous reports suggest that the ability of FRCs to connect families with the full range of legal and social support services they may need is limited by a number of factors, including:

- funding changes that have led FRCs to focus on the provision of FDR;[48]
- gaps in collaboration with legal assistance services,[49] which may be a consequence of the initial requirement that lawyers remain separate from FRCs;[50]
- gaps in collaboration with specialist family violence services;[51] and

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44 House of Representatives Standing Committee on Family and Community Affairs, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation* (Commonwealth of Australia, 2003).

45 KPMG, *Future Focus of the Family Law Services: Final Report* (Report prepared for Attorney-General's Department (Cth), 2016) 10.

46 Ibid 43.

47 Attorney-General's Department (Cth), *Operational Framework for Family Relationship Centres* (2017)

48 Interrelate Limited, *Submission 416*; Centacare Family and Relationship Services (CFRS), *Submission 125*.

49 Drummond Street Services, *Submission 20*.

50 Lawrie Moloney et al, 'Family Relationship Centres: Partnerships with Legal Assistance Services' (2013) 51(2) *Family Court Review* 250, 251 <http://doi.wiley.com/10.1111/fcre.12024>; Patrick Parkinson, 'The Idea of Family Relationship Centres in Australia' (2013) 51(2) *Family Court Review* 195, 201.

51 KPMG, above n 45, 46.

- limited trust within Aboriginal and Torres Strait Islander communities and culturally and linguistically diverse communities in the ability of FRCs to provide culturally appropriate services.[52]

16.26 Family & Relationship Services Australia described the gap between the original vision for FRCs and the services they are now able to provide:

> When established 12 years ago, the FRCs were branded as the place for families to turn when seeking relationship advice or support through separation and dispute resolution … FRCs were set up as a no-wrong-door 'hub' of information, advice and referral support …However, that original concept did not include funding for broad 'wrap around' services and over the years, resourcing has been insufficient to ensure clients' smooth transition through family law processes and positive outcomes for children, both parents and all family members.[53]

16.27 The ALRC proposed the establishment of Families Hubs to provide a range of co-located services, including family law and family support services.[54] It was envisaged that Families Hubs could overcome existing service fragmentation, providing clients with a single intake and assessment process and linking clients with the range of services they may require—as well as providing case management to clients with complex needs.[55] Stakeholders raised a number of concerns with the Families Hubs proposals, including:

- the potential for resources, including workforce resources, to be drained from existing services in order to establish Families Hubs, creating further strain in an already resource-scarce system;[56]
- safety risks created by the placement of multiple services, including specialist family violence services, in one location that may be attended by both victims and perpetrators of family violence;[57]
- the possible duplication of services and confusion for system users that may arise if a new element is introduced to the family law system, particularly in relation to existing FRCs and state-based service hubs;[58]

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52 Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (2012); Family Law Council, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds* (2012).

53 Family & Relationship Services Australia (FRSA), *Submission 407*.

54 Australian Law Reform Commission, *Review of the Family Law System*, Discussion Paper No 86 (2018) proposals 4–1 to 4–4.

55 Ibid ch 4.

56 See, eg, Safe Steps Family Violence Response Centre, *Submission 408*; Victoria Legal Aid, *Submission 375*; Townsville Community Legal Service Inc, *Submission 370*; Women's Legal Services Australia, *Submission 366*; Women's Legal Service NSW, *Submission 340*; B Fehlberg, *Submission 319*; Family Court of Western Australia, *Submission 311*; Mallee Family Care, *Submission 310*; National Legal Aid, *Submission 297*; National Family Violence Prevention Legal Services Forum, *Submission 293*; Law Council of Australia, *Submission 285*; Domestic Violence Victoria, *Submission 284*.

57 See, eg, Safe Steps Family Violence Response Centre, *Submission 408*; Women's Legal Services Australia, *Submission 366*; Women's Legal Service NSW, *Submission 340*; Australian Association of Social Workers, *Submission 295*; Rape & Domestic Violence Services Australia, *Submission 287*.

58 See, eg, Safe Steps Family Violence Response Centre, *Submission 408*; Family & Relationship Services Australia (FRSA), *Submission 407*; Victoria Legal Aid, *Submission 375*; Women's Legal Services

- the difficulty in selecting an appropriate governance, funding, and management structure to achieve service integration across Commonwealth, state, and territory funded services;[59] and
- unsuitability for rural and regional locations due to the absence of some of the key services identified in the proposals and the issues of confidentiality and anonymity that may arise if people in small communities are expected to attend a single, sign-posted building to access the full suite of services they may require.[60]

16.28 Of the stakeholders who supported the concept and objectives of Families Hubs, many submitted that these goals would best be achieved by supporting and expanding FRCs, which act as a critical entry point to the broader family law and family support system.[61] Partnerships Victoria acknowledged the current limitations on the ability of FRCs to connect families with the full range of legal and social support services they may need, and submitted that these could be addressed with 'minor adaptations' to existing FRCs. This was identified as a more efficient and cost effective approach to achieving the goals of the Families Hubs proposals.[62] Relationships Australia Victoria similarly framed Hubs as augmented FRCs, focused on the provision of information, triage, effective early intervention, and dispute resolution.[63] Interrelate suggested that building on FRCs to achieve the aims of Families Hubs would capitalise on the 'significant footprints' FRCs have established in the communities they serve, and preserve their 'knowledge, expertise and understanding of local services'.[64]

16.29 The ALRC's proposal to establish Families Hubs responded to stakeholder calls for a contemporary family law system that advances the safety and wellbeing of children and families, emphasises collaborative and joined up service delivery, reduces conflict and adversarial approaches, is accessible for all families, including children and young people, and builds community trust. This represented a shift in service philosophy from that of FRCs which were designed to link families with services through information and referrals. This shift responded to the evidence of the growing need for joined up service delivery to meet the advice and support needs of separating families and children, including families experiencing family violence.

Australia, *Submission 366*; Victorian Judicial Advisory Group in Family Violence (JAGFV), *Submission 333*; Family Court of Western Australia, *Submission 311*; Mallee Family Care, *Submission 310*; National Legal Aid, *Submission 297*; National Family Violence Prevention Legal Services Forum, *Submission 293*; Law Council of Australia, *Submission 285*; Domestic Violence Victoria, *Submission 284*.

59 See, eg, No to Violence, *Submission 398*; Women's Legal Service NSW, *Submission 340*; Relationships Australia Victoria, *Submission 267*.

60 See, eg, No to Violence, *Submission 398*; Victoria Legal Aid, *Submission 375*; National Legal Aid, *Submission 297*.

61 See, eg, Uniting Communities, *Submission 426*; Relationships Australia National, *Submission 317*; Mallee Family Care, *Submission 310*; Partnerships Victoria, *Submission 307*; Anglicare Australia, *Submission 291*; Relationships Australia Victoria, *Submission 267*; Resolution Institute, *Submission 260*. See also Safe Steps Family Violence Response Centre, *Submission 408*; P Parkinson, *Submission 341*; Swaab, *Submission 332*; National Legal Aid, *Submission 297*.

62 Partnerships Victoria, *Submission 307*. See also P Parkinson, *Submission 341*.

63 Relationships Australia Victoria, *Submission 267*.

64 Interrelate Limited, *Submission 416*.

16.30 The ALRC stresses the importance of expanding FRCs in alignment with the new service philosophy which Families Hubs would have represented, including valuable components such as:

- visible contact points for accessing a range of services;
- assisting families to navigate and engage with existing services;
- having services in close proximity to each other;
- providing a case management function; and
- wraparound service delivery.

Introducing case management to FRCs

16.31 Stakeholders identified case management services as an existing service gap that would enhance the ability of FRCs to ensure separating families and their children are connected with the range of services they may require.[65] Some stakeholders suggested that the introduction of case management to existing services, including FRCs, would better address fragmentation than would service co-location through the Families Hubs.[66]

16.32 National Legal Aid submitted that the 'critical service delivery component' should take the form of 'integrated and supported case-management rather than physical co-location.'[67] Family & Relationship Services Australia described case management as 'the essential (yet underfunded) ingredient' to supporting separated parents with complex needs.[68] Relationships Australia Victoria submitted that the use of case managers in FRCs would allow clients experiencing family violence to be safely connected with specialist family violence services, while keeping these services physically separate from primary service locations.[69] Submissions identified this as a safer way of supporting clients to access crucial family violence services than through co-location of these services in a physical hub.[70]

16.33 The role of case managers in FRCs could be modelled on Relationships Australia Victoria's Family Safety Practitioners (FSP). Submissions[71] and previous inquiries[72] identified this model as an innovative approach to supporting FRC clients with complex needs. The FSP model takes a whole-of-family approach to case management, which some stakeholders recommended as an appropriate approach for Families Hubs or enhanced FRCs assisting separating families and their children.[73]

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65 See, eg, Uniting Communities, *Submission 426*; Better Place, *Submission 425*; P Parkinson, *Submission 341*; Partnerships Victoria, *Submission 307*; Domestic Violence Victoria, *Submission 284*.

66 See, eg, Safe Steps Family Violence Response Centre, *Submission 408*; Rape & Domestic Violence Services Australia, *Submission 287*.

67 National Legal Aid, *Submission 297*.

68 Family & Relationship Services Australia (FRSA), *Submission 407*.

69 Ibid.

70 Relationships Australia Victoria, *Submission 267*. See also Rape & Domestic Violence Services Australia, *Submission 287*; Safe Steps Family Violence Response Centre, *Submission 408*.

71 See, eg, Relationships Australia, *Submission 11*.

72 Family Law Council, above n 3.

73 Fitzroy Legal Service and Darebin Community Legal Service, *Submission 336*; Drummond Street Services,

16.34 Introducing case managers to FRCs would ensure that clients with complex needs receive supported referrals to relevant services identified throughout this inquiry that sit outside the family law system, without requiring co-location as proposed in the Families Hubs. These services include housing assistance, health services (such as mental health and alcohol and other drug services), and gambling help services. Case managers could also link clients with relevant family law services where these are not provided by the FRC, including parenting support programs and therapeutic services, such as family counselling and specialised services for children. This enhancement responds to findings that family law service providers, including FRCs, are seeing increasingly complex clients, requiring the development of models of referral and collaboration with other socio-legal services.[74] In the 2016 report on families with complex needs the Family Law Council recommended introducing case management to the family relationship services sector to better support the growing numbers of clients with complex needs seeking assistance from out-of-court family law services.[75]

Identifying services for co-location in FRCs

16.35 In addition to case management, stakeholders submitted that enhanced FRCs should provide a broader range of co-located or integrated services where possible.[76] While funding constraints have led to FDR becoming the primary family law service provided by FRCs,[77] some FRCs also provide a range of family law and family support services.[78] In some cases this includes provision of both federally and state funded services in the one location. For example, the Family Life Frankston/Mornington Peninsula FRC in Victoria provides child inclusive FDR, counselling, and post separation education groups, along with other federally funded services, including a Children's Contact Service, a Parenting Orders Program, and Family and Relationship Services. This is co-located with state funded services including 'Cradle to Kinder' (a service providing intensive parenting support to mothers aged up to 25 years with their children aged 0-4 years) and specialist family violence services, including a men's behaviour change program, a victim/survivor support group, and 'Dads in Focus' (a program seeking to reduce violent behaviour and support men to develop their parenting skills). The newly established Victorian Orange Door Support and Safety Hub will also co-locate its Bayside Peninsula branch with the Family Life FRC, creating a single entry point for families to a suite of family violence and integrated family services.[79] A similar program of services is offered by the Noarlunga FRC in South Australia.[80]

Submission 259.

74 KPMG, above n 45, 42. See also Better Place, *Submission 425*.

75 Family Law Council, above n 3, 132–3.

76 See, eg, Partnerships Victoria, *Submission 307*.

77 See KPMG, above n 45.

78 Partnerships Victoria, *Submission 307*.

79 Family Life, *Submission 309*.

80 Uniting Communities, *Submission 426*.

16.36 Recognising that there is variation in the services provided by individual FRCs, and in the service needs of the different communities they serve,[81] the ALRC recommends that the Australian Government work with FRCs to identify and fill existing service gaps to ensure each FRC is equipped to meet the varied service needs of separating families and their children.

16.37 A number of stakeholders recognised the value of providing access to onsite legal assistance services at Families Hubs or expanded FRCs, so that separating families are able to access legal advice and information and FRCs are able to offer legally assisted dispute resolution (LADR) as required.[82]

16.38 Supporting FRCs to further develop partnerships with at least two legal assistance services would allow FRCs to provide both sides of a dispute with access to legal information and advice, and facilitate LADR as required.

16.39 Collaboration with legal assistance services is identified in the existing Operational Framework for FRCs.[83] However, stakeholders advised that the current resourcing of both FRCs and legal assistance services creates barriers to the development and maintenance of these service partnerships.[84] A recent KPMG report similarly concluded that limited legal aid funding may reduce the ability of family law services, including FRCs, to provide legally assisted dispute resolution.[85]

16.40 Stakeholders highlighted the value of providing access to legal assistance services alongside family relationship services.[86] Victoria Legal Aid submitted that when parents are supported to address both their legal and non-legal issues, disputes are less likely to become entrenched, and families are 'more likely to resolve their issues, address safety concerns for children, and create lasting and meaningful change in the lives of the children'.[87] Relationships Australia Victoria suggested that providing both parties to a dispute with independent legal advice on property and financial matters would assist in the just and equitable resolution of these matters through FDR.[88] Partnerships Victoria agreed that provision of LADR is currently a 'major gap' for most FRCs, and supported funding FRCs to engage legal assistance services to fill this gap.[89]

16.41 The inclusion of a financial counselling service in FRCs would support the increased use of FDR to resolve property and financial matters, as recommended by the ALRC in Chapter 8. Ensuring separating parents have access to financial support

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81 See Partnerships Victoria, *Submission 307*.
82 See, eg, Macarthur Legal Centre, *Submission 346*; Caxton Legal Centre, *Submission 292*; Relationships Australia Victoria, *Submission 267*; Peninsula Community Legal Centre, *Submission 263*.
83 Attorney-General's Department (Cth), *Operational Framework for Family Relationship Centres* (2017) 9.
84 Better Place, *Submission 425*; Partnerships Victoria, *Submission 307*.
85 KPMG, above n 45, 36.
86 See, eg, Marrickville Legal Centre, *Submission 137*; Drummond Street Services, *Submission 20*; Relationships Australia, *Submission 11*.
87 Victoria Legal Aid, *Submission 61*.
88 Relationships Australia Victoria, *Submission 267*.
89 Partnerships Victoria, *Submission 307*.

responds to findings that financial stress is a factor affecting many separated parents,[90] and that financial disadvantage correlates with poorer wellbeing outcomes for children.[91]

16.42 The benefit of providing separating families with access to independent financial advice or counselling to assist them in reaching agreement was recognised in submissions.[92] Professor Bruce Smyth submitted that the '"Rolls Royce" model would be to employ a financial counsellor/mediator in Family Relationship Centres so that technical financial information (including income support; child support; superannuation splitting etc) could be offered'.[93] A report by the Women's Legal Service Victoria found that access to financial counsellors assisted women who had experienced family violence post-separation, and recommended increased access to these services.[94]

16.43 It may also be beneficial to integrate a wider range of family law services in FRCs, including children's contact services (CCSs). The inclusion of CCSs in FRCs would increase the number of available government funded CCSs. As discussed in Chapter 13, there are currently insufficient numbers of these services to meet existing demand.

16.44 Including CCSs in FRCs would also place them within an integrated social services model, through which parents on supervised time orders could access and be connected with complementary services. These could include counselling, parenting education programs, and behaviour change programs, to assist them in moving to self-management of time with children.[95] Both submissions and research have highlighted the benefits of providing CCSs within an integrated service model.[96] CatholicCare Sydney submitted that this approach 'gives families the best opportunity to address the issues that led to a court order for supervised contact, and therefore make self-managed contact arrangements a viable future option.'[97]

16.45 Relationships Australia Victoria submitted that the inclusion of CCSs may not be possible in all enhanced FRCs, as they require specific features to operate safely and effectively, which may be lacking at some existing FRC sites.[98]

16.46 In expanding existing FRCs, it may be beneficial to consider the establishment of new FRCs in areas of current and projected service need. The locations for the existing 65 FRCs were selected over 10 years ago, during which time there has been significant

90 Kaspiew et al, above n 2, 11.
91 Diana Warren, 'Low-Income and Poverty Dynamics – Implications for Child Outcomes' (Social Policy Research Paper No 47, Department of Social Services (Cth), 2017).
92 See, eg, Relationships Australia National, *Submission 317*; Relationships Australia Victoria, *Submission 267*; Marrickville Legal Centre, *Submission 137*.
93 Associate Professor B Smyth, *Submission 104*.
94 Emma Smallwood, 'Stepping Stones: Legal Barriers to Economic Equality after Family Violence' (Women's Legal Service Victoria, 2015).
95 See Jo Commerford and Cathryn Hunter, 'Children's Contact Services: Key Issues' (CFCA Paper No 35, Australian Institute of Family Studies, 2015).
96 CatholicCare Sydney, *Submission 79*; Relationships Australia, *Submission 11*; Commerford and Hunter, above n 95.
97 CatholicCare Sydney, *Submission 79*.
98 Relationships Australia Victoria, *Submission 267*.

population growth. The KPMG report, which considered the future of family law services including FRCs, forecast future need for these services based on population growth and other demand drivers. While noting data limitations, gaps in service availability were identified.[99] Stakeholders suggested that there was a need to consider these demographic changes and establish Families Hubs or expanded FRCs in communities with an identified service need.[100] Townsville Community Legal Service submitted that the current placement of FRCs 'can create "haves" and "have nots" in the level and type of services provided'.[101]

Specialist service provision

16.47 Several submissions raised the concern that enhancements to mainstream services, such as the FASS and FRCs, would do little to improve access to integrated services for Aboriginal and Torres Strait Islander people and people from culturally and linguistically diverse communities.[102] Stakeholders were particularly concerned about the service gap this would leave for Aboriginal and Torres Strait Islander people, who are less likely to seek assistance from mainstream services due to a lack of trust in these services and their ability to provide a culturally safe response.[103]

16.48 Stakeholders submitted that resources should be provided to Aboriginal Community Controlled Organisations (ACCOs), and culturally specific services, to ensure these clients can access integrated legal and social support through a culturally safe and specialist service.[104] Some stakeholders suggested establishing co-located service hubs in services trusted and accessed by Aboriginal and Torres Strait Islander people, such as Aboriginal Medical Services or Aboriginal Legal Services.[105]

16.49 The National Family Violence Prevention Legal Services Forum also recommended funding for Family Violence Prevention Legal Services that work exclusively with Aboriginal and Torres Strait Islander victim/survivors of family violence to provide integrated legal and support services, including case management services, noting that the FASS may not reach these clients. The Forum submitted:

> One size does not fit all and a single model is not appropriate for all families and individuals moving through the family law system. Instead of, or alongside, expansion of the FASS program, the government must invest in FVPLSs to continue and expand

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99 KPMG, above n 45.

100 Better Place, *Submission 425*; Family & Relationship Services Australia (FRSA), *Submission 407*; Relationships Australia National, *Submission 317*; Partnerships Victoria, *Submission 307*.

101 Townsville Community Legal Service Inc, *Submission 370*.

102 See, eg, National Family Violence Prevention Legal Services Forum, *Submission 293*; Greater Brisbane Family Law Pathways Network, *Submission 273*.

103 See, eg, National Family Violence Prevention Legal Services Forum, *Submission 293*.

104 See, eg, Aboriginal Justice Caucus Working Group on Family Violence, *Submission 381*; National Family Violence Prevention Legal Services Forum, *Submission 293*; NATSILS, *Submission 290*.

105 See, eg, ATSILS (QLD), *Submission 384*; Law Council of Australia, *Submission 285*; Drummond Street Services, *Submission 259*; Association of Family and Conciliation Courts Australian Chapter, *Submission 258*; Aboriginal Legal Service (NSW and ACT), *Submission 210*.

> service delivery. It is also important to build and strengthen referral pathways between FASS and culturally safe specialist services...[106]

16.50 The ALRC agrees that enhancements to the FASS and FRCs should be accompanied by additional support to specialist services, including ACCOs, to provide integrated legal and social support services, including case management.

106 National Family Violence Prevention Legal Services Forum, *Submission 293*.

Appendix A
Preliminary Consultations
October 2017–February 2018

Name	Location
Deputy Chief Magistrate Felicity Broughton, Magistrates Court of Victoria	Melbourne
Neighbourhood Justice Centre	Melbourne
Hon Professor Marcia Neave AO	Melbourne
Magistrate Jennifer Bowles and Magistrate Gail Hubble, Children's Court of Victoria	Melbourne
Victoria Legal Aid	Melbourne
Andrew Bickerdike, Relationships Australia Victoria	Melbourne
Wendy Kayler-Thomson, Forte Family Lawyers	Melbourne
Women's Legal Service Victoria	Melbourne
Andrew Jackomos, Commissioner for Aboriginal Children and Young People Victoria	Melbourne
Professor Rosemary Hunter	Melbourne
Rosie Batty	Melbourne
Judge Evelyn Bender, Federal Circuit Court of Australia	Melbourne
Hon Alastair Nicholson AO RFD QC	Melbourne
Hon Justice Steven Strickland, Family Court of Australia	Telephone
Attorney-General's Department (Cth)	Telephone
National Legal Aid Family Law Working Group	Melbourne
Hon Justice Gary Watts, Family Court of Australia	Telephone
Megan Mitchell, National Children's Commissioner	Sydney
Kylie Beckhouse, Director Family Law, Legal Aid NSW	Sydney

Name	Location
Hon Chief Justice John Pascoe AC CVO, Family Court of Australia	Sydney
Judge Robyn Sexton, Federal Circuit Court of Australia	Sydney
Professor Patrick Parkinson AM	Sydney
Bravehearts Foundation	Brisbane
Nicky Davies, Director Family Law, Civil Justice and Advice Services, Legal Aid Queensland	Brisbane
Judge Kevin Lapthorn, Federal Circuit Court of Australia	Brisbane
Family Law Committee, Queensland Bar Association	Brisbane
Queensland Family and Child Commission	Brisbane
Dr Heather Nancarrow, Australia's National Research Organisation for Women's Safety (ANROWS)	Telephone
Women's Legal Services Australia	Sydney
Collaborative Practice Canberra	Canberra

Appendix B
Second Round Consultations
March–August 2018

Name	Location
Centre for Innovative Justice	Melbourne
Family Violence Working Group, Council of Attorneys-General	Melbourne
Hon Justice Margaret Cleary, Family Court of Australia	Melbourne
Rainbow Families Victoria	Melbourne
Drummond Street Services	Melbourne
Family Life	Melbourne
Professor Jennifer McIntosh and Professor Ann Sanson	Melbourne
Hon Justice Steven Strickland, Family Court of Australia	Melbourne
Hon Judge Rita Zammit, Supreme Court of Victoria	Melbourne
Australian Association of Collaborative Professionals	Melbourne
Women's Legal Service Victoria	Melbourne
inTouch Multicultural Centre Against Family Violence	Melbourne
Albury Wodonga Family Law Pathways Network	Albury
Upper Murray Family Care	Albury
Hume Riverina Community Legal Centre	Wodonga
Family Law Section, Law Council of Australia	Melbourne
Kathryn McMillan QC, Quay 11 Chambers	Brisbane
Department of Child Safety, Youth and Women	Brisbane
Specialist Domestic and Family Violence Court Program, Brisbane Magistrates Court	Brisbane
LGBTI Legal Services	Brisbane

Name	Location
Domestic and Family Violence Implementation Council	Brisbane
Hon Michelle May AM QC	Brisbane
Children and Families Legal Assistance Forum	Brisbane
Domestic Violence Prevention Centre Gold Coast Inc.	Gold Coast
Specialist Domestic and Family Violence Court Program, Southport Magistrates Court	Gold Coast
Lone Fathers Association	Canberra
Judge Kate Hughes, Federal Circuit Court of Australia	Canberra
Dr Juliet Behrens, Burley Griffen Chambers	Canberra
Department of Social Services (Cth)	Canberra
Family & Relationship Services Australia	Canberra
Relationships Australia National	Canberra
Attorney-General's Department (Cth)	Canberra
Jane Fox, BBS Family Lawyers and Mediators and Penelope Kari, Jeffcott Chambers	Adelaide
Relationships Australia South Australia	Adelaide
Family Relationships Advice Line	Adelaide
South Australian Family Law Pathways Network	Adelaide
Judge Peter Cole, Federal Circuit Court of Australia	Adelaide
Helen Connolly, Commissioner for Children and Young People South Australia	Adelaide
AC.CARE	Mount Gambier
Nicola Atchison, Independent Children's Lawyer	Mount Gambier
North Queensland Women's Legal Service	Cairns
Far North Queensland Family Law Pathways Network	Cairns
Cairns Family Law Practitioners Association	Cairns
Queensland Indigenous Family Violence Legal Service	Cairns
Cairns Regional Domestic Violence Service	Cairns

Name	Location
Judge Josephine Willis, Federal Circuit Court of Australia	Cairns
Legal Aid Queensland	Townsville
North Queensland Women's Legal Service	Townsville
North Queensland Family Law Pathways Network	Townsville
Centacare North Queensland	Townsville
Townsville Family Law Practitioners Association	Townsville
Interrelate	Newcastle
Greater Newcastle Family Law Pathways Network	Newcastle
Judge Janet Terry, Federal Circuit Court of Australia	Newcastle
Hunter Community Legal Centre	Newcastle
Inner City Legal Centre	Sydney
Dr Ghena Krayem, University of Sydney	Sydney
Australian Dispute Resolution Advisory Council	Sydney
Maha Abdo, Muslim Women's Association	Sydney
Forum of Aboriginal Specialist Services	Parramatta
Rick Welsh, The Shed and Mary Gleeson, Legal Aid New South Wales	Parramatta
Family Advocacy and Support Service	Parramatta
National Enquiry Centre, Family Court of Australia	Parramatta
Women With Disabilities Australia	Telephone
People with Disability Australia	Telephone
Queensland Family Law Practitioners Association	Telephone
National Legal Aid	Hobart
Professor Roberta Julian, Dr Ron Frey and Dr Romy Winter, University of Tasmania	Hobart
Positive Solutions	Hobart
Legal Aid Tasmania	Hobart
Tasmanian Family Law Pathways Network	Hobart

Name	Location
Forum of Mediation Services	Alice Springs
Forum of Legal Services	Alice Springs
Alice Springs Family Law Pathways Network	Alice Springs
Judge John Birch, Judge Sarah McNamara and Judicial Registrar Sally Bolton, Alice Springs Local Court	Alice Springs
Forum of Aboriginal Specialist Services	Alice Springs
Northern Territory Department of the Attorney-General and Justice	Darwin
Territory Families	Darwin
Chief Judge John Lowndes, Darwin Local Court	Darwin
Judge Sue Oliver, Darwin Children's Court	Darwin
Judge Tony Young, Federal Circuit Court of Australia	Darwin
Top End Family Law Pathways Network	Darwin
Forum of legal practitioners	Darwin
Colin Pettit, Commissioner for Children and Young People Western Australia	Perth
Department of Social Security (WA)	Perth
Western Australian Family Law Pathways Network and Family Court of Western Australia Reference Group	Perth
Northern Suburbs Community Legal Centre	Perth
The Hon Justice Stephen Thackray, Chief Judge, Family Court of Western Australia and forum of key system participants	Perth
Aboriginal Family Law Service Western Australia	Perth
Family Law Practitioners Association Western Australia	Perth
CatholicCare	Wollongong
Uniting	Wollongong
Judge Tom Altobelli, Federal Circuit Court of Australia	Wollongong
Forum of legal practitioners	Wollongong

Name	Location
Family Advocacy and Support Service	Wollongong
Illawarra and Southern Highlands Family Law Pathways Network	Wollongong
Anne Hollingworth, Regulation 7 Family Consultant	Wollongong
Victorian Aboriginal Legal Service	Melbourne
Victim Survivors Advisory Council, Family Safety Victoria	Melbourne
Child Dispute Services, Federal Circuit Court of Australia	Melbourne
Office of the Public Advocate Victoria	Melbourne
Australian Federation of Disability Organisations	Melbourne
Judge Kevin Lapthorn, Judge Norah Hartnett, Judge Liz Boyle, Principal Registrar Adele Byrne and CEO Stewart Fenwick, Federal Circuit Court of Australia	Melbourne
Wendy Kayler-Thomson, Forte Family Lawyers	Melbourne
Chief Magistrate Catherine Geason, Magistrates Court of Tasmania	Telephone
Australian Domestic and Family Violence Death Review Network	Telephone
Commonwealth Ombudsman	Telephone
National Disability Insurance Agency	Telephone
Intersex Human Rights Australia	Telephone
Peter Magee, Armstrong Legal and George Hazim	Telephone

Appendix C
Final Round Consultations
October 2018— February 2019

Name	Location
Resolution Institute	Sydney
Women's Legal Service New South Wales	Sydney
Greater Sydney Family Law Pathways Network	Parramatta
Hon Robyn Sexton	Sydney
Hon Professor Richard Chisholm AM	Brisbane
Attorney-General's Department (Cth)	Canberra Telephone
Judge Kevin Lapthorn, Federal Circuit Court of Australia	Brisbane
Legal Aid Queensland	Brisbane
Child Dispute Services, Federal Circuit Court of Australia	Melbourne
Family Safety Victoria	Melbourne
Fitzroy Legal Service	Melbourne
Victoria Legal Aid	Melbourne
Safe Steps Family Violence Response Centre	Melbourne
National Family Violence Prevention Legal Services	Melbourne
Victorian Legal Services Board and Commissioner	Melbourne
For Kids Sake	Brisbane
Dr Siobhan McDonnell, Australian National University	Canberra
National Aboriginal and Torres Strait Islander Legal Services	Telephone
Women's Legal Service Victoria	Melbourne
Women's Domestic Violence Court Advocacy Service New South Wales	Sydney
Hon Justice Steven Strickland, Family Court of Australia	Telephone

Name	Location
Family Law Section, Law Council of Australia	Sydney
Hon Deputy Chief Justice Robert McClelland, Family Court of Australia	Sydney
Department of Social Services (Cth)	Telephone
Principal Family Court Judge, Jacquelyn Moran, Family Court of New Zealand	Telephone
Hon Justice Richard O'Brien, Family Court of Australia	Telephone
Megan Mitchell, National Children's Commissioner	Sydney
Child Dispute Services, Family Court of Australia and Federal Circuit Court of Australia	Sydney
Hon Mary Finn	Canberra
Hon Justice Gary Watts, Family Court of Australia	Sydney
Forte Family Lawyers	Sydney
Professor Patrick Parkinson AM	Brisbane
Family Justice Courts of Singapore	Singapore
Family & Relationship Services Australia	Telephone
Federal Circuit Court of Australia reform sub-committee	Telephone
Judges of the Family Court of Australia	Brisbane
Professor Belinda Fehlberg and Ms Lisa Sarmas, University of Melbourne	Telephone
Australian Institute of Family Law Arbitrators and Mediators	Telephone

Appendix D
Issues Paper Questions

Objectives and principles

Question 1 What should be the role and objectives of the modern family law system?

Question 2 What principles should guide any redevelopment of the family law system?

Access and engagement

Question 3 In what ways could access to information about family law and family law related services, including family violence services, be improved?

Question 4 How might people with family law related needs be assisted to navigate the family law system?

Question 5 How can the accessibility of the family law system be improved for Aboriginal and Torres Strait Islander people?

Question 6 How can the accessibility of the family law system be improved for people from culturally and linguistically diverse communities?

Question 7 How can the accessibility of the family law system be improved for people with disability?

Question 8 How can the accessibility of the family law system be improved for lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) people?

Question 9 How can the accessibility of the family law system be improved for people living in rural, regional and remote areas of Australia?

Question 10 What changes could be made to the family law system, including to the provision of legal services and private reports, to reduce the cost to clients of resolving family disputes?

Question 11 What changes can be made to court procedures to improve their accessibility for litigants who are not legally represented?

Question 12 What other changes are needed to support people who do not have legal representation to resolve their family law problems?

Question 13 What improvements could be made to the physical design of the family courts to make them more accessible and responsive to the needs of clients, particularly for clients who have security concerns for their children or themselves?

Legal principles in relation to parenting and property

Question 14 What changes to the provisions in Part VII of the *Family Law Act* could be made to produce the best outcomes for children?

Question 15 What changes could be made to the definition of family violence, or other provisions regarding family violence, in the *Family Law Act* to better support decision making about the safety of children and their families?

Question 16 What changes could be made to Part VII of the *Family Law Act* to enable it to apply consistently to all children irrespective of their family structure?

Question 17 What changes could be made to the provisions in the *Family Law Act* governing property division to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes?

Question 18 What changes could be made to the provisions in the *Family Law Act* governing spousal maintenance to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes?

Question 19 What changes could be made to the provisions in the *Family Law Act* governing binding financial agreements to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes?

Resolution and adjudication processes

Question 20 What changes to court processes could be made to facilitate the timely and cost-effective resolution of family law disputes?

Question 21 Should courts provide greater opportunities for parties involved in litigation to be diverted to other dispute resolution processes or services to facilitate earlier resolution of disputes?

Question 22 How can current dispute resolution processes be modified to provide effective low-cost options for resolving small property matters?

Question 23 How can parties who have experienced family violence or abuse be better supported at court?

Question 24 Should legally-assisted family dispute resolution processes play a greater role in the resolution of disputes involving family violence or abuse?

Question 25 How should the family law system address misuse of process as a form of abuse in family law matters?

Question 26 In what ways could non-adjudicative dispute resolution processes, such as family dispute resolution and conciliation, be developed or expanded to better support families to resolve disputes in a timely and cost-effective way?

Question 27 Is there scope to increase the use of arbitration in family disputes? How could this be done?

Question 28 Should online dispute resolution processes play a greater role in helping people to resolve family law matters in Australia? If so, how can these processes be best supported, and what safeguards should be incorporated into their development?

Question 29 Is there scope for problem solving decision making processes to be developed within the family law system to help manage risk to children in families with complex needs? How could this be done?

Question 30 Should family inclusive decision making processes be incorporated into the family law system? How could this be done?

Integration and collaboration

Question 31 How can integrated services approaches be better used to assist client families with complex needs? How can these approaches be better supported?

Question 32 What changes should be made to reduce the need for families to engage with more than one court to address safety concerns for children?

Question 33 How can collaboration and information sharing between the family courts and state and territory child protection and family violence systems be improved?

Children's experiences and perspectives

Question 34	How can children's experiences of participation in court processes be improved?
Question 35	What changes are needed to ensure children are informed about the outcome of court processes that affect them?
Question 36	What mechanisms are best adapted to ensure children's views are heard in court proceedings?
Question 37	How can children be supported to participate in family dispute resolution processes?
Question 38	Are there risks to children from involving them in decision making or dispute resolution processes? How should these risks be managed?
Question 39	What changes are needed to ensure that all children who wish to do so are able to participate in family law system processes in a way that is culturally safe and responsive to their particular needs?
Question 40	How can efforts to improve children's experiences in the family law system best learn from children and young people who have experience of its processes?

Professional skills and wellbeing

Question 41	What core competencies should be expected of professionals who work in the family law system? What measures are needed to ensure that family law system professionals have and maintain these competencies?
Question 42	What core competencies should be expected of judicial officers who exercise family law jurisdiction? What measures are needed to ensure that judicial officers have and maintain these competencies?
Question 43	How should concerns about professional practices that exacerbate conflict be addressed?
Question 44	What approaches are needed to promote the wellbeing of family law system professionals and judicial officers?

Governance and accountability

Question 45 Should s 121 of the *Family Law Act* be amended to allow parties to family law proceedings to publish information about their experiences of the proceedings? If so, what safeguards should be included to protect the privacy of families and children?

Question 46 What other changes should be made to enhance the transparency of the family law system?

Question 47 What changes should be made to the family law system's governance and regulatory processes to improve public confidence in the family law system?

Appendix E
Discussion Paper Proposals and Questions

2. Education, Awareness and Information

Proposal 2–1 The Australian Government should develop a national education and awareness campaign to enhance community understanding of the family law system. This should include information about:

- the benefits of seeking information, advice and support when contemplating or experiencing separation;
- the duties and responsibilities of parents and the importance of taking a child-centred approach to post-separation parenting that prioritises children's safety and best interests;
- the existence and location of the proposed Families Hubs (Proposals 4–1 to 4–4) as a place where people experiencing separation can access advice and support services;
- the availability of the proposed family law system information package (Proposals 2–5 to 2–8) that provides practical information to assist people, including children and young people, to understand and navigate the family law system, including how to access the package; and
- the availability of alternative dispute resolution processes to assist and empower people experiencing separation to reach agreement about arrangements for their children and property outside of court proceedings.

Proposal 2–2 The national education and awareness campaign should be developed in consultation with Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTIQ and disability organisations and be available in a range of languages and formats.

Proposal 2–3 The Australian Government should work with state and territory governments to facilitate the promotion of the national education and awareness campaign through the health and education systems and any other relevant agencies or bodies.

Proposal 2–4 The Australian Government should work with state and territory governments to support the development of referral relationships to family law services, including the proposed Families Hubs (Proposals 4–1 to 4–4), from:

- universal services that work with children and families, such as schools, childcare facilities and health services; and

- first point of contact services for people who have experienced family violence, including state and territory specialist family violence services and state and territory police and child protection agencies.

Proposal 2–5 The Australian Government should convene a standing working group with representatives from government and non-government organisations from each state and territory to:

- advise on the development of a family law system information package to facilitate easy access for people to clear, consistent, legally sound and nationally endorsed information about the family law system; and
- review the information package on a regular basis to ensure that it remains up-to-date.

Proposal 2–6 The family law system information package should be tailored to take into account jurisdictional differences and should include information about:

- the legal framework for resolving parenting and property matters;
- the range of legal and support services available to help separating families and their children and how to access these services; and
- the different forums and processes for resolving disputes.

Proposal 2–7 The family law system information package should be accessible in a range of languages and formats, including:

- electronically via a central website;
- as printed material available at key entry points to the family law system and universal services; and
- through interactive means, including a national telephone helpline and a national web-chat service.

Proposal 2–8 The family law system information package should be:

- developed with reference to existing government and non-government information resources and services;
- developed in consultation with Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTIQ and disability organisations; and
- user-tested for accessibility by community groups including children and young people, Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse communities, LGBTIQ people and people with disability.

3. Simpler and Clearer Legislation

Proposal 3–1 The *Family Law Act 1975* (Cth) and its subordinate legislation should be comprehensively redrafted with the aim of simplification and assisting readability, by:

- simplifying provisions to the greatest extent possible;

- restructuring legislation to assist readability, for example by placing the most important substantive provisions as early as possible;
- redrafting the Act, Regulations and Rules in ordinary English, by modernising language, and as far as possible removing terms that are unlikely to be understood by general readers, such as legal Latin, archaisms, and unnecessarily technical terms;
- user testing key provisions for reader comprehension during the drafting process, for example, through focus groups, to ensure that the legislation is understood as intended;
- removing or rationalising overlapping or duplicative provisions as far as possible;
- removing provisions establishing the Family Court of Australia and the Australian Institute of Family Studies to separate legislation;
- removing provisions defining parentage for the purposes of Commonwealth law to separate legislation; and
- considering what provisions should be contained in subordinate legislation rather than the Act.

Proposal 3–2 Family law court forms should be comprehensively reviewed to improve usability, including through:

- only gathering information that is absolutely required, and simplifying how information is gathered (eg through use of check-boxes);
- using smart forms, to pre-populate information from previously completed forms (such as name and address), ask contextual questions based on previous answers, and provide contextual help within the form;
- using real-time help functions, such as a live-chat functionality, and links to audio-visual help;
- providing collaborative functions in circumstances where forms require information from both parties to allow them both to easily enter information;
- ensuring that all forms are drafted in ordinary English and where possible providing alternative forms in Easy English to assist litigants with limited literacy or English skills;
- providing a paper form for use by individuals without access to technology; and
- providing a single set of forms for all courts exercising jurisdiction under the *Family Law Act 1975* (Cth).

Proposal 3–3 The principle (currently set out in s 60CA of the *Family Law Act 1975* (Cth)) that the child's best interests must be the paramount consideration in making decisions about children should be retained but amended to refer to 'safety and best interests'.

Proposal 3–4 The objects and principles underlying pt VII of the *Family Law Act 1975* (Cth) set out in s 60B should be amended to assist the interpretation of the provisions governing parenting arrangements as follows:

- arrangements for children should be designed to advance the child's safety and best interests;
- arrangements for children should not expose children or their carers to abuse or family violence or otherwise impair their safety;
- children should be supported to maintain relationships with parents and other people who are significant in their lives where maintaining a relationship does not expose them to abuse, family violence or harmful levels of ongoing conflict;
- decisions about children should support their human rights as set out in the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities; and
- decisions about the care of an Aboriginal or Torres Strait Islander child should support the child's right to maintain and develop the child's cultural identity, including the right to:

    (a) maintain a connection with family, community, culture and country; and

    (b) have the support, opportunity and encouragement necessary to participate in that culture, consistent with the child's age and developmental level and the child's views, and to develop a positive appreciation of that culture.

Proposal 3–5 The guidance in the *Family Law Act 1975* (Cth) for determining the arrangements that best promote the child's safety and best interests (currently set out mainly in s 60CC), should be simplified to provide that the following matters must be considered:

- any relevant views expressed by the child;
- whether particular arrangements are safe for the child and the child's carers, including safety from family violence or abuse;
- the developmental, psychological and emotional needs of the child;
- the capacity of each proposed carer of the child to provide for the developmental, psychological and emotional needs of the child;
- the benefit to a child of being able to maintain relationships that are significant to them, including relationships with their parents, where it is safe to do so; and
- anything else that is relevant to the particular circumstances of the child.

Proposal 3–6 The *Family Law Act 1975* (Cth) should provide that, in determining what arrangements best promote the safety and best interests of an Aboriginal or Torres Strait Islander child, the maintenance of the child's connection to their family, community, culture and country must be considered.

Proposal 3–7 The decision making framework for parenting arrangements in pt VII of the *Family Law Act 1975* (Cth) should be further clarified by:

- replacing the term 'parental responsibility' with a more easily understood term, such as 'decision making responsibility'; and
- making it clear that in determining what arrangements best promote the child's safety and best interests, decision makers must consider what arrangements would be best for each child in their particular circumstances.

Question 3–1 How should confusion about what matters require consultation between parents be resolved?

Proposal 3–8 The *Family Law Act 1975* (Cth) should be amended to explicitly state that, where there is already a final parenting order in force, parties must seek leave to apply for a new parenting order, and that in considering whether to allow a new application, consideration should be given to whether:

- there has been a change of circumstances that, in the opinion of the court, is significant; and
- it is safe and in the best interests of the child for the order to be reconsidered.

Proposal 3–9 The Attorney-General's Department (Cth) should commission a body with relevant expertise, including in psychology, social science and family violence, to develop, in consultation with key stakeholders, evidence-based information resources to assist families in formulating care arrangements for children after separation that support children's wellbeing. This resource should be publicly available and easily accessible, and regularly updated.

Proposal 3–10 The provisions for property division in the *Family Law Act 1975* (Cth) should be amended to more clearly articulate the process used by the courts for determining the division of property.

Proposal 3–11 The provisions for property division in the *Family Law Act 1975* (Cth) should be amended to provide that courts must:

- in determining the contributions of the parties, take into account the effect of family violence on a party's contributions; and
- in determining the future needs of the parties, take into account the effect of any family violence on the future needs of a party.

Proposal 3–12 The Attorney-General's Department (Cth) should commission further research on property and financial matters after separation, including property adjustment after separation, spousal maintenance, and the economic wellbeing of former partners and their children after separation.

Proposal 3–13 The Australian Government should work with the financial sector to establish protocols for dividing debt on relationship breakdown to avoid hardship for vulnerable parties, including for victims of family violence.

Proposal 3–14 If evaluation of action flowing from this Inquiry finds that voluntary industry action has not adequately assisted vulnerable parties, the Australian Government should consider relaxing the requirement that it not be foreseeable, at the time the order

is made, that to make the order would result in the debt not being paid in full.

Proposal 3–15 The Australian Government should develop information resources for separating couples to assist them to understand superannuation, and how and why superannuation splitting might occur.

Proposal 3–16 The *Family Law Act 1975* (Cth) should require superannuation trustees to develop standard superannuation splitting orders on common scenarios. Procedural fairness should be deemed to be satisfied where parties develop orders based on these standard templates. The templates should be published on a central register.

Proposal 3–17 The Australian Government should develop tools to assist parties to create superannuation splitting orders. These could include:

- a tool to look up the legal name and contact details of superannuation funds;
- a tool, with appropriate safeguards, to identify the superannuation accounts held by a former partner from Australian Tax Office records, with necessary amendments to the taxation law to support this;
- tools to assist parties with process requirements, such as making superannuation information requests, providing draft orders to superannuation trustees for comment where standard orders are not used, and providing final orders to trustees; and
- allowing auto-generation of standard form orders based on the standard orders provided by the superannuation trustee and user-entered data.

Question 3–2 Should provision be made for early release of superannuation to assist a party experiencing hardship as a result of separation? If so, what limitations should be placed on the ability to access superannuation in this way? How should this relate to superannuation splitting provisions?

Question 3–3 Which, if any, of the following approaches should be adopted to reform provisions about financial agreements in the *Family Law Act 1975* (Cth):

- amendments to increase certainty about when financial agreements are binding;
- amendments to broaden the scope for setting aside an agreement where it is unjust to enforce the agreement, for example, because there has been family violence, or a change of circumstances that was unforeseen when the agreement was entered into;
- replacing existing provisions about financial agreements with an ability to make court-approved agreements; or
- removing the ability to make binding pre-nuptial financial agreements from family law legislation, and preserving the operation of any existing valid agreements?

Proposal 3–18 The considerations that are applicable to spousal maintenance (presently located in s 75 of the *Family Law Act 1975* (Cth)) should be located in a separate section of family law legislation that is dedicated to spousal maintenance applications (‘dedicated spousal maintenance considerations’).

Proposal 3–19 The dedicated spousal maintenance considerations should include a requirement that the court consider the impact of any family violence on the ability of the applicant to adequately support themselves.

Question 3–4 What options should be pursued to improve the accessibility of spousal maintenance to individuals in need of income support? Should consideration be given to:

- greater use of registrars to consider urgent applications for interim spousal maintenance;
- administrative assessment of spousal maintenance; or
- another option?

4. Getting Advice and Support

Proposal 4–1 The Australian Government should work with state and territory governments to establish community-based Families Hubs that will provide separating families and their children with a visible entry point for accessing a range of legal and support services. These Hubs should be designed to:

- identify the person's safety, support and advice needs and those of their children;
- assist clients to develop plans to address their safety, support and advice needs and those of their children;
- connect clients with relevant services; and
- coordinate the client's engagement with multiple services.

Proposal 4–2 The Australian Government should work with state and territory governments to explore the use of digital technologies to support the assessment of client needs, including their safety, support and advice needs, within the Families Hubs.

Proposal 4–3 Families Hubs should advance the safety and wellbeing of separating families and their children while supporting them through separation. They should include on-site out-posted workers from a range of relevant services, including:

- specialist family violence services;
- legal assistance services (such as community legal centres);
- family dispute resolution services;
- therapeutic services (such as family counselling and specialised services for children);
- financial counselling services;
- housing assistance services;
- health services (such as mental health services and alcohol and other drug services);
- gambling help services;
- children's contact services; and

- parenting support programs or parenting education services (including a program for fathers).

Proposal 4–4 Local service providers, including Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTIQ and disability organisations, specialist family violence services and legal assistance services, including community legal services, should play a central role in the design of Families Hubs, to ensure that each hub is culturally safe and accessible, responsive to local needs, and builds on existing networks and relationships between local services.

Proposal 4–5 The Australian Government should, subject to positive evaluation, expand the Family Advocacy and Support Service (FASS) in each state and territory to include:

- an information and referral officer to conduct intake, risk and needs screening and triage, as well as providing information and resources;
- a family violence specialist legal service and a family violence specialist support service to assist clients who have experienced or are experiencing family violence; and
- an additional legal service and support service, to assist clients who are alleged to have used family violence and clients who are not affected by family violence but have other complex needs.

Proposal 4–6 The FASS support services should be expanded to provide case management where a client has complex needs and cannot be linked with an appropriate support service providing ongoing case management.

Proposal 4–7 The level and duration of support provided by the FASS should be flexible depending on client need and vulnerability, as well as legal aid eligibility for ongoing legal services.

Proposal 4–8 The Australian Government should, subject to positive evaluation, roll out the expanded FASS to a greater number of family court locations, including in rural, regional and remote locations.

5. Dispute Resolution

Proposal 5–1 The guidance as to assessment of suitability for family dispute resolution that is presently contained in reg 25 of the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) should be relocated to the *Family Law Act 1975* (Cth).

Proposal 5–2 The new legislative provision proposed in Proposal 5–1 should provide that, in addition to the existing matters that a family dispute resolution provider must consider when determining whether family dispute resolution is appropriate, the family dispute resolution provider should consider the parties' respective levels of knowledge of the matters in dispute, including an imbalance in knowledge of relevant financial arrangements.

Proposal 5–3 The *Family Law Act 1975* (Cth) should be amended to require parties to attempt family dispute resolution prior to lodging a court application for property and financial matters. There should be a limited range of exceptions to this requirement, including:

- urgency, including where orders in relation to the ownership or disposal of assets are required or a party needs access to financial resources for day to day needs;
- the complexity of the asset pool, including circumstances involving third party interests (apart from superannuation trustees);
- where there is an imbalance of power, including as a result of family violence;
- where there are reasonable grounds to believe non-disclosure may be occurring;
- where one party has attempted to delay or frustrate the resolution of the matter; and
- where there are allegations of fraud.

Proposal 5–4 The *Family Law Act 1975* (Cth) should be amended to specify that a court must not hear an application for orders in relation to property and financial matters unless the parties have lodged a genuine steps statement at the time of filing the application. The relevant provision should indicate that if a court finds that a party has not made a genuine effort to resolve a matter in good faith, they may take this into account in determining how the costs of litigation should be apportioned.

Proposal 5–5 The *Family Law Act 1975* (Cth) should include a requirement that family dispute resolution providers in property and financial matters should be required to provide a certificate to the parties where the issues in dispute have not been resolved. The certificate should indicate that:

- the matter was assessed as not suitable for family dispute resolution;
- the person to whom the certificate was issued had attempted to initiate a family dispute resolution process but the other party has not responded;
- the parties had commenced family dispute resolution and the process had been terminated; or
- the matter had commenced and concluded with partial resolution of the issues in dispute.

Question 5–1 Should the requirement in the *Family Law Act 1975* (Cth) that proceedings in property and financial matters must be instigated within twelve months of divorce or two years of separation from a de facto relationship be revised?

Proposal 5–6 The *Family Law Act 1975* (Cth) should set out the duties of parties involved in family dispute resolution or court proceedings for property and financial matters to provide early, full and continuing disclosure of all information relevant to the case. For parties involved in family dispute resolution or court proceedings, disclosure duties should apply to:

- earnings, including those paid or assigned to another party;

- vested or contingent interests in property, including that which is owned by a legal entity that is fully or partially owned or partially controlled by a party;
- income earned by a legal entity fully or partially owned or controlled by a party, including income that is paid or assigned to any other party, person or legal entity;
- superannuation interests; and
- liabilities and contingent liabilities.

Proposal 5–7 The provisions in the *Family Law Act 1975* (Cth) setting out disclosure duties should also specify that if a court finds that a party has intentionally failed to provide full, frank and timely disclosure it may:

- impose a consequence, including punishment for contempt of court;
- take the party's non-disclosure into account when determining how costs are to be apportioned;
- stay or dismiss all or part of the party's case; or
- take the party's non-disclosure into account when determining how the financial pool is to be divided.

Question 5–2 Should the provisions in the *Family Law Act 1975* (Cth) setting out disclosure duties be supported by civil or criminal penalties for non-disclosure?

Proposal 5–8 The *Family Law Act 1975* (Cth) should set out advisers' obligations in relation to providing advice to parties contemplating or undertaking family dispute resolution, negotiation or court proceedings about property and financial matters. Advisers (defined as a legal practitioner or a family dispute resolution practitioner) must advise parties that:

- they have a duty of full, frank and continuing disclosure, and, in the case of family dispute resolution, that compliance with this duty is essential to the family dispute resolution process; and
- if the matter proceeds to court and a party fails to observe this duty, courts have the power to:
    - (a) impose a consequence, including punishment for contempt of court;
    - (b) take the party's non-disclosure into account when determining how costs are to be apportioned;
    - (c) stay or dismiss all or part of the party's case; and
    - (d) take the party's non-disclosure into account when determining how the financial pool is to be divided.

Question 5–3 Is there a need to review the process for showing that the legal requirement to attempt family dispute resolution prior to lodging a court application for parenting orders has been satisfied? Should this process be aligned with the process proposed for property and financial matters?

Proposal 5–9 The Australian Government should work with providers of family

dispute resolution services, legal assistance services, specialist family violence services and Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTIQ and disability organisations to support the further development of culturally appropriate and safe models of family dispute resolution for parenting and financial matters. This should include:

- examining the feasibility of means-tested fee for service and cost recovery models to be provided by legal aid commissions and community organisations such as Family Relationship Centres;
- the further development of dispute resolution models for property and financial matters involving, where necessary, support by financial counsellors and the provision of legal advice by private practitioners and legal assistance services, such as legal aid commissions, community legal centres and the Legal Advice Line that is part of Family Relationships Advice Line; and
- amendments to existing funding agreements and practice agreements to support this work.

Proposal 5–10 The Australian Government should work with providers of family dispute resolution services, private legal services, financial services, legal assistance services, specialist family violence services and Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTIQ and disability organisations to develop effective practice guidelines for the delivery of legally assisted dispute resolution (LADR) for parenting and property matters.

These Guidelines should include:

- guidance as to when LADR should not be applied in matters involving family violence and other risk related issues;
- effective practice in screening, assessing and responding to risk arising from family violence, child safety concerns, mental ill-health, substance misuse and other issues that raise questions of risk;
- the respective roles and responsibilities of the professionals involved;
- the application of child-inclusive practice;
- the application of approaches to support cultural safety for Aboriginal and Torres Strait Islander people;
- the application of approaches to support cultural safety for families from culturally and linguistically diverse communities;
- the application of approaches to support effective participation for LGBTIQ families;
- the application of approaches that support effective participation for families where parents or children have disability;
- practices relating to referral to other services, including health services, specialist family violence services and men's behaviour change programs;
- practices relating to referrals from and to the family courts; and

- information sharing and collaboration with other services involved with the family.

Proposal 5–11 These Guidelines should be regularly reviewed to support evidence-informed policy and practice in this area.

6. Reshaping the Adjudication Landscape

Proposal 6–1 The family courts should establish a triage process to ensure that matters are directed to appropriate alternative dispute resolution processes and specialist pathways within the court as needed.

Proposal 6–2 The triage process should involve a team-based approach combining the expertise of the court's registrars and family consultants to ensure initial and ongoing risk and needs assessment and case management of the matter, continuing, if required, until final decision.

Proposal 6–3 Specialist court pathways should include:

- a simplified small property claims process;
- a specialist family violence list; and
- the Indigenous List.

Proposal 6–4 The *Family Law Act 1975* (Cth) should provide for a simplified court process for matters involving smaller property pools. The provisions should allow for:

- the court to have discretion, subject to the requirements of procedural fairness, not to apply formal rules of evidence and procedure in a given case;
- the proceedings to be conducted without legal technicality; and
- the simplified court procedure to be applied by the court on its own motion or on application by a party.

Proposal 6–5 In considering whether the simplified court procedure should be applied in a particular matter, the court should have regard to:

- the relative financial circumstances of the parties;
- the parties' relative levels of knowledge of their financial circumstances;
- whether either party is in need of urgent access to financial resources to meet the day to day needs of themselves and their children;
- the size and complexity of the asset pool; and
- whether there are reasonable grounds to believe there is history of family violence involving the parties, or risk of family violence.

The court should give weight to each of these factors as it sees fit.

Proposal 6–6 The family courts should consider developing case management protocols to support implementation of the simplified process for matters with smaller

property pools, including provision for:

- case management by court registrars to establish, monitor and enforce timelines for procedural steps, including disclosure;
- conducting a conciliation conference once the asset pool has been identified; and
- establishing a standard timetable for processing claims with expected timeframes for case management of events (mentions, conciliation conferences and trial).

Proposal 6–7 The family courts should consider establishing a specialist list for the hearing of high risk family violence matters in each registry. The list should have the following features:

- a lead judge with oversight of the list;
- a registrar with responsibility for triaging matters into the list and ongoing case management;
- family consultants to prepare short and long reports on families whose matters are heard in the list; and
- a cap on the number of matters listed in each daily hearing list.

All of the professionals in these roles should have specialist family violence knowledge and experience.

Question 6–1 What criteria should be used to establish eligibility for the family violence list?

Question 6–2 What are the risks and benefits of early fact finding hearings? How could an early fact finding process be designed to limit risks?

Proposal 6–8 The Australian Government should work with state and territory governments to develop and implement models for co-location of family law registries and judicial officers in local court registries. This should include local courts in rural, regional and remote locations.

Question 6–3 What changes to the design of the Parenting Management Hearings process are needed to strengthen its capacity to apply a problem-solving approach in children's matters? Are other changes needed to this model?

Question 6–4 What other ways of developing a less adversarial decision making process for children's matters should be considered?

Proposal 6–9 The Australian Government should develop a post-order parenting support service to assist parties to parenting orders to implement the orders and manage their co-parenting relationship by providing services including:

- education about child development and conflict management;
- dispute resolution; and
- decision making in relation to implementation of parenting orders.

Proposal 6–10 The Australian Government should work with relevant stakeholders,

including the Community Services and Health Industry Skills Council, the Australian Psychological Society, the Australian Association of Social Workers, the Mediator Standards Board, Family & Relationship Services Australia and specialist family violence services peak bodies, to develop intake assessment processes for the post-order parenting support service.

Proposal 6–11 The proposed Family Law Commission (Proposal 12–1) should develop accreditation and training requirements for professionals working in the post-order parenting support service.

Proposal 6–12 The Australian Government should ensure that all family court premises, including circuit locations and state and territory court buildings that are used for family law matters, are safe for attendees, including ensuring the availability and suitability of:

- waiting areas and rooms for co-located service providers, including the extent to which waiting areas can accommodate large family groups;
- safe waiting areas and rooms for court attendees who have concerns for their safety while they are at court;
- private interview rooms;
- multiple entrances and exits;
- child-friendly spaces and waiting rooms;
- security staffing and equipment;
- multi-lingual and multi-format signage;
- remote witness facilities for witnesses to give evidence off site and from court-based interview rooms; and
- facilities accessible for people with disability.

7. Children in the Family Law System

Proposal 7–1 Information about family law processes and legal and support services should be available to children in a range of age-appropriate and culturally appropriate forms.

Proposal 7–2 The proposed Families Hubs (Proposals 4–1 to 4–4) should include out-posted workers from specialised services for children and young people, such as counselling services and peer support programs.

Proposal 7–3 The *Family Law Act 1975* (Cth) should provide that, in proceedings concerning a child, an affected child must be given an opportunity (so far as practicable) to express their views.

Proposal 7–4 The *Family Law Act 1975* (Cth) should provide that, in any family dispute resolution process concerning arrangements for a child, the affected child must be given an opportunity (so far as practicable) to express any views about those arrangements.

Proposal 7–5 The Attorney-General's Department (Cth) should work with the family relationship services sector to develop best practice guidance on child-inclusive family dispute resolution, including in relation to participation support where child-inclusive family dispute resolution is not appropriate.

Proposal 7–6 There should be an initial and ongoing assessment of risk to the child of participating in family law proceedings or family dispute resolution, and processes put in place to manage any identified risk.

Proposal 7–7 Children should not be required to express any views in family law proceedings or family dispute resolution.

Proposal 7–8 Children involved in family law proceedings should be supported by a 'children's advocate': a social science professional with training and expertise in child development and working with children. The role of the children's advocate should be to:

- explain to the child their options for making their views heard;
- support the child to understand their options and express their views;
- ensure that the child's views are communicated to the decision maker; and
- keep the child informed of the progress of a matter, and to explain any outcomes and decisions made in a developmentally appropriate way.

Proposal 7–9 Where a child is not able to be supported to express a view, the children's advocate should:

- support the child's participation to the greatest extent possible; and
- advocate for the child's interests based on an assessment of what would best promote the child's safety and developmental needs.

Proposal 7–10 The *Family Law Act 1975* (Cth) should make provision for the appointment of a legal representative for children involved in family law proceedings (a 'separate legal representative') in appropriate circumstances, whose role is to:

- gather evidence that is relevant to an assessment of a child's safety and best interests; and
- assist in managing litigation, including acting as an 'honest broker' in litigation.

Question 7–1 In what circumstances should a separate legal representative for a child be appointed in addition to a children's advocate?

Question 7–2 How should the appointment, management and coordination of children's advocates and separate legal representatives be overseen? For example, should a new body be created to undertake this task?

Question 7–3 What approach should be taken to forensic issues relating to the role of the children's advocate, including:

- admissibility of communications between the children's advocate and a child; and
- whether the children's advocate may become a witness in a matter?

Proposal 7–11 Children should be able to express their views in court proceedings and family dispute resolution processes in a range of ways, including through:

- a report prepared by the children's advocate;
- meeting with a decision maker, supported by a children's advocate; or
- directly appearing, supported by a children's advocate.

Proposal 7–12 Guidance should be developed to assist judicial officers where children seek to meet with them or otherwise participate in proceedings. This guidance should cover matters including how views expressed by children in any such meeting should be communicated to other parties to the proceeding.

Proposal 7–13 There should be a Children and Young People's Advisory Board for the family law system. The Advisory Board should provide advice about children's experiences of the family law system to inform policy and practice development in the system.

8. Reducing Harm

Proposal 8–1 The definition of family violence in the *Family Law Act 1975* (Cth) should be amended to:

- clarify some terms used in the list of examples of family violence and to include other behaviours (in addition to misuse of systems and processes (Proposal 8–3)) including emotional and psychological abuse and technology facilitated abuse; and
- include an explicit cross-reference between the definitions of family violence and abuse to ensure it is clear that the definition of abuse encompasses direct or indirect exposure to family violence.

Question 8–1 What are the strengths and limitations of the present format of the family violence definition?

Question 8–2 Are there issues or behaviours that should be referred to in the definition, in addition to those proposed?

Proposal 8–2 The Australian Government should commission research projects to examine the strengths and limitations of the definition of family violence in the *Family Law Act 1975* (Cth) in relation to the experiences of:

- Aboriginal and Torres Strait Islander people;
- people from culturally and linguistically diverse backgrounds; and
- LGBTIQ people.

Proposal 8–3 The definition of family violence in the *Family Law Act 1975* (Cth) should be amended to include misuse of legal and other systems and processes in the list of examples of acts that can constitute family violence in s 4AB(2) by inserting a new subsection referring to the 'use of systems or processes to cause harm, distress or financial loss'.

Proposal 8–4 The existing provisions in the *Family Law Act 1975* (Cth) concerning dismissal of proceedings that are frivolous, vexatious, an abuse of process or have no reasonable prospect of success ('unmeritorious proceedings') should be rationalised.

Proposal 8–5 The *Family Law Act 1975* (Cth) should provide that, in considering whether to deem proceedings as unmeritorious, a court may have regard to evidence of a history of family violence and in children's cases must consider the safety and best interests of the child and the impact of the proceedings on the other party when they are the main caregiver for the child.

Question 8–3 Should the requirement for proceedings to have been instituted 'frequently' be removed from provisions in the *Family Law Act 1975* (Cth) setting out courts powers to address vexatious litigation? Should another term, such as 'repeated' be substituted?

Question 8–4 What, if any, changes should be made to the courts' powers to apportion costs in s 117 of the *Family Law Act 1975* (Cth)?

Proposal 8–6 The *Family Law Act 1975* (Cth) should provide that courts have the power to exclude evidence of 'protected confidences': that is, communications made by a person in confidence to another person acting in a professional capacity who has an express or implied duty of confidence. The Act should provide that:

- Subpoenas in relation to evidence of protected confidences should not be issued without leave of the court.
- The court should exclude evidence of protected confidences where it is satisfied that it is likely that harm would or might be caused, directly or indirectly, to a protected confider, and the nature and extent of the harm outweighs the desirability of the evidence being given. Harm should be defined to include actual physical bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm (such as shame, humiliation and fear).
- In exercising this power, the court should consider the probative value and importance of the evidence to the proceedings and the effect that allowing the evidence would have on the protected confider.
- In family law proceedings concerning children, the safety and best interests of the child should be the paramount consideration when deciding whether to exclude evidence of protected confidences. Such evidence should be excluded where a court is satisfied that admitting it would not promote the safety and best interests of the child.
- The protected confider may consent to the evidence being admitted.
- The court should have the power to disallow such evidence on its own motion or by application of the protected confider or the confidant. Where a child is the protected confider, a representative of the child may make the claim for protection on behalf of the child.
- The court is obliged to give reasons for its decision.

Proposal 8–7 The Attorney-General's Department (Cth) should convene a working group comprised of the family courts, the Family Law Section of the Law Council of Australia, the Royal Australian and New Zealand College of Psychiatrists, the Australian Psychological Society, the Royal Australian College of General Practitioners, Family & Relationship Services Australia, National Legal Aid, Women's Legal Services Australia and specialist family violence services peak bodies and providers to develop guidelines in relation to the use of sensitive records in family law proceedings. These guidelines should identify:

- principles to consider when a subpoena of sensitive records is in contemplation;
- obligations of professionals who are custodians of sensitive records in relation to the provision of those records;
- processes for objecting to a subpoena of sensitive records; and
- how services and professionals need to manage implications for their clients regarding the possibility that material may be subpoenaed and any potential consequences for their clients if a subpoena is issued.

9. Additional Legislative Issues

Proposal 9–1 The *Family Law Act 1975* (Cth) should include a supported decision making framework for people with disability to recognise they have the right to make choices for themselves. The provisions should be in a form consistent with the following recommendations of the ALRC Report 124, *Equality, Capacity and Disability in Commonwealth Laws*:

- Recommendations 3–1 to 3–4 on National Decision Making Principles and Guidelines; and
- Recommendations 4–3 to 4–5 on the appointment, recognition, functions and duties of a 'supporter'.

Proposal 9–2 The Australian Government should ensure that people who require decision making support in family law matters, and their supporters, are provided with information and guidance to enable them to understand their functions and duties.

Proposal 9–3 The *Family Law Act 1975* (Cth) should include provisions for the appointment of a litigation representative where a person with disability, who is involved in family law proceedings, is unable to be supported to make their own decisions. The Act should set out the circumstances for a person to have a litigation representative and the functions of the litigation representative. These provisions should be in a form consistent with recommendations 7–3 to 7–4 recommendations of ALRC Report 124, *Equality, Capacity and Disability in Commonwealth Laws*.

Proposal 9–4 Family courts should develop practice notes explaining the duties that litigation representatives have to the person they represent and to the court.

Proposal 9–5 The Australian Government should work with state and territory governments to facilitate the appointment of statutory authorities as litigation

representatives in family law proceedings.

Proposal 9–6 The Australian Government should work with the National Disability Insurance Agency (NDIA) to consider how referrals can be made to the NDIA by family law professionals, and how the National Disability Insurance Scheme (NDIS) could be used to fund appropriate supports for eligible people with disability to:

- build parenting abilities;
- access early intervention parenting supports;
- carry out their parenting responsibilities;
- access family support services and alternative dispute resolution processes; and
- navigate the family law system.

Proposal 9–7 The Australian Government should ensure that the family law system has specialist professionals and services to support people with disability to engage with the family law system.

Question 9–1 In relation to the welfare jurisdiction:

- Should authorisation by a court, tribunal, or other regulatory body be required for procedures such as sterilisation of children with disability or intersex medical procedures? What body would be most appropriate to undertake this function?
- In what circumstances should it be possible for this body to authorise sterilisation procedures or intersex medical procedures before a child is legally able to personally make these decisions?
- What additional legislative, procedural or other safeguards, if any, should be put in place to ensure that the human rights of children are protected in these cases?

Proposal 9–8 The definition of family member in s 4(1AB) of the *Family Law Act 1975* (Cth) should be amended to be inclusive of Aboriginal and Torres Strait Islander concepts of family.

Question 9–2 How should a provision be worded to ensure the definition of family member covers Aboriginal and Torres Strait Islander concepts of family?

10. A Skilled and Supported Workforce

Proposal 10–1 The Australian Government should work with relevant non-government organisations and key professional bodies to develop a workforce capability plan for the family law system.

Proposal 10–2 The workforce capability plan for the family law system should identify:

- the different professional groups working in the family law system;
- the core competencies that particular professional groups need; and
- the training and accreditation needed for different professional groups.

Proposal 10–3 The identification of core competencies for the family law system workforce should include consideration of the need for family law system professionals to have:

- an understanding of family violence;
- an understanding of child abuse, including child sexual abuse and neglect;
- an understanding of trauma-informed practice, including an understanding of the impacts of trauma on adults and children;
- an ability to identify and respond to risk, including the risk of suicide;
- an understanding of the impact on children of exposure to ongoing conflict;
- cultural competency, in relation to Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse communities and LGBTIQ people;
- disability awareness; and
- an understanding of the family violence and child protection systems and their intersections with the family law system.

Question 10–1 Are there any additional core competencies that should be considered in the workforce capability plan for the family law system?

Proposal 10–4 The Family Law Commission proposed in Proposal 12–1 should oversee the implementation of the workforce capability plan through training—including cross-disciplinary training—and accreditation of family law system professionals.

Proposal 10–5 In developing the workforce capability plan, the capacity for family dispute resolution practitioners to conduct family dispute resolution in property and financial matters should be considered. This should include consideration of existing training and accreditation requirements.

Question 10–2 What qualifications and training should be required for family dispute resolution practitioners in relation to family law disputes involving property and financial issues?

Proposal 10–6 State and territory law societies should amend their continuing professional development requirements to require all legal practitioners undertaking family law work to complete at least one unit of family violence training annually. This training should be in addition to any other core competencies required for legal practitioners under the workforce capability plan.

Proposal 10–7 The *Family Law Act 1975* (Cth) should provide for the accreditation of Children's Contact Service workers and impose a requirement that these workers hold a valid Working with Children Check.

Question 10–3 Should people who work at Children's Contact Services be required to hold other qualifications, such as a Certificate IV in Community Services or a Diploma of Community Services?

Proposal 10–8 All future appointments of federal judicial officers exercising family law jurisdiction should include consideration of the person's knowledge, experience and aptitude in relation to family violence.

Question 10–4 What, if any, other changes should be made to the criteria for appointment of federal judicial officers exercising family law jurisdiction?

Question 10–5 What, if any, changes should be made to the process for appointment of federal judicial officers exercising family law jurisdiction?

Proposal 10–9 The Australian Government should task the Family Law Commission (Proposal 12–1) with the development a national accreditation system with minimum standards for private family report writers as part of the newly developed Accreditation Rules.

Proposal 10–10 The Family Law Commission (Proposal 12–1) should maintain a publicly available list of accredited private family report writers with information about their qualifications and experience as part of the Accreditation Register.

Proposal 10–11 When requesting the preparation of a report under s 62G of the *Family Law Act 1975* (Cth), the family courts should provide clear instructions about why the report is being sought and the particular issues that should be reported on.

Proposal 10–12 In appropriate matters involving the care, welfare and development of a child, judges should consider appointing an assessor with expert knowledge in relation to the child's particular needs to assist in the hearing and determination of the matter.

Proposal 10–13 The *Family Law Act 1975* (Cth) should provide that, where concerns are raised about the parenting ability of a person with disability in proceedings for parenting orders, a report writer with requisite skills should:

- prepare a report for the court about the person's parenting ability, including what supports could be provided to improve their parenting; and
- make recommendations about how that person's disability may, or may not, affect their parenting.

Proposal 10–14 The *Family Law Act 1975* (Cth) should be amended to provide that in parenting proceedings involving an Aboriginal or Torres Strait Islander child, a cultural report should be prepared, including a cultural plan that sets out how the child's ongoing connection with kinship networks and country may be maintained.

Question 10–6 Should cultural reports be mandatory in all parenting proceedings involving an Aboriginal or Torres Strait Islander child?

Proposal 10–15 The Australian Government should, as a condition of its funding agreements, require that all government funded family relationships services and family law legal assistance services develop and implement wellbeing programs for their staff.

11. Information Sharing

Proposal 11–1 State and territory child protection, family violence and other relevant legislation should be amended to:

- remove any provisions that prevent state and territory agencies from disclosing relevant information, including experts' reports, to courts, bodies and agencies in the family law system in appropriate circumstances; and
- include provisions that explicitly authorise state and territory agencies to disclose relevant information to courts, bodies and agencies in the family law system in appropriate circumstances.

The relevant agencies can be identified through the proposed information sharing framework (Proposals 11–2 and 11–3).

Question 11–1 What other information should be shared or sought about persons involved in family law proceedings? For example, should:

- State and territory police be required to enquire about whether a person is currently involved in family law proceedings before they issue or renew a gun licence?
- State and territory legislation require police to inform family courts if a person makes an application for a gun licence and they have disclosed they are involved in family law proceedings?
- The *Family Law Act 1975* (Cth) require family courts to notify police if a party to proceedings makes an allegation of current family violence?
- The *Family Law Act 1975* (Cth) give family law professionals discretion to notify police if they fear for a person's safety and should such professionals be provided with immunity against actions against them, including defamation, if they make such a notification?

Proposal 11–2 The Australian Government should work with state and territory governments to develop and implement a national information sharing framework to guide the sharing of information about the safety, welfare and wellbeing of families and children between the family law, family violence and child protection systems. The framework should include:

- relevant federal, state and territory court documents;
- child protection records;
- police records;
- experts' reports; and
- other relevant information.

Proposal 11–3 The information sharing framework should include the legal framework for sharing information and information sharing principles, as well as guidance about:

- why information needs to be shared;

- what information should be shared;
- circumstances when information should be shared;
- mechanisms for information sharing, including technological solutions;
- how information that is shared can be used;
- who is able to share information;
- roles and responsibilities of professionals in the system in relation to information sharing;
- interagency education and training;
- interagency collaboration; and
- monitoring and evaluation of information sharing initiatives.

Question 11–2 Should the information sharing framework include health records? If so, what health records should be shared?

Question 11–3 Should records be shared with family relationships services such as family dispute resolution services, Children's Contact Services, and parenting order program services?

Proposal 11–4 The Australian Government and state and territory governments should consider expanding the information sharing platform as part of the National Domestic Violence Order Scheme to include family court orders and orders issued under state and territory child protection legislation.

Proposal 11–5 State and territory governments should consider providing access for family courts and appropriate bodies and agencies in the family law system to relevant inter-jurisdictional and intra-jurisdictional child protection and family violence information sharing platforms.

Proposal 11–6 The family courts should provide relevant professionals in the family violence and child protection systems with access to the Commonwealth Courts Portal to enable them to have reliable and timely access to relevant information about existing family court orders and pending proceedings.

Proposal 11–7 The Australian Government should work with states and territory governments to co-locate child protection and family violence support workers at each of the family law court premises.

Proposal 11–8 The Australian Government and state and territory governments should work together to facilitate relevant entities, including courts and agencies in the family law, family violence and child protection systems, entering into information sharing agreements for the sharing of relevant information about families and children.

Proposal 11–9 The Australian Government and state and territory governments should work together to develop a template document to support the provision of a brief summary of child protection department or police involvement with a child and family to family courts.

Question 11–4 If a child protection agency has referred a parent to the family courts to obtain parenting orders, what, if any, evidence should they provide the courts? For example, should they provide the courts with any recommendations they may have in relation to the care arrangements of the children?

Proposal 11–10 The Australian Government should develop and implement an information sharing scheme to guide the sharing of relevant information about families and children between courts, bodies, agencies and services within the family law system.

Proposal 11–11 The *Family Law Act 1975* (Cth) should support the sharing of relevant information between entities within the family law system. The information sharing scheme should include such matters as:

- what information should be shared;
- why information should be shared;
- circumstances when information should be shared;
- mechanisms for information sharing;
- how information that is shared can be used;
- who is able to share information; and
- roles and responsibilities of professionals in the system in relation to information sharing.

Proposal 11–12 The Australian Government should work with states and territories to ensure that the family relationships services they fund are captured by, and comply with, the information sharing scheme.

Question 11–5 What information should be shared between the Families Hubs (Proposals 4–1 to 4–4) and the family courts, and what safeguards should be put in place to protect privacy? For example:

- Should all the information about services within the Families Hubs that were accessed by parties be able to be shared freely with the family courts?
- What information should the family courts receive (ie services accessed, number of times accessed, or more detailed information about treatment plans etc)?
- Should client consent be needed to share this information?
- Who would have access to the information at the family courts?
- Would the other party get access to any information provided by the Families Hubs services to the family courts?
- Should there be capacity for services provided through the Families Hubs to provide written or verbal evidence to the family courts?

12. System Oversight and Reform Evaluation

Proposal 12–1 The Australian Government should establish a new independent statutory body, the Family Law Commission, to oversee the family law system. The aims

of the Family Law Commission should be to ensure that the family law system operates effectively in accordance with the objectives of the *Family Law Act 1975* (Cth) and to promote public confidence in the family law system. The responsibilities of the Family Law Commission should be to:

- monitor the performance of the system;
- manage accreditation of professionals and agencies across the system, including oversight of training requirements;
- issue guidelines to family law professionals and service providers to assist them to understand their legislative duties;
- resolve complaints about professionals and services within the family law system, including through the use of enforcement powers;
- improve the functioning of the family law system through inquiries, either of its own motion or at the request of government;
- be informed by the work of the Children and Young People's Advisory Board (Proposal 7–13);
- raise public awareness about the roles and responsibilities of professionals and service providers within the family law system; and
- make recommendations about research and law reform proposals to improve the system.

Proposal 12–2 The Family Law Commission should have responsibility for accreditation and oversight of professionals working across the system. In discharging its function to accredit and oversee family law system professionals, the Family Law Commission should:

- develop Accreditation Rules;
- administer the Accreditation Rules including the establishment and maintenance of an Accreditation Register;
- establish standards and other obligations that accredited persons must continue to meet to remain accredited, including oversight of training requirements;
- establish and administer processes for the suspension or cancellation of accreditation; and
- establish and administer a process for receiving and resolving complaints against practitioners accredited under the Accreditation Rules.

Proposal 12–3 The Family Law Commission should have power to:

- conduct own motion inquiries into issues relevant to the performance of any aspect of the family law system;
- conduct inquiries into issues referred by government relevant to the performance of any aspect of the family law system; and
- make recommendations to improve the performance of an aspect of the family law system as a result of an inquiry.

Proposal 12–4 The Family Law Commission should have responsibility for raising public awareness about the family law system and the roles and responsibilities of professionals and services within the system.

Proposal 12–5 The Family Law Commission should have responsibility for providing information and education to family law professionals and service providers about their legislative duties and functions.

Proposal 12–6 The Family Law Commission should identify research priorities that will help inform whether the family law system is meeting both its legislative requirements and its public health goals.

Proposal 12–7 The Australian Government should build into its reform implementation plan a rigorous evaluation program to be conducted by an appropriate organisation.

Proposal 12–8 The Australian Government should develop a cultural safety framework to guide the development, implementation and monitoring of reforms to the family law system arising from this review to ensure they support the cultural safety and responsiveness of the family law system for client families and their children. The framework should be developed in consultation with relevant organisations, including Aboriginal and Torres Strait Islander, culturally and linguistically diverse, and LGBTIQ organisations.

Proposal 12–9 The cultural safety framework should address:

- the provision of community education about the family law system;
- the development of a culturally diverse and culturally competent workforce;
- the provision of, and access to, culturally safe and responsive legal and support services; and
- the provision of, and access to, culturally safe and responsive dispute resolution and adjudication processes.

Proposal 12–10 Family law service providers should be required to provide services that are compliant with relevant parts of the cultural safety framework.

Proposal 12–11 Privacy provisions that restrict publication of family law proceedings to the public, currently contained in s 121 of the *Family Law Act 1975* (Cth) should be maintained, with the following amendments:

- s 121 should be redrafted to make the obligations it imposes easier to understand;
- an explicit exemption to the restriction on publication or dissemination of accounts of proceedings should be provided for providing accounts of family law proceedings to professional regulators, and for use of accounts by professional regulators in connection with their regulatory functions;
- an avoidance of doubt provision should be inserted to clarify that government agencies, family law services, service providers for children, and family violence service providers are not parts of the 'public' for the purposes of the provision;

- the offence of publication or dissemination of accounts of proceedings should only apply to public communications, and legislative provisions should clarify that the offence does not apply to private communications; and
- to ensure public confidence in family law decision making, an obligation should be placed on any courts exercising family law jurisdiction, other than courts of summary jurisdiction, to publish anonymised reports of reasons for decision for final orders.

Question 12–1 Should privacy provisions in the *Family Law Act 1975* (Cth) be amended explicitly to apply to parties who disseminate identifying information about family law proceedings on social media or other internet-based media?

Question 12–2 Should a Judicial Commission be established to cover at least Commonwealth judicial officers exercising jurisdiction under the *Family Law Act 1975* (Cth)? If so, what should the functions of the Commission be?

Appendix F
List of Submissions to the Issues Paper and Discussion Paper

Submissions to Issues Paper (IP48)

1. TASC National
2. Anglicare SA
3. Far North Coast Family Law Practitioners Association (FNCFLPA)
4. Churches of Christ Care
5. Youth Affairs Council of South Australia
6. P Theobald
7. Fitzroy Legal Service and Darebin Community Legal Centre
8. Western Sydney CLC
9. Family Life
10. People with Disability Australia (PWDA)
11. Relationships Australia
12. Australian Dispute Resolution Advisory Council Inc (ADRAC)
13. Australia Bar Association
14. National LGBTI Health Alliance
15. Safe Steps Family Violence Response Centre
16. Queensland Family and Child Commission
17. Albury Wodonga Family Law Pathways Network
18. The Royal Australian and New Zealand College of Psychiatrists
19. R Stanfield
20. Drummond Street Services
21. V Sinclair
22. A Tate

23. Domestic Violence Victoria
24. Central Australian Women's Legal Service (CAWLS)
25. Australian Association of Social Workers
26. Berry Street
27. Family Law Practitioners Association WA
28. Setting the Record Straight for the Rights of the Child
30. Peninsula Community Legal Centre
31. Australasian Centre for Human Rights and Health
32. No to Violence
33. Domestic Violence Legal Workers' Network of WA
34. Community Legal Centres NSW
35. D Bryant
36. Mallee Family Care
37. Office of the Public Advocate
38. Migrant Women's Lobby Group of SA
39. Professor B Fehlberg, L Sarmas and Professor J Morgan
40. Women's Law Centre of WA
41. Australian Institute of Family Law Arbitrators and Mediators
42. ATSILS Qld
43. Law Council of Australia
44. Domestic Violence NSW
45. Women's Legal Services Australia
46. T Murdock, Dispute Management Australia
47. R Honey, Murdoch University
48. Dr C Turnbull
49. Court Network
50. Koori Caucus Working Group on Family Violence
51. Caxton Legal Centre
52. M Wood
53. Family & Relationship Services Australia

54. Human Rights Law Centre
55. Australian Psychological Society
56. P Curry
57. Women Lawyers of Western Australia
58. Domestic Violence Action Centre
59. Family Relationship Centre Port Augusta
60. F Kelly
61. Victoria Legal Aid
62. Relationships Australia South Australia
63. National Family Violence Prevention Legal Services Forum
64. Aboriginal Legal Service of Western Australia
65. Federation of Community Legal Centres (Victoria)
66. R Davies
67. C Cassidy
68. Family Court of Australia
69. Family Law Practitioners Association of Tasmania
70. Resolution Institute
71. M Westby
72. PeakCare Queensland Inc
73. Access Community Services Ltd
74. A Weller
75. T Quinn
76. Brimbank Melton Community Legal Centre
77. Dr B Batagol
78. Family Inclusion Network Queensland (Townsville)
79. CatholicCare Sydney
80. Bar Association of Queensland
81. Hunter Community Legal Centre
82. The Humanitarian Group
83. Mediator Standards Board

84. Victorian Women Lawyers

85. Seniors Rights Service

86. The Benevolent Society

87. Public Advocate & Children and Young People Commissioner, ACT Human Rights Commission

88. Law Society of South Australia

89. Liberty Victoria, Rights Advocacy Project

90. Advocacy for Inclusion

91. Victorian Association of Collaborative Professionals

92. Z Rathus

93. ASD Family Legal

94. D Plummer

95. NSW Bar Association

96. Families for Children's Rights: The Australian Movement

97. I Vann

98. J Szyndler

99. Lone Fathers Association of Australia

100. Women's Legal Service Victoria

101. Victorian Aboriginal Legal Service

102. Centre for Excellence in Child and Family Welfare

103. P Law

104. Associate Professor B Smyth

105. Women's Rights Group, Monash Law Student Society Just Leadership Program

106. Rainbow Families Victoria

107. Interact Support Inc

108. NSW Young Lawyers Family Law Committee, Law Society of NSW

109. Centre for Innovative Justice, RMIT University

110. M Job and H Meagher

111. E Schindeler

112. R Watton

113. National Judicial College of Australia

114. Relationships Australia Northern Territory
115. CatholicCare Victoria Tasmania (CCVT)
116. Djirra Letter
117. S Fitzroy-Mendis
118. For Kids Sake
119. D Redford
120. Unchain My Heart and National Council of Jewish Women of Australia
121. South Australian Bar Association
122. Joint NATSIWA, Harmony, and AWAVA
123. L Bowen
124. Inner City Legal Centre
125. Centacare Family Relationship Services
126. Interrelate
127. O Hirsig
128. YFoundations
129. Relationships Australia Victoria
130. Hume Riverina Community Legal Service
131. R Alexander
132. Hon Professor R Chisholm AM
133. R Saladino
134. White Ribbon Australia
135. FMC Mediation and Counselling
136. CPSU
137. Marrickville Legal Centre
138. Grandparents Victoria
139. Parenting Coordination Australia
140. Farrar Gesini Dunn
141. Gowland Legal
142. R Hainsworth
143. Family Law Practitioners Association of Queensland

144. Australian Association of Collaborative Professionals
145. J Webb
146. Relationships Australia Qld and Culshaw Miller Lawyers
147. The Parenting Centre
148. Bravehearts Foundation Ltd
149. ODRI
150. Queensland Council of Social Service
151. S Thompson
152. Anglicare WA
153. Women's Domestic Violence Court Advocacy Services NSW
154. Law Society of NSW
155. MELCA
156. ANROWS
157. NATSILS
158. Women's Legal Service Queensland
159. Townsville Community Legal Service
160. Collaborative Practice Canberra
161. Springvale Monash Legal Service
162. Uniting
163. National Legal Aid
164. Wirringa Baiya Aboriginal Women's Legal Centre
165. D Cooper
166. Research team Z Rathus AM, Dr S Jeffries, Dr H Menih, Professor R Field
167. Rape & Domestic Violence Services Australia
168. N Ciffolilli
169. C Fitzpatrick, E Hooper, C Hooper and J Dmitrovic
170. Queensland Association of Collaborative Practitioners
171. AC.CARE
172. Dr M Fernando
173. H Robert

174. R Kerr
175. D Loveday
176. Professor M Keyes
177. Chidambara Raj C.B.
178. M Packer
179. J Wangmann, T Booth and M Kaye of UTS Faculty of Law
180. Feminist Legal Clinic
181. Queensland Indigenous Family Violence Legal Service
182. Women's Council for Domestic and Family Violence Services WA
183. U Chowdhury, A Rimovetz, E Post and S Davis
184. M Brandon
185. R Chen
186. Dr C May
187. R Grayson
188. R Tilbrook
189. Intersex Human Rights Australia
190. ANU Law Reform and Social Justice
191. Dr S Meyer
192. M Thorley
193. ACT LGBTIQ Ministerial Advisory Council
194. Sex Workers Outreach Project
195. R Singh
196. A Kennedy
197. CatholicCare Diocese of Broken Bay
198. Lander & Rogers
199. R Khosa
200. Toowoomba and South West Queensland Family Law Pathways Network
201. Collaborative Professionals (NSW) Inc
202. National Council of Women of Australia (NCWA)
203. Dr A Gearing

204. Yourtown
205. Think Law Group Pty Ltd
206. Australian Institute of Family Studies (AIFS)
207. Australian Children's Contact Service Association
208. Rainbow Territory
209. P Bachmann
210. Aboriginal Legal Service (NSW and ACT)
211. Dr L Steele
212. Rainbow Families NSW
213. Women's Legal Service Victoria
214. St Kilda Legal Services
215. M Kaye
216. S Christie
217. Australian Human Rights Commission
218. Women's Legal Service NSW
219. Outer West Domestic Violence Network
220. M Paul
221. Queensland Law Society
222. Moores and MELCA
223. C Williams
224. M Jackson
225. H Burgess
226. J Zeleznikow
227. K Fitzpatrick
228. Australian Paralegal Foundation
229. Surrogacy Australia
230. Justice for Children Australia
231. Eeny Meeny Miney Mo Foundation
232. Association of Family and Conciliation Courts Australian Chapter
233. Dr D Tustin

234. P Easteal

235. Loddon Campaspe Community Legal Centre and Goulburn Valley Community Legal Centre

236. The National Council of Single Mothers and Their Children

237. M Derry

238. S Mison-Popow

239. Australian Association for Infant Mental Health

240. L Hudson

Submissions to Discussion Paper (DP86)

256. Attorney-General's Department

257. Global Mobility Immigration Lawyers and Migration Agents

258. Association of Family and Conciliation Courts Australian Chapter

259. Drummond Street Services

260. Resolution Institute

261. J Howieson, R Carroll, S Murray, I Murray, L Young, L Jarvis, D Hansen and F Lester

263. Peninsula Community Legal Centre

264. Rainbow Families Victoria

265. Australian Children's Contact Service Association

266. Dr D Tustin

267. Relationships Australia Victoria

268. Uniting

269. Family Law Pathways Network Greater Melbourne

270. Association of Superannuation Funds of Australia

271. Megan Mitchell, National Children's Commissioner

272. Economic Abuse Reference Group

273. Greater Brisbane Family Law Pathways Network

274. Speech Pathology Australia

275. Sporting Shooters' Association of Australia

276. Legal Profession Board of Tasmania

277. Victorian Legal Services Board and Commissioner
278. ANROWS
279. Bravehearts
280. Royal Australian and New Zealand College of Psychiatrists
281. Australian Psychological Society
282. Dr M Livermore
283. Centre for Excellence in Child and Family Welfare
284. Domestic Violence Victoria
285. Law Council of Australia
286. Women's Legal Service Qld
287. Rape & Domestic Violence Services Australia
288. Marrickville Legal Centre
289. Prof R Carroll
290. NATSILS
291. Anglicare Australia
292. Caxton Legal Centre
293. National Family Violence Prevention Legal Services
294. Hume Riverina Community Legal Service
295. Australian Association of Social Workers
296. M Kaye
297. National Legal Aid
298. Z Rathus
299. Grant Bowen
300. Lucy Trethewey
301. Roland Bow
302. William Fleming
303. Child Support Australia
304. K Payne
305. Dr David Thorp
306. Megan Loukes

307. Partnerships Victoria
308. Hon Mary Finn
309. Family Life
310. Mallee Family Care
311. Family Court of Western Australia
312. UnitingCare Queensland
313. NSW Gay and Lesbian Rights Lobby
314. Liberal Democratic Party
315. CatholicCare Sydney
316. Surrogacy Australia
317. Relationships Australia National
318. Crystal Peterson
319. Prof Belinda Fehlberg
320. Donna Cooper
321. Alastair Lawrie
322. Brimbank Melton Community Legal Centre
323. National LGBTI Health Alliance
324. NSW Legal Services Commissioner
325. Jacqueline Campbell
326. Australian Association of Collaborative Professionals
327. Dr Michelle Fernando and Dr Nicola Ross
328. Victorian Association of Collaborative Professionals
329. John Drake
330. Michael Packer
331. Helen Couzner
332. Swaab
333. Victorian Judicial Advisory Group in Family Violence
334. Central Coast Family Law Pathways Network
335. Emily Schindeler
336. Fitzroy Legal Service and Darebin Community Legal Service

337. MELCA
338. Portable
339. Mediator Standards Board
340. Women's Legal Service NSW
341. Patrick Parkinson
342. Justine Sturgiss
343. Jason Kirkpatrick
344. Megan Morris and Kim Halford
345. James Reid
346. Macarthur Legal Centre
347. Ruth Hainsworth
348. Christopher Turnbull
349. Andrew Lancaster
350. Aldrin Mendonca
351. Adam Peaty
352. Lesley Laing, Cathy Humphreys, Susan Heward-Belle and Georgia Ovenden
353. Sherika Ponniah and Meera Klemola
354. Dr L Steele
355. Family Law Reform Coalition
356. Luke Hoskin
357. Lander & Rogers Lawyers
358. Richard Russell
359. Baptist Care Australia
360. SA Commissioner for Children and Young People
361. Elizabeth Pinna
362. Family Inclusion Network Qld Townsville Inc
363. Domestic Violence NSW
364. Rainbow Families NSW
365. Rami Singer
366. Women's Legal Services Australia

367. LGBTI Legal Service
368. Family Law Practitioners' Association Qld
369. Don Huggins
370. Townsville Community Legal Service Inc
371. Good Shepherd Australia New Zealand
372. Shoalcoast Community Legal Centre Inc
373. NSW Bar Association
374. Nick Hansen
375. Victoria Legal Aid
376. HESTA
377. Domestic and Family Violence Death Review and Advisory Board
378. Queensland Council of Social Service (QCOSS)
379. Australian Women Against Violence Alliance (AWAVA)
380. Aboriginal Legal Service (NSWACT)
381. Aboriginal Justice Caucus Working Group on Family Violence
382. Inner City Legal Centre
383. Domestic Violence Prevention Centre, Gold Coast Inc
384. ATSILS (Qld)
385. Community Legal Centres NSW
386. Australian Dispute Resolution Advisory Council (ADRAC)
387. Law Institute of Victoria
388. Yourtown
389. Interact Support Inc
390. Judicial Council of Cultural Diversity
391. Commissioner for Children and Young People WA
392. JFA Purple Orange
393. Fighters Against Child Abuse Australia
394. Patricia Easteal and Lisa Young
395. Susan De Campo and Amelia De Campo
396. Australian Institute of Family Studies (AIFS)

397. Neil Jackson
398. No to Violence
399. Advocacy for Inclusion
400. Family Court of Australia
401. Hon Jenny Mikakos, Minister for Families and Children
402. Women with Disabilities Victoria
403. Z Rathus, H Menih, S Jeffries, R Field
404. CASA Forum Victorian Centres Against Sexual Assault
405. Office of the Public Advocate VIC
406. Community and Public Sector Union (CPSU)
407. Family and Relationship Services Australia
408. Safe Steps Family Violence Response Centre
409. People with Disability Australia
410. Family Law Practitioners' Association of Western Australia (Inc)
411. Monash Gender and Family Violence Prevention Centre
412. Gadens
413. Women's Legal Service Victoria
414. Commonwealth Director of Public Prosecutions
415. Family Law Practitioners' Association of Tasmania
416. Interrelate Limited
417. Women's Domestic Violence Court Advocacy Service
418. Intersex Human Rights Australia
419. Magistrates Court of Victoria and Children's Court of Victoria
420. C Blanchfield et al
421. For Kids Sake
422. Julia Meyerowitz-Katz
423. Blue Sky Lawyers
424. CatholicCare
425. Better Place
426. Uniting Communities

Appendix G
Examples of Redrafted Provisions

This Appendix sets out suggested drafting of particular provisions in the *Family Law Act*. Recommendations 5, 7, 38, 39 and 41 involve substantive changes to the law. Recommendation 42 involves simplification and clarification of the law together with a small number of substantive changes to the law. Recommendation 55 involves simplification and clarification of the law without substantive change.

Recommendation 5 (to replace existing s 60CC):

How a court determines what is in a child's best interests

When determining what child orders are most likely to be in a child's best interests, the court may consider:

(a) what arrangements best promote the safety of the child and the child's carers, including safety from family violence, abuse, or other harm;

(b) any relevant views expressed by the child;

(c) the developmental, psychological and emotional needs of the child;

(d) the benefit to the child of being able to maintain relationships with each parent and other people who are significant to the child, where it is safe to do so;

(e) the capacity of each proposed carer of the child to provide for the child's developmental, psychological and emotional needs, having regard to the carer's ability and willingness to seek support to assist them with caring; and

(f) anything else that is relevant to the particular circumstances of the child.

Recommendation 7 (to replace existing s 61DA):

Presumption of joint decision-making about major long-term issues when making parenting orders

(1) When making a child order, the court must apply a presumption that it is in

the child's best interests for the child's parents to have joint decision-making responsibility for major long-term issues relating to the child.

(2) The presumption does not apply if the court has reasonable grounds to believe that the child's parent (or a person who lives with the child's parent) has engaged in child abuse or family violence.

(3) The presumption may be rebutted by evidence that it would not be in the child's best interests for the parents to have joint decision-making responsibility for major long-term issues relating to the child.

(4) When the court is making an interim order, it may decline to apply the presumption if applying it would not be appropriate in the circumstances.

Comments on suggested draft

The draft implements Recommendation 7 by replacing the s 61DA presumption of 'equal shared parental responsibility' with a presumption of 'joint decision-making about major long-term issues'. It also seeks to make the provision easier to understand (Recommendation 55). The following measures have been taken to make the provision easier to understand.

The wording of the proposed revision makes the note to existing subs (1) unnecessary. The proposed section uses shorter phrases (eg 'the child's best interests' instead of 'the best interests of the child') and omits unnecessary words (eg 'unless the court considers that' in existing s 61DA (3)).

It also amends the exception in subs (2) to refer to 'child abuse' generally rather than confine it to abuse of a child who is a member of the family. (This removes a complication, and there seems no good reason to apply the presumption if a parent has abused *another* child. The proposed revision also adds precision to subs (2) by substituting 'if the court has reasonable grounds' for 'if there are reasonable grounds'.

The draft provision is 132 words and replaces a provision of 229 words.

Recommendation 38:

Unless the court orders otherwise, final child orders made after a contested hearing are taken to include an order that the parties must meet with a family consultant to assist their understanding of the final child orders.

Recommendation 39:

(1) In all contested proceedings for final child orders,

(a) the court may make an order requiring the parties to meet with a family consultant for the purposes of receiving post-order case management, and

(b) the court must consider whether to make such an order.

(2) When an order is made under Subsection (1), the appointed family consultant may request the court to place the matter in a contravention list or recommend that the court make additional orders directing a party to attend a post-separation child program.

Recommendation 41:

Fresh application for child order

Where a final child order applies to a child, and a person makes an application for a different child order (other than by consent), the court must consider whether:

(a) there has been a significant change of circumstances since the final order was made; and

(b) it is in the child's best interests for the final order to be reconsidered.

Comments on suggested draft

The suggested draft would implement Recommendation 41 by codifying the principle in *Rice & Asplund.*

Recommendation 42 (to replace existing Div 13A):

Providing for child's needs after child orders have been made

Division 1: General

1. Persons not to act contrary to child orders

When a child order has been made, a person must not act contrary to or frustrate the operation of the order, for example by:

(a) removing a child from the care of a person; or

(b) placing a child with a person; or

(c) delivering or refusing to deliver a child to a person; or

(d) interfering with the exercise or performance of any of the powers, duties or responsibilities that a person has under the order.

2. Court may issue warrant for arrest of alleged offender

The court may issue a warrant authorising a person to whom it is addressed to arrest a person (the alleged offender) if the court is satisfied, on application by a party to a child order:

(a) that there are reasonable grounds for believing that the alleged offender has contravened section 1;

(b) that there is an application before the court for the person to be dealt with under this Division for the alleged contravention; and

(c) that the issue of a warrant is necessary to ensure that the alleged offender will attend before a court to be dealt with under this Division for the alleged contravention.

A warrant stops being in force on the date specified in the warrant, or, if no date is specified, 6 months after the issue of the warrant.

3. Meaning of contravene an order

A person is taken to have contravened a child order if:

(a) the person is bound by the order and has intentionally failed to comply with it, or has made no reasonable attempt to comply with it; or

(b) the person has intentionally prevented compliance with the order by a person who was bound by it, or has aided or abetted a contravention of the order.

Note:

Child orders may be subject to a subsequent child care plan (see s [64D]). This means that an action that would otherwise contravene a child order may not be a contravention, because of a subsequent inconsistent child care plan. Whether this is the case or not depends on the terms of the child order.

4. Standard of proof

In proceedings under this Division:

(a) The court may make an order under s 12 [community service; fine; imprisonment] against a person only if satisfied beyond reasonable doubt that the person contravened the child order.

(b) In relation to other matters, the standard of proof is proof on the balance of probabilities.

Division 2: Measures available to address underlying problems

5. Court may vary an existing child order, order additional time, or refer parties to a program

At any stage of proceedings under this Division, if it considers it desirable to do so, the court may do any of the following:

(a) vary a child order;

(b) suspend the operation of the whole or any part of a child order for a specified time;

(c) where a child has not spent time with a person as required by a child order, make an order that the child spend time with a person in lieu of the time that did not take place under the child order; or

(d) recommend or make an order requiring that one or more parties attend a post-separation child program or other specified program to support compliance with, or resolve difficulties relating to, a child order.

6. Service provider to be notified

(1) If the court makes an order under s 5(d) [requiring a party to attend a program], unless the court otherwise orders, the principal executive officer of the court shall:

(a) ensure that the provider of the program concerned is notified of the making of the order, and

(b) request the provider to inform the court, and the other party or parties

to the proceeding, if the provider considers that a person ordered to attend the program is unsuitable to attend it, or has failed to attend the entire program.

(2) The court may make such orders as it considers appropriate if a person ordered to attend the program has been assessed as unsuitable to attend it, or has failed to attend any part of the program.

Division 3: Reasonable Excuse

7. No order to be made under ss 11 or 12 if contravener proves reasonable excuse

(1) No order is to be made under ss 11 or 12 of this Division where a person who has contravened a child order satisfies the court that he or she has a reasonable excuse for the contravention.

(2) The circumstances in which a person has a reasonable excuse for contravening a child order include, but are not limited to, the circumstances set out in ss 8 and 9.

Note 1: Even when a person has a reasonable excuse for contravening a child order, the court has power to make the orders provided for in s 5.

Note 2: The court's power to make costs orders under s 117 may be exercised in cases where a person has a reasonable excuse for contravening a child order (as well as in other cases).

8. Reasonable excuse where the person did not understand the obligations under the order and ought to be excused

(1) A person has a reasonable excuse for contravening a child order if the court is satisfied:

(a) that the person contravened the order because, or substantially because, at the time of the contravention he or she did not understand the obligations imposed by the order; and

(b) that the person ought to be excused in respect of the contravention.

(2) If a court decides that the person had a reasonable excuse for this reason, the court shall explain, in language the person is likely to understand, the obligations imposed by the order and the possible consequences if the person fails to comply with the order in future.

9. Reasonable excuse where contravention was reasonably believed necessary to protect health or safety

A person ('the respondent') has a reasonable excuse for contravening a child order if the court is satisfied that:

(a) at the time of the contravention the respondent believed on reasonable grounds that the person's actions were necessary to

protect the health or safety of a person (including a child); and

(b) any period during which, because of the contravention, the child did not live with or spend time with a person in accordance with the child order was not longer than a period of time the court considers was reasonably necessary to protect the person's health or safety.

Division 4: Orders where person has contravened a child order and has not proved a reasonable excuse

10. Principles relating to making orders under ss 11 and 12

In considering what orders, if any, to make under ss 11 or 12, as well as having regard to other relevant matters, the court should have regard to:

(a) the importance of compliance with child orders;

(b) the seriousness of the contravention;

(c) whether the person who contravened the order had previously been found by a court exercising power under this Act to have contravened a child order, or had behaved in a way that showed a serious disregard of obligations under the order;

(d) the likely effects of the order on any child or other person; and

(e) the behaviour of any person with whom the child is to live or spend time under the child order.

11. Orders for less serious contraventions: compensation; bond

In proceedings under this Division, if:

(a) the court is satisfied that a person has contravened a child order; and

(b) the person does not satisfy the court that he or she has a reasonable excuse;

the court may, subject to this Division, make one or more of the following orders:

(c) where the respondent's contravention resulted in a person not spending time with a child or living with a child as provided in the order, an order requiring the respondent to compensate the person for some or all of the expenses reasonably incurred as a result of the contravention; and

(d) an order requiring a person to enter into a bond, as provided in s 13.

12. Orders for more serious contraventions: community service; fine; imprisonment

(1) In proceedings under this Division,

(a) if the court is satisfied beyond reasonable doubt that a person has contravened a child order; and

(b) the person does not satisfy the court on the balance of probabilities that he or she has a reasonable excuse,

the court may, subject to this Division, make one or more of the following orders:

(c) any order referred to in s 11; or

(d) an order requiring a person to perform community service, as provided in s 14; or

(e) an order imposing a fine, of not more than 60 penalty units; or

(f) an order imposing a term of imprisonment, as provided in s 15.

(2) The court shall not make an order under this section if it considers that it would be more appropriate to deal with the matter by way of an order under ss 5 or 11.

13. Matters relating to bonds

When the court makes an order under s 11 requiring the person who committed the contravention to enter into a bond:

(a) The bond is to be for a specified period of up to 2 years, and may be with or without surety, and with or without security.

(b) The court may impose one or more conditions, including conditions that require the person:

(i) to attend appointments with a family consultant; or

(ii) to attend family counselling; or

(iii) to attend family dispute resolution; or

(iv) to be of good behaviour.

(c) The court shall explain to the person, in language the person is likely to understand:

(i) the purpose and effect of the requirements; and

(ii) the consequences that may follow if the person fails to enter into the bond or enters into the bond but then fails to act in accordance with it.

14. Matters relating to community service orders

(1) The court may make a community service order under s 12 if:

(a) the proceedings are heard in a State or Territory where laws of that State or Territory provide for a community service order of any kind to be made against a person convicted of an offence; and

(b) an agreement under s 70NFI is in force in the State or Territory.

(2) The order may not regulate the person's conduct beyond 500 hours or such lesser period as is prescribed in relation to the State or Territory.

(3) The order ceases to have effect 2 years after it was made, or after such lesser period as is specified in the order.

(4) To the extent provided by the regulations, the laws of the State or Territory with respect to a community service order made under those laws apply in relation to the order.

(5) Before making the community service order, the court shall explain to the person, in language the person is likely to understand,

(a) the purpose and effect of the proposed order;

(b) the consequences that may follow if the person fails to comply with the order or with any requirements made in relation to the order; and

(c) that the proposed order may be revoked or varied (if that is the case) at any time during the term imposed.

(6) If the community service order was made by the Family Court of Australia or the Federal Circuit Court of Australia, either of those courts may vary or discharge it. If the order was made by any other court, that court and the Family Court of Australia may vary or discharge it. The court may give directions as to the effect of the variation or discharge that the court considers appropriate.

(7) An arrangement made under s 112AN for or in relation to the carrying out of sentences imposed, or orders made, under Division 2 of Part XIIIA is taken to extend to the carrying out of sentences imposed, or orders made, under this Subdivision.

15. Matters relating to imprisonment

(1) The court may under s 12 sentence the person to a term of imprisonment expressed to be:

(a) for a specified period of 12 months or less; or

(b) for a period ending when the person:

(i) complies with the order concerned; or

(ii) has been imprisoned under the sentence for 12 months or such lesser period as is specified by the court;

whichever happens first.

(2) A court must not sentence a person to imprisonment under s 12 unless it is satisfied that, in all the circumstances of the case, it would not be appropriate to deal with the contravention by making other orders under this Subdivision.

(3) If a court sentences a person to imprisonment under s 12, the court must state the reasons why it is satisfied it would not be appropriate to deal with the contravention by making other orders under this Subdivision. However, a failure by a court to comply with this subsection does not invalidate a sentence.

(4) A court that sentences a person to imprisonment under s 12 may:

(a) suspend the sentence upon the terms and conditions determined by the court; and

(b) terminate such a suspension.

(5) A court, when sentencing a person to imprisonment under s 12, may, if it considers it appropriate, direct that the person be released upon entering into a bond described in subsection (6) after the person has served a specified part of the term of imprisonment.

(6) A bond for the purposes of subsection (5) is a bond (with or without surety or security) that the person will be of good behaviour, for a specified period of up to 2 years, and/or comply with the terms of a specified order of the court.

(7) A court that has sentenced a person to imprisonment under s 12 may at any time order the release of the person if it is satisfied that the person will, if released, comply with the court's orders.

(8) To avoid doubt, the serving by a person of a period of imprisonment under s 12 for failure to make a payment under a child maintenance order does not affect the person's liability to make the payment.

16. Imprisonment not to be imposed for a child maintenance contravention unless contravention intentional or fraudulent

The court must not make an order imposing a sentence of imprisonment on a person under s 12 in respect of a contravention of a child maintenance order made under this Act unless the court is satisfied that the contravention was intentional or fraudulent.

17. Imprisonment not to be imposed for certain contraventions relating to child support

The court must not make an order imposing a sentence of imprisonment on a person under s 12 in respect of:

(a) a contravention of an administrative assessment of child support made under the *Child Support (Assessment) Act 1989*; or

(b) a breach of a child support agreement made under that Act; or

(c) a contravention of an order made by a court under Division 4 of Part 7 of that Act for a departure from such an assessment (including such an order that contains matters mentioned in s 141 of that Act).

Division 5: Other matters

18. Relationship between this Division and other laws

(1) This section applies where an act or omission by a person who is the subject of proceedings under this Division is also the subject of a prosecution for an offence against any law.

(2) If the person is prosecuted in respect of the act or omission, the court shall dismiss the proceedings under this Division, or adjourn them until the prosecution has been completed.

(3) Nothing in this Division renders a person liable to be punished twice in respect of the same act or omission.

19. Arrangements with States and Territories for carrying out of sentences and orders

An arrangement made under s 112AN for or in relation to the carrying out of sentences imposed, or orders made, under Division 2 of Part XIIIA is taken to extend to the carrying out of sentences imposed, or orders made, under this Subdivision.

20. Division does not limit operation of s 112AP (contempt)

Nothing in this Division is intended to limit the operation of s 112AP (contempt).

21. Matters relating to costs applications

1. In any application for costs under s 117 arising from proceedings under this Division, the court may consider, among other relevant matters, any previous contravention proceedings between the parties and the outcome of those proceedings.

2. The court shall make an order for costs under s 117 against a person who is found to have contravened an order and has not satisfied the court of a reasonable excuse unless the respondent satisfies the court that such an order should not be made.

Comments on suggested draft

This suggested redrafting of Division 13A closely reflects the drafting contained in Submission 132 to this Inquiry by the Hon Professor Richard Chisholm. Detailed commentary on the drafting can be found in that submission.

Recommendation 55 (Legislative Clarity):

To replace existing s 65DAB:

Court may have regard to child care plans

When considering what orders might be in the child's best interests the court may consider the terms of any current child care plan.

Comments on suggested draft

This proposed section illustrates a number of points. First, there are advantages in removing the prescriptive element. Most obviously, the prescriptive nature of the provision makes little sense in view of the wide discretion conveyed by the words 'if doing so would be in the best interests of the child'. Next, it seems unnecessary to formulate this simple matter as a requirement: the court would naturally take a child care agreement into account. The proposed section would draw the attention of the court and the parties to the likely value of considering any current child care plan, and in practice it seems likely that the more prescriptive version would achieve no more than this. Further, removing the prescriptive element could avoid unmeritorious appeals, and removes the need for excessive precision, enabling the provision to be more simply expressed.

Next, the language has been revised to make the provision shorter, simpler and easier to read. 'Child care plan' replaces 'parenting plan' in order to place the emphasis on the children and their needs. The simpler expression 'current child care plan' replaces the longer and more complex expression 'most recent parenting plan (if any) that has been entered into between the child's parents (to the extent to which that plan relates to the child)'. The opening words of the proposed section 'When considering what orders might be in the child's best interests' remove the need for more technical language. The proposed section has 23 words, the existing section 59 words.

To replace existing s 64D:

Child orders subject to later child care plans

Unless the court orders otherwise, a child order is subject to a later child care plan made between the parties to the proceedings and any other person to whom the child order applies.

Comments on suggested draft

The proposed revision makes a slight change in the law, by removing the requirement of 'special circumstances'. That requirement seems to have limited value, especially since it leaves the court with considerable discretion in deciding what are exceptional circumstances (note the word 'includes' in subs (3)). This change reduces the prescriptive element and enables the rather complex provisions of subs (2) and (3) to be removed.

The words 'other than the child' have been removed as unnecessary, and other language has been simplified. The intended result is a simple and sensible provision whose meaning is immediately apparent.

To replace existing s 68R:

State or Territory court making a family violence order may revive vary, discharge or suspend certain orders under this Act

Power

(1) When making or varying a final family violence order, a State or Territory court that has jurisdiction in relation to this Part may revive, vary, discharge or suspend any of the following orders:

(a) any order under this Act to the extent to which it expressly or impliedly requires or permits a person to spend time with a child;

(b) an undertaking given to, and accepted by, a court exercising jurisdiction under this Act; and

(c) a bond entered into under an order under this Act.

(2) The court may do so on its own initiative or on application by any person.

Limits on power

(3) The court must not make an order under this section unless it also makes or varies a family violence order in the proceedings, and has evidence that was not before the court that made that order or injunction.

(4) The court may vary, discharge or suspend an order that, when made or granted, was inconsistent with an existing family violence order only if the court is satisfied that it is appropriate to do so because a person has been exposed, or is likely to be exposed, to family violence as a result of the operation of that order or injunction.

Regulations may require order to be registered

(5) The regulations may require a copy of the court's decision to revive, vary, discharge or suspend an order, injunction or arrangement to be registered in accordance with the regulations. Failure to comply with such a requirement does not affect the validity of the court's decision.

Comments on suggested draft

The proposed subsection (1) replaces its counterpart by using a general description of the relevant orders rather that spelling them out. This avoids some repetition, and relieves the reader from having to consult other sections. Subsection (3) again avoids the reader having to consult other provisions in order to understand it. Similarly, the proposed subsection (4) is a simpler expression of the current subsection (5).

The wording of subsection (2) is based on the view that with simple matters there may be no need to have a separate sub-paragraph for each idea. Avoiding two subparagraphs reduces the appearance of complexity and may help to make the provisions easier to read. Subsection (4) of the existing section has been rendered unnecessary by the addition of the word 'final' in subsection (1). The draft, of 265 words, replaces provisions of 505 words.

To replace existing ss 65X–65ZD:

Division X Children not to be removed from Australia when certain child orders have been made or child proceedings are pending

Section 1 Parties must not remove children from Australia when certain child orders have been made or child proceedings are pending

(1) This Division applies when an interim or final child order provides that a person is to have parental responsibility for a child, or expressly or impliedly requires or permits a person to live with, spend time with or communicate with a child.

(2) This Division also applies when interim or final proceedings for a child order are pending.

(3) When such a child order is made, or when such proceedings are pending, a person who was a party to the proceedings in which the order was made, or a person who is acting on behalf of, or at the request of a party, must not take or send the child concerned from Australia to a place outside Australia except as permitted by

subsection (4).

Penalty: Imprisonment for 3 years.

Note: The ancillary offence provisions of the *Criminal Code*, including section 11.1 (attempts), apply in relation to the offence created by subsection (1).

(4) This Division does not prohibit taking or sending the child to a place outside Australia if:

(a) it is done with the written consent of each person in whose favour the child order was made or the consent of all the parties to the pending proceedings; or

(b) it is done in accordance with an order of a court made under this Part or under a law of a State or Territory; or

(c) if the person satisfies the court that he or she has a reasonable excuse.

Section 2 Owners of aircraft and vessels may not permit certain children to leave Australia after being served with a statutory declaration

(1) If this Division applies and a person in whose favour the order was made has served on the captain, owner or charterer of an aircraft or vessel a statutory declaration made by the person not earlier than 7 days before the date of service that relates to the order and complies with subsection (2).

(2) The statutory declaration must contain:

(a) full particulars of the order, including:

(i) the full name and the date of birth of the child to whom the order relates;

(ii) the full names of the parties to the proceedings in which the order was made; and

(iii) the terms of the order; and

(b) such other matters (if any) as are prescribed in the regulations.

(3) The person on whom the declaration is served must not permit the child identified in the declaration to leave a port or place in Australia in the aircraft or vessel for a destination outside Australia except as permitted by subsection (3).

Penalty: 60 penalty units.

(4) The person is not guilty of an offence under this section if the court is satisfied that

(a) the child leaves in the company, or with the consent in writing (authenticated as prescribed), of the person who made the statutory declaration; or

(b) the child leaves in accordance with an order of a court made, under this Part or under a law of a State or Territory, at the time of, or after, the making of the order; or

(c) the person has a reasonable excuse.

(5) A statutory declaration under s 2 may be served on the owner or charterer of an aircraft or vessel, or on the agent of the owner of an aircraft or vessel, by sending it by registered post addressed to the owner, charterer or agent at the person's principal place of business.

(6) The captain, owner or charterer of an aircraft or vessel, or the agent of the owner of an aircraft or vessel, is not liable in any civil or criminal proceedings in respect of anything done in good faith for the purpose of complying with this Division.

Section 3 Person not to be punished twice for offence under this Division

If an act or omission by a person that constitutes an offence under this Division is also an offence against any other law, the person may be prosecuted and convicted under that other law, but nothing in this Division makes a person liable to be punished twice in respect of the same act or omission.

Section 4 Division does not affect State or Territory laws stopping children leaving Australia

Nothing in this Subdivision prevents or restricts the operation of any law of a State or Territory under which:

(a) action may be taken to prevent a child from leaving Australia or being taken or sent outside Australia; or

(b) a person may be punished in respect of the taking or sending of a child outside Australia.

Comments on suggested draft

The proposed revision is shorter than the existing provisions (806 not 1505 words). The headings and section titles are intended to indicate the subject matter more clearly. For example, the titles of proposed sections 1 and 2 use the active voice, emphasising the persons on whom the duty is cast. The subject matter is somewhat re-arranged in what is intended to be a more useful sequence, and attempts have been made to simplify the language while maintaining legal precision (which is particularly important for provisions that create offences).

Appendix H
Suggested Restructure of Children's Provisions

The first section of this Appendix outlines a suggested structure for legislative provisions relating to children. This is in accordance with Recommendation 55 on legislative simplification, and in particular the recommendations to:

- restructure the legislation to assist readability; and
- place in a new Family Law Act only those substantive provisions which indicate to parties how their dispute will be determined.

The second section of this Appendix includes a Table indicating the anticipated impact of the recommendations in this Report on each existing provision in Part VII of the *Family Law Act*.

Suggested structure for provisions relating to children

This Report recommends that a number of matters in Part VII of the current Act should be transferred to a new Family Law (Judicial and Administrative Provisions) Act. The suggested structure of provisions that follows is suggested as a suitable framework for the provisions relating to children that will be contained in the recommended new Family Law Act. For convenience, the significant relevant sections of the current Act are listed in order to indicate how the subject-matter would be distributed.

In this suggested framework the terms '*child orders*', '*child cases*' and '*child care plans*' are preferred to the current 'parenting orders', 'parenting proceedings' and 'parenting plans'. The proposed terms appear to have two advantages. First, and mainly, they focus on the children, who best interests are paramount. Second, they avoid the problem that 'parenting' is an awkward term to use since some children's proceedings involve parties who are non-parents, such as step-parents and other relatives.

Part 1: Providing for the child's needs: principles to guide courts and others in making arrangements for the care of children

(Certain provisions in existing Div 1, 6 and 9)

The subject matter that would be contained under this heading is approximately indicated by current sections 60CA, 60CB, 60CC, 60CE, 60CF 60CG, 61F, 61DA. (In accordance with recommendations in this Report, ss 60B and 65DAA would be repealed, and some other provisions, notably s 60CC and s 61DA, would be amended).

Part 2: Assisting parents to provide for child's needs without resort to litigation

(Certain provisions in existing Div 1 Sub-Div E, Div 2, Div 4)

Division 1: Parental responsibility: ss 61A–61D, 61E.

Division 2: Child care: ss 63A–63H.

Division 3: Family dispute resolution: ss 60I, 60J.

Part 3: Court proceedings and court orders in child cases

(Certain provisions in existing Div 5, Div 6, Div 8 Sub-div E, Div 9, Div 10, Div 12A)

Division 1: The court's powers

(1) Child orders: ss 64B, 64C, 65GF, 65J, 65M–65Q.

(2) Child care plans and child orders: ss 64D, 65DAB.

(3) Injunctions and other orders: ss 67ZC, 67ZD, 68B, 68C.

Division 2: Court proceedings in child's cases

(1) General: s 60CD.

(2) The Independent Children's Lawyer: ss 68L, 68LA, 68M.

(3) Manner of conducting child cases: ss 69ZM–69ZX.

(4) Matters relating to evidence in child cases: ss 69ZT–69ZX.

Division 3: Reports relating to children: ss 62A, 62G.

Part 4: Providing for the child's needs[1] for protection against violence, neglect and abuse

(Certain provisions in existing Div 1 Sub-div BA, Div 8 Sub-div D, Div 11, Div 12 Sub-div F)

Division 1: Sharing of information between court and child protection and other authorities: ss 60CH, 60CI.

Division 2: Cases involving allegations of child abuse or family violence: ss 67Z, 67ZA, 67ZB, 67ZBA, 67ZBB, 69ZW.

Division 3: Family violence orders and child orders: ss 68N, 68P, 68Q, 68R, 68S, 68T.

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1 Any provisions dealing with the safety of people other than children would be elsewhere in the Act.

Part 5: Providing for child's needs after child orders have been made

(Provisions in existing Div 13A and certain new provisions)

Sections 70NAA – 70NFJ. (Appendix G includes a suggested redrafting of these provisions, including some substantive amendments, in accordance with Recommendation 42.)

New provisions implementing Recommendations 38, 39 and 41 (see Appendix G).

Part 6: Location and recovery of children

(Provisions in existing Div 8 Sub-div C)

Division 1: Location orders and Information Orders: ss 67J, 67K, 67L 67M 67N, 67P.
Division 2: Recovery orders: ss 67Q, 67R, 67S, 67T, 67U, 67V, 67W, 67X, 67Y.

Impact of Recommendations on the Existing Provisions of the *Family Law Act*, Part VII—Children

This Table sets out the anticipated effect of the recommendations in this Report on each existing provision of Part VII of the *Family Law Act*. "Retain" means that the ALRC suggests the substance of the provision be retained, albeit the provision could be redrafted for simplification and readability in accordance with Recommendation 55. "Amend" means that the ALRC makes a formal recommendation in this Report for substantive amendment to the provision. "Repeal" means that the ALRC makes a formal recommendation in this Report for the repeal of the provision. "Location in proposed structure" indicates the suggested location of any provision which might be included in the amended legislation. Some provisions, such as those entitled "What this Division does", may become unnecessary if the suggested restructure and redrafting is implemented.

Current Provision	Recommendation	Location in proposed structure
Division 1—Introductory		
Subdivision A—What this Division does		
60A What this Division does	Revise for consistency with overall restructure and simplification of Act.	
Subdivision B—Object, principles and outline		
60B Objects of Part and principles underlying it	Repeal (Rec 4)	
60C Outline of Part	Revise for consistency with overall restructure and simplification of Act.	
Subdivision BA—Best interests of the child: court proceedings		
60CA Child's best interests paramount consideration in making a parenting order	Retain	Pt 1
60CB Proceedings to which subdivision applies	Retain	Pt 1
60CC How a court determines what is in a child's best interests	Amend (Rec 5, Appendix G)	Pt 1
60CD How the views of a child are expressed	Retain	Pt 1
60CE Children not required to express views	Retain	Pt 1

60CF Informing court of relevant family violence orders	Retain	Pt 1
60CG Court to consider risk of family violence	Retain	Pt 1
60CH Informing court of care arrangements under child welfare laws	Retain	Pt 4, div 1
60CI Informing court of notifications to, and investigations by, prescribed State or Territory agencies	Retain	Pt 4, div 1
Subdivision BB—Best interests of the child: adviser's obligations		
60D Adviser's obligations in relation to best interests of the child	Retain	Family Law (Judicial and Administrative Provisions) Act
Subdivision C—Interpretation and application of Part		
60E Application of Part to void marriages	Retain	Family Law (Judicial and Administrative Provisions) Act
Subdivision D—Interpretation—how this Act applies to certain children		
60EA,[2] 60F, 60G, 60H, 60HA, 60HB	Retain	Family Law (Judicial and Administrative Provisions) Act
Subdivision E—Family dispute resolution		
60I, 60J	Retain	Pt 2, div 3
Division 2—Parental responsibility		
61A, 61B, 61C, 61D	Retain	Pt 2, div 1
61DA Presumption of equal shared parental responsibility when making parenting orders	Amend (Rec 7, Appendix G)	Pt 1

2 The suggested placement of s 60EA Definition of *de facto partner* and other definitional provisions applies only unless the drafter may prefer to place all definitions together

61DB Application of presumption of equal shared parental responsibility after interim parenting order made	Amend for consistency with amendment of 61DA and repeal of 65DAA (Rec 7, Rec 8, Appendix G)	Pt 1
61E Effect of adoption on parental responsibility	Retain	Pt 2, div 1
61F Application to Aboriginal or Torres Strait Islander children	Retain	Pt 1
Division 3—Reports relating to children under 18		
62A What this Division does	Retain	Pt 3, div 3
62B Court's obligation to inform people to whom Part VII orders apply about family counselling, family dispute resolution and other family services	Retain	Family Law (Judicial and Administrative Provisions) Act
62G Reports by family consultants	Retain	Pt 3, div 3
Division 4—Parenting plans		
63A, 63B, 63C, 63CAA, 63D, 63DB, 63E, 63F, 63G, 63H	Retain	Pt 2, div 2
63DA Obligations of advisers	Retain	Family Law (Judicial and Administrative Provisions) Act
Division 5—Parenting orders—what they are		
64A, 64B, 64C	Retain	Pt 3, div 1
64D	Retain (see Appendix G)	Pt 3, div 1

Division 6—Parenting orders other than child maintenance orders		
Subdivision A—Introductory		
65A, 65AA, 65B	Revise for consistency with overall simplification and restructuring of Act.	
Subdivision B—Applying for and making parenting orders		
65C Who may apply for a parenting order	Retain	Family Law (Judicial and Administrative Provisions) Act
65D Court's power to make parenting order	Retain	Pt 3, div 1
65DAA Court to consider child spending equal time or substantial and significant time with each parent in certain circumstances	Repeal	
65DAB	Retain (see Appendix G)	Pt 3, div 1
65DAC, 65DAE, 65DA	Retain	Pt 3, div 1
65F, 65G	Retain	Family Law (Judicial and Administrative Provisions) Act
65H Children who are 18 or over or who have married or entered de facto relationships	Retain	Family Law (Judicial and Administrative Provisions) Act
65J Effect of adoption on parenting order	Retain	Pt 3, div 1
65K What happens when parenting order that deals with whom a child lives with does not make provision in relation to death of parent with whom child lives	Retain	Family Law (Judicial and Administrative Provisions) Act
65L Family consultants may be required to supervise or assist compliance with parenting orders	Amend (Rec 36, Appendix G)	Family Law (Judicial and Administrative Provisions) Act

65LA Court may order attendance at a postseparation parenting program	Retain	Family Law (Judicial and Administrative Provisions) Act
65LB Conditions for providers of postseparation parenting programs	Retain	Family Law (Judicial and Administrative Provisions) Act
Subdivision C—General obligations created by certain parenting orders		
65M, 65N, 65NA, 65P, 65Q	Retain	Family Law (Judicial and Administrative Provisions) Act
Subdivision D—Dealing with people who have been arrested		
65R, 65S, 65T, 65U, 65V, 65W	Retain	Family Law (Judicial and Administrative Provisions) Act
Subdivision E—Obligations under parenting orders relating to taking or sending children from Australia		
65X, 65Y, 65Z, 65ZA, 65ZB, 65ZC, 65ZD	Retain (see Appendix G)	Family Law (Judicial and Administrative Provisions) Act
Division 7—Child maintenance orders		
Subdivisions A – G: 66A, 66B, 66C, 66D, 66E, 66F, 66G, 66H, 66J, 66K, 66L, 66M, 66N, 66P, 66Q, 66R, 66S, 66SA, 66T, 66U, 66V, 66VA, 66W, 66X	Retain	Separate part of the Act relating to financial matters
Division 8—Other matters relating to children		
Subdivisions A – B: 67A, 67B, 67C, 67D, 67E, 67F, 67G	Retain	Separate part of the Act relating to financial matters
Subdivision C—Location and recovery of children		
67J, 67K, 67L, 67M, 67N, 67P	Retain	Pt 6, div 1

67Q, 67R, 67S, 67T, 67U, 67V, 67W, 67X, 67Y	Retain	Pt 6, div 2
Subdivision D—Allegations of child abuse and family violence		
67Z, 67ZA, 67ZB, 67ZBA, 67ZBB	Retain	Pt 4, div 2
Subdivision E—Other orders about children		
67ZC, 67ZD	Retain	Pt 3, div 1
Division 9—Injunctions		
68A, 68B, 68C	Retain	Pt 3, div 1
Division 10—Independent representation of child's interests		
68L, 68LA, 68LM	Retain	Pt 3, div 2
Division 11—Family violence		
68N, 68P, 68Q	Retain	Pt 4, div 3
68R	Retain (see Appendix G)	Pt 4, div 3
68S, 68T	Retain	Pt 4, div 3
Division 12—Proceedings and jurisdiction		
Subdivisions A—What this Division does; B—Institution of proceedings and procedure; C—Jurisdiction of courts		
69A, 69B, 69C, 69D, 69E, 69F, 69G, 69GA, 69H, 69J, 69K, 69L, 69M, 69N	Retain	Family Law (Judicial and Administrative Provisions) Act
Subdivision D—Presumptions of parentage		
69P – 69U	Retain (see Chapter 14)	Parentage Act
Subdivision E—Parentage evidence		
69V – 69ZD	Retain (see Chapter 14)	Parentage Act

Subdivisions F—Extension, application and additional operation of Part		
69ZE, 69ZF, 69ZG, 69ZH, 69ZJ, 69ZK	Retain	Family Law (Judicial and Administrative Provisions) Act
Subdivision G—Short form reasons for decisions relating to interim parenting orders		
69ZL Short form reasons for decisions relating to interim parenting orders	Retain	Family Law (Judicial and Administrative Provisions) Act
Division 12A—Principles for conducting child related proceedings		
Subdivisions A—Proceedings to which this Division applies; B—Principles for conducting childrelated proceedings; C—Duties and powers related to giving effect to the principles; D—Matters relating to evidence		
69ZM, 69ZN, 69ZO, 69ZP, 69ZQ, 69ZR, 69ZS, 69ZT, 69ZV, 69ZW, 69ZX	Retain	Pt 3, div 2
Division 13—State, Territory and overseas orders		
Subdivisions A—What this Division does; B—Registration of State and Territory orders; C—Registration of overseas orders; D—Transmission of Australian orders to overseas jurisdictions		
70A, 70C, 70D, 70E, 70G, 70H, 70J, 70K, 70L, 70M, 70N	Retain	Family Law (Judicial and Administrative Provisions) Act
Division 13A—Consequences of failure to comply with orders, and other obligations, that affect children		
Subdivisions A—Preliminary; B—Court's power to vary parenting order; C—Contravention alleged but not established; D—Contravention established but reasonable excuse for contravention; E—Contravention without reasonable excuse (less serious contravention); F—Contravention without reasonable excuse (more serious contravention)		

70NAA, 70NAB, 70NAC, 70NAD, 70NAE, 70NAF, 70NBA, 70NBB, 70NCA, 70NCB, 70NDA, 70NDB, 70NDC, 70NEA, 70NEB, 70NEC, 70NECA, 70NED, 70NEF, 70NEG, 70NFA, 70NFB, 70NFC, 70NFD, 70NFE, 70NFF, 70NFG, 70NFH, 70NFI, 70NFJ	Amend (Rec 42, Appendix G)	Pt 5
Division 14—Miscellaneous		
70P, 70Q	Retain	Family Law (Judicial and Administrative Provisions) Act

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Appendix J
Existing and Proposed Decision Making in Children's Matters

Figure 1: Current decision making pathway.

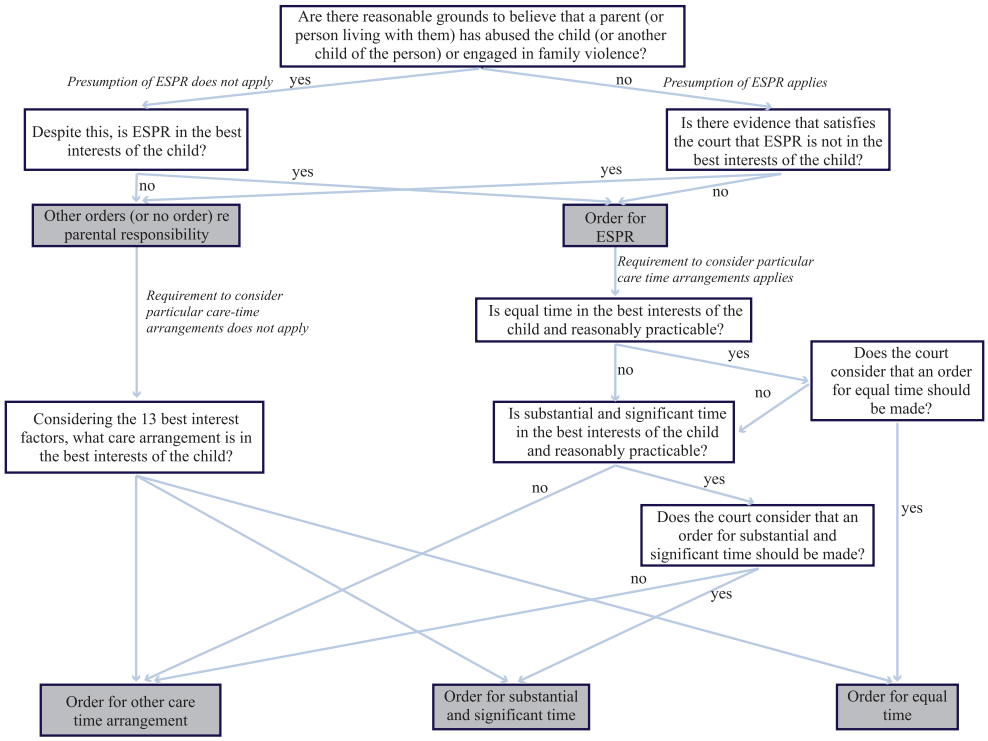

Figure 2: Recommended decision making framework