Australian Government
Australian Law Reform Commission

Review of the Family Law System

ISSUES PAPER

You are invited to provide a submission or comment on this Issues Paper

Issues Paper 48 (IP 48)

March 2018

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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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Making a submission

Any public contribution to an inquiry is called a submission. The Australian Law Reform Commission seeks submissions from a broad cross-section of the community, as well as from those with a special interest in a particular inquiry.

The closing date for submissions to this Issues Paper is **7 May 2018.**

Online submission form

The ALRC strongly encourages online submissions directly through the ALRC website where an online submission form will allow you to respond to individual proposals and questions: <https://www.alrc.gov.au/content/family-law-system-ip48-submission>
Once you have logged into the site, you will be able to save your work, edit your responses, and leave and re-enter the site as many times as you need to before lodging your final submission. You may respond to as many or as few proposals and questions as you wish. There is space at the end of the form for any additional comments.

Further instructions are available on the site. If you have any difficulties using the online submission form, please email web@alrc.gov.au, or phone +61 2 8238 6305.

Alternatively, pre-prepared submissions may be mailed, faxed or emailed, to:

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Open inquiry policy

As submissions provide important evidence to each inquiry, it is common for the ALRC to draw upon the contents of submissions and quote from them or refer to them in publications.

The ALRC accepts public and confidential submissions. Public submissions are published on the ALRC website. The ALRC removes private addresses and contact details before publishing submissions.

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If your submission contains information about a court proceeding, including a proceeding under the *Family Law Act 1975* (Cth) (*Family Law Act*), you should carefully consider the terms of any order made by a court in that proceeding relating to the disclosure of information. For example, it is an offence under s 102PK of the *Family Law Act* to contravene a suppression order or a non-publication order made under s 102PE of the *Family Law Act*. The ALRC cannot publish submissions that identify parties to family law proceedings, and any submissions that do so will be treated as confidential.

See the ALRC policy on submissions and inquiry material for more information: www.alrc.gov.au/about/making-submission.

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.

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?

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Question 3 In what ways could access to information about family law and family law related services, including family violence services, be improved?

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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?

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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?

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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?

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Question 31 How can integrated services approaches be better used to assist client families with complex needs? How can these approaches be better supported?

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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?

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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?

Issues Paper

The review

1 On 17 August 2017, the then Attorney-General of Australia, Senator the Hon George Brandis QC, asked the Australian Law Reform Commission (ALRC) to review the family law system, commencing from 1 October 2017.

2 This Issues Paper is the first consultation document in the Inquiry. It introduces the issues covered by the Terms of Reference and asks questions to assist in the development of reform responses through submissions from stakeholders. The submissions and further consultation rounds will inform the next stages of the process: a Discussion Paper, planned for release in September 2018; and the Final Report in March 2019.

Scope of this review

3 The Terms of Reference for this Inquiry ask the ALRC to consider reform to the family law system. A number of matters are particularly highlighted for consideration. Taken together, the Terms of Reference require the ALRC to consider the appropriate role of the family law system in contemporary Australia and how it can be responsive to the needs of diverse families and family structures.

4 This includes considering how to encourage the resolution of family disputes as quickly and affordably as possible, and in a way that is the least harmful, and most protective, of the safety and wellbeing of all involved, particularly children. It also involves considering whether reform is needed to the substantive law governing decisions about parenting and property disputes. Further questions arise about the need for reform to the culture, structure and governance of the family law system. Reflecting this focus, and the preliminary consultations the ALRC has undertaken, this Issues Paper is divided into eight sections that address these issues. These sections focus on questions about:

(1) the objectives of the contemporary family law system and the principles that should guide its work with client families;

(2) the barriers that affect access to and engagement with the system and how these can be addressed;

(3) whether legislative changes are needed to ensure the law is clear and comprehensible for the people who need to use it and supports decision makers to determine safe and developmentally healthy arrangements for children and the appropriate division of resources on separation;

(4) whether the system's processes for resolving and adjudicating disputes are well adapted to meet the needs of separated families;

(5) the development of integrated services for families with complex needs;

(6) how best to support the involvement of children in the family law system;

(7) the competencies and skills required of family law system professionals and ensuring these are maintained; and

(8) the system's governance practices and accountability mechanisms.

5 There are a number of matters that are not referred to in the Terms of Reference. These include the operation of the child support scheme, the structure of the family courts, and matters of state and territory responsibility, such as Australia's child protection systems. However, as these issues are closely related to and frequently interact with the family law system, concerns about the intersections and cooperation between these systems are matters that the ALRC will consider in the course of this Inquiry.

Approach to this review

6 As noted in the Terms of Reference, this Inquiry builds on a number of earlier reviews that examined aspects of the family law system. These have included reviews of the issues of parentage law, child support, family violence, access to justice arrangements, the needs of Aboriginal and Torres Strait Islander clients, and the interactions between the Commonwealth family law system and state and territory child protection systems. A list of the relevant reports is set out below in the section on Objectives and Principles.

7 The ALRC is aware that many stakeholders have engaged with a number of the previous reviews. In conducting its work on this Inquiry, the ALRC will have regard to the reports of these reviews and will consider the publicly available submissions to them.

8 However, the ALRC does not propose to revisit each of the matters that have been examined elsewhere. The Commission's work on this Inquiry is focused on the opportunity provided by the Terms of Reference to consider the redevelopment of the family law system as a whole, in an integrated and holistic, rather than piecemeal, way.

9 In doing so, the ALRC will adopt a client-centred perspective, consistent with the emphasis in the Terms of Reference on the needs of families and individuals who use the system or wish to access its services. The ALRC is therefore interested in hearing about the experiences of people who have used the system and the challenges that users have faced in accessing or navigating its services to resolve family problems, as well as experiences of positive engagements with the system.

10 To support this analysis, the ALRC would welcome anonymised case studies that support submissions about how particular issues, practices or elements of the system have been experienced by client families and their children.

Getting involved

11 This Issues Paper is intended to encourage informed community participation by providing some background information and highlighting the issues so far identified by the ALRC as relevant to the areas listed in the Terms of Reference. The Issues Paper may be downloaded free of charge from the ALRC website: <www.alrc.gov.au>.

12 You can get involved in the Inquiry in a number of ways, including by making a submission and by participating in a consultation. The ALRC invites individuals and organisations to make submissions in response to specific questions, to any of the background material and analysis provided, or on any other matter within the Terms of Reference.

13 You can also confidentially tell us about your recent experience with the family law system at the ALRC *'Tell Us Your Story'* page (accessible at www.alrc.gov.au/content/tell-us-your-story).

14 There is no specified format for submissions, although the questions provided in this document are intended to provide guidance for respondents. Submissions may be made in writing, by email, or by using the ALRC online submission form. Submissions made using the online submission form are preferred. You are encouraged to answer as many or as few of the questions in the Issues Paper as you wish. Stakeholders who have made a submission to a previous review are welcome to send the ALRC a copy of that submission with a covering letter attached.

15 Submissions using the ALRC online submission form can be made at: <https://www.alrc.gov.au/content/family-law-system-ip48-submission>. All submissions should reach the ALRC by 7 May 2018.

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21 See the ALRC policy on submissions and inquiry material for more information: www.alrc.gov.au/about/making-submission.

Terms used in the Issues Paper

22 References to the '**family law system**' in the Issues Paper refer collectively to the family courts (the Family Court of Australia, the Family Court of Western Australia and the Federal Circuit Court of Australia) 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) as well as legal aid, community legal sector and private legal services.

23 The Issues Paper also uses the term '**family courts**' throughout. A wide range of courts may exercise jurisdiction under the *Family Law Act 1975* (Cth) (*Family Law Act*), including the Family Court of Australia (Family Court), the Federal Circuit Court of Australia (Federal Circuit Court), the Family Court of Western Australia, and state and territory courts of summary jurisdiction (which include magistrates' courts and some local and children's courts). The term '**family courts**' is used to refer to the principal courts exercising family law jurisdiction, namely the Family Court, the Federal Circuit Court and the Family Court of Western Australia. The term '**federal family courts**' is used to refer only to the Family Court and the Federal Circuit Court.

24 There are a number of different terms in use to describe violence committed against a family member or in a domestic setting, including family violence, domestic violence, domestic and family violence, intimate partner violence and domestic abuse. This Issues Paper generally uses the term '**family violence**', as this is the term used in the *Family Law Act*.

25 A wide range of terms are used in different parts of Australia to refer to protective orders to prevent family violence, including Domestic Violence Orders (DVO), Apprehended Domestic Violence Orders (ADVO), Violence Restraining Orders (VRO), Domestic Violence Restraining Orders (DVRO), Family Violence Intervention Orders (FVIO) and Family Violence Orders (FVO). This Issues Paper uses the term '**family violence protection orders**' to refer to all of these types of orders.

26 The term '**child centred**' is used to refer to an approach that can be applied across different areas that provide services to children and families, including education, family services and child protection. The approach is one that prioritises the

needs and interests of children. Child-centred policies and frameworks acknowledge and accommodate the developmental needs and timeframes in childhood and adolescence and support the involvement of children and young people in decisions that affect them.[1]

27 The term '**trauma-informed practice**' is used to refer to the provision of services in a way that is 'based on knowledge and understanding of how trauma affects people's lives and their service needs'.[2] The Mental Health Coordinating Council has described this approach as being 'informed by an understanding of the particular vulnerabilities and "triggers" that survivors of complex trauma experience'.[3]

28 The term '**disability**' is used in this Issues Paper to refer to physical, mental, intellectual or sensory disabilities, consistently with the United Nations *Convention on the Rights of Persons with Disabilities*[4] and the *Disability Discrimination Act 1992* (Cth).

Objectives and principles

29 In this Inquiry, the ALRC is considering what reforms are needed to the family law system to ensure it is able to meet the needs of families who seek its services. In this section, the ALRC asks about the role and objectives of the family law system in contemporary Australia, and what principles should guide its redevelopment.

The role and objectives of the family law system

Question 1	What should be the role and objectives of the modern family law system?

30 Australia's modern family law system began operation with the commencement of the *Family Law Act 1975* (Cth) and the opening of the Family Court on 5 January 1976. Underpinning the development of these reforms were a number of policy objectives. These included a desire to:

- create a less punitive and more dignified divorce process than had existed under the former fault-based divorce system;[5]

1 Gail Winkworth and Morag McArthur, 'Being "Child Centred" in Child Protection: What Does It Mean?' (2006) 31(4) *Children Australia* 13.

2 Liz Wall, Daryl Higgins and Cathryn Hunter, 'Trauma-Informed Care in Child/Family Welfare Services' (CFCA Paper No 37, Child Family Community Australia, 2016).

3 Mental Health Coordinating Council, *Trauma-Informed Care and Practice: Towards a Cultural Shift in Policy Reform across Mental Health and Human Services in Australia* (2013) 9.

4 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008).

5 Commonwealth, *Parliamentary Debates*, House of Representatives, *Family Law Bill*, 28 November 1974, 4321–23 (Mr Whitlam) 4323; Commonwealth, *Parliamentary Debates*, House of Representatives, 9 April 1975, 1375–1377 (Dr JF Cairns) 1375.

- provide divorcing couples with a 'one-stop shop' of legal and counselling services to help them resolve disputes;[6] and
- establish a specialist national court for family law matters with an informal process.[7]

31 As the preamble to the Terms of Reference for this Inquiry notes, Australian social and family life has changed a great deal since the time of these reforms. The past forty years have seen a diversification of family structures, including increased numbers of unmarried families, stepfamilies, blended families, same-sex families and kinship-care arrangements. Alongside this have been significant changes in the methods of family formation, including a reduction in the number of adoptions and a growing use of assisted conception procedures and surrogacy to achieve parenthood.

32 As these shifts have occurred, significant changes in the jurisdiction, structure and workload of the family law system have also taken place. These include changes to give effect to Australia's obligations under the United Nations *Convention on the Rights of the Child*,[8] and to ensure the Family Court can make orders about the children of unmarried parents and the property of unmarried couples. At the same time, approaches to dispute resolution have evolved substantially, with a growing emphasis on pre-filing and alternative dispute resolution processes, as well as more active judicial case management of litigated matters. The family courts have also seen increasing numbers of self-represented litigants.

33 Recent studies indicate that the nature of the family law system's client base is also very different from the one that was envisaged at the time it was created. While most separating couples are able to work out their arrangements with limited or no recourse to the family law system, many of the families who do turn to the family law system for support have complex needs. These studies show that safety concerns for children are now a common feature of the family law system's workload,[9] and that many of the system's client families are affected by issues that may pose a risk of harm to the child, including issues of family violence, mental ill-health and substance misuse.[10]

34 The impact of this profile on the nature and workload of the family law system has been recognised in a number of recent reviews. This body of work includes:

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6 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* (1975) 80; Commonwealth, *Parliamentary Debates*, House of Representatives, *Family Law Bill*, 28 November 1974, 4321–23 (Mr Whitlam) 4322.

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

8 *Convention on the Rights of the Child*, opened for signature 20 December 1989, 1577 UNTS 3 (entered into force 2 September 1990).

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

10 Lixia Qu et al, 'Post-Separation Parenting, Property and Relationship Dynamics after Five Years' (Attorney-General's Department (Cth), 2014) 43, 44, 59–65.

- the Family Law Council's 2012 reports, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* and *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds*;
- the Family Law Council's 2013 report, *Parentage and the Family Law Act*;
- the Productivity Commission's 2014 report, *Access to Justice Arrangements*;
- the Australian Institute of Family Studies' 2014 *Independent Children's Lawyers Study*;
- the Australian Institute of Family Studies' 2015 reports on the evaluation of the 2012 family violence reforms;
- the 2015 report of the Queensland Special Taskforce on Domestic and Family Violence, *Not Now, Not Ever*;
- the Family Law Council's interim (2015) and final (2016) reports on *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems*;
- the 2016 report of the Victorian Royal Commission into Family Violence;
- the final report of the Council of Australian Governments (COAG) Advisory Panel on Reducing Violence against Women and their Children (2016); and
- the 2017 report of the House of Representatives Standing Committee on Social Policy and Legal Affairs (SPLA Committee), *A Better Family Law System to Support and Protect Those Affected by Family Violence* (*SPLA Family Violence Report*).

35 These reports have highlighted a number of problems affecting families who use the family law system, including concerns about:

- difficulties that families face in seeking to achieve safe outcomes for children and victims of family violence;
- the growing cost of legal services and expert reports;
- increasing delays in the courts;
- the extent to which the system's services support child-centred approaches and the participation of children in processes that affect them;
- the extent to which the provisions of the *Family Law Act* are applied consistently to all children irrespective of their family structure;
- the cultural responsiveness of mainstream family law services and the cultural safety of court processes for Aboriginal and Torres Strait Islander peoples and culturally and linguistically diverse clients;
- the difficulties that face clients in rural and remote areas of Australia in accessing family law services; and

- concerns about the adversarial nature of legal processes and the impact on parental and child wellbeing.

36 More broadly, these reviews reflect a growing debate about the role of the family law system in contemporary Australia, including questions about:

- the affordability of services and processes and the importance of costs being proportionate to the parties' dispute;[11]
- the ways in which the prevalence of cases involving safety concerns for children challenges the assumption of a clear distinction between the work of the family law, child protection and family violence systems in Australia, and the importance of collaboration across these jurisdictions;[12]
- the ways in which the prevalence of families affected by ongoing conflict in the family law system challenges the conceptualisation of dispute resolution as a single event; and
- the appropriateness of adversarial processes, and the ethics of adversarial practices, in a system concerned with the wellbeing of children.[13]

37 Reflecting these questions, stakeholders during early consultations suggested the importance to this Inquiry of clearly identifying the role and objectives of the contemporary family law system, as a basis for addressing the Terms of Reference.

38 Academic scholarship has suggested that a modern family law system has a number of key functions, including advancing the safety, healthy development and economic support interests of children, protecting adult rights to physical safety and equitable distribution of resources, and regulating the processes for resolving post-separation problems to ensure they are affordable and cost-effective.[14]

39 The ALRC seeks stakeholder input about the objectives that would best express the appropriate role and functions of a contemporary family law system.

Principles to guide the redevelopment of the family law system

Question 2 What principles should guide any redevelopment of the family law system?

11 Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 1, 2014).

12 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).

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).

14 Noel Semple and Nick Bala, 'Reforming Ontario's Family Justice System: An Evidence-Based Approach' (Association of Family and Conciliation Courts, 2013) 4–6.

40 Early consultations also suggested the need to identify relevant principles, or values, that should guide the redevelopment of the family law system and support the achievement of its objectives.

41 Section 43 of the *Family Law Act* provides the following principles to be applied by the courts in the exercise of their jurisdiction under the Act:

> (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.

42 Noting that these principles are largely unamended since the passage of the Act in 1975 (apart from the addition of a reference to protection from family violence), stakeholders suggested it is timely to consider whether they continue to provide appropriate guidance for the family courts.

43 The Terms of Reference for this Inquiry do not provide a comprehensive list of principles to be applied by the ALRC in undertaking this Inquiry. However, the preamble to the Terms of Reference notes a number of matters that are relevant, including:

- 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; and
- the paramount importance of protecting the needs of the children of separating families.

44 A number of additional principles were proposed during preliminary consultations for this Inquiry, including suggestions that the family law system should:

- be child centred and trauma informed;
- ensure equality of treatment for children regardless of their family structure;
- foster ethical professional practices; and
- promote a learning culture.

45 The ALRC is seeking stakeholder input on the question of whether an overarching set of principles should be developed for the family law system and, if so, what principles would be appropriate to guide its work in its modern social context.

Access and engagement

46 Ensuring the family law system is accessible to all families who require its services is a critical element of ensuring access to justice.[15] Accessibility of services is also critical to the system's ability to protect the welfare of children of separated parents, which is a central tenet of the *Family Law Act*. This section asks how access to the family law system might be improved, including through enhanced access to information and assistance to navigate the different services and processes within the family law system. The ALRC also invites comment on how access to the family law system could be improved for particular groups, including Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse backgrounds, people with disability, and people living in rural, regional and remote areas of Australia.

47 As the cost of legal and other services can be a significant barrier to access to justice,[16] the ALRC also asks what changes could be made to the family law system to allow family disputes to be resolved more affordably. Finally, the ALRC asks what improvements could be made to the court environment and court procedures to support people to engage in the family law system, particularly for self-represented parties and people with security concerns.

Access to information and navigation assistance

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?

Access to information

48 People using the family law system can find it difficult to access information about family law and family law related services. In consultations, the ALRC heard concerns that:

- court websites can be difficult to navigate for both clients and professionals;
- readily available information for clients about family law proceedings and the family law system's processes and services is limited;

15 Access to Justice Taskforce, Attorney-General's Department (Cth), *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009).

16 Ibid 40–44; Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 1, 2014).

- information catering to people with language and/or literacy barriers is limited; and
- clients find it difficult to access information that would allow them to identify and connect with relevant legal and non-legal services.[17]

49 Stakeholders also commented that there is limited accessible information available for children, noting that a lack of information can increase the anxiety and trauma children experience in these circumstances.[18]

50 The ALRC notes that National Legal Aid has received funding to develop a community legal education resource, including a website, about interactions between the family law, family violence and child protection systems. The ALRC is interested in feedback about what other changes could be made to improve access to information in the family law system.

Navigation assistance

51 Client families and individuals can find it difficult to navigate the family law system, particularly where they have a range of legal and support needs requiring engagement with multiple services.

52 One possible method of addressing this issue is to have a case worker or 'navigator' available to assist individuals or families with multiple needs to navigate the family law system, from the time of first contact to resolution. A navigator could assist clients to identify and access services that are relevant to their needs, as well as monitor the person's engagement with these services and assist them through the court process where appropriate.

53 Navigators have been used to address barriers to access in the health sector since the 1990s, assisting patients to access information, engage with services, coordinate multiple service providers, overcome language, cultural, economic barriers and service mistrust as well as to support patients to advocate for themselves.[19]

54 An example of how navigation assistance can be provided in the justice sector can be seen in the role of the Neighbourhood Justice Officer (NJO)[20] at the Neighbourhood Justice Centre in Victoria.[21] The NJO assists court clients to identify

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17 See also Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 1, 2014) ch 5.

18 The 'Best for Kids' initiative of Legal Aid NSW provides an example of legal information designed for children: Legal Aid NSW, *Best for Kids* (2015) <www.bestforkids.org.au/index.html>.

19 See, eg, Harold P Freeman, 'The Origin, Evolution, and Principles of Patient Navigation' (2012) 21(10) *Cancer Epidemiology Biomarkers & Prevention* 1614; Ana Natale-Pereira et al, 'The Role of Patient Navigators in Eliminating Health Disparities' (2011) 117(15) *Cancer* 3543; CM Bernardes et al, 'Lessons Learned from a Pilot Study of an Indigenous Patient Navigator Intervention in Queensland, Australia' (2018) 27(1) *European Journal of Cancer Care* e12714.

20 Anthony Morgan and Rick Brown, 'Estimating the Costs Associated with Community Justice' [2015] (507) *Trends and Issues in Crime and Criminal Justice* 1, 9.

21 The Neighbourhood Justice Centre is located in Melbourne. It is a multi-jursidictional court, with a variety of treatment and support services such as mediation, legal advice, employment and housing support, counselling and mental health services: Magistrates' Court of Victoria, *Neighbourhood Justice Centre* <www.magistratescourt.vic.gov.au>.

and connect with appropriate services, such as mental health, financial counselling and drug and alcohol rehabilitation services. In some cases, where the matter has been adjourned to give a client time to engage such services, the NJO is able to report back to the court on the client's progress. The need for appropriate qualifications and training for navigators is considered below in the section, 'Professional skills'.

55 An example of how navigation assistance is currently provided within the family law system is the role of the Family Safety Practitioner, which is a component of the Family Safety Model run by Relationships Australia Victoria. This model is discussed in more detail below in the section, 'Integration and collaboration'. A key part of the Family Safety Practitioner role entails identifying the service needs of each family member and facilitating warm referrals to these services, which might include referrals for legal advice, counselling or housing assistance. The Family Safety Practitioner also supports family members with transitions between services and monitors the family's engagement with them.

56 The recently developed Family Advocacy and Support Service (FASS), discussed below in the section, 'Integration and collaboration', also goes some way to assisting clients to navigate the family law system by providing them with information and legal advice in relation to relevant state and territory matters as well as federal family law matters, and by providing clients with warm referrals to support services relevant to their needs.

57 Technology might also be used to assist client families to navigate the family law system.[22] The ALRC notes that the Neighbourhood Justice Centre uses a Court Triage Service and a mobile app which provide a digital link and coordination system for registry staff, judicial officers, lawyers, clinicians and court users. This includes SMS alerts delivered to the client's phone with updates on the progress of their matter and reminders about court events. In the UK, the CourtNav program assists self-represented litigants to understand procedural requirements and walks them through the process of completing forms using questions online.[23]

58 The ALRC is interested in how these or other models could be expanded to provide navigation assistance to families with complex needs from the time of first contact throughout their engagement with the family law system.

Aboriginal and Torres Strait Islander communities

Question 5 How can the accessibility of the family law system be improved for Aboriginal and Torres Strait Islander people?

59 Reviews over a number of years have reported that mainstream family law services are not designed or delivered in a way that recognises the lived experiences of Aboriginal and Torres Strait Islander people.

22 Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 1, 2014) rec 17.2.
23 Ibid 580–81.

60 These reports have highlighted the range of barriers affecting access to the family law system for Aboriginal and Torres Strait Islander clients, including issues of cost, language, cultural safety and geographic and physical accessibility. These reports recognise the cultural and geographic diversity of Aboriginal and Torres Strait Islander peoples,[24] and that questions relating to access to family law services and the courts for Aboriginal and Torres Strait Islander families are inseparable from the history of colonisation, dispossession of land and forced removal from country and the separation of children from families through historic government policies of child removal.[25]

61 A range of recommendations have been made to enhance accessibility of the family law system for Aboriginal and Torres Strait Islander communities and provide families with culturally safe services.[26] These have included recommendations for:

- the development and delivery of family law system responses, including planning and dispute resolution processes, by or in conjunction with Aboriginal and Torres Strait Islander communities and organisations;[27]
- embedding workers from Aboriginal and Torres Strait Islander specific services in the family courts and Family Relationship Centres as liaison officers;[28]
- strategies to support the development of an Aboriginal and Torres Strait Islander workforce across the family law system, including the appointment of Indigenous counsellors, lawyers, family dispute resolution practitioner and judicial officers; and
- developing tailored education programs about the family law and child protection systems for Aboriginal and Torres Strait Islander communities.

62 In 2017, the SPLA Committee recommended that, 'as a matter of urgency', the Australian Government implement the Family Law Council's recommendations from its 2012 Report, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients*, as well as the Council's additional recommendations in its 2016

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24 Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (2012) 1; 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).

25 Department of Prime Minister and Cabinet, *Closing the Gap: Prime Minister's Report 2017* (2017).

26 Indigenous Legal Needs Project, Submission No 19 to Senate Standing Committee on Finance and Public Administration, Parliament of Australia, *Inquiry into Access to Legal Assistance Services* (2016) 2015; Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016); Family Law Council *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (2012); KPMG, *Unlocking the Future: Maranguka Justice Reinvestment Project in Bourke—Preliminary Assessment* (2016); Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 1, 2014).

27 Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016).

28 Ibid 99.

report on families with complex needs 'as they relate to Aboriginal and Torres Strait Islander families'.[29] These included recommendations for:

- the provision of culturally secure family assessment reports in matters involving Aboriginal and Torres Strait Islander children;[30]
- the development of culturally secure court hearing processes in the family courts similar to those applied in state and territory Koori and Murri courts;[31] and
- a greater use of cultural healing and trauma-recovery approaches that are grounded in Indigenous knowledge.[32]

63 Some reports have also questioned the appropriateness of family law system responses to family violence for Aboriginal and Torres Strait Islander peoples,[33] including the effectiveness of mainstream conceptualisations and responses to family violence in Aboriginal and Torres Strait Islander communities.[34] In particular, recent research[35] and submissions to the SPLA Inquiry[36] have raised questions about the implications for Aboriginal women of the coercive control paradigm in the *Family Law Act*'s definition of family violence.

64 These challenges point to the need to better understand the dynamics in which family violence occurs within Aboriginal and Torres Strait Islander families and communities to ensure meaningful access to the family law system for Aboriginal and Torres Strait Islander clients.

65 The ALRC acknowledges the many submissions that have been made to previous reviews about how access to the family law system for Aboriginal and Torres Strait Islander people can be improved and will have regard to these and earlier reports and recommendations in conducting its work on this Inquiry. The ALRC also welcomes additional input from stakeholders about these questions.

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29 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 11, rec 24.

30 Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016).

31 Ibid 99.

32 Aboriginal and Torres Strait Islander Healing Foundation, *Bringing Them Home 20 Years On: An Action Plan for Healing* (2017); Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016).

33 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 11.

34 Department of Prime Minister and Cabinet, *Closing the Gap: Prime Minister's Report 2017* (2017) 95–6; Harry Blagg et al, 'Innovative Models in Addressing Violence against Indigenous Women: Final Report' (Horizons No 1, ANROWS, 2017).

35 Heather Nancarrow, *Legal Responses to Intimate Partner Violence: Gendered Aspirations and Racialised Realities* (Griffith University, 2016) Abstract.

36 Alice Springs Women's Shelter, Submission No 121 to SPLA Committee, Parliament of Australia, Inquiry into *A Better Family Law System* (April 2017) 3.

Culturally and linguistically diverse clients

Question 6 How can the accessibility of the family law system be improved for people from culturally and linguistically diverse communities?

66 In 2017, the SPLA Committee concluded that 'the family law system is not currently accessible, equitable, responsive' to culturally and linguistically diverse families, nor is it one which 'prioritises the[ir] safety'.[37]

67 According to the 2016 Census, more than one quarter (26%) of Australians were born overseas, 49% of all Australians were born overseas or had at least one parent born overseas, and more than one fifth (21%) of the population spoke a language other than English at home.[38] However, research has suggested that people from culturally and linguistically diverse backgrounds are underrepresented as users of the family law system.[39] While many people from such communities may prefer to resolve family problems privately, or with the assistance of culturally-specific conflict resolution services, the Family Law Council's 2012 work suggests there is also a desire for equality of access to the services of the family law system.[40]

68 A number of interrelated issues produce barriers to access to the family law system. People from culturally and linguistically diverse backgrounds, particularly those from newly arrived or refugee communities, may have limited knowledge and understanding of the Australian family law system.[41] Access to information about family law can often be impeded by language and literacy barriers: information about family law and family law services may not be available in some community languages, and limited literacy even in a person's own community language may mean that even where available, translated material is not accessible.[42]

69 Where culturally and linguistically diverse clients do engage with the family law system, concerns have been raised about the availability and quality of interpreting services acting as a barrier to effective participation.[43] Additionally, concerns exist

37 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 11, 257.

38 Australian Bureau of Statistics, *Census of Population and Housing: Reflecting Australia—Stories from the Census, 2016: Cultural Diversity in Australia, Cat No 2071.0* (2017).

39 The Allen Consulting Group, 'Research on Family Support Program Family Law Services' (Final Report, Attorney-General's Department (Cth), May 2013) 55; Susan Armstrong, 'Enhancing Access to Family Dispute Resolution for Families from Culturally and Linguistically Diverse Backgrounds' (Australian Family Relationships Clearinghouse Briefing No 18, Australian Institute of Family Studies, 2010).

40 Family Law Council, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds* (2012) ch 2.

41 Ibid 31–3.

42 Ibid 33.

43 Judicial Council on Cultural Diversity, *The Path to Justice: Migrant and Refugee Women's Experience of the Courts* (Judicial Council on Cultural Diversity, 2017) 29.

about the availability of culturally appropriate services, and levels of cultural competency among professionals in the family law system.[44]

70 People from culturally and linguistically diverse backgrounds who experience family violence face additional barriers in accessing family law services, which may include a lack of understanding by family law system professionals about culturally-specific instances of family violence and cultural norms and pressures relating to disclosure of family violence.[45] Another factor affecting the family law system needs of people in newly arrived communities is a high rate of intergenerational conflict, which can lead to inter-parent conflict and marriage breakdown.[46]

71 In 2012, the Family Law Council made a number of recommendations to improve the family law system for clients from culturally and linguistically diverse backgrounds, implementation of which was also recommended in the *SPLA Family Violence Report*.[47] These included recommendations to improve:

- community education about family law and family law services;
- cultural competency in the family law system;
- service integration;
- numbers of culturally and linguistically diverse personnel working within family law system services;
- engagement and collaboration with culturally and linguistically diverse communities in the development, delivery and evaluation of services; and
- the use of interpreters in the family law system.[48]

72 In June 2017, pilots of legally-assisted and culturally-appropriate dispute resolution began in eight Family Relationship Centres across Australia, with the aim of assisting families to resolve post-separation disputes in a safe and culturally-appropriate way.[49] The ALRC seeks stakeholder input on initiatives such as these, and any other ways that access to family law services for clients from culturally and linguistically diverse communities could be improved.

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44 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 13, 244–5; Judicial Council on Cultural Diversity, above n 43, 44.

45 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 11, 241–8; InTouch Multicultural Centre Against Family Violence, 'Barriers to the Justice System Faced by CALD Women Experiencing Family Violence' (2010).

46 Family Law Council, above n 36, 37.

47 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 11, rec 25.

48 Family Law Council, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds* (2012) ch 5.

49 Attorney-General's Department (Cth), *Multicultural Access and Equity Plan 2017–2019* (2017) 6.

People with disability

Question 7 How can the accessibility of the family law system be improved for people with disability?

73 People with disability may engage with the family law system in a range of ways:

- adults with disability may be involved as parties to parenting and property matters;
- children with disability may be the subject of disputes in parenting matters;
- responsibility for the care of children with disability may be a relevant consideration in property proceedings; and
- children with disability may engage with the court in the exercise of its welfare jurisdiction.

74 Associated with these, a number of barriers to access to justice have been identified.

75 Particular concerns have been raised in relation to the safety needs of women and girls with disability. Women and girls with disability are twice as likely as women and girls without disability to experience violence during their lives.[50] They are also more likely to experience violence over a longer timeframe, resulting in more severe trauma, and are more vulnerable to particular types of abuse, such as sexual assault, financial abuse and forced or coerced sterilisation.[51]

76 Service providers may not have a clear understanding of how to identify and support both adults and children with disability who experience violence. Within the family law system, one potential consequence of such lack of expertise is that disclosures of sexual abuse by girls who have an intellectual disability may not be believed.[52]

77 People with disability may also face barriers to participating in court, such as communication barriers, difficulties accessing the necessary supports to participate effectively in proceedings, and in giving instructions to legal representatives.[53] This creates the potential for parents with disability to be disadvantaged in achieving orders for the care of children in family law proceedings.

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50 Lauren Krnjacki et al, 'Prevalence and Risk of Violence against People with and without Disabilities: Findings from an Australian Population-Based Study' (2016) 40(1) *Australian and New Zealand Journal of Public Health* 16.

51 COAG Advisory Panel on Reducing Violence against Women and their Children, *Final Report* (2016) 11, 37.

52 Women with Disabilities Victoria, Submission to the Family Violence Royal Commission (15 June 2015).

53 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014).

78 In a family law proceeding, a person with disability may have a litigation or case guardian appointed, whose role is to act in the place of the person with a disability and take responsibility for the conduct of the proceedings. The *Family Law Rules 2004* (Cth) provide that a person with a disability 'may start, continue, respond to, or seek to intervene in, a case only by a case guardian'.[54] A person with disability is defined in the *Family Law Rules* as a person who, because of a physical or mental disability, does not understand the nature or possible consequences of the case, or is not capable of adequately conducting, or giving adequate instruction for the conduct of, the case.[55] A similar provision in the *Federal Circuit Court Rules 2001* (Cth) allows for the appointment of a litigation guardian.[56]

79 A person with a disability may face difficulties in having a guardian appointed to assist them because of concerns about perceived exposure to liability and the uncertain funding of the litigation.[57] In some cases, indefinite delays to proceedings have been experienced where no litigation or case guardian is available for appointment, with 'very serious consequences for the parties involved; and particularly for any children involved in the proceedings'.[58] Concerns have also been raised about the limited information available to guide litigation guardians in exercising their responsibilities.[59]

80 A litigation or case guardian acts as a 'substitute decision maker' for a person with disability—that is, the guardian makes decisions on behalf of the person with disability. Broader concerns exist about how *supported* decision making might be facilitated in family law processes—that is, how a person with disability might be supported to participate in the court process and to make their own decisions in family law proceedings. Promoting supported decision making is consistent with the recognition in the United Nations *Convention on the Rights of Persons with Disabilities* (CRPD) that people with disability enjoy legal capacity on an equal basis with others and should be provided with access to the support they require to exercise their legal capacity.[60]

81 The level of understanding of disability held by judicial officers and legal practitioners and other professionals working in the family law system may also act as a barrier to access to justice. Limited understanding of how disability can affect a parent in a family law matter may see a parent lose their care role, or be persuaded to consent to limited contact arrangements, because of assumptions made about a

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54 *Family Law Rules 2004* (Cth) r 6.08.
55 Ibid Dictionary.
56 *Federal Circuit Court Rules 2001* (Cth) r 11.09.
57 Office of the Public Advocate (Vic), 'Whatever Happened to the Village, the Removal of Children from Parents with a Disability' (December 2013) 20; Law Society of NSW, *Letter to Attorney-General: Case Guardians and Litigation Guardians in the Family Court of Australia and the Federal Circuit Court of Australia* (2015).
58 Law Society of NSW, above n 57.
59 Office of the Public Advocate (Vic), above n 57.
60 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 12. See further Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) 215–20.

person's parenting capacity or capacity to manage the stresses of litigation.[61] A parent with disability may sometimes incur the additional expense of securing a specialist report that can address the issue of their disability because of a lack of particular expertise among family consultants.[62]

82 As noted, children with disability may be involved in the family law system, either as the subject of disputes in relation to their care, or in the exercise of the Family Court's welfare jurisdiction.[63] There may be concerns about the extent to which these children are supported to express their views and to be heard in the court process.[64] The welfare power is discussed further below in the section, 'Legal principles in relation to parenting and property'.

83 A number of suggestions have been made to address access to justice issues for people with disability, including:

- improved awareness of the types of violence experienced by people with disability, as well as cross-sector collaboration with disability-specific services.[65]
- training and accreditation for family law system professionals to enhance their competency in working with parents and children with disability; and
- incorporating relevant provisions of the CRPD into the *Family Law Act*.[66]

84 The ALRC seeks stakeholder input about these issues.

Lesbian, gay, bisexual, transgender, intersex and queer clients

Question 8 How can the accessibility of the family law system be improved for lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) people?

85 Australian Bureau of Statistics (ABS) Census data in 2016 recorded higher numbers of same-sex couples than previous counts. Just under 46,800 same-sex couples living under the same roof were recorded, representing a 36% increase since the 2011 Census.[67] Same-sex couples account for 0.9% of all couples in Australia, with

61 Office of the Public Advocate (Vic), above n 57.
62 Ibid.
63 *Family Law Act 1975* (Cth) s 67ZC.
64 Children's participation is considered further below. See also Linda Steele, 'Court Authorised Sterilisation and Human Rights Inequality, Discrimination and Violence Against Women and Girls with Disability' (2016) 39(3) *UNSW Law Journal* 1002; Linda Steele, 'Making Sense of the Family Court's Decisions on the Non-Therapeutic Sterilisation of Girls with Intellectual Disability' (2008) 22 *Australian Journal of Family Law* 1.
65 COAG Advisory Panel on Reducing Violence against Women and their Children, above n 51.
66 Office of the Public Advocate (Vic), above n 57.
67 Australian Bureau of Statistics, *Census of Population and Housing: Reflecting Australia—Stories from the Census, 2016: Same-Sex Couples in Australia, Cat No 2071.0* (2017).

slightly more same-sex male couples (23,700) than female (23,000).[68] For the first time, the 2016 Census collected information on sex and gender diversity by allowing other than male/female responses in relation to questions about gender.[69] 'Intentional and valid' responses indicating sex/gender diversity were provided by 1260 respondents, which the ABS considers an under count for methodological reasons.

86 Access issues for LGBTIQ people need to be contextualised within an understanding of the recency of the legal recognition of same-sex relationships. Following the commencement of the *Marriage Amendment (Definitions and Religious Freedoms) Act 2017* (Cth) on 9 December 2017, 'the right to marry is no longer determined by sex or gender' at the federal level.[70]

87 Although there has been a sustained focus on marriage equality over many years in the human rights sphere,[71] in the family law system there has been limited attention paid to the extent to which it is equipped to meet the needs of clients in LGBTIQ groups.

88 For property matters, the federal family law system has been available to people in non-heterosexual relationships since 2009, provided the relationship falls within the definition of 'de facto' in s 4AA(1) of the *Family Law Act*.

89 In relation to parenting matters, recognition of same-sex parenthood is complex and will depend on whether a child was conceived using reproductive technology and the circumstances in which this occurred. Reforms to provisions recognising partners of women who conceive through artificial conception as parents were enacted in 2008 and provide recognition for lesbian co-parents in some circumstances (*Family Law Act* s 60H). These provisions do not cover children of male same-sex relationships and academic critiques have argued that despite these reforms, non-biological lesbian co-mothers continue 'to be treated as secondary figures in their children's lives'.[72] The Family Law Council considered the parentage provisions of the *Family Law Act* in 2013 and concluded that the present legal framework did not 'reflect the reality of parenting and family life for many children in Australia'.[73]

90 Transgender and intersex[74] children may also be engaged in the family law system in the exercise of the Family Court's welfare jurisdiction relating to approval

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68 Ibid.

69 Australian Bureau of Statistics, *Census of Population and Housing: Reflecting Australia—Stories from the Census, 2016: Sex and Gender Diversity in the 2016 Census, Cat No 2071.0* (2017).

70 Attorney-General's Department (Cth), *Marriage* <www.ag.gov.au/FamiliesAndMarriage/Marriage/Pages/default.aspx>.

71 Australian Human Rights Commission, 'Resilient Individuals: Sexual Orientation, Gender Identity & Intersex Rights: National Consultation Report' (Australian Human Rights Commission, 2015).

72 Fiona Kelly, Hannah Robert and Jennifer Power, 'Is There Still No Room for Two Mothers? Revisiting Lesbian Mother Litigation in Post-Reform Australian Family Law' (2017) 31(1) *Australian Journal of Family Law* 1, 25.

73 Family Law Council, *Report on Parentage and the Family Law Act* (2013) 31.

74 Transgender is a term used for a person whose gender identity is different from their sex assigned at birth. Intersex refers to people who are born with genetic, hormonal or physical sex characteristics that are not typically 'male' or 'female': Australian Human Rights Commission, above n 71, 5.

for medical interventions related to their gender identity.[75] Similarly to children with disability who may be subject to the court's welfare jurisdiction, concerns exist about the opportunity for children to participate in this process.[76] The welfare power is discussed further below in the section, 'Legal principles in relation to parenting and property'.

91 There is limited information available on the issues that people from LGBTIQ groups face in accessing the family law system. A 2017 study based on interviews with 24 people who had experienced separations involving children in same-sex couple contexts reported that these people had experienced 'an added layer of difficulty to their separation process due to their concerns around finding the support of a service provider'.[77] Feedback from participants suggested that while some LGBTIQ families had enjoyed positive experiences of mainstream services, others felt such services did not understand their position and were poorly equipped to meet their needs. Out of the range of separation related services used—counselling, mediation, Family Relationship Centres and lawyers—positive experiences were least likely to be reported with lawyers. Particularly poor experiences were reported by non-biological parents (mostly women due to the composition of the sample).[78]

92 The *SPLA Family Violence Report* said that 'multiple submissions noted a need for improvement in the quality and accessibility of services for people from LGBTIQ communities' and recommended that family law professionals receive 'training on working with these groups to ensure that the family law system is accessible and responsive'.[79]

93 Access barriers due to limited professional knowledge may also arise in relation to LGBTIQ people who experience family violence. While the evidence base on family violence among these groups is underdeveloped, the indications are that prevalence rates are similar to those in the general population.[80] A key issue for young people in these groups is that they may experience violence from family members as a result of their sexuality or gender identity.[81] In addition to the forms of family violence that occur generally, people in these groups may experience other types of violence arising from their sexuality or gender identity, such as threats to reveal this identity to those who may be unaware of it. The Victorian Royal Commission into Family Violence

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75 *Family Law Act 1975* (Cth) s 67ZC.

76 See, eg, Morgan Carpenter, *The Family Court Case Re: Carla (Medical Procedure) [2016] FamCA 7* (8 December 2016) OII Australia—Intersex Australia <https://oii.org.au/31036/re-carla-family-court/>. Children's participation is considered further below.

77 Luke Gahan, 'Separated Same-Sex Parents' Experiences and Views of Service Providers' (2017) 17(2) *Journal of Family Strengths* Article 2, 26.

78 Ibid 27.

79 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 11, 252.

80 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol V, 143.

81 Lynne Hillier et al, 'Writing Themselves in 3: The Third National Study on the Sexual Health and Wellbeing of Same Sex Attracted and Gender Questioning Young People' (Monograph Series 78, Australian Research Centre in Sex, Health and Society, La Trobe University, 2010) 46.

highlighted a significant need for improvement in understanding of and response to this issue.[82]

94 The existing evidence and initial consultations for this Inquiry suggest a need for consideration of the extent to which services in the family law system are presently configured to respond to the needs of clients from LGBTIQ groups. The ALRC welcomes further stakeholder input about this issue.

People living in rural, regional and remote areas

Question 9 How can the accessibility of the family law system be improved for people living in rural, regional and remote areas of Australia?

95 In 2009, 69% of Australians lived in major cities, 20% lived in inner regional areas, 9% in outer regional areas and around 2.3% lived in remote or very remote areas. Those living in remote or very remote areas are more likely to be Aboriginal or Torres Strait Islander people, and a greater proportion of those in very remote areas live in multi-family households.[83]

96 While some regional areas are well served by family law services, others may face a number of access challenges. People living in rural, regional and remote Australia can face geographical barriers to accessing the family law system and its associated services, which are predominantly located in major metropolitan areas.[84] Geographic isolation from such services is often compounded by limited public transport, and the expense of private transport. People living in remote communities in particular may have to travel great distances to reach services and family law courts located in regional areas.[85]

97 In those locations where in-person legal services are available, a further barrier to accessing the family law system may arise where the services available are insufficient to avoid a conflict of interest, meaning both parties to the dispute are not able to seek advice.[86]

98 Aboriginal and Torres Strait Islander people living in rural, regional and remote areas can face additional barriers to accessing the family law system. These include the

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82 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol V, 158. See also Sarah Tayton et al, 'Groups and Communities at Risk of Domestic and Family Violence: A Review and Evaluation of Domestic and Family Violence Prevention and Early Intervention Services Focusing on at-Risk Groups and Communities' (NSW Department of Family and Community Services, 2014).

83 Jennifer Baxter, Matthew Gray and Alan Hayes, 'Families in Regional, Rural and Remote Australia' (Fact Sheet, Australian Institute of Family Studies, 2011) 2.

84 KPMG, 'Future Focus of the Family Law Services: Final Report' (Attorney General's Department, 2016) 57–8.

85 Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (2012) 54; House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 13, 233.

86 Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (2012) 48.

overarching issues of poorer socio-economic, health and education outcomes for Aboriginal and Torres Strait Islander people living in remote communities.[87] Specialist family law assistance for Aboriginal and Torres Strait Islander people is also limited in rural, regional and remote areas,[88] and while some mainstream services are available in these locations, Aboriginal and Torres Strait Islander people may not engage with them due to concerns that these are not culturally secure or appropriate.[89]

99 In addition, Aboriginal and Torres Strait Islander people may speak English as an additional language and face further barriers to access because of limited availability of interpreter services in regional and remote locations, or limited familiarity of interpreters with the family law system.[90]

100 People experiencing family violence in rural, regional and remote areas can also experience additional barriers to accessing the family law system, such as a lack of available support services, including crisis accommodation, particularly where access to finances or transport is limited.[91] Where services are available, a feeling of 'visibility'—that is, the likelihood that the person who has experienced and the person who used violence will be both known to local support workers—may impede disclosing family violence and seeking assistance.[92]

101 Suggestions for improving access for people in rural, regional and remote areas have included making greater use of communication technology to provide services, including for court appearances and conferencing, coupled with efforts to improve availability of such technology, as well as to improve digital literacy.[93] For Aboriginal and Torres Strait Islander clients in rural and remote areas, access to justice may be improved by measures including increasing the availability and family law expertise of interpreters in these locations,[94] improving the cultural competency of mainstream services in these areas, and improved collaboration with Aboriginal and Torres Strait Islander specific services.[95]

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87 Productivity Commission, above n 9, 784.
88 Ibid 779.
89 Ibid 768.
90 Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (2012) 42–3.
91 Amanda George and Bridget Harris, 'Landscapes of Violence: Women Surviving Family Violence in Regional and Rural Victoria' (Centre for Rural and Regional Law and Justice, 2014) 57–9.
92 Ibid 50–1.
93 Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016) 134–6.
94 Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (2012) 43, 102–3; House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 13, 234.
95 Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (2012) 44–6.

Costs and access to the family law system

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?

102 The *SPLA Family Violence Report* noted that the costs associated with seeking negotiated or adjudicated outcomes in the family law system can sometimes impoverish families,[96] particularly in the context of the significant limitations on the availability of publicly subsidised legal services and legal aid.[97]

103 The *SPLA Family Violence Report* indicated that on multiple occasions the Committee was told of legal costs in family law matters that had amounted to over $100,000.[98] For example, Women's Legal Services Australia observed that it is common for legal fees in this range to accumulate if the family law matter has been ongoing over a course of two or three years, and that these costs can create an imperative for vulnerable parties to settle the matter in a way that falls short of meeting their legal entitlements or protective needs.[99] The National Association of Community Legal Centres also noted that people who are ineligible for legal aid but earn less than $50,000 or $60,000 a year are unable to afford the private legal fees necessary to access the family law system.[100]

104 Australian Institute of Family Studies (AIFS) research has shown that the median personal income for separated parents some 12 months after separation is $55,000 for fathers and $33,800 for mothers.[101] Financial stress among this cohort is common, with only 37.4% of fathers and 26% of mothers not reporting one of seven potential indicators of financial stress, such as being unable to pay bills on time.[102] These data suggest that incurring legal costs in relation to a family law dispute would be unsustainable for many separated families.

105 Among the factors that contribute to the high costs of litigation are court delays, multiple court hearings, and lack of compliance with court orders.[103] In children's matters, costs can be associated with obtaining a private family report. The SPLA Committee noted that these reports can cost many thousands of dollars, depending on the experience and reputation of the report writer.[104] The SPLA Committee

96 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 13, 59.
97 Ibid 125–9.
98 Ibid 60.
99 Ibid 61.
100 Ibid 127.
101 Rae Kaspiew et al, *Experiences of Separated Parents Study (Evaluation of the 2012 Family Violence Amendments)* (Australian Institute of Family Studies, 2015) 11.
102 Ibid 12.
103 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 13, 61.
104 Ibid 213.

recommended the development of a fee schedule to regulate the costs of family reports and other expert witnesses.[105]

106 The Productivity Commission's *Access to Justice Arrangements Report* also highlighted the limited availability in the family law system of resolution avenues that are proportionate to the issues in dispute.[106] It noted that financial barriers to accessing the family courts may lead parties to not act on their legal problems, to not seek legal advice, or to withdraw from or settle cases prematurely.[107] In these circumstances, parties may agree to unsafe, unfair or unworkable arrangements. This may leave children exposed to ongoing parental conflict or family violence, with significant negative impacts on their wellbeing.[108] Parties who have experienced violence may also be exposed to continuing violence through these arrangements or feel pressured to accept unfair property settlements that leave them and their children financially disadvantaged post-separation.[109]

107 The Productivity Commission suggested that the resolution of less complex family law matters was best achieved through expanded availability of low-cost family dispute resolution (FDR) services and affordable legal advice on parenting and financial issues, especially in matters involving family violence.[110] As noted in the section, 'Resolution and adjudication processes', it argued that increased use of FDR would reduce the expense involved in litigating in the family courts when resolving a dispute. It proposed augmenting the availability of low-cost resolution mechanisms, such as offering FDR for property and financial matters, and simplifying the law applicable to these cases.

108 The Productivity Commission also raised a range of other possible strategies to address cost related access barriers. One involves 'unbundling' of legal services—that is, separating the legal services that are necessary for dispute resolution into their constituent parts and offering these discrete services for a fee. The constituent parts of 'unbundled' legal assistance fall into three main categories: general counselling and legal advice, preparation or assistance with drafting of documents or pleadings, and court appearances.[111]

109 The ALRC invites stakeholder comment on these and other means to reduce costs associated with resolving family law matters.

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105 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 13, rec 22.
106 Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 2, 2014) 853.
107 Ibid 855–6.
108 Ibid 856.
109 Ibid 872–3; House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 13, 160–1.
110 Ibid 855.
111 Ibid.

Self-represented parties

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?

110 Self-representation has become an increasingly common feature of family law litigation, affecting around half of the family law trials in the Federal Circuit Court[112] and the Family Court of Western Australia.[113] While not all litigants who self-represent do so for the same reasons,[114] evidence from other jurisdictions reveals that many parties who do so find access to justice difficult to exercise.[115] Despite this, some stakeholders have suggested that family law litigation involving parties without legal representation is likely to grow, as the costs of legal services become less affordable for many families.

111 One set of challenges facing parties who self-represent concerns the commencement of proceedings, which requires knowledge about such things as:

- the correct forms to use and how to complete them;
- what documents to prepare and how to file them; and
- what evidence is needed to support the person's case and how to obtain it.[116]

112 Much of this process relies on legal know-how, including an understanding of concepts such as disclosure and subpoenas.[117] The *SPLA Family Violence Report* also highlighted particular confusion about the operation of different rules and procedures in the Family Court of Australia and the Federal Circuit Court, which can exacerbate the difficulties for self-represented parties in identifying the correct forms.[118]

113 Self-represented litigants face further challenges in presenting their case to the court. Court procedures are designed for the use of legal professionals. The presence of a self-representing party complicates the normal communication patterns in court, and

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112 Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016) 22.

113 Family Court of Western Australia, *Family Court of Western Australia Annual Review 2016* (2016) 3.

114 Rosemary Hunter, 'Litigants in Person in Contested Cases in the Family Court' (1998) 12 *Australian Journal of Family Law* 171.

115 Liz Trinder et al, 'Litigants in Person in Private Family Law Cases' (Ministry of Justice Analytical Series, Ministry of Justice, 2014).

116 Tatiana Tkacukova, 'Communication in Family Court: Financial Remedy Proceedings from the Perspective of Litigants in Person' (2016) 38(4) *Journal of Social Welfare and Family Law* 430, 436.

117 Ibid.

118 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 13, 63.

alters the role of the judicial officer.[119] Although appellate court guidelines require the judges of the family courts to actively intervene to ensure a self-represented litigant is afforded procedural fairness,[120] some commentators have suggested that this requirement is insufficient to 'level the playing field' where one party has limited knowledge of court procedures and formalities.[121]

114 Studies also suggest that self-represented litigants are disadvantaged by their lack of familiarity with legal language. By comparison with lawyers, who are trained in thinking and expressing themselves in argumentation based on legal principles, these studies indicate that litigants who self-represent tend to describe their feelings, and to rely on a 'narrative mode similar to everyday storytelling'.[122] This research also suggests that self-represented litigants often have difficulty challenging witnesses.[123]

115 Another barrier affecting self-represented parties in parenting matters is the complexity of the legislation.[124] This issue is discussed further below in the section, 'Legal principles in relation to parenting and property'.

116 Self-represented parties may also impede access to justice for the other party to a matter. For parties who have experienced family violence, fear of being cross-examined by the person who has perpetrated the abuse may lead them to avoid the court and consent to arrangements that do not provide the security they need.[125] This issue is discussed further in the section, 'Misuse of process'.

117 Early consultations for this Inquiry revealed a number of suggestions for reform to address these issues, including:

- developing specialist clinics within the courts or legal aid commissions to provide pro bono training and advice for parties who self-represent, along the lines of Canada's National Self-Represented Litigants Project;[126]
- re-drafting court forms and instructions in plain English and re-developing court websites to ensure they are user-friendly and that forms are easily searchable; and
- simplifying the legislative framework and drafting provisions in plain English.

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119 Tania Sourdin and Nerida Wallace, 'The Dilemmas Posed by Self-Represented Litigants—The Dark Side' (Access to Justice Paper 32, 2014).

120 Stephen H Scarlett, 'Litigants in Person: Guidelines for the Federal Circuit Court' (2014) 24 *Journal of Judicial Administration* 4.

121 Ibid, 10.

122 Tkacukova, above n 116.

123 Ibid.

124 Helen Rhoades et al, 'Another Look at Simplifying Part VII' (2014) 28 *Australian Journal of Family Law* 114.

125 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 13; Stephanie Peatling, '"Women Are Being Traumatised": Rosie Batty Call to End Cross-Examination by "Abusers"' *The Age*, 24 October 2016 <www.theage.com.au>.

126 National Self-Represented Litigants Project, *About the NSRLP* <https://representingyourselfcanada.com/about-the-nsrlp/>.

118 In addition to these suggestions, recent reports have explored the possibility of changes to court procedures to incorporate more inquisitorial features.[127] This includes a recommendation by the Family Law Council to pilot a Counsel Assisting model to assist judicial officers in matters where a party is not legally represented.[128] This issue is described further in the section, 'Resolution and adjudication processes'.

The court environment

> **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?

119 Recent research has suggested that the court environment is an integral part of facilitating access to justice in the family law area.[129] In initial consultations, stakeholders voiced a number of concerns about the safety and accessibility of court precincts for client families. These included concerns about:

- insufficient availability of safe rooms;
- safety risks that are created where there is only one entrance to the court;
- a lack of security outside the court to respond to safety risks as clients leave the court;
- a lack of child-friendly spaces at court; and
- insufficient rooms available to facilitate the participation of parties who are experiencing or have experienced violence in the proceedings from a separate room.

120 Similar concerns were voiced in submissions to the Royal Commission into Family Violence, with the Commission reporting that one of the most prominent themes in the submissions it received was concern about the safety and wellbeing of court attendees.[130] In considering the safety and accessibility of the Magistrates' Court of Victoria, the Royal Commission recommended:

- safe waiting areas and rooms for co-located service providers;
- accessibility for people with disability;
- proper security staffing and equipment;

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127 Trinder et al, above n 115.

128 Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016).

129 Patricia Branco, 'Considering a Different Model for the Family and Children Courthouse Building: Reflections on the Portuguese Experience' (2018) 8(3) *Onati Socio-Legal Series* 1, 4.

130 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol III, 130.

- separate entry and exit points for applicants and respondents;
- private interview rooms for use by registrars and service providers;
- remote witness facilities to allow witnesses to give evidence off site and from court-based interview rooms;
- adequate facilities for children and 'child-friendly' courts;
- multi-lingual and multi-format signage; and
- use of pre-existing local facilities and structures to accommodate proceedings or associated aspects of court business (for example, for use as safe waiting rooms).[131]

121 The Neighbourhood Justice Centre in Victoria has been identified as a positive example of a client-friendly, accessible and safe court building. The Neighbourhood Justice Centre provides 'breakout spaces' where people can sit outside of the court but still hear when their matters are called, changing the 'tone' of court and reducing client anxiety and agitation. There is also a children's play room on the ground floor.

122 The ALRC heard support for the roaming or 'dynamic security' system used at the Neighbourhood Justice Centre. This system replaces the usual 'airport-style' security at the court entrance with roaming security guards, who talk and interact with everyone who comes into the building.[132] This system is reported to defuse tension and create a more client-friendly atmosphere and has been successful in ensuring client and staff safety to date.

123 The ALRC would like to hear from stakeholders about what improvements could be made to improve court environments for family law clients.

Legal principles in relation to parenting and property

124 The *Family Law Act* governs how decisions in family disputes over parenting and property matters will be made. In this section, the ALRC asks what changes might be made to the legislative provisions governing decisions about children's care arrangements and the court's welfare jurisdiction. It also asks whether and how the law in relation to parenting might be reformed to ensure a consistent approach to decision making about children's care needs regardless of the structure of their family or how it was formed. The ALRC also asks about the need for changes to be made to the law governing property division, spousal maintenance and binding financial agreements.

131 Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016) rec 70.The ALRC heard during consultations that renovations are currently being made to magistrates' courts in Victoria to include childcare facilities in line with the recommendations of the Royal Commission into Family Violence.

132 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol III, 138.

Parenting

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?

Parenting orders

125 Early consultations for this Inquiry revealed a number of concerns about Part VII of the *Family Law Act* (Part VII). Among other things, Part VII vests relevant courts with the power to make 'parenting orders' about the care of children. These may include orders about:

- who a child lives with;
- the time a child is to spend with another person or persons;
- the allocation of parental responsibility for a child;
- the communication a child is to have with another person or persons;
- the maintenance of a child, in limited circumstances;
- how disputes about the operation of the order may be resolved; and
- any aspect of the care, welfare or development of a child or any other aspect of parental responsibility for a child.

126 Part VII also contains a framework that governs decision making about these issues by the courts. This framework, introduced in 2006, provides that the best interests of the child must be the court's 'paramount consideration' when deciding what orders to make. It also sets out a list of factors the courts must take into account when determining the child's best interests. This list identifies two matters—the benefit to the child of having a meaningful relationship with both parents, and the need to protect the child from harm from being subjected to, or exposed to, abuse, neglect or family violence—as primary considerations. As a result of amendments to the Act in 2012, the courts are required to give greater weight to the second of the primary factors, the need to protect children from harm.

127 Additional factors that the courts must consider include:

- any views expressed by the child;
- the capacity of each parent to provide for the child's needs;
- the attitude to the responsibilities of parenthood demonstrated by each parent;
- any family violence involving the child or a member of the child's family; and

- the right of Aboriginal or Torres Strait Islander children to enjoy their culture.

128 The decision-making framework in Part VII also includes a presumption that it is in the best interests of the child for his or her parents to have equal shared parental responsibility for their care. This presumption does not apply in cases of family violence or child abuse, and it can be rebutted by evidence that it is not in the best interests of the particular child in the circumstances. If the court does make an order for equal shared parental responsibility, it is then required to consider whether an equal care-time arrangement is in the child's best interests and reasonably practicable.

129 In the 2006 case of *Goode & Goode*,[133] the Full Court of the Family Court held that this framework provides the courts with a multi-step decision-making pathway to follow. According to this pathway, a judicial officer should:

- consider each of the relevant matters in the best interests checklist and make findings about them if possible;
- decide whether the presumption of equal shared parental responsibility applies or is rebutted;
- if the presumption applies and is not rebutted, consider whether making an order that the child spend equal time with the parents is in the child's best interests;
- if equal time is found not to be in the child's best interests, consider making an order that the child spend substantial and significant time with each parent; and
- if neither equal time nor substantial and significant time is considered to be in the child's best interests, make such orders as the court decides are in the best interests of the child.

130 Academic scholarship and preliminary consultations for this Inquiry indicate that this framework has been the subject of considerable critique. This has included concerns about:

- the effectiveness of the legislation in addressing safety concerns for children arising from family violence and child abuse;
- the complexity and repetition within the decision-making framework, and associated cost issues for clients and productivity issues for the courts;[134]
- the confusion created by the presumption of equal shared parental responsibility, which many in the community have misunderstood as a requirement that children should spend equal amounts of time with each parent;

133 *Goode & Goode* [2006] FamCA 1346 (15 December 2006).

134 Grant Riethmuller, 'Deciding Parenting Cases under Part VII—42 Easy Steps' (2015) 24 *Australian Family Lawyer* 38.

- the scope for escalation of conflict associated with the requirement that parents must jointly make decisions;[135] and
- the lack of respect and weight given to the views of the child in parenting proceedings.[136]

Family violence and parenting orders

131 The definition of family violence in the *Family Law Act* is integral to the application of the provisions designed to protect children from harm. The relevant section, introduced in 2012, defines family violence as 'violent, threatening or other behaviour by a person that coerces or controls a member of the person's family … or causes the family member to be fearful'.[137] The section also provides a non-exhaustive list of examples of behaviour that may constitute family violence, including:

- assault;
- sexual assault or other sexually abusive behaviour;
- stalking;
- repeated derogatory taunts;
- intentionally damaging or destroying property;
- intentionally causing death or injury to an animal;
- financial abuse;
- social isolation from friends, family or culture; and
- deprivation of liberty.

132 Some concerns have been expressed that this definition:

- may not adequately reflect the experiences of violence in Aboriginal and Torres Strait Islander communities;[138]
- does not include misuse of process as a form of abuse;
- does not mention psychological abuse; and
- is not consistent with state and territory family violence legislation, whose definitions do not include a requirement of coercive and controlling behaviour.[139]

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135 Richard Chisholm, 'Re-Writing Part VII of the Family Law Act: A Modest Proposal' (2015) 24(3) *Australian Family Lawyer* 17.

136 See, eg, National Children's Commissioner, *Children's Rights Report 2015* (Australian Human Rights Commission, 2015) 17.

137 *Family Law Act 1975* (Cth) s 4AB.

138 Alice Springs Women's Shelter, Submission No 121 to SPLA Committee, Parliament of Australia, Inquiry into *A Better Family Law System* (April 2017).

139 See, eg, *Family Violence Protection Act 2008* (Vic) s 5.

133 Recent reports and early consultations for this Inquiry suggested a number of potential reforms to the decision-making framework in Part VII and to the Act's definition of family violence. These include proposals to:

- include abuse of process as an example in the definition of family violence;[140]
- remove the presumption of equal shared parental responsibility[141] and the language of equal shared time from Part VII;[142]
- amend the best interests of the child checklist to more clearly prioritise the protection of children from physical or psychological harm;[143]
- provide a simplified decision-making framework for determining interim parenting matters;
- provide a separate dedicated pathway for decision making in cases involving family violence; and
- enact requirements that a risk assessment for family violence be undertaken upon a matter being filed and at each hearing or court event and that findings of fact be made about allegations of family violence as soon as practicable after proceedings are filed.[144]

The welfare jurisdiction

134 Concerns have also been raised about the *Family Law Act*'s welfare jurisdiction, which gives the family courts a broad power to make orders relating to the welfare of children.[145] This supervisory jurisdiction of the court is used to support a range of orders arising outside the context of a dispute between parents, although the scope of the court's power under s 67ZC is uncertain.[146] Recent reports and early consultations have revealed concerns about how the welfare jurisdiction operates in relation to people with disability (in particular in relation to the sterilisation of young women), and in relation to intersex children.

135 The sterilisation of a young person, including one with an intellectual disability, must usually be authorised by the Family Court pursuant to the exercise of its welfare jurisdiction.[147] Scholarly critiques have suggested that, in these matters, the Court has

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140 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 13, rec 8.
141 Ibid rec 19.
142 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) <www.wlsa.org.au/campaigns/safety_first_in_family_law>.
143 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 13, [6.36].
144 Ibid rec 7.
145 *Family Law Act 1975* (Cth) s 67ZC.
146 Belinda Fehlberg et al, *Australian Family Law: The Contemporary Context* (Oxford University Press, 2nd ed, 2015) 36.
147 *Secretary, Department of Health and Community Services v JWB and SMB (Marion's case)* (1992) 175 CLR 218.

tended to focus on the person's disability, including assumptions about their lack of capacity, instead of looking at their social context and capabilities.[148] Organisations such as Women with Disabilities Australia and the Australian Human Rights Commission have argued that forced sterilisation is a serious violation of human rights, and have called for a prohibition of the involuntary or coerced sterilisation of girls unless there is a serious threat to life.[149] However, the Family Court has noted that it is increasingly rare for such applications to be brought.[150] In 2013, the Senate Standing Committee on Community Affairs recommended the development of uniform model legislation to regulate the sterilisation of people with disability.[151]

136 In relation to intersex children, concerns have been raised about the ability of intersex children to participate in decision making about their gender identity and the extent to which court scrutiny on decisions in relation to medical treatment is required to uphold human rights standards. In *Re: Carla*,[152] the court held that its prior consent to the removal of gonads in a five year old child who was raised as a girl having been born with 'the external appearance of a girl, but with male gonads not contained within a scrotum' was not required.[153] This approach has been criticised by human rights advocates, on the basis that significant risks can ensue from the treatment, including infertility and loss of sexual sensation.[154] Intersex people have reported that it is common for medical procedures to be carried out on infants or young children, without their consent.[155] Responding to concerns from intersex organisations, the Senate Community Affairs Reference Committee in 2013 recommended that all proposed intersex medical interventions for children and adults without the capacity to consent should require authorisation from a civil and administrative tribunal or the Family Court.[156]

137 The ALRC also notes the recent appeal decision in *Re Kelvin*[157] in which the requirement for family court approval was overturned for stage two of medical

148 Linda Steele, 'Making Sense of the Family Court's Decisions on the Non-Therapeutic Sterilisation of Girls with Intellectual Disability', above n 64.

149 Women with Disabilities Australia, Submission No 49 to Senate Standing Committee on Community Affairs, Parliament of Australia, *Inquiry into Involuntary or Coerced Sterilisation of People with Disabilities in Australia* (March 2013) 12; Australian Human Rights Commission, Submission No 5 to Senate Standing Committee on Community Affairs, Parliament of Australia, *Inquiry into Involuntary or Coerced Sterilisation of People with Disabilities in Australia* (November 2012) 4.

150 The Hon Diana Bryant AO, Submission No 36 to Senate Standing Committee on Community Affairs, Parliament of Australia, *Inquiry into Involuntary or Coerced Sterilisation of People with Disabilities in Australia* (February 2013).

151 Senate Standing Committee on Community Affairs, Parliament of Australia, *Inquiry into Involuntary or Coerced Sterilisation of People with Disabilities in Australia* (2013) rec 27.

152 *Re: Carla* [2016] FamCA 7.

153 Ibid [2].

154 Human Rights Law Centre, *Queensland Family Court Approves Sterilising Surgery on 5 Year Old Intersex Child: Re: Carla (Medical Procedure) [2016] FamCA 7* (2016) https://www.hrlc.org.au/human-rights-case-summaries/2017/4/21/queensland-family-court-approves-sterilising-surgery-on-5-year-old-intersex-child.

155 Senate Standing Committee on Community Affairs, Parliament of Australia, *Inquiry into Involuntary or Coerced Sterilisation of People with Disabilities in Australia* (2013) 94.

156 Ibid rec 6.

157 *Re: Kelvin* [2017] FamCAFC 258.

treatment where the young person was considered to be *Gillick*[158] competent (of sufficient maturity to give informed consent) and their parents and treating medical practitioners agreed with the course of action.

138 The ALRC invites comment on whether changes should be made to Part VII, the definition of family violence, or any other provisions of the *Family Law Act* to produce best outcomes for children and better support decision making in relation to the safety of children and their families.

139 The ALRC is also interested in receiving feedback about other sections of the *Family Law Act* and Rules that affect arrangements for children, including:

- section 68LA, which defines the nature of the role of the Independent Children's Lawyer;
- the principles in Division 12A for conducting child-related proceedings;
- the provisions of Division 13A which govern the courts' powers in relation to non-compliance with orders that affect children; and
- the rules governing the making of consent orders.

Arrangements for children and family diversity

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?

140 As noted above in the section, 'Objectives and principles', a significant number of Australian families with children do not fit the traditional heterosexual nuclear family model. Since the passage of the *Family Law Act*, Australia has seen increasing numbers of stepfamilies, blended families, sole-parent families and same-sex families, as well as growing numbers of kinship-care arrangements.

141 Families in Australia also reflect a considerable diversity of cultural practices in relation to the care and raising of children, including among Aboriginal and Torres Strait Islander peoples and culturally and linguistically diverse communities. In many cases these practices incorporate approaches to family structure that are distinct from those of nuclear families.[159] For example, it is not uncommon for Aboriginal children to have multiple caregivers drawn from their wider kinship networks,[160] while many families in Australia's new and emerging communities take a collectivist approach to child rearing.

158 *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112.

159 Secretariat of National Aboriginal and Islander Child Care, *Growing Up Our Way: Aboriginal and Torres Strait Islander Child Rearing Practices Matrix* (2011).

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

142 In addition to this diversity, recent years have seen a growing use of assisted conception processes and surrogacy arrangements by Australian families, increasing the number of potential parents a child may have, including a mix of genetic, gestational, social and intending parents. Together, these developments suggest that for a significant number of Australian children, their family will include carers who are not their biological or legal parents.

143 Reflecting on this context, a number of stakeholders and reports have suggested that many of the provisions of Part VII, which are limited in their application to the child's biological or adoptive parents, should be amended to better reflect the diversity of families in which children are cared for, and to better support decision making by the courts in cases where children are living in non-traditional families.

144 The ALRC seeks comment on whether Part VII of the *Family Law Act* should be amended to better reflect the diversity of families in Australia and support a consistent decision-making approach for all children regardless of their family structure.

Property adjustment

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?

145 The *Family Law Act* provides the family courts with broad powers to adjust property interests and make orders for spousal maintenance between current or former married couples, and between former partners from unmarried relationships. The provisions relating to married and unmarried couples are very similar but are not identical.

146 The 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,[161] and a power to alter the interests of the parties in property.[162] Orders may be made that affect third parties in certain circumstances.[163] 'Property' is interpreted broadly to include all the property of the parties, and to include both legal and equitable interests, and tangible as well as intangible property such as shares or debts.[164] The Act also provides detailed provisions allowing for the division of superannuation interests.[165]

147 The power to alter property interests is broadly framed as a power to 'make such order as [the court] considers appropriate'.[166] However, this power may only be exercised where the court is satisfied 'that, in all the circumstances, it is just and

161 *Family Law Act 1975* (Cth) ss 78, 90SL.
162 Ibid ss 79, 90SM.
163 Ibid ss 90AE, 90TA.
164 *In the Marriage of Duff* [1977] FamCA 24.
165 *Family Law Act 1975* (Cth) s 90MS.
166 Ibid ss 79(1), 90SM(1)(a).

equitable to make the order'.[167] The court's discretion must also be exercised in accordance with legal principles, including those in the Act itself.[168]

148 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), which incorporate the 'future needs' factors set out in s 75(2).

149 The law in a number of overseas family law systems takes a less discretionary approach to this issue. For example, the legislation in some countries employs default rules, such as a presumption of equal sharing (for example, New Zealand),[169] or uses 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.[170]

150 A survey of separating parents conducted by the AIFS indicates that key factors affecting the division of their property were the extent of the assets, liabilities, and financial resources of the parties, who initiated the separation and who left the family home, family violence, and care-time arrangements for children.[171] The research found that a majority (62%) of respondents thought that their property arrangement was fair.[172]

151 However, this research suggests that for those affected by family violence or other risk factors, there is a greater likelihood of an outcome in which the person who has experienced violence will not achieve a fair outcome and may suffer long-term financial disadvantage.[173]

152 A number of suggestions have been made for changes to the *Family Law Act*'s property regime. These have included:

- proposed changes to the provisions guiding how property should be split including:
    - adoption of a community of property regime;[174] and

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167 Ibid ss 79(2), 90SM(3); *Stanford and Stanford* (2012) 247 CLR 108, [35] (French CJ, Hayne, Kiefel and Bell JJ).
168 *Stanford and Stanford* (2012) 247 CLR 108, [38] (French CJ, Hayne, Kiefel and Bell JJ).
169 *Property (Relationships) Act 1976* (NZ) s 11.
170 *Family Law Act 1990* (Ontario) s 4, definition of 'net family property'.
171 Rae Kaspiew and Lixia Qu, 'Property Division after Separation: Recent Research Evidence' (2016) 30(3) *Australian Journal of Family Law* 1, 20.
172 Ibid 21.
173 Ibid 25.
174 See, eg, Attorney-General's Department (Cth), *Property and Family Law: Options for Change* (1999).

- a presumption of equal contributions,[175] or other presumptions about how property should be split, such as a presumption of equal sharing;[176]

- codification of the Full Court of the Family Court's decision in *Kennon & Kennon*,[177] or otherwise providing clearer guidance about how family violence will be taken into account in property matters;[178]
- amendments to allow greater use of court orders for the split or transfer of unsecured joint debt and liabilities;[179]
- suggestions that the requirement to regard the best interests of the child as the paramount consideration should also apply to adjustment of property;[180]
- suggestions that the Act's complex superannuation splitting provisions be simplified;[181] and
- suggestions that the property provisions for married and unmarried couples be merged and any remaining inconsistencies resolved.

153 The ALRC invites comment on whether these or any other changes should be made to the provisions in the *Family Law Act* governing property division.

Spousal maintenance

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?

154 The *Family Law Act* vests the family courts with power to order a party to a marriage or a 'de facto' relationship to pay spousal maintenance to the other party if that person is unable to support him or herself due to caring responsibilities for a child of the marriage, disability, or 'any other adequate reason'.[182] The court can make 'such

175 Ibid 35.
176 See, eg, Australian Law Reform Commission, *Matrimonial Property*, Report No 39 (1987) rec 7; Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 2, 2014) rec 24.4.
177 *Kennon & Kennon* [1997] FamCA 905.
178 See, eg, House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 13, rec 13; Family Law Council, *Letter of Advice: Violence and Property Proceedings*, (2001) recs i–ii; Women's Legal Services Australia, above n 142.
179 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 13, rec 16.
180 See, eg, Family Law Council, Submission to Attorney-General's Department (Cth) Discussion Paper *Property and Family Law: Options for Change* (July 1999) 26.
181 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 13, rec 15.
182 *Family Law Act 1975* (Cth) ss 72, 90SF.

order as it considers proper' for the provision of maintenance,[183] having regard to the person's capacity to pay.

155 The Act provides a list of 19 matters that may be taken account in determining what order to make, including the age and health of the parties, their income, property, financial resources and capacity for employment, and whether a party has the care and control of a child of the relationship who is under the age of 18. Orders for maintenance can either provide for lump sum maintenance, or for periodic payments.[184]

156 There is limited data available on the incidence of maintenance orders. However, surveys of court judgments have indicated that orders for maintenance are rare and are generally limited to cases involving high income families and made on an interim basis or for a limited period of time.[185]

157 Research suggests that this profile is in line with community attitudes in Australia, with one 1999 study indicating very limited community support for the payment of private spousal support after separation.[186]

158 However, a number of the early consultations for this Inquiry and submissions to the SPLA Inquiry have suggested that there should be greater consideration of spousal maintenance orders in cases involving family violence. These include a suggestion that family violence be included as a relevant factor in determining needs for the purposes of spousal maintenance applications.[187] Some stakeholders also proposed the development of a system of administrative determination of maintenance claims, in a similar fashion to child support.

159 The ALRC is interested in comment about whether changes are needed to the spousal maintenance provisions, particularly in relation to people who have experienced family violence.

Binding financial agreements

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?

160 The *Family Law Act* provides for both married couples and unmarried cohabiting couples to settle their financial affairs by way of a binding financial agreement (BFA). A BFA may be entered into before, during or after a relationship,[188]

183 Ibid ss 74, 90SE.
184 Ibid ss 80, 90SS.
185 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).
186 Ibid 16.
187 Victoria Legal Aid, Submission No 60 to House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System* (May 2017) 25–26.
188 *Family Law Act 1975* (Cth) ss 90B–90D and 90UB–90UD.

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.[189]

161 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*.[190] 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 the effect of the agreement on 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;[191] 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.[192]

162 Over the years, the courts have overturned a number of agreements because of failure to meet the *Family Law Act*'s entry requirements, or previous versions of them.[193] In response to this, two sets of amendments[194] have been enacted to strengthen the enforceability of BFAs, including by:

- reducing the number of matters about which parties must receive legal advice; and
- providing the courts with some flexibility to uphold an agreement where certain requirements were not met but it would be 'unjust and inequitable' if the agreement were not binding.[195]

163 Despite these changes, members of the legal profession have expressed concerns about their exposure to professional negligence liability resulting from the continuing uncertainty about the advice they are required to give clients.[196] Other issues that have been raised during consultations include concerns about:

- the use of BFAs to the disadvantage of the member of the couple in the weaker bargaining position;

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189 See, eg, Ibid s 90B(1).
190 Ibid ss 71A, 90SA.
191 Ibid ss 90G, 90UJ.
192 Ibid ss 90K, 90UM.
193 Most prominently *Black and Black* [2008] FamCAFC 7.
194 Made by the *Family Law Amendment Act 2003* (Cth) and the *Federal Justice System Amendment (Efficiency Measures) Act (No 1) 2009* (Cth).
195 *Family Law Act 1975* (Cth) ss 90G(1A), 90UJ(1A).
196 Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Commonwealth Parliament, Canberra, Friday 12 February 2016, 18 (Mr Paul Doolan, Family Law Section, Law Council of Australia). See also, eg, John Wade, 'The Perils of Prenuptial Financial Agreements: Effectiveness and Professional Negligence' (2012) 22(3) *Australian Family Lawyer* 24.

- the extent to which the provisions governing BFAs sit comfortably with a discretionary approach to property adjustment;
- whether and how family violence should be taken into account where a couple has entered into a financial agreement, including family violence that commenced after the financial agreement was finalised;[197] and
- the effect of the recent High Court decision in *Thorne v Kennedy*,[198] which set aside an agreement on the basis of unconscionable conduct, on enforceability of agreements.

164 The ALRC is interested in comment on whether any further changes are needed to the provisions governing BFAs.

Resolution and adjudication processes

165 Most families manage their separation without recourse to the family law system. Many, however, seek assistance from one or more of the family law system's services, such as a FDR service or by engaging a lawyer. While less common, some families approach the courts to resolve their dispute. This section considers what improvements can be made to the system's processes for resolving and adjudicating family law disputes. The ALRC asks what changes to court processes could be made to provide more timely and affordable resolution of matters and to better manage risk to children. It also asks about the place of alternative dispute resolution processes, as well as how people might be further assisted to resolve matters on their own or with minimal involvement from professionals.

166 There is now clear evidence that many of the people who approach the family law system for assistance today have complex support needs, including in relation to family violence and other safety concerns for children, and that these disputes often involve a co-occurrence of risk issues, such as drug and alcohol misuse or mental health concerns.[199] In light of this evidence, the ALRC asks what processes, including alternative dispute resolution models and less adversarial decision-making approaches, might be used to assist families with complex needs, as well as how support could be best provided to the parties involved in these matters. The ALRC also asks how misuse of process in family law matters might be prevented.

Timely and cost-effective resolution of litigated disputes

Question 20 What changes to court processes could be made to facilitate the timely and cost-effective resolution of family law disputes?

197 See, eg, concerns expressed in Women's Legal Service (Qld), Submission No 3 to SPLA Committee, Parliament of Australia, *Inquiry into the Family Law Amendment (Financial Agreements and Other Measures) Bill 2015* (2016).

198 *Thorne v Kennedy* [2017] HCA 49 (8 November 2017).

199 Kaspiew et al, 'Evaluation of the 2012 Family Violence Amendments', above n 9, 16.

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?

167 Early consultations for this Inquiry revealed significant concerns about the delays currently associated with litigated proceedings in the family courts. These included calls for changes in how cases are managed by the courts and a greater use of orders diverting litigants to low-cost dispute resolution options outside the courts.

168 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,[200] and that delays may be even longer in regional and remote areas of Australia.

169 Reforms to the *Family Law Act* in 2006 require parents to attempt a FDR process to settle arrangements for their children before initiating court proceedings, unless one of a number of statutory exemptions applies.[201] This reform led to a significant reduction in court applications for final orders in children matters.[202] However, children's matters continue to dominate the workload of the family courts.[203] AIFS research indicates that many of these cases involve concerns about family violence or other issues of risk to the child,[204] and that these matters are more likely to involve lengthy resolution timeframes than less complex cases.[205]

170 Stakeholders raised a number of concerns associated with the present delays for families, including:

- the potential for children and parents to spend long periods living in limbo while waiting for trial;
- the safety risks to parties and children arising from delayed resolution of disputes that involve protective concerns;
- the scope for delay and uncertainty to exacerbate conflict;[206] and
- the potential for clients to consent to outcomes that fall short of the security and protection a court order could provide.[207]

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200 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 13.
201 *Family Law Act 1975* (Cth) s 60I.
202 Rae Kaspiew et al, 'Evaluation of the 2012 Family Violence Amendments' (Synthesis Report, Australian Institute of Family Studies, 2015) 16.
203 Rae Kaspiew et al, 'Court Outcomes Project (Evaluation of the 2012 Family Violence Amendments)' (Australian Institute of Family Studies, 2015) 17.
204 Kaspiew et al, 'Family Law Court Filings 2004–05 to 2012–13', above n 202.
205 Kaspiew et al, 'Court Outcomes Project (Evaluation of the 2012 Family Violence Amendments)', above n 203, table 3.4.
206 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 13, 58.
207 Ibid.

171 Recent reports and initial consultations raised a number of reform strategies for consideration, including:

- the development of a triage approach to court applications, to ensure that urgent cases are identified and dealt with expeditiously and that families are referred to a resolution pathway that is appropriate to their needs;[208]
- a more streamlined case management model within the courts, such as the use of a teamed docket system that pairs judicial officers and registrars and possibly family consultants;
- increased use of practice directions and notes to support efficiency and safety. Examples provided in initial consultations were Practice Direction No 2 of 2017 (Interim Family Law Proceedings) in the Federal Circuit Court limiting affidavits in interim proceedings to ten pages and annexures to five;
- greater leadership from the bench to address delays caused by parties and/or their legal advisers failing to meet court deadlines, including through the setting of budgets for matters;
- a greater use of orders diverting litigants to mediation or other dispute resolution services after the commencement of litigation;[209] and
- limiting the availability of appeals from interim orders.

172 The ALRC seeks stakeholder input about the possibilities for enhancing the timely and cost-effective resolution of disputes that reach the courts.

Small property claims

Question 22 How can current dispute resolution processes be modified to provide effective low-cost options for resolving small property matters?

173 Preliminary consultations for this Inquiry and a number of recent reports have raised concerns about the 'one pathway for all' approach to court proceedings and emphasised a need to ensure the availability of dedicated dispute resolution pathways that are appropriate to the nature and complexity of the issues involved.[210] Particular concerns have been raised in this context about the limited availability of less formal and lower cost dispute resolution options for property matters that involve small asset pools,[211] including the implications of this limitation for women who have experienced family violence.[212]

208 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 13.
209 Ibid.
210 Ibid rec 5.
211 Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 2, 2014) 871.
212 Ibid 870.

174 These concerns reflect the increasing recognition of economic and financial abuse as an aspect of family violence, and the obstacles faced by those who experience family violence in obtaining fair financial settlements.[213]

175 A number of suggestions for change to address these problems have been made. These include:

- a recommendation by the Productivity Commission that the requirement in s 60I of the *Family Law Act* to attempt FDR prior to lodging an application for children's orders be extended to financial matters;[214]
- recommendations by the SPLA Committee and Women's Legal Service Victoria that the family courts promote early resolution of small property disputes through a streamlined case management process with simplified procedural and evidentiary requirements;[215]
- recommendations by the Victorian Royal Commission into Family Violence,[216] the Family Law Council,[217] and the SPLA Committee,[218] that state and territory magistrates be encouraged to increase the exercise of their *Family Law Act* powers in relation to property when parties with family law needs are already before the court;
- the implementation of a small claims list in the Federal Circuit Court[219] along the lines used by the Federal Circuit Court in claims of up to $20,000 under the *Fair Work Act 2009* (Cth) and claims up to $40,000 under the *National Consumer Credit Protection Act 2009* (Cth); and
- the roll out of an arbitration process for small property claims along the lines of Legal Aid Queensland's arbitration model,[220] which is available to legally aided clients for resolution of property disputes of between $20,000 and $400,000.

176 The ALRC seeks stakeholder input in relation to this issue.

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213 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol IV, ch 21.
214 Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 2, 2014) 875.
215 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 13, rec 14; Women's Legal Service Victoria, 'Small Claims, Large Battles: Achieving Economic Equality in the Family Law System' rec 1.
216 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol I, 217.
217 Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016) 16.
218 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 13, rec 17.
219 Victoria Legal Aid, Submission No 60 to SPLA Committee, Parliament of Australia, Inquiry into *A Better Family Law System* (May 2017) 6.
220 Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 2, 2014) box 24.7.

Appropriate dispute resolution for cases involving family violence

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?

177 Recent reports have pointed to client concerns about the adversarial nature of court processes and its potential impact on parties who have experienced family violence or abuse.[221] In particular, the *SPLA Family Violence Report* noted stakeholder views that the adversarial approach 'mirrors the dynamic of abusive relationships',[222] and concerns that engagement with court processes can re-traumatise people who have experienced family violence.[223]

178 These views reflect the growing recognition of the negative effects of adversarial processes on people who have experienced trauma,[224] and the potential adverse implications of this for their parenting capacity.[225]

179 Alongside the emergence of this knowledge has been a growing awareness of the need for trauma-informed approaches to service delivery in the family law system.[226] A description of this model of service delivery is provided above in the section that defines the terms used in this Issues Paper.

180 Given the concentration of multiple and complex issues facing many of the families who engage with formal dispute resolution pathways, there is a significant likelihood that parents and children may be affected by trauma arising from exposure to family violence or abuse.[227]

181 For some groups, trauma may arise from a constellation of long-standing and contemporary issues. For example, any trauma-informed response must incorporate an

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221 Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016) 114; House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 13, 134–5.

222 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 13, 49.

223 Family and Relationship Services Australia, Submission No 80 to SPLA Committee, Parliament of Australia, Inquiry into *A Better Family Law System* (April 2017).

224 Judith Lewis Herman, 'The Mental Health of Crime Victims: Impact of Legal Intervention' (2003) 16(2) *Journal of Traumatic Stress* 159.

225 Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016). See, eg *Esfara & Wollens* [2016] FamCA 2 (13 January 2016) [22], [353]; *Theophane & Hunt (Final Parenting Orders)* [2014] FamCAFC 68 (24 November 2014) [87], [95]–[97]; *Vaughan & Vaughan* [2015] FCCA 3268 (11 December 2015) [142]–[144].

226 Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016) 6.

227 Mental Health Coordinating Council, *Trauma-Informed Care and Practice: Towards a Cultural Shift in Policy Reform across Mental Health and Human Services in Australia* (2013) 8.

understanding of the specific experiences of trauma of Aboriginal and Torres Strait Islander peoples, including intergenerational trauma.[228] In relation to culturally and linguistically diverse groups, depending on culture of origin and migration history, trauma—including from circumstances that have led to forced migration— may be pertinent. Intergenerational trauma may also play a role.[229]

182 The Family Courts' *Family Violence Best Practice Principles* recognise these concerns and exhort judicial officers to manage their courtroom in a way that seeks to reduce the potential for re-traumatisation of parties who have experienced family violence.[230] This includes through directions or orders about how particular evidence is to be given and orders limiting or not allowing cross-examination of a particular witness.

183 However, a number of stakeholders have suggested the need for greater support for litigants who have experienced family violence or abuse and/or for the development of appropriately designed alternative dispute resolution processes to reduce the potential for re-traumatisation.

184 A key suggestion for addressing the trauma concerns of litigants has centred on recommendations for embedding specialist family violence workers in the family courts, along the lines employed in some state and territory magistrates' courts, so as to provide support for parties who have experienced family violence.[231]

185 An alternative proposal made to the SPLA Inquiry was for the expansion of legally-assisted FDR processes. The *SPLA Family Violence Report* notes in this regard the submission from Women's Legal Services Australia that a 'well-supported and safe mediation process, with expert lawyers and mediators' who have a sound understanding of family violence and family law, can be an 'empowering' process for a parent who has experienced family violence, particularly when compared to the traditional court process, which Women's Legal Services Australia submitted 'rarely results in a good outcome'.

186 Legally-assisted FDR typically involves a collaborative partnership approach between a family dispute resolution service provider and two legal services. It is designed to ensure that each party is both legally represented and supported during the dispute resolution process. In this way, agencies are able to provide a service to clients in cases that might otherwise be assessed as not suitable for FDR, such as cases involving family violence.

187 The ALRC notes that the Attorney-General's Department has recently expanded funding to support pilot programs in enhanced, legally-assisted FDR, particularly for

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228 Judy Atkinson, 'Trauma-Informed Services and Trauma-Specific Care for Indigenous Australian Children' (Resource Sheet No 21, Closing the Gap Clearinghouse, 2013) 2.

229 Rebecca Jenkinson et al, 'Settlement Experiences of Recently Arrived Humanitarian Migrants' (Fact Sheet, Australian Institute of Family Studies, 2016).

230 Family Court of Australia and Federal Circuit Court of Australia, *Family Violence Best Practice Principles* (4th ed, 2016) 16.

231 Attorney-General's Department (Cth), Submission No 89 to SPLA Committee, Parliament of Australia, *A Better Family Law System* (May 2017) 6.

Aboriginal and Torres Strait Islander clients and culturally and linguistically diverse clients.[232] These will be evaluated. The SPLA Committee recommended that, subject to a positive evaluation of these pilots, the Australian Government should expand the availability of legally-assisted FDR.[233]

188 The ALRC invites stakeholder input about ways of addressing the safety and support needs of litigants at court and the development of alternative dispute resolution options for parties who have experienced family violence or abuse.

Misuse of process

Question 25 How should the family law system address misuse of process as a form of abuse in family law matters?

189 The Terms of Reference ask the ALRC to consider the need for reform in relation to 'family violence and child abuse, including protection for vulnerable witnesses'. A further term of reference asks the ALRC to consider the 'mechanisms for reviewing and appealing decisions'. An issue that is central to these questions is the potential for court proceedings and other family law system processes to be misused to maintain a dynamic of abuse.[234]

190 Research conducted by AIFS has shown that patterns of violence involving multiple types of abuse—especially financial abuse, social isolation and threats of self-harm and harm against children—are associated with higher court use and higher rates of unsuccessful engagement with FDR.[235] Research[236] and analysis[237] over a long period of time has highlighted a range of behaviours that can occur in this context, including:

232 Ibid.

233 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 13, rec 4.

234 Ibid 65.

235 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).

236 Miranda Kaye, Julie Stubbs and Julie Tolmie, 'Domestic Violence and Child Contact Arrangements' 17(1) *Australian Journal of Family Law* 93; Rebecca Patrick, Kay Cook and Hayley McKenzie, 'Domestic Violence and the Exemption from Seeking Child Support: Providing Safety or Legitimising Ongoing Poverty and Fear' (2008) 42 *Social Policy and Administration* 749; 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); 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).

237 Australian Law Reform Commission, *For the Sake of the Kids: Complex Contact Cases and the Family Court*, Report No 73 (1995); Domestic and Family Violence Death Review Board, *2016–2017 Annual Report* (2017).

- instigating and re-instigating legal proceedings in multiple courts, including applications for final orders and for enforcement of parenting orders in the family courts;[238]
- 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';[239]
- approaching multiple legal practitioners for advice, particularly in regional, rural and remote communities, to ensure that potential sources of legal advice of the former partner are 'conflicted out' of providing advice;[240]
- making cross-applications in proceedings for personal protection orders;
- 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;
- self-representing in court to create opportunities to personally cross-examine victims about family violence, sexual abuse allegations and other sensitive issues;
- 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;
- making multiple notifications to child protection agencies;
- challenging and appealing child support determinations;
- deliberately not engaging or delaying engaging with FDR services to delay resolution;
- non-disclosure of income and assets in property and financial matters; and
- attempting to fraudulently gain access to Centrelink benefits.

191 A number of suggestions for reform have been proposed in this area. This includes the SPLA Committee's recommendation, noted above in the section, 'Legal principles in relation to parenting and property', that the definition of family violence in the *Family Law Act* be amended to include 'abuse of process' in the list of examples of behaviour that might come within the definition.[241] The Committee also

238 *Caffell & Falcon* [2013] FCCA 1652 provides an example of this dynamic. This case reportedly involved 56 court appearances over a period of 8 years, commencing when the parties' daughter was two years old.

239 Australian Institute of Judicial Administration, *National Domestic and Family Violence Bench Book* <http://dfvbenchbook.aija.org.au/contents>.

240 Ibid; Alice Springs Women's Shelter, Submission No 121 to SPLA Committee, Parliament of Australia, Inquiry into *A Better Family Law System* (April 2017).

241 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 13, rec 8.

recommended strengthening penalties, including costs orders, to respond to instances of misuse of court processes.[242]

192 In relation to the issue of misuse of subpoenas, the Family Law Council's 2016 report noted Practice Direction 2 of 2011 issued by the Family Court of Western Australia as a possible response to this concern. This Practice Direction provides that a subpoena directed to a family counsellor will not be issued unless the subpoena 'is accompanied by a letter certifying that reasonable efforts have been made' to discuss the 'possible consequences of compliance with the subpoena, including the impact on the family or children involved' with the person against whom the subpoena is directed.[243]

193 Other recent developments in this area include the Australian Government's recent draft of legislative amendments to protect vulnerable witnesses from direct cross-examination by self-represented litigants in circumstances where allegations of family violence are involved.[244] The *SPLA Family Violence Report* recommended that this legislation be introduced into Parliament as a matter of urgency.[245]

194 Further provisions in this draft legislation are intended to 'clarify and modernise the powers of the Family Court of Australia exercising jurisdiction under the *Family Law Act* to summarily dismiss applications without merit'.[246] If implemented, these changes would bring the relevant provisions in the *Family Law Act* broadly into line with the powers available to the Federal Court of Australia and the Federal Circuit Court.[247] They would allow a court to issue decrees in circumstances where it is satisfied that applications or responses to applications have 'no reasonable prospect of success' (in whole or part),[248] and would also allow a court to dismiss proceedings (in whole or part) if satisfied they would be frivolous, vexatious or an abuse of process. This aspect of the amendments goes further than the current relevant provisions of the Act, which do not refer to abuse of process.

195 An additional suggestion made during preliminary consultations involves limiting excessive use of litigation by restricting appeals from interim decisions to cases dealing with questions of law or by requiring leave of the court.

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242 Ibid rec 5.

243 Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016).

244 Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017 (Cth).

245 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 13, rec 12.

246 Attorney-General's Department (Cth), *Amendments to the Family Law Act 1975 to Respond to Family Violence: Public Consultation Paper* (2016) 12.

247 Ibid pt 2.

248 Attorney-General's Department (Cth), *Exposure Draft—Family Law Amendment (Family Violence and Other Measures) Bill 2017* (2016) item 12.

196 The Family Law Council's suggested trial of a Counsel Assisting model was also intended to address concerns in this area, as this mechanism would limit the opportunities for cross-examination of vulnerable parties by self-represented litigants.[249]

197 The ALRC seeks stakeholder input about ways of addressing the issue of misuse of process.

Alternative dispute resolution processes

Conciliation and FDR

> **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?

198 In addition to effecting changes to court processes, stakeholders and recent reports have suggested the need to expand and adapt the family law system's range of alternative dispute resolution options to facilitate speedier and less costly settlements for client families.[250]

199 As noted above, reforms to the *Family Law Act* in 2006 require parents (with some exceptions) to attempt a FDR process to settle arrangements for their children before initiating court proceedings.[251] Among the dispute resolution options provided by the family law system, FDR is the formal pathway most often used by parents to settle arrangements for children in the 18 or so months after separation.[252] However, FDR is not currently mandated for property and financial matters prior to filing an application.

200 Another option, discussed above, is legally-assisted FDR. Legal aid commissions and a small number of community sector FDR providers offer legally-assisted FDR processes for children's matters and for a limited number of property and financial matters, and this process reportedly has a very high rate of settlement.[253] The registrars of the Federal Circuit Court also refer some matters to Relationships Australia Victoria for privileged conciliation.[254]

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249 Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016) 68.

250 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 13; Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016); Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 2, 2014).

251 *Family Law Act 1975* (Cth) s 60I.

252 Kaspiew et al, above n 101; Rae Kaspiew et al, *Evaluation of the 2006 Family Law Reforms* (Australian Institute of Family Studies, 2009).

253 National Legal Aid Submission No 88 to SPLA Committee, Parliament of Australia, Inquiry into *A Better Family Law System* (April 2017) 7.

254 Federal Circuit Court of Australia, *Annual Report 2016–17* (2017).

201 In privately funded matters, lawyer-led negotiation is involved in a substantial proportion of property and financial matters, as well as in settling arrangements for children. Diversion to conciliation and mediation services is also available for both children's and property matters to a limited extent after proceedings have been initiated.[255]

202 The ALRC is interested in receiving input from stakeholders about the opportunities for developing the range of non-court dispute resolution processes that might be used to assist families to achieve timely and cost-effective resolution of disputes about children and property.

Arbitration

Question 27 Is there scope to increase the use of arbitration in family disputes? How could this be done?

203 During early consultations for this Inquiry, a number of stakeholders suggested that arbitration[256] processes may offer significant potential to reduce the costs and delays associated with litigated proceedings, particularly in relation to property and financial matters. At present, consensual arbitration services, which are provided for in property and financial matters under the *Family Law Act*,[257] are not widely used in Australia.[258]

204 The Productivity Commission's *Access to Justice Arrangements* Report recommended the implementation of strategies to increase the use of arbitration. It noted the example of Legal Aid Queensland's arbitration model.[259] This service is available to legally aided clients for resolution in relation to property disputes of between $20,000 and $400,000. The cost is deferred until the process is over and Legal Aid Queensland recovers lawyers' fees and half the value of its outlay. The arbitrators are specialist family lawyers with training in arbitration.

205 The ALRC is interested in hearing from stakeholders about the potential role of arbitration in resolving family law disputes.

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255 For example, a program closely linked to the court system is the Family Law Settlement Service operated by the Law Society of NSW. See Marilyn Scott, 'Sydney Family Law Settlement Service: 2012 Service Evaluation Report' (Law Society of NSW, 2014).

256 The *Family Law Act* defines arbitration as 'a process (other than the judicial process) in which parties to a dispute present arguments and evidence to an arbitrator, who makes a determination to resolve the dispute': s 10L.

257 The *Family Law Act* provides for consensual arbitration (pt II div 4, pt IIIB div 4) with determinations being registrable in the court (s 13H) and reviewable by the Family Court and the Federal Circuit Court (s 13J).

258 Belinda Felhberg et al, *Australian Family Law: The Contemporary Context* (Oxford University Press, 2nd ed, 2015) 480.

259 Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 2, 2014) box 24.7.

Technology-assisted mechanisms to support client-led resolution

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?

206 Preliminary consultations for this Inquiry revealed a concern to ensure the availability of accessible information and dispute resolution processes for clients with less complex needs, and the importance of providing processes that enable separating families to sort out their issues without incurring significant legal costs. Stakeholders also emphasised the importance for families with less complex needs of being able to manage their separation in a way that maximises their own control over the process.

207 In the family law system, steps in this direction have already been taken with the implementation of Family Relationships Advice Line, Family Relationships Online and the Telephone Dispute Resolution Service.

208 Early consultations revealed an interest in the further development of online resources in this context. Several stakeholders noted the availability of online legal information and assistance services in relation to other legal issues that might be adapted for the family law system's purposes, such as the FineFixer tool,[260] developed by Moonee Valley Legal Service in Victoria. This site provides a free online information and advice service for people who receive a fine.

209 Two online tools that were noted in relation to family law matters are the United States *It's Over Easy* divorce settlement program, and the Dutch-based *Justice42* dispute resolution platform.[261] The *Justice42* tool, developed by the Hague Institute for Innovation in Law (HiiL), was designed to provide separating couples with access to an affordable dispute resolution process. The process includes an initial face-to-face intake process that is designed to ensure cases involving family violence or other safety concerns for parties or children are screened out of the program. The program itself guides separating couples through a series of conversations on family law related issues. If the parties reach an agreement on any of these issues, the agreement will be checked by a lawyer with family law expertise who has agreed to charge a set fee for *Justice42* users. If the parties are not able to reach agreement, they are referred to a mediation service.

210 The ALRC invites stakeholder input about the use of online resources as a way of reducing costs and enhancing client control over the resolution of family disputes.

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260 *Fine Fixer* <https://finefixer.org.au>.

261 *It's Over Easy* <www.itsovereasy.com/>; *Justice42—Online Dispute Resolution Platform* <http://www.si2fund.com/portfolio/justice42/>.

Problem solving decision-making processes

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?

211 The Terms of Reference ask 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 for less adversarial resolution of parenting and property disputes'. In addition, the ALRC is asked to have regard to the need for reforms to address the issues facing 'families with complex needs, including where there is family violence, drug or alcohol addiction or serious mental illness'.

212 The *SPLA Family Violence Report* raised a number of concerns about the adversarial nature of current court processes for families with complex needs, particularly for parties who have experienced violence or abuse. Preliminary consultations for this Inquiry also questioned the appropriateness of the single event model of civil litigation for disputes about the care of children[262] where parents have complex needs, particularly where there is ongoing conflict and risks to children. These concerns reflect the empirical evidence that a significant number of client families engage in repeated use of the family courts,[263] particularly when the matter involves issues of family violence or other safety concerns for children. The limitations of the single event model of litigation for these kinds of matters have also been noted by the courts.[264]

213 Some stakeholders suggested that this circumstance highlights the need to develop a more iterative approach to decision making that can better support the management of risk to children over time, particularly where the protective capacities of the parents have been compromised and the matter does not meet the threshold for intervention by the state child protection system.[265] In such cases, judicial officers may need to consider ways of reducing the level of risk to the child by enhancing the safe parenting capacity of one or both parties, such as by linking them to trauma recovery, mental health, behaviour change and/or drug and alcohol rehabilitation services.[266]

214 Such problem-solving approaches are now a familiar feature of state and territory children's courts and specialist lists of magistrates' courts, such as drug courts,[267] mental health lists,[268] and Koori and Murri courts for Aboriginal and Torres

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262 See *Rice and Asplund* (1979) FLC 725.

263 Kaspiew et al, 'Court Outcomes Project (Evaluation of the 2012 Family Violence Amendments)', above n 203.

264 *Truman & Truman* [2008] FamCAFC 4 (21 January 2008).

265 See, eg, *Doyle & Galbraith* [2015] FCCA 3603 (23 December 2015).

266 Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016).

267 Ojmarrh Mitchell et al, 'Assessing the Effectiveness of Drug Courts on Recidivism: A Meta-Analytic Review of Traditional and Non-Traditional Drug Courts' (2012) 40(1) *Journal of Criminal Justice* 60.

268 Magistrates' Court of Victoria, *Assessment and Referral Court List* <www.magistratescourt.vic.gov.au>.

Strait Islander young people.[269] A problem-solving approach aims to address behavioural problems and risk issues that underlie the dispute, with a view to achieving a more sustainable resolution of the conflict.[270] The process harnesses the authority of the court to effect change and build capacity in two ways; first by connecting parties to relevant rehabilitation and support services, and second, through judicial oversight of the person's progress in making behavioural change, typically through the use of part-heard proceedings.[271]

215 Some stakeholders suggested that the framework in Division 12A of Part VII of the *Family Law Act*, which was enacted in 2006, could support the development of a problem-solving approach by the family courts in children's matters. Division 12A contains a set of principles that require judicial officers to conduct children's cases in a way that considers 'the needs of the child concerned' and promotes 'child-focused parenting'.[272] In furtherance of these principles, it exhorts judges to 'actively direct, control and manage' the hearing process,[273] including determining the evidence to be called and the manner in which the hearing is to be conducted. It also allows judges to determine children's matters in stages, through the use of part-heard proceedings,[274] and permits them, where the court considers it appropriate, to encourage parties to attend a counselling service.[275]

216 However, the preliminary consultations for this Inquiry suggest that the consistent use of Division 12A powers and the Less Adversarial Trial case management approach applied in the Family Court has waned over time. A number of stakeholders expressed a strong desire for the courts to reinvigorate the Division 12A approach, or to otherwise move towards a more problem-solving approach in appropriate cases.

217 Some stakeholders noted the recent development of an Indigenous List in the Federal Circuit Court in Sydney, which employs a problem-solving approach in parenting matters involving Aboriginal and Torres Strait Islander children.[276] This model brings together representatives from the Wirringa Baiya Community Legal Centre, the Family Advocacy and Support Service, Relationships Australia and the Men's Shed in matters involving an Aboriginal or Torres Strait Islander child.

218 On the other hand, some stakeholders suggested that the Division 12A approach is too time consuming for judicial officers to manage in the context of the current hearing delays.

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269 Kathleen Daly and Elena Marchetti, 'Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model' (2007) 29(3) *Sydney Law Review* 415.

270 Michael S King, 'Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice' (2008) 32(3) *Melbourne University Law Review* 1096.

271 Jay Jordens and Elizabeth Richardson, 'Collaborative Problem Solving in a Community Court Setting' (2014) 23 *Journal of Judicial Administration* 253.

272 *Family Law Act 1975* (Cth) ss 69ZN(3),(6) (Principles 1 and 4).

273 Ibid s 69ZN.

274 Ibid s 69ZR(1).

275 Ibid s 69ZQ(1)(f).

276 Federal Circuit Court of Australia, above n 254, 13.

219 The capacity of federal judicial officers to engage in problem-solving approaches is also limited by the requirements of Chapter III of the *Australian Constitution* and the High Court's decision in *R v Kirby; Ex parte Boilermakers' Society of Australia*, which require federal judges to limit their work to the exercise of a judicial power or a function that is sufficiently 'incidental or ancillary to it'.[277] In light of this constraint, judicial monitoring of a party's behavioural change progress over time may well raise procedural fairness concerns, and is unlikely to be regarded as compatible with the federal judicial role.[278]

220 Stakeholders in early consultations suggested two alternative approaches to developing a problem-solving approach to decision making for suitable cases. These were:

- **A hybrid model**, in which the court transfers the role of monitoring the parties' engagement with services to a registrar of the court or to a community-based family relationships agency.
- **An administrative model**, such as a non-judicial tribunal. A version of this approach is embodied in the recently developed Parenting Management Hearing Panel, a consent-based inquisitorial style process to support self-represented parties that will be piloted in Parramatta and one other location.[279]

221 The ALRC seeks stakeholder input regarding the opportunities for developing problem solving decision-making processes within the family law system.

Family inclusive decision-making processes

Question 30 Should family inclusive decision-making processes be incorporated into the family law system? How could this be done?

222 Another non-adversarial model that has been proposed for assisting families to settle arrangements for the care of children is the Family Group Conference (FGC) process, also known as Family Led Decision-Making (FLDM). In response to submissions from Aboriginal and Torres Strait Islander organisations, the Family Law Council's 2016 report suggested that this process should be considered for family law matters involving Aboriginal and Torres Strait Islander children, given its potential to offer a culturally-safe and family inclusive approach to determining care arrangements for children.[280] The FLDM process is currently used in child protection systems around

277 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254. See further Duffy, James, 'Problem-Solving Courts, Therapeutic Jurisprudence and the Constitution: If Two Is Company, Is Three a Crowd?' (2011) 35(2) *Melbourne University Law Review*.

278 Sarah Murray, *The Remaking of the Courts: Less Adversarial Practice and the Constitutional Role of the Judiciary in Australia* (The Federation Press, 2014) 114–36.

279 Attorney-General's Department (Cth), Submission No 89 to SPLA Committee, Parliament of Australia, *A Better Family Law System* (May 2017) 8.

280 Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016).

Australia to engage members of the child's extended family in planning and decision making about the child's care where there are concerns for the child's safety or wellbeing.[281] For this purpose, the process has been defined as:

> A decision-making and planning process whereby the wider family group makes plans and decisions for children and young people who have been identified either by the family or by service providers as being in need of a plan that will safeguard and promote their welfare.[282]

223 The Family Law Council's discussion of FGCs focused in particular on its benefits for Aboriginal and Torres Strait Islander children.[283] The Council also recommended that FGCs be developed in the family law system for families from culturally and linguistically diverse backgrounds in appropriate matters to allow children to be cared for within their own families and communities wherever possible.[284]

224 However, the FGC/FLDM process is applied more widely than this within the child protection system context,[285] and stakeholders have suggested that the model may offer a more appropriate process than traditional court proceedings for matters involving family violence.[286] The idea of expanding the use of FGCs to family law cases involving family violence was mooted by (then) Judge Boshier of the New Zealand Family Court in 2006, who noted in relation to children affected by family violence that:

> [I]t is often a victim's family who keeps them safe. The [legal] process needs to take this into account, and possibly the best way to do that is to involve those people who have a significant connection with the victim when deciding the best way to provide protection.[287]

225 The ALRC seeks stakeholder input about the potential use of family inclusive decision-making processes in the family law system.

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281 Tara Ney, Jo-Anne Stoltz and Maureen Maloney, 'Voice, Power and Discourse: Experiences of Participants in Family Group Conferences in the Context of Child Protection' (2013) 13(2) *Journal of Social Work* 184.

282 Nick Frost, Fiona Abram and Hannah Burgess, 'Family Group Conferences: Context, Process and Ways Forward: Family Group Conferences' (2014) 19(4) *Child & Family Social Work* 480.

283 Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016).

284 Ibid.

285 Nathan Harris, 'Family Group Conferencing in Australia 15 Years On' (Child Abuse Prevention Issues No 27, Australian Institute of Family Studies National Child Protection Clearinghouse, 2008); Hayley Boxall, Anthony Morgan and Kiptoo Terer, 'Evaluation of the Family Group Conferencing Pilot Program' (Research and Public Policy Series No 121, Australian Institute of Criminology, 2012).

286 Nicholas Petrie and Louise Kruger (2014) 'Child Protection Matters in the Northern Territory' 39(2) *Alternative Law Journal* 104, 106; Te Awatea Violence Research Centre, 'Evaluation of Family Group Conferences Practice and Outcomes: A Review of the Literature' (2013) 11(1) *Te Awatea Review* 12, 14.

287 The Hon P Boshier, 'Family Group Conferences and the Judicial Process: What Judges Take Notice Of, and Some New Thoughts' (Presentation, Te Hokinga Mai Conference, New Zealand, 28 November 2006).

Integration and collaboration

226 In this section the ALRC asks questions about how integrated services models can be further developed to assist family law clients with complex needs, how the need for families to engage with more than one court to address safety concerns for children can be reduced, and how collaboration and information sharing between the family courts and state and territory child protection and family violence systems can be improved.

Integrated services and partnerships

Question 31 How can integrated services approaches be better used to assist client families with complex needs? How can these approaches be better supported?

227 The ALRC has been asked to report on the need for reforms in relation to 'the protection of the best interests of children and their safety' and to support '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'.

228 The 2012 *Legal Australia-Wide Survey: Legal Need in Australia* report revealed that individuals with family-related legal needs often have a co-occurring range of non-legal support needs,[288] such as housing needs, financial needs and therapeutic support needs. AIFS research has shown that for many family law system clients, these needs arise out of the experience of family violence or other behaviours that raise safety concerns for their children and/or themselves, such as parental mental illness or drug or alcohol dependency.[289]

229 Addressing these needs may require family law system clients to engage with a range of different services, which may include legal assistance services, housing and employment services, (mental) health services, drug and alcohol rehabilitation programs, counselling services, parenting courses and/or behaviour change programs. Previous reviews suggest that navigating between these different services can pose significant difficulties for client families. Some reports, for example, have pointed to problems associated with the siloed nature of service provision,[290] and the lack of information sharing between agencies.[291] A related problem is the fragmented character

288 Christine Coumarelos et al, *Legal Australia-Wide Survey: Legal Need in Australia* (Law and Justice Foundation of New South Wales, 2012); Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016).

289 Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016).

290 Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010).

291 COAG Advisory Panel on Reducing Violence against Women and their Children, above n 51; Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016).

of the wider justice system that governs the protection of children and families in Australia, in which the family law, family violence and child protection jurisdictions operate independently of one another.[292]

230 Recent reports have also highlighted a number of safety and wellbeing issues for children and their families resulting from this fragmentation,[293] including the potential for:

- the risk of harm to children or parents to be underestimated or ineffectively responded to, with negative impacts on their safety and wellbeing;[294]
- perpetrators of family violence to be able to exploit this jurisdictional fragmentation because 'the systems are not working as "one whole entity"';[295]
- a child to 'fall through the cracks' between the different systems and services and be left unprotected;[296]
- re-traumatisation of a person who is required to recount their experiences of family violence or abuse to multiple service providers;[297] and
- a client disengaging from services due to the frustrating and time-consuming process of being referred to multiple services, which may leave people with little faith in the ability of available services to assist or protect them.[298]

231 In response to these concerns, recent reports have emphasised the value of integrated services models, where service providers with mutual clients work together

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292 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); 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, above n 13; Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010).

293 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); Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016); Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010); House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 13.

294 COAG Advisory Panel on Reducing Violence against Women and their Children, above n 51; 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); House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 13; Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010).

295 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 13, 66.

296 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).

297 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 13, 75.

298 COAG Advisory Panel on Reducing Violence against Women and their Children, above n 51, 106.

as a team to address the client's multiple needs in a coordinated way.[299] Previous reports have also stressed the importance of developing effective collaborative relationships and information-sharing protocols between agencies to the success of these models.[300]

232 There are a number of existing integrated services models operating in the family law system, including models that are case managed by agencies in the family relationships sector and court-based integrated services models.

233 The Family Safety Model (FSM), developed and delivered by Relationships Australia Victoria, is currently attached to Relationships Australia Victoria's men's behaviour change programs and, as a pilot, to its FDR services. The FSM takes an integrated, whole-of-family approach to working with families affected by family violence by working with those who use violence and those who experience it, including children.[301] Central to the model is the Family Safety Practitioner (FSP), who conducts an initial safety assessment (which is revised throughout the family's engagement with the service) and identifies service needs with each family member. The FSP also facilitates warm referrals and supports the family members with transitions to these services—which might include referrals for legal advice, counselling, financial planning and/or housing assistance—and monitors the family's engagement with these services and their ongoing needs. [302]

234 In contrast, the Family Advocacy and Support Service (FASS), which was launched in response to a recommendation of the Family Law Council, [303] is a court-located model. It is currently operating on a pilot basis in 23 family law registries across each Australian state and territory. The FASS model combines the services of duty lawyers and specialist family violence support workers for clients affected by family violence who seek assistance at the court. It is delivered and coordinated by legal aid commissions and takes a team-based warm referral approach to delivering

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299 Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010); House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 13; 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); Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016); Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016); COAG Advisory Panel on Reducing Violence against Women and their Children, above n 51.

300 Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016); COAG Advisory Panel on Reducing Violence against Women and their Children, above n 51; Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010).

301 Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016) 85–6.

302 Ibid; Relationships Australia, Submission No 55 to SPLA Committee, Parliament of Australia, Inquiry into *A Better Family Law System* (April 2017).

303 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 13, 144; Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016) 119–21.

both legal and non-legal support services to families affected by family violence.[304] While the service is based within the family courts, it aims to address jurisdictional fragmentation by providing clients with information and advice in relation to state and territory family violence and child protection matters, as well as family law matters, and the interactions between them. Like the FSM employed by Relationships Australia Victoria, the FASS model provides an initial risk assessment, safety planning and warm referrals to relevant support services, such as counselling and/or drug and alcohol services, as well as the duty lawyer service.[305]

235 The FASS pilot is funded until 2019, at which time an evaluation process will assist the Australian Government to make future service delivery decisions.[306] The SPLA Committee has recommended that, subject to the pilot receiving a positive evaluation, the FASS program be expanded to a greater number of locations, including in rural and regional Australia.[307] The SPLA Committee also recommended the FASS program be extended to include a child safety service attached to the family courts,[308] and that it be broadened to include collaboration and referral pathways to other specialist support services for families with complex needs, including Aboriginal and Torres Strait Islander specific services and services for culturally and linguistically diverse families and parents or children with disability.[309]

236 During initial consultations for this Inquiry, some stakeholders suggested other models of integrated services to address safety concerns for children and parents in the family law system, including an expansion of existing health justice partnerships[310] to include greater involvement of family law services.

237 One suggestion was for the development of Children's Advocacy Centres (CACs), a model that currently operates in the United States. CACs use a multidisciplinary team approach, bringing together representatives from the police, child protection departments, a public prosecutor, a child psychologist and a child advocate to conduct, observe and report on forensic interviews with children who have experienced abuse. A key aim of this model is to reduce the need for children to re-tell their story to multiple professionals and services. The SPLA Committee, in its recent report, recommended that the Attorney-General—through COAG—consider the adoption of such multidisciplinary approaches to assist the family courts to determine issues of risk to children.[311]

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304 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 13, 144; Federal Circuit Court of Australia, above n 254, 83–5.

305 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 13, 145.

306 Ibid.

307 Ibid rec 1.

308 Ibid rec 20.

309 Ibid rec 26.

310 *Health Justice Partnerships across Australia* <www.healthjustice.org.au/hjp/health-justice-partnerships-in-australia/>.

311 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 13, rec 21.

238 There have been a number of recent recommendations for the further development of integrated services models, including by the Family Law Council,[312] the COAG Advisory Panel on Reducing Violence Against Women and their Children,[313] and the SPLA Committee.[314]

239 The ALRC seeks comment about the possibilities for expanding existing integrated services models and/or developing further integrated services programs to support client families with multiple and complex needs. The ALRC is also interested in comment on how these models might be better supported to function effectively.

Engaging with multiple courts

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?

240 The preamble to the Terms of Reference notes the jurisdictional intersection of the federal family law and state and territory family violence and child protection systems in protecting children from harm, and 'the desirability of ensuring that, so far as is possible, children's matters arising from family separation are dealt with in the one proceedings'.

241 The Family Law Council's 2015 report on *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* revealed that many families engage with the family law system following proceedings for family violence-related orders in a state or territory court or, to a lesser extent, after contact with a state or territory child protection department or children's court.[315] The extent of client crossover between these systems is not known. However, data provided to the Family Law Council suggested that thousands of families each year receive legal assistance for multiple court proceedings.[316]

242 The Family Law Council identified a number of problems affecting safe outcomes for children and their families as a result of this situation, including the impact of:

- difficulties experienced by families in negotiating the different legal frameworks, terminology and procedural rules across the different jurisdictions;

312 Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016) rec 6.
313 COAG Advisory Panel on Reducing Violence against Women and their Children, above n 51, rec 6.5.
314 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 13, rec 32.
315 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) ch 2.
316 Ibid.

- the need for parents and children to re-tell their story and re-litigate the question of risk in different forums;
- the limited capacity for federal judicial officers to address a family's multiple legal needs by exercising the protective jurisdictions of state and territory courts as a result of the High Court's decision in *Re Wakim*;[317] and
- barriers inhibiting access to the family courts by family members who are encouraged to seek family law orders by a state or territory child protection department, including barriers associated with the relative cost, pace and formality of family law proceedings by comparison with those of state courts, barriers that can be particularly acute for Aboriginal and Torres Strait Islander families and grandparent carers.[318]

243 The federal family courts also have no power to compel the intervention of child protection authorities in family law proceedings to assist families with complex needs where there are risk concerns for children.

244 However, state and territory courts of summary jurisdiction are vested with federal jurisdiction under Part VII of the *Family Law Act* to make consent parenting orders and to determine parenting matters with the consent of the parties. Previous work by the ALRC suggests that this jurisdiction is rarely exercised.[319] However, in light of the significant constitutional barriers affecting the ability of federal courts to exercise the powers of state and territory courts, the Family Law Council suggested that the best opportunity for realising a 'one court' model is to support state and territory courts of summary jurisdiction to exercise their family law powers where parties with family law needs are already before the court.[320] The Victorian Royal Commission into Family Violence made a similar recommendation in relation to Victorian magistrates.[321] These recommendations are currently being progressed by the Council of Attorneys-General Family Violence Working Group.[322]

245 Despite this progress, some stakeholders have raised continuing concerns about the resource and time capacity implications for state and territory courts of taking on additional family law work, as well as concerns about the capacity of children's courts, where proceedings involve prosecution-style applications by the state, to determine private law *inter partes* disputes.

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317 *Re Wakim; Ex Parte McNally* (1999) 198 CLR 511.

318 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) 33–4.

319 Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010).

320 Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016) rec 15.

321 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol IV, 211.

322 See Law, Crime and Community Safety Council, *Communiqué*, 19 May 2017.

246 Several stakeholders suggested alternative solutions to the problems facing families with multiple legal needs. These included:

- vesting federal judicial officers with dual commissions;
- developing a national family and child protection system; and
- developing digital hearing processes to reduce the need for families to physically attend court hearings in different locations.

247 The ALRC invites stakeholder input about changes that might be made to reduce the need for families to engage with more than one court to address safety concerns for children.

Cross-jurisdictional collaboration

Question 33 How can collaboration and information sharing between the family courts and state and territory child protection and family violence systems be improved?

248 Recent reports and early consultations have also revealed concerns about the limited extent of collaboration and information sharing between the family courts and state and territory children's courts and family violence courts and with state and territory child protection systems. The Family Law Council's recent reports identified a number of existing practices along these lines. These include the Family Court's Magellan list, which provides a coordinated multi-agency approach to the resolution of cases involving allegations of serious harm, and the co-location of child protection department practitioners in family court registries in Victoria and Western Australia.

249 The Family Law Council made a number of recommendations designed to enhance collaboration and information exchange between the federal family law and state and territory systems, including:

- the development of a national database of court orders from the family courts and state and territory children's courts and magistrates' courts that can be accessed by each court;
- the expansion of the co-located child protection worker model to all family court registries;
- increasing the circuiting of FCC judicial officers and locating family court registry staff in state and territory magistrates' courts, including specialist domestic violence courts; and
- the development by the National Judicial College of Australia of a continuing joint professional development program for judicial officers from the family courts and state and territory courts in which judicial officers preside over matters involving family violence.

250 A number of similar recommendations were made by the Victorian Royal Commission into Family Violence and the COAG Advisory Panel on Reducing Violence against Women and their Children.[323] The Royal Commission also recommended the Victorian Government pursue amendments to the *Family Law Act* to provide that a breach of a personal protection injunction made under the *Family Law Act* is a criminal offence, so as to facilitate the prosecution of breaches of *Family Law Act* protection orders by state police.[324]

251 The Council of Attorneys-General Family Violence Working Group is currently progressing work on a number of these recommendations, including the development of a national information-sharing regime and the provision of joint training for judicial officers across the family law and state and territory systems.[325]

252 Preliminary consultations for this Inquiry, however, revealed some gaps and ongoing concerns in relation to information sharing between the courts. These included:

- a desire for state and territory child protection departments to adopt a consistent approach to responding to family court requests for information under s 69ZW of the *Family Law Act*, and concerns about the extent of redaction of child protection files in some jurisdictions; and
- concerns about the potential impact of information-sharing regimes on client privacy.

253 The ALRC invites input from stakeholders about the opportunities for enhancing collaboration and information sharing between the family courts and state and territory child protection and family violence systems.

Children's experiences and perspectives

254 In this section, the ALRC asks how children's involvement in the family law system might be facilitated, and the best ways to ensure children's views can be heard in both court processes and FDR. The ALRC also asks how any risks to children from involving them in family law disputes can best be managed.

Children and young people and the courts

Question 34 How can children's experiences of participation in court processes be improved?

323 See, eg, Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016) recs 134, 216; COAG Advisory Panel on Reducing Violence against Women and their Children, above n 51, rec 6.7.

324 Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016) rec 131.

325 See Law, Crime and Community Safety Council, *Communiqué*, 19 May 2017.

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?

255 The *Family Law Act* recognises the rights accorded to children and young people under the *Convention on the Right on the Rights of Child* (the CRC). These include participation rights, which afford children the right to freedom of expression (Article 13), access to information (Article 17), and to make their views known and participate in processes relevant to their care (Articles 9 and 12).

256 In furtherance of these rights, the Act requires the family courts to have regard to the views of the child when deciding their best interests.[326] This requirement is qualified by a stipulation that children are not required to express their views.[327]

257 There are several ways in which the courts may receive information about the child's views. One mechanism is through the appointment of an Independent Children's Lawyer, whose role is to represent the child's best interests and ensure any views expressed by the child are put before the court. Another commonly used mechanism involves the preparation of a report for the court by a Family Consultant or external report writer. Family Consultants/report writers are required to ascertain the child's views and include these views in the report. A third mechanism provided for in the *Family Law Act* involves the judicial officer meeting directly with the child. This mechanism is rarely used. However, two recent reports have recommended the development of guidelines for judicial interactions with children and young people where judicial officers wish to do this.[328]

258 Evidence gathered by AIFS has indicated that in many matters where an application for final orders is filed, resolution (either by judicial determination or consent before or during trial) occurs without the court having received any independent information about the views of the child or young person.[329] This means that in some matters, a final decision may be made about the parenting arrangements for a child without that child having had an opportunity to participate through any of the currently available mechanisms outlined above.

259 In cases where children have an Independent Children's Lawyer appointed, research conducted by AIFS and others indicates varied practice in relation to meetings

326 *Family Law Act 1975* (Cth) s 60CC(3)(a).
327 Ibid s 60CE.
328 Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016); Kylie Beckhouse, 'To Investigate Legal Representation Schemes for Children in the US, Canada and the UK—Administration, Delivery and Innovation' (Churchill Foundation, 2015).
329 Rae Kaspiew et al, 'Court Outcomes Project: Evaluation of the 2012 Family Violence Amendments' (Australian Institute of Family Studies, 2015) 26–9.

with children and young people and facilitating their participation in proceedings.[330] The AIFS research found that Independent Children's Lawyers were greatly valued, particularly by judicial officers, for their role in evidence gathering and litigation management, through which they were seen to bring a child focus to proceedings that may otherwise be lacking.[331] However, this and other research has also reported significant disappointment among children and young people in relation to their experience of having an Independent Children's Lawyer represent them.[332] Among other concerns, children and young people interviewed for the AIFS study indicated a need for more interaction with the Independent Children's Lawyer representing their interests, including for the purpose of explaining court outcomes and how their views are fed into the court's decision-making process.[333]

260 The AIFS research, reports that followed it,[334] and early consultations for this Inquiry, have revealed concerns about the existing mechanisms for ascertaining children's views for court proceedings and called for reforms to these mechanisms and/or the development of new mechanisms to ensure a positive experience of participation from the perspective of the child or young person. Proposals to the SPLA Inquiry called for the appointment of a children's advocate,[335] or the development of a model of representation for children that combines legal representation with a therapeutic/clinical approach.[336]

261 Other proposals have included the development of a new agency to 'oversee the provision of child representation [and] investigatory and expert report writing',[337] the adoption of a multidisciplinary team approach to child representation,[338] along the lines used by the Children and Family Court Advisory Service (Cafcass) in the UK and the Ontario Office for Children's Law in Canada,[339] and adoption of a mechanism along the lines of the Scottish F9 Form, which provides an opportunity for children to write directly to the Sheriff (judicial officer) about their views on their future care.[340]

262 The ALRC invites stakeholder input on improvements that might be made to how children are enabled to participate in family court proceedings.

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330 Rae Kaspiew et al, 'Independent Children's Lawyers Study' (Final Report, Australian Institute of Family Studies, 2013); Felicity Bell, 'Meetings Between Children's Lawyers and Children Involved in Private Family Law Disputes' (2016) 28(1) *Child and Family Law Quarterly* 5.

331 Kaspiew et al, 'Independent Children's Lawyers Study', above n 330.

332 Ibid; Patrick Parkinson and Judy Cashmore, *The Voice of a Child in Family Law Disputes* (Oxford University Press, 2008).

333 Kaspiew et al, 'Independent Children's Lawyers Study', above n 330, 165–7.

334 Kylie Beckhouse, above n 328.

335 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 13, [6.119].

336 Ibid [6.120]–[6.122].

337 Kylie Beckhouse, above n 328.

338 Ibid rec 6.

339 Rachel Birnbaum and Nicholas Bala, 'Views of the Child Reports: The Ontario Pilot Project— Research Findings and Recommendations' (Queen's Law Research Paper Series No 2017-092, Queen's University, 2017).

340 See on this, Kirsteen Mackay, 'The Treatment of the Views of Children in Private Law Child Contact Disputes Where There Is a History of Domestic Abuse' (Scotland's Commissioner for Children and Young People, 2013).

Children and young people and FDR

Question 37 How can children be supported to participate in family dispute resolution processes?

263 There is no statutory obligation to consider the views of the child in FDR processes. However, both child-focused and child-inclusive practice models are used by many FDR providers. Child-focused practice aims to incorporate the practitioner's knowledge of the research literature on children's development into the negotiation process.[341] Child-inclusive approaches, on the other hand, incorporate the views of the particular child who is subject to the process through the involvement of a specialist child consultant.[342] The child consultant speaks to the child about their experiences and views and feeds this information back to the parents during the dispute resolution process to assist them in focusing on their child's needs and best interests in their negotiations.[343]

264 Apart from initial positive evaluation evidence about the child-inclusive approach,[344] there is little systematic empirical research about its application in the system currently. Some information suggests that child-focused practice occurs more often and child-inclusive practice less often, possibly because of the resource intensive nature of the latter approach.[345]

265 Victoria Legal Aid includes a child-inclusive element, called Kids Talk, in its legally-assisted FDR program.[346] An internal evaluation of the program has found that, where its use was appropriate, Kids Talk provided children and young people with a 'voice' in the FDR process and was successful in focusing the attention of parents and lawyers on the child's needs and perspectives.[347] Kids Talk is only used in matters in which parents are assessed as 'willing and able' to take their children's perspectives into account.[348] This approach is in line with research findings that support assessment of parental capacity to take their children's views on board as the deciding factor in

341 Nola Webb and Lawrie Moloney, 'Child-Focused Development Programs for Family Dispute Professionals: Recent Steps in the Evolution of Family Dispute Resolution Strategies in Australia' (2003) 9(1) *Journal of Family Studies* 23; Lawrie Moloney and Jennifer McIntosh, 'Child-Responsive Practices in Australian Family Law: Past Problems and Future Directions' (2004) 10(1) *Journal of Family Studies* 71.

342 Moloney and McIntosh, above n 341.

343 Jennifer McIntosh, 'Child Inclusion as a Principle and as Evidence-Based Practice: Applications to Family Law Services and Related Sectors' (AFRC Issues Paper No 1, Australian Family Relationships Clearinghouse, 2007).

344 Jennifer E McIntosh, Caroline M Long and Yvonne D Wells, '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).

345 The Allen Consulting Group, above n 39, 47.

346 Victoria Legal Aid, *Kids Talk* <www.legalaid.vic.gov.au/get-legal-services-and-advice/family-dispute-resolution-victoria-legal-aid/kids-talk>.

347 Michele Harris, 'An Evaluation of Victoria Legal Aid's Kids Talk Program' (Victoria Legal Aid, 2012).

348 Victoria Legal Aid, above n 346.

determining the suitability of child-inclusive practice in any matter.[349] While screening of this nature may be necessary for protecting the safety of children in matters where their parents or carers lack this capacity, it raises further questions about how these children might also be supported to participate in the FDR process.

266 The ALRC invites stakeholder input about the use and benefits of child-inclusive FDR processes, including culturally appropriate models.

Children's participation and risks to children

Question 38 Are there risks to children from involving them in decision-making or dispute resolution processes? How should these risks be managed?

267 Cases involving family violence or other safety concerns for children raise particular issues in relation to children's participation in court proceedings and dispute resolution processes. As noted above, the participation of children in family law proceedings gives effect to Australia's obligations under the CRC. However, complicating the child's right to participate is a concern for children whose ability to exercise agency may be highly constrained by their family circumstances, such as environments characterised by violence or abuse.[350] This circumstance creates a difficult 'balancing act' for practitioners in the context of both court proceedings and dispute resolution processes, between upholding the child's right to participate, and protecting the child from harm that may be caused through participation.[351]

268 Concerns about how to support children's safe participation in legal proceedings have gained prominence in policy debates in several jurisdictions in recent years.[352] Reflecting this concern, some lawyers use specialist counselling services, which have dedicated domestic violence child therapists, to speak with children.[353]

269 This issue has also affected the practices of Independent Children's Lawyers. Some Independent Children's Lawyers are wary of speaking to children in this context, so as to avoid eliciting information that might mean they need to become a witness in the case, and out of concern that the child or a parent might suffer retaliation by the parent who has used violence if the child discloses the violence. A related concern is that children in such cases may be overburdened or further traumatised by being interviewed by too many professionals. Other Independent Children's Lawyers,

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349 Jennifer E McIntosh and Caroline M Long, 'Children Beyond Dispute: A Prospective Study of Outcomes from Child Focused and Child Inclusive Post-Separation Family Dispute Resolution' (Final Report, Attorney-General's Department (Cth), 2006).

350 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.

351 Felicity Bell, 'Barriers to Empowering Children in Private Family Law Proceedings' (2016) 30 *International Journal of Law, Policy and the Family*; 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.

352 Cathy Humphreys and Caroline Bradbury-Jones, 'Domestic Abuse and Safeguarding Children: Focus, Response and Intervention' (2015) 24(4) *Child Abuse Review* 231.

353 See, eg, *Carinity Communities—Talera* <www.carinity.org.au/communities/counselling-talera>.

however, consider that children and young people who have been exposed to family violence or subjected to abuse have a particularly acute need to exercise agency through participation.[354]

270 A similar contention is evident in the field of child-inclusive practice in FDR services when matters involve family violence.[355] Some practitioners have argued that child-inclusive practice has a significant role to play in this context, emphasising that children and young people are important sources of information about their circumstances, including the presence of risk.[356] Other practitioners hold the view that the application of child-inclusive practice in these circumstances may intensify the pressures on the child and expose them to retribution from the perpetrator for speaking out.

271 While these concerns tend to focus on matters involving family violence, consideration of methods to facilitate children's safe participation in court proceedings and dispute resolution processes are relevant to all matters in which a child is the subject of a dispute. Exposure to ongoing parental conflict in the post-separation period can have significant negative impacts on a child's development and wellbeing.[357] Children's safety and wellbeing may also be put at risk where their participation occurs in the context of protracted legal proceedings or repeated parenting applications.[358] This may occur in the context of misuse of process, discussed above in the section, 'Resolution and adjudication processes'.

272 The ALRC seeks stakeholder input about best to manage any risk to children from involving them in decision-making or dispute resolution processes.

Barriers to children's involvement in the family law system

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?

273 Early consultations indicated a view that any reforms aimed at improving children's experiences of participation in the courts and other dispute resolution processes should be sensitive and responsive to the fact that, like adults, the needs of individual children differ. This issue is particularly pertinent for children who may require culturally-specific support, such as Aboriginal and Torres Strait Islander

354 Kaspiew et al, 'Independent Children's Lawyers Study', above n 330.

355 Rae Kaspiew et al, *Evaluation of a Pilot of Legally Assisted and Supported Family Dispute Resolution in Family Violence Cases, Final Report* (Australian Institute of Family Studies, 2012); Sarah Dobinson and Rebecca Gray, 'A Review of the Literature on Family Dispute Resolution and Family Violence: Identifying Best Practice and Research Objectives for the Next Ten Years' (2017) 30(3) *Australian Journal of Family Law* 180.

356 Michele Harris, above n 347, 5.

357 Jennifer McIntosh, 'Enduring Conflict in Parental Separation: Pathways of Impact on Child Development' (2003) 9(1) *Journal of Family Studies* 63.

358 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol II, 108.

children and children from culturally and linguistically diverse communities,[359] and for children with disability.

274 Children may be affected by the same barriers in accessing services that apply more broadly in their communities (see discussion above in the section, 'Access and engagement'). For example, research has revealed that, like adults with disability, children with disability can face particular barriers in seeking assistance to deal with abuse.[360] Children may also have needs and experiences that are unique from those of their parents and carers. For example, the Koorie Youth Council notes that the role of an Aboriginal child or young person in their family or community may differ from that of a child under a western cultural framework, and that this may lead to inappropriate assumptions or assessments of their needs or experiences if applied by mainstream services lacking cultural competency.[361] Children in newly arrived migrant families may face unique challenges to their participation in circumstances where they have adapted more quickly to life in Australia than their parents, for example by learning English, which can affect the power dynamic between children and their parents[362] and lead to intergenerational conflict.[363]

275 The ALRC is interested in comment on changes that might be needed to ensure that all children who wish to participate in the family law system are supported to do so.

Learning from the experiences of children and young people

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?

276 Existing research suggests that the reflections and insights of children about their experiences of family law and child protection systems can be critical to informing the design of services and policy.[364] Stakeholders to this Inquiry stressed the need to listen to and learn from the perspectives of children and young people who have experienced the family law system in developing any reforms to support the involvement of children in family law processes.

359 Ibid vol II, 112.

360 Julie Taylor et al, 'Deaf and Disabled Children Talking about Child Protection' (The University of Edinburgh Child Protection Research Centre, 2015).

361 Koorie Youth Council, Submission No 906 to Royal Commission into Family Violence (Vic), *Submission from the Koorie Youth Council to the Royal Commission into Family Violence* (June 2015).

362 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol II, 114.

363 Family Law Council, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds* (2012) 37.

364 Jane Fortin, Joan Hunt and Lesley Scanlan, *Taking a Longer View of Contact: The Perspectives of Young Adults Who Experienced Parental Separation in Their Youth* (Sussex Law School, 2012); Kirsteen Mackay, above n 340; Julie Taylor et al, above n 360.

277 In considering how best to learn from the perspectives of children and young people, the ALRC notes the Family Justice Young People's Board (FJYPB) in the UK. The FJYPB is a group of over 50 children and young people who have either had direct experience of the family justice system or have an interest in children's rights and the family courts. These children and young people support the work of the Family Justice Board in seeking to improve the family justice system from a child-centred and child-inclusive perspective.[365]

278 The ALRC seeks stakeholder input about using the perspectives of children and young people to inform developments in the family law system.

Professional skills and wellbeing

279 In this section, the ALRC asks questions about the appropriate skills and core competencies of professionals in the family law system, as well as how professional wellbeing for those working in family law might be supported.

Core competencies and training

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?

280 The ALRC has been asked to report on the need for reform regarding 'the skills, including but not limited to legal, required of professionals in the family law system'. The preamble to the Terms of Reference for this Inquiry also identifies 'the benefits of the engagement of appropriately skilled professionals in the family law system' as an underlying principle.

281 Recent reports[366] and preliminary consultations for this Inquiry have identified significant concerns about the skills and knowledge of family law system professionals in a number of areas. These include deficiencies and gaps in relation to:

365 Cafcass, *Family Justice Young People's Board* <www.cafcass.gov.uk/family-justice-young-peoples-board/>.

366 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 13; COAG Advisory Panel on Reducing Violence against Women and their Children, above n 51; 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); Australian Law Reform Commission and

- understanding the nature and dynamics of family violence and child sexual abuse and their impact on children, including knowledge of the ways in which perpetrators of family violence can use the family law system to continue abuse;
- understanding the impacts of trauma on clients and an ability to practice in a trauma-informed way;
- the capacity to identify risk, including the risk of family violence and risk of suicide;
- cultural competency, including an understanding of Aboriginal and Torres Strait Islander kinship systems and child rearing practices and the particular experiences of family violence of Aboriginal and Torres Strait Islander peoples, and an understanding of the experiences and access to justice barriers affecting clients from culturally and linguistically diverse backgrounds, parents and children with disability, and LGBTIQ clients and families; and
- knowledge of the intersections of the family law, child protection and family violence systems.

282 Other recent reviews and early consultations have also raised concerns about the competency or practices of particular professional sectors. These include concerns about:

- the level of knowledge of some private family report writers and judicial officers in relation to family violence and child sexual abuse;[367]
- the competence of some legal practitioners with respect to knowledge of family violence and/or commitment to trauma-informed practice;[368]
- the practices of some lawyers that operate to extend the conflict between the parties;[369]
- the skills of some Independent Children's Lawyers in regard to child-inclusive practice;[370] and

NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010); Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016).

367 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 13.

368 Ibid; Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 1, 2014); Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016).

369 See on this point, *Simic & Norton* [2017] FamCA 1007 (11 December 2017).

370 See on this point, Kaspiew et al, 'Independent Children's Lawyers Study', above n 330; Bell, above n 351.

- the limited knowledge of family law and family violence among interpreters who assist family law clients.[371]

283 Recent reports and early consultations have also recommended or called for the development of dedicated training and accreditation programs or professional standards to address these gaps. These have included proposals for:

- modules on family violence and child sexual abuse to be included in the National Family Law Specialist Accreditation Scheme and/or continuing professional development requirements;[372]
- joint professional development and training for family law, child protection and family violence sector professionals;[373]
- greater training around family violence in the accreditation process for FDR practitioners to improve consistency of practice;[374]
- the development of a national accreditation program for family consultants;[375]
- a greater focus in legal training and professional development on non-adversarial and non-court options for dispute resolution;[376]
- training in risk identification for family lawyers;[377]
- improved training for Independent Children's Lawyers to enhance skills in working with children;[378]

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371 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); Queensland Special Taskforce on Domestic and Family Violence, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (Queensland Government, 2015); Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016); COAG Advisory Panel on Reducing Violence against Women and their Children, above n 51.

372 Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016) rec 11.

373 Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016); 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); Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010).

374 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 13, 280.

375 Ibid rec 30; Women's Legal Services Australia Submission No 6 to SPLA Committee, Parliament of Australia, Inquiry into *A Better Family Law System* (April 2017) rec 5(a).

376 Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 2, 2014) rec 7.1.

377 Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016) rec 3; 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.

378 Kaspiew et al, 'Independent Children's Lawyers Study', above n 330; Kylie Beckhouse, above n 328.

- training for interpreters to improve their understanding of family law[379] and family violence;[380] and
- professional development for judicial officers in family violence, cultural competency, trauma-informed practice and the impacts of family violence on children and their attachment relationships.[381]

284 The use of training to address perceived gaps in the knowledge of 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.[382] Against this backdrop, the SPLA Committee,[383] and some early consultations, have called for appointments to the family courts to occur only where judicial officers already have family law and family violence expertise.

285 The ALRC notes the National Domestic and Family Violence Bench Book, developed in response to a recommendation of the Australian and New South Wales Law Reform Commissions to assist judicial officers presiding over matters involving family violence.[384] The SPLA Committee reported mixed responses to the National Bench Book, with some stakeholders supporting it is a valuable resource for judicial officers, while others argued that it does not provide sufficient detail or training, particularly in relation to the impact of trauma, cultural competency and disability.[385]

286 The ALRC also notes that National Legal Aid has been funded to redevelop the National Training Program for Independent Children's Lawyers,[386] the design of which is currently underway, and the submission from the Attorney-General's Department to the SPLA Inquiry advising that a training package for judicial officers covering the nature and dynamics of family violence is currently being developed.[387]

287 The ALRC seeks stakeholder input about the skills and competencies that should be required of all family law system professionals and how these can be maintained. The ALRC is also interested in stakeholder views about the particular

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379 Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (2012) rec 8.2; Family Law Council, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds* (2012) rec 6.1.

380 COAG Advisory Panel on Reducing Violence against Women and their Children, above n 51.

381 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 13, rec 27; Women's Legal Services Australia Submission No 6 to SPLA Committee, Parliament of Australia, Inquiry into *A Better Family Law System* (April 2017); Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016) recs 12, 15; Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol VI, recs 215–16; Queensland Special Taskforce on Domestic and Family Violence, above n 371, recs 103–05; COAG Advisory Panel on Reducing Violence against Women and their Children, above n 51, rec 1.4.

382 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 13, 285.

383 Ibid.

384 Ibid 267–8.

385 Ibid 269.

386 Ibid rec 27.

387 Attorney-General's Department (Cth), Submission No 89 to SPLA Committee, Parliament of Australia, *A Better Family Law System* (May 2017) 10.

competencies that should be possessed by any new professionals that may be introduced to the family law system, such as 'navigators' (discussed above in the section, 'Access and engagement').

Professional wellbeing

Question 44 What approaches are needed to promote the wellbeing of family law system professionals and judicial officers?

288 The possible negative impacts on the health and wellbeing of practitioners, such as family law system professionals, who work with clients who have experienced family violence or abuse, are well recognised.[388] These include the risk of vicarious trauma,[389] which can mirror the effects of trauma on those who experience it first hand, and may include anxiety, depression, disturbed sleep, hyper-vigilance, and disruptions in interpersonal relationships.[390]

289 The risk of vicarious trauma to individual practitioners also raises concerns around the flow-on effects it may have on co-workers and the ability of the practitioner's organisation to provide high-quality services.[391]

290 It has been suggested that the particular needs and behaviours of clients who have experienced trauma, coupled with the possible impact of vicarious trauma on a legal practitioner's ability to provide quality services to meet those needs, may go some way to explaining the high number of complaints made against lawyers practicing in the area of family law.[392] Whether or not this is the case, Legal Service Commissions around Australia consistently report high numbers of complaints received in relation to family law matters.[393]

291 It is important to note that complaints against legal practitioners may be legitimate in many cases, and that complaints mechanisms play an important role in ensuring accountability and transparency. This issue is discussed further below in the section, 'Governance and accountability'. However, stakeholders identified the making of unreasonable complaints as a factor that negatively affects professional wellbeing.

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388 See, eg, Jane Dunkley and Thomas A Whelan, 'Vicarious Traumatisation: Current Status and Future Directions' (2006) 34(1) *British Journal of Guidance & Counselling* 107; Zoe Morrison, '"Feeling Heavy": Vicarious Trauma and Other Issues Facing Those Who Work in the Sexual Assault Field' (ACSSA Wrap 4, Australian Institute of Family Studies, September 2007) 1.

389 ` Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010) 1488; Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol VI; Peter Jaffe et al, 'Vicarious Trauma in Judges: The Personal Challenge of Dispensing Justice' [2006] *Judges Journal*; Lisa Morgillo, 'Do Not Make Their Trauma Your Trauma: Coping With Burnout as a Family Law Attorney' (2015) 53(3) *Family Court Review* 456.

390 Morrison, above n 388.

391 Ibid; Morgillo, above n 389.

392 Morgillo, above n 389.

393 See, eg, Office of the Legal Services Commissioner (NSW), *2016-2017 Annual Report* (2017) 6; Victorian Legal Services Board and Commissioner (Vic), *Annual Report 2017* (2017) 57; Legal Services Commission (Qld), *2016-17 Annual Report* (2017) 26.

Complaints against Independent Children's Lawyers, the other party's legal representative, or other professionals, may be used by another party as a form of control or abuse of process.[394] Often this occurs in matters where that person has a history of using violence or other controlling behaviours. In some cases, these people may also use intimidating, threatening or violent behaviour towards legal practitioners.[395] The issue of abuse of process is discussed above in the section, 'Resolution and adjudication processes'.

292 In its recent report, the SPLA Committee acknowledged the possible impact of vicarious trauma on judicial decision making, noting that the

> high workload of judges and the nature of family law cases involving family violence may lead to judges experiencing vicarious trauma or burnout which, in turn, can impact appropriate decision making in family law cases involving family violence.[396]

293 Research has also identified a lack of effective supervision and large or unmanageable caseloads as factors that can increase the risk of vicarious trauma,[397] and pointed to the need for this issue to be addressed at the organisational, rather than individual level. The literature suggests that this might call for the provision of:

- training on how to identify and manage vicarious trauma;
- effective supervision, which includes making workers feel safe to express their fears, concerns and difficulties;
- caseload management;
- staff and peer support;
- support programs to build resilience and emotional wellbeing;
- ensuring safe workplaces, including safety from firsthand abuse or aggression in the course of service delivery; and
- building a workplace culture that encourages self-care and work-life balance.[398]

294 Examples of organisational-level wellbeing programs include the 'Well at Work' program developed by the Royal Commission into Institutional Responses to Child Sexual Abuse in recognition of the Royal Commission's duty of care to staff

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394 See, eg, *Whycliffe & Ravinspole* [2015] FamCA 275 (17 April 2015). The father in this case, who was alleged to have used family violence against the mother during the relationship, undertook a 'campaign of complaint about the ICL, the Legal Aid Office, the Family Consultant, the psychologist and the judicial officers' during the course of proceedings: [7].

395 See, eg, *Leone & Cino (No 5)* [2015] FamCA 1221 (18 December 2015).

396 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 13, 282.

397 Morrison, above n 388; Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol VI; Andrew P Levin and Scott Greisberg, 'Vicarious Trauma in Attorneys' (2003) 24 *Pace Law Review* 245.

398 Morrison, above n 388; Liz Wall, Daryl Higgins and Cathryn Hunter, above n 2; Richard Collier, 'Wellbeing in the Legal Profession: Reflections on Recent Developments (Or, What Do We Talk About, When We Talk About Wellbeing?)' (2016) 23(1) *International Journal of the Legal Profession* 41; Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol VI.

who would be working directly with survivors of abuse. The program included training for all staff on how to identify and manage workplace stress, compassion fatigue and vicarious trauma; regular wellbeing checks with qualified counsellors; in-house de-briefing sessions as required; and the provision of wellbeing activities.[399]

295 The ALRC seeks stakeholder input about ways of enhancing the safety and wellbeing of family law system professionals and judicial officers in the family law system.

Governance and accountability

296 In this section, the ALRC considers how public understanding and confidence in the family law system can be improved. To that end, it asks what reform might be needed to improve the transparency of court processes. The ALRC also asks what changes could be made to governance and regulatory processes to improve public confidence in the family law system.

Transparency and privacy

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?

297 Early consultations for this Inquiry revealed stakeholder concerns about the operation of the privacy provisions of the Act.[400] Section 121 of the *Family Law Act* makes it a criminal offence to publish or otherwise disseminate to the public an account of any family law proceedings that identifies a party or witness to the proceedings without the permission of the court. The prohibition is subject to a number of exceptions, including communications with child welfare authorities, legal aid bodies, legal professional regulators, and where the court authorises publication.

298 The enactment of s 121 in the 1970s was driven by a desire to eliminate the indignities associated with the former fault-based divorce regime, where the names of co-respondents to adultery petitions were often reported in the tabloid press.[401] The aim in enacting this provision was to protect the privacy of parties and their children. However, this protection is qualified by the principle of 'open justice', which is fundamental to ensuring that courts remain transparent and accountable for their

399 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (2017) vol I, appendix G.

400 *Family Law Act 1975* (Cth) s 121. The courts also have power to make a suppression order or a non-publication order in certain circumstances: see *Family Law Act 1975* (Cth) s 102PE.

401 See the Hon John Fogarty, 'Establishment of the Family Court of Australia and its Early Years' (2001) 60 *Family Matters* 90, 97.

decisions.[402] Section 121 was designed to balance these principles (of privacy versus open justice) by allowing reporting of family law proceedings provided that the parties cannot be identified. In accordance with this requirement, for example, the Family Court publishes judgments in children's matters in an anonymised format.[403] This allows scrutiny of judicial decision making without compromising the privacy of parties.

299 In recent years, however, a number of stakeholders have raised concerns about the balance struck in s 121, arguing that it does not provide adequate scope for individuals who use the family courts to share their experiences publicly. For example, in its submission to the ALRC Freedoms Inquiry, the National Association of Community Legal Centres suggested that s 121 prevents 'victims and survivors of violence from speaking openly of their experiences of the family law system'.[404]

300 On the other hand, others have cautioned that the existing restrictions on the publication of court proceedings provide an important safeguard for protecting the privacy of families and children, and should be maintained, particularly for parenting matters.

301 Recent evidence to parliamentary inquiries suggests that s 121 has also created uncertainty about the information that regulators of professional bodies, such as bodies that govern the practices of psychologists and social workers, may access for the purposes of investigating alleged misconduct by their members. Although a dedicated exemption is provided to allow legal professional regulators to investigate the conduct of lawyers, this is not the case for other professions. The Australian Psychological Society's Family Law and Psychology Interest Group considers that production of family law files and reports to regulators would be constrained by s 121.[405] Similarly, the Australian Association of Social Workers considers that it cannot investigate complaints against its members relating to family law proceedings due to the requirements of s 121.[406] Women's Legal Services Australia has suggested that the *Family Law Act* be amended to provide an exception for disclosures under the *Health Practitioner Regulation National Law*.[407]

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402 See, eg, *Family Law Act 1975* (Cth) s 97(1).

403 See Family Court of Australia, *Finding Out About Judgments* <www.familycourt.gov.au/wps/wcm/connect/fcoaweb/judgments/finding-out-about-judgments>.

404 National Association of Community Legal Centres, Submission No 143 to Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws (Interim Report 127)* (October 2015) 14.

405 Australian Psychological Society Family Law and Psychology Interest Group, Submission No 10 to Senate Finance and Public Administration References Committee, Parliament of Australia, *Inquiry into the Administration of Health Practitioner Registration by the Australian Health Practitioners Regulation Agency (AHPRA)* (11 April 2011).

406 Australian Association of Social Workers, 'Complaints Relating to Social Workers and the Family Court of Australia & Federal Circuit Court of Australia' <www.aasw.asn.au/document/item/3863>.

407 Women's Legal Services Australia, Submission No 80 to Senate Standing Committee on Community Affairs, Parliament of Australia, *Inquiry into the Complaints Mechanism Administered under the Health Practitioner Regulation National Law* (February 2017).

302 Initial consultations revealed a number of proposals for responding to these issues, including:

- relaxation of the s 121 prohibition in relation to proceedings that do not involve children (while maintaining the prohibition on publication of proceedings that would identify a child);
- enactment of a 'whistle-blower' exception to s 121, to allow press reporting on matters of genuine public interest; and
- providing exceptions to s 121 to clarify that information may be shared with professional regulators to facilitate their investigatory functions.

303 The ALRC invites comment on whether changes are needed to make the operation of the family law system more transparent, including changes to s 121 of the *Family Law Act*, and how the privacy of client families and children should be protected.

Accountability and governance

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?

304 As other recent inquires have highlighted, a critical focus for instilling public confidence in an organisation or system is the nature of its governance practices.[408] This includes questions about institutional leadership, complaints handling mechanisms, regulatory measures, arrangements for monitoring and review of services and practices, and capacity building and cultural change processes.[409] Preliminary consultations for this Inquiry, as well as recent reviews, have revealed significant concerns about these issues in relation to the family law system.

305 One issue that was raised in early consultations centres the current complaints processes of the family courts. Consistent with the independence of the courts, decisions of a judicial officer may be overturned only through the appeal process. An appeal against the decision of the court often involves considerable expense and will focus (largely) on questions of law. Where a person wishes to lodge a complaint about the conduct of a Commonwealth judicial officer, this is dealt with by the Chief Justice or Chief Judge of the relevant court.[410]

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408 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (2017) vol 7.

409 Ibid.

410 For more information about the complaints procedures currently in place, see: Family Court of Australia, *Judicial Complaints Procedure* <www.familycourt.gov.au>; Federal Circuit Court of Australia, *Judicial Complaints Procedures* <www.federalcircuitcourt.gov.au>.

306 This process contrasts with those established in other Australian jurisdictions, where independent judicial commissions have been created to investigate complaints about the conduct of state judicial officers. In New South Wales, for example, the *Judicial Officers Act 1986* (NSW) provides a process for people to seek an independent investigation of complaints about the ability or behaviour of state judicial officers (but not their decisions). Investigations are conducted by the Judicial Commission of NSW, which has power to 'initiate such investigations into the subject-matter of the complaint as it thinks appropriate'.[411] A similar independent Judicial Commission process exists in Victoria, with power to examine complaints about the conduct or capacity of state judicial officers, including complaints about inappropriate remarks from the bench.[412]

307 A number of stakeholders also suggested the need for more sensitive handling of complaints made by people who have used the system's services, with some recounting negative experiences of engaging with existing complaints mechanisms. The recent report of the Royal Commission into Institutional Responses to Child Sexual Abuse highlights the importance of organisational responses to complaints about negative experiences of services, noting that these 'have the potential to either significantly compound or help alleviate' the impact of the person's experience.[413]

308 As described above in the section, 'Resolution and adjudication processes', many of the family law system's clients have experienced family violence or abuse, and research indicates that engagement with the legal system, and particularly adversarial processes, can exacerbate trauma.[414] Sensitive and well-managed complaints procedures, on the other hand, can in some cases improve mental health outcomes for people who have experienced violence.[415]

309 As noted above in the section, 'Professional skills and wellbeing', recent reviews have also revealed consumer concerns about the quality of some professional services within the family law system, particularly with respect to practitioners' knowledge of family violence. In response, recent reports have suggested the need for strengthened regulatory mechanisms and/or accreditation requirements.[416] For example, the SPLA Committee received a number of submissions raising concerns about the family violence and child sexual abuse competency of family report writers.[417]

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411 *Judicial Officers Act 1986* (NSW) s 23.

412 Judicial Commission Victoria, *Homepage* <www.judicialcommission.vic.gov.au>.

413 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (2017) 172.

414 Herman, above n 224.

415 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (2017).

416 See House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 13, ch 8; Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016) rec 11.

417 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 13, 207.

310 Family consultants who are employed by the courts have their performance and conduct directly managed by the court, which advises that 'the appropriate venue' for addressing concerns about the methodology and content of family reports is cross-examination in court. Complaints that cannot be addressed in cross-examination can be directed to a Regional Dispute Resolution Coordinator or senior Family Consultant.[418]

311 Family consultants and external report writers are often members of regulated professions, and as such may be subject to professional and ethical standards and regulation by their professional associations.[419] However, initial consultations suggest that these associations may be reluctant to investigate professional conduct in the context of family law matters, for fear of breaching privacy provisions or interfering with active court proceedings. The SPLA Committee recommended the development of a formal complaints mechanism for family consultants.[420]

312 Preliminary consultations also revealed concerns about the lack of a system-wide governance structure for the family law system. In particular, stakeholders suggested there should be a single governance body that can provide leadership in shaping the development of the system, with responsibility for monitoring performance, ensuring there are transparent and accessible complaints mechanisms, promoting ethical practices, and fostering learning and innovation, including the development of new methods of service delivery to meet evolving client needs.

313 Early consultations indicated a range of views about how the governance of the family law system might be strengthened to improve public confidence. These included the following proposals:

- The creation of an overarching governance body which performs regulatory functions for the family law system, including supervising the administration of the system, investigating and taking action on complaints, and making recommendations to government about how to improve the system.[421]
- The redevelopment of the Family Law Council to vest it with responsibility for taking a more active role in shaping the system along the lines of the role performed by the Independent Advisory Council (IAC) under the *National Disability Insurance Scheme Act 2013* (Cth), which provides the NDIS Board with advice about how the National Disability Insurance Agency should perform its functions.

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418 Family Court of Australia, *Complaints about Family Reports and Family Consultants—Family Court of Australia* <www.familycourt.gov.au>; Federal Circuit Court of Australia, *Federal Circuit Court of Australia Complaints Policy* <www.federalcircuitcourt.gov.au>; House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 13, 275.

419 For example, the Australian Psychological Society, *Australian Psychological Society: Ethics* <www.psychology.org.au/about/ethics/>. Psychology Board of Australia, *Standards and Guidelines* <www.psychologyboard.gov.au/Standards-and-Guidelines.aspx>.

420 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 13, rec 30.

421 Some similar functions are performed by some state and territory Commissioners for Children and Young People: see, eg, the *Commission for Children and Young People Act 2012* (Vic).

- Strengthening institutional leadership within the system to encourage cross-sector collaboration, promote habits of ethical practice,[422] internally monitor and review performance, and translate the findings of review processes into improved service design.
- The introduction of a death review process, similar to those used by state and territory child protection systems and coronial processes, to make recommendations for change.[423]
- The creation of a Commonwealth Judicial Commission to conduct independent investigations of complaints of judicial misconduct.[424]

314 The ALRC invites comment on how governance arrangements and professional regulation in the family law system could be improved.

422 See on this, Christine Parker, Tahlia Gordon and Steve Mark, 'Regulating Law Firm Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales' (2010) 37(3) *Journal of Law and Society* 466.

423 Women's Legal Services Australia, Submission to the Family Law Council, *Inquiry into Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (October 2015).

424 This was recommended in Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Australia's Judicial System and the Role of Judges* (2009).