Review of the family law system: Issues and opportunities
Presentation to the Australian Institute of Family Studies 2018 Conference

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I would like to begin by acknowledging the traditional owners of the land on which we meet, the Wurundjeri people of the Kulin nation, and pay my respects to their elders past, present and emerging.

I would also like to thank the Director of the Australian Institute of Family Studies (AIFS), Anne Hollands, for inviting me to speak to you this morning about the Australian Law Reform Commission's Family Law System Inquiry.

The Commission is currently considering the many submissions it received in response to its Issues Paper, which was released in March this year. I'll say something about the questions that the Issues Paper canvassed and some of the themes in the responses to it a bit later. But before doing that, I would like to briefly outline the terms of reference for the inquiry and say a little about its contemporary context and why this review is, I think, timely and important.

The terms of reference for the inquiry

The first thing to note about the Family Law System Inquiry is that it builds on a long and continuing body of empirical study and policy work on various aspects of the family law system. In recent years, these have included research investigations of children's and young people's experiences of the family law system,[1] and of direct cross examination of self-represented litigants,[2] as well as policy reviews of the barriers affecting access to the system by Aboriginal and Torres Strait Islander and Culturally and Linguistically Diverse families,[3] and of the need for reform to the parentage provisions of the *Family Law Act*,[4] among other things.

However, as the preamble to the ALRC's reference notes, this is the first comprehensive review of Australia's family law system since its commencement more than 40 years ago. It is therefore the first opportunity to consider the possibilities for its re-development in a systematic and integrated, rather than piecemeal, way.

[1] R. Carson et al, 'Children and Young People in Separated Families: Family Law System Experiences and Needs' (Australian Institute of Family Studies, 2018).
[2] R. Carson et al, 'Direct Cross-Examination in Family Law Matters: Incidence and Context of Direct Cross-Examination Involving Self-Represented Litigants' (Australian Institute of Family Studies, 2018).
[3] 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).
[4] Family Law Council, *Report on Parentage and the Family Law Act* (2013).

For this reason, the terms of reference are wide-ranging. They are not just about the law or the courts but ask us to think more broadly about the kinds of services and professional skills needed to support families and children through the separation transition, and the kinds of processes that are best adapted to help former partners deal with problems and manage conflict.

In particular, the ALRC has been asked to consider:

- the opportunities for appropriate, early and cost-effective resolution of family law disputes;
- the best ways to inform decision-makers about the best interests of children and the views held by children in family disputes;
- whether the adversarial court system offers the best way to support the safety of families and resolve matters in the best interests of children;
- the issues facing families with complex needs, including where there is family violence, drug or alcohol addiction or serious mental illness;
- the opportunities for cross-system collaboration, coordination and integration; and
- how to improve the clarity and accessibility of the law.

In considering these issues, the ALRC has been asked to be mindful of the paramount importance of protecting the needs of the children of separating families, and of the need for public understanding and confidence in the family law system.

Overall, then, the reference reflects an interest in re-imagining the family law system in a way that better supports the range of contemporary needs of separating families and their children.

The international and historical context for this review

However, concern to update the structure and operation of family law systems is not unique to Australia, and recent years have seen a number of common law jurisdictions grappling with the need to reform family law system approaches that have become less workable for families than they once were.

An example is the Family Law Reform Committee of Manitoba, which recently released its recommendations for reform in a report called *Modernising our family law system*.[5] That report suggests the review in that case was triggered by concerns about two issues, each of which is reflected in the ALRC's terms of reference. The first was a concern to reduce the costs to families of resolving family law disputes, with the report noting a steady increase in the numbers of people who cannot afford the legal services they need, and who cannot effectively represent themselves in court.[6] The second issue centred on questions about the appropriateness of the adversary process for resolving family law matters. In relation to this issue, the Family Law Reform Committee noted that the 'winner' and 'loser' character of the adversarial approach can be problematic for separated families because it 'often contributes to an ongoing relationship of conflict' between the parties, which runs counter to the production of healthy joint parenting relationships.[7] Reflecting these concerns, the Manitoba Law

[5] Manitoba Family Law Reform Committee, *Modernising our family law system* (June 2018).
[6] Ibid, 2.
[7] Ibid.

Reform Committee was asked to consider reforms that would the system 'more accessible and improve wellness and outcomes for families' by designing 'an alternative model that could be faster, less complex, less expensive for families and less adversarial'.[8]

The Law Commission of Ontario has also undertaken work on reforming the family justice system in that province,[9] with a focus on addressing issues of affordability and accessibility of services for self-represented litigants and families with multifaceted problems.[10] The Commission's Final Report, published in 2013, notes that its review stemmed from evidence of difficulties experienced by people in 'understanding and using information, lack of affordable representation and inadequate response to the multidisciplinary nature of family issues'.[11]

The Scottish Government is also currently undertaking consultations as part of a broader commitment to preparing a 'Family Justice Modernisation Strategy'.[12] The aims of this strategy are reportedly to improve 'people's experience of the family justice system' and to identify what changes are needed 'to ensure it is fit for the 21st century'.[13] To date, this has included a program of work that is looking at the barriers to children's involvement in family law cases, ways of better protecting the victims of domestic abuse, and opportunities for developing less adversarial alternatives to the court process.[14]

It is important to note that policy interest in reducing the costs and adversarial nature of court proceedings is a longstanding one that is not confined to family law proceedings. Over the years there have been a number of law reform inquiries on this topic, across several common law jurisdictions, which have been variously tasked with looking for alternatives to the adversarial model[15] and ways of creating a 'simpler, cheaper and more accessible legal system'.[16]

But, as the Manitoba Family Law Reform Committee's report notes, these questions raise particular issues in the context of a family law system, both because of the potential impact on a family's ability to recover financially from their separation, and because of the potential to compromise wellbeing outcomes for children who may be exposed to ongoing conflict that has been exacerbated by the litigation process.

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[8] Ibid, 1.
[9] Law Commission of Ontario, *Increasing Access to Family Justice Through Comprehensive Entry Points and Inclusivity: Final Report* (2013).
[10] Law Commission of Ontario, *Increasing Access to Family Justice Through Comprehensive Entry Points and Inclusivity: Final Report* (2013), 5-6.
[11] Law Commission of Ontario, *Increasing Access to Family Justice Through Comprehensive Entry Points and Inclusivity: Final Report* (2013), 5.
[12] See Scottish Government, Review of Part 1 of the Children (Scotland) Act 1995 and creation of a Family Justice Modernization Strategy: https://consult.gov.scot/family-law/children-scotland-act/
[13] See J. Davidson, 'Scottish Government to fund research into barriers to children being heard in the family justice system', *Holyrood*, 4 June 2018; J. Davidson, 'Scottish Government pledges to prioritise children's interests in family court cases', *Holyrood*, 18 May 2018.
[14] Scottish Government, Improving experiences of family justice: https://news.gov.scot/news/improving-experiences-of-family-justice
[15] Lord Woolf, *Access to Justice*: *Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996).
[16] ALRC, *Managing Justice: A Review of the Federal Civil Justice System* (Report No. 89).

The contemporary Australian context

However, the ALRC has been asked to consider a number of other issues that point to the timeliness of a modernisation strategy for Australia's family law system. In particular, the preamble to the reference notes that Australia has seen 'profound social changes and changes to the needs of families' since the system was designed over 40 years ago and highlights the importance of ensuring it is able to meet 'the contemporary needs of families and individuals who need to have resort to' its services.

A multi-disciplinary workforce

Australia's present family law system dates back to the 1970s and the commencement of the *Family Law Act* and the Family Court of Australia in January 1976. The social changes that those reforms were designed to address included a growing dissatisfaction with the indignities of the former fault-based divorce system[17] – which often involved reportage of divorce cases in the tabloid press[18] – and increasing recognition that many families needed something more than a legal response to the breakdown of their relationship.[19]

Against this background, the design of the Family Court – which was marketed as a 'helping court'[20] – emphasised the importance of providing both legal and non-legal services for separating families.[21] The Ruddock Report, of the first parliamentary inquiry into the family law system, notes that the Family Court was conceived of 'as a team' of service providers, with court counsellors to conduct relationship counselling and prepare reports about children for the court, and legal advisers to inform parties about their rights and entitlements.[22]

Forty years on, however, a growing body of empirical research has highlighted the increasing complexity of the issues that modern families bring to the system, including the prevalence of family violence and other sources of safety concern for children, such as mental ill-health and substance abuse.[23] Recent reports suggest that this profile indicates the need to expand on the Family Court's original multi-disciplinary workforce design.[24] Where in the 1970s, that strategy was envisaged as a team of lawyers and counsellors, the complexity of issues experienced by clients today points to the relevance of a much broader range of professionals. As one submission to our Inquiry expressed this idea:

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[17] See the Hon. J. Fogarty, 'Establishment of the Family Court of Australia and its Early Years' (2001) 60 *Family Matters* 90.
[18] L. Star, *Counsel of Perfection: The Family Court of Australia* (1996), 136.
[19] Joint Select Committee on the Family Law Act, *Family Law in Australia: Vol. 1* (July 1980), [7.12].
[20] Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 28 November 1974, at 4322 (Prime Minister Whitlam).
[21] Joint Select Committee on the Family Law Act, *Family Law in Australia: Vol. 1* (July 1980), [7.7].
[22] Joint Select Committee on the Family Law Act, *Family Law in Australia: Vol. 1* (July 1980), [7.13-7.14].
[23] See eg, R. Kaspiew, R. Carson, J. Dunstan, L. Qu, B. Horsfall, J. De Maio, S. Moore, L. Moloney, M. Coulson and S. Tayton, *Evaluation of the 2012 family violence amendments: Synthesis report* (Australian Institute of Family Studies: 2015), 16.
[24] Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016), 119-120.

> The dynamics involved in family conflict have complex emotional, cultural, social, health and economic underpinnings. … Successful design and implementation of post- separation arrangements, for child issues particularly, if the parents cannot arrange this themselves, requires the co-ordinated input of a range of expertise (from psychologists, social workers, independent financial consultants, addiction specialists, cultural and community representatives and others).[25]

Productivity issues

In addition to issues of disciplinary expertise, the prevalence of families with multiple support needs has also had some significant productivity implications for the family law system.

For example, we know from the 2016 KPMG report on the *Future Focus of the Family Law Services*[26] that the increased complexity of client needs has had a profound impact on the system's workload and capacity to deliver outcomes in a timely way. Both family relationship and legal assistance services have indicated that the growth in families with complex issues has meant an increase in the time and resources needed to provide a case managed approach that can address the entirety of a family's support needs – which might, for example, require them to liaise with the state child protection department or the police, or with domestic violence services as well as alcohol and other drugs or mental health services.

Case complexity has also impacted the workload of the courts, compounding the effects for judicial officers and parties of the growing number of litigants who are not legally represented.[27]

Jurisdictional fragmentation

A related issue, and one canvassed by the Family Law Council in 2015, concerns the evidence that many clients of the family law system find themselves having to engage with more than one legal system or court in order to achieve safe outcomes for their children. The Family Law Council's recent work suggests that this dynamic can see families having to negotiate different legal frameworks, different procedural rules and different decision-makers, as well as having to repeat their story to multiple professionals, sometimes at a time of high risk and vulnerability.[28]

I pause to note at this point that the genesis of the idea for the Family Court of Australia came from the creation of similar specialist family courts in the United States and Europe.[29] But, there was an important difference between the Australian version and its

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[25] Marrickville Legal Centre, Submission No. 137 to Australian Law Reform Commission, *Family Law System Review* (2018).
[26] KPMG, *Future Focus of the Family Law Services: Final Report* (January 2016)
[27] See on this, T. Sourdin and N. Wallace, 'The Dilemmas Posed by Self-Represented Litigants—The Dark Side' (Access to Justice Paper 32, 2014).
[28] 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), 97.
[29] Joint Select Committee on the Family Law Act, *Family Law in Australia: Vol. 1* (July 1980), [7.8] and [7.9].

international forebears, which is that many of these earlier models combined jurisdiction over divorce, maintenance and custody of children with juvenile protection matters and family-based criminal cases.[30] In contrast, the Family Court of Australia was vested with 'the full jurisdiction of the Commonwealth' in relation to marriage and matrimonial causes,[31] leaving power to deal with issues of child welfare, adoption and family violence to be exercised by state courts.

As this indicates, the complexity of the modern profile of family law client needs was a development that was unforeseen in the 1970s, when issues of family violence were not commonly raised in divorce disputes. However, as the Family Law Council has noted, the prevalence of safety issues in the contemporary family law system workload raises real questions about the system's capacity to respond effectively to the range of legal and support needs these cases involve.[32] It also points to the importance of cross-system collaboration and information sharing, as well as joint professional development for professionals working in the family law, family violence and child protection sectors.[33]

Children's rights

Another shift since the 1970s that suggests a need for modernisation is Australia's accession to the *United Nations Convention on the Rights of the Child* (the CRC), which affords children the right to participate in decision-making processes that are relevant to their care.[34]

Like the development of a multi-disciplinary workforce, this is also an area where the 1970s reforms were groundbreaking for their time, when the introduction of the *Family Law Act* ushered in a new era of child inclusive practice in divorce matters. At the time, this shift centred on two innovations: the use of Court counsellors to meet with children and provide judges with reports about their wishes,[35] and the provision of separate legal representatives for children, funded by legal aid commissions.[36]

However, the recent study conducted by Rachel Carson and her colleagues from the Australian Institute of Family Studies (AIFS) points to some ways in which children's participation rights might be further enhanced to ensure the views of children and young

[30] Joint Select Committee on the Family Law Act, *Family Law in Australia: Vol. 1* (July 1980), [7.8]
[31] Senate Standing Committee on Constitutional and Legal Affairs, *Report on the Law and Administration of Divorce and Related Matters and the Clauses of the Family Law Bill 1974* (Australian Government Printer of Australia, 1975), [33]-[34].
[32] 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), 96.
[33] Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016), Recommendations 6 and 12.
[34] Articles 9 and 12.
[35] A. Marshall, 'Family Court Counselling Service' [1978] *Law Society Journal* 175, at 177-179 and 181-182; A. Marshall, 'Social workers and psychologists as Family Court Counsellors within the Family Court of Australia' (1977) 30(1) *Australian Social Work* 9.
[36] See D. Whelan, 'The Wishes of Children and the Role of the Separate Representative' (1978-79) 5 *Monash University Law Review* 287.

people are meaningfully considered and treated respectfully by the professionals who engage with them.[37]

Cultural diversity

A final significant area of social change since the passage of the *Family Law Act* has been an increased diversity of family structures. Australia has recently shown its support for marriage equality and recognition of lesbian, gay, bisexual, transgender and intersex families. It has also become home to a growing number of migrant families since the 1970s, becoming one of the most culturally diverse nations in the world.[38] And Australia's first nations peoples have asked us to recognise their unique experience of disadvantage and intergenerational trauma and to respect the cultural identity and connection to country needs of Aboriginal and Torres Strait Islander children.

Yet, reviews and research over a number of years have shown that mainstream family law services have not always been designed or delivered in a way that recognises the lived experiences of people from these groups, and that there remain significant barriers affecting access to the family law system for Aboriginal and Torres Strait Islander families,[39] people from culturally diverse communities,[40] and for LGBTIQ families.[41]

The ALRC review

So, what does all this mean for the modern family law system? We know from the work of the AIFS and others that the nature of the system's workload today is very different to the one that was envisaged at the time it was created. We also know that most separated parents are able to work out their parenting and property arrangements with limited assistance from the family law system, but that those who do seek its services, especially those who use the courts, are more likely to be experiencing multiple problems.

Overall, this profile suggests that for many separating families, the system will need to offer little more than information, while being careful to ensure it is comprehensible and accessible to the range and diversity of Australian families, including children and young people. But it also demonstrates that some families will need secondary strategies, such as legal advice and support services to assist them to reduce conflict

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[37] R. Carson et al, 'Children and Young People in Separated Families: Family Law System Experiences and Needs' (Australian Institute of Family Studies, 2018).
[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] 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).
[40] Family Law Council, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds* (2012); House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (2017), 257.
[41] F. Kelly, H. Robert and J. 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.

and reach agreement about parenting and financial arrangements. And it means that for a small proportion of separated families, tertiary responses will be needed to facilitate agreement making or provide access to adjudication when self-management of parenting or financial arrangements cannot otherwise be achieved.

The AIFS research tells us that although these families may not be the majority, they are more likely than other users of the system to have a range of complex needs and require a range of different services.[42] I note in this context that the families involved in the recent AIFS study of children and young people reported accessing an average of eight services after separation.[43]

As I mentioned at the outset, the Commission is presently considering the responses it received to its Issues Paper. The ALRC uses a three-stage approach to conducting inquiries, and the Issues Paper is the first of three publications. The Issues Paper for the Family Law System Inquiry was released in March this year and asked a series of questions about the issues raised by the terms of reference and called for submissions. Altogether it asked 47 questions, covering various elements of the family law system, including questions about:

- how to improve access to the system for particular groups, including people living in regional, rural and remote areas of Australia and self-represented litigants, as well as Aboriginal and Torres Strait Islander peoples and people with disability;
- the legislative principles governing disputes about children and property;
- the timely and cost-effective resolution of litigated disputes and the opportunities for developing less adversarial dispute resolution mechanisms;
- ways of supporting integrated service delivery and cross-jurisdictional collaboration;
- how to support children's participation in family law system processes; and
- the kinds of skills and competencies that family law system professionals should have.

The ALRC has received over 400 submissions in response to these questions, from across a broad spectrum of stakeholders. Importantly, these include from people who have used the family law system, as well as submissions from legal assistance services and family law practitioners, family relationship agencies and alternative dispute resolution organisations and professionals, domestic violence services, psychologists, social work and psychiatry peak bodies, disability services, children's commissions, researchers and academics, among others.

The Commission has also conducted consultations with more than 100 individuals and organisations around the country, including in capital cities and regional and rural locations, such as Albury/Wodonga, Mt Gambier, Alice Springs, the Gold Coast, Cairns, Townsville, Wollongong and Newcastle.

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[42] R. Kaspiew, R. Carson, J. Dunstan, L. Qu, B. Horsfall, J. De Maio, S. Moore, L. Moloney, M. Coulson and S. Tayton, *Evaluation of the 2012 family violence amendments: Synthesis report* (Australian Institute of Family Studies: 2015), 16.

[43] R. Carson et al, 'Children and Young People in Separated Families: Family Law System Experiences and Needs' (Australian Institute of Family Studies, 2018).

In addition, we have been fortunate to hear from children and young people about our issues.

Not surprisingly, many of the issues that have been raised with the Commission reflect the same concerns that have been exercising the minds of law reform bodies and governments in other jurisdictions. These include concerns to ensure the system prioritises the safety and wellbeing of children,[44] that it uses non-adversarial processes as far as possible,[45] that it offers families a single entry point and seamless pathway between services,[46] that it has a culturally diverse workforce with professionals who are able to respond to families with cultural competency,[47] and that it is affordable, navigable and comprehensible, so that people with family law needs do not have to struggle to find and understand the information they need.

Conclusion

The Commission is presently considering these submissions, as well as the relevant empirical data, and these will inform the development of our Discussion Paper, which is the second of the ALRC's three reports. This Paper, which is due for release in early October, will set out the Commission's preliminary proposals for reform and seek public feedback about these. That feedback will help us to reshape our ideas and settle the preparation of our Final Report, which will be delivered to the Attorney-General in March next year.

In conclusion, I would like to encourage you to engage with the family law system review, to keep an eye out for the release of the Discussion Paper in October, which will be published on the ALRC's website, and to send us your thoughts about its proposals to help us consider how best to ensure the family law system is able to meet the needs of Australian families in the 21st century.

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[44] See eg, Berry Street, Submission No. 26 to Australian Law Reform Commission, *Family Law System Review* (2018); Australian Dispute Resolution Advisory Council (ADRAC), Submission No. 12 to Australian Law Reform Commission, *Family Law System Review* (2018); CatholicCare Sydney, Submission No. 79 to Australian Law Reform Commission, *Family Law System Review* (2018); Domestic Violence Victoria, Submission No. 23 to Australian Law Reform Commission, *Family Law System Review* (2018); Queensland Family & Child Commission, Submission No. 16 to Australian Law Reform Commission, *Family Law System Review* (2018); The Royal Australian and New Zealand College of Psychiatrists, Submission No. 18 to Australian Law Reform Commission, *Family Law System Review* (2018).

[45] See eg, National LGBTI Health Alliance, Submission No. 14 to Australian Law Reform Commission, *Family Law System Review* (2018); Relationships Australia, Submission No. 11 to Australian Law Reform Commission, *Family Law System Review* (2018); For Kids Sake, Submission No. 118 to Australian Law Reform Commission, *Family Law System Review* (2018); Caxton Legal Centre, Submission No. 51 to Australian Law Reform Commission, *Family Law System Review* (2018).

[46] Eg, Victoria Legal Aid, Submission No. 61 to Australian Law Reform Commission, *Family Law System Review* (2018); Anglicare SA, Submission No. 2 to Australian Law Reform Commission, *Family Law System Review* (2018); Aboriginal Legal Service of Western Australia, Submission No. 64 to Australian Law Reform Commission, *Family Law System Review* (2018).

[47] The Humanitarian Group, Submission No. 82 to Australian Law Reform Commission, *Family Law System Review* (2018); Koori Caucus Working Group on Family Violence, Submission No. 50 to Australian Law Reform Commission, *Family Law System Review* (2018); National Family Violence Prevention Legal Services Forum, Submission No. 63 to Australian Law Reform Commission, *Family Law System Review* (2018).