



Australian Government

Australian Law Reform Commission

# Family Law for the Future – An Inquiry into the Family Law System

SUMMARY REPORT







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SUMMARY REPORT

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

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

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**Australian Government**  
**Australian Law Reform Commission**

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

31 March 2019

Dear Attorney-General

**Review of the Family Law System**

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

Yours sincerely,

**The Hon Justice SC Derrington**  
**President**



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# Terms of Reference

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## Review of the family law system

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

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

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

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

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

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

### **Scope of the reference**

The ALRC should have regard to existing reports relevant to:

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

### **Consultation**

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

### **Timeframe for reporting**

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

# **Participants**

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## **Australian Law Reform Commission**

### **President**

The Hon Justice SC Derrington

### **Commissioner in Charge**

The Hon Justice SC Derrington (from 6 November 2018)

Professor H Rhoades (until 5 November 2018)

### **Part-time Commissioners**

The Hon Justice J Middleton, Federal Court of Australia

The Hon J Faulks

Mr G Sinclair

Dr A Bickerdike (from 29 June 2018)

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

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

### **General Counsel**

Mr Matt Corrigan

### **Principal Legal Officers**

Dr Rae Kaspiew

Dr Julie MacKenzie (until 15 January 2019)

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

Mr Stephen Still (until 11 January 2019)

Mr Richard Pelvin (from 14 January 2019)

**Senior Legal Officers**

Mr Micheil Paton (from 10 September 2018)

Ms Lisa Zehetner (from 4 June 2018)

**Legal Officers**

Ms Sarah Dobinson

Ms Genevieve Murray (from 8 January 2019)

Ms Mira Green (from 14 January 2019)

**Judge's Associates (Research)**

Ms Phoebe Tapley (from 4 February 2019)

Ms Tess Van Geelen (from 4 February 2019)

**Executive Support Officer**

Ms Claudine Kelly (from September 2018)

**Aurora Scholarship**

Emma St Clair

**Legal Interns**

Nicola Bird

Alex Jeffares

Elena Panozzo

Kathy Truong

**Monash University Student Clinic**

George Abraham

Amanda Selvarajah

Emily Tang

Jessica Tran

**Advisory Committee Members**

Mr Michael Berry SC, President, Family Law Practitioners' Association of WA (from end of June 2018)

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

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

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

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

Mr Jeremy Culshaw, Legal Practice Director, Culshaw Miller Lawyers (WA); The Legal Advice Service (WA and SA)

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

Professor Belinda Fehlberg, Melbourne Law School, University of Melbourne

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

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

Ms Manuela Galvao, Regional Co-ordinator, Child Dispute Services, Family Court of Australia and Federal Circuit Court of Australia, Melbourne, Victoria

Ms Louise Glanville, Managing Director, Victoria Legal Aid

Magistrate Anne Goldsbrough, Magistrates' Court of Victoria

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

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

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

Mr Michael Kearney SC, Waratah Chambers, Sydney, NSW

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

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

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

Commissioner Megan Mitchell, National Children's Commissioner, Australian Human Rights Commission, Sydney, NSW

His Hon Judge Matthew Myers AM, Co-Chair of the Aboriginal Family Law Pathways Network, Federal Circuit Court of Australia, Sydney, NSW

Dr Heather Nancarrow, CEO, ANROWS, Sydney, NSW

The Hon Justice Richard O'Brien, Family Court of Western Australia and Family Court of Australia, Perth, WA

Ms Jaquie Palavra, Managing Solicitor, Family Law Section, Northern Territory Legal Aid Commission

Ms Nicole Rich, Executive Director, Family Youth & Children's Law, Executive Director for Gippsland Region, Victoria Legal Aid

Mr Glenn R Thompson OAM, Partner, Newnham Solicitors, Sydney, NSW

Professor John Tobin, Melbourne Law School, University of Melbourne

The Hon Justice Garry Watts, Family Court of Australia, Sydney, NSW

The Hon Justice Jillian Williams, Family Court of Australia, Melbourne, Victoria

## Acknowledgements

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The ALRC gratefully acknowledges:

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



# Recommendations

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## 4. Closing the Jurisdictional Gap

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

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

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

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

## 5. Children's Matters

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

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

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

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

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

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

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

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

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

## 7. A Simplified Approach to Property Division

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## 8. Encouraging Amicable Resolution

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

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

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

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

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

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

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

## 9. Arbitration

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

- relating to enforcement;

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

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

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

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

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

## 10. Case Management: Efficiency and Accountability

**Recommendation 30** The *Family Law Act 1975* (Cth) should include an overarching purpose of family law practice and procedure to facilitate the just resolution of disputes according to law, as quickly, inexpensively, and efficiently as possible, and with the least acrimony so as to minimise harm to children and their families.

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

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

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

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

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

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

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

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

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

## 11. Compliance with Children's Orders

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

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

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

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

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

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

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

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

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

## 12. Support Services in the Courts

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

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

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

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

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

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

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

## 13. Building Accountability and Transparency

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

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

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

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

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

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

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

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

## 14. Legislative Clarity

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

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

## 16. Secondary Interventions

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

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

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

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

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



# Summary Report

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## The Inquiry

1. At its heart, the focus of this Inquiry is the breakdown of intimate relationships—both marriages and de facto relationships—and finding the best way to resolve disputes at the lowest financial, emotional, and psychological costs, always giving primacy to the interests of any children affected by those disputes.
2. Most separating families resolve their parenting and property issues without recourse to the family law system—up to 70% of separated families establish agreed parenting arrangements independent of the family law system,<sup>1</sup> and up to 40% of parents settle the division of their property through discussion.<sup>2</sup> A key goal of this Inquiry is to ensure that the law assists those families who do not use the system to establish private arrangements that are fair, just, and in the best interests of any children to the relationship. For those families who do use the system, the key goal is that the system is effective in assisting parties to resolve their dispute.

## The Family Law System

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

4. The idea of ‘a system’ is not entirely accurate. The *Family Law Act* is not a comprehensive legislative framework for Australian family law, as it deals almost exclusively with matters arising *after* the breakdown of an intimate relationship. The Australian family law system is more confined than others, such as Singapore or New Zealand (which are both unitary legal systems). In those jurisdictions the family courts deal with a full suite of family-related cases including divorce and related matters but also extending to matters including adoption and guardianship, juvenile justice, probate and succession, the status of children and parentage, and elder abuse.

5. The work of state and territory agencies responsible for child protection and family violence would not directly fall within the family law system, but their interaction with the family law system is critical to its effectiveness. Services that may incidentally

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<sup>1</sup> Lixia Qu et al, ‘Post-Separation Parenting, Property and Relationship Dynamics after Five Years’ (Attorney-General’s Department (Cth), 2014) xvi.

<sup>2</sup> Ibid xvii. One fifth of those couples do so without using any ‘mechanism’. The proportion of couples who finalise property division without assistance may be considerably higher for separating couples without children.

engage with separated couples, but that are not specifically targeted at such groups, would not ordinarily be considered part of the family law system. These may include general counsellors, drug and alcohol services, mental health services, health practitioners and the like.

## The Case for Reform

6. Ultimately, the case for reform is that the system is not adequately assisting Australian separated couples to resolve disputes following the breakdown of their relationship. Children are not consistently protected from harm; nor are people experiencing family violence. Disputes are protracted by delays occasioned by resource constraints in the courts but also by the conduct of parties who are unable or unwilling to resolve their dispute quickly and without acrimony. The substantive law, which has been subject to repeated amendments, is no longer clear or comprehensible.

7. Public perceptions of the family law system are mixed. The majority of those who contributed to this Inquiry were highly dissatisfied. These individuals identified significant failings in the system. Other submissions highlighted that they had encountered individuals in the system who ‘went above and beyond’ to help them. Contributions from women highlighted a range of concerns, particularly around violence and abuse, but also in relation to poor disclosure regarding financial resources. Men were often concerned about inadequate time with their children, and not being able to see their children because of non-enforcement of parenting orders. Both men and women often felt that the system failed to address the conduct of the other litigant when it involved misuse of court procedures and resources.

8. This Inquiry has identified structural and systemic difficulties within the Australian family law system. We currently have two regimes: a federal regime that deals primarily with parenting and property matters (with a federal court structure in which to adjudicate those matters); and state and territory regimes that are responsible for child protection and domestic violence laws (with state and territory courts vested with jurisdiction to deal with those matters). Those who advocated for a federal family court in 1974 could not have foreseen the growth in the reported incidence of child abuse and family violence that has occurred in Australia in the ensuing decades.<sup>3</sup> The existing model, which requires parties to navigate multiple courts across jurisdictions, fails to meet the needs of children and families across the family law, child protection, and family violence jurisdictions.

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3 R Kaspiew et al, *Experiences of Separated Parents Study (Evaluation of the 2012 Family Violence Amendments)* (Australian Institute of Family Studies, 2015) which found 57.6% of separated parents report family violence before or during separation.

9. The need for structural and systemic reform in the area of family law has been a consistent theme in recent reviews in both Australia<sup>4</sup> and other jurisdictions.<sup>5</sup> Most recently, it has seen Attorneys-General from Australia, Canada, New Zealand, the United Kingdom, and the United States agree to explore ways of better meeting the needs of separating families, including alternatives to judicial proceedings, multi-disciplinary approaches, improved responses to family violence, and tailored approaches for Aboriginal and Torres Strait Islander peoples and culturally diverse communities.<sup>6</sup>

10. A desire for ‘holistic’ change,<sup>7</sup> rather than ‘band aids’<sup>8</sup> or ‘tinkering’,<sup>9</sup> was also a strong theme in the submissions and consultations for this Inquiry. At the same time, many submissions noted that Australia’s family law system has ‘a proud history of innovation’,<sup>10</sup> which should be retained and enhanced (or, in some cases, reinstated).

11. Underpinning the recommendations are a number of interconnected themes that were outlined in the Discussion Paper: a focus on families, not the system; advancing the safety and wellbeing of children and families; collaborative and coordinated service delivery; accessibility for all families; non-adversarial approaches; valuing children and young people; and building community trust.

## **Overarching Principles**

12. In formulating its recommendations, the ALRC has been guided by the following overarching principles:

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

**Principle Two:** It is essential to the rule of law that the substantive and procedural law is clear, coherent, and enforceable so as to enable families to

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

5 See, eg, Action Committee on Access to Justice in Civil and Family Matters, Ottawa, Canada, *Access to Civil & Family Justice: A Roadmap for Change* (2013); Manitoba Family Law Reform Committee, *Modernizing Our Family Law System* (Manitoba Family Law Reform Committee, 2018); Scottish Government, *Review of Part 1 of the Children (Scotland) Act 1995 and Creation of a Family Justice Modernisation Strategy: A Consultation* (2018).

6 Quintet Meeting of Attorneys-General, ‘Official Communiqué’ (2018).

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

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

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

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

resolve issues arising after separation (without exacerbating parties' exposure to litigation) in a just, timely, and cost-effective manner that is reasonable in, and proportionate to, the circumstances of the case.

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

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

## Outcomes

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

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

## Overview of the Report

### Context

14. The *Family Law Act*, which came into force on 5 January 1976, was premised on the need to reform divorce law to eliminate fault, simplify procedures, and reduce costs.<sup>11</sup> It was responsible for two significant reforms that changed the approach to marriage breakdown in Australia: the introduction of no-fault divorce, and the establishment of a specialist multi-disciplinary court for the resolution of family disputes, the Family Court of Australia.<sup>12</sup> Significant social and legal changes in the ensuing 43 years provide the context for this Inquiry as discussed in **Chapter 2**.

### The Data

15. **Chapter 3** sets out available data regarding the number of families that enter the family law system. It presents the key characteristics of matters before the Family Court and the Federal Circuit Court<sup>13</sup> and outlines the way matters before the Courts are likely to resolve.

16. Of those matters that enter the Courts, the data indicate that:

- most matters are litigated in the Federal Circuit Court, where over half of applicants are seeking parenting orders;
- the vast majority of matters that commence in the Courts settle;
- matters spend a long time in the system;
- over one-third of all matters that proceed to trial will settle on the ‘steps of the court’;
- unrepresented litigants are more likely to take a matter to trial;
- appeals rarely progress, and over half that do progress are dismissed by the court;
- family violence and abuse is a sustained and growing issue for the family courts; and
- use and output of Family Consultants and specialist services for children has decreased.

17. Of particular concern to the ALRC is that almost half (45%) of all final order applications in the Federal Circuit Court were referred to child welfare agencies.

18. The ALRC received close to 800 confidential stories about people’s recent

<sup>11</sup> Kep Enderby, ‘The Family Law Act: Background to the Legislation’ (1975) 1(1) *University of New South Wales Law Journal* 10, 17.

<sup>12</sup> Helen Rhoades, ‘Children, families and the law – A view to the past with an eye to the future’ in Alan Hayes and Daryl Higgins (eds), *Families, policy and the law: Selected essays on contemporary issues for Australia* (Australian Institute of Family Studies, 2014) 170.

<sup>13</sup> And the Western Australian equivalents as noted.

experience of the family law system through the confidential *Tell Us Your Story* portal on the ALRC website and 331 confidential submissions. These stories spoke of multiple issues and experiences. A number of key themes emerged, including:

- **The family law system is unsafe:** People told us that the system failed to respond adequately to their safety concerns for themselves and their children. Some people told us that the system placed them in unsafe situations, or that professionals failed to respond in a manner that ensured the safety and wellbeing of children and their caregivers and in some cases caused further distress, or even harm.
- **The family law system does not enforce parenting orders adequately:** Many people were unhappy with the lack of means to enforce parenting orders, and many people spent years in protracted litigation in order to seek enforcement of parenting orders.
- **The family law system is overly complex:** Many people found the law and legal processes that apply to family law disputes complex to engage with and to understand. Many felt they could not navigate the system to reach agreement without the assistance of professionals, which left some feeling disempowered.
- **The family law system is expensive:** People told us that the cost of resolving their family law disputes through the courts and associated services was high. Some people told us about the significant impact this cost had on their financial security and that of their children. Others told us that the cost made the system inaccessible to them, particularly when they were ineligible for legal aid.
- **The family law system is slow:** Access to courts and services was so delayed that people told us they had to wait excessive lengths of time to receive assistance or take steps towards resolving their dispute. Many felt frustrated by this, and some said that their disputes escalated and/or they were left in situations that were unsafe for themselves and their children while awaiting access to the courts.
- **The family law system lacks accountability:** People who were unhappy with the outcome of their family law dispute or wished to complain about family law system professionals felt they had limited avenues to do so. Some felt that the system and those who work within it are not accountable to the families they serve.

## Jurisdictional Gap

19. Since the turn of this century, there has been a raft of inquiries, reviews, and reports which have made recommendations to Government about improving the family law system.<sup>14</sup> They have all identified substantially the same fundamental issues and have

<sup>14</sup> These include: Family Law Pathways Advisory Group, *Out of the Maze – Pathways to the future for families experiencing separation* (July 2001); House of Representatives Standing Committee on Family and Community Affairs, *Every picture tells a story* (December 2003); The Hon Richard Chisholm, *Family Courts Violence Review* (2009); Family Law Council, *Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues* (December 2009); Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National*

all made similar recommendations over a period now of almost two decades. Apart from minor tinkering, the fundamental challenges and difficulties have not attracted sufficient political will to solve the problems that differently constituted inquiry bodies continue to identify. The major themes that emerge from an analysis of 11 inquiries conducted between 2001–2017 are that:

- the family law system does not deal well with violence;<sup>15</sup>
- there needs to be greater information sharing between the family courts and state and territory child protection agencies;<sup>16</sup> and
- matters involving family law, family violence, and child abuse need to be dealt with in the same place at the same time.<sup>17</sup>

20. In **Chapter 4**, the ALRC explains that the existing jurisdictional framework for the resolution of family law disputes does not provide an appropriate framework for 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.

21. The existing framework also inhibits the possibility of children’s matters arising from family separation being dealt with in the same proceedings as any issues relating to family violence and/or child abuse.

22. The Australian Government has recently stated that state and territory courts are not intended to become the primary fora for resolving family law disputes.<sup>18</sup> Nevertheless, the ALRC urges the Government to give careful consideration to that option.

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

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*Legal Response*, ALRC 114 (2010); Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, 2014); Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever* (2015); Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems: Interim Report* (June 2015) and *Final Report* (June 2016); Victoria, Royal Commission into Family Violence (2016); Council of Attorneys-General Advisory Panel, *Reducing Violence against Women and their Children* (2016); House of Representatives Standing Committee on Social Policy and Legal Affairs, *A better family law system to support and protect those affected by violence* (Report, December 2017).

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

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

17 Four (36%) of the inquiries recommended that state and territory magistrates and children’s courts be encouraged to exercise family law jurisdiction.

18 Attorney-General’s Department, ‘Amendments to the *Family Law Act 1975* to respond to family violence’, Public Consultation Paper (December 2016) 4.

earlier reports.

## Children's Matters

24. One of the most critical functions of the *Family Law Act* is the provision of a legal framework to assist parents and other caregivers to put in place living arrangements for the care of children. That framework also necessarily guides judicial decision making with respect to children.

25. In **Chapter 5**, the ALRC recommends amendments to Pt VII of the *Family Law Act* to promote the best interests of the child in family law matters. These amendments include: reducing and simplifying the factors to be taken into account in determining which arrangements are most likely to promote a child's best interests; removing mandatory consideration of particular arrangements, including equal shared time; amending the presumption of equal shared parental responsibility; and ensuring the definition of 'family member' is appropriate for Aboriginal and Torres Strait Islander people. The ALRC further recommends that the Less Adversarial Trial model in Div 12A should be reinvigorated and applied in all family courts.

## Property

26. In **Chapter 6**, the ALRC explains that the law governing the division of property and other financial matters is no less complex than the law relating to parenting matters. The *Family Law Act* prescribes that a court must not make an order altering existing title or rights in respect of property unless it is just and equitable to do so. In considering whether any order should then be made, the court is required to take into account six matters, as well as an additional 19 matters, dealt with in another section concerned with spousal maintenance, should they be considered relevant. There is, however, no guidance in the legislation as to how those factors are to be considered in reaching the final result. It is left to judicial discretion.<sup>19</sup>

27. Most families have small asset pools. They do not necessarily want to spend their limited resources on a trial to see how the discretion might be exercised in their particular case. It should be possible for separating parties to obtain some guidance from the legislation as to what a reasonable division of their property interests might be, including superannuation and liabilities.

28. Specific issues in relation to property such as superannuation, bankruptcy, and debt are discussed in this chapter along with binding financial agreements, spousal maintenance, and family violence. All of these issues are considered integral to a broad discussion of the need for reform of the way in which property division is provided for under the *Family Law Act*.

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19 *Mallett v Mallett* (1984) 156 CLR 605; *Norbis v Norbis* (1986) 161 CLR 513 [6]-[7].

29. In **Chapter 7**, the ALRC recommends that the property division provisions be amended to clearly set out the steps that a court must take in considering an order to alter the property interests of the parties to a relationship and to stipulate that the date of assessment of the value of the assets and liabilities is the date of separation.

30. The ALRC recommends that the *Family Law Act* be amended to start with a presumption that the parties made equal contributions during the relationship. There would be limited exceptions. Equality of contributions provides separated couples with a clear starting point for negotiating property settlements. It is fairer and more equitable. Equality of contributions would limit conflict and focus the parties' attention on the necessary adjustment to be made to take account of each party's future economic circumstances.

31. In relation to superannuation interests, the ALRC recommends amendments to make splitting superannuation interests easier, and the introduction of a presumption that superannuation benefits accumulated during a relationship will be shared equally.

32. The ALRC further recommends amendments to: clarify the treatment of unsecured debts; facilitate access to dispute resolution where liability for a joint debt is in question; and restrict adverse credit reporting in limited circumstances.

33. The ALRC recommends disentangling the statutory provisions relating to property settlement from those relating to spousal maintenance, with separate factors for assessment included in the *Family Law Act*. Recommendations also address the need to facilitate access to interim spousal maintenance when it is most needed.

34. With regard to family violence, the ALRC recommends amending the *Family Law Act* to provide for a cause of action by which compensation for harm caused by family violence can be pursued, explicitly reversing the effect of the decision in *Kennon & Kennon*.<sup>20</sup> Recommendations include removing evidentiary barriers to raising claims of family violence and the extension of the Less Adversarial Trial to property and financial matters when appropriate.

## **Encouraging Amicable Resolution**

35. There are clear benefits for families in resolving disputes away from the courts where this is possible and appropriate. In **Chapter 8**, the ALRC proposes amendments to increase the proportion of both parenting matters, and property and financial matters that are dealt with away from the family courts. Existing dispute resolution patterns suggest that with stronger legislative encouragement to avoid courts, and greater availability of Family Dispute Resolution (FDR) and, for more complex matters, Legally Assisted Dispute Resolution (LADR), more families could resolve their issues without litigation.

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20 (1997) 22 Fam LR 1.

36. In **Chapter 8**, the ALRC recommends legislative change to require parties to take genuine steps to resolve property and financial matters and parenting matters before filing a court application. A corresponding obligation on courts not to hear a matter unless the applicant has satisfied the genuine steps requirement or established entitlement to an exception is also recommended.

37. Further recommendations support these measures by adapting the legislative framework for FDR for property and financial matters. To strengthen FDR and LADR as viable alternatives to court for a greater proportion of separated couples, the ALRC makes recommendations to reinforce the importance of disclosure, particularly in financial matters, where a fair settlement can only occur following full disclosure of each party's financial interests and resources.

## Arbitration

38. Increasing the availability and use of private arbitration is the focus of **Chapter 9**. In that Chapter, the ALRC outlines a number of recommendations which aim to increase the use of arbitration in appropriate family law disputes. Currently, arbitration is rarely used.

39. Recommendations include increasing the scope of matters which may be arbitrated, removing the opportunity to object to registration of an award, clarifying that superannuation splits may be affected by an arbitral award, and providing courts with additional powers to make directions regarding the conduct of an arbitration process. It is suggested that, in limited circumstances, there could be arbitration in relation to children's issues.

## Case Management: Efficiency and Accountability

40. In **Chapter 10**, the ALRC recommends amendments to the *Family Law Act* to ensure that parties who are compelled to litigate, for whatever reason, are nevertheless able to have their disputes resolved in a just, timely, and cost-effective manner that is reasonable in, and proportionate to, the circumstances of their case. The ALRC recommends amending the *Family Law Act* to provide that the overarching purpose of the family law practice and procedure provisions is to facilitate the just resolution of disputes according to law, as quickly, inexpensively, and efficiently as possible, and with the least acrimony so as to minimise harm to children and families. Failure to so act would see parties, their lawyers, and other intervening third-parties personally responsible for costs as well as other consequences—including being required to seek the leave of the court to serve further applications.

41. The ALRC also recommends amendments to the *Family Law Act* and the promulgation of a joint Practice Note to govern the fundamental principles of case

management of the Family Court and Federal Circuit Court.<sup>21</sup>

42. The ALRC makes further recommendations:

- to ensure that family court judges have robust case management tools at their disposal to reduce costs and delays in family law litigation;
- to supplement the more robust case management tools by amending the *Family Law Act* to make clear to parties, and their lawyers, that the family courts will make costs orders where it is appropriate to do so; and
- to empower judges to exercise summary dismissal powers where there has been an egregious failure by a party to comply with the overarching purpose of family law practice and procedure.

## Compliance with Children’s Orders

43. In **Chapter 11** the ALRC considers the issue of compliance with children’s orders. Stakeholders raised concerns about the high rate of families returning to court following the making of orders,<sup>22</sup> as well as complaints about the costs and stress of responding to (sometimes many) contravention applications, and the need for improved measures to support highly conflicted parties to implement parenting arrangements.

44. Stakeholders also highlighted the tendency for interpersonal conflict to escalate and ‘solidify’ during court proceedings,<sup>23</sup> leaving parties ill-equipped to manage co-parenting arrangements when the proceedings end.<sup>24</sup> Submissions also noted that there needs to be greater support for families after the making of final orders to support compliance with the orders.<sup>25</sup> We heard from a significant number of people through the *Tell Us Your Story* portal that non-compliance with orders had been a significant issue for them which had caused anguish, and led to repeated engagement with, and feelings of frustration about, the family law system.

45. In **Chapter 11**, the ALRC suggests amendments to improve compliance with parenting orders. The ALRC recommends that the *Family Law Act* be amended to require parties involved in contested proceedings for final parenting orders to meet with a Family Consultant to have their orders explained to them. The court should also have the necessary powers to order more intensive engagement with a Family Consultant where it would assist the parties to put in place arrangements to facilitate compliance with their orders.

<sup>21</sup> The Family Court of Western Australia has its own existing case management regime.

<sup>22</sup> See on this Rae Kaspiew et al, *Court Outcomes Project (Evaluation of the 2012 Family Violence Amendments)* (Australian Institute of Family Studies, 2015) 41.

<sup>23</sup> See, eg, M Packer, *Submission 178*; C Fitzpatrick, E Hooper, C Hooper and J Dmitrovic, *Submission 169*; Fitzroy Legal Service and Darebin Community Legal Centre, *Submission 7*.

<sup>24</sup> See, eg, Relationships Australia Victoria, *Submission 129*; Interrelate, *Submission 126*.

<sup>25</sup> See, eg, Victoria Legal Aid, *Submission 61*.

46. It is also important, particularly in high conflict families, that the ability to appeal interim orders is controlled. The ability to appeal on unmeritorious grounds can be utilised as a form of systems abuse, providing an abuser with another weapon with which to harass the other party. Parties also need clarity as to the threshold circumstances which must arise before it may be appropriate to make a new application for parenting orders where final orders have been made previously.

## Support Services in Courts

47. Children are a central concern of family law. They are often at the centre of a dispute between parents or other caregivers about their care arrangements following family separation. The family law system should, on any view, be child-centric.

48. In decisions about care arrangements for children, decision makers must currently regard the best interests of the child as the paramount consideration.<sup>26</sup> Consequently, family law cases do not proceed simply on the basis that they are disputes between parties, but that the orders made should be ones that best promote and protect the interests of the child.<sup>27</sup> Family Consultants, Independent Children's Lawyers, and Indigenous Liaison Officers play a critical role in ensuring that children and their interests are best supported, represented, and protected.

49. As set out in **Chapter 12**, the nature of the services the family courts provide has changed over the years, as has the terminology used to describe those services and the extent to which people are counselled in-house or referred to agencies external to the court (as provided for in Pt II of the *Family Law Act*). Nevertheless, court services remain vital. For example, they may assist parties to resolve litigation more quickly, and assist parties to understand and comply with court orders.

50. The ALRC recommends that the *Family Law Act* be amended to clarify and expand the functions of Family Consultants. The ALRC also recommends that the role be renamed to more appropriately reflect the nature of the role. It will be essential to the successful implementation of this Recommendation that the Australian Government provides sufficient funding to increase the number of Family Consultants within the family courts.

51. The ALRC also recommends that the *Family Law Act* be amended to include a provision requiring an Independent Children's Lawyer to comply with the *Guidelines for Independent Children's Lawyers* which provide guidance from the Chief Justice and Chief Judges of the family courts as to the courts' expectations of Independent Children's Lawyers.

52. The ALRC also urges the Australian Government to provide sufficient funding

26 *Family Law Act 1975* (Cth) s 60CA.

27 *M v M* (1988) 166 CLR 69, 76; *ZP v PS* (1994) 181 CLR 639, 647.

to restore the program through which Indigenous Liaison Officers were engaged in the family courts as appropriate to the needs of a particular registry.

## **Building Accountability and Transparency**

53. In **Chapter 13**, the ALRC makes a suite of recommendations that seek to enhance public and professional confidence in the family law system as a whole.

54. In order to enhance system performance, accountability, and transparency in decision making, the ALRC recommends expanding the role of the existing Family Law Council to include monitoring and reporting of the overall functioning of the family law system. The ALRC also recommends that a Children and Young People’s Advisory Board be established to assist the Family Law Council to receive feedback on children’s experiences of the family law system and incorporate children’s views into policy and practice development.

55. Judges and lawyers are key participants in the family law system. Accordingly, the ALRC recommends that legislation provide for consistent criteria requiring family law and family violence expertise for the appointment of judicial officers who will exercise family law jurisdiction, and that any legal practitioner undertaking family law work should be required to complete regular family violence training.

56. Other crucial roles within the system include family report writers, Family Dispute Resolution Practitioners, and Children’s Contact Services. The ALRC recommends introducing mandatory accreditation for private family report writers. Building on the recommendation in Chapter 8 that Family Dispute Resolution Practitioners should mediate more property and financial matters, the ALRC sets out the additional skills and qualifications they may require. Finally, in **Chapter 13**, the ALRC recommends introducing accreditation for all Children’s Contact Services, including private services which are currently not subject to any form of regulation or oversight. This incorporates requirements for staff to hold appropriate qualifications and undergo screening checks.

## **Legislative Clarity**

57. The *Family Law Act* and its subordinate legislation have become complex and difficult to use over many years, creating:

- a barrier to access to justice for unrepresented litigants;
- additional costs and delay; and
- a lack of clarity as to the principal policy goals of the legislation, in particular the best interests of the child as the paramount consideration in decisions about children’s arrangements.

58. To address this, in **Chapter 14** the ALRC recommends general principles that should be applied to comprehensively redraft this legislation, to improve its usability

for all readers of the legislation. Some examples of redrafted key provisions, and a proposed restructure of children's provisions, are provided. The ALRC also examines the provisions which prohibit the inclusion of identifying information in any publication of family law proceedings. The ALRC recommends retaining the substance of those provisions but redrafting them to achieve greater clarity. In an Appendix, the ALRC sets out suggestions for legislative drafting in line with these principles and recommendations.

## Primary Interventions

59. Primary interventions are delivered to the whole community in order to provide support before problems occur. Typically delivered in community settings, they may focus, for example, on changing cultural norms or social attitudes through public education about positive parenting practices or legal rights and policies.<sup>28</sup> The point of primary interventions is to shift the risk profile positively for the entire relevant population.<sup>29</sup> In the family law system, primary interventions aim to reach Australian families prior to, or early on in family separation, so that families feel empowered to take proactive steps to seek information, advice, and support in seeking to reach post-separation agreements. As these interventions are matters of social, rather than legal policy, the ALRC makes no specific recommendations but sets out key initiatives the Government may wish to consider.

60. To improve community understanding of the family law system, including what to do when experiencing separation and where to go for help, the ALRC suggests the development of a national education and awareness campaign. The campaign would raise general awareness of the law governing post-separation parenting and the availability of further information and support, including facilitative dispute resolution processes.

61. The ALRC also suggests the development of a centralised source of clear, consistent, legally sound, and nationally endorsed information about the family law system. This would include more detailed information about relevant laws and processes, designed for families seeking to reach agreement post-separation.

62. The ALRC also suggests the development of referral relationships between family law services and universal services (such as health and education services), and first point of contact services for people who have experienced family violence (such as the police), to ensure that families, children, and young people are supported in accessing information, advice, and support in relation to separation at an early stage.

## Necessary Secondary Interventions

63. Families who seek assistance from the family law system may have a range of

<sup>28</sup> Daryl J Higgins, 'A Public Health Approach to Enhancing Safe and Supportive Family Environments for Children' (2015) 96 *Family Matters* 39, 40.

<sup>29</sup> Ibid.

legal and social support needs.<sup>30</sup> This may include a need for housing assistance, financial assistance, and health and therapeutic support needs in addition to a need for legal advice and dispute resolution assistance. Some families present with complex needs arising from experiences of family violence, mental illness, or drug or alcohol misuse.<sup>31</sup> These issues can complicate a family's experience of separation, and can present barriers to reaching agreement.

64. Connecting those family members who are experiencing these or other issues with prompt, appropriate, and coordinated services may increase the likelihood of reaching a lasting agreement. These services can assist family members to address issues that may exacerbate conflict, and increase both their preparedness for legal matters and suitability for FDR. It may also facilitate more efficient and effective use of the court and other family law services, including FDR, and better protect family members, including children, who are engaged in the family law system.

65. In **Chapter 16**, the ALRC recommends enhancements to secondary interventions in the family law system. The ALRC recommends that the FASS be enhanced to assist families entering the system through the family courts. To ensure families who enter the system through out-of-court family law services have equivalent access to coordinated services, the ALRC also recommends enhancements to FRCs.

## The Law Reform Process

66. The scope of each ALRC inquiry is defined by the Terms of Reference. The recommendations for reform must sit within this scope and need to be built on an appropriate conceptual framework and evidence base.

67. A major aspect of building the evidence base to support the formulation of ALRC recommendations for reform is consultation. Widespread community consultation is a hallmark of best practice law reform. Pursuant to s 38 of the *Australian Law Reform Commission Act 1996* (Cth), the ALRC 'may inform itself in any way it thinks fit' for the purposes of reviewing or considering anything that is the subject of an inquiry.

68. The process for each law reform project may differ according to the scope of the inquiry, the range of stakeholders, the complexity of the laws under review, and the period of time allotted for the inquiry, as set out in the Terms of Reference. For each inquiry, the ALRC determines a consultation strategy in response to its particular subject matter and likely stakeholder interest groups. While the exact procedure is tailored to

<sup>30</sup> People with family-related legal problems have the highest rate of adverse health and social consequences as compared to people experiencing other types of legal problems. These adverse consequences include financial strain, having to move home, stress-related illness, and physical illness. See Christine Coumarelos et al, *Legal Australia-Wide Survey: Legal Need in Australia* (Law and Justice Foundation of NSW, 2012) 83–7, 90. bid 83–7, 90.

<sup>31</sup> Rae Kaspiew et al, *Experiences of Separated Parents Study (Evaluation of the 2012 Family Violence Amendments)* (Australian Institute of Family Studies, 2015) 85.

suit each inquiry, the ALRC usually works within an established framework, outlined on the ALRC website.

## Community Consultation

69. The ALRC undertook a national consultation process to gain an understanding of the key issues in the Inquiry. The ALRC conducted over 175 confidential consultations with stakeholders to the family law system. A list of those consulted is included in this Report. Consultations were not limited to state capitals. The ALRC visited a range of towns and regions including Mt Gambier, Alice Springs, Wollongong, and Albury.

70. The ALRC received close to 800 confidential stories about people's recent experience of the family law system through the confidential *Tell Us Your Story* portal on the ALRC website and 331 confidential submissions. The ALRC also received over 440 formal submissions to an Issues Paper and Discussion Paper, released in March and October 2018, respectively.

71. Submissions provided the ALRC with information regarding the operation of the family law system, the perceived gaps and issues with current operations, and focused areas of concern. These submissions came from a wide range of people and organisations, including individuals who have used the family law system and organisations and professionals associated with it, such as legal assistance services, family law practitioners, family relationships services, alternative dispute resolution professionals, specialist family violence services, psychologists, social work and psychiatry peak bodies, disability organisations, children's commissions, researchers, and academics. Around half of these submissions are publicly available on the ALRC website. The remaining submissions are confidential.

72. Consultations and submissions, together with other research, including earlier reports and inquiries, have informed the recommendations for reform in this Report. The ALRC thanks all stakeholders for the important contribution they have made to our evidence base.

## Appointed Experts

73. In addition to the contribution of expertise by way of consultations and submissions, specific expertise is also received by the ALRC from members of its Advisory Committee. The Advisory Committee met on three occasions during the course of the Inquiry. A list of Advisory Committee members is included at the front of this Summary Report. While ultimate responsibility for the recommendations lies with the Commissioners of the ALRC, Advisory Committee members provide quality assurance in the consultation and research process, assist in the identification of key issues, and contribute to the determination of the final recommendations. The ALRC acknowledges the considerable contribution made by the Advisory Committee members and expresses its gratitude to them for voluntarily providing their time and expertise.

