ALRC Report 135: Family Law for the Future—An Inquiry into the Family Law System
Closing the Jurisdictional Gap: A 'Radical' Recommendation

Consider a hypothetical matter that might come before the Federal Circuit Court of Australia. In this matter the judge is asked to make orders that confirm existing parenting arrangements in respect of an infant pending trial. Prior to the matter coming before the Federal Circuit Court, the father of the child is arrested following a family violence incident involving the mother and infant. He is charged and released on bail. While criminal proceedings are still pending the parties take out mutual family violence orders with the assistance of legal aid. The mother agrees to the father having overnight access to the child.

However, the father later accuses the mother of breaching her family violence order and lodges an application for parenting orders with the Federal Circuit Court. At the hearing for those orders, although both parties are represented, the judge's attention is not brought to the allegations made by the mother in obtaining her family violence order, which included strangulation. No police report in respect of the initial incident is provided to the judge. No one seeks a child protection order. On the basis of the material before the court, the judge makes orders maintaining the father's access to the child. The infant ultimately dies while in the father's care.

The failure to protect the child in this scenario, whose circumstances bear a tragic resemblance to real matters that come before the family courts, is symptomatic of the fundamentally flawed structure of the contemporary family law system. This goes beyond a question of adequate resourcing of the family courts; it reflects an inherent risk in the current jurisdictional arrangements.

This is the context for arguably the most controversial recommendation in *Report 135,* that state and territory courts become the primary fora for resolving family law disputes and that first instance federal family courts be ultimately abolished (Recommendation 1).

A system that is unfit for purpose

This 'radical' recommendation addresses fundamental structural problems within the Australian family law system that have been identified by inquiries and reports over several decades. These problems arise from the bifurcated legislative regimes that deal with different aspects of matters that impact on families in modern Australia—a federal regime that deals primarily with parenting and property matters (with a federal court structure in which to adjudicate those matters), and state and territory regimes that are responsible for child protection and family 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. In 2017–18, a 'Notice of Child Abuse, Family Violence or Risk of Family Violence' was filed in 30% of final order applications in the Family Court of Australia.[1] In the same period 45% of all final order applications in the Federal Circuit Court of Australia were referred to child welfare agencies.[2]

The federal family courts have limited investigative powers to follow up allegations made in family law proceedings that indicate potential safety risks and are thus reliant on receiving information from state and territory courts and agencies about risks to families and children. There are, however, significant barriers to information sharing between systems at present. The nature of our federation makes these barriers hard to overcome, even with adequate resourcing of the courts and legal aid.

More than a hypothetical risk

Inherent in this fragmented model is the risk that children may "fall through the gap" between the jurisdictions, with grave consequences for their safety. This risk is not merely hypothetical. During this inquiry, the ALRC's attention was drawn to numerous examples of the family law system placing children in unsafe situations. While it is not appropriate to set out these real-life examples, the scenario above serves to illustrate the grave safety concerns they disclose.

Structural reform

The fundamental structural difficulties of the family law system can be remedied only by enabling family law, family violence and child abuse matters to be dealt with in the same place at the same time. One court considering the best interests of the child in totality.

The Family Court of Western Australia provides an example of how a "one-court, one-family" model can work effectively, albeit not perfectly.

Another model that might be considered is that of the Unified Family Courts in Canada.[3] Like Australia, Canada is a federal system and jurisdiction over specific aspects of family law is split between federal superior courts and provincial courts. The division of responsibilities between federal and provincial jurisdictions has presented similar challenges for Canadian families as is experienced by Australian families. The Unified Family Court model is not dissimilar to the concept of state family courts. However, the constitutional arrangements of Canada differ from those in Australia and the model cannot be simply transposed.

The ALRC makes this recommendation after extensive consideration of available options for pursuing an integrated approach to the resolution of the legal issues of separating families. Constitutional and pragmatic considerations ultimately inform the conclusion that the devolution of family law jurisdiction to state and territory courts is the best available pathway.

The ALRC accepts that this recommendation has consequences of significant magnitude and would, if proceeded with, take significant time to implement. However, the difficulty of pursuing fundamental structural change does not alter the imperative to do so. Fundamental—or indeed 'radical'—change is ultimately required to address the unacceptable risk to children under the current framework. It will not become easier in another 40 years to redesign a system that is already unfit for purpose.

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[1] *Family Court of Australia Annual Report 2017/18*, Figure 3.18, 3.19.
[2] Federal Circuit Court, Private correspondence with the ALRC, 22 January 2019.
[3] Canada, Department of Justice, *Unified Family Court Summative Evaluation* (Final Report, March 2009).