Australian Government
Australian Law Reform Commission

Review of the Family Law System

DISCUSSION PAPER

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

Discussion Paper 86 (DP 86) October 2018

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This Discussion Paper reflects the law as at 14 September 2018.

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

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Making a submission

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

The closing date for submissions to this Discussion Paper is **13 November 2018.**

Providing a submission

Pre-prepared submissions may be emailed to:

familylaw@alrc.gov.au

To discuss alternative ways of making a submission, call (02) 8238 6333.

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As submissions provide important evidence to each inquiry, it is common for the ALRC to draw upon the contents of submissions and quote from them or refer to them in publications. The ALRC will publish the submissions it receives unless the submission contains confidential material or does not comply with its submission policy, because it: breaches applicable laws, promotes a product or a service, contains offensive language, expresses sentiments that are likely to offend or vilify sections of the community, or does not substantively comment on the issues relevant to the particular Inquiry.

If your submission contains information about a court proceeding, including a proceeding under the *Family Law Act 1975* (Cth) (*Family Law Act*), you should carefully consider the terms of any order made by a court in that proceeding relating to the disclosure of information. For example, it is an offence under s 102PK of the *Family Law Act* to contravene a suppression order or a non-publication order made under s 102PE of the *Family Law Act*.

The ALRC cannot publish submissions that identify parties to family law proceedings, and any submissions that do so will be treated as confidential. The ALRC will also not publish submissions that have been marked confidential by the submitter. Confidential submissions may still be the subject of a Freedom of Information request. The ALRC does not publish anonymous submissions.

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Contents

Terms of Reference

Review of the family law system

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

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

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

- the appropriate, early and cost-effective resolution of all family law disputes;
- the protection of the best interests of children and their safety;

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

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

Scope of the reference

The ALRC should have regard to existing reports relevant to:

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

Consultation

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

Timeframe for reporting

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

Participants

Australian Law Reform Commission

President

The Hon Justice Sarah Derrington

Commissioner in Charge

Professor Helen Rhoades

Part-time Commissioners

Dr Andrew Bickerdike (from 29 June 2018)

The Hon Mr John Faulks

The Hon Justice John Middleton, Federal Court of Australia

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Lisa Zehetner (from 4 June 2018)

Legal Officer

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

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

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Proposals and Questions

2. Education, Awareness and Information

Proposal 2–1 The Australian Government should develop a national education and awareness campaign to enhance community understanding of the family law system. This should include information about:

- the benefits of seeking information, advice and support when contemplating or experiencing separation;
- the duties and responsibilities of parents and the importance of taking a child-centred approach to post-separation parenting that prioritises children's safety and best interests;
- the existence and location of the proposed Families Hubs (Proposals 4–1 to 4–4) as a place where people experiencing separation can access advice and support services;
- the availability of the proposed family law system information package (Proposals 2–5 to 2–8) that provides practical information to assist people, including children and young people, to understand and navigate the family law system, including how to access the package; and
- the availability of alternative dispute resolution processes to assist and empower people experiencing separation to reach agreement about arrangements for their children and property outside of court proceedings.

Proposal 2–2 The national education and awareness campaign should be developed in consultation with Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTIQ and disability organisations and be available in a range of languages and formats.

Proposal 2–3 The Australian Government should work with state and territory governments to facilitate the promotion of the national education and awareness campaign through the health and education systems and any other relevant agencies or bodies.

Proposal 2–4 The Australian Government should work with state and territory governments to support the development of referral relationships to family law services, including the proposed Families Hubs (Proposals 4–1 to 4–4), from:

- universal services that work with children and families, such as schools, childcare facilities and health services; and

- first point of contact services for people who have experienced family violence, including state and territory specialist family violence services and state and territory police and child protection agencies.

Proposal 2–5 The Australian Government should convene a standing working group with representatives from government and non-government organisations from each state and territory to:

- advise on the development of a family law system information package to facilitate easy access for people to clear, consistent, legally sound and nationally endorsed information about the family law system; and
- review the information package on a regular basis to ensure that it remains up-to-date.

Proposal 2–6 The family law system information package should be tailored to take into account jurisdictional differences and should include information about:

- the legal framework for resolving parenting and property matters;
- the range of legal and support services available to help separating families and their children and how to access these services; and
- the different forums and processes for resolving disputes.

Proposal 2–7 The family law system information package should be accessible in a range of languages and formats, including:

- electronically via a central website;
- as printed material available at key entry points to the family law system and universal services; and
- through interactive means, including a national telephone helpline and a national web-chat service.

Proposal 2–8 The family law system information package should be:

- developed with reference to existing government and non-government information resources and services;
- developed in consultation with Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTIQ and disability organisations; and
- user-tested for accessibility by community groups including children and young people, Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse communities, LGBTIQ people and people with disability.

3. Simpler and Clearer Legislation

Proposal 3–1 The *Family Law Act 1975* (Cth) and its subordinate legislation should be comprehensively redrafted with the aim of simplification and assisting readability, by:

- simplifying provisions to the greatest extent possible;
- restructuring legislation to assist readability, for example by placing the most important substantive provisions as early as possible;
- redrafting the Act, Regulations and Rules in ordinary English, by modernising language, and as far as possible removing terms that are unlikely to be understood by general readers, such as legal Latin, archaisms, and unnecessarily technical terms;
- user testing key provisions for reader comprehension during the drafting process, for example, through focus groups, to ensure that the legislation is understood as intended;
- removing or rationalising overlapping or duplicative provisions as far as possible;
- removing provisions establishing the Family Court of Australia and the Australian Institute of Family Studies to separate legislation;
- removing provisions defining parentage for the purposes of Commonwealth law to separate legislation; and
- considering what provisions should be contained in subordinate legislation rather than the Act.

Proposal 3–2 Family law court forms should be comprehensively reviewed to improve usability, including through:

- only gathering information that is absolutely required, and simplifying how information is gathered (eg through use of check-boxes);
- using smart forms, to pre-populate information from previously completed forms (such as name and address), ask contextual questions based on previous answers, and provide contextual help within the form;
- using real-time help functions, such as a live-chat functionality, and links to audio-visual help;
- providing collaborative functions in circumstances where forms require information from both parties to allow them both to easily enter information;
- ensuring that all forms are drafted in ordinary English and where possible providing alternative forms in Easy English to assist litigants with limited literacy or English skills;
- providing a paper form for use by individuals without access to technology; and

- providing a single set of forms for all courts exercising jurisdiction under the *Family Law Act 1975* (Cth).

Proposal 3–3 The principle (currently set out in s 60CA of the *Family Law Act 1975* (Cth)) that the child's best interests must be the paramount consideration in making decisions about children should be retained but amended to refer to 'safety and best interests'.

Proposal 3–4 The objects and principles underlying pt VII of the *Family Law Act 1975* (Cth) set out in s 60B should be amended to assist the interpretation of the provisions governing parenting arrangements as follows:

- arrangements for children should be designed to advance the child's safety and best interests;
- arrangements for children should not expose children or their carers to abuse or family violence or otherwise impair their safety;
- children should be supported to maintain relationships with parents and other people who are significant in their lives where maintaining a relationship does not expose them to abuse, family violence or harmful levels of ongoing conflict;
- decisions about children should support their human rights as set out in the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities; and
- decisions about the care of an Aboriginal or Torres Strait Islander child should support the child's right to maintain and develop the child's cultural identity, including the right to:
  - (a) maintain a connection with family, community, culture and country; and
  - (b) have the support, opportunity and encouragement necessary to participate in that culture, consistent with the child's age and developmental level and the child's views, and to develop a positive appreciation of that culture.

Proposal 3–5 The guidance in the *Family Law Act 1975* (Cth) for determining the arrangements that best promote the child's safety and best interests (currently set out mainly in s 60CC), should be simplified to provide that the following matters must be considered:

- any relevant views expressed by the child;
- whether particular arrangements are safe for the child and the child's carers, including safety from family violence or abuse;
- the developmental, psychological and emotional needs of the child;
- the capacity of each proposed carer of the child to provide for the developmental, psychological and emotional needs of the child;

- the benefit to a child of being able to maintain relationships that are significant to them, including relationships with their parents, where it is safe to do so; and
- anything else that is relevant to the particular circumstances of the child.

Proposal 3–6 The *Family Law Act 1975* (Cth) should provide that, in determining what arrangements best promote the safety and best interests of an Aboriginal or Torres Strait Islander child, the maintenance of the child's connection to their family, community, culture and country must be considered.

Proposal 3–7 The decision making framework for parenting arrangements in pt VII of the *Family Law Act 1975* (Cth) should be further clarified by:

- replacing the term 'parental responsibility' with a more easily understood term, such as 'decision making responsibility'; and
- making it clear that in determining what arrangements best promote the child's safety and best interests, decision makers must consider what arrangements would be best for each child in their particular circumstances.

Question 3–1 How should confusion about what matters require consultation between parents be resolved?

Proposal 3–8 The *Family Law Act 1975* (Cth) should be amended to explicitly state that, where there is already a final parenting order in force, parties must seek leave to apply for a new parenting order, and that in considering whether to allow a new application, consideration should be given to whether:

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

Proposal 3–9 The Attorney-General's Department (Cth) should commission a body with relevant expertise, including in psychology, social science and family violence, to develop, in consultation with key stakeholders, evidence-based information resources to assist families in formulating care arrangements for children after separation that support children's wellbeing. This resource should be publicly available and easily accessible, and regularly updated.

Proposal 3–10 The provisions for property division in the *Family Law Act 1975* (Cth) should be amended to more clearly articulate the process used by the courts for determining the division of property.

Proposal 3–11 The provisions for property division in the *Family Law Act 1975* (Cth) should be amended to provide that courts must:

- in determining the contributions of the parties, take into account the effect of family violence on a party's contributions; and
- in determining the future needs of the parties, take into account the effect of any family violence on the future needs of a party.

Proposal 3–12 The Attorney-General's Department (Cth) should commission further research on property and financial matters after separation, including property adjustment after separation, spousal maintenance, and the economic wellbeing of former partners and their children after separation.

Proposal 3–13 The Australian Government should work with the financial sector to establish protocols for dividing debt on relationship breakdown to avoid hardship for vulnerable parties, including for victims of family violence.

Proposal 3–14 If evaluation of action flowing from this Inquiry finds that voluntary industry action has not adequately assisted vulnerable parties, the Australian Government should consider relaxing the requirement that it not be foreseeable, at the time the order is made, that to make the order would result in the debt not being paid in full.

Proposal 3–15 The Australian Government should develop information resources for separating couples to assist them to understand superannuation, and how and why superannuation splitting might occur.

Proposal 3–16 The *Family Law Act 1975* (Cth) should require superannuation trustees to develop standard superannuation splitting orders on common scenarios. Procedural fairness should be deemed to be satisfied where parties develop orders based on these standard templates. The templates should be published on a central register.

Proposal 3–17 The Australian Government should develop tools to assist parties to create superannuation splitting orders. These could include:

- a tool to look up the legal name and contact details of superannuation funds;
- a tool, with appropriate safeguards, to identify the superannuation accounts held by a former partner from Australian Tax Office records, with necessary amendments to the taxation law to support this;
- tools to assist parties with process requirements, such as making superannuation information requests, providing draft orders to superannuation trustees for comment where standard orders are not used, and providing final orders to trustees; and
- allowing auto-generation of standard form orders based on the standard orders provided by the superannuation trustee and user-entered data.

Question 3–2 Should provision be made for early release of superannuation to assist a party experiencing hardship as a result of separation? If so, what limitations should be placed on the ability to access superannuation in this way? How should this relate to superannuation splitting provisions?

Question 3–3 Which, if any, of the following approaches should be adopted to reform provisions about financial agreements in the *Family Law Act 1975* (Cth):

- amendments to increase certainty about when financial agreements are binding;

- amendments to broaden the scope for setting aside an agreement where it is unjust to enforce the agreement, for example, because there has been family violence, or a change of circumstances that was unforeseen when the agreement was entered into;
- replacing existing provisions about financial agreements with an ability to make court-approved agreements; or
- removing the ability to make binding pre-nuptial financial agreements from family law legislation, and preserving the operation of any existing valid agreements?

Proposal 3–18 The considerations that are applicable to spousal maintenance (presently located in s 75 of the *Family Law Act 1975* (Cth)) should be located in a separate section of family law legislation that is dedicated to spousal maintenance applications ('dedicated spousal maintenance considerations').

Proposal 3–19 The dedicated spousal maintenance considerations should include a requirement that the court consider the impact of any family violence on the ability of the applicant to adequately support themselves.

Question 3–4 What options should be pursued to improve the accessibility of spousal maintenance to individuals in need of income support? Should consideration be given to:

- greater use of registrars to consider urgent applications for interim spousal maintenance;
- administrative assessment of spousal maintenance; or
- another option?

4. Getting Advice and Support

Proposal 4–1 The Australian Government should work with state and territory governments to establish community-based Families Hubs that will provide separating families and their children with a visible entry point for accessing a range of legal and support services. These Hubs should be designed to:

- identify the person's safety, support and advice needs and those of their children;
- assist clients to develop plans to address their safety, support and advice needs and those of their children;
- connect clients with relevant services; and
- coordinate the client's engagement with multiple services.

Proposal 4–2 The Australian Government should work with state and territory governments to explore the use of digital technologies to support the assessment of

client needs, including their safety, support and advice needs, within the Families Hubs.

Proposal 4–3 Families Hubs should advance the safety and wellbeing of separating families and their children while supporting them through separation. They should include on-site out-posted workers from a range of relevant services, including:

- specialist family violence services;
- legal assistance services (such as community legal centres);
- family dispute resolution services;
- therapeutic services (such as family counselling and specialised services for children);
- financial counselling services;
- housing assistance services;
- health services (such as mental health services and alcohol and other drug services);
- gambling help services;
- children's contact services; and
- parenting support programs or parenting education services (including a program for fathers).

Proposal 4–4 Local service providers, including Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTIQ and disability organisations, specialist family violence services and legal assistance services, including community legal services, should play a central role in the design of Families Hubs, to ensure that each hub is culturally safe and accessible, responsive to local needs, and builds on existing networks and relationships between local services.

Proposal 4–5 The Australian Government should, subject to positive evaluation, expand the Family Advocacy and Support Service (FASS) in each state and territory to include:

- an information and referral officer to conduct intake, risk and needs screening and triage, as well as providing information and resources;
- a family violence specialist legal service and a family violence specialist support service to assist clients who have experienced or are experiencing family violence; and
- an additional legal service and support service, to assist clients who are alleged to have used family violence and clients who are not affected by family violence but have other complex needs.

Proposal 4–6 The FASS support services should be expanded to provide case management where a client has complex needs and cannot be linked with an appropriate support service providing ongoing case management.

Proposal 4–7 The level and duration of support provided by the FASS should be flexible depending on client need and vulnerability, as well as legal aid eligibility for ongoing legal services.

Proposal 4–8 The Australian Government should, subject to positive evaluation, roll out the expanded FASS to a greater number of family court locations, including in rural, regional and remote locations.

5. Dispute Resolution

Proposal 5–1 The guidance as to assessment of suitability for family dispute resolution that is presently contained in reg 25 of the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) should be relocated to the *Family Law Act 1975* (Cth).

Proposal 5–2 The new legislative provision proposed in Proposal 5–1 should provide that, in addition to the existing matters that a family dispute resolution provider must consider when determining whether family dispute resolution is appropriate, the family dispute resolution provider should consider the parties' respective levels of knowledge of the matters in dispute, including an imbalance in knowledge of relevant financial arrangements.

Proposal 5–3 The *Family Law Act 1975* (Cth) should be amended to require parties to attempt family dispute resolution prior to lodging a court application for property and financial matters. There should be a limited range of exceptions to this requirement, including:

- urgency, including where orders in relation to the ownership or disposal of assets are required or a party needs access to financial resources for day to day needs;
- the complexity of the asset pool, including circumstances involving third party interests (apart from superannuation trustees);
- where there is an imbalance of power, including as a result of family violence;
- where there are reasonable grounds to believe non-disclosure may be occurring;
- where one party has attempted to delay or frustrate the resolution of the matter; and
- where there are allegations of fraud.

Proposal 5–4 The *Family Law Act 1975* (Cth) should be amended to specify that a court must not hear an application for orders in relation to property and financial matters unless the parties have lodged a genuine steps statement at the time of filing the application. The relevant provision should indicate that if a court finds that a party has

not made a genuine effort to resolve a matter in good faith, they may take this into account in determining how the costs of litigation should be apportioned.

Proposal 5–5 The *Family Law Act 1975* (Cth) should include a requirement that family dispute resolution providers in property and financial matters should be required to provide a certificate to the parties where the issues in dispute have not been resolved. The certificate should indicate that:

- the matter was assessed as not suitable for family dispute resolution;
- the person to whom the certificate was issued had attempted to initiate a family dispute resolution process but the other party has not responded;
- the parties had commenced family dispute resolution and the process had been terminated; or
- the matter had commenced and concluded with partial resolution of the issues in dispute.

Question 5–1 Should the requirement in the *Family Law Act 1975* (Cth) that proceedings in property and financial matters must be instigated within twelve months of divorce or two years of separation from a de facto relationship be revised?

Proposal 5–6 The *Family Law Act 1975* (Cth) should set out the duties of parties involved in family dispute resolution or court proceedings for property and financial matters to provide early, full and continuing disclosure of all information relevant to the case. For parties involved in family dispute resolution or court proceedings, disclosure duties should apply to:

- earnings, including those paid or assigned to another party;
- vested or contingent interests in property, including that which is owned by a legal entity that is fully or partially owned or partially controlled by a party;
- income earned by a legal entity fully or partially owned or controlled by a party, including income that is paid or assigned to any other party, person or legal entity;
- superannuation interests; and
- liabilities and contingent liabilities.

Proposal 5–7 The provisions in the *Family Law Act 1975* (Cth) setting out disclosure duties should also specify that if a court finds that a party has intentionally failed to provide full, frank and timely disclosure it may:

- impose a consequence, including punishment for contempt of court;
- take the party's non-disclosure into account when determining how costs are to be apportioned;
- stay or dismiss all or part of the party's case; or

- take the party's non-disclosure into account when determining how the financial pool is to be divided.

Question 5–2 Should the provisions in the *Family Law Act 1975* (Cth) setting out disclosure duties be supported by civil or criminal penalties for non-disclosure?

Proposal 5–8 The *Family Law Act 1975* (Cth) should set out advisers' obligations in relation to providing advice to parties contemplating or undertaking family dispute resolution, negotiation or court proceedings about property and financial matters. Advisers (defined as a legal practitioner or a family dispute resolution practitioner) must advise parties that:

- they have a duty of full, frank and continuing disclosure, and, in the case of family dispute resolution, that compliance with this duty is essential to the family dispute resolution process; and
- if the matter proceeds to court and a party fails to observe this duty, courts have the power to:
  - (a) impose a consequence, including punishment for contempt of court;
  - (b) take the party's non-disclosure into account when determining how costs are to be apportioned;
  - (c) stay or dismiss all or part of the party's case; and
  - (d) take the party's non-disclosure into account when determining how the financial pool is to be divided.

Question 5–3 Is there a need to review the process for showing that the legal requirement to attempt family dispute resolution prior to lodging a court application for parenting orders has been satisfied? Should this process be aligned with the process proposed for property and financial matters?

Proposal 5–9 The Australian Government should work with providers of family dispute resolution services, legal assistance services, specialist family violence services and Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTIQ and disability organisations to support the further development of culturally appropriate and safe models of family dispute resolution for parenting and financial matters. This should include:

- examining the feasibility of means-tested fee for service and cost recovery models to be provided by legal aid commissions and community organisations such as Family Relationship Centres;
- the further development of dispute resolution models for property and financial matters involving, where necessary, support by financial counsellors and the provision of legal advice by private practitioners and legal assistance services, such as legal aid commissions, community legal centres and the Legal Advice Line that is part of Family Relationships Advice Line; and

- amendments to existing funding agreements and practice agreements to support this work.

Proposal 5–10 The Australian Government should work with providers of family dispute resolution services, private legal services, financial services, legal assistance services, specialist family violence services and Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTIQ and disability organisations to develop effective practice guidelines for the delivery of legally assisted dispute resolution (LADR) for parenting and property matters.

These Guidelines should include:

- guidance as to when LADR should not be applied in matters involving family violence and other risk related issues;
- effective practice in screening, assessing and responding to risk arising from family violence, child safety concerns, mental ill-health, substance misuse and other issues that raise questions of risk;
- the respective roles and responsibilities of the professionals involved;
- the application of child-inclusive practice;
- the application of approaches to support cultural safety for Aboriginal and Torres Strait Islander people;
- the application of approaches to support cultural safety for families from culturally and linguistically diverse communities;
- the application of approaches to support effective participation for LGBTIQ families;
- the application of approaches that support effective participation for families where parents or children have disability;
- practices relating to referral to other services, including health services, specialist family violence services and men's behaviour change programs;
- practices relating to referrals from and to the family courts; and
- information sharing and collaboration with other services involved with the family.

Proposal 5–11 These Guidelines should be regularly reviewed to support evidence-informed policy and practice in this area.

6. Reshaping the Adjudication Landscape

Proposal 6–1 The family courts should establish a triage process to ensure that matters are directed to appropriate alternative dispute resolution processes and specialist pathways within the court as needed.

Proposal 6–2 The triage process should involve a team-based approach combining the expertise of the court's registrars and family consultants to ensure initial and ongoing risk and needs assessment and case management of the matter, continuing, if required, until final decision.

Proposal 6–3 Specialist court pathways should include:

- a simplified small property claims process;
- a specialist family violence list; and
- the Indigenous List.

Proposal 6–4 The *Family Law Act 1975* (Cth) should provide for a simplified court process for matters involving smaller property pools. The provisions should allow for:

- the court to have discretion, subject to the requirements of procedural fairness, not to apply formal rules of evidence and procedure in a given case;
- the proceedings to be conducted without legal technicality; and
- the simplified court procedure to be applied by the court on its own motion or on application by a party.

Proposal 6–5 In considering whether the simplified court procedure should be applied in a particular matter, the court should have regard to:

- the relative financial circumstances of the parties;
- the parties' relative levels of knowledge of their financial circumstances;
- whether either party is in need of urgent access to financial resources to meet the day to day needs of themselves and their children;
- the size and complexity of the asset pool; and
- whether there are reasonable grounds to believe there is history of family violence involving the parties, or risk of family violence.

The court should give weight to each of these factors as it sees fit.

Proposal 6–6 The family courts should consider developing case management protocols to support implementation of the simplified process for matters with smaller property pools, including provision for:

- case management by court registrars to establish, monitor and enforce timelines for procedural steps, including disclosure;
- conducting a conciliation conference once the asset pool has been identified; and
- establishing a standard timetable for processing claims with expected timeframes for case management of events (mentions, conciliation conferences and trial).

Proposal 6–7 The family courts should consider establishing a specialist list for the hearing of high risk family violence matters in each registry. The list should have the following features:

- a lead judge with oversight of the list;
- a registrar with responsibility for triaging matters into the list and ongoing case management;
- family consultants to prepare short and long reports on families whose matters are heard in the list; and
- a cap on the number of matters listed in each daily hearing list.

All of the professionals in these roles should have specialist family violence knowledge and experience.

Question 6–1 What criteria should be used to establish eligibility for the family violence list?

Question 6–2 What are the risks and benefits of early fact finding hearings? How could an early fact finding process be designed to limit risks?

Proposal 6–8 The Australian Government should work with state and territory governments to develop and implement models for co-location of family law registries and judicial officers in local court registries. This should include local courts in rural, regional and remote locations.

Question 6–3 What changes to the design of the Parenting Management Hearings process are needed to strengthen its capacity to apply a problem-solving approach in children's matters? Are other changes needed to this model?

Question 6–4 What other ways of developing a less adversarial decision making process for children's matters should be considered?

Proposal 6–9 The Australian Government should develop a post-order parenting support service to assist parties to parenting orders to implement the orders and manage their co-parenting relationship by providing services including:

- education about child development and conflict management;
- dispute resolution; and
- decision making in relation to implementation of parenting orders.

Proposal 6–10 The Australian Government should work with relevant stakeholders, including the Community Services and Health Industry Skills Council, the Australian Psychological Society, the Australian Association of Social Workers, the Mediator Standards Board, Family & Relationship Services Australia and specialist family violence services peak bodies, to develop intake assessment processes for the post-order parenting support service.

Proposal 6–11 The proposed Family Law Commission (Proposal 12–1) should develop accreditation and training requirements for professionals working in the post-order parenting support service.

Proposal 6–12 The Australian Government should ensure that all family court premises, including circuit locations and state and territory court buildings that are used for family law matters, are safe for attendees, including ensuring the availability and suitability of:

- waiting areas and rooms for co-located service providers, including the extent to which waiting areas can accommodate large family groups;
- safe waiting areas and rooms for court attendees who have concerns for their safety while they are at court;
- private interview rooms;
- multiple entrances and exits;
- child-friendly spaces and waiting rooms;
- security staffing and equipment;
- multi-lingual and multi-format signage;
- remote witness facilities for witnesses to give evidence off site and from court-based interview rooms; and
- facilities accessible for people with disability.

7. Children in the Family Law System

Proposal 7–1 Information about family law processes and legal and support services should be available to children in a range of age-appropriate and culturally appropriate forms.

Proposal 7–2 The proposed Families Hubs (Proposals 4–1 to 4–4) should include out-posted workers from specialised services for children and young people, such as counselling services and peer support programs.

Proposal 7–3 The *Family Law Act 1975* (Cth) should provide that, in proceedings concerning a child, an affected child must be given an opportunity (so far as practicable) to express their views.

Proposal 7–4 The *Family Law Act 1975* (Cth) should provide that, in any family dispute resolution process concerning arrangements for a child, the affected child must be given an opportunity (so far as practicable) to express any views about those arrangements.

Proposal 7–5 The Attorney-General's Department (Cth) should work with the family relationship services sector to develop best practice guidance on child-inclusive family dispute resolution, including in relation to participation support where child-inclusive family dispute resolution is not appropriate.

Proposal 7–6 There should be an initial and ongoing assessment of risk to the child of participating in family law proceedings or family dispute resolution, and processes put in place to manage any identified risk.

Proposal 7–7 Children should not be required to express any views in family law proceedings or family dispute resolution.

Proposal 7–8 Children involved in family law proceedings should be supported by a 'children's advocate': a social science professional with training and expertise in child development and working with children. The role of the children's advocate should be to:

- explain to the child their options for making their views heard;
- support the child to understand their options and express their views;
- ensure that the child's views are communicated to the decision maker; and
- keep the child informed of the progress of a matter, and to explain any outcomes and decisions made in a developmentally appropriate way.

Proposal 7–9 Where a child is not able to be supported to express a view, the children's advocate should:

- support the child's participation to the greatest extent possible; and
- advocate for the child's interests based on an assessment of what would best promote the child's safety and developmental needs.

Proposal 7–10 The *Family Law Act 1975* (Cth) should make provision for the appointment of a legal representative for children involved in family law proceedings (a 'separate legal representative') in appropriate circumstances, whose role is to:

- gather evidence that is relevant to an assessment of a child's safety and best interests; and
- assist in managing litigation, including acting as an 'honest broker' in litigation.

Question 7–1 In what circumstances should a separate legal representative for a child be appointed in addition to a children's advocate?

Question 7–2 How should the appointment, management and coordination of children's advocates and separate legal representatives be overseen? For example, should a new body be created to undertake this task?

Question 7–3 What approach should be taken to forensic issues relating to the role of the children's advocate, including:

- admissibility of communications between the children's advocate and a child; and
- whether the children's advocate may become a witness in a matter?

Proposal 7–11 Children should be able to express their views in court proceedings and family dispute resolution processes in a range of ways, including through:

- a report prepared by the children's advocate;
- meeting with a decision maker, supported by a children's advocate; or
- directly appearing, supported by a children's advocate.

Proposal 7–12 Guidance should be developed to assist judicial officers where children seek to meet with them or otherwise participate in proceedings. This guidance should cover matters including how views expressed by children in any such meeting should be communicated to other parties to the proceeding.

Proposal 7–13 There should be a Children and Young People's Advisory Board for the family law system. The Advisory Board should provide advice about children's experiences of the family law system to inform policy and practice development in the system.

8. Reducing Harm

Proposal 8–1 The definition of family violence in the *Family Law Act 1975* (Cth) should be amended to:

- clarify some terms used in the list of examples of family violence and to include other behaviours (in addition to misuse of systems and processes (Proposal 8–3)) including emotional and psychological abuse and technology facilitated abuse; and
- include an explicit cross-reference between the definitions of family violence and abuse to ensure it is clear that the definition of abuse encompasses direct or indirect exposure to family violence.

Question 8–1 What are the strengths and limitations of the present format of the family violence definition?

Question 8–2 Are there issues or behaviours that should be referred to in the definition, in addition to those proposed?

Proposal 8–2 The Australian Government should commission research projects to examine the strengths and limitations of the definition of family violence in the *Family Law Act 1975* (Cth) in relation to the experiences of:

- Aboriginal and Torres Strait Islander people;
- people from culturally and linguistically diverse backgrounds; and
- LGBTIQ people.

Proposal 8–3 The definition of family violence in the *Family Law Act 1975* (Cth) should be amended to include misuse of legal and other systems and processes in the list of examples of acts that can constitute family violence in s 4AB(2) by inserting

a new subsection referring to the 'use of systems or processes to cause harm, distress or financial loss'.

Proposal 8–4 The existing provisions in the *Family Law Act 1975* (Cth) concerning dismissal of proceedings that are frivolous, vexatious, an abuse of process or have no reasonable prospect of success ('unmeritorious proceedings') should be rationalised.

Proposal 8–5 The *Family Law Act 1975* (Cth) should provide that, in considering whether to deem proceedings as unmeritorious, a court may have regard to evidence of a history of family violence and in children's cases must consider the safety and best interests of the child and the impact of the proceedings on the other party when they are the main caregiver for the child.

Question 8–3 Should the requirement for proceedings to have been instituted 'frequently' be removed from provisions in the *Family Law Act 1975* (Cth) setting out courts powers to address vexatious litigation? Should another term, such as 'repeated' be substituted?

Question 8–4 What, if any, changes should be made to the courts' powers to apportion costs in s 117 of the *Family Law Act 1975* (Cth)?

Proposal 8–6 The *Family Law Act 1975* (Cth) should provide that courts have the power to exclude evidence of 'protected confidences': that is, communications made by a person in confidence to another person acting in a professional capacity who has an express or implied duty of confidence. The Act should provide that:

- Subpoenas in relation to evidence of protected confidences should not be issued without leave of the court.
- The court should exclude evidence of protected confidences where it is satisfied that it is likely that harm would or might be caused, directly or indirectly, to a protected confider, and the nature and extent of the harm outweighs the desirability of the evidence being given. Harm should be defined to include actual physical bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm (such as shame, humiliation and fear).
- In exercising this power, the court should consider the probative value and importance of the evidence to the proceedings and the effect that allowing the evidence would have on the protected confider.
- In family law proceedings concerning children, the safety and best interests of the child should be the paramount consideration when deciding whether to exclude evidence of protected confidences. Such evidence should be excluded where a court is satisfied that admitting it would not promote the safety and best interests of the child.
- The protected confider may consent to the evidence being admitted.
- The court should have the power to disallow such evidence on its own motion or by application of the protected confider or the confidant. Where a child is the

protected confider, a representative of the child may make the claim for protection on behalf of the child.

- The court is obliged to give reasons for its decision.

Proposal 8–7 The Attorney-General's Department (Cth) should convene a working group comprised of the family courts, the Family Law Section of the Law Council of Australia, the Royal Australian and New Zealand College of Psychiatrists, the Australian Psychological Society, the Royal Australian College of General Practitioners, Family & Relationship Services Australia, National Legal Aid, Women's Legal Services Australia and specialist family violence services peak bodies and providers to develop guidelines in relation to the use of sensitive records in family law proceedings. These guidelines should identify:

- principles to consider when a subpoena of sensitive records is in contemplation;
- obligations of professionals who are custodians of sensitive records in relation to the provision of those records;
- processes for objecting to a subpoena of sensitive records; and
- how services and professionals need to manage implications for their clients regarding the possibility that material may be subpoenaed and any potential consequences for their clients if a subpoena is issued.

9. Additional Legislative Issues

Proposal 9–1 The *Family Law Act 1975* (Cth) should include a supported decision making framework for people with disability to recognise they have the right to make choices for themselves. The provisions should be in a form consistent with the following recommendations of the ALRC Report 124, *Equality, Capacity and Disability in Commonwealth Laws*:

- Recommendations 3–1 to 3–4 on National Decision Making Principles and Guidelines; and
- Recommendations 4–3 to 4–5 on the appointment, recognition, functions and duties of a 'supporter'.

Proposal 9–2 The Australian Government should ensure that people who require decision making support in family law matters, and their supporters, are provided with information and guidance to enable them to understand their functions and duties.

Proposal 9–3 The *Family Law Act 1975* (Cth) should include provisions for the appointment of a litigation representative where a person with disability, who is involved in family law proceedings, is unable to be supported to make their own decisions. The Act should set out the circumstances for a person to have a litigation representative and the functions of the litigation representative. These provisions should be in a form consistent with recommendations 7–3 to 7–4 recommendations of ALRC Report 124, *Equality, Capacity and Disability in Commonwealth Laws*.

Proposal 9–4 Family courts should develop practice notes explaining the duties that litigation representatives have to the person they represent and to the court.

Proposal 9–5 The Australian Government should work with state and territory governments to facilitate the appointment of statutory authorities as litigation representatives in family law proceedings.

Proposal 9–6 The Australian Government should work with the National Disability Insurance Agency (NDIA) to consider how referrals can be made to the NDIA by family law professionals, and how the National Disability Insurance Scheme (NDIS) could be used to fund appropriate supports for eligible people with disability to:

- build parenting abilities;
- access early intervention parenting supports;
- carry out their parenting responsibilities;
- access family support services and alternative dispute resolution processes; and
- navigate the family law system.

Proposal 9–7 The Australian Government should ensure that the family law system has specialist professionals and services to support people with disability to engage with the family law system.

Question 9–1 In relation to the welfare jurisdiction:

- Should authorisation by a court, tribunal, or other regulatory body be required for procedures such as sterilisation of children with disability or intersex medical procedures? What body would be most appropriate to undertake this function?
- In what circumstances should it be possible for this body to authorise sterilisation procedures or intersex medical procedures before a child is legally able to personally make these decisions?
- What additional legislative, procedural or other safeguards, if any, should be put in place to ensure that the human rights of children are protected in these cases?

Proposal 9–8 The definition of family member in s 4(1AB) of the *Family Law Act 1975* (Cth) should be amended to be inclusive of Aboriginal and Torres Strait Islander concepts of family.

Question 9–2 How should a provision be worded to ensure the definition of family member covers Aboriginal and Torres Strait Islander concepts of family?

10. A Skilled and Supported Workforce

Proposal 10–1 The Australian Government should work with relevant non-government organisations and key professional bodies to develop a workforce capability plan for the family law system.

Proposal 10–2 The workforce capability plan for the family law system should identify:

- the different professional groups working in the family law system;
- the core competencies that particular professional groups need; and
- the training and accreditation needed for different professional groups.

Proposal 10–3 The identification of core competencies for the family law system workforce should include consideration of the need for family law system professionals to have:

- an understanding of family violence;
- an understanding of child abuse, including child sexual abuse and neglect;
- an understanding of trauma-informed practice, including an understanding of the impacts of trauma on adults and children;
- an ability to identify and respond to risk, including the risk of suicide;
- an understanding of the impact on children of exposure to ongoing conflict;
- cultural competency, in relation to Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse communities and LGBTIQ people;
- disability awareness; and
- an understanding of the family violence and child protection systems and their intersections with the family law system.

Question 10–1 Are there any additional core competencies that should be considered in the workforce capability plan for the family law system?

Proposal 10–4 The Family Law Commission proposed in Proposal 12–1 should oversee the implementation of the workforce capability plan through training—including cross-disciplinary training—and accreditation of family law system professionals.

Proposal 10–5 In developing the workforce capability plan, the capacity for family dispute resolution practitioners to conduct family dispute resolution in property and financial matters should be considered. This should include consideration of existing training and accreditation requirements.

Question 10–2 What qualifications and training should be required for family dispute resolution practitioners in relation to family law disputes involving property and financial issues?

Proposal 10–6 State and territory law societies should amend their continuing professional development requirements to require all legal practitioners undertaking family law work to complete at least one unit of family violence training annually. This

training should be in addition to any other core competencies required for legal practitioners under the workforce capability plan.

Proposal 10–7 The *Family Law Act 1975* (Cth) should provide for the accreditation of Children's Contact Service workers and impose a requirement that these workers hold a valid Working with Children Check.

Question 10–3 Should people who work at Children's Contact Services be required to hold other qualifications, such as a Certificate IV in Community Services or a Diploma of Community Services?

Proposal 10–8 All future appointments of federal judicial officers exercising family law jurisdiction should include consideration of the person's knowledge, experience and aptitude in relation to family violence.

Question 10–4 What, if any, other changes should be made to the criteria for appointment of federal judicial officers exercising family law jurisdiction?

Question 10–5 What, if any, changes should be made to the process for appointment of federal judicial officers exercising family law jurisdiction?

Proposal 10–9 The Australian Government should task the Family Law Commission (Proposal 12–1) with the development a national accreditation system with minimum standards for private family report writers as part of the newly developed Accreditation Rules.

Proposal 10–10 The Family Law Commission (Proposal 12–1) should maintain a publicly available list of accredited private family report writers with information about their qualifications and experience as part of the Accreditation Register.

Proposal 10–11 When requesting the preparation of a report under s 62G of the *Family Law Act 1975* (Cth), the family courts should provide clear instructions about why the report is being sought and the particular issues that should be reported on.

Proposal 10–12 In appropriate matters involving the care, welfare and development of a child, judges should consider appointing an assessor with expert knowledge in relation to the child's particular needs to assist in the hearing and determination of the matter.

Proposal 10–13 The *Family Law Act 1975* (Cth) should provide that, where concerns are raised about the parenting ability of a person with disability in proceedings for parenting orders, a report writer with requisite skills should:

- prepare a report for the court about the person's parenting ability, including what supports could be provided to improve their parenting; and
- make recommendations about how that person's disability may, or may not, affect their parenting.

Proposal 10–14 The *Family Law Act 1975* (Cth) should be amended to provide that in parenting proceedings involving an Aboriginal or Torres Strait Islander child, a

cultural report should be prepared, including a cultural plan that sets out how the child's ongoing connection with kinship networks and country may be maintained.

Question 10–6 Should cultural reports be mandatory in all parenting proceedings involving an Aboriginal or Torres Strait Islander child?

Proposal 10–15 The Australian Government should, as a condition of its funding agreements, require that all government funded family relationships services and family law legal assistance services develop and implement wellbeing programs for their staff.

11. Information Sharing

Proposal 11–1 State and territory child protection, family violence and other relevant legislation should be amended to:

- remove any provisions that prevent state and territory agencies from disclosing relevant information, including experts' reports, to courts, bodies and agencies in the family law system in appropriate circumstances; and
- include provisions that explicitly authorise state and territory agencies to disclose relevant information to courts, bodies and agencies in the family law system in appropriate circumstances.

The relevant agencies can be identified through the proposed information sharing framework (Proposals 11–2 and 11–3).

Question 11–1 What other information should be shared or sought about persons involved in family law proceedings? For example, should:

- State and territory police be required to enquire about whether a person is currently involved in family law proceedings before they issue or renew a gun licence?
- State and territory legislation require police to inform family courts if a person makes an application for a gun licence and they have disclosed they are involved in family law proceedings?
- The *Family Law Act 1975* (Cth) require family courts to notify police if a party to proceedings makes an allegation of current family violence?
- The *Family Law Act 1975* (Cth) give family law professionals discretion to notify police if they fear for a person's safety and should such professionals be provided with immunity against actions against them, including defamation, if they make such a notification?

Proposal 11–2 The Australian Government should work with state and territory governments to develop and implement a national information sharing framework to guide the sharing of information about the safety, welfare and wellbeing of families and children between the family law, family violence and child protection systems. The framework should include:

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

Proposal 11–3 The information sharing framework should include the legal framework for sharing information and information sharing principles, as well as guidance about:

- why information needs to be shared;
- what information should be shared;
- circumstances when information should be shared;
- mechanisms for information sharing, including technological solutions;
- how information that is shared can be used;
- who is able to share information;
- roles and responsibilities of professionals in the system in relation to information sharing;
- interagency education and training;
- interagency collaboration; and
- monitoring and evaluation of information sharing initiatives.

Question 11–2 Should the information sharing framework include health records? If so, what health records should be shared?

Question 11–3 Should records be shared with family relationships services such as family dispute resolution services, Children's Contact Services, and parenting order program services?

Proposal 11–4 The Australian Government and state and territory governments should consider expanding the information sharing platform as part of the National Domestic Violence Order Scheme to include family court orders and orders issued under state and territory child protection legislation.

Proposal 11–5 State and territory governments should consider providing access for family courts and appropriate bodies and agencies in the family law system to

relevant inter-jurisdictional and intra-jurisdictional child protection and family violence information sharing platforms.

Proposal 11–6 The family courts should provide relevant professionals in the family violence and child protection systems with access to the Commonwealth Courts Portal to enable them to have reliable and timely access to relevant information about existing family court orders and pending proceedings.

Proposal 11–7 The Australian Government should work with states and territory governments to co-locate child protection and family violence support workers at each of the family law court premises.

Proposal 11–8 The Australian Government and state and territory governments should work together to facilitate relevant entities, including courts and agencies in the family law, family violence and child protection systems, entering into information sharing agreements for the sharing of relevant information about families and children.

Proposal 11–9 The Australian Government and state and territory governments should work together to develop a template document to support the provision of a brief summary of child protection department or police involvement with a child and family to family courts.

Question 11–4 If a child protection agency has referred a parent to the family courts to obtain parenting orders, what, if any, evidence should they provide the courts? For example, should they provide the courts with any recommendations they may have in relation to the care arrangements of the children?

Proposal 11–10 The Australian Government should develop and implement an information sharing scheme to guide the sharing of relevant information about families and children between courts, bodies, agencies and services within the family law system.

Proposal 11–11 The *Family Law Act 1975* (Cth) should support the sharing of relevant information between entities within the family law system. The information sharing scheme should include such matters as:

- what information should be shared;
- why information should be shared;
- circumstances when information should be shared;
- mechanisms for information sharing;
- how information that is shared can be used;
- who is able to share information; and
- roles and responsibilities of professionals in the system in relation to information sharing.

Proposal 11–12 The Australian Government should work with states and territories to ensure that the family relationships services they fund are captured by, and comply with, the information sharing scheme.

Question 11–5 What information should be shared between the Families Hubs (Proposals 4–1 to 4–4) and the family courts, and what safeguards should be put in place to protect privacy? For example:

- Should all the information about services within the Families Hubs that were accessed by parties be able to be shared freely with the family courts?
- What information should the family courts receive (ie services accessed, number of times accessed, or more detailed information about treatment plans etc)?
- Should client consent be needed to share this information?
- Who would have access to the information at the family courts?
- Would the other party get access to any information provided by the Families Hubs services to the family courts?
- Should there be capacity for services provided through the Families Hubs to provide written or verbal evidence to the family courts?

12. System Oversight and Reform Evaluation

Proposal 12–1 The Australian Government should establish a new independent statutory body, the Family Law Commission, to oversee the family law system. The aims of the Family Law Commission should be to ensure that the family law system operates effectively in accordance with the objectives of the *Family Law Act 1975* (Cth) and to promote public confidence in the family law system. The responsibilities of the Family Law Commission should be to:

- monitor the performance of the system;
- manage accreditation of professionals and agencies across the system, including oversight of training requirements;
- issue guidelines to family law professionals and service providers to assist them to understand their legislative duties;
- resolve complaints about professionals and services within the family law system, including through the use of enforcement powers;
- improve the functioning of the family law system through inquiries, either of its own motion or at the request of government;
- be informed by the work of the Children and Young People's Advisory Board (Proposal 7–13);
- raise public awareness about the roles and responsibilities of professionals and service providers within the family law system; and

- make recommendations about research and law reform proposals to improve the system.

Proposal 12–2 The Family Law Commission should have responsibility for accreditation and oversight of professionals working across the system. In discharging its function to accredit and oversee family law system professionals, the Family Law Commission should:

- develop Accreditation Rules;
- administer the Accreditation Rules including the establishment and maintenance of an Accreditation Register;
- establish standards and other obligations that accredited persons must continue to meet to remain accredited, including oversight of training requirements;
- establish and administer processes for the suspension or cancellation of accreditation; and
- establish and administer a process for receiving and resolving complaints against practitioners accredited under the Accreditation Rules.

Proposal 12–3 The Family Law Commission should have power to:

- conduct own motion inquiries into issues relevant to the performance of any aspect of the family law system;
- conduct inquiries into issues referred by government relevant to the performance of any aspect of the family law system; and
- make recommendations to improve the performance of an aspect of the family law system as a result of an inquiry.

Proposal 12–4 The Family Law Commission should have responsibility for raising public awareness about the family law system and the roles and responsibilities of professionals and services within the system.

Proposal 12–5 The Family Law Commission should have responsibility for providing information and education to family law professionals and service providers about their legislative duties and functions.

Proposal 12–6 The Family Law Commission should identify research priorities that will help inform whether the family law system is meeting both its legislative requirements and its public health goals.

Proposal 12–7 The Australian Government should build into its reform implementation plan a rigorous evaluation program to be conducted by an appropriate organisation.

Proposal 12–8 The Australian Government should develop a cultural safety framework to guide the development, implementation and monitoring of reforms to the family law system arising from this review to ensure they support the cultural safety and responsiveness of the family law system for client families and their children. The

framework should be developed in consultation with relevant organisations, including Aboriginal and Torres Strait Islander, culturally and linguistically diverse, and LGBTIQ organisations.

Proposal 12–9 The cultural safety framework should address:

- the provision of community education about the family law system;
- the development of a culturally diverse and culturally competent workforce;
- the provision of, and access to, culturally safe and responsive legal and support services; and
- the provision of, and access to, culturally safe and responsive dispute resolution and adjudication processes.

Proposal 12–10 Family law service providers should be required to provide services that are compliant with relevant parts of the cultural safety framework.

Proposal 12–11 Privacy provisions that restrict publication of family law proceedings to the public, currently contained in s 121 of the *Family Law Act 1975* (Cth) should be maintained, with the following amendments:

- s 121 should be redrafted to make the obligations it imposes easier to understand;
- an explicit exemption to the restriction on publication or dissemination of accounts of proceedings should be provided for providing accounts of family law proceedings to professional regulators, and for use of accounts by professional regulators in connection with their regulatory functions;
- an avoidance of doubt provision should be inserted to clarify that government agencies, family law services, service providers for children, and family violence service providers are not parts of the 'public' for the purposes of the provision;
- the offence of publication or dissemination of accounts of proceedings should only apply to public communications, and legislative provisions should clarify that the offence does not apply to private communications; and
- to ensure public confidence in family law decision making, an obligation should be placed on any courts exercising family law jurisdiction, other than courts of summary jurisdiction, to publish anonymised reports of reasons for decision for final orders.

Question 12–1 Should privacy provisions in the *Family Law Act 1975* (Cth) be amended explicitly to apply to parties who disseminate identifying information about family law proceedings on social media or other internet-based media?

Question 12–2 Should a Judicial Commission be established to cover at least Commonwealth judicial officers exercising jurisdiction under the *Family Law Act 1975* (Cth)? If so, what should the functions of the Commission be?

1. Executive Summary

Contents

The Inquiry

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

1.2 Senator Brandis appointed Professor Helen Rhoades to lead this Inquiry. Three part time Commissioners, the Hon Mr John Faulks, Dr Andrew Bickerdike, and Mr Geoff Sinclair, were appointed in their personal capacity to assist Professor Rhoades.

1.3 The Terms of Reference for the Inquiry ask the ALRC to consider a number of matters. These include questions about the need for reform in relation to:

- the appropriate, early and cost-effective resolution of family law disputes;
- the protection of the best interests of children and their safety;
- families with complex needs, including where there is family violence, drug or alcohol addiction or serious mental illness;
- 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;

- 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; and
- improving the clarity and accessibility of the law.

1.4 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;
- the importance of ensuring the *Family Law Act 1975* (Cth) meets the contemporary needs of families and individuals who need to have resort to the family law system;
- the benefits of the engagement of appropriately skilled professionals in the family law system; and
- the importance of public understanding and confidence in the family law system.

1.5 In short, the Terms of Reference require the ALRC to consider the appropriate role of the family law system in Australia today and the best ways of ensuring it is responsive to the needs of separating families and their children who seek its assistance.

1.6 A number of matters affecting the family law system are not part of the ALRC's Terms of Reference. These include the operation of the child support scheme, the structure of the family courts, and matters of state and territory responsibility, such as Australia's child protection systems. However, as issues of state and territory responsibility are closely related to and frequently interact with the family law system, concerns about the intersections and cooperation between these systems are matters that the ALRC has considered in the course of its Inquiry.

Inquiry process

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

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

1.9 The ALRC received 480 submissions in response to this invitation, from across a broad spectrum of stakeholders. These included individuals who have used the family

law system and organisations and professionals associated with it, including legal assistance services, family law practitioners, family relationships services, alternative dispute resolution professionals, specialist family violence services, psychologists, social work and psychiatry peak bodies, disability organisations, children's commissions, researchers and academics, among others. Around half of these submissions are publicly available on the ALRC website. The remaining submissions are confidential.

1.10 In addition to the request for submissions, the ALRC invited people with recent experience of the family law system to confidentially tell us about their experience via a specially created *Tell Us Your Story* portal on the Inquiry website. The ALRC received close to 800 contributions to this website.

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

1.12 The ALRC has drawn on these contributions, consultations and submissions in developing the proposals and questions in this Discussion Paper. The Commission has also considered previous reports and empirical research on the issues raised by the Inquiry, as well as reports of family law system reviews in other jurisdictions, and the opinions of its Advisory Committee members in shaping its proposals for reform.

1.13 The ALRC invites individuals and organisations to make submissions in response to the specific proposals and questions contained in this Discussion Paper to inform its work on the final stage of the Inquiry. The closing date for submissions is **13 November 2018**. Information about how to make a submission is provided at the front of this Discussion Paper, and on the ALRC website: www.alrc.gov.au.

1.14 Following this process, the ALRC will provide its Final Report containing recommendations for reform of the family law system to the Attorney-General by 31 March 2019.

A growing need for reform

1.15 The need for systemic reform in the area of family law has been a consistent theme in recent reviews in both Australia[1] and other jurisdictions.[2] 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 Indigenous and culturally diverse communities.[3]

1.16 A desire for 'holistic' change,[4] rather than 'band aids'[5] or 'tinkering',[6] was also a strong theme in the submissions and consultations for this Inquiry. As Caxton Legal Centre expressed this:

> If a family law system was to be designed afresh, it is unlikely its designers would arrive at the current system.[7]

1.17 At the same time, many submissions noted that Australia's family law system has 'a proud history of innovation',[8] and that recent years have seen the development of some promising initiatives that should be retained and enhanced.

1.18 Underpinning these responses are a number of interconnected themes that are outlined below.

A focus on families, not the system

1.19 As explained in its Issues Paper, the ALRC has adopted a client-centred approach to the consideration of reform in this Inquiry.[9] This approach is consistent with the emphasis in the Terms of Reference on meeting the needs of families and individuals who use the system or require its services. A client-centred approach also accords with the process adopted in other family law system reform processes. For example, in its 2013 review, the Canadian Action Committee on Access to Justice in Civil and Family Matters employed what it called a 'public first' principle, saying of this:

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1 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).

2 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).

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

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

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

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

7 Caxton Legal Centre, *Submission 51*.

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

9 Australian Law Reform Commission, *Review of the Family Law System*, Issues Paper 48 (2018) 13.

> Too often, we focus inward on how the system operates from the point of view of those who work in it. For example, court processes — language, location, operating times, administrative systems, paper and filing requirements, etc. — typically make sense and work for lawyers, judges and court staff. They often do not make sense or do not work for litigants. The focus must be on the people who need to use the system. This focus must include all people, especially members of immigrant, aboriginal and rural populations and other vulnerable groups. Litigants, and particularly self-represented litigants, are not, as they are too often seen, an inconvenience; they are why the system exists.[10]

1.20 The ALRC's work on this Inquiry has benefitted from a significant level of engagement from the wider community, including a large number of individuals who have shared their experience of using the family law system with the Commission. The ALRC has also heard from children and young people about their experiences and views of the family law system, and many of the organisations that provide services in the system have provided the ALRC with case studies of their clients' experiences.

1.21 In addition to these stories and case studies, the ALRC has been supported in its understanding of families' needs by the significant body of empirical research that has been undertaken by the Australian Institute of Family Studies (AIFS) and others. From these studies we know that while most separating couples are able to work out their arrangements with limited or no professional assistance, many of the families who do turn to the family law system today have 'complex needs'.[11] These data show that safety concerns for children are now a common feature of the family law system's workload,[12] and that many of its client families have multiple legal and support needs associated with issues such as family violence, mental illness or substance misuse.[13]

1.22 As discussed in greater detail below, one of the consequences of this shift in the family law system's workload has been to bring new responsibilities for safeguarding children's wellbeing to the system's service providers.[14] It also means that the family law system can no longer operate in isolation from the wider justice system in Australia, and that it must work in partnership with services and courts beyond its jurisdictional boundaries to ensure families are able to obtain the supports they need.

1.23 The available data also tell us that most Australian families have modest resources,[15] and that the use of courts to resolve disputes is expensive. We also know that many families live outside the metropolitan precincts of Australia's capital cities,

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10 Action Committee on Access to Justice in Civil and Family Matters, Ottawa, Canada, above n 2, 7.

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

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

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

14 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) 5.

15 Rae Kaspiew et al, *Experiences of Separated Parents Study (Evaluation of the 2012 Family Violence Amendments)* (Australian Institute of Family Studies, 2015) 11-12.

where access to courts and legal services may be limited.[16] These features challenge us to find ways to provide families with accessible and low cost mechanisms for addressing their family law needs.

1.24 The issues raised with the ALRC by individuals who have engaged with the system also provide some indications of the needs of families who approach it for assistance. As noted, the ALRC invited people with recent experience of the family law system to confidentially tell us about their experience via a specially created portal on the Inquiry website. Prominent among the responses to this invitation were calls for:

- changes to the law and decision making processes to ensure children are protected from harm and their parents are safe;
- simpler and clearer legislation and information about the law to support people to sort out arrangements by themselves;
- more affordable and less confrontational processes for resolving post-separation problems;
- legal services that are delivered in a way that does not exacerbate or extend their dispute; and
- greater support to navigate the system to ensure that all of the person's needs can be met in a seamless way.

1.25 A further strong concern expressed in the consultations and contributions from individuals was the need for professional practices that do not disempower clients but maximise their control over the resolution of their problems.

Advancing the safety and wellbeing of children and families

1.26 To assist the ALRC's work on this Inquiry, the Issues Paper called for stakeholder input about the objectives that would best express the appropriate role and functions of a contemporary family law system and the principles that should guide its redevelopment.[17]

1.27 The responses to this question revealed a strong consensus that, in light of the changed nature of the system's workload, advancing the safety and wellbeing of children and their families should be the system's 'fundamental' objective[18] and 'primary' focus and function.[19] CatholicCare Sydney, for example, identified the 'safety and wellbeing of children as the absolute goal of family law intervention',[20] while others, like Drummond Street Services, suggested that the primary responsibility

16 Amanda George and Bridget Harris, 'Landscapes of Violence: Women Surviving Family Violence in Regional and Rural Victoria' (Centre for Rural and Regional Law and Justice, 2014) 59.
17 Australian Law Reform Commission, *Review of the Family Law System*, Issues Paper 48 (2018) 16.
18 See, eg, Berry Street, *Submission 26*; V Sinclair, *Submission 21*; Queensland Family and Child Commission, *Submission 16*; Australian Dispute Resolution Advisory Council Inc (ADRAC), *Submission 12*.
19 See, eg, Wirringa Baiya Aboriginal Women's Legal Centre, *Submission 164*; Relationships Australia Victoria, *Submission 129*; L Bowen, *Submission 123*; Western Sydney CLC, *Submission 8*.
20 CatholicCare Sydney, *Submission 79*.

of the system should be to protect the rights to safety of all family members, both adults and children.[21]

1.28 Submissions also indicated that advancing the safety of children and families should be the paramount principle guiding the ALRC's redevelopment of the family law system, including 're-shaping its workforce, capability and process'.[22]

1.29 This emphasis reflects the concerns expressed in a number of previous reports, including the 2017 House of Representatives Standing Committee on Social Policy and Legal Affairs report, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (2017) (*SPLA Family Violence* report).[23]

Collaborative and coordinated service delivery

1.30 The submissions also demonstrate that the changing nature of the system's workload, and the challenges it poses for service delivery, are well understood within the family law system. Victoria Legal Aid, for instance, noted that the system is under 'increasing pressure' in response to the growing 'complexity of the issues and needs of families utilising the family law system' and the 'prevalence of family violence and other risk issues affecting children and families'.[24]

1.31 In response to these shifts, stakeholders suggested that a central part of redeveloping the family law system should involve a move away from inward-looking approaches towards practices that emphasise collaborative and joined-up service delivery, including with services and courts outside the family law system.[25] The submissions also suggest that this shift has complicated the view that post-separation disputes are primarily a 'legal problem'. As Marrickville Legal Centre noted:

> The dynamics involved in family conflict have complex emotional, cultural, social, health and economic underpinnings. Characterisation of family conflict as a 'legal problem' does not assist, and frequently exacerbates, dispute. Successful design and implementation of post- separation arrangements, for child issues particularly, if the parents cannot arrange this themselves, requires the co-ordinated input of a range of expertise (from psychologists, social workers, independent financial consultants, addiction specialists, cultural and community representatives and others).[26]

1.32 As well as emphasising the need for a multi-disciplinary approach, the submissions recognised that many families will need support to navigate other legal

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21 Drummond Street Services, *Submission 20*. See also Victorian Women Lawyers, *Submission 84*; Victoria Legal Aid, *Submission 61*; V Sinclair, *Submission 21*.

22 The Benevolent Society, *Submission 86*; Women's Legal Services Australia, *Submission 45*.

23 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 1. See also COAG Advisory Panel on Reducing Violence against Women and their Children, *Final Report* (2016); Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016); Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016).

24 Victoria Legal Aid, *Submission 61*.

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

26 Marrickville Legal Centre, *Submission 137*.

systems outside the family law system.[27] For example, the submission from Fitzroy Legal Service and Darebin Community Legal Centre described how clients of their practice

> commonly present with multiple, overlapping and interconnected issues including parenting, family violence, child protection and migration, as well as underlying problems such as homelessness/housing stress, mental health issues, drug use, and involvement in the criminal law system.[28]

1.33 Stakeholders suggested that this complexity will require family law professionals to work in partnership with other service systems and sectors, both within and beyond the boundaries of the family law system,[29] in order to respond to families in a flexible and person-centred way.[30]

1.34 The consultations and submissions suggest that the development of this approach is already underway, particularly in the community legal and family relationships sectors, and it is in this respect that many stakeholders identified existing initiatives that are working well for families and should be retained and expanded. These include:

- the Family Advocacy and Support Service (FASS), which combines the services of legal aid commission duty lawyers and specialist family violence support workers to assist clients affected by family violence who seek assistance at the courts;[31]
- legally assisted dispute resolution (LADR) services, in which legal practitioners are present to provide advice and reality-check proposed agreements with their client, allowing families who might otherwise be assessed as not appropriate for family dispute resolution (FDR) to access a safe non-adversarial dispute resolution process;[32]
- the Indigenous List of the Federal Circuit Court of Australia (Federal Circuit Court), which brings together representatives from a range of Indigenous-specific services to support families in parenting matters that involve an Aboriginal or Torres Strait Islander child;[33] and

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

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

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

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

31 See for discussion of this service, House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 1, 144.

32 See for discussion of these services, ibid 94–99, 151-152.

33 Australian Law Reform Commission, *Review of the Family Law System*, Issues Paper 48 (2018) 65.

- the co-location of child protection practitioners in the family courts in Victoria and Western Australia, which provides an information sharing interface between the family law and child protection systems.[34]

1.35 The ALRC also received submissions which highlighted good practice models outside the family law system that could inform its redevelopment, including health justice partnerships between legal assistance and community health services,[35] the Neighbourhood Justice Centre in Melbourne, which has embedded workers from 18 different legal and support services under the one roof,[36] and the recent co-location of the Frankston Family Relationship Centre (FRC) and a Victorian Orange Door Support and Safety Hub.[37]

Accessibility for all families

1.36 Another central concern of the submissions and consultations centred on the need for the contemporary family law system to be accessible to all families who need it, regardless of their location or financial or social background.[38]

1.37 The submissions canvassed a number of accessibility issues. These included concerns to ensure that any system re-design accommodates the diversity of family and parenting relationships and considers the range of people who may be affected by separation, including intergenerational relationships.[39]

1.38 Stakeholders also noted the importance of the system being affordable, understandable, and straightforward for people to navigate and use, including by providing information and forms written in plain English.[40] In particular, a number of stakeholders raised concerns about the barriers to access created by the formality of the family courts. The Women's Law Centre of Western Australia, for example, submitted that:

> The current family court system is too formal and procedural. Many of our clients are unable to understand what is required of them to engage with the system to pursue their legal rights.[41]

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34 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) 90–1.

35 See Health Justice Australia, *Mapping a New Path: The Health Justice Landscape in Australia* (2017).

36 See, eg, Law Society of NSW, *Submission 154*; Fitzroy Legal Service and Darebin Community Legal Centre, *Submission 7*.

37 Family Life, *Submission 9*. See also Victorian Government, 'The Orange Door Support and Safety Hubs: Interim Integrated Practice Framework' (April 2018).

38 See eg, M Brandon, *Submission 184*; Victoria Legal Aid, *Submission 61*; Domestic Violence NSW, *Submission 44*; Australian Association of Social Workers, *Submission 25*; Drummond Street Services, *Submission 20*.

39 See, eg, Grandparents Victoria, *Submission 138*; Centacare Family and Relationship Services (CFRS), *Submission 125*; Z Rathus, *Submission 92*; Human Rights Law Centre, *Submission 54*; Family & Relationship Services Australia, *Submission 53*; Setting the Record Straight for the Rights of the Child, *Submission 28*; National LGBTI Health Alliance, *Submission 14*.

40 See, eg, Farrar Gesini Dunn, *Submission 140*; L Bowen, *Submission 123*; Law Council of Australia, *Submission 108*; D Plummer, *Submission 94*; Aboriginal Legal Service of Western Australia, *Submission 74*; Victoria Legal Aid, *Submission 61*.

41 Women's Law Centre of WA, *Submission 40*.

1.39 In addition, the ALRC's consultations emphasised the need for the modern family law system to be accessible to people living in rural and remote areas of Australia, and to be inclusive of and culturally safe for Aboriginal and Torres Strait Islander peoples, culturally and linguistically diverse families, people with disability, and lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) families.[42]

1.40 These issues have been the focus of a number of earlier reports, including the Family Law Council's 2012 reports on *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients*[43] and *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds*,[44] and reports by the Judicial Council on Cultural Diversity.[45]

Non-adversarial approaches

1.41 Another strong theme in the submissions and consultations was a call for a greater focus on problem-solving and conflict reduction,[46] and a move towards a greater use of non-adversarial approaches as much as possible.[47]

1.42 Central to these calls was a view that adversarial processes tend to escalate conflict between separating parents,[48] and concerns about the flow-on impact of this on children's wellbeing.[49] More generally, many saw the use of an adversarial model as being poorly adapted for dealing with family conflict.[50] As one legal practitioner expressed this:

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42 See, eg, Rainbow Families Victoria, *Submission 106*; Associate Professor B Smyth, *Submission 104*; Australian Association of Social Workers, *Submission 25*; Central Australian Women's Legal Service, *Submission 24*; People with Disability Australia (PWDA), *Submission 10*.

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

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

45 Judicial Council on Cultural Diversity, *The Path to Justice: Migrant and Refugee Women's Experience of the Courts* (Judicial Council on Cultural Diversity, 2017); Judicial Council on Cultural Diversity, *The Path to Justice: Aboriginal and Torres Strait Islander Women's Experience of the Courts* (Judicial Council on Cultural Diversity, 2017); Judicial Council on Cultural Diversity, *National Framework to Improve Accessibility to Australian Courts for Aboriginal and Torres Strait Islander Women and Migrant and Refugee Women*.

46 See, eg, ASD Family Legal, *Submission 93*; Aboriginal Legal Service of Western Australia, *Submission 74*; Australian Psychological Society, *Submission 55*; Drummond Street Services, *Submission 20*; P Theobald, *Submission 6*; Anglicare SA, *Submission 2*.

47 See, eg, Yourtown, *Submission 204*; C Fitzpatrick, E Hooper, C Hooper and J Dmitrovic, *Submission 169*; N Ciffolilli, *Submission 168*; Uniting, *Submission 162*; MELCA, *Submission 155*; J Webb, *Submission 145*; R Hainsworth, *Submission 142*; Marrickville Legal Centre, *Submission 137*; For Kids Sake, *Submission 118*; A Weller, *Submission 74*; P Curry, *Submission 56*; Caxton Legal Centre, *Submission 51*; Domestic Violence Victoria, *Submission 23*; Drummond Street Services, *Submission 20*; National LGBTI Health Alliance, *Submission 14*; Anglicare SA, *Submission 2*.

48 See, eg, R Singh, *Submission 195*; M Packer, *Submission 178*; O Hirsig, *Submission 127*; Centacare Family and Relationship Services (CFRS), *Submission 125*; Women's Law Centre of WA, *Submission 40*; Berry Street, *Submission 26*; V Sinclair, *Submission 21*.

49 See, eg, Interrelate, *Submission 126*; For Kids Sake, *Submission 118*; Australian Psychological Society, *Submission 55*; Relationships Australia, *Submission 11*.

50 Women's Law Centre of WA, *Submission 40*. See also M Packer, *Submission 178*; C Fitzpatrick, E Hooper, C Hooper and J Dmitrovic, *Submission 169*; MELCA, *Submission 155*; Centacare Family and Relationship Services (CFRS), *Submission 125*; Australian Psychological Society, *Submission 55*;

> The adversarial system may not promote any injustice between (for example) two large and well-resourced corporate entities slugging it out over a commercial dispute. Family law litigants, however, are generally not well resourced. They often earn average or less than average income and have no spare money for lawyers. They often have fairly minor assets loaded with debt, or even substantial net debt. They often have had no prior experience of legal processes or instructing lawyers, and they are undergoing what is almost always a tremendously stressful and difficult time for them and for their families.[51]

1.43 Importantly, this theme was also expressed by children and young people who shared their experiences and views about the family law system, with one young person suggesting that the 'winner/loser' approach used in the courts 'should be ditched'.[52]

1.44 This theme has also been a feature of family law policy reviews in other countries in recent times.[53] For example, in its 2018 report, the Family Law Reform Committee of Manitoba noted that it had been asked to consider reforms that would provide a less adversarial alternative to the courts in order to 'improve wellness' for families,[54] commenting:

> In other types of cases, having a 'winner' and a 'loser' is not necessarily a bad thing as it is a final resolution to a problem. In family law, often the relationship between the parties is ongoing and significant. Issues such as the joint parenting of children, child and spousal support are long-term and having a winner and loser often contributes to an ongoing relationship of conflict.[55]

Valuing children and young people

1.45 Many of the submissions and consultations also emphasised the need for children and young people to be recognised as the family law system's key stakeholders, and the importance of embedding a child-centred approach to the system's work in any redevelopment.[56]

1.46 Stakeholders indicated that this should include improving access to the system for children and young people, such as through the provision of dedicated information resources and tailored services.[57] Submissions also stressed the importance of having skilled people to support children and young people to participate in processes that

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Australian Dispute Resolution Advisory Council Inc (ADRAC), *Submission 12*; Anglicare SA, *Submission 2*.

51 P Curry, *Submission 56*.

52 See South Australia Commissioner for Children and Young People, 'What Children and Young People Think Should Happen When Families Separate' (Office of the Commissioner for Children and Young People, 2018) 15.

53 See, eg, Quintet Meeting of Attorneys-General, above n 3.

54 Manitoba Family Law Reform Committee, above n 2, 1.

55 Ibid 2.

56 See, eg, M Packer, *Submission 178*; Office of the Public Advocate (Vic), *Submission 37*; Youth Affairs Council of South Australia, *Submission 5*.

57 South Australia Commissioner for Children and Young People, above n 52.

affect them, including support to express their views, and of ensuring children's voices are heard, respected and valued.[58]

1.47 These calls reflect the findings of a recent AIFS study that examined the experiences of children and young people who had engaged with the family law system,[59] which suggested the need for improvements in this regard.[60]

Building community trust

1.48 Another clear message received by the ALRC during its work on this Inquiry concerns the importance of fostering public confidence in the family law system.[61] This includes building trust in the system's ability to safeguard children and their families.[62]

1.49 Many suggested ways of addressing the issue of community trust, including through greater transparency[63] and scrutiny of the system's processes and practices,[64] and through community education to improve public understanding of what the system provides and how it works.[65]

1.50 Many, however, saw the solution to the family law system's image problem as resting with effective reform to the issues described above, such as through building collaborative relationships with services and courts outside the family law system to ensure clients' needs can be met in a seamless way, and by improving the accessibility of services and the law.[66]

1.51 Along similar lines, some suggested the need to re-think the characterisation of access to justice 'as though justice is by its nature remote and inaccessible'[67] and submitted that it is time to work instead towards 'the *devolution* of justice, where our institutions are reformed so as to bring justice down to the people'.[68]

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58 See, eg, Dr M Fernando, *Submission 172*; Townsville Community Legal Service, *Submission 159*; Bravehearts Foundation Ltd, *Submission 148*.

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

60 See also Rae Kaspiew et al, 'Independent Children's Lawyers Study' (Final Report, 2nd ed, Australian Institute of Family Studies, 2014).

61 See, eg, CatholicCare Sydney, *Submission 79*; Victoria Legal Aid, *Submission 61*; The Royal Australian and New Zealand College of Psychiatrists, *Submission 18*; Relationships Australia, *Submission 11*.

62 See, eg, Bravehearts Foundation Ltd, *Submission 148*; NATSIWA, Harmony Alliance and AWAVA, *Submission 122*; R Davies, *Submission 66*; Domestic Violence NSW, *Submission 44*; Drummond Street Services, *Submission 20*.

63 See, eg, Centacare Family and Relationship Services (CFRS), *Submission 125*; D Plummer, *Submission 94*; Safe Steps Family Violence Response Centre, *Submission 15*; See also Women's Legal Services Australia, *Submission 45* which called for a national death review mechanism.

64 See, eg, I Vann, *Submission 97*; Families for Children's Rights: The Australian Movement, *Submission 96*; Domestic Violence Action Centre, *Submission 58*.

65 See, eg, Law Council of Australia, *Submission 108*.

66 See, eg, Victoria Legal Aid, *Submission 61*.

67 P Curry, *Submission 56*.

68 Ibid. See also Relationships Australia Victoria, *Submission 129*.

An action plan for change

1.52 As the concerns and reform directions outlined above indicate, there is a need to redevelop the family law system on a number of levels. Recognition of the changing nature of the system's core work and the growing complexity of issues that families present with have seen calls to prioritise the safety and wellbeing of children in considering the design of processes and services, as well as ways of mainstreaming non-adversarial responses and ensuring children and young people are supported to participate in processes that affect them. More fundamentally, these changes require a paradigm shift away from thinking about the family law system as separate and distinct from the wider justice system affecting families and children and challenge us to focus on ways of 'devolving' justice to families.

1.53 In order to achieve these shifts, and in light of the evidence of the contemporary needs of client families and their children, the ALRC proposes the use of a public health approach to frame its plan for change.[69]

What is a public health approach?

1.54 A public health approach aims to prevent or reduce a particular social problem, such as child harm, by identifying risk indicators and developing mechanisms for responding to them. It is an approach that aims to prevent problems from occurring in the first place, to quickly respond to problems if they do occur, and to minimise any long-term effects and prevent reoccurrence. In Australia, the public health model has been recognised by all governments as the appropriate framework for working to ensure the safety and wellbeing of children, as set out in the *National Framework for Protecting Australia's Children*.[70]

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

1.56 Primary interventions, such as public awareness and education campaigns, are delivered to the whole community in order to provide support before problems occur. Typically delivered in community settings, such as schools, community health providers and the media, they may focus, for example, on changing cultural norms or social attitudes through public education about positive parenting practices or legal rights and policies.[71] The point of primary interventions is to shift the risk profile positively for the entire relevant population.[72] In the child protection domain, this means aiming to have fewer children in need of more intensive secondary or tertiary services, such as removal from their family by child protection agencies.

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69 This approach was also suggested by a number of stakeholders. See, eg, Drummond Street Services, *Submission 20*.

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

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

72 Higgins, above n 71.

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

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

Why a public health approach for the family law system?

1.59 Since 1975, separation has become an increasingly common life event, with around 50,000 children experiencing the divorce of their parents each year.[73] The main influences on wellbeing outcomes for children in separated families are the same as for those in non-separated families: financial disadvantage,[74] exposure to parental conflict,[75] and exposure to less than optimum parenting behaviours.[76] The research shows that greater proportions of separated families are affected by these factors,[77] including financial disadvantage resulting from the breakdown of the relationship[78] and exposure to conflict.[79] These data suggest that particular attention needs to be paid to measures that address these issues in order to enhance the wellbeing of children.[80]

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73 Ruth Weston and Lixia Qu, 'Trends in Family Transitions, Forms and Functioning: Essential Issues for Policy Development and Legislation' in *Families, policy and the law: Selected essays on contemporary issues for Australia* (Australian Institute of Family Studies, 2015) 9. Data provided to the ALRC by the Department of Social Services show that around 70,000 new families are registered on the Child Support Program data base each year.

74 See, eg Diana Warren, 'Low-Income and Poverty Dynamics: Implications for Child Outcomes' (47, Department of Social Services, 2017) <https://www.dss.gov.au/publications-articles/research-publications/social-policy-research-paper-series/social-policy-research-paper-number-47-low-income-and-poverty-dynamics-implications-for-child-outcomes>.

75 See, eg Rae Kaspiew et al, 'Domestic and Family Violence and Parenting: Mixed Method Insights into Impact and Support Needs: Final Report' (Australia's National Research Organisation for Women's Safety, 2017).

76 See, eg, Killian Mullan and Daryl Higgins, 'A Safe and Supportive Family Environment for Children: Key Components and Links to Child Outcomes' (Occasional Paper 52, Australian Institute of Family Studies, 2014).

77 Conflict: see, eg, Kaspiew et al, 'Domestic and Family Violence and Parenting: Mixed Method Insights into Impact and Support Needs: Final Report', above n 75, 47; Problematic parenting: Killian Mullan and Daryl Higgins, above n 76; Financial disadvantage: Diana Warren, above n 74.

78 David De Vaus et al, 'The Economic Consequences of Divorce in Australia' (2014) 28(1) *International Journal of Law Policy and the Family* 26.

79 Kaspiew et al, 'Domestic and Family Violence and Parenting: Mixed Method Insights into Impact and Support Needs: Final Report', above n 75, 49.

80 See, eg, Julie Moschion and Jan C. van Ours, 'Do Childhood Experiences of Parental Separation Lead to Homelessness?' (Life Course Centre Working Paper Series No 2017-10, Life Course Centre, Institute for Social Science Research, University of Queensland, 2017).

1.60 In applying this lens to the family law system, it is important to emphasise that the vast majority of separated parents report positive relationships with their former partner,[81] as well as positive levels of wellbeing for themselves[82] and their children.[83] While financial stress is a factor that affects many separated parents,[84] most separating families work out their post-separation parenting[85] and property arrangements[86] with little or no reliance on the family law system.

1.61 From a public health perspective, therefore, it is evident that many separating families will only require support of a primary nature, such as clear information about the law and how and where to get advice if needed.

1.62 However, the AIFS research indicates that some separating families will need a greater level of assistance from the family law system, and that these families are more likely to be dealing with a mix of issues, of the kinds described above. For example, this research shows that significant proportions of family law system clients who use its formal dispute resolution pathways (that is, who use FDR, see lawyers, or use the courts) are affected by characteristics associated with risk and vulnerability, and particularly among those who engage with the courts.[87]

1.63 Given the evidence that issues such as family violence, mental illness and substance abuse are key risk factors for poor outcomes for children,[88] it is evident that the family law system is delivering services to many families at a time of heightened vulnerability. On this basis, interaction with the family law system offers a critical opportunity for interventions with families that can potentially reduce the factors that might compromise a child's wellbeing.

1.64 Applying a public health approach to guide the family law system's interventions, it is clear that at a broad level they should operate to mitigate these risk factors by:

- not exacerbating financial disadvantage;
- reducing children's exposure to conflict and abuse;
- enhancing the capacity of parents to adopt parenting behaviours that are consistent with positive wellbeing outcomes for children; and
- addressing behaviours that negatively affect parental care.

81 Kaspiew et al, above n 15, 15; Qu et al, above n 13, 14.
82 Kaspiew et al, above n 15, 162.
83 Ibid 138; Qu et al, above n 13, 137.
84 Kaspiew et al, above n 15, 11.
85 Ibid 71.
86 Qu et al, above n 13, 98.
87 Rae Kaspiew et al, 'Evaluation of the 2012 Family Violence Amendments: Synthesis Report' (Australian Institute of Family Studies, 2015) 16.
88 Bromfield et al, above n 11, 11.

Redeveloping the family law system

1.65 In consideration of these factors, the redevelopment of the family law system should focus on strengthening its primary and secondary responses, to ensure that information and advice is widely available and that support services are easily accessible. It would also mean re-shaping the system's tertiary interventions to increase the capacity for conflict reduction by expanding the availability and flexibility of non-adversarial dispute resolution processes and enhancing access to timely and joined up adjudication processes.

1.66 Applying the public health approach described above, the available data and the submissions to this Inquiry demonstrate a compelling case for these changes as a way of reducing the costs of engagement with the system for families and realising downstream savings to government by addressing factors that compromise children's long-term wellbeing.[89] The ALRC's proposals seek to address the redevelopment objectives described above in line with this approach.

1.67 At the **primary level** of intervention, the ALRC proposes the development of a national education and awareness campaign to promote public awareness of the law and sources of information, advice and support for separating families and children (Chapter 2). This would be supplemented by an accessible authorised information package, and by simplifying the *Family Law Act* to make it more accessible and comprehensible for families (discussed in Chapter 3). It would also be supported by the building of referral relationships between the family law system and universal services and 'first port of call' services for people affected by family violence, such as health services and police (Chapter 2). Together, this set of proposals aim to ensure that separating families, including children and young people, know how and where to get the assistance they need.

1.68 As a **secondary level** response, the ALRC proposes to build on the work pioneered by FRCs by establishing community-based Families Hubs to provide separating families with a visible contact point for accessing a range of advice and support services in the one place. This initiative would bring together a team of on-site embedded workers from a range of local services, including legal assistance services, family relationships services, specialist family violence services, financial counselling and housing assistance services, and specialist services for children and young people. The Hubs would be complemented by a proposed expansion of the Family Advocacy and Support Service (FASS) to create a new case management model with specialist assistance from both men's and women's family violence services as well as legal assistance for both parties. Together, the Families Hubs and the expansion of the FASS aim to reduce the risk of people 'falling through the gaps' between different services sectors and not having their safety and support needs, or those of their children, met. These initiatives are discussed in Chapter 4.

89 See on this approach, The Modernising Child, Youth and Family Panel, NZ Ministry of Social Development, 'Investing in New Zealand's Children and Their Families: Expert Panel Final Report' (December 2015).

1.69 The ALRC's proposed **tertiary level** responses include an expanded range of flexible dispute resolution options for reaching agreement about both property and children, including LADR models that are responsive to the safety needs of families (Chapter 5). The ALRC also proposes the development of a team-based triage process to ensure matters that reach the courts are directed to appropriate alternative dispute resolution pathways and specialist lists within the courts as needed, including new specialist lists for small property claims and family violence cases (Chapter 6). The ALRC also proposes that family law registries be co-located in state and territory local courts, including in regional and rural areas (Chapter 6). These reforms would be supplemented by the appointment of children's advocates to support the participation of children and young people in contested proceedings (Chapter 7), and by the creation of a post-order parenting support service to assist highly conflicted parents to implement court orders and reduce the likelihood of enforcement proceedings (Chapter 6).

1.70 Together, these changes would be supported by a range of other proposals, including:

- stronger legislative safeguards to address misuse of process and protect sensitive records (Chapter 8);
- a new role for Litigation Representatives to give effect to a supported decision making approach for litigants with disability (Chapter 9);
- a workforce capability plan to support family law system professionals to obtain and maintain core competencies for working with families and children, and an accreditation scheme for private report writers in children's matters (Chapter 10);
- the development of a national information sharing framework to guide exchange of information between the family law, family violence and child protection systems (Chapter 11);
- a cultural safety framework to guide implementation of the reforms in a community-informed and culturally safe way (Chapter 12); and
- a new oversight body to monitor the operation of the family law system (Chapter 12).

Terms used in the Discussion Paper

1.71 References to the '**family law system**' in the Discussion Paper refer collectively to the family courts (the Family Court of Australia (Family Court), the Family Court of Western Australia and the 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.

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

1.73 The term '**legal assistance services**' is used throughout the Discussion Paper to refer to government funded legal services, including legal aid commissions, community legal centres and Aboriginal and Torres Strait Islander legal services.

1.74 Reference to '**family relationships services**' in the Discussion Paper refers to the suite of out-of-court services provided to families contemplating or experiencing separation or other relationship issues. These services include FDR services, family counselling, parenting order programs, post separation cooperative parenting programs, CCSs and supporting children after separation programs. These services are often provided by FRCs and are also referred to as 'family law services' by the Attorney-General's Department (Cth)[90] and the Department of Social Services.[91] Where the term '**family law services**' is used in the Discussion Paper, it is used more broadly to capture all services that may assist separating families, including family relationships services and legal assistance services.

1.75 The Discussion Paper refers throughout to '**specialist family violence services**'. This term is used to refer to services providing direct support and assistance to people who have experienced, or are experiencing, family violence and their children.

1.76 Where the term '**Aboriginal and Torres Strait Islander organisations**' is used, this is intended to refer collectively to all organisations and services that provide advocacy and/or specialist legal or support services to Aboriginal and Torres Strait Islander people, including Aboriginal Community Controlled Organisations and Aboriginal and Torres Strait Islander legal services.

1.77 The Discussion Paper refers throughout to '**culturally and linguistically diverse organisations**'. This term is intended to capture all organisations and services that provide advocacy and/or specialist legal or support services to people from culturally and linguistically diverse communities. This includes legal and support services for migrants, refugees and asylum seekers.

1.78 The term '**disability organisations**' is used throughout the Discussion Paper to refer to all organisations and services providing advocacy and/or specialist legal or support services to people with disability.

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90 KPMG, *Future Focus of the Family Law Services: Final Report* (Report prepared for Attorney-General's Department (Cth), 2016) 2.

91 Department of Social Services (Cth), *Family Law Services* <www.dss.gov.au/our-responsibilities/families-and-children/programs-services/family-support-program/family-law-services>.

1.79 Use of the term '**LGBTIQ organisations**' in the Discussion Paper refers to all organisations and services providing advocacy and/or specialist legal or support services to LGBTIQ people.

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

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

1.82 The term '**child centred**' is used to refer to an approach that can be applied across different areas that provide services to children and families, including education, family services and child protection. The approach is one that prioritises the needs and interests of children. Child-centred policies and frameworks acknowledge and accommodate the developmental needs and timeframes in childhood and adolescence and support the involvement of children and young people in decisions that affect them.[92]

1.83 The term '**trauma-informed practice**' is used to refer to the provision of services in a way that is 'based on knowledge and understanding of how trauma affects people's lives and their service needs'.[93] The Mental Health Coordinating Council has described this approach as being 'informed by an understanding of the particular vulnerabilities and "triggers" that survivors of complex trauma experience'.[94]

1.84 The term '**disability**' is used in this Discussion Paper to refer to physical, mental, intellectual or sensory disabilities, consistently with the United Nations *Convention on the Rights of Persons with Disabilities*[95] and the *Disability Discrimination Act 1992* (Cth).

1.85 The concept of **'cultural safety'** is generally acknowledged to have originated in New Zealand in the 1980s.[96] A commonly accepted definition of cultural safety is

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

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

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

95 *Convention on the Rights of Persons with Disabilities*, Opened for Signature 30 March 2007, 999 UNTS 3 (Entered into Force 3 May 2008).

96 Elaine Papps and Irihapeti Ramsden, 'Cutural safety in Nursing: The New Zealand Experience' (1996) 8(5) International Journal for Quality in Health Care 491 cited in Australian Human Rights Commission, *Cultural Safety for Aboriginal and Torres Strait Islander Children and Young People: A Background Paper to Inform Work on Child Safe Organisations* (2018).

'an environment which is safe for people; where there is no assault, challenge or denial of their identity, of who they are and what they need. It is about shared respect, shared meaning, shared knowledge and experience, of learning together with dignity, and truly listening'.[97] Cultural safety is distinct from cultural awareness, which is understanding that differences exist, and cultural sensitivity, which is 'accepting the legitimacy of difference and reflecting on the impact of the service's provider's life experience and positioning on others'.[98] Although the two concepts are complementary,[99] cultural safety is distinct from cultural competence, which is defined as 'the ability of systems to provide care to patients with diverse values, beliefs and behaviours, including tailoring delivery to meet patients' social, cultural and linguistic needs'.[100]

1.86 The term '**child protection agencies**' is used primarily to refer to statutory bodies established by states and territories to provide assistance to vulnerable children through investigating concerns regarding abuse, neglect or harm, and where necessary, seeking court orders for their care and protection. The term may also include referral, information and support services established by states and territories to assist vulnerable families and children.

97 Eckermann A, Dowd T, Martin M, et al *Binang Goonj: Bridging Cultures in Aboriginal Health* (University of New England, 1994) cited in Robyn Williams, 'Cultural Safety: What Does It Mean for Our Work Practice?' (2008) 23(2) *Australian and New Zealand Journal of Public Health* 213.

98 Irihapeti Ramsden, 'Cultural Safety and Nursing Education in Aotearoa and Te Waipounamu' (PhD Thesis, Victoria University Wellington, 2002) cited in Australian Human Rights Commission, above n 96.

99 Australian Human Rights Commission, above n 96.

100 Joseph Betancourt, Alexander Green and J Emilio Carrillo, *Cultural Competence in Health Care: Emerging Frameworks and Practical Approaches* (2002) cited in Australian Human Rights Commission, above n 96.

2. Education, Awareness and Information

Contents

Summary

2.1 This chapter sets out the ALRC's proposals for improving community understanding of the family law system, including what to do when experiencing separation and where to go for help, through the development of a national education and awareness campaign. This campaign, which aims to foster public confidence in the family law system, should promote awareness of the Families Hubs, proposed in Chapter 4, as a central point of contact for separation-related legal and support services. The campaign is also designed to raise awareness of the law governing post-separation parenting and of the availability of alternative dispute resolution processes outside of the courts. To ensure the campaign has a wide-reach, the ALRC proposes that it be developed in consultation with relevant community groups and promoted through universal services, including health and education services.

2.2 The ALRC also proposes 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.

2.3 In addition, the ALRC proposes that a family law system information package be developed. The package should draw on existing government and non-government information resources and services to produce a centralised source of clear, consistent, legally sound and nationally endorsed information about the family law system that should be updated regularly and promoted through the national education and awareness campaign.

National education and awareness campaign

Proposal 2–1 The Australian Government should develop a national education and awareness campaign to enhance community understanding of the family law system. This should include information about:

- the benefits of seeking information, advice and support when contemplating or experiencing separation;
- the duties and responsibilities of parents and the importance of taking a child-centred approach to post-separation parenting that prioritises children's safety and best interests;
- the existence and location of the proposed Families Hubs (Proposals 4–1 to 4–4) as a place where people experiencing separation can access advice and support services;
- the availability of the proposed family law system information package (Proposals 2–5 to 2–8) that provides practical information to assist people, including children and young people, to understand and navigate the family law system, including how to access the package; and
- the availability of alternative dispute resolution processes to assist and empower people experiencing separation to reach agreement about arrangements for their children and property outside of court proceedings.

Proposal 2–2 The national education and awareness campaign should be developed in consultation with Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTIQ and disability organisations and be available in a range of languages and formats.

Proposal 2–3 The Australian Government should work with state and territory governments to facilitate the promotion of the national education and awareness campaign through the health and education systems and any other relevant agencies or bodies.

2.4 Taking a national approach to raising public awareness about the family law system, including awareness of the benefits of seeking information, advice and supports and how these can be accessed, aligns with the public health framework outlined in Chapter 1. It represents a primary whole of population intervention which aims to support separating families by providing information about the family law system and how people can be assisted to obtain advice and support before problems occur.[1] This approach is consistent with the use of public education campaigns by

1 See generally Child Family Community Australia, 'Defining the Public Health Model for the Child Welfare Services Context' (Child Family Community Australia Resource Sheet, Australian Institute of Family Studies, 2014); Daryl J Higgins, 'A Public Health Approach to Enhancing Safe and Supportive Family Environments for Children' (2015) 96 *Family Matters* 39.

governments to effect attitudinal change and raise awareness of sources of support in other areas.[2]

2.5 The proposed campaign should aim to effect changes in the steps taken by people contemplating or experiencing separation before conflicts develop or become entrenched. It should also aim to raise awareness of the benefits of seeking information, advice and support early and the availability of information about children's best interests and the law governing post-separation parenting. This should include raising awareness about the potential harm to children caused by ongoing high levels of interparental conflict.[3] It should also aim to enhance public awareness of what to do and where to go when contemplating or experiencing separation, including information about the Families Hubs, described in Chapter 4, as a central point of contact for anyone seeking legal advice or support services. The campaign should also include information about the availability of alternative dispute resolution processes outside of the courts.

2.6 A number of submissions suggested a need for public education and awareness raising about the family law system.[4] For example, For Kids Sake proposed that:

> Investment should be made in education and early, comprehensive support for families. This should include a national educational campaign on better managing relationships and separation, including raising awareness of the potentially harmful consequences to children of family breakdown and the extreme risks, consequences and prevalence of some forms of psychological child abuse and family violence. The availability and benefits of coaching, conciliation, family-friendly resolution services, and comprehensive, online resources for separating parents and their children should also be promoted nationally as mainstream, healthier alternatives to family court proceedings.[5]

2.7 Anglicare South Australia called for a 'strategic commitment to invest in early intervention efforts … to shift the mainstream understanding of and culture around separation'.[6] Building community awareness was also suggested as a way of addressing concerns about public mistrust in the family law system.[7] Submissions indicated the existence of significant misunderstandings of the law and processes within the community,[8] and a lack of awareness about how to locate and access support.[9] The campaign would aim to address these concerns by raising public

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2 See generally Higgins, above n 1; Matthew R Sanders and Ronald J Prinz, 'Using the Mass Media as a Population Level Strategy to Strengthen Parenting Skills' (2008) 37(3) *Journal of Clinical Child & Adolescent Psychology* 609.

3 See Rae Kaspiew et al, 'Domestic and Family Violence and Parenting: Mixed Method Insights into Impact and Support Needs: Final Report' (Australia's National Research Organisation for Women's Safety, 2017).

4 See, eg, Centacare Family and Relationship Services (CFRS), *Submission 125*; Law Council of Australia, *Submission 43*; Western Sydney CLC, *Submission 8*; P Theobald, *Submission 6*.

5 For Kids Sake, *Submission 118*.

6 Anglicare SA, *Submission 2*.

7 See, eg, Lone Fathers Association of Australia, *Submission 99*; CatholicCare Sydney, *Submission 79*.

8 See, eg, National Legal Aid, *Submission 163*; Aboriginal Legal Service of Western Australia, *Submission 64*; Court Network, *Submission 49*.

9 See, eg, Inner City Legal Centre, *Submission 124*; Federation of Community Legal Centres Victoria, *Submission 65*.

understanding of the reformed family law system and the availability of supports for adults, children and young people experiencing separation.

2.8 Uniting suggested that a public education campaign could be used to ensure that people are familiar with where to go for assistance by marketing 'visible, and uniformly branded' first point of contact organisations that are able to provide families with the services they need.[10] This would be achieved by advertising the proposed Families Hubs, described in Chapter 4, as a community-based and visible point of entry to a range of legal and support services.

2.9 Submissions also identified a need to raise public awareness of the availability and benefits of alternative dispute resolution processes, noting that the community is less familiar with these processes than with the family courts.[11] Stakeholders also identified the importance of promoting awareness of the availability of practical information about the family law system, with submissions suggesting the current information access points are not well-known or visible to families.[12] Peninsula Community Legal Centre, for example, reported that clients have difficulty locating existing sources of information and suggested creating a centralised website with fact sheets, supported by an awareness raising campaign 'to alert people to its existence so that it is highly visible and well-known.'[13]

2.10 To ensure the national education and awareness campaign is accessible to and inclusive of the diverse range of Australian families, the ALRC proposes it be developed in consultation with relevant community organisations, including Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTIQ and disability organisations and be available in a range of languages and formats. This should include consideration of the content of the campaign, as well as the methods used for public release.

2.11 The need for education and awareness raising efforts to be culturally relevant and accessible to a range of communities in Australia was recognised in submissions.[14] The National LGBTI Health Alliance suggested the 'use of communication streams such as websites that speak to LGBTI families and communities' and the inclusion of images and language representing the diversity of family structures.[15] The Migrant Women's Lobby of South Australia suggested that a national education program on the family law system be developed to raise awareness among culturally and linguistically diverse communities, and suggested information could be provided through multi-cultural community radio stations and television programs.[16] The Australian

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10 Uniting, *Submission 162*.

11 See, eg, Centacare Family and Relationship Services (CFRS), *Submission 125*; Anglicare SA, *Submission 2*. See also MELCA, *Submission 155*; FMC Mediation and Counselling, *Submission 135*.

12 See, eg, Peninsula Community Legal Centre, *Submission 30*; Drummond Street Services, *Submission 20*.

13 Peninsula Community Legal Centre, *Submission 30*.

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

15 National LGBTI Health Alliance, *Submission 14*.

16 Migrant Women's Lobby Group of SA, *Submission 38*.

Association of Social Workers (AASW) also suggested that families in rural and regional areas could be reached through locally specific news media.[17]

2.12 The ALRC also proposes that the Australian Government work with state and territory governments to facilitate the promotion of the national family law education and awareness campaign through relevant agencies or bodies, including through the health and education systems. This draws on the public health approach of providing primary interventions through universal services already working with families and children, such as health services, education services and child care services.[18] The value of providing information and education to families through universal services was acknowledged in submissions.[19] Stakeholders recognised this as an important way of reaching families and children early,[20] as well as a valuable method for providing access to information for people experiencing family violence who may not be able to seek out information online or by attending services associated with separation without facing an elevated risk to their safety.[21]

2.13 Ongoing public education and awareness about the family law system and the roles and responsibilities of professionals and services within the system should be the responsibility of the Family Law Commission, as proposed in Chapter 12.

Referral relationships with services outside the family law system

Proposal 2–4 The Australian Government should work with state and territory governments to support the development of referral relationships to family law services, including the proposed Families Hubs (Proposals 4–1 to 4–4), from:

- universal services that work with children and families, such as schools, childcare facilities and health services; and
- first point of contact services for people who have experienced family violence, including state and territory specialist family violence services and state and territory police and child protection agencies.

2.14 The ALRC proposes that the Australian Government work with state and territory governments to support referrals to family law services, including the proposed Families Hubs,[22] from universal services that work with children and

17 Australian Association of Social Workers, *Submission 25*.
18 See Higgins, above n 1.
19 See, eg, M Brandon, *Submission 184*; CatholicCare Sydney, *Submission 79*; Drummond Street Services, *Submission 20*.
20 See, eg, CatholicCare Sydney, *Submission 79*; Drummond Street Services, *Submission 20*; Anglicare SA, *Submission 2*.
21 See, eg, National Legal Aid, *Submission 163*; Australian Association of Social Workers, *Submission 25*.
22 See ch 4.

families. These include schools, childcare facilities and health services. The proposal also envisages the development of referral relationships between family law services, including the Families Hubs, and services that work with people who have experienced family violence, including police, child protection agencies and specialist family violence services.

2.15 Public health literature recognises the value of using universal services as a referral or soft-entry point to engage families who may otherwise not access a support system until a point of crisis.[23] Higgins has argued that referrals from universal services to secondary supports are an important primary intervention in a public health approach, writing:

> Often the distinction between universal and targeted services is presented as a dichotomy; however there is scope for it to be seen as a continuum, with universal services being the platform for the ramping up or integration of services that would then be classified as targeted.[24]

2.16 The proposal seeks to enhance the likelihood of universal services referring clients with family law needs to family law services, including the proposed Families Hubs, as early as possible.

2.17 This proposal is supported by submissions that recognised the need to create referral relationships with services outside of the family law system that work with families and children.[25] Some stakeholders suggested that training or community legal education be provided to universal services to raise their understanding of the family law system and separation-related issues, so that workers can effectively 'issue spot' and make appropriate referrals into the system.[26] Submissions also suggested these referral relationships could be established by having workers from the family law system provide outreach and regular visits to universal services.[27] This might include service providers from the Families Hubs conducting information sessions or outreach in local schools and health services.

2.18 The potential of such relationships with universal services can be seen in the recent use of health justice partnerships. Health justice partnerships involve partnerships between health and legal assistance services, which bring lawyers into health settings to support health workers in identifying underlying legal issues and

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23 K Muir et al, 'National Evaluation (2004-2008) if the Stronger Families and Communities Strategy 2004-2009' (Occasional Paper No 24, Department of Families, Housing, Community Services and Indigenous Affairs (Cth), 2009); M O'Donnell, D Scott and F Stanley, 'Child Abuse and Neglect: Is it Time for a Public Health Approach? (2008) 32(4) *Australian and New Zealand Journal of Public Health* 325; D Scott, 'Towards a Public Health Model of Child Protection in Australia' (2006) 1(1) *Communities, Children and Families in Australia* 9, cited in Higgins, above n 1, 47.

24 Higgins, above n 1, 47.

25 See, eg, Uniting, *Submission 162*; Centacare Family and Relationship Services (CFRS), *Submission 125*.

26 See, eg, Interact Support Inc, *Submission 107*; Victoria Legal Aid, *Submission 61*; Women's Legal Services Australia, *Submission 45*.

27 See, eg, Women's Rights Group, Monash Law Student Society Just Leadership Program, *Submission 105*; Australian Association of Social Workers, *Submission 25*.

linking clients with legal assistance.[28] A number of submissions suggested health justice partnerships could be used effectively in the family law system.[29]

2.19 Health justice partnerships were created in recognition of the fact that people's legal issues can be caused by, or give rise to, health issues and that many people seek advice on these issues from health services rather than legal services.[30] Many health justice partnerships are being used to create referral relationships to legal advice services for people who have experienced family violence.[31]

2.20 The proposal also seeks to build referral relationships between family law services and first point of contact services for people experiencing family violence in the context of separation, including state and territory police and child protection agencies. The risk of family violence is heightened immediately before and after separation,[32] and police are often the first point of contact within the family violence system for people experiencing family violence.[33] As such, police may be well positioned to refer people experiencing separation in the context of family violence to family law services at an early stage.

2.21 Submissions suggested that police practice varies in relation to the provision of appropriate referrals in these circumstances. For example, the Benevolent Society submitted that:

> there is a lack of information about how to navigate the family law system provided by police or other first contact services after a domestic violence incident. Whilst some first responders may provide information on women's or community legal services, this is not guaranteed and victims of domestic or family violence may face significant delays in accessing any support or advice on the legal avenues available or required to protect themselves and their children. This is an issue of particular significance for women from culturally and linguistically diverse communities (CALD) or refugee backgrounds, who face additional language barriers to accessing assistance and are often unaware of their rights under Australian law and the services available to assist them.[34]

2.22 Family Life also recognised the potential for referral relationships between police and family relationships services to link people who are contemplating or experiencing separation in the context of family violence with appropriate services. The ALRC notes that Family Life is currently developing an information and training package to be provided to police in its local area, including information relevant to each stage of separation. It is envisaged that, when police are called to a situation where family law matters, such as access to children, are involved, they will provide

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28 Health Justice Australia, *Mapping a New Path: The Health Justice Landscape in Australia* (2017).

29 See, eg, Women's Legal Services Australia, *Submission 45*; Women's Law Centre of WA, *Submission 40*; Peninsula Community Legal Centre, *Submission 30*; Relationships Australia, *Submission 11*; Western Sydney CLC, *Submission 8*.

30 Health Justice Australia, above n 28, 2.

31 Ibid 11.

32 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol III, 1.

33 Ibid.

34 The Benevolent Society, *Submission 86*.

information about the services provided through Family Life's Family Relationship Centre (FRC).[35]

2.23 The newly established Victorian Orange Door Support and Safety Hubs, described in Chapter 4, represent another first point of contact service that could be enhanced through supported referral relationships with family law services. As these hubs conduct intake, screening and assessment of risks and needs, and make referrals for people affected by family violence, they may be well positioned to link people contemplating or experiencing separation with appropriate family law services, including the proposed Families Hubs (Chapter 4).

Family law system information package

Proposal 2–5 The Australian Government should convene a standing working group with representatives from government and non-government organisations from each state and territory to:

- advise on the development of a family law system information package to facilitate easy access for people to clear, consistent, legally sound and nationally endorsed information about the family law system; and
- review the information package on a regular basis to ensure that it remains up-to-date.

Proposal 2–6 The family law system information package should be tailored to take into account jurisdictional differences and should include information about:

- the legal framework for resolving parenting and property matters;
- the range of legal and support services available to help separating families and their children and how to access these services; and
- the different forums and processes for resolving disputes.

Proposal 2–7 The family law system information package should be accessible in a range of languages and formats, including:

- electronically via a central website;
- as printed material available at key entry points to the family law system and universal services; and
- through interactive means, including a national telephone helpline and a national web-chat service.

35 Family Life, *Submission 9*.

Proposal 2–8 The family law system information package should be:

- developed with reference to existing government and non-government information resources and services;
- developed in consultation with Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTIQ and disability organisations; and
- user-tested for accessibility by community groups including children and young people, Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse communities, LGBTIQ people and people with disability.

2.24 The ALRC proposes that the Australian Government convene a standing working group with representatives from government and non-government organisations from each state and territory to develop a family law system information package to facilitate easy access for people to clear, consistent, legally sound and nationally endorsed information about the family law system. To ensure that the information stays up-to-date, the working group should meet on a regular basis to review the information package and recommend necessary updates.

2.25 A family law system information package should provide people experiencing separation with a practical guide to the family law system. It should provide information to guide people wishing to resolve their post-separating parenting and property matters themselves, including clear information on the legal frameworks governing these matters. It may also include the improved guidance material proposed in Proposal 3–9 to assist families in formulating agreements for caring for children after separation that support children's wellbeing.

2.26 The package should provide information on the range of services that can assist separating families should they require support. This should include information that assists people to identify and access local services. It should also inform people of the range of processes and forums for resolving disputes, including the differences between them and what to expect if they engage with these processes. The package should be tailored to take into account jurisdictional differences and should be available in a range of community languages and formats.

2.27 The need for the information package to include developmentally and age appropriate information about family law processes and services for children and young people is discussed in Chapter 7.

2.28 A clearly identifiable information package, supported by promotion through the national education and awareness campaign proposed above, would enhance community understanding of the system and ensure people know where to go for information and advice.

2.29 The proposals address concerns raised in submissions about the need for a centralised source of accessible, authoritative and reliable information for people experiencing separation.[36] Stakeholders suggested that this information should help families to understand the law and processes for reaching post-separation agreements, answer problem-focused questions from a client perspective, and include simple information about what to expect, including timelines and step-by-step guides.[37] The provision of accessible information, including information about possible next steps, through a centralised online hub or portal was similarly recommended by the Law Commission of Ontario in its 2013 review of Ontario's family justice system.[38]

2.30 While information of the kind described above is available in the current family law system, submissions suggested that existing websites, particularly court websites, are difficult to navigate,[39] and that the vast array of possible sources of information can be confusing for the public as well as professionals.[40] Peninsula Community Legal Centre, for example, submitted that information about family law and available services is 'scattered in numerous, disparate locations and is difficult to navigate for many users of the family law system, particularly those who are disadvantaged and with complex needs.'[41] Some noted that, in the current system, people are sometimes seeking information about family law from unreliable sources, such as family, friends, unofficial websites and social media.[42]

2.31 There are existing Australian Government initiatives that provide Australian families with a centralised source of information. The Family Relationship Advice Line is a national telephone based service funded by the Commonwealth Attorney-General's Department that provides information, referrals and advice to families affected by separation or relationship issues.[43] In June 2018 the Australian Government also relaunched the Family Relationships Online website, which provides information about available services and dispute resolution options, including factsheets in community languages, and a 'find local help' feature to help link people with nearby

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36 See, eg, National Legal Aid, *Submission 163*; Inner City Legal Centre, *Submission 124*; Federation of Community Legal Centres Victoria, *Submission 65*; Peninsula Community Legal Centre, *Submission 30*; Law Council of Australia, *Submission 43*; Western Sydney CLC, *Submission 8*.

37 See, eg, Uniting, *Submission 162*; Women's Domestic Violence Court Advocacy Services NSW, *Submission 153*; Australian Psychological Society, *Submission 55*; Law Council of Australia, *Submission 43*.

38 Law Commission of Ontario, *Increasing Access to Family Justice through Comprehensive Entry Points and Inclusivity*, Final Report (2013).

39 See, eg, Anglicare WA, *Submission 152*; Victorian Aboriginal Legal Service, *Submission 101*; CatholicCare Sydney, *Submission 79*; Western Sydney CLC, *Submission 8*; Churches of Christ Care, *Submission 4*.

40 See, eg, M Brandon, *Submission 184*; Inner City Legal Centre, *Submission 124*; Family & Relationship Services Australia, *Submission 53*; Peninsula Community Legal Centre, *Submission 30*.

41 Peninsula Community Legal Centre, *Submission 30*.

42 National Legal Aid, *Submission 163*. See also Anglicare SA, *Submission 2*.

43 Australian Government, *Family Relationships Advice Line* <www.familyrelationships.gov.au /BrochuresandPublications/Pages/family-relationships-advice-line.aspx>. See also Relationships Australia Queensland and Culshaw Miller Lawyers, *Submission 146*.

services.[44] The National Enquiry Centre (NEC) also provides procedural information and assistance to people in relation to matters in the federal family courts. The NEC can be contacted by telephone, email or web-chat.[45]

2.32 There is also a range of other information services and resources that have been developed by legal assistance services and family relationships services. For example, legal aid commissions provide a range of information services to the public, and to specific groups within the community. This information is provided in many forms, including by telephone and online chat; in online and hard copy publications; on websites; through social media; through community legal education; and through training to non-legal service providers. National Legal Aid is also developing a resource, including a website, with information to help people navigate between the family law, family violence and child protection systems. The resource draws on information from each state and territory and aims to provide accurate legal and referral information.[46]

2.33 Submissions expressed support for the consolidation of existing information services and resources[47] and for regular monitoring and updating of information as needed.[48] The benefits of coordinating the development and delivery of information and education resources have been recognised by the Productivity Commission. These benefits include reducing duplication, improving quality control, making more efficient use of available resources and funding, and making it easier for people to find the information they are looking for.[49]

2.34 The ALRC proposes that the information package be developed with reference to existing government and non-government information resources and services, with the aim of consolidating and enhancing, rather than replacing, existing resources and services. Bringing together a working group of representatives from government and non-government organisations from each state and territory should allow a stock-take and assessment of existing information sources. In creating a centralised source of information about the family law system, selected resources can be updated to reflect reforms and a cooperative approach should eliminate unnecessary duplication. Convening meetings of the working group on a regular basis should ensure consistency and currency of the information provided to people experiencing separation.

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44 The Hon Christian Porter MP and the Hon Dr David Gillespie MP, 'Relaunch of Family Relationships Online' (Media Release, 15 June 2018). See Australian Government, *Family Relationships Online* <https://www.familyrelationships.gov.au/>.

45 Family Court of Australia, *Family Law National Enquiry Centre* <www.familycourt.gov.au/wps/wcm/connect/fcoaweb/contact-us/national-enquiry-centre/fl-nec>. See also Family Court of Australia, *Submission 68*.

46 National Legal Aid, *Submission 163*.

47 See, eg, Ibid; Women's Rights Group, Monash Law Student Society Just Leadership Program, *Submission 105*; Australian Psychological Society, *Submission 55*; Peninsula Community Legal Centre, *Submission 30*.

48 See, eg, Queensland Law Society, *Submission 221*; Relationships Australia, *Submission 11*.

49 Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 2, 2014) vol I, ch 5.

2.35 Noting stakeholder concerns about the accessibility of the family law system,[50] the ALRC proposes that the information package be developed in consultation with Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTIQ and disability organisations to ensure its accessibility for people from these groups. The accessibility of the information package should also be user-tested by different groups, including children and young people.

2.36 Developing the package in consultation with relevant community organisations should also promote the inclusion of culturally specific and relevant information. The importance of integrating culturally specific and relevant information into mainstream information services has been recognised in past reports. For example, the Family Law Council recommended developing 'roadmaps' of services (including relevant support services) for Aboriginal and Torres Strait Islander people and people from culturally and linguistically diverse communities, and integrating these roadmaps into mainstream information sources, including the Family Relationship Advice Line and Family Relationships Online.[51] The Productivity Commission also recognised that a consolidation of information and education resources should not result in a 'one-size-fits-all' approach, 'as it is unlikely that it would be effective given the diversity of issues, needs and capability across the population.'[52]

2.37 To further enhance accessibility, submissions suggested that information should be provided in a range of formats, including websites and through telephone lines and web-chats,[53] as well as in non-digital forms for people with limited digital literacy or access to computers or smart phones.[54] The need for information to be available in a range of languages, including Aboriginal languages, as well as easy English, Auslan videos, visual and audio formats was also emphasised.[55] Some submissions also recognised that the accessibility of information could be improved through user-testing.[56]

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50 See, eg, Women's Rights Group, Monash Law Student Society Just Leadership Program, *Submission 105*; CatholicCare Sydney, *Submission 79*; National Family Violence Prevention Legal Services Forum, *Submission 63*; Law Council of Australia, *Submission 43*; People with Disability Australia (PWDA), *Submission 10*.

51 Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (2012) rec 3; Family Law Council, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds* (2012) rec 3.

52 Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 2, 2014) vol I, 162.

53 See, eg, National Legal Aid, *Submission 163*; Inner City Legal Centre, *Submission 124*; Law Council of Australia, *Submission 43*.

54 See, eg, Relationships Australia, *Submission 11*; People with Disability Australia (PWDA), *Submission 10*.

55 See, eg, The Humanitarian Group, *Submission 82*; Aboriginal Legal Service of Western Australia, *Submission 64*; Women's Legal Services Australia, *Submission 45*; People with Disability Australia (PWDA), *Submission 10*; Churches of Christ Care, *Submission 4*; TASC National, *Submission 1*.

56 See, eg, Springvale Monash Legal Service, *Submission 161*; Koori Caucus Working Group on Family Violence, *Submission 50*.

3. Simpler and Clearer Legislation

Contents

Summary

3.1 The *Family Law Act 1975* (Cth), and its subordinate legislation, have become complex and difficult to use over many years. Submissions indicated that this is a barrier to access to justice for unrepresented litigants, may lead to additional costs and delay, and obscures the principal policy goals of the legislation, particularly the focus on the best interests of the child as the paramount consideration in decisions about parenting arrangements.

3.2 To address this, this chapter proposes general principles that should be applied to comprehensively redraft this legislation, to improve its usability for all readers of the legislation. Further proposals are also made for improvements to family court forms, to improve their ease of use.

3.3 The chapter then focuses on pt VII of the *Family Law Act*, which provides a framework for determining parenting arrangements after separation. Part VII provides the family courts with a wide power to make such orders about children's care and living arrangements, parental responsibility, and other matters relevant to a child's welfare ('parenting orders') as it thinks proper. In making parenting orders, pt VII provides that the best interests of the child must be the paramount consideration. However, the current law imposes a complex set of requirements (sometimes described

as a 'pathway') on the way the court is to determine what is most likely to be in the child's best interests. The ALRC proposes a number of changes to make the rules about parenting arrangements clearer, and less likely to obscure the importance of the safety and best interests of the child. These include clearer principles to be applied in interpreting the law, simplified factors to be taken into account in determining what arrangements are most likely to promote a child's safety and best interests, and clarifying rules about parental responsibility and when a new application may be made to the court.

3.4 Finally, this chapter examines the provisions of the *Family Law Act* that deal with how property and financial issues are finalised following relationship breakdown. This includes provisions for division of property, debts, and superannuation, provisions for agreements about how these matters will be dealt with upon separation (binding financial agreements, known as BFAs), and provisions in relation to spousal maintenance. A range of amendments would assist in simplifying and clarifying these provisions. Better responses to family violence are a clear need across all of these areas. The ALRC makes a number of proposals to improve how the *Family Law Act*'s property and financial provisions deal with this issue.

Simplifying family law legislation

Proposal 3–1 The *Family Law Act 1975* (Cth) and its subordinate legislation should be comprehensively redrafted with the aim of simplification and assisting readability, by:

- simplifying provisions to the greatest extent possible;
- restructuring legislation to assist readability, for example by placing the most important substantive provisions as early as possible;
- redrafting the Act, Regulations and Rules in ordinary English, by modernising language, and as far as possible removing terms that are unlikely to be understood by general readers, such as legal Latin, archaisms, and unnecessarily technical terms;
- user testing key provisions for reader comprehension during the drafting process, for example, through focus groups, to ensure that the legislation is understood as intended;
- removing or rationalising overlapping or duplicative provisions as far as possible;
- removing provisions establishing the Family Court of Australia and the Australian Institute of Family Studies to separate legislation;
- removing provisions defining parentage for the purposes of Commonwealth law to separate legislation; and

- considering what provisions should be contained in subordinate legislation rather than the Act.

3.5 The family law system, including its legal frameworks, should be designed to be as accessible and comprehensible as possible to all families who need to use it. Submissions have clearly indicated that the *Family Law Act* is currently not meeting this need.

3.6 The Act, when introduced, was a very simple piece of legislation, and was generally easy to follow. It is now more than 600 pages long. A common theme in the submissions to this Inquiry concerned the need for the Act to be simplified.

3.7 The submissions and academic commentary suggest that the current complexity of the legislation creates difficulties for people seeking to understand the law, contributes to community misunderstanding of key elements of the law, and poses a significant obstacle to effective participation in court proceedings for the growing number of litigants who are not legally represented.

3.8 Previous reports have also shown that complex legislation is a contributing factor to court delays, and that making decisions in compliance with the provisions of pt VII of the *Family Law Act*, in particular, has been associated with productivity concerns. State magistrates' courts have also indicated that the complexity of the *Family Law Act* affects their capacity to exercise their family law jurisdiction.[1]

3.9 The Act should be comprehensively redrafted, with clarity, coherence and comprehensibility as primary goals, with the key areas of focus including:

- improving its drafting of the Act;
- improving its comprehensibility;
- restructuring and rationalising the Act to make it easier to quickly locate the provisions that apply to particular circumstances;
- narrowing the scope of the Act to core issues; and
- making better use of subordinate legislation.

Improving the drafting of the *Family Law Act*

3.10 The Act now regulates a significant range of matters that were not dealt with in detail in the original Act, including obligations of professionals, detailed procedural requirements for applications, and elaborate provisions about how courts may make orders about enforcement. It also provides a detailed pathway that must be followed in

1 For example, in relation to property jurisdiction, see Magistrates' Court of Victoria, Submission No 56 to House 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*.

making parenting decisions.[2] The complexity of the Act will, in part, reflect the range of subject matters included in it and how prescriptive its provisions are.

3.11 In redrafting the Act, a balance must be struck between providing useful guidance on the application of the law and being overly prescriptive. Opportunities for simplification include:

- considering whether particular provisions need to be in legislation, or can be dealt with in some other way, such as through information materials, operational policies, or funding agreements;
- moving detailed operational matters to delegated legislation, or dealing with them by training or the provision of information;
- removal of unused provisions, if they are no longer useful;[3]
- where a provision in the *Family Law Act* is required, considering whether a less detailed and more principles-based approach could be adopted to the drafting of the provision.

3.12 The goal should be to ensure that families and unrepresented litigants can easily understand the legal framework that applies to their situation, while allowing professionals to find detail in appropriate locations.

Restructuring and rationalising the legislation

3.13 The fundamental structure of the Act has not changed significantly since its introduction. However, the increased size of the Act and scope of matters regulated by it has made it increasingly difficult to navigate and to find the provisions that apply to a particular circumstance.

3.14 For example, in pt VII of the Act, it is frequently necessary to 'jump around' the legislation, as the provisions are not presented in a logical order that assists readers to understand the decision making pathway. Further, the provisions that families are most likely to need (the children's care arrangements provisions) are mid-way through a very lengthy Act.

3.15 Many submissions supported changes to the Act to support greater accessibility, including for self-represented litigants.[4] For example, in commenting on the complexity of the legislation and procedures, one stakeholder commented that the

> current Australian family law is suitable and accessible for use only by lawyers, and an utterly alien and estranging environment for the balance of the people of Australia that it ostensibly serves.[5]

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

3 For example, anecdotally, substantial parts of div 12A of pt VII are not used by judicial officers due to resourcing constraints, or a preference not to utilise the discretionary elements of these provisions.

4 See, eg, Queensland Law Society, *Submission 221*.

5 Marrickville Legal Centre, *Submission 137*.

3.16 A restructuring of the Act should consider:

- placing the provisions that readers are most likely to require close to the front of the Act, and placing the most technical or most rarely used provisions towards the end;
- presenting the key parts of the decision making pathways for the subjects covered by the Act in a clear narrative order, to assist the reader to understand how decision-makers analyse what decisions to make;
- grouping related provisions together wherever possible (for example, provisions about parental responsibility should be grouped together); and
- renumbering the Act, and adopting a numbering scheme that can be easily adapted in any future amendments to the Act without becoming illogical or confusing.

3.17 The arrangement of material in the Act sometimes involves significant duplication and overlap. For example:

- separate enforcement provisions are provided for pt VII, and for the rest of the Act;
- separate injunction powers are provided for pt VII, and for the rest of the Act;
- separate jurisdictional provisions for courts apply for pt VII, and for the rest of the Act, and are structured very differently;
- provisions such as the objects of pt VII substantially overlap with the best interests principles in s 60CC, but in slightly different terms;
- substantively similar, but separate, property regimes exist for married and de facto couples, providing almost identical rights, but with provisions ordered and drafted differently;[6]

Comprehensibility of the legislation

3.18 The Act has a wide range of users, from judicial officers to people who will never litigate or seek legal advice, but who nevertheless want to understand the legal principles that apply to assist them to discuss their separation arrangements with their former partner. The current drafting of the Act requires a very high degree of English literacy to understand it, with some provisions requiring a significant familiarity with legal concepts.

6 This duplication was noted, for example, by: Family Court of Australia, *Submission 68*; Law Council of Australia, *Submission 43*.

3.19 Changes should be made to the Act to make it easier for a wider range of readers to understand.[7] These include:

- redrafting the Act, Regulations and Rules in ordinary English and modernising language; and
- removing legal Latin, archaisms, and terms that are unlikely to be understood by general readers of the legislation (for example, 'subpoena' and 'affidavit').

3.20 Some changes in terminology, such as removing the terms 'subpoena' and 'affidavit' are likely to take some time for those familiar with the Act to become accustomed to and may require lengthier terms (such as 'witness statement' instead of 'affidavit', and 'order to produce information' instead of 'subpoena'). However, these are not compelling reasons to continue a practice that is alienating for many people.

3.21 One theme that arose from submissions was that certain provisions of the Act are frequently misunderstood by readers. For example, some stakeholders noted that the presumption of equal shared parental responsibility is commonly misunderstood to be a presumption of equal time, rather than a presumption of equal decision making responsibility.[8] In drafting new provisions, this potential for misunderstanding should be addressed by testing reader comprehension during the drafting process, for example, through focus groups, to ensure that the legislation is understood as intended.

Narrowing the scope of the Act

3.22 The Act regulates a number of matters that would be best dealt with in other legislation. Moving these provisions to separate legislation would substantially reduce the length of the Act, and be more in line with normal practice. Two particularly clear examples are provided by the provisions establishing the Family Court of Australia (Family Court), and the provisions establishing the Australian Institute of Family Studies (AIFS). While such matters have a logical connection with the Act, they will rarely be relevant to people consulting the Act in relation to family law problems.

3.23 The ALRC also proposes removing provisions defining parentage for the purposes of Commonwealth laws to a separate *Parentage Act*. The *Family Law Act* contains a number of provisions in relation to parentage, although the term 'parent' is not the subject of extensive definition.[9] These include a set of presumptions as to parentage,[10] and provisions relating to evidence of parentage, such as orders for the carrying out of parentage testing procedures, and provision for the court to make a

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7 See, eg, Grandparents Victoria, *Submission 138*; Marrickville Legal Centre, *Submission 137*.

8 See, eg, R Alexander, *Submission 131*.

9 Section 4 of the Act provides only that, when used in children's matters in relation to a child who has been adopted, 'parent' means an adoptive parent of the child. The Family Court has considered the meaning of 'parent' for the purposes of the Family Law Act, and interpreted it to mean a 'biological' or 'natural' parent: *Tobin & Tobin* [1999] Family Court of Australia 446 (13 May 1999) [42]–[45]; *Donnell & Dovey* [2010] FamCAFC 15 (10 February 2010) [92].

10 *Family Law Act 1975* (Cth) pt VII div 12 subdiv D.

declaration of parentage that is conclusive evidence of parentage for the purposes of Commonwealth laws.[11]

3.24 The Act also contains a set of parentage provisions—expressed as when a child will be a child of a person—dealing with situations including when a child is born as a result of artificial conception procedures and under surrogacy arrangements.[12] The sections of the Act dealing with artificial conception procedures and surrogacy arrangements involve a complex array of provisions that operate to ascribe parentage either through satisfaction of conditions set out in the Act or as a result of recognising the effect of prescribed state and territory legislation. Provisions in relation to artificial conception procedures in particular have been criticised for the complexity of their drafting.[13]

3.25 Moving the parentage provisions to separate legislation offers an opportunity to provide a consolidated and coherent approach to these provisions, and to draft them more simply and consistently. It will also offer the opportunity to consider the substantive content of these provisions in relation to:

- consistency with state and territory laws that govern parentage for the purposes of state and territory laws;[14]
- recognition of parentage in non-nuclear family forms, including the recognition of single and multi-parent families and parents under Aboriginal or Torres Strait Islander traditions and customs;[15] and
- recognition of parentage of children born under surrogacy arrangements that cannot be the subject of a parentage order under state and territory surrogacy legislation.[16]

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11 Ibid pt VII div 12 subdiv E.

12 Ibid pt VII div 1 subdiv D.

13 *Aldridge & Keaton* [2009] FamCAFC 229 (22 December 2009) [22]; Jenni Millbank, 'Resolving the Dilemma of Legal Parentage for Australians Engaged in International Surrogacy' (2013) 27 *Australian Journal of Family Law* 135.

14 The main state and territory laws related to parentage are included in: *Parentage Act 2004* (ACT); *Status of Children Act 1996* (NSW); *Status of Children Act* (NT); *Status of Children Act 1978* (Qld); *Family Relationships Act* 1975 (SA); *Status of Children Act 1974* (Vic); *Family Court Act 1997* (WA).

15 A number of submissions raised questions about the fitness for purpose of existing parentage laws in enabling recognition of the diversity of family forms: see, eg, Australian Human Rights Commission, *Submission 217*; H Robert, *Submission 173*; Rainbow Families Victoria, *Submission 106*; F Kelly, *Submission 60*; Drummond Street Services, *Submission 20*; ATSILS Qld, *Submission 42*; Women's Legal Services Australia, *Submission 45*.

16 This will be the case for children born as a result of commercial surrogacy arrangements. For submissions raising parentage in surrogacy arrangements, see, eg, Surrogacy Australia, *Submission 229*; Australian Human Rights Commission, *Submission 217*; Rainbow Families NSW, *Submission 212*; Australian Dispute Resolution Advisory Council Inc (ADRAC), *Submission 12*. The regulation of surrogacy has previously been the subject of calls for a comprehensive inquiry: see Family Law Council, *Report on Parentage and the Family Law Act* (2013) rec 17; House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Surrogacy Matters: Inquiry into the Regulatory and Legislative Aspects of International and Domestic Surrogacy Arrangements* (2016) rec 3.

Making better use of delegated legislation

3.26 One feature of the Act is that it contains significant amounts of detail that might be better contained in delegated legislation. For example, various provisions (such as pt IIIA) impose obligations on professionals and other system participants to explain certain matters. It would reduce the length of the Act, and provide greater flexibility, if these obligations were dealt with in delegated legislation or through other mechanisms such as accreditation requirements.

Forms

Proposal 3–2 Family law court forms should be comprehensively reviewed to improve usability, including through:

- only gathering information that is absolutely required, and simplifying how information is gathered (eg through use of check-boxes);
- using smart forms, to pre-populate information from previously completed forms (such as name and address), ask contextual questions based on previous answers, and provide contextual help within the form;
- using real-time help functions, such as a live-chat functionality, and links to audio-visual help;
- providing collaborative functions in circumstances where forms require information from both parties to allow them both to easily enter information;
- ensuring that all forms are drafted in ordinary English and where possible providing alternative forms in Easy English to assist litigants with limited literacy or English skills;
- providing a paper form for use by individuals without access to technology; and
- providing a single set of forms for all courts exercising jurisdiction under the *Family Law Act 1975* (Cth).

3.27 A further barrier for self-represented litigants is that many of the current court forms are overly complex and difficult to understand and complete. For example, the Family Law Practitioners Association of Tasmania described the Financial Statement as an 'unnecessary complicated document' which 'does [not] in any way mirror the information that is usually required'.[17] This creates difficulties for self-represented litigants,[18] increases time and expense in completing the forms, places a heavier burden

17 Family Law Practitioners Association of Tasmania, *Submission 69*. The Law Council has also proposed an updated Financial Statement: Law Council of Australia, *Submission 43*.

18 See, eg, Caxton Legal Centre, *Submission 51*.

on duty lawyer services, and may lead to parties not entering information completely or correctly, due to confusion about what the form requires.

3.28 Many submissions commented on this issue.[19] The difficulties faced by parties in completing forms has been noted for some time.[20] The Law Council of Australia observed that there is a need for 'the creation of a single interface for the transmission/input of client data' and outlined a number of benefits of an online system for collecting information:

> The online interface would be written in plain English (and available in languages other than English and also audio-enabled to meet the needs of the visually impaired and clients with low literacy). An online interface would obviate the current problem of forms becoming superseded and allow additional questions or data requirements to be added by the court instantaneously. The online interface would obviate the problem of clients having to locate resources to print forms, photocopy forms, scan and upload paper forms and post or physically file forms. It would minimize or obviate the need for service and proof of service. It would obviate or significantly decrease the need for clients to interpret the type or form of documents or information required. The interface could allow witnesses in remote locations to input evidence with ease. An electronic interface would enable the oral transmission and recording of information from the client/witness to alleviate difficulties for the linguistically diverse and literacy poor. Documents and exhibits to be put into evidence would be uploaded and would be given an identifier (avoiding the need for photocopying, document bundles, pagination and annexure markings). Provision could easily be made for the swearing or affirmation of this evidence.[21]

3.29 The ALRC proposes that family court forms should be comprehensively reviewed, and better use of technology deployed to improve their usability.

3.30 Sophisticated use of electronic forms has many advantages, including a simpler, cheaper and better experience for users. Electronic forms may also improve the accuracy of data entered by users if people are better able to understand them, and may provide more efficient and accurate recording of data if forms are integrated into case-management systems.

3.31 However, there will be people who do not have easy access to, or skills with, technology to use electronic forms. Paper forms should remain available to assist people in this position.[22]

3.32 As with the legislation, it would be highly desirable for forms to be user tested before they are finalised to ensure that they meet their goal of enhanced ease of use.

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19 See, eg, National Family Violence Prevention Legal Services Forum, *Submission 63*.

20 Simplification of forms is, for example, part of the Women's Legal Services Australia *Safety First in Family Law* plan: Women's Legal Services Australia, *Safety First in Family Law: Five Steps to Creating a Family Law System That Keeps Women and Children Safe* (2016) <www.wlsa.org.au/campaigns/safety_first_in_family_law>.

21 Law Council of Australia, *Submission 43*.

22 See, eg, Women's Law Centre of WA, *Submission 40*; Community Legal Centres NSW, *Submission 34*.

Parenting arrangements

3.33 Part VII of the *Family Law Act* provides a framework for determining parenting arrangements after separation. Part VII provides the family courts with a wide power to make such orders about children's care and living arrangements, parental responsibility, and other matters relevant to a child's welfare ('parenting orders') as it thinks proper. In making parenting orders, pt VII provides that the best interests of the child must be the paramount consideration.

3.34 However, the current law imposes a complex pathway for decision making by the courts when determining what arrangements will best promote the child's best interests. The ALRC proposes that a number of changes be made to make this pathway simpler and clearer for families.

Simplifying decision making about parenting arrangements

Proposal 3–3 The principle (currently set out in s 60CA of the *Family Law Act 1975* (Cth)) that the child's best interests must be the paramount consideration in making decisions about children should be retained but amended to refer to 'safety and best interests'.

Proposal 3–4 The objects and principles underlying pt VII of the *Family Law Act 1975* (Cth) set out in s 60B should be amended to assist the interpretation of the provisions governing parenting arrangements as follows:

- arrangements for children should be designed to advance the child's safety and best interests;
- arrangements for children should not expose children or their carers to abuse or family violence or otherwise impair their safety;
- children should be supported to maintain relationships with parents and other people who are significant in their lives where maintaining a relationship does not expose them to abuse, family violence or harmful levels of ongoing conflict;
- decisions about children should support their human rights as set out in the *Convention on the Rights of the Child* and the *Convention on the Rights of Persons with Disabilities*; and
- decisions about the care of an Aboriginal or Torres Strait Islander child should support the child's right to maintain and develop the child's cultural identity, including the right to:

  (a) maintain a connection with family, community, culture and country; and

(b) have the support, opportunity and encouragement necessary to participate in that culture, consistent with the child's age and developmental level and the child's views, and to develop a positive appreciation of that culture.

Proposal 3–5 The guidance in the *Family Law Act 1975* (Cth) for determining the arrangements that best promote the child's safety and best interests (currently set out mainly in s 60CC), should be simplified to provide that the following matters must be considered:

- any relevant views expressed by the child;
- whether particular arrangements are safe for the child and the child's carers, including safety from family violence or abuse;
- the developmental, psychological and emotional needs of the child;
- the capacity of each proposed carer of the child to provide for the developmental, psychological and emotional needs of the child;
- the benefit to a child of being able to maintain relationships that are significant to them, including relationships with their parents, where it is safe to do so; and
- anything else that is relevant to the particular circumstances of the child.

Proposal 3–6 The *Family Law Act 1975* (Cth) should provide that, in determining what arrangements best promote the safety and best interests of an Aboriginal or Torres Strait Islander child, the maintenance of the child's connection to their family, community, culture and country must be considered.

Proposal 3–7 The decision making framework for parenting arrangements in pt VII of the *Family Law Act 1975* (Cth) should be further clarified by:

- replacing the term 'parental responsibility' with a more easily understood term, such as 'decision making responsibility'; and
- making it clear that in determining what arrangements best promote the child's safety and best interests, decision makers must consider what arrangements would be best for each child in their particular circumstances.

Question 3–1 How should confusion about what matters require consultation between parents be resolved?

3.35 Part VII of the *Family Law Act* provides a framework for determining parenting arrangements after separation, which includes a wide power for the court to make such

parenting orders as it thinks proper.[23] The best interests of the child must be the paramount consideration in making decisions about children,[24] but the Act provides a number of steps that a court must go through in order to apply this principle and reach a decision.

3.36 These steps include the following:

- The court must consider each of the relevant matters in a lengthy checklist of factors (comprising two 'primary' considerations, about the child's safety and meaningful relationships with both parents, and 13 additional factors) and make findings about them if possible.[25]
- The court must decide whether the legislative presumption of equal shared parental responsibility applies or is rebutted.[26]
- If the court makes or proposes to make an order for equal shared parental responsibility, it must consider whether the child spending equal time with each of the parents would be in the best interests of the child, and whether it would be reasonably practicable. If it is, the court must then consider making an order that the child spend equal time with each of the parents.
- If the court does not make an order for equal time, the court must then consider whether the child spending 'substantial and significant time' with each parent would be in the child's best interests, and whether it is 'reasonably practicable'. If it is, the court must consider making such an order.
- If neither equal time nor substantial and significant time is considered to be in the child's best interests, make such orders as the court decides are in the best interests of the child.[27]

3.37 Submissions to this Inquiry expressed a number of concerns about this pathway, including that:

- it is complex and repetitive,[28] which has increased costs for clients and has created productivity issues for the courts;
- it has created community confusion by having a presumption of equal shared parental responsibility, which is commonly misunderstood as being a presumption of equal shared time;[29]

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23 *Family Law Act 1975* (Cth) s 64D.
24 Ibid s 60CA.
25 Ibid s 60CC.
26 Ibid s 61DA.
27 Ibid s 65DAA; *Goode & Goode* [2006] FamCA 1346 (15 December 2006); *Marvel & Marvel* [2010] FamCAFC 101. However, the pathway does not necessarily need to be analysed in this order: *Starr & Duggan* [2009] FamCAFC 115, [35].
28 See, eg, CatholicCare Victoria Tasmania (CCVT), *Submission 115*.
29 See, eg, Queensland Law Society, *Submission 221*; Hunter Community Legal Centre, *Submission 81*.

- the requirement that parents must jointly make decisions provides scope for conflict in the absence of clear information about which decisions do not require consultation;[30]
- insufficient weight is given to the views of the child in decision making;[31] and
- greater emphasis should be placed on ensuring the child's safety.[32]

3.38 For example, the Law Council of Australia (Law Council) submitted that:

> The 'legislative pathway' currently mandated under the Act results in the family courts needing to undertake a significant number of steps before reaching a consideration of the subject child's best interests. It is best interests that ought to be the primary focus of any dispute under the Act and the route to determining them should be direct, rather than one that is convoluted, misunderstood by the public, and based on a rebuttable presumption.[33]

3.39 Submissions also emphasised the need to make safety an overriding consideration in all family law decision making.[34]

The paramount importance of the child's best interests

3.40 Consistent with the submissions, the ALRC considers that the principle that the best interests of the child must be paramount ('the paramountcy principle') should be retained as the overriding consideration in making decisions about children. This underpins the Act's emphasis on children's needs, rather than parents' rights. It is also consistent with Australia's obligations under the *Convention on the Rights of the Child*, which requires the best interests of the child to be a primary consideration in any proceedings regarding the child.[35] There was widespread support in submissions for maintaining the child focus of the Act, and for retention of the paramountcy principle.[36] For example, Relationships Australia submitted that 'above all, … the well-being of children [should] remain ... paramount and, as a corollary, will prevail over the rights and interests of adults'.[37]

3.41 However, as noted in Chapter 1, the family law system has increasingly over time come to deal with families with complex issues, including issues that represent a risk to the child's safety. As a result, safety is now a key consideration in much family law decision making.[38] This importance should be reflected in the Act by including safety as a part of the paramountcy principle. The elevation of safety to be an integral

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30 See, eg, Aboriginal Legal Service of Western Australia, *Submission 64*.
31 See, eg, Centre for Excellence in Child and Family Welfare, *Submission 102*.
32 See, eg, Queensland Family and Child Commission, *Submission 16*.
33 Law Council of Australia, *Submission 43*.
34 See, eg, Gowland Legal, *Submission 141*.
35 *Convention on the Rights of the Child*, opened for signature 20 December 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 3.1.
36 See, eg, Victoria Legal Aid, *Submission 61*.
37 Relationships Australia, *Submission 11*.
38 For submissions on safety as the paramount consideration see, eg, Centacare Family and Relationship Services (CFRS), *Submission 125*.

aspect of the paramountcy principle is consistent with many submissions to this Inquiry, which emphasised the fundamental importance of this issue.[39]

3.42 At present, the need to protect children from harm is one of the two 'primary considerations' in determining the best interests of the child. This proposal accordingly may not significantly affect the reasoning that should be applied in deciding litigated parenting disputes. However, particularly outside of the court context, the amendment would send a strong message to families who rely on the legislation about the centrality of safety to a child's best interests, and its fundamental importance as a consideration in all matters relating to parenting arrangements.

Providing clear principles to assist with interpretation

3.43 To assist with interpretation, legislation commonly includes objects provisions. These may be used by courts and other users of the legislation to assist them to resolve ambiguities or other interpretive difficulties in line with the intentions of Parliament.[40] There are no objects for the *Family Law Act* as a whole, although principles for decision making under the Act are provided for in s 43. However, for pt VII, s 60B of the Act provides both 'objects' for pt VII, and what are said to be 'principles' underlying those objects.

3.44 Section 60B substantially overlaps with s 60CC (the best interests factors), but is inconsistent in a number of respects. As noted by Professor Richard Chisholm, s 60B confuses rather than clarifies interpretation, and has had little practical effect.[41]

3.45 It is important that the Act makes a clear, concise, and coherent statement of the purpose and objectives of the parenting arrangements provisions. The ALRC proposes that s 60B be replaced by a new principles section, which sets out key principles that underlie all of the provisions about parenting arrangements. The purposes of this provision should be:

- to clearly identify to readers of the legislation the values and approach that are embodied in the legislation; and
- to assist with legislative interpretation of provisions about parenting arrangements.

3.46 The proposed principles are that:

- arrangements for children should be designed to advance the child's safety and best interests;
- arrangements for children should not expose children or their carers to abuse or family violence or otherwise impair their safety;

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39 See, eg, Australian Paralegal Foundation *Submission 228*; Women's Legal Service Queensland, *Submission 158*; Federation of Community Legal Centres Victoria, *Submission 65*.

40 *Acts Interpretation Act 1901* (Cth) s 15AA.

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

- the potential benefits to the child of relationships with parents and other people who are significant in their lives should be recognised, provided that maintaining a relationship does not expose them to abuse, family violence or harmful levels of continuing conflict;
- decisions about children should support their human rights as set out in the *Convention on the Rights of the Child* and the *Convention on the Rights of Persons with Disabilities*;
- decisions about Aboriginal and Torres Strait Islander children should support their right to maintain and develop their cultural identity, including the right:
    - to maintain a connection with family, community, culture and country; and
    - to have the support, opportunity and encouragement necessary to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views, and to develop a positive appreciation of that culture.

Simplifying and clarifying the decision making pathway

3.47 It is critical that legislative guidance about how decisions are made about the care of children is as simple and easy to understand as possible. This is particularly important to:

- assist people without legal representation to understand how the court will make decisions about children, and their obligations under the Act;
- avoid misunderstandings about what the guidance contained in the Act means;
- reduce the length and complexity of legal documents required for proceedings, thereby reducing costs to litigants, and reducing delay; and
- reduce the length and complexity of judgments in parenting cases and enhance their comprehensibility for litigants.

3.48 Submissions and academic commentators have criticised the complexity of the decision making framework.[42] These include concerns about:

- confusion about the overlap and contradictions between the principles in s 60B and the best interests factors in s 60CC;[43]
- the lengthy and complex list of factors to be considered in determining a child's best interests in s 60CC;[44]
- the confusion caused by the distinction between 'primary' and 'additional' best interests factors in s 60CC;[45] and

42 See, eg, Z Rathus, *Submission 92*.
43 See, eg, Victorian Women Lawyers, *Submission 84*.
44 Australian Dispute Resolution Advisory Council Inc (ADRAC), *Submission 12*.

- the requirement to assess a child's best interests multiple times (in the context of the presumption of equal shared care, the provisions for care-time arrangements, and generally in terms of the proposed arrangements).[46]

3.49 The ALRC proposes that this decision making framework should be replaced with a simpler framework that:

- emphasises the paramount importance of the safety and best interests of the child;
- provides core factors to be applied in determining what is most consistent with a child's safety and best interests, while recognising that other factors may be relevant to a particular case; and
- emphasises that parenting arrangements should be shaped around the circumstances of the particular child.

3.50 It is important that parents and carers and other decision makers about children are provided with appropriate guidance about what arrangements may be most consistent with the safety and best interests of children. Proposal 3–9 is that evidence-based explanatory material should be developed to assist parents and carers in considering what arrangements might best support the child's safety and best interests in particular situations.

3.51 The approach the ALRC proposes would be less complex and prescriptive about the steps to be taken in determining what is most likely to be consistent with the safety and best interests of the child. However, judicial officers will still be required to produce adequate reasons for their decision, which will allow scrutiny and appeal of decisions where clear errors have been made, such as failure to take into account a relevant consideration, taking into account an irrelevant consideration, or an error of law. In practical terms, a simplification of the decision making framework may make it easier for judicial officers to focus on explaining to parties why they have made a particular decision to parties, rather than ensuring that their judgment is appeal-proof by addressing all elements of the decision making pathway.

Simplifying the best interests factors

3.52 A key opportunity for simplification is provided by the best interests factors in s 60CC. When the *Family Law Act* was enacted, it provided very limited guidance on how the best interests of the child were to be determined. Over successive amendments, a list of factors was inserted, expanded, and eventually restructured into separate lists of 'primary' and 'additional' considerations.

3.53 Section 60CC currently provides the factors that a court must take into account in determining best interests, comprising:

- two 'primary' considerations: the benefit to the child of a meaningful relationship with both parents, and the need to protect the child from physical or

45 See, eg, Relationships Australia, *Submission 11*.
46 See, eg, Victorian Women Lawyers, *Submission 84*.

psychological harm from being subjected to, or exposed to, abuse, neglect or family violence;

- thirteen additional considerations; and
- any other matter that is relevant.

3.54 Although there is support for the Act providing factors to be considered in determining children's best interests,[47] academic commentary and submissions have a made a number of criticisms of the approach of s 60CC. One criticism is of the division of the best interests factors into a hierarchy of primary and additional factors. The ACT LGBTIQ Ministerial Advisory Council argued that:

> This division is not supported by international human rights law which recognises that all the rights of the child, as outlined in the *Convention on the Rights of the Child*, together constitute the best interests of the child and must be treated holistically.[48]

3.55 Professor Richard Chisholm has similarly argued that it is 'unhelpful for the law to speak in terms of the twin pillars [primary considerations]. All the circumstances must be considered and evaluated in each case'.[49]

3.56 Some other submissions recommended that other considerations, such as connection to culture for Aboriginal and Torres Strait Islander children, should be elevated to primary considerations.[50] AIFS also pointed to evidence that despite s 60CC(2A), which provides that greater weight must be given to the protection from harm than to a meaningful relationship with both parents, lawyers and non-legal professionals are not confident that appropriate weight is being given to protection from harm, and analysis of judgments shows that the provision has limited effect.[51]

3.57 A further issue with s 60CC is the number of factors that are explicitly stated as potentially relevant. Professor Chisholm has previously proposed a redraft that would reduce this list from 15 to 10 factors.[52]

3.58 The sheer number of factors to be considered is confusing, increases legal costs, and may not necessarily capture the issues that are particularly relevant to a case. The ALRC considers that it is not possible or desirable to capture all of the myriad circumstances that may be relevant to a decision about parenting arrangements in the legislation. The existing list of factors identifies issues that may be relevant but does not provide any useful context that would assist readers of the Act to apply them to their own particular circumstances. Given this, the ALRC proposes that the approach to providing guidance on determining what is most consistent with the safety and best interests of a child should be reconfigured by providing only a core list of

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47 See, eg, Victoria Legal Aid, *Submission 61*.
48 ACT LGBTIQ Ministerial Advisory Council, *Submission 193*.
49 Chisholm, above n 41, 14.
50 National Family Violence Prevention Legal Services Forum, *Submission 63*.
51 Australian Institute of Family Studies, *Submission 206*.
52 Chisholm, above n 38, 4–5. Many submissions supported Professor Chisholm's suggested amendments, eg, Marrickville Legal Centre, Submission 137; Relationships Australia, Submission 11; Family Court of Australia, Submission 68; Queensland Law Society, Submission 221.

considerations that are likely to be relevant to a large majority of matters and providing much greater guidance for parents and others outside of legislation, to provide them with more meaningful assistance in working out what arrangements to put in place (see Proposal 3–9).

3.59 The ALRC proposes that six factors should be retained in a reconfigured s 60CC:

- any relevant views expressed by the child;
- whether particular arrangements are safe for the child and the child's carers, including safety from family violence or abuse;
- the developmental, psychological and emotional needs of the child;
- the capacity of each proposed carer for the child to provide for the developmental, psychological and emotional needs of the child;
- the benefit to a child of being able to maintain relationships with parents and other people who are significant to them, where it is safe to do so;
- anything else that is relevant to the particular circumstances of the child.

3.60 The requirement to consider any views expressed by the child is included as the first consideration because of the fundamental importance of the child's voice being heard (see Chapter 7).

3.61 Safety for the child, and for the child's carers, has been included as the second consideration given the evidence of the high degree of risk factors that exist in family law cases, particularly in cases where parents use more formal pathways to resolve their dispute,[53] and the strong calls in submissions for safety to be a priority of the family law system.

3.62 The developmental, psychological and emotional needs of the child are likely to be relevant in a very large proportion of cases, as is the capacity of proposed carers to provide for these needs, and the maintenance of significant relationships.

3.63 As noted, it is not possible to describe in advance all of the circumstances that may be relevant to a child. The final factor allows anything else that is relevant to the particular circumstances of the child to be taken into account. This provision provides flexibility to ensure that the decision making pathway can be adapted to the particular circumstances of a child. It is important to note that, if something is raised by the parties as relevant to the best interests of the child, judicial officers will be required to consider this matter if it is, in fact, relevant.

3.64 Simplification of the list therefore avoids parties feeling that they must provide evidence about irrelevant factors to ensure that they have addressed each of the items

53 See the analysis of complex issues and family law pathways in Rae Kaspiew et al, 'Evaluation of the 2012 Family Violence Amendments: Synthesis Report' (Australian Institute of Family Studies, 2015) 16.

in s 60CC. However, it does not prevent any of the matters that will no longer appear in s 60CC being raised if they are relevant.

3.65 The ALRC also proposes that some specific consideration regarding culture should be provided, in a separate provision, for Aboriginal and Torres Strait Islander children. Ensuring that an Aboriginal or Torres Strait Islander child maintains their connection to family, community, culture and country is of fundamental importance for Aboriginal and Torres Strait Islander people. The ALRC accordingly proposes that legislation should provide that, in considering the best interests of an Aboriginal or Torres Strait Islander child, there be a requirement that this connection be considered.

Clarifying rules around parental decision making

3.66 Submissions identified that there is particular confusion about the concept of parental responsibility. The *Family Law Act* defines parental responsibility as 'all the duties, powers, responsibilities and authority which, by law, parents have in relation to children'.[54] The common law, and state and Commonwealth statute law, about these matters is complex. As noted by the Alternative Dispute Resolution Advisory Council, parental responsibility 'is a very difficult concept to explain, both in relation to what it means and as to how it can work in the context of a relationship breakdown.'[55] In broad terms, parental responsibility encompasses:

- duties to care for and control the child, and to maintain the child;[56] and
- powers to make a range of decisions about the child including about education, religion, medical treatment, and name, as well as day to day decisions about the care, welfare and development of the child.[57]

3.67 Case law indicates that these powers are 'conferred on parents ... for the benefit of the child and not for the benefit of parents'.[58] In the absence of a court order, both parents have parental responsibility.[59] In proceedings before a court, there is a presumption that equal shared parental responsibility is in the best interests of the child, in the absence of abuse or family violence.[60] The Act provides that, where an order for equal shared parental responsibility has been made, 'major long-term decisions' must be made jointly, and that parents must consult each other and genuinely attempt to reach agreement on these matters.[61]

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54 *Family Law Act 1975* (Cth) s 61B.

55 Australian Dispute Resolution Advisory Council Inc (ADRAC), *Submission 12*.

56 The duty to maintain the child is imposed by statutes, such as the child maintenance provisions of the *Family Law Act* and the child support scheme.

57 Belinda Fehlberg et al, *Australian Family Law: The Contemporary Context* (Oxford University Press, 2nd ed, 2015) 292.

58 *Secretary, Department of Health and Community Services v JWB and SMB (Marion's case)* (1992) 175 CLR 218, 316 (McHugh J).

59 *Family Law Act 1975* (Cth) s 61C.

60 Ibid s 61DA.

61 Ibid ss 65DAC and 65DAE. See also *B & B & Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FamCA 451 (19 June 2003) [9.29].

3.68 There are a number of aspects of these provisions that are potentially confusing. The definition of parental responsibility requires an understanding of the law of parental powers and is not likely to be understood by many readers of the legislation. However, as noted, parental responsibility is primarily about decision making about children, rather than care-time arrangements, and is focused on duties and powers, rather than rights. The *Family Law Act* emphasises this by stating that the presumption of equal shared parental responsibility 'does not provide for a presumption about the amount of time the child spends with each of the parents'.[62] Despite this, submissions to this Inquiry suggest that many clients believe that the presumption of equal shared parental responsibility is, in effect, a presumption of equal shared time.[63]

3.69 Furthermore, submissions indicated significant confusion about what the result of an order for equal shared parental responsibility is. The principal consequences in the legislation of an order are requirements for particular care-time arrangements to be considered with an overriding best interests requirement,[64] and that major long-term decisions must be made jointly.[65] Some submissions indicated that this had made little practical difference to the way parents regarded their responsibilities.[66] Other submissions indicated that confusion arises in relation to how parents must consult each other about decisions.[67] No consultation is required for day to day decisions made by the parent caring for a child at a particular time.

3.70 Notwithstanding this, individual submissions indicated that many understood that consultation or joint decision making was required on a much broader range of decisions. This may partly be because provisions on parental responsibility are not consolidated in the Act into one place. In particular, provisions about consultation on major long-term decisions are found in a separate division of the legislation to the provisions establishing the concept and presumption of parental responsibility.

3.71 Parental decision making is fundamentally important to a child, and a key area of potential disagreement between parents, and thus must be dealt with in the Act. In simplifying and clarifying these provisions, the ALRC proposes:

- replacing the term 'parental responsibility' with one that is easier for readers to understand (for example, 'decision making responsibility')[68]; and
- maintaining the provision that each parent has parental responsibility for a child unless this position is altered by a court order but removing the terminology of a presumption.

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62 *Family Law Act 1975* (Cth) note to s 61DA(2).
63 See, eg, National Family Violence Prevention Legal Services Forum, *Submission 63*; Domestic Violence Legal Workers Network of WA, *Submission 33*; Peninsula Community Legal Centre, *Submission 30*.
64 *Family Law Act 1975* (Cth) s 65DAA.
65 Ibid s 65DAC.
66 Caxton Legal Centre, *Submission 51*.
67 See, eg, Australian Psychological Society, *Submission 55*.
68 Victoria Legal Aid, *Submission 61*; Caxton Legal Centre, *Submission 51*.

3.72 Given evidence regarding confusion between parents about what matters concerning their children require consultation between them, the ALRC also seeks further input on how this confusion can be addressed.

Requirements to consider particular care-time arrangements

3.73 Where a court makes an order for equal shared parental responsibility, the *Family Law Act* requires it to consider whether equal time, or failing that, substantial and significant time, are in the best interests of the child, and are reasonably practicable.[69] This requirement was criticised in a number of submissions as introducing an unnecessary additional step in the process for determining care-time arrangements[70] and detracting from a focus on what is actually in the child's best interests,[71] including diverting the court's attention away from a focus on the child's safety needs.[72] Others submitted that it provides scope for exacerbating conflict.[73]

3.74 Stakeholders suggested that a strong community perception remains that the *Family Law Act* provides a presumption of equal shared care. From the material provided in submissions, the ALRC considers it likely that this is in part a result of the explicit link drawn between the presumption of equal shared parental responsibility and the requirement to consider equal time or substantial and significant time. Some submissions also suggested that this misperception of the law may cause victims of family violence to agree to inappropriate and unsafe arrangements.[74]

3.75 The ALRC considers that the legislation should make it clear that in determining what arrangements will best promote the child's safety and best interests, the court must determine, on all of the material before it, what is best for the particular child in their particular circumstances.

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69 *Family Law Act 1975* (Cth) s 65DAA.

70 The Family Court noted that it seems to require equal time, or substantial and significant time, to be considered even when neither party are seeking it: Family Court of Australia, *Submission 68*.

71 See, eg, N Ciffolilli, *Submission 168*; Marrickville Legal Centre, *Submission 137*; CatholicCare Victoria Tasmania (CCVT), *Submission 115*; Women's Law Centre of WA, *Submission 40*.

72 See, eg, Women's Legal Services Australia Submission No 6 to SPLA Committee, Parliament of Australia, Inquiry into *A Better Family Law System* (April 2017) p 26.

73 See, eg, S Christie, *Submission 216*; Women's Law Centre of WA, *Submission 40*.

74 See, eg, Women's Legal Service Victoria, *Submission 213*.

Applying for new orders about children

Proposal 3–8 The *Family Law Act 1975* (Cth) should be amended to explicitly state that, where there is already a final parenting order in force, parties must seek leave to apply for a new parenting order, and that in considering whether to allow a new application, consideration should be given to whether:

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

3.76 The family courts have the power under the *Family Law Act* to discharge, vary suspend or revive earlier parenting orders.[75] The Act does not specify the circumstances in which parties may return to the family courts to seek revision of an order. It is clear, however, that constant re-litigation of decisions about parenting arrangements is unlikely to be in the interests of the child. To address this, case law has established some guidance on the issue, known as the principle in *Rice & Asplund*. However, it is unlikely that parents will be aware of this case law. The ALRC considers this is an important issue and should be clear on the face of the legislation.

3.77 The current case law is also open to misunderstanding. Although it is commonly understood as requiring a significant change of circumstances, the case law presents a more nuanced test. In *Marsden & Winch* the Full Court of the Family Court stated that the court must look at:

> (1) The past circumstances, including the reasons for the decision and the evidence upon which it was based.
>
> (2) Whether there is a likelihood of orders being varied in a significant way, as a result of a new hearing.
>
> (3) If there is such a likelihood, the nature of the likely changes must be weighed against the potential detriment to the child or children caused by the litigation itself. Thus, for example, small changes may not have sufficient benefit to compensate for the disruption caused by significant re-litigation.[76]

3.78 The Full Court of the Family Court agreed with the observation of Warnick J in *SPL & PLS* that the test is a reflection of a best interests analysis.[77]

3.79 For litigants who are not legally represented, the approach of the current case law is likely to cause confusion.[78]

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75 *Family Law Act 1975* (Cth) s 65(2).

76 *Marsden & Winch* [2009] FamCAFC 152, [50]. This formulation was cited by the Full Court of the Family Court with approval in *O'Brien & O'Brien* (2017) [2017] FamCAFC 219, [21].

77 *Marsden & Winch* [2009] FamCAFC 152, [46]–[47].

3.80 There is also concern about parties being harassed by frequent applications,[79] given the conservative exercise of the courts' powers to summarily dismiss applications or declare applicants vexatious.

3.81 It is important that parties be able to bring new applications about parenting arrangements. This may reflect changing circumstances of the parties, or of the child. It may be necessary to change arrangements to support the best interests of the child.

3.82 The Act should be amended to provide that parties can apply for a new order about parenting arrangements by leave, and that in considering whether to grant leave, consideration should be given to whether there is a change of circumstances that, in the opinion of the court, is significant, and whether it is safe and in the best interests of the child for the order to be reconsidered.

Improved guidance material

Proposal 3–9 The Attorney-General's Department (Cth) should commission a body with relevant expertise, including in psychology, social science and family violence, to develop, in consultation with key stakeholders, evidence-based information resources to assist families in formulating care arrangements for children after separation that support children's wellbeing. This resource should be publicly available and easily accessible, and regularly updated.

3.83 It is important that parents and other decision makers be provided with the best information possible to help them to work out what is most consistent with the safety and best interests of their children. The s 60CC factors have, to some extent, guided practice and decision making in this area. However, to the extent they do so, they do it without explanation of what each of the factors means or examples of how they might be relevant to a family's particular circumstances.

3.84 This information gap is particularly problematic because only a small proportion of family law matters are resolved by courts. The AIFS evaluation of the 2012 family violence amendments showed that over 80% of families do not resolve their issue through mediation, counselling, family dispute resolution, the courts, or lawyers, and only 9% required the assistance of a lawyer or a court to ultimately resolve their arrangements.[80] It is therefore not possible to rely on parents being provided with the help of a professional to understand how the factors in the legislation apply to their circumstances.

3.85 To ensure that parties are provided with information about how to work out parenting arrangements that are in their child's best interests, the ALRC proposes that amendments to the legislation should be accompanied by an extensive, evidence-based

78 D Bryant, *Submission 35*.
79 See, eg, Law Council of Australia, *Submission 43*.
80 Rae Kaspiew et al, *Experiences of Separated Parents Study (Evaluation of the 2012 Family Violence Amendments)* (Australian Institute of Family Studies, 2015) 71.

resource to assist parents. This resource could complement existing guidance on developing parenting orders provided by the publication *Parenting Orders: What You Need to Know*.[81]

3.86 It is important that this resource be based on empirical evidence, validated social science research, and is developed and kept up to date by a respected body with significant knowledge and experience of research on children's matters. One option that may be suitable is AIFS. Whichever body is chosen should have established expertise in psychology, social science and family violence.

3.87 Detailed guidance material should assist both parents who are working out post-separation parenting arrangements without professional help and family dispute resolution practitioners who are assisting parents. The guidance material will give them access to significantly more useful and comprehensive information about what may or may not be relevant to the safety and best interests of a child than could be set out in legislation.

Property and financial matters

3.88 This section examines the provisions of the *Family Law Act* that deal with how property and financial issues are settled following relationship breakdown. This includes provisions for division of property, debts, and superannuation, provisions for agreements about how these matters will be dealt with upon separation (binding financial agreements, also known as BFAs), and provisions in relation to spousal maintenance. The ALRC considers that a range of amendments would assist in simplifying and clarifying these provisions. In addition, better responses to family violence are clearly needed across all of these areas. The ALRC makes a number of proposals to improve how the *Family Law Act*'s property and financial provisions deal with this issue.

Property division

Proposal 3–10 The provisions for property division in the *Family Law Act 1975* (Cth) should be amended to more clearly articulate the process used by the courts for determining the division of property.

Proposal 3–11 The provisions for property division in the *Family Law Act 1975* (Cth) should be amended to provide that courts must:

- in determining the contributions of the parties, take into account the effect of family violence on a party's contributions; and
- in determining the future needs of the parties, take into account the effect of any family violence on the future needs of a party.

81 Attorney-General's Department (Cth), *Parenting Orders—What You Need to Know* (2016).

Proposal 3–12 The Attorney-General's Department (Cth) should commission further research on property and financial matters after separation, including property adjustment after separation, spousal maintenance, and the economic wellbeing of former partners and their children after separation.

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

3.90 The Act provides two key powers to judicial officers in relation to parties to a current or former marriage and parties to a former 'de facto' relationship: a power to declare the title or rights that a party has in respect of property,[82] and a power to alter the interests of the parties in property.[83] Orders may be made that affect third parties in certain circumstances.[84] 'Property' is interpreted broadly to include all the property of the parties, and to include both legal and equitable interests, and tangible property as well as intangible property such as shares.[85] The Act also provides detailed provisions allowing for the division of superannuation interests.[86]

3.91 The power to alter property interests is broadly framed as a power to 'make such order as [the court] considers appropriate'.[87] However, this power may only be exercised where the court is satisfied 'that, in all the circumstances, it is just and equitable to make the order'.[88] The court's discretion must also be exercised in accordance with legal principles, including those in the Act itself.[89]

3.92 In considering an application to alter property interests, the court must:

- identify the existing legal and equitable interests of the parties in the property;
- consider whether it would be just and equitable to make an order altering those interests; and
- if it is just and equitable to do so, consider what orders should be made, taking into account the factors listed in s 79(4), which incorporate the 'future needs' factors set out in s 75(2).

82 *Family Law Act 1975* (Cth) ss 78, 90SL.
83 Ibid ss 79, 90SM.
84 Ibid ss 90AE, 90TA.
85 *In the Marriage of Duff* [1977] FamCA 24.
86 *Family Law Act 1975* (Cth) s 90MS.
87 Ibid ss 79(1), 90SM(1)(a).
88 Ibid ss 79(2), 90SM(3); *Stanford and Stanford* (2012) 247 CLR 108, [35] (French CJ, Hayne, Kiefel and Bell JJ).
89 *Stanford and Stanford* (2012) 247 CLR 108, [38] (French CJ, Hayne, Kiefel and Bell JJ).

Empirical data on property division under the Family Law Act

3.93 There is a significant body of research on the economic impacts of separation, which indicates that separation has a significant adverse impact on women, particularly those with children.[90] These studies include AIFS' comprehensive *Settling up* Report (1986),[91] its further *Division of Matrimonial Property in Australia* Paper (2001),[92] and its analysis of property division after separation from data in the Longitudinal Study of Separated Families Wave 3 (2016).[93] There is also the more recent quantitative analysis of first instance decisions by Dr Christopher Turnbull (2017).[94]

3.94 In 2016, Kaspiew and Qu analysed the pathways separating couples use to resolve property issues, using data from the Longitudinal Study of Separated Parents Wave 3. Parents interviewed for the study were asked about the main pathway they used to resolve their property issues. Approximately 60% of couples resolved their property arrangements through discussions, or it 'just happened', 29% of couples used a lawyer, 4.2% used mediation, and 7% used the courts.[95] These data indicate a greater use of lawyer and court pathways than for children's cases but lack analysis of the reasons for this.

3.95 On average, mothers received 57% of the property pool.[96] However, there was significant variation among couples, with the most important factors affecting the share of property received being:

- the size of the asset pool, with larger asset pools associated with both mothers and fathers reporting that they received a lower proportion of the asset pool (with the pattern being stronger for mothers);
- who initiated the separation, and who left the house, with the person who initiated the separation receiving a smaller share of the property;
- a history of family violence, with experiencing family violence being associated with receiving a lower share of property division; and
- care-time arrangements, with parents who had majority care of a child receiving a higher share of the property pool.[97]

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90 For a brief survey of this research, see Belinda Fehlberg and Lisa Sarmas, 'Australian Family Property Law: "Just and Equitable" Outcomes?' (2018) 32 *Australian Journal of Family Law* 81, 88–91.

91 In particular, Peter McDonald, 'Settling Up: Property and Income Distribution on Divorce in Australia' (Australian Institute of Family Studies, 1986).

92 G Sheehan and J Hughes, 'Division of Matrimonial Property in Australia' (Research Paper No 25, Australian Institute of Family Studies, 2001).

93 Rae Kaspiew and Lixia Qu, 'Property Division after Separation: Recent Research Evidence' (2016) 30(3) *Australian Journal of Family Law* 1.

94 Christopher Turnbull, *Family Law Property Settlements: Principled Law Reform for Separated Families* (PhD Thesis, Queensland University of Technology, 2017).

95 Kaspiew and Qu, above n 93, 17.

96 This is consistent with Dr Christopher Turnbull's finding of 55%: Dr C Turnbull, *Submission 48*.

97 Kaspiew and Qu, above n 93, 20–21.

3.96 The finding about the effects of family violence on property settlement outcomes is consistent with other research about the economic effects of family violence.[98]

3.97 The empirical research thus provides some insight into the dynamics of property adjustment after separation. However, there is relatively limited empirical research on post-separation property and financial arrangements under the *Family Law Act* compared to the amount of research on parenting matters, and submissions noted the need for further research on this subject.[99]

3.98 The ALRC therefore proposes that more research should be undertaken on property adjustment and spousal maintenance after separation, to provide a clearer picture of what arrangements former couples are making and why. This will be critical to informing further policy development in this area.

Prescription v discretion

3.99 The evidence from the Kaspiew and Qu study noted above showed that a majority (62%) of parents who finalised arrangements under the current regime thought that the outcome they received was fair.[100] However, there has been a long-running debate in Australia about whether the current, discretionary system for family law property division should be retained, or whether it would be fairer to move to a more prescriptive or formulaic approach.

3.100 For example, the Productivity Commission's *Access to Justice* report (2014) received evidence that separating couples find it difficult to assess how their property should be divided under the current provisions of the Act. In response, the Productivity Commission recommended that the Australian Government review the property provisions in the *Family Law Act* with a view to clarifying how property will be distributed on separation, and that the review should consider introducing presumptions about splitting property as currently applies in New Zealand.[101] The idea of a more formulaic, or presumption-based, approach to property division was present in many of the submissions. For example, the Australian Dispute Resolution Advisory Council (ADRAC) argued that

> The legislation in this area is complicated and on the face of it does not provide clear guidance as to how the court is to exercise their powers ... The reported case law regarding the application of the legislation is vast and inconsistent. This results in a great variety of interpretation, uncertainty and range of advice as to rights and entitlements in this area.[102]

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98 See, eg, Rochelle Braaf and Isobelle Barrett Meyering, *Seeking Security: Promoting Women's Economic Wellbeing Following Domestic Violence* (Australian Domestic & Family Violence Clearinghouse, 2011).

99 See, eg, Dr C Turnbull, *Submission 48*.

100 Kaspiew and Qu, above n 93, 21–22.

101 Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 2, 2014) 874. New Zealand's property relationships laws are currently under review by the New Zealand Law Commission, with a final report due in November 2018.

102 Australian Dispute Resolution Advisory Council Inc (ADRAC), *Submission 12*.

3.101 Professor Patrick Parkinson has argued that 'the inconsistency and incoherence of family property law has consistently been the elephant in the room'.[103]

3.102 To remedy the uncertainty of the legislation, ADRAC proposed a range of rebuttable presumptions about how assets and debts should be treated.[104] Relationships Australia Victoria also argued that the current discretionary system leads to uncertainty, and noted a range of alternative, more prescriptive models.[105] Dr Turnbull argued that, as part of a first step in a reform program, a guidance document for parties distilling principles from case law should be produced.[106] Professor Parkinson has proposed both statutory reform, and changes to the way family law appeals are heard.[107]

3.103 By contrast, other submissions to this Inquiry supported the current discretionary approach to family law property division.[108] These submitters considered that this approach allows the specific circumstances of each family to be better taken into account while providing enough guidance through case law to inform bargaining in the shadow of the law.[109] Lander & Rogers, for example, argued that notwithstanding the discretionary nature of the system, there is 'some degree of common knowledge as to how property settlements are determined by the law—perhaps a byproduct of the high "divorce rate" in our community is a broad social communication of relevant legal issues'.[110]

3.104 Some, however, have suggested that greater guidance could be provided in legislation, including through incorporating principles distilled from case law.[111] Fehlberg and Sarmas, for example, have proposed that significantly different factors should be used to determine property outcomes within a discretionary framework, with consideration given to:

- the housing requirements of dependent children;
- the material and economic security of the parties;
- whether adjustments should be made as compensation for relationship-based loss; and
- equal division of any surplus.[112]

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103 Patrick Parkinson, 'Why Are Decisions on Family Property so Inconsistent?' (2016) 90 *Australian Law Journal* 498, 499.

104 Australian Dispute Resolution Advisory Council Inc (ADRAC), *Submission 12*. Presumptions were also suggested by other submissions, eg, Victoria Legal Aid, *Submission 61*.

105 Relationships Australia Victoria, *Submission 129*. See also R Singh, *Submission 195*; R Kerr, *Submission 174*.

106 Turnbull, above n 94, 251.

107 Parkinson AM, above n 103, 523–6.

108 See, eg, National Legal Aid, *Submission 163*; Women's Legal Service Victoria, *Submission 100*; D Bryant, *Submission 35*.

109 Law Council of Australia, *Submission 43*.

110 Lander & Rogers, *Submission 198*.

111 Lisa Young and Jo Goodie, 'Is There a Need for More Certainty in Discretionary Decision-Making in Australian Family Property Law?' (2018) 32 *Australian Journal of Family Law* 162, 185.

112 Belinda Fehlberg and Lisa Sarmas, above n 90, 98.

3.105 The ALRC notes that there is no clear consensus in submissions about whether a discretionary or prescriptive system for property division is preferable. A formula based system would have some attractions, particularly in offering non-lawyers clearer guidance on how their property should be divided. However, it is also clear that to avoid injustice, it would be necessary to provide exceptions to any standard rules, which would open up significant uncertainty as to how the rules would apply in many cases.[113] Furthermore, there is a risk that more prescriptive legislation will lead to greater attempts by litigants to argue technical points or find loopholes in order to achieve non-standard outcomes, which over time may significantly add to the complexity of the law.

3.106 On balance, the ALRC does not consider that the case has been made out for a shift from a discretionary system to a prescriptive system before further research is undertaken about property adjustment on relationship breakdown. However, as outlined below, a number of amendments can be made to improve the clarity of the law.

Legislative simplification and clarification

3.107 Some supporters of the current discretionary approach did consider that the drafting of the property provisions could be improved to promote greater clarity, particularly by setting out the analytical steps for arriving at a property division in a more logical order. For example, the Law Society of NSW Young Lawyers commented that:

> The Full Court has noted that the process undertaken during financial matters 'merely illuminates the path to the ultimate result.' The Committee submits litigants and practitioners would benefit from a clearer legislative pathway, which may include a codification of the 'four-step' process if it is to be retained.[114]

3.108 Similar suggestions were also made by National Legal Aid and Suzanne Christie.[115] In addition to suggestions for codification of the process for determining property adjustment, submissions also indicated that replacing the cross-reference to s 75 for the future needs factors and replacing them with factors specifically designed from property division, would improve the usability and clarity of the Act.[116]

3.109 In line with proposals for legislative simplification elsewhere in this Discussion Paper, the ALRC considers that redrafting the core provisions of pt VIII to more clearly set out the analytical steps in determining a property settlement would improve the usability of the legislation.

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113 Lander & Rogers, *Submission 198*.
114 NSW Young Lawyers Family Law Committee, Law Society of NSW, *Submission 108*.
115 S Christie, *Submission 216*; National Legal Aid, *Submission 163*.
116 NSW Young Lawyers Family Law Committee, Law Society of NSW, *Submission 108*.

Family violence

3.110 Many submissions supported amendment to the Act to clarify how family violence is relevant to property division, including in assessing contributions and/or future needs.[117] This has also been recommended by the House of Representatives Standing Committee on Social Policy and Legal Affairs (SPLA Committee),[118] the Family Law Council,[119] and the ALRC's 1994 *Equality Before the Law* report.[120]

3.111 Since the Full Court of the Family Court's decision in *Kennon*,[121] family violence may be taken into account in family law property proceedings. In that case, the court held that:

> where there is a course of violent conduct by one party towards the other during the marriage which is demonstrated to have had a significant adverse impact upon that party's contributions to the marriage, or, put the other way, to have made his or her contributions significantly more arduous than they ought to have been, that is a fact which a trial judge is entitled to take into account in assessing the parties' respective contributions within s.79.[122]

3.112 This is a relatively strict test: the party arguing for an adjustment must demonstrate (a) a course of violent conduct, (b) a significant adverse impact upon the party's contributions. The court emphasised that it would only apply in "exceptional" circumstances and to a "relatively narrow band of cases".

3.113 Subsequent experience has indicated that this argument is not frequently used, and, where it is, that it leads to relatively modest adjustments to property outcomes. An analysis by Easteal, Warden and Young found only 57 reported judgments in which a *Kennon* argument was raised between 2006 and 2012.[123] Family violence was found by the court to have occurred in 72% (41) of these matters, and a property adjustment for violence was made in 42% (24 cases).[124] Where the judicial officer specified the adjustment that they were making, the average adjustment was 7.3%, with the most common adjustment made being 10%.[125]

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117 National Legal Aid, *Submission 163*; Springvale Monash Legal Service, *Submission 161*; Marrickville Legal Centre, *Submission 137*; NSW Young Lawyers Family Law Committee, Law Society of NSW, *Submission 108*; Women's Legal Services Australia, *Submission 45*; Safe Steps Family Violence Response Centre, *Submission 15*.

118 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (2017) rec 13.

119 Family Law Council, *Letter of Advice: Violence and Property Proceedings*, (2001).

120 Australian Law Reform Commission, *Equality before the Law: Justice for Women*, Report No 69 (1994) rec 9.6.

121 *Kennon & Kennon* [1997] FamCA 905.

122 Ibid.

123 Patricia Easteal, Catherine Warden and Lisa Young, 'The Kennon "Factor": Issues of Indeterminacy and Floodgates' (2014) 28 *Australian Journal of Family Law* 1, 9.

124 Ibid 10–11.

125 Ibid 12.

3.114 Submissions identified arguments both for and against an amendment to take family violence into account. The arguments against the amendment were:

- that codification of *Kennon* might have the unintended consequence of restricting claims about other circumstances where contributions were made more arduous by the other party, for example, due to alcohol abuse;
- that the law should be allowed to develop incrementally through case law;
- that amendments may not materially increase claims for family violence adjustments, due to the need for particularised and relevant evidence to support any claims;
- that, because the *Family Law Act* does not cover the field, parties might also be able to bring claims in tort, for example, for personal injury; and,
- that inclusion of family violence may make settlement of cases more difficult.[126]

3.115 In addition to these concerns, Lander & Rogers noted a possible increase in legal costs in litigated matters, reflecting the additional legal and factual disputes that might be in issue.[127]

3.116 These concerns warrant consideration. In relation to the possible unintended consequence of excluding other claims about cases where contributions were more arduous, although this is a possibility, this is a matter that can be addressed by careful drafting to avoid such inferences from the drafting, and by careful explanation of the purpose and scope of the amendment in extrinsic materials. The ALRC does not consider that further development of the law through case law is likely to be an effective reform mechanism, given the evidence of the limited impact of the *Kennon* principle since the decision in 1997 described above. Issues with evidence, and overlap with other possible claims, are issues that arise whether or not an amendment is made.

3.117 An issue of particular concern is whether explicit acknowledgement of the relevance of family violence would have adverse consequences for dispute resolution and litigation, both in terms of increased conflict in negotiations, and in increasing the complexity of proceedings. Notwithstanding this risk, there are a number of arguments in favour of an explicit recognition of family violence in the *Family Law Act*.

3.118 A strong consensus has emerged in favour of identifying and managing family violence in dispute resolution for safety reasons, as indicated elsewhere in this Discussion Paper. From this point of view, greater identification of family violence is desirable in order to allow appropriate safety planning, and to ensure that power balances are addressed in mediation and court processes. If parties identify their family violence as a result of greater awareness of the relevance of this to property settlements, this is a desirable outcome from this point of view.

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126 Law Council of Australia, *Submission 43*.
127 Lander & Rogers, *Submission 198*.

3.119 Further, as indicated by the above discussion, family violence can already be taken into account in property settlements following the decision in *Kennon*. Despite this, it appears that many victims of family violence choose not to raise the issue in litigation. Stating the relevance of violence in the *Family Law Act* itself may produce only incremental change in the law, but will mean that unrepresented parties are more likely to become aware of its potential relevance to their matter. From an access to justice point of view, it is difficult to justify continuance of a situation whereby legally represented victims of family violence are more likely to raise this factor and have it taken into account than unrepresented ones.

3.120 This conclusion is strengthened by the evidence that the current negotiation dynamic is producing worse outcomes for victims of family violence. The risk of decreased settlement rates, or of increased legal costs for litigated matters, must be weighed against the benefit of bargaining in the shadow of the law of a clear statement of the relevance of family violence to outcomes, which may encourage settlement and better outcomes for people affected by family violence.

3.121 On balance, the ALRC does not consider possible risks of recognising family violence in the Act are sufficient to outweigh the possible benefits of the proposal. However, this is an issue that should be closely monitored in any evaluation of reforms to ensure that there are not unacceptable unintended consequences.

3.122 Given empirical evidence of less favourable property outcomes for parties who have experienced family violence, and the infrequency of adjustments for family violence under the *Kennon* principle, the ALRC proposes that the Act be amended to acknowledge the relevance of family violence both to the contributions to property, and to future needs. This ALRC considers that this would:

- clarify the relevance of violence to property settlements, particularly for unrepresented litigants; and
- clarify the relevance of family violence to the future needs of a person who has experienced family violence.

Debt

Proposal 3–13 The Australian Government should work with the financial sector to establish protocols for dividing debt on relationship breakdown to avoid hardship for vulnerable parties, including for victims of family violence.

Proposal 3–14 If evaluation of action flowing from this Inquiry finds that voluntary industry action has not adequately assisted vulnerable parties, the Australian Government should consider relaxing the requirement that it not be foreseeable, at the time the order is made, that to make the order would result in the debt not being paid in full.

3.123 For some separating families, the primary concern upon separation is dividing debt, rather than assets. In most circumstances, these debts will be held with third

parties, such as banks, that are not involved in the family law litigation. Part VIIIAA of the *Family Law Act* empowers the family courts to make orders that affect the rights, liabilities, or property interests of a third party. Orders that the court can make under pt VIIIAA include:

- an order directed to a creditor of the parties to substitute one party for both parties in relation to the debt owed to the creditor;
- an order directed to a creditor of one party to substitute the other party, or both parties, to the marriage for that party in relation to the debt owed to the creditor; and
- an order directed to a creditor of the parties that the parties be liable for a different proportion of the debt owed to the creditor than the proportion the parties are liable to before the order is made.[128]

3.124 These provisions give the family courts with a broad discretion to make orders that affect debt. However, a number of limitations apply to these powers, most importantly including:

- it must not be foreseeable when the order is made that to make the order would result in the debt not being paid in full; and
- the creditor must be accorded procedural fairness in relation to the making of the order.[129]

3.125 The Women's Legal Service Victoria report, *Small Claims, Large Battles* has explored in some depth the issues that arise from joint debt:

> Women may be chased by creditors for mortgage repayments, car loans, personal loans and credit card debts, even where they do not have the benefit of the home, the car, the loan monies, or the credit card purchases. To avoid liability for a debt incurred, the contract with the lender would need to be altered, but this cannot usually be done without the consent of the other party and the creditor. The fear of bankruptcy or a negative credit rating means many women continue to service joint debts even when they have little means to do so.[130]

3.126 Although some submitters considered that the current provisions are adequate,[131] a number of submissions identified significant issues with the division of debt upon relationship breakdown, particularly (but not limited to) cases where there has been family violence or other issues, such as gambling addiction.[132] These problems include the high cost of seeking a property order and the unavailability of legal aid or other legal assistance where assets fall below a threshold,[133] which makes it infeasible to seek orders for division of debts. Others noted the difficulty of obtaining orders given

128 *Family Law Act 1975* (Cth) s 90AE(1).
129 Ibid s 90AE(3).
130 Women's Legal Service Victoria, 'Small Claims, Large Battles: Achieving Economic Equality in the Family Law System' (2018) 29.
131 Law Council of Australia, *Submission 43*.
132 Relationships Australia, *Submission 11*.
133 Townsville Community Legal Service, *Submission 159*; Caxton Legal Centre, *Submission 51*.

the requirement not to make orders that might result in the debt not being paid in full. The Family Court suggested that the restrictions on the making of orders regarding debt are necessary for reasons of practicality, procedural fairness, and constitutional reasons.[134]

3.127 Women's Legal Service Victoria has argued that the courts' powers in relation to debt are not commonly exercised, generally because to make the order would risk the debt not being paid in full, and because lenders argue that creating a new contract for the transferred debt would engage their responsible lending obligations. Instead, they found that it is more common for the court to make an order that one party pay the joint debt, and indemnify the other for non-payment.[135]

3.128 Some submitters proposed that there should be a default position that the debts entered into by parties during their relationship should be their joint responsibility.[136] Others suggested that debts should be included in a fast-track process for resolution of small property claims.[137] Caxton Legal Centre suggested that:

> debt allocation [could] be determined by principles such as, unless there are exceptional circumstances, debt follows the asset, debt remains with the debt owner and finally that debt repayment is the responsibility of the person who can afford to support the debt.[138]

3.129 However, none of these proposals would address financial abuse situations, where debt was contracted, or increased, as part of a course of abusive conduct.

3.130 While the SPLA Committee recommended that the Attorney-General's Department (Cth) consider options for legislative amendments to address debt division, the ALRC considers that the existing provisions are legally adequate. However, the requirement that it be foreseeable that debts be repaid in full is a clear practical difficulty with making orders,[139] and orders that one party pay the debt and indemnify the other raise additional problems, such as a potential need for enforcement proceedings.

3.131 The ALRC notes that industry has made some progress in developing protocols and guidelines to improve practice in this area and avoid hardship to vulnerable individuals. The ALRC proposes that the Australian Government work with the lending industry to strengthen these efforts, and that the effectiveness of these efforts be assessed as part of any evaluation that results from this Inquiry. If this evaluation does not show an improvement in outcomes, the ALRC proposes that the Australian Government should consider relaxing the requirement that it be foreseeable that debts be paid in full in appropriate cases.

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134 Family Court of Australia, *Submission 68*.
135 Women's Legal Service Victoria, above n 130.
136 Relationships Australia Victoria, *Submission 129*; Caxton Legal Centre, *Submission 51*; Australian Dispute Resolution Advisory Council Inc (ADRAC), *Submission 12*.
137 ATSILS Qld, *Submission 42*; Domestic Violence Legal Workers Network of WA, *Submission 33*.
138 Caxton Legal Centre, *Submission 51*.
139 Victoria Legal Aid, *Submission 61*.

Superannuation

Proposal 3–15 The Australian Government should develop information resources for separating couples to assist them to understand superannuation, and how and why superannuation splitting might occur.

Proposal 3–16 The *Family Law Act 1975* (Cth) should require superannuation trustees to develop standard superannuation splitting orders on common scenarios. Procedural fairness should be deemed to be satisfied where parties develop orders based on these standard templates. The templates should be published on a central register.

Proposal 3–17 The Australian Government should develop tools to assist parties to create superannuation splitting orders. These could include:

- a tool to look up the legal name and contact details of superannuation funds;
- a tool, with appropriate safeguards, to identify the superannuation accounts held by a former partner from Australian Tax Office records, with necessary amendments to the taxation law to support this;
- tools to assist parties with process requirements, such as making superannuation information requests, providing draft orders to superannuation trustees for comment where standard orders are not used, and providing final orders to trustees; and
- allowing auto-generation of standard form orders based on the standard orders provided by the superannuation trustee and user-entered data.

Question 3–2 Should provision be made for early release of superannuation to assist a party experiencing hardship as a result of separation? If so, what limitations should be placed on the ability to access superannuation in this way? How should this relate to superannuation splitting provisions?

3.132 In 2001, the *Family Law Act* was amended to allow agreements and court orders splitting superannuation interests. Prior to these amendments, property matters were sometimes adjourned for lengthy periods until superannuation interests vested and could be split.

3.133 Superannuation is a complex and technical area. The *Family Law Act* and the *Family Law (Superannuation) Regulations 2001* (Cth), and a number of detailed determinations,[140] together allow superannuation interests to be identified, valued, and divided between the parties to a family law matter.

140 Including methods and factors for valuing certain superannuation interests (the *Family Law (Superannuation) (Methods and Factors for Valuing Particular Superannuation Interests) Approval 2003*), annual interest rate adjustment determinations (eg the *Family Law (Superannuation) (Interest Rate*

3.134 There is limited recent empirical evidence as to the use of superannuation splitting orders. However, the *Small Claims* project noted above has provided significant information about some of the challenges that superannuation can present. Submissions confirmed the experiences described in that report, indicating that separating couples find superannuation splitting to be very difficult, particularly without legal assistance.[141] This is confirmed by empirical evidence that superannuation splits continue to be uncommon.[142]

3.135 A number of submissions recommended that superannuation provisions be simplified.[143] Particular challenges included:

- difficulties discovering which funds a former partner has accounts with, particularly given that a person can hold multiple superannuation accounts;[144]
- difficulties discovering the trustee name for superannuation funds;[145]
- difficulties drafting legally correct orders that superannuation funds will accept;[146] and
- costs charged by superannuation funds for superannuation information requests and for superannuation splitting.[147]

3.136 Fees charged by superannuation funds can be significant. As part of its Small Claims, Large Battles project, Women's Legal Service Victoria sought information from the largest superannuation funds and found that

> [t]he average fee charged for processing requests for information was $52, and ranged from no fee to $187. The average fee for complying with super splitting orders was $64 and ranged from no fee to $492.[148]

3.137 At a time of significant financial stress, and for lower income households, these fees may impose hardship.

3.138 Lifetime superannuation savings for men and women are unequal. For example, the median superannuation balance for men aged 60–64 in 2015–16 was $110,000, compared to $36,000 for women.[149] The *Family Law Act* does not require a superannuation split, and it is likely that parties often agree not to split superannuation because they prefer to achieve a reasonable adjustment of property from non-

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for Adjustment Period) Determination 2018), and various determinations about provision of information for certain schemes (eg the *Family Law (Superannuation) (Provision of Information — Commonwealth Superannuation Scheme) Determination 2004*).

141 Domestic Violence Legal Workers Network of WA, *Submission 33*; Women's Legal Service Victoria, above n 130, 26.

142 Kaspiew and Qu, above n 93, 14.

143 See, eg, Relationships Australia Victoria, *Submission 129*; Interact Support Inc, *Submission 107*; Caxton Legal Centre, *Submission 51*.

144 Lander & Rogers, *Submission 198*.

145 Women's Legal Service Victoria, above n 130, 27.

146 Ibid.

147 Lander & Rogers, *Submission 198*.

148 Women's Legal Service Victoria, above n 130, 27.

149 Ross Clare, 'Superannuation account balances by age and gender' (Association of Superannuation Funds of Australia Limited, 2017) 5.

superannuation assets. For example, a party may choose to trade off the family home for superannuation. However, in many cases, a fair property split cannot be achieved without a superannuation split, such as where there are minimal non-superannuation assets, and a significant disparity in superannuation balances. Failure to provide the economically weaker party with access to superannuation may also contribute to poor living standards in retirement. It is therefore concerning that there is some evidence that superannuation splits are rare in practice.

3.139 The superannuation provisions of the Act are difficult to simplify because they reflect the complexity of the superannuation system itself. However, the process for families could be simplified by providing better information resources and guided assistance to help them develop suitable orders. Suggestions provided in submissions include:

- developing an administrative mechanism to provide access to a former partner's superannuation information;[150]
- requiring superannuation funds to implement standard superannuation splitting orders for accumulation funds;[151]
- encouraging superannuation funds to reduce fees for family law services;[152]
- developing a simplified form that parties can submit to superannuation trustees, and allowing this to satisfy procedural fairness requirements;[153] and
- in the interim, allowing family court registrars to provide assistance to parties in drafting orders.[154]

3.140 The SPLA Committee also recommended an administrative mechanism to identify superannuation assets, and simplification of procedures, including forms.[155] It is apparent from submissions that the greatest barriers to superannuation splitting are practical difficulties around information about superannuation, procedural fairness, and drafting orders. The ALRC has drawn from suggestions made in submissions to propose a number of measures that are aimed at reducing the practical difficulty of superannuation splitting, including:

- developing better information resources for separating couples;
- requiring superannuation trustees to develop standard orders that will satisfy procedural fairness requirements; and
- developing tools to facilitate access to superannuation information, including information held by the Australian Taxation Office.

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150 Women's Legal Service Victoria, above n 130, 27.
151 Victorian Women Lawyers, *Submission 84*.
152 Women's Legal Service Victoria, above n 130, 28.
153 Ibid.
154 Ibid.

3.141 There may some limitations on the ability of these approaches to deal with less-common and more complex superannuation scenarios. If this becomes apparent in implementation, systems should be designed to advise parties to seek specialist advice about their situation.

3.142 Access to taxpayer data may raise sensitive issues. If the proposal about use of data held by the Australian Taxation Office is adopted, it will be important to ensure that there are stringent safeguards around access to taxpayer information on superannuation accounts. Safeguards could include identity verification requirements, penalties for misuse of the system, and a limitation on access to circumstances where the non-member spouse has been declared as a partner on a previous tax return for the member spouse.

Early release of superannuation

3.143 There has been recent debate about how to deal with superannuation, including proposals for early release of superannuation. The *Small Claims* report indicated that early release of superannuation under hardship provisions can be of assistance to women economically recovering from separation, but that this must be balanced against the effect of release on provision for retirement.[156]

3.144 Question 3–2 asks whether there should be provision for early release of superannuation beyond the existing hardship provisions, how this would relate to superannuation splitting provisions, and what limitations should be placed on early release if it is expanded.

Binding financial agreements

Question 3–3 Which, if any, of the following approaches should be adopted to reform provisions about financial agreements in the *Family Law Act 1975* (Cth):

- amendments to increase certainty about when financial agreements are binding;
- amendments to broaden the scope for setting aside an agreement where it is unjust to enforce the agreement, for example, because there has been family violence, or a change of circumstances that was unforeseen when the agreement was entered into;
- replacing existing provisions about financial agreements with an ability to make court-approved agreements; or
- removing the ability to make binding pre-nuptial financial agreements from family law legislation, and preserving the operation of any existing valid agreements?

156 Women's Legal Service Victoria, above n 130, 5, 26.

3.145 Binding financial agreements, or BFAs, were introduced into the *Family Law Act* in 2000. Statutory recognition of BFAs was necessary to allow them to oust the jurisdiction of the family courts, as case law has held that common law contracts cannot do so.[157] The rationale for the introduction of BFAs was given by the Attorney-General, the Hon Darryl Williams QC, in his second reading speech as:

> to encourage people to agree about how their matrimonial property should be distributed in the event of, or following, separation. Agreements will allow people to have greater control and choice over their own affairs in the event of marital breakdown.[158]

3.146 Situations in which BFAs were thought likely to be of utility included subsequent marriages, rural properties, and family businesses.[159]

3.147 Under the current provisions, both married and de facto couples are able to settle their financial affairs by way of a BFA. A BFA may be entered into before, during or after a relationship,[160] and may set out how part or all of the parties' property or financial resources, and maintenance, should be dealt with in the event that the marriage or relationship ends.[161]

3.148 Assuming a BFA is validly made, its effect is to 'oust' the jurisdiction of the family courts to make orders adjusting the parties' property in accordance with the provisions of the *Family Law Act*.[162] Because of this effect, the Act provides a number of safeguards to protect parties who enter into a BFA. These include:

- strict requirements for entry into the agreement, including a requirement that each party sign the agreement, receive independent legal advice about the effect of the agreement on their rights, and the advantages and disadvantages of entering into it, receive a statement stating that this advice has been received, and provide that statement to the other party;[163] and
- provisions allowing the courts to set aside a BFA on certain grounds such as where a party's agreement was obtained by fraud or there has been a material change of circumstances since the agreement was made.[164] A recent case illustrating this was *Thorne v Kennedy*, where the High Court found that a financial agreement was voidable due to both undue influence and unconscionable conduct in the circumstances leading up to the agreement being entered into.[165]

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157 *Hyman v Hyman* [1929] AC 601.
158 Commonwealth, *Parliamentary Debates*, House of Representatives, 22 September 1999, 10151–4 (Daryl Williams QC).
159 Ibid.
160 *Family Law Act 1975* (Cth) ss 90B–90D and 90UB–90UD.
161 See, eg, Ibid s 90B(1).
162 Ibid ss 71A, 90SA.
163 Ibid ss 90G, 90UJ.
164 Ibid ss 90K, 90UM.
165 *Thorne v Kennedy* [2017] HCA 49 (8 November 2017).

3.149 The ALRC is not aware of any empirical data on the number of financial agreements that have been entered into. However, anecdotally, they are not common.

3.150 Submissions indicated a range of views about BFAs. Although many submitters acknowledged that in principle it is desirable for individuals to be able to agree on arrangements in the event of a relationship breakdown, there were criticisms of the concept, because:

- BFAs are regarded as being most likely to benefit the more economically powerful member of a couple to the other party's detriment, and/or are formed in situations of unequal bargaining power;[166]
- BFAs may not anticipate changes in the circumstances of the parties during the relationship, including dependencies arising from issues such as caring arrangements for children, and changes in lifestyle as the couple's shared wealth grows;[167]
- BFAs have failed to provide certainty to parties;[168] and
- BFAs may have adverse mental health effects on parties due to power imbalances, particularly in the context of family violence.[169]

3.151 The underlying tension in the BFA provisions was described by the Law Council of Australia as being

> the balancing, on the one hand, of the desirability of allowing adults to regulate the financial terms of their relationships (and the benefit thereby of reducing the need for those couples to access state-funded services upon the breakdown of their relationships) versus the recognition that most [pre-nuptial] BFAs favour one party over the other and many produce outcomes that would not be considered 'just and equitable' pursuant to s 79.[170]

3.152 These tensions were borne out in other submissions. Among some sectors of the legal profession, there is a strong view that BFAs have failed to achieve their intention of providing certainty. For example, the Aboriginal and Torres Strait Islander Legal Service Queensland commented that: 'our view is that BFAs are currently of little utility and provide no certainty to anyone who enters into one. Some lawyers will simply not prepare them because the legislation is too technical and BFAs can easily fail'.[171]

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166 Feminist Legal Clinic, *Submission 180*; Women's Legal Service Queensland, *Submission 158*; S Thompson, *Submission 151*; Victorian Women Lawyers, *Submission 84*.

167 See, eg, S Thompson, *Submission 151*; Centacare Family and Relationship Services (CFRS), *Submission 125*.

168 ATSILS Qld, *Submission 42*.

169 The Royal Australian and New Zealand College of Psychiatrists, *Submission 18*.

170 Law Council of Australia, *Submission 43*.

171 S Christie, *Submission 216*; M Kaye, *Submission 215*; ATSILS Qld, *Submission 42*.

3.153 Submissions,[172] and recent media reports[173] have also highlighted that many lawyers have come to regard BFAs are representing an unacceptable risk of professional liability and now refuse to draft them.

3.154 Some submissions also raised concerns about unequal power dynamics in bargaining for BFAs. Women's Legal Services Australia, for example, submitted that BFAs are 'particularly used against CALD women who have limited or no English, little understanding of their legal rights, limited support and no understanding of the Australian legal system or laws'.[174]

3.155 Although cases such as *Thorne v Kennedy* demonstrate that BFAs can be set aside in some situations such as this, this outcome was only achieved through complex litigation in reliance on equitable doctrine, which would be challenging for all but a small minority of affected individuals with specialist legal representation to pursue.

3.156 Suggestions for reform included:

- imposing stricter requirements for disclosure before BFAs are entered into;[175]
- providing for a requiring cooling off period before BFAs are entered into;[176]
- imposing a fairness, or justice and equity, test for BFAs to be binding,[177] or allowing BFAs to be set aside where they cause 'substantial injustice';[178]
- replacing references to common law and equitable principles with a statutory test of 'unfairness';[179]
- amending the Act to allow greater consideration of family violence dynamics and unequal bargaining power, or to allow BFAs to be set aside on the basis of family violence;[180]
- allowing BFAs to be set aside on the basis of a 'general hardship' test;[181]
- amending the Act to require court approval of a financial agreement before it becomes binding;[182]

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172 U Chowdhury, A Rimovetz, E Post and S Davis, *Submission 183*.
173 Natasha Bita, 'Prenups Too Risky for Legal Eagles' *Sunday Telegraph*, 26 August 2018.
174 Women's Legal Services Australia Submission No 6 to SPLA Committee, Parliament of Australia, Inquiry into *A Better Family Law System* (April 2017) 38.
175 Women's Legal Service Queensland, *Submission 158*.
176 U Chowdhury, A Rimovetz, E Post and S Davis, *Submission 183*.
177 Ibid; Women's Legal Service Queensland, *Submission 158*; R Honey, Murdoch University, *Submission 47*.
178 S Thompson, *Submission 151*. Dr Thompson's submission elaborates on the American Law Institute's proposal about substantial injustice, including circumstances in which it could be established.
179 R Honey, Murdoch University, *Submission 47*.
180 National Legal Aid, *Submission 163*; Women's Legal Service Queensland, *Submission 158*; S Thompson, *Submission 151*; L Bowen, *Submission 123*; Drummond Street Services, *Submission 20*; Women's Legal Services Australia Submission No 6 to SPLA Committee, Parliament of Australia, Inquiry into *A Better Family Law System* (April 2017) 38.
181 Women's Legal Service Queensland, *Submission 158*.
182 S Christie, *Submission 216*; Law Council of Australia, *Submission 43*.

- amending the Act so that BFAs are only evidence of parties' intentions, and are not binding;[183] or
- repealing the BFA provisions.[184]

3.157 The ALRC considers that there is significant anecdotal evidence to conclude that BFAs do not produce the level of certainty that was originally envisaged when they were introduced. This is reflected in the growing concern within the legal profession about professional liability associated with drafting BFAs if they are eventually set aside, and the difficulty of predicting the circumstances that may lead to a BFA being set aside.

3.158 In the circumstances, there are serious questions about whether the BFA provisions, particularly in relation to pre-nuptial agreements, are meeting their original policy objectives, and whether amendments to allow them to do so are possible without unacceptable unintended consequences. There appears to be a reasonable case that pre-nuptial agreements should be removed from the Act.

3.159 However, this would be a very significant change to policy on BFAs. Accordingly, the ALRC asks for further submissions on what approach to reforming BFAs should be adopted, ranging from amendments to increase certainty, to repeal of provisions for pre-nuptial BFAs.

Spousal maintenance

Proposal 3–18 The considerations that are applicable to spousal maintenance (presently located in s 75 of the *Family Law Act 1975* (Cth)) should be located in a separate section of family law legislation that is dedicated to spousal maintenance applications ('dedicated spousal maintenance considerations').

Proposal 3–19 The dedicated spousal maintenance considerations should include a requirement that the court consider the impact of any family violence on the ability of the applicant to adequately support themselves.

Question 3–4 What options should be pursued to improve the accessibility of spousal maintenance to individuals in need of income support? Should consideration be given to:

- greater use of registrars to consider urgent applications for interim spousal maintenance;
- administrative assessment of spousal maintenance; or
- another option?

183 Feminist Legal Clinic, *Submission 180*.
184 S Christie, *Submission 216*.

3.160 The *Family Law Act* provides the family courts with a broad discretion to make orders for spousal maintenance.[185] Spousal maintenance may be payable where one party has the capacity to pay, and the other party is incapable of supporting adequately themselves without maintenance due to caring for a child of the relationship who is under 18, an inability to work due to age or disability, or any other adequate reason.[186] As a result, spousal maintenance is not available where the economically stronger party does not have the capacity to pay, even if their financial situation is significantly stronger than that of the other party.

3.161 The Act provides a number of factors (the 'future needs' factors) that should be taken into account in determining whether a person is eligible for maintenance, and what orders should be made about maintenance if so.[187] These include 19 matters including:

- the age and state of health of each of the parties;
- the income, property and financial resources of each of the parties, and the physical and mental capacity of each of them for employment
- whether either party has the care or control of a child of the relationship under 18 years of age
- responsibilities to support any other person;
- eligibility for benefits or pensions; and
- a standard of living that in all the circumstances that is reasonable.

3.162 Spousal maintenance can be agreed between the parties, or court ordered. Unlike child support, there is no scheme for administrative assessment of maintenance obligations. However, once maintenance has been ordered, the Child Support Agency can assist with collection of maintenance, for no charge.

3.163 Similarly for property orders, there is limited recent empirical evidence about the use of spousal maintenance orders. What research is available indicates that spousal maintenance orders are rare and are usually made on an interim basis. A review of Family Court and Federal Magistrates Court (as it was then) judgments in 2008 found that only 115 judgments of over 10,000 were indexed as relating to spousal maintenance.[188] The best available empirical evidence about the prevalence and quantum of spousal maintenance is an AIFS study from 1999, which drew on data from the Australian Divorce Transition Project, a telephone survey of 650 divorced

185 *Family Law Act 1975* (Cth) s 74.
186 Ibid s 72.
187 Ibid s 75(2).
188 Grant Riethmuller and Robin Smith 'Spousal Maintenance: Is it Time to Roast this Old Chestnut?', (Paper, 13th National Family Law Conference, Adelaide, 7 April 2008) 1–2, cited in Fehlberg et al, above n 57, 605.

individuals, and was designed to include both court ordered and privately arranged maintenance.[189] This study found that

> periodic spousal support continues to be rare, minimal and brief. Over the last decade, it appears to have occurred in less than 7 per cent (±2 per cent) of divorces, typically lasts for about two years, and averages about $128 per week ($6,640 per annum).[190]

3.164 There is clear evidence that family breakdown leads to financial hardship, and that women take longer to recover from this than men.[191] The AIFS data suggest that if levels of spousal maintenance have remained unchanged since 1999, then spousal maintenance is not making a significant contribution to alleviating financial hardship for post-separation families.

3.165 Submissions raised a number of circumstances where there may be an urgent or ongoing need for spousal maintenance, including where a parent is unable to return to work after separation due to caring responsibilities,[192] and where one party has a disability that prevents them from working.[193] In addition, submissions identified a need for spousal maintenance for individuals who have settled in Australia on a partner visa and are ineligible for government support.[194] The Migrant Women's Lobby Group of South Australia commented that:

> [f]or CALD women particularly those who are victims of domestic violence and are on visas under the sponsorship of the husband if proper financial provisions are not made to protect them these women would be left in dire straits penniless and homeless.[195]

3.166 There are also concerns about the practical accessibility of spousal maintenance orders. For example, while the Law Council of Australia suggested that there is no need for substantial change to provisions for spousal maintenance,[196] it also noted that changes to allow urgent interim spousal maintenance claims to be dealt with quickly are desirable.[197]

3.167 Others identified a range of possible reforms to the maintenance provisions, including:

- simplifying provisions for spousal maintenance and setting them out in a more sequential order, incorporating the process for analysing maintenance questions set out in case law;[198]
- merging provisions for married and de facto spousal maintenance;[199]

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189 Juliet Behrens and Bruce Smyth, 'Spousal Support in Australia: A Study of Incidence and Attitudes' (Working Paper No 16, Australian Institute of Family Studies, February 1999).
190 Ibid.
191 David De Vaus et al, 'The Economic Consequences of Divorce in Australia' (2014) 28(1) *International Journal of Law Policy and the Family* 26.
192 Interact Support Inc, *Submission 107*.
193 Victoria Legal Aid, *Submission 61*.
194 Australasian Centre for Human Rights and Health, *Submission 31*.
195 Migrant Women's Lobby Group of SA, *Submission 38*.
196 Family Court of Australia, *Submission 68*; Law Council of Australia, *Submission 43*.
197 Law Council of Australia, *Submission 43*. See also Victorian Women Lawyers, *Submission 84*.
198 NSW Young Lawyers Family Law Committee, Law Society of NSW, *Submission 108*.

- introducing 'capacity to earn' as a factor to be taken into account when assessing spousal maintenance;[200]
- introducing a rebuttable presumption of capacity to pay;[201]
- acknowledging explicitly the situation of individuals in Australia on temporary or partner visas, without other means of support;[202]
- including family violence as a consideration, such as through the relevance of the effects of violence on the future needs of a party;[203]
- introducing administrative assessment and enforcement of spousal maintenance;[204] and
- streaming spousal maintenance matters into appropriate lists.[205]

3.168 In line with the ALRC's focus on simplification and clarification of the law, the ALRC agrees with suggestions that spousal maintenance provisions could be redrafted to more clearly set out for readers the process for assessing spousal maintenance. This should include removing the cross-reference between property orders and spousal maintenance orders.

3.169 There was broad support in the submissions for an explicit recognition of the relevance of family violence to a person's need for spousal maintenance. For example, the Caxton Legal Centre noted that

> [o]ur concern is for the client who experiences disadvantage whilst their ex-partner has capacity to pay support. This scenario usually arises when there is family and domestic violence including in the form of financial abuse. The person who is the victim of family violence is usually self-represented due to their lack of access to finances. Usually their need for financial support is both urgent and ongoing. [206]

3.170 It seems clear that a course of violent conduct during a relationship could have an impact on a person's ability to adequately support themselves after separation. This could flow from a range of different impacts, such as trauma, physical disability, or a controlling partner preventing a person engaging with education and outside work that would have economically empowered them following separation. Many of these impacts would be relevant under the future needs factors. However, given the prevalence of family violence, and data indicating that some victims of family violence

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199 Law Council of Australia, *Submission 43*.
200 Victoria Legal Aid, *Submission 61*.
201 National Legal Aid, *Submission 163*.
202 CatholicCare Diocese of Broken Bay, *Submission 197*; Australasian Centre for Human Rights and Health, *Submission 31*.
203 National Legal Aid, *Submission 163*; Gowland Legal, *Submission 141*; L Bowen, *Submission 123*; NSW Young Lawyers Family Law Committee, Law Society of NSW, *Submission 108*; Victoria Legal Aid, *Submission 61*; Women's Legal Services Australia, *Submission 45*; Domestic Violence Victoria, *Submission 23*.
204 Victorian Women Lawyers, *Submission 84*; Victoria Legal Aid, *Submission 61*; Women's Legal Services Australia, *Submission 45*.
205 National Legal Aid, *Submission 163*.
206 Caxton Legal Centre, *Submission 51*.

are hesitant to seek spousal maintenance,[207] it would be appropriate to explicitly acknowledge its relevance to spousal maintenance requirements. The ALRC proposes that this could be achieved by inserting a reference to the effects of family violence on a person's ability to adequately support themselves into the future needs factors.

3.171 Drawing on the experience of administrative assessment and enforcement of child support, a number of submissions recommended that a similar system be implemented for spousal maintenance.[208]

3.172 It may be that development of a scheme of administrative assessment of spousal maintenance would make maintenance more available to economically weaker parties. However, there would be significant challenges to be overcome in developing such a scheme, particularly in deriving a formula that would adequately reflect the diversity of family situations, capacities, and financial circumstances. There may be options that could simplify this, similar to child support, such as providing for a standardised formula for maintenance providing basic support where the other partner has capacity to pay, with the option for agreements or departure orders to provide flexibility for non-standard situations.

3.173 The available empirical data indicates that spousal maintenance, where it occurs, often does so in the context of more formal legal dispute resolution, such as court processes.[209] It is possible that difficulty with accessing courts where parties have been unable to reach agreement on maintenance has led to a decline in the number of orders, particularly for interim maintenance, given the time critical nature of that form of relief. Previous practice in the courts was for urgent interim spousal maintenance applications to be heard and determined by a Registrar, in a relatively fast and cost-effective way. One option for improving the accessibility of spousal maintenance would be to revive this system for considering interim claims for maintenance.

207 Behrens and Smyth, above n 189.
208 See, eg, Women's Law Centre of WA, *Submission 40*; Caxton Legal Centre, *Submission 51*.
209 Behrens and Smyth, above n 189.

4. Getting Advice and Support

Contents

Summary

4.1 Many families who seek assistance from the family law system will have a range of legal and support needs.[1] This may include a need for housing assistance, financial assistance, and health and therapeutic support needs in addition to a need for legal advice about parenting or child support. As noted in Chapter 1, some families present with needs arising from experiences of family violence, mental illness or drug or alcohol misuse, that exacerbate their separation-related needs.

4.2 Submissions to this Inquiry indicate that family law clients are often frustrated by the disconnected nature of the service system, where family law and other services tend to operate in siloes.[2] The submissions and previous research also point to a number of barriers affecting the ability of families to access the range of services they need, and to the associated safety and wellbeing risks for children and parents.[3]

4.3 This chapter proposes the development of clearly designated community-based Families Hubs to act as a supported entry point to a range of legal and support services to meet the needs of separating families and their children outside the courts. The Families Hubs would build on the work of the Family Relationship Centres (FRCs), established in 2006, by bringing together, under one roof, embedded on-site workers from a range of local services, including legal assistance services, specialist family

1 Christine Coumarelos et al, *Legal Australia-Wide Survey: Legal Need in Australia* (Law and Justice Foundation of New South Wales, 2012).

2 See, eg, Victoria Legal Aid, *Submission 61*; Fitzroy Legal Service and Darebin Community Legal Centre, *Submission 7*.

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

violence services (for men and women), family dispute resolution services, therapeutic services, financial counselling services, housing assistance services, health services, children's contact services and parenting support or education services.

4.4 The proposal for Families Hubs aims to advance the safety and wellbeing of families and children by providing an initial needs assessment and linking clients with appropriate services and coordinating their engagement with these services over time.

4.5 To ensure a similar service for separating families who access the courts, the ALRC also proposes the existing Family Advocacy and Support Service (FASS) be expanded to offer a case managed model that is able to provide legal and support services to both parties to a dispute. Further, it is proposed that the FASS be rolled out to a greater number of family court locations, including in rural, regional and remote locations.

Addressing service fragmentation

4.6 As noted in Chapter 1, previous reports have demonstrated the growing presence of family law system clients with multiple support needs—including separation-related needs for housing assistance, counselling and legal advice about parenting and child support arrangements and visa issues—as well as support or safety needs associated with issues such as family violence or addictive behaviours.[4]

4.7 Associated with this dynamic, stakeholders noted the range of professional expertise that families with complex needs are likely to require, and the range of different services that clients may need to engage with.[5] The submissions and consultations also indicate that many clients who present with family law issues will have previously engaged with universal services, such as Centrelink, a health service or the police. While these organisations can act as referral pathways to legal services,[6] the ALRC's consultations suggest that such services rarely offer clients assistance with accessing the family law system.

4.8 As the family law system is presently structured, the range of services that a client may need remain largely siloed from one another. Submissions indicated that navigating between the different service sectors without assistance can be an overwhelming and frustrating experience for clients.[7] The submissions also suggest that the current fragmentation of services can pose significant safety risks for children and their parents.[8] This issue reflects concerns raised in previous reports about the

4 Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016); Rae Kaspiew et al, 'Evaluation of the 2012 Family Violence Amendments' (Synthesis Report, Australian Institute of Family Studies, 2015).

5 See Drummond Street Services, *Submission 20*; Relationships Australia, *Submission 11*.

6 Sophie Clarke and Suzie Forell, 'Pathways to Justice: The Role of Non-Legal Services' (Law and Justice Foundation of NSW, June 2007).

7 See, eg, Interrelate, *Submission 126*; Western Sydney CLC, *Submission 8*; Fitzroy Legal Service and Darebin Community Legal Centre, *Submission 7*.

8 See, eg, Family Inclusion Network Queensland (Townsville), *Submission 78*; National Family Violence Prevention Legal Services Forum, *Submission 63*; Australian Psychological Society, *Submission 55*; No to Violence, *Submission 32*.

dangers of disjointed service delivery for families with complex needs, and the need for coordinated and case managed responses.[9] As Professor Leah Bromfield and her colleagues have noted:

> When working with a parent who is dealing with multiple and complex problems, practitioners are likely to have to try to support them on different fronts. Referring the family to a different service or professional for each problem or trying to tackle all problems simultaneously will be overwhelming for the family. An effective intervention is planned and purposeful, based on a comprehensive assessment and staged to meet the family's needs and capacities over time.[10]

4.9 In recognition of the multi-service case management needs of family law clients, and the risks to children where families 'fall through the gaps' between service systems, submissions called for an integrated, or joined up, approach to service delivery, designed from a client-centred perspective.[11] Caxton Legal Centre, for example, observed that:

> What is required is a system response that recognises the different family law issues of the clients and provides a range of services appropriately matched to resolve those issues. For complex matters, the response needs to be holistic and multidisciplinary—one that addresses both legal and psychosocial issues.[12]

A need for joined up service delivery

4.10 As outlined in Chapter 1, many stakeholders identified existing positive initiatives within the family law system that should be retained and expanded. These included the FASS, which combines the services of legal aid lawyers and specialist family violence support workers to support clients affected by family violence who seek assistance at the courts. Some submissions suggested the need for similar cross sector partnerships outside the courts to support families with multiple service needs.[13]

4.11 One possibility for effecting this would involve expanding the role of the FRCs. In 2006, a network of FRCs was developed across the country,[14] with the aim of providing a single 'front door' entry point to the family law system for separating

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9 See, eg, Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010); Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016); Queensland Special Taskforce on Domestic and Family Violence, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (Queensland Government, 2015).

10 Leah Bromfield et al, *Issues for the Safety and Wellbeing of Children in Families with Multiple and Complex Problems: The Co-Occurrence of Domestic Violence, Parental Substance Misuse, and Mental Health Problems* (Australian Institute of Family Studies, 2010) 14.

11 See, eg, Federation of Community Legal Centres Victoria, *Submission 65*; Relationships Australia, *Submission 11*.

12 Caxton Legal Centre, *Submission 51*.

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

14 Australian Government et al, *A New Family Law System: Government Response to Every Picture Tells a Story: Response to the Report of the House of Representatives Standing Committee on Family and Community Affairs Inquiry into Child-Custody Arrangements in the Event of Family Separation* (2005) 11.

families outside of the courts.[15] While FRCs were designed to act as the 'front door' to services for separating families, they were not intended to operate as a 'one-stop-shop'. Rather than housing a wide range of services on-site, FRCs were designed to link clients with services through referrals.[16] Submissions to this Inquiry and previous reports suggest that the ability of FRCs to connect families with the full range of legal and support services they may need is limited by a number of factors, including:

- funding changes that have led FRCs to focus on the provision of family dispute resolution;[17]
- gaps in collaboration with legal assistance services,[18] which may be a hangover from the initial requirement that lawyers remain separate from FRCs;[19]
- gaps in collaboration with specialist family violence services;[20] and
- limited trust within Aboriginal and Torres Strait Islander communities and culturally and linguistically diverse communities in the ability of FRCs to provide culturally appropriate services.[21]

4.12 More generally, stakeholders noted that many services operate in a siloed way and may not have capacity to identify the full range of a client's service needs beyond those they provide.[22] Even where co-occurring issues are identified, agencies may not have sufficient knowledge of the broader services sector to make appropriate referrals,[23] and are unlikely to be able to coordinate and support a client's engagement with other services over time.

4.13 As a result, many clients are left to identify and access the services appropriate to their needs without assistance.[24] The risk of this is that families will disengage from the system or receive assistance in only one sphere (eg, legal advice), while their broader safety, support and advice needs, and those of their children, are not met.

4.14 In response, stakeholders suggested the need for a central hub[25] or problem-solving centre,[26] that incorporates a needs assessment role with both navigation assistance and coordination of service delivery, to assist people to safely and

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15 KPMG, *Future Focus of the Family Law Services: Final Report* (Report prepared for Attorney-General's Department (Cth), 2016) 43.
16 Sue Pidgeon, 'From Policy to Implementation—How Family Relationship Centres Became a Reality' (2013) 51(2) *Family Court Review* 224.
17 Centacare Family and Relationship Services (CFRS), *Submission 125*.
18 Drummond Street Services, *Submission 20*.
19 Lawrie Moloney et al, 'Family Relationship Centres: Partnerships with Legal Assistance Services' (2013) 51(2) *Family Court Review* 250, 251.
20 KPMG, above n 15.
21 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).
22 See, eg, Victoria Legal Aid, *Submission 61*.
23 Family & Relationship Services Australia, *Submission 53*.
24 Interrelate, *Submission 126*.
25 See, eg, Australian Psychological Society, *Submission 55*; Relationships Australia, *Submission 11*.
26 Fitzroy Legal Service and Darebin Community Legal Centre, *Submission 7*.

seamlessly access the range of services they may need when contemplating or experiencing separation.

Families Hubs

Proposal 4–1 The Australian Government should work with state and territory governments to establish community-based Families Hubs that will provide separating families and their children with a visible entry point for accessing a range of legal and support services. These Hubs should be designed to:

- identify the person's safety, support and advice needs and those of their children;
- assist clients to develop plans to address their safety, support and advice needs and those of their children;
- connect clients with relevant services; and
- coordinate the client's engagement with multiple services.

Proposal 4–2 The Australian Government should work with state and territory governments to explore the use of digital technologies to support the assessment of client needs, including their safety, support and advice needs, within the Families Hubs.

Proposal 4–3 Families Hubs should advance the safety and wellbeing of separating families and their children while supporting them through separation. They should include on-site out-posted workers from a range of relevant services, including:

- specialist family violence services;
- legal assistance services (such as community legal centres);
- family dispute resolution services;
- therapeutic services (such as family counselling and specialised services for children);
- financial counselling services;
- housing assistance services;
- health services (such as mental health services and alcohol and other drug services);
- gambling help services;
- children's contact services; and
- parenting support programs or parenting education services (including a program for fathers).

Proposal 4–4 Local service providers, including Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTIQ and disability organisations, specialist family violence services and legal assistance services, including community legal services, should play a central role in the design of Families Hubs, to ensure that each hub is culturally safe and accessible, responsive to local needs, and builds on existing networks and relationships between local services.

4.15 The ALRC proposes that multi-agency Families Hubs be established in local communities to provide separating families and their children with a visible contact point for accessing a range of legal assistance and support services in one place. Families Hubs should advance the safety and wellbeing of separating families and children while supporting them through separation. They should be designed and resourced to identify a person's safety, support and advice needs, and those of their children; assist them to develop a plan to address these needs and connect with relevant services; and coordinate their engagement with services.

4.16 The services to be represented by on-site workers in Families Hubs should respond to the range of service needs of separating families and their children, as identified in research[27] and submissions.[28] These would include specialist family violence services (for men and women); legal assistance services; family dispute resolution services; therapeutic services (such as family counselling and specialised services for children); financial counselling services; housing assistance services; health services (including mental health services and alcohol and other drug services); gambling help services; a children's contact service; and parenting support programs or parenting education services (including a program for fathers). The services represented in each Hub should be selected based on the service needs of the local community.[29]

4.17 As the range of services needed by separating families and their children would include both Commonwealth and state and territory funded agencies, the ALRC proposes that the Australian Government work with state and territory governments to establish Families Hubs.

4.18 The use of central access points, such as community-based hubs, has been championed in other sectors and jurisdictions as a way to address the unmet service needs of client groups that cannot be delivered by a single agency. In 2013, the Law Commission of Ontario recommended the creation of multidisciplinary, multifunction centres to act as integrated entry points to Ontario's family justice system.[30] Integrated

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

28 See, eg, Relationships Australia, *Submission 11*; Fitzroy Legal Service and Darebin Community Legal Centre, *Submission 7*.

29 See, eg, Fitzroy Legal Service and Darebin Community Legal Centre, *Submission 7*.

30 Law Commission of Ontario, *Increasing Access to Family Justice through Comprehensive Entry Points and Inclusivity*, Final Report (2013).

service hubs have also been used to address public health issues, both in Australia[31] and overseas.[32] As noted above, this approach also underpins the development of the Orange Door Support and Safety Hubs in Victoria.[33]

4.19 As suggested by stakeholders, to be effective each Hub would need to be clearly identified and well known in the local community as a trusted place to seek help when you separate.[34] The prominence of information about the Families Hubs in the national education campaign proposed in Chapter 2 would help to support community awareness of them and encourage families to seek assistance from them at an early stage when contemplating or experiencing separation.

4.20 The proposed Families Hubs share some of the features that drove the development of existing FRCs.[35] As with FRCs, Families Hubs are intended to be community-based, clear entry points to the range of services that separating families may need outside of the courts. However, Families Hubs would also have some important distinctions from FRCs. While FRCs were designed to link families with services through information and referrals, Families Hubs are designed to play a more active role in helping families to navigate and engage with existing services. As described below, this would be done through an initial intake process to identify the person's safety, support and advice needs. Clients would then be linked with on-site workers from relevant services in the one place. The Families Hubs would also have a case management function, to ensure clients with complex needs do not fall through the gaps when they leave a Families Hub.

4.21 The services represented in Families Hubs would extend beyond those currently provided by FRCs, including legal assistance services, specialist family violence services, addiction services, and financial counselling housing assistance services. In some communities they could also include culturally specific services, such as migrant resource centres or services provided by Aboriginal Community Controlled Organisations.

4.22 The policy goal of the Families Hubs also differs from that which drove the establishment of FRCs in 2006. FRCs were introduced as part of a suite of reforms designed to shift the culture of family separation 'away from litigation and towards cooperative parenting'.[36] The design of the Families Hubs responds to stakeholder calls for a contemporary family law system that advances the safety and wellbeing of children and families, emphasises collaborative and joined up service delivery, reduces conflict and adversarial approaches, is accessible for all families, including children and young people, and builds community trust. This shift in service philosophy

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31 See eg, NSW Health, *Integrated Care* <http://www.health.nsw.gov.au/healthone/Pages/integrated-care.aspx>; NSW Health, *HealthOne NSW Service Models* <http://www.health.nsw.gov.au/healthone/Pages/healthone-nsw-service-models.aspx>.

32 See eg, Youth Wellness Hubs Ontario, *What Are Youth Wellness Hubs?* <https://youthhubs.ca/>.

33 Victorian Government, *Support and Safety Hubs: Interim Integrated Practice Framework* (2018).

34 See eg, Anglicare WA, *Submission 152*; Relationships Australia, *Submission 11*; Fitzroy Legal Service and Darebin Community Legal Centre, *Submission 7*.

35 See on this, Pidgeon, above n 16.

36 Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill 2005.

responds to the evidence of the growing need for joined up service delivery to meet the advice and support needs of separating families and children, including families experiencing family violence.

4.23 The proposed Families Hubs should build on and support FRCs, rather than replacing them. As discussed below, workers from FRCs should be embedded in Families Hubs. However, Families Hubs should become the publically recognised first port of call for separating families. In selecting locations for Families Hubs, the ALRC suggests the Australian Government should identify places of convenience for separating families. For example, hubs may be housed in or adjacent to existing FRCs, legal aid commissions, the newly established Orange Door Support and Safety Hubs in Victoria, or state and territory magistrates courts.

How would Families Hubs link clients with appropriate services?

4.24 To ensure each person who seeks help at a Families Hub is linked with the services appropriate to their needs, each hub should have client support officers whose role is to conduct an initial risk and needs identification and link clients with relevant on-site workers. Client support officers should also fulfil a case management function as needed, as discussed below. Client support officers should have appropriate training and familiarity with the service system and should have the core competencies identified in the workforce capability framework set out in Chapter 10.

4.25 The ALRC also proposes the government explore the use of emerging digital technologies to assist client support officers in assessing client needs, including assessment of the client's safety, support and advice needs. This may include the use of predictive analytics, machine learning and real time computing.[37] Victoria Legal Aid suggested that online tools may also have the potential to assist professionals to identify family law issues.[38] The ALRC notes the increasing use of online tools to assist with client intake and referrals, including Victoria Legal Aid's new Online Referral Booking Information Tool (ORBIT), which is being used to assist staff in matching clients with appropriate services.[39]

4.26 After identifying clients' service needs, the client support officer should link them with the on-site workers from relevant services. This may involve introducing

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37 See Ryan van Leent, *Emerging Technologies Enabling Data-Driven Policy and Practice—Series Introduction* <https://blogs.sap.com/2018/02/05/emerging-technologies-enabling-data-driven-policy-and-practice-series-introduction/>; Ryan van Leent, *Emerging Technologies Enabling Data-Driven Policy and Practice—Combatting Wicked Problems with Predictive Analytics* <https://blogs.sap.com/2018/03/13/emerging-technologies-enabling-data-driven-policy-and-practice-combatting-wicked-problems-with-predictive-analytics/>; Ryan van Leent, *Emerging Technologies Enabling Data-Driven Policy and Practice—Improving Customer Empathy with Machine Learning* <https://blogs.sap.com/2018/03/14/emerging-technologies-enabling-data-driven-policy-and-practice-improving-customer-empathy-with-machine-learning/>; Ryan van Leent, *Emerging Technologies Enabling Data-Driven Policy and Practice— Overcoming Big Data Challenges with Real-Time Computing* <https://blogs.sap.com/author/ryan.van.leent/>.

38 Victoria Legal Aid, *Submission 61*.

39 Victoria Legal Aid, *New Online Tool Helps More Victorians Access Legal Support Services* <www.legalaid.vic.gov.au/about-us/news/new-online-tool-helps-more-victorians-access-legal-support-services>.

clients to these workers, and sharing information received during the intake process with the client's consent. These services can then conduct a more thorough risk and needs assessment, as well as safety planning if this is required. If clients require a service not represented at the hub, the client support officer should assist with these referrals.

4.27 With the client's consent, on-site workers could share information as clients move between services. In this way, clients would not have to re-tell their story. It is also envisaged that these professionals would work together with clients to develop a staged plan to address their multiple support needs (and those of their children) in a way that does not overwhelm them.[40]

Services to be included in Families Hubs

4.28 To support easy access to services, each hub should have on-site workers out-posted from a range of the services most commonly required by separating families and their children, as well as additional services identified as relevant to the local community.

4.29 In communities with existing FRCs, workers from these FRCs should be present in the Families Hubs. FRCs play a central role in providing key services to separating families in the current family law system, and this role should be supported through the Families Hubs. On-site FRC workers at the Hubs could provide links to family dispute resolution services, parenting support programs, children's contact services and/or therapeutic services. During consultations and submissions, the ALRC heard of significant innovation that has occurred within FRCs and a willingness to play a central role in future service innovation and integration.[41] The learnings from the FRCs would be critical to the development of the Hubs.

4.30 It is important to note that while services provided by FRCs would be required by separating families accessing Families Hubs, the other services listed in Proposal 4–3 would be of equal importance. Submissions suggested that it would be important to any integrated service initiative to include legal assistance services and specialist family services, alongside addiction services and existing family relationship services, to meet the full range of families' separation-related needs.[42] Embedded workers from these services would be integrated in the Hubs in a collaborative and non-hierarchical manner—a factor identified as essential to the success of integrated service approaches.[43]

4.31 The inclusion of workers from specialist family violence services would be integral to the success of Families Hubs. This should include services for women and services for men.

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40 Bromfield et al, above n 10, 14.
41 See, eg, Relationships Australia, *Submission 11*; Family Life, *Submission 9*.
42 See, eg, Relationships Australia, *Submission 11*.
43 ANROWS, *Submission 156*.

4.32 The Commission's consultations also identified the importance of including parenting services for fathers in any new integrated service model.[44] Research suggests that fathers may be less likely than mothers to access child and family services, and that service providers may need to adapt the way that services are promoted and delivered to more effectively engage fathers.[45] The ALRC proposes that the parenting support programs or parenting education services in Families Hubs include a program for fathers. This may include specialist services that work with fathers who have used violence.[46]

4.33 In Chapter 7, the ALRC proposes that out-posted workers from specialised services for children and young people should be included in the Families Hubs (Proposal 7–2). Consultations for this Inquiry raised concerns about the limited availability of places for young people whose parents are separating to get help. In including workers from services for children and young people in the Hubs, consideration should be given to making the hubs a visible place in the community for young people to go for help when their parents are separating.

4.34 As community-based initiatives, the design of each Families Hub should be responsive to the needs of the local community it serves. As such, local service providers should play a central role in identifying the services most needed by separating families in the community. This should include capacity for flexibility to accommodate on-site workers from local agencies such as Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTIQ and disability organisations. This would help to ensure the Hubs meet local needs and are culturally safe and accessible spaces. The importance of co-designing integrated services with community controlled organisations was recognised in a number of submissions.[47]

4.35 Providing local service providers with a central role in the design and delivery of each hub would also allow existing networks and relationships between local services to be supported and strengthened, rather than replaced, by the Hubs, and would help to establish community trust.

4.36 The on-site workers from this range of services should be brought together in Families Hubs with the shared priority of advancing the safety and wellbeing of separating families and their children while supporting them through separation. This is consistent with the core aim of the contemporary family law system and may be used to guide the development of a program logic[48] for the planning and evaluation of the

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44 See on this, Richard Fletcher, 'Father-Inclusive Practice and Associated Professional Competencies' (AFRC Briefing 9, Australian Institute of Family Studies, 2008) 3.

45 Fletcher, above n 44; Bridget Tehan and Myfanwy McDonald, 'Engaging Fathers in Child and Family Services' (CAFCA Practice Sheet, Australian Institute of Family Studies, 2010).

46 Cathy Humphreys and Monica Campo, 'Fathers Who Use Violence: Options for Safe Practice Where There Is Ongoing Contact with Children' (CFCA Paper No 43, Australian Institute of Family Studies, 2017).

47 See, eg, National Family Violence Prevention Legal Services Forum, *Submission 63*; Domestic Violence NSW, *Submission 44*; Community Legal Centres NSW, *Submission 34*; Fitzroy Legal Service and Darebin Community Legal Centre, *Submission 7*.

48 Also referred to as a program theory, logic model and/or theory of change, a program logic describes how a program is intended to work by linking activities with outputs, intermediate impacts and longer term

hubs. Submissions suggested the use of a common framework and a focus on families to guide the process of service integration in the contemporary family law system.[49]

4.37 Embedding out-posted workers from different services together at the Hubs may also help to overcome the organisational and professional cultures and practices and service philosophy issues that have been identified as barriers to collaborative practice.[50] Co-locating workers helps to break down siloes and build trust between them, improve their knowledge of each other's roles and services, enhance their ability to 'issue spot' and make appropriate referrals, and can drive service innovation.[51] The development of collaborative relationships between on-site workers should be further supported through ongoing joint professional development organised by the Hubs, such as is currently provided by the Family Law Pathways Networks.[52]

Supporting clients outside of the Families Hubs

4.38 In some cases, a client might not require further assistance from a service after their initial meeting. Where they do, the on-site worker could make a follow-up appointment for the client while they are together. This appointment could occur at the Families Hub, or off-site at the main premises of the relevant service provider.

4.39 Where a person seeking help at a Hub has complex needs or vulnerabilities, the Hubs should provide an additional case management service. This service should be provided by a client support officer and be similar to that provided by the Family Safety Practitioner in Relationship Australia Victoria's Family Safety Model,[53] who both facilitates and supports family members to connect with services and monitors their engagement with services over time.[54]

4.40 Case management may involve checking in with a client after they have left the hub and throughout their service engagement and providing additional referrals as needed. The client support officer should only perform this role where an on-site worker, such as a family violence specialist worker, is not more suited to provide ongoing case management and the client cannot be linked with a case manager from any other appropriate service, such as a migrant women's support service. Ensuring

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outcomes. See NSW Ministry of Health, *Developing and Using Program Logic: A Guide* (2017) 4. See also Drummond Street Services, *Submission 20*.

49 See, eg, Drummond Street Services, *Submission 20*; Relationships Australia, *Submission 11*.

50 See eg, COAG Advisory Panel on Reducing Violence against Women and their Children, above n 3, 111. Lana Zannettino and Helen McLaren, 'Domestic Violence and Child Protection: Towards a Collaborative Approach across the Two Service Sectors: Towards a Collaborative Approach' (2014) 19(4) *Child & Family Social Work* 421.

51 Marty Grace and Louise Coventry, 'The Co-Location of YP4 and Centrelink in Bendigo Australia: An Example of Partnership in Action' (2010) 10(2) *Journal of Social Work* 157; Ally R Memon and Tony Kinder, 'Co-Location as a Catalyst for Service Innovation: A Study of Scottish Health and Social Care' (2017) 19(4) *Public Management Review* 381; Martine B Powell and Rebecca Wright, 'Professionals' Perceptions of a New Model of Sexual Assault Investigation Adopted by Victoria Police' (2012) 23(3) *Current Issues in Criminal Justice* 333.

52 See eg, Toowoomba and South West Queensland Family Law Pathways Network, *Submission 200*; Albury Wodonga Family Law Pathways Network, *Submission 17*.

53 See also Relationships Australia Victoria, *Submission 129*.

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

that Families Hubs have capacity to perform a case management function as required would ensure that when vulnerable clients leave a Hub, they are not on their own.

4.41 To improve client pathways into and beyond hub services, Families Hubs should also have strong referral relationships with universal services such as education and health services, Centrelink and Child Support, and first point of contact services for people who have experienced family violence, as discussed in Proposal 2–4. They should also establish close working relationships with the family courts, including co-located registries in state and territory local courts (discussed in Chapter 6).

4.42 Each Families Hub should have a Hub Coordinator, who should develop and maintain relationships with each of the services represented at the Hub, as well as other relevant services in the local community that separating families and their children may need. Where client support officers are not familiar with available services to meet particular client needs, the Hub Coordinator should be available to provide assistance.

4.43 The Hub Coordinator should also support the development of strong collaborative relationships between on-site workers and with relevant services in the local community. As noted above, this should include responsibility for joint professional development.

Expansion of the Family Advocacy and Support Service

Proposal 4–5 The Australian Government should, subject to positive evaluation, expand the Family Advocacy and Support Service (FASS) in each state and territory to include:

- an information and referral officer to conduct intake, risk and needs screening and triage, as well as providing information and resources;
- a family violence specialist legal service and a family violence specialist support service to assist clients who have experienced or are experiencing family violence; and
- an additional legal service and support service, to assist clients who are alleged to have used family violence and clients who are not affected by family violence but have other complex needs.

Proposal 4–6 The FASS support services should be expanded to provide case management where a client has complex needs and cannot be linked with an appropriate support service providing ongoing case management.

Proposal 4–7 The level and duration of support provided by the FASS should be flexible depending on client need and vulnerability, as well as legal aid eligibility for ongoing legal services.

Proposal 4–8 The Australian Government should, subject to positive evaluation, roll out the expanded FASS to a greater number of family court locations, including in rural, regional and remote locations.

4.44 To ensure that separating families who enter the family law system through the courts are also provided with navigation assistance, legal and other supports, and case management as needed, the ALRC proposes an expansion of the existing FASS in each state and territory. The model proposed includes an information and referral officer (IRO), two legal services and two support services, giving FASS the capacity to assist both parties to a dispute. One of the legal services and one of the support services should be provided by services with family violence expertise. All FASS workers would also need to have the core competencies appropriate to their role as identified in the workforce capability plan set out in Chapter 10. The expanded FASS model should provide duty legal services and support services to people affected by family violence, as well as people who may not be affected by family violence but have other complex needs.

4.45 To address the risk of clients with safety risks, complex needs and vulnerabilities falling through the gaps, it is proposed that the FASS support services have the capacity to provide case management support as needed. This support should be provided where a client with complex needs and vulnerabilities does not have an existing case manager, and cannot be linked with an appropriate services providing ongoing case management. The level and duration of support provided by FASS, including case management support, should be flexible depending on each client's level of need and vulnerability. For clients requiring ongoing legal services beyond the FASS duty legal services, existing legal aid eligibility tests should apply.

4.46 To ensure access to the expanded FASS, the ALRC proposes that it be rolled out to a greater number of family court locations, including rural, regional and remote locations. These proposals are subject to a positive evaluation of the existing FASS.

The current Family Advocacy and Support Service

4.47 In May 2017, the Australian Government launched the FASS in each state and territory. The FASS is designed to provide integrated duty legal services and support services to families affected by family violence in the family courts. The FASS is currently running as a pilot in 23 family court registries, with funding until 2019.[55] The FASS is currently being evaluated by independent evaluators.[56]

4.48 While each FASS assists families affected by family violence; is delivered and coordinated by legal aid commissions; and combines duty lawyers and specialist family violence support workers using a team-based approach,[57] the legal aid commissions in each state and territory have developed their own models.

4.49 Some models provide two duty legal services, which enables the FASS to assist both parties in a family law dispute.[58] These services are provided by legal aid

55 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) 144.

56 National Legal Aid, *Submission 163*.

57 Federal Circuit Court of Australia, *Annual Report 2016–17* (2017) 83–5.

58 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 55, 144.

commissions and community legal centres. Some models also provide two support services. The service providers differ, but typically include a family violence specialist support service for women and an additional support service for men.[59]

4.50 In other models, the FASS is staffed by one legal service and/or one support service.[60] Some FASS models also have a coordinator or IRO, who triages and links clients with FASS duty lawyers and support services to meet their legal and non-legal needs.[61]

4.51 Eligibility for one-off duty legal assistance or support through the FASS is not dependent on legal aid eligibility tests. People are eligible for this assistance if they, or a member of their family, have experienced, used or are alleged to have used family violence and they need legal assistance with a family law, child protection or family violence matter.[62]

4.52 While the evaluation of the existing FASS models has not yet been published, the FASS was commended to the ALRC in many submissions and consultations.[63] A number of submissions suggested the FASS model should be supported and expanded to assist clients at the family courts to navigate and access appropriate services to meet their legal and non-legal needs, including through the addition of a case management model.[64]

4.53 While not all families seeking legal and support services through the courts will be affected by family violence, research indicates that many will be.[65] The importance of providing services to people who have used family violence as well as people who have experienced family violence in efforts to reduce the risks faced by victims/survivors and their children has been recognised in recent reports.[66] Ensuring that both parties to a dispute can access legal and support services, including case management, through the expanded FASS, would promote the safety and wellbeing of both parties and their children.

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59 See, eg, Peninsula Community Legal Centre, *Submission 30*; Legal Aid NSW, Submission No 90 to SPLA Committee, Parliament of Australia, Inquiry into *A Better Family Law System* (June 2017).

60 See, eg, Legal Aid ACT, *Family Advocacy and Support Services* <http://legalaidact.org.au>; Legal Services Commission of South Australia, *Family Advocacy and Support Service—Legal Services Commission of South Australia—Duty Lawyer and Social Work Service* <https://lsc.sa.gov.au/resources/FASSFactsheet.pdf>.

61 See, eg, Victoria Legal Aid, *Submission 61*; Peninsula Community Legal Centre, *Submission 30*.

62 See, eg, Legal Aid ACT, above n 60; Victoria Legal Aid, *Family Advocacy and Support Services* <www.legalaid.vic.gov.au/get-legal-services-and-advice/free-legal-advice/get-help-court/family-advocacy-and-support-services>.

63 See, eg, NATSIWA, Harmony Alliance and AWAVA, *Submission 122*; Aboriginal Legal Service of Western Australia, *Submission 64*; Australian Psychological Society, *Submission 55*; Women's Legal Services Australia, *Submission 45*; Safe Steps Family Violence Response Centre, *Submission 15*.

64 See, eg, Women's Domestic Violence Court Advocacy Services NSW, *Submission 153*; Marrickville Legal Centre, *Submission 137*; Victoria Legal Aid, *Submission 61*.

65 Allegations of family violence were present in 65% of judicially determined matters and 52% of matters resolved by consent after court proceedings in the post-reform court files analysis. Rae Kaspiew et al, 'Court Outcomes Project: Evaluation of the 2012 Family Violence Amendments' (Australian Institute of Family Studies, 2015) 48.

66 See, eg, COAG Advisory Panel on Reducing Violence against Women and their Children, above n 3; Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016) vol III, ch 18.

An expanded Family Advocacy and Support Service

4.54 As discussed above, the family law system has a need for clear access points to link family law clients with the full range of legal and support services they may need. The proposed expansion of the FASS is designed to ensure that separating families who enter the family law system through the courts are provided with this entry point, linked with appropriate services and provided with case management support where this is needed.

4.55 The expanded FASS model proposed represents a 'best practice' model drawn from the different FASS models currently operating in each state and territory and responds to the need identified in submissions for clients entering through the family courts to receive navigation assistance, including:

- assistance for clients moving between the various legal and support services they may require;[67]
- assistance for clients moving between the family law, family violence and child protection systems;[68]
- case management support for clients with complex needs;[69] and
- provision of clear and appropriate information and resources.[70]

FASS Information and Referral Officer

4.56 The IRO should be the first contact point for people seeking legal and/or support services from the FASS. The IRO should conduct intake, risk and needs screening and triage. This may involve checking whether clients have a family violence order for their protection or have had a family violence order made against them; checking whether clients are prevented by a conflict of interest from seeing either legal service; checking whether clients needs assistance with housing, financial support or therapeutic support; and checking whether clients need legal information or advice. The IRO should then refer clients to the most appropriate legal and/or support service. The IRO should also provide clients with appropriate information and resources from the information package proposed in Chapter 2. The IRO should have the core competencies identified in the workforce capability plan as detailed in Chapter 10.

FASS legal services

4.57 To ensure that both parties to a dispute can receive duty legal services through the FASS, each FASS should comprise two legal services. Each FASS should have one legal service provided by a specialist family violence legal service, such as a Women's Legal Service or Domestic Violence Unit. These services have specialist knowledge

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67 See, eg, Berry Street, *Submission 26*; Drummond Street Services, *Submission 20*.

68 See, eg, Federation of Community Legal Centres Victoria, *Submission 65*; Fitzroy Legal Service and Darebin Community Legal Centre, *Submission 7*.

69 See, eg, CatholicCare Sydney, *Submission 79*; Victoria Legal Aid, *Submission 61*.

70 See, eg, Women's Domestic Violence Court Advocacy Services NSW, *Submission 153*; TASC National, *Submission 1*.

and skills in assisting people experiencing family violence, and are likely to provide duty services in magistrates courts—creating referral pathways for clients moving between the court systems. Caxton Legal Centre, which provides duty legal services in the Brisbane Magistrates Court as well as FASS duty legal services in the Brisbane registry of the Federal Circuit Court of Australia, described how this creates a referral pathway for their clients:

> In Brisbane, domestic violence duty lawyers can refer urgent family law matters to the Family Advocacy and Support Service in the Brisbane Federal Circuit Court registry (it is only a short walk between the courts and our duty lawyers are rostered in both courts), who can assist clients with commencing family law proceedings and provide continuing support services throughout that process.[71]

4.58 Each FASS should also provide an additional legal service, which may be provided by a legal aid commission or community legal service, skilled in the provision of legal services to clients with complex needs. These services should also have knowledge of, or provide duty services in the magistrates courts to create referral pathways for clients moving between the court systems. While the additional legal service may not be a specialist family violence service, the staff would need to have the core competencies identified in the workforce capability plan outlined in Chapter 10. This should include an understanding of the nature and dynamics of family violence, and the ability to work both with people who have used family violence and people who have experienced family violence.

4.59 The ALRC suggests that, where possible, the legal assistance services selected to provide FASS duty services should also provide on-site legal assistance at the proposed Families Hubs,[72] described above. This would create referral pathways between the family courts and the Families Hubs, and ensure that clients who move between them are able to receive assistance from the same legal assistance service where possible. The ALRC notes that the FASS legal services currently address fragmentation between the family law, family violence and child protection systems by providing clients with advice and advocacy in relation to state family violence orders and state child protection orders, and their interaction with the family law system.[73] This work should continue in the expanded FASS model.

4.60 The FASS legal services should continue to provide clients with the same services they do through the current model, which include:

- legal advice and support;
- drafting assistance, including preparation of notices of risk and court applications;
- screening and risk assessment for legally-assisted dispute resolution in legal aid commission programs; and

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71 Caxton Legal Centre, *Submission 51*.
72 See Proposals 4–1 to 4–4.
73 Federal Circuit Court of Australia, above n 57, 84.

- drafting urgent applications and providing court representation in these matters, including matters where an order is needed for the recovery of a child or an airport watch list order is needed to prevent a child from being removed from Australia.[74]

4.61 The FASS legal services should continue to operate on a duty basis, providing unbundled legal services on a non-ongoing basis.[75] The level of service provided should be flexible dependent on client need and vulnerability, as well as legal aid eligibility for any ongoing legal services provided. Where clients require ongoing assistance and are not eligible for legal aid, FASS legal practitioners should assist with referrals to other local legal service providers.

FASS support services

4.62 Each FASS should have one support service provided by a family violence specialist service with the skills and knowledge to support people experiencing family violence. These services are also likely to have experience supporting clients in the magistrates courts in family violence matters, and to have knowledge of local support services available to assist people who are experiencing family violence. Women's Domestic Violence Court Advocacy Service, which provides support services through FASS in New South Wales as well as assisting women in local family violence matters, provided the following case study of how their service assists clients across the family law and family violence systems and between relevant services:

> Amy* accessed the FASS service at Parramatta seeking legal advice … This was the first time she had disclosed to a service the domestic violence she was experiencing. … After receiving advice from a FASS duty solicitor, Amy was referred to the FASS social support worker. Amy shared her safety concerns and the impact on her wellbeing. The FASS social support worker completed the Safety Assessment Tool (DVSAT) and assisted Amy in forming a safety plan … The FASS worker assisted Amy in making a report to the police, obtaining a protection order, meeting with a Centrelink social worker, and applying for financial assistance through Victim Services.[76]

4.63 An additional support service should be provided by each FASS to ensure both parties in a family law matter are able to receive support to address their non-legal needs. As family violence disproportionately affects women[77] and is disproportionately perpetrated by men,[78] many specialist family violence services are women's services. The additional support service is therefore likely to work predominately with men; however it is important to note that not all men who access this service would have used, or be alleged to have used, family violence. This support service should be

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74 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 55, 144; Federal Circuit Court of Australia, above n 57, 84.

75 See National Legal Aid, *Submission 163*.

76 Women's Domestic Violence Court Advocacy Services NSW, *Submission 153*.

77 In Australia, one in 6 women and one in 16 men have experienced physical and/or sexual violence by a current or previous partner since the age of 15 and almost one in 4 women and one in 6 men have experienced emotional abuse from a current or previous partner since the age of 15. See Australian Institute of Health and Welfare, 'Family, Domestic and Sexual Violence in Australia' (AIHW, 2018) 1.

78 Ibid 32.

provided by an organisation experienced in providing services to people who have used family violence and/or supporting clients with complex needs. As men may also experience family violence,[79] the workers in these services should also be appropriately skilled to provide support to people who have experienced family violence.

4.64 The need for an additional FASS support service for men was identified in the FASS case study provided by Relationships Australia:

> Relationships Australia New South Wales provides the FASS for men in Wollongong, Sydney, Parramatta and Newcastle family court registries. Initial feedback is that this service has been very useful and effective in supporting men through the provision of an interdisciplinary service which also includes assistance in navigating the family law processes. In particular, FASS staff have been able to work with men to reduce their emotional valence and support attendance at courses to reduce their potential to use family violence – and have it used against them. However the capacity to offer services to men is confined, in the Pilot, to one day per week[80]

4.65 As identified in the above case study, the additional support service may have experience providing behaviour change programs or parenting support programs. The potential of FASS to provide a more structured referral pathway between the courts and behaviour change programs was identified by the House of Representatives Standing Committee on Social Policy and Legal Affairs (SPLA Committee).[81]

4.66 The FASS support services should continue to provide clients with the same services they do through the current model, which include:

- safety planning for clients at risk; and
- coordinating and advocating for additional referrals to services able to meet each client's range of support needs.[82]

4.67 The ALRC notes that FASS support services are currently available to clients who have legal representation separate from the FASS, as well as self-represented litigants.[83] Legally represented clients should continue to have access to these services in the expanded FASS where they have non-legal support needs that are not otherwise being met.

4.68 As with the FASS legal services, the ALRC suggests that, where possible, the services selected to provide FASS support services should also provide on-site legal

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79 In Australia, one in 16 men have experienced physical and/or sexual violence by a current or previous partner since the age of 15 and one in 6 men have experienced emotional abuse from a current or previous partner since the age of 15. See Ibid 1.

80 Relationships Australia, *Submission 11*.

81 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 55, 302.

82 Federal Circuit Court of Australia, above n 57, 84–5; House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 55, 144.

83 See, eg, Legal Aid NSW, *Family Advocacy and Support Service* (11 January 2018) Legal Aid NSW <https://www.legalaid.nsw.gov.au/what-we-do/domestic-violence/family-advocacy-and-support-service-fass>; Victoria Legal Aid, *Specialist Family Violence Services at Family Law Registries Open for Referrals* <www.legalaid.vic.gov.au/about-us/news/specialist-family-violence-services-family-law-registries-open-for-referrals>.

assistance at the proposed Families Hubs, described above, to support referral pathways for clients between these Hubs and the courts.

Case management support

4.69 The FASS support services should be expanded to provide case management to clients with complex needs and vulnerabilities when they cannot be linked with an appropriate support service providing ongoing case management. Case management is used across health, social care, correctional and legal sectors, and broadly refers to the coordination, navigation and management of a person's journey while engaged with that sector where a person has complex needs.[84] As with the case management function of the client support officer in Families Hubs, this may involve checking in with a client after they have left the hub and throughout their service engagement, and providing additional referrals and advocacy to ensure clients remain linked with relevant services.

4.70 Many submissions suggested that the FASS could be expanded through the addition of a case management service.

4.71 The Centre for Innovative Justice suggested that the FASS model should:

> provide ongoing case management of parties in matters involving FV [family violence] so as to oversee their participation in relevant services while family law proceedings are on foot, thereby minimising risk to family members while a legal matter is resolved.[85]

4.72 Peninsula Community Legal Centre, which provides FASS legal services in the Dandenong registry of the FCCA in Victoria, noted that, while FASS is playing a significant role in assisting families with their immediate legal and non-legal needs, there is a need for ongoing assistance to help clients coordinate and maintain their engagement with a range of support services which the current model does not provide. It was suggested that this need could be met by a 'navigator' at court who 'would have a role similar to a social worker in the sense that they would provide ongoing, holistic support and referral … but also have legal knowledge and skills.'[86]

4.73 Domestic Violence Victoria also recommended that a case management service should be introduced to the family law system through an expansion of the FASS. This service would provide each party with a case manager 'who would work alongside their client to coordinate and broker the family law system while also providing practical and emotional support throughout the entire journey. This would include referrals to other internal and external services as required.' It was suggested that this should be preferred to creating a new 'navigator' service.[87]

4.74 Victoria Legal Aid suggested that the FASS model be expanded by a case management model, which would 'support families to move promptly through the

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84 Sue Lukersmith, Michael Millington and Luis Salvador-Carulla, 'What Is Case Management? A Scoping and Mapping Review' (2016) 16(4) *International Journal of Integrated Care* 2.

85 Centre for Innovative Justice, RMIT University, *Submission 109*.

86 Peninsula Community Legal Centre, *Submission 30*.

87 Domestic Violence Victoria, *Submission 23*.

system, identify and collect the relevant information for their matter, and link children and families into appropriate services to enable them to address non-legal needs'.[88] It was suggested that clients be triaged into the service, with the intensity of the service provided proportionate to each client's level of need and vulnerability.[89] The gathering of relevant evidence in appropriate family law proceedings involving children is a role that the ALRC proposes be fulfilled by separate legal representatives (Proposal 7–10).

4.75 The ALRC considers that, where clients have complex needs and vulnerabilities and do not have an existing case manager, or cannot be linked with one outside of the FASS, case management should be provided by the FASS support services. This would allow them to continue to check in with and provide support, referrals and advocacy to clients with complex needs throughout their engagement with the family law system. These services are likely to have existing case management skills and familiarity with local services available to assist clients with their non-legal needs.

4.76 Some submissions suggested that, while FASS was a promising model, as a mainstream service it may not be effective when providing services to Aboriginal and Torres Strait Islander people. It was suggested that these clients should have access to specialist services and Aboriginal Community Controlled Organisations.[90] The ALRC recognises the importance of Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse communities, people with disability and people from LGBTIQ communities having access to specialist services. FASS support services should link clients in need of ongoing case management to appropriate support services outside of the FASS wherever possible. This would require the FASS support services to have knowledge of local specialist services. The importance of establishing collaboration and referral pathways between mainstream services, including the FASS, and specialist services has been recognised in previous reports.[91]

4.77 The ALRC proposes that the level and duration of support provided by the FASS support services should be flexible, depending on client need and vulnerability.

FASS locations

4.78 In addition to expanding the existing FASS as detailed in Proposals 4–5 to 4–8, the ALRC proposes that the expanded FASS be rolled out to a greater number of family court locations, including rural, regional and remote locations. This includes locations that the family courts visit on circuit. FASS is currently operating in most permanent family court registries, but is not represented in all circuit court locations.[92] The ALRC also suggests that, when co-locating family law registries in local court

88 Victoria Legal Aid, *Submission 61*.

89 Ibid.

90 See, eg, NATSILS, *Submission 157*; National Family Violence Prevention Legal Services Forum, *Submission 63*.

91 Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (2012) rec 3; Family Law Council, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds* (2012) rec 3; House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 55, rec 26.

92 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 55, 144.

registries as proposed in Proposal 6–8, the Australian Government should roll out the expanded FASS to these local court registries in locations where clients are not already assisted by existing duty legal services and support services.

4.79 The SPLA Committee reported that it received evidence indicating that 'the FASS is improving safety and assisting families to navigate complex and fragmented jurisdictions.'[93] This reflects the feedback received in this Inquiry through consultations and submissions. The SPLA Committee also identified a need for FASS to be rolled out, recommending that it be extended to a greater number of locations including in rural and regional Australia.[94] The expansion of FASS to a greater number of locations, including rural, regional and remote locations that the family courts visit on circuit, was also supported in submissions.[95]

4.80 Women's Legal Services Australia suggested expansion of the FASS to a greater number of locations should take local needs into account, highlighting the need for 'recognition that such a model needs to be responsive to the needs of the local people and so if rolled out each registry needs to consult locally about what is needed and may provide the service differently.'[96]

93 Ibid 148.
94 Ibid rec 1.
95 See, eg, Women's Domestic Violence Court Advocacy Services NSW, *Submission 153*; Anglicare WA, *Submission 152*; Federation of Community Legal Centres Victoria, *Submission 65*; Victoria Legal Aid, *Submission 61*; Peninsula Community Legal Centre, *Submission 30*.
96 Women's Legal Services Australia, *Submission 45*.

5. Dispute Resolution

Contents

Summary

5.1 Patterns of service use have changed significantly since the introduction of stronger legislative support for family dispute resolution (FDR) in children's matters in 2006. Court filings in children matters dropped by 25% and the use of FDR increased significantly. FDR has gained increasing acceptance and more sophisticated models, such as legally assisted dispute resolution (LADR), are seen as suitable even for more complex cases. By contrast, FDR is used less frequently for property and financial matters and is not a mandatory requirement. However, research evidence shows that most separated parents have modest incomes and asset pools, demonstrating a need for greater access to affordable dispute resolution mechanisms.

5.2 This chapter sets out proposals to enhance the availability and use of flexible and appropriate models of FDR in both parenting and property and financial matters. These include refinements to provisions for mandatory FDR for parenting matters, and changes to support the use of pre-litigation FDR for property and financial orders, including a requirement to lodge a genuine steps statement at the time of filing, and an explicit duty of disclosure of property assets.

5.3 The chapter also includes proposals to improve professional practices, including advisers' obligations when providing advice to clients relating to FDR, and proposals to further develop culturally appropriate and safe models of FDR, and for development of guidelines for LADR.

Expanding the availability of FDR

5.4 The *Family Law Act 1975* (Cth)[1] creates a legislative scheme for FDR. It defines FDR as:

> a process (other than a judicial process)
>
> (a) in which a FDR practitioner helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other; and
>
> (b) in which the practitioner is independent of all of the parties involved in the process.[2]

5.5 FDR practitioners are accredited under the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) (*Family Dispute Regulations*). There is also a parallel scheme for accreditation of mediators, the National Mediation Accreditation System (NMAS), overseen by the Mediator Standards Board. The advantages, disadvantages and implications for people using the family law system of two parallel schemes should be considered in the development of the workforce capability plan proposed in Chapter 10. The use of the term FDR should be taken to encompass mediation in this section unless an explicit distinction is made.

5.6 Presently, there are significant distinctions between practitioners registered under the NMAS and FDR practitioners within the meaning of s 10G of the *Family Law Act*. Only processes involving FDR practitioners within the meaning of s 10G of the *Family Law Act* are covered by the confidentiality[3] and inadmissibility[4] provisions. Further, only FDR practitioners may issue certificates evidencing attempts at FDR under s 60I of the *Family Law Act*.

5.7 The legislative scheme in relation to FDR was introduced to support the 2006 family law reforms, which strengthened support for the use of FDR in children's matters. The 65 Family Relationships Centres (FRCs) established between 2006 and 2008 provide a significant proportion of the publicly subsidised FDR services that are available to separated parents. FDR is provided by some FRCs in property and financial matters in limited circumstances on a subsidised or means-tested basis. Self funded FDR may also be provided by private practitioners in property and children's matters.

5.8 In practice, parties using FDR may or may not have sought advice from a lawyer, but legal advice is not uncommonly sought by people using these processes. LADR is a mediation-based model where the involvement of lawyers is formally built into the process. Lawyer-led negotiation refers to a process of negotiation where one or both parties has retained a lawyer who conducts negotiation on their behalf.

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1 *Family Law Act 1975* (Cth) pt II div 3.
2 Ibid s 10F.
3 Ibid s 10H.
4 Ibid s 10J.

Requirements to attempt FDR

5.9 The legislative amendments introduced to strengthen FDR in children's matters required parents to attempt FDR prior to lodging a court application,[5] with certain exceptions.[6] The exceptions include circumstances of urgency or where a party is able to establish on reasonable grounds that family violence or child abuse has occurred or there are risks that it may occur.

5.10 FDR practitioners may issue one of five types of certificates to indicate that a party has attempted to satisfy the requirement to attend FDR prior to lodging a court application in a parenting matter.[7]

5.11 The five reasons for issuing a certificate are:

- one party refused to attend FDR;
- the FDR practitioner considered it inappropriate to proceed to FDR having regard to the matters set out in reg 25 of the *Family Dispute Regulations*;
- both parties attended and made a genuine effort to resolve their dispute;
- the parties attended FDR but one party did not make a genuine effort to resolve the dispute;
- the FDR commenced but was terminated having regard to matters set out in reg 25.

5.12 In contrast with children's matters, the *Family Law Act* does not require parties to attempt FDR prior to lodging a court application for property or financial matters. Rather, what are known as pre-action procedures are contained in the *Family Law Rules 2004* (Cth) *(Family Law Rules)*.[8] These Rules require parties to make a 'genuine effort' to resolve a dispute by negotiation, conciliation, arbitration or counselling, and by exchanging a notice of intention to claim and exploring options for settlement by correspondence.

Research evidence on dispute resolution pathways

5.13 Presently, patterns in the use of FDR for children's matters differ significantly from its use in property and financial matters. Australian Institute of Families Studies (AIFS) research demonstrates that mediation-type processes, as distinct from lawyer-led negotiation, are used much less frequently for property and financial matters compared with children's matters.

5.14 In a near nationally-representative cohort of parents, mediation was the reported pathway for property and financial settlements for only 4.2% of parents (with

5 Ibid s 60I(7).
6 Ibid s 60I(9).
7 Ibid s 60I(8).
8 *Family Law Rules 2004* (Cth) sch 1.

settlement through lawyers reported by 29.3%),[9] while 9.7% of the same cohort of parents reported using mediation to settle parenting arrangements.[10] These patterns demonstrate the impact of the encouragement to use FDR for children's matters in the 2006 family law reforms, which resulted in a 25% reduction in court filings in children's matters.[11]

The need for greater availability of FDR in property matters

5.15 In 2014, the Productivity Commission's *Access to Justice* report identified a 'missing middle' in terms of cost effective avenues for property and financial arrangements after separation. Its analysis concluded that court pathways were too expensive for many separated couples and that increased access to FDR would address the gap.[12] Academic commentary has also highlighted the limited availability of non-legal avenues for discussing financial issues after separation.[13]

5.16 The recent *Small Claims Large Battles* report by Women's Legal Services Victoria has also highlighted the lack of proportionate resolution mechanisms for small property pools. This project showed that legal costs for matters involving settlements worth under $30,000 amounted to between 50% and 126% of the value of the settlement.[14] The report also noted that additional costs associated with legal proceedings, such as process server fees, valuation fees, costs associated with issuing subpoenas and administrative costs charged by some superannuation funds for processing information requests further eroded the net value of the settlement.[15]

5.17 Research by AIFS demonstrates that, on average, separated parents have limited financial means, with median personal incomes reported by a 2014 sample of $55,000 for fathers and $33,800 for mothers.[16] About two thirds of the sample reported at least one indicator of a possible nine different indicators of financial stress, such as being unable to pay bills on time, since separation.

5.18 This evidence indicates that many families will need access to affordable mechanisms for settling property and financial arrangements after separation. Reflecting this position, many submissions to this Inquiry supported the greater availability of FDR for property and financial matters.[17]

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9 Lixia Qu et al, 'Post-Separation Parenting, Property and Relationship Dynamics after Five Years' (Attorney-General's Department (Cth), 2014) 98.

10 Ibid 54.

11 Rae Kaspiew et al, 'Family Law Court Filings 2004–05 to 2012–13' (Research Report No 30, Australian Institute of Family Studies, 2015).

12 Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 2, 2014) 875.

13 Fehlberg, Belinda, Bruce Smyth and Kim Fraser, 'Pre-Filing Family Dispute Resolution for Financial Disputes: Putting the Cart before the Horse?' (2010) 16 *Journal of Family Studies* 197.

14 Women's Legal Service Victoria, 'Small Claims, Large Battles: Achieving Economic Equality in the Family Law System' (2018) 38.

15 Ibid.

16 Rae Kaspiew et al, *Experiences of Separated Parents Study (Evaluation of the 2012 Family Violence Amendments)* (Australian Institute of Family Studies, 2015) 11–12.

17 See, eg, CatholicCare Diocese of Broken Bay, *Submission 197*; Interrelate, *Submission 126*; Mediator Standards Board, *Submission 83*; CatholicCare Sydney, *Submission 79*; Family Relationship Centre Port Augusta, *Submission 59*; Migrant Women's Lobby Group of SA, *Submission 38*; Drummond Street

5.19 In the UK, a statutory requirement (with exceptions) to attend a mediation and assessment meeting (MIAM) prior to lodging a court application in both children and property matters was introduced in 2014.[18] This 'requirement' replaced a previous 'expectation' contained in court rules.[19] Research examining mediation practice after this change suggests that MIAMs convert to mediation in around 66–76% of cases, with full or partial agreement being reached in about 68% of cases.[20] These findings apply to privately funded processes.

FDR in property and financial matters

5.20 The ALRC proposes there be legislative provisions requiring FDR in property and financial matters. This section sets out proposals for legislative amendments in relation to the assessment of suitability for FDR, the provision of FDR for property and financial matters, and a genuine steps statement and disclosure requirements.

5.21 These proposals are intended to create a scheme for FDR to be applied in suitable property and financial cases with expeditious access to courts for matters that are not suitable for FDR, including matters where fraud and non-disclosure are alleged to be occurring.

Property and financial matters and family violence

5.22 Since the 2006 family law reforms, research evidence on family violence among separated families has increased significantly. Although much of this evidence focuses on children's matters, it also provides important insights of relevance to property and financial matters.

5.23 Key findings in this research include the extent of financial abuse as a form of family violence,[21] links between a history of family violence, protracted resolution processes and lower property and financial outcomes,[22] and evidence that negotiation of property arrangements is a potential factor that can heighten risk.[23]

5.24 As a consequence, the ALRC's proposals recognise that FDR may be appropriate for many but not all former couples attempting to resolve property and financial matters and that screening, risk assessment and risk management will be important in this context, as in children's matters.

Services, *Submission 20*; Peninsula Community Legal Centre, *Submission 30*; Relationships Australia, *Submission 11*.

18 *Children and Families Act 2014* (UK) c 6, s 10.

19 *Family Procedure Rules 2010* (UK) pt 3 and Practice Direction 3A.

20 Becky Hamlyn, Emma Coleman and Mark Sefton, *Mediation Information and Assessment Meetings (MIAMS) and Mediation in Private Law Family Disputes: Quantitative Research Findings* (Ministry of Justice, 2015) 3.

21 Rae Kaspiew et al, 'Domestic and Family Violence and Parenting: Mixed Method Insights into Impact and Support Needs, Final Report' (Australia's National Research Organisation for Women's Safety).

22 Rae Kaspiew and Lixia Qu, 'Property Division after Separation: Recent Research Evidence' (2016) 30(3) *Australian Journal of Family Law* 1; Lixia Qu, Lawrie Moloney and Rae Kaspiew, 'Characteristics of Separated Parents Who Remain Fearful or in High Conflict: Towards Better-Targeted Legal and Service Responses' (Presentation at the Australian Institute of Family Studies 2016 Conference, Melbourne, 7 July 2016).

23 Kaspiew et al, above n 16, 42.

Assessment of suitability for FDR

Proposal 5–1 The guidance as to assessment of suitability for family dispute resolution that is presently contained in reg 25 of the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) should be relocated to the *Family Law Act 1975* (Cth).

Proposal 5–2 The new legislative provision proposed in Proposal 5–1 should provide that, in addition to the existing matters that a family dispute resolution provider must consider when determining whether family dispute resolution is appropriate, the family dispute resolution provider should consider the parties' respective levels of knowledge of the matters in dispute, including an imbalance in knowledge of relevant financial arrangements.

5.25 The assessment of suitability for FDR is a critical aspect of implementing the process safely and effectively. Locating guidance about how suitability is to be assessed in the *Family Law Act* will increase its transparency and accessibility for clients of the system, as well as professionals.

5.26 Presently, reg 25 in the *Family Dispute Resolution Regulations* 2008 directs attention to five specific issues and a catch all provision. The specific issues are: a history of family violence (if any) among the parties; the likely safety of the parties; the equality of bargaining power among the parties; the risk that a child may suffer abuse; and the emotional, psychological and physical health of the parties.

5.27 The ALRC also proposes that there be an additional consideration when assessing suitability for FDR, namely, the extent to which there is an imbalance in knowledge of the parties' financial arrangements. This additional factor reflects stakeholder concerns that one party may benefit from an FDR process as a result of superior knowledge of relevant financial arrangements.[24]

Proposal 5–3 The *Family Law Act* 1975 (Cth) should be amended to require parties to attempt family dispute resolution prior to lodging a court application for property and financial matters. There should be a limited range of exceptions to this requirement, including:

- urgency, including where orders in relation to the ownership or disposal of assets are required or a party needs access to financial resources for day to day needs;
- the complexity of the asset pool, including circumstances involving third party interests (apart from superannuation trustees);

24 See, eg, Domestic Violence NSW, *Submission 44*; Domestic Violence Legal Workers Network of WA, *Submission 33*.

- where there is an imbalance of power, including as a result of family violence;
- where there are reasonable grounds to believe non-disclosure may be occurring;
- where one party has attempted to delay or frustrate the resolution of the matter; and
- where there are allegations of fraud.

5.28 As noted, pre-action procedures are contained in the *Family Law Rules*.[25] Some submissions indicated that compliance with these Rules is very limited,[26] and they do not apply in the Federal Circuit Court of Australia, which handles most family law matters.[27]

5.29 The addition of a legislative requirement to attempt FDR prior to lodging a court application for property and financial orders (with exceptions) reflects calls by stakeholders for greater legislative support for the use of FDR in property matters, while recognising that this is an appropriate avenue for many but not all separated families.[28] The exceptions are formulated so as not to impede expeditious access to courts when required. They also provide access to the courts for matters involving complex asset pools and/or complex ownership structures and where non-disclosure or fraud is alleged.

5.30 Legal practitioner representative bodies also endorsed the need for parties to attempt to resolve their matters out of court.[29] However, their submissions generally rejected the idea of extending the requirement in s 60I of the *Family Law Act* to property and financial matters. The Law Council of Australia, for example, argued that:

> The clear concern is that any such process would be productive of greater costs and delay and could be used by the financially stronger party as a tool that would strategically and financially harm the weaker spouse.[30]

5.31 However, there was also recognition among these bodies of the value of out of court dispute resolution avenues for property and financial matters. The Queensland Bar Association, for example, argued that mediation or dispute resolution should be

25 *Family Law Rules 2004* (Cth) sch 1.
26 See, eg, M Paul, *Submission 220*; Bar Association of Queensland, *Submission 80*.
27 Rae Kaspiew et al, 'Court Outcomes Project (Evaluation of the 2012 Family Violence Amendments)' (Australian Institute of Family Studies, 2015) 18.
28 See, eg, CatholicCare Diocese of Broken Bay, *Submission 197*; D Cooper, *Submission 165*; Townsville Community Legal Service, *Submission 159*; Interrelate, *Submission 126*; Mediator Standards Board, *Submission 83*; CatholicCare Sydney, *Submission 79*; Victoria Legal Aid, *Submission 56*; Mallee Family Care, *Submission 36*; Drummond Street Services, *Submission 20*.
29 See, eg, South Australian Bar Association, *Submission 121*; NSW Young Lawyers Family Law Committee, Law Society of NSW, *Submission 108*.
30 Law Council of Australia, *Submission 43*.

explicitly included in the pre-action procedures and that these procedures should be included in the *Family Law Act*.[31] It further argued for the introduction of a

> Mediator's Certificate together with a mandate that litigants not only make a genuine effort to resolve the dispute but do all acts and things possible to explore in good faith, and exhaust alternative dispute resolution processes.[32]

5.32 As formulated, the proposal responds both to support for greater use of FDR in property and financial matters and to concerns about adverse consequences if this requirement is not implemented carefully. The proposal is intended to convey a clear message that FDR is the preferred avenue for the resolution of property and financial matters and should, in many cases, occur independently of any court action. However, exceptions are provided to support access to courts for cases where this is needed and proportionate.

Genuine steps statement

Proposal 5–4 The *Family Law Act 1975* (Cth) should be amended to specify that a court must not hear an application for orders in relation to property and financial matters unless the parties have lodged a genuine steps statement at the time of filing the application. The relevant provision should indicate that if a court finds that a party has not made a genuine effort to resolve a matter in good faith, they may take this into account in determining how the costs of litigation should be apportioned.

Proposal 5–5 The *Family Law Act 1975* (Cth) should include a requirement that family dispute resolution providers in property and financial matters should be required to provide a certificate to the parties where the issues in dispute have not been resolved. The certificate should indicate that:

- the matter was assessed as not suitable for family dispute resolution;
- the person to whom the certificate was issued had attempted to initiate a family dispute resolution process but the other party has not responded;
- the parties had commenced family dispute resolution and the process had been terminated; or
- the matter had commenced and concluded with partial resolution of the issues in dispute.

Question 5–1 Should the requirement in the *Family Law Act 1975* (Cth) that proceedings in property and financial matters must be instigated within twelve months of divorce or two years of separation from a de facto relationship be revised?

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31 Bar Association of Queensland, *Submission 80*.
32 Law Council of Australia, *Submission 43*.

5.33 The ALRC proposes that applicants be required to provide evidence of the steps that have been taken to try to resolve issues in dispute between the applicant and respondent in relation to the settlement of property and financial matters. This 'genuine steps' approach is modelled in part on the approach taken in the *Civil Dispute Resolution Act 2011* (Cth).[33]

5.34 Where no such steps have been taken, the statement should explain the reasons for this. Grounds should align with the exceptions sets out in Proposal 5–3. This will assist the courts in making case management decisions in relation to the matter.

5.35 Courts already have powers to take a party's behaviour in the conduct of proceedings into account in making costs orders under the *Family Law Act.*[34] Having this power clearly specified in the legislation in the context of the genuine effort requirement will support its implementation, by providing an explicit financial disincentive to litigation where it is not warranted.

5.36 The submissions demonstrate that engagement or non-engagement with court processes in relation to property and financial matters can have a tactical character. Specifying costs consequences for such behaviour will mitigate the possibility that these proposals might have the unintended consequence of creating further opportunities to misuse processes.

5.37 The proposal places the onus on the party seeking access to court to establish whether the genuine steps requirement has been satisfied or does not apply. The certificate from the FDR provider is a mechanism by which parties may provide evidence of their attempts to resolve the dispute in good faith. The proposed certificate categories do not require a statement in relation to genuine effort to be made by the FDR provider. This approach is designed to avoid problems for FDR providers that have arisen in relation to children's matters (discussed below).

5.38 Presently, the *Family Law Act* requires that proceedings for property and financial orders be instigated within twelve months of a divorce becoming final[35] or for de facto former partners, two years from the date of separation.[36] The ALRC is interested in stakeholder views on whether these periods should be extended in light of the proposals in this section.

33 *Civil Dispute Resolution Act 2011* (Cth) s 6.
34 *Family Law Act 1975* (Cth) s 117(2A).
35 Ibid s 44(3).
36 Ibid s 44(5).

Disclosure obligations in property and financial matters

Proposal 5–6 The *Family Law Act 1975* (Cth) should set out the duties of parties involved in family dispute resolution or court proceedings for property and financial matters to provide early, full and continuing disclosure of all information relevant to the case. For parties involved in family dispute resolution or court proceedings, disclosure duties should apply to:

- earnings, including those paid or assigned to another party;
- vested or contingent interests in property, including that which is owned by a legal entity that is fully or partially owned or partially controlled by a party;
- income earned by a legal entity fully or partially owned or controlled by a party, including income that is paid or assigned to any other party, person or legal entity;
- superannuation interests; and
- liabilities and contingent liabilities.

Proposal 5–7 The provisions in the *Family Law Act 1975* (Cth) setting out disclosure duties should also specify that if a court finds that a party has intentionally failed to provide full, frank and timely disclosure it may:

- impose a consequence, including punishment for contempt of court;
- take the party's non-disclosure into account when determining how costs are to be apportioned;
- stay or dismiss all or part of the party's case; or
- take the party's non-disclosure into account when determining how the financial pool is to be divided.

Question 5–2 Should the provisions in the *Family Law Act 1975* (Cth) setting out disclosure duties be supported by civil or criminal penalties for non-disclosure?

5.39 An important issue in property proceedings is identifying assets, income and liabilities. For this reason, disclosure obligations are fundamental to a fair and transparent process in negotiating agreements out of court or decision making in court. Studies[37] and submissions[38] suggest that non-disclosure of assets and income can be associated with financial abuse and misuse of systems and processes.

37 Prue Cameron, 'Relationship Problems and Money: Women Talk about Financial Abuse' (Wire Women's Information, 2015); Kaspiew et al, 'Domestic and Family Violence and Parenting: Mixed Method

5.40 Presently the duty of disclosure is contained in court rules.[39] Consistent with submissions to this Inquiry,[40] the ALRC proposes that the disclosure obligations should instead be set out transparently and accessibly in the *Family Law Act*.

5.41 Like the Law Council of Australia, which argued for a penalty if a contravention of disclosure requirements is established, many stakeholders expressed concerns about the impact of non-disclosure and the difficulty of getting a recalcitrant party to disclose. The Law Society of South Australia submitted that:

> Many practitioners have reported being forced to issue proceedings on behalf of their client as the result of one party failing to provide disclosure to the other and for the sole purpose to obtain discovery. A failure to provide disclosure can have a significant impact upon the progress of a matter and create significant (and unnecessary) delay and can often further marginalise a disadvantaged party. For example, practitioners report that it is common for a party to attend to obtain advice with little or minimal knowledge about the party's financial affairs. This may be as a result of an element of financial control in the relationship or may simply be a product of naturally assumed or aligned roles within the relationship where one party has managed and controlled the finances and the other has had little involvement and therefore the knowledge of the financial situation.[41]

5.42 Existing mechanisms to support disclosure include the courts' power to impose punishment for contempt of court,[42] or to take the non-disclosure into account in considering costs.[43] The proposed provision in relation to taking non-disclosure into account in apportioning the property pool reflects current case law.[44] In relation to costs for non-disclosure, case law indicates that 'special and unusual features' are required to depart from the usual position that each party should bear their own costs.[45]

5.43 The ALRC is interested in stakeholders' views about whether these existing mechanisms are sufficient or whether further mechanisms, such as a civil or criminal penalty for contravention, should be implemented.

Insights into Impact and Support Needs, Final Report', above n 21; Women's Legal Service Victoria, above n 14.

38 See, eg, Women's Legal Service Victoria, *Submission 100*.

39 *Family Law Rules 2004* (Cth) r 13.01; *Federal Circuit Court Rules 2001* (Cth) r 24.03.

40 See, eg, South Australian Bar Association, *Submission 121*; NSW Young Lawyers Family Law Committee, Law Society of NSW, *Submission 108*; Law Society of South Australia, *Submission 88*; Victoria Legal Aid, *Submission 56*; Law Council of Australia, *Submission 43*.

41 Law Society of South Australia, *Submission 88*.

42 See, eg, *Family Law Rules 2004* (Cth) r13.01(1).

43 See, eg, *Family Law Act 1975* (Cth) s 117(2A)(c); *Family Law Rules 2004* (Cth) r 13.14.

44 *In the Marriage Of: Suzanne Margaret Weir Appellant/Wife And: William Hilton Weir Respondent Husband [1992] FamCA 69*.

45 *Johnson, BG v Johnson, K (No 2) (Costs)* [1999] FamCA 959 24.

Advisers' obligations in relation to disclosure

Proposal 5–8 The *Family Law Act 1975* (Cth) should set out advisers' obligations in relation to providing advice to parties contemplating or undertaking family dispute resolution, negotiation or court proceedings about property and financial matters. Advisers (defined as a legal practitioner or a family dispute resolution practitioner) must advise parties that:

- they have a duty of full, frank and continuing disclosure, and, in the case of family dispute resolution, that compliance with this duty is essential to the family dispute resolution process; and
- if the matter proceeds to court and a party fails to observe this duty, courts have the power to:
  - (a) impose a consequence, including punishment for contempt of court;
  - (b) take the party's non-disclosure into account when determining how costs are to be apportioned;
  - (c) stay or dismiss all or part of the party's case; and
  - (d) take the party's non-disclosure into account when determining how the financial pool is to be divided.

5.44 This proposal supports the preceding proposals by reinforcing disclosure obligations through the provision of advice by FDR practitioners or legal practitioners.

5.45 The proposal is intended to ensure that parties understand the significance of their disclosure obligations and the consequences of failure to comply.

A need to review s 60I certificates for children's matters?

Question 5–3 Is there a need to review the process for showing that the legal requirement to attempt family dispute resolution prior to lodging a court application for parenting orders has been satisfied? Should this process be aligned with the process proposed for property and financial matters?

5.46 Certificates issued by FDR practitioners under the *Family Law Act* allow a party to establish they have attempted to comply with the requirement to attempt FDR and the certificate is attached to a court application.[46] The alternative method of accessing

46 *Family Law Act 1975* (Cth) s 60I(8).

court is to establish that the matter satisfies one of the exceptions to the requirement to attempt FDR.[47]

5.47 The AIFS *Court Outcomes Project* report indicates that matters are more commonly initiated with a certificate than pursuant to an exception.[48] Data from court administrative systems presented in that report indicate that in 2013–14, there were 5,461 applications for final orders under an exception, compared with 6,549 that were presented with s 60I certificates.[49]

5.48 Research auspiced by Interrelate, covering its own operations, demonstrates some complexity in decision making about certificate types among FDR practitioners.[50] Although reg 25 of the *Family Dispute Regulations* was a prominent consideration in their decision making, other influences included concern about the impact of particular types of certificates for clients, fear of complaints, organisational policy, and children's best interests. There were particular concerns about the category indicating that only one party had made a genuine effort to resolve the dispute, particularly since it potentially has ramifications for costs orders.[51] The research showed that in practice, this type of certificate was issued rarely, compared to the other types.[52]

5.49 This research showed that FDR practitioners regarded issuing certificates as a 'disempowering' act signifying the end of FDR, rather than an 'empowering act' opening up a litigation pathway. It also showed that about three quarters of 777 former clients who had received a certificate and agreed to be surveyed had an accurate understanding of the purpose of the certificate, but that only 4.4% of the sample could correctly and spontaneously recall what type of certificate they had.[53]

5.50 Submissions also raised concerns about the efficacy and purpose of certificates and the five categories in the legislation. Some suggested a review of the categories was warranted.[54] The concerns related to the complexities involved in making professional judgements in relation to the type of certificate issued and doubts as to whether courts pay attention to the type of certificate.[55]

5.51 Further problems raised in submissions included the influence of the categories, including the 'no genuine effort' designation, on dynamics between clients or between

47 Ibid s 60I(9).
48 Kaspiew et al, 'Court Outcomes Project (Evaluation of the 2012 Family Violence Amendments)', above n 27, 21.
49 Ibid.
50 Bruce Smyth et al, 'Certifying Mediation: A Study of Section 60I Certificates' (CRSM Working Paper 2/2017, University of Canberra and Interrelate) xii.
51 A note to the *Family Law Act 1975* (Cth) s 60I indicates that the court may take the type of certificate into account in deciding how to apportion costs under *Family Law Act 1975* (Cth) s 117.
52 Bruce Smyth et al, above n 50, 44.
53 Ibid 45.
54 See, eg, M Brandon, *Submission 184*; Uniting, *Submission 162*; FMC Mediation and Counselling, *Submission 135*.
55 See, eg, CatholicCare Victoria Tasmania (CCVT), *Submission 115*; T Murdock, Dispute Management Australia, *Submission 46*.

the FDR practitioner and a client's legal representative.[56] Relationships Australia South Australia indicated that the genuine effort categories gave rise to a significant number of complaints.[57] Uniting, for example, indicated:

> To state a person did not make a genuine effort requires a subjective assessment which cannot be easily tested in court given rules around confidentiality and admissibility. Moreover, requiring mediators to make such statements is contrary to the principles of mediation. This type of certificate is most likely to escalate conflict, lead to complaint, and potentially places other parties at risk.[58]

5.52 Some submissions suggested that certificates were viewed by some lawyers as a mere 'tick a box' procedural step to access the courts, rather than as supporting substantive efforts to resolve disputes and assist parents.[59] Another submission indicated that 'refusal to attend' certificates were being issued when the parties were each attempting to organise FDR but with different organisations, one private and one publicly subsidised. If one party refused to pay for private mediation, then the private mediator would issue a certificate that would allow their client to proceed to court.[60] Other circumstances identified as not being covered by the existing categories included lack of participation due to waiting times, lack of availability of a party for a period, and lack of agreement on where or when a joint session should take place.[61]

5.53 Submitters made a range of suggestions regarding reform of the certificate system. These included:

- a simple indication of whether FDR had been attempted or not;[62]
- a simple statement that the issues had not been resolved, with further elaboration in a 'genuine steps statement' similar to that required under the *Civil Dispute Resolution Act 2011* (Cth);[63]
- categories indicating that: Party 1 attended and Party 2 did not attend; both parties attended separately but a joint session did not take place; at least one joint session took place; a court ordered joint session may be/is unlikely to be beneficial;[64]
- that four types of certificates be provided for: attended FDR, did not respond, declined invitation to attend FDR, and not appropriate for FDR at this time.[65]

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56 M Brandon, *Submission 184*; Uniting, *Submission 162*; FMC Mediation and Counselling, *Submission 135*; CatholicCare Victoria Tasmania (CCVT), *Submission 115*; T Murdock, Dispute Management Australia, *Submission 46*.
57 Relationships Australia South Australia, *Submission 62*.
58 Uniting, *Submission 162*.
59 See, eg, NSW Young Lawyers Family Law Committee, Law Society of NSW, *Submission 108*.
60 D Cooper, *Submission 165*.
61 CatholicCare Victoria Tasmania (CCVT), *Submission 115*.
62 FMC Mediation and Counselling, *Submission 135*.
63 Uniting, *Submission 162*.
64 CatholicCare Victoria Tasmania (CCVT), *Submission 115*.
65 Relationships Australia South Australia, *Submission 62*.

5.54 The points made in submissions and the research by Interrelate suggest a revision of the process for establishing compliance with the requirements of *Family Law Act* may have merit.

5.55 In addition to addressing concerns among practitioners, it may be desirable to align the approaches for establishing compliance with FDR requirements for parenting matters with those proposed for property and financial matters. This would be consistent with the aim in this Discussion Paper of reducing complexity in the legislation. The Commission welcomes stakeholder feedback on these issues.

Supporting further development of FDR and LADR models

5.56 As the family law system has evolved since the 2006 reforms, the application of FDR has become increasingly sophisticated, with the development of specialist models in a range of areas, such as the pilots for legally assisted and culturally appropriate dispute resolution in eight FRCs.[66] These pilots are being evaluated. The House of Representatives Standing Committee on Social Policy and Legal Affairs report, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (*SPLA Family Violence* report) recommended that subject to a positive evaluation of these pilots, the Australian Government should expand the availability of LADR.[67]

5.57 Prior to the 2006 family law reforms, the application of FDR in family violence cases was regarded as inappropriate for a range of reasons, including the likelihood that the family violence would have created a power imbalance that compromised the ability of the parties to negotiate on an equal footing. [68]

5.58 Research evidence and practice experience demonstrates that now, even in cases involving family violence, FDR is regularly applied[69] and produces outcomes that are acceptable to a significant proportion of clients.[70] Some cases require safeguards such as shuttle mediation where the parties are not in the same room.

5.59 However, there are also concerns that FDR may be inappropriately applied in some family violence cases, particularly where screening processes are inadequate,[71] producing outcomes that are unsafe for children and caregivers.[72] It is clear that

66 Attorney General's Department, 'Attorney General's Department Submission to the Parliamentary Inquiry into a Better Family Law System' (Parliament of the Commonwealth of Australia, 2017) 6.

67 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (2017) rec 4.

68 Australian Law Reform Commission and NSW Law Reform Commission, 'Family Violence - A National Legal Response: Final Report' (ALRC Report 114, NSWLRC 128, Australian Law Reform Commission and NSW Law Reform Commission) [21.30]–[21.39].

69 Kaspiew et al, above n 16, 73.

70 Ibid 127.

71 Rae Kaspiew et al, 'Evaluation of the 2012 Family Violence Amendments: Synthesis Report' (Australian Institute of Family Studies, 2015) 33.

72 Domestic Violence NSW, *Submission 44*.

sophisticated clinical decisions are required in determining whether or not to attempt FDR where family violence is or has been involved.

5.60 Where family violence cases are screened out of FDR,[73] these families are not able to access this low cost resolution avenue.[74] Some proceed to court, incurring the expenses associated with doing so, but not all do. The Interrelate research showed that of 756 of its clients who had been issued with a certificate, only half had lodged court applications for parenting orders.[75] A number of stakeholders expressed concerns about what happens to clients and their children in this position, given that they may not have the means or desire to access court processes.

5.61 As FDR has become more widely applied, there is increasing acceptance among stakeholders that FDR should be available to clients affected by family violence, provided that appropriate safeguards are in place to mitigate safety risks and power imbalances. Increasingly, LADR models involving not only lawyers but support workers for both parties have been seen as a viable alternative to court processes for clients affected by family violence. [76]

Supporting the development of FDR

Proposal 5–9 The Australian Government should work with providers of family dispute resolution services, legal assistance services, specialist family violence services and Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTIQ and disability organisations to support the further development of culturally appropriate and safe models of family dispute resolution for parenting and financial matters. This should include:

- examining the feasibility of means-tested fee for service and cost recovery models to be provided by legal aid commissions and community organisations such as Family Relationship Centres;
- the further development of dispute resolution models for property and financial matters involving, where necessary, support by financial counsellors and the provision of legal advice by private practitioners and legal assistance services, such as legal aid commissions, community legal centres and the Legal Advice Line that is part of Family Relationships Advice Line; and
- amendments to existing funding agreements and practice agreements to support this work.

73 Kaspiew et al, above n 16, 73.
74 Women's Legal Service NSW, *Sense and Sensitivity: Family Law, Family Violence and Confidentiality* (2016) 4.
75 Bruce Smyth et al, above n 50, 65.
76 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 67, 89; Women's Legal Service Victoria, above n 14, 37.

5.62 This proposal is designed to support an increase in the availability of non-adversarial and culturally safe models of dispute resolution. It recognises that families seeking to resolve post-separation disputes about children and/or property may bring issues that require a range of different professional skill sets to support the dispute resolution process. The proposal would involve an Australian Government coordinated process to collaboratively identify how existing models and practices can be further developed and enhanced to meet this need.

5.63 The proposal identifies three main areas of focus: development and delivery of FDR for property and financial matters; LADR models for parenting and property matters; and models to meet the needs of Aboriginal and Torres Strait Islander communities, culturally and linguistically diverse families, LGBTIQ families and families where parents and/or children may be affected by disability. Models in these areas should be developed in collaboration with organisations representing the interests of the communities concerned, which aligns with the proposed cultural safety framework (see Chapter 12).

5.64 The submissions to this Inquiry indicated that community and legal assistance services provide FDR services for property and financial matters but that the supply of these services is constrained by funding limitations and operating frameworks. Private, self funded FDR is also provided by some organisations and private mediators.

5.65 A range of organisations in consultations and submissions indicated that they already provide FDR in property and financial matters on a limited basis and would favour an expansion in capacity to offer such services. Submissions described models involving co-mediators,[77] specially trained FDR practitioners with clients also advised to obtain legal advice,[78] and models involving financial counsellors.

5.66 Relationships Australia Victoria noted it had been providing FDR in property matters for thirty years and the service was available to about 1000 families annually:

> The fees for the service are means tested and are as low as $10 per hour. Clients usually pay for their own legal advice, but in many cases—particularly where the property pool is small—the legal advice is limited to one or two consultations and clients share the costs of writing up consent orders. Some clients are able to access free or low cost legal advice, for example from community legal centres or lawyers who offer fee relief to low income families.[79]

5.67 Port Augusta FRC submitted that:

> The Port Augusta Family Relationship Centre also offers property mediation. Following an initial session where clients are provided with information to assist them in identifying and valuing their property, two additional 3-hour sessions are offered. Mediators are accredited FDR Practitioners, but also have a background in Family Law. Property mediation is always co-mediated, with one practitioner concentrating on the calculations while the other practitioner assists in discovery and the negotiations. If agreement is reached, the practitioner prepares a comprehensive

77 Family Relationship Centre Port Augusta, *Submission 59*.
78 Relationships Australia South Australia, *Submission 62*.
79 Relationships Australia Victoria, *Submission 129*.

> property agreement. At all times clients are strongly encouraged to seek legal advice. $30 for each party for each 3-hour property mediation is charged if they earn $50,000 or over. No client is refused service if they are unable to pay.[80]

5.68 Like this submission, a number of others indicated that but for this service, their clients would have no other way of resolving property and financial matters, including cases involving debt.[81]

5.69 In addition to cost-effectiveness and accessibility, submissions suggested a range of other justifications for expanding the availability of FDR or LADR options for property and financial matters. These included a need for faster, non-adversarial mechanisms and the ability to offer separated couples the opportunity to use the same agency and a similar process to resolve both their parenting and property and financial matters. Research by Professor Belinda Fehlberg and colleagues has also highlighted the need for low cost and consistent avenues for making parenting and financial arrangements.[82]

5.70 A submission from Relationships Australia argued for the importance of being able to meet need in relation to both financial and parenting arrangements, noting:

> the distinction between these two categories [parenting and property] is a matter of legal artifice which does not reflect or respond to the experience of separating families, and Relationships Australia regularly encounters cases in which an otherwise successful parenting plan is undermined by a subsequent adversarial property dispute.[83]

5.71 Submissions noted a range of constraints on the ability of FRCs, community legal centres and legal aid commissions to offer FDR in property and financial matters. Primarily, these constraints related to the focus on children's matters in their service agreements and funding arrangements, with property matters generally only being dealt with in certain circumstances if they are ancillary to a children's matter.[84] Brimbank Melton Community Legal Centre said, for example:

> Most CLC's do not offer property advice nor assistance with legally assisted family dispute resolution for property matters as their funding does not permit the provision of assistance in property matters. This leaves many people with small property pools who cannot afford a private lawyer with no option but to self-represent which puts further pressure on them and on the courts. For vulnerable non-English speakers with small property pools self-representation is not an option and there is no access to justice at all.[85]

5.72 On this basis, a systematic examination of existing constraints on the ability of these organisations to provide these services, either on a meant tested, cost recovery, or fee for service basis, is warranted.

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80 Family Relationship Centre Port Augusta, *Submission 59*.
81 See, eg, Townsville Community Legal Service, *Submission 159*; Mallee Family Care, *Submission 36*.
82 Belinda Fehlberg, Christine Millward and Monica Campo, 'Post-Separation Parenting Arrangements, Child Support and Property Settlement: Exploring the Connections' (2010) 24 *Australian Journal of Family Law* 214.
83 Relationships Australia, *Submission 11*.
84 See, eg, Interrelate, *Submission 126*; Victoria Legal Aid, *Submission 56*.
85 Brimbank Melton Community Legal Centre *Submission 76*.

5.73 In addition to service agreements and funding arrangements, submissions pointed to the importance of considering a range of other issues to facilitate an increase in the supply and uptake of FDR in property and financial matters. These included the necessity to develop an appropriate practitioner skills base and to ensure that models were carefully planned and developed. [86]

5.74 In connection with existing FDR practices, among many positive accounts, some consultations and submissions raised concerns about a range of issues, including delays associated with accessing services,[87] the capacity of some existing approaches to support flexible and workable agreements[88] and practitioner quality.[89]

5.75 The submissions also highlighted a need for models and approaches to be developed in ways that ensure they meet the needs of Aboriginal and Torres Strait Islander people, culturally and linguistically diverse groups, LGBTIQ groups and people with disability. Submissions identified a range of issues that need to be addressed in this context, including:

- for Aboriginal and Torres Strait Islander people, the need for FDR models involving Aboriginal Community Controlled Organisations and that accommodate engagement with a range of kin and community members;[90]
- awareness that people from different countries may have cultural inhibitions about disclosing family violence[91] and there may be particular complexities in identifying property pools, such as dowry payments and properties located in other countries;[92]
- FDR processes need to be provided by professionals and organisations that understand the law as it applies to LGBTIQ families (including parentage provisions) and that understand LQBTIQ families, relationships and communities;[93]
- for families with disability, FDR processes need to be accessible and provided by services and professionals trained in working with people with disability.[94]

86 See, eg, FMC Mediation and Counselling, *Submission 135*.
87 Anglicare SA, *Submission 2*.
88 Peninsula Community Legal Centre, *Submission 30*.
89 Gowland Legal, *Submission 141*.
90 Victorian Aboriginal Legal Service, *Submission 101*.
91 Relationships Australia, *Submission 11*.
92 Migrant Women's Lobby Group of SA, *Submission 38*.
93 Rainbow Families NSW, *Submission 212*; Rainbow Territory, *Submission 208*; Rainbow Families Victoria, *Submission 106*; Drummond Street Services, *Submission 20*.
94 People with Disability Australia (PWDA), *Submission 10*.

A framework for legally assisted dispute resolution

Proposal 5–10 The Australian Government should work with providers of family dispute resolution services, private legal services, financial services, legal assistance services, specialist family violence services and Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTIQ and disability organisations to develop effective practice guidelines for the delivery of legally assisted dispute resolution (LADR) for parenting and property matters.

These Guidelines should include:

- guidance as to when LADR should not be applied in matters involving family violence and other risk related issues;
- effective practice in screening, assessing and responding to risk arising from family violence, child safety concerns, mental ill-health, substance misuse and other issues that raise questions of risk;
- the respective roles and responsibilities of the professionals involved;
- the application of child-inclusive practice;
- the application of approaches to support cultural safety for Aboriginal and Torres Strait Islander people;
- the application of approaches to support cultural safety for families from culturally and linguistically diverse communities;
- the application of approaches to support effective participation for LGBTIQ families;
- the application of approaches that support effective participation for families where parents or children have disability;
- practices relating to referral to other services, including health services, specialist family violence services and men's behaviour change programs;
- practices relating to referrals from and to the family courts; and
- information sharing and collaboration with other services involved with the family.

Proposal 5–11 These Guidelines should be regularly reviewed to support evidence-informed policy and practice in this area.

5.76 LADR models for more complex cases, including those involving family violence, have gained increased support in recent years,[95] as practice has developed since the 2006 family law reforms. This form of FDR, which involves a lawyer for each party who is integrally involved in the process and participates in the sessions, may be suitable for cases that would otherwise be screened out of FDR.

5.77 In responses to the question about greater availability of LADR for matters involving family violence, substantial numbers of submissions supported LADR for both children and property and financial matters.[96] Women's Legal Services Australia, for example, submitted that:

> WLSA believes that a well-supported mediation process, with expert lawyers and mediators who are family violence and trauma informed, culturally competent and disability aware and have a sound understanding of family law, can be an empowering process for a victim-survivor of family violence.[97]

5.78 Further justifications offered by stakeholders included that LADR provides an alternative to court, important for ameliorating issues of cost and trauma and supporting safe outcomes:

> The need for expansion of legally-assisted FDR services for families with complex issues. In our experience exclusion from FDR to go to court may result either in the family not going to court and risk for children and parents continuing, or the family going to court and resulting in processes and outcomes which are not favourable for children or vulnerable adults. We have heard of cases of family violence which have benefitted from court involvement, but more so we have heard and seen cases where the court process has not worked well for children and the more vulnerable parent.[98]

5.79 Submissions also emphasised the importance of screening for family violence and other complex issues, as well as safety planning and the involvement of professionals trained in working with trauma.[99]

5.80 Among the current providers of LADR are legal aid commissions, with grants of aid for trials often being dependent upon an attempt at resolution in this way. National Legal Aid's submission indicated that 7,300 LADR conferences are conducted nationally each year.[100] In 2015–17, the national average settlement rate across the country was 79%.

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95 Marilyn Scott, 'Legally Assisted Family Dispute Resolution: A Study by the Greater Sydney Family Law Pathways Network' (Greater Sydney Family Law Pathways Network, 2012).

96 National Legal Aid, *Submission 163*; CatholicCare Victoria Tasmania (CCVT), *Submission 115*; Women's Legal Service Victoria, *Submission 100*; Z Rathus, *Submission 92*; Hunter Community Legal Centre, *Submission 81*; CatholicCare Sydney, *Submission 79*; Family Relationship Centre Port Augusta, *Submission 59*; Australian Psychological Society, *Submission 55*; Caxton Legal Centre, *Submission 51*; Women's Legal Services Australia, *Submission 45*; Community Legal Centres NSW, *Submission 34*; Drummond Street Services, *Submission 20*; Relationships Australia, *Submission 11*; Fitzroy Legal Service and Darebin Community Legal Centre, *Submission 7*.

97 Women's Legal Services Australia, *Submission 45*.

98 Drummond Street Services, *Submission 20*.

99 National Legal Aid, *Submission 163*; Victoria Legal Aid, *Submission 56*.

100 National Legal Aid, *Submission 163*.

5.81 Other LADR programs include the Legally Assisted FDR Program in Melbourne, involving the Family Law Legal Service and the Monash Oakleigh Legal Service, a partnership between the Hunter Community Legal Centre, the Hunter Family Relationship Centre and the Central Coast Community Legal Centre, and a partnership between Women's Legal Services Victoria, the Melbourne Family Relationship Centre and the FMC Mediation Centre.

5.82 National Legal Aid's submission identified a number of important functions for lawyers in these processes, including:

- providing advice about the law and likely outcomes to reality test and manage client expectations;
- redressing power imbalances, supporting vulnerable parties and promoting fairness; and
- ensuring agreements are put into writing and framed in enforceable terms.[101]

5.83 LADR also poses challenges. Some of these were identified in an evaluation of the Co-ordinated FDR Pilot, a multi-disciplinary multi-agency LADR process trialled in five locations around Australia between 2010 and 2012.[102] The evaluation highlighted the intensive nature of risk screening and management, the importance of mechanisms to support the development of effective collaborative relationships between agencies and professionals and the need for the application of a common risk assessment framework by all agencies involved in the process.[103]

5.84 A number of submissions raised concerns about LADR, suggesting a need for careful consideration of several issues in the development of such processes. Concerns included:

- the potential for coercive control and intimidation dynamics to be maintained in the process;[104]
- the need for LADR practitioners to have effective skill sets for managing 'manipulative, vindictive, belligerent and bullying' behaviours and for lawyers to have specialist training to operate in LADR processes;[105]
- a reluctance among private legal practitioners to be involved in LADR processes;[106]
- the need for involvement of lawyers with a practice disposition consistent with LADR rather than adversarial practice;[107]

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101 Ibid.
102 Rae Kaspiew et al, *Evaluation of a Pilot of Legally Assisted and Supported Family Dispute Resolution in Family Violence Cases, Final Report* (Australian Institute of Family Studies, 2012).
103 Ibid.
104 Domestic Violence Action Centre, *Submission 58*.
105 Mallee Family Care, *Submission 36*.
106 Interrelate, *Submission 126*.
107 See, eg, Family Relationship Centre Port Augusta, *Submission 59*.

- the need for Aboriginal clients to have access to legal assistance and support from culturally safe, specialised legal assistances and support services before, during and after LADR;[108] and
- the need for models to accommodate interpreters.[109]

5.85 The proposal for a practice framework for LADR recognises the complexities involved in an LADR model of practice. A practice framework for LADR would assist in supporting effective practice and developing stakeholder confidence in this approach. Further, the proposal recognises that LADR has predominantly been applied in children's matters, meaning that its application in property and financial matters requires careful consideration.

5.86 As noted earlier, family violence raises significant issues for property and financial matters, including negotiation of property matters being a factor associated with escalation of violence, protracted resolution processes and lower shares in property and financial pools for people who experiences family violence. The issues to be addressed in the development of the proposed framework recognise these complexities and are designed to ensure that LADR for property and financial matters is implemented in a safe and appropriate way.

5.87 The proposal also acknowledges the findings from previous research which shows that practice initiatives that require collaboration between professionals from different disciplines or service sectors can entail significant challenges, including in the articulation and implementation of respective roles and responsibilities.[110]

5.88 Further, practice in this area requires sensitive and collaborative decision making, including about whether and how the process should proceed where there has been family violence. A practice framework will assist by identifying core practice issues and providing guidance on how they should be dealt with.

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108 National Family Violence Prevention Legal Services, *Submission 77*; Koori Caucus Working Group on Family Violence, *Submission 50*.

109 Peninsula Community Legal Centre, *Submission 30*.

110 Rae Kaspiew et al, above n 102; Helen Rhoades, Hilary Astor and Ann Sanson, 'A Study of Inter-Professional Relationships in a Changing Family Law System' [2009] *Australian Journal of Family Law* 10.

6. Reshaping the Adjudication Landscape

Contents

Summary

6.1 Research has shown that of the families who approach the family law system for help, those who use the courts are the most likely to have a range of co-occurring support needs associated with the experience of family violence or other behaviours affecting the safety and wellbeing of their children or themselves.[1] In line with the public health approach outlined in Chapter 1, a core aim of the system's tertiary interventions should be to reduce the effects of harm experienced by these families, and to prevent its reoccurrence. This should include efforts to provide timely and cost-effective adjudication pathways and processes that are adapted to address safety concerns and problematic parenting behaviours.

6.2 This chapter proposes a range of changes to support the family law system to address these issues. These include proposals for:

- developing a triage and risk assessment for the family courts and specialist lists for small property claims and family violence cases to supplement the existing specialist list in the Federal Circuit Court of Australia (Federal Circuit Court) for cases involving Aboriginal and Torres Strait Islander children (the Indigenous List);
- co-locating family law registries in state and territory local courts, including in rural, regional and remote areas;

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

- establishing a post-order parenting support service to assist parties to implement parenting orders and manage post-order conflict; and
- enhancing the safety and accessibility of court precincts.

Triage, risk assessment and specialist pathways

Proposal 6–1 The family courts should establish a triage process to ensure that matters are directed to appropriate alternative dispute resolution processes and specialist pathways within the court as needed.

Proposal 6–2 The triage process should involve a team-based approach combining the expertise of the court's registrars and family consultants to ensure initial and ongoing risk and needs assessment and case management of the matter, continuing, if required, until final decision.

Proposal 6–3 Specialist court pathways should include:

- a simplified small property claims process;
- a specialist family violence list; and
- the Indigenous List.

6.3 The Issues Paper sought stakeholder input about the possibilities for enhancing the timely and cost-effective resolution of disputes that reach the courts.[2] This question reflected concerns raised by the House of Representatives Standing Committee on Social Policy and Legal Affairs (SPLA Committee) and in early consultations for this Inquiry about the lengthy delays associated with litigated proceedings in the family courts.[3] Such concerns were also evident in the submissions received by the ALRC. Victorian Women Lawyers, for example, noted that '[t]he increased demand for engagement with the family law jurisdiction must be addressed with appropriate measures to reduce delays'.[4]

6.4 Consistent with the SPLA Committee's report, *A Better Family Law System to Support and Protect Those Affected by Family Violence*[5] (*SPLA Family Violence* report), a key set of responses to this question focused on the need for improved triage and case management processes within the family courts.[6] This response was generally

2 Australian Law Reform Commission, *Review of the Family Law System*, Issues Paper 48 (2018) Question 20.

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

4 Victorian Women Lawyers, *Submission 84*.

5 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 3, 102–112.

6 See, eg, Law Society of South Australia, *Submission 88*; Australian Psychological Society, *Submission 55*; Caxton Legal Centre, *Submission 51*; D Bryant, *Submission 35*; Peninsula Community Legal Centre, *Submission 30*; Australian Bar Association, *Submission 13*; Anglicare SA, *Submission 2*.

linked to concerns that expensive judge-time was being used to case manage matters and the need to reduce the number of court events for families. The NSW Young Lawyers Family Law Committee, for example, submitted that:

> The more time judges spend case managing matters, the less time they have to hear substantive issues. The more court events parties are required to attend, particularly court events which do not progress the matter, the greater a party's costs.[7]

6.5 These submissions suggested that reduction of delays could be achieved by effective triage conducted by experienced registrars, which would reserve judges' time for hearing and determining disputed issues.[8] Some also submitted that registrars should triage cases at different points in the court process to ensure compliance with the court's directions.[9]

6.6 In the family law system context, triage refers to a systematic process of case assessment to identify and prioritise cases that need urgent attention, or may be suitable for a diversionary intervention, such as referral to family dispute resolution or mediation. Reflecting this, a number of stakeholders suggested that any triage process should involve a teamed approach, with registrars working together with family consultants[10] to conduct initial risk and needs assessments.[11]

6.7 Some stakeholders also argued for triage and case management, including screening for risk and needs, to be ongoing until the point of resolution or setting down for trial.[12] National Legal Aid, for example, argued that 'triage should occur at the time of intended filing and after filing at key points in proceedings'.[13] The point about triage being a continuous process is particularly important in light of submissions evidencing the dynamic nature of family law proceedings, wherein new information may emerge and circumstances change as a matter proceeds.[14] Relationships Australia South Australia emphasised the need to ensure that risk screening covers a range of potential risks, not just those arising from family violence.[15]

6.8 Stakeholders called for the diversion of appropriate matters to alternative dispute resolution processes, including to alternative dispute resolution processes outside the courts or to on-site family dispute resolution services where possible.[16] There were also

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7 NSW Young Lawyers Family Law Committee, Law Society of NSW, *Submission 108*.

8 See, eg, Law Society of NSW, *Submission 154*; Law Council of Australia, *Submission 62*; D Bryant, *Submission 35*.

9 See, eg, Australian Bar Association, *Submission 13*.

10 See, eg, D Bryant, *Submission 35*; Australian Bar Association, *Submission 13*.

11 See, eg, Women's Legal Service Victoria, *Submission 213*; CatholicCare Sydney, *Submission 79*; ATSILS Qld, *Submission 42*; Safe Steps Family Violence Response Centre, *Submission 15*.

12 See, eg, Women's Domestic Violence Court Advocacy Services NSW, *Submission 153*; National Family Violence Prevention Legal Services Forum, *Submission 63*; Domestic Violence Action Centre, *Submission 58*; Peninsula Community Legal Centre, *Submission 30*.

13 National Legal Aid, *Submission 163*.

14 See, eg, Loddon Campaspe Community Legal Centre and Goulburn Valley Community Legal Centre, *Submission 210*; Wirringa Baiya Aboriginal Women's Legal Centre, *Submission 164*; Peninsula Community Legal Centre, *Submission 30*.

15 Relationships Australia South Australia, *Submission 62*.

16 Anglicare WA, *Submission 152*; Victoria Legal Aid, *Submission 61*; Mallee Family Care, *Submission 36*; Peninsula Community Legal Centre, *Submission 30*.

calls for the development of, and direction to, fast-tracked pathways depending on identified need, [17] including the development of a specialist list for small property claims and high risk family violence matters, as well as the expansion of the Federal Circuit Court's Indigenous List to other registries as appropriate.

6.9 The ALRC proposes that the family courts consider establishing a registrar and family consultant team-based triage process to direct matters to appropriate alternative dispute resolution processes and specialist pathways within the court as needed, and to case manage the matter until resolution. This should include specialist pathways for small property claims and high risk family violence matters (discussed below). It should also include a specialist Indigenous List as appropriate.

6.10 The ALRC considers that in the creation of this process, significant attention should be paid to developing appropriate dynamic risk and needs assessment processes.

A small claims property process

Proposal 6–4 The *Family Law Act 1975* (Cth) should provide for a simplified court process for matters involving smaller property pools. The provisions should allow for:

- the court to have discretion, subject to the requirements of procedural fairness, not to apply formal rules of evidence and procedure in a given case;
- the proceedings to be conducted without legal technicality; and
- the simplified court procedure to be applied by the court on its own motion or on application by a party.

Proposal 6–5 In considering whether the simplified court procedure should be applied in a particular matter, the court should have regard to:

- the relative financial circumstances of the parties;
- the parties' relative levels of knowledge of their financial circumstances;
- whether either party is in need of urgent access to financial resources to meet the day to day needs of themselves and their children;
- the size and complexity of the asset pool; and
- whether there are reasonable grounds to believe there is history of family violence involving the parties, or risk of family violence.

The court should give weight to each of these factors as it sees fit.

17 See, eg, Law Society of NSW, *Submission 154*; Aboriginal Legal Service of Western Australia, *Submission 64*; Law Council of Australia, *Submission 62*; Victoria Legal Aid, *Submission 61*; Human Rights Law Centre, *Submission 54*; Caxton Legal Centre, *Submission 51*; Central Australian Women's Legal Service, *Submission 24*.

Proposal 6–6 The family courts should consider developing case management protocols to support implementation of the simplified process for matters with smaller property pools, including provision for:

- case management by court registrars to establish, monitor and enforce timelines for procedural steps, including disclosure;
- conducting a conciliation conference once the asset pool has been identified; and
- establishing a standard timetable for processing claims with expected timeframes for case management of events (mentions, conciliation conferences and trial).

6.11 The ALRC proposes that a process be implemented to manage small property claims in the family courts in a timely and cost-effective manner where certain eligibility criteria are met. This requires legislative amendment to support a simplified pathway, supported by a case management process, for determining orders in cases with smaller property pools.

6.12 The family law system currently has limited capacity for small property and financial matters to be resolved affordably.[18]

6.13 Other proposals in this Discussion Paper go some way toward addressing this service gap. The expansion of family dispute resolution (FDR) for property and financial matters will support the resolution of some matters, particularly where compliance with disclosure obligations occurs without the need for court intervention (see Chapter 5). For another subset of cases that are dealt with by state and territory courts for family violence orders, recent legislative changes to provide for an increase in their jurisdiction will assist,[19] provided state and territory courts take up this jurisdiction.

6.14 However, even with the implementation of these measures, there will still be a need for a cost-effective mechanism for those with small property pools for whom these steps do not represent a solution. In light of this, the Issues Paper invited stakeholder input about mechanisms for modifying existing dispute resolution processes to provide effective low-cost options for resolving small property matters.[20]

6.15 In response to this question, submissions indicated support for the recommendation in the *SPLA Family Violence* report for changes to support expeditious resolution of small property claims. That report recommended amendments

18 See further ch 5.

19 Revised Explanatory Memorandum, Family Law Amendment (Family Violence and Other Measures) Bill 2018 12–29.

20 Australian Law Reform Commission, *Review of the Family Law System*, Issues Paper 48 (2018) Question 22.

to the *Family Law Act* to include a requirement for 'an early resolution for small claim property matters', and suggested case management processes should support this.[21]

6.16 The needs that the SPLA Committee's recommendations responded to were highlighted in Women's Legal Services Victoria's *Small Claim, Large Battles* report.[22] This report was based on a project involving free legal representation being provided to 48 women with limited assets or significant debt. Proceedings were concluded for 20 matters and the average size of settlements received was $71,447.[23] Had the proceedings been self-funded, the cost of legal fees would have represented between 50% and 126% of the asset pool.

6.17 The *Small Claims, Large Battles* report made recommendations in four relevant areas. It called for:

- a 'streamlined case management process available upon application to the court with simplified procedural and evidentiary requirements';[24]
- eligibility for the process to be based on financial vulnerability, the issues in dispute, and the nature and value of assets;[25]
- availability for eligible parties with concurrent unresolved parenting matters;[26]
- using registrars to increase oversight in relation to compliance with disclosure requirements.[27]

6.18 Many submissions endorsed the need for mechanisms consistent with these requirements, although a number of different strategies were raised.[28] Elements that were suggested included:

- a significant case management role for registrars[29] including a role in triaging applications at an early stage;[30]
- simplified and contracted processes, such as a requirement to file a Case Outline rather than submissions, and a reduced number of mention hearings;[31]
- a streamlined process using a basic legislative framework;[32]

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21 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 3, rec 14.
22 Women's Legal Service Victoria, 'Small Claims, Large Battles: Achieving Economic Equality in the Family Law System' (2018).
23 Ibid 5.
24 Women's Legal Service Victoria, above n 22 rec 1.
25 Ibid rec 2.
26 Ibid rec 3.
27 Ibid rec 4.
28 See, eg, CatholicCare Diocese of Broken Bay, *Submission 197*; R Alexander, *Submission 131*; Bar Association of Queensland, *Submission 80*; Victoria Legal Aid, *Submission 61*; D Bryant, *Submission 35*; Domestic Violence Legal Workers Network of WA, *Submission 33*; Peninsula Community Legal Centre, *Submission 30*.
29 South Australian Bar Association, *Submission 121*.
30 D Bryant, *Submission 35*.
31 Bar Association of Queensland, *Submission 80*.

- a judicial settlement conference;[33] and
- a daily duty list to provide ready access to a judge where warranted, including by video-link for registries where a sole judge might be sitting on other matters.[34]

6.19 Areas where similar approaches are applied include the industrial law jurisdiction of the Federal Circuit Court. Under the *Fair Work Act 2009* (Cth),[35] plaintiffs may elect to have a matter under $20,000 heard using a simplified procedure. The characteristics of this procedure are set out in the *Fair Work Act*,[36] and include provisions specifying that the court is not bound by rules of evidence and procedure, may act in an informal manner, and may amend the papers commencing the proceedings with notice to the other party. Some elements of this approach, such as discretion in relation to rules of evidence, are already available under the *Family Law Act* in children's proceedings.[37] They may be applied to other proceedings under the *Family Law Act* by consent of the parties.[38] In light of the simplification proposed for the *Family Law Act* (see Chapter 3), the relationship between the existing provisions and the proposed new provisions will need to be addressed in the drafting stage.

6.20 In relation to the way that eligibility for a small claims property process should be established, submissions cautioned against a simplistic approach based on dollar value.[39] Reasons for this included that large property pools could potentially not be complex from a legal perspective and that small pools could be considered complex (for example, where parties are young and have income and superannuation but significant debt). Further, given that income levels and property values vary across Australia, set monetary criteria would be inappropriate. These views, together with the policy objectives in proposing a small claims process, that is, to provide access to justice for vulnerable parties who may otherwise be unable to attain a cost-proportionate property settlement, have informed the criteria set out in the proposal.

6.21 To promote the accessibility of the small claims property process, its availability should be clearly communicated in material accessible to members of the public and the legal profession.

32 Law Society of South Australia, *Submission 88*.
33 South Australian Bar Association, *Submission 121*.
34 D Bryant, *Submission 35*.
35 *Fair Work Act 2009* (Cth) s 548.
36 Ibid.
37 *Family Law Act 1975* (Cth) pt VII div 12A.
38 *Family Law Act 1975* (Cth) s 69ZM(4).
39 See, eg, Law Society of South Australia, *Submission 88*; Bar Association of Queensland, *Submission 80*.

A specialist family violence pathway

Proposal 6–7 The family courts should consider establishing a specialist list for the hearing of high risk family violence matters in each registry. The list should have the following features:

- a lead judge with oversight of the list;
- a registrar with responsibility for triaging matters into the list and ongoing case management;
- family consultants to prepare short and long reports on families whose matters are heard in the list; and
- a cap on the number of matters listed in each daily hearing list.

All of the professionals in these roles should have specialist family violence knowledge and experience.

Question 6–1 What criteria should be used to establish eligibility for the family violence list?

Question 6–2 What are the risks and benefits of early fact finding hearings? How could an early fact finding process be designed to limit risks?

6.22 It is clear that matters involving family violence form a substantial proportion of the caseload of the family courts. The Australian Institute of Family Studies (AIFS) evaluation of the 2012 family violence amendments showed that of the families who reported resolving their matters through courts, nearly half had safety concerns for themselves and/or their children, 85% reported a history of family violence involving emotional abuse, and more than half reported physical violence.[40] Family violence is the most commonly raised factual issue in litigated proceedings.[41]

6.23 In light of these data, and consistent with the SPLA Committee's recommendations,[42] some stakeholders noted the importance of developing a specialist family violence court list for high risk cases, supported by early risk assessment and triage and early decision making.[43]

6.24 In relation to having early access to specialist expertise for family violence assessments, many stakeholders, including the Family Court of Australia (Family

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

41 Rae Kaspiew et al, 'Court Outcomes Project (Evaluation of the 2012 Family Violence Amendments)' (Australian Institute of Family Studies, 2015) 49.

42 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 3 recs 3 and 5.

43 See also Women's Legal Services Australia, *Safety First in Family Law: Five Steps to Creating a Family Law System That Keeps Women and Children Safe* (2016) <www.wlsa.org.au/campaigns/safety_first_in_family_law>.

Court), endorsed this need.[44] The National Family Violence Prevention Legal Service argued, for example, that without sufficiently expert assessments at an early stage, the implications of family violence would not be understood:

> it is too often dismissed as 'historical', despite clients and their children experiencing significant and ongoing impact of family-violence related trauma, including the effects that violence may have on someone's parenting capacity.[45]

6.25 As noted above, submissions also pointed to the need for case management for cases involving families with more complex needs to support faster, better informed decision making.[46]

6.26 Some submissions suggested that listing practices in some areas can have adverse consequences for family violence matters, for example, where over-listing results in crowded court waiting areas and matters not being reached.[47] The NSW Young Lawyers Family Law Committee, for example, submitted that such listing practices resulted in

> matters regularly being marked 'not reached' with no apparent priority afforded on the next occasion and parties being required to wait at court, in confined spaces, for hours on end without any clear explanation as to how the court list is being called or whether their matter will actually be heard.[48]

6.27 Following a recommendation by the Royal Commission into Family Violence,[49] the Magistrates' Court of Victoria has started to cap its family violence hearing lists.[50] The ALRC considers a similar approach is warranted in any specialist family violence list that is developed in the family courts.

6.28 Some stakeholders also suggested a specialised family violence list should have the ability to make a range of orders, including in relation to recovery of children and contravention,[51] and be able to make orders quickly to respond to safety issues, such as suspension of a child's time with a violent parent.[52] National Legal Aid also submitted that there should be restrictions on the number of interlocutory applications and the size and number of affidavits.[53]

6.29 Some submissions suggested that a process for early determinations of fact in relation to family violence should be part of any specialist approach.[54] The justification for this position was that such an approach would go some way toward early resolution

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44 See, eg, Family Court of Australia, *Submission 68*.
45 National Family Violence Prevention Legal Services Forum, *Submission 63*.
46 See, eg, Women's Legal Service Queensland, *Submission 158*; Victoria Legal Aid, *Submission 61*.
47 See, eg, ATSILS Qld, *Submission 42*.
48 NSW Young Lawyers Family Law Committee, Law Society of NSW, *Submission 108*.
49 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) rec 68.
50 Magistrates Court of Victoria, Practice Direction No 9 of 2015 caps the number of applications to be listed in the number of family violence intervention orders listed in the Family Violence application list at Broadmeadows Magistrates Court at 40.
51 See, eg, Victoria Legal Aid, *Submission 61*.
52 See, eg, Women's Legal Service Queensland, *Submission 158*.
53 National Legal Aid, *Submission 163*.
54 Springvale Monash Legal Service, *Submission 161*; See, eg, Women's Legal Service Queensland, *Submission 158*.

of issues in dispute, making the nature of other factual issues and legal questions for determination clearer.[55]

6.30 The ALRC notes on this point that the family courts have power under s 69ZR of the *Family Law Act* to make early determinations about issues of fact, including about allegations of family violence, but that the use of this provision by the courts is not widespread.[56] The Family Law Council has suggested that 'it would align with the principles of timeliness and flexibility' if the practice of making early findings of fact about family violence 'were adopted on a more consistent basis', so that parties could be referred to appropriate support and recovery programs.[57]

6.31 Provision for early fact finding hearings was also made in the UK in 2008.[58] However, a 2015 study suggests that this approach reinforces a narrow, incident-based approach that compartmentalises consideration of family violence.[59] Submissions from some domestic violence organisations to this Inquiry also cautioned against a focus on fact finding.[60] The ALRC seeks stakeholder views on this question.

6.32 The development of a specialist family law list for family violence matters is consistent with specialist approaches applied in state and territory courts of summary jurisdiction.[61] However, in the context of evidence demonstrating that the majority of parenting matters in the family law courts involve family violence, consideration of a specialist family violence list raises the question of the criteria that should be applied to determine eligibility for the list. Given that family violence is a feature of the majority of matters before the family courts, the submissions and consultations suggest that the specialist list should be reserved for 'high risk' cases determined by assessment of the following matters:

- the level of urgency and risk;
- whether the family is involved in court proceedings in other jurisdictions in relation to civil or criminal family violence matters;
- whether the family is involved with child protection agencies;
- whether either or both parties are self-represented; and
- whether either or both parties are from Aboriginal or Torres Strait Islander, culturally or linguistically diverse backgrounds or have a disability.

6.33 The ALRC seeks stakeholder input on this question.

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55 Springvale Monash Legal Service, *Submission 161*.

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

57 Ibid.

58 Practice Direction 12J - Child Arrangements and Contact Orders: Domestic Abuse and Harm.

59 Adrienne Barnett, '"Like Gold Dust These Days": Domestic Violence Fact-Finding Hearings in Child Contact Hearings' (2015) 23 *Feminist Legal Studies* 47.

60 See, eg, Safe Steps Family Violence Response Centre, *Submission 15*.

61 See Department of Justice and Attorney-General (Qld), *Domestic and Family Violence Reform* <www.justice.qld.gov.au/corporate/justice-initiatives/domestic-and-family-violence-reform>.

Co-location of courts

Proposal 6–8 The Australian Government should work with state and territory governments to develop and implement models for co-location of family law registries and judicial officers in local court registries. This should include local courts in rural, regional and remote locations.

6.34 The ALRC was asked to consider the need for reform in relation to collaboration between the family law system and state and territory family violence and child protection systems. In Chapter 4, the ALRC proposed establishing community-based Families Hubs that will allow families to access a range of advisory and support services in the one place. Proposal 6–8 seeks to provide a similar solution to the problems posed by the current separation of courts dealing with family law on the one hand and child protection and family violence on the other.

6.35 Previous reviews have shown that many separated families come into contact with the family law system in a context where the need for parenting orders is likely to be one of a number of legal issues the family is facing. This may require the family to engage with both a state or territory local court and a federal family court.[62] In its 2015 report, the Family Law Council noted, for example, that

> a mother might be an applicant for a family violence protection order, a prosecution witness for assault charges where she is the victim, and a respondent in a child protection application, whilst simultaneously experiencing related legal issues concerning parenting issues and housing and debt.[63]

6.36 The Family Law Council's report identified a number of problems for families associated with the separation of courts dealing with the safety of families and children, noting that

> the families who are most likely to be involved with more than one of these jurisdictions are those with support needs associated with family violence, and that clients in this circumstance are likely to be engaging with these systems at a time of high risk and vulnerability. Within this context, the greatest concern to stakeholders was the risk that a child 'falls through the cracks' between the different systems and that none 'adequately deals with the child protection issues'.[64]

62 Family Law Council, *Interim Report to the Attorney-General in Response to the First Two Terms of Reference on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (2015) ch 2; Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010) ch 16.

63 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) 36.

64 Ibid 29.

6.37 Submissions to this Inquiry expressed similar concerns. The Fitzroy Legal Service and Darebin Community Legal Centre, for example, submitted:

> In our experience, clients often struggle to understand why their issues can't all be dealt with together and are frustrated by the need to make multiple applications to different courts (often involving different legal representatives) for what they understand to be a single problem. This represents a fundamental barrier to access to justice for these clients. … At the heart of this issue is the division of responsibility for the various systems between federal and state governments. These jurisdictional conflicts create confusion, duplication, waste and are a barrier to access to justice, especially for the most vulnerable members of our community.[65]

6.38 In recognition of these difficulties, the ALRC's Issues Paper invited stakeholders to suggest changes that could support families to achieve the range of orders they need about these matters in the one place.[66]

6.39 The responses noted that there have been numerous reviews and recommendations about this topic stretching back to 2002, but that the problems associated with the fragmentation of courts for families seeking safe outcomes for children remain.[67] Some stakeholders suggested that this problem has reached a crisis point.[68] The Family Court, for example, described this issue as 'one of the big ticket items that needs to be addressed' by the ALRC's review, submitting that the issue 'needs to be confronted head-on, rather than applying band aid solutions'.[69]

6.40 Many submissions acknowledged and supported the Family Law Council's recommendations, which suggested that the best opportunity for meeting the multiple legal needs of families is for the Australian Government to support state and territory courts of summary jurisdiction to exercise their family law powers to a greater extent when parties with family law needs are already before the court.[70] This recommendation acknowledged the significant constitutional barriers affecting the ability of the federal family courts to exercise the jurisdiction of state and territory

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

66 Australian Law Reform Commission, *Review of the Family Law System*, Issues Paper 48 (2018) Question 32.

67 See Family Law Council, 'Family Law and Child Protection: Final Report' (September 2002) rec 13; Julie Jackson, 'Bridging the Gaps between Family Law and Child Protection: Is a Unified Family Court the Key to Improving Services for Children and Their Families in the Family Law System? (2010)' (2010); Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010); 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).

68 See, eg, Bravehearts Foundation Ltd, *Submission 148*.

69 Family Court of Australia, *Submission 68*.

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

courts,[71] as well as the evidence that local courts tend to be the first point of contact with the legal system for families with both family violence and family law needs.[72]

6.41 The Council of Attorneys-General Family Violence Working Group is currently progressing this recommendation,[73] and legislative amendments to support its operation have recently been passed.[74] Stakeholders expressed general support for this development, but also stressed the importance of the Commonwealth providing adequate funding to support state and territory courts to manage the increase in their workload.[75]

6.42 However, the submissions also noted the limitations of this solution for families with multiple legal needs. In particular, stakeholders noted that the family law jurisdiction of state and territory courts operates on a limited basis, requiring consent to the jurisdiction by both parties for parenting matters.[76] More particularly, submissions noted the existing heavy workloads of local courts, and that many magistrates and local court judges are likely to have had limited experience of family law.[77]

6.43 These submissions highlighted the importance of ensuring that families have access to decision makers and supporting service systems that have specialist expertise in family law.[78]

6.44 This importance was recognised by the Family Law Council in its 2016 report, which recommended that the Australian Government explore 'the possibilities for increasing circuiting of Federal Circuit Court judicial officers and registry staff in state and territory magistrates' courts'.[79]

6.45 As noted in Chapter 1, a strong theme in the submissions and consultations for this Inquiry is that the family law system can no longer operate in isolation from state and territory systems and courts, and that it is time for the family law system to work in partnership with these other parts of the broader justice system. As one organisation expressed this:

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71 See for an explanation of these barriers, 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) 45–48, 65–76.

72 Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010) ch 16; Family Law Council, *Interim Report to the Attorney-General in Response to the First Two Terms of Reference on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (2015) ch 2.

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

74 Family Law Amendment (Family Violence and Other Measures) Bill 2018 (Cth).

75 See, eg, Queensland Law Society, *Submission 221*; Dr B Batagol, *Submission 77*; Victoria Legal Aid, *Submission 61*; Court Network, *Submission 49*.

76 *Family Law Act 1975* (Cth) s 69J, s 69N.

77 See, eg, Queensland Law Society, *Submission 221*; Marrickville Legal Centre, *Submission 137*; Relationships Australia Northern Territory, *Submission 114*; Dr B Batagol, *Submission 77*.

78 See, eg, Law Council of Australia, *Submission 62*; Victoria Legal Aid, *Submission 61*.

79 Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016) rec 10.

> Federal and State government commitment to operate within an eco-system of service systems is needed to improve collaboration, integrated service responses and ongoing family functioning.[80]

6.46 These submissions included calls for greater cooperation between the family courts and state and territory local courts to support families with multiple legal needs.[81]

6.47 The ALRC supports the Family Law Council's 2016 recommendation and proposes that the Australian Government approach its state and territory counterparts with a view to co-locating family law registries in identified local courts.

6.48 The ALRC's consultations and submissions also highlighted strong concerns about the limited availability of family law services in regional and remote areas of Australia where there is infrequent or no family court presence.[82] The ALRC notes previous and recent initiatives by the family courts to address these concerns, including the conduct of Family Court hearings in state court facilities in the Torres Strait and the more recent commencement of hearings in the Pilbara by the Family Court of Western Australia.[83]

6.49 The ALRC proposes that co-located family law registries should include courts in rural, regional and remote locations.

Addressing concerns about adversarial processes

6.50 In accordance with the Terms of Reference, the Issues Paper sought stakeholder feedback about 'whether the adversarial court system offers the best way to support the safety of families and resolve matters in the best interests of children'.[84] The responses to this question indicate that many of those who work in the system believe that the current litigation model is not well adapted for achieving these aims.

6.51 A key concern raised in the responses to the Issues Paper is that, while much has been achieved through the development of alternative dispute resolution services, families who need an adjudication process continue to face a process that is ill-suited for dealing with family relationship issues. More particularly, some stakeholders suggested that the litigation process tends to entrench or exacerbate existing hostilities

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80 Anglicare WA, *Submission 152*.

81 See, eg, R Alexander, *Submission 131*; Relationships Australia Northern Territory, *Submission 114*; Dr B Batagol, *Submission 77*; Victoria Legal Aid, *Submission 61*; Domestic Violence Action Centre, *Submission 58*; Family Law Practitioners Association WA, *Submission 27*; Domestic Violence Victoria, *Submission 23*; Drummond Street Services, *Submission 20*.

82 See, eg, Loddon Campaspe Community Legal Centre and Goulburn Valley Community Legal Centre, *Submission 210*; Hume Riverina Community Legal Service, *Submission 130*; Victorian Women Lawyers, *Submission 84*; Family Relationship Centre Port Augusta, *Submission 59*; Mallee Family Care, *Submission 36*; Albury Wodonga Family Law Pathways Network, *Submission 17*; Anglicare SA, *Submission 2*.

83 See on this, Shannon Beattie, 'Family Law Advice to Aid Indigenous Families' *North West Telegraph*, 25 July 2018.

84 Australian Law Reform Commission, *Review of the Family Law System*, Issues Paper 48 (2018) Question 29.

between the parties,[85] with adverse implications for the wellbeing of children.[86] As Interrelate expressed this concern, 'it is incongruous to expect parents will be pitted against one another in court one day and the next they will act cooperatively and collaboratively to care for their children'.[87]

6.52 Others suggested more generally that an adversarial process is a poor fit for family disputes.[88] The Australian Dispute Resolution Advisory Council (ADRAC), for example, described it as an approach that invites parties to 'compete with their ex-partner', suggesting that '[a]dversarialism focuses on competing positions, rather than interests, pitting families against each other'.[89]

6.53 In a similar way, some invoked the imagery of 'battle' when reflecting on their clients' experiences of litigation,[90] while others, such as the Women's Law Centre of Western Australia, noted that in disputes about the care of children, it is as though the parties are 'like opposed commercial law litigants rather than parties deeply embroiled in highly stressful highly emotive conflicts to determine the most private aspects of their lives'.[91] Another family law practitioner argued:

> The adversarial system may not promote any injustice between (for example) two large and well-resourced corporate entities slugging it out over a commercial dispute. Family law litigants, however, are generally not well resourced. They often earn average or less than average income and have no spare money for lawyers. They often have fairly minor assets loaded with debt, or even substantial net debt. They often have had no prior experience of legal processes or instructing lawyers, and they are undergoing what is almost always a tremendously stressful and difficult time for them and for their families.[92]

6.54 Others suggested that the model of litigation in the family courts is particularly inappropriate for people affected by family violence.[93] Domestic Violence Victoria, for example, submitted:

> the adversarial model used in the current family law system is one of the most significant barriers to access and engagement for survivors of family violence. … The adversarial model replicates the power imbalance of family violence and colludes in the coercion and control of women experiencing family violence. It is a space that advantages perpetrators of family violence and disempowers survivors. … The

85 See, eg, R Hainsworth, *Submission 142*; Women's Law Centre of WA, *Submission 40*; Domestic Violence Victoria, *Submission 23*; Fitzroy Legal Service and Darebin Community Legal Centre, *Submission 7*.

86 See, eg, Relationships Australia Victoria, *Submission 129*; Interrelate, *Submission 126*; For Kids Sake, *Submission 118*; Australian Psychological Society, *Submission 55*.

87 Interrelate, *Submission 126*.

88 See, eg, Women's Law Centre of WA, *Submission 40*; Safe Steps Family Violence Response Centre, *Submission 15*.

89 Australian Dispute Resolution Advisory Council Inc (ADRAC), *Submission 12*.

90 See, eg, Domestic Violence Action Centre, *Submission 58*; P Curry, *Submission 56*; Domestic Violence Victoria, *Submission 23*.

91 Women's Law Centre of WA, *Submission 40*.

92 P Curry, *Submission 56*.

93 See, eg, Yourtown, *Submission 204*; Domestic Violence Action Centre, *Submission 58*; Australian Psychological Society, *Submission 55*; Berry Street, *Submission 26*; Domestic Violence Victoria, *Submission 23*; Safe Steps Family Violence Response Centre, *Submission 15*.

> adversarial system is combative in nature, deterring survivors of family violence from participating in it, to settle early, and/or to not raise their experience of family violence at all in order to preserve their own safety and well-being and that of their children. As a result, the current family law system frequently fails to deliver justice to survivors of family violence.94

6.55 These submissions indicated that court proceedings are often intimidating for people who have experienced family violence,[95] with some noting that it can 'reinforce the destructive and traumatic experience of family violence' for clients[96] and enable perpetrators of violence to continue their abuse of the other party.[97] Others noted that these dynamics can deter victims of family violence from using court processes altogether, or deter them from raising their experience of family violence, and that this can increase the risk of further harm.[98]

6.56 Such concerns reflect the findings of the SPLA Committee, which concluded that 'the existing adversarial system for family law disputes is not appropriate to address matters involving family violence', and 'must be restructured and redesigned so safety and accessibility are central'.[99]

6.57 It is important to note that there was also some support for the present model of litigation. A number of stakeholders, for example, highlighted the importance of more traditional court processes for disputes that involve complex questions of law and complicated financial arrangements, such as property proceedings involving complex trust arrangements or assets in multiple international jurisdictions.[100]

6.58 There were also submissions that noted the existing use of less adversarial approaches by the Family Court of Western Australia and in the Federal Circuit Court's Indigenous List and praised these initiatives.[101]

6.59 However, many stakeholders suggested the need to consider the development of a less adversarial process for children's matters more generally.[102] These submissions proposed that adjudication processes should be tailored for the kind of dispute involved, with a more 'solution focused' process being applied in matters concerning children.[103]

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94 Domestic Violence Victoria, *Submission 23*.

95 See, eg, Domestic Violence Action Centre, *Submission 58*; Domestic Violence Victoria, *Submission 23*; Safe Steps Family Violence Response Centre, *Submission 15*.

96 Berry Street, *Submission 26*.See also Centacare Family and Relationship Services (CFRS), *Submission 125*; Australian Psychological Society, *Submission 55*.

97 See, eg, Domestic Violence Action Centre, *Submission 58*; P Curry, *Submission 56*; Domestic Violence Victoria, *Submission 23*; Fitzroy Legal Service and Darebin Community Legal Centre, *Submission 7*.

98 See, eg, Centacare Family and Relationship Services (CFRS), *Submission 125*.

99 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 3, [3.83].

100 See, eg, Bar Association of Queensland, *Submission 80*.

101 See, eg, Aboriginal Legal Service of Western Australia, *Submission 64*.

102 See, eg, M Packer, *Submission 178*; C Fitzpatrick, E Hooper, C Hooper and J Dmitrovic, *Submission 169*; Domestic Violence Action Centre, *Submission 58*; Caxton Legal Centre, *Submission 51*; Anglicare SA, *Submission 2*.

103 Domestic Violence Action Centre, *Submission 58*. See also M Packer, *Submission 178*; C Fitzpatrick, E Hooper, C Hooper and J Dmitrovic, *Submission 169*; Anglicare SA, *Submission 2*.

What is a 'less adversarial' decision making process?

6.60 Some stakeholders requested clarification of the language of 'adversarial' and 'less adversarial' used in the Terms of Reference.[104] This request reflected an understanding of adversarial processes as a term of art that denotes a particular form of legal system. Within this context, the language of adversarial refers to a form of proceedings in which the parties, rather than the judicial officer, have responsibility for determining the evidence to be relied on to support or refute their claim.[105]

6.61 However, it is clear from the submissions described above that many stakeholders, including from the legal profession, responded to this question from a client perspective, which apprehended the language of 'adversarial' in its more common usage as a process that incorporates an oppositional or combative approach.[106] This understanding is in keeping with the client-centred methodology adopted in the conduct of this Inquiry, as described in Chapter 1.

6.62 When applied to adjudication processes, the term 'less adversarial' is a relative characterisation. The academic literature indicates that in general terms less adversarial refers to 'a style of judging that is more restorative, interventionist or inquisitorial in nature than more traditional curial practices'.[107] This includes problem-solving court processes, such as those that are increasingly used in other jurisdictions to deal with matters where behavioural problems complicate the resolution of legal disputes, for example, in family drug treatment courts and mental health tribunals.[108]

6.63 The benefits of a problem-solving adjudication process include the capacity to address behaviours that underlie and complicate the legal issues,[109] with a view to reducing the level of risk to others and the potential for ongoing litigation.[110] Such processes are particularly indicated where an ongoing relationship between the parties needs to be preserved,[111] as is the case in most disputes about the care of children.

6.64 A problem-solving court process harnesses the authority of the court to effect behavioural change (and reduce risk) in two ways. The first is by empowering judges to connect litigants with relevant services, such as behaviour change programs, trauma

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104 See, eg, Family Court of Australia, *Submission 68*; Law Council of Australia, *Submission 62*; Australian Bar Association, *Submission 13*.

105 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) ch 1.

106 See, eg, M Packer, *Submission 178*; N Ciffolilli, *Submission 168*; A Weller, *Submission 74*; Domestic Violence Victoria, *Submission 23*; Safe Steps Family Violence Response Centre, *Submission 15*; Relationships Australia, *Submission 11*.

107 Sarah Murray, *The Remaking of the Courts: Less Adversarial Practice and the Constitutional Role of the Judiciary in Australia* (The Federation Press, 2014) 1.

108 Michael S King, 'Reflections on ADR, Judging and Non-Adversarial Justice: Parallels and Future Developments' (2012) 22 *Journal of Judicial Administration* 76.

109 Duffy, James, 'Problem-Solving Courts, Therapeutic Jurisprudence and the Constitution: If Two Is Company, Is Three a Crowd?' (2011) 35(2) *Melbourne University Law Review* 394, 395; Penelope Weller, 'Taking a Reflexive Turn: Non-Adversarial Justice and Mental Health Review Tribunals' (2011) 37(1) *Monash University Law Review* 81, 82.

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

111 Warren Brookbanks, 'Non-Adversarial Justice: An Evolving Paradigm' (2017) 26 *Journal of Judicial Administration* 222.

recovery services and rehabilitation and education programs. Professor Harry Blagg has described this aspect as follows:

> Problem-oriented courts attempt to facilitate a team approach and encourage close collaboration between agencies involved in the justice process. The problem-oriented court acts as the 'hub' connecting various 'spokes', such as drug and alcohol treatment agencies, community based corrections, probation services and domestic violence agencies, forming a holistic and integrated approach. This approach encourages magistrates and judges to take a pro-active and overtly leading role in the creation of better, well coordinated services for clients.[112]

6.65 The second mechanism involves judicial oversight of the person's engagement and progress in making behavioural change, typically via the use of part-heard proceedings.[113] Underpinning each of these components is the use of a therapeutic justice court craft, which seeks to minimise the potential adverse mental health impacts of legal processes on those who use the courts.[114]

Revising the Parenting Management Hearings process

Question 6–3 What changes to the design of the Parenting Management Hearings process are needed to strengthen its capacity to apply a problem-solving approach in children's matters? Are other changes needed to this model?

Question 6–4 What other ways of developing a less adversarial decision making process for children's matters should be considered?

6.66 The main reform direction proposed in response to the concerns described above centred on the development of a multi-disciplinary panel process. This option was raised by a diverse range of stakeholders, including legal assistance services, family relationships services, domestic violence services, child advocacy organisations and individuals with experience of the family law system.[115] Many also emphasised the need to incorporate a problem-solving approach.[116]

6.67 The ALRC notes that the Australian Government has already proposed to pilot a less adversarial decision making process for children's matters. Legislation was introduced into Parliament in December 2017 to establish an administrative tribunal

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112 Harry Blagg, 'Problem-Oriented Courts' (Law Reform Commission of Western Australia, March 2008) 2.

113 Jordens and Richardson, above n 110.

114 Jelena Popovic, 'Judicial Officers: Complementing Conventional Law and Changing the Culture of the Judiciary' (2002) 20 *Law in Context: A Socio-Legal Journal* 121.

115 See, eg, Marrickville Legal Centre, *Submission 137*; Lone Fathers Association of Australia, *Submission 99*; I Vann, *Submission 97*; P Curry, *Submission 56*; Australian Psychological Society, *Submission 55*; Caxton Legal Centre, *Submission 51*; Domestic Violence Victoria, *Submission 23*; Drummond Street Services, *Submission 20*; Albury Wodonga Family Law Pathways Network, *Submission 17*; National LGBTI Health Alliance, *Submission 14*; Anglicare SA, *Submission 2*.

116 CatholicCare Diocese of Broken Bay, *Submission 197*; See, eg, Centacare Family and Relationship Services (CFRS), *Submission 125*; Victoria Legal Aid, *Submission 61*; Drummond Street Services, *Submission 20*; The Royal Australian and New Zealand College of Psychiatrists, *Submission 18*; Queensland Family and Child Commission, *Submission 16*; Safe Steps Family Violence Response Centre, *Submission 15*.

known as the Parenting Management Hearings Panel (PMH Panel). This model was designed to provide a multi-disciplinary alternative to court proceedings for less complex children's matters where parents are not legally represented.

6.68 There has been a mixed response to the proposed PMH Panel. In submissions to this Inquiry, and to the parliamentary review of the Bill establishing the PMH Panel, stakeholders noted a number of limitations of the PMH process for client families. These included concerns about:

- the proposal to require leave for parties to be legally represented;[117]
- the qualifications of panel members, including calls to ensure that every PMH Panel sit with at least one member who has expertise in sexual assault, family violence, child abuse and trauma-informed practice and that panel members have a thorough knowledge of the impacts of family violence on children;[118] and
- the absence of guidelines to ensure cultural competency of panel members and the cultural safety of hearing processes for Aboriginal and Torres Strait Islander and culturally and linguistically diverse families.[119]

117 Hunter Valley Family Law Practitioners Association, Submission No 4 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Family Law Amendment (Parenting Management Hearings) Bill 2017* (2018); Victorian Family Law Bar Association, Submission No 23 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Family Law Amendment (Parenting Management Hearings) Bill 2017* (2018).

118 Women's Legal Services Australia, Submission No 17 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Family Law Amendment (Parenting Management Hearings) Bill 2017* (2018); Australian Women Against Violence Alliance, Submission No 9 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Family Law Amendment (Parenting Management Hearings) Bill 2017* (2018); Rape and Domestic Violence Services Australia, Submission No 10 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Family Law Amendment (Parenting Management Hearings) Bill 2017* (2018); Domestic Violence Victoria, Submission No 12 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Family Law Amendment (Parenting Management Hearings) Bill 2017* (2018); Western NSW Community Legal Centre Inc, Submission No 13 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Family Law Amendment (Parenting Management Hearings) Bill 2017* (2018); Safe Steps, Submission No 18 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Family Law Amendment (Parenting Management Hearings) Bill 2017* (2018); Domestic Violence NSW, Submission No 22 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Family Law Amendment (Parenting Management Hearings) Bill 2017* (2018); Domestic Violence Action Centre, Submission No 24 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Family Law Amendment (Parenting Management Hearings) Bill 2017* (2018).

119 Aboriginal & Torres Strait Islander Legal Service (QLD) Ltd, Submission No 15 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Family Law Amendment (Parenting Management Hearings) Bill 2017* (2018); National Family Violence Prevention Legal Services, Submission No 19 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Family Law Amendment (Parenting Management Hearings) Bill 2017* (2018).

6.69 Some stakeholders also called for:

- greater scope to be provided for children and young people to participate in the hearing process;[120] and
- strengthened risk assessment processes.[121]

6.70 In light of these reservations, and the strong support for a less adversarial adjudication approach for families with complex needs in the submissions to this Inquiry, the ALRC seeks stakeholder input about ways of strengthening the capacity of the PMH process to apply a therapeutic problem-solving approach for families with complex needs or to otherwise develop a less adversarial decision making process that addresses the concerns for families and children described above.

A post-order parenting support service

Proposal 6–9 The Australian Government should develop a post-order parenting support service to assist parties to parenting orders to implement the orders and manage their co-parenting relationship by providing services including:

- education about child development and conflict management;
- dispute resolution; and
- decision making in relation to implementation of parenting orders.

Proposal 6–10 The Australian Government should work with relevant stakeholders, including the Community Services and Health Industry Skills Council, the Australian Psychological Society, the Australian Association of Social Workers, the Mediator Standards Board, Family & Relationship Services Australia and specialist family violence services peak bodies, to develop intake assessment processes for the post-order parenting support service.

Proposal 6–11 The proposed Family Law Commission (Proposal 12–1) should develop accreditation and training requirements for professionals working in the post-order parenting support service.

120 Commissioner for Children and Young People Western Australia, Submission No 1 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Family Law Amendment (Parenting Management Hearings) Bill 2017* (2018); Commissioner for Children and Young People South Australia, Submission No 3 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Family Law Amendment (Parenting Management Hearings) Bill 2017* (2018); Australian Human Rights Commission, Submission No 7 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Family Law Amendment (Parenting Management Hearings) Bill 2017* (2018).

121 Women's Legal Services Australia, Submission No 17 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Family Law Amendment (Parenting Management Hearings) Bill 2017* (2018); National Legal Aid, Submission No 31 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Family Law Amendment (Parenting Management Hearings) Bill 2017* (2018).

6.71 This proposal addresses concerns raised with the ALRC about the high rate of families returning to court following the making of final orders,[122] as well as complaints about the costs and stress of responding to (sometimes many) enforcement applications, and the need for improved measures to support highly conflicted parents to implement parenting arrangements and develop positive post-order communication.[123]

6.72 It also reflects broader concerns raised by stakeholders about the importance of recognising that many of the families who engage with the courts are likely to need assistance across time, and the need, as the Marrickville Legal Centre put it, 'for re-orientation of the temporal focus of family court process from a build-up to a single, large decision-making event, toward the constitution of a family law matter as a series of decision events'.[124] The importance of this shift in thinking was also described by ADRAC, which submitted that

> The very idea that a 'resolution' can be provided that somehow deals with the issues once and for all is naïve and, in some instances, dangerous. Family dynamics change, and separating families encounter repeating and often unpredictable changes in their lives that require constant adjustment and renegotiation.[125]

Post-order conflict and enforcement proceedings

6.73 Many stakeholders highlighted the tendency for interparental conflict to escalate and 'solidify' during court proceedings,[126] leaving parents ill-equipped to manage co-parenting arrangements when the proceedings end.[127] Submissions also noted that there needs to be greater support for families after the making of final orders to support compliance with the orders.[128]

6.74 As explained throughout this Discussion Paper, exposure to ongoing high levels of interparental conflict is a key predictor of poor outcomes for children.[129] Ongoing parental conflict is also a key contributing factor to non-compliance with court orders and returns to court for enforcement proceedings.[130] A 2015 study of court files conducted by AIFS showed a high rate of repeat litigation in children's matters, with nearly four in ten judicially determined cases having previously been before the courts.[131]

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122 See on this Kaspiew et al, above n 41, 41.
123 See, eg, Lone Fathers Association of Australia, *Submission 99*.
124 Marrickville Legal Centre, *Submission 137*.
125 Australian Dispute Resolution Advisory Council Inc (ADRAC), *Submission 12*.
126 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*.
127 See, eg, Relationships Australia Victoria, *Submission 129*; Interrelate, *Submission 126*.
128 See, eg, Victoria Legal Aid, *Submission 61*.
129 EM Cummings and PT Davies, *The Guilford Series on Social and Emotional Development. Marital Conflict and Children: An Emotional Security Perspective* (Guilford Press, 2010).
130 Helen Rhoades, 'Contact Enforcement and Parenting Programmes— Policy Aims in Confusion?' (2004) 16 *Child and Family Law Quarterly* 1, 3. For a case study on this, see Fitzroy Legal Service and Darebin Community Legal Centre, *Submission 7*.
131 Kaspiew et al, above n 41, 41.

6.75 These data indicate that many Australian children living in separated families may be exposed to ongoing conflict between their parents over long time frames and may spend a substantial period of their childhood engaged with court proceedings. The case of *Caffell & Falcon*, which reportedly involved 56 court appearances over a period of eight years, commencing when the parties' daughter was 2 years old, provides an example of the potential impacts of this dynamic.[132] Evidence provided to the court at the final hearing, when the child was aged 10, described her as profoundly traumatised with an 'extremely high' level of anxiety.

6.76 Previous research about contravention proceedings matters has suggested that they are poorly adapted for reducing parental conflict. For one thing, they involve further litigation, which is likely to further entrench existing conflict. As the Family Law Council's 1998 report on enforcement proceedings noted, by the time enforcement matters reach court, the dispute between the parents tends to be 'highly polarised and emotionally charged'.[133]

6.77 Other research about contravention proceedings has also showed that the majority of applications resulted in a variation of the ordered arrangements, rather than enforcement of them, reflecting the unworkability of the ordered arrangements due to factors such as a change in the living or working arrangements of one of the parents, the introduction of a new partner, the children's maturation, concerns about the child's safety or the intended relocation of one party.[134]

6.78 This research of court files has also suggested that entrenched conflict is characteristic of contravention matters, revealing that few applications for enforcement represent one-off disputes, but tend to be part of an ongoing conflict involving multiple proceedings. In addition, contravention applications often reflect a range of relationship issues, such as unresolved feelings about the breakdown of the marriage, grievances about child support payments or other financial matters, and anxieties about stepparents, rather than simply being a dispute over compliance with parenting orders.[135]

6.79 The Family Law Council's report also pointed to the high costs of enforcement proceedings as a solution to disputes about post-order parenting arrangements.[136]

6.80 Non-adversarial alternatives to court-based mechanisms for reducing post-order conflict are therefore likely to have significant benefits for children as well as reducing the 'downstream' costs of further court proceedings.[137]

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132 *Caffell & Falcon* [2013] FCCA 1652 (25 October 2013); See also *Theophane & Hunt (Final Parenting Orders)* [2014] FamCAFC 68 (24 November 2014).

133 Julia Tolmie, 'Child Contact Orders: Enforcement and Penalties—The Final Report of the Family Law Council' (1998) 12 *Australian Journal of Family Law* 305, 2, 9.

134 Helen Rhoades, above n 130, 3. See also Sarah Middleton, 'Variation of Parenting Orders and the Best Interests of Children: Are Some Categories of Change More Likely than Others to Satisfy the Rule in Rice and Asplund?' (2007) 21 *Australian Journal of Family Law* 1.

135 Helen Rhoades, above n 130, 2–3.

136 Julia Tolmie, above n 133, 2, 9.

137 Barbara Jo Fidler, 'Parenting Coordination: Lessons Learned & Key Practice Issues' (2012) 31(2) *Canadian Family Law Quarterly* 237, 238. See also Uniting, *Submission 162*.

6.81 As noted above, many submissions emphasised the importance of problem-solving approaches, rather than adversarial court processes,[138] for dealing with parental conflict. This included submissions calling for a greater use of educative processes[139] that involve social workers and psychologists.[140]

Providing post-order support for highly conflicted families

6.82 In this context, a number of stakeholders recommended adapting the parenting coordinator model used in the US and Canada for this purpose.[141]

6.83 Parenting coordination is a child focused alternative dispute resolution process developed in the United States in the 1980s in which mental health or legal professionals work with highly conflicted parents to assist them to implement their parenting plans or parenting orders and to improve communication.[142]

6.84 The process of parenting coordination involves a number of strategies to accomplish these goals, including education, dispute resolution and, where necessary, decision making about implementation issues, for example, about how to implement an order that the parents have half of every school holidays or Christmas Day with the children where the orders do not specify the mechanics of this.[143] Coordinators cannot, however, make binding changes to the existing orders.

6.85 The educative process aspect typically includes educating parents about children's developmental needs and the impact of conflict and other parenting behaviours on children, as well as conflict management strategies and problem-solving skills, including assistance with developing processes for communicating in a child focused way[144] and reducing vengeful reactive behaviours.[145]

6.86 Another key part of the parenting coordination process involves clarifying the terms of the orders to head off disputes about, for example, about what 'handover on Friday afternoon' means, and developing protocols with parents about communication, exchange of information, exchange of clothing, and parent-child contact, to forestall implementation problems.[146]

6.87 Parenting coordinators also have a direct dispute resolution function, which relies on the coordinator's mediation and conflict management skills to assist parents to work out disagreements over the children's care as they arise.

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138 See, eg, R Hainsworth, *Submission 142*; Marrickville Legal Centre, *Submission 137*; Relationships Australia Victoria, *Submission 129*; Centacare Family and Relationship Services (CFRS), *Submission 125*; Drummond Street Services, *Submission 20*; Anglicare SA, *Submission 2*.

139 See, eg, Australian Psychological Society, *Submission 55*.

140 See, eg, Marrickville Legal Centre, *Submission 137*.

141 See, eg, D Bryant, *Submission 35*; Relationships Australia Victoria, *Submission 129*.

142 Christine A Coates, 'The Parenting Coordinator as Peacemaker and Peacebuilder' (2015) 53(3) *Family Court Review* 398, 399.

143 Christine A Coates et al, 'Parenting Coordination for High-Conflict Families' (2004) 42(2) *Family Court Review* 246.

144 Fidler, above n 137, 239.

145 Coates, above n 142, 400.

146 Fidler, above n 137, 239.

6.88 In addition, parenting coordinators have a decision making function, as part of a contract with the parents. If the attempt at mediation fails, the contract with the parents provides the coordinator with authority to arbitrate the dispute, only to the extent they can make decisions about how the parenting orders must be implemented.[147]

6.89 A unique aspect of the role is its non-confidential nature, which means that if the matter does return to court, the parenting coordinator is able to provide information to the court about the reasons for non-compliance with the orders and what attempts at resolving the dispute have been made.[148]

6.90 Parenting coordination in the United States is a court-ordered process and the parties usually sign a contract for the services of a parenting coordinator for a period of 12 months to two years.[149]

6.91 While the empirical evaluation data is limited, a recent report by the Canadian Research Institute suggests that the process of parenting coordination has led to a significant reduction in the number of court appearances for families who have used it in the United States.[150]

6.92 The ALRC's proposal for the development of a post-order parenting support service is made against this background, and in response to the submissions calling for a greater use of less adversarial problem-solving approaches to parental conflict. The service should build on existing post-separation cooperative parenting programs, which provide support and education to separated parents to learn about the effects of conflict on their child, the importance of being supportive of their child's relationship with the other parent and how to look at the needs of their child.[151] These existing services are voluntary, whereas the proposed post-separation parenting support service would be a court-ordered or court-referred service. The proposed service would also have the ability to arbitrate disputes as to how orders should be implemented where mediation has been unsuccessful, as described above.

6.93 The proposed service should be offered to parties to parenting orders, including those with consent parenting orders, following an intake process to assess for needs and suitability. As in the United States and Canada, the intended clients for the service would be highly conflicted parents or carers of children, including people whose relationship is characterised by poor communication, low cooperation and high levels of conflict, but not family violence.[152] The service is not intended or appropriate for cases where there has been a history of coercive controlling violence,[153] an issue that is

147 Lorne Bertrand and John-Paul Boyd, 'The Development of Parenting Coordination and an Examination of Policies and Practices in Ontario, British Columbia and Alberta' (Canadian Research Institute for Law and the Family, 2017) 10–11.
148 Ibid 3.
149 Fidler, above n 137, 239.
150 Lorne Bertrand and John-Paul Boyd, above n 147.
151 See, eg, Mallee Family Care, *Post Separation Co-Operative Parenting (PSCOP)* <www.malleefamilycare.com.au/Services/Families-Youth-Children/PSCOP.aspx>.
152 Fidler, above n 137, 238.
153 Fidler, above n 137.

often present in contravention proceedings.[154] For this reason, consultation with specialist family violence services will be critical to the process of developing intake assessment, accreditation and professional development requirements.

6.94 In light of the submissions, the proposal envisages the service employing professionals with a disciplinary background in psychology or social work with extensive experience of working with high conflict families.[155] The guidelines in North America also require parenting coordinators to be competent in using evidence-based knowledge to make decisions, practising in a culturally competent manner and engaging in self-reflective practice.[156] The submissions to this Inquiry suggest that relevant professionals should also be experienced in trauma-informed service delivery[157] and have training and experience in dynamic risk assessment.[158]

6.95 The ALRC proposes that the Family Law Commission proposed in Chapter 12 work with relevant peak bodies to develop training and accreditation requirements for the post-order parenting support service to ensure uniform standards of practice and ongoing professional development.[159]

A safe and accessible court environment

Proposal 6–12 The Australian Government should ensure that all family court premises, including circuit locations and state and territory court buildings that are used for family law matters, are safe for attendees, including ensuring the availability and suitability of:

- waiting areas and rooms for co-located service providers, including the extent to which waiting areas can accommodate large family groups;
- safe waiting areas and rooms for court attendees who have concerns for their safety while they are at court;
- private interview rooms;
- multiple entrances and exits;
- child-friendly spaces and waiting rooms;
- security staffing and equipment;
- multi-lingual and multi-format signage;

154 Julia Tolmie, above n 133.
155 Lorne Bertrand and John-Paul Boyd, above n 147, 8.
156 Ibid 9.
157 See, eg, AC.CARE, *Submission 171*; Centacare Family and Relationship Services (CFRS), *Submission 125*; The Benevolent Society, *Submission 86*; PeakCare Queensland, *Submission 72*; Victoria Legal Aid, *Submission 61*; Western Sydney CLC, *Submission 8*.
158 See, eg, Women's Legal Services Australia, *Submission 45*.
159 This proposal should be also read in conjunction with the proposed workforce capability plan in Chapter 10.

- remote witness facilities for witnesses to give evidence off site and from court-based interview rooms; and
- facilities accessible for people with disability.

6.96 This proposal addresses stakeholder concerns that court premises be made safe and accessible for attendees. This proposal reflects similar recommendations made by the Royal Commission into Family Violence for improving the safety and accessibility of the Magistrates' Court of Victoria.[160]

6.97 One of the most significant themes in the submissions about court design was concern about the safety of court attendees. More particularly, submissions called for the design of court premises to allow for parties to be kept separated when there are safety concerns. Submissions supported design elements including:

- separate entrances and exits;[161]
- safe waiting areas and rooms;[162] and
- use of remote witness facilities to enable witnesses to give evidence off site and from court-based interview rooms.[163]

6.98 As well as calls for court premises to be culturally safe places and physically non-intimidating,[164] the needs of court attendees in rural, regional and remote areas were identified as needing particular attention.[165]

6.99 Submissions also drew attention to the need for the design of court premises to accommodate the accessibility needs of court attendees. This included ensuring court premises are accessible for people with disability,[166] have rooms large enough to accommodate family groups,[167] and have multi-lingual and multi-format signage.

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

161 See, eg, CatholicCare Diocese of Broken Bay, *Submission 197*; Women's Council for Domestic and Family Violence Services WA, *Submission 182*; Relationships Australia, *Submission 11*; Western Sydney CLC, *Submission 8*.

162 See, eg, Women's Council for Domestic and Family Violence Services WA, *Submission 182*; Law Council of Australia, *Submission 62*; Women's Legal Services Australia, *Submission 45*.

163 See, eg, Victoria Legal Aid, *Submission 61*; Churches of Christ Care, *Submission 4*.

164 Relationships Australia suggested that that amenities such as cafes and vertical gardens could be considered: Relationships Australia, *Submission 11*.

165 See, eg, Women's Council for Domestic and Family Violence Services WA, *Submission 182*; Law Council of Australia, *Submission 62*.

166 See, eg, Australian Human Rights Commission, *Submission 217*; Australian Psychological Society, *Submission 55*.

167 See, eg, Women's Legal Service NSW, *Submission 218*.

7. Children in the Family Law System

Contents

Summary

7.1 Children are at the centre of many family law disputes, but they do not always have an opportunity to express their views and perspectives about the issues that are in dispute. This chapter makes several proposals aimed at embedding children's participation across the family law system and making the family law system more child centred.

7.2 The ALRC proposes improvements to information and support services (including counselling and peer support programs) for children, through the rationalisation of information about family law services (proposed in Chapter 2), and the Families Hubs (proposed in Chapter 4).

7.3 The ALRC also makes proposals aimed at realising children's right to be heard, while prioritising their safety. The ALRC proposes:

- that children be given an opportunity to express their views in court proceedings and family dispute resolution (FDR) processes concerning them, subject to ongoing assessment and management of risk;
- a new model for supporting children's participation in family law proceedings: through a new professional role, the 'children's advocate', who would promote the informed involvement of children in family law proceedings, as well as the expression of their views;

- a separate and complementary appointment of a legal representative for children involved in family law proceedings (a 'separate legal representative') in appropriate circumstances, to gather evidence that is relevant to an assessment of a child's safety and best interests and assist in managing litigation, including acting as an 'honest broker' in litigation.

7.4 The ALRC asks several questions aimed at refining the relationship between professionals working to support children and their safety and best interests, and seeks stakeholder feedback on issues including the circumstances in which both a children's advocate and a separate legal representative should be appointed, and how their work should be overseen and managed.

7.5 Finally, the ALRC proposes the establishment of a Children and Young People's Advisory Board to provide advice about children's experiences of the family law system and to inform policy and practice development.

Children in the family law system

7.6 Children are clearly a central concern of family law. They are very often at the centre of a dispute between parents or other caregivers about their care arrangements following family separation. In decisions about care arrangements for children, decision makers must currently regard the best interests of the child as the paramount consideration.[1] Because the family law jurisdiction is concerned with the determination of the child's best interests, 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.[2]

7.7 However, views about the extent to which children should *participate* in family law processes, as opposed to just being the focus of those processes, have changed considerably since the passage of the *Family Law Act 1975* (Cth). As Relationships Australia observed:

> Children—their voices, fears, questions and interests—were largely absent from the debate on the Family Law Bill in the 1970s. Argument was very much centred around the process of divorce, and how it was experienced by the adult parties to the marriage, in isolation from their roles as parents. … Sensibilities around children's views and voices (independent from those of their parents), and the effects on them of family conflict, are relatively recent. This means that the Act has been 'retrofitted', in an ad hoc way, to attempt to bring real substance to protection of children's views and interests in separation and family dispute resolution, as well as to recognise child protection/welfare concerns. [3]

7.8 Approaches to children's participation in family law processes have been informed by changing understandings of children and childhood. There has been a

1 *Family Law Act 1975* (Cth) s 60CA.
2 *M v M* (1988) 166 CLR 69, 76; *ZP v PS* (1994) 181 CLR 639, 647.
3 Relationships Australia, *Submission 11*.

move away from seeing children as 'passive, dependent and less than adults' to 'conceptualisations of children as active social actors in their own lives'.[4]

7.9 Approaches have also been informed by developments relating to the rights of children. The *Convention on the Rights of the Child* (CRC) contains a number of rights relating to participation. The most important of these, for the purposes of considering children's participation in family law processes, is the right to be heard. Article 12 of the CRC provides that children who are capable of forming their own views should have the right to 'express those views freely in all matters affecting the child, the views of the child given due weight in accordance with the age and maturity of the child'. In relation to judicial and administrative proceedings, art 12 provides that a child should be 'provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or appropriate body'.[5]

Participating and protecting

7.10 There was significant support in submissions for facilitating children's participation in family law processes. For example, Anglicare WA said:

> We believe that it is important that children should have the opportunity to participate, be heard, be informed, and be (where possible) consulted about decisions that affect their future. We need to ensure their views are taken into account when decisions are made that affect their future. This includes listening and acting on any safety concerns they have. Children should be seen as reliable witnesses and have their experiences listened to and believed.[6]

7.11 Dr Felicity Bell has summarised various rationales for children's participation as:

- Enlightenment: children can make valuable contributions to decision-making about matters affecting them because they have a unique perspective on their own lives.
- Empowerment: children have the capacity to participate and the right to participate.
- Citizenship: according children respect based on their status in society where they are located somewhere between current and future citizens.[7]

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4 E Kay M Tisdall, 'Subjects with Agency? Children's Participation in Family Law Proceedings' (2016) 38(4) *Journal of Social Welfare and Family Law* 362, 362.

5 *Convention on the Rights of the Child*, opened for signature 20 December 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 12.

6 Anglicare WA, *Submission 152*. See also, eg, Australian Human Rights Commission, *Submission 217*; Marrickville Legal Centre, *Submission 137*; Centre for Excellence in Child and Family Welfare, *Submission 102*; Public Advocate and Children & Young People Commissioner, ACT Human Rights Commission, *Submission 87*; Resolution Institute, *Submission 70*; Australian Psychological Society, *Submission 55*; Family & Relationship Services Australia, *Submission 53*; Setting the Record Straight for the Rights of the Child, *Submission 28*; Queensland Family and Child Commission, *Submission 16*; Youth Affairs Council of South Australia, *Submission 5*.

7 Felicity Bell, 'Facilitating the Participation of Children in Family Law Processes' (Southern Cross University, prepared for Legal Aid NSW, 2015) 6.

7.12 Many submissions to this Inquiry discussed the benefits of children's participation in similar terms to one or more of these rationales. For example, the Youth Affairs Council of South Australia submitted that the

> benefits of greater engagement with children and young people in Court processes for the Family Court are also substantial. Studies suggest that incorporating the views and experiences of children and young people into processes and practices provides a more complete picture of family disputes and the impacts of parental separation.[8]

7.13 Many submissions couched the participation of children in terms of their rights to do so. Churches of Christ Care said: 'Children's voices are easily lost in legal processes, and despite legislative guidance, decisions are often made in favour of parental rights and preferences rather than children's rights and preferences'.[9] CatholicCare Sydney submitted that 'many elements of the family law system are directed more towards adults, and … children's voices are not sufficiently heard. A shift in culture is needed across the sector to genuinely and actively support children's right to be heard'.[10]

7.14 Relationships Australia Victoria submitted:

> we believe that there needs to be more emphasis on children's empowerment in the Australian Family Law system in cases of divorce and separation, especially where parental relationships are conflicted, in contrast to the traditional approach, which has emphasised children's welfare and interests.[11]

7.15 Submissions also suggested that participation contributes to children's and young people's wellbeing, including through a greater sense of control over their own lives. The Youth Affairs Council of South Australia said that participation

> provides other personal benefits for children and young people with evidence suggesting that the increased sense of control felt by children and young people who participate in family law proceedings has a direct correlation with positive psychological and physical health.[12]

7.16 Approaches promoting greater participation by children in family law proceedings are seen by some as at odds with a concern to protect child's best interests by shielding them from potentially harmful involvement in a family law dispute.[13]

7.17 Concerns exist that children are too vulnerable to be placed in the middle of conflict, and that they might be manipulated or influenced by a parent in this process.[14]

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8 Youth Affairs Council of South Australia, *Submission 5*.

9 Churches of Christ Care, *Submission 4*.

10 CatholicCare Sydney, *Submission 79*. See also, eg, Justice for Children Australia, *Submission 230*; Australian Human Rights Commission, *Submission 217*; Dr M Fernando, *Submission 172*; Public Advocate and Children & Young People Commissioner, ACT Human Rights Commission, *Submission 87*; Resolution Institute, *Submission 70*; D Bryant, *Submission 35*; Queensland Family and Child Commission, *Submission 16*; Churches of Christ Care, *Submission 4*.

11 Relationships Australia Victoria, *Submission 129*.

12 Youth Affairs Council of South Australia, *Submission 5*. See also, eg, Australian Human Rights Commission, *Submission 217*; Yourtown, *Submission 204*; M Westby, *Submission 71*; The Royal Australian and New Zealand College of Psychiatrists, *Submission 18*.

13 See, eg, Patrick Parkinson and Judy Cashmore, *The Voice of a Child in Family Law Disputes* (Oxford University Press, 2008) 2–3.

There are also concerns that children should not feel burdened with the responsibility of decision making about post-separation arrangements for their care—feeling as if they have to choose between parents, for instance.[15] Where family violence is a factor, there are also concerns about child participation increasing risks to the child's safety.[16] This view was expressed in some submissions to this Inquiry. For example, Michael Packer submitted that 'conflict is detrimental to the development of children. The court process is, by its very definition a conflict based process and therefore involving children in it is not consistent with considering their wellbeing'.[17] Grandparents Victoria also said that '[c]hildren should be kept away from the adversarial elements of court processes as much as possible'.[18]

7.18 This tension between protection and participation is sometimes framed as a contest between competing principles or rights. The protectionist perspective is often aligned with a 'welfare' or 'best interests' approach. In this view, children are seen as vulnerable and in need of protection, with concern that 'due to children's positioning as dependent, unequal and inexperienced, asking them for their views and preferences regarding matters normally viewed as 'adult' may be experienced as stressful, and therefore to the detriment of child welfare'.[19] The best interests of the child are the paramount consideration in determining children's care arrangements under the *Family Law Act*,[20] and the CRC enshrines the right of the child to have their best interests treated as a primary consideration.[21] The Committee on the Rights of the Child has suggested that there is no tension between children's welfare or best interests (art 3) and their right to participation (art 12). Instead, they are complementary:

> one establishes the objective of achieving the best interest of the child and the other provides the methodology for reaching the goal of hearing the child … there can be no correct application of article 3 if the components of article 12 are not respected. Likewise article 3 reinforces the functionality of article 12, facilitating the essential role of children in all decisions affecting their lives.[22]

14 Felicity Bell, 'Barriers to Empowering Children in Private Family Law Proceedings' (2016) 30 *International Journal of Law, Policy and the Family* 225, 227.

15 Patrick Parkinson and Judy Cashmore, above n 13, 14.

16 Amanda Shea Hart, 'Child-Inclusive Mediation in Cases of Domestic Violence in Australia' (2009) 27(1) *Conflict Resolution Quarterly* 3, 10.

17 M Packer, *Submission 178*. See also, eg, Families for Children's Rights: The Australian Movement, *Submission 96*.

18 Grandparents Victoria, *Submission 138*.

19 Gillian S Macdonald, 'Hearing Children's Voices? Including Children's Perspectives on Their Experiences of Domestic Violence in Welfare Reports Prepared for the English Courts in Private Family Law Proceedings' (2017) 65 *Child Abuse & Neglect* 1, 4. See also, eg, Jonathan Herring, 'Vulnerability, Children, and the Law' in Michael Freeman (ed), *Law and Childhood Studies* (Oxford University Press, 2012) 243; Stephanie Holt, 'The Voice of the Child in Family Law: A Discussion Paper' (2016) 68 *Children and Youth Services Review* 139; Karine Hamilton and Pamela Henry, 'The Inclusion of Children in Family Dispute Resolution in Australia: Balancing Welfare versus Rights Principles' (2012) 20(4) *The International Journal of Children's Rights* 584.

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

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

22 Committee on the Rights of the Child, *General Comment No. 12 (2009): The Right of the Child to Be Heard* 51st Sess, UN Doc CRC/C/GC/12 (1 July 2009) 18.

7.19 Other commentators agree that a sharp distinction between protection and participation can be overdrawn. Professors Patrick Parkinson and Judy Cashmore have argued that, in family law matters, placing the goals of protecting children and facilitating their participation in opposition to each other is not helpful: 'The way forward is to abandon the idea that children's best interests can be served by protection from participation, and to find ways of protecting them in participation'.[23]

7.20 Participation may also be a means of developing or promoting a child's agency, when they are supported appropriately. Professor Kay Tisdall, using the language of 'thin' and 'thick' agency, has suggested that: 'Many children affected by domestic abuse may have particularly 'thin' agency in disputed contact cases but this could be 'thickened' with sufficient support for their views to be developed, heard and understood'.[24]

Children's views about participation

7.21 Children want to have a say in decisions that are made about their care arrangements.[25] Research on children's experiences of family law processes has also suggested that they are unhappy with the level and type of involvement they have had in these processes, and would like to have a greater opportunity to participate. A 2018 research study by the Australian Institute of Family Studies (the AIFS Children and Young People Study) into the experiences of children and young people in separated families has summarised the findings of a 'substantial body of family law research in both the Australian and international context' as establishing the importance of

> children and young people having an opportunity for their views to be heard and considered in decision-making affecting them. In particular, research has highlighted the importance of facilitating these opportunities to be heard, both in relation to matters relevant to deciding the post-separation care and regarding the more general effects of their parents' separation.[26]

7.22 However, this desire to participate is often not realised. The AIFS Children and Young People Study found that, for a substantial proportion of children and young people,

> the approaches adopted by the service professionals with whom they interacted operated in a way that limited their practical impact or effectively marginalised the child or young person's involvement in decision-making about parenting arrangements.[27]

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23 Patrick Parkinson and Judy Cashmore, above n 13, 219.

24 Tisdall, above n 4, 374. See also Public Advocate and Children & Young People Commissioner, ACT Human Rights Commission, *Submission 87*.

25 Australian Institute of Family Studies, 'The Longitudinal Study of Australian Children: Annual Statistical Report 2014' 27; Rachel Carson et al, 'Children and Young People in Separated Families: Family Law System Experiences and Needs' (Australian Institute of Family Studies, 2018) 30; South Australia Commissioner for Children and Young People, 'What Children and Young People Think Should Happen When Families Separate' (Office of the Commissioner for Children and Young People, 2018) 5. See also Yourtown, *Submission 204*; Youth Affairs Council of South Australia, *Submission 5*.

26 Rachel Carson et al, above n 25, 30.

27 Ibid 50–1.

7.23 Children and young people also reported having no or limited say in their care arrangements:

> Participating children and young people commonly reported that they were either not consulted by the relevant family law system professionals in their case or, even where there were options to participate, that they were not heard by those professionals.[28]

7.24 The Australian Human Rights Commission echoed this, noting that

> the National Children's Commissioner has received numerous representations from children and young people, and their advocates, about failures by courts and agencies within the family law system to solicit their views in the context of decision-making, and to provide them with accessible information about processes and outcomes.[29]

Information for children about family law processes

Proposal 7–1 Information about family law processes and legal and support services should be available to children in a range of age-appropriate and culturally appropriate forms.

7.25 Accessible information about the family law system is an important building block to support children's participation in the family law system. The ALRC considers that children should have access to material about the process of family separation and about available legal and other support services. This might take the form of static information as well options such as a phone line or a web- chat facility for children and young people.[30] The information should be tailored to be accessible to children across a range of ages and developmental stages.

7.26 There is some existing online material available for children. For example, the Family Court of Australia (Family Court) and the Federal Circuit Court of Australia websites contain some information designed for children.[31] Legal Aid NSW has developed the 'Best for kids' website, which provides information for children and young people about family law processes.[32] National Legal Aid's website about Independent Children's Lawyers also includes some information designed for children and young people.[33] Family Relationships Online, an information service relaunched in 2018, contains some information about services for children, but does not appear to have tailored this information to be specifically accessible for children and young people themselves.[34] In the United Kingdom, the Children's and Family Court

28 Ibid 63.
29 Australian Human Rights Commission, *Submission 217*.
30 South Australia Commissioner for Children and Young People, above n 25, 10.
31 Family Court of Australia, *Kids & Young People* <www.familycourt.gov.au>; Federal Circuit Court of Australia, *Kids & Young People* <www.federalcircuitcourt.gov.au>.
32 Legal Aid NSW, *Best for Kids* <www.bestforkids.org.au/index.html>.
33 National Legal Aid, *Independent Childrens Lawyers* <https://icl.gov.au/>.
34 Family Relationships Online, *Services for Children* <www.familyrelationships.gov.au/parenting/services-children>; The Hon Christian Porter MP and the Hon Dr David Gillespie MP, 'Relaunch of Family Relationships Online' (Media Release, 15 June 2018).

Advisory Support Service (Cafcass) web page has a clearly identifiable section with information tailored for young people.[35]

7.27 Developing information for children and young people should be part of the broader rationalisation of information about family law services, addressed in Chapter 2.

Integrated support services for children

Proposal 7–2 The proposed Families Hubs (Proposals 4–1 to 4–4) should include out-posted workers from specialised services for children and young people, such as counselling services and peer support programs.

7.28 Support services for children should be part of the services available in Families Hubs, proposed in Chapter 4. Providing access to services for children and young people at the Families Hubs is consistent with developing a new family law system that is child-focused at all levels. Like adults engaging with the family law system, many children and young people have both legal and non-legal needs for support.

7.29 Yourtown submitted that users of Kids Help Line reported not feeling that they had support after parental separation:

> many young Australians feel unable to talk about their emotional distress and interrelated issues at various stages of family separation, or that they have no one to whom they can talk about their feelings or ask for advice. Small numbers of respondents to the Experiences Survey said that they did not talk about their feelings when they first found out their parents were separating as they were in shock, others that they did not have the opportunity to talk to anyone or that they were too young to talk about it at the time. One respondent stated "I was in denial or shock. I didn't register that it was happening until moved out and parental responsibility things stated happening, so I didn't talk about it". Some KHL callers said they did not talk at various stages of the separation to their friends, siblings or parents because they feel embarrassed about their emotions, they did not think anyone would understand or they feel a sense of alienation from their normal lives preventing them from discussing their feelings. They sometimes said they are trying to be put on a 'brave face' for their siblings or parents and that they did not want to be considered weak by their parents. They also feared that mentioning their emotions towards or talking about the family separation would disappoint their parents, make them feel angry or that speaking up about them would get their family in trouble in some way.[36]

7.30 Counselling services and peer support programs have been identified by research with children as being particularly valued services to access during family separation.[37]

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35 Cafcass—Children and Family Court Advisory and Support Service, *Home* <www.cafcass.gov.uk/>.

36 Yourtown, *Submission 204*. The Experiences Survey was a national survey of 'young Australians whose parents had separated' conducted by Kids Help Line in partnership with the University of Sydney. It was administered in 2017.

37 Rachel Carson et al, above n 25, 86.

A right to be heard

Proposal 7–3 The *Family Law Act 1975* (Cth) should provide that, in proceedings concerning a child, an affected child must be given an opportunity (so far as practicable) to express their views.

Proposal 7–4 The *Family Law Act 1975* (Cth) should provide that, in any family dispute resolution process concerning arrangements for a child, the affected child must be given an opportunity (so far as practicable) to express any views about those arrangements.

Proposal 7–5 The Attorney-General's Department (Cth) should work with the family relationship services sector to develop best practice guidance on child-inclusive family dispute resolution, including in relation to participation support where child-inclusive family dispute resolution is not appropriate.

7.31 The ALRC proposes that family law legislation create an explicit right for children to be heard both in court proceedings relating to the child and in family dispute resolution. The ALRC considers that family law processes should be child-inclusive: that is, processes should be designed to facilitate children's participation. As Relationships Australia submitted:

> Any new system, legislation or process must start with and be designed around the best interests of the children and, in particular, assume hearing from children as the default position in service provision and court processes. Arguments for exceptions must be made out.[38]

Legal proceedings

7.32 Proposal 7–3 strengthens the current provisions in the *Family Law Act* in relation to hearing a child's views, by placing a positive obligation on decision makers to ensure children have an opportunity to be heard in proceedings. While the *Family Law Act* currently requires the court to consider any views expressed by a child in deciding whether a particular order is in the best interest of that child, there is no obligation on decision makers to ensure that an opportunity to express views has been afforded to a child.[39] This proposal is expressed broadly to encompass a wide range of proceedings under the *Family Law Act*. The ALRC invites stakeholder comment about which type of proceedings should be covered by the proposal.

7.33 This proposal promotes compliance with the CRC, which establishes the right of every child to freely express their views in all matters affecting them, and states that

38 Relationships Australia, *Submission 11*. Other submissions supported creating a right to be heard: see, eg, Australian Human Rights Commission, *Submission 217*; Dr M Fernando, *Submission 172*; Churches of Christ Care, *Submission 4*.

39 *Family Law Act 1975* (Cth) s 60CC(3)(a); *Bondelmonte v Bondelmonte* [2017] HCA 8 (1 March 2017) [43].

the child should be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child.[40]

7.34 The right to be heard has been explicitly incorporated into family law legislation in New Zealand and Scotland. In New Zealand, a child must be given reasonable opportunities to express views on matters affecting the child in proceedings involving guardianship, care or contact.[41] Scottish legislation provides that, when making a parenting order, the court, taking account of a child's age and maturity, shall so far as practicable give a child the opportunity to indicate whether they wish to express their views and, if they do so wish, give the child an opportunity to express them.[42]

7.35 The ALRC notes that the Family Court already says that its practice involves routinely offering an opportunity for children to be heard:

> In every child related matter in the Family Court that proceeds to trial an attempt is made to ascertain (but not coerce) the children's views with the assistance of appropriately qualified psychologists or social workers who also provide expert assessments of the maturity, influence and understanding of the child in question.[43]

7.36 However, available evidence suggests that a significant proportion of matters in the family courts may not involve the use of an independent means of ascertaining children's views.[44]

Family dispute resolution

7.37 As with court processes, the ALRC proposes that children should be provided with an opportunity to be heard in FDR. FDR is more commonly used than courts to reach decisions about parenting arrangements, so it is important that efforts to divert matters from the court, where appropriate, do not result in lessening the opportunity for children's participation. Professor Mark Henaghan has noted this risk in the context of commenting on reforms in New Zealand, which require parties to attempt FDR before having access to the Family Court, suggesting that this has led to a curtailing of children's right to be heard.[45]

7.38 Incorporating children's views in FDR is often referred to as a 'child-inclusive' model of practice. Child-inclusive approaches incorporate the views of the particular child as elicited by a specialist child consultant.[46] The child consultant speaks to the

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40 *Convention on the Rights of the Child*, opened for signature 20 December 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 12. One of the objects of pt VII of the Act, concerning children, is to give effect to the CRC: *Family Law Act 1975* (Cth) s 60B(4).

41 *Care of Children Act 2004* (NZ) s 6. A child must also be given reasonable opportunities to express views in relation to the administration of property belonging to, or held in trust for, a child, or the application of the income of property of that kind.

42 *Children (Scotland) Act 1995* (Scot) s 11(7)(b).

43 Family Court of Australia, *Submission 68*.

44 Rae Kaspiew et al, 'Court Outcomes Project (Evaluation of the 2012 Family Violence Amendments)' (Australian Institute of Family Studies, 2015) 26–9.

45 Mark Henaghan, 'Article 12 of the UN Convention on the Rights of Children' (2017) 25(2) *International Journal of Children's Rights* 537, 546.

46 Lawrie Moloney and Jennifer McIntosh, 'Child-Responsive Practices in Australian Family Law: Past Problems and Future Directions' (2004) 10(1) *Journal of Family Studies* 71.

child about the child's experiences and views and feeds this information back to the parties during the dispute resolution process to assist them in focusing on their child's needs and best interests in their negotiations.[47] There is limited research about the level of use of child-inclusive practice in FDR.[48]

7.39 A number of submissions to the Inquiry supported more use of—or increased availability of—child-inclusive mediation.[49] Some supported routine inclusion of children's voices in FDR. For example, AC.CARE submitted: 'Make child inclusive mediation the practice model used in FDR across Australia and fund centres appropriately to deliver on this'.[50] The Australian Human Rights Commission recommended that '[a]ny alternative dispute resolution processes for parenting matters provide children with the opportunity to express their views, in compliance with article 12 of the Convention on the Rights of the Child'.[51]

7.40 Relationships Australia identified that some FDR providers were already moving toward the default use of child-inclusive practices, reporting that 'Relationships Australia New South Wales is moving toward an "opt out" system of child-inclusive practice, away from the current "opt in" approach. This is intended to normalise the participation of children in FDR'.[52] Similarly, Family & Relationship Services Australia noted that 'Family Law Service providers in the FRSA network have found that strong outcomes are obtained when taking an opt out rather than opt in approach in child inclusive practice, unless there are sound reasons that they should not be involved'.[53]

7.41 Evaluations of child-inclusive mediation have suggested that it produces decisions that provide better long-term outcomes for children.[54] Some submissions to

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

48 The Allen Consulting Group, 'Research on Family Support Program Family Law Services' (Final Report, Attorney-General's Department (Cth), May 2013) 47.

49 See, eg, D Cooper, *Submission 165*; National Legal Aid, *Submission 163*; Anglicare WA, *Submission 152*; Marrickville Legal Centre, *Submission 137*; Centre for Excellence in Child and Family Welfare, *Submission 102*; CatholicCare Sydney, *Submission 79*; Victoria Legal Aid, *Submission 61*; Family & Relationship Services Australia, *Submission 53*; Law Council of Australia, *Submission 43*; Drummond Street Services, *Submission 20*; Australian Dispute Resolution Advisory Council Inc (ADRAC), *Submission 12*.

50 AC.CARE, *Submission 171*.

51 Australian Human Rights Commission, *Submission 217*. See also, eg, Uniting, *Submission 162*; FMC Mediation and Counselling, *Submission 135*; L Bowen, *Submission 123*; Victorian Aboriginal Legal Service, *Submission 101*; Resolution Institute, *Submission 70*; Relationships Australia South Australia, *Submission 62*; The Royal Australian and New Zealand College of Psychiatrists, *Submission 18*; Relationships Australia, *Submission 11*.

52 Relationships Australia, *Submission 11*.

53 Family & Relationship Services Australia, *Submission 53*.

54 See, eg, Jennifer E McIntosh et al, 'Child-Focused and Child-Inclusive Divorce Mediation: Comparative Outcomes from a Prospective Study of Postseparation Adjustment' (2007) 46(1) *Family Court Review* 105; Jennifer E McIntosh, Caroline M Long and Yvonne D Wells, 'Children Beyond Dispute: A Four Year Follow up Study of Outcomes from Child Focused and Child Inclusive Post-Separation Family Dispute Resolution' (Final Report, Attorney General's Department (Cth), 2009); Brittany N Rudd et al, 'Child-Informed Mediation Study Follow-up: Comparing the Frequency of Relitigation Following Different Types of Family Mediation' (2015) 21(4) *Psychology, Public Policy, and Law* 452; Stephanie

this Inquiry also suggested that children's participation in FDR assists in focusing parents on the needs of the child and promotes better outcomes.[55] CatholicCare Sydney provided the following case study:

> Siblings aged 9 years, 8 years and 5 years were referred for a child consultation. Their parents were going through FDR and in conflict about why weekend contact had stopped. The mother wanted contact reinstated because the children told her that they wanted more time with her, while the father wanted to maintain reduced contact, because the children were telling him that they didn't want to change the arrangements. … The children each had two sessions with a child consultant. They spoke about feeling caught in the middle, about wanting to take care of their parents (resulting in them telling their parents different things), and what they thought their parents wanted to hear from them. … The CIP process gave these parents the space to reflect on their children's experiences and to refocus on their parenting responsibilities. The level of blame towards one other reduced as they understood that the level of conflict between them was impacting on the children's ability to cope with living between two homes. … The children's voices and experiences, shared through this process, helped their parents to be more attuned to the differences in personality, needs and experiences of each child.[56]

7.42 Victoria Legal Aid includes a child-inclusive element, called Kids Talk, in its legally-assisted FDR program.[57] An internal evaluation of the program found that Kids Talk provided children and young people with a 'voice' in the FDR process and was successful in focusing the attention of parents and lawyers on the child's needs and perspectives.[58] Kids Talk is only used in matters in which parents are assessed as 'willing and able' to take their children's perspectives into account, and with the consent of both parents.[59] However, in its submission, Victoria Legal Aid noted that Kids Talk is able to be successfully used in cases where families experience multiple and complex issues, including mental health issues, family violence, and substance misuse.[60] It argued that this capacity,

> combined with the high settlement rates of FDR where there is a Kids Talk component, shows the usefulness of Kids Talk in focusing decision-making on the needs of the children and reducing the likelihood of complex matters requiring court determination, or at least reducing the issues in dispute.[61]

7.43 Victoria Legal Aid noted in its submission that participation in Kids Talk requires parental consent, and queried 'whether or not the child's right to be heard should or could override the need for consent from both parents, as is required presently'.[62] Marrickville Legal Centre submitted that assessment of parental capacity

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Young, 'The Missing Heart of Parenting Disputes in the Australian Family Law System: A Case for a Child-Inclusive Approach to Judicial Decision-Making' (2017) 7 *Family Law Review* 116, 117.

55 See, eg, FMC Mediation and Counselling, *Submission 135*; Relationships Australia, *Submission 11*; Family Life, *Submission 9*.

56 CatholicCare Sydney, *Submission 79*.

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

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

59 Victoria Legal Aid, above n 57.

60 Victoria Legal Aid, *Submission 61*.

61 Ibid.

62 Ibid.

should not be the deciding factor in whether children should be allowed to participate in FDR process:

> we strongly advocate for the greatly increased availability of child-inclusive FDR services, whether or not the parents are assessed initially as having that capacity. An important initial goal of FDR, in the event that they are not so assessed, might be to understand and come to terms with the views of their child.[63]

7.44 Child-inclusive mediation is resource intensive, and some submissions suggested that not all FDR providers are sufficiently equipped to provide it. CatholicCare Sydney, for example, drew attention to this, submitting that a 'challenge for the future provision of this specialised and important work is the lack of training available for CIP practitioners and supervisors'.[64] Relationships Australia also noted that the

> role of child consultant requires high levels of expertise and experience in dealing with both parents and children in distress, underpinned by a strong foundation in child development and experience working with complex issues for children. A high level of expertise in dealing with complex clinical and family issues and dynamics is also necessary. Given these requirements, appropriate professional standards and provision for ongoing supervision are critical, as is training in the application of child-inclusive practice to family dispute resolution.[65]

7.45 Implementing Proposal 7–4 would involve a significant expansion of the availability of child-inclusive FDR, with an attendant need for increased resourcing to support this. This proposal may require a staged approach to implementation while capacity is developed in the system. It will also require a consistent framework to ensure that the use of child-inclusive approaches accords with best practice. To this end, the ALRC proposes that the Attorney-General's Department (Cth) should work with the family relationships services sector to develop best practice guidance on child-inclusive family dispute resolution.[66]

Safe participation

Proposal 7–6 There should be an initial and ongoing assessment of risk to the child of participating in family law proceedings or family dispute resolution, and processes put in place to manage any identified risk.

Proposal 7–7 Children should not be required to express any views in family law proceedings or family dispute resolution.

7.46 There may be risks to a child of participating in the process of resolution or adjudication of family law disputes. The ALRC proposes that there should be initial

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63 Marrickville Legal Centre, *Submission 137*. See also Centre for Excellence in Child and Family Welfare, *Submission 102*.

64 CatholicCare Sydney, *Submission 79*.

65 Relationships Australia, *Submission 11*.

66 See also Chapter 10 on workforce capabilities and Chapter 12 on the role of the proposed Family Law Commission in overseeing training requirements.

and ongoing assessment of risk in child-inclusive processes. The outcome of the initial risk assessment should inform decisions about whether and how child inclusive processes should take place. Startegies should be put into place to manage any identified risk.

7.47 A number of submissions were concerned with the risks to children of participation in family law processes. Some were concerned about a child being manipulated or pressured by a party to the dispute. For example, For Kids Sake submitted that involving children 'creates the most powerful of incentives for one parent or another to influence their stated views'.[67] Others were concerned about the effects of exposing children to parental conflict. A number of submissions noted that participation may heighten risks of family violence or reprisals against children where parents react badly to hearing their child's views.[68]

7.48 Others pointed out that 'it is naive to suggest that a child's first exposure to and participation in the dispute (and ensuing harm) is experienced in the family law system'.[69] The Australian Human Rights Commission similarly observed:

> While it is undoubtedly important to prevent children and young people from being traumatised through their interactions with the court, excluding children and young people from participation in the decision-making process does not protect them from the impact of Family Court proceedings, as they will ultimately be affected by the court's decisions around living arrangements and contact orders.[70]

7.49 AIFS noted that this concern to shield children from harm can sometimes itself cause harm or distress to children, reporting that:

> Responses from participants in the Children and Young People study suggest that steps taken to shield children and young people from their parents' litigation, while benevolent in their intention, may be associated with the experience of harm on the part of the young person. When their agency and capacity to participate in decision making affecting them was not accepted and accommodated, many young participants expressed feelings of isolation, frustration and anger towards the family law system, legal professionals and/or their parents. In particular, many young people described feeling that their views had been dismissed because the court, legal professionals or their parents believed that they were 'too young'. Young participants also reflected on their disappointment and/or distress when identifying a failure on the part of these professionals to act protectively and to respond to their safety concerns when they arose.[71]

7.50 One response to risk may be to exclude a child from participation. However, the ALRC considers that the family law system instead must continue to develop mechanisms to allow for the safe participation of children. The AIFS Children and Young People Study indicated that its 'data analysis suggests that the goals of

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67 For Kids Sake, *Submission 118*. See also, eg, R Watton, *Submission 112*.

68 See, eg, Z Rathus, *Submission 92*; Aboriginal Legal Service of Western Australia, *Submission 64*; Australian Psychological Society, *Submission 55*.

69 Caxton Legal Centre, *Submission 51*.

70 Australian Human Rights Commission, *Submission 217*.

71 Australian Institute of Family Studies, *Submission 206*. See also M Westby, *Submission 71*.

protection and participation can be met with the application of trauma-informed, child-inclusive approaches to participation in the family law context'.[72]

7.51 A number of submissions, while acknowledging risks to the child of participation, similarly considered that they could be mitigated with trained professionals and appropriate processes of risk assessment and screening. For example, Family & Relationships Services Australia submitted that

> identified risks would be best managed through careful screening and oversight by appropriately qualified professionals skilled in understanding child development and extensive experience in working with children, preferably in the context of family breakdown.[73]

7.52 Another mechanism by which risk may be managed is through the model of participation that is used. For example, one model of including children in FDR, the child-centred continuum model, is designed to enable participation while offering a range of modes of involvement—from 'managed child-focus', in which involvement is limited to building a parent's readiness to hear the voice of the child, through to direct child participation.[74]

No requirement to express views

7.53 Proposals 7–3 to 7–5 strengthen children's rights to be heard in family law proceedings concerning them. However, while children should be provided with an opportunity to be heard, they should not be required to participate where they do not wish to do so. The *Family Law Act* already makes provision that children cannot be required to express a view in relation to any matter, and the ALRC proposes that this remain the position.[75] It is consistent with respect for a child's agency to respect a child's decision not to express a view in family law proceedings, and also offers another protective mechanism: enabling children not to participate where they decide that this may cause them unwanted harm or distress.[76]

Supporting children's participation

How is children's participation presently facilitated?

7.54 In FDR, as discussed above, a child may participate when a child-inclusive model of FDR is used. In such cases, the child's views are generally ascertained through meetings with a 'child consultant'. There is no uniform definition of a child

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72 Rachel Carson et al, above n 25, 50.

73 Family & Relationship Services Australia, *Submission 53*. See also, eg, National Legal Aid, *Submission 163*; Uniting, *Submission 162*; Victorian Aboriginal Legal Service, *Submission 101*; The Benevolent Society, *Submission 86*; Victoria Legal Aid, *Submission 61*.

74 Lorri A Yasenik and Jon M Graham, 'The Continuum of Including Children in ADR Processes: A Child-Centered Continuum Model' (2016) 54(2) *Family Court Review* 186. See also Relationships Australia, *Submission 11*.

75 *Family Law Act 1975* (Cth) s 60CE.

76 For submissions supporting the position that a child should not be required to express views, see, eg, The Royal Australian and New Zealand College of Psychiatrists, *Submission 18*; Youth Affairs Council of South Australia, *Submission 5*.

consultant, but they are generally professionals with specialist experience in working with children, including with children experiencing distress.[77]

7.55 In litigated proceedings, the *Family Law Act* requires the court to consider any views expressed by a child in deciding whether to make a particular parenting order (or a range of other orders) in relation to the child.[78] The Act also provides that the court may inform itself of a child's views by:

- having regard to anything in a report given to the court by a family consultant;
- making an order that the child's interests in the proceedings be independently represented by a lawyer; or
- any other means the court thinks appropriate, subject to applicable court rules.[79]

7.56 A family consultant may provide a report (known as a 'family report') to the court where the care, welfare and development of a child is relevant. Where a family consultant has been directed to provide a report, they must ascertain the views of the child and include those views of the child in the report to the court.[80] The Family Court may also order that a report be prepared by an expert witness, which may include the views of the child.[81]

7.57 An Independent Children's Lawyer may be appointed under s 68L of the *Family Law Act* where it appears to the court that the child's interests in the proceedings ought to be independently represented.[82]

7.58 Their role is also set out in the Act: an Independent Children's Lawyer is not the child's legal representative, and is not obliged to act on the child's instructions in relation to the proceedings.[83] Instead, the Independent Children's Lawyer must form an independent view, based on the evidence available, of what is in the best interests of the child and act in relation to the proceedings in what the independent children's lawyer believes to be the best interests of the child.[84] National guidelines also set out the expectations of the role of the Independent Children's Lawyer.[85]

7.59 An Independent Children's Lawyer is appointed to a case by the legal aid commission in the relevant state or territory. Legal aid commissions have in-house

77 See further McIntosh, above n 47.
78 *Family Law Act 1975* (Cth) s 60CC(3)(a).
79 Ibid s 60CD.
80 Ibid ss 62G(2), 62G(3A)(a)–(b). Section 62G includes a note stating that a person cannot require a child to express a view in relation to any matter.
81 *Family Law Rules 2004* (Cth) r 15.45.
82 The Full Court of the Family Court identified a non-exhaustive set of criteria for appointments of Independent Children's Lawyers in *Re K* (1994) 17 Fam LR 537. Among the 13 identified factors are allegations of abuse and where there is intractable conflict.
83 *Family Law Act 1975* (Cth) ss 68LA(4)(a)–(b).
84 Ibid ss 68LA(2)(a)–(b).
85 National Legal Aid, *Guidelines for Independent Children's Lawyers* (2013).

Independent Children's Lawyers and also manage a panel of private practitioners who can be appointed to this role.[86]

7.60 Broadly, Independent Children's Lawyers perform three distinct roles in matters in which they are appointed:

- facilitating a child's participation;
- gathering evidence relevant to a child's best interests, such as arranging subpoenas for documents or witnesses, gathering information about relevant personal protection orders and obtaining family reports;[87] and
- litigation management: acting as an 'honest broker' in litigation, including 'ensuring that the litigation is conducted in a child-focused manner (including from a forensic perspective …), encouraging settlement of a matter where appropriate, and keeping the litigation on track'.[88]

7.61 In 2014, research by the Australian Institute of Family Studies (the AIFS Independent Children's Lawyer Study) found that Independent Children's Lawyers and judicial officers considered that Independent Children's Lawyers' evidence gathering and litigation-management functions were of more significance than their role in facilitating children's participation.[89]

7.62 The national guidelines for Independent Children's Lawyers provide that they should seek to provide a child with the opportunity to express a view in relation to the matter, and that the Independent Children's Lawyer should ordinarily meet with a child.[90] However, research has suggested that there is wide variation in practice and perspectives about whether Independent Children's Lawyers should have direct contact with children in the course of performing their function.[91]

7.63 The AIFS Independent Children's Lawyer Study found that the dominant orientation to practice by Independent Children's Lawyers was to exercise caution in directly meeting with children, and to prefer that evidence of a child's views be obtained through a report prepared by a family consultant or single expert witness.[92] The minority orientation to practice involved high levels of contact with children for a

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86 National Legal Aid, above n 33.

87 Rae Kaspiew et al, 'Independent Children's Lawyers Study' (Final Report, 2nd ed, Australian Institute of Family Studies, 2014) 58–9.

88 Ibid 53.

89 Ibid xi.

90 National Legal Aid, above n 85, 5.3, 6.2. There are some exceptions to the expectation to meet with the child: where the child is under school age; there are exceptional circumstances, eg, a risk of 'systems abuse' for the child; and where there are significant practical limitations, such as remoteness.

91 Kaspiew et al, 'Independent Children's Lawyers Study', above n 87. See also, eg, Felicity Bell, 'Meetings Between Children's Lawyers and Children Involved in Private Family Law Disputes' (2016) 28(1) *Child and Family Law Quarterly* 5.

92 Kaspiew et al, 'Independent Children's Lawyers Study', above n 87, 38. Doctoral research published in 2017 involving interviews with ICLs found that 11 out of 14 of the ICL study participants, when asked, did not specifically state that it was the role of the ICL to ascertain the child's views: Margaret Voight, *Is a View Different from a Wish? Considering the Child's View in Parenting Disputes in Australian Family Law Matters*. (SJD, Queensland University of Technology, 2017) 154.

range of purposes, including familiarising the child with the Independent Children's Lawyer, explaining the Independent Children's Lawyer's role, as well as consulting with the child on the proceedings and their views.[93]

7.64 The reluctance of Independent Children's Lawyers to meet with children may stem from a lack of clarity about the purpose of the meeting. Directly engaging with a child has a participatory rationale—providing the child with information about the role of the Independent Children's Lawyer and the court process and an opportunity to express their views about the process or outcomes. It also has a forensic rationale—evidence of a child's views must be put before the court where that evidence is available.[94] Where the forensic rationale was privileged by Independent Children's Lawyers, they were more likely to view meeting with children for the purposes of ascertaining their views as the role of family consultants or expert witnesses.[95]

7.65 The cautious approach to engaging with children taken by Independent Children's Lawyers contrasts with the reported views of children and young people, as well as parents, who have had experience of family law processes. The AIFS Independent Children's Lawyer Study reported that:

> A very significant theme in the data from parents/carers and children/young people is their understanding that the role of the ICL is meant to support participation. … A significant disjuncture was evident between the understandings of professionals, particularly ICLs and judges, with their emphasis on the case-management and evidence-gathering aspects of the role, and the understandings and expectations of parents and children/young people. From the perspective of parents, the case-management and evidence-gathering roles are ancillary to an ICL function that should be about understanding the child and the child's perspective, and understanding the circumstances of the family.[96]

7.66 AIFS, in its submission to this Inquiry, summarised the findings of its more recent Children and Young People study, reporting that:

> Most children and young people who reported engaging with family law system professionals reported feeling negatively towards the court process, the family consultant/family report writer and the ICL, and dissatisfied with either their level of input to, or awareness of, the decision-making process or the final parenting arrangements.[97]

7.67 There was support in submissions for the work of Independent Children's Lawyers.[98] However, many submissions also expressed concerns about a lack of direct engagement by Independent Children's Lawyers with children, and about the level of

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93 Kaspiew et al, 'Independent Children's Lawyers Study', above n 87, 39–40.
94 Ibid 37.
95 Rae Kaspiew et al, 'Getting the Word out: The Role of Independent Children's Lawyers in the Family Law System' (2014) 28 *Australian Journal of Family Law* 29, 37.
96 Ibid 138–9.
97 Australian Institute of Family Studies, *Submission 206*.
98 See, eg, National Legal Aid, *Submission 163*; R Alexander, *Submission 131*; Victorian Women Lawyers, *Submission 84*; Family Court of Australia, *Submission 68*; Drummond Street Services, *Submission 20*; People with Disability Australia (PWDA), *Submission 10*.

engagement with family consultants.[99] National Family Violence Prevention Legal Services Forum illustrated its concerns with the following case study:

> Ms N is an Aboriginal woman with a teenage daughter who was physically abused by her father, our client's ex-partner. The father denied the allegations of physical abuse and claimed Ms N had fabricated the claims and was deliberately trying to turn the child against him. The daughter was represented during family law proceedings by an Independent Children's Lawyer. Without ever meeting with the child, the ICL proposed to the court that the child should have supervised contact with her father. The child was threatening suicide if she had to see the father.[100]

7.68 National Legal Aid, while arguing that Independent Children's Lawyers have a 'pivotal function' in assisting the promotion of the best interests of the child and while highlighting a number of practice improvements in the work of Independent Children's Lawyers, also acknowledged that the demands placed on the role often exceeded the capacity of a single representative to discharge them. It observed that Independent Children's Lawyers may be expected to perform one or more of the following tasks in litigation:

- working closely with a range of therapeutic services including arranging therapy, counselling, contact services, parenting after separation programs, behaviour change programs, mediation;
- managing a range of parenting issues that arise between parties and require ICL intervention (particularly in times of significant court delays), ie variations to changeover locations, children's refusal to attend contact, proposals for travel, schooling and health disputes;
- implementing matters arising under court orders including requesting random drug testing and analysing results, arranging expert reports, providing orders to schools and other agencies;
- working with child protection agencies over involvement with family, Notices of Risk, investigations, requests for intervention etc;
- issuing requests for information and subpoenas to obtain as much information about the child from as many relevant sources as possible;
- court ordered tasks such as preparing chronologies, proposed minutes of orders, trial timetables, producing tender and exhibit bundles;
- arranging and attending roundtable conferences and mediations to broker settlements;
- working with the child including arranging regular meetings and communicating to ensure the child's participation is facilitated; and
- working with the child and family post the making of final orders which provide for the ICL's discharge within a certain time frame.[101]

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99 See, eg, Australian Human Rights Commission, *Submission 217*; Yourtown, *Submission 204*; Springvale Monash Legal Service, *Submission 161*; Interact Support Inc, *Submission 107*; Domestic Violence Victoria, *Submission 23*; Churches of Christ Care, *Submission 4*.

100 National Family Violence Prevention Legal Services Forum, *Submission 63*.

101 National Legal Aid, *Submission 163*.

7.69 In recognition of this complexity, National Legal Aid submitted that it was time for 'new thinking' about how to allocate the tasks currently assigned to Independent Children's Lawyers.[102]

A new model for supporting children's participation

Proposal 7–8 Children involved in family law proceedings should be supported by a 'children's advocate': a social science professional with training and expertise in child development and working with children. The role of the children's advocate should be to:

- explain to the child their options for making their views heard;
- support the child to understand their options and express their views;
- ensure that the child's views are communicated to the decision maker; and
- keep the child informed of the progress of a matter, and to explain any outcomes and decisions made in a developmentally appropriate way.

Proposal 7–9 Where a child is not able to be supported to express a view, the children's advocate should:

- support the child's participation to the greatest extent possible; and
- advocate for the child's interests based on an assessment of what would best promote the child's safety and developmental needs.

Proposal 7–10 The *Family Law Act 1975* (Cth) should make provision for the appointment of a legal representative for children involved in family law proceedings (a 'separate legal representative') in appropriate circumstances, whose role is to:

- gather evidence that is relevant to an assessment of a child's safety and best interests; and
- assist in managing litigation, including acting as an 'honest broker' in litigation.

Question 7–1 In what circumstances should a separate legal representative for a child be appointed in addition to a children's advocate?

Question 7–2 How should the appointment, management and coordination of children's advocates and separate legal representatives be overseen? For example, should a new body be created to undertake this task?

102 Ibid.

Question 7–3 What approach should be taken to forensic issues relating to the role of the children's advocate, including:

- admissibility of communications between the children's advocate and a child; and
- whether the children's advocate may become a witness in a matter?

Children's advocate

7.70 The ALRC proposes that there be a new professional role created to support the participation of children in contested proceedings. A children's advocate should take on the role of facilitating the involvement of children in family law processes, along the spectrum from informing children about family law processes through to supporting the children to express their views and perspectives. The ALRC considers that the role of the children's advocate should be clearly demarcated as someone who supports children's participation in proceedings and supports their right to be heard.

7.71 The role of the children's advocate can be seen as akin to a formal 'supporter' in the supported decision making framework recommended (by the ALRC and others) in relation to people with disability.[103] In that framework, a supporter assists a person to express their will, preferences and rights, in accordance with the recognition in the *Convention on the Rights of Persons with Disabilities* of the decision making rights of people with disability. In terms of the participation of children in family law processes, the children's advocate can similarly be thought of as a role that supports child to express their views, in accordance with art 12 of the CRC.

7.72 Tisdall, in calling for innovative approaches to supporting children's participation in family law proceedings, has advocated conceiving of participation support in terms of supporting and developing a child's capacity and autonomy. When viewed in this way:

> We would be focusing on the information children would need to participate, we would invest in support for children to develop and express their views, and children's involvement in family law proceedings would become the norm rather than the exception. We would … not use concerns about a child's welfare as a reason to ignore the child's right to participate. Instead, the focus would be to make proceedings as constructive and supportive as possible, perhaps requiring radical changes in what are currently adversarial and formal approaches.[104]

7.73 An explicit support role accords with children's expressed preferences about facilitating their participation. The AIFS Children and Young People study quoted Lily, aged 12–14 years, who wanted someone to support her in her engagement with the family law process:

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103 See further Chapter 9 on supported decision making for people with disability in family law proceedings.

104 E Kay M Tisdall, 'Challenging Competency and Capacity?' (2018) 26(1) *The International Journal of Children's Rights* 159, 177.

> The ICL, oh she did listen and said that she agreed with me in the first appointment and was very nice and did listen to my opinions. But then in the second appointment kind of thing, she was still nice but she was like oh no, I came up with my own solution kind of thing. She was like, 'You know I still said what you wanted me to say' but she didn't support it, so it didn't—in the second one it was like maybe she wasn't such a good, you know, supporter … Yeah, I was confused and I also felt kind of betrayed because she said she'd support me and then she didn't and I was very upset because, yeah, she just went and said that I should stay overnight. She was also the one who told me what the outcome was and then I felt really upset, yeah.[105]

7.74 Currently, the available mechanisms to present children's views—through the appointment of an Independent Children's Lawyer or a family or expert report—present those views as part of a broader assessment of the child's best interests. This has led to concerns about the 'filtering' or distortion of children's views.[106] As Stephanie Young has described:

> A child, if represented, might speak to their independent representative and provide them a view; likewise, a child may also meet with a family expert who might ask and include information about the child's view. The information all then filters through each individual's own experience and emotion and is reproduced in a way that ultimately reflects the particular determination that the individual has made about what is in the best interest of the child.[107]

7.75 In Chapter 3, the ALRC reiterates its support for the position that the best interests and safety of the child should be the paramount consideration when determining care arrangements for that child. However, the ALRC also considers that the role of the children's advocate is needed: a skilled professional whose distinct role is to support the informed involvement of children in family law proceedings, as well as the expression of their views. This will provide a dedicated mechanism to support children to express their views, so those views can be fully considered by decision makers in making determinations.

7.76 Having this function distinct from other functions, including evidence gathering and litigation management currently undertaken by the Independent Children's Lawyer, and from a broader family assessment in a family report or expert report, avoids the risk of 'role confusion'[108] and ameliorates the excessive demands on professionals who are presently tasked with discharging this function.

7.77 A number of submissions called for a rethinking of the current models of representation of children's views. Many submissions stressed the importance of meeting with children to obtain their views.[109] Some explicitly called for a child advocate, although views varied as to the function of this advocate. The Benevolent Society argued that there is a

> clear need for the resourcing, training and provision of a children's advocate, appointed to the child or young person, to bring the voice of the child to the court

105 Rachel Carson et al, above n 25, 52.
106 Patrick Parkinson and Judy Cashmore, above n 13, 60–1.
107 Young, above n 54, 124.
108 Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) 262–3.

> process and to convey and explain the court processes and decisions to the child. The advocate would have expertise in child development and child welfare, with additional skills in trauma informed practice. This specialist would be appointed to the child for the entire court process and would be independent of the child's parents and legal representatives.[110]

7.78 A number called for a multidisciplinary or teamed model of representation for children. For example, the Youth Affairs Council of South Australia advocated establishing a new body 'staffed by a multi-disciplinary team including lawyers, social workers, psychologists, child protection workers and other related disciplines. … [and] tasked with engaging with children and young people and supporting them through their participation within the family law system'.[111] National Legal Aid supported 'greater availability of social science professionals to work with Independent Children's Lawyers to improve children's participation in the family law system'.[112]

Expertise of children's advocate

7.79 The primary expertise of the children's advocate should be in working with children and child development. Given that their role is to support children's participation, and particularly to support them to express their views, children's advocates need not be lawyers. Instead, the ALRC considers that children's advocates should be social science professionals with particular training and expertise in child development and working with children, in addition to the identified core competencies of all family law professionals proposed in Chapter 10.

7.80 Some submissions raised concerns about the cultural awareness and competence of professionals working with children.[113] Professionals working with children should be culturally competent, to enable children to participate appropriately. In some cases, children's participation may be best supported by a children's advocate who shares the child's cultural background.

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109 See, eg, National Family Violence Prevention Legal Services Forum, *Submission 63*; Relationships Australia South Australia, *Submission 62*; Churches of Christ Care, *Submission 4*.

110 The Benevolent Society, *Submission 86*. See also, eg, AC.CARE, *Submission 171*; Anglicare WA, *Submission 152*; Bravehearts Foundation Ltd, *Submission 148*; CatholicCare Sydney, *Submission 79*; Family & Relationship Services Australia, *Submission 53*; Setting the Record Straight for the Rights of the Child, *Submission 28*; The Royal Australian and New Zealand College of Psychiatrists, *Submission 18*; Relationships Australia, *Submission 11*; People with Disability Australia (PWDA), *Submission 10*. See also South Australia Commissioner for Children and Young People, above n 25, 14.

111 Youth Affairs Council of South Australia, *Submission 5*. See also, eg, National Legal Aid, *Submission 163*; Public Advocate and Children & Young People Commissioner, ACT Human Rights Commission, *Submission 87*; Law Council of Australia, *Submission 43*; Setting the Record Straight for the Rights of the Child, *Submission 28*; The Royal Australian and New Zealand College of Psychiatrists, *Submission 18*.

112 National Legal Aid, *Submission 163*.

113 See, eg, Victorian Aboriginal Legal Service, *Submission 101*; Aboriginal Legal Service of Western Australia, *Submission 64*; National Family Violence Prevention Legal Services Forum, *Submission 63*; Koori Caucus Working Group on Family Violence, *Submission 50*; Law Council of Australia, *Submission 43*; ATSILS Qld, *Submission 42*. Chapter 12 proposes that there be a cultural safety framework developed for the family law system. Chapter 10 proposes a workforce capability plan that identifies core competencies for family law professionals, one of which is cultural competency.

Separate legal representative

7.81 The ALRC proposes in Proposal 7–10 that the role of the Independent Children's Lawyer be refocused to concentrate on its existing evidence-gathering and litigation-management functions. These functions are highly valued by judicial officers in assisting to bring material before the court that may otherwise not be presented by the parties to a dispute.

7.82 The ALRC proposes that the legal representative be retitled 'separate legal representative' to more accurately reflect this role and to reduce the existing confusion that the Independent Children's Lawyer is a direct representative of the child.

7.83 The ALRC invites comment from stakeholders in relation to the circumstances in which a separate legal representative should be appointed for a child.

7.84 The ALRC also invites comment on the appropriate oversight and governance mechanisms for children's advocates and separate representatives. Some submissions argued that there should be an independent body established that is tasked with facilitating children's participation. While their functions vary, models suggested included the Children and Family Court Advisory and Support Service (Cafcass) in the UK, and the Office of the Children's Lawyer (OCL) in Ontario, Canada.[114]

7.85 Cafcass is an independent statutory body. Its principal functions are, in respect of family proceedings in which the welfare of children is or may be in question: to safeguard and promote the welfare of the children; give advice to any court about any application made to it in such proceedings; make provision for children to be represented in such proceedings; and provide information, advice and other support for the children and their families.[115]

7.86 The OCL is a law office in the Ministry of the Attorney General, Ontario. Where there is a dispute before a court about the arrangements for children, a court may request the OCL's involvement. The OCL may then assign a lawyer to represent the child, a clinician to write a report for the court, or a lawyer and a clinical investigator to represent the child and a clinician.[116]

7.87 Legal aid commissions currently oversee Independent Children's Lawyers in the relevant states and territories, and National Legal Aid submitted that legal aid commissions are appropriate bodies to oversee its suggestion of a multidisciplinary team focused on children's participation.[117]

Forensic issues

7.88 The ALRC invites comments from stakeholders about the approach that should be taken to forensic issues relating to the role of the children's advocate, including the

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114 See, eg, Anglicare WA, *Submission 152*; Law Council of Australia, *Submission 43*; Relationships Australia, *Submission 11*; Youth Affairs Council of South Australia, *Submission 5*.

115 *Criminal Justice and Court Services Act 2000* (UK) c 43, s 12.

116 Ministry of the Attorney General (Ontario), *The Office of the Children's Lawyer* <www.attorneygeneral.jus.gov.on.ca/english/family/ocl/>.

117 National Legal Aid, *Submission 163*.

admissibility of communications between the children's advocate and a child, and whether the children's advocate may become a witness in a matter.

7.89 At present, family report writers can be called as a witness and cross-examined about the contents of reports prepared by them.[118]

7.90 Independent Children's Lawyers will not generally be a witness in a matter. The *Family Law Act* provides that they are not under an obligation to disclose to the court and cannot be required to disclose to the court any information that a child communicates to them.[119] However, they may disclose to the court any information that the child communicates to them if they consider the disclosure to be in the best interests of the child, even if this disclosure is against the wishes of the child.[120]

7.91 There may be tensions between allowing a children's advocate to be called as a witness and a child's expectation that confidentiality in communications with a support person be respected.

How the child's views are expressed

Proposal 7–11 Children should be able to express their views in court proceedings and family dispute resolution processes in a range of ways, including through:

- a report prepared by the children's advocate;
- meeting with a decision maker, supported by a children's advocate; or
- directly appearing, supported by a children's advocate.

Proposal 7–12 Guidance should be developed to assist judicial officers where children seek to meet with them or otherwise participate in proceedings. This guidance should cover matters including how views expressed by children in any such meeting should be communicated to other parties to the proceeding.

7.92 The ALRC proposes that children should be able to communicate their views to decision makers in a range of ways, including through direct participation with the support of a children's advocate to explain their options for participation and to assist them to do so. The ALRC does not propose that there be a single method for hearing a child's views. Instead, the nature of a child's participation may vary according to the particular child's circumstances, needs, ability and willingness to participate.

118 CCH Intelliconnect, *Australian Family Law & Practice Premium Commentary* (at 12 September 2018) [19–070].
119 *Family Law Act 1975* (Cth) s 68L(6).
120 Ibid ss 68L(7)–(8).

7.93 As Parkinson and Cashmore have argued, a

> smorgasbord of ways of hearing the voices of children in legal proceedings should be seen as offering means that ought to be available in legal systems and that should be utilized in a flexible way depending on the circumstances of the case and the needs of the child.[121]

7.94 Other jurisdictions may provide useful models for hearing children's views. Following a successfully evaluated pilot, 'Voice of the Child Reports' have been introduced in 2018 in Ontario, Canada.[122] These are short, non-evaluative reports authored by a clinician from the OCL. They contain a child's views and preferences about a particular issue related to a custody and access dispute. The pilot evaluation found that these reports were a quick, cost-effective and sensitive way to involve children.[123]

7.95 In England and Wales, a court may order that a 'Section 7' report is prepared (usually by Cafcass social workers) relating to the welfare of the child, and these will generally include children's views.[124] Scotland uses an 'F9 Form' in which children can write their views to the court.[125]

7.96 The practice of judicial officers meeting with children is not common in Australia, although it occurs more frequently in other jurisdictions. The *Family Law Rules 2004* (Cth) previously made provision for judicial interviews with children, but this was removed by amendment in 2010.[126] The explanatory statement to the amendments noted that judges retain the discretion to meet with children if they wish.[127] There have been a number of calls for more decision makers to meet directly with children.[128] For example, Dr Michelle Fernando has argued that '[m]eeting with a judge gives a child an opportunity to express their views directly to a court without filtering by a third party. It satisfies the child that their views have been heard by the decision-maker'.[129]

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121 Patrick Parkinson and Judy Cashmore, above n 13, 40.

122 Office of the Children's Lawyer, Ontario 'Re: Office of the Children's Lawyer Reports' (Memorandum, 27 June 2018).

123 Rachel Birnbaum and Nicholas Bala, 'Views of the Child Reports: The Ontario Pilot Project— Research Findings and Recommendations' (Queen's Law Research Paper Series No 2017–092, Queen's University, 2017) 37–8.

124 *Children Act 1989* (UK) c 41, s 7.

125 Scottish Government, *Review of Part 1 of the Children (Scotland) Act 1995 and Creation of a Family Justice Modernisation Strategy: A Consultation* (2018) 15. The F9 Form is under review to make it more child friendly: Ibid 16.

126 *Family Law Amendment Rules 2010* (Cth).

127 Explanatory Statement, Family Law Amendment Rules 2010 (Cth). See further Dr M Fernando, *Submission 172*.

128 See, eg, Young, above n 54; Michelle Fernando, 'Conversations Between Judges and Children: An Argument in Favour of Judicial Conferences in Contested Children's Matters' (2009) 23 *Australian Journal of Family Law* 48; Patrick Parkinson and Judith Cashmore, 'Judicial Conversations With Children in Parenting Disputes: The Views of Australian Judges' (2007) 21 *International Journal of Law Policy and the Family* 160.

129 Dr M Fernando, *Submission 172*.

7.97 The principal objections from judicial officers to meeting with children are that they are not appropriately trained in communicating with children, and that there are due process issues raised by receiving information that may influence decision making that is not available to the parties to the proceedings.[130]

7.98 The ALRC considers that this option for participation should be available to children, even if it is not a routine mode of facilitating child participation. In particular, where a chid expresses the desire to meet with a decision maker, and has had the opportunity to be fully informed of the process, such a meeting should be facilitated where possible. Guidance for these meetings should be developed.[131] The concerns of judicial officers relating to expertise may be allayed through the child being supported by the children's advocate. Due process concerns may be addressed by, for example, informing the child that what is discussed in such a meeting is not confidential, and by providing that the children's advocate is to report back in open court as to what was discussed.[132]

7.99 Hearing from a child directly is not common in family law proceedings in Australia. Sections 100B(1) and (2) of the Act provide that a child (other than a child who is, or is seeking to become, a party to a case) must not swear an affidavit and must not be called as a witness or remain in court unless the court otherwise orders. A party applying to adduce the evidence of a child in the Family Court must file an affidavit that includes, inter alia, a summary of the evidence to be adduced, and the court may order that the child's evidence be given by way of affidavit, video conference, closed circuit television or other electronic communication.[133]

7.100 The reluctance to allow children to directly participate in family law proceedings stems from a concern that such involvement may be risky or harmful to a child. The ALRC agrees with its conclusion in its 1997 report on children's participation in the legal process that direct participation in family law proceedings should not be the primary method of participation.[134] Nonetheless, research has suggested that some children want to directly participate in proceedings, and the ALRC considers that there should be no bar to this in appropriate cases.[135]

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130 Patrick Parkinson and Judy Cashmore, above n 13, 171–5.

131 The Family Law Council made a recommendation to this effect in 2016: Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016) rec 13.2.

132 See further Patrick Parkinson and Judy Cashmore, above n 13, 213–14; Michelle Fernando, 'Proposed Guidelines for Judges Meeting with Children in Family Law Proceedings' (2012) 1 *Family Law Review* 213; Dr M Fernando, *Submission 172*.

133 *Family Law Rules 2004* (Cth) r 15.02.

134 Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) rec 151.

135 Rachel Carson et al, above n 25, 65–7. See also M Karle and S Gathmann, 'The State of the Art of Child Hearings in Germany: Results of a National Representative Study in German Courts' (2016) 54(2) *Family Court Review*.

A children and young people's advisory board

Proposal 7–13 There should be a Children and Young People's Advisory Board for the family law system. The Advisory Board should provide advice about children's experiences of the family law system to inform policy and practice development in the system.

7.101 The ALRC proposes that there be a Children and Young People's Advisory Board for the family law system that operates as part of the Family Law Commission proposed in Chapter 12. Such an Advisory Board will provide an ongoing capability for children and young people to participate not only in individual family law matters, but also in the development and oversight of the family law system. It will provide a formal mechanism for obtaining feedback from children, including on their experiences of participation in the family law system.

7.102 The Advisory Board should be integrated with other governance processes to ensure that children's contributions have an opportunity to meaningfully influence the ongoing development of the family law system.

7.103 The Family Justice Young People's Board (FJYPB) in England and Wales provides an analogous function. The FJYPB is a group of over 50 children and young people aged between seven and 25 years who live across England and Wales. Its members have either had direct experience of the family justice system or have an interest in children's rights and the family courts. FJYPB members participate in meetings of the Family Justice Board and work with other family law system agencies including government departments and mediation services.[136] The Family Justice Board takes a cross-system approach to family justice and is jointly chaired by ministers from the Ministry of Justice and Department for Education. Its members are senior stakeholders from across the family justice system.[137]

7.104 In Australia, a Young People's Family Law Advisory Group (YPFLAG) has been implemented by the South Australian Family Law Pathways Network, and Victoria Legal Aid has developed a Young Person's Advisory Forum. In other sectors, young people's voices have also been incorporated into the governance of organisations that work with young people. For example, the National Youth Mental Health Foundation, headspace, has a Youth National Reference Group that works with headspace to 'ensure young people's voices and opinions remain front and centre'.[138] Relationships Australia argued that a similar representative body in the family law system 'composed of people who have lived experience of the system as a child or

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

137 *Family Justice Board* GOV.UK <www.gov.uk/government/groups/family-justice-board>.

138 *Headspace Youth National Reference Group* <https://headspace.org.au/about-us/>.

young person, could be of great value in supporting the development of user-driven services'.[139]

7.105 A number of the submissions supported the creation of a formal role for children and young people in the governance of the family law system.[140] Anglicare SA noted that YPFLAG 'supports young people to be heard and share their lived experience of the legal system … Such panels should be valued as part of a continual improvement and quality process of the family law system'.[141] The Youth Affairs Council of South Australia similarly supported the board or advisory committee of young people with experience of the family law system. It suggested that the Advisory Board's functions should include shaping

> the policies, procedures and strategies of an independent organisation tasked with representing the interests and wellbeing of children and young people experiencing the family law system. The board would also undertake reviews of services related to the family law system, review feedback and complaints, develop resources to encourage meaningful engagement with children and young people, and develop child and young person appropriate information about the family law system.[142]

139 Relationships Australia, *Submission 11*.

140 National Legal Aid, *Submission 163*; Anglicare WA, *Submission 152*; YFoundations, *Submission 128*; Victoria Legal Aid, *Submission 61*; Law Council of Australia, *Submission 43*; Safe Steps Family Violence Response Centre, *Submission 15*. People With Disability Australia said that the advisory body should include children and young people with disability: People with Disability Australia (PWDA), *Submission 10*. In 2016, the Family Law Council also recommended a young person's advisory panel be established: Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016) rec 13.1.

141 Anglicare SA, *Submission 2*.

142 Youth Affairs Council of South Australia, *Submission 5*. See also South Australia Commissioner for Children and Young People, above n 25, 21–22.

8. Reducing Harm

Contents

Summary

8.1 As noted, many families who engage with the family law system have complex needs, including many who have needs associated with issues of family violence or abuse that affect their safety or those of their children.[1] Numerous reports, including the recent House of Representatives Standing Committee on Social Policy and Legal Affairs report, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (2017) (*SPLA Family Violence* report),[2] have considered the experiences of people affected by these issues, and confirmed the need for reforms to the family law system to better support families and children in this situation.

8.2 In response to these issues, this chapter contains proposals to:

- clarify the definition of family violence and ensure that the link between family violence and abuse is clear on the face of the legislation;
- reduce opportunities for legal and other processes within the family law system to be misused as a form of abuse, by recognising systems abuse as an example

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

2 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).

of family violence and by strengthening the courts' power in relation to unmeritorious proceedings; and

- support greater protection for privacy of sensitive records in relation to court processes, by providing courts with the power to exclude evidence of 'protected confidences' and by developing guidelines in relation to the use of sensitive records in family law proceedings.

Definitions of family violence and abuse

Proposal 8–1 The definition of family violence in the *Family Law Act 1975* (Cth) should be amended to:

- clarify some terms used in the list of examples of family violence and to include other behaviours (in addition to misuse of systems and processes (Proposal 8–3)) including emotional and psychological abuse and technology facilitated abuse; and
- include an explicit cross-reference between the definitions of family violence and abuse to ensure it is clear that the definition of abuse encompasses direct or indirect exposure to family violence.

Question 8–1 What are the strengths and limitations of the present format of the family violence definition?

Question 8–2 Are there issues or behaviours that should be referred to in the definition, in addition to those proposed?

8.3 The ALRC proposes to update the definition of family violence in s 4AB of the *Family Law Act 1975* (Cth) to respond to contemporary knowledge about the nature and scope of family violence, and to clarify that the definition of 'abuse' includes where the child suffers serious psychological harm from being subjected or exposed to family violence.

8.4 Additionally, in Proposal 8–3 the ALRC proposes to include misuse of systems and processes as an example of behaviour that may constitute family violence in the list in s 4AB(2) of the definition. This is discussed further below.

8.5 The Issues Paper invited stakeholder views on whether changes should be made to the definition of family violence to better support decision making about the safety of children and their families.[3] Consistent with the responses received by the ALRC, this section sets out proposals to expand and clarify aspects of the definition and seeks further stakeholder views about whether other changes to the definition are warranted.

3 Australian Law Reform Commission, *Review of the Family Law System*, Issues Paper 48 (2018) 41.

8.6 The family violence definition was changed as part of the 2012 amendments to the *Family Law Act*. The current definition is based on a 'contextual core'[4]: 'family violence means violent threatening or other behaviour by a person that coerces or controls a member of the person's family ... or causes the family member to be fearful.'[5]

8.7 The definition also includes a non-exhaustive list of examples that may constitute family violence where the core attributes of 'fear, coercion or control' are present.[6] The examples of violent behaviour include assault, sexual assault or other sexually abusive behaviour, stalking, and intentionally damaging or destroying property.[7] Further provisions relate to children being exposed to family violence.[8]

8.8 Family violence is relevant to decision making in a number of areas in the *Family Law Act*. Among the most important of these are:

- decisions about the parenting arrangements that are in a child's best interests;[9] and
- informing decisions about the matters that may proceed directly to court rather than first being assessed for family dispute resolution (FDR).[10]

8.9 Family violence will also be a relevant consideration under the ALRC's proposals to amend the legislation in relation to property and financial matters, and spousal maintenance, set out in Chapter 3.

8.10 The present definition replaced a definition that was similar to the common law definition of assault. It is based on a recommendation made by the ALRC and the NSW Law Reform Commission (NSWLRC) in the 2010 report, *Family Violence—A National Legal Response*.[11] The ALRC/NSWLRC recommendation suggested developing a national common understanding of family violence based on a shared 'contextual core' supplemented by a non-exhaustive list of examples of physical and non-physical violence.[12]

8.11 The contextual core of this definition is also reflected in the approach applied in the recent *National Risk Assessment Principles for Domestic and Family Violence* (National Risk Assessment Principles) developed by Australia's National Research Organisation for Women's Safety (ANROWS).[13] The conceptualisation applied in this

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4 Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010) [5.170].
5 *Family Law Act 1975* (Cth) s 4AB(1).
6 Ibid s 4AB(2).
7 Ibid s 4AB(1).
8 Ibid s 4AB(3)–(4).
9 Ibid s 60CC(2)(b).
10 Ibid s 60I.
11 Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010) rec 6-4.
12 Ibid [5.170].
13 Australia's National Research Organisation for Women's Safety, *National Risk Assessment Principles for Domestic and Family Violence* (2018).

context recognises a wide range of behaviours 'intended to coerce, control and/or create fear within an intimate or familial relationship'.[14] The National Risk Assessment Principles emphasise the importance of a 'common, shared definition' of domestic and family violence.[15]

8.12 The Australian Institute of Family Studies Evaluation of the 2012 family violence reforms (AIFS Family Violence Evaluation) considered the impact of the new legislative definition in the *Family Law Act*. It highlighted the important educative role of the definition in assisting professionals and people who use the family law system to understand the kinds of behaviours that amount to family violence.[16] Its survey of family law system professionals also found that 73% of those surveyed agreed that the amended definition in s 4AB and the amended child abuse definition in s 4 supported safer parenting arrangements.[17]

8.13 However, the evaluation also highlighted variation among professionals and within different professional groups (relationship services practitioners, lawyers and judges), about the operation of the definition.[18] Differences of opinion were evident on whether it was too broad or too narrow and on the practical impact of coercion, control or fear as pre-conditions for particular behaviours to be considered family violence.[19]

8.14 Overall, the evaluation findings indicated that the main area of impact of the changed definition was in the use of FDR by parents affected by emotional abuse in the absence of physical violence. Following the 2012 reforms, there was an increase in reports of parents reaching parenting arrangements through FDR rather than courts.[20] This reflects the inclusion of actions amounting to emotional abuse in the definition, meaning that this form of abuse was more readily identified and taken into account in reaching parenting arrangements in FDR.

8.15 The breadth of views among professionals canvassed by the AIFS Family Violence Evaluation was similar to those evident in submissions to the present Inquiry, which indicates that this range of different views persists. In broad terms, submissions demonstrated varied views in the following areas:

- whether the definition is too broad[21] or too narrow;[22]
- whether the *Family Law Act* definition should be consistent with state and territory legislative frameworks;

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14 Corina Backhouse and Cherie Toivonen, 'National Risk Assessment Principles for Domestic and Family Violence: Companion Resource' (Australia's National Research Organisation for Women's Safety, 2018) 7.

15 Australia's National Research Organisation for Women's Safety, above n 13, 2.

16 Rae Kaspiew et al, *Responding to Family Violence: A Survey of Family Law Practices and Experiences (Evaluation of the 2012 Family Violence Amendments)* (Australian Institute of Family Studies, 2015) 39.

17 Ibid 33.

18 Ibid 32.

19 Ibid 34–9.

20 Rae Kaspiew et al, above n 1, 56.

21 NSW Young Lawyers Family Law Committee, Law Society of NSW, *Submission 108*.

22 Safe Steps Family Violence Response Centre, *Submission 15*.

- whether fear, coercion or control should be mandatory elements of the definition; and
- the extent to which the definition should refer to specific behaviour and if so what behaviours should be included in the list of examples.

Elements of the definition

8.16 One of the main differences between the *Family Law Act* definition of family violence and the definition in some states and territories is the inclusion of the limiting elements of fear, coercion and/or control. In Queensland[23] and Victoria,[24] for example, control, domination and fear are non-mandatory elements, with core elements being: abuse of a physical, sexual, emotional, psychological or economic nature or threatening or coercive behaviour. In the ACT, in contrast, to come within the definition of family violence, behaviour needs to control or dominate or cause feelings of fear.[25]

8.17 The appropriateness or otherwise of the necessity for fear, coercion or control was one of the main differences in submissions, to the extent that they addressed this question.

8.18 Domestic Violence Victoria favoured a nationally consistent definition and supported 'retaining a requirement for coercive and controlling behaviour, as this is a key element of the dynamics of family violence.'[26] Victoria Legal Aid submitted that in defining behaviour that should be recognised as harmful for *Family Law Act* purposes, the definition should focus on control, and behaviour that was repeated:

> there would be benefit in expanding the definition of family violence in the legislation to capture all forms of physical abuse (not just assault), focus on the behaviour of the perpetrator (and not require a specific effect such as the victim feeling coerced, controlled or fearful), recognise the repetitive conduct of all forms of family violence (not just derogatory taunts) and that this repeated conduct is intended to exercise control, and recognise the impact of the violence on children and family functioning and that this can amount to family violence.[27]

8.19 Some submissions from Aboriginal organisations favoured definitions not limited by fear, coercion or control. The National Family Violence Prevention Legal Service[28] and the Koori Caucus Working Group on Family Violence[29] favoured the adoption of the Victorian approach, with fear, coercion and control as non-mandatory elements. The National Family Violence Prevention Legal Services Forum further noted that:

> This is obviously a complex area and extensive consultation will be required, including with Aboriginal and Torres Strait Islander communities and specialist Aboriginal and Torres Strait Islander Community Controlled Organisations with

23 *Domestic and Family Violence Protection Act 2012* (Qld) s 8.
24 *Family Violence Protection Act 2008* (Vic) s 5.
25 *Family Violence Act 2016* (ACT) s 8.
26 Domestic Violence Victoria, *Submission 23*.
27 Victoria Legal Aid, *Submission 61*.
28 National Family Violence Prevention Legal Services Forum, *Submission 63*.
29 Koori Caucus Working Group on Family Violence, *Submission 50*.

> family violence expertise, to ensure that considerations around lateral violence and the needs of Aboriginal and Torres Strait Islander victim/survivors are adequately taken into account.[30]

8.20 The Queensland Indigenous Family Violence Legal Prevention Service favoured the definition in the Queensland legislation.[31] The Aboriginal Legal Service of Western Australia suggested that 'there is a risk that [the *Family Law Act*] definition may not capture all forms of family violence in Aboriginal communities because there will not always be coercion or control, or the existence of fear.'[32] It argued that behaviour that would amount to criminal behaviour, such as physical assault, should not require fear, coercion or control, while behaviour that may not, such as financial abuse, should.[33]

8.21 Other submissions also argued against fear, coercion or control as mandatory elements.[34] They suggested that the need to establish fear or coercion or control excludes harmful behaviour that should be taken into account. In this vein, Ms Zoe Rathus from Griffith University argued that:

> I believe that the definition should be the list of behaviours which can amount to DFV and should include behaviour that is coercive and controlling and behaviour that causes fear. However, those characteristics should not need to be present in every instance before conduct can be said to amount to family violence.[35]

8.22 In contrast to this view, another group of academics, Dr Jane Wangmann, Ms Miranda Kaye and Associate Professor Tracey Booth from the University of Technology Sydney, did not support change to the definition, arguing that it is appropriately framed and capable of capturing a range of harmful behaviours that did not need to be specifically listed.[36]

8.23 Domestic Violence Victoria made a similar point, suggesting that a definition based on 'broad categories of behaviour' was preferable to an overly detailed one. It argued that

> non-exhaustive lists of examples of violence can be a useful aide-memoir [but they] can sometimes be more detrimental to understanding the tactics and forms of family violence if implementers of the law do not have a good understanding of the nature and dynamics of family violence and restrict their understanding of family violence to only those examples listed.[37]

8.24 Like a range of other submitters,[38] Domestic Violence Victoria made the point that effective implementation of the family violence definition and other measures

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30 National Family Violence Prevention Legal Services Forum, *Submission 63*.
31 Queensland Indigenous Family Violence Legal Service, *Submission 181*.
32 Aboriginal Legal Service of Western Australia, *Submission 64*.
33 Ibid.
34 See, eg, Peninsula Community Legal Centre, *Submission 30*; Safe Steps Family Violence Response Centre, *Submission 15*.
35 Z Rathus, *Submission 92*.
36 Dr J Wangmann, M Kaye and Associate Professor T Booth, UTS Faculty of Law, *Submission 179*.
37 Domestic Violence Victoria, *Submission 23*.
38 See, eg, Uniting, *Submission 162*; Victorian Women Lawyers, *Submission 84*; Relationships Australia South Australia, *Submission 62*; Domestic Violence Action Centre, *Submission 58*.

intended to improve responses to family violence depended on 'rigorous family violence capacity development' for professionals across the system.[39]

8.25 Having regard to the evidence canvassed in this section, the ALRC considers it appropriate to seek further input from stakeholders on the strengths and limitations of the family violence definition, particularly in relation to its structure and the elements required to make a finding of family violence.

Expansion of the list of non-exhaustive examples

8.26 In contrast to the varied views in relation to the 'contextual core' of the family violence definition, there was strong support in submissions for expansion of the non-exhaustive list of examples. In particular, many submissions supported including misuse of process as an example in the family violence definition.[40] This issue is dealt with below (see Proposal 8–3).

8.27 Additional suggestions in submissions that are reflected in the proposed amendments either clarify the meaning of existing examples or respond to developments in knowledge about family violence that have gained recognition since the definition was enacted in 2012.

8.28 Seven types of behaviours have been identified as amounting to family violence: physical, sexual, psychological and emotional, social, financial, spiritual, and technology facilitated abuse.[41] Existing examples in the definition of family violence in the *Family Law Act* are consistent with these behaviours. The ALRC makes a number of proposals for additional examples below. These are also consistent with the behaviours identified as amounting to family violence. An overarching coercive control characterisation is recognised to include chronic, cumulative and routine behaviours including social isolation, financial abuse and monitoring movements, including through the use of technology.

8.29 The proposed changes and additions to the list of examples are described below. The ALRC acknowledges the arguments made in favour of more general and less specific approaches to defining family violence and also acknowledges that an approach based on less specificity is adopted in the proposals for the simplification of the parenting provisions in the Act (see Chapter 3). However, in the context of family violence, the ALRC considers that the legislative definition has a particularly important educative role and that the definition should be clear to the public as well professionals across the system. This is especially so since research indicates that some forms of family violence, such as social isolation and financial abuse, are often not recognised as family violence within the community.[42]

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39 Domestic Violence Victoria, *Submission 23*.

40 This reflects responses to Australian Law Reform Commission, *Review of the Family Law System*, Issues Paper 48 (2018) Question 25.

41 Corina Backhouse and Cherie Toivonen, above n 14, 7.

42 Kim Webster et al, 'Australians' Attitudes to Violence against Women: Full Technical Report' (Victorian Health Promotion Foundation, 2014) 69.

Proposals in relation to the non-exhaustive list

8.30 The first example of behaviour that may constitute family violence is an 'assault'. [43] The ALRC proposes that this legal term be replaced with a plain language description: 'an act that causes physical harm or causes fear of physical harm'. This change was suggested in some submissions[44] and is consistent with some state frameworks, which refer to 'physical' violence or abuse.[45]

8.31 The ALRC proposes that the term 'emotional or psychological abuse' replace 'repeated derogatory taunts'.[46] This term is more consistent with the terms used in the clinical and practice literature on family violence and with state and territory frameworks.[47] Preference for this terminology was indicated in several submissions.[48]

8.32 The ALRC also proposes a number of additions to existing examples in the definition:

- To s 4AB(2)(g) 'unreasonably denying the family member the financial autonomy that he or she would otherwise have had', the ALRC proposes adding the words 'including requiring the family member to transfer or hand over control of assets, or forcing the family member to sign a document such as a loan or guarantee'. This adds detail and clarity to the existing provision, reflects research findings about common types of financial abuse and is consistent with some state and territory frameworks.[49]
- To s 4AB(2)(h) 'unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support', the ALRC proposes adding the words 'including unreasonably withholding information about financial and other resources'. This responds to evidence in the research literature[50] and submissions[51] about the extent to which concealment of financial and property resources is associated with a pattern of financial and other abuse.
- To s 4AB(2)(i) 'preventing the family member from making or keeping connections with his or her family, friends and culture', the ALRC proposes

43 *Family Law Act 1975* (Cth) s 4AB(1)(a).
44 Victoria Legal Aid, *Submission 61*.
45 See, eg, *Family Violence Protection Act 2008* (Vic) s 5(1)(a)(i); *Family Violence Act 2016* (ACT) s 8(1)(a)(i).
46 *Family Law Act 1975* (Cth) s 4AB(2)(d).
47 Family Violence Protection Act 2008 (Vic) s 5(1)(a)(ii)); Family Violence Act 2016 ACT s 8(1)(a)(i).
48 National Legal Aid, *Submission 163*; Australian Psychological Society, *Submission 55*; The Royal Australian and New Zealand College of Psychiatrists, *Submission 18*.
49 See, eg, *Family Violence Act 2016* (ACT) s 8(3).
50 Rae Kaspiew et al, *Experiences of Separated Parents Study (Evaluation of the 2012 Family Violence Amendments)* (Australian Institute of Family Studies, 2015) 25; Emma Smallwood, 'Stepping Stones: Legal Barriers to Economic Equality after Family Violence' (Women's Legal Services Victoria, 2015); Women's Legal Service Victoria, 'Small Claims, Large Battles: Achieving Economic Equality in the Family Law System' (2018).
51 See, eg, Women's Legal Services Australia, *Submission 45*.

adding the terms 'community or religion'. This responds to submissions calling for recognition of the importance of the maintenance of community connections,[52] something that can be particularly significant for people for whom membership of their community is important to their identity and wellbeing. Such groups include Aboriginal and Torres Strait Islander people,[53] people from culturally and linguistically diverse backgrounds[54] and LGBTIQ people.[55]

8.33 The ALRC further proposes adding two new examples to the definition of family violence (in addition to misuse of systems and processes: Proposal 8–3):

- using electronic or other means to distribute words or images that cause harm or distress; and
- non-consensual surveillance of a family member by electronic or other means.

8.34 Both of these respond to suggestions in submissions[56] and policy documents[57] of the need to recognise technology facilitated abuse and the evidence in the research literature of the extent of this behaviour.[58] They are also consistent with some state and territory frameworks.[59]

Further research into the definition of family violence

Proposal 8–2 The Australian Government should commission research projects to examine the strengths and limitations of the definition of family violence in the *Family Law Act 1975* (Cth) in relation to the experiences of:

- Aboriginal and Torres Strait Islander people;
- people from culturally and linguistically diverse backgrounds; and
- LGBTIQ people.

52 Women's Council for Domestic and Family Violence Services WA, *Submission 182*; No to Violence, *Submission 32*.

53 Secretariat of National Aboriginal and Islander Child Care Inc, *Working and Walking Together: Supporting Family Relationship Services to Work with Aboriginal and Torres Strait Islander Families and Organisations* (SNAICC, 2010).

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

55 Rainbow Families Victoria, *Submission 106*.

56 Women's Council for Domestic and Family Violence Services WA, *Submission 182*; NATSIWA, Harmony Alliance and AWAVA, *Submission 122*; The Benevolent Society, *Submission 86*; No to Violence, *Submission 32*.

57 COAG National Summit on Reducing violence against women and their children, 'COAG National Summit 2016: Outcomes and Reflections' (2016).

58 Kaspiew et al, above n 50, 25; ReCharge: Women's Technology Project, 'ReCharge: Women's Technology Safety, Legal Resources, Research and Training' (2015).

59 See, eg, *Domestic and Family Violence Protection Act 2012* (Qld) s 8(5).

8.35 There are three particular areas where the ALRC considers the definitional approach to family violence requires further consideration, including detailed consultation with the groups concerned: Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse backgrounds, and LGBTIQ people.

8.36 Submissions raised a range of areas where practices associated with particular cultural and/or faith communities may be associated with abusive behaviour. Unchain My Heart drew attention to the position of Jewish women married under Jewish law who wish to divorce under Jewish law (as well as Australian law) but whose husbands refuse to consent to the issue of a bill of divorce (the *Gett*).[60] Because the consent of both parties is required, denial of consent means divorce under Jewish law cannot occur. The submission indicated that there are a

> growing number [of cases] in which the process is controlled or manipulated by one party, mainly the husband, to extract property or parenting concessions or to torment and harass the other party... In these cases, the husband controls or manipulates the divorce process by refusing to give his wife a Gett and thereby preventing her from remarrying according to Jewish Law and from having children who can fully participate in the Jewish community.[61]

8.37 Other submissions highlighted other cultural practices, including dowry and forced marriage.[62] In Victoria, the definition of family violence in s 5 of the *Family Violence Protection Act 2008* (Vic) was expanded in 2018 to include 'using coercion, threats, physical abuse or emotional or psychological abuse' to 'cause a person to enter into a marriage' or to 'demand or receive dowry'.[63]

8.38 In relation to LGBTIQ people, the Inner City Legal Centre suggested that 'the family law system needs to be more sensitive to the prevalence of LGBTIQ family violence and the unique experiences concomitant with these issues'.[64]

8.39 The existing literature and submissions to this Inquiry point to need for a more detailed understanding of the perspectives of Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse backgrounds and LGBTIQ people on the form, meaning and impact of family violence.

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60 Unchain My Heart and National Council of Jewish Women of Australia, *Submission 120*.
61 Ibid.
62 Migrant Women's Lobby Group of SA, *Submission 38*; Australasian Centre for Human Rights and Health, *Submission 31*; Domestic Violence Victoria, *Submission 23*.
63 *Justice Legislation Amendment (Family Violence Protection and Other Matters) Act* 2018 (Vic) s 15.
64 Inner City Legal Centre, *Submission 124*.

Family violence as child abuse

8.40 The definitions of child abuse[65] and family violence[66] in the *Family Law Act* are interlinked but not co-located. The family violence definition recognises and defines exposure of children to family violence in this way:

> (3) For the purposes of this Act, a child is exposed to family violence if the child sees or hears family violence or otherwise experiences the effects of family violence.
>
> (4) Examples of situations that may constitute a child being exposed to family violence include (but are not limited to) the child:
>
> (a) overhearing threats of death or personal injury by a member of the child's family towards another member of the child's family; or
>
> (b) seeing or hearing an assault of a member of the child's family by another member of the child's family; or
>
> (c) comforting or providing assistance to a member of the child's family who has been assaulted by another member of the child's family; or
>
> (d) cleaning up a site after a member of the child's family has intentionally damaged property of another member of the child's family; or
>
> (e) being present when police or ambulance officers attend an incident involving the assault of a member of the child's family by another member of the child's family.[67]

8.41 The definition of child abuse in s 4 of the *Family Law Act* explicitly recognises exposure to family violence as a form of child abuse where it causes serious psychological harm. The relevant provision reads: '"*abuse*", in relation to a child, means: … causing the child to suffer serious psychological harm, including (but not limited to) when that harm is caused by the child being subjected to, or exposed to, family violence.'[68]

8.42 Some submissions to this Inquiry indicated that these provisions are not well understood. They suggested a lack of recognition in the *Family Law Act* that family violence can be a form of child abuse.[69]

8.43 The ALRC considers that this is an issue that should be addressed as part of the simplification of the *Family Law Act* (discussed in Chapter 3). The re-draft of the Act should include co-locating the provisions in relation to family violence and child abuse. Unless the lack of clarity is resolved in another way, the provisions dealing with the definition of family violence should also include a note explaining the effect of the two definitions operating together.

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65 *Family Law Act 1975* (Cth) s 4.
66 Ibid s 4AB.
67 Ibid.
68 Ibid s 4.
69 Victoria Legal Aid, *Submission 61*; No to Violence, *Submission 32*; Domestic Violence Victoria, *Submission 23*.

Misuse of systems and processes as family violence

Proposal 8–3 The definition of family violence in the *Family Law Act 1975* (Cth) should be amended to include misuse of legal and other systems and processes in the list of examples of acts that can constitute family violence in s 4AB(2) by inserting a new subsection referring to the 'use of systems or processes to cause harm, distress or financial loss'.

8.44 In addition to the above proposed changes to the definition of family violence, the ALRC proposes that the non-exhaustive list of examples in the definition be amended to include misuse of systems and processes. The term 'misuse of systems and processes' is used in this Discussion Paper to refer to behaviour involving engagement and non-engagement with various family law and other systems and processes to achieve ends other than those the processes are designed for, in the context of family violence.

8.45 Submissions and a range of research and analysis over a sustained period indicate that the misuse of processes and systems is not uncommon after separation in the context of ongoing post-separation family violence.[70]

8.46 The evidence in submissions and other sources suggests that a wide range of processes and systems may be engaged in this context,[71] including state and territory child protection systems, the Child Support Program, and family law processes, including family law proceedings, FDR and legal aid commission processes.

8.47 The following range of examples is drawn from the submissions:

- manipulation in engagement with Family Relationship Centre services either prior to lodging a court application or when mandated by a court order;[72]
- refusing to attend meetings, rescheduling meetings, or refusing to sign documents, which can increase time and potentially costs for the other party;[73]

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70 Australian Law Reform Commission, *For the Sake of the Kids: Complex Contact Cases and the Family Court*, Report No 73 (1995); Prue Cameron, 'Relationship Problems and Money: Women Talk about Financial Abuse' (Wire Women's Information, 2015); Rosemary Hunter, 'Litigants in Person in Contested Cases in the Family Court' (1998) 12 *Australian Journal of Family Law* 171; Rae Kaspiew et al, 'Domestic and Family Violence and Parenting: Mixed Method Insights into Impact and Support Needs: Final Report' (Australia's National Research Organisation for Women's Safety, 2017); Miranda Kaye, Julie Stubbs and Julie Tolmie, 'Domestic Violence and Child Contact Arrangements' (2003) 17(1) *Australian Journal of Family Law* 93.

71 Australian Institute of Judicial Administration, *National Domestic and Family Violence Bench Book* <http://dfvbenchbook.aija.org.au/contents>; Emma Fitch and Patricia Easteal, 'Vexatious Litigation in Family Law and Coercive Control: Ways to Improve Legal Remedies and Better Protect the Victims' (2017) 7 *Family Law Review* 103; Kaspiew et al, 'Domestic and Family Violence and Parenting: Mixed Method Insights into Impact and Support Needs: Final Report', above n 70.

72 Anglicare WA, *Submission 152*.

73 Australian Psychological Society, *Submission 55*.

- seeking preliminary advice to create a conflict of interest and prevent the other party from obtaining legal advice, using litigation to waste the resources of the other party and using the threat of indemnity costs (these are costs that a court might award if it found that a party had failed to accept a reasonable offer to settle the proceedings) to intimidate the other party;[74]
- repeated engagement with parenting orders programs over issues that have been dealt with in other services over a number of years;[75]
- protracted negotiations and litigation where one party has greater capacity to pay for legal assistance and intimidation through legal correspondence;[76]
- refusal to participate in FDR to delay resolution or force the other party to self-represent in court and to make notifications to child protection agencies in relation to trivial matters;[77]
- repeated applications to court in the same matter, including in relation to recovery orders;[78] and
- frequent applications for variation in child support assessments.[79]

8.48 Research[80] and cases[81] have demonstrated that misuse of processes and systems can cause anxiety, fear, and post-traumatic stress disorder for people who are the targets of this behaviour. Misuse of processes and systems can impede post-separation re-establishment and recovery from the effects of family violence, as well as compromising parenting capacity and the emotional and other resources available to meet children's needs.

8.49 It also has significant implications for the efficiency of the system and access to the system for other users. The illegitimate use of processes and systems limits their availability for users with legitimate needs. Consistent with previous analyses and research reports,[82] concern about these issues was evident in a range of different submissions to this Inquiry. The Australian Psychological Society, for example, described the personal and systemic implications in this way:

> This misuse and abuse of processes not only exposes family members to further harm, but is a waste of limited family court resources through lengthy and costly delays for individuals, unnecessary court time and administrative burden within the family law system.

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74 Bar Association of Queensland, *Submission 80*.
75 CatholicCare Victoria Tasmania (CCVT), *Submission 115*.
76 Interrelate, *Submission 126*.
77 Uniting, *Submission 162*; Peninsula Community Legal Centre, *Submission 30*.
78 Women's Legal Services Australia, *Submission 45*.
79 P Theobald, *Submission 6*.
80 Kaspiew et al, 'Domestic and Family Violence and Parenting: Mixed Method Insights into Impact and Support Needs: Final Report', above n 70.
81 See, eg, *Finch & Shibo* (Unreported, FamCAFC, 2016); *Marsden & Winch* [2009] FamCAFC 152.
82 Australian Law Reform Commission, *For the Sake of the Kids: Complex Contact Cases and the Family Court*, Report No 73 (1995) [5.29]; Australian Institute of Judicial Administration, above n 71, 885–886; Prue Cameron, above n 70.

> This abuse can have significant impacts on the target by causing them psychological distress and exacerbating physical and mental ill-health issues.
>
> The time spent on dealing with these matters puts significant pressure on targets and can impact on the time available to parent their children.
>
> Where the legal process can be drawn out over a long period, sometimes years, the ongoing stress and uncertainty has a major negative impact, including on children of the relationship where parenting arrangements are uncertain and children can feel caught between their parents and are at an increased risk of being exposed to detrimental conflict. Even for adult children, the experience of parents' ongoing conflict and pressure for divided loyalties can impact significantly, including on their own children.[83]

8.50 Several analyses have also highlighted the financial hardship implications of financial abuse as a form of family violence and abuse of systems and processes, including in relation to property and financial matters.[84] This point was raised in a range of submissions from organisations and individuals. For example, the Public Advocate and Children and Young Person's Commissioner submitted that:

> The ACT Victims of Crime Commissioner regularly hears stories from victims who have found themselves tens of thousands of dollars in debt as a result of long-running child-related disputes in the Family Court. These victims are seeking safety for themselves and for their children. Some make the choice of consenting to orders that do not provide safety for their children in order to avoid further debt. Those who continue the legal process find themselves in financial hardship, which necessarily affects the children.[85]

8.51 The proposed amendment to the definition of family violence[86] in Proposal 8–3 would have the effect of focusing attention on misuse of systems and processes whenever consideration of family violence is enlivened, including for the purposes of establishing access to the court system,[87] determining orders about children's care arrangements, and for the purposes of the reformed property provisions under the proposal to make family violence relevant to property adjustment determinations (Proposal 3–11).

8.52 The wording of the proposed amendment is deliberately wider than the terms used in relation to court action in similar contexts (eg, where proceedings are frivolous, vexatious, an abuse of process, or have no reasonable prospect of success[88]) in order to capture a wider range of behaviours than those that occur within legal systems. This approach is consistent with the wide range of behaviours identified in submissions and other analyses.

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83 Australian Psychological Society, *Submission 55*.

84 Prue Cameron, above n 70; Kaspiew et al, 'Domestic and Family Violence and Parenting: Mixed Method Insights into Impact and Support Needs: Final Report', above n 70; Women's Legal Service Victoria, above n 50.

85 Public Advocate and Children & Young People Commissioner, ACT Human Rights Commission, *Submission 87*.

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

87 Ibid s 60I.

88 See, eg, Ibid s 45A.

8.53 The proposal reflects a recommendation made in the *SPLA Family Violence* report,[89] which was widely supported by varied groups of stakeholders in submissions to this Inquiry.[90] For example, Western Sydney Community Legal Centre submitted that:

> We wholeheartedly agree with the issues raised under paragraph 190 of the Issues Paper in relation to the ways that the family law system and its processes are misused, and further agree with the characterisation of such misuse as a form of abuse.
>
> We would support the amendment of the definition of family violence within the *Family Law Act* to include such misuse of process as a form of abuse.[91]

8.54 However, some stakeholders expressed disagreement with such an amendment. Arguments raised in opposition included that court powers for the management of abuse of process are sufficient[92] and that misuse of processes and systems is not necessarily a form of family violence.[93]

8.55 Given the submissions and research evidence detailing the ways in which a range of processes and systems may be used for illegitimate purposes as part of a pattern of family violence, the ALRC considers it important that the full range of behaviours can be considered within the application of the family violence definition.[94] This allows for a broader consideration than that involved in the court's powers to manage unmeritorious proceedings. These are discussed in the next section.

Management of unmeritorious proceedings

Proposal 8–4 The existing provisions in the *Family Law Act 1975* (Cth) concerning dismissal of proceedings that are frivolous, vexatious, an abuse of process or have no reasonable prospect of success ('unmeritorious proceedings') should be rationalised.

8.56 The ALRC proposes that the existing provisions in the *Family Law Act* concerning unmeritorious proceedings be rationalised. As detailed below, this should include locating the relevant provisions together in the Act, making clear the difference between them, and providing the court with the same powers under both sets of unmeritorious proceedings provisions. The last of these changes would ensure that courts have the power to make orders requiring a party found to have instigated unmeritorious proceedings to seek leave of the court before lodging a new court application and serving papers on the other party

89 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 2, rec 8.

90 See, eg, CatholicCare Sydney, *Submission 79*; Australian Psychological Society, *Submission 55*; Central Australian Women's Legal Service, *Submission 24*; Drummond Street Services, *Submission 20*.

91 Western Sydney CLC, *Submission 8*.

92 Law Council of Australia, *Submission 43*.

93 Caxton Legal Centre, *Submission 51*.

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

8.57 The term 'unmeritorious proceedings' is used in the Discussion Paper to describe proceedings that are unjustified. It encompasses 'frivolous or vexatious proceedings', 'abuse of process' and proceedings that have 'no reasonable prospect of success'. These are all legal terms.[95]

Policy considerations

8.58 As the preceding discussion demonstrates, legal processes may be misused to perpetuate abuse. This can obviously have a detrimental impact on children in families involved in such proceedings, either directly in the case of parenting matters or indirectly in the case of property and financial matters. In addition to these consequences, this issue raises wider questions of public interest, including because vexatious litigation adversely affects the system's capacity to deal with meritorious claims in a timely manner.[96]

8.59 Case law emphasises the important role that courts have in protecting the integrity of their processes and public confidence in the administration of justice. Jurisprudence on abuse of process clearly recognises the important policy rationale for the courts' powers in relation to abuse of process (including vexatious proceedings). This rationale is the public interest in the administration of justice, requiring courts to ensure their processes are used fairly by state and citizen in order to maintain public confidence in the courts.[97]

8.60 The High Court describes abuse of process as involving at least one of three potential characteristics: the court's processes being invoked for an illegitimate or collateral purpose, the use of the court's procedures being unjustifiably oppressive to a party, or the use of the court's procedures bringing the administration of justice into disrepute.[98]

8.61 Case law also recognises that abuse of process takes a variety of forms 'limited only by human ingenuity'.[99] The policy rationale for these powers of 'preventing waste of judicial resources and their use for purposes unrelated to the determination of genuine disputes'[100] is particularly significant in the context of family violence, family law matters and children's interests.

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95 Under s 102Q of the *Family Law Act 1975*, vexatious proceedings are proceedings that: are an abuse of the process of a court or tribunal; and are instituted in a court or tribunal to harass or annoy, to cause delay or detriment, or for another wrongful purpose; and pursued in a court or tribunal without reasonable ground and are conducted in a court or tribunal in a way so as to harass or annoy, cause delay or detriment, or achieve another wrongful purpose. The other provision dealing with unmeritorious proceedings, s 45A, refers to proceedings that have no reasonable prospect of success, are vexatious, frivolous or an abuse of process.

96 Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 1, 2014) 448.

97 *Williams v Spautz* (1992) 174 CLR 509, [520].

98 *Rogers v R* [1994] CLR 251, [286] (McHugh J).

99 *Sea Culture International Pty Ltd v Scoles* [1991] FCR 275, [279].

100 Ibid [279].

Recent reforms

8.62 In recent years, reforms at state, territory and Commonwealth level have been implemented to modernise and strengthen courts' powers to address abuse of their processes. Two key reforms are discussed below.

8.63 Firstly, the Commonwealth, and some states and territories, have enacted laws based on the Standing Committee of Attorneys-General model law on vexatious proceedings.[101] The policy rationale for these provisions is to support a 'more comprehensive legislative regime that clearly sets out the circumstances in which vexatious proceedings orders can be made and the kinds of orders that can be made'.[102]

8.64 This approach inserts a provision in relevant legislation to address circumstances where a litigant is found to have frequently instituted or conducted vexatious proceedings (vexatious proceedings powers). In the family law context, this provision is s 102QB[103] of the *Family Law Act*. The provision sets out powers in relation to proceedings where a court is satisfied that 'a person has frequently instituted or conducted vexatious proceedings in Australian courts or tribunals'.[104] These powers allow for courts to stay or dismiss all or part of proceedings currently on foot[105] and to make an order prohibiting the person from instituting proceedings under the *Family Law Act*.[106] The consequence of such an order is that the person subject to the order must not institute proceedings or serve documents on the party without leave of the court.[107]

8.65 Secondly, courts have powers to stay or dismiss proceedings before them that are found to be without reasonable prospect of success, frivolous, vexatious or an abuse of process (summary dismissal powers). In the *Family Law Act*, this provision has recently been amended by the *Family Law Amendment (Family Violence and Other Measures) Act 2018* (Cth). Prior to this amendment, these powers were contained in s 118. A new provision, s 45A, has replaced s 118 and also consolidates powers that were previously contained in both legislation and court rules.[108]

8.66 The new summary dismissal powers provision sets out a court's powers to dismiss a proceeding on foot if it concludes it has no reasonable prospect of success or if it is satisfied that the proceeding is frivolous, vexatious or an abuse of process. The amendment specifies that to have 'no reasonable prospect of success', the proceedings do not have to be 'hopeless' or 'bound to fail'. The policy rationale for the change is to

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101 Explanatory Memorandum, Access to Justice (Federal Jurisdiction) Amendment Bill 2011.
102 Ibid 2.
103 *Family Law Act 1975* (Cth) pt XIB div 2.
104 Ibid s 102QB(1)(a).
105 Ibid s 102QB(2)(a).
106 Ibid s 102QB(2)(b).
107 Ibid s 102QD(1).
108 The relevant provisions were contained in *Family Law Act 1975* (Cth) s 118; *Federal Circuit Court of Australia Act 1999* (Cth) s 17A; *Family Law Rules 2004* (Cth) r 10.12; *Federal Circuit Court Rules 2001* (Cth) r 13.10. In the Federal Circuit Court, s 17A of the *Federal Circuit Court Act 1999* (Cth) will continue to apply.

allow 'a court to prevent the use of its courtroom as a tool for perpetrators of family violence to perpetuate family violence'.[109]

8.67 In exercising summary dismissal powers and vexatious proceedings powers, courts are balancing the rights of an individual litigant to have access to courts to have legitimate claims heard and considered in accordance with due process[110] against the need to protect court processes from abuse. The case law evidences a concern to accord due process to claims that may be legitimate but poorly formulated, particularly where a self-represented litigant is involved.[111]

8.68 Case law confirms that powers that deprive people of access to courts are to be used sparingly.[112] However, having regard to the policy considerations underlying these powers reviewed above and the views expressed in submissions, it appears that these powers may in fact be used too sparingly in the family law context.[113]

Rationalisation

8.69 Consistent with the proposals to simplify the *Family Law Act* (see Chapter 3), the unmeritorious proceedings powers should be presented in the *Family Law Act* in a more accessible and consistent format.

8.70 Rather than being located in two different parts of the Act, as they are now,[114] they should be located together. The different applications of the provisions should be clear in the legislation: the summary dismissal powers apply to one set of proceedings presently before a decision making body where either the application or response has no reasonable prospect of success, or is frivolous, vexatious or an abuse of process in whole or part; and the vexatious proceedings powers apply where a person has frequently instituted or conducted vexatious proceedings in Australian courts or tribunals.

Power to prevent a party from instituting further proceedings

8.71 In relation to the vexatious proceedings powers, the Family Court of Australia (Family Court) submission expressed concern that the powers to impose consequences in s 118 of the *Family Law Act* (as it was when the submission was made) were more limited than those available in s 102QB.[115] Under s 102QB(2), the court may make an order prohibiting the person from instituting further proceedings. The consequence of

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109 Revised Explanatory Memorandum, Family Law Amendment (Family Violence and Other Measures) Bill 2018 (Cth) 17.
110 See, eg, *Batistatos v Roads and Traffic Authority of NSW* (2006) 226 CLR 159.
111 See, eg, *Egbert v Egbert (No 2)* [2016] FamCA 663.
112 *Lindon v Commonwealth of Australia (No 2)* (1966) 136 ALR 136, 256.
113 CatholicCare Diocese of Broken Bay, *Submission 197*; Women's Council for Domestic and Family Violence Services WA, *Submission 182*; National Legal Aid, *Submission 163*; Western Sydney CLC, *Submission 8*.
114 Section 45A is in div 3 of pt V and s 102QB is in div 2 of pt XIB of the *Family Law Act 1975* (Cth).
115 Family Court of Australia, *Submission 68*.

such an order is that the person subject to the order must not institute proceedings or serve documents on the party without leave of the court.[116]

8.72 This power was not available under s 118[117] of the Act and is not available under s 45A of the Act.

8.73 The Family Court argued that powers to make orders against a party to prevent them from instituting further proceedings and serving documents on the other party without leave of the court should also be available where powers under former s 118 (now s 45A) are exercised. This argument reflects a concern to address cases where 'one party oppresses the other by repetitive filing of applications and the serving of those applications on the other party', an abuse of process that 'can have a deleterious effect on [the oppressed party's] mental status and consequently their parenting capacity'.[118]

8.74 The ALRC considers it is appropriate that these powers be available under both sets of unmeritorious proceedings provisions.

Should the requirement of frequency be changed?

Question 8–3 Should the requirement for proceedings to have been instituted 'frequently' be removed from provisions in the *Family Law Act 1975* (Cth) setting out courts powers to address vexatious litigation? Should another term, such as 'repeated' be substituted?

8.75 Section 102QB requires the court to be satisfied that a person has 'frequently' instituted or conducted vexatious proceedings in Australian courts or tribunals. The ALRC is interested in stakeholder views about the extent to which the requirement for frequency inhibits the exercise of the power. Case law considering the meaning of term 'frequently' indicates that the assessment is not made on an 'arithmetic' basis, but with regard to the quality and nature of the proceeding.[119]

8.76 Where orders have been made under s 102QB, the cases demonstrate that an exceedingly long litigation history is usually relevant. Examples include:

- A ten year litigation history involving a father who had had a vexatious litigant order made against him by the Supreme Court of Queensland, family violence order proceedings in state courts, a family report recommendation that the father spend no time at all with the couple's children and a judicial finding that the father's behaviour was intended to intimidate the mother's lawyers into ceasing to act for her.[120] When an order under s 102QB was made in 2017, it was noted

116 *Family Law Act 1975* (Cth) s 102QD(1).
117 It was removed when s 102QB was implemented.
118 Family Court of Australia, *Submission 68*.
119 *Potier v Attorney General (NSW)* (2015) 89 NSWLR 284, 116; applied in for eg *Grant and Aiden (No 2)* [2018] FamCA 304.
120 *Xuarez & Vitela* [2012] FamCA 574.

that the application in the Supreme Court detailed more than 24 proceedings since 2009[121] and an application for security of costs in 2009 referred to 32 other proceedings in other courts;[122] and

- A nine year old girl had been the subject of litigation between her parents since shortly after her birth. A trial judge in 2012 had found that spending unsupervised time with her father would involve an unacceptable risk of harm due to behaviours raising a psychological risk of harm in addition to 'aggressive and violent physical behaviour'.[123] In 2017, an order under s 102QB was made against the father in light of 14 unsuccessful Family Court applications,[124] proceedings in other courts including the Family Court, District Court and Supreme Court, and findings by the judge that the father's conduct in relation to his applications amounted to abuse of process, pursuit of applications without reasonable grounds, conducting proceedings so as to harass and annoy the mother and pursuit of proceedings for a wrongful purpose.[125]

8.77 The ALRC requests stakeholder views on whether the term 'frequently' should be removed from the provision.

Unmeritorious proceedings: relevant considerations

Proposal 8–5 The *Family Law Act 1975* (Cth) should provide that, in considering whether to deem proceedings as unmeritorious, a court may have regard to evidence of a history of family violence and in children's cases must consider the safety and best interests of the child and the impact of the proceedings on the other party when they are the main caregiver for the child.

8.78 The ALRC also proposes that the *Family Law Act* should provide that, in considering whether to deem proceedings as unmeritorious, a court may have regard to evidence of a history of family violence and in children's cases must consider the safety and best interests of the child and the impact of the proceedings on the other party. This would ensure that courts making orders in relation to vexatious litigation consider:

- the safety and best interests of children and the impact of the proceedings on their caregiver when the orders relate to parenting matters; and
- any history of family violence in parenting and property and financial matters.

121 *Xuarez & Vitela (No 3)* [2017] FamCA 1108, [37].
122 Ibid [36].
123 *Collins & Ricardo* [2012] FamCA 11, [267].
124 *Collins & Ricardo* [2017] FamCA 882, [119].
125 Ibid [133].

Having regard to any history of family violence

8.79 The discussion earlier in this chapter established the degree of concern that stakeholders expressed in submissions about the misuse of systems and processes as a means of perpetuating family violence.

8.80 In connection with courts' powers to dismiss unmeritorious proceedings, submissions also raised concern about the possibility that s 45A of the *Family Law Act* (summary dismissal powers) might operate to the detriment of people who have experienced family violence but are without legal representation and are unable to adequately formulate their claim. [126]

8.81 At the same time, there was significant stakeholder concern about the impact that continued litigation has on the ability of people who have experienced family violence to recover and provide effective care for their children. [127] These concerns are already acknowledged in court decisions [128] and the ALRC considers that greater legislative recognition should be accorded to them.

8.82 In the context of these concerns, the ALRC considers it appropriate that the revision of the unmeritorious proceedings provisions include provision that courts may 'consider any history of family violence' involving the parties when considering exercising its powers under the provisions.

8.83 The proposal will encourage focus on the overall context in which the proceedings are taking place and would be relevant to both parenting and property matters. Together with the proposal to amend the definition of family violence to include misuse of systems and processes (Proposal 8–3), this change should mean that evidence would be placed before the court that supports a holistic assessment of the pattern of behaviour involved in the matter and the extent to which engagement with court and other dispute resolution and administrative systems is genuine or unmeritorious.

Best interests of children and protection of parenting capacity

8.84 Submissions to this Inquiry also evidenced a clear concern for the implications for children of both misuse of systems and processes and vexatious litigation specifically. There is long-standing recognition that, as an area where the paramount interests are those of children, not the adult parties, children's proceedings are different from conventional *inter partes* litigation. [129] In *M v M*, the High Court held that in proceedings involving parenting matters, courts are concerned with 'promot[ing] and protect[ing] the interests of the child' rather than enforcing a 'parental right'. [130]

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126 Aboriginal Legal Service of Western Australia, *Submission 64*; Women's Legal Services Australia, *Submission 45*; Central Australian Women's Legal Service, *Submission 24*.

127 See, eg, Australian Psychological Society, *Submission 55*.

128 See, eg, *Collins & Ricardo* [2017] FamCA 882, 85–89.

129 *M v M* (1988) 166 CLR 69, 76 (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ).

130 Ibid [20].

8.85 In this context, the ALRC considers that greater focus on the interests of children and their caregivers in matters involving unmeritorious proceedings is warranted.

8.86 To achieve this end, the ALRC proposes the inclusion of two additional considerations to guide the exercise of judicial discretion in exercising powers under the reformed unmeritorious proceedings provisions in children's matters namely:

- the safety and best interests of children; and
- the impact of proceedings on the other party where they are the main caregiver for the children involved.

8.87 This aspect of the proposal also reflects s 69ZN(3) of the *Family Law Act*,[131] requiring the court to consider the needs of the child concerned and the impact that the conduct of the proceedings may have on them, including through having an adverse impact on the wellbeing of the other party.

Costs orders

Question 8–4 What, if any, changes should be made to the courts' powers to apportion costs in s 117 of the *Family Law Act 1975* (Cth)?

8.88 The submissions evidence significant stakeholder concern about the personal and systemic cost of unmeritorious proceedings in the family law system, but there was limited discussion of how this should be addressed. Some submissions suggested more frequent use of costs orders,[132] pursuant to the court's discretion to depart from the ordinary position where each party bears their own costs.[133] The court may consider a range of factors in making an order for costs, including the conduct of the parties to the proceedings, compliance with previous orders of the court, whether a party has been wholly unsuccessful in proceedings and the terms of and response to settlement offers.

8.89 In the absence of systematic evidence in relation to existing practices under this costs regime, and their capacity to deter and address unmeritorious proceedings, the ALRC considers that there are likely to be inherent limitations on the capacity of a costs regime to address abuse of process in the context of family violence. While recognising the importance of costs as a 'financial sanction on parties who conduct litigation without reasonable cause',[134] the ALRC considers that the primary mechanism for addressing unmeritorious proceedings should be explicit statutory powers rather than costs.

8.90 There are several justifications for this position. In addition to the principles of transparency and accessibility, a practical consideration is of significant influence:

131 *Family Law Act 1975* (Cth) pt VII div 12A principle 1.
132 Law Council of Australia, *Submission 43*.
133 *Family Law Act 1975* (Cth) s 117(2).
134 Australian Law Reform Commission, 'Costs Shifting - Who Pays for Litigation' (1995) [11.5].

some litigants, especially self-represented litigants, will not have the means to bear any costs at all[135] and cost recovery proceedings may simply provide a further avenue for abuse of process. Further, costs orders may be avoided if a matter is eventually settled.

8.91 Some submissions suggested there was insufficient use of existing powers to make costs orders and argued for changes to costs provisions.[136] The Australian Bar Association, for example, argued for additional provisions supporting costs orders against parties who have:

> a) not complied with rules of court or court directions; b) not been ready to proceed when required; or c) improperly or unnecessarily caused another party to incur legal costs.[137]

8.92 In 1995, the ALRC report *Costs Shifting—Who Pays for Litigation*[138] recommended changes to the costs regime, which is presently in the same form as it was at that time. The recommended changes involved maintaining the starting point that each party should bear their own costs, subject to disciplinary and case management orders and orders for costs in favour of a party where the court is satisfied that the order is necessary to permit that party to present his or her case properly or to negotiate a fair settlement.[139]

8.93 The ALRC is interested in hearing the views of other stakeholders in relation to amendments to the costs provisions in s 117 of the *Family Law Act* or other measures to increase the use of costs orders as a disincentive to litigation being pursued in illegitimate circumstances.

Sensitive records

8.94 Presently, records created in confidential processes, such as counselling and medical consultations, may be subpoenaed and admitted into evidence in family law proceedings. There are no special provisions in the *Family Law Act* or court rules that deal with these records. Courts have discretion as to whether and how they are admitted.

8.95 The ALRC proposes stronger protections for the use in family law proceedings of records created through confidential processes. The proposal concerns processes such as medical and psychological services where the person providing the service ordinarily owes confidentiality to the person receiving the service. The proposals relate to processes outside those that currently are confidential[140] or inadmissible[141] in family law proceedings because they are provided by family counsellors.[142]

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135 See, eg, *Haykal & Krawiec (No 2)* [2015] FamCA 266.
136 See, eg, Bar Association of Queensland, *Submission 80*.
137 Australian Bar Association, *Submission 13*.
138 Australian Law Reform Commission, above n 134.
139 Ibid rec 18.
140 *Family Law Act 1975* (Cth) s 10D.
141 Ibid s 10E.
142 Services provided by family counsellors within the meaning of s 10C(1) attract these protections.

8.96 The ALRC proposes that courts should be required to assess the potential evidentiary value of the records against the potential for harm to the person the records involve in determining whether they should be used in family law proceedings. Where the records relate to a confidential process involving a child, the child's best interests should be the guiding principle for the court. The proposals are intended to provide stronger safeguards for the protection of these records.

8.97 The ALRC proposes:

- inserting a provision into the *Evidence Act 1995* (Cth) or the *Family Law Act* to require courts to consider the harm that could occur if the records are used in a court process;
- providing that where the records are those of a child, their safety and best interests are the paramount consideration in deciding whether a subpoena should be issued and whether and how the records should be used in court proceedings;
- a party should be required to ask the court for permission to request the production of records and ensure the other party has notice of the request; and
- courts, legal bodies and medical and psychological bodies should work together to develop guidelines for managing these issues.

Power to exclude evidence of protected confidences

Proposal 8–6 The *Family Law Act 1975* (Cth) should provide that courts have the power to exclude evidence of 'protected confidences': that is, communications made by a person in confidence to another person acting in a professional capacity who has an express or implied duty of confidence. The Act should provide that:

- Subpoenas in relation to evidence of protected confidences should not be issued without leave of the court.
- The court should exclude evidence of protected confidences where it is satisfied that it is likely that harm would or might be caused, directly or indirectly, to a protected confider, and the nature and extent of the harm outweighs the desirability of the evidence being given. Harm should be defined to include actual physical bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm (such as shame, humiliation and fear).
- In exercising this power, the court should consider the probative value and importance of the evidence to the proceedings and the effect that allowing the evidence would have on the protected confider.

- In family law proceedings concerning children, the safety and best interests of the child should be the paramount consideration when deciding whether to exclude evidence of protected confidences. Such evidence should be excluded where a court is satisfied that admitting it would not promote the safety and best interests of the child.
- The protected confider may consent to the evidence being admitted.
- The court should have the power to disallow such evidence on its own motion or by application of the protected confider or the confidant. Where a child is the protected confider, a representative of the child may make the claim for protection on behalf of the child.
- The court is obliged to give reasons for its decision.

8.98 Proposal 8–6 responds to concerns about sensitive records, including counselling[143] and therapeutic records, being used in family law proceedings. Presently, legislation and court rules do not treat this type of evidence any differently to any other type of evidence in family law proceedings. Evidence of this nature is sought and admitted regularly. When such documents are produced under a subpoena, courts sometimes place restrictions on who may look at them and how they may be used.[144] These restrictions are applied at the discretion of the court if a party makes a request for them, after consideration of the evidentiary and due process consequences of the requested restrictions.

8.99 However, in state and territory legislation in recent years, protections consistent with Proposal 8–6 have been introduced to recognise the public interest in ensuring that evidence generated in confidential processes are used in court processes only when evidentiary value outweighs the possibility of harm to the person whose confidence is being breached.

8.100 Aspects of Proposal 8–6 are modelled on div 1A and div 1B in pt 3.10 of the *Evidence Act 1995* (NSW). Jurisdictions that have adopted the same approach in recent years include the ACT[145] and Tasmania.[146] Some jurisdictions have even stronger provisions providing immunity from the admission of sexual assault counselling records in criminal proceedings without the consent of the victim.[147]

8.101 The proposals are consistent with a previous recommendation by the ALRC in 2006 in the *Uniform Evidence Law Report* 102.[148] At that time, the ALRC recognised

143 This is not intended to refer to family counsellors within the meaning of s 10C of the *Family Law Act 1975* (Cth), as s 10D and s 10F already provide confidentiality and protection from admissibility.
144 See, eg, *Douglas & Mauldon* [2015] FCCA 2217.
145 *Evidence Act 2011* (ACT) s 126B.
146 *Evidence Act 2001* (Tas) s 126B.
147 See, eg, *Evidence Act 2001* (Tas) s 127B.
148 Australian Law Reform Commission; New South Wales Law Reform Commission; Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC Report No 102 (2006) rec 15.1 and rec 15.2.

the public interest ensuring that people were not deterred from seeking therapeutic and other assistance. Consistent with its earlier position in 2006, the ALRC proposes that there be recognition of the special character of proceedings involving children[149] and seeks to strengthen protection of their therapeutic records.

8.102 Since the ALRC's recommendations in 2006, the evidence base on the damaging impact of family violence and other forms of abuse on adults and children has strengthened.[150] Research has reinforced the importance of access to therapeutic assistance to aid recovery.[151] Further, a recent AIFS study on children in separated families has highlighted the importance of therapeutic counselling to them, demonstrating that it is one of the most valued sources of support for children whose parents are separated.[152] Some stakeholders have also suggested the 2012 family violence reforms to the *Family Law Act* have increased the extent to which sensitive records are sought due to heightened focus on family violence and child safety.[153]

8.103 A range of concerns about the use of these records have been raised in submissions, research and consultations. These include:

- that the potential use of such records in court proceedings creates uncertainty about the scope of confidentiality that can genuinely be offered in therapeutic relationships;
- such records are likely to be of limited probative value because they are not produced for forensic purposes;[154]
- people who need therapeutic assistance may be deterred from seeking it because their confidentiality may not be maintained;[155]
- professionals and organisations who maintain such records may not be aware that they can object to the production of the material;[156] and
- that responding to subpoena requests absorbs significant time and resources outside of the core role of these professionals and organisations.

8.104 Submissions to this Inquiry also revealed significant concern among stakeholders about sensitive records of adult and child victims of abuse or family violence being subpoenaed. Professionals who work with victims of family violence and child abuse expressed concern about the impact on therapeutic processes and outcomes for clients of the use of their therapeutic records in family court proceedings.

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149 *M v M* (1988) 166 CLR 69, 76 Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ.
150 See, eg, Kaspiew et al, 'Domestic and Family Violence and Parenting: Mixed Method Insights into Impact and Support Needs: Final Report', above n 70.
151 Ibid.
152 Rachel Carson et al, 'Children and Young People in Separated Families: Family Law System Experiences and Needs' (Australian Institute of Family Studies, 2018).
153 Women's Legal Service NSW, *Sense and Sensitivity: Family Law, Family Violence and Confidentiality* (2016).
154 Ibid 5.
155 Anglicare SA, *Submission 2*.
156 Women's Legal Service NSW, above n 153.

They argued that the use of these records in legal proceedings can cause additional trauma.

8.105 The Royal Australian and New Zealand College of Psychiatrists submitted that:

> [w]hen their clinical records are disclosed against their will, patients frequently feel ashamed, helpless and stigmatised. Successful therapy may become impossible in such circumstances; the relationship of trust with the psychiatrist may be permanently damaged, and in some cases, patients may be re-traumatised by the forcible disclosure.[157]

8.106 More specifically, there is concern among professionals who work with adult and child victims of family violence and abuse that access to these records may be sought through subpoenas in family law proceedings as a means of perpetuating further abuse.[158] The Australian Psychological Society, for example, submitted that:

> The APS is particularly concerned about the misuse of subpoenas of confidential psychological therapy records or files, which has become a common event in court proceedings and could be considered a form of abuse. For example, some litigants ask their lawyer to subpoena therapy notes so they can obtain access to confidential material they can then use to continue to intimidate their ex-partner.[159]

8.107 Women's Legal Service NSW operates a Sexual Assault Counselling Privilege Service and also provides support to counsellors and therapists who provide services to women and child involved in family law and child protection proceedings. It submitted, that in its experience, subpoenas for counselling records are readily issued, with courts finding they meet the threshold requirement of 'apparent relevance'.[160]

8.108 Existing discretionary safeguards, such as restrictions on the right of parties (rather than their legal representatives) to examine subpoenaed material,[161] or provision for the material to be initially viewed only by the judge so that weight and relevance may be determined later in proceedings, are considered by some to provide insufficient protection.[162]

8.109 The ALRC proposes making it clear that the person wanting to use the records as evidence has to satisfy the courts that this is justifiable and to ask the courts for permission to issue a subpoena. Even where a subpoena is issued, the person whose records are concerned may still object to the records being used in court or to ask for special conditions to be applied, such as only lawyers and the court being allowed to look at them. Where the records involve a child, a legal representative may raise these arguments on their behalf.

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157 The Royal Australian and New Zealand College of Psychiatrists, *Submission 18*.

158 National Legal Aid, *Submission 103*; CatholicCare Sydney, *Submission 79*; National Family Violence Prevention Legal Services, *Submission 77*; Court Network, *Submission 49*; Women's Legal Services Australia, *Submission 45*; Anglicare SA, *Submission 2*.

159 Australian Psychological Society, *Submission 55*.

160 *Hatton v The Attorney General (Cth)* [2000] FLC 93-038 49.

161 See, eg, *Family Law Rules 2004* (Cth) r 15.31

162 Women's Legal Service NSW, above n 153, 21–22.

8.110 *Family Law Rules* already provide that a subpoena can be issued only with permission from the court,[163] other than in applications for interim, procedural, ancillary or other incidental proceedings.[164] The ALRC proposes that at any stage times court permission be required to issue a subpoena relating to protected confidences.

8.111 The Family Court adopted a position consistent with the implementation of s 126B of the *Evidence Act 1995* NSW in its submission to this Inquiry.[165]

8.112 The ALRC proposes that judicial discretion be maintained in balancing a range of relevant considerations on a case by case basis, while recognising the potential for harm to outweigh the probative value of therapeutic records.

Guidelines in relation to sensitive records

Proposal 8–7 The Attorney-General's Department (Cth) should convene a working group comprised of the family courts, the Family Law Section of the Law Council of Australia, the Royal Australian and New Zealand College of Psychiatrists, the Australian Psychological Society, the Royal Australian College of General Practitioners, Family & Relationship Services Australia, National Legal Aid, Women's Legal Services Australia and specialist family violence services peak bodies and providers to develop guidelines in relation to the use of sensitive records in family law proceedings. These guidelines should identify:

- principles to consider when a subpoena of sensitive records is in contemplation;
- obligations of professionals who are custodians of sensitive records in relation to the provision of those records;
- processes for objecting to a subpoena of sensitive records; and
- how services and professionals need to manage implications for their clients regarding the possibility that material may be subpoenaed and any potential consequences for their clients if a subpoena is issued.

8.113 There is significant concern among stakeholders about the use of sensitive records in family law proceedings, as outlined above.

8.114 Very significant concerns are expressed by professionals in relation to the impact that the possibility (and actuality) of the use of therapeutic records in court processes may have on therapeutic processes and outcomes for clients.[166]

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163 *Family Law Rules 2004* (Cth) r 15.17(2).
164 Ibid r 15.18(a).
165 Family Court of Australia, *Submission 68*.
166 Uniting, *Submission 162*; The Royal Australian and New Zealand College of Psychiatrists, *Submission 18*.

8.115 Divergent views as between legal stakeholders on the one hand and providers of therapeutic services on the other are evident in this area. The collaborative development of guidelines will assist not only in providing greater guidance for legal and non-legal professionals in this area but also has the potential to develop better understanding and common ground among these groups. This proposal broadens a suggestion made by the Australian Psychological Society for guidelines to be developed:

> as to when therapeutic records can be subpoenaed for family court matters, and to identify mechanisms for the courts to consider the possible consequences of compliance with the subpoena, including the impact on the family or children involved.[167]

8.116 It is also consistent with a suggestion by Women's Legal Services NSW *Sense and Sensitivity* Report to develop guidelines to inform the decision making process in relation to subpoena of sensitive records.[168] Among the suggested topics for guidelines in this report were:

- A presumption that there is always potential for a detrimental impact on the therapeutic relationship when sensitive records are accessed, particularly in a litigation context.
- Clarification of the type of sensitive records to be protected.
- Acknowledgement that parties can seek production of their own therapeutic records with restrictions on access by a perpetrator as required.[169]

167 Australian Psychological Society, *Submission 55*.

168 A range of other organisations supported the approach of Women's Legal Services NSW in *Sense and Sensitivity*: see, eg, National Family Violence Prevention Legal Services, *Submission 77*; Women's Legal Services Australia, *Submission 45*.

169 Women's Legal Service NSW, above n 153 Proposal 8.

9. Additional Legislative Issues

Contents

Summary

9.1 In addition to the issues of complexity and comprehensibility of the *Family Law Act 1975* (Cth) as a whole (see Chapter 3), submissions also identified concerns about specific aspects of the Act. These included issues relating to supported decision making, the welfare jurisdiction,[1] and the definition of 'family member'.

9.2 There is currently no provision in the *Family Law Act* for decision making supports to be provided to people with disability. The ALRC proposes that a supported decision making framework be included in the Act to bring it into alignment with the National Decision Making Principles recommended by the ALRC in its 2014 Report, *Equality, Capacity and Disability in Commonwealth Laws* (*Equality, Capacity and Disability* report).[2] This proposal is intended to ensure that decisions concerning people with disability in the family law system are made in accordance with their will, preference and rights.

9.3 The *Family Law Act* grants a supervisory jurisdiction over the exercise of parental responsibility for children (the welfare jurisdiction). Submissions identified concerns about the operation of the welfare jurisdiction, particularly in relation to the authorisation of sterilisation of young people with disability, and authorisation of

1 The Family Court of Western Australia also exercises the welfare jurisdiction.

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

medical procedures on intersex children. Given the complexity of these issues, the ALRC asks for further input on an appropriate response.

9.4 Finally, the definition of 'family member' in the *Family Law Act* currently covers a range of relationships based on legal marriage, cohabitation and adoption. Submissions suggested that this definition may not be appropriate for the range of significant relationships that involve the care of children among Aboriginal and Torres Strait Islander people. The ALRC proposes that the definition be amended to be inclusive of Aboriginal and Torres Strait Islander concepts of family and asks for further input on how such a provision should be worded.

Supported decision making

9.5 Assistance with decision making occurs in many different ways and for people with all levels of decision making ability, usually involving family members, friends or other supporters. 'Supported' and 'substitute' decision making reflect different ideas; and a 'supporter' is different from a 'substitute' decision maker.

9.6 As the ALRC's *Equality, Capacity and Disability* report noted, recent years have seen a shift in preference for the language and practice of 'supported' rather than 'substitute' decision making.[3] Supported decision making emphasises the ability of a person to make decisions, with any support necessary to make and communicate their decisions. In the *Equality, Capacity and Disability* report, the ALRC concluded that this preference was best expressed through developing a new lexicon for the roles of supporters and substitutes. The ALRC considered that the crucial issue was how to advance, to the extent possible, supported decision making in a federal system.

Legal frameworks for supported decision making

9.7 The right to supported decision making is enshrined in the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD).[4] Article 5 (entitled 'Equality and non-discrimination') relevantly requires States Parties to: recognise that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law; prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds; and take all appropriate steps to ensure that reasonable accommodation is provided. Article 12 (entitled 'Equal recognition before the law') underpins the ability of people with disability to achieve many of the other rights in the CRPD, and relevantly obliges States Parties to:

- recognise the right of people with disability to enjoy legal capacity 'on an equal basis with others in all aspects of life';[5]

3 Ibid.

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

5 Ibid art 12(2).

- 'take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity';[6] and
- ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse. [7]

9.8 By ratifying the CRPD, Australia accepts its obligations to protect these rights for people with disability.

9.9 On 9 March 2018, the United Nations Committee on the Rights of Persons with Disabilities adopted General Comment No. 6 (2018) on equality and non-discrimination to clarify the obligations of States Parties regarding non-discrimination and equality as enshrined in art 5 of the CRPD. The General Comment provides that in order to ensure consistency between articles 5 and 12 of the CRPD, States Parties should:

> Reform existing legislation to prohibit discriminatory denial of legal capacity, premised on status-based, functional or outcome-based models. Where appropriate, replace those with models of supported decision-making, taking into account universal adult legal capacity without any form of discrimination[8]

9.10 Australia made an Interpretative Declaration upon ratifying the CRPD, including the following text relevant to art 12:

> Australia declares its understanding that the CRPD allows for fully supported or substituted decision making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards.[9]

9.11 The Interpretative Declaration is intended to outline the Australian Government's understanding of its obligations under the Article. There are differing views about the effect of Australia's Interpretative Declaration, particularly in relation to the role of substitute decision making.[10] Some stakeholders and commentators suggest that the Article does not allow for substitute decision making under any circumstances. Others argue it allows for substitute decision making, but only in specific circumstances, as a measure of last resort, subject to safeguards, and when in the best interests of the person with disability.

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6 Ibid art 12(3).
7 Ibid Article 12(4).
8 Committee on the Rights of Persons with Disabilities, *General Comment No. 6*, UN Doc CRPD/C/GC/6 (9 March 2018) para 49.
9 *Convention on the Rights of Persons with Disabilities: Declarations and Reservations (Australia)*, Opened for Signature 30 March 2007, 999 UNTS 3 (Entered into Force 3 May 2008).
10 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014).

9.12 In relation to Australia's compliance with art 12, Australia's Civil Society Report observed:

> A number of laws, policies and practices deny or diminish recognition of people with disability as persons before the law, or deny or diminish a person's ability to exercise legal capacity. Substitute decision making arrangements vary from jurisdiction to jurisdiction and are a key source for significant and widespread breaches of human rights, especially against those who may need support in decision making.[11]

9.13 These issues are discussed further in this chapter in relation to the proposals about litigation representatives.

Legal capacity and decision making capacity

9.14 It is important when considering supported decision making to distinguish between 'legal capacity' and 'decision making capacity'. Decision making capacity refers to 'a person's cognitive capability to make a decision'.[12] Mental Health Australia and the ACT Disability, Aged and Carer Advocacy Service have stated:

> In medico-legal models it might be measured according to a judgment of 'sound mind, memory and understanding'; or of a person's ability to understand and assess information, risks and outcomes of a particular decision at a particular time.[13]

9.15 A person who is determined to have impaired decision making capacity may become subject to guardianship or other formal substitute decision making regimes.

9.16 Legal capacity differs from decision making capacity in that legal capacity refers to 'a person's right to be recognised as both a holder [legal personhood] and user [legal agency] of legal rights'.[14]

9.17 It is recognised that the intent of the CRPD is to acknowledge that all people have the right to enjoy legal capacity on an equal basis, and that all people are able to exercise their legal capacity when they have the right supports. In this context, supported decision making can be seen as a mechanism to support a person to retain and exercise legal capacity if their decision making is impaired.[15]

Supported decision making in Australia

9.18 In the *Equality, Capacity and Disability* report, the ALRC recommended a Commonwealth Decision Making Model that was framed by a set of National Decision Making Principles. The aim of these principles is to guide reform of Commonwealth, state and territory laws.

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11 Disability Rights Now, *Civil Society Report to the United Nations on the Rights of Persons with Disabilities* (2012).

12 Mental Health Australia and The ACT Disability, Aged and Carer Advocacy Service, *Supported Decision Making, Psychosocial Disability and the National Disability Insurance Scheme* (2016).

13 Ibid.

14 McSherry, Bernadette, 'Legal Capacity under the Convention on the Rights of Persons with Disabilities' (2012) 20 *Journal of Law and Medicine* 22 cited in Ibid.

15 Mental Health Australia and The ACT Disability, Aged and Carer Advocacy Service, above n 12.

9.19 The National Decision Making Principles are:

- all adults have an equal right to make decisions that affect their lives and to have those decisions respected;
- persons who require support in decision making must be provided with access to the support necessary for them to make, communicate and participate in decisions that affect their lives;
- the will, preferences and rights of persons who may require decision making support must direct decisions that affect their lives; and
- laws and legal frameworks must contain appropriate and effective safeguards in relation to interventions for persons who may require decision making support, including to prevent abuse and undue influence.

9.20 The emphasis is on the autonomy and independence of people with disability who may require support in making decisions—their will, preferences and rights must drive decisions that they are supported in making, and that others may make on their behalf. The National Decision Making Principles provide a conceptual overlay, consistent with the CRPD, for a Commonwealth Decision Making Model that encourages supported decision making.

9.21 Each Principle is accompanied by a set of guidelines to guide reform of Commonwealth, state and territory laws.

Implementation of the National Decision Making Principles

9.22 There has been recognition in recent literature that the National Decision Making Principles could act as a catalyst for facilitating important law reform over subsequent decades and consideration of how they may be used by communities, policy-makers and governments to promote 'world-leading legal changes to ensure that individuals with disability have an equal right to make decisions for themselves'.[16] Researchers have claimed that:

> If the CRPD is a 'signpost' towards 'supported decision-making', the National Principles shows the arterial routes more clearly. These arterial routes are the broad legal policies that should be followed in legislative regimes governing decision-making—so that, for example, legislation recognises the right to support, the concept of a supporter and a representative, and defines their roles and duties in the appropriate way.[17]

9.23 At a Commonwealth level, it has been recognised that the *National Disability Insurance Scheme Act 2013* (Cth) (NDIS Act) incorporates some elements of supported decision making[18] but that these should be augmented by providing legal recognition

16 Bruce Alston, 'Towards Supported Decision-Making: Article 12 of the Convention on the Rights of Persons with Disabilities and Guardianship Law Reform' (2017) 35(2) *Law in Context* 21.

17 Ibid 30.

18 Alston, above n 16. The author refers to the following: *National Disability Insurance Scheme Act 2013* (Cth) s 80(1); *National Disability Insurance Scheme (Nominees) Rules 2013* (Cth) rr 3.1, 5.3, 5.8, 5.10.

for supporters, and associated safeguards.[19] Recommendations have been made about how supported decision making could be more fully implemented through the NDIS.[20] McSherry and Butler argue that:

> The reform of service delivery by offering individually tailored formal and informal decision-making support and a greater range of care and treatment options should be viewed as essential to implementing the support model envisaged by Art 12.[21]

9.24 The ALRC further considered the issue of supported decision making in its 2017 report, *Elder Abuse—A National Legal Response*, and made a recommendation that the Australian Government should further consider its earlier recommendations that aged care laws and legal frameworks should be amended consistently with the National Decision Making Principles.

9.25 Australia is being recognised as a world leader in developing research programs to find effective ways to provide support for people with decision making difficulties.[22] A number of projects and pilots have been undertaken or are currently underway to explore how supported decision making can work in practice.[23] However, others have noted that 'while various programs of decision-making support have been tried, evaluations are few and methodological rigor is largely absent'.[24]

Supported decision making in the family law system

Proposal 9–1 The *Family Law Act 1975* (Cth) should include a supported decision making framework for people with disability to recognise they have the right to make choices for themselves. The provisions should be in a form consistent with the following recommendations of the ALRC Report 124, *Equality, Capacity and Disability in Commonwealth Laws:*

- Recommendations 3–1 to 3–4 on National Decision Making Principles and Guidelines; and
- Recommendations 4–3 to 4–5 on the appointment, recognition, functions and duties of a 'supporter'.

Proposal 9–2 The Australian Government should ensure that people who require decision making support in family law matters, and their supporters, are provided with information and guidance to enable them to understand their functions and duties.

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19 Ibid.
20 Mental Health Australia and The ACT Disability, Aged and Carer Advocacy Service, above n 12.
21 Bernadette McSherry and Andrew Butler, 'Support for the Exercise of Legal Capacity: The Role of the Law' (2015) 22 *Journal of Law and Medicine* 739, 744 cited in Alston, above n 16.
22 Jan Killeen, 'Supported Decision making: Learning from Australia' (Winston Churchill Memorial Trust, Travel Fellowship 2016).
23 Ibid; Mental Health Australia and the ACT Disability, Aged and Carer Advocacy Service, above n 12.
24 Terry Carney, 'Supported Decision-Making in Australia: Meeting the Challenge of Moving from Capacity to Capacity-Building?' (2017) 35(2) *Law in Context* 44.

9.26 There is currently no provision in the *Family Law Act* for decision making supports to be provided to people with disability. Rather, the rules of the family courts make provision for the appointment of a case guardian or litigation guardian.

9.27 The submissions to this Inquiry raised concerns about this approach. The Office of the Public Advocate in Victoria, for example, criticised the current litigation guardian model in the family courts as being a form of substituted decision making.[25] There was also support in the submissions for the replacement of this approach with a supported decision making framework for family law matters.[26]

9.28 In response, the ALRC proposes that the *Family Law Act* be amended to include a supported decision making framework that reflects the National Decision Making Principles set out in the ALRC's *Equality, Capacity and Disability* report.

9.29 This proposal is consistent with recommendations 3–1 to 3–4 in the ALRC's *Equality, Capacity and Disability* report that relate to the principles contained in the National Decision Making Principles and the supporting Guidelines.

9.30 Recommendation 3–1 of the *Equality, Capacity and Disability* report provides that the intent of reforming Commonwealth, state and territory laws and legal frameworks in accordance with the National Decision Making Principles and Guidelines is to ensure that:

- supported decision making is encouraged;
- representative decision makers are appointed only as a last resort; and
- the will, preferences and rights of persons direct decisions that affect their lives.

9.31 Recommendations 3–2 to 3–4 set out Support Guidelines, Will, Preferences and Rights Guidelines, and Safeguards Guidelines.

9.32 Recommendations 4–3 to 4–5 in the *Equality, Capacity and Disability* report relate to the concept of a supporter, and their appointment, functions and duties.

9.33 The ALRC proposes that the *Family Law Act* should be amended in accordance with recommendation 4–3 in the *Equality, Capacity and Disability* report, to provide that:

- a person who requires decision making support should be able to choose to be assisted by a supporter, and to cease being supported at any time;
- where a supporter is chosen, ultimate decision making authority remains with the person who requires decision making support; and

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25 Office of the Public Advocate (Vic), *Submission 37*.

26 See Queensland Law Society, *Submission 221*; Australian Human Rights Commission, *Submission 217*; Advocacy for Inclusion, *Submission 90*; Public Advocate and Children & Young People Commissioner, ACT Human Rights Commission, *Submission 87*; Law Council of Australia, *Submission 43*; Office of the Public Advocate (Vic), *Submission 37*; People with Disability Australia (PWDA), *Submission 10* particularly supported the National Decision Making Principles.

- supported decisions should be recognised as the decisions of the person who required decision making support.

9.34 The ALRC also proposes that people who require decision making support, and their supporters, should be provided with information and guidance to enable them to understand their functions and duties. This proposal reflects recommendation 4–11 in the *Equality, Capacity and Disability* report.

9.35 Professor Terry Carney has discussed the role of evidence-based approaches in transitioning from substitute to supported decision making through capacity-building programs for supporters of people with cognitive impairments.[27]

9.36 Support for the implementation of the proposals would need to include:

- determinations about who can be appointed as supporters and any funding implications;
- consideration of the interaction with state and territory appointed decision makers;
- revision of policies, practices and guidelines across the family law system to include consistent guidance about supported decision making; and
- training and education for family law professionals about the supported decision making framework.

Litigation representatives in family law proceedings

Proposal 9–3 The *Family Law Act 1975* (Cth) should include provisions for the appointment of a litigation representative where a person with disability, who is involved in family law proceedings, is unable to be supported to make their own decisions. The Act should set out the circumstances for a person to have a litigation representative and the functions of the litigation representative. These provisions should be in a form consistent with recommendations 7–3 to 7–4 recommendations of ALRC Report 124, *Equality, Capacity and Disability in Commonwealth Laws*.

Proposal 9–4 Family courts should develop practice notes explaining the duties that litigation representatives have to the person they represent and to the court.

Proposal 9–5 The Australian Government should work with state and territory governments to facilitate the appointment of statutory authorities as litigation representatives in family law proceedings.

9.37 Including provisions in the *Family Law Act* about the appointment, functions, and duties of, litigation representatives will ensure that people with disability who do

27 Carney, above n 24.

not have the ability to conduct family law proceedings will be represented in a way that best protects their right to enjoy legal capacity.

Capacity to participate in civil proceedings

9.38 The capacity test for a person to participate in civil proceedings is different from the capacity test for decision making, which is referred to earlier in this chapter.

9.39 At common law, the capacity test for a person to participate in civil proceedings is the same as the test for a person to enter into legal transactions.[28] There is a presumption of capacity 'unless and until the contrary is proved'.[29]

9.40 The focus of the test is on the capacity of the person to understand they have a legal problem, to seek legal assistance about the problem, to give clear instructions to their lawyers, and to understand and act on the advice which they are given.[30] The test is issue-specific. That is, capacity must be considered in relation to the particular proceedings and their nature and complexity.

9.41 Litigation representatives are appointed when a person does not have capacity to conduct litigation. A litigation representative may also be known as a litigation guardian, case guardian, guardian *ad litem*, next friend, tutor or special representative. In broad terms, a litigation representative acts in the place of the person and is responsible for the conduct of the proceedings.

9.42 The circumstances in which a litigation representative may be appointed are set out in rules of court. In general, a litigation representative is appointed by the court, on the application of a party or an interested person, such as a parent or guardian or, sometimes, the person's own lawyer.

9.43 The federal family courts' rules provide for the appointment of litigation representatives as follows:

- a child or a person with a disability may start, continue, respond to, or seek to intervene in, a case only by a case guardian (Family Court);[31] or
- 'a person needs a litigation guardian in relation to a proceedings if the person does not understand the nature and possible consequences of the proceeding or is not capable of adequately conducting, or giving adequate instruction for the conduct of, the proceeding' (Federal Circuit Court of Australia).[32]

9.44 Litigation representatives can also be removed or substituted by the court, on the application of a party or on its own motion. There are no other review mechanisms for the conduct of a litigation representative, except to the extent that the representative's

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28 *Goddard Elliot v Fritsch* [2012] VSC 87.
29 *L v Human Rights and Equal Opportunity Commission* (2006) 233 ALR 432.
30 *Goddard Elliot v Fritsch* [2012] VSC 87.
31 *Family Law Rules 2004* (Cth) rule 6.08(1). Rule 6.08(2) provides that subrule (1) does not apply if the court is satisfied that a child understands the nature and possible consequences of the case and is capable of conducting the case.
32 *Federal Circuit Court Rules 2001* (Cth) rule 11.08(1).

conduct may be reviewed under state and territory guardianship laws, if the representative is also a guardian or administrator.

9.45 There is no obligation under common law or court rules for a litigation representative to make decisions that reflect the will, preferences and rights of the person represented. Rather, at common law, a litigation representative has a 'duty to see that every proper and legitimate step for that person's representation is taken' — which may be akin to a 'best interests' test.

9.46 A litigation representative has no obligation to consult or facilitate the participation of the person represented, except to the extent that such duties may be imposed by state or territory guardianship legislation (if the person is also a guardian or administrator).

9.47 Clearly, this is a departure from the preferred will and preferences approach to supported decision making recommended by the ALRC in its *Equality, Capacity and Disability* report and endorsed in this Discussion Paper.

9.48 A number of stakeholders expressed concern that litigation guardianship is a form of substitute decision making,[33] which is arguably inconsistent with the CRPD. For example, People With Disability Australia argued that:

> In its current state, the family law system does not reflect a CRPD compliant understanding of legal capacity...the Family Law Rules allow for case or litigation guardians to be appointed to perform substitute decision-making.[34]

A changed role for litigation representatives

9.49 There is clearly a need for a litigation representative to be appointed for some people with disability in the family law system. Submissions recognised that in some circumstances such an appointment is necessary.[35]

9.50 However, a re-conceptualisation of the role and duties of litigation representatives in family law proceedings is required so that their primary role is to support people with disability to exercise their legal capacity.

9.51 The Office of the Public Advocate (Vic) observed that:

> The appointment of a litigation guardian may be a measure that enables a person to be recognised as a person before the law, it may be a way to enable that person to enjoy legal capacity and the litigation guardian may be a form of support for a person to exercise legal capacity. But this framing of litigation guardianship in terms of the CRPD is not how we have traditionally conceived the litigation guardian's role.[36]

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33 See, eg, Advocacy for Inclusion, *Submission 90*; Office of the Public Advocate (Vic), *Submission 37*; People with Disability Australia (PWDA), *Submission 10*.

34 People with Disability Australia (PWDA), *Submission 10*.

35 See Advocacy for Inclusion, *Submission 90*; Office of the Public Advocate (Vic), *Submission 37*.

36 Office of the Public Advocate (Vic), *Submission 37*.

9.52 The Office of the Public Advocate (Vic) argued that the challenge is to bring Australia's traditional approach to litigation guardianship in line with Australian understandings about the CRPD.[37]

9.53 Advocacy for Inclusion stressed that a model for substituted decision making should never be used.[38] They proposed instead that a model of facilitated decision making be implemented, which would only be used as a last resort. Advocacy for Inclusion argued that facilitated decision making 'would be used when the person with disability's *current* will and preference cannot be ascertained, after all steps to ascertain them have been tried and a litigation guardian is to be appointed if *absolutely necessary*'.[39] The basis of the facilitated decision making model is that the person's legal capacity is given effect by a decision facilitator, who considers the person's will and preferences and human rights, rather than 'best interests'.[40]

9.54 The ALRC endorses the recommendation in its *Equality, Capacity and Disability* report that the appointment of litigation representatives in family law legislation should be in accordance with National Decision Making Principles and associated Guidelines.

9.55 It is critical that the appointment of litigation representatives is provided for in the primary legislation to ensure:

- that reforms are universally adopted in all family law proceedings;
- that the litigation representative provisions appropriately interface with reform proposals relating to supported decision making; and
- that there are clear understandings in the law about the roles and duties of litigation representatives.

Appointment of litigation representatives

9.56 The ALRC proposes that the *Family Law Act* be amended to provide that a person needs a litigation representative if the person cannot be supported to:

- understand the information relevant to the decisions that they will have to make in conducting proceedings, including in giving instructions to their legal practitioner;
- retain that information to the extent necessary to make those decisions;
- use or weigh that information as part of a decision making process; or
- communicate the decisions in some way.

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37 The Office of the Public Advocate proposed some models that could be drawn upon, such as the role of a supportive guardian in the *Guardianship and Administration Bill* before the Victorian Parliament, the supportive attorney role in Victoria's *Powers of Attorney Act 2014*, and the support person in Victoria's *Medical Treatment Planning and Decisions Act 2016*: see Ibid.

38 Advocacy for Inclusion, *Submission 90*.

39 Ibid.

40 Ibid.

9.57 This proposal reflects recommendation 7—3 in the ALRC's *Equality, Capacity and Disability* report. It represents a significant shift in the appointment of litigation representatives by requiring courts to consider the available decision making support in determining whether a person needs a litigation representative.

9.58 Existing law does not expressly enable the availability of support to be taken into account in assessing whether a litigation representative should be appointed. However, in some ways this concept can be seen as a manifestation of the current common law approach of assessing capacity in the context of the particular transaction or proceedings.[41]

Functions and duties of litigation representatives

9.59 The ALRC proposes that family law legislation should be amended to provide that litigation representatives must:

1. support the person represented to express their will and preferences in making decisions;
2. where it is not possible to determine the will and preferences of the person, determine what the person would likely want based on all the information available;
3. where 1. and 2. are not possible, consider the person's human rights relevant to the situation; and
4. act in a manner promoting the personal, social, financial and cultural wellbeing of the person represented.

9.60 This proposal reflects recommendation 7–4 in the ALRC's *Equality, Capacity and Disability* report and aligns with the facilitated decision making approach.

9.61 The ALRC further proposes that family courts should develop practice notes explaining the duties that litigation representatives have to the person they represent and to the court. This proposal reflects recommendation 7–5 in the ALRC's *Equality, Capacity and Disability* report.

Who should be appointed to the role of litigation representative?

9.62 The ALRC proposes that statutory authorities should be appointed as litigation representatives in family law proceedings.

9.63 The current difficulties in appointing litigation representatives in the family courts were raised in submissions.[42] The primary reason is the reluctance of individuals and authorities to undertake this work because of concerns about:

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

42 See, eg, National Legal Aid, *Submission 163*; Family Court of Australia, *Submission 68*; Law Council of Australia, *Submission 43*.

- the risk of costs orders being made against them if they accept an appointment as a litigation representative; and
- payment of the costs of litigation representatives.

9.64 The Law Council of Australia argued that:

> The most critical issue which currently adversely affects the ability of people with a disability to exercise their legal rights or to participate in the legal process under the Act, is the increasing unavailability of authorities or persons willing to accept appointment as litigation guardians in family law litigation.[43]

9.65 The Family Court drew the ALRC's attention to the submission made by the Court's former Chief Justice, the Hon Diana Bryant, to the ALRC's *Equality, Capacity and Disability* Inquiry.[44] In that submission, the then Chief Justice argued:

> It is abundantly clear to me that the current system is not working effectively and I encourage the Attorney-General and his Department to give urgent consideration to funding for case guardians' legal costs generally, where those costs cannot be met by the party, and to instituting a nomination process that enables case guardians to be quickly appointed where a suitable candidate is not available.[45]

9.66 The lack of available people to act as litigation representatives can have serious consequences for people with disability, significantly compromising their access to justice and leading to lengthy delays in resolving their family law issues.[46]

9.67 The benefits of appointing state and territory authorities to the role include that:

- they do not have the potential conflict of interest issues that others, such as family members, may have;
- they have appropriate skill sets for the role; and
- they should be able to be appointed without delay.

9.68 The ALRC anticipates that state and territory public guardians are best placed to take on the work of litigation representatives.

9.69 There was support in the submissions for statutory authorities to be appointed as litigation guardians in family law proceedings.[47] The Family Court, for example, stressed the importance of addressing the Court's continuing inability to be able to

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43 Law Council of Australia, *Submission 43*. Women's Legal Services Australia also noted the limited access to a case guardian when one is required: see Women's Legal Services Australia, *Submission 45*.

44 Family Court of Australia, *Submission 68*.

45 Chief Justice, Family Court of Australia, Submission to the Australian Law Reform Commission, *Issues Paper 44: Equality, Capacity and Disability in Commonwealth Laws* (17 January 2014).

46 The Australian Human Rights Commission referred to their *Equal Before the Law* report which found that people with disability often face barriers to participating in court, including the difficulty of being able to access the necessary supports, such as the timely appointment of a guardian: see Australian Human Rights Commission, *Submission 217*.

47 See, eg, Law Council of Australia, *Submission 43*. The Family Court of Australia recommended that a properly funded panel of qualified persons be established to undertake that role: Family Court of Australia, *Submission 68*.

make effective orders for the appointment of case guardians and recommended that a properly funded panel of qualified persons be established to undertake that role.[48]

9.70 National Legal Aid also agreed that the issue of availability of case guardians is a matter which would be most appropriately resolved by the Commonwealth, states and territories and their respective stakeholders.[49] It acknowledged that suggestions have been made that legal aid commissions are well placed to take on the role of administering case guardians, and set out several issues that would need to be further investigated or resolved if such a suggestion were pursued, including potential perceptions of conflict, indemnity issues, and the different nature of case guardian work to legal work.[50]

9.71 The concerns regarding orders for costs being made against statutory authorities accepting appointments as litigation representatives is an issue that is addressed in the Civil Law and Justice Legislation Amendment Bill 2018 (Cth), which is currently before the Federal Parliament.[51] That Bill contains a proposed amendment to insert a provision into the *Family Law Act* to prohibit the courts from making an order for costs against a guardian unless the court is satisfied that an act or omission of the guardian is unreasonable or has unreasonably delayed the proceedings.

9.72 NSW has a guardian *ad litem* scheme where the Office of the General Counsel of the Department of Justice administers appointments across participating courts and tribunals in NSW.

Supporting people with disability to use the system

Proposal 9–6 The Australian Government should work with the National Disability Insurance Agency (NDIA) to consider how referrals can be made to the NDIA by family law professionals, and how the National Disability Insurance Scheme (NDIS) could be used to fund appropriate supports for eligible people with disability to:

- build parenting abilities;
- access early intervention parenting supports;
- carry out their parenting responsibilities;
- access family support services and alternative dispute resolution processes; and
- navigate the family law system.

48 Family Court of Australia, *Submission 68*.
49 National Legal Aid, *Submission 163*.
50 Ibid.
51 *Civil Law and Justice Legislation Amendment Bill 2018*.

Proposal 9–7 The Australian Government should ensure that the family law system has specialist professionals and services to support people with disability to engage with the family law system.

9.73 These proposals aim to ensure people with disability who have family law needs are appropriately supported to engage in family law processes. To this end, the ALRC proposes that referral pathways should be established between family law professionals and the NDIA to facilitate supports for eligible people with disability through the NDIS. The ALRC also proposes that the Australian Government ensure that the family law system has appropriately skilled and available professionals and appropriately designed services to support people with disability.

9.74 These proposals should be read in conjunction with the ALRC's proposals for the preparation of reports for decision makers about the parenting capacity of people with disability and for a workforce capability plan (see Chapter 10).

9.75 The proposals respond to stakeholder concerns about the limited supports available to parents with disability.[52] They also reflect the rights of people with disability under the CRPD, which obliges States Parties to provide people with the necessary modifications and adjustments in order to obtain effective access to justice and to exercise their legal capacity.[53]

9.76 The Committee on the Rights of Persons with Disabilities' General Comment No. 6, discussed above, provides that in order to ensure consistency between articles 5 and 12 of the CRPD, States Parties should:

> Provide resources to systems of supported decision-making to assist persons with disabilities to navigate existing legal systems. Legislating and resourcing such services should be consistent with the key provisions identified in paragraph 29 of general comment No. 1 (2014) on equal recognition before the law. This includes basing any systems of support on giving effect to the rights, will and preferences of those receiving support rather than what is perceived as being in their best interests. The best interpretation of will and preferences should replace best-interest concept in all matters related to adults where it is not practicable to determine the person's will and preferences[54]

9.77 The submissions in relation to these issues supported the employment of advocates for people with disability who can assist with accessing and engaging with the family law system.[55]

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52 See Australian Human Rights Commission, *Submission 217*; Advocacy for Inclusion, *Submission 90*.

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

54 Committee on the Rights of Persons with Disabilities, *General Comment No. 6*, UN Doc CRPD/C/GC/6 (9 March 2018) para 49.

55 See, eg, Advocacy for Inclusion, *Submission 90*; Public Advocate and Children & Young People Commissioner, ACT Human Rights Commission, *Submission 87*; People with Disability Australia (PWDA), *Submission 10*.

9.78 The NDIS provides one mechanism for facilitating this. The NDIS provides support to people with disability, their families and carers. It is an insurance scheme which provides that eligible people with disability choose their own supports. The NDIS is governed by the *National Disability Insurance Scheme Act 2013* (Cth) (*NDIS Act*). The objects of the *NDIS Act* include:

- to give effect to Australia's obligations under the CRPD;
- support the independence and social and economic participation of people with disability;
- provide reasonable and necessary supports, including early intervention supports, for participants in the NDIS; and
- promote the provision of high quality and innovative supports that enable people with disability to maximise independent lifestyles and full inclusion in the community.

9.79 The NDIA is the statutory authority that administers the NDIS. There was support in the submissions for referral relationships to be established between professionals in the family law system and the NDIA,[56] including for the NDIS to play a role in supporting parents with disability with their parenting responsibilities.

9.80 However, there are limits to the extent that the NDIS can provide supports to people with disability in the family law system.

9.81 Firstly, not all people with disability will be eligible to access the NDIS. It is therefore critical that reforms to the family law system ensure that mainstream family law services are disability accessible. This will ensure that parents with disability who are not eligible to receive funding under the NDIS to access specialist, tailored supports can access mainstream supports that are disability-aware, competent and accessible.

9.82 Secondly, the NDIS itself does not provide supports to people with disability. It provides funding for people with disability to access the supports they need. This means that even if a parent with disability is receiving funding through the NDIS to access parenting supports this will not assist them if there are not appropriate disability-competent and accessible services in the family law system to provide these supports. This is particularly an issue for people with disability living in rural and remote areas. It is critical that reforms to the family law system address the need for the system to have specialist disability services available to provide supports to people with disability to access the system and exercise their rights.

56 See Advocacy for Inclusion, *Submission 90*; Office of the Public Advocate (Vic), *Submission 37*.

The welfare jurisdiction

Question 9–1 In relation to the welfare jurisdiction:

- Should authorisation by a court, tribunal, or other regulatory body be required for procedures such as sterilisation of children with disability or intersex medical procedures? What body would be most appropriate to undertake this function?
- In what circumstances should it be possible for this body to authorise sterilisation procedures or intersex medical procedures before a child is legally able to personally make these decisions?
- What additional legislative, procedural or other safeguards, if any, should be put in place to ensure that the human rights of children are protected in these cases?

9.83 The welfare jurisdiction, now found in s 67ZC of the *Family Law Act*, was introduced in 1983 following a recommendation by the Family Law Council. It provides the court with a power to make orders to protect the welfare of children. In making a decision, the child's best interests must be the paramount consideration.[57] This power has been likened to the *parens patriae* wardship jurisdiction of the Supreme Courts.[58]

9.84 Although the welfare jurisdiction appears broad in scope, there are limitations on this power. To ensure that no part of the Act is beyond the Commonwealth's constitutional power, the Act contains provisions limiting the application of its provisions to circumstances that are clearly within power.[59] Relevantly, the Act provides that certain provisions, including s 67ZC, apply only where they either come within one of the state referrals of power over children,[60] or 'so far as they make provision with respect to the parental responsibility of the parties to a marriage for a child of the marriage'.[61] As a result, despite its apparent breadth, the welfare power in s 67ZC can only be exercised in relation to certain aspects of parental responsibility, and is effectively directed at supervising parents' exercise of their parental responsibilities, rather than the general welfare of children.[62]

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57 *Family Law Act 1975* (Cth) s 67ZC(2).

58 *Secretary, Department of Health and Community Services v JWB and SMB (Marion's case)* (1992) 175 CLR 218, [62] (Mason CJ, Dawson, Toohey, Gaudron JJ).

59 See sub-div F of div 12 of pt VII, in particular.

60 *Family Law Act 1975* (Cth) s 69ZE. These referrals relate to child maintenance, determination of parentage for the purposes of Commonwealth law, and, relevantly, 'custody and guardianship of, and access to, children'. See, eg, *Commonwealth Powers (Family Law-Children) Act 1986 (NSW)* s 3.

61 *Family Law Act 1975* (Cth) s 69ZH.

62 *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365, [206] (Callinan J).

9.85 This limitation has had practical consequences. In *Minister for Immigration and Indigenous Affairs v B*, the High Court held that the welfare power did not allow orders to be made binding third parties.[63] Gummow, Hayne and Heydon JJ described the limitation in s 69ZH as 'limiting and decisive'.[64] In that case, the result was that the court was not able to make orders directed at the Minister for Immigration about children in immigration detention.

9.86 Case law has indicated that where a decision falls within the parents' authority, authorisation by the court under s 67ZC is not necessary. Thus, most decisions by parents do not require court authorisation. For example, in *Re: Sean and Russell (Special Medical Procedure)* Murphy J commented that, '[w]here a decision falls properly within the ambit of parental responsibility, the authorisation or consent to a procedure is a parental decision'.[65]

9.87 Only specific classes of decision require authorisation, particularly those commonly referred to as 'special medical procedures'. There is a significant degree of uncertainty in the case law as to which procedures require authorisation. In *Re Kelvin*, the court noted that 'as a general rule, whether court authorisation is required will be dependent upon the entirety of the circumstances surrounding the particular treatment.'[66] A key factor will be whether a treatment is 'therapeutic'. This test was acknowledged by the High Court in *Marion's Case* to be uncertain.[67] The Family Court has held that:

> I would define treatment (including surgery) as therapeutic when it is administered for the chief purpose of preventing, removing or ameliorating a cosmetic deformity, a pathological condition or a psychiatric disorder, provided the treatment is appropriate for and proportionate to the purpose for which it is administered. "Non-therapeutic" medical treatment is descriptive of treatment which is inappropriate or disproportionate having regard to the cosmetic deformity, pathological condition or psychological disorder for which the treatment is administered and of treatment which is administered chiefly for other purposes.[68]

9.88 Other relevant factors will include whether the procedure is irreversible, and whether there is a significant risk of an incorrect decision being made.[69]

9.89 Within this framework, the welfare power has been used by the Family Court to make orders about a range of matters, including:

- sterilisation of children with disability;[70]

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63 *Minister for Immigration v B* (2004) 219 CLR 365.
64 *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365, [110].
65 *Re: Sean and Russell (Special Medical Procedures)* (2010) [2010] FamCA 948, [84].
66 *Re: Kelvin* [2017] FamCAFC 258, [138].
67 *Secretary, Department of Health and Community Services v JWB and SMB (Marion's case)* (1992) 175 CLR 218, [48].
68 *Re: Jamie* (2013) [2013] FamCAFC 110, [269] (Strickland J). This dictum was cited with approval in *Re: Kelvin* [2017] FamCAFC 258, [132].
69 *Secretary, Department of Health and Community Services v JWB and SMB (Marion's case)* (1992) 175 CLR 218, para 49 per Mason CJ, Dawson, Toohey and Gaudron JJ.

- procedures on intersex children (possibly no longer required for some procedures following decisions such as *Re: Carla*);[71]
- treatment of children with gender dysphoria (authorisation is now no longer required where there is no dispute as to the procedure or the child's competence to make medical decisions);[72]
- authorisation of other, non-therapeutic, medical procedures, such as bone marrow donation;[73] and
- authorisation of administration of an experimental drug on a child.[74]

9.90 Submissions raised concerns about the application of the welfare jurisdiction in two areas in particular: sterilisation of children with disability, and medical procedures on intersex children, including procedures such as sterilisation and genital surgery ('intersex medical procedures').

Sterilisation of children with disabilities

9.91 Submissions indicated concerns with the use of the welfare power to authorise sterilisation of children with disabilities.[75] The Australian Human Rights Commission noted that:

> Involuntary or forced sterilisation is a serious violation of human rights. In 2013, the UN Committee on the Rights of Persons with Disabilities released its concluding observations on Australia's compliance with the CRPD. The Committee raised serious concerns about the involuntary sterilisation of people with disabilities and urged Australia to adopt uniform national legislation prohibiting the sterilisation of people with disabilities in the absence of their prior, fully informed and free consent.[76]

9.92 The UN Human Rights Committee has raised similar concerns in relation to Australia's compliance with the *International Covenant on Civil and Political Rights*.[77] The Royal Australian and New Zealand College of Psychiatrists commented that it was

> concerned at reports that family courts have focused on disability rather than capacity when considering forced sterilisation. In the RANZCP's view, the forced sterilisation of a young person on the grounds of their disability alone constitutes discrimination and is a breach of human rights. At a minimum, such procedures should only ever be

70 *Secretary, Department of Health and Community Services v JWB and SMB (Marion's case)* (1992) 175 CLR 218.
71 *Re: Carla* [2016] FamCA 7.
72 *Re: Kelvin* [2017] FamCAFC 258; *Re: Matthew* [2018] Family Court of Australia 161 (16 March 2018).
73 *In the Marriage of GWW and CMW* [1997] FamCA 2; *Re Inaya (Special Medical Procedure)* (2007) FamCA [2007] 658. The former case found court authorization was required; the latter found that it was not, but nevertheless made an order.
74 *Re Baby A* (2008) [2008] FamCA 417. The court observed the authorisation was perhaps not required, but made an order to avoid doubt.
75 See, eg, Centre for Excellence in Child and Family Welfare, *Submission 102*; People with Disability Australia (PWDA), *Submission 10*.
76 Australian Human Rights Commission, *Submission 217*.
77 Ibid p 26.

> approved on an involuntary basis when the person lacks the capacity to make valid decisions about their healthcare.[78]

9.93 Some submissions argued for a prohibition on sterilisation of girls with disability unless there is a serious threat to life.[79] Dr Linda Steele cautioned against different rules applying to girls with disability, arguing that this 'risks affirming the in/capacity divide and further naturalising, depoliticising and entrenching the mental incapacity of girls with disability as a basis on which to legitimise their sterilisation through the welfare jurisdiction.'[80]

Intersex medical procedures

9.94 Other submissions raised concerns about the regulation of intersex medical procedures, including procedures resulting in the sterilisation of intersex children, and other procedures, such as procedures to 'normalise' genitalia. These submissions supported the need for third-party supervision of these procedures, but had concerns about the effectiveness of the current approach adopted under the welfare power to protect children's human rights. These concerns included the scope of the requirement to authorise procedures, the quality of the information provided to the Family Court, the absence of effective contradictors or representatives of human rights organisations in proceedings, the authorisation of deferrable procedures where a child would later have capacity to consent, and gender stereotyping and misunderstandings of intersex status.

9.95 As noted by UN human rights bodies: '[i]ntersex people are born with physical or biological sex characteristics ... that do not fit the typical definitions for male or female bodies.'[81] Intersex status is distinct from gender identity.[82] Medical treatment of intersex people has become an issue of international concern. For example, in October 2016, the UN Committee Against Torture, the Committee on the Rights of the Child, and the Committee on the Rights of Persons with Disabilities, among others, issued a joint statement, noting that

> intersex infants, children and adolescents are subjected to medically unnecessary surgeries, hormonal treatments and other procedures in an attempt to forcibly change their appearance to be in line with societal expectations about female and male bodies. When … these procedures are performed without the full, free and informed consent of the person concerned, they amount to violations of fundamental human rights … Profound negative impacts of these often irreversible procedures have been reported, including permanent infertility, incontinence, loss of sexual sensation, causing

78 The Royal Australian and New Zealand College of Psychiatrists, *Submission 18*. See also Dr L Steele, *Submission 211*; Domestic Violence Victoria, *Submission 23*.

79 Domestic Violence Victoria, *Submission 23*.

80 Dr L Steele, *Submission 211*.

81 United Nations Office of the High Commissioner of Human rights, 'End Violence and Harmful Medical Practices on Intersex Children and Adults, UN and Regional Experts Urge' <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20739&LangID=E?>. See also the definition of 'intersex status' in s 4 of the *Sex Discrimination Act 1975* (Cth).

82 A Kennedy, *Submission 196*; Intersex Human Rights Australia, *Submission 189*.

> life-long pain and severe psychological suffering, including depression and shame linked to attempts to hide and erase intersex traits[83]

9.96 The Committees argued for strong regulatory intervention to respond to these issues:

> States must, as a matter of urgency, prohibit medically unnecessary surgery and procedures on intersex children. They must uphold the autonomy of intersex adults and children and their rights to health, to physical and mental integrity, to live free from violence and harmful practices and to be free from torture and ill-treatment … Intersex children and adults should be the only ones who decide whether they wish to modify the appearance of their own bodies – in the case of children, when they are old or mature enough to make an informed decision for themselves.[84]

9.97 Concerns about the carrying out of deferrable medical interventions on intersex children have been raised by academics, community advocates, and in submissions to this Inquiry. In March 2017, the Australian and Aotearea/New Zealand intersex organisations and advocates issued the Darlington Statement, which states that:

> the Family Court system in Australia has failed to adequately consider the human rights and autonomy of children born with variations of sex characteristics, and the repercussions of medical interventions on individuals and their families. The role of the Family Court is itself unclear. Distinctions between "therapeutic" and "non-therapeutic" interventions have failed our population.[85]

9.98 Submissions indicated concern about the scope of the requirement for authorisation of intersex medical procedures. Submissions noted that it is rare for intersex medical procedure cases to come to court, and that those that do have been restricted to sterilisation cases.[86] The Australian Human Rights Commission noted:

> There do not appear to have been any cases about genital 'normalising' procedures. On one view, these cases fall within the terms of the High Court's decision in *Marion's* case, because they are non-therapeutic interventions and there is a risk that decisions are being made that would not be made by the child themselves if they were in a position to have their views heard and considered.[87]

9.99 The case of *Re: Carla* offers an example of this type of procedure being carried out.[88] Medicare data cited by Intersex Human Rights Australia (IHRA) suggests that a significant number of such procedures occur each year.[89] Of additional concern to submitters was case law which indicates that even medical procedures that result in sterilisation of intersex people may be therapeutic and thus not require court approval.[90] Submissions particularly noted the decision in *Re: Carla*, in which the

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83 United Nations Office of the High Commissioner of Human rights, above n 81.
84 Ibid.
85 Joint statement by Australia and Aotearoa/New Zealand intersex community organisations and independent advocates, 'Darlington Statement' <https://darlington.org.au/statement/>.
86 Aileen Kennedy identified fewer than 10 such cases: A Kennedy, *Submission 196*.
87 Australian Human Rights Commission, *Submission 217*.
88 *Re: Carla* [2016] FamCA 7.
89 Intersex Human Rights Australia, *Submission 189*.
90 Submissions noted that the case law is inconsistent on this point: see, eg, ACT LGBTIQ Ministerial Advisory Council, *Submission 193*.

Family Court held that parents could consent to a child's sterilisation without court authorisation, on the basis that the procedure was therapeutic.[91] IHRA argued that the therapeutic/non-therapeutic distinction

> has failed to distinguish between interventions that are strictly clinically necessary and those that are not; between interventions based on culturally-specific social norms and gender stereotypes and those that are not. This criterion should be abandoned as a threshold test of whether a medical procedure requires oversight or authorisation from a decision making forum.[92]

9.100 IHRA argued that '[a]ny non-deferrable interventions which alter the sex characteristics of infants and children proposed to be performed before a child is able to consent on their own behalf' should require authorisation from an independent body.[93]

9.101 Submissions also raised concerns about the quality of information upon which the Family Court is authorising procedures, noting for example that human rights bodies and intersex organisations have not been included as parties or interveners in cases about intersex medical procedures,[94] and that there is usually no contradictor.[95] IHRA advocated for the decision making forum for intersex medical procedures to include human rights experts, clinicians, and intersex-led community organisations.[96]

9.102 The Issues Paper noted concerns about the ability of children to participate in decision making about intersex medical procedures. The Family Court's submission indicated that a review of the case law in this area 'did not demonstrate concerns about the opportunity for the children in those cases to participate in the process'.[97] However, some submissions and other reports have proposed a more radical form of children's participation in decision making: that decisions about deferrable procedures should not be able to be authorised until the child is able to consent, with IHRA commenting that *Re Carla* and *Re Lesley* appear to show 'unnecessary pre-empting of the legal capacity of a future adult'.[98]

Options for reform

9.103 In 2013, the Senate Community Affairs References Committee published two reports, on the involuntary or coerced sterilisation of people with disabilities,[99] and on the involuntary or coerced sterilisation of intersex people.[100] Both reports made recommendations to strengthen protections.

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91 See, eg, Intersex Human Rights Australia, *Submission 189*; Inner City Legal Centre, *Submission 124*.
92 Intersex Human Rights Australia, *Submission 189*.
93 Ibid.
94 Australian Human Rights Commission, *Submission 217*.
95 Human Rights Law Centre, *Submission 54*.
96 Intersex Human Rights Australia, *Submission 189*.
97 Family Court of Australia, *Submission 68*.
98 Intersex Human Rights Australia, *Submission 189*.
99 Senate Standing Committee on Community Affairs, Parliament of Australia, *Inquiry into Involuntary or Coerced Sterilisation of People with Disabilities in Australia* (2013).
100 Senate Standing Committee for Community Affairs, Parliament of Australia, *Inquiry into the Involuntary or Coerced Sterilisation of Intersex People in Australia* (2013).

9.104 In relation to sterilisation of people with disability, these recommendations included:

- sterilisation should not be performed on a person with disability without their consent, or if they cannot consent but may develop the capacity to do so, should not be performed until it becomes clear that that capacity will never develop; [101]
- the 'best interests' test should be replaced with a 'best protection of rights test', making explicit reference to the protection of the individual's rights, and the maintenance of future options and choices;[102]
- a legal representative for the person with disability should be appointed in all sterilisation cases;[103]
- there should be provision of a right for public advocates, such as the Office of the Public Advocate, to be a party to child or adult sterilisation cases;[104]
- a special medical procedures advisory committee should be established, to provide expert opinion to the Family Court upon request in relation to specific cases, and to other statutory decision makers and government as appropriate on best practice in relation to sterilisation and related procedures for people with disability, and that the committee must include non-medical disability expertise as well as medical expertise;[105] and
- uniform model legislation should be developed to regulate the sterilisation of persons with disabilities and this model should be enacted in a new division of the *Family Law Act*.[106]

9.105 In relation to intersex people, recommendations included:

- all proposed intersex medical interventions for children and adults without the capacity to consent should require authorisation from a civil and administrative tribunal or the Family Court;[107]
- the special medical procedures advisory committee should draft guidelines for the treatment of common intersex conditions based on medical management, ethical, human rights and legal principles, and that these guidelines should be reviewed on an annual basis;[108]

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101 Senate Standing Committee on Community Affairs, Parliament of Australia, *Inquiry into Involuntary or Coerced Sterilisation of People with Disabilities in Australia* (2013) recs 6 and 7.
102 Ibid rec 11.
103 Ibid rec 15.
104 Ibid rec 18.
105 Ibid rec 21.
106 Ibid rec 27.
107 Senate Standing Committee for Community Affairs, Parliament of Australia, *Inquiry into the Involuntary or Coerced Sterilisation of Intersex People in Australia* (2013) rec 6.
108 Ibid rec 9.

- complex intersex medical interventions should be referred to the special medical procedures advisory committee for consideration and report;[109] and
- intersex support groups should be core funded to provide support and information to patients, parents, families and health professionals in all intersex cases.[110]

9.106 These recommendations have not been implemented by the Australian Government.

9.107 Many of these recommendations were supported in submissions,[111] although this was not uniformly the case.[112] Submissions also raised other suggestions, including:

- adoption of a more inquisitorial approach;[113]
- introduction of multidisciplinary tribunals with expertise in medicine, psychology and social work to consider these matters;[114]
- removing the jurisdiction from the Family Court and transferring it to an independent body, such as state or territory tribunals;[115] or
- a total prohibition on sterilisation of girls with disabilities.[116]

9.108 In considering the range of submissions provided on this issue, the ALRC considers that there is scope for improvement in the current approach to regulation of these procedures. This could be achieved by improvements to the operation of the welfare jurisdiction, transfer of the function to a more specialist body (such as a state or territory tribunal), or through direct regulation of the procedures. Each of these options has advantages and disadvantages. For example, a direct regulatory response is likely to be more effective than the current supervisory jurisdiction, but such regulation would arguably be better integrated into existing medical regulatory systems, rather than residing in the *Family Law Act*. State and territory tribunals are more experienced in dealing with guardianship matters, but there is a risk of fragmentation of practice across Australia, jurisdictional problems where there is an interstate element to the matter, or inconsistent adoption of best practice across jurisdictions.

9.109 The ALRC therefore seeks further input on what rules should apply to these procedures, how they should be given effect, and what safeguards should be provided to protect the human rights of the children affected.

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109 Ibid rec 10.
110 Ibid rec 12.
111 Human Rights Law Centre, *Submission 54*.
112 Dr Steele, for example, opposed the 'best protection of rights' test: Dr L Steele, *Submission 211*.
113 Inner City Legal Centre, *Submission 124*.
114 National LGBTI Health Alliance, *Submission 14*.
115 ACT LGBTIQ Ministerial Advisory Council, *Submission 193*.
116 Dr L Steele, *Submission 211*.

Definition of family member

Proposal 9–8 The definition of family member in s 4(1AB) of the *Family Law Act 1975* (Cth) should be amended to be inclusive of Aboriginal and Torres Strait Islander concepts of family.

Question 9–2 How should a provision be worded to ensure the definition of family member covers Aboriginal and Torres Strait Islander concepts of family?

9.110 The definition of family member in the *Family Law Act*[117] presently covers a range of relationships based on legal marriage and cohabitation and adoption involving inter-generational (grandparent, parent, child) and intra-generational (sibling) relationships. The definition is relevant in relation to the family violence definition,[118] provisions guiding the making of parenting orders[119] and provisions relating to family violence orders.[120]

9.111 Some submissions expressed concern that the definition was not appropriate for the range of significant relationships recognised among Aboriginal and Torres Strait Islander people.[121] These concerns are consistent with extensive commentary over a significant period of time in relation to the fit between the notion of family in the *Family Law Act* and Aboriginal and Torres Strait Islander family structures.[122] Although these structures vary among different groups, often members of the extended family network play a significant role in the care of children. The *Working and Walking Together* resource describes approaches to family among Aboriginal and Torres Strait Islander people in this way:

> Those involved in children's lives, and helping to raise them, commonly include grandparents, aunts, uncles, cousins, nieces and nephews, and members of the community who are considered to be family.[123]

9.112 In light of this, the question seeks feedback on the appropriate wording for an amendment in the definition of 'family member' to be inclusive of Aboriginal and Torres Strait Islander practices. Examples in other legislation include 'related according to Aboriginal or Torres Strait Islander kinship rules or are both members of

117 *Family Law Act 1975* (Cth) s 4(1AB).
118 Ibid s 4AB.
119 Ibid s 60CC(3).
120 Ibid ss 60CF, 60CH, 60CI.
121 See, eg, Victoria Legal Aid, *Submission 61*.
122 Stephen Ralph, 'The Best Interests of the Aboriginal Child in Family Law Proceedings' (1998) 12(2) *Australian Journal of Family Law*.
123 Secretariat of National Aboriginal and Islander Child Care Inc, *Working and Walking Together: Supporting Family Relationship Services to Work with Aboriginal and Torres Strait Islander Families and Organisations* (SNAICC, 2010) 19.

some other culturally recognised family group' in South Australia.[124] Northern Territory legislation uses a 'relative of a person includes someone who, according to Aboriginal tradition or contemporary social practice, is a relative of the person'.[125]

124 *Intervention Orders Prevention of Abuse Act* 2009 (SA) s 8.
125 *Domestic and Family Violence Act* (NT) s 10.

10. A Skilled and Supported Workforce

Contents

Summary

10.1 Workforce capability, including the skills, knowledge and abilities of professionals, is critical to the ability of a system to operative effectively and accessibly. Submissions to this Inquiry identified a need for a whole-of-system approach to developing and maintaining core competencies among practitioners who work with separating families, including system-wide standards and a capability framework for the family law system.

10.2 In response, the ALRC proposes the development of a workforce capability plan for the family law system to ensure that all professionals working with separating families and their children have the necessary competencies to provide quality services.

10.3 To support the workforce capability plan, the ALRC also makes proposals in relation to the training and accreditation of particular professional groups within the current family law system, including proposals:

- to improve the capacity of family dispute resolution (FDR) practitioners in relation to resolving property and financial matters;
- for the inclusion of family violence training in legal practitioners' continuing professional development requirements; and

- for Children's Contact Service (CCS) workers to be appropriately qualified and accredited.

10.4 Changes are also proposed to:

- the criteria for appointment of federal judicial officers exercising family law jurisdiction to include knowledge, experience and aptitude in relation to family violence;
- establish an accreditation system for private report writers in children's matters, to be supported by a publicly available list of accredited report writers; and
- provide for the preparation of specialist reports in children's matters where concerns are raised about the parenting ability of a person with a disability and in parenting proceedings involving an Aboriginal or Torres Strait Islander child.

10.5 The ALRC also makes proposals about the development and implementation of wellbeing programs for staff of federally funded family relationships services and family law legal assistance services.

A workforce capability plan for the family law system

Proposal 10–1 The Australian Government should work with relevant non-government organisations and key professional bodies to develop a workforce capability plan for the family law system.

Proposal 10–2 The workforce capability plan for the family law system should identify:

- the different professional groups working in the family law system;
- the core competencies that particular professional groups need; and
- the training and accreditation needed for different professional groups.

Proposal 10–3 The identification of core competencies for the family law system workforce should include consideration of the need for family law system professionals to have:

- an understanding of family violence;
- an understanding of child abuse, including child sexual abuse and neglect;
- an understanding of trauma-informed practice, including an understanding of the impacts of trauma on adults and children;
- an ability to identify and respond to risk, including the risk of suicide;
- an understanding of the impact on children of exposure to ongoing conflict;

- cultural competency, in relation to Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse communities and LGBTIQ people;
- disability awareness; and
- an understanding of the family violence and child protection systems and their intersections with the family law system.

Question 10–1 Are there any additional core competencies that should be considered in the workforce capability plan for the family law system?

Proposal 10–4 The Family Law Commission proposed in Proposal 12–1 should oversee the implementation of the workforce capability plan through training—including cross-disciplinary training—and accreditation of family law system professionals.

10.6 The ALRC proposes that the Australian Government work with relevant non-government organisations and key professional bodies to develop a workforce capability plan for the family law system. In developing the plan, the competencies and knowledge listed above in Proposal 10–3 should be considered. The plan should identify the different professional groups working in the family law system, the core competencies that each group of professionals require, and the training and accreditation needed for different professional groups.

10.7 The proposed Family Law Commission[1] should oversee the implementation of the workforce capability plan through training—including cross-disciplinary training—and accreditation of family law system professionals.

A whole-of-system approach to ensuring core competencies

10.8 The effectiveness and accessibility of a system is dependent on the skills, knowledge and abilities of its workforce.[2] To ensure that the family law system is responsive and accessible for all families who need it, including children and young people, the ALRC proposes a whole-of-system approach to supporting the development of necessary competencies across the system's workforce. Taking a whole-of-system approach will ensure consistency and shared understanding of key issues, such as family violence, which will support improved collaboration.

10.9 This proposal reflects the broad support in the submissions for a whole-of-system approach to developing and maintaining core competencies among practitioners who work with separating families, including calls for the development of system-wide

1 See ch 12.

2 See generally 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); Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016).

standards[3] and a capability framework to 'help the family law system identify the skills and attributes required' of its workforce.[4]

10.10 While the degree and focus of some competencies will vary depending on the particular professional role,[5] many submissions identified a list of core competencies for all family law professionals.[6] For example, Relationships Australia Victoria identified a need for both 'common core competencies shared across the sector' as well as 'the acquisition of deeper knowledge required to perform specialist roles'.[7]

10.11 Development of a capability plan will allow for a whole-of-system approach to ensuring the system has a workforce that is able to meet the needs of clients. As identified in the submissions, this will ensure the different professional sectors in the system have a shared understanding of key issues, providing an important path to improved collaboration.[8]

10.12 The recent capability framework released by the New Zealand Government for its family violence workforce provides an example of how such a framework can provide a roadmap for improving sector-wide competencies for a range of professionals within a sector. The New Zealand framework aims to provide a common understanding of family violence across the workforce and identifies the knowledge, skills and behaviours required by different professionals in the sector.[9]

10.13 Family Safety Victoria similarly released two workforce capability frameworks[10] in 2017 to accompany the Victorian Government's 10-Year Industry Plan for Family Violence Prevention and Response. The Industry Plan aims to address the workforce requirements of government and non-government agencies and services working with family violence.[11] The Frameworks identify foundational knowledge to be shared across the workforce, as well as specialist skills and knowledge required by certain professions. The Industry Plan was developed in response to a recommendation of the Royal Commission into Family Violence, which recognised the need for a

3 Relationships Australia, *Submission 11*.
4 Queensland Family and Child Commission, *Submission 16*.
5 See, eg, National Legal Aid, *Submission 163*; Victoria Legal Aid, *Submission 61*.
6 See, eg, Rape & Domestic Violence Services Australia, *Submission 167*; National Legal Aid, *Submission 163*; NATSILS, *Submission 157*; Family Inclusion Network Queensland (Townsville), *Submission 78*; Victoria Legal Aid, *Submission 61*; Australian Psychological Society, *Submission 55*; Family & Relationship Services Australia, *Submission 53*; Women's Legal Services Australia, *Submission 45*; The Royal Australian and New Zealand College of Psychiatrists, *Submission 18*; Relationships Australia, *Submission 11*.
7 Relationships Australia Victoria, *Submission 129*.
8 See, eg, Family Inclusion Network Queensland (Townsville), *Submission 78*; Victoria Legal Aid, *Submission 61*.
9 Ministry of Social Development (NZ), *Family Violence, Sexual Violence and Violence within Whānau: Workforce Capability Framework* (2017).
10 Family Safety Victoria, *Preventing Family Violence & Violence Against Women Capability Framework* (2017); Family Safety Victoria, *Responding to Family Violence Capability Framework* (2017).
11 State Government of Victoria and Family Safety Victoria, *Building from Strength: 10-Year Industry Plan for Family Violence Prevention and Response* (2017).

systematic response to the range of workforce issues across the different professional sectors working with people affected by family violence.[12]

10.14 The ALRC's proposed workforce capability plan should include a framework that identifies the foundational knowledge required of all system professionals and the level of competency required by different professionals depending on their role within the system. Consistent with the submissions to this Inquiry, it should also identify the training and accreditation needed for different professional groups and the organisational supports that will be required to ensure practitioners obtain and maintain these competencies.[13] A number of stakeholders also supported the development of a governance body to oversee training and professional development.[14] The ALRC proposes that the Family Law Commission, described in Chapter 12, should oversee this implementation.

10.15 The ALRC suggests that the Australian Government work collaboratively with relevant non-government organisations and key professional bodies to ensure training and accreditation is adapted to include the competencies adopted in the workforce capability plan. Where possible, training should be provided across disciplines and sectors. Submissions suggested this would give professionals a chance to learn about each other's roles and their intersections, and to build relationships and encourage collaborative practices.[15]

10.16 Development of the workforce capability plan should also allow for consideration of any changes to the roles and degree of competence required by professionals currently situated in the family law system as a result of other proposed reforms.

10.17 The workforce capability plan should be developed in such a way that it complements and informs other relevant plans, frameworks and initiatives. These include the cultural safety framework proposed in Chapter 12 and Victoria's Responding to Family Violence Capability Framework. The ALRC also notes the work currently being progressed by the Council of Attorneys-General Family Violence Working Group on improving family violence competency,[16] and the need to consider any recommendations it makes in developing the proposed workforce capability plan.

Suggested core competencies

10.18 Submissions identified a need for improved professional competency across the family law system in a number of key areas. Many of these have been identified in other recent reports as areas in need of improvement.

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12 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol VI, rec 207.

13 See, eg, National Legal Aid, *Submission 163*; Centacare Family and Relationship Services (CFRS), *Submission 125*; Women's Legal Services Australia, *Submission 45*; Australian Dispute Resolution Advisory Council Inc (ADRAC), *Submission 12*; People with Disability Australia (PWDA), *Submission 10*.

14 See, eg, National Legal Aid, *Submission 163*.

15 See, eg, Ibid; Relationships Australia Victoria, *Submission 129*; Victoria Legal Aid, *Submission 61*.

16 Attorney-General's Department, *Family Violence* <www.ag.gov.au/FamiliesAndMarriage/Families/FamilyViolence/Pages/default.aspx>.

10.19 In line with earlier reports,[17] many stakeholders identified a knowledge of family violence as a necessary competency for the family law system's workforce.[18] This accords with the House of Representatives Standing Committee on Social Policy and Legal Affairs' (SPLA Committee) recommendation for the development of a national, ongoing, comprehensive, and mandatory family violence training program for family law professionals that includes training about the nature and dynamics of family violence, how to work with vulnerable clients, and the impact of family violence on children.[19] Many stakeholders also identified the need for professionals to receive training on identifying and responding to a broader range of risks, including the risk of suicide.[20]

10.20 Submissions also identified trauma-informed practice as a core competency for family law professionals, including the need for all professionals to understand the impact of trauma on adults and children.[21] The Australian Human Rights Commission suggested that training and resources on trauma-informed practice should include the impact of intergenerational trauma on Aboriginal and Torres Strait Islander people.[22] A number of submissions also stressed the importance of family law professionals understanding the impact of trauma on children's attachment and development.[23]

10.21 More particularly, many identified the need for professionals who work with separating families to have an understanding of the impact of conflict on children.[24] An understanding of child abuse, including child sexual abuse and neglect, was also identified in submissions as an important competency for family law system

17 See, eg, Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010); Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016); House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 2; Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016).

18 See, eg, National Legal Aid, *Submission 163*; Centacare Family and Relationship Services (CFRS), *Submission 125*; CatholicCare Sydney, *Submission 79*; Family Inclusion Network Queensland (Townsville), *Submission 78*; Australian Psychological Society, *Submission 55*; Women's Legal Services Australia, *Submission 45*; Domestic Violence NSW, *Submission 44*; Domestic Violence Victoria, *Submission 23*; Churches of Christ Care, *Submission 4*.

19 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 2, rec 28.

20 See, eg, Australian Institute of Family Studies, *Submission 206*; R Tilbrook, *Submission 188*; Centre for Excellence in Child and Family Welfare, *Submission 102*; Lone Fathers Association of Australia, *Submission 99*; Australian Psychological Society, *Submission 55*; Australian Dispute Resolution Advisory Council Inc (ADRAC), *Submission 12*; Western Sydney CLC, *Submission 8*.

21 See, eg, Australian Human Rights Commission, *Submission 217*; Uniting, *Submission 162*; Women's Domestic Violence Court Advocacy Services NSW, *Submission 153*; Victoria Legal Aid, *Submission 61*; Australian Psychological Society, *Submission 55*; The Royal Australian and New Zealand College of Psychiatrists, *Submission 18*; Relationships Australia, *Submission 11*.

22 Australian Human Rights Commission, *Submission 217*.

23 See, eg, Ibid; Women's Domestic Violence Court Advocacy Services NSW, *Submission 153*; Centacare Family and Relationship Services (CFRS), *Submission 125*; Centre for Excellence in Child and Family Welfare, *Submission 102*; Family Inclusion Network Queensland (Townsville), *Submission 78*.

24 See eg, Relationships Australia Victoria, *Submission 129*; CatholicCare Sydney, *Submission 79*; Family & Relationship Services Australia, *Submission 53*; ATSILS Qld, *Submission 42*.

professionals,[25] and particularly for practitioners who work with children, including those involved in child-inclusive dispute resolution.

10.22 Another theme in the submissions on this point concerned the importance of family law professionals being culturally competent,[26] with many stakeholders identifying a need for cultural competency training in relation to LGBTIQ families, as well as Aboriginal and Torres Strait Islander people and people from culturally and linguistically diverse communities.[27] For example, Rainbow Families Victoria submitted that 'the current family law system lacks the understanding of our rainbow families in their many shapes and sizes' and suggested a need for workforce development across the system, developed in consultation with rainbow families, LGBTIQ advocacy services and services specialising in service provision to LGBTIQ people.[28]

10.23 The National Family Violence Prevention Legal Services Forum similarly suggested that Aboriginal and Torres Strait Islander communities should have the opportunity to lead the development of relevant training programs to ensure that cultural knowledge is drawn on and that Aboriginal and Torres Strait Islander cultural awareness training is not conflated with generalist cultural competency training. The Forum also stressed that cultural competency and family violence competency should not be addressed in isolation, but rather as 'intersecting issues', noting the unique experiences and needs of Aboriginal and Torres Strait Islander women who experience family violence.[29]

10.24 The need for a community led approach to developing these and other competencies was recognised by the SPLA Committee, which recommended that cultural competency be included in national family violence training for family law professionals.[30] The ALRC suggests such an approach will be possible through the development of the workforce capability plan, which will consider each competency within an overarching framework. The need for a culturally competent and culturally diverse workforce also forms part of the proposed cultural safety framework.[31]

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25 See, eg, Women's Legal Service NSW, *Submission 218*; Women's Domestic Violence Court Advocacy Services NSW, *Submission 153*; Bravehearts Foundation Ltd, *Submission 148*; Centre for Excellence in Child and Family Welfare, *Submission 102*; Family Inclusion Network Queensland (Townsville), *Submission 78*; Drummond Street Services, *Submission 20*; The Royal Australian and New Zealand College of Psychiatrists, *Submission 18*.

26 See, eg, Australian Human Rights Commission, *Submission 217*; National Legal Aid, *Submission 163*; Domestic Violence NSW, *Submission 44*; Law Council of Australia, *Submission 43*; Churches of Christ Care, *Submission 4*.

27 See, eg, Women's Legal Service NSW, *Submission 218*; Family Inclusion Network Queensland (Townsville), *Submission 78*; Victoria Legal Aid, *Submission 61*; Australian Dispute Resolution Advisory Council Inc (ADRAC), *Submission 12*.

28 Rainbow Families Victoria, *Submission 106*.

29 National Family Violence Prevention Legal Services Forum, *Submission 63*.

30 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 2, rec 28.

31 See ch 12.

10.25 Some submissions identified the importance of disability awareness among family law professionals.[32] For example, People with Disability Australia recommended that all family law system professionals receive 'repeated and nationally consistent training' on a number of issues relating to people with disability, including disability awareness and human rights; intersectional discrimination; the nature and impacts of violence against people with disability; and the barriers to accessing justice faced by people with disability.[33]

10.26 Other stakeholders suggested the need for understanding of the intersections and overlaps between the family law, family violence and child protection systems,[34] an issue that has been recognised in previous reports.[35]

10.27 The need for family law professionals to understand vicarious trauma, including the ability to recognise and respond to signs of vicarious trauma, was also suggested as a core competency.[36] This issue is discussed further below in relation to professional wellbeing.

10.28 A number of submissions also suggested that family law professionals should have a basic understanding of some specialist areas, such as substance misuse and mental health issues.[37] The ALRC invites submissions on whether these or other areas of knowledge should be considered necessary competencies for family law system professionals.

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32 See, eg, Women's Legal Service NSW, *Submission 218*; Australian Human Rights Commission, *Submission 217*; National Legal Aid, *Submission 163*; Relationships Australia, *Submission 11*.

33 People with Disability Australia (PWDA), *Submission 10*.

34 See, eg, CatholicCare Sydney, *Submission 79*; Family Inclusion Network Queensland (Townsville), *Submission 78*; Victoria Legal Aid, *Submission 61*; The Royal Australian and New Zealand College of Psychiatrists, *Submission 18*; Safe Steps Family Violence Response Centre, *Submission 15*.

35 See Family Law Council, *Interim Report to the Attorney-General in Response to the First Two Terms of Reference on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (2015); Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016); House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 2.

36 See, eg, Toowoomba and South West Queensland Family Law Pathways Network, *Submission 200*; CatholicCare Diocese of Broken Bay, *Submission 197*; Family & Relationship Services Australia, *Submission 53*; Relationships Australia, *Submission 11*.

37 See, eg, National Legal Aid, *Submission 163*; NATSILS, *Submission 157*; Relationships Australia Victoria, *Submission 129*; Victoria Legal Aid, *Submission 61*.

FDR practitioners and property matters

Proposal 10–5 In developing the workforce capability plan, the capacity for family dispute resolution practitioners to conduct family dispute resolution in property and financial matters should be considered. This should include consideration of existing training and accreditation requirements.

Question 10–2 What qualifications and training should be required for family dispute resolution practitioners in relation to family law disputes involving property and financial issues?

10.29 This proposal provides that the workforce capability plan should consider the competencies to be required of FDR practitioners in relation to property and financial matters. This should include consideration of existing training and accreditation requirements. This will ensure that FDR practitioners have the appropriate skills and knowledge to provide dispute resolution in family law matters involving property and financial issues, as will be necessitated by the proposed legislative amendment requiring parties to attempt family dispute resolution (FDR) prior to lodging a court application for property and financial matters.[38]

10.30 An understanding of property division in family law matters and an ability to assist separating families to settle property and financial arrangements were not identified in submissions as a core competency required of all family law professionals. However, submissions did suggest that there would be a need to support FDR practitioners in this regard, particularly if the use of FDR in these matters were to increase as a result of this Inquiry.[39]

10.31 In 2012, the Community Services & Health Industry Skills Council recognised a need for improved competency for FDR practitioners in relation to property and spousal maintenance. The Council made a number of recommendations, some of which it suggested could be addressed through a review of existing qualifications, units of study and resources. The Graduate Diploma of Family Dispute Resolution was updated in 2015.[40] Material on the resolution of property and financial matters is covered in one of the six compulsory units included in the Diploma.[41]

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38 See prop 5–3.

39 See, eg, Marrickville Legal Centre, *Submission 137*; CatholicCare Sydney, *Submission 79*.

40 Training.gov.au (TAG), *Qualification Details: CHC81115—Graduate Diploma of Family Dispute Resolution (Release 1)* <https://training.gov.au/Training/Details/CHC81115#>.

41 Training.gov.au (TAG), *Unit of Competency Details: CHCDSP001—Facilitate Dispute Resolution in the Family Law Context (Release 1)* <https://training.gov.au/Training/Details/CHCDSP001>.

10.32 To be accredited as an FDR practitioner a person must:

- have completed the full Graduate Diploma of Family Dispute Resolution; or
- have an appropriate qualification and competency in the six compulsory units from the Graduate Diploma of Family Dispute Resolution; or
- be accredited under the National Mediator Accreditation System and have competency in the six compulsory units from the Graduate Diploma of Family Dispute Resolution; or
- have been included in the FDR Register before 1 July 2009 and have demonstrated competency in the three specified units of the Vocational Graduate Diploma of Family Dispute Resolution before 1 July 2011.[42]

10.33 As FDR practitioners would be required to play a more significant role in the resolution of property and financial matters under the ALRC's proposals, the ALRC considers that the requisite competencies should be identified in the workforce capability plan, along with any changes to existing training and accreditation requirements.

10.34 The ALRC seeks stakeholder input about the appropriate qualifications and training requirements for FDR practitioners in relation to the resolution of property and financial matters.

Legal practitioners and family violence training

Proposal 10–6 State and territory law societies should amend their continuing professional development requirements to require all legal practitioners undertaking family law work to complete at least one unit of family violence training annually. This training should be in addition to any other core competencies required for legal practitioners under the workforce capability plan.

10.35 The current continuing professional development (CPD) requirements for legal practitioners differ slightly between the various states and territories, but generally require the completion of 10 units including at least one in each of the following fields: ethics and professional responsibility; practice management and business skills; professional skills; and substantive law.[43]

10.36 The ALRC considers that adding family violence as a CPD requirement is a step that can be taken to address an immediate need in relation to the family violence

42 Attorney-General's Department (Cth), *Accreditation as a Family Dispute Resolution Practitioner—Fact Sheet* (2017).

43 ACT Law Society, *CPD Guidelines* (2017); *Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015* (NSW) r 6; *Legal Profession Regulations 2014* (NT) sch 2; *Queensland Law Society Administration Rule 2005* (Qld) r 47; *LPEAC Rules 2004* (SA) r 2; Law Society of Tasmania, *Practice Guideline No. 4* (2015); *Legal Profession Amendment Rules 2015* (WA) r 13D.

competency of legal practitioners while the workforce capability plan is being progressed. This recognises that many separating parents may be affected by family violence[44] and the important role that legal practitioners play in providing initial advice and ongoing assistance to separating families in relation to both alternative dispute resolution and litigation. The use of CPD requirements to improve family violence competency in the legal profession was supported in submissions.

10.37 The inclusion of family violence in the accreditation process for legal practitioners to become family law specialists was recommended by the Family Law Council in 2016.[45] The Law Council of Australia submitted that family violence is presently 'a matter which informs the assessment requirements of the successful completion of Specialist Accreditation in Family Law' but recognised that

> not all practitioners who work in family law are cognisant of the complex dynamics relating to family violence such as to enable them to properly identify risk flags relating to family violence or to properly advise someone in those circumstances. It is vital that lawyers practicing in family law be in a position to identify the risk and or existence of family violence in order to enliven assessment, safety planning processes and referrals.[46]

10.38 The Law Council of Australia suggested that the core competencies of legal practitioners should be addressed on several levels, including through mandatory continuing legal education for admitted lawyers. Specifically, the Law Council recommended 'mandatory family violence education for all legal practitioners as part of their continuing legal education requirements, if not on an annual basis then at least on the basis of one hour/unit every 2 years.'[47]

10.39 The Law Society of NSW expressed support for the Law Council of Australia's recommendation for compulsory family violence training for all solicitors, and suggested family law practitioners should be required to undertake a percentage of CPD points in family law related topics.[48]

10.40 Other submissions also suggested the use of CPD requirements to ensure legal practitioners practicing family law have and maintain relevant core competencies.[49] For example, the Women's Domestic Violence Court Advocacy Service NSW suggested that domestic and family violence, sexual abuse and trauma training be included in the mandatory CPD requirements for family law lawyers.[50] Western Sydney Community Legal Centre suggested CPD requirements should be used to ensure all legal

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

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

46 Law Council of Australia, *Submission 43*.

47 Ibid.

48 Law Society of NSW, *Submission 154*.

49 See, eg, Uniting, *Submission 162*; Family Inclusion Network Queensland (Townsville), *Submission 78*.

50 Women's Domestic Violence Court Advocacy Services NSW, *Submission 153*.

professionals have the requisite core competencies, including family violence, trauma-informed practice and the impact of trauma on adults and children.[51]

10.41 Both the Law Council of Australia and the Law Society of NSW suggested it would be particularly useful to train family law practitioners on identifying and responding to risk, including family violence.[52] The need to improve the ability of legal practitioners to identify and respond to risk has been recognised in previous reports,[53] and was supported in other submissions.[54]

10.42 It was also suggested that family violence training for legal practitioners should include the ability to identify primary aggressors,[55] the ability to work with both people who have experienced family violence and people who have perpetrated family violence,[56] and developments in family violence research.[57] Springvale Monash Legal Service recommended that state and territory law societies should consult with specialist family violence organisations to develop mandatory family violence training for family law lawyers.[58]

10.43 The Queensland Law Society submitted that, ideally, family law legal practitioners would engage in ongoing education in relation to family violence, child development and family dynamics but suggested this may be difficult to achieve through CPD requirements as '[f]amily law solicitors are not necessarily an easily identifiable cohort, which would make the monitoring of the scheme difficult' and '[m]any generalist solicitors undertake family law work, particularly in rural and regional areas.'[59]

10.44 The ALRC suggests that the law societies in each state and territory should consider ways of ensuring all legal practitioners who undertake family law work are identified and held to this requirement. While recognising that family law work may not be the bulk of practice for some generalist legal practitioners, including those in rural and regional areas, it is suggested that family violence competency would be beneficial to these practitioners and their clients in relation to a range of legal matters, including criminal law matters, family violence matters, and child protection matters. Provision of training through virtual forms, such as webinars, should be made available to ensure training is accessible to legal practitioners in rural and regional locations.

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51 Western Sydney CLC, *Submission 8*.
52 Law Society of NSW, *Submission 154*; Law Council of Australia, *Submission 43*.
53 Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010) rec 21-3; Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016) rec 11.
54 See, eg, Victorian Women Lawyers, *Submission 84*; Family Inclusion Network Queensland (Townsville), *Submission 78*.
55 No to Violence, *Submission 32*.
56 Victorian Women Lawyers, *Submission 84*.
57 Ibid.
58 Springvale Monash Legal Service, *Submission 161*.
59 Queensland Law Society, *Submission 86*.

Children's Contact Services

Proposal 10–7 The *Family Law Act 1975* (Cth) should provide for the accreditation of Children's Contact Service workers and impose a requirement that these workers hold a valid Working with Children Check.

Question 10–3 Should people who work at Children's Contact Services be required to hold other qualifications, such as a Certificate IV in Community Services or a Diploma of Community Services?

10.45 The ALRC proposes that the *Family Law Act 1975* (Cth) (or subordinate legislation) should provide for the accreditation of CCS workers and impose a requirement that these workers hold a valid Working with Children Check (WWCC). The ALRC invites submissions in relation to any other qualifications that CCS workers should be required to hold, such a Certificate IV in Community Services or a Diploma of Community Services.

10.46 Creating an accreditation system with minimum standards for CCS workers will ensure standardisation across the sector and ensure that all people working with at-risk children and their families are appropriately skilled to do so. As Children's Contact Services are involved with some of the most vulnerable families and children in the family law system at a time of potential risk, it is critical that CCS workers in both government funded and private services are accredited. Ensuring that these workers hold a valid WWCC should be a minimum requirement for any person working with children.

10.47 The role of CCSs in the family law system is to provide a safe and child focused place for changeover or supervised contact where children are potentially at risk. This involves providing services to separating families where there are concerns about family violence, child abuse including child sexual abuse, alcohol and other drug misuse, mental health issues, parental incapacity or where a child has had little or no contact with a parent for an extended period of time.

10.48 Children's Contact Services supervise contact between high-risk parents and their children, and also assist in reintroducing a parent to a child's life.[60] They may also provide reports to the family courts providing a 'written, objective account of a family's time at a service'.[61] AC.CARE submitted that CCSs are 'an essential service for families in high conflict or where there are safety concerns'.[62]

60 Jo Commerford and Cathryn Hunter, 'Children's Contact Services: Key Issues' (CFCA Paper No 35, Australian Institute of Family Studies, 2015) 17; Relationships Australia, *Submission 11*.

61 Attorney-General's Department, *Children's Contact Services Guiding Principles Framework for Good Practice* (2014) 6.

62 AC.CARE, *Submission 171*.

10.49 Government funded CCSs are subject to the Families and Children Activity Administrative Approval Requirements[63] and the Children's Contact Services Guiding Principles Framework for Good Practice.[64] The Families and Children Activity Administrative Approval Requirements apply to all federally funded family law services and require practitioners to hold 'an appropriate degree, diploma or other qualification' and demonstrate an appropriate level of competence for their role.[65] The Children's Contact Services Guiding Principles Framework for Good Practice requires CCS workers to undergo police checks and WWCCs and to comply with professional codes of conduct.[66] It also requires all staff to have a high level of relevant skills and suggests completion of a Certificate IV or Diploma in Children's Contact Service Work as a best practice consideration.[67] Interrelate, which operates six federally funded CCSs, submitted that these guidelines 'are considered good practice … but alignment with them is considered optional.'[68]

10.50 Due to the limited number of government funded CCSs, particularly in regional, rural and remote areas, and the reportedly long waiting lists for accessing these services, private CCSs have emerged to meet a growing need.[69] Private CCSs are unregulated, and workers are not required to hold particular qualifications or a WWCC.[70]

10.51 A number of submissions expressed concern in relation to the availability and quality of CCSs.[71] Domestic Violence Victoria detailed a number of concerns in its submission, including about the 'quality, accessibility and availability of contact centres for supervised contact'. It noted, in particular, prolonged waiting times for services, concerns about the 'family violence literacy of staff providing supervised access', and concerns that 'the expense of private contact centres makes them inaccessible' for families.[72]

10.52 Submissions identified a need for regulation and accreditation across the CCS sector, to ensure safe and high-quality services are provided by both government funded and private services.[73]

10.53 Some submissions also suggested a need for CCS workers to hold specific qualifications. CatholicCare Sydney suggested that CCS staff should have 'tertiary

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63 Department of Social Services, *Families and Children Activity Administrative Approval Requirements* (2014).
64 Attorney-General's Department, above n 61.
65 Department of Social Services, above n 63, standard 5.
66 Attorney-General's Department, above n 61, 10.
67 Ibid 32.
68 Interrelate, *Submission 126*.
69 See Ibid; T Quinn, *Submission 75*; Relationships Australia, *Submission 11*.
70 Australian Children's Contact Service Association, *Submission 207*.
71 See, eg, Ibid; Women's Legal Service Queensland, *Submission 158*; NATSIWA, Harmony Alliance and AWAVA, *Submission 122*; T Quinn, *Submission 75*.
72 Domestic Violence Victoria, *Submission 23*. See also Interrelate, *Submission 126*; CatholicCare Sydney, *Submission 79*.
73 See, eg, AC.CARE, *Submission 171*; Interrelate, *Submission 126*; NATSIWA, Harmony Alliance and AWAVA, *Submission 122*; CatholicCare Sydney, *Submission 79*; T Quinn, *Submission 75*; Domestic Violence Victoria, *Submission 23*; Relationships Australia, *Submission 11*; Anglicare SA, *Submission 2*.

qualifications appropriate to work with families who tend to have complex needs and where there are child safety concerns',[74] while AC.CARE suggested 'bringing back the Certificate 4 or Diploma in Children's Contact Services (preferably the diploma).'[75] Interrelate also suggested the Certificate IV in Children's Contact Services could be used to ensure core competencies in CCSs, observing '[t]he lack of availability of the Cert IV in CCS likely contributes to the lack of experience and expertise in this part of the sector.'[76]

10.54 The Certificate IV in Children's Contact Services and Diploma of Children's Contact Services have been replaced by the Certificate IV in Community Services and the Diploma of Community Services.[77]

10.55 The ALRC welcomes submissions as to whether people who work at Children's Contact Services should be required to hold a qualification, such as a Certificate IV in Community Services or Diploma of Community Services.

Judicial appointments

Proposal 10–8 All future appointments of federal judicial officers exercising family law jurisdiction should include consideration of the person's knowledge, experience and aptitude in relation to family violence.

Question 10–4 What, if any, other changes should be made to the criteria for appointment of federal judicial officers exercising family law jurisdiction?

Question 10–5 What, if any, changes should be made to the process for appointment of federal judicial officers exercising family law jurisdiction?

10.56 This proposal addresses stakeholder calls for federal judicial officers exercising family law jurisdiction to be family violence competent. The proposal also reflects recommendations made by the House of Representatives Standing Committee on Social Policy and Legal Affairs,[78] and the Royal Commission into Family Violence in relation to appointments of judicial officers in Victoria.[79]

10.57 More particularly, the proposal aims to address concerns that federal judicial officers should be expected to have the same core competencies as other family law

74 CatholicCare Sydney, *Submission 79*.
75 AC.CARE, *Submission 171*.
76 Interrelate, *Submission 126*.
77 Training.gov.au (TAG), *Qualification Details: CHC41308 - Certificate IV in Children's Contact Services Work (Release 2)* <https://training.gov.au/Training/Details/CHC41308>; Training.gov.au (TAG), *Qualification Details: CHC51108—Diploma of Children's Contact Services Work (Release 2)* <https://training.gov.au/Training/Details/CHC51108>.
78 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 2, 285.
79 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol. VI, rec 214.

system professionals.[80] As described above, the ALRC proposes that an understanding of family violence be considered a necessary competency for all family law system professionals. Some submissions suggested that this competency is especially important for judicial officers, as litigated proceedings often involve clients with the most complex needs, including in relation to family violence.[81] As noted in Chapter 6, family violence is the most commonly raised factual issue in family law proceedings.[82]

10.58 The need for professional development for judicial officers in relation to family violence and trauma-informed practice has been the subject of numerous recommendations in recent reports.[83] The ALRC notes that professional development is currently available to judicial officers exercising family law jurisdiction in relation to a number of the core competencies identified in Proposal 10–3. For example, the National Judicial College of Australia detailed a one day program it will be offering in 2018 on family violence, which includes a guide to the National Domestic and Family Violence Bench Book; support of vulnerable witnesses; behaviour change programs; the impact of trauma on child development; and judicial self-care.[84] The Family Court of Australia (Family Court) also provided some detail on professional development available to its judicial officers and stated that the court is 'strongly committed to providing on-going judicial education, and in providing CPD for its judges.'[85]

10.59 The workforce capability plan detailed above will offer an opportunity to review existing professional development for judicial officers exercising family law jurisdiction to ensure it addresses each of the identified core competencies, which include an understanding of family violence, an understanding of child abuse, and an understanding of the impacts of trauma on adults and children.

10.60 However, as noted by the SPLA Committee, the use of training to develop family violence competency for judicial officers is limited by the principle of judicial independence, as judicial officers cannot be compelled to attend or participate in training following appointment to the bench.[86] Recognising this, the SPLA Committee

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80 See, eg, Australian Human Rights Commission, *Submission 217*; Rape & Domestic Violence Services Australia, *Submission 167*; Relationships Australia Victoria, *Submission 129*; Victoria Legal Aid, *Submission 61*.

81 See, eg, National Legal Aid, *Submission 163*; Victoria Legal Aid, *Submission 61*.

82 Rae Kaspiew et al, 'Court Outcomes Project (Evaluation of the 2012 Family Violence Amendments)' (Australian Institute of Family Studies, 2015) 49.

83 COAG Advisory Panel on Reducing Violence against Women and their Children, *Final Report* (2016) rec 1.4; Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016) rec 13; House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 2, rec 27; Queensland Special Taskforce on Domestic and Family Violence, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (Queensland Government, 2015) recs 103-05; Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol VI, recs 215–16.

84 National Judicial College of Australia, *Submission 113*.

85 Family Court of Australia, *Submission 68*.

86 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 2, 285.

suggested that it is critical that judges with family violence expertise are appointed to the federal family courts.[87]

10.61 This view was also reflected in submissions to this Inquiry.[88] Victoria Legal Aid, for example, suggested that the core competencies required of family law professionals generally should also be considered in the selection and appointment of judicial officers.[89]

10.62 In light of the prevalence of family violence as an issue in family law matters, the ALRC proposes that 'knowledge, experience and aptitude' in relation to family violence become a relevant criterion for appointment as a federal judge exercising family law jurisdiction. This approach reflects the submission from the National Judicial College, which suggested that a focus on 'competencies, rather than personality,' which is the current wording in the relevant provision of the Family Law Act,[90] offers a more contemporary approach to appointments of judicial officers.[91]

10.63 The consultations for this Inquiry also expressed support for the use of appointment processes that advertise, interview and assess candidates for judicial appointment as a way to ensure greater diversity on the bench,[92] including the appointment of judicial officers from Aboriginal and Torres Strait Islander and culturally and linguistically diverse communities. Some submissions also expressed support for this style of appointment process.[93] For example, the Aboriginal Legal Service of Western Australia suggested that a more transparent process may encourage a wider cross-section of applicants for judicial office.[94] The importance of a culturally diverse workforce is discussed in the ALRC's proposal for a cultural safety framework in Chapter 12.[95]

10.64 In light of these views, the ALRC invites submissions on what, if any, other changes should be made to the criteria for appointment of federal judicial officers and whether changes should be made to the appointments process to encourage a broader cross-section of applications and appointments to judicial office.

Reports in children's matters

10.65 In the current family law system, the family courts may be assisted to make decisions in parenting matters by family reports.[96] These may be prepared by family consultants employed by the court;[97] external family reports writers engaged by the

87 Ibid.
88 Women's Domestic Violence Court Advocacy Services NSW, *Submission 153*.
89 Victoria Legal Aid, *Submission 61*.
90 *Family Law Act 1975* (Cth) s 22.
91 National Judicial College of Australia, *Submission 113*.
92 See on this, Elizabeth Handsley and Andrew Lynch, 'Facing up to Diversity? Transparency and the Reform of Commonwealth Judicial Appointments 2008–13' (2015) 37 187.
93 See, eg, Aboriginal Legal Service of Western Australia, *Submission 64*; Women Lawyers of Western Australia, *Submission 57*; Law Council of Australia, *Submission 43*.
94 Aboriginal Legal Service of Western Australia, *Submission 64*.
95 See ch 12.
96 *Family Law Act 1975* (Cth) s 62G.
97 Ibid s 11B.

courts;[98] or private psychologists, psychiatrists, paediatricians, speech and occupational therapists and educational experts (single experts).[99] Court-based and external family report writers are usually social workers or psychologists.[100]

10.66 Family reports can be highly influential in children's matters. Submissions to this Inquiry described them as playing a 'pivotal' role in assisting the court's determination of the child's best interests.[101] They can be influential in the recommendations of Independent Children's Lawyers to the court and the decisions of judicial officers; can be used as a tool in dispute resolution negotiations; and may determine whether one party is found eligible for a grant of legal aid.[102]

10.67 The *Australian Standards of Practice for Family Assessment and Reporting,*[103] developed by the family courts, currently provide minimum standards and best practice guidelines for all report writers.[104] However, these are not binding or enforceable and there is no formal accreditation or monitoring process in place.[105]

An accreditation system for private family report writers

Proposal 10–9 The Australian Government should task the Family Law Commission (Proposal 12–1) with the development a national accreditation system with minimum standards for private family report writers as part of the newly developed Accreditation Rules.

Proposal 10–10 The Family Law Commission (Proposal 12–1) should maintain a publicly available list of accredited private family report writers with information about their qualifications and experience as part of the Accreditation Register.

10.68 The ALRC proposes that the Australian Government task the proposed Family Law Commission with the development of a national accreditation system with minimum standards for private family report writers as part of the new Accreditation Rules the Family Law Commission will have responsibility for developing under Proposal 12–2. As set out in Chapter 12, the ALRC proposes that part of the Family

98 *Family Law Regulations 1984* (Cth) reg 7.

99 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 2, 205–6.

100 Ibid 270.

101 CPSU, *Submission 136*.

102 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 2, 271; Women's Legal Services Australia, *Submission 45*.

103 *Australian Standards of Practice for Family Assessments and Reporting* (Family Court of Australia, Federal Circuit Court of Australia and Family Court of Western Australia, 2015).

104 Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016) 31. See also Association of Family and Conciliation Courts Australian Chapter, *Submission 232*.

105 Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016) 31; House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 2, 276; Family Court of Australia, *Submission 68*; Women's Legal Services Australia, *Submission 45*.

Law Commission's function should be to develop and administer Accreditation Rules, modelled on the existing accreditation system for FDR practitioners.

10.69 To supplement this, the ALRC also proposes that the Family Law Commission maintain a publicly available list of accredited family report writers with information about their qualifications and experience as part of the Accreditation Register proposed in Proposal 12–2.

10.70 These proposals respond to the concerns raised with the ALRC and in previous inquiries about the quality of private reports in children's matters. Improving oversight of family report writers has been the subject of previous recommendations. Proposal 10–9 draws on Recommendation 30 of the SPLA Committee's report, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (*SPLA Family Violence* report), which recommended that

> the Australian Government develops a national accreditation system with minimum standards and ongoing professional development for family consultants modelled on the existing accreditation system for family dispute resolution practitioners. This system should include a complaints mechanism for parties when family consultants do not meet the required professional standards.[106]

10.71 Together, Proposals 10–9 and 10–10 seek to address the calls for greater transparency and support for consumer choice in the selection of report writers for children's cases by allowing parties to ascertain that a proposed report writer has acquired and maintained the competencies that are relevant to the matter.

10.72 Submissions to this Inquiry raised concerns about the possible negative outcomes for children in cases where the report writer is not appropriately qualified or expert in the relevant issues, such as an understanding of trauma and its impacts on adults and children,[107] child abuse,[108] cultural norms,[109] or disability.[110] Many suggested the need for specific and ongoing training for report writers to address these concerns.[111] These competencies are each addressed in the family law system workforce capability plan, detailed above.

10.73 Submissions also expressed concerns about the lack of freely available information about the qualifications, skills and experience of private report writers.[112]

10.74 In response to these concerns, some stakeholders suggested returning to a process whereby responsibility for family reports is vested exclusively with court-

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106 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 2 rec 30.

107 See, eg, Z Rathus, Dr S Jeffries, Dr H Menih and Professor R Field, *Submission 166*; Women's Legal Services Australia, *Submission 45*.

108 See, eg, Bravehearts Foundation Ltd, *Submission 148*; Women's Legal Services Australia, *Submission 45*.

109 See, eg, Brimbank Melton Community Legal Centre *Submission 76*; National Family Violence Prevention Legal Services Forum, *Submission 63*; Women's Legal Services Australia, *Submission 45*.

110 People with Disability Australia (PWDA), *Submission 10*.

111 See eg, Rape & Domestic Violence Services Australia, *Submission 167*; Brimbank Melton Community Legal Centre *Submission 76*.

112 See eg, Women's Council for Domestic and Family Violence Services WA, *Submission 182*; Women's Legal Services Australia, *Submission 45*.

based family consultants.[113] However, a research team that has been looking at family reports since 2015 submitted that there is not sufficient evidence to support a finding as to the relative quality of reports prepared by private *versus* court-based family report writers. The team suggested that, in place of abolishing private family report writers, as recommended by the SPLA Committee,[114] a 'proper and rigorous' accreditation process be established for private professionals wishing to prepare family reports.[115]

10.75 Many submissions on this issue similarly saw a need for the development of a national accreditation scheme and supported the SPLA Committee's recommendation in this regard.[116] For example, the Family Court submitted that:

> An accreditation scheme which allows parties to ascertain that private report writer has acquired and maintained the required competencies and works to a high standard could greatly assist both litigants and the Court.[117]

10.76 The Family Court further submitted that this scheme should be 'administered by an independent body operating under a robust and sufficiently resourced governance structure'.[118] The ALRC's proposals give effect to these views.

10.77 While the proposed accreditation system does not include a complaints mechanism, the ALRC has made proposals in Chapter 12 to address concerns raised in recent reports[119] and submissions[120] about the need for a complaints avenue in relation to family reports.

10.78 Currently, if a party to a dispute wishes to complain about the contents of a family report, they are required to do so through cross-examination.[121] This can be challenging for unrepresented litigants and has associated costs.[122] Complaints about conduct that cannot be addressed in cross-examination can also be directed to the appropriate Regional Coordinator of Child Dispute Services or the Senior Family Consultant where the matter is in the Family Court,[123] or the appropriate Regional

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113 See eg, U Chowdhury, A Rimovetz, E Post and S Davis, *Submission 183*; CPSU, *Submission 136*.

114 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 2, rec 22.

115 Z Rathus, Dr S Jeffries, Dr H Menih and Professor R Field, *Submission 166*.

116 See, eg, Centre for Excellence in Child and Family Welfare, *Submission 102*; Family Inclusion Network Queensland (Townsville), *Submission 78*.

117 Family Court of Australia, *Submission 68*.

118 Ibid.

119 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 2, 275–6, 287.

120 See, eg, Z Rathus, Dr S Jeffries, Dr H Menih and Professor R Field, *Submission 166*; Women's Legal Services Australia, *Submission 45*.

121 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 2, 275.

122 Ibid 208–9.

123 Family Court of Australia, *Complaints about Family Reports and Family Consultants* <www.familycourt.gov.au/wps/wcm/connect/fcoaweb/contact-us/feedback/family-reports-consultants-complaints>.

Dispute Resolution Coordinator where the matter is in the Federal Circuit Court of Australia (Federal Circuit Court).[124]

10.79 Complaints can also be made to relevant professional regulatory bodies, such as the Australian Association of Social Workers or the Australian Psychological Society. Proposal 12–11 in Chapter 12 seeks to remove existing barriers to professional regulatory bodies receiving and reviewing these complaints. The ALRC also proposes the establishment of a new oversight body, the Family Law Commission, in Chapter 12 that would have responsibility for oversight of, and receive complaints about, professionals across the family law system. This would include family report writers.

The focus and specialisation of reports and report writers

Proposal 10–11 When requesting the preparation of a report under s 62G of the *Family Law Act 1975* (Cth), the family courts should provide clear instructions about why the report is being sought and the particular issues that should be reported on.

Proposal 10–12 In appropriate matters involving the care, welfare and development of a child, judges should consider appointing an assessor with expert knowledge in relation to the child's particular needs to assist in the hearing and determination of the matter.

10.80 To encourage the preparation of reports focused on the specific issues in matters relating to the care, welfare and development of a child, such as family violence or parental mental health, the ALRC proposes that, when requesting a report under s 62G of the *Family Law Act*, the family courts should provide clear instructions about why a report is being sought and the particular issues that should be reported on. Section 62G of the *Family Law Act* provides that in matters concerning the care, welfare and development of a child the court may direct a family report writer to provide a report on matters relevant to the proceedings.[125]

10.81 This proposal seeks to address a concern raised by stakeholders that reports can be general in nature, with a lack of focus on specific issues that have been raised in the proceedings, such as family violence or child abuse. In response to this issue, Women's Legal Service Australia called for the courts to give report writers greater clarity about why the report is being sought and the main issues to be reported on.[126]

10.82 The ALRC also proposes that, in appropriate matters involving the care, welfare and development of a child, judges should consider appointing an assessor with expert knowledge in relation to the child's needs. This proposal responds to stakeholder calls for specialist advice to be available to decision makers in cases involving children with

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124 Federal Circuit Court of Australia, *Federal Circuit Court of Australia Complaints Policy* <www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/contact-us/feedback-complaints/complaints>.

125 *Family Law Act 1975* (Cth) s 62G.

126 Women's Legal Services Australia, *Submission 45*.

particular cultural or other needs, such as Aboriginal and Torres Strait Islander children.[127]

10.83 The proposal encourages judges to use s 102B of the *Family Law Act*, which empowers the court to 'get an assessor to help it in the hearing and determination of the proceedings, or any part of them or any matter arising under them', to appoint assessors with expertise in particular areas in relevant cases to assist in the hearing and determination of appropriate arrangements for the child's care.

10.84 Despite the existence of this provision in the *Family Law Act*, it appears to have been used rarely in family law proceedings. This stands in contrast to the use of assessors by other courts to assist judicial officers with expert evidence. For example, proceedings under the *Land Court Act 2000* (Qld) and in the NSW Land and Environment Court make use of Indigenous assessors to advise the court about matters within the Assessor's knowledge that are relevant to a question in the proceedings.[128]

10.85 This proposal seeks to bring this mechanism to the attention of decision makers and parties, and to enhance its use as an option in appropriate cases.

Reports on parenting ability of people with disability

Proposal 10–13 The *Family Law Act 1975* (Cth) should provide that, where concerns are raised about the parenting ability of a person with disability in proceedings for parenting orders, a report writer with requisite skills should:

- prepare a report for the court about the person's parenting ability, including what supports could be provided to improve their parenting; and
- make recommendations about how that person's disability may, or may not, affect their parenting.

10.86 The ALRC proposes that, in children's matters where there are concerns about the parenting ability of a person with disability, a report writer with requisite skills should prepare a report to assist the court in its decision making.

10.87 This proposal, which complements the ALRC's proposed provision of supports for people with disability,[129] respond to concerns raised in submissions to this Inquiry that in family law proceedings inappropriate inferences may sometimes be drawn about a person's capacity to parent based upon their disability.

10.88 More particularly, a number of submissions expressed concerns about the potential for assumptions about people with disability as parents to influence the

127 See, eg, National Family Violence Prevention Legal Services Forum, *Submission 63*; National LGBTI Health Alliance, *Submission 14*; People with Disability Australia (PWDA), *Submission 10*.

128 *Land Court Act 2000* (Qld) s 32D. See also Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [26-667].

129 See ch 9.

outcomes in contested cases.[130] The Australian Human Rights Commission, for example, submitted that:

> Assumptions about a person with disability's parenting capacity or capacity to manage the stresses of litigation creates the potential for parents with disability to be disadvantaged in achieving orders for the care of children in family law proceedings, and may see a parent lose their care role, or be persuaded to consent to limited contact arrangements.[131]

10.89 The Office of the Public Advocate (Vic) noted similarly that 'disability is frequently presented as a deficit in a parent who is seeking parental responsibility and residence in relation to their child', and stressed that disability 'does not, prima facie, mean a person is unable to parent their child'.[132]

10.90 Other stakeholders indicated that women with disability who are victims of family violence are particularly vulnerable in this regard, and urged reform to ensure the courts are 'aware of how perpetrators of family violence will target impairment to discredit mothers with disabilities as a tactic of family violence and take steps to mitigate this'.[133] Women's Legal Services Australia also noted that:

> Women with disability who have been subjected to family violence and their advocates have expressed concern to WLSA that often a woman's 'disability is on trial' in family law matters when the focus should be on recognising the perpetration of family violence, the impact of the perpetration of such violence and the best interests of the child. This is also reflected in WLSA members' experiences.[134]

10.91 Part VII of the *Family Law Act* provides the courts with power to reallocate parental responsibility in relation to a child where this is in the child's best interests.[135] In deciding what orders will be in the child's best interests, the courts must consider the capacity of each parent to provide for the child's emotional and intellectual needs.[136]

10.92 Domestic Violence Victoria raised concerns about the current approach to determining parenting capacity for parents with disability in the family law system:

> The family law system uses a deficit-based approach in relation to disability and parenting and should transition to focusing on the capacities of women with disabilities as mothers, creating options and services that support women with disabilities who are experiencing family violence to strengthen their parenting away from the perpetrator of family violence.[137]

10.93 The Office of the Public Advocate (Vic) also raised concerns about the currency of assessment tools used by some report writers for the family courts to assess

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130 See, eg, Advocacy for Inclusion, *Submission 90*; Office of the Public Advocate (Vic), *Submission 37*; Safe Steps Family Violence Response Centre, *Submission 15*.
131 Australian Human Rights Commission, *Submission 217*.
132 Office of the Public Advocate (Vic), *Submission 37*.
133 Domestic Violence Victoria, *Submission 23*.
134 Women's Legal Services Australia, *Submission 45*.
135 *Family Law Act 1975* (Cth) s 61DA.
136 Ibid s 60CC(3)(f).
137 Domestic Violence Victoria, *Submission 23*.

cognitive disability and its impacts on parenting capacity,[138] while others questioned the skills of report writers in relation to assessing the parenting capacity of people with disability.[139]

10.94 In light of these concerns, the ALRC's proposal is designed to ensure that decision makers have access to appropriate evidence in matters where concerns are raised about the parenting abilities of a person with disability. The ALRC proposes that these reports should be provided by people with the requisite skills and qualifications to assess the parenting capacity of a parent with disability.

10.95 These reports should include assessments about the supports that could be provided to people with disability to build their parenting abilities so that they can fulfil their parenting responsibilities to the best of their abilities and enjoy meaningful relationships with their children.

Cultural reports for Aboriginal and Torres Strait Islander children

Proposal 10–14 The *Family Law Act 1975* (Cth) should be amended to provide that in parenting proceedings involving an Aboriginal or Torres Strait Islander child, a cultural report should be prepared, including a cultural plan that sets out how the child's ongoing connection with kinship networks and country may be maintained.

Question 10–6 Should cultural reports be mandatory in all parenting proceedings involving an Aboriginal or Torres Strait Islander child?

10.96 The *Family Law Act* currently contains a number of provisions designed to protect the rights of Aboriginal and Torres Strait Islander children to enjoy and maintain a connection with their culture.[140] These include a requirement that the court, when determining what is in the best interests of a child, must consider the child's right to enjoy their Aboriginal or Torres Strait Islander culture,[141] and must have regard to any kinship obligations, and child-rearing practices, that are part of the child's Aboriginal or Torres Strait Islander culture.[142] Under the ALRC's proposed simplification of the Act, set out in Chapter 3, it is proposed that for Aboriginal and Torres Strait Islander children, the court must consider the maintenance of the child's connection to their family, community, culture and country when determining what arrangements best promote the child's safety and best interests (Proposal 3–6).

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138 Office of the Public Advocate (Vic), *Submission 37*.

139 See, eg, National Legal Aid, *Submission 163*. People with Disability Australia argued that the lack of 'trauma-informed disability awareness training for family consultants and others in the family law system can mean that expert reports are written and received without interrogating the underlying biases against people with disability.': People with Disability Australia (PWDA), *Submission 10*.

140 See, eg, *Family Law Act 1975* (Cth) s 60B(3), which protects the rights of Aboriginal children to enjoy their culture and maintain a connection with that culture.

141 Ibid s 60CC(3)(h).

142 Ibid s 61F.

10.97 The ALRC proposes that these rights be supported by amending the *Family Law Act* to provide for the preparation of cultural reports in matters where the care of an Aboriginal or Torres Strait Islander child is in issue. The ALRC further proposes that these reports include a cultural plan articulating how the child's ongoing connection with kinship networks and country will be maintained.[143]

10.98 This proposal is supported by calls for the use of cultural reports from a range of stakeholders.[144] The Law Council of Australia, for example, submitted:

> An important adjunct to the family report where cultural issues are identified would be the preparation of a cultural report that is relevant to the family. To the LCA's knowledge, such reports are rarely used but would be of immeasurable assistance especially in circumstances involving caregivers from mixed cultural backgrounds. Cultural reports may identify the cultural needs and characteristics of the child and may provide guidance about the child's participation.[145]

10.99 The proposal also seeks to bring the *Family Law Act* into line with best practice in other jurisdictions,[146] and reflects similar recommendations made by the Family Law Council in 2016[147] and by the SPLA Committee in 2017.[148]

10.100 As described by Victorian Aboriginal Legal Services, the aims of these reports 'should not only be to provide the court with a better understanding of the unique circumstances and experiences of the Aboriginal family, but also to provide a greater voice for the Aboriginal family in court'. [149]

10.101 Cultural reports should include information about the obligations of family members raising children associated with raising totemic and country connection, which can help to inform the decision maker's understanding of, and responsiveness, to the particular cultural issues facing the child, including the child's connection to family, culture, community and country. A cultural plan could address specific issues relating to a child, such as how the child's ongoing connection with kinship networks and country may be maintained,[150] with reference to the care arrangements being proposed in the parenting proceedings.

10.102 As set out in Proposal 10–12 above, the ALRC proposes that the family courts should consider appointing assessors with expert knowledge in relation to a child's needs, including the cultural needs of Aboriginal and Torres Strait Islander children.

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143 See Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016) 99.

144 See, eg, Women's Legal Service NSW, *Submission 218*; Queensland Law Society, *Submission 86*; Law Council of Australia, *Submission 43*; ATSILS Qld, *Submission 42*.

145 Law Council of Australia, *Submission 43*.

146 See, eg, *Children, Youth and Families Act 2005* (Vic) s 176.

147 Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016) rec 16.

148 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 2 rec 24.

149 Victorian Aboriginal Legal Service, *Submission 101*.

150 Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016) 149.

10.103 Previous reports and submissions to this Inquiry have identified a number of possible sources of expertise for the preparation of cultural reports. The Family Law Council suggested that Elders and Grandmothers should be involved in their preparation as appropriate.[151] The Australian and Torres Strait Islander Legal Service Qld supported the appointment of specialist cultural report writers in the family law system,[152] while VALS argued that cultural reports should be

> written by an ACCO that is connected to the child, parent or extended family. The report writer should consult with the family and extended family when appropriate, and with relevant community members. This information should be included alongside academic information that assists in explaining the experiences of the family, such as, the impacts of inter-generational trauma and child removal on the family and their community.[153]

10.104 The Law Council of Australia also proposed that cultural reports be used in cases involving children from culturally and linguistically diverse backgrounds.[154] The ALRC suggests that consideration should be given to the need for specialist reports to be prepared, where relevant, in parenting proceedings involving children from culturally and linguistically diverse backgrounds and LGBTIQ families to address the particular needs of those children.

Professional wellbeing

Proposal 10–15 The Australian Government should, as a condition of its funding agreements, require that all government funded family relationships services and family law legal assistance services develop and implement wellbeing programs for their staff.

10.105 All federally funded family relationships services and family law legal assistance services should be required to develop and implement wellbeing programs for their staff. This will ensure that a best practice approach is taken to addressing the risk of vicarious trauma to the staff providing these services. Improving professional wellbeing will in turn improve the ability of professionals and the organisations they work for to provide quality services to separating families.

10.106 Many of the clients who seek assistance from family law services and legal assistance services in relation to separation are affected by family violence and/or child abuse.[155] People working regularly with clients who have experienced violence or abuse are frequently exposed to traumatic material which places them at risk of vicarious trauma. A person with vicarious trauma may experience the same symptoms

151 Ibid 99.
152 ATSILS Qld, *Submission 42*.
153 Victorian Aboriginal Legal Service, *Submission 101*.
154 Law Council of Australia, *Submission 43*.
155 See Rae Kaspiew et al, *Experiences of Separated Parents Study (Evaluation of the 2012 Family Violence Amendments)* (Australian Institute of Family Studies, 2015); Lixia Qu et al, 'Post-Separation Parenting, Property and Relationship Dynamics after Five Years' (Attorney-General's Department (Cth), 2014).

as someone who experiences trauma first hand, including anxiety, depression, irritability and disturbed sleep. They may also experience changes in their beliefs about themselves, other people and the world. For example, they may lose belief in their own abilities, or start to view the world as an unsafe place in which people treat each other badly.[156]

Making organisations responsible for staff wellbeing

10.107 The management of work-based risks to mental health by employers is a responsibility under work health and safety legislation.[157] Employers are responsible for identifying workplace hazards, assessing the risk these hazards pose to staff and implementing effective control mechanisms.[158] People working in the family law system face clear workplace risks, given that 'exposure to trauma is the clearest predictor of vicarious traumatisation.'[159]

10.108 A number of submissions agreed that vicarious trauma should be seen as an issue of work health and safety responsibility.[160] Treating vicarious trauma as an organisational concern also makes clear that vicarious trauma is a 'normal and expected'[161] reaction to family law system professionals' exposure to trauma, rather than a weakness or shortcoming on the part of any individual staff member. Recognising vicarious trauma as a risk inherent in the work of family law system professionals was supported in submissions.[162]

10.109 Many organisations supported introduction of approaches to promote the wellbeing of family law professionals in their submissions.[163] Suggested approaches included professional or clinical supervision, debriefing, confidential counselling and vicarious trauma training.

10.110 These approaches are best captured collectively by wellbeing programs. Safe Work Australia has identified the provision of wellbeing programs as a best practice approach to promoting psychological health and safety in the workplace.[164] The Royal Commission into Institutional Responses to Child Sexual Abuse's wellbeing program is an example of one such program provided to staff of a federally funded body in

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156 Zoe Morrison, '"Feeling Heavy": Vicarious Trauma and Other Issues Facing Those Who Work in the Sexual Assault Field' (ACSSA Wrap 4, Australian Institute of Family Studies, September 2007) 1; Rape & Domestic Violence Services Australia, *Submission 167*.

157 See Safe Work Australia, *Work-Related Psychological Health and Safety: A Systematic Approach to Meeting Your Duties: National Guidance Material* (2018).

158 Ibid 6.

159 Morrison, above n 156, 5.

160 Rape & Domestic Violence Services Australia, *Submission 167*; Domestic Violence Victoria, *Submission 23*.

161 Morrison, above n 156, 6.

162 See, eg, Marrickville Legal Centre, *Submission 137*; CatholicCare Sydney, *Submission 79*; Australian Psychological Society, *Submission 55*; Relationships Australia, *Submission 11*.

163 See, eg, CatholicCare Diocese of Broken Bay, *Submission 197*; National Legal Aid, *Submission 163*; Marrickville Legal Centre, *Submission 137*; Queensland Law Society, *Submission 86*; CatholicCare Sydney, *Submission 79*; Aboriginal Legal Service of Western Australia, *Submission 64*; Victoria Legal Aid, *Submission 61*; Family & Relationship Services Australia, *Submission 53*; Western Sydney CLC, *Submission 8*.

164 Safe Work Australia, above n 157, 6, 44.

response to a recognised risk of vicarious trauma.[165] Western Sydney CLC expressed support for organisational wellbeing programs, and commended the Royal Commission's program 'as [a guide] of how to promote the wellbeing of professionals and judicial officers who work in the family law system.'[166]

10.111 Some of the submissions from legal assistance and family relationships services detailed approaches they have taken to promote staff wellbeing.[167] These include provision of relevant training, supervision, mentoring, team debriefing, access to confidential counselling services and provision of wellbeing allowances. Family & Relationship Services Australia submitted that its member services already

> do a number of thing[s] to maintain the wellbeing of their practitioners, including setting minimum levels of supervision requirements for all staff who work face-to-face with clients...and set[ting] strong wellbeing initiatives and policies.[168]

10.112 This suggests that many of the organisations that would be required to provide wellbeing programs under Proposal 10–15 are capable of meeting such a requirement. By requiring all federally funded services whose staff are at risk of vicarious trauma to meet this requirement, a best practice approach would become uniform across these services. While this proposal would not regulate private family law services, it would ensure federally funded services lead by example in achieving healthy workplaces.

10.113 A number of submissions observed that non-legal professions in the family law system had better developed approaches to professional wellbeing than legal services, and that legal practitioners and judicial officers may benefit from a shift to a similar culture and practice in relation to wellbeing.[169] Introducing a requirement to implement wellbeing programs in family law legal assistance services, as Proposal 10–15 does, would promote such a culture shift.

10.114 Implementing wellbeing programs may also reduce the human and financial costs to organisations associated with vicarious trauma. These include staff absences, high staff turnover and workers compensation claims.[170]

10.115 However, the implementation of wellbeing programs may not alone be sufficient to address the risk of vicarious trauma. A number of submissions identified current workloads as a factor significantly affecting the wellbeing of family law professionals and judicial officers.[171] Anglicare WA submitted that, while support from an organisation is one factor that improves professional wellbeing, organisations also

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165 Australian Law Reform Commission, *Review of the Family Law System*, Issues Paper 48 (2018) 87–8.

166 Western Sydney CLC, *Submission 8*.

167 See, eg, National Legal Aid, *Submission 163*; Relationships Australia Northern Territory, *Submission 114*; CatholicCare Sydney, *Submission 79*; Women's Legal Services Australia, *Submission 45*.

168 Family & Relationship Services Australia, *Submission 53*.

169 See, eg, National Legal Aid, *Submission 163*; Marrickville Legal Centre, *Submission 137*; Relationships Australia Victoria, *Submission 129*.

170 Rape & Domestic Violence Services Australia, *Submission 167*.

171 See, eg, NSW Young Lawyers Family Law Committee, Law Society of NSW, *Submission 108*; Aboriginal Legal Service of Western Australia, *Submission 64*; Women's Legal Services Australia, *Submission 45*; Law Council of Australia, *Submission 43*.

need to be sufficiently resourced to ensure staff do not have large and unmanageable caseloads 'which reduces wellbeing and exacerbates vicarious trauma.'[172]

10.116 Research also identifies large or unmanageable caseloads as a factor increasing the risk of vicarious trauma.[173] The Victorian Royal Commission into Family Violence recognised the impact of large workloads on the workplace stress and vicarious trauma of staff in specialist family violence services, and recommended an industry plan to address these and other challenges collectively faced by the workforce.[174] Consideration of the caseloads of professionals in family relationships services and family law legal assistance services will require consideration in the implementation of any wellbeing program.

Judicial wellbeing

10.117 Judicial officers are also exposed to people who have experienced trauma, and so are at risk of vicarious trauma.[175] The need for approaches to promote the wellbeing of judicial officers exercising family law jurisdiction was recognised in a number of submissions.[176]

10.118 In consultations, the ALRC heard that the Federal Circuit Court has a Judicial Wellbeing Committee and a Judicial Wellbeing Policy. In its submission, the Family Court detailed the measures already introduced by the court's Judicial Welfare Committee. These include provision of confidential counselling and support for judicial officers and their families, and a mentoring program for newly appointed judicial officers. The Family Court further submitted that the court's Judicial Education program has included programs relevant to judicial wellbeing.[177]

10.119 The National Judicial College of Australia submitted that mentoring is 'a valuable means of alleviating stress on judicial officers' and noted work it is currently undertaking with the Australasian Institute of Judicial Administration to develop mentoring guidelines. The National Judicial College of Australia also identified wellbeing as a core competency for judicial officers, with information and tools to support judicial wellbeing incorporated into all of its programs.[178]

10.120 The ALRC supports the continued development of approaches to promote the wellbeing of judicial officers exercising family law jurisdiction.

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172 Anglicare WA, *Submission 152*.

173 Andrew P Levin and Scott Greisberg, 'Vicarious Trauma in Attorneys' (2003) 24 *Pace Law Review* 245; Morrison, above n 156.

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

175 Peter Jaffe et al, 'Vicarious Trauma in Judges: The Personal Challenge of Dispensing Justice' [2006] *Judges Journal*; Carly Schrever, 'Judging Stress' (2015) September *Victorian Law Institute Journal* 29.

176 See, eg, Uniting, *Submission 162*; Aboriginal Legal Service of Western Australia, *Submission 64*; Victoria Legal Aid, *Submission 61*; Law Council of Australia, *Submission 43*.

177 Family Court of Australia, *Submission 68*.

178 National Judicial College of Australia, *Submission 113*.

Potential flow-on effects of improving professional wellbeing

10.121 A number of submissions from individuals expressed frustration that the ALRC was looking at professional wellbeing in the family law system. For example, I Vann submitted:

> We are far less concerned about this than we are of the rise in parental suicides and fatherless children, homelessness among men as a result of corrupt child support agency practices and rates of depression rampant in people suffering this system. Legal professionals make enough money off us to get their own help.[179]

10.122 However, the ALRC considers ensuring that professional wellbeing is central to producing a workforce that is able to meet the safety and wellbeing needs of children and their families.

10.123 Vicarious trauma can negatively impact upon a professional's ability to provide quality services to clients. It may also have a flow-on effect on that professional's co-workers and their ability to provide quality services.[180]

10.124 The need to promote professional wellbeing to ensure clients receive quality services in the family law system was recognised in submissions. As one organisation noted:

> It is critical that strategies are put in place to manage VT [vicarious trauma] effectively, not only to ensure the wellbeing of professionals but also to ensure the family law system functions effectively for clients.[181]

10.125 Setting the Record Straight for the Rights of the Child submitted similarly that the 'wellbeing of practitioners within the family law system is crucial to its fair and effective operation'.[182]

179 I Vann, *Submission 97*.
180 Australian Law Reform Commission, *Review of the Family Law System*, Issues Paper 48 (2018) 86.
181 Rape & Domestic Violence Services Australia, *Submission 167*.
182 Setting the Record Straight for the Rights of the Child, *Submission 28*.

11. Information Sharing

Contents

Summary

11.1 Some families and children have contact with multiple legal and support services and systems, either simultaneously or over a period of time. These may include contacts with the family law, family violence and child protection systems, and with a range of legal and support services.

11.2 Timely exchange of information between entities within the family law system and between the family law, family violence and child protection systems is critical to promoting the care, safety, welfare, wellbeing and health of families and children, including through early identification of risk and better coordination of interventions. This will also assist in preventing families and children falling between the jurisdictional gaps between the systems and not having their safety and support needs met.

11.3 Reforms to information sharing practices involving families and children who access the family law system need to be holistic and address legal, policy and cultural contexts. To better realise this goal, this chapter proposes reforms to:

- strengthen the legal framework that supports information sharing between the family law, family violence and child protection systems;
- develop a national framework for information sharing between these systems to ensure ongoing, long-term inter-governmental commitment to this issue;
- implement initiatives in the shorter term to facilitate improved information sharing between systems; and
- implement an information sharing scheme for the proposed reformed family law system.

11.4 Good personal and institutional working relationships are also critical to the success of information sharing between systems.[1]

11.5 There are significant reforms occurring in some jurisdictions to improve the sharing of information between entities within their jurisdiction about the safety and wellbeing of families and children. Any reforms in this area should consider how reforms occurring within jurisdictions can be integrated.

Barriers to information sharing between systems

11.6 Legislative power in relation to issues concerning families is divided between the Australian and state and territory governments. The Commonwealth has specific powers under the *Constitution* to deal with matters relating to marriage, and divorce and matrimonial causes.[2] The states and territories have also referred some of their powers to the Commonwealth, including powers related to 'ex-nuptial children'.[3] The *Family Law Act 1975* (Cth) (*Family Law Act*) provides the legal framework for the Commonwealth's powers concerning families.

11.7 State and territory governments do not have limitations on their powers in relation to legislating for families, however, where a law is inconsistent with a federal law then the federal law prevails.[4] State and territory governments are responsible for the administration and operation of child protection services.[5] Legal frameworks and government and organisational structures for child protection are different in each state and territory. The Commonwealth has some responsibility for the legal frameworks addressing family violence through the *Family Law Act*, however, states and territories have primary responsibility for family violence legal frameworks and court systems. The difficulties that the division of powers between Australian, state and territory governments create for families and children who have safety concerns are well documented.[6]

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1 See, eg, Patrick O'Leary et al, 'Interagency Working in Child Protection and Domestic Violence' (2018) 71(2) *Australian Social Work*.

2 The Commonwealth may legislate in the areas of 'marriage', and 'divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants': *Australian Constitution* ss 51(xxi), 51(xxii). The Commonwealth also has the power to legislate with respect to 'matters incidental to the execution of any power vested by this Constitution in the Parliament'; Ibid s 51(xxxix).

3 All states, except Western Australia, have transferred to the Commonwealth legislative power in relation to 'custody and guardianship of, and access to' ex-nuptial children. This specifically excluded a reference of powers that would affect the operation of the care and protection legislation of the states and territories.

4 *Australian Constitution* s 109.

5 See Australian Institute of Family Studies, 'Australian Child Protection Legislation - CFCA Resource Sheet' <https://aifs.gov.au/cfca/publications/australian-child-protection-legislation>.

6 See, eg, Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010) 114; Richard Chisholm, *Information-Sharing in Family Law & Child Protection: Enhancing Collaboration* (Commonwealth of Australia, 2013); 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). The Australian Institute of Family Studies referred to some of their research that was relevant to this issue: Australian Institute of Family Studies, *Submission 206*. See also Lesley Laing, Susan Heward-Belle and Cherie Toivonen, 'Practitioner Perspectives on Collaboration across Domestic Violence, Child Protection, and Family Law: Who's Minding the Gap?' (2018) 71(2) *Australian Social Work*.

11.8 There are some significant barriers to information sharing between the family law, family violence and child protection systems, including:

- the large number of interfaces between courts, bodies and agencies that are encompassed when addressing information sharing between systems;
- the differing laws and legal frameworks in jurisdictions;
- the perceived and real barriers to information sharing presented by privacy and confidentiality provisions;
- the significant number of stakeholders involved in information sharing between the systems; and
- the lack of understandings by professionals in the systems about the legal frameworks, and corresponding responsibilities for professionals in those systems, including different thresholds for assessing risk.

National approaches to addressing information sharing across systems

11.9 In the past eight years there have been a number of recommendations in reports aimed at addressing barriers to information sharing between the family law, family violence and child protection systems.[7]

11.10 Currently, work is being progressed under the Council of Attorneys-General Family Violence Working Group (CAG Family Violence Working Group) to develop measures to improve the interaction between the family law, family violence and child protection systems.[8] One of its seven terms of reference relates to improving information sharing between the systems. The June 2018 Council of Attorneys-General communiqué noted that work is underway to develop an information sharing regime for the sharing of court orders, judgments, transcripts and other relevant documentation between the family law, family violence and child protection systems.[9] A report back to the Council of Attorneys-General is due later in 2018.

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7 See Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010) 114; Chisholm, above n 6; Richard Chisholm, *The Sharing of Experts' Reports between the Child Protection System and the Family Law System* (Commonwealth of Australia, 2014); Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (2017); Family Law Council, *Interim Report to the Attorney-General in Response to the First Two Terms of Reference on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (2015); House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (2017); Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016).

8 A Council of Attorneys-General Family Violence Working Group of senior justice officials was formed in May 2017 to develop measures to improve the interaction between the family law, child protection and family violence systems: Attorney-General's Department, *Family Violence* <www.ag.gov.au/FamiliesAndMarriage/Families/FamilyViolence/Pages/default.aspx>.

9 Commonwealth Attorney-General's Department, *Council of Attorneys-General, Communique June 2018* <www.ag.gov.au/About/CommitteesandCouncils/Council-of-Attorneys-General/Documents/Council-of-Attorneys-General-communique-June-2018.pdf>.

11.11 While there is a clear commitment that the CAG Family Violence Working Group will develop an information sharing regime for relevant court orders, judgments and transcripts, it is not known what recommendations for reforms, if any, will be made for the sharing of other information. Accordingly, the reforms set out in the proposals below are intended to complement and build upon the work currently being done by the CAG Family Violence Working Group. The ALRC acknowledges that some of the reform proposals may be reforms that the CAG Family Violence Working Group may already be progressing in a similar form.

11.12 The Australian Government has also accepted in principle the recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse that the Australian, state and territory governments should develop:

- an information exchange scheme to share information about the safety and wellbeing of children;[10]
- nationally consistent provisions to facilitate information sharing;[11] and
- education, training, and guidelines to support the information exchange.[12]

11.13 The Australian Government has committed to working with other jurisdictions

> to identify and remove barriers to information sharing and to develop methods to promote and enable information sharing. Governments will seek to build on existing arrangements within jurisdictions and across jurisdictions in preparation for developing an agreed information sharing scheme.[13]

11.14 The Australian Government should ensure that the implementation of reforms proposed in this chapter complements any reforms being implemented in response to the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse.

Information sharing across systems

11.15 Submissions made reference to initiatives in particular states and territories that are successfully improving information sharing between the family law system and the child protection and family violence systems.[14] It appears that the implementation of initiatives to date has been significantly reliant upon facilitative legislative provisions, and to a significant extent, good relationships between stakeholders in jurisdictions.

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10 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (2017) rec 8.6.

11 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (2017) rec 8.7.

12 Ibid rec 8.8.

13 Commonwealth Attorney-General's Department, *Australian Government Response to the Royal Commission into Institutional Responses to Child Sexual Abuse* (2018) <www.ag.gov.au/RightsAndProtections/Australian-Government-Response-to-the-Royal-Commission-into-Institutional-Responses-to-Child-Sexual-Abuse/Pages/default.aspx> response to rec 8.7.

14 See, eg, National Legal Aid, *Submission 163*; NATSILS, *Submission 157*; National Family Violence Prevention Legal Services Forum, *Submission 63*; Victoria Legal Aid, *Submission 61*.

Legislative reform for information sharing

Proposal 11–1 State and territory child protection, family violence and other relevant legislation should be amended to:

- remove any provisions that prevent state and territory agencies from disclosing relevant information, including experts' reports, to courts, bodies and agencies in the family law system in appropriate circumstances; and
- include provisions that explicitly authorise state and territory agencies to disclose relevant information to courts, bodies and agencies in the family law system in appropriate circumstances.

The relevant agencies can be identified through the proposed information sharing framework (Proposals 11–2 and 11–3).

Question 11–1 What other information should be shared or sought about persons involved in family law proceedings? For example, should:

- State and territory police be required to enquire about whether a person is currently involved in family law proceedings before they issue or renew a gun licence?
- State and territory legislation require police to inform family courts if a person makes an application for a gun licence and they have disclosed they are involved in family law proceedings?
- The *Family Law Act 1975* (Cth) require family courts to notify police if a party to proceedings makes an allegation of current family violence?
- The *Family Law Act 1975* (Cth) give family law professionals discretion to notify police if they fear for a person's safety and should such professionals be provided with immunity against actions against them, including defamation, if they make such a notification?

11.16 The ALRC proposes that states and territories ensure that all applicable legislation, including family violence and child protection legislation, facilitates the sharing of relevant information about families and children with entities in the family law system, in appropriate circumstances.[15]

15 This proposal is also intended to capture prohibition of publication provisions in legislation as recommended in various reports. See, eg, Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010) 114; 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).

11.17 The ALRC acknowledges that there is currently legislative reform relating to information sharing occurring in some jurisdictions.

11.18 In the last eight years a number of reports have made recommendations for legislative reform to remove barriers to information sharing between the family law, family violence and child protection systems.[16] This is critical for ensuring that relevant information is legally able to be shared between appropriate bodies and agencies to better protect children and families and keep them safe from harm. This would also suggest that sharing information regarding applications for gun licences would be an additional protection to promoting the safety of families and children.

11.19 Improved information sharing between the systems requires a supportive legal framework. Removing existing legislative barriers, and enacting facilitative information sharing provisions, are critical steps to improving information sharing between the systems.

11.20 There is no uniformity in state and territory child protection and family violence legislation for the sharing of information with courts and relevant bodies and agencies in the family law system. Some legislation, for example, Chapter 16A of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) allows information to be exchanged between prescribed bodies despite other laws that prohibit or restrict the disclosure of personal information.[17] The federal family courts are prescribed bodies for the purposes of this legislation.[18]

11.21 Judge Harman provided an example of how these liberal information sharing provisions had assisted in a case:

> By way of example, this power has been used to obtain information in a case in which a recovery order was sought when a mother had removed a child from a father's care and had, in the preceding ten months, attempted suicide on a number of occasions, had threatened self harm and filicide and had experienced repeated hospitalisations for both physical and psychiatric treatment. Significant issues of unacceptable risk were apparent. Requests pursuant to s 245D of the NSW Act were made to 6 Hospitals (both private and public) and the Child's Pre-School. Documents were produced from each within 72 hours comprising several hundred pages of material.[19]

11.22 In a 2013 Report addressing information sharing in family law and child protection, Professor Richard Chisholm stated that it 'would assist very substantially if states would introduce legislation along the lines of that of New South Wales providing

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16 Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010) 114 recs 30-3, 30-4, 30-9 to 30-13; Chisholm, above n 6 recs 1-2; Chisholm, above n 7 recs 1-3, 5; Family Law Council, *Interim Report to the Attorney-General in Response to the First Two Terms of Reference on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (2015) rec 5.

17 A prescribed body may request another prescribed body to provide the requesting agency with any information held by the other body that relates to the safety, welfare or well-being of a particular child or young person or class of children or young persons: *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 245D.

18 *Children and Young Persons (Care and Protection) Regulation 2012* (NSW) reg 8.

19 Judge Harman, 'Practical Issues in Evidence Gathering in Interim Parenting Procedures' (2018) 27(1) *Australian Family Lawyer* 49.

for information sharing between Child Protection and the family courts'.[20] Judge Harman has observed that, '[t]he child welfare legislation of each State and Territory contains information sharing provisions that may well be capable of utilisation in a similar fashion to the NSW provisions'.[21]

11.23 In contrast, some legislative provisions in states and territories expressly prohibit the sharing of information and impose penalties for the unauthorised sharing of information. For example, the *Children, Youth and Families Act 2005* (Vic), imposes penalties for the unlawful sharing of Children's Court Clinic Reports.[22] Victoria Legal Aid has argued that the sharing of Children's Court Clinic Reports would

> enable the child's voice to be heard in the family law court proceedings without requiring the child to re-tell their story. Currently in Victoria, only parties to the Children's Court proceedings are allowed access to the reports and distribution of a report to an individual, or his or her lawyer, who is not a party to the proceeding will attract a penalty under the *Children, Youth and Families Act 2005* (Vic). Sharing this information would require amendments to legislation at both the Commonwealth and state and territory level.[23]

11.24 Other submissions recognised the importance of a supportive legal framework to facilitate information sharing.[24] National Legal Aid has argued that one of the requirements for enhancing collaboration and information sharing is 'legislative underpinnings that allow or facilitate information sharing'.[25]

11.25 The sharing of information that is brought into existence by an individual, such as a case worker or report writer, may entail the person being subpoenaed to provide evidence in family law proceedings. This could potentially contribute to increased costs and time delays. However, the potential benefits of information sharing for families and children, in terms of more efficient and better evidence gathering, would most likely outweigh these issues.

11.26 It is also important to ensure that the *Family Law Act* enables information sharing with family violence and child protection systems. The ALRC proposes that s 121 of the *Family Law Act* be amended to make it clear that it does not restrict sharing of information by the family courts with professional regulators, government agencies, family relationships services, service providers for children, and specialist family violence services (see Proposal 12–11).

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20 Chisholm, above n 6.
21 Harman, above n 19.
22 *Children, Youth and Families Act 2005* (Vic) s 552.
23 Victoria Legal Aid, *Submission 61*.
24 National Legal Aid, *Submission 163*; ANROWS, *Submission 156*.
25 National Legal Aid, *Submission 163*.

A national information sharing framework

Proposal 11–2 The Australian Government should work with state and territory governments to develop and implement a national information sharing framework to guide the sharing of information about the safety, welfare and wellbeing of families and children between the family law, family violence and child protection systems. The framework should include:

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

Proposal 11–3 The information sharing framework should include the legal framework for sharing information and information sharing principles, as well as guidance about:

- why information needs to be shared;
- what information should be shared;
- circumstances when information should be shared;
- mechanisms for information sharing, including technological solutions;
- how information that is shared can be used;
- who is able to share information;
- roles and responsibilities of professionals in the system in relation to information sharing;
- interagency education and training;
- interagency collaboration; and
- monitoring and evaluation of information sharing initiatives.

Question 11–2 Should the information sharing framework include health records? If so, what health records should be shared?

Question 11–3 Should records be shared with family relationships services such as family dispute resolution services, Children's Contact Services, and parenting order program services?

11.27 The ALRC proposes that Australian, state and territory governments 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.

11.28 The framework should be developed with reference to information sharing initiatives within jurisdictions and also with reference to the proposed information sharing scheme for the family law system (see Proposal 11–10).

11.29 To facilitate improvements in information sharing between the systems it is critical that there is engagement and ongoing commitment from all governments. A framework allows for shared understandings and commitment to information sharing, and provides a foundation for national reform and the rollout of considered and consistent information sharing practices.

11.30 There was support in the submissions for a nationally consistent approach to information sharing between systems.[26] National Legal Aid advocated for:

> a need for harmony around when and how information sharing between systems is allowed, particularly given restrictions relating to identification of parties and children found in relevant Commonwealth and State and Territory legislation'.[27]

11.31 Victoria Legal Aid considered it important to:

> develop principles to underpin information sharing between the state and territory courts and the family law system. These would reinforce a culture of sharing that increases safety and engages families in appropriate supports.[28]

11.32 Submissions noted the information sharing work of the CAG Family Violence Working Group.[29] There was also acknowledgement in submissions of the importance of sharing records such as child protection records, police records and experts' reports for reasons including assessing risks to children and reducing duplication of interventions for families and children.[30] For example, Queensland Law Society advocated for a 'robust information sharing regime between child protection agencies, police and state health authorities which would enhance the Court's capacity to properly assess the risk of family violence'.[31]

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26 See, eg, Ibid. Drummond Street Services believed that initiatives that promote cross-fertilisation of understandings, expertise and integration of processes would be beneficial: Drummond Street Services, *Submission 20*. Women's Legal Service Victoria supported, in principle, a national information sharing regime: Women's Legal Service Victoria, *Submission 100*.

27 National Legal Aid, *Submission 163*.

28 Victoria Legal Aid, *Submission 61*. Victoria Legal Aid noted that possible principles could include: transparency; safety; child-centred; purpose; relevance; and collaborative.

29 See, eg, National Legal Aid, *Submission 163*; Family Court of Australia, *Submission 68*; Victoria Legal Aid, *Submission 61*.

30 See, eg, Queensland Law Society, *Submission 221*; Victorian Women Lawyers, *Submission 84*; Victoria Legal Aid, *Submission 61*; Law Council of Australia, *Submission 43*.

31 Queensland Law Society, *Submission 221*.

11.33 It was also acknowledged in submissions that it is critical that state and territory systems obtain information from the family law system. The Law Council of Australia argued that:

> At present, the state court must take into account the terms of any parenting order, but that court will not necessarily have copies of parenting orders, or a Family Report upon which such orders may be based. In private matters, sometimes parties might bring their family law orders along to court, but in police matters often neither party participates. If so, the court and the police cannot access the Act orders (even if they know one exists).[32]

11.34 Some submissions raised concerns regarding information sharing and the need for safeguards to be put in place to ensure that sharing is done appropriately.[33] The Koori Caucus Working Group on Family Violence stressed that it is necessary to:

> ensure that increased information sharing does not further disadvantage or deter Aboriginal and Torres Strait Islander families from accessing the family law system… such reforms must be accompanied by significant improvements to the cultural competency and family violence sensitivity of child protection agencies.[34]

11.35 Women's Legal Services raised concerns about information sharing breaching people's privacy and confidentiality.[35] Other submissions considered that the benefits of information sharing outweighed protections of privacy and confidentiality.[36] Relationships Australia argued that:

> Information sharing, and both the real and perceived conflicts with rules of privacy, confidentiality, admissibility and privilege, remain a real barrier to people being able to receive integrated services.[37]

11.36 The ALRC recognises that protections may need to be applied to certain records. In Chapter 8, the ALRC proposes that safeguards be put in place in relation to sensitive records (protected confidences) being admitted into evidence (Proposal 8–6). The records covered by that proposal might or might not be covered by the information sharing framework. The intersection between the protections intended to be achieved in Proposal 8–6 and the scope of information that is to be shared under these proposals will need to be considered in the development of the information sharing framework.

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32 Law Council of Australia, *Submission 43*.

33 See, eg, Koori Caucus Working Group on Family Violence, *Submission 50*; The Royal Australian and New Zealand College of Psychiatrists, *Submission 18*. The Law Council of Australia supported the sharing of information as to complaints, and child protection processes, however noted that 'there needs to be a greater awareness of the context in which such information is gathered and a greater scrutiny of and safeguards applied to its use once shared.': Law Council of Australia, *Submission 43*.

34 Koori Caucus Working Group on Family Violence, *Submission 50*. The National Family Violence Prevention Legal Services Forum also stated that, '[w]ithout sufficient improvements to the cultural sensitivity and approach of child protection agencies, there is a danger that increased information sharing between family courts and child protection agencies could have the unintended and harmful consequence of increasing child protection scrutiny and intervention in Aboriginal and Torres Strait Islander families': National Family Violence Prevention Legal Services Forum, *Submission 63*.

35 Women's Legal Services Australia, *Submission 45*.

36 See, eg, Outer West Domestic Violence Network, *Submission 219*; Western Sydney CLC, *Submission 8*.

37 Relationships Australia, *Submission 11*. Relationships Australia noted that it 'supports the provision of information and training on the scope of obligations of confidentiality and privacy.'

11.37 In relation to technological solutions for information sharing, the 'Family Violence Portal' trialled in Western Australia was identified as being an instructive model.[38] It is a 'technological portal to access information from police, child protection and corrections databases to facilitate information sharing, risk assessment and case management matters'.[39]

Mechanisms for sharing information across systems

11.38 Developing an information sharing framework is a considerable task which will demand significant commitment by all governments. Accordingly, the ALRC also proposes a number of mechanisms for promoting information sharing between the systems—information sharing platforms, co-location of professionals, information sharing agreements, summaries of child protection and police involvement—that could be implemented without significant resourcing implications or time delays.

11.39 A key theme of the proposed reforms in this section is that they are aimed at enabling the exchange of key information at the earliest possible time.

Information sharing platforms

Proposal 11–4 The Australian Government and state and territory governments should consider expanding the information sharing platform as part of the National Domestic Violence Order Scheme to include family court orders and orders issued under state and territory child protection legislation.

Proposal 11–5 State and territory governments should consider providing access for family courts and appropriate bodies and agencies in the family law system to relevant inter-jurisdictional and intra-jurisdictional child protection and family violence information sharing platforms.

Proposal 11–6 The family courts should provide relevant professionals in the family violence and child protection systems with access to the Commonwealth Courts Portal to enable them to have reliable and timely access to relevant information about existing family court orders and pending proceedings.

11.40 While the ALRC recognises that a holistic technological solution to sharing information between systems is desirable, there are many challenges in relation to such a solution, including costs and time delays in development. Information sharing platforms already exist within and across some jurisdictions that could be utilised to improve information sharing between the systems. These proposals give effect to this idea.

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38 National Legal Aid, *Submission 163*.

39 Ibid. Brimbank Milton CLC recommended that there be a single database set up for information sharing between the courts, the Department of Human Services, Corrections and the Police: Brimbank Melton Community Legal Centre *Submission 76*.

11.41 The ALRC proposes expanding the National Domestic Violence Order Scheme (NDVOS) to include family court orders and orders issued under state and territory child protection legislation.[40]

11.42 Several reports have made recommendations for a national database to include family violence, family court and state and territory child protection orders.[41] Submissions supported a national database of court orders,[42] with some particularly supporting the expansion of NDVOS.[43] Relationships Australia observed that:

> There has also been advocacy for registration of documents such as enduring powers of attorney and advance health directives; if this is progressed, then it would be highly desirable, from the outset, to build in interoperability between State and Territory systems (rather than needing to retrofit this capability at some yet to be determined time). This could be in conjunction with work being done to implement recommendations from the Royal Commission into Institutional Responses to Child Sexual Abuse, in terms of States and Territories sharing information on working with children checks.[44]

11.43 Women's Legal Services Australia recognised that, '[i]f there is to be a database that each of the courts can access, issues of timeliness and currency of data would need to be considered.'[45]

11.44 The ALRC also proposes that states and territories should consider providing access to family courts and appropriate bodies and agencies in the family law system to relevant inter-jurisdictional and intra-jurisdictional child protection and family violence information sharing platforms.

11.45 The Commonwealth Department of Social Services is working with the NSW Department of Family and Community Services to address barriers to information sharing through a proposed new national system that would allow child protection information held by states and territories to be accessible across jurisdictions.[46]

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40 This recommendation reflects recommendation 6 in the House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 7.

41 Family Law Council, *Interim Report to the Attorney-General in Response to the First Two Terms of Reference on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (2015) rec 5; House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 7 rec 6; Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) rec 134.

42 See Springvale Monash Legal Service, *Submission 161*; Centre for Excellence in Child and Family Welfare, *Submission 102*; CatholicCare Sydney, *Submission 79*; Family Court of Australia, *Submission 68*; National Family Violence Prevention Legal Services Forum, *Submission 63*; Law Council of Australia, *Submission 43*; Relationships Australia, *Submission 11*.

43 See, eg, Family Court of Australia, *Submission 68*; Relationships Australia, *Submission 11*.

44 Relationships Australia, *Submission 11*. The recommendations about working with children checks from the Royal Commission into Institutional Responses to Child Sexual Abuse are being progressed through the Council of Attorneys-General: Commonwealth Attorney-General's Department, *Council of Attorneys-General, Communique December 2017* <www.ag.gov.au/About/CommitteesandCouncils/Council-of-Attorneys-General/Documents/Council-of-Attorneys-General-communique-December-2017.pdf>.

45 Women's Legal Services Australia, *Submission 45*.

46 Justin Hendry, *How DSS Will Link up State-Based Child Protection Systems* (1 February 2018) <www.itnews.com.au/news/how-dss-will-link-up-state-based-child-protection-systems-482094>.

11.46 There are a number of information sharing platforms in states and territories that currently exist, or are under development, to facilitate the sharing of information between relevant entities within their jurisdiction. These platforms assist with issues such as risk identification and assessment, and they can provide a history of an agency's contact with a family or child. For example:

- ChildStory[47] in New South Wales;
- the Child Information Sharing Scheme[48] in Victoria; and
- child protection workers in the Northern Territory have access to more than 20 different data systems to track the welfare of vulnerable children.[49]

11.47 In addition, Family Life submitted:

> Family Life practitioners **share the CSnet Client Information System (CIS)** and are able to coordinate the data collection from federal and state funded services at the practice **intersection of Family Law, Family Violence and Child Protection**. Family Life practitioners are using technology and data collection to support safely guiding separating families as they enter the cross-jurisdictional 'zone'.[50]

11.48 Clear understandings would need to be reached between state and territory agencies and entities in the family law system in relation to who could access information and for what purposes it could be used, including privacy considerations. For example, Uniting suggested that lawyers for children might be given direct access to child protection databases, but also recognised the significant privacy implications of such a shift.[51]

11.49 The ALRC also proposes that the family courts should provide relevant state and territory family violence and child protection professionals with access to the Commonwealth Courts Portal to enable them to access information about parenting orders and proceedings. The ALRC and NSW Law Reform Commission made a similar recommendation in the 2010 report, *Family Violence—A National Legal Response*.[52]

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47 New South Wales has implemented ChildStory which is an information technology system that places each child supported by the child protection system at the centre of their story with a network of family, carers, caseworkers and other service providers around them: Families and Community Services NSW, *ChildStory* <https://childstory.net.au/>.

48 The new Victorian Child Information Scheme allows authorised organisations and professionals who work with children, young people and their families to share information with each other to promote children's wellbeing and safety. The scheme will be supported by a new IT system called Child Link which will draw together information from existing government information management systems: Victorian Government, *Child Information Sharing Scheme* <https://www.vic.gov.au/childinfosharing>.

49 Victoria Laurie, 'Child Welfare IT Trumps Privacy' *The Australian*, 22 May 2018.

50 Family Life, *Submission 9*.

51 Uniting, *Submission 162*.

52 Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010) rec 30-8.

Co-location of professionals within other systems

Proposal 11–7 The Australian Government should work with states and territory governments to co-locate child protection and family violence support workers at each of the family law court premises.

11.50 The ALRC proposes that there be co-location of professionals from family law, family violence and child protection systems within each of the other systems. As National Legal Aid argued, one of the requirements for enhancing collaboration and information sharing is having 'professionals across all three systems'.[53]

11.51 Co-location of professionals has been recommended in several reports.[54] In practice, this model currently exists in Victoria[55] and Western Australia.[56] These co-location initiatives are acknowledged as being successful mechanisms for improving information exchange between the family law and child protection systems and were supported in submissions.[57] National Legal Aid praised the co-location initiatives, stating:

> The experience of co-location has been transformative. It has enabled improved sharing of information, and a better understanding of perspectives and roles which addresses some of the potential barriers to collaboration occurring'.[58]

11.52 The Victorian Royal Commission into Family Violence recommended that the Victorian Department of Health and Human Services support on a continuing basis the co-located child protection practitioner initiative in the Victorian registries of the family courts.[59]

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53 National Legal Aid, *Submission 163*.

54 Family Law Council, *Interim Report to the Attorney-General in Response to the First Two Terms of Reference on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (2015) rec 5; House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 7 rec 32; Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) rec 137.

55 'The co-located DHHS Liaison Officers at the Melbourne and Dandenong registries of the family law courts in Victoria assist with the sharing of information between the family law courts and child protection agencies. The liaison officers are also available to provide information to lawyers as to when the DHHS has involvement with a family or child': Victoria Legal Aid, *Submission 61*.

56 'In Western Australia the role of the Department of Communities staff member is to facilitate information sharing in accordance with the MOU between the Family Court of Western Australia, the Department and Legal Aid WA, coordinate the response of that Authority to requests for information from the Family Court of Western Australia, and where necessary provide urgent oral reports': National Legal Aid, *Submission 163*.

57 Ibid. National Legal Aid supported the co-location of child protection staff as 'a strategy that models and supports collaboration and information exchange'. See also Australian Institute of Family Studies, *Submission 206*; Centre for Excellence in Child and Family Welfare, *Submission 102*; CatholicCare Sydney, *Submission 79*. Relationships Australia argued that, '[s]hort of a transformational change, then more services, including child protection services, should be co-located with courts.': Relationships Australia, *Submission 11*.

58 National Legal Aid, *Submission 163*.

59 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) rec 137.

11.53 The co-located model in Victoria has been evaluated as successful by the Australian Institute of Family Studies (AIFS). The observations made by AIFS included:[60]

- family law and child protection professionals highly valued the role of the co-located practitioner;
- improved timeliness and quality of information occurred for both the Department of Health and Human Services (DHHS) and family courts, which lead to earlier and more informed decision making; and
- the Melbourne role provided an effective point of access to the other system for both family law professionals and child protection practitioners.

11.54 Some limitations and areas for improvement to the current co-location models have been identified.[61] For example, the National Family Violence Prevention Legal Services Forum observed that while the co-located child protection model in the Family Court of Western Australia is working well, any expansion to further jurisdictions

> would need to be carefully considered in terms of local application and potential unintended consequences, including close consultation with FVPLSs in that jurisdiction.[62]

11.55 Any implementation of this reform proposal should take into consideration how limitations to the models that have been identified in submissions and the AIFS evaluation could be overcome in further implementation of co-located models.

11.56 Most current initiatives, as well as submissions, focused on co-location of child protection officers in the family law system. However, the ALRC also proposes there be an expansion of co-located models which provides for professionals across the family law, family violence and child protection systems to be placed within the other systems. The Family Advocacy and Support Service (FASS) is an example of a co-located service that is, anecdotally, working well (see Chapter 4). The ALRC is also proposing that there be co-location of family law registries in state and territory local courts (see Proposal 6–8).

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60 Liz Wall et al, 'Evaluation of the Co-Located Child Protection Practitioner Initiative' (Australian Institute of Family Studies, 2015).

61 See, eg, Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016); National Family Violence Prevention Legal Services Forum, *Submission 63*; Victoria Legal Aid, *Submission 61*; Wall et al, above n 60.

62 National Family Violence Prevention Legal Services Forum, *Submission 63*.

Information sharing agreements

Proposal 11–8 The Australian Government and state and territory governments should work together to facilitate relevant entities, including courts and agencies in the family law, family violence and child protection systems, entering into information sharing agreements for the sharing of relevant information about families and children.

11.57 The ALRC proposes that relevant courts, bodies and agencies in the family law, family violence and child protection systems enter into information sharing agreements to share relevant information about families and children.

11.58 Information sharing agreements are a key mechanism for improving the sharing of information between systems and promoting better outcomes for families and children. They represent a commitment by relevant entities in the family law, family violence and child protection systems to work together co-operatively to share relevant information with each other in a timely manner when it is lawful and practicable to do so.

11.59 There have been a number of recommendations in reports in recent years for the creation of information sharing agreements between courts, and relevant bodies and agencies in the family law, family violence and child protection systems.[63] In some jurisdictions information sharing agreements are already in place. However, these may need reviewing to ensure that all necessary stakeholders are included and that their provisions reflect current, and desirable, information sharing practices.[64]

11.60 Professor Richard Chisholm recommended that the 'content of formal agreements should relate to their basic purpose, for example to set out principles and procedures agreed by the parties relating to information sharing and associated procedural matters. Agreements should not be used to state or summarise the law or describe the procedures ordinarily used by the parties'.[65]

11.61 Professor Chisholm developed a model agreement for information sharing between the family law courts, child protection agencies and legal aid commissions. The model agreement is intended to assist in the formulation of agreements between

63 Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010) 114 recs 30-16, 30-17; Family Law Council, *Interim Report to the Attorney-General in Response to the First Two Terms of Reference on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (2015) rec 5; House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 7 rec 21; Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) rec 136.

64 The ALRC is not aware of the extent or nature of information sharing agreements in place in jurisdictions as these details were not provided in the submissions and these agreements are not always publicly available.

65 Chisholm, above n 6 rec 4.

these parties while allowing the parties to mould the agreement to meet their jurisdictional needs.

11.62 While this model agreement only relates to information sharing between the family law and child protection systems, it provides a useful guide to inform development of agreements between different systems.

11.63 Submissions supported the use of information sharing agreements.[66] The Memorandum of Understanding between the Family Court of Western Australia, the Department of Communities and Legal Aid WA was referred to as being a good model for facilitating effective information exchange between the family law and child protection systems.[67]

11.64 Western Australia also has instructive models for information sharing in family violence matters, including an agreement which has the Family Court of Western Australia as a party.[68]

11.65 Information sharing agreements need to be supported through:

- appropriate visibility of, and training about, the agreements among staff employed by the entities that are parties to the agreement;
- regular review and evaluation of the agreements to ensure they are continuing to meet their purpose; and
- regular updating of provisions in the agreements to reflect new legal frameworks, policies and procedures.

Information sharing with child protection agencies and police

Proposal 11–9 The Australian Government and state and territory governments should work together to develop a template document to support the provision of a brief summary of child protection department or police involvement with a child and family to family courts.

66 See, eg, National Legal Aid, *Submission 163*; NATSILS, *Submission 157*; ANROWS, *Submission 156*.

67 See Justice Simon Moncrieff, 'Child Protection in the Family Court of Western Australia' (Paper, ANU/NJCA Conference, 8 February 2015); NATSILS, *Submission 157*; Family Law Practitioners Association WA, *Submission 27*.

68 *Information Sharing Protocols between the Family Court of Western Australia, Magistrates Court of Western Australia, Department of the Attorney General, Department of Corrective Services, Legal Aid Western Australia in matters involving Family Violence* (February 2009); *Memorandum of Understanding—Information sharing between agencies with responsibilities for preventing and responding to family and domestic violence in Western Australia*—parties to this agreement include state and Commonwealth departments and non-government agencies participating in multi-agency case management, with signatories between 2009 and 2011.

Question 11–4 If a child protection agency has referred a parent to the family courts to obtain parenting orders, what, if any, evidence should they provide the courts? For example, should they provide the courts with any recommendations they may have in relation to the care arrangements of the children?

11.66 The ALRC proposes that governments work together to facilitate child protection agencies and police providing brief summary documents to family courts about their involvement with families and children.

11.67 The early provision of information is critical to making timely assessments about risks to children and families. The development of summary template-type documents that could be used nationally would greatly assist the family courts in identifying risks for children and families in a timely way and would ensure consistency of information that is being received across jurisdictions.

11.68 In Western Australia, the 'Family Violence Portal' allows officials from the Family Court of Western Australia to access information from police, child protection and corrections databases. The proposal for a summary document would provide similar information to the federal family courts from state and territory agencies.

11.69 Submissions emphasised the need for family courts to have timely information from child protection agencies and police to help them identify safety risks to children.[69] Judge Harman has emphasised that:

> it must be remembered that an absence of timely evidence gathering is also generative of delay, and fundamentally impacts the best interests of children and may generate or exacerbate risk.[70]

11.70 Currently, evidence from child protection agencies about their involvement with a child and family can be provided in response to notices of risk they receive from the family courts,[71] subpoenas, or orders for information under s 69ZW of *the Family Law Act* issued by the court.[72] Similarly, police may provide evidence of their involvement

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69 See, eg, Law Society of South Australia, *Submission 88*; ATSILS Qld, *Submission 42*; Albury Wodonga Family Law Pathways Network, *Submission 17*.

70 Harman, above n 19.

71 The Federal Circuit Court of Australia has a mandatory *Notice of Risk* which must be filed by any person filing an Initiating Application or Response seeking parenting orders: Federal Circuit Court of Australia, *Notice of Risk* <www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/forms-and-fees/court-forms/form-topics/family+law/notice-risk>. The Family Court of Australia has the *Notice of Child Abuse, Family Violence or Risk of Family Violence (Current Case)* which must be filed in certain circumstances: Family Court of Australia, *Notice of Child Abuse, Family Violence or Risk of Family Violence (Current Case)* <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/forms-and-fees/court-forms/form-topics/family+violence/form-nchild-abuse>.

72 Section 69ZW of the *Family Law Act* is about evidence relating to child abuse or family violence. It allows a court in child-related proceedings to make an order requiring a prescribed State or Territory agency to provide the court with the documents or information specified in the order. These must be documents recording, or information about, one or more of these: (a) any notifications to the agency of suspected abuse of a child to whom the proceedings relate or of suspected family violence

with a family in response to a subpoena or s 69ZW order. Judge Harman has observed that the material produced by each state and territory child protection department in response to s 69ZW orders varies.[73] His Honour observed that responses from police are more uniform.[74]

11.71 In some jurisdictions arrangements are in place for the provision of a 'snapshot' document providing information about the involvement a child and family have had with a system. For example, the NSW child protection legislation[75] provides for the Federal Circuit Court of Australia (Federal Circuit Court) to request and receive a 'Person History' document. Judge Harman has praised this initiative, stating:

> This summary can be obtained in less than two hours and lists each report that has been received by the Department by date, brief description of the basis for the report and action taken. The information is searched by reference to the name and date of birth of a child rather than parents.[76]

11.72 Submissions supported the need for consistency in information being provided to family courts by child protection agencies.[77] Albury Wodonga Family Law Pathways Network argued that:

> Only some child protection agencies provide a summary report to the Court on receipt of the Notice of Risk which would then be available to the Court prior to the first Court date. This is valuable information for the Court prior to the first Court date.[78]

11.73 The trigger for state and territory agencies providing a summary document would need to be determined. The trigger might be the receipt of a notice of risk or s 69ZW order from the family courts, or provisions within state and territory legislation (such as the NSW provision), that require child protection agencies or police to provide a summary document response. The ALRC invites stakeholder feedback on the appropriate trigger.

11.74 The ALRC is also interested in stakeholders' views about whether the Federal Circuit Court's *Notice of Risk* and the Family Court of Australia's *Notice of Child Abuse, Family Violence or Risk of Family Violence (Current Case)* are the most

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affecting the child; (b) any assessments by the agency of investigations into a notification of that kind or the findings or outcomes of those investigations; (c) any reports commissioned by the agency in the course of investigating a notification.

73 Judge Harman observed that, '[t]he NSW Department of Family and Community Services simply produces documents from their file whereas ACT and Victorian agencies provide a report summarising involvement with the family.': Harman, above n 19. The ALRC has previously recommended that federal family courts and state and territory child protection agencies should develop protocols for dealing with requests for documents and information under s 69ZW and responding to subpoenas: Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010) 114 rec 30-5.

74 Judge Harman observed that, '[m]aterial produced by Police is more uniform with each producing material in the nature of records of antecedents together with specific event records and/or statements.': Harman, above n 19.

75 *Children and Young Persons (Care and Protection) Act 1998* (NSW).

76 Harman, above n 19. Judge Harman noted that examples providing bases for reports include, 'drug use by carer', 'sexual assault of child' or 'exposure to FV' and the action taken could include 'closed competing priorities', 'referred for assistance' or 'open investigation'.

77 See, eg, Queensland Law Society, *Submission 221*; CatholicCare Sydney, *Submission 79*; Albury Wodonga Family Law Pathways Network, *Submission 17*.

78 Albury Wodonga Family Law Pathways Network, *Submission 17*.

appropriate mechanisms for the family courts to notify child protection agencies about risks to children.

11.75 It is envisaged that the type of information that would be required from police would include callouts by police in response to family violence incidents, information relating to family violence orders, breaches of any orders and whether charges were laid. The ALRC recognises that the sharing of some of this information may lead to police being subpoenaed in family law proceedings which could have costs and delay implications for proceedings. However, the potential benefits of information sharing for families and children would most likely outweigh these issues.

11.76 The ALRC recognises that states and territories may be concerned about resourcing required to facilitate this reform. However, the provision of early information to the family courts could potentially obviate the need for responding to subpoena requests or s 69ZW orders at a later date.[79]

11.77 Submissions made calls for greater intervention of child protection agencies in family law proceedings when there is a concern about one or both parents.[80] Drummond Street Services argued that:

> Child Protection may substantiate concerns about a particular parent, and ask the protective parent to address risk issues by seeking custody or conditions through the family court. In such cases, Child Protection practitioners often provide no documentation regarding their direction to the parents, and the onus is on the protective parent to follow through on their own. There is often no advocacy by Child protection or engagement with family court process to ensure the necessary outcomes are achieved, and there is often no follow-up to ascertain that the necessary outcomes were achieved. There should be greater involvement of Child Protection services in matters where risks are substantiated, to ensure suitable orders are made which can protect children and vulnerable parents.[81]

11.78 The ALRC is also interested in stakeholders' views about whether child protection agencies should be required to provide evidence to the family courts in cases where they refer parents to the courts to obtain parenting orders.

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79 Relationships Australia argued that the costs associated with delivering family law services for people affected by violence are, to an appreciable extent, driven by the need to share information across jurisdictions and sectors (eg, through responding to subpoenas issued by state and territory courts and, increasingly, the family courts): Relationships Australia, *Submission 11*. Judge Harman has acknowledged that practical and financial barriers exist in relation to the issuing of subpoenas: Harman, above n 19.

80 Law Society of South Australia, *Submission 88*; Drummond Street Services, *Submission 20*; Albury Wodonga Family Law Pathways Network, *Submission 17*.

81 Drummond Street Services, *Submission 20*.

Information sharing in a reformed family law system

Proposal 11–10 The Australian Government should develop and implement an information sharing scheme to guide the sharing of relevant information about families and children between courts, bodies, agencies and services within the family law system.

Proposal 11–11 The *Family Law Act 1975* (Cth) should support the sharing of relevant information between entities within the family law system. The information sharing scheme should include such matters as:

- what information should be shared;
- why information should be shared;
- circumstances when information should be shared;
- mechanisms for information sharing;
- how information that is shared can be used;
- who is able to share information; and
- roles and responsibilities of professionals in the system in relation to information sharing.

Proposal 11–12 The Australian Government should work with states and territories to ensure that the family relationships services they fund are captured by, and comply with, the information sharing scheme.

Question 11–5 What information should be shared between the Families Hubs (Proposals 4–1 to 4–4) and the family courts, and what safeguards should be put in place to protect privacy? For example:

- Should all the information about services within the Families Hubs that were accessed by parties be able to be shared freely with the family courts?
- What information should the family courts receive (ie services accessed, number of times accessed, or more detailed information about treatment plans etc)?
- Should client consent be needed to share this information?
- Who would have access to the information at the family courts?
- Would the other party get access to any information provided by the Families Hubs services to the family courts?
- Should there be capacity for services provided through the Families Hubs to provide written or verbal evidence to the family courts?

11.79 Information sharing between bodies, agencies and services within the family law system is also critical to protecting the safety and wellbeing of families and children.

11.80 Under the proposals in this Discussion Paper, the reformed family law system would incorporate the following new bodies and agencies:

- Families Hubs (Proposals 4–1 to 4–4);
- an expanded FASS (Proposals 4–5 to 4–8); and
- a post-order parenting support service (Proposal 6–9).

11.81 Determining what, when, and how, information should be shared between these, and other, entities is critical to both protecting families and children and ensuring the effective functioning of the system.

11.82 The ALRC proposes that an information sharing scheme be developed and implemented between relevant bodies, agencies and services within the family law system.

11.83 The ALRC emphasises that this scheme should be developed with reference to information sharing initiatives within jurisdictions and also with reference to the proposed information sharing framework between the family law, family violence and child protection systems (see Proposals 11–2 and 11–3).

11.84 While the Issues Paper did not specifically address the sharing of information between entities within the family law system, some submissions did address this issue.[82] Family & Relationship Services Australia argued that, '[c]ollaboration between Family Law Services and the courts has been constrained by the issue of privacy and confidentiality has been a barrier to effective collaboration'.[83] Domestic Violence Victoria also called for 'greater information sharing and collaboration between legal and non-legal supports for women and children who are experiencing family violence and going through family law proceedings.'[84]

11.85 There has been significant work undertaken in Victoria in response to recommendations made by the Royal Commission into Family Violence for improving information sharing to keep victims of violence safe and hold perpetrators accountable. The Family Violence Information Sharing Scheme has been established in Victoria.[85] The scheme authorises the sharing of information between prescribed information sharing entities for family violence risk assessment and risk management. The prescribed information sharing entities include selected officials from the Magistrates'

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82 See, eg, Family & Relationship Services Australia, *Submission 53*; Domestic Violence Victoria, *Submission 23*.

83 Family & Relationship Services Australia, *Submission 53*.

84 Domestic Violence Victoria, *Submission 23*.

85 The Victorian Family Violence Information Sharing Scheme has been created by Part 5A of the *Family Violence Protection Act 2008* (Vic) and the *Family Violence Protection (Information Sharing and Risk Management) Regulations 2018*: Victorian Government, *Information Sharing and Risk Management* <www.vic.gov.au/familyviolence/family-safety-victoria/information-sharing-and-risk-management.html#A>.

Court of Victoria, the Children's Court of Victoria, Victoria Police and practitioners in The Orange Door Support and Safety Hubs.

11.86 The Victorian Government has also established the Child Information Sharing Scheme. This scheme 'allows authorised organisations and professionals who work with children, young people and their families to share information with each other to promote children's wellbeing and safety.'[86] The Victorian Government states that the new scheme 'makes it easier for professionals to support children, young people and families get the help they need as early as possible, and prevent any harm occurring'.[87] The scheme commenced on 27 September 2018 for a first phase of organisations.

11.87 The Family Violence Information Sharing Scheme and the Child Information Sharing Scheme are designed to complement one another.

11.88 The ALRC considers that the development of these schemes in Victoria, and relevant schemes in other jurisdictions, can help to inform the development of an information sharing scheme for entities and professionals within the family law system.

86 All Victorian children and young people aged 0-18 years are covered by this new scheme: Victorian Government, above n 48.

87 Ibid.

12. System Oversight and Reform Evaluation

Contents

Summary

12.1 Ensuring public confidence in the family law system is critical to the system's ability to promote the wellbeing of separated families. Submissions to this Inquiry have indicated concerns about the effectiveness of current governance arrangements. This chapter makes proposals that are intended to strengthen these arrangements and promote public confidence in the system.

12.2 A key proposal is to establish a Family Law Commission as an oversight body, with functions of monitoring system performance; managing training and accreditation of, and complaints against, professionals and agencies across the system; conducting inquiries into the functioning of the system; and education. It is proposed that the accreditation function would involve the development, administration and enforcement of Accreditation Rules for family law system professionals.

12.3 It is also proposed that the Australian Government should develop a cultural safety framework to guide the development, implementation and monitoring of reforms to the family law system arising from this review to improve accessibility of the system

for Aboriginal and Torres Strait Islander people, culturally and linguistically diverse communities and LGBTIQ families.

12.4 Experience of the 2006 and 2012 family law reforms has confirmed the importance of comprehensive, empirically based evaluations of changes to the family law system. Accordingly, the ALRC proposes a full evaluation of the proposed reform package, to support refinement and further development of the family law system.

12.5 Submissions illustrated the ongoing debate about the boundary between privacy and transparency in relation to publication of accounts of family law proceedings. The ALRC proposes a number of refinements to privacy provisions to address areas of uncertainty. These would ensure that accounts of family law proceedings could be provided to professional regulators and that accounts could be shared between service providers. The proposed refinements would also provide that private conversations about proceedings are not prohibited. Given the rising use of social media, further input is sought about whether explicit amendment to the current provisions is required to refer to social media.

12.6 Finally, submissions indicated some support for the establishment of a National Judicial Commission to investigate and report on complaints against federal judicial officers exercising family law jurisdiction. The chapter considers issues surrounding this, including judicial independence, and seeks further input on whether this reform should be pursued.

A new oversight body for the family law system

Proposal 12–1 The Australian Government should establish a new independent statutory body, the Family Law Commission, to oversee the family law system. The aims of the Family Law Commission should be to ensure that the family law system operates effectively in accordance with the objectives of the *Family Law Act 1975* (Cth) and to promote public confidence in the family law system. The responsibilities of the Family Law Commission should be to:

- monitor the performance of the system;
- manage accreditation of professionals and agencies across the system, including oversight of training requirements;
- issue guidelines to family law professionals and service providers to assist them to understand their legislative duties;
- resolve complaints about professionals and services within the family law system, including through the use of enforcement powers;
- improve the functioning of the family law system through inquiries, either of its own motion or at the request of government;
- be informed by the work of the Children and Young People's Advisory Board (Proposal 7–13);

- raise public awareness about the roles and responsibilities of professionals and service providers within the family law system; and
- make recommendations about research and law reform proposals to improve the system.

12.7 The ALRC proposes that a new oversight body, the Family Law Commission, be established to monitor the operation of the family law system, the quality of the service it delivers to families, and accreditation processes for professionals.

12.8 The functions of the Family Law Commission should include those listed above in Proposal 12–1. These include, monitoring the performance of the family law system, professional accreditation, resolving complaints about professionals and services within the family law system, conducting inquiries, and making recommendations about research and law reform proposals to improve the system.

12.9 The proposals in this section should be read in conjunction with the following reform proposals:

- the family law system information package (Proposals 2–5 to 2–8);
- the national education and awareness campaign (Proposals 2–1 to 2–3); and
- the workforce capability plan (Proposals 10–1 to 10–4).

12.10 Together, these proposals would provide a comprehensive approach to promoting awareness of, and public confidence in, the family law system and ensuring a skilled workforce adheres to established professional standards.

12.11 A range of material considered by the ALRC indicates that the service the family law system delivers to families needs to be improved through more consistent approaches to mechanisms for performance monitoring and improvement, accreditation and complaints handling across the system. Some submissions from organisations acknowledged that public confidence in the family law system is not high and that a more transparent, independent and rigorous approach to establishing, monitoring and enforcing professional standards is required.[1]

12.12 Submissions from individuals manifested frustration over lack of access to a transparent and independent avenue for the resolution of complaints against a range of professionals across the system including legal practitioners, judicial officers, family dispute resolution (FDR) practitioners and family report writers.[2]

12.13 On the other hand, consultations and submissions from agencies within the family law system drew attention to the high level of client complaints received in both

1 See, eg, Victoria Legal Aid, *Submission 61*; Domestic Violence Victoria, *Submission 23*; Relationships Australia, *Submission 11*.

2 See, eg, R Watton, *Submission 112*; I Vann, *Submission 97*.

legal and non-legal agencies, with particular concerns raised in relation to vexatious complaints. Such complaints have also been described in research[3] and judgments.[4]

12.14 Although there is a body of useful and rigorous research on the operation of the system, there is presently no agency that systematically monitors performance. The ALRC considers there needs to be a mechanism for assessing the operation of the system, including usage levels of different services and agencies, on a regular basis. In this regard, the Family Law Commission could incorporate and expand on the work of the Family Law Council currently established under s 115 of the *Family Law Act 1975* (Cth).

12.15 Presently, accreditation and complaints issues are dealt with in a piecemeal fashion, with varied avenues and approaches depending on the organisation and professional discipline that different professionals belong to. This proposal would mean that an over-arching framework for accreditation and complaints handling would be created and administered by the Family Law Commission. This framework is intended to support family law system specific accreditation and complaints-handling mechanisms that are in addition to existing professional requirements.

12.16 In addition to responding to complaints, the ALRC proposes that the Family Law Commission should have power to independently inquire, either of its own motion or at the request of government, into any issues affecting the performance of the family law system.

Practitioner accreditation and complaints

Proposal 12–2 The Family Law Commission should have responsibility for accreditation and oversight of professionals working across the system. In discharging its function to accredit and oversee family law system professionals, the Family Law Commission should:

- develop Accreditation Rules;
- administer the Accreditation Rules including the establishment and maintenance of an Accreditation Register;
- establish standards and other obligations that accredited persons must continue to meet to remain accredited, including oversight of training requirements;

3 Alison O'Neill et al, 'The Views of Psychologists, Lawyers, and Judges on Key Components and the Quality of Child Custody Evaluation in Australia' (2018) 56(1) *Family Court Review* 64.

4 *Stapleton & Bryant* [2017] FamCA 1005 (17 November 2017).

- establish and administer processes for the suspension or cancellation of accreditation; and
- establish and administer a process for receiving and resolving complaints against practitioners accredited under the Accreditation Rules.

Accreditation

12.17 The *Family Law Act* already includes a legislative framework for the accreditation and de-accreditation of professionals working within the system. Division 1 of pt II allows for the development of Accreditation Rules for family counsellors, FDR practitioners and persons who perform 'other roles prescribed by regulations made for the purposes of this paragraph'.[5] Presently, only FDR practitioners are regulated under this framework.

12.18 The *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) (*Family Dispute Regulations*) were developed in 2008 to support the expansion of FDR and to establish a scheme to support FDR practice. The regulations set out: the process for accreditation and obligations of accredited FDR practitioners, grounds and processes for suspension and cancellation of accreditation, in addition to dealing with certain practice issues.

12.19 The new Accreditation Rules would be based on this approach. Obligations as well as grounds and processes for suspending and cancelling accreditation would be developed specifically for each of the professional groups covered by the Accreditation Rules.

12.20 The Accreditation Rules would be based on the core competency requirements identified under the workforce capability plan for the family law system, outlined in Chapter 10. As with the FDR practitioner accreditation requirements, they would align with the Australian Qualifications Framework.

12.21 Professionals working in the following areas would be required to obtain accreditation under the Accreditation Rules:

- all professionals employed by family law system agencies funded by the Australian Government;
- all professionals providing services (either individually or as part of an agency) to families under the family law legislation on a private basis, including legal practitioners, Children's Contact Services and family counsellors within designated organisations.[6]

12.22 It would be necessary to determine and publish in more precise terms exactly which professionals would require accreditation, and in which circumstances, to avoid

5 *Family Law Act 1975* (Cth) s 10A(1).
6 Ibid s 10C(2).

any uncertainty regarding the ambit of the 'family law system', or which services are provided 'under the family law legislation'.

12.23 These accreditation requirements would be in addition to any qualification and training requirements that these professionals may otherwise be expected to have. This is similar to the situation of migration agents in Australia who must be registered with, and are regulated by, the Office of Migration Agents Registration Authority, in addition to any other professional bodies with which that person may be associated, such as a legal services regulator.

12.24 It is not anticipated that these new accreditation requirements would simply duplicate the regulatory role that another professional body may already have for a particular professional. Rather, by structuring the accreditation requirements around the core competencies identified specifically for family law service providers in the workforce capability plan (see Chapter 10), it is expected that a significant number of the attributes and behaviours to be regulated by the Family Law Commission would be quite distinct from those regulated by other professional bodies.

12.25 The Family Law Commission would need to work collaboratively with other bodies that are responsible for accrediting and registering professionals working within the family law system.

De-accreditation and complaints

12.26 Under the *Family Dispute Regulations*, power to suspend or cancel accreditation is accorded to the Secretary of the Commonwealth Attorney-General's Department.[7] Under this proposal, this power in relation to FDR practitioners and other professionals covered by the Accreditation Rules would be exercised by the Family Law Commission.

12.27 Under the *Family Dispute Regulations*, one of the criteria for accreditation is having 'access to a suitable complaints mechanism to which persons who use the applicant's services as a FDR practitioner may have recourse if they wish to complain about services provided'.[8]

12.28 Under this proposal, the Family Law Commission will be responsible for receiving and considering complaints against all professionals accredited under the Accreditation Rules, where that complaint relates to one of the identified core competencies required of family law service providers.

12.29 The complaints-handling function should be in addition to, rather than instead of, any existing complaints mechanisms administered by the organisations and professional bodies to which the relevant professionals already belong. The Family Law Commission should limit its investigation to any potential breach of the core competencies relating to family law service providers, and its powers should be limited to cancelling or suspending the professional's accreditation in relation to the provision

7 *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) reg 17.
8 Ibid reg 6.

of family law services only. It would therefore be possible for a professional to lose their accreditation as a family law service provider, and so be unable to provide family law services, but to retain their other professional qualifications and registrations, and so be able to continue providing professional services outside of the family law system.

12.30 In order to exercise its complaints-handling function, the Family Law Commission should need to be satisfied that the complainant has already attempted to resolve the complaint with the professional or organisation being complained about.

12.31 It should have the power to dismiss complaints that it considers vexatious, frivolous or not made in good faith.

12.32 The complaints-handling function should assess whether the professional involved has adhered to the standards and obligations set out in the Accreditation Rules.

Inquiries

Proposal 12–3 The Family Law Commission should have power to:

- conduct own motion inquiries into issues relevant to the performance of any aspect of the family law system;
- conduct inquiries into issues referred by government relevant to the performance of any aspect of the family law system; and
- make recommendations to improve the performance of an aspect of the family law system as a result of an inquiry.

12.33 The ALRC proposes that, in addition to the Family Law Commission investigating complaints that are brought to its attention, it should also have power to conduct inquiries, either on its own motion or in response to a request from government.

12.34 Own motion inquiries provide a valuable tool for authorities to investigate issues which may be affecting the performance of a system, or clients' experiences of the system. Such issues may come to the authority's attention through means other than a specific complaint being lodged.

12.35 The matters which may inform an authority's decision to conduct an own motion inquiry include:

- the number of complaints received about a particular issue;
- if there are systemic implications related to a particular issue;
- if there is likely to be a public interest in a particular issue; or
- the number of people that may be affected by a particular issue.

12.36 In addition, the Family Law Commission should have power to conduct inquiries into any issues relating to the family law system at the request of government. This would build on the work of the existing Family Law Council established under s 115 of the *Family Law Act* which has power to provide advice and make recommendations of its own motion or at the request of the Attorney-General (Cth).

12.37 It is intended that the Family Law Commission would primarily focus on systemic issues affecting a number of organisations working in the area of family law, rather than focusing an investigation on one particular organisation to determine its compliance (or otherwise) with its obligations. For illustrative purposes only, a hypothetical example of the type of issue which could be the subject of an inquiry by the Family Law Commission is whether the categories of FDR certificates (currently provided for under s 60I(8) of the *Family Law Act*) are appropriate.

Information and education about the family law system

Proposal 12–4 The Family Law Commission should have responsibility for raising public awareness about the family law system and the roles and responsibilities of professionals and services within the system.

Proposal 12–5 The Family Law Commission should have responsibility for providing information and education to family law professionals and service providers about their legislative duties and functions.

Proposal 12–6 The Family Law Commission should identify research priorities that will help inform whether the family law system is meeting both its legislative requirements and its public health goals.

12.38 The ALRC proposes that the Family Law Commission has a public education and awareness raising function.

12.39 The ALRC recognises the need for public information and education about the functions and duties of professionals and services within the family law system (see Chapter 2). The ALRC proposes that the Family Law Commission should take a key role in the development and implementation of the reform proposals in that chapter and accordingly be a key player in driving nationwide understanding about the purpose of the family law system and its role in protecting the safety, wellbeing and welfare of families and children.

12.40 The Family Law Commission would be well placed to provide a public awareness educative role through its knowledge of the family law system, its accessibility to professionals, agencies and service providers within the system and its profile as an accountability body with a public interest focus.

12.41 The ALRC also proposes that the Family Law Commission should provide information and education to family law professionals and service providers to assist them to understand their legislative duties and perform them appropriately and lawfully.

12.42 An effectively functioning system requires all professionals within it to have sound understanding of their roles and duties and the legislative framework within which they operate. The Family Law Commission could facilitate training of professionals to ensure they understand their responsibilities and ensure they have obtained their core competencies.

Monitoring and research

12.43 The Family Law Commission should work with key stakeholders, including the family courts, the Commonwealth Attorney-General's Department and the Department of Social Services, to develop a mechanism for monitoring system performance on a regular basis.

12.44 This program should include a regular collation of data based on administrative sources to assess patterns in family court filings[9] and patterns in services usage of family law services[10] that are funded by the Australian Government. The purpose of this program should be to enable transparent and regular reporting of court, Commission and service use that would be available to stakeholders across the system. Analogous programs are carried out in allied areas, such as the collation of national data on the performance of state and territory child protection systems by the Australian Institute of Health and Welfare,[11] on an annual basis.

12.45 The ALRC also considers that the Family Law Commission would be well placed to identify research priorities that could help identify whether the family law system is meeting its policy objectives and achieving its public health goals. The Family Law Commission could have power to refer research projects to organisations, such as the Australian Institute of Family Studies.

Evaluation of reforms

Proposal 12–7 The Australian Government should build into its reform implementation plan a rigorous evaluation program to be conducted by an appropriate organisation.

12.46 Separate from the proposals in relation to the Family Law Commission, the ALRC proposes that the Australian Government ensure that an evaluation program is implemented alongside the implementation of the reforms proposed in this Discussion Paper.

12.47 This proposal recognises and endorses the considerable investment the Australian Government has made in evaluation and research in the past decade,

9 See, eg, Rae Kaspiew et al, 'Family Law Court Filings 2004–05 to 2012–13' (Research Report No 30, Australian Institute of Family Studies, 2015).

10 KPMG, *Future Focus of the Family Law Services: Final Report* (Report prepared for Attorney-General's Department (Cth), 2016).

11 Australian Institute of Health and Welfare, 'Child Protection Australia 2016–17' (Child Welfare Series No 68, AIHW, 2018).

beginning with the Evaluation of the 2006 family law reforms[12] and continuing with the Evaluation of the 2012 family violence amendments.[13]

12.48 This sustained evaluation program, together with other research,[14] has supported continuous improvement of the family law system, enabling evidence-based identification of the needs of separated families and the extent to which they are fulfilled within the current configuration of the system.

12.49 Given the scale of the reforms proposed in this Discussion Paper, and the intention that they improve services for the population of separated families at large and for particularly complex and vulnerable groups including children, it is critical that their impact be evaluated. The scope of the evaluation should be similar to that of the 2006 and 2012 Evaluations conducted by the Australian Institute of Family Studies as noted above.

12.50 Given the range of changes proposed to the system, there should be an extensive evaluation program capable of assessing the individual and combined impact of the changes implemented and their consequences for separated families including children. The evaluation should assess the extent to which the reforms are meeting their objectives, assessing positive, negative and unintended consequences. Planning for the evaluation should be an integral part of the implementation plan for the reforms so that benchmark data, against which the impact of the changes can be assessed, is collected in appropriate areas. Service providers and other stakeholders should be consulted in advance about the indicators which are proposed to be measured to assess the impact of the reforms. Stakeholders should also be consulted about the data that the stakeholders will be requested to provide to contribute to the evaluation.

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12 Rae Kaspiew et al, *Evaluation of the 2006 Family Law Reforms* (Australian Institute of Family Studies, 2009).

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

14 See, eg, Felicity Bell, 'Barriers to Empowering Children in Private Family Law Proceedings' (2016) 30 *International Journal of Law, Policy and the Family* 225; Rae Kaspiew et al, 'Independent Children's Lawyers Study' (Final Report, 2nd ed, Australian Institute of Family Studies, 2014); Rachel Carson et al, 'Children and Young People in Separated Families: Family Law System Experiences and Needs' (Australian Institute of Family Studies, 2018); Helen Rhoades, Grania Sheehan and John Dewar, 'Developing a Consistent Message about Children's Care Needs across the Family Law System' (2013) 27 *Australian Journal of Family Law* 191; Bruce Smyth et al, 'Certifying Mediation: A Study of Section 60I Certificates' (CRSM Working Paper 2/2017, University of Canberra and Interrelate); Patrick Parkinson and Judy Cashmore, *The Voice of a Child in Family Law Disputes* (Oxford University Press, 2008).

A cultural safety framework

Proposal 12–8 The Australian Government should develop a cultural safety framework to guide the development, implementation and monitoring of reforms to the family law system arising from this review to ensure they support the cultural safety and responsiveness of the family law system for client families and their children. The framework should be developed in consultation with relevant organisations, including Aboriginal and Torres Strait Islander, culturally and linguistically diverse, and LGBTIQ organisations.

Proposal 12–9 The cultural safety framework should address:

- the provision of community education about the family law system;
- the development of a culturally diverse and culturally competent workforce;
- the provision of, and access to, culturally safe and responsive legal and support services; and
- the provision of, and access to, culturally safe and responsive dispute resolution and adjudication processes.

Proposal 12–10 Family law service providers should be required to provide services that are compliant with relevant parts of the cultural safety framework.

12.51 A strong theme in the submissions to this Inquiry was the importance of the family law system being culturally safe for all families who need its assistance. This will lead to the system being more accessible for families and communities who have concerns about the system's current ability to address, and appropriately respond to, their cultural needs.

12.52 These submissions reflect issues that have been described in a number of previous reports,[15] including concerns about the limited availability of interpreters, the need for greater collaboration between the family law system and culturally-specific services, the need for strategies to improve the diversity of the family law system's workforce, including judicial officers, and the need to enhance the cultural competency of family law professionals and the family law literacy of diverse communities.

15 See, eg, 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); Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016); Judicial Council on Cultural Diversity, *National Framework to Improve Accessibility to Australian Courts for Aboriginal and Torres Strait Islander Women and Migrant and Refugee Women*; 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).

12.53 These reports have included a large number of recommendations to address these concerns, including recommendations for building an Aboriginal and Torres Strait Islander workforce in the family law system, developing a community legal education strategy for culturally and linguistically diverse communities, and legislating for the provision of cultural reports in contested children's matters.[16] Most recently, the House of Representatives Standing Committee on Social Policy and Legal Affairs (SPLA Committee) recommended that these be implemented 'as a matter of urgency'.[17]

12.54 Submissions to this Inquiry have also called for the recommendations made in these earlier reports to be implemented, emphasising the importance of ensuring the family law system is safe and accessible for all families who need it. As noted in Chapters 1 and 6, many stakeholders during our consultations offered strong support for the Federal Circuit Court of Australia's Indigenous Lists. The Aboriginal Legal Service of Western Australia noted the Family Court of Western Australia's 'potential to resolve child related disputes in a more culturally appropriate way than the traditional state-based child protection system'.[18] However, along with other submissions, they argued that 'there is a need to change Aboriginal people's perception of the system so that it is seen by them as an effective option for resolving family, and in particular, child-related disputes'.[19]

12.55 Submissions also recognised LGBTIQ communities face barriers to access and inclusion in the family law system and that there is a need to enhance the responsiveness of the system for LGBTIQ families.[20] For example, the Australian Psychological Society submitted that:

> Many LGBTIQ+ people are apprehensive about [the] family law system and fear that their relationship, sexuality, gender diversity, family form or structure will not be understood at all stages of engagement...[21]

12.56 In its submission, Rainbow Families NSW outlined some of the potential consequences for LGBTIQ families of this fear, noting that:

> Perceived lack of support available within the system can result in a tendency to make informal agreements to avoid going to court. Some felt that the lack of inclusiveness was reflected in the language used. Whilst there are benefits in resolving family law disputes outside of the court system, in some cases this may result in people agreeing to arrangements that are not in the best interests of their child or that are simply unworkable.[22]

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

17 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 15 rec 24.

18 Aboriginal Legal Service of Western Australia, *Submission 64*.

19 Ibid. See also NATSIWA, Harmony Alliance and AWAVA, *Submission 122*.

20 See, eg, Australian Human Rights Commission, *Submission 217*; National LGBTI Health Alliance, *Submission 14*.

21 Australian Psychological Society, *Submission 55*.

22 Rainbow Families NSW, *Submission 212*.

12.57 More generally, many submissions indicated the need for the family law system to be able to provide community-informed and responsive services for all families.[23] As The Humanitarian Group put it:

> With such a breadth and depth of different cultures and languages participating in the family law system it is essential that the family law system is able to adapt and respond with cultural competency and appropriateness.[24]

12.58 In order to address these calls, the ALRC proposes a cultural safety framework be developed for the family law system to support and guide the implementation of reforms arising from this review or earlier recommendations. This approach builds on the development of frameworks to guide culturally appropriate services in other sectors, such as the health system.[25] The *Cultural Respect Framework 2016–2026 for Aboriginal and Torres Strait Islander Health—A National Approach to Building a Culturally Respectful Health System* commits the Australian Government and states and territories to embed cultural respect principles into their health systems.[26]

12.59 The ALRC proposes a community-informed co-design model for the framework's development in consultation with relevant community organisations, including Aboriginal and Torres Strait Islander, culturally and linguistically diverse, and LGBTIQ organisations. This model reflects submissions received by the ALRC, which emphasised that involvement of diverse communities in the design and delivery of education and engagement strategies will be critical to their success.[27] The Queensland Family and Child Commission noted, for example, that

> when Aboriginal and Torres Strait Islander peoples are given the opportunity to decide, design, and deliver services in their communities, it is more likely these services will be culturally safe and responsive.[28]

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23 See, eg, Yourtown, *Submission 204*; CatholicCare Diocese of Broken Bay, *Submission 197*; Grandparents Victoria, *Submission 138*.

24 The Humanitarian Group, *Submission 82*.

25 See, eg, ACT Government, 'Towards Culturally Appropriate and Inclusive Services: A Co-Ordinating Framework for ACT Health 2014-2018' (2014).

26 Australian Health Ministers' Advisory Council, *Cultural Respect Framework 2016–2026 for Aboriginal and Torres Strait Islander Health—A National Approach to Building a Culturally Respectful Health System* (2016).

27 See, eg, Uniting, *Submission 162*; Centacare Family and Relationship Services (CFRS), *Submission 125*; Caxton Legal Centre, *Submission 51*; Law Council of Australia, *Submission 43*.

28 Queensland Family and Child Commission, *Submission 16* citing Queensland's strategy for Aboriginal and Torres Strait Islander children, Our Way: A generational strategy for Aboriginal and Torres Strait Islander children and families 2017-2037.

Privacy provisions

Proposal 12–11 Privacy provisions that restrict publication of family law proceedings to the public, currently contained in s 121 of the *Family Law Act 1975* (Cth) should be maintained, with the following amendments:

- s 121 should be redrafted to make the obligations it imposes easier to understand;
- an explicit exemption to the restriction on publication or dissemination of accounts of proceedings should be provided for providing accounts of family law proceedings to professional regulators, and for use of accounts by professional regulators in connection with their regulatory functions;
- an avoidance of doubt provision should be inserted to clarify that government agencies, family law services, service providers for children, and family violence service providers are not parts of the 'public' for the purposes of the provision;
- the offence of publication or dissemination of accounts of proceedings should only apply to public communications, and legislative provisions should clarify that the offence does not apply to private communications; and
- to ensure public confidence in family law decision making, an obligation should be placed on any courts exercising family law jurisdiction, other than courts of summary jurisdiction, to publish anonymised reports of reasons for decision for final orders.

Question 12–1 Should privacy provisions in the *Family Law Act 1975* (Cth) be amended explicitly to apply to parties who disseminate identifying information about family law proceedings on social media or other internet-based media?

12.60 The *Family Law Act* attempts to strike a balance between the principle of open justice, and public expectations of accountability and transparency that flow from this principle, and the right of children and families to privacy. The principle of open justice is promoted by the requirement in the *Family Law Act* that proceedings will generally be conducted in open court (that is, any member of the public can attend the proceedings),[29] and by the routine publishing of reasons for decision in anonymised form.[30] In contrast, the privacy provisions in the Act can be seen as limiting open justice. These privacy provisions, contained in s 121, are designed to protect the privacy of families and children from sensational and intrusive media reporting of the kind that was common prior to the enactment of the Act. Similar provisions can be

29 *Family Law Act 1975* (Cth) s 97.
30 At time of publication, decisions were available on the AustLII website at: www.austlii.edu.au.

found in a number of overseas family law jurisdictions, as well as in child protection and juvenile justice laws in the states and territories of Australia.[31]

12.61 The provisions criminalise the publication or dissemination of an account of a family law proceeding that could identify a party, witness or other person associated with the proceeding. Exceptions are provided for publication of case reports, legal professional regulation, and other purposes. The court can also make orders authorising publication of identifying information, and occasionally does so.[32] As a result, it is legal to publish detailed accounts of family law proceedings, provided that the account does not directly or indirectly identify relevant persons.

12.62 This provision has generated significant controversy over many years but was last comprehensively reviewed in the McCall Report in 1997, which recommended the maintenance of privacy provisions, but some relaxation of s 121 in relation to property proceedings.[33] There is a perception that the provision prevents scrutiny of family law decision making, reporting on the deficiencies of the family law system, and victims of family violence from speaking out about their experiences.[34]

12.63 Although the provision does place restrictions on commentary about proceedings, anonymised reports of judgments are routinely published, and there is no prohibition on comment on family law proceedings, provided individuals are not identified. As noted by the Law Council of Australia (Law Council), requirements for anonymisation do not prevent individuals from telling their stories. For example, the evidence reported by the Royal Commission into Institutional Abuse was anonymised but still enabled the stories of individuals who had experienced abuse to be made public.[35] Prosecutions for breaches of s 121 are rare.[36]

12.64 There is strong support for privacy of family law proceedings across the family law sector, due to the potential impacts on children and families of inappropriate reporting. The reasons for this support are well summarised by the Community and Public Sector Union submission, which notes a 'considerable risk of misinformation, defamation, trial by social media, and present and future trauma for children subject to proceedings' if restrictions on reporting were relaxed.[37]

12.65 However, aspects of s 121 cause significant confusion.[38] For example, doubts have been expressed about whether s 121 prevents communication of details of proceedings to professional regulators as part of a complaint, or communications

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31 See, eg, *Family Court Act 1980 (NZ)* s 11B; *Children and Young Persons (Care and Protection) Act 1998 (NSW)* s 105; *Children (Criminal Proceedings) Act 1987* (NSW) ss 15A-15G.

32 A recent high profile case in which this was done was the 'Baby Gammy' matter: *Farnell & Chanbua* [2016] FCWA 17 (14 April 2016).

33 IWP McCall, 'Publicity in Family Law Cases : Report to the Attorney-General for the Commonwealth on Proposals for Amendments to Family Law Act, Section 121' (Attorney-General's Department, 1997).

34 For the latter, see, eg, Centacare Family and Relationship Services (CFRS), *Submission 125*.

35 Law Council of Australia, *Submission 43*.

36 The most recent prosecution was of the *Courier-Mail* in 2014 for its reporting on an international child abduction case.

37 CPSU, *Submission 136*.

38 These ambiguities are explored in depth in Adiva Sifris and Sharon Rodrick, 'The Reach and Efficacy of s 121 of the Family Law Act' (2017) 7 *Family Law Review* 30.

between family law service providers about safety concerns for clients, or even private conversations between individuals.

12.66 A number of changes should be made to improve the clarity of the provision, and ensure that it does not discourage communications about family law proceedings beyond its intended scope. These include:

- redrafting the provision to make it easier to understand and apply;
- replacing the exemption for legal professional regulators with a general exemption for providing accounts of family law proceedings to professional regulators, and for use of accounts by regulators in the performance of their functions;
- clarifying the meaning of 'the public'; and
- clarifying that the offence only applies to communications made in public (that is, not in private).

12.67 It is concerning that substantial elements of the community believe that the family courts are using s 121 to avoid scrutiny of their decisions. To provide a clear indication that the courts' decisions must be available for scrutiny, the ALRC proposes that the existing practise of publishing anonymised judgments should be codified and made mandatory in the Act.

Modernisation of drafting

12.68 At present, s 121 is drafted in a form that many readers are likely to find difficult to read and understand. In line with Proposal 12–11, s 121 should be redrafted and simplified to assist readers to understand the scope of the offence.

12.69 There is arguably some benefit in explicitly clarifying that s 121 applies to parties who disseminate identifying information about family law proceedings via social media and other internet-based media. Section 121 already includes prohibitions on publishing 'by electronic means' or 'otherwise disseminating' to a section of the public, and courts have held that this includes publishing material on a website.[39] However, it is queried whether specifically including 'social media' or other related terms may clarify the scope of the provision. For example, juvenile justice legislation in New South Wales includes an explicit prohibition on publication by way of 'electronic broadcast [or] by the Internet'.[40]

Exemption for providing accounts of proceedings to regulators

12.70 Submissions to the Issues Paper indicated considerable confusion as to whether accounts of proceedings can be provided to professional regulators, or by professional regulators to others in connection with the performance of their regulatory functions.[41]

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39 See, eg, *Xuarez & Vitela* [2012] FamCA 574.
40 *Children (Criminal Proceedings) Act 1987* (NSW), s 15A(2).
41 See, eg, Women's Legal Services Australia, *Submission 45*.

12.71 It is unlikely that regulators in this context are members of 'the public' for the purposes of s 121. In relation to provision of information to child welfare authorities, the Full Court of the Family Court of Australia has held that 'it is the connection which exists between the information which is sought to be provided to the child welfare authorities and the functions that they perform, which distinguishes them from other persons or organisations in the public'.[42] It is likely that a similar connection exists between the information that would be provided to regulators, and their regulatory functions.

12.72 However, it is important to ensure that people are not inadvertently deterred by privacy provisions from making valid complaints. The ALRC therefore proposes that the existing exemption for providing information to legal professional regulators be broadened into an exemption for providing information to any professional regulator, and use of the accounts by the professional regulator in direct connection to their regulatory functions.

The public nature of communications

12.73 A critical element of the offence in s 121 is that information must be published or disseminated to the public, or a part of the public. It is unlikely that this was intended to prohibit communications to government agencies, family law service providers, service providers for children, or family violence service providers. There are compelling reasons, including safety, for information about family law proceedings to be shared with service providers. However, the drafting of the provisions has given rise to some confusion about this.

12.74 Submissions to this Inquiry suggested that it should be clear that information should be able to be shared among services to improve the ability of professionals to collaborate.[43]

12.75 Submissions also indicated that the drafting of the provision gives rise to some doubt as to whether researchers are able to access court files for the purposes of research.[44] However, given the close connection between the work of family law researchers and the information in court files, it is not clear that they would be a 'part of the public' in this context. The courts' power in s 121(9)(g) to approve publications would also appear to be sufficient to allow information from files to be provided to researchers.

12.76 To avoid confusion, an avoidance of doubt provision should be inserted into s 121 to clarify that 'the public' does not include government agencies, family law services, or other service providers.

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42 *Re: W* [1997] FamCA 8.

43 In relation to sharing of family reports amongst family law professionals, see especially CatholicCare Victoria Tasmania (CCVT), *Submission 115*.

44 Z Rathus, Dr S Jeffries, Dr H Menih and Professor R Field, *Submission 166*.

12.77 Case law indicates that the offence in s 121 does not prohibit private communications. In *Donnelly v Edelsten*, Morling J held that the phrase 'disseminates to the public'

> should be taken as a reference to widespread communication with the aim of reaching a wide audience. It cannot have been intended by the legislature that the restriction on dissemination should apply, for example, to conversations between a party to Family Court proceedings and a close personal friend.[45]

12.78 However, a number of submitters understood this to be its effect. The ALRC recommends that this scope for confusion be minimised by clarifying that the offence of dissemination 'to the public or to a section of the public' does not apply to private communications. There is substantial case law considering the meaning of 'private communications' in other legal contexts, including discrimination law.[46]

Obligation to report anonymised accounts of cases

12.79 The family law courts have a long-standing practice of publishing anonymised reports of decisions. However, this is not required by the *Family Law Act*, and many individual submitters believed that s 121 allows the courts to avoid scrutiny by preventing details of their decisions being shared.

12.80 To address these concerns, the ALRC proposes that the existing practice of publishing anonymised decisions be codified and made mandatory under the Act.

A National Judicial Commission

Question 12–2 Should a Judicial Commission be established to cover at least Commonwealth judicial officers exercising jurisdiction under the *Family Law Act 1975* (Cth)? If so, what should the functions of the Commission be?

12.81 Many submissions to this Inquiry have suggested that there should be greater accountability for judicial officers exercising family law jurisdiction. There are strict constitutional limits on how discipline may be imposed on Commonwealth judicial officers. However, the ALRC ask if a National Judicial Commission should be established to provide greater transparency and independence around the consideration of complaints against judicial officers.

Independence of the judiciary

12.82 The judiciary comprises one of the three limbs of Australian Government (with the executive and the Parliament). The High Court has held, over many years, that the *Constitution* implies a strong separation of powers, which prevent executive or

45 *Donnelly v Edelsten* [1988] FLC 91, 76, 775. Cited with approval in *R Pty Ltd atf the Fletcher Trust & Jones and Anor* (2016) [2016] FamCA 928, [37].

46 See, eg, the discussion in Australian Human Rights Commission, *Federal Discrimination Law* (Australian Human Rights Commission, 2016) 80.

parliamentary interference with the judicial branch. In line with the independence of the judiciary, judges:

- are appointed with tenure until they reach the mandatory retirement age of 70;
- cannot have their remuneration reduced; and
- may only be dismissed by the Governor-General on an address from both Houses of Parliament praying for their dismissal on the ground of proved misbehaviour or incapacity.[47]

12.83 In addition to these protections, judicial officers also enjoy immunity from any legal proceedings in relation to actions taken in the exercise of their jurisdiction. Chief Justice Gleeson (as he was then) explained the policy of these immunities as follows:

> This immunity from civil liability is conferred by the common law, not as a perquisite of judicial office for the private advantage of judges, but for the protection of judicial independence in the public interest. It is the right of citizens that there be available for the resolution of civil disputes between citizen and citizen, or between citizen and government, and for the administration of criminal justice, an independent judiciary whose members can be assumed with confidence to exercise authority without fear or favour.[48]

12.84 These features, taken together, are intended to ensure that judicial officers will be impartial adjudicators, by limiting the opportunities for reprisals by governments or private citizens if they disagree with decisions of the judicial officer. The independence of the judiciary is a fundamental value of Australian democracy, and is strongly embedded in the *Constitution*.

12.85 This independence, and these immunities, do not mean that Commonwealth judicial officers are wholly unaccountable for their conduct as judges. As Gleeson CJ noted:

> Judges are required, subject to closely confined exceptions, to work in public, and to give reasons for their decisions. Their decisions routinely are subject to appellate review, which also is conducted openly. The ultimate sanction for judicial misconduct is removal from office upon an address of Parliament.[49]

12.86 As detailed above, the ALRC proposes that courts exercising family law jurisdiction should be required to publish reasons for their decisions (Proposal 12–11). This section considers possible changes to the way complaints against judicial officers are handled to enhance accountability.

The current system for handling complaints about judicial officers

12.87 The Commonwealth system for complaints about judicial officers has been a matter of debate since at least the 1980s and events surrounding allegations of misconduct against the late Justice Lionel Murphy QC. This debate has included

47 *Australian Constitution* s 72.
48 *Fingleton v R* [2005] HCA 34, [38] (Gleeson CJ).
49 Ibid [39] (Gleeson CJ).

consideration by the ALRC in its report, *Managing Justice: a Review of the Federal Civil Justice System* (2000), which recommended developing protocols for dealing with complaints.[50] A Senate Inquiry into Australia's judicial system and the role of judges (2009) recommended the establishment of a federal judicial commission to consider complaints against judicial officers.[51]

12.88 In 2012, significant reforms were introduced to the handling of complaints against Commonwealth judicial officers in the *Court Legislation Amendment (Judicial Complaints) Act 2012* (Cth) (*Judicial Complaints Act*). The *Judicial Complaints Act* provided powers and immunities supporting the role of heads of jurisdiction, or a complaint handler chosen by them, in considering complaints against judicial officers.

12.89 When a person makes a complaint against a judicial officer, the relevant head of jurisdiction will decide whether to:

- take no further action on the complaint (for example, if it is clearly frivolous or vexatious);
- refer the complaint to a 'complaint handler' for investigation (either an individual judge, or a 'Conduct Committee'; or
- refer the complaint to Parliament if it raises serious matters that would warrant dismissal and do not require further investigation.

12.90 The *Judicial Complaints Act* provides heads of jurisdiction with the power to 'take any measures that the [head of jurisdiction] believes are reasonably necessary to maintain public confidence in the Court, including, but not limited to, temporarily restricting another Judge to non-sitting duties'.[52] In addition, as noted above, the head of jurisdiction may refer the matter to Parliament to consider dismissal in appropriate circumstances.

12.91 To support this process, the new judicial complaints system:

- provides complaints handlers with immunities in the performance of their functions;[53] and
- exempts documents in relation to complaints handlers exercising their functions from the *Freedom of Information Act 1982* (Cth).[54]

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50 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) recs 11, 12.

51 Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Australia's Judicial System and the Role of Judges* (2009) recs 10, 11.

52 See, eg, *Family Law Act 1975* (Cth) s 21B(1A)(d).

53 See, eg, Ibid s 38Y.

54 *Freedom of Information Act 1982* (Cth) ss 5(1A)–(1C).

12.92 At the time of introducing the Act, the Australian Government indicated that it would not establish a judicial commission because:

- issues of removal of judicial officers from office are rare;
- when required, Parliamentary Commissions can be established to inquire into a particular judicial officer for this purpose;
- s 72(ii) of the *Constitution* (which provides for judicial officers to be removed on an address from both Houses of Parliament to the Governor-General) means that it is important for a Commission to be a creature of Parliament rather than the executive.[55]

12.93 These arguments are relevant to the most serious complaints, which might warrant the dismissal of a judicial officer, but not to complaints that fall short of this level of seriousness.

12.94 Notwithstanding this system, no Commonwealth judicial officer has ever been dismissed from office.

Judicial commissions in the states and territories

12.95 New South Wales and Victoria have both established judicial commissions. These existing commissions can provide insight into the range of functions that can be performed by a commission, and their practical impact on public confidence in the judiciary and judicial independence.

12.96 The NSW Commission was established as an independent statutory authority in 1987, and there is accordingly now 30 years of experience of its operations. The membership of the Commission comprises six heads of jurisdiction, and four appointed members, one of whom must be a legal practitioner, and the others of whom must have 'high standing in the community'.[56]

12.97 The Commission has a function, through its Conduct Division, to deal with complaints about judicial officers, and issues of potential incapacity of a judicial officer, that are referred to it.[57] Any person can make a complaint about a judicial officer's behaviour or capability. However, the Commission may only consider the complaint if it might be sufficient to justify the dismissal of the judicial officer, or if 'the matter warrants further examination on the ground that the matter may affect or may have affected the performance of judicial or official duties by the officer'.[58] A preliminary consideration is then undertaken, after which complaints may be summarily dismissed on a number of grounds, including that the matter is trivial, or

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55 Moira Coombs, Department of Parliamentary Services (Cth), *Bills Digest*, No 172of 2011–12 (26 June 2012) 4.

56 *Judicial Officers Act 1986* (NSW) s 5.

57 Ibid s 14. Other functions include assisting the courts to promote consistency in sentencing (s 8), judicial education (s 9), producing guidelines to assist the Commission and its Conduct Division with conducting its functions (s 10), and providing advice to Minister on such matters as the Commission thinks appropriate (s 11(1)(a)).

58 *Judicial Officers Act 1986* (NSW) s 15.

frivolous and vexatious.[59] If the complaint is not summarily dismissed, it must be referred to the Conduct Division for consideration, or the relevant head of jurisdiction if not serious enough to warrant consideration by the Conduct Division.[60]

12.98 The Conduct Division must be constituted by two judicial officers, and one person of high standing in the community. The Division will examine the matter, and conduct hearings.[61] If the Division finds the complaint substantiated, it must either report to the Governor about the matter (if the matter may warrant dismissal) or to the head of jurisdiction (if it does not).[62] Reports to the Governor must be tabled in Parliament.[63]

12.99 Although controversial when created,[64] the Judicial Commission of NSW has come to be an accepted part of the regulation of judicial officers in that state. Chief Justice Bathurst, the President of the Commission, has stated of the complaints function that:

> For three decades, the Commission has successfully balanced the need for judicial accountability with the preservation of judicial independence. An institutionalised process for examining complaints provides an independent and robust assessment of complaints against judicial officers.[65]

12.100 In 2016–17, the Commission received 75 complaints about 57 judicial officers.[66] Of these complaints, 96% (72 of 75) were summarily dismissed, but three required further examination. Of these, two were referred to the relevant head of jurisdiction, and one was considered by the Conduct Division.[67]

12.101 The Judicial Commission of Victoria was created by the *Judicial Commission of Victoria Act 2017* (Vic) and commenced operations on 3 July 2017. Unlike its NSW counterpart, the Judicial Commission of Victoria is solely focused on complaints about judicial officers, which it conducts through a similar process to the NSW Commission. Judicial education functions remain with the Judicial College of Victoria.

Judicial accountability in family law

12.102 Notwithstanding the relatively new system of complaints handling provided by the *Judicial Complaints Act*, submissions, particularly from, but not limited to,

59 Ibid ss18, 20.
60 Ibid s 21.
61 Ibid ss 23, 24.
62 Ibid s 28.
63 Ibid s 29.
64 Judicial Commission of New South Wales, *Annual Report 2016-17* (Judicial Commission of NSW, 2017) 4.
65 Ibid 11.
66 Ibid 45.
67 Ibid.

individuals who had been involved in family law litigation, indicated appetite for a more effective system for handling complaints against judicial officers.[68]

12.103 An example of dissatisfaction with existing arrangements for judicial complaints was provided by the Law Society of NSW Young Lawyers, who commented that

> the establishment of an independent, accountable and effective complaint system is an important feature in improving the public's confidence in the family law system. The current system is such that complaints... are made to the Chief Judge of the relevant court and, for the most part, there appears to be no oversight or transparency as to how complaints are handled. There is also no prescribed timeframe for which complaints are to be processed and resolved, if ever and there is no effective remedy or recourse if the complaint is not resolved.[69]

12.104 The Law Council of Australia, noted that they support establishing a Federal Judicial Commission, and considered this part of a broader debate about the need for federal anti-corruption bodies.[70] Similarly, Domestic Violence Victoria supported the creation of an independent body, similar to those established in some state jurisdictions.[71]

Is it time to reconsider a National Judicial Commission?

12.105 The Judicial Complaints Act represented a significant advance in formalising procedures for dealing with complaints about the conduct or capacity of judicial officers. However, information received by this Inquiry has indicated that this system is still regarded by elements of the public as lacking in transparency, independence, and effectiveness.

12.106 There would inevitably be constitutional restraints on the powers of a National Judicial Commission. However, the ALRC considers that it is timely to consider whether a Judicial Commission that could impartially consider complaints, and make recommendations to the relevant head of jurisdiction, or Parliament, as appropriate, is necessary to improve public confidence in judicial officers exercising family law jurisdiction. The ALRC seeks input on whether a Judicial Commission should be established, and, if so, what its functions should be.

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68 See, eg, For Kids Sake, *Submission 118*; Family Inclusion Network Queensland (Townsville), *Submission 78*; Women's Legal Services Australia, *Submission 45*.

69 NSW Young Lawyers, *Submission 68*.

70 Law Council of Australia, *Submission 43*.

71 Domestic Violence Victoria, *Submission 23*.