

Submission to the ALRC Review of the Family Law System – Issues Paper

Prepared by:
Farrar Gesini Dunn

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Overview

The overarching question when rethinking the family law system as it currently exists is, in our view:

What process, or processes, could be introduced to enable the 95% of litigants who reach agreement through the Court process to reach agreement without needing to commence Court proceedings?

The *Family Law Act* requires amendment to ensure that only those cases that are intractable for whatever reason come before the Court. All other cases should be diverted to a rigorous, dedicated, systemised settlement pathway that stands alone, entirely separate to the Court system. The Court system should purely play the role of being a decision-making forum. Currently, the Court system is attempting to undertake a number of roles, including:

1. Providing hearing time for matters requiring a decision on a final basis;
2. Managing cases that arguably should never have been filed in the Court system through to a settlement by way of a process that might broadly be called “therapeutic” judicial decision-making or case management;
3. Dealing with vexatious or otherwise trivial matters, which should not be allocated Court time.

Currently, the judicial pathway once a matter is started in either the Federal Circuit Court or the Family Court anticipates a series of events dedicated towards settlement before the case is allocated hearing time. This is causing the Court system to be overwhelmed with cases, which it is under-resourced to manage. 95% of cases filed settle. A large percentage of these cases should never have commenced proceedings at the outset.

The Court is now failing to keep anywhere close to its key performance indicators regarding the acceptable timeframe between filing and first return date, acceptable time between filing and final hearing, and acceptable time between final hearing and judgment delivered. To overcome this problem, to allow those cases that require a decision to be made to receive a decision, and for that decision to be made promptly, without delay, and expeditiously, means that a system must be created that is a dedicated settlement pathway outside the Court process; a pathway that is as rigorous as the litigation pathway.

Currently, alternative dispute resolution is seen as a “soft” option, or as an “alternative” to the primary dispute resolution process that is judicial decision-making. What is required is an entire change in mindset whereby the settlement pathway is seen as the primary process in which decisions are reached and judicial decision-making is seen as the alternative, the option of last resort. Therefore, matters are only “tipped into the Court system” once they have exhausted all options for reaching a negotiated agreement.

Historically, alternate dispute resolution has been an “add on” to the Court process as it is recognised that it is preferable for parties to reach an agreement rather than engage in adversarial proceedings. However, the Court’s primary role, and the manner in which the adversarial system operates (“the rules of the game”), is founded upon a set of principles that are incoherent when applied towards the set of principles that must, or should be, applied when parties are being prepared to engage in a negotiated settlement.

In essence, the rules of the game of the adversarial process are antithetical towards supporting parties to reduce the conflict between them and find common ground - what one would consider the appropriate rules of the game to facilitate parties having the best opportunity to reach a negotiated outcome. For example, if it is recognised that to reduce conflict, it is preferable to encourage parties to find areas of agreement rather than disagreement, then the last thing you would require parties to do is complete competing affidavits that require parties to do the direct opposite. That is, to highlight the areas of disagreement and distrust and differences of opinion.

Accordingly, we recommend that there should be another question asked by the ALRC in its inquiry into the family law system. The question should read as follows:

“What process or processes must be introduced to enable the 95% of litigants who commence family law proceedings and then resolve their dispute, to resolve their dispute without commencing litigation?”

This question, once asked, opens up and allows for there to be an investigation of what sort of dedicated settlement process should be introduced on a mandatory basis that is as rigorous and compulsory, with the same rules and laws applying to it and strong consequences applied in the event of non-compliance with each step in the settlement process, as is currently applied through the Court system. In essence, it is the “rule of law” as applied to a dedicated settlement system, as against the rule of law as applied in a dedicated decision-making system. This question then causes there to be a review of how the skillsets of lawyers (both as traditional advocates and as conflict resolution specialists – where most of their legal work is done), counsellors, psychologists, mediators and judges can best be enhanced in order to provide the rigorous understanding of the needs of a separating couple in conflict.

The creation of a dedicated settlement system is directly in line with, and supports, propositions widely accepted such as:

1. It is in the best interests of children that their parents reach an agreement as to their care, welfare and development;
2. The reduction of children being exposed to conflict is in their best interests;
3. The role-modelling for children of their parents managing conflict and reaching an agreement in relation to their care is an important principle for children to learn.

It allows for a process that is more dignified and bespoke to the needs of the family, rather than being matter number “31” in a list of 40 matters on a particular day in Court. Such a system can also provide for the safety of parties who are at risk of family violence or have suffered family violence, and it allows for financial matters to be resolved in a timely way, saving costs and resulting in more bespoke agreements achieved.

It is broadly accepted that agreements reached are more likely to be followed by the parties involved, rather than orders imposed upon them, which again ensures that the family, however redesigned, will be more functional.

Our submissions in relation to the questions and analysis in the Issues Paper are below.

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

Given the breadth of the definition of “family law system” in the Issues Paper, in our view, it could lead to error if you try to define the same role and objectives for each part of the system.

The different elements of the family law system should support one another and be governed by the same principles, however, the role and objectives for some elements may be different to others. For example, the role and objectives of the Courts within the family law system should be different to the role and objectives of government funded post separation parenting programmes. The role and objectives of the former should be to achieve a fair, prompt and cost effective adjudication of disputes between separating couples. Post separation parenting programmes should aim to assist parents to improve their parenting skills, promote children’s best interests, and assist parents to reach agreement.

As such, Question 1 could be reframed as follows:

What should be the role and objectives of each part of the modern family law system and how can we ensure each of the parts complement each other?

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

It is important that any principles developed not only guide this reform agenda, but future reforms do as well.

This question could instead be:

What principles should guide the family law system and any redevelopment of it?

Those principles should be:

1. The paramount importance of protecting the needs of the children of separating families;
2. Protecting adult and children’s rights to physical and emotional safety;
3. The importance of ensuring that the legislation meets the contemporary needs of families and individuals who need to rely on the family law system;
4. The importance of making the family law system affordable, culturally apposite, and accessible to the CALD community and to Aboriginal and Torres Strait Islander people;
5. The importance of affording dignity and privacy to separating families;
6. The importance of public understanding and confidence in the family law system;
7. The desirability of encouraging the resolution of family disputes at the earliest opportunity and in the least costly and damaging manner;
8. Fostering ethical professional practices;

9. Promoting a learning culture.

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

No submission in relation to this questions or its analysis.

Question 4: How might people with family law related needs be assisted to navigate the family law system?

Questions 3 and 4 are excellent questions and do not need to be amended, in our view.

The Family Relationship Centres were introduced primarily for this function. In our experience they function now more as counselling and mediation providers to all socioeconomic groups. This needs to be rebalanced so the Family Relationship Centre provides navigation assistance to separating parties from the time of first contact throughout their engagement with the family law system, as well as providing counselling and mediation to those who cannot afford a private service.

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

No submission in relation to this questions or its analysis.

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

No submission in relation to this questions or its analysis.

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

In our view consideration also needs to be given to the benefits (or not) of:

- Litigation guardians, including greater capacity and funding for litigation guardians to be appointed where necessary; and
- Court premises and technology. Some Courts, particularly regional courts, have outdated technology available and old premises. Upgrades to both may assist people with disabilities.

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

In our view consideration also needs to be given to the benefits (or not) of:

- Upgrades to Court forms, language and legislation. At present, Court forms only have two options for gender. Applications for Divorce refer to Husband and Wife only when filing online. This means that same sex couples have to go to more effort (and expense) to get divorced;
- Training for the profession and the bench in LGBTIQ matters;
- Amending the language in the legislation to make it clear that biology is not the deciding factor when it comes to who is a parent.

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

In our view consideration also needs to be given to the benefits (or not) of having more capacity for parties and/or lawyers to attend Court electronically.

Question 10: What changes could be made to the family law system, including to the provision of legal services and private reports, to reduce the cost to clients of resolving family disputes?

At present, time and delay are the biggest continuators to parties' costs. In our view, consideration needs to be given to having one Court for all family matters (including family law, care, and domestic violence), which would prevent parties being in multiple courts.

Consideration also needs to be given to the benefits (or not) of:

- Funding for family consultants. It is not just legally aided parties who cannot afford to fund private reports. In addition, more evidence based reports (i.e. using psychological or psychiatric testing, etc.) early in the proceedings (or before) are likely to lead to settlement;
- Government funding of training of experts so that more private experts are willing to be involved in Court matters;
- Funding to provide for mediation and Collaborative law to occur prior to making a Court application;

- Legal Aid funding for out of Court work such as mediation and Collaborative law, and private reports;
- Having clearer rules about what happens at each Court date and having effective case management of matters to ensure minimal delay;
- Having cost consequences for parties who do not comply with rules, Orders and filing deadlines;
- Having training for the bench and the profession in domestic violence, anti-bullying and respectful, interest based negotiation.

Question 11: What changes can be made to court procedures to improve their accessibility for litigants who are not legally represented?

In our view, consideration needs to be given to the simplification of forms and instructions in forms. For example, the Application for Consent Orders is confusing for clients. Part H is not consistent with Part I. Online instructions for the Online Application for Divorce are also confusing, particularly regarding a joint application and service.

Question 12: What other changes are needed to support people who do not have legal representation to resolve their family law problems?

Current challenges in this area include, inconsistency in outcomes, judges and Registries. This makes it hard for the legal profession to provide accurate advice to self-represented parties about likely outcomes.

Other challenges for self-represented parties include multiple Courts (i.e. DV, care, family), unclear legislation, and presumptions in the Family Law Act that lead people to focus on “rights” when it comes to arrangements for children, rather than the child’s best interest.

Consideration needs to be given to the ways in which these challenges can be managed. In addition, consideration needs to be given to the benefit of having more evidence-based research about what arrangements are recommended for young children.

Question 13: What improvements could be made to the physical design of the family courts to make them more accessible and responsive to the needs of clients, particularly for clients who have security concerns for their children or themselves?

Apart from matters that deal with the physical design of the Family Courts, the other improvement that may be made to make the Courts more accessible and responsive to the needs of clients, particularly those who have security concerns for their children or for

themselves, is to ensure that the list of matters to be heard on a particular day is limited to a certain number, so that each matter listed for hearing is in fact heard that day.

Currently, the number of matters listed in a particular day, more often than not, ensures one or a number of the following can occur:

1. The matter is not reached;
2. The matter, if reached, is dealt with in a more simplified way because there is no time available to deal with the issues raised in the competing applications in the most appropriate or case-managed manner; or
3. The matter is processed, however, no decision is made.

For families to attend at Court, including vulnerable members of a family, only to discover that there is a high likelihood that the documents that have been prepared by them, or on their behalf by their solicitors at great cost, have not been read by the judicial officer because the judicial officer is overworked and does not have time to read all of the material filed on each matter, is disillusioning to litigants who attend Court expecting the rule of law to be exercised in a fair and measured way.

This situation is unresponsive to the needs of litigants who are financially vulnerable, if not also physically vulnerable. Directions recently made to limit the number of pages of an affidavit or the number of annexures (Federal Circuit Court) are understandable, however, there is a risk that such vulnerable litigants may lose faith in the system as there is a high risk that these accommodations may be counterproductive to the effective application of the rule of law. This is because relevant material may be left out or “not read”, the material filed is not in admissible form, or serious allegations are made with no supporting evidence in the name of complying with a rule. Given the manner in which interim hearings are conducted, this has a grave impact upon how a Judge can make a decision when competing applications are on foot and there is no evidence to assist in making a safe decision.

It is imperative that, in order for vulnerable families to feel protected by the law, there is a clear example of the rule of law being exercised in relation to each matter – either by way of decisions being made or orders being enforced.

There is no value in a litigant, being the victim of family violence, feeling safe waiting in a special room, to only find they've had to attend Court for the whole of that day and nothing has happened; that is, no decision made. The risk to those parties in having to attend a Court to only find they have to attend on another day, which could be easily weeks away, if not months, due to the lack of availability of judicial officers, raises greater concerns in relation to their security rather than the building design per se.

Question 14: What changes to the provisions in Part VII of the Family Law Act could be made to produce the best outcomes for children?

The key issue in relation to part VII of the *Family Law Act* is that it fails to provide a process which encourages parents to reach an agreement in relation to the arrangements for their children. Currently, part VII of the *Family Law Act* sets out the substantive issues which are to be taken into account when a judicial decision is to be made. It presumes that at the time a judicial decision is made, that it is made after a full investigation of all competing issues.

Unfortunately, the reality is, in most applications filed in relation to children's issues, the judicial officer is required, or at least requested, to make a decision on an interim basis, pending the final hearing. Currently, the timeframe between filing and the final hearing can be as long as two years. Therefore, orders made on a temporary basis can have a disproportionate impact upon what the outcome is likely to be on a final basis, given the amount of time this decision will be in place before a final hearing. And this is in circumstances where usual practice provides that a full investigation of the issues set out in the *Family Law Act* cannot take place at an interim hearing.

Further, in effect, the current law does not allow for, or encourage, parents to trial "temporary" arrangements, because there is a risk that the so-called temporary arrangement will become a final one due to how the law is currently interpreted. This can block settlement negotiations between parties.

Question 15: What changes could be made to the definition of family violence, or other provisions regarding family violence, in the Family Law Act to better support decision making about the safety of children and their families?

The recommendations generally made in relation to the definition of family violence as set out in the issues paper are appropriate. The issue in relation to the Courts is that many allegations of family violence are made and it is not possible for those allegations to be properly investigated on an interim basis. Further, more often than not, allegations made do not comply with the rules of evidence. Given the seriousness of the allegations made, it is inescapable to require those allegations to satisfy evidentiary requirements.

It is impossible to make reforms that provide for very serious consequences when family violence is alleged if, on an interim basis, those allegations cannot be investigated and findings cannot be made due to lack of resources within the system. Therefore, for such recommendations to be accepted, it is absolutely imperative that the proper funding of the system follow – and given there will not be the funds available, what is required is an overhaul of the system so that only those cases that require judicial intervention are accepted by the Court for filing.

Question 16: What changes could be made to Part VII of the Family Law Act to enable it to apply consistently to all children irrespective of their family structure?

No submission in relation to this questions or its analysis.

Question 17: What changes could be made to the provisions in the Family Law Act governing property division to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes?

Currently section 79 of the *Family Law Act* and the equivalent sections that deal with property division of de facto couples is a discretionary system with the discretion fettered by a number of specific factors that must be taken into account. Property includes superannuation. The law provides for an analysis of the retrospective and prospective circumstances of the parties; that is, what were the contributions of the parties during the relationship and what is the impact upon each of the parties going forward as independent individuals. Any codification of those principles would not be a reform as such, and would be simply codifying what is considered to be current understanding in relation to the division of property. It is not recommended that there be a change to this current approach.

What is recommended is that the proposition that income and income earning capacity be treated as property is explored as, more often than not, it is the parties' income earning capacity that is the most valuable "asset" to come out of a relationship.

When the *Family Law Act* was drafted, it was at a time when it was presumed the traditional family structure consisted of one party at home on a fulltime basis caring for the children and the other party undertaking the role as primary breadwinner. More often than not, the division of these roles could be viewed in gendered terms.

Such is the way in which the spouse maintenance sections are written: it does not accommodate those circumstances where two professional parties (for example, medical practitioners) have continued to work during their relationship and had children, however, the wife has not continued along the path of specialisation and has worked as a GP (because she can manage the hours and look after the children) whilst her husband becomes a specialist who works for longer hours, and, therefore, develops an income and earning capacity that is as much as seven or eight times what she earns. However, because she earns an income, the likelihood of her ever successfully making an application for spouse maintenance is low. The reality, however, is that the most valuable asset created during their relationship is the husband's income earning capacity of somewhere between half a million and a million dollars per annum. It may very well be that in cases such as this, their asset portfolio at separation does not reflect what is now the established income earning capacity of one of the parties, as the reality is, that for at least ten to fifteen years of their relationship, he was developing that income earning capacity through the years of study, supported indirectly by his wife.

The issues victims of violence seeking spouse maintenance confront are the same issues that apply in relation to any ongoing orders made for interim payments – that is the question of enforceability. Enforcing an order that a party refuses to comply with in the civil justice system is expensive and, more often than not, prohibitive. For a victim of violence, it is virtually impossible.

Therefore, the key area of reform required is around enforcement. Litigants don't appreciate that in a civil justice system, the person who is required to enforce an order (and pay their lawyer) is the party to the orders. This is obviously different to the criminal justice system, where the police enforce the law.

We propose that reform to the *Family Law Act* is explored to ensure that orders made have "teeth" and that people understand that if they breach an order, there will be consequences. This applies in relation to periodic orders for sums of money as well as orders in relation to children. Such a reform, taking away the obligation of enforcement from an identified victim of violence would be a positive reform protecting the interests of these victims.

Question 18: What changes could be made to the provisions in the Family Law Act governing spousal maintenance to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes?

See comments in relation to Question 17.

Question 19: What changes could be made to the provisions in the *Family Law Act* governing binding financial agreements to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes?

That couples can enter into financial agreements was a welcome change to family law in Australia. The current drafting of the relevant provisions, however, is cumbersome and difficult to understand. A wholesale re-drafting of the provisions is not desirable as it would create uncertainty for those who have entered into financial agreements in contemplation of, or during, a relationship, but not yet separated.

It is our submission that further consideration could be given to the following areas of the *Family Law Act*:

1. The meaning of "other matters" for the purposes of sections 90B, 90C, 90D. For example, does "other matters" include child support?
2. When provisions for payment (or non-payment) of spousal maintenance are of force and effect? Maintenance is not mentioned in sections 90UF, 90UB and 90UC. These sections provide that it is only maintenance after separation that may be covered in those Agreements (by the interaction of subsections 1 and 2 of those respective

sections). However, because no separation declaration is required, there can be a tension, subject to the drafting of the particular Agreement, about when obligations arise. This is further the case because of section 90UI, which provides that if, when an Agreement comes into effect (and notably this provision doesn't say "of force and effect" which is phrase used in section 90UF), a spouse party is in receipt of a pension allowance or benefit, then the Court's power in respect of maintenance is not limited.

3. The drafting of sections 90UI and 90F. Both use the phrase "taking into account the terms and effect of the agreement, the party was unable to support [themselves] without an income tested pension allowance or benefit". This phrasing raises a number of questions:
 - a. It is common practice for parties to formalize a property settlement at the end of the relationship with Consent Orders in relation to adjustment of property and a financial agreement in relation to maintenance. Arguably a strict reading of the provision would mean that, notwithstanding the terms of the consent order, if the Agreement itself didn't provide adequate support, then the Agreement may not be binding. This question has been considered by the Court in obiter but ultimately not decided;
 - b. There are members of the community who are not entitled to Centrelink benefits, including New Zealand citizens who arrived after a certain date. The legislation does not explain whether or not their lack of entitlement under social security law means that they are, therefore, able to support themselves without an income tested pension allowance or benefit, regardless of their financial means.

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

In our view consideration also needs to be given to:

- The enforcement of existing pre-action procedure requirements;
- Cost or other consequences for parties who make an Application for interim or interlocutory relief and run a substantially different application on the day (and the same applies to a respondent's position);
- Cost or other consequences for parties who fail to comply with Orders or directions. Although there is scope within the current rules and legislation for this to occur in practice it often does not;
- Requirements for Independent Children's Lawyers to personally attend Court events;
- Use of Collaborative practice, including for those matters where proceedings have commenced. A mechanism could be used whereby parties are referred to

independent Collaborative practitioners to try to resolve their matter. If the Collaborative practitioners report back to the Court that a genuine attempt was made but the process was not successful, then the matter could have a preferential hearing date. Particularly so if the Collaborative process was able to narrow the issues in dispute and so a short, specific-issues hearing could be allocated quickly to determine any remaining issues;

- Allocating a hearing date only to those matters that are ready to proceed and having a system that ensures that a hearing date is within 3 months of being listed. Currently, depending on the Registry, many matters are allocated a hearing date on the first return, which may not be needed and thereby prevents other matters from being listed;
- Standing matters down for discussions on day one of a trial. While settlement is to be encouraged too, often these discussions could have been had well in advance and the effect of "settlement on the Court steps" is that other matters that do need to be heard and determined are left waiting. Such a change would go some way to ensuring that practitioners use the time before trial to explore settlement outcomes. This approach would save clients considerably financial and emotional costs.

Question 21: Should courts provide greater opportunities for parties involved in litigation to be diverted to other dispute resolution processes or services to facilitate earlier resolution of disputes?

In our view, consideration also needs to be given to the idea floated above, which incorporates Collaborative practice into Court proceedings. This would provide parties with a real incentive to try to resolve matters and to limit the issues that are in dispute. Consideration could also be given to settlement conferences in parenting matters that involve the family report writer, to try to ensure that agreements reached are workable and in the best interests of children, thereby limiting further litigation.

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

In our view, a precursor to this question is the question:

What is a "small property matter"?

What is a "small property matter" varies from Registry to Registry and is most aligned with average house prices in an area. Therefore, any provision in rules or legislation that is based on a dollar figure could have unintended outcomes. That said, pro-active case management and preferential listing for Conciliation Conferences could be used to limit the time spent in litigation and, therefore, the cost incurred by parties. Case management with a view to limiting discovery and ensuring only targeted discovery is provided could also limit parties' costs.

Question 23: How can parties who have experienced family violence or abuse be better supported at court?

In our view consideration needs to be given to:

- The benefits of having more, and better trained, security staff at the Courts. One of the authors of this submission had an issue in the Melbourne Registry when acting for a woman. There was an Intervention Order in place against the Husband and the Wife's evidence was of a long history of severe violence perpetrated by the Husband against her. At Court the Husband approached the Wife who was standing with the author. The author asked him to leave and stepped in between them to provide a physical barrier. A Court Support Worker was nearby, saw what was happening and went to get security. She returned saying that security was too busy. The author engaged the Husband in conversation and moved him towards a corner and the Court Support Worker took the Wife out of the building and to our office nearby while the author continued to distract the Husband. It provided the Wife with little faith that her concerns about her safety would be taken seriously;
- The benefits of better and more regular training for judicial officers. A Federal Circuit Court Judge in Melbourne remarked in a matter recently words the effect that "the parties can hit each other as much as they like. It's not my problem." This was in the context of serious allegations of violence being made by a mother against a father;
- The benefits of the use of family consultants to provide the Court with information about the effects of family violence on children and parents and families as a whole, and particularly the impact on children who may not have directly witnessed violence but live in a family where that dynamic existed, including better understanding of, and opportunities for, family report writers to provide evidence about the ongoing effect on the victim (or survivor) of violence and how that may inform their participation in the legal process.

Question 24: Should legally-assisted family dispute resolution processes play a greater role in the resolution of disputes involving family violence or abuse?

In our view consideration also needs to be given to the coupling of legally-assisted family dispute resolution processes with further training in the area for lawyers, which ideally would include the participation or input of a family consultant with experience in the area. Many people who have experienced violence talk about the benefit of processes that allow them to advocate for themselves and participate in dispute relationship, with proper support. It is for many an opportunity to change the dynamic and to show their strength. Collaborative practice, and particularly interdisciplinary Collaborative practice, is particularly well suited to

this work especially if any remaining areas of dispute can be returned to the Court system with a preferential listing and determination as suggested above.

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

This question and its analysis is good. In our view, however, careful consideration needs to be given to the effect that restriction of certain processes within the Court system could have, as such restrictions could result in litigants not being able to access all relevant information needed in the family law matter (e.g. restrictions on subpoenas).

It is our experience that some litigants use the Court system to harass and control their former partners and/or children. In some cases, physical violence is present during the relationship. In others it is not. Abuse of process is something which is, in our experience, very difficult to convey to judicial officers, and the principles of procedural fairness and access to justice mean that it is very difficult to stop the abuse of Court processes.

The test for being a vexatious litigant is high and that mechanism is not readily available to prevent repeated interim and interlocutory applications pending final hearing. Consideration should be given to the benefits of better training and understanding by judicial officers of the manifestations of family violence and what impact it has.

Where the Court process is misused in parenting matters, a family report writer can often identify the dynamic and it can inform the Court's approach to the matter. Where the issues, however, are financial, the issue of violence may not be relevant and, therefore, not brought to the Court's attention, or not fully explored. In our view, consideration should be given to the benefits of having evidence about the dynamics of family violence and how that interacts with abuse of process in these matters. Obtaining a report from a qualified expert, such as a family consultant, in these matters, might assist the Court in understanding the underlying dynamic and making directions or Orders to appropriately protect the other party.

Question 26: In what ways could non-adjudicative dispute resolution processes, such as family dispute resolution and conciliation, be developed or expanded to better support families to resolve disputes in a timely and cost-effective way?

No submission in relation to this questions or its analysis.

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

No submission in relation to this questions or its analysis.

Question 28: Should online dispute resolution processes play a greater role in helping people to resolve family law matters in Australia? If so, how can these processes be best supported, and what safeguards should be incorporated into their development?

No submission in relation to this questions or its analysis.

Question 29: Is there scope for problem solving decision-making processes to be developed within the family law system to help manage risk to children in families with complex needs? How could this be done?

No submission in relation to this questions or its analysis.

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

No submission in relation to this questions or its analysis.

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

Integrated services in whatever format must be constructed in such a way as to recognise the contrary points of view that emerge in these cases and provide a forum for consideration of those divergent views. The focus of an integrated service approach needs to be on the immediate issue confronting the families, but also on the longer term wellbeing, both emotional and financial of the families involved.

A recurring observation from those of us assisting families involved in the family law system is the lack of awareness and understanding of the various processes that they find themselves in. This ranges from the terminology involved through to the services provided; for example, confusion between counselling and mediation, use of the term “custody” and guardianship.

Families with complex needs may not engage with the Family Court system and any model implemented needs to be cast in such a way as to address their needs.

Building on existing service models and drawing from the experience and knowledge of those organisations to construct the integrated model is essential. Across this system needs to be transparency and confidence in how that integration occurs, to avoid a system where families are boxed in one program or another.

This would mean that funding mechanisms need to be equitably addressed.

Question 32: What changes should be made to reduce the need for families to engage with more than one court to address safety concerns for children?

The objective outlined is essential. It is, however, imperative that families receive the assistance and benefit of judicial officers, registry staff or counsellors who are trained in dealing with families and in particular children.

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

In our view, consideration also needs to be given to:

- The consistency across programs and services assisting families with regard to confidentiality; and
- The clarification of what services attract confidentiality by falling under the family counselling and family dispute resolution processes in the *Family Law Act*, and what legislation (if any) applies to those that don't fall within that definition.

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

A key observation that arises in dealing directly with families in the family law system is the commonly held view that children are coached or influenced by one or both of their parents to express certain views. Consequently, the mechanism that is adopted to ensure children's views are heard must ensure these influences and the impacts are identified and addressed.

With regard to improving a child's experience of participation in court processes, it is very much a question of ensuring that the children understand the role of an Independent Children's Lawyer, or whoever that it might be that they are meeting with, to express their views. It is not the case that because a child expresses a particular view, that that will be the outcome. The process of eliciting a child's views is not simply for that person to be the child's mouthpiece. Educative processes are required with children that are engaged and participating in any process to ensure they understand the role or manner in which the information they share may be applied.

A significant number of families are able to resolve arrangements between them through the Consent Order process, and in these circumstances, often there is no participation of the children in that decision-making, other than the extent to which the parents choose to engage with the children. For parents that are communicating well and have an alignment in terms of their objectives with regard to the children, this can be a positive experience. For those families that do not, query whether a parenting after separation arrangement should be endorsed.

Any program that involves children's participation needs to be mindful of the different issues confronting children at their various ages and stages and be sufficiently flexible to address those needs.

Question 35: What changes are needed to ensure children are informed about the outcome of court processes that affect them?

No submission in relation to this questions or its analysis.

Question 36: What mechanisms are best adapted to ensure children's views are heard in court proceedings?

No submission in relation to this questions or its analysis.

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

In our view, a precursor to this question is the question:

What is the benefit of involving children in family dispute resolution processes (if any)?

Then, when looking at how children can be supported in family dispute resolution processes, careful consideration needs to be given to:

- How the professionals who are obtaining children's views are trained;
- How children's views are then integrated into the family dispute resolution process between parents;
- What opinions and/or feedback should be given to parents, if any, and how; and

- What role the professional plays if the matter does proceed to Court and whether any information obtained in this process can/should be used in any Court proceedings.

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

See comments in relation to Question 37.

Question 39: What changes are needed to ensure that all children who wish to do so are able to participate in family law system processes in a way that is culturally safe and responsive to their particular needs?

This question appears to be based on the premise that children should participate in family law system processes if they want to. Perhaps, initially, and as outlined above, consideration needs to be given to the benefits (or lack thereof) of involving children in family law system processes.

Further, careful consideration needs to be given to whether or not children are properly able to represent their views if involved in family law system processes, and what assistance, if any, they should be provided with if they are required to do so.

Question 40: How can efforts to improve children's experiences in the family law system best learn from children and young people who have experience of its processes?

In our view, consideration also needs to be given to:

- The overlap between the role of the Independent Children's Lawyer and the role of the family report writer; and
- The potential benefits (or not) of the formalization of the non-reportable therapy process.

Question 41: What core competencies should be expected of professionals who work in the family law system? What measures are needed to ensure that family law system professionals have and maintain these competencies?

In our view consideration also needs to be given to:

- Whether specialist accreditation should be required and, if so, how it could be regulated;
- The possibility of having compulsory, family law specific, continuing professional development, which is required to practice family law;
- The possibility of referrals of legal practitioners to law societies by judicial officers;
- Legal training for non-lawyers involved in the system to ensure that consistent advice and support is provided by all professionals involved in a person's matter.

Question 42: What core competencies should be expected of judicial officers who exercise family law jurisdiction? What measures are needed to ensure that judicial officers have and maintain these competencies?

In our view consideration also needs to be given to:

- The accessibility of appeal processes to litigants;
- How to ensure that judicial officers provide good Court processes and outcomes for litigants to uphold the integrity of the system (e.g. Judges who do not apply the law rigorously, are unwilling to make decisions, or are too slow to give judgements, cause injustices for litigants, particularly in circumstances where the appeal process is inaccessible for them).

Question 43: How should concerns about professional practices that exacerbate conflict be addressed?

Currently in the ACT, the Law Society handles complaints made against practitioners. It is uncommon, however, for practitioners to make a complaint against a fellow practitioner. The conduct that can be reported to the law Society is professional misconduct and unsatisfactory professional conduct.

The term "professional misconduct" covers a broad range of acts and circumstances. Examples may include:

- Failing to abide by professional obligations;
- Contravening the *Legal Profession Act 2006* and the associated rules;
- Dishonesty;
- Charging excessive costs;

- Being found guilty of a serious offence or tax offence;
- Insolvency.

Unsatisfactory professional conduct involves a consistent or substantial failure to reach or maintain a reasonable standard of competence and diligence in the practice of law.

These are high bars that are unlikely to be met by professional practice that exacerbates conflict.

It is our submission that consideration could also be given to the benefits (or not) of monitoring concerns relating specifically to lawyers practicing Family Law. Further then, whether or not interest based negotiation training would be of assistance to those practitioners who are known to exacerbate conflict in family law matters.

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

In our view consideration also needs to be given to:

- What assistance the Court can provide to legal practitioners, for example:
 - o Strict compliance with Court procedure rules to provide legal practitioners with more certainty when advising their clients; and
 - o Better management of duty lists to enable legal practitioners to use their time and their client's resources most efficiently.

We understand that in most Registries, multiple final hearings are listed for the same day with the assumption that most will settle on the Court steps. This has a detrimental effect on those working within the family law system, including legal professionals, court staff and judicial officers. It requires unnecessary and wasted preparation, which, for clients, means unnecessary costs incurred, and for judicial officers means that they do not have the capacity to accurately prepare for the matters listed before them.

Question 45: Should s 121 of the *Family Law Act* be amended to allow parties to family law proceedings to publish information about their experiences of the proceedings? If so, what safeguards should be included to protect the privacy of families and children?

No submission in relation to this questions or its analysis.

Question 46: What other changes should be made to enhance the transparency of the family law system?

In our view, consideration also needs to be given to the benefits (or not) of providing parties with additional information online so that they can properly understand the practical effect for them in choosing one legal pathway over another without requiring legal advice, for example, information in relation to expected timeframes for each Registry.

Question 47: What changes should be made to the family law system's governance and regulatory processes to improve public confidence in the family law system?

No submission in relation to this questions or its analysis.