



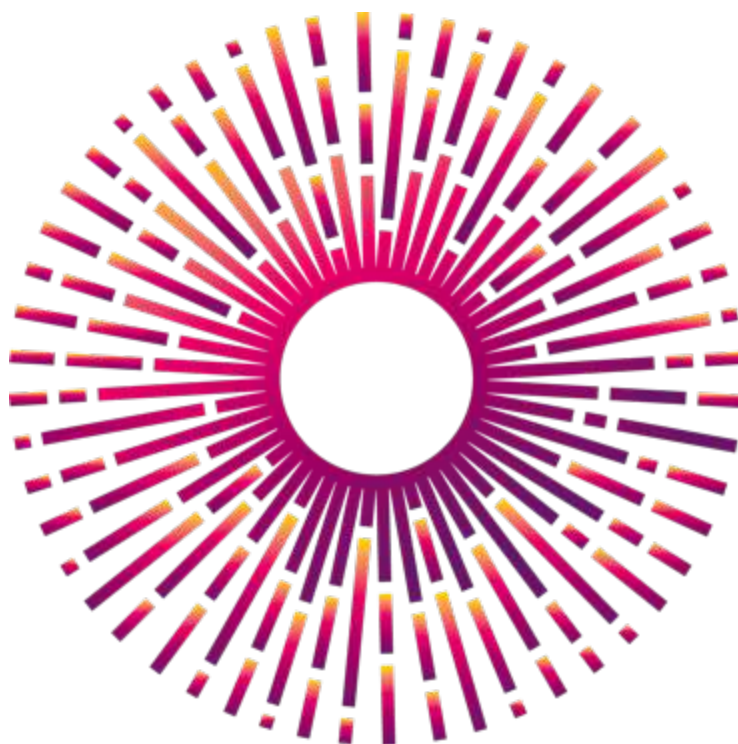
## Australian Law Reform Commission

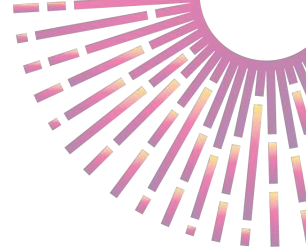
# Review of the family law system

Submission from the  
Australian Institute of Family Studies

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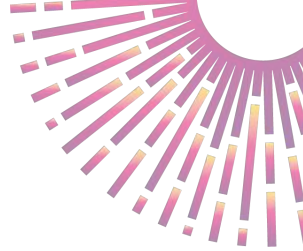
Authorised by Anne Hollonds, Director





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## Executive summary

This submission presents findings from the AIFS research program relevant to areas under consideration by the ALRC, including:

- the objectives and principles of the *Family Law Act 1975* (Cth)
- changes that could improve clients' access to, and engagement with, family law system services
- legal principles around parenting and property, and adjudication and dispute resolution processes
- potential improvements to services integration and inter-agency collaboration
- insight into children's experiences and perspectives, and factors affecting their wellbeing
- family law system service professionals' performance and skills
- areas of potential improvement to governance and accountability.

Relevant to the consideration of objectives and principles, successive AIFS research studies have highlighted the prevalence of complex issues characterising families that access the family law system. The roles and objectives of the family law system must reflect the complex needs found in a substantial proportion of separating families. There needs to be a strong focus on securing the safety and best interests of children, and on supporting families in addressing safety concerns via timely and effective support services and dispute resolution.

AIFS data point to the need for a system that is both trauma-informed and whole-of-family in its focus; that aims to support families in addressing their underlying issues; and a system that prioritises the best interests of children via child-centred and child-inclusive approaches.

This submission identifies the existing legislative provisions as providing a basis for the further articulation of principles that better prioritise child-centred decision making, and that may facilitate opportunities for the participation of children and young people in the process of making decisions that affect them.

The AIFS research emphasises the need for greater access by children to information relating to family law system processes, and to information about the progress of their case. It identifies the potential for children to participate in the decision-making process in their case.

A key theme emerging from the research is the need for support services to address children's post-separation needs, and to facilitate their participation in post-separation decision making. Indeed, some participants asserted that those measures were essential to ensuring safe parenting arrangements.

The research also explores issues associated with access and engagement by self-represented litigants, with a particular focus on issues arising in the context of domestic and family violence and relating to court processes, including direct cross-examination.

In relation to the legal principles for parenting and property, the submission focuses on the modest and mixed effects of the 2012 family violence amendments identified in the *Evaluation of the 2012 Family Violence Amendments* (2015) and highlights the negative association between the experience of family violence/abuse and property division and financial outcomes that emerged in the Longitudinal Study of Separated Families data.

Data from AIFS research also shines a light on existing resolution and adjudication processes, and on the main pathways used by parents when resolving parenting and property disputes –



including in those cases characterised by family violence. Analysis of these data highlight the challenges associated with direct cross-examination in circumstances characterised by family violence, and the impact of family violence on negotiation and litigation processes.

This submission identifies successive AIFS research programs as relevant to questions of systemic integration and collaboration, particularly in relation to improvements to collaboration and information sharing across the family law, family violence and child protection jurisdictions.

The discussion of recent AIFS research provides particular insight into the experiences and perspectives of children and young people. It identifies that listening to children's views is critical to the family law system meeting children's needs. It also identifies that a key issue for children themselves was the lack of information that they received about the decision-making process, as well as their desire to participate in the decision-making process. The data indicate a need for further training of service professionals, and the development of both skills and mechanisms to facilitate safe participation.

The data indicate gaps in the core competencies of family law professionals and judicial officers exercising family law jurisdiction, with ongoing improvement required in relation to the identification and assessment of, and response to, family violence and child safety concerns.

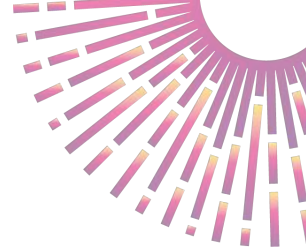
In order to support the wellbeing of clients and to encourage greater transparency and accountability of the family law system, there is a need for improved training, accreditation and ongoing professional development, together with accessible and effective pathways that enable concerns or complaints to be raised and investigated.



## Introduction

This submission is made in response to the Issues Paper entitled *Review of the Family Law System* released by the Australian Law Reform Commission on 14 March 2018. It is based on the following research projects conducted by the Australian Institute of Family Studies (AIFS):

1. **Children and Young People in Separated Families (2018) (Children and Young People study)**: This qualitative study was commissioned by the Australian Government, Attorney-General's Department (AGD) and involved in-depth, semi-structured interviews conducted with 61 children and young people (aged between 10 and 17 years of age), supplemented by interviews with parents of these children ( $n = 47$ ). The aim of this research was to investigate the experiences and needs of children and young people whose parents had separated and had accessed the family law system. The study focused on children and young people's experiences of these services and how the family law system may better meet their needs.
2. **Direct Cross-Examination in Family Law Matters (2018) (DCFL study)**: Commissioned by the AGD, this project was designed to explore the extent to which direct cross-examination was a feature of matters involving self-represented litigants in families characterised by alleged or substantiated family violence, and the factual and legal context characterising these family law matters. The study involved analysis of quantitative and qualitative data relevant to direct cross-examination involving self-represented litigants in family law matters, derived from court files and audio and transcripts of proceedings, collected from the Family Court of Australia (FCoA) and the Federal Circuit Court of Australia (FCCoA), together with analysis of relevant unreported judgments of the Family Court of Western Australia (FCoWA).
3. *Domestic and Family Violence and Parenting: Mixed-Method Insights into Impact and Support Needs. Final Report* (2017) (**DFVP Study**): This project was commissioned by the Australian National Research Organisation for Women's Safety and conducted with researchers at the University of Melbourne and La Trobe University. It was designed to explore the impact of parenting and service engagement and experience in the context of domestic and family violence. The project comprised a systematic literature review; analysis of the following datasets: *Growing Up in Australia: The Longitudinal Study of Australian Children* (LSAC), the *Survey of Recently Separated Parents 2012* (SRSP 2012) the *Longitudinal Study of Separated Families* (LSSF) (see sections 4 and 5, below, respectively); and responses to semi-structured interviews with 50 participants.
4. *Evaluation of the 2012 Family Violence Amendments* (**Evaluation**): The Evaluation research program examined the effects of amendments to the *Family Law Act 1975* (Cth) (FLA) that were intended to improve the family law system's responses to matters involving family violence and safety concerns. It comprised the following studies:
  - a. *Responding to Family Violence: A Survey of Family law Practices and Experiences* (**RFV study**) was a survey of family law practices and experiences, primarily based on online surveys completed by judicial officers and registrars ( $n = 37$ ), legal professionals ( $n = 322$ ) and non-legal professionals ( $n = 294$ ) across the family law system.
  - b. *Experiences of Separated Parents Study* (**ESPS**), which comprised two cross-sectional quantitative Surveys of Recently Separated Parents (SRSP), conducted in 2012 and 2014: SRSP 2012 ( $n = 6,119$ ) and SRSP 2014 ( $n = 6,079$ ). These surveys allowed a comparison between the pre-reform and post-reform data.



- c. Court outcomes project (CO Project), involving:
  - i. an analysis of quantitative data from court files in matters resolved prior to the 2012 family violence amendments ( $n = 895$ ) and in matters resolved post-2012 family violence amendments ( $n = 997$ )
  - ii. an examination of patterns in court filings based on administrative data from each of the three family law courts for each financial year from 2009–10 to 2013–14
  - iii. a systematic analysis of published appeal and first instance judgments applying the provisions introduced by the 2012 family violence amendments.
- 5. *The Longitudinal Study of Separated Families (LSSF)* (2009, 2010, 2014): involves three survey waves of up to 10,000 parents covering a five-year period after separation (see Qu et al. (2014) *Post-Separation Parenting, Property and Relationship Dynamics After five Years*. Canberra: Attorney-General's Department).<sup>1</sup>
- 6. *Independent Children's Lawyers Study (ICL Study)*: This study investigated the extent to which having an ICL involved in family law proceedings improved outcomes for the child. Commissioned by the AGD, the study involved a mixed methods approach via four main studies:
  - a. online surveys of professionals – ICLs ( $n = 149$ ), judicial officers ( $n = 54$ ) and other legal ( $n = 192$ ) and non-legal professionals ( $n = 113$ ) across all Australian states and territories
  - b. semi-structured interviews with parents ( $n = 24$ ) and children/young people aged between 10 and 17 years ( $n = 10$ ) who had been involved in a family law matter in which an ICL had been appointed and which had been finalised in 2011 or 2012
  - c. semi-structured interviews with ICLs ( $n = 20$ )
  - d. request for information from legal aid commissions (including policy, procedural and budget information), together with semi-structured interviews with one representative from each jurisdiction's commission. Semi-structured interviews with representatives from departments responsible for child protection in each jurisdiction were also conducted.

Brief mention is also made of the following AIFS research:

1. Kaspiew, R., & Qu, L. (2016). Property Division After Separation: Recent Research Evidence. *Australian Journal of Family Law*, 30(3), 1–20.
2. Wall, L., Scott, D., Kaspiew, R., Carson, R., Quadara, A., Perriman, A., & Higgins, D. (2015). *Evaluation of the Co-Located Child Protection Practitioner Initiative*. Melbourne: Australian Institute of Family Studies (Unpublished).
3. Kaspiew, R., De Maio, J., Deblaquiere, J., & Horsfall, B. (2012). *Evaluation of a Pilot of Legally Assisted and Supported Family Dispute Resolution in Family Violence Cases*. Melbourne: Australian Institute of Family Studies.

<sup>1</sup> The first two waves of the LSSF were commissioned by the Australian Government, Attorney-General's Department (AGD) and the then Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA), now called the Department of Social Services (DSS), while AGD commissioned the third LSSF wave.





4. Moloney, L., Kaspiew, R., De Maio, J., Deblaquiere, J., & Horsfall, B. (2011). *Evaluation of the Family Relationship Centre Legal Assistance Partnerships*. Melbourne: Australian Institute of Family Studies.

## 1. Objectives and principles (Q 1 – Q 2)

Questions 1 and 2 as outlined in the ALRC Issues Paper seek to identify the role and objectives of the modern family law system and the principles that should guide its redevelopment. Relevant to the consideration of these questions, successive AIFS research programs have highlighted the prevalence of complex issues characterising families accessing the family law system, including family violence, mental health issues and substance abuse/misuse. Almost two-thirds of separated parents participating in the *AIFS Evaluation of the 2012 Family Violence Amendments: Experiences of Separated Parents Study* (ESPS) reported a history of emotional and/or physical violence before/during separation, and this continued for a slightly lower proportion of parents post-separation (ESPS report, 2015, Table 3.4). Longer term insight provided by the *Longitudinal Study of Separated Families* (LSSF) suggests that problematic dynamics continue for approximately one-quarter of separated families up to five years after separation (Qu et al., 2014, Table 3.6). Parents' concerns for their own and/or their children's safety as a result of ongoing, post-separation contact with the other parent were reported by nearly one-fifth of parents participating in the ESPS (ESPS report, 2015, Figure 3.12), with the majority of these safety concerns arising from emotional abuse or anger issues, mental health concerns, violent or dangerous behaviour or substance misuse (ESPS report, 2015, Table 3.10, see Table 1 below). Notably, statistically significant increases were identified in these data in relation to safety concerns associated with emotional abuse or anger issues and with mental health issues between the pre- and post-reform data collections, which may suggest gaps in access to services and supports to address these concerns.

**Table 1. Behaviour generating safety concerns, pre- and post-reform, ESPS**

Behaviour generating safety concerns	2012 (%)	2014 (%)		
	Total	Total	Fathers	Mothers
Emotional abuse or anger issues	77.0	81.3 *	75.8	85.4 †††
Mental health issues	55.3	61.5 **	60.5	62.3
Violent or dangerous behaviour	50.5	53.3	47.8	57.4 ††
Alcohol or substance abuse	44.3	42.9	34.2	49.5 †††
Gambling problems	8.0	7.8	3.6	10.9 †††
Something else	12.9	8.7 **	9.8	7.9
No. of observations	1,090	1,093	437	656

Notes: Data have been weighted. Parents who had safety concerns were asked: "Do your concerns relate to any of the following issues: [behaviours generating safety concerns]". Percentages do not sum to 100.0% as multiple responses could be chosen. Data for fathers and mothers in 2012 are not shown—see De Maio et al. (2013), p. 40. Statistically significant differences between 2012 and 2014 within a given population are noted: \*  $p < .05$ ; \*\*  $p < .01$ ; \*\*\*  $p < .001$ . Statistically significant differences between mothers and fathers within a given population (years) are noted: †  $p < .05$ ; ††  $p < .01$ ; †††  $p < .001$ .

More specifically, the longitudinal and cross-sectional data analysed for the *Domestic and Family Violence and Parenting: Mixed Method Insights into Impact and Support Needs: Final Report* (2017) (DFVP Study, 2017) suggested that domestic and family violence and interparental conflict negatively affects parenting capacity, and results in poorer outcomes for children, particularly where the violence or conflict is sustained over time. This research also



highlighted inconsistent access to therapeutic services in this context, as well as an inconsistent focus on recovery in both the child protection and the family law system services for these families.

With these data in mind, the roles and objectives of the family law system and the principles guiding its redevelopment should reflect the complex needs of this substantial proportion of separating families, with a particular focus on securing the safety and best interests of children and supporting families to address safety concerns via access to timely and effective support services and dispute resolution options. In order to meet the needs of contemporary separating families, service provision that is trauma-informed and whole-of-family in its focus, as well as aimed at supporting families to address their underlying issues, as indicated by the AIFS data noted above, will better position families to meet the needs and best interests of children in both the short and longer term. Legal and non-legal family law system professionals who are trained and supported to provide these services would facilitate these improvements – an issue considered further in section 7 ‘Professional skills and wellbeing’.

More specifically, research with children and young people, including the AIFS *Children and Young People in Separated Families study* (Children and Young People study, 2018) and the *Independent Children’s Lawyer Study* (ICL Study, 2014), highlights the need to accommodate a greater focus on child-centred and child-inclusive approaches so that the system facilitates safe post-separation decision-making. Part VII of the *Family Law Act 1975* (Cth) (FLA), which includes the provisions that govern the making of parenting orders, seeks to: prioritise the best interests and safety of children as the paramount consideration; consider their expressed views; and give effect to the United Nations Convention on the Rights of the Child (UNCRC) in this process (s 60B; s 60CA; s 60CC). These existing legislative provisions provide a basis for the further articulation of principles that better prioritise child-centred decision making and opportunities for the participation of children and young people in the process of making decisions that affect them. This issue will be considered in further detail below in section 3 ‘Legal principles relating to parenting and property’ and in section 6 ‘Children’s experiences and perspectives’.

## 2. Access and engagement (Q 3 – Q 13)

This section of the Issues Paper concerns the accessibility of family law related services for particular groups and for people with complex needs. Questions 3–4 relate to ways in which access to information about family law and related services could be improved along with the means of assisting people with family law related needs to navigate the family law system. Particular insight into these issues is available from AIFS research with children and young people participating in the ICL Study and the Children and Young People study. Young participants emphasised their need for greater access to information relating to family law system processes, information about the progress of their particular case and information regarding the potential for them to participate in the decision-making process in their case. Young participants in both studies also identified the importance of accessing services to support their post-separation needs, and to facilitate their participation in decision making relating to their post-separation parenting arrangements. This participation was identified by some as pivotal to ensuring that safe parenting arrangements were made (Children and Young People study, 2018; ICL Study, 2014). These findings will be considered in further detail in section 6 ‘Children’s experiences and perspectives’.

Questions 11–12 of the ALRC Issues Paper focus on how court procedures can be changed to improve accessibility for litigants who are not legally represented and other changes that can





be made to support these people to resolve their family law issues. Self-represented litigants face a number of challenges in engaging with the family law system. Substantial proportions of self-represented litigants were identified in both the pre- and post-reform samples in the *Evaluation of the 2012 Family Violence Amendments*. Approximately one-fifth of applicants in both cohorts of the ESPS reported that they were without legal representation (ESPS Study, 2015, 2014: 20%, 2012: 22%). The Court Files component of the *AIFS Evaluation of the 2012 Family Violence Amendments – Court Outcomes Project* (CO Project) revealed that, in the pre- and post-reform samples, fathers were more likely to be self-represented than mothers, with more mothers than fathers having a private solicitor and publicly funded legal representation (CO Project, 2015, Table 3.2, see below Table 2).

**Table 2. Legal representation of parties in cases pre- and post- 2012 amendments**

At case application	Pre-reform			Post-reform		
	Fathers (%)	Mothers (%)	Total (%)	Fathers (%)	Mothers (%)	Total (%)
<b>Legal representation</b>						
Private solicitor	61.4	69.0	65.2	66.4	68.6	67.4
Publicly funded solicitor	5.7	7.6	6.6	4.2	7.2	5.7
No representative	25.5	18.4	22.0	21.5	17.8	19.9
Not available	7.4	5.0	6.2	7.9	6.4	7.1
Total	100.0	100.0	100.0	100.0	100.0	100.0
No. of parents	867	880	1,787	970	973	1,990

Although the Court Outcomes data was not analysed according to whether parties were legally represented, the *Domestic and Family Violence and Parenting Study* (DFVP Study), the *Direct Cross-Examination in Family Law Matters Study* (DCFL Study, 2018) and the *AIFS Evaluation of the 2012 Family Violence Amendments – Responding to Family Violence Study* (RFV Study, 2015) provide insight into the challenges that, if addressed, may improve accessibility and support people without legal representation to resolve their family law issues. Examples of challenges include those arising for self-represented litigants associated with correctly and adequately completing court forms, preparing affidavit material, and gathering, presenting and testing evidence. Data collected from audio recordings of proceedings in the DCFL study identified that a substantial proportion of self-represented litigants experienced difficulties complying with the rules of cross-examination (DCFL study, 2018). A substantial proportion of judicial officers were engaged in varying levels of intervention to prohibit or rephrase questions or to assume the role of posing questions during cross-examination. The data collected from audio of proceedings also illustrated that the challenges associated with conducting direct cross-examination or being directly cross-examined were compounded in circumstances characterised by family violence. Measures intended to better protect victims of family violence in these circumstances are currently under parliamentary consideration with the introduction of the Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017 and may support improved accessibility by self-represented litigants. Despite Division 12A of the FLA providing for a less-adversarial approach to apply in child-related proceedings, issues associated with accommodating procedural fairness in the conduct of litigation in the context of family violence, and with the potential for legal processes to be misused in order to perpetuate abuse, are amplified for unrepresented parties who may agree to



unsafe consent orders to avoid litigation in these circumstances. These issues are considered further in section 4 ‘Resolution and adjudication processes’.

At a more administrative level, the earlier RFV Study found that a majority of participating judicial officers (73%) mostly or strongly agreed that Form 4 Notices were helpful when filed with the assistance of a solicitor in enabling them to understand the extent and nature of any risks to parents or children; however, these notices were identified as less helpful when completed by a self-represented litigant (38%). Concerns were also raised by some legal professionals that the Form 4 Notice was not user-friendly and that it was time-consuming to complete and repetitive. In addition to addressing these issues, access to cost-effective, legally assisted family dispute resolution also provides a potential alternative option to resolving family law problems and is considered in further detail in section 4 ‘Resolution and adjudication processes’.

### 3. Legal principles in relation to parenting and property (Q 14 – Q 19)

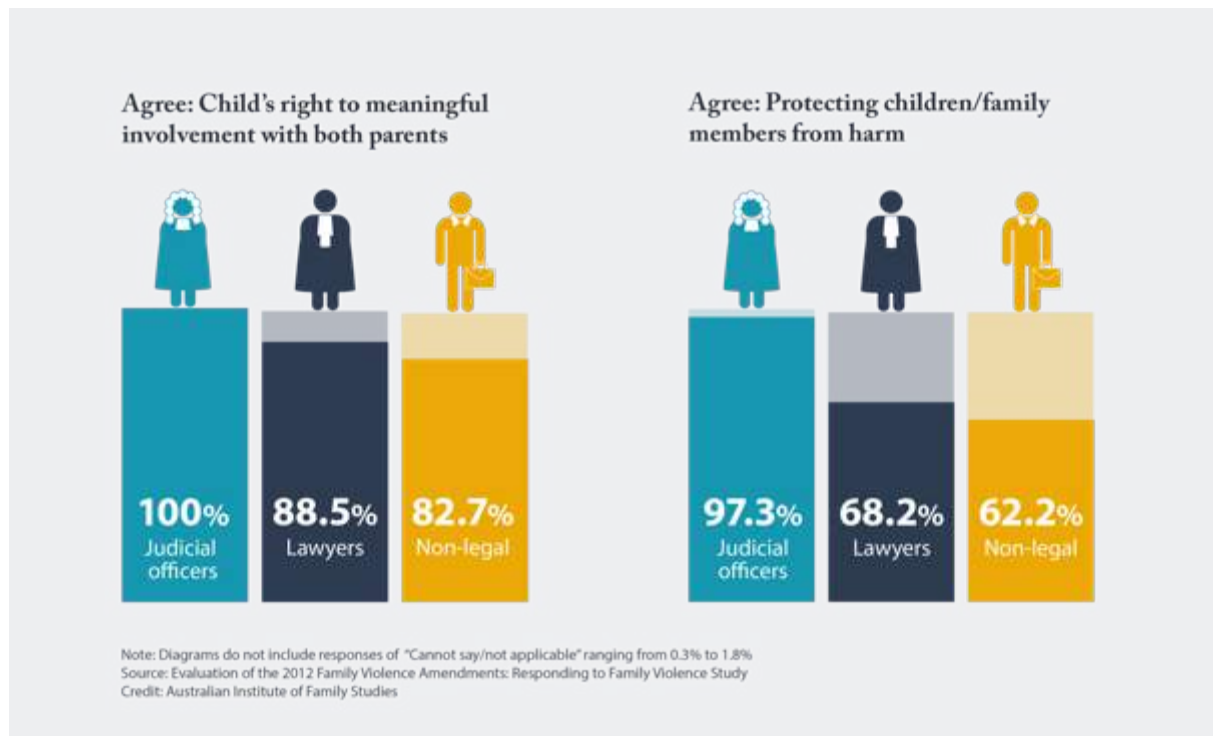
Questions 14 and 15 of the ALRC Issues Paper focus on changes that may be made to the provisions of Part VII of the FLA to produce the best outcomes for children, and to the definition of family violence and other family violence provisions, to better support decision making about the safety of children and their families.

Relevant to these questions (and as noted in section 1), the objects of Part VII of the FLA and the principles underlying these objects are directed at safeguarding the best interests of children, including by ‘ensuring that children have the benefit of both of their parents having meaningful involvement in their lives to the maximum extent consistent with the best interests of the child’, and protecting children from physical or psychological harm arising from abuse, neglect or family violence (s 60B). More specifically, the FLA provides that when making parenting orders, the best interests of children are the paramount consideration (s 60CA), with priority accorded to the need to protect children from physical or psychological harm arising from abuse, neglect or family violence (s 60CC(1) and (2) and s 60CC(2A)). Despite these provisions, together with other provisions of the FLA requiring protection from family violence, child abuse and neglect (e.g. s 60CG; s 69ZQ), data from successive AIFS research programs highlight concerns about the effectiveness of Part VII, and of the family law system more generally, in terms of producing the best outcomes for children and supporting decision making that supports the safety of children and their families. Concerns have also been raised about the complexity of the family law system and of the legislation more specifically, in part relating to the interaction of the ‘best interests’ provisions outlined above with: (a) the presumption that it is in the best interest of children for parents to have equal shared parental responsibility; and (b) the need for consideration to be given to making an order for equal time where this presumption applies and is not rebutted (s 61DA and s 65DAA(1)).

The evidence from all three components of the *Evaluation of the 2012 Family Violence Amendments* suggested limited and somewhat mixed effects of these legislative changes on parenting arrangements, disclosure of family violence and child safety concerns and upon professional practices. For example, despite the introduction of s 60CC(2A), requiring priority to be accorded to the ‘protection from harm’ primary consideration (s 60CC(2)(b)), notably fewer lawyers and non-legal professionals participating in the RFV study agreed that adequate priority was being accorded to this consideration as compared to the ‘meaningful relationship’ consideration (s 60CC(2)(a)), (see Figure 1 below from RFV Study, 2015: 68% of lawyers and 62% of non-legal professionals cf. 89% of lawyers and 83% of non-legal professionals).



**Figure 1. Agreement about weight accorded to s 60CC(2) primary considerations, views of family law system professionals**



Consistent with these findings from the RFV Study, the Published Judgments component of the CO Project (2015) demonstrated that the effects of s 60CC(2A) varied according to the way in which the court analysed the facts in the cases and applied its discretion in the context of the Part VII decision-making framework overall. While intended to provide a means of resolving the tension between the two primary considerations and unambiguously according priority to the protection from harm consideration, the judgment analysis suggested that the provision had had limited effect. This limited effect was particularly apparent where the courts found there to be ambiguity associated with the allegations of family violence, child abuse or other safety concerns, or in relation to the way in which one parent had behaved towards the other parent's relationship with the child (CO Project, 2015). In fact, judicial determinations in this Published Judgments study involving sole parental responsibility or limited or no parenting time appeared to arise where a very severe history of family violence had been established or where parental behaviour was clearly deficient. Where evidence was more ambiguous or where a parent's motivations for raising allegations of violence or abuse had been questioned, the judgment analysis suggested that care-time decisions were more likely to favour arrangements that maintained children's relationships with both parents (CO Project, 2015).

Modest and mixed effects of the legislative amendments were also evident in the data from the Court Files component of the CO Project, with subtle shifts in parenting arrangements. For example, a decrease in judicially determined orders for shared parenting responsibility were identified after the 2012 reforms but changes in patterns of judicially determined care-time orders were limited, and orders for supervised time remained stable (CO Project, 2015, Tables 3.25 and 3.30). While the ESPS component of the Evaluation identified that the greater emphasis on identifying family violence and safety concerns had supported modest, positive shifts in the making of parenting arrangements post-reform (ESPS, 2015, Figure 3.17 and Figures 5.7–5.9), there was nevertheless a reduction in reports of supervised parenting arrangements and arrangements for no-time where there were safety concerns (ESPS, 2015,



Table 2.7 and Figure 3.17). A large proportion of participating parents also reported negative attitudes towards the efficacy of the family law system and its ability to protect the safety of children and address issues of family violence. For example, nearly one-third of parents with concerns for themselves and their child disagreed that the family law system protects the safety of children, while just over two-thirds of those who had concerns for the child alone disagreed (ESPS, 2015). Minorities of parents who reported physical abuse agreed with the proposition that the family law system addressed violence more in the post-reform context (ESPS, 2015, physical abuse: 35% cf. 28%, emotional abuse: 32% cf. 28%).

While the RFV study indicated that professionals were more confident in their own rather than other professionals' capacity to identify and respond to family violence and child abuse/child safety concerns (RFV Study, 2015, Tables 4.3 and 4.4), this did not translate into high levels of confidence among the aggregate sample about the capacity of the family law system as a whole. For example, fewer than half of legal and non-legal professionals participating in the RFV study agreed that the legal system had systems to screen adequately for family violence and child abuse (46% lawyers and 38% non-legal professionals) or to deal adequately with these cases (47% lawyers and 29% non-legal professionals). In this context, improving the family law system's responses to families with complex needs remains a 'work in progress' (ESPS, chapter 6). Further discussion of data relevant to the assessment of and response to disclosures of family violence and safety concerns is considered in section 7 'Professional skills and wellbeing'.

Relevant insights are also available from the qualitative component of the DFVP study (2017), which involved interviews with women who had past or current experiences of family violence and had used services and agencies in the domestic violence, child protection and family law sectors. With few exceptions, the participants in the qualitative component of the DFVP research expressed negative views of their experiences with the family law system (DFVP study, 2017). Most participants considered that their experiences of family violence were not accorded due weight by family law professionals. Further, limited or superficial engagement with children also meant that the needs of their children (and any experiences of trauma) were not adequately recognised and responded to by service providers (discussed further in sections 5 'Integration and collaboration' and 6 'Children's experiences and perspectives'). Consistent with the observations made in the context of data from the *Evaluation of the 2012 Family Violence Amendments*, several participants in the DFVP study also described a system-wide emphasis on shared parenting and on the child's need to maintain relationships with a parent (despite the 2012 amendments and the increased emphasis on family violence), which, in turn, resulted in a failure to accord priority to the protection of children from family violence and child abuse. Some participants described concerns by family law professionals to not be seen as 'alienating' a parent, which appeared to supersede concerns over family violence. In some cases, this was described as leading to outcomes involving ongoing contact with fathers where there was a history of family violence and an ongoing risk to the child's wellbeing. Some participants also described the continued engagement with family law system services as a tactic to continue their abuse. (Further discussion of this issue appears in section 4 'Resolution and adjudication processes' below.)

In the context of these research findings, issues relevant to the consideration of the ALRC's Questions 14 and 15 include the extension of risk assessment measures currently employed at the commencement of matters (e.g. the Notice of Risk), a further legislative amendment to clearly identify the safety of children and other family members ahead of arrangements for shared parental responsibility and parenting time and the further broadening of the definition of family violence to capture abuse of process. The existing legislative provisions may also provide a basis for the further articulation of principles that support post-separation decision making that prioritises child-centred and child-inclusive approaches that may better





accommodate the safety of children and their families. Facilitating opportunities for children to participate in decision making that affects them is important, not only because it is central to meeting Australia's obligations pursuant to the UN Convention on the Rights of the Child but also because it is important from an evidentiary perspective to facilitate safer outcomes, and is consistent with the expressed views of participating children and young people in cases characterised by family violence (Children and Young People study, 2018, and see further section 6 'Children's experiences and perspectives').

Questions 17–19 of the ALRC Issues Paper focus on what changes could be made to the provisions in the FLA governing property division, spousal maintenance and binding financial agreements 'to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes'. The analysis of LSSF (Longitudinal Study of Separated Families) Wave 3 data collected in 2012 (Qu et al., 2014) is of relevance to these questions, in particular the negative association between the experience of family violence/abuse and property division and financial outcomes. These data indicate that parents who reported experiences of physical hurt inflicted by the other parent of their children before separation received slightly less share of the property division than parents who reported neither emotional abuse before/during separation nor physical hurt before separation. This pattern was consistent for both fathers and mothers. The mean shares of property division reported were:

- fathers:
  - physical hurt before separation: 32%
  - emotional abuse alone before/during separation: 34%
  - neither before/during separation: 37%
- mothers:
  - physical hurt before separation: 46%
  - emotional abuse alone before/during separation: 50%
  - neither before/during separation: 50%.

The further multivariate analysis of this data by Kaspiew and Qu (2016) indicates a more complex link between family violence and property division. Mothers who experienced physical hurt before separation were more likely than other mothers to be the party vacating the family home. Vacating the family home was identified as being linked to receiving a lesser share of the property division. While fathers, like mothers, who vacated the family home also received a lesser share of the property division; leaving the family home was not related to fathers' reports of experience of family violence before/during separation. Kaspiew and Qu (2016) also identified that fathers and mothers who experienced violence/abuse before/during separation were still more likely than those without such experiences to have financial hardship four to five years after separation.

When parents were asked how they felt about the property division at the time of the LSSF Wave 3 interview, those who reported experiencing physical hurt or emotional abuse before/during separation were less likely than others without such experiences to consider their property division as fair. This pattern continued to hold when a number of parental and children's characteristics and circumstances were controlled (Qu et al., 2014).<sup>2</sup> The proportions of parents who considered the outcomes as 'very fair' or 'somewhat fair' were:<sup>3</sup>

<sup>2</sup> Parental and children's characteristics that were controlled include children's age, separation duration, share of property division received, who initiated separation and who left the house, and the main pathway used for property division.

<sup>3</sup> Note that parents who selected the response option 'don't know' were included in the total when calculating the percentages.

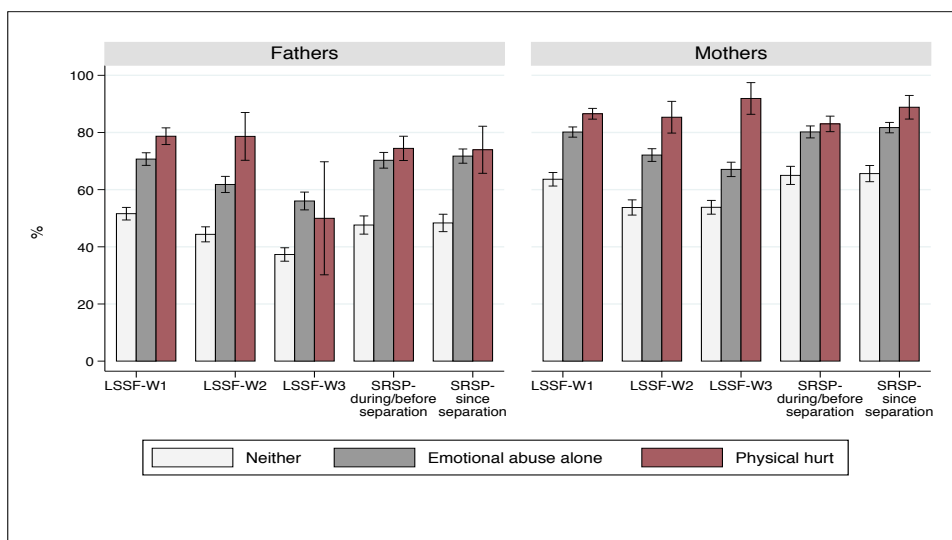


- fathers:
  - physical hurt before separation: 47%
  - emotional abuse alone before/during separation: 50%
  - neither before/during separation: 70%
- mothers:
  - physical hurt before separation: 55%
  - emotional abuse alone before/during separation: 62%
  - neither before/during separation: 82%.

Using the data from LSSF and the Survey of Recently Separated Parents, 2012 data, Kaspiew and colleagues in the DFVP study (2017) found the link between the experience of violence/abuse and financial hardships (Figure 2 below). Across all three waves of LSSF and SRSP 2012, fathers and mothers with experience of physical hurt were the most likely to indicate that they had experienced financial hardship, while those who had neither been physically hurt nor emotionally abused were the least likely to indicate that they had experienced financial hardship.

Further analysis of longitudinal data also showed that violence/abuse experience before/during separation were also related to experiences of financial hardship up to five years after separation (Qu et al., 2014, Figure 3 below). In LSSF Wave 3, parents who reported experiencing physical hurt before separation (reported in Wave 1) were the most likely of the three groups to report experiencing recent/current financial hardship in Wave 3 (54% of the fathers and 67% of the mothers), followed by those who reported emotional abuse alone before/during separation (45% of the fathers and 61% of the mothers). Financial hardship was least commonly reported by those who reported that they had not experienced either emotional abuse or physical hurt before/during separation (39% of the fathers and 55% of the mothers) (Qu et al., 2014). Similar patterns emerged in relation to LSSF Wave 2 (approximately 2–3 years after separation).

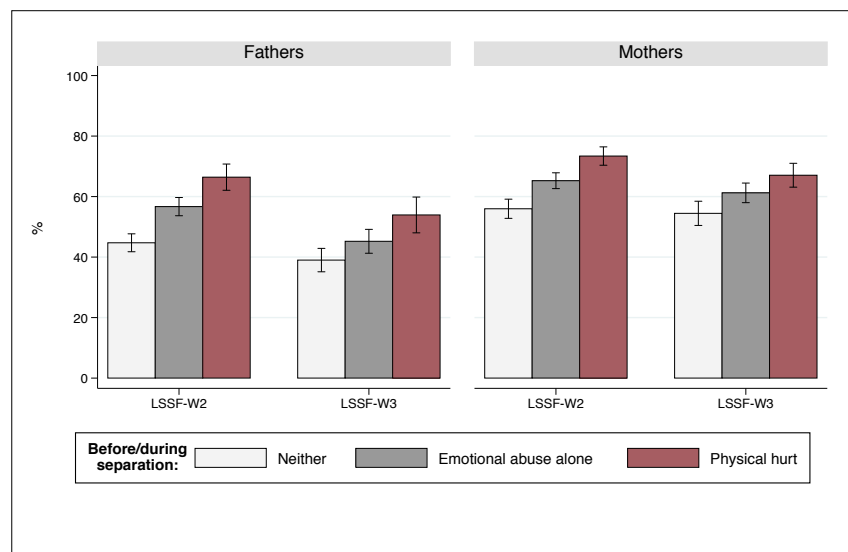
**Figure 2. Proportion of parents who experienced financial hardships by reports of experience of abuse/violence, LSSF W1–W3 and SRSP**



Note: Three waves of LSSF included eight types of financial difficulties and SRSP 2012 contained nine types of financial difficulties. The time frame of financial difficulties referred to since separation for LSSF W1 and SRSP, and the last 12 months for LSSF W2 and W3.



**Figure 3. Proportion of parents who experienced financial hardship by reports of experience of abuse/violence during or before separation (reported in W1), LSSF**



Note: Three waves of LSSF included eight types of financial difficulties. The time frame of financial difficulties referred to the last 12 months for LSSF W2 and W3.

It is in the context of these findings that parents who experienced family violence before/during separation – often mothers living with children – were worse off in property division and financial conditions after separation that we suggest that the family law systems and practice need to do more to ensure that family violence/abuse victims are not further ‘victimised’ financially, especially in property division.

## 4. Resolution and adjudication processes (Q 20 – Q 30)

The ALRC Issues Paper seeks comment on how dispute resolution and court processes may be improved or modified to resolve family law disputes in a timely and cost-effective manner. Our response in this section will focus primarily on Questions 23, 24 and 25, while providing contextual data relevant to Question 22.

### Property arrangements

Question 22 in the Issues Paper focuses on how current dispute resolution processes can be modified to provide effective low-cost options for resolving small property matters. The data collected in LSSF Wave 3 regarding main pathways for property settlements are relevant to this issue.<sup>4</sup> By Wave 3 (five years after separation), nine out of 10 parents who had property for division indicated that they had sorted out their property matters. Table 4 shows parents’ reports of main pathways used for property settlement. Nearly 60% of parents settled their property division without using family law services (i.e. the division occurred through discussions between themselves or through no specific process, ‘it just happened’). Nearly 30% of parents reported the use of lawyers as their main pathway and only 7% of separated parents settled

<sup>4</sup> Property division was not examined in either of the previous survey waves.



property division through the courts. Few parents (4%) used mediation or dispute resolution services for their property division.

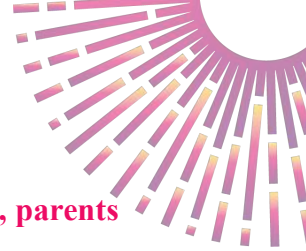
**Table 4. Main pathways for property division, LSSF Wave 3**

Main pathway	Settled (%)	In process (%)	All (%)
Mediation or dispute resolution services	4.2	4.0	4.2
A lawyer	29.3	26.3	29.1
The courts	7.1	9.2	7.2
Discussions	39.3	44.8	39.5
Nothing specific, it just happened	18.8	15.4	18.6
Other	1.4	0.3	1.4
Total	100.0	100.0	100.0
No. of participants	6,900	312	7,212

Notes: Data have been weighted. Excludes a small number of parents who didn't know or refused to answer (0.5%). Percentages may not total 100% due to rounding.

Table 5 below shows that main pathways for property settlement differed according to levels of net assets. Higher levels of net assets were associated with a higher use of formal pathways (i.e. lawyers, the courts, mediation or dispute resolution services) and a lower use of informal pathways. Parents with asset pools of the highest value (\$500,000+) were more likely than those with the other asset ranges to nominate lawyers and courts and less likely to nominate discussions (though discussions represented the second most common pathway nominated by those with the highest value of assets). Lawyers were also nominated by substantial proportions of parents in the medium-high and medium asset pool ranges (\$140,000–\$499,000: 41–43%) and by those with assets amounting to \$40,000–\$139,000 (25%). The group most likely to nominate discussions as the main pathway for property division was the low asset group (<\$40,000). For the negative equity group, although interparental discussions formed the most common main pathway to settle the debt arrangements, over one-fifth reported lawyers as their main pathway.

The findings that significant proportions of parents with asset pools between \$40,000 and \$139,000 and those with negative equity used lawyers for property settlement are worth noting. Although the LSSF did not collect data on legal costs, it is likely that a significant proportion of their asset value was used to cover these costs. The LSSF data also shows that one-third of separated parents had low to moderate levels of assets (under \$140,000). Therefore, these data suggest the need for low-cost family law services to help separating parents with low to moderate levels of assets to resolve their disputes. Research including the Women's Legal Service Victoria's most recent *Small Claims, Large Battles Project* (2018) may support consideration of affordable services for parents with low levels of assets.



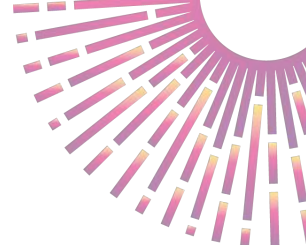
**Table 5. Main pathway for property division, by level of net assets at separation, parents who reached property settlements, LSSF Wave 3**

Main pathway	Net assets at separation ***					
	Negative (in debt)	< \$40,000 (%)	\$40,000– 139,000 (%)	\$140,000– 299,000 (%)	\$300,000– 499,000 (%)	\$500,000+ (%)
Mediation or dispute resolution services	4.9	1.3	3.5	6.1	5.0	7.7
A lawyer	22.8	6.8	25.0	41.4	42.7	50.6
The courts	7.4	2.0	6.0	8.9	10.4	13.1
Discussions	43.8	49.9	45.8	35.1	34.5	25.1
Nothing specific, it just happened	17.1	37.9	18.3	8.0	7.0	2.9
Other	4.0	2.3	1.5	0.5	0.5	0.6
<b>Total</b>	<b>100.0</b>	<b>100.0</b>	<b>100.0</b>	<b>100.0</b>	<b>100.0</b>	<b>100.0</b>
<b>No. of participants</b>	<b>119</b>	<b>1,163</b>	<b>1,270</b>	<b>1,160</b>	<b>1,180</b>	<b>1,271</b>

Notes: Data have been weighted. Excludes a small number of parents who didn't know or refused to answer (0.5%). Percentages may not total 100% due to rounding. \*\*\*  $p < .001$ ; statistically significant relationship emerged between main pathway used and level of net assets.

## Parenting arrangements

The ESPS study identified the main pathways used for resolving parenting arrangements and found that there was no significant difference between the 2012 and 2014 cohorts (see Table 6). Discussions with the other parent were found to be overwhelmingly the most common pathway (69%, similar to the findings of LSSF Wave 1 where 66% reported using 'discussions'). In particular, discussions with the other parent were more common in cases involving no family violence (81%) than in cases involving physical violence or emotional abuse (see Table 7).

**Table 6. Main pathways used by parents to resolve parenting arrangements**

	2012 (%)	2014 (%)		
	Total	Total	Fathers	Mothers
Counselling/mediation/FDR services	9.5	9.9	9.9	9.9
A lawyer	6.5	5.7	6.2	5.3
The courts	3.4	2.9	3.0	2.9
Discussions with other parent	68.9	68.9	71.5	66.5 <sup>†††</sup>
Nothing specific, just happened	9.3	10.4	7.6	13.0 <sup>†††</sup>
Something else	2.3	2.1	1.8	2.4
No. of observations	4,428	4,108	1,869	2,239

Notes: Data have been weighted. The "don't know" and "refused" responses were excluded from this analysis (less than 1%). Percentages may not total 100.0% due to rounding. Differences between 2012 and 2014 were not statistically significant. Statistically significant differences between fathers and mothers within a given population are noted: <sup>†</sup>  $p < .05$ ; <sup>††</sup>  $p < .01$ ; <sup>†††</sup>  $p < .001$ .

**Table 7. Main pathways used by parents to resolve parenting arrangements by experience of family violence, 2012 and 2014**

	Physical violence (%)		Emotional abuse alone (%)		No family violence (%)	
	2012	2014	2012	2014	2012	2014
Counselling/mediation /FDR service	15.0	13.5	10.4	13.1 *	6.1	5.6
A lawyer	10.4	11.5	8.3	7.3	3.0	1.8 *
The courts	8.1	8.0	4.1	2.6 *	0.6	0.9
Discussions with focus parent	52.7	52.2	65.0	63.5	80.3	81.0
Nothing specific, just happened	10.6	11.6	9.1	10.4	8.8	9.9
Something else	3.2	3.2	3.1	3.1	1.2	0.8
No. of observations	976	847	1,684	1,550	1,768	1,711

Notes: Data have been weighted. The "don't know" and "refused" responses were excluded from this analysis (less than 1%). Percentages may not total 100.0% due to rounding. Statistically significant differences between 2012 and 2014 within a given population are noted: \*  $p < .05$ ; \*\*  $p < .01$ ; \*\*\*  $p < .001$ .

The table above indicates that it was common for parties who had experienced family violence or emotional abuse to engage in counselling/mediation/family dispute resolution when resolving parenting arrangements. In the context of Question 24 regarding whether legally assisted FDR should play a greater role in the resolution of disputes involving family violence or abuse, it is noted that the AIFS Evaluation of a Pilot of Legally Assisted and Supported FDR in Family Violence Cases (Kaspiew et al., 2012) and the AIFS Evaluation of the Family Relationship Centre Legal Assistance Partnerships Program (Moloney et al., 2011) identify benefits associated with multidisciplinary approaches and collaborative partnerships that facilitate a 'client-focused approach and ... more holistic delivery of services with the capacity of these approaches identified as reducing the use of adversarial and court-based dispute resolution' (Moloney et al., 2011, E2). For example, while data from clients experiencing lawyer-assisted FDR in the Evaluation of the FRC legal assistance partnership program were limited, they were consistent with other project data suggesting that lawyer-assisted mediation had 'considerable potential if well targeted and supported by clear protocols' (Moloney et al., 2011, E2). More specifically, in relation to cases characterised by family violence, the AIFS





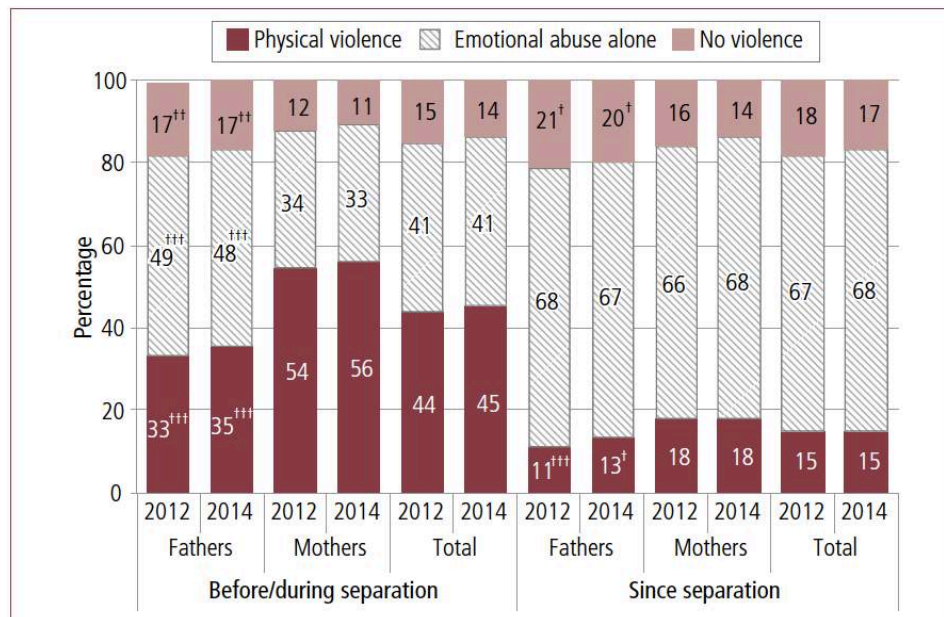
Evaluation of a Pilot of Legally Assisted and Supported Family Dispute Resolution in Family Violence Cases identified the benefits of a holistic and multidisciplinary approach involving a range of professionals providing risk assessment, case management and ongoing support for parents to reach safe parenting arrangements in a non-adversarial and child-sensitive environment (Kaspiew et al., 2012).

Previous research and analysis, including that of Kaspiew et al. (2009), the Australian and NSW Law Reform Commissions (2010) and Bagshaw et al. (2010), raised concerns about the effectiveness of screening and assessment practices in the FDR context. Nevertheless, over one-third of participating lawyers in the RFV Study indicated that in their experience, the family violence reforms had often or almost always led to an improvement in screening by FDR practitioners (RFV Study, 2015). While there were indications in that research that FDR was proceeding with families for whom it was inappropriate, improved screening tools and further training have been identified as facilitating improvements in the delivery of FDR by Family Support Program funded providers (such as FRCs) in matters involving family violence (Productivity Commission, 2014, pp. 857–859). It also noted that funding has been extended for pilots of enhanced, legally assisted FDR, which may support developments in our understanding of best practice FDR for cases involving family violence (AGD, 2017).

Nevertheless, as Figure 4 (ESPS, 2015, Figure 4.3) illustrates, when considering the link between parents' use of courts according to their experiences of family violence, mothers who accessed courts were more likely than fathers to have experienced physical violence before or during separation (56% in 2014 cf. 35% of fathers in 2014). The data suggest that people reporting experiences of family violence or abuse are more likely to use formal forms of dispute resolution to resolve their parenting arrangements and, accordingly, the importance of ensuring that the safety and wellbeing of parties who have experienced family violence or abuse are protected in court. An important aspect of supporting parties who have experienced family violence or abuse is to provide accessible avenues for disclosure and for professionals to engage in appropriate screening practices. This will be considered further in section 7 'Professional skills and wellbeing'.



**Figure 4. Parents who accessed the courts, by experiences of family violence before/during and since separation**



Notes: Data have been weighted. Statistically significant differences between 2012 and 2014 were not found. Statistically significant differences between mothers and fathers within a given population (years) are noted: <sup>+</sup>  $p < .05$ ; <sup>++</sup>  $p < .01$ ; <sup>+++</sup>  $p < .001$ .

More specifically, the adversarial nature of family law proceedings (including a reliance on cross-examination as a fundamental means of testing evidence) has led to concerns about the trauma posed to parties with experiences of family violence or abuse when engaging in the court process, with potential for this measure to facilitate misuse of process by a perpetrator, as noted in Question 25 of the ALRC Issues Paper. Of some relevance to this question, the Direct Cross-Examination in Family Law study (DCFL study, 2018) aimed at identifying the extent to which direct cross-examination was a feature of matters involving self-represented litigants and alleged or substantiated family violence, and the factual and legal context characterising these family law matters. The majority (72%) of sampled court files (spanning the 2015–16 and 2016–17 financial years) from the Federal Circuit Court of Australia (FCCoA) and the Family Court of Australia (FCoA) that had proceeded to a final hearing involved one or more self-represented parties and alleged or substantiated family violence as well as direct cross-examination by one or both parties to the proceedings (DCFL study, 2018).

Of the cases that did not involve cross-examination (28%), the reasons for no cross-examination, where apparent from the file, included the settlement of the matter before cross-examination (37%) or the opposing party's non-appearance in court (19%). Notably, in one case, the judicial officer determined that that no cross-examination of the mother by the father should take place, given the father's history of family violence and the risk of psychological harm to the mother. Nevertheless, the analysis showed that there were higher rates of allegations of family violence against both parents in files where there was direct cross-examination compared to files involving no direct cross-examination (DCFL report, 2018, Table 3.6). Almost two-thirds of the sampled cases where direct cross-examination took place (61%) involved an alleged or substantiated perpetrator of family violence undertaking direct cross-examination whereas almost half involved the alleged or substantiated victims of family violence undertaking the direct cross-examination (49%), noting that 31% of cases involved mutual allegations of family violence (DCFL study, 2018). In a substantial proportion of cases involving direct cross-examination (29%), the direct cross-examination appeared to give rise to



distress or to an otherwise negative experience on the part of the party undertaking the cross-examination or the party being cross-examined or both. For instance, in one case, the review of the audio of proceedings indicated that the respondent mother was audibly nervous and upset when answering questions during her cross-examination by the respondent father, in circumstances where the cross-examination related to his assault of her (for which he had been convicted) and in relation to her allegation of rape against him. This case provided an example of the potential traumatising effect of direct cross-examination, which may, in turn, raise questions about the quality of the evidence obtained through this process.

An analysis of the arrangements made to accommodate and manage direct cross-examination (where available) suggested a complex picture of mixed practices and responses. The data indicate that for the majority of cases in the sample where direct cross-examination took place, specific safeguards were not in place (58%) (DCFL report, 2018, Table 5.1). One of the most common safeguards involved judicial intervention and, specifically, the judicial officer facilitating the cross-examination by relaying questions to the witness. Other forms of judicial intervention and monitoring were frequently identified in the sample and included: intervening when questions were inappropriate or irrelevant; limiting or stopping questioning; or warning parties about their conduct in court and towards the other party. Other safeguards engaged included the use of a video link for the protection of the mother when directly cross-examining the father (3%) and the granting of permission for a McKenzie friend to act as a third-party questioner (13%). In a substantial proportion of the cases (40%), judicial officers were identified as engaging in a high level of monitoring and intervening during cross-examination. However, the analysis identified challenges from the perspective of the court in ensuring that procedural fairness had been afforded to the cross-examining party while protecting the cross-examined party.

Similarly, data from the DFVP study provided insight into situations within the legal system where tensions may be identified as emerging between procedural fairness and the protection of parties from harm (DFVP study, 2017). For example, some participants in the study identified procedural steps such as providing addresses on court documents as having the potential to compromise a party's safety. Several participants described how the nature of the process itself may be traumatising due to the stress of having to repeat their stories and come face-to-face with a perpetrator during court processes. For example, one participant described her experience of the family law processes as an extension of the ex-partner's abuse, 'including being cross-examined by her ex-partner over days about sexual matters of no relevance to the proceedings', an experience she described as being 'incredibly traumatising' (DFVP study, 2017, pp. 182–183). Despite her fear for her own safety and that of her child, this participant indicated that the orders of the court in her case required her to provide her ex-partner with her address at all times. Additionally, close to one-fifth of the women participating in the qualitative DFVP sample described challenges in accessing counselling for their children during their engagement with the family law system due to: (a) conditions prohibiting them from taking children to counselling in court orders; (b) fathers vetoing counselling; (c) following advice not to engage in counselling to avoid creating the wrong impression before the court; or (d) avoiding therapeutic records being subpoenaed. This finding provides insight into the circumstances that may prevent victims of family violence or abuse from receiving the appropriate therapeutic support.

Participants in this qualitative component of the DFVP study made a number of suggestions as to how the family law system could better support victims of family violence, and these included parties and children being able to access therapeutic support without being concerned about records being subpoenaed (DFVP report, 2017). A number of the women also described a need for greater awareness of family violence in all its forms (including systems abuse and



more subtle forms of abusive dynamics) and its consequences, as well as the importance of an integrated response from services and agencies. Of note, the majority of women in the DFVP study described family violence as continuing post-separation (94%), particularly through coercive and controlling behaviour and verbal abuse. In particular, more than half of participating women (58%) reported experiences suggestive of post-separation systems abuse by the father/ex-partner involving the use of administrative and legal systems or services or other agencies (including family law services) to further perpetuate abuse. This finding emphasises that although victims of family violence may have less contact with their perpetrators post-separation, family violence or abuse may continue, particularly in the form of behaviour that perpetuates dynamics of fear, control and coercion. In particular, analysis of the qualitative interview data revealed a range of tactics used by perpetrators, which allowed them to take advantage of the adversarial nature of family law proceedings. Examples provided included repeated litigation and mediation, cross-examination about rape and sexual practices during proceedings, disruption of family law proceedings, repeated breaches of personal protection orders, non-compliance with family law orders and protracted family law proceedings to exhaust personal and financial resources. A number of women raised feeling disappointed with family relationship services or the court system and with their inability to prevent their experiences of systems abuse. These findings suggest the need for a more comprehensive analysis of systems abuse as a form of family violence, consideration of its specific inclusion in the FLA definition of family violence in s 4AA, and greater awareness of the possibility that services, systems and processes may be misused by perpetrators of family violence to perpetuate dynamics of abuse and control.

## 5. Integration and collaboration (Q 31 – Q 33)

As noted in section 1, successive AIFS research programs have identified the complex, co-occurring needs of separating families that support consideration of the expansion of existing multi-disciplinary service models and of improvements to collaboration and information sharing as raised in the ALRC Issues Paper, Questions 31 and 33 respectively.

AIFS research has also provided insight into: (a) the fragmented nature of the systems and services with whom separating families interact across the family law, family violence and child protection jurisdictions, and the potential for this fragmentation to contribute to ineffective identification of and response to risks of harm; (b) the re-traumatisation of children and their families where there is inadequate communication between systems and services to prevent risks; and (c) barriers to the sharing of information that would better protect the safety of children and family members and avoid the requirement for them to recount their experiences (Children and Young People study, 2018; ICL Study, 2014; Evaluation RFV Study, 2015). Participants in the DFVP study also highlighted participating mothers' dissatisfaction with service responses to the risks and harm associated with family violence; with this dissatisfaction often relating to their fragmented engagement with multiple services, agencies and professionals. Some participants in the qualitative component of the study reported being passed from agency to agency without a coherent or helpful solution being offered to resolve their concerns. This was particularly so when professionals lacked the expertise to respond appropriately. The expansion of the Co-located Child Protection Practitioner Initiative, which was identified in the AIFS evaluation of this initiative as a highly valuable resource, is one measure that may improve collaboration and information sharing between the family law and child protection systems.

Inconsistencies in service delivery across jurisdictions, including those involving the granting of inconsistent orders (e.g. where family violence orders sought to protect against harm while





family law orders required ongoing contact with a perpetrator) were also identified by participants in the DFVP study. Such inconsistencies were frustrating and confusing for participants, as were efforts by perpetrators to exploit these system and service overlaps (see further section 4 above). As noted in earlier sections of this submission, consideration of measures that encourage a whole-of-family approach, and that are both child-centred in their focus and child-inclusive in their approach, are consistent with the findings of the Children and Young People Study (2018) and ICL Study (2014), as well as AIFS research relating to legally assisted and supported FDR (Kaspiew et al., 2012; Moloney et al., 2011). As foreshadowed above, this research does, however, highlight the importance of ensuring that professionals engaging with children and young people, and who provide services to families characterised by family violence, mental health issues and substance misuse, have the requisite training, experience and expertise.

## 6. Children's experiences and perspectives (Q 34 – Q 40)

Questions 34 to 40 of the ALRC Issues Paper focus on children's experiences and perspectives and this section considers how children's experiences of participation may be improved (Q 34), how children may be informed of the outcome of court processes that affect them (Q 35) and how they can be supported to safely participate in the decision making or dispute resolution process (Q 37). The results from AIFS research, most recently the Children and Young People study (2018) and the ICL Study (2014), are relevant to the consideration of these questions and demonstrate that listening to the views and experiences of children and young people is critical to the improvement of family law system services in terms of meeting their needs.

Questions 34 to 36 specifically relate to the improvement of children's experiences of participation in the court process, the changes that are needed to ensure children are informed about the outcome of court processes that affect them, and the mechanisms best adapted to ensure children's views are heard in court. Relevant to the consideration of these questions, children and young people participating in the Children and Young People study (2018) were asked about their experiences of any legal or non-legal family law system services (including courts, legal services and ICLs, family reports/assessments, family dispute resolution, contact services and counselling services) that their families had engaged with when separating. 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 (Children and Young People study, 2018). On the other hand, participating children and young people were more likely to report being direct beneficiaries of post-separation counselling, and they more commonly reflected positively on the support that they received from counsellors (Children and Young People study, 2018). While some participants described their engagement with these family law system professionals as facilitating their participation in decision making about parenting arrangements, the responses of a substantial proportion of children and young people with experiences of the family law system suggested that the approaches adopted by the service professionals with whom they interacted operated in a way that limited their practical impact or effectively marginalised their involvement in decision making about parenting arrangements (Children and Young People study, 2018). In particular, children and young people were more likely to feel excluded from parenting arrangements made pursuant to family law proceedings





if they were not afforded the opportunity to speak or meet with the legal professionals or court personnel involved in their cases (Children and Young People study, 2018).

More specifically, the data from the Children and Young People study (2018) suggest that there were mixed experiences regarding the extent to which children and young people identified service providers as acknowledging their views and experiences. Most participating children and young people who could recall accessing an ICL reported meeting them, and almost half of these participants reported that they acknowledged their views (Children and Young People study, 2018). In relation to family consultants/family report writers, while children and young people were more likely to recall engaging with these professionals, half of the participants who recalled engaging with them indicated that their views were not acknowledged (Children and Young People study, 2018). Although only a small proportion of participants whose families accessed FDR could recall doing so, less than one-quarter of these participants reported meeting the FDR practitioner or mediator but each of these participants reported that their views had been acknowledged by these professionals (Children and Young People study, 2018). Importantly, perceived inaction on the part of family law system professionals (particularly in response to safety concerns raised by children and young people) was identified as causing distress by a number of participants who reported some level of engagement with family law system professionals (Children and Young People study, 2018).

A key area of concern for many children and young people was the lack of information provided to them about the nature and length of proceedings, where or when they would be able to share their views, as well as information about the potential and finalised outcomes. More than one-third (38%) of participants said that more information on the decision-making process and their place in it was vital to their wellbeing. For example, one young person indicated that while he was aware of his parents' family law proceedings, he was of the understanding that the proceedings did not relate to him and was surprised when his father informed him that he was required to comply with the living arrangements made pursuant to this process. These participating children and young people described feeling as though they had been 'kept in the dark' with respect to the processes leading to the parenting arrangements made with respect to them.

As foreshadowed above, for some participants in the Children and Young People study, having an ICL or family consultant to speak on their behalf enabled them to have a say in the decision-making process (Children and Young People study, 2018). More specifically, some participants described their engagement with these family law system professionals as facilitating their participation by having a professional to advocate on their behalf (in the case of the ICL) or a professional to seek and articulate their views in the family law process (Children and Young People study, 2018). For example, one young person described positive experiences with lawyers where there was a preparedness not only to genuinely listen to their views and to acknowledge their concerns but also to take action to address their situation. Ultimately, having the views that they had expressed inform the decision-making process was nominated as important by most children and young people who reported engagement with services (Children and Young People study, 2018). However, for many children and young people who were interviewed, their experiences with family law professionals were characterised by confusion and frustration. 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.

Further, several children expressed confusion and frustration at the role played by family law system professionals in their case and their impact on outcomes (Children and Young People study, 2018). While ICLs are not required to act on the child's instructions and while ICLs and family report writers may (and do) make recommendations that do not accord with the views



of the relevant children, the data from the interviews with young participants suggest that these professionals did not always effectively communicate this important feature of their appointment in their dealings with children and young people (Children and Young People study, 2018). For example, one interviewee described her experiences with the ICL and sense of ‘betrayal’ when the ICL made a recommendation contrary to her views regarding the parenting arrangements. Other negative accounts of engagement with professionals included their views being dismissed (either overtly in the interview or in the eventual court orders), not being able to meet with the relevant professional in person, a sense that they were being encouraged by the professional to reflect a particular view (or perceptions of professionals as not objective or independent), and having limited information about what was going on during and after the court hearings (Children and Young People study, 2018). Consistent with the above trends, the ICL Study (2014) identified ICL practices involving limited or no contact between the ICL and the child or young person as giving rise to disappointment and unmet expectations on the part of children and young people (ICL Study, 2014). Also consistent with the Children and Young People study, the ICL Study identified a lack of clarity in relation to the role of the ICL, both from the perspective of parents and children and young people, and particularly regarding the approach and activities undertaken by the ICL in their cases (ICL Study, 2014). While some positive reflections were provided in these studies regarding children and young people’s experiences with ICLs, the mixed feedback reflected the substantial inconsistency in approaches to the ICL role by professionals, and an ongoing need for training and research on best practice approaches to working with and listening to children in this context.

In relation to interactions with family report writers, participants in the Children and Young People study expressed concerns about the short duration of their consultations, the order in which the consultations occurred and the settings in which they took place. As with meeting the ICL, several young participants noted that it often took more than one meeting to develop rapport and to build a relationship of trust with family consultants, which would, in turn, facilitate greater participation on the part of the child or young person. Some young participants who indicated that they did not feel that they had been heard suggested that this type of engagement would have been helpful in facilitating their active contribution to the decision-making process. These concerns, and the relative dearth of research on the practices of family consultants and family report writers and of the nature and quality of family reports, highlights the need for further research in this area specific to the Australian context (Children and Young People study, 2018).

Overall, a majority of young participants in the Children and Young People study wanted greater attention to be paid to the perspectives of children and young people throughout the process of making parenting arrangements. When asked about the advice that they would like conveyed to family law professionals about how they could better assist children through parental separation, nearly two-thirds (64%) of young participants spoke about ‘listening’ more to their views (Children and Young People study, 2018). Almost half (46%) of the participating children and young people wanted court personnel to be more supportive and mindful of their needs throughout the process (Children and Young People study, 2018). A substantial proportion (30%) of young participants emphasised the importance of objective or neutral professional behaviour in facilitating their effective engagement (Children and Young People study, 2018). Reflections from the Children and Young People and ICL studies emphasise the critical importance of clear communication with children about their rights and best interests, the role of the various family law system professionals, and how their views will be heard in the decision-making process. Key characteristics of ‘effective professional practice’ from the



perspectives of young participants in the Children and Young People study (2018) may be summarised as including:

- the space for young people to speak and more effective listening to their views and experiences (64%)
- the professional takes steps to build trust with the children and young people with whom they interact (including via qualities such as patience, empathy and respect), as well as being more mindful of children and young people's needs (46%)
- professionals engage in open communication by providing more information relevant to the decision-making process in their cases (38%)
- professionals act protectively and address and respond to their concerns; build a relationship of trust (which includes qualities such as patience, empathy and respect), and keep children and young people informed about issues affecting them.

The data from the Children and Young People project suggest that a child-inclusive approach could be adopted incorporating the features of effective professional practice outlined above and following an approach that:

- enables the relevant children and young people to contribute to, and be accurately heard, in the decision-making process and to be kept independently informed of the nature and progress of this decision-making process
- provides a clear and accurate explanation of the decision made
- provides access to ongoing therapeutic support and assistance as required
- accommodates the potential for flexibility to change and ongoing and meaningful communication.

More specifically, young participants reflected positively on professionals who were approachable, spent time building rapport and trust, respected their views and took their concerns seriously. A 'genuine', 'good listener' emerged from the data as someone who focused on the discussion that they were having with the young person by taking notes, by not interrupting them or changing the subject, and by actively participating in the conversation by considering and responding to the comments made by the young person. Independence and avoiding a partisan approach were identified as key requirements by some participating children and young people, as was respect for their views and autonomy. Creating a space where children and young people felt comfortable and safe to speak honestly and openly was identified as important to gaining accurate information. The importance of professionals being an effective conduit of information was identified as requiring the communication of the young person's views to the relevant decision makers and providing practical information about the nature of the decision-making process, the role of the various professionals and the progress and resolution of their matter. While further research may inform the development of professional practice and service delivery specific to particular judicial, legal and non-legal professionals and service providers, an increased commitment to child-inclusive approaches to post-separation decision making would be an important step towards addressing the calls of participating children and young people to 'give children a bigger voice, more of the time' (Participant, Children and Young People study, 2018).

Question 38 of the ALRC Issues Paper seeks to explore the potential risks to children associated with involving them in decision-making or dispute resolution processes and how these risks may be managed, and Question 39 looks, in part, to understand changes that would support children who wish to participate in family law system processes, and to do so in a way that is



responsive to their particular needs. Parents and judicial, legal and non-legal service providers are faced with the challenge of protecting and supporting the agency and participatory rights of children and young people, without exposing them to harm that may arise from participation in circumstances characterised by family violence and/or abuse. Key among these concerns is ensuring that children and young people are not re-traumatised by their participation, as a result, for example, of continuing exposure to parental conflict, from the multiple interviews effect,<sup>5</sup> or by enabling parents to involve their children in the misuse of legal processes (see also DFVP study, 2017).

While acknowledging concerns about involving children in their parents' conflict, these concerns must be considered in light of circumstances where these children are, or have already been, exposed to their parents' conflict or violent and abusive behaviour. As noted in section 1 above, listening to the voices of children and young people has been identified as particularly critical in these circumstances, not only because this participation is central to meeting obligations pursuant to the UNCRC but because it is important from an evidentiary perspective and is consistent with the expressed views of participating children and young people in cases characterised by family violence or conflict (Children and Young People study, 2018). 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' (Children and Young People study, 2018).

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. For example, several young participants recounted particularly distressing experiences described in terms akin to breaches of their trust when, having recounted experiences of family violence, they were reunited with the perpetrator during the family report sessions, or they faced negative repercussions from a parent upon the release of the family report. Another young participant recounted upsetting interactions with a family consultant where she had confided in the consultant about her father's physical and psychological abuse towards her, only for the father to be invited in for a co-joint session in circumstances where her consent was not informed or free from duress.

These data indicate that further training and development of skills and mechanisms to facilitate safe participation are required. At the outset, there is a need for improved communication with children and young people, and consideration of measures that respond appropriately to the views and concerns of children and young people. An expansion of the opportunities and means of participation available to children and young people in the family law system, supported by a child-centred, child-inclusive approach that is multi-disciplinary in nature should be informed by more specific research to identify improved practice approaches for listening to and communicating the views of children in separated families.

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<sup>5</sup> The multiple interviews effect may arise where children are questioned multiple times or have had contact with multiple services: Kaspiew et al., 2014.



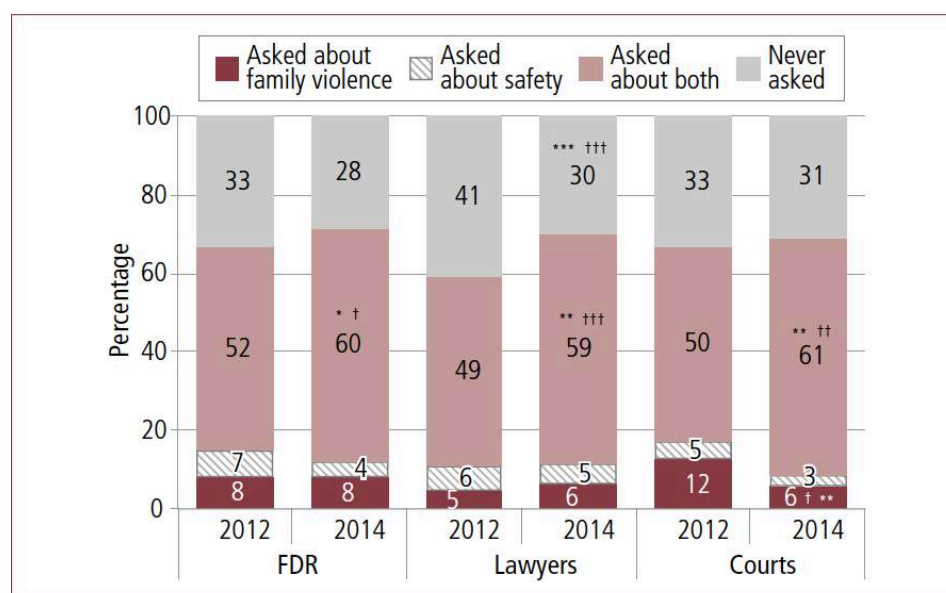


## 7. Professional skills and wellbeing (Q 41 – Q 44)

Questions 41 and 42 in the Issues Paper concerned the core competencies that should be expected of professionals working in the family law system and judicial officers exercising family law jurisdiction, and the potential measures to ensure that they have and maintain these competencies. Question 44 also sought feedback on approaches needed to promote the wellbeing of family law service professionals and judicial officers. Data drawn from both adult participants (including professionals) in the Evaluation of the 2012 amendments (2015) and from the DFVP study (2017) and the ICL Study (2014), together with young participants from this study and the more recent Children and Young People study (2018), provide insights relevant to these questions.

While data from all three components of the Evaluation demonstrated that there had been an increased emphasis since the 2012 amendments on identifying family violence and safety concerns across the family law system, particularly among lawyers and courts, the data also indicate that refinements in practices in this area and the development of effective screening had some way to go. The ESPS did identify statistically significant increases in the proportions of parents who reported being asked about family violence and safety concerns when using formal pathways (FDR/mediation, lawyers and courts) as their main means of resolving their parenting arrangements (ESPS, 2015, Figure 5.2 (replicated in Figure 5)). However, close to three in 10 parents in the post-reform sample reported never being asked about either of these issues when engaging with these formal pathways.

**Figure 5. Reports of being asked about family violence or safety concerns by professionals in main pathway, 2012 and 2014**



Notes: Data have been weighted. Percentages may not total 100.0% due to rounding. Statistically significant differences between 2012 and 2014 within a given population are noted: \*  $p < .05$ ; \*\*  $p < .01$ ; \*\*\*  $p < .001$ . Statistically significant differences between mothers and fathers within a given population (years) are noted: †  $p < .05$ ; ††  $p < .01$ ; †††  $p < .001$ .

Consistent with this, data from the Court Files Study in the Court Outcomes project indicated increases in allegations of family violence and child abuse (CO Project, Table 3.10), and a greater emphasis on identifying concerns about family violence and child abuse, with greater evidence of risk assessment in family reports (CO Project, Table 3.16) and more evidence of





family violence and child abuse on court files (CO Project, Tables 2.19 and 3.22). While the ESPS findings suggest a small increase overall in the proportion of parents who reported disclosing family violence or concerns (ESPS, 2016, Table 5.5), substantial minorities still reported experiencing family violence or holding safety concerns but not disclosing these concerns to family law system professionals (ESPS, 2016, Table 5.10, see Table 8).

**Table 8. Non-disclosure of family violence/safety concerns to family law professionals, 2012 and 2014**

	2012 (%)	2014 (%)
All participating parents who had violence/safety concerns and did not disclose	41.3	37.9 *
Parents who had sorted/were sorting out arrangements and did not disclose to this service:		
FDR/mediation	46.2	45.7
Lawyer	33.6	28.2
Court	22.8	21.5

Notes: Data have been weighted. Percentages may not total 100.0% due to rounding. Sample populations: total—2012: n = 2,275, 2014: n = 2,296; FDR/mediation—2012: n = 415, 2014: n = 448; lawyers—2012: n = 393, 2014: n = 416; court—2012: n = 333, 2014: n = 334. Statistically significant differences between 2012 and 2014 within a given population are noted: \*  $p < .05$ ; \*\*  $p < .01$ ; \*\*\*  $p < .001$ .

Additionally, areas in need of improvement in professionals' responses to disclosures of family violence and safety concerns were also identified in the ESPS. In both the 2012 and 2014 surveys, just over half of participants reported that their disclosures of family violence were taken seriously and dealt with appropriately, and roughly half of parents in both surveys reported that their safety concerns were taken seriously and dealt with appropriately (ESPS, 2015, Table 5.11, Table 9 below). Of note, participants were also more likely to report that 'nothing happened' in response to disclosures of safety concerns in the post-reform sample (42%) rather than family violence (32%) (data not shown). Referrals to support services were more common with disclosures of family violence (36%) than safety concerns (25%) in 2014 (data not shown).

**Table 9. Responses to disclosure of family violence by gender, 2012 and 2014**

	2012 (%)			2014 (%)		
	Total	Fathers	Mothers	Total	Fathers	Mothers
<b>Response to disclosing family violence</b>						
Taken seriously, dealt with appropriately	53.4	38.0	61.5 <sup>+++</sup>	51.9	41.0	58.4 <sup>+++</sup>
Acknowledged but not considered relevant	31.2	38.1	27.5 <sup>+++</sup>	32.6	38.4	29.1 <sup>++</sup>
Ignored or not taken seriously	10.8	19.5	6.2 <sup>+++</sup>	10.9	16.7	7.4 <sup>+++</sup>
Something else	4.7	4.5	4.8	4.6	4.0	5.0
No. of observations	1,182	396	786	1,243	437	806
<b>Response to disclosing safety concerns</b>						
Taken seriously, dealt with appropriately	50.9	39.5	58.4 <sup>+++</sup>	48.5	38.3	55.3 <sup>+++</sup>
Acknowledged but not considered relevant	31.0	33.4	29.4	33.1	36.7	30.7 <sup>+</sup>
Ignored or not taken seriously	13.0	20.5	8.2 <sup>+++</sup>	13.6	19.4	9.9 <sup>+++</sup>
Something else	5.0	6.7	4.0	4.7	5.6	4.2
No. of observations	1,096	412	684	1,170	434	736

Notes: Data have been weighted. Percentages may not total 100.0% due to rounding. Statistically significant differences between 2012 and 2014 were not found. Statistically significant differences between mothers and fathers within a given population (years) are noted: <sup>+</sup>  $p < .05$ ; <sup>++</sup>  $p < .01$ ; <sup>+++</sup>  $p < .001$ .

Further insight is available from the RFV component of the Evaluation. Based on surveys of professionals in the family law system, these data suggest that professional practices on the whole changed in a direction consistent with the intention of the family violence reforms, with greater emphasis being placed on identifying and assessing concerns about family violence and child abuse. Self-assessments by lawyers and non-legal professionals participating in the RFV study suggested shifts in advice-giving practices, particularly in legal practice. However, while professionals were more confident in their own capacity to identify family violence and child abuse/child safety concerns, this did not translate into high levels of confidence among the aggregate sample of professionals in relation to the systems general capacity to screen for these concerns (RFV study, Table 4.1). There was also less confidence that improvements in practice had occurred in key areas, including approaches to the identification and response to matters involving family violence and child safety concerns (RFV, 2015 study, sections 4.2 and 6.2). Concerns were also raised in relation to family law specific screening tools and while increases were identified in relation to the filing of Form 4/Notice of Risks (CO Project, Figure 2.9), the effect of this increase on statutory child protection services was identified as a cause for concern. Professionals participating in the RFV study also raised concerns about the resources required to properly assess concerns relating to family violence and child safety and the need for improvements in training and practice tools, access to more effective education and training in the areas of family violence and child abuse, complexities associated with the family law system and overlaps and inconsistencies between family law and state/territory child protection and family violence responses (RFV study, sections 4.2–4.3 and 6.2–6.3).

Similarly, recommendations arising from the DFVP study include increased education and reform within the family law system and, in particular, the enhancement of legal professionals' understanding of the complexity of domestic and family violence, including the tactics of abuse and issues associated with co-parenting, particularly those discussed in section 4 relating to the use of systems to perpetrate abuse. Consistent with the findings of the RFV study, the DFVP



study recommended: (a) improvements to the identification of, and response to, domestic and family violence victims by the family law sector; (b) additional training and support to be provided to therapeutic service providers working with families; and (c) improvements in the level of collaboration between services in the domestic and family violence, family law and child protection space to reduce risks and improve outcomes for victims (see further section 5 ‘Integration and collaboration’).

Data from the ICL Study (2014) are also relevant here, with concerns raised by all professional stakeholders participating in the ICL Study (2014), including ICLs themselves, relating to the adequacy of accreditation, training and ongoing professional development arrangements in equipping ICLs to deal directly with children and young people and to perform optimally in matters involving family violence and child abuse (ICL Study, 2014). The need for greater support for professionals to meet these obligations was particularly apparent in interview data from ICLs participating in this study. Existing funding arrangements were also identified as placing constraints on the level of service that ICLs could provide, with some private practitioners indicating that their ICL workload was extremely underfunded, with much of this work undertaken on a pro-bono basis (ICL Study, 2014). Adopting measures to further address these issues would assist in responding to concerns raised by all stakeholder groups participating in the ICL Study indicating that the performance of some ICLs fell short of the requisite standard, primarily in terms of acting independently, impartially and with professional rigour. From the perspective of children and young people, in particular, participants expressed disappointment and even betrayal in terms of their experiences with ICLs, with uncertainty about the ICL role, disappointment with the limited or no contact with the ICL role, or with their response to their concerns where contact took place, and uncertainty as to how their views informed the decision-making process.

These observations were also reflected in the more recent Children and Young People’s study (2018) as detailed in section 6 ‘Children’s experiences and perspectives’ with respect to a broader range of family law system service professionals (see section 6 above). A substantial proportion of these young participants, particularly in circumstances characterised by family violence and abuse, were potentially retraumatised when their families engaged with family law system services that did not listen to their views and experiences and where the absence of requisite skills, expertise and effective professional practice led to inaction and further exposure of children to harm or risk of harm.

## 8. Governance and accountability (Q 45 – Q 47)

Questions 46 and 47 related to changes that should be made to enhance transparency of the family law system and that may be made to the governance and regulatory processes to improve public confidence in the family law system. As outlined in the discussion in section 7 ‘Professional skills and wellbeing’ above, participants in the Children and Young People study (2018), in the RFV study (2015) and in the ICL Study (2014) raised concerns about the capacity and expertise of family law system service professionals, particularly in the context of identifying, assessing and responding to family violence. More specifically, young participants in the Children and Young People study, along with the professionals, parents and children participating in the ICL Study, identified concerns associated with professional practice difficulties associated with making complaints about the ICLs and family report writers. The discussion in sections 6 and 7 above outlines expectations of effective professional practice by family law system professionals. Together with addressing concerns raised by participants in



relation to training and accreditation, accessible and effective pathways that enable concerns or complaints about professional practice to be raised and investigated, and measures to encourage awareness of these pathways, are mechanisms that may support both the wellbeing of the clients of family law system services and encourage greater transparency and accountability of the family law system. Indeed, thorough and well-managed complaints procedures may, in turn, inform improvements to address concerns associated with training and accreditation.

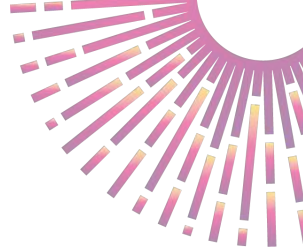
## 9. Conclusion

This submission has highlighted:

- the prevalence of complex issues characterising the families that access the family law system
- issues surrounding self-represented litigants, particularly in the context of domestic and family violence
- the challenges associated with direct cross-examination in circumstances characterised by family violence
- the negative association between the experience of family violence/abuse and property division and financial outcomes.

In particular, this submission has identified the need to:

- support families to address safety concerns via timely and effective support services and dispute resolution
- ensure the best interests of children via child-centred and child-inclusive approaches
- give children greater access to information relating to family law system processes and to information about the progress of their case
- allow children to participate in the decision-making process in their case
- work towards better systemic integration and collaboration across family law
- give further training to service professionals, and develop skills and mechanisms to facilitate safe participation
- improve identification and assessment of, and response to, family violence and child safety concerns
- ensure accessible and effective pathways that enable concerns or complaints to be raised and investigated.



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