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BAR ASSOCIATION OF QUEENSLAND

21 May 2018

The Executive Director
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001

*By email: info@alrc.gov.au*

Dear Executive Director

***Re: Review of the Family Law System – Issues Paper 48***

Thank you, on behalf of the Bar Association of Queensland ('the Association'), for the opportunity to provide a response to Issues Paper 48, in relation to the Australian Law Reform Commission's review of the family law system.

Please find **enclosed** the Association's submission on this matter.

The Association would be pleased to provide further feedback, or answer any queries you may have.

Yours faithfully

**G A Thompson QC**
**President**

encl

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*Constituent Member of the Australian Bar Association*


# Submission

*Issues Paper 48 – Review of the family law system*

*Australian Law Reform Commission*

***A Submission of the Bar Association of Queensland***

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# 1. Introduction

The Association is encouraged by the Government's commitment to improving the family law system and appreciates the significant role the Australian Law Reform Commission ('the ALRC') has in identifying and recommending opportunities for reform.

The Association has had the benefit of reviewing the comprehensive submissions made by the Family Law Section of the Law Council of Australia ('the LCA') and supports the submissions and observations made by the LCA. As such, we shall not repeat the LCA's submissions. Instead, the Association provides this submission to highlight issues of particular importance to its members who practise in family law.

The Association's submission focuses on the following issues:

- the difficulties associated with assumptions underlying the Issues Paper, being that family violence is primarily relevant to parenting proceedings, and that complexities in litigation arise primarily in matters in which family violence is alleged;
- the potential benefits in legislating to exclude consideration of an expectation of an inheritance from property matters;
- the potential benefits of requiring litigants to attend a compulsory Court information session at an early stage;
- the problems associated with the current family law dispute resolution processes;
- a proposal to improve current family law dispute resolution processes, namely the implementation of Stage 1 and Stage 2 Mediator's Certificates to certify that parties (save where urgency exists or a *Rice & Asplund* issue is asserted) have made a genuine effort and exhausted attempts at alternative dispute resolution;
- the benefits of developing a short cause system for small and uncomplicated property matters;
- the potential for reform in relation to litigation as a form of abuse, focusing on the conduct of legal practitioners and costs orders; and
- the misunderstood nature of section 121.

# 2. Objectives and principles

## 2.1 Underlying assumptions

The Association notes the Issues Paper appears to be premised on a number of assumptions, two of which are that:

2.1.1 family violence is primarily relevant to parenting proceedings; and
2.1.2 complexities in litigation arise primarily in matters in which family violence is alleged.

In the experience of the Association's members practising in family law, these assumptions are largely misguided for a number of reasons which will be explored below.

### 2.1.1 Family violence is primarily relevant to parenting proceedings

It is the experience of the Association's members practising in family law that family violence permeates numerous other aspects of family law proceedings, beyond just parenting proceedings.

The Court may take into account family violence when considering what order (if any) should be made[1] to alter the property interests of the parties pursuant to section 79 of the *Family Law Act 1975* (Cth) ('the Act').[2] In *Kennon v Kennon,*[3] the Family Court of Australia commented *'... our view is that where there is a course of violent conduct by one party towards the other during the marriage which is demonstrated to have had a significant adverse impact upon that party's contributions to the marriage, or, put the other way, to have made his or her contributions significantly more arduous than they ought to have been, that is a fact which a trial judge is entitled to take into account in assessing the parties' respective contributions within s 79'.*[4]

Furthermore, when determining whether to exercise its discretion in section 79A to set aside or vary a section 79 alteration of property interests order, the Court may consider whether there was duress or suppression of material evidence in the proceeding.[5] When determining what order (if any) should be made in relation to spousal maintenance pursuant to section 75,[6] the Court may consider *'any fact or circumstance which, in the opinion of the Court, the justice of the case requires to be taken into account'.*[7] It is conceivable that the justice of the case may require family violence to be taken into account where it *'may have a bearing upon the victim's present and future financial needs'*,[8] for example, an inability to work due to health issues caused by the previous acts of family violence.

Family violence may also be relevant to a consideration of whether the Court may make an order to set aside a Financial Agreement, if, for example, a party to the agreement engaged in conduct that was unconscionable at the time of making the agreement.[9] Given that these Financial Agreements are made out of Court, without the Court turning its mind to whether the 'deal' is just and equitable, and by both parties 'agreeing' perhaps to both a property division and maintenance arrangement, unconscionable conduct on the part of a perpetrator of family violence can become an important evidential consideration for the Court in later determining whether the financial agreement ought be set aside.

The Association urges the Commission to understand that issues of family violence are not the sole province of parenting matters.

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[1] *Family Law Act 1975* (Cth) s 79(4).
[2] Ibid s 79(1)(a).
[3] *Kennon v Kennon* (1997) 22 Fam LR 1.
[4] Ibid at 24.
[5] *Family Law Act 1975* (Cth) s 79A(1)(a).
[6] Ibid s 74(1), 75(1).
[7] Ibid s 75(2)(o).
[8] Sarah Middleton, 'The Verdict on Kennon: Failings of a contribution-based approach to domestic violence in Family Court property proceedings' (2005) 30(5) *Alternative Law Journal* 237.
[9] *Family Law Act 1975* (Cth) s 90K(1)(e).

### 2.1.2 Complexities in litigation arise primarily in matters in which family violence is alleged

Whilst allegations of family violence may be relevant to all kinds of family law disputes, it is not correct to assume (as the Issues Paper appears to do) that family violence is the *only* reason why a matter may be complex. Indeed, members of the Association who practise in family law, frequently experience factors which complicate litigation where there have been no allegations of family violence.

Complexity in litigation arises in a range of ways – for example many matters now feature international aspects, with the logistical complexities that present from one party wishing to live in one country, the other in another and the child caught in the middle; or, where property proceedings involve trusts and real property in multiple international jurisdictions.

Complexity in parenting matters may also arises in:

- section 60H (and related matters) where a child may be a child for the purposes of the *Family Law Act* and two different State's Status of Children Acts;[10]
- matters where one or both of the parties suffer mental health issues;
- matters where one or both of the parties are affected by drug or alcohol use or addiction; and
- matters where grandparents seek contact with a child.

Equally, a party's personality style, or perhaps even a personality disorder, may affect a party's willingness to engage in litigation in a productive way, and to compromise and reach a resolution.

Finally, significant time delays in the family law system complicate litigation by prolonging, and at times entrenching, the interpersonal conflict between parties and allowing the dispute to become intractable by dint of the passage of time.

## 3. Legal principles in relation to property entitlements

The Association is of the view that there would be significant merit in excluding an expectation of an inheritance from consideration in property adjustment proceedings. What has been called a "ghoulish"[11] pursuit of the other side's possible inheritance, where the adult, who may bequeath property upon a party to the marriage, is of capacity and in all likelihood will continue to be so. The time and energy which can be spent on pursuing a possible benefit under a will, which may be changed at the whim of the testator, is not something which ought to feature in property proceedings.

The Commission ought to consider whether legislative reform should be made to exclude inheritances where the testator has capacity at the time of the proceedings.

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[10] See for example *Crisp & Clarence* [2015] FamCA 964 (9 November 2015) (not disturbed on appeal) at [48]: '*As the child was conceived in Queensland but born in South Australia, there is a dispute as to which Act should apply for the purposes of s 60H(2) [of the Family Law Act*]'.

[11] As raised by Moore J in *C v M* [2000] FamCA 1086: *'In my experience more often than not when it has been raised in a particular case, there has been a misunderstanding of the basis upon which De Angelis proceeded. On my reading, it is confined to a narrow band of circumstances and is not an invitation to intrude and offend by a ghoulish pursuit of the current will of a parent of one party, merely because that parent may be of advanced years, or of concessions about the value of their property'.*

# 4. Resolution and adjudication processes

## 4.1 Court information session

The Association would support the Commission recommending a compulsory information session for family law litigants in the Family Court of Australia ('the FCA') and the Federal Circuit Court ('the FCC'). This session could involve a member of the judiciary and a Family Consultant providing litigants with information such as the behaviour expected at Court, but more importantly, the long-term effects on children living with parents in conflict, and how children may be impacted by the litigation process. When we say conflict, we do not necessarily define that only to mean family violence. Rather, we speak of the horrible and long-term impacts on children where mum and dad cannot agree on a thing; where children pick up on the meta-messages of each parent who do not say anything bad about the other parent, but get anxious or obviously angry at the mere mention of the other parent's name. Importantly, children can be negatively affected even when the proceedings only involve property proceedings.

It is not uncommon for the judicial officer to speak to parties regarding these matters at an interim hearing, or at trial. The Association is of the view that holding an information session at an early stage (such as once proceedings have been filed and before the first mention) will increase a litigant's understanding of the process and potentially encourage more conciliatory behaviour throughout the process, with the ultimate goal being to produce better outcomes for children involved in litigation – be it property or parenting or both.

## 4.2 Resolution of family law disputes

### 4.2.1 Overarching comments

Like other questions in the Issues Paper, questions 20 to 28 inclusive contain considerable overlap. We direct these submissions to the concepts and discussions raised in questions 20 to 28.

*'Dispute resolution'* within the family law system is generally accepted to be encompassed by the term *'alternative dispute resolution'* ('ADR') and includes the following:

- informal and formal negotiation between parties,
- conciliation conferences conducted by Court Registrars;
- family dispute resolution ('FDR');
- Family Relationship Centres;
- legal aid convened conferences;
- private mediation;
- arbitration; and
- hybrids of the above.

ADR can be conducted by qualified legal practitioners, social workers and psychologists. Not all mediators are accredited (nor is such accreditation always compulsory) and there are several bodies providing such accreditation.

ADR can occur at any point in time during the life of a family law dispute. Optimally and in order to facilitate the timely and cost-effective resolution and reduce the impact upon

children of those disputes it is appropriate that ADR should occur as soon as *practicable* after the ending of the relationship and before any court proceedings have been instituted.

It is submitted that these questions, particularly question 20, should be enlarged to include the words *'in a way that is less intrusive to the best interests of children'*, irrespective of whether the matter is property or parenting.[12]

Further, the Association is of the view that *'timely'*, with regard to the *'timely'* resolution of disputes, does not necessarily mean soon after separation. One, or both, parties are not usually in an emotional position to settle their matters in the immediate aftermath of separation. A separation results in grief, and a number of phases which that involves. Whilst a party is in the denial or anger phase, resolution is not likely. Equally, one party may have emotionally left the relationship a long time before separation and is more readily able to discuss resolution of their relationship issues as opposed to the unaware party where the fact of separation comes as a shock; the unaware party is usually not ready to settle their matters as soon as the other party. For these reasons, *'timely'*, should not be confused with too quickly after separation.

In answering these questions, it needs to be appreciated that whilst the vast majority of family law disputes resolve without direct Court intervention, the existence of Court oversight of ADR is an important part of, and is integral to, the timely and cost-effective resolution of those disputes.

Amendments to the Act, rules of Court and any associated Regulations should continue to emphasize and support the vital role that ADR has in the resolution of modern family law disputes.

Those members of the Association who practise as mediators in family law often experience the following scenario, where it is in the interests of one party to delay resolution:

1. Party A writes to Party B seeking to negotiate settlement of dispute (be it a property and/or parenting dispute). Party B fails to respond or does not meaningfully respond.
2. Party A writes again to Party B seeking to mediate settlement of dispute. Party B fails to respond or does not meaningfully respond.
3. Party A files proceedings – usually in the FCC.
4. First Return date in FCC – often eight weeks after step 2 or 3 (Party B may or may not have formally responded but appears). The Court issues usual directions *vis*, disclosure, valuation and mediation after the parties attend the first return date.
5. Parties attend mediation.
6. It is generally accepted by family law practitioners (at least in South East Queensland) that the industry standard for settlement rates of such disputes is around 80%.[13]

It is obvious that one party, usually Party A, has incurred unnecessary expense. Ordinarily this party is seeking a change to the existing status quo, either because they have been prevented from spending time with children, or seeking sole occupation of the former matrimonial home, or to access profits of the family business or simply seeking an end the

[12] There is ample evidence available to the ALRC of the emotional impact upon children arising from their parents being engaged in protracted disputes concerning parenting or financial matters.

[13] The article and research conducted by Judge Harman appears to correspond with this view – see J Harman, *'Should mediation be the first step in all Family Law Act proceedings?'* (2016) 27 ADRJ 17.

financial relationship. Party B usually has, until a resolution focused legal practitioner or experienced mediator intervenes, either no incentive to change the status quo or an unrealistic expectation of what that change might entail.

This common scenario can be easily avoided.

The following focus is upon Court processes and rules that could be improved in order to:

1. avoid the unnecessary filing of applications to Court; and
2. clarify and enforce the obligations upon legal practitioners (but also self-represented clients) to exhaust all forms of ADR before engaging in and consuming valuable Court time unless the matter requires urgent court attention.

## 4.2.2 The existing (Court) processes

**Part IIIA of the Act**

The starting point is Part IIIA of the Act. Section 12A provides that the objects of Part IIIA include ensuring that people affected or likely to be affected by separation are informed about ways of resolving disputes other than by applying for orders under the Act.

Section 12B sets out that the *Family Law Regulations 1984* (Cth) ('the Regulations') may prescribe information that is to be included in documents provided to persons and that in relation to such prescribed information (emphasis added):

> *(2) Without limitation, information prescribed under this section must include information about:*
> *(a) the legal and possible social effects of the proposed proceedings (including the consequences for children whose care, welfare or development is likely to be affected by the proceedings); and*
> *(b) the services provided by family counsellors and family dispute resolution practitioners to help people affected by separation or divorce; and*
> *(c) the steps involved in the proposed proceedings; and*
> *(d) the role of family consultants; and*
> *(e) the arbitration facilities available to arbitrate disputes in relation to separation and divorce.*

Section 12E casts an obligation upon lawyers to give documents containing information prescribed under section 12B. Section 60D of the Act also casts specific obligations upon an *'adviser'* to a person concerning parenting matters. The overlap appears to be unnecessary and confusing.

It is submitted that consideration be given to redrafting Part IIIA both to include specific reference to mediation, provide clarity about expectations of legal practitioners, reinforce the importance of avoiding litigation (where possible) and reinforcing the objects (particularly that of the FCC Act and Rules) of pursuing timely and cost-effective resolution of disputes. Such redrafting could also place greater emphasis upon the duties and obligations of legal practitioners to pursue these objects.

There is evidence to support that the term 'family dispute resolution' may be confusing or misleading to parties involved in family law disputes. [14] It is submitted that terminology such as *'alternative dispute resolution'* or *'mediation'* be substituted and defined instead of the term *'family dispute resolution practitioners'* which is strictly limited to parenting matters.

1. Thereafter, it is submitted that an overhaul of the prescribed information that has been published to date by both the FCA and FCC (brochures) pursuant to the Regulations should be undertaken and a central location ought be created (irrespective of FCA or FCC) for such updated prescribed information to be located in a user friendly online environment.

The central location for information could:

2. provide certainty that a particular publication is a prescribed publication pursuant to Part IIIA of the FLA; and
3. provide online resources and connections with government funded and private organisations or individuals who can provide the services outlined in section 12B.[15]

It is submitted that there should be a specific requirement that, together with any Initiating Application to Court, a legal representative provides a certificate declaring that the prescribed information has been provided and explained to the client. It is unsatisfactory that presently this obligation can be met by simply giving the client a brochure issued from the Court, which the client may or may not read, and may or may not comprehend.

This legal certificate may operate instead of, or in conjunction with, the Court information session referred to at paragraph 4.1.

It is submitted that the relevant rules of Court should be expanded to specifically provide for costs against a lawyer for failing to provide and explain the prescribed information to the client.

**The pre-action procedures**

Schedule 1 of the *Family Law Rules 2004* (Cth) ('the Rules') sets out the pre-action procedures ('the procedures') mandated for both property and parenting matters.

In terms of encouraging litigants to avoid initiating proceedings for property matters (with relevant differences for parenting matters), the procedures provide that each party is required to make a genuine effort to resolve the dispute by participating in dispute resolution, exploring options for settlement by correspondence and complying with the duty of disclosure, unless there are good reasons for not doing so.[16] It is submitted that the words *'mediation'* or *'alternative dispute resolution'* should be incorporated into the procedures.

The procedures prescribe steps to be undertaken before filing an application. A person must give a copy of the procedures to the other prospective parties to the case, make inquiries

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[14] Australian Institute of Family Studies, *Evaluation of the 2006 family law reforms* (December 2009) 5.2.
[15] Such organisations would be required to meet some satisfactory level of professional standards to the satisfaction of the Principal Registrar.
[16] *Family Law Rules 2004* (Cth) sch. 1, pt 1, para. 1.

about the dispute resolution services available and invite the other parties to participate in dispute resolution.[17] The proposed applicant must also give to the proposed respondent written notice of his or her intention to start a case if there is no appropriate dispute resolution service available, a party fails or refuses to participate in dispute resolution or the parties are unable to reach agreement by dispute resolution.[18]

The procedures can be expanded upon to provide clarity as to what is required by these provisions and also to provide a simpler way to institute proceedings and obtain a Directions Order upon the first return without requiring any attendance of the parties or their legal practitioners (see proposal below). Further, the lack of consistency in the procedure for first returns creates significant costs implications, particularly for parties in regional Queensland. For example, the judicial officer may hear interim arguments at first return, or the judicial officer may determine that they not be heard until a child dispute conference has occurred. The procedures ought to be consistent so that parties do not incur the unnecessary cost of flying solicitors or barristers to a regional hearing, only to be ordered to attend a later hearing.

It is submitted that there is no logical reason why the procedures cannot be widened or developed into specific rules of Court or indeed provisions contained within the Act concerning *'litigation conduct'*.

It is further submitted that unless proceedings are urgent, there should be a specific requirement that, together with any Initiating Application to Court, a legal representative provides a certificate declaring that the procedures have been complied with and that such certificate include compliance with the obligations and steps required under the procedures. It is also proposed that there be greater enforcement, through orders for costs, of those obligations by the Court.

### 4.2.3 Section 60I certificates – maintain / abolish / extend to property matters

**Existing problems**

The following are issues the Association's members have observed since the implementation of the requirement for parties in parenting matters to obtain a section 60I certificate from a family dispute resolution practitioner ('FDRP') before initiating court proceedings ('the sect 60I regime').

The sect 60I regime can cause unreasonable delay. Parties relying upon Government-funded relationships centres are often required to wait three to four weeks merely to have an intake interview with the actual FDR taking place weeks later. In circumstances where a child is not spending time with a parent (for no good reason), that cannot be in the child's best interests.

There are no reported incidences of costs orders being made against a party for unreasonably failing to comply with the sect 60I regime either due to a failure to participate or a failure to *'make a genuine effort'* to resolve the dispute. If there are no consequences for abusing the system, it will continue to be abused.

[17] Ibid para. 3.
[18] Ibid.

There appears to be no gathering of useful or recent empirical evidence of numbers of disputes finally resolved (i.e. never require Court proceedings) as opposed to all other matters (i.e. unresolved, partially resolved or end up in Court anyway). The studies conducted by the Australian Institute of Family Studies appear to be limited to responses from Government-funded organisations offering FDR when there is a significant body of private FDRPs which should be included within such research.

The circumstances where certificates for *'refusal'* to attend are unclear, for example, if a private FDRP sends an invitation to Party B to attend FDR and that Party B refused on the basis that they cannot afford private FDR and are arranging publicly funded FDR through a Family Relationships Centre, some FDRP's are of the view that such conduct is a *'refusal or failure'* of Party B to attend.

In our members' experiences, the certificates for *'not appropriate'* to attend are given out too easily, for example members of the Association frequently encounter disputes that have had Court proceedings initiated where a *'not appropriate to conduct dispute resolution'* certificate has been provided[19] in circumstances where the reason for inappropriateness is not stated and the grounds (based upon the affidavit material) would appear to have been situational family violence. The existence of family violence allegations or family violence orders (whilst a serious issue) should not be seen or presumed to be an automatic impediment to ADR as an appropriately skilled FDRP (mediator) commonly will arrange for FDR / ADR in a manner, keeping the parties separate and which avoids exposing a party to family violence or otherwise accommodates a vulnerable party by creating a level playing field for negotiations.

Again, based on our members' experiences, the skill level of some FDRPs is questionable, for example, encouraging and condoning parenting arrangements that are not child focused and contrary to social science research, for example, overnight time outcomes for breastfeed infants, or week about for babies.

It is also often observed that Party A reluctantly accepts a sub-optimal arrangement because it is *'the best they can get'* without any repercussions on the unreasonable party and to otherwise obtain a sect 60I certificate to pursue the matter through the Courts. When the dispute eventually reaches a judge on the first return date a settled environment or status quo has been created that most judicial officers are reluctant to interfere with, in the absence of independent data – such as a family report, further compounding delay to the determination of a child's best interests.

**Abuse of the sect 60I regime**

Behind the above problems is the concern held by members of the Association that the sect 60I regime is able to be manipulated by a party who has no incentive to change the status quo. For example, the primary carer of children post-separation can unreasonably withhold the children from spending any time with the other parent without appropriate justification – the sect 60I regime compounds that delay. For example, a parent wishing to relocate with the children (on reasonable grounds) can have their reasons for relocation thwarted by a parent who uses the sect 60I regime as a means of delaying a determination about any such relocation.[20]

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[19] *Family Law Act 1975* (Cth) s 60I (8)(aa).

[20] See also Australian Institute of Family Studies, *Experiences of Separated Parents Study* (October 2015).

The following is a case example from a member of the Association recently acting on behalf of the Independent Children's Lawyer in a parenting matter in the FCC.[21]

*Case Example 1:*

*In April 2016 Final Orders by consent were entered into between Father (F) and Mother (M) for their four children, then aged as follows Boy1 (aged 8) Girl1 (aged 7), Boy2 (aged 6) and Girl2 (aged 4) where they lived with M and spent alternate weekends and holidays with F. In October 2016 the Department of Child Safety removed the children from M and placed them with the paternal aunt (but did not elaborate upon their concerns to F). The children were returned to M shortly after pursuant to a IPA.[22] Later that month F learns from the Department that they had intervened due to M partner, a Mr S having served 5 years imprisonment for the rape, indecent dealing and deprivation of liberty of a 14 year old girl. In mid-February 2017 F sought a grant of legal aid. LAQ[23] policy is to not grant aid to file applications in Court without attending a LAQ convened conference.[24] This conference was not scheduled until 1 March 2017. LAQ did not grant funding to proceed to Court until 20 April 2017 and proceedings commenced on 10 May 2017.*

*The Final Hearing of the above matter did not occur until 3 April 2018. Until that period the children had been living primarily with M and that the children were being brought into contact with Mr. S despite existing FCC and Department injunctions restraining M from doing so. On 3 April 2018 the FCC made final orders for the children to live with F and interim order for there to be no contact between the children and M pending a risk assessment report being conducted upon Mr. S (this being the recommendation of the Family Report Writer in October 2017).*

The above illustrates cases where the facts clearly indicate FDR is counter-intuitive to the best interests of a child or children. The provisions concerning whether a FDRP can or should issue a certificate in those circumstances are unclear and the provisions of the FLA from sections 60I(8) to 60J are complicated and unclear. Further, the longer parents take to develop their initial parenting agreements, the more likely they are to rely mainly on formal services (legal and non-legal) and the Courts.[25]

Finally, it does not appear that the introduction of the requirement to obtain a sect 60I certificate has had a discernible impact upon the filing of applications in the FCC.

In 2006 amendments to the Act introduced a significant change to the manner in which parenting decisions were determined together with the implementation the sect. 60I regime. From 1 July 2007, applicants wishing to apply for a parenting order under the Act were required to provide a section 60I certificate from a FDRP, unless they fell within one of the legislative exceptions. The graph below is drawn from the Federal Magistrates Court / FCC Annual Reports from the period 2006 to 2017.

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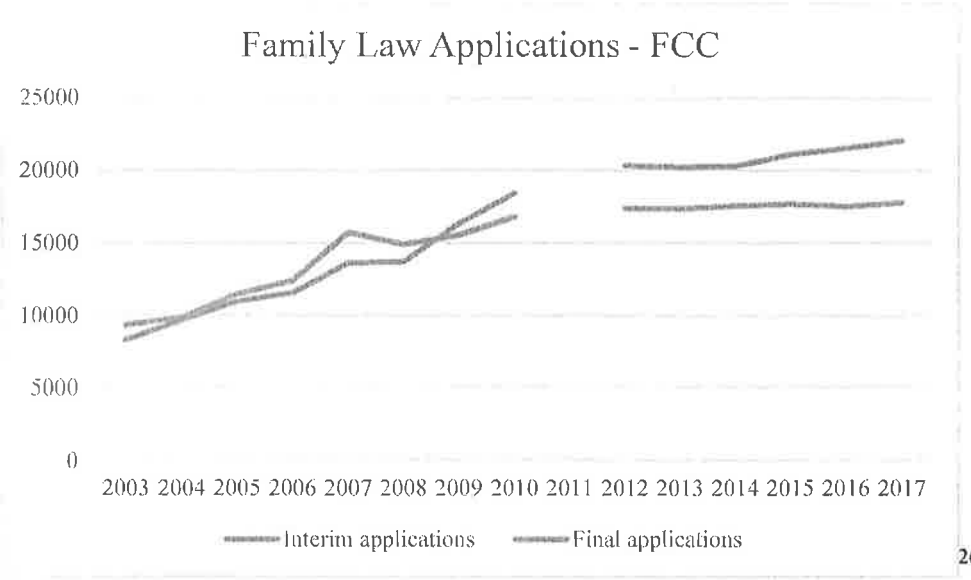
[21] As the matter was resolved after trial with only interim orders the proceedings have not yet been reported on the FCC website or assigned a media neutral citation.
[22] Intervention with Parental Agreement.
[23] Legal Aid Queensland.
[24] It would likely have been required anyway pursuant to section 60I of the *Family Law Act 1975* (Cth), and Legal Aid Queensland issue section 60I certificates at the conclusion of conferences.
[25] Australian Institute of Family Studies, *Understanding parenting disputes after separation* (August 2016).



[26]

The worrying trend from the above graph is in relation to the greater increase of interim applications over final applications. It is easy to speculate that the delay in the final determination of disputes creates a greater necessity for interim applications due to some changing dynamic with a party's circumstances.

**Not extending section 60I certificates to property matters**

It does not appear logical that the resolution of parenting matters can be delayed by the sect. 60I regime, yet there is no real gateway (other than the rarely enforced or robustly applied pre-action procedures) for property matters to pass into the Courts.

The Association acknowledges[27] the challenges in extending the sect 60I regime to financial matters as opening the way for a financially stronger party to use as a tool for delay or to "starve" a weaker party of vital funds. It is also true that a section 60I process shortly after separation may deprive a party from obtaining proper disclosure or information in order to make a fully informed decision within a FDR process.

It is submitted however (as outlined above) that those same challenges exist in parenting matters. Wherever a party desires maintaining the status quo that party can use the sect 60I regime to delay the timely and cost-effective resolution of the dispute.

Ultimately, for the reasons set out above, the Association is opposed to extending the s60I regime to property matters and is opposed to its continuance in its current form to parenting matters.

**A proposal – "the genuine effort and exhausted attempts at ADR" certificate**

To meet the following objectives:

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[26] The Annual Report link for 2011 on the Federal Circuit Court of Australia website was broken, accordingly these figures were unavailable.

[27] As submitted by the Family Law Section of the Law Council of Australia.

1. timely and cost-effective resolution of family law disputes (question 20 – a dispute that does not proceed to court is both timely and cost-effective);
2. greater opportunity for diversion to dispute resolution processes (question 21);
3. low-cost dispute resolution processes for small property matters (question 22);
4. support for victims of family violence or abuse and overcomes misuse of process (questions 23, 24 – delay and abuse of process is a form of family violence and abuse);
5. expanding the existing dispute resolution process into a more evaluative (but non-adjudicative) process (question 26);
6. increasing the scope of the use of arbitration (question 27); and
7. incorporating online dispute resolution (question 28)

it is submitted that consideration ought be given to the replacement of the existing FDR / sect 60I regime and identified array of dispute resolution services with the introduction of a Mediator's Certificate together with a mandate that litigants not only make a genuine effort to resolve the dispute[28] but do all acts and things possible to explore in good faith, and exhaust, alternative dispute resolution processes. Optimally, this would be incorporated as a new part to the Act.

The evidence supporting such a requirement, particularly at a stage along the litigation pathway immediately prior to providing the parties with Trial Directions is contained within the recently conducted private mediation pilot conducted in the FCC.

The Association's members who are also mediators cite lack of preparation as the predominant reason for the failure of mediations. Logically then, the most appropriate time to revisit settlement negotiations with an experienced mediator is when the parties have their dispute ready *'as if'* it were to proceed to a final hearing. The following propositions are not novel as the Queensland civil Courts have operated similar processes for family provision (estate) matters,[29] personal injury matters,[30] and farm debt matters.[31] Indeed the procedure referred to above had its genesis in some of the provisions contained in the *Uniform Civil Procedure Rules 2004* (Qld) and Practice Directions of the Queensland State civil Courts.

While opposed to the section 60I regime, the Association does support a compulsory ADR system required of litigants who intend utilising the Courts with such system broken into the following stages:

1. Mediator's Certificate – Stage 1 before an application is filed in Court ('a Stage 1 Certificate');
2. Draft Directions for ADR; and
3. Mediator's Certificate – Stage 2 before a matter is given trial dates by a judge or justice ('a Stage 2 Certificate').

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[28] As is required under the pre-action procedures in *Family Law Rules 2004* (Cth) sch. 1.
[29] Supreme Court of Queensland, *Practice Direction No. 8 of 2001 – Family provision applications*, 10 December 2001.
[30] Supreme Court of Queensland, *Practice Direction No. 22 of 1991 – Case management for civil proceedings (other than commercial causes)*, 15 October 1991.
[31] *Farm Business Debt Mediation Act 2017* (Qld).

The Mediator's Certificate (Stage 1 or 2) would operate in the following way:

- Save for matters of urgency, a **Stage 1 Certificate** – required *before* proceedings can be filed in a Court. This Certificate certifies that certain prescribed matters have occurred, for example:
    - the parties attended ADR and genuinely participated in the process;
    - the issues in dispute were identified (including the issues in the dispute that were resolved, and the issues remaining in dispute);
    - the steps the mediator identifies that may enable the parties to exhaust mediation attempts in the future (if not settled); and
    - that Court proceedings may need to be instituted in order to assist the parties exhaust those attempts (e.g. valuations, subpoena etc).

- When serving an Initiating Application, a draft Directions Order (for the progression of the final dispute) is also served upon the respondent.

- The draft Directions Order should include:
    - a dispute resolution plan designed to exhaust the exploration of a resolution of the dispute through alternative dispute resolution;
    - requirements for disclosure;
    - provisions with regard to appointment of court experts (family report writers, valuers, etc);
    - a timetable toward early and inexpensive resolution (exchanges of offers, defining issues, settlement conferences);
    - mediating with an accredited mediator qualified to issue a Stage 2 Certificate;
    - arbitrating the dispute;
    - a direction / order that neither party may relist the matter for trial directions without first obtaining a Stage 2 Certificate that certifies the parties having attended mediation and that (in relation to the unresolved issues) have done all acts and things possible to explore in good faith and exhaust the dispute resolution processes.

- A strict 14 day response time to the draft Directions Order, with cost consequences for non-compliance.

- In the event there is no response or the respondent consents to the draft Directions Order, the applicant can notify the Court and request the draft Directions Order issue in chambers or via a Registrar and the first return date may be vacated (where there are no interim matters pending).

- **Stage 2 Certificate** – required *after* proceedings have been filed in a Court and *before* that Court allocates final hearing dates for the dispute
    - This Certificate would contain most of the Stage 1 required certifications;
    - An additional certification that the parties have done all acts and things possible to explore in good faith and exhaust alternative dispute resolution processes

- The certifying mediator must have relevant qualifications and experience in the family law system.[32]

- Exonerations from obtaining a Stage 1 Certificate would include existing section 60I exemptions (clarified exemptions per above) but also legislative clarity concerning when such a certificate is not required. A Court may have the discretion to vacate the requirement of a Stage 2 Certificate where, for example matters of urgency or risk of harm exist.

The Association therefore recommends consideration be given to discontinuing the existing sect 60I regime and replace that regime with the above.

For the above proposal to be effective there would need to be a significant shift in the role of a mediator away from a facilitative model toward a more evaluative model, particularly in terms of evaluating the conduct of the parties in mediation and their preparedness to mediate.

A Stage 1 Certificate should indicate what further matters the parties could obtain before the dispute resolution process can be deemed *'exhausted'*, such as obtaining reports, disclosure, legal advice, financial advice. A Stage 2 Certificate certification that the parties have 'done all acts and things possible to explore in good faith and exhaust the dispute resolution processes' ought be defined within the Act and such definition would need to include, that in preparation for and attending the mediation the parties:

- had received legal advice about likely ranges of outcomes;
- have complied with all directions particularly *vis* disclosure (or a non-disclosure was not the cause for the failure of the mediation);
- ensured all expert reports were available in sufficient time for a party to consider;
- exchanged with each other party and the mediator an Outline of Case that properly identified the relevant facts, law and proposals (including a complete draft proposed order); and
- genuinely participated in the mediation process.

The proposed compulsory ADR system and Mediators Certificate regime would optimally be implemented at the same time as a *'litigation conduct'* regime – either as a revamped procedure (for both the FCA and FCC), or as a standalone provision within the Act.

## 4.3 Small claim property matters

In its December 2017 *'A better family law system to support and protect those affected by family violence'* report, the House of Representatives Standing Committee on Social Policy and Legal Affairs recommended that the Government introduce amendments to require an early resolution process for small claim property matters.

The Association agrees that there would be significant merit in adopting a short cause or direct track system overseen by the judiciary for small and uncomplicated property disputes. Features of this system could include:

[32] The prescribed requirements for an arbitrator pursuant to *Family Law Regulations 1984* (Cth) reg. 67B could apply.

1. reduced mentions before the Court;
2. a Case Outline limited to setting out the pool and what entitlement adjustments ought be (i.e. no submissions to be made, just an expression of the contributions based adjustment and section 75(2) adjustment);
3. short form Reasons; and
4. referrals to Court-facilitated arbitration as a further ADR option (Legal Aid Queensland's arbitration process[33] is an example of a successful model of property arbitration funded and facilitated for eligible parties with small property pools).

The Association would oppose any suggestion that there ought to be a monetary limit on the matters which may be referred to the short cause system. In the experience of the Association's members practising in family law, small property pools can and do create complex matters, including those which may require cross-examination of witnesses.

The Association would favour amendment of the FCA and FCC Rules to develop a clear and complete Practice Direction with case management guidelines and procedures to implement this system. The Practice Direction may provide for the judicial officer to identify that the property pool is small *and* uncomplicated at first mention and refer it to the separate short cause system to be managed in accordance with the Practice Direction. We do not propose the "small" or "uncomplicated" be defined, as definitions tend to complicate. These are common-sense concepts which parties, their lawyers and judges know when they see it.

There are numerous benefits to this proposal. First, reducing the number of mentions required and limiting the length of the Case Outline would reduce costs for parties with smaller and uncomplicated asset pools. Courts have, on occasion, commented on the cost-effectiveness of litigation to determine small and uncomplicated property matters.[34]

Second, the system would assist with managing judicial resources by reducing the time-consuming burden on judicial officers to consider small and uncomplicated matters in the same manner they consider large and complicated matters. This may assist with reducing the significant delays in the FCA and FCC through ensuring that matters are decided in a time proportionate to the size and complexity of the asset pool.

Finally, whilst it is acknowledged that not all self-represented parties have small and uncomplicated asset pools, the simpler procedures of the short cause system would significantly assist those who do.

## 4.4 Litigation as a form of abuse

Sometimes there is a power imbalance between parties in a family law dispute. As addressed in a different context at paragraph 4.2.3 of this submission, a party may seek to protract the dispute at the other party's detriment if they are, for example, better resourced than the other party, or satisfied with the status quo of arrangements with spousal maintenance and/or

[33] See http://www.legalaid.qld.gov.au/About-us/Policies-and-procedures/Grants-Handbook/What-do-we-fund/Family-law/Property-disputes/Property-arbitration?BestBetMatch=arbitration|33642ca2-1ee0-427b-938e-96024c6f8bda|0a4b0d77-1b6c-4201-871e-25d5b0944cb0|en-AU#toc-assessment-criteria-2 for further information.

[34] For example, in *Mitchell & Nevis* [2014] FCCA 376 Judge Brown commented: *'in my view, what is significant is that the pool is meagre and considerations of pragmatism dictate that the court should act to finalise the proprietorial interests between the parties ... given the paucity of assets, I am gravely concerned that the monies expended by Ms Mitchell in getting the case to this point may be out of proportion to what she will ultimately recoup'.*

children. In the experience of the Association's members who practise in family law, litigation can be used to further this power imbalance.

Conduct of legal practitioners

The Association's view is that the power imbalance between parties should not be perpetuated by legal practitioners through behaviour such as:

1. seeking preliminary advice from numerous barristers in an attempt to prevent those barristers from acting for the other party due to a conflict of interest (this is particularly problematic in regional areas where there are fewer options for legal representation);
2. engaging in litigation in a manner which has the dominant purpose of depleting the other party of financial resources; and
3. threatening indemnity costs where there is no reasonable basis for same.

To address such behaviour, the Association agrees with the LCA's recommendation that the *Australian Solicitor Conduct Rules* and the *Barristers Rules*, insofar as they be relevant, (collectively, 'the legal practitioner Rules') should be amended to include prohibitions against legal practitioners using litigation to perpetuate the power imbalance between the parties.

The Association would support amendments to the legal practitioner Rules to the effect that:

1. A solicitor must not engage a barrister for the dominant purpose of denying the other party access to legal representation on the basis of conflict of interest.
2. A legal practitioner must not engage in in litigation in a manner which has the dominant purpose of depleting the other party of financial resources.
3. A legal practitioner must not send correspondence which threatens, or otherwise make a threat of, indemnity costs against the other party unless:
    a. the legal practitioner believes on reasonable grounds that the material already available provides a proper basis, at law, to do so; and
    b. in the correspondence itself, the legal practitioner particularises the basis at law, and by reference to the material, to make a threat of indemnity costs.

Cost orders – as against legal practitioners

Despite the existing procedures casting obligations upon legal practitioners and r 19.10(1)(b) of the Rules making failure to comply with the pre-action procedures a specific factor to consider in a costs application against legal practitioners, the members of the Association are unaware, at least in the Brisbane Registry, of either the FCA or FCC adjourning proceedings or making a costs order based on a legal practitioner's failure to comply with the procedures. It is respectfully submitted that the Courts could respond directly to this issue with greater certainty and robustness, including costs orders where appropriate, for failure to comply with procedures.

Costs orders – as against the other party

Costs orders made against parties pursuant to sub-section 117(2) of the Act are infrequent, particularly in comparison to other areas of civil litigation with comparable legislative provisions.

In order to enhance efficient litigation, the Association is of the view that there would be significant merit in amending section 117 of the Act to strengthen the powers of the Court by providing the judicial officer with the ability to make costs orders against parties who:

1. have not complied with the relevant Rules of Court or Court directions; and/or
2. have not been ready to proceed when required; and/or
3. improperly or unnecessarily caused another party to incur legal costs.

# 5. Governance and accountability

## 5.1 Section 121 – the publication of accounts of proceedings

**Misunderstood nature of section 121(1) of the Act**

The Association notes the ALRC's statement in the Issues Paper that, *'a number of stakeholders have raised concerns about the balance struck in s 121, arguing that it does not provide adequate scope for individuals who use the family courts to share their experiences publicly'.*

The application of section 121(1) does not apply to all communications regarding family law proceedings and does not adversely affect the transparency or accountability of the Court system. Its application is limited, as explained by Justice Kenny in *Hinchcliffe v Commissioner of Police of the Australian Federal Police* [2001] FCA 1747 (emphasis added):

> *'First, before s 121(1) can be contravened, there must be a dissemination of an account of proceedings, or part of them, under the Act. I accept, as the respondents submitted, that an "account", for this purpose, is a narrative, description, retelling, or recital of such proceedings ... there is no account of proceedings merely because some allegations made in the proceedings are reiterated outside the Court. Before there can be an account of proceedings in the relevant sense, a communication must purport to narrate, describe, retell or recite something that has happened in the proceedings, or something about the proceedings*
>
> ...
>
> *Subsection 121(1) also requires that there be a dissemination of an account of proceedings or part of them "to the public or to a section of the public". In Re Edelsten; Ex parte Donnelly (1988) 18 FCR 434, Morling J considered what was intended by the reference to "the public" in s 121(1) of the Act. His Honour said at 436:*
>
> > *[I]n the context of s 121 'disseminates to the public' should be taken as a reference to widespread communication with the aim of reaching a wide*

> *audience. It cannot have been intended by the legislature that the restriction on dissemination should apply, for example, to conversations between a party to Family Court proceedings and a close personal friend'.*

Justice Kenny concluded that former spouses' communication of false statements to people who they associate with (and whom had a *'special interest in the subject-matter of the communication which is substantially greater than, or substantially different from, the interest of members of the public generally who do not have such a relationship'*) did not infringe section 121 of the Act.

**Media coverage of family law proceedings**

The privacy of children involved in family law proceedings (whether it be property or parenting) is of the utmost importance. For this reason, the Association would oppose any recommendation by the ALRC that section 121 should be amended to allow the press to identify parties to family law proceedings to *'report on matters of genuine public interest'*. Family law proceedings are deeply personal and intimate; there is rarely if ever public interest in airing such matters. This is all the more so when the parties have children.

There appears to be no valid argument as to why members of the press should publish the identity of individuals. Such publications could cause safety concerns (particularly in situations of family violence), reputational damage, and unnecessary sensationalism in the potential creation of *'celebrity'* litigants.

Most of all, whether the proceedings are property or parenting – it hurts the children.

**Proposed amendment – relaxation of the *Harman* principle**

The *Harman* principle provides that where a party is compelled to disclose documents or information, the party obtaining the documents or information cannot use it for any purpose other than for which it was given, unless it has been received into evidence.

The Association would support relaxation of the *Harman* principle so that a party who obtained, for example, a family report in family law proceedings would be able to use that report (or other such document) for a legitimate forensic report in other proceedings such as criminal proceedings,[35] or in family violence proceedings or child protection matters at a State level.

Equally, if a party says (a) in one Court, but (b) in another, those inconsistencies ought to be able to be shared and examined. The same approach should apply where a child is reported as saying something to the Report Writer, which may have legitimate forensic use in other proceedings. Where such legitimate forensic use exists, the parties ought not be put to the trouble and expense of bringing an application to a family court to seek permission for its use.

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[35] See, for example, *Miller & Murphy* [2016] FCCA 974 where Judge Brown of the Federal Circuit Court allowed a party to utilise a family consultant's report in their defence of intervention order proceedings in the Magistrates Court, in circumstances where the evidence of the party who sought the intervention order was inconsistent with the child's views recorded in the report.

It should also be the case that a Family Report produced in family law proceedings ought to be able to be tendered into evidence in family violence proceedings, to assist the Magistrate in making Orders which protect the parties and children from harm, but also work for that family.