Australian Government
Attorney-General's Department

# Submission of the Attorney-General's Department

## Australian Law Reform Commission

*Review of the family law system*

# 1. Introduction

The Attorney-General's Department (the department) thanks the Australian Law Reform Commission (ALRC) for its comprehensive work to date in conducting its review of the family law system. The ALRC's Discussion Paper sets out 124 proposals for change to the family law system and asks 33 questions for further consideration. The proposals are based on the large number of submissions received in response to the ALRC's earlier Issues Paper, confidential contributions from people with personal experience of the family law system, and the ALRC's own review of research and other reports relating to the family law system.

The careful analysis and broad ranging proposals made in the Discussion Paper make a valuable contribution toward a plan for reshaping the family law system to ensure it better meets the needs of Australian families.

This submission does not respond to each of the Discussion Paper's proposals, but seeks to draw to the ALRC's attention issues within the terms of reference that may benefit from further consideration in the final stage of the review, and refers to relevant resources that may assist.

# 2. Addressing concerns about adversarial processes

## Terms of reference

A key matter contained in the Terms of Reference for the ALRC review is consideration of:

> *whether the adversarial court system offers the best way to support the safety of families and resolve matters in the best interests of children, and the opportunities that exist for less adversarial resolution of parenting and property disputes.*

This term of reference recognises longstanding concerns about the appropriateness of adversarial approaches in the context of resolving post-separation family disputes.[1]

## Strong support for less-adversarial processes

Consistent with findings and observations documented in previous expert reports and inquiries, the Discussion Paper identifies that a strong theme, in submissions and consultations, has been the genuine concern held by stakeholders and users of the family law system that, in a family law setting, adversarial processes escalate conflict between separating parents, with negative flow-on effects for children's wellbeing;[2] and, more generally, that the use of an adversarial model is poorly adapted for dealing with family

[1] For example, House of Representatives Standing Committee on Family and Community Affairs *Every Picture Tells a Story* Report (2003) (*Every Picture Tells a Story* Report); Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protections System (2016), p. 22;* Senate Standing Committee on Social Policy and Legal Affairs' Inquiry into *A better family law system to support and protect those affected by family violence* (2017) (SPLA Inquiry Report).

[2] The Australian Institute of Family Studies (AIFS) research report *Post Separation Parenting, Property and Relationship Dynamics after Five Years* (2014) observed that a low or worsened child wellbeing was more likely to be reported when there was a negative inter-parental relationship after separation, or safety concerns.

conflict.[3] Importantly, the Discussion Paper reports that this theme was also expressed by children and young people who shared their experiences and views about the family law system.[4]

The Discussion Paper reflects stakeholder submissions received by the ALRC which call for the family law system to have a 'greater focus on problem-solving and conflict reduction', and argue that there should be 'a move towards a greater use of non-adversarial approaches as much as possible.'[5] Those with experience in the family law system recommend reforms where 'non-adversarial responses' are the 'mainstream' component of the system.[6]

The Discussion Paper makes clear that increasing the capacity for conflict reduction by expanding the availability and flexibility of non-adversarial dispute resolution processes, and enhancing access to timely and joined up adjudication processes, are key to reshaping the family law system to better serve families and children.[7]

## Proposals for expanding use of non-adversarial dispute resolution processes

Consistent with the broad support expressed in submissions for greater use of less-adversarial processes for resolving family law disputes, many of the proposals contained in the Discussion Paper are aimed at expanding the availability, flexibility and use of non-adversarial dispute resolution processes. For example:

- The proposed establishment of Families Hubs (proposals 4-1 – 4-3) has a policy goal of better supporting separating families to access appropriate and relevant services, including less-adversarial dispute resolution services
- The proposal to require parties to attempt family dispute resolution prior to lodging a court application for property and financial matters (proposal 5-3)
- The proposal that government increase the availability of non-adversarial and culturally safe models of dispute resolution for parenting and financial matters (proposals 5-9– 5-11), and
- The proposal that a post-order parenting support service be developed and delivered to assist parents to implement parenting orders and manage their co-parenting relationship (with the aim of reducing conflict and the risk of future conflict between parents), through key support services including education, dispute resolution and decision-making (proposals 6-9 – 6-11).

## Calls for a less-adversarial adjudication process

In addition to the range of proposals for the expansion of non-adversarial dispute resolution processes and recommendations to improve access to these processes and make them a mainstream part of the family law system, the Discussion Paper draws attention to stakeholder concerns that less-adversarial adjudication options are not accessible or available, particularly for those cases where parents may not be able to reach an agreement about parenting arrangements through family dispute resolution. Many stakeholders recommend that a less-adversarial and 'solution focussed' process be developed and applied for all children's matters.

> *A key concern raised in the responses to the Issues Paper is that, while much has been achieved through the development of alternative dispute resolution services, families who need an adjudication process continue to face a process that is ill-suited for dealing with family relationship issues.*[8]

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[3] Discussion Paper, p. 10.
[4] Ibid, p. 11.
[5] Ibid, p. 10.
[6] Ibid, p. 13.
[7] Ibid, p. 16.
[8] Ibid, p. 138.

Stakeholders also emphasise a need for those adjudicating family law disputes to incorporate a problem-solving approach.[9] Calls for a problem-solving approach are consistent with the evidence that supporting parents to reduce conflict is beneficial for children's wellbeing.[10]

The Discussion Paper reports that the main reform direction proposed in response to these recommendations and concerns has been the development of a multi-disciplinary adjudication process, led by a Panel of Experts sitting outside of the traditional court system. In this context, the Discussion Paper refers to the Government's proposal to pilot the Parenting Management Hearings (PMH) Panel. The Family Law (Parenting Management Hearings) Bill 2017 (PMH Bill) was introduced into the Senate in December 2017. The Discussion Paper notes that there has been a mixed response to the proposed PMH Panel model, and that concerns have been raised with the ALRC and through the Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the PMH Bill about:

- the proposal to require leave for parties to be legally represented
- the qualifications of Panel members and their ability to deal with cases involving family violence
- the absence of cultural competency guidelines in the legislation
- the need for further information about the proposed risk assessment processes, and
- the scope for children and young people to participate in the hearing process.

Of note, a significant number of submissions to the Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the PMH Bill called for implementation of the PMH Panel in two locations to be delayed until after the completion of ALRC review. Numerous stakeholders have called for the proposed PMH model to be considered in detail by the ALRC review.[11]

The department's submission to the Senate Legal and Constitutional Affairs Legislation Committee's inquiry on the Bill, responding to concerns raised by stakeholders, can be found on the Committee's website, at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/ParentingManagement/Submissions. A copy is also provided as an **attachment** to this submission.

As articulated in the submission, the department considers that the proposed PMH pilot is an important opportunity to gather evidence, through a carefully designed evaluation methodology, about the operation of an inquisitorial (less-adversarial) and multi-disciplinary model for resolving family law parenting disputes.

In particular, the department's submission explains the stringent qualification requirements for both legally and non-legally trained Panel members; the significant safeguards contained in the Bill to with respect to matters involving family violence and other features of the model which would assist the Panel to respond effectively to family violence; the proposed approach to risk identification and assessment; and the policy rationale for the approach taken to legal representation.

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[9] Ibid, p. 142.

[10] Joan Kelly, *Risk and Protective Factors Associated with Child and Adolescent Adjustment Following Separation and Divorce: Social Science Applications* in *Parenting Plan Evaluations: Applied Research for the Family Court* (2012).

[11] For example, the following submissions to the inquiry into the PMH Bill: Women's Legal Services Australia submission (page 8), Law Council of Australia submission (page 6) and Victorian Family Law Bar Association submission (page 2).

The department notes that the ALRC's Discussion Paper poses the following questions with respect to less-adversarial decision making processes:

> Question 6-3: What changes to the design of the Parenting Management Hearings process are needed to strengthen its capacity to apply a problem solving approach in children's matters? Are other changes needed to the model?
>
> Question 6-4: What other ways of developing a less adversarial decision making process for children's matters should be considered?

Given the extent of support expressed for less adversarial approaches, and the view of many who work in the family law system that the current litigation model is not well adapted for supporting the safety of families and resolving matters in the best interests of children, the department encourages family law stakeholders to respond to these questions. The department hopes that as a result of consultations and submissions following release of the Discussion Paper, the ALRC will be in a position to more fully address proposals for less-adversarial adjudication processes in the final report.

In particular, in addition to further consideration of options for less-adversarial adjudication processes outside the traditional court system (such as through the PMH model), the department sees benefit in the ALRC continuing to explore the extent to which less-adversarial and problem-solving approaches should, and could – consistently with Constitutional requirements – be adopted, or incorporated, within the court setting.

In this context, it is also relevant to note that the framework in Division 12A of Part VII of the *Family Law Act*, which was enacted in 2006, provides a foundation for a less-adversarial approach in all children's matters, but that this framework has not been utilised to its potential. The department notes in this regard:

- the ALRC's call, in its earlier Issues Paper, for feedback about 'the principles in Division 12A for conducting child-related proceedings' [12]
- the ALRC's statement, in its Discussion Paper (made in the context of discussion on 'removal of unused provisions [of the Family Law Act], if they are no longer useful'), that 'anecdotally, substantial parts of Division 12A of Part VII of the Family Law Act are not used by judicial officers due to resourcing constraints, or a preference not to utilise the discretionary elements of these provisions'[13]
- calls from some stakeholders for Division 12A to be 'reinvigorated'[14]
- views of some stakeholders that the Division 12A approach is too resource intensive and time consuming for judicial officers to manage in the context of current hearing delays[15]
- stakeholder support for the development of an Indigenous List in the Federal Circuit Court in Sydney, which employs a problem-solving approach in parenting matters involving Aboriginal and Torres Strait Islander children, and[16]
- challenges for legal practitioners posed by less-adversarial decision-making models[17] / training and education needs.[18]

The department supports the ALRC's further consideration of reform approaches in this area.

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[12] Issues Paper, p. 46.
[13] Discussion Paper, p. 36.
[14] Issues Paper, p. 65.
[15] Ibid.
[16] Ibid.
[17] Less Adversarial Trial Handbook, Family Court of Australia (June, 2009).
[18] Law Council of Australia, Submission 43, para 151.

# 3. Compliance and Enforcement

## Terms of reference and proposal for post-order parenting support program

The Terms of Reference for the inquiry note:

> *the desirability of finality in the resolution of family disputes and the need to ensure compliance with family law orders and outcomes.*

More than 70 per cent of separated couples resolve parenting and property arrangements between themselves, without the need for court involvement.[19] Many of these couples also maintain amicable or good relationships post-separation. These couples are more likely (than those who have parenting orders issued by a court) to agree on changes to their parenting arrangements over time as the needs of their children and other factors require it, and are therefore more likely to avoid court altogether. A number of the proposals set out in the Discussion Paper are intended to support the continuance and improvement of this outcome.

However, for those separated couples who require court intervention to resolve parenting matters (less than 30 per cent of all separating couples), the situation is different. There is a concerning trend among these parents of returns to court. That is, parents whose children are the subject of 'parenting orders' (in contrast to those who agree on parenting arrangements outside of court) are more likely to be involved in further court proceedings down the track.[20]

Stakeholders observe that there is a tendency for inter-parental conflict to escalate and solidify during family court proceedings, and this leaves parents ill-equipped to manage co-parenting arrangements after the proceedings come to an end.[21] Ongoing parental conflict is also a key contributing factor to non-compliance with court orders and returns to court.[22] Applications for court enforcement of parenting orders are more likely to be part of an ongoing conflict involving multiple court proceedings, rather than one-off disputes.[23]

For this reason, the ALRC proposes that there is a need to better support parents and those with parental responsibility, to implement parenting arrangements. Investment in these support services has the potential to reduce the need for parents to return to court to have orders amended or enforced. To this end, the Discussion Paper primarily examines issues of non-compliance with family court orders and enforcement mechanisms in the context of a proposal to establish a post-order parenting support program (proposals 6-9 – 6-11).

The proposal for a post-order parenting support service would be aimed at reducing conflict between parents, and helping those families that have already engaged with the court to avoid returning to court. The framework for the service would be based on a less-adversarial problem-solving approach to parental conflict. The service would provide participants with education about child development and conflict management; dispute resolution services to assist parties resolve conflict; and assistance with decision-making in relation to the implementation of parenting orders.[24]

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[19] Australian Institute of Family Studies, *Separated parents and the family law system: What does the evidence say?* (2016).
[20] Discussion Paper, p. 145.
[21] Ibid; referencing the Australian Institute of Family Studies, *Court Outcomes Project – Evaluation of the 2012 Family Violence Amendments* (2015).
[22] Helen Rhoades, *Contact Enforcement and Parenting Programmes – Policy Aims in Confusion?* (2004).
[23] Discussion Paper, p. 146
[24] Ibid, pp. 148-149.

The Discussion Paper makes a number of other proposals that may also support compliance with family court orders, in particular, by ensuring that family law professionals are provided with appropriate training and professional development to facilitate the best decision-making possible. In addition, engaging with families early in the development of parenting orders process, to support communication between parents and the potential for effective co-parenting arrangements where this is possible, is key. Also related to this are the following proposals:

- information and education campaigns (proposals 2-1 and 3-9)
- legislative clarification, including the processes for applying for new parenting orders once final orders have been made (proposals 3-1 , 3-8)
- community-based Hubs that connect families to multiple professional services to support families resolve their family law matters (proposals 4-1, 4-3), and
- the introduction of a workforce capability plan (proposals 10-1 – 10-3).

## Context and concerns regarding non-compliance and enforcement

Family law matters are different in nature from other civil law matters, particularly where children are involved. Noting the need to ensure the best interests of the child are met and the likelihood of an ongoing relationship to some degree between most parties, the appropriateness of available remedies for contraventions of orders often comes into question. The department recognises that courts may be faced with difficulties in balancing the interests of upholding orders of the court, fulfilling expectations of litigants, instituting appropriate deterrents for non-compliance and focusing on the best interests of children. This is compounded by the fact that courts when making orders are required to consider the future relationship of parties, particularly in relation to the care of children; enforcement action that punishes a parent for non-compliance may not always be in a child's best interests.

Further, as highlighted in the Discussion Paper, in the context of family law, it can be the case that the parties have a range of (non-malicious) reasons for not complying with parenting orders. Similarly, not all contraventions will necessarily relate to a dispute about the orders[25], and indeed some parents may mutually agree to 'breach' orders by adjusting the co-parenting arrangement over time to meet the needs of their growing children, albeit that the changed arrangements would, strictly speaking, be in contravention of the court orders in relation to those children.

The department is aware of a number of barriers and issues relating to the enforcement of family court orders, expressed by stakeholders, including:

- the financial burden and stress of a party having to bring an application to have orders enforced
- the uncertainty of whether orders will be enforced, and how, noting the broad discretion of the court
- if orders are not enforced but are varied, whether they will be complied with or will ongoing litigation be required, and
- the underlying reasons for non-compliance with family court orders and the impacts and risks, particularly for children, of enforcement.

## Exploring options to support families to comply with family court orders

The department considers that there is no uniform or 'one-size-fits-all' response to issues of non-compliance and enforcement of parenting orders. There are a range of avenues and options to encourage and ensure compliance with family court orders. Families have individual experiences, needs and outcomes, and any compliance and enforcement framework needs to be adaptable to cater to a range of requirements.

[25] Discussion Paper, p. 146.

The department would welcome the ALRC's further investigation into how compliance and enforcement could be considered across the full spectrum of families' interaction with the family law system. Supporting compliance with orders could commence as early as possible in the process, from drafting orders to ensure they are achievable and framed in a way that encourages compliance; ensuring parties understand orders and their respective obligations; through to informing parties of the consequences of non-compliance; and available options for enforcing orders.

An enforcement framework, while aiming to provide finality, also needs to be flexible, in recognition of the fact that circumstances change, children grow and develop, and family relationships do not remain static. As noted in the Discussion Paper, family dynamics change and circumstances often necessitate adjustment to agreements between parties.[26]

Noting these considerations, the department supports the ALRC's further examination of options for early support for families in developing family court orders; support following the making of orders; and processes and consequences for non-compliance. As established by the Terms of Reference of the review, the principles underpinning this should focus on resolution of family law matters in a manner that is less adversarial, inclusive, cost effective, and timely.

The department looks forward to the ALRC's further exploration of these issues.

[26] Discussion Paper, p. 145.