



Association of Family and Conciliation Courts Australian Chapter

Submission in response to the ALRC Review of the Family Law System

12 November 2018

TO:

Australian Law Reform Commission

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CONTENTS

About the Association of Family and Conciliation Courts ("AFCC")	1
AFCC - Australian Chapter.....	2
Abbreviations.....	3
Definitions.....	3
Acknowledgments	4
Introduction and Executive Summary	5
Responses of the AFCC Australia	6
Chapter 2. Education, Awareness and Information	6
Proposal 2-2	6
Proposal 2-3	8
Chapter 3. Simpler and Clearer Legislation.....	9
Proposal 3-1	9
Proposal 3-4	11
Proposal 3-6	13
Proposal 3-10	14
Proposal 3-11	15
Proposal 3-18	16
Proposal 3-19	17
Chapter 4. Getting Advice and Support	18
Proposal 4-1	18
Proposal 4-2	20
Proposal 4-4	21
Chapter 5. Dispute Resolution	22
Proposal 5-3	22
Proposal 5-4.....	24
Proposal 5-5	25
Question 5-1	26
Proposal 5-6	27
Proposal 5-7	28
Proposal 5-8	30
Chapter 6. Reshaping the Adjudication Landscape.....	31
Proposal 6-12	31
Chapter 7. Children in the Family Law System.....	33
Proposal 7-7	33
Proposal 7-11	34
Chapter 8. Reducing Harm.....	35

Proposal 8-1	35
Proposal 8-3	37
Proposal 8-4	38
Proposal 8-5	39
Question 8-3	40
Chapter 9. Additional Legislative Issues	41
Proposal 9-8	41
Chapter 10. A Skilled and Supported Workforce	42
Proposal 10-3	42
Question 10-1	43
Proposal 10-8	44
Question 10-4	45
Proposal 10-9	46
Proposal 10-11	48
Proposal 10-13	49
Proposal 10-14	50
Question 10-6	51
Chapter 11. Information Sharing	52
Proposal 11-1	52
Proposal 11-2	53
Proposal 11-3	54
Question 11-2	55
Proposal 11-4	56
Proposal 11-5	57
Proposal 11-6	58
Proposal 11-7	59
Proposal 11-8	60
Proposal 11-9	61
Proposal 11-10	62
Proposal 11-11	63
Chapter 12. System Oversight and Reform Evaluation	65
Proposal 12-1	65
Proposal 12-8	67
Question 12-2	68

About the Association of Family and Conciliation Courts ("AFCC")

AFCC is an interdisciplinary, international association of professionals dedicated to improving the lives of children and families through the resolution of family conflict. AFCC promotes a collaborative approach to serving the needs of children among those who work in and with family law systems, encouraging education, research and innovation and identifying best practices. Worldwide membership of AFCC stands at approximately 6,000.

Vision:

A justice system in which all professionals work collaboratively through education, support and access to services to achieve the best possible outcome for children and families.

Values:

- Collaboration and respect among professions and disciplines
- Learning through inquiry, discussion and debate
- Innovation in addressing the needs of families and children in conflict
- Diversity in family structures and cultures
- Empowering families to resolve conflict and make decisions about their future

AFCC - Australian Chapter



The Australian Chapter of AFCC was formed to bring together Australian Family Law professionals including judicial officers, lawyers, psychologists, social workers, other mental health professionals, mediators, educators, researchers, academics, welfare groups and administrators to share in formal and informal opportunities for education, training, research and professional collaboration.

There are many benefits of having a national interdisciplinary association of family law professionals that is also part of a larger international community as the chapter has formed various committees to focus on different family law issues and facets of professional practice and hopes to encourage the formation of state and local groups around their particular needs and interests.

The chapter also offers a range of professional development activities, conferences and presentations to enhance family law practice and provide opportunities to expand on current knowledge about how best to serve families and children.

Australia wide membership includes family law practitioners across the full range of professional roles, family law academics and researchers and organisational members including Not for Profit Welfare organisations.

The Australian Chapter of AFCC also supports a number of committees. This submission has been formulated by the AFCC Legal Issues Committee and approved for submission to the ALRC by the board of AFCC Australia.

Abbreviations

Term	Abbreviation
Association of Family and Conciliation Courts	AFCC
Australian Law Reform Commission	ALRC
The Convention on the Rights of the Child	CRC
Family Court of Australia	FCoA
Family Dispute Resolution	FDR
Family Law Act	FLA
Federal Circuit Court of Australia	FCC
Federal Circuit and Family Court of Australia	FCFCA
Lesbian, Gay, Bisexual, Transgender, Intersex and Questioning	LGBTIQ

Definitions

Term	Meaning
Family Law Proceedings	contested proceedings in one of the Family Law Courts
Expert	includes but not limited to psychologist, psychiatrist, and medical practitioners
Private experts	experts appointed and funded privately by parties
Federal experts	experts appointed by and funded by the FCFCA (usually employees of the Courts)

Acknowledgments

The AFCC Australia acknowledges the AFCC Legal Issues Committee, which was instrumental in the preparation of this submission, with further contribution by the members of board of AFCC Australia.

The AFCC Australia confirms that Dr Andrew Bickerdike, AFCC Board Member, was not involved in the preparation of this submission.

Introduction and Executive Summary

The AFCC Australia contributed by way of submission in response to the Issues Paper released by the ALRC and has subsequently considered the *Review of the Family Law System* Discussion Paper published on 2 October 2018 by the ALRC.

AFCC members strive to assist and empower families to resolve conflict and make decisions about their future whilst acknowledging the diversity in family structures in the Australia family law community.

AFCC cautiously supports the ideas raised the Discussion Paper that encourage families interacting with the family law system to:

- a) educate themselves;
- b) access expert help at the earliest opportunity; and
- c) explore and manage their own dispute resolution opportunities to avoid litigation.

Understanding the high proportion of self-represented litigants in the Australian family law system, AFCC supports proposals resulting in the simplification of the language within the family law legislative framework.

The AFCC seeks further consideration by ALRC about the following:

- a) protecting children from harm, in particular, systems abuse and from being exposed to numerous medical practitioners, including experts; and
- b) the accreditation of experts working with families and children in any setting.

The AFCC is conscious of the government resourcing required to implement change and takes the view that:

- a) there are already several structures in place which may be improved rather than replaced; and
- b) the ALRC may not need to implement such a wholesale change to the family law system, instead build upon existing networks and system.

Responses of the AFCC Australia

Chapter 2. Education, Awareness and Information

Proposal 2-2

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

The AFCC welcomes the proposal generally that any national education and awareness campaign should be developed in consultation with Aboriginal and Torres Strait Islander people, culturally and linguistically diverse, LGBTIQ and disability organisations and be available in a range of languages and formats.

It is the AFCC's view however that the need for information and resources across this broad group of people is vastly different and that consultation with each group is likely to lead to responses that meet the needs of one group but are in direct contrast to another. In this regard, the AFCC adopts the view of the Productivity Commission that a "one size fits all approach" is unlikely to be effective¹

It is submitted that Aboriginal and Torres Strait Islander people, as the first nations people, have specific cultural needs and that recognition of same is best achieved by consultation with community elders and community members with a view to preparing resources and information that is specifically targeted to Aboriginal and Torres Strait Islander people. It is further submitted that consultation alone is insufficient to ensure that there is proper engagement with Aboriginal and Torres Strait Islander people and to ensure that the community has trust and belief in the resources being prepared. It is well recognised, including through an analysis of the FCFA statistics, that engagement with the family law system is much lower in Aboriginal and Torres Strait Islander communities when considered against non-indigenous communities. It is further well recognised that a significant cause of this poor engagement is a lack of trust for the family system having regard to the history of government intervention in the removal of Aboriginal and Torres Strait Islander children from country and community. It is suggested that consultation alone will be insufficient to address these historical trust issues and that it should be mandatory to have representation be respected members of Aboriginal and Torres Strait Islander community on any organisation tasked with the design and drafting of resources.

¹ Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 2, 2014) vol I, 162.

The AFCC suggests that the Proposal be amended so as to reflect a specific consultation and engagement process with Aboriginal and Torres Strait Islander people, as distinct from other groups, with a view to a specific resource being prepared with information specific to Aboriginal and Torres Strait Islander communities and that it be mandatory for any organisation preparing such resources to have members that are respected members of Aboriginal and Torres Strait Islander communities.

Proposal 2-3

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

The AFCC welcomes the use of health and education systems to facilitate the promotion of a national education and awareness campaigns and in particular, sees this as a significant advancement for Aboriginal and Torres Strait Islander communities and people living in rural and remote areas.

As is recognised in the Discussion Paper, many families entering the family law system have had recent engagement with health and/or education services. It is submitted that this is particularly so for Aboriginal and Torres Strait Islander communities and people living in rural and remote areas, where local health and educational services are sometimes the only government services within the local community or region. With respect to Aboriginal and Torres Strait Islander people they are also often trusted resources within local communities that will likely encourage greater engagement within the community.

It is submitted by the AFCC that the use of existing government access points, such as health and education providers, will likely lead to greater accessibility for both Aboriginal and Torres Strait Islander people and regional and remote communities. It is the view of the AFCC that these services will be a greater point of contact for regional, rural and remote communities than the Families Hubs proposed in Proposal 4. The use of such existing services will also minimise the potential financial impediments to the implementation of Proposal 2 which in turn, may allow for the allocation of limited resources to other significant Proposals.

Chapter 3. Simpler and Clearer Legislation

Proposal 3-1

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

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

The AFCC submits as an overarching observation, that proposals pertaining to the simplification of the relevant legislation pertaining to Family Law must address the issue of there currently being two distinct Acts and two sets of Rules pertaining to the administration of Family Law. It is submitted that this adds to confusion in relation to accessing the FCFCA.

The AFCC submits that there ought to be one dominant Act in relation to the application of Family Law and one set of Court Rules, subordinate to such Act and that such legislation and subordinate rules ought to be applied by any Court exercising jurisdiction under the Act.

As the theme of this submission shows, the AFCC would support and welcome all

measures taken to considerably simplify the FLA in order to substantially improve readability and usability and to remove, so far as is possible, all duplication or overlap of provisions. By way of one example, the AFCC submits that users of the Family Law system would benefit from the current provisions of the FLA pertaining to married couples and de facto couples being merged and any inconsistencies in the current provisions in this regard being resolved. The AFCC would also welcome the simplification of the provisions in Part VIII B regarding superannuation interests to improve usability.

The AFCC would endorse the redrafting of the FLA, Rules, Regulations and subordinate legislation to modernise the language used, however, it is suggested that care should be taken when considering removal of terms such as 'affidavit' and 'subpoena' (as an example) with terms such as 'witness statement' and 'order to produce documents' not to create an unintended situation of introducing unnecessarily lengthier and potentially more complex terms when viewed in terms of every day practice and how this might translate to the use of such terms in orders or directions of the Court.

It is the experience of AFCC members that terms such as Affidavits and Subpoenas are also known and understood in the wider community, and given it is third parties to FCFCA proceedings who are required to produce documents or attend court on subpoena, there seems little advantage to changing the language in one court system, without all the other courts following suit.

In FCFCA proceedings it is common practice for relevant records to be sought from sources such as Banks, Police and government departments, schools and medical and allied health professionals, all of whom would be aware of customary language of "subpoena".

It is suggested that the use of focus groups might assist in determining whether particular language or terms as currently used, ought be removed and replaced altogether or whether there is scope for such terms to be explained in the definitions of the FLA or through greater use of explanatory information.

The AFCC would support the use of subordinate legislation to 'carve out' provisions contained in the current Act which are logically capable of removal by virtue of discrete subject matter. However, in this regard the AFCC suggests that care should be taken to:

- provide a clear list within the FLA, of the subordinate legislation to be read in conjunction with the FLA;
- to adopt the same style of numbering and format for consistency between the FLA and all subordinate legislation;
- as far as is possible to ensure all definitions are consistent throughout the FLA and all subordinate legislation; and
- as far as is possible, avoid or reduce the need to cross reference between multiple subordinate legislation on any particular topic.

Proposal 3-4

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

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

The AFCC supports a recognition as proposed that “decisions about the care of an Aboriginal and Torres Strait Islander child should support the child’s right to maintain and develop the child’s cultural identity, including the right to: maintain a connection with family, community, culture and country and have the support, opportunity and encouragement necessary to participate in that culture, consistent with the child’s age and developmental level and the child’s views, and to develop a positive appreciation of culture.”

It is submitted that the proposed amendment is an appropriate consolidation of the current elements of the FLA and provides recognition of the significance of the matters of culture when determining the best interests of Aboriginal and Torres Strait Islander children.

The proposed amendment places an onus on the Court determining an application to have proper and thorough regard to elements of culture significant to Aboriginal and Torres Strait Islander people, rather than the general non-specific considerations provided by the existing ss.60CC(3h) and (6) of the FLA.

The proposed amendment also recognises the significance of community and country to parenting of Aboriginal and Torres Strait Islander people and in doing so recognises the broader concepts of family and care providers within communities.

Further, whilst recognising the particular importance of community and culture for Aboriginal and Torres Strait islander children, the AFCC wishes to emphasise that community and culture should be taken into consideration for all children, particularly those from a culturally and linguistically diverse (“CALD”) background. All children have a right to maintain and develop a cultural identity, including the right to maintain a connection with family, community and culture and to have the support, opportunity and encouragement necessary to participate in that culture, consistent with the child’s age, developmental level and the child’s views.

Proposal 3-6

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

It is the AFCC's view that Proposal 3.6 is sufficiently met by Proposal 3.4 and that there is no need for a separate statement within the Act.

Proposal 3.4 sets out that Aboriginal and Torres Strait Islander children's connection to family, community, culture and country is a required assessment in determining the child's best interests. In order to recognise the important of this for Aboriginal and Torres Strait Islander children and families, the AFCC supports it being included within s.60CC of the FLA. A further summary style statement within the FLA as proposed in Proposal 3.6 creates duplication that is unnecessary and inconsistent with the primary objective of simplifying the FLA.

Proposal 3-10

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

As a fundamental proposition, the AFCC submits that all provisions regarding the division of property and spousal maintenance as they currently pertain to married couples and de facto couples ought to be merged and any inconsistencies addressed to ensure parity.

It is suggested that such an exercise will significantly increase readability and usability of the FLA as well as reducing the current length of the FLA by omitting large sections which would no longer be warranted.

It is also suggested by AFCC that the provisions pertaining to the division of property would be rendered more easily interpreted and usable if they were amended to make the overall decision making process clearer.

It is suggested that the steps taken by a Court in determining a division of property enshrined by the Full Court in *Hickey v Hickey and the Attorney General for the Commonwealth of Australia (Intervenor)* 2003 FLC 93-143 and later particularised by the High Court in *Stanford v Stanford* [2012] HCA 52 should be set out in the FLA clearly and sequentially to avoid users of the FLA, many of whom are self-represented, having to 'jump about' in determining the relevant sections to apply.

Proposal 3-11

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

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

The AFCC endorses a greater emphasis on the protection of persons who have experienced family violence being considered in the context of matters relating to the division of property and spousal maintenance. Specifically, the AFCC supports amendments to the FLA at both the contributions and future needs stages of the decision making pathway as proposed, which go beyond the test in the decision of the Full Court of the Family Court in *Kennon & Kennon* [1997] FamCA 905. The AFCC welcomes such a robust approach to promoting the protection of persons who have experienced family violence in the context of property matters.

Proposal 3-18

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

The AFCC considers that users of the FLA, many of whom are self-represented, might benefit from the provisions regarding spousal maintenance being grouped more sequentially and under a clearer and more dedicated section to improve usability of the FLA.

Proposal 3-19

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

The AFCC also submits that in terms of any substantive change to the relevant factors considered in the making of spousal maintenance orders, at the very least, the inclusion of any findings of fact regarding the existence of family violence between parties being included as a compulsory consideration in section 75(2) of the FLA.

Chapter 4. Getting Advice and Support

Proposal 4-1

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

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

The AFCC supports the proposal in general terms for creation of Families Hubs. The AFCC recognises that participants within the family law system often encounter disjointed service provision with significant overlap in services.

The AFCC however questions whether it is realistic to create a new model of Families Hub which would require a significant financial investment by the Australian Government, or whether limited resources would be better utilised in the creation of Families Hubs within existing service providers. The Committee suggests that this is particularly relevant for Aboriginal and Torres Strait Islander communities and litigants in remote, regional and rural areas.

With respect to Aboriginal and Torres Strait Islander communities, it is suggested that consideration should be given to Indigenous Families Hubs being established within services specific to Aboriginal communities, such as the Aboriginal Medical Service or Aboriginal Legal Service. The creation of such Indigenous Families Hubs will lead to greater engagement from members of the community as there are established and trusted relationships within those services.

With respect to remote, regional and rural areas, it is suggested that Families Hubs will only be of assistance if they are accessible by the community. Given the resourcing that would no doubt be involved in funding the Proposal, smaller scale modelled Hubs for regional areas using existing service providers such as medical and educational facilities would best service the local communities.

In order to maximise appropriate resourcing, it is submitted that the role of the existing Family Relationships Centres should be redefined upon the creation of Families Hubs to ensure that the overlap of services is avoided.

The AFCC proposes that the role of Family Relationships Centres should be redefined as a provider of Family Dispute Resolution and counselling and related services. Currently, it is the experience of the AFCC members that parties are referred to Family Relationships Centres frequently for assessment of their ongoing needs and that this duplication should be avoided so as to ensure funding is appropriately allocated across the system.

The Legal Issues Committee suggests the following:

- a) The Australian Government should work with state and territory governments to establish community-based Indigenous Families Hubs to provide culturally appropriate support to separating families.
- b) The Australian Government should work with state and territory governments to establish small scale community-based Families Hubs in regional, rural and remote communities in the event that larger Families Hubs are inaccessible to local community.
- c) The role of Family Relationships Centres should be redefined upon creation of the Families Hubs to avoid duplication of assessment services and ensure appropriate funding allocation.

Proposal 4-2

The Australian Government should work with state and territory governments to explore the use of digital technologies to support the assessment of client needs, including their safety, support and advice needs, within the Families Hubs.

The AFCC endorses the proposal to explore the use of digital technologies to support the assessment of client needs within the Families Hubs, especially for those residing in remote, regional and rural areas. This will also allow greater access to services for FCFCA litigants who are already disadvantaged in respect of access to court services.

The AFCC emphasises however that engagement through digital technology is insufficient to meet the long term and complex needs of families residing in remote, regional and rural areas and that beyond assessment; access to ongoing services is best achieved by Families Hubs, even if on a smaller scale, being located within the local community.

Proposal 4-4

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

Whilst the AFCC supports the consultation of a wide range of stakeholders in design on Families Hubs, it is submitted that with respect to Aboriginal and Torres Strait Islanders communities, consultation on the design of the Hubs is insufficient to ensure they are culturally appropriate.

The AFCC in the first instance proposes that specific Indigenous Hubs be established to meet the needs of Aboriginal and Torres Strait Islander people. In the event Families Hubs remain generalist as per Proposal 4.1, it is submitted that that the Proposal be amended so as to reflect a specific consultation and engagement process with Aboriginal and Torres Strait Islander people, as distinct from other groups and that it be mandatory for respected members of Aboriginal and Torres Strait Islander workers to be on site at each Families Hub.

Chapter 5. Dispute Resolution

Proposal 5-3

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

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

It is submitted by the AFCC that amendments to the FLA that mandate parties to comply with the requirements of section 60I of the FLA (or similar as proposed) prior to filing applications for a division of property and/or spousal maintenance would greatly assist in early resolution of matters and, in turn, reduce the number of applications filed in the FCFAC. The AFCC Australia supports this proposal.

For those applications that are filed in the FCFCA system, as an overriding principle, the AFCC would support and welcome the establishment of an early and comprehensive triage system designed to quickly identify the needs of clients and thereafter to have the ability to streamline matters into specialised lists and programs suited to their needs, including to highly specialised FDR services designed to support families where family violence is a feature.

It is suggested that Legal Aid commissions, might, with further funding, establish panels of private practitioners who are able to offer 'un-bundled' legal services to parties involved in small property matters, both in a representative capacity and in the capacity as an FDR facilitator.

For those matters where family violence is a feature and as such, identified as not being appropriate for FDR in accordance with the exceptions set out in ss 60I(9)(b)(i)-(iv) of the FLA and as proposed in the Proposal 5-3, it is submitted that with the

assistance of a triage system, such matters might be diverted to specialised conciliation lead jointly by a Registrar and a Family Consultant within the court structure. It is accepted that this would require an increase in the resources available to the courts to cater for such services.

Proposal 5-4

The Family Law Act 1975 (Cth) should be amended to specify that a court must not hear an application for orders in relation to property and financial matters unless the parties have lodged a genuine steps statement at the time of filing the application. The relevant provision should indicate that if a court finds that a party has not made a genuine effort to resolve a matter in good faith, they may take this into account in determining how the costs of litigation should be apportioned.

The AFCC considers that requiring a Genuine Steps Statement to be filed in conjunction with an Initiating Application as well as amendments to the FLA requiring parties to comply with s 60I in financial matters might be excessive.

If parties are required to obtain a s 60I certificate, as the AFCC Australia endorses, it is submitted that this is all that ought to be necessary at the time of filing an application seeking orders for a property adjustment and/or spousal maintenance.

The AFCC considers that a Genuine Steps Statement might still have its uses but suggests that consideration be given to requiring such a document to be filed in the context of trial directions. That way, the document could be tailored to capture the efforts of the parties prior to filing the Initiating Application as well as their conduct throughout the course of the litigation.

The AFCC Australia endorses the overriding principle that an obligation on parties to make a genuine effort to resolve their matter in good faith does not end at the time of filing an Initiating Application.

Proposal 5-5

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

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

The AFCC would welcome amendments to the FLA that require FRD practitioners to provide a certificate to the parties (or one party in certain circumstances) as proposed. However, it is suggested that such certificates should also include an option in terms where:

- the matter commenced and the parties made a genuine effort to resolve their matter in good faith, but were unable to ultimately reach resolution of the issues in dispute; and
- the matter commenced but was terminated due to the failure of one or both of the parties to provide early and full disclosure.

It is suggested that the addition of such options for inclusion on a certificate would go beyond what is capable of being conveyed in the 3rd and 4th of the ALRC proposals listed above and that this would be useful to FDR practitioners and ultimately to the courts in being able to usefully assess from this certificate the conduct of the parties to a matter during the FDR process.

Question 5-1

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

The AFCC considers the requirement for proceedings in property and financial matters must be instigated within twelve months of divorce or two years of separation from a de facto relationship needs no revision. This is in spite of the AFCC's endorsement of introducing the requirement for compulsory FRD prior to filing Applications in such matters.

It is rather submitted that there be a greater emphasis on disseminating information on such time frames through education initiatives, which would be able to be achieved through the Education, Information and Awareness initiatives proposed in the Discussion Paper.

Proposal 5-6

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

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

The AFCC suggests that meaningful FDR cannot be accomplished without early and full disclosure of relevant information having been completed. Therefore it follows, and the AFCC endorses, amendments to the FLA setting out clear obligations of all parties, in respect of disclosure.

As noted above, the AFCC would welcome the section 60I certificates issued in financial matters being drafted in such a way that gives FDR practitioners the ability to record the conduct of the parties in terms of their early and full disclosure.

Proposal 5-7

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

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

The AFCC Australia would welcome measures taken to impose stricter compliance requirements with Rules and directions as proposed and possibly including, for example, the adoption of a self-executing 'Deemed Abandonment' model (where appropriate) as currently exists in respect of Appeals or a similar 'Deemed Undefended' model with the remainder of a matter progressing on an undefended basis in certain circumstances. Greater use of costs orders would also be appropriate as well as taking into account any non-disclosure when determining a final division of property.

It is submitted that there is currently insufficient emphasis placed on compliance with the requirement to make full, frank and timely disclosure. It is quite often to the strategic advantage of one of the parties to delay making full and early disclosure, which can result in overly prolonged proceedings and increased costs. It is further submitted that the implications of such behavior in circumstances where family violence is a feature of the matter can be even greater.

It is further suggested that all too often, issues of non-disclosure are not fully addressed or taken into consideration until a final hearing of a matter. In circumstances where the vast majority of matters are resolved prior to reaching a final hearing it is suggested that many instances of delinquent behavior by litigants in terms of their obligation to provide full, frank and timely disclosure are left unchecked and unaddressed.

The AFCC therefore supports the proposal above sanctioning harsher penalties for parties where it is found that they have intentionally failed to provide full, frank and timely disclosure. However, the AFCC suggests that measures to appropriately identify and address this issue early and throughout the lifespan of proceedings is also warranted, perhaps through the use of early and detailed undertakings as to disclosure

to be filed, such as at the time of filing, within 2 weeks of any further conciliation conference or dispute resolution process ordered throughout the proceedings and at the stage of compliance with any trial directions. Alternatively, such undertakings could simply be required arbitrarily at 3 monthly intervals during the lifespan of the proceedings. It is suggested that such undertakings could specifically require details of disclosure made. In this way, it is submitted that this might address the issue of one party using strategic delinquency in their obligations to make full, frank and timely disclosure to their advantage and alleviate the situation of the other party being left in the position of having to bring interlocutory proceedings to address such issues, often at significant cost.

Proposal 5-8

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

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

As per its overriding views for the promotion of simplicity and avoidance of duplication, the AFCC endorses the alignment of the requirements for pre-filing certificates for both parenting and property matters to be undertaken. It is suggested and expected that the drafting of new provisions in the FLA requiring certificates to be filed in financial matters would be undertaken in a way that would:

- have regard to the existing requirements of s60I;
- make any amendments to the existing provisions required to ensure simplicity and avoid duplication;
- reduce the need for parties to search for provisions regarding pre-filing conditions in separate sections of the FLA; and
- provide for flexibility for FDR practitioners to be able to address both parenting and financial matters in the same certificate, where appropriate.

Chapter 6. Reshaping the Adjudication Landscape

Proposal 6-12

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

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

The AFCC supports in principal access to safe and appropriate court facilities for all litigants accessing family law services in the FCFCA.

The AFCC questions whether proposal 6.12 is in fact realistic in its practical implementation, particularly for circuit locations.

The AFCC is also concerned that whilst ideal, the Proposal does not properly address the real and practical issues in accessing courts faced by people residing in regional, remote and rural locations, where the court facilities are less of an issue than actually accessing a court that is so far from their usual residence so as to make it prohibitive.

To meet the needs of litigants in rural, regional and remote communities, the AFCC reiterates its previous submissions and proposes that:

- a) there be an increase in court sittings on circuit and that additional resources be funded to make such possible; and

- b) there be an increase in access to digital court services, including audio visual links, and that to implement such, service agreements be entered into with community resources, such as local courts, education facilities and health services where such technology is already in existence and available to community members.

Chapter 7. Children in the Family Law System

Proposal 7-7

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

In response to proposal 7.3 to 7.7:

The AFCC supports the children's right to be heard and a for risk assessment with respect to children's participation to be conducted.

The AFCC agrees with the view that the emphasis should be on protecting children in participation rather than from participation. The challenge will be how this can be achieved. In practical terms how are children to be given the opportunity to be heard?

A general concern of AFCC members is that the proposal of the ALRC will require significant government resources. If these resources are not provided then there is a risk that like many of the previous reports and reviews of the family law system, the recommendations will not be fully implemented.

The AFCC also supports children's greater participation in FDR as many matters resolve without going to court at all or early in the court proceedings. In that context, it is beneficial for both the children and their parents to hear how the children are feeling after their parents' separation and what their views are, which in turn could inform interim and longer term parenting arrangements and the preparation of Parenting Plans and FCFCA consent orders.

Given Australia's obligations under the CRC and the results of the studies recently undertaken into children's participation in proceedings, the AFCC supports reforms to allow children's greater participation in family law proceedings. This should not however replace the role of the Independent Children's Lawyer. The nature and scope of any new role needs to be carefully considered and clearly defined. The children's advocate outlined in chapter 7 of the discussion paper is one such option.

It makes sense for children's advocates to be part of the Families Hubs which will make them easily accessible for parents and children. It may also be useful to have child advocates based at court registries.

Proposal 7-11

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

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

The AFCC has some reservations about the proposed role of the children's advocate and advises that caution needs to be exercised. If the children's advocate prepares a report is the advocate to be cross-examined?

Judges rarely meet with children and many are cautious about doing so. Some judges are better placed than others to meet with children in appropriate cases being family law specialists and former Independent Children's Lawyers.

In appropriate cases judges meeting with the children can give the judge valuable insight and can be empowering for children. It can also greatly truncate proceedings particularly with respect to discrete issues such as where a child should go to school, a child's surname, travel or extra-curricular activities.

The challenge that arises with respect to judges talking to children are issues with respect to procedural fairness and the best way of managing these meetings for children. If children's advocates are appointed they could assist with this process.

There may be some cases where the Independent Children's Lawyer and the children's advocate will complement each other but their respective roles will need to be clearly defined so there is no duplication.

Chapter 8. Reducing Harm

Proposal 8-1

The definition of family violence in the Family Law Act 1975 (Cth) should be amended to:

- *clarify some terms used in the list of examples of family violence and to include other behaviours (in addition to misuse of systems and processes (Proposal 83)) including emotional and psychological abuse and technology facilitated abuse; and*
- *include an explicit cross-reference between the definitions of family violence and abuse to ensure it is clear that the definition of abuse encompasses direct or indirect exposure to family violence.*

The AFCC recognises and endorses the need to enhance protection measures offered to those who have experienced family violence, when navigating the Family Law system.

Further, the AFCC would welcome and endorse the expansion of the definition of family violence in the FLA to ensure parity with state and territory legislation. The proposed amendments to the definition would go some way to addressing this disparity and are endorsed, however, it is suggested that the FLA should include a non-exhaustive list of examples of behaviors that constitute such definitions of family violence for clarity. See for example the list of examples of emotional or psychological abuse set out in section 11 of the *Domestic and Family Violence Protection Act 2012* (QLD):

"Emotional or psychological abuse" means behaviour by a person towards another person that torments, intimidates, harasses or is offensive to the other person.

Example:

- *following a person when the person is out in public, including by vehicle or on foot*
- *remaining outside a person's residence or place of work*
- *repeatedly contacting a person by telephone, SMS message, email or social networking site without the person's consent*
- *repeated derogatory taunts, including racial taunts*
- *threatening to disclose a person's sexual orientation to the person's friends or*

family without the person's consent

- *threatening to withhold a person's medication*
- *preventing a person from making or keeping connections with the person's family, friends or culture, including cultural or spiritual ceremonies or practices, or preventing the person from expressing the person's cultural identity."*

Proposal 8-3

The definition of family violence in the Family Law Act 1975 (Cth) should be amended to include misuse of legal and other systems and processes in the list of examples of acts that can constitute family violence in s 4AB(2) by inserting a new subsection referring to the 'use of systems or processes to cause harm, distress or financial loss'.

The effect of repeated and/or frequent vexatious claims on a respondent can be devastating and significantly hamper their ability to parent their children. One example reported by an AFCC member is where parents have been in litigation involving 4 separate Initiating Applications and several Applications in a Case within substantive proceedings over the course of 10 years, in relation to a child who is almost 11. Allegations of family violence were made during the course of the proceedings and a current state based Protection Order is in place. The result for this child is that there has been very little time during their short life that the parents have not been engaged in litigation.

The AFCC would welcome the expansion of the definition of family violence in the FLA to include specifically an abuse of process as an example of family violence with sufficient specificity to outline certain behaviours, including but not limited to bringing repeated frivolous and vexatious claims.

Proposal 8-4

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

The AFCC Australia supports the proposal to rationalise the provisions of the FLA dealing with unmeritorious proceedings to ensure such provisions are to be found in the same part of the FLA and to be drafted in clear language so as to be easily interpreted as applicable to either proceedings where summary dismissal provisions apply or to proceedings where the vexatious proceedings provisions apply.

Proposal 8-5

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

The AFCC endorses amendments to the FLA that widen the definition of family violence to include abuse of process and related behaviors. It follows that in considering any proceedings unmeritorious, that the relevant provisions of the FLA ought specifically to direct the judicial officer to have regard to any evidence of a history of family violence. However, the AFCC considers that the FLA should mandate a judicial officer to consider any evidence of a history of family violence but use of the word 'must' rather than 'may'. The proposal that *in children's cases [a judicial officer] must consider the safety and best interests of the child and the impact of the proceedings on the other party when they are the main caregiver for the child* is supported by the AFCC.

It is submitted by the AFCC, that a comprehensive triage system at the time of filing all new applications would assist in the identification of litigants who instigate and re-instigate multiple proceedings including in different courts. The AFCC submits that such a triage process would be significantly aided by a greater degree of integration and coordination between the Family Law system and other commonwealth, state and territory systems including existing family violence systems, child protection systems and the Department of Human Services - Child Support, which matters are taken up in the Discussion Paper.

Question 8-3

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

The AFCC Australia would not endorse the removal of the word 'frequent' in preference for replacement by the word 'repeated', but rather the expansion of the provision to provide for either or both circumstances by use of the word 'or'.

Chapter 9. Additional Legislative Issues

Proposal 9-8

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

The AFCC welcomes the proposal to amend the definition of family member in s.4(1AB) of the FLA to be inclusive of Aboriginal and Torres Strait Islander concepts of family.

With respect to the wording of such definition as posed by Question 9.2 the AFCC proposes the following wording:

- *Family Member:* For Aboriginal and Torres Strait Islander children, family member shall include members of their biological family as well as the child's kin.
- *Kin:* For Aboriginal and Torres Strait islander children, kin shall include any member of the child's community or country that has demonstrated responsibility for raising and educating children within the child's community or country.

Chapter 10. A Skilled and Supported Workforce

Proposal 10-3

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

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

It is submitted on behalf of the AFCC, that professionals working in the Family Law system should have to comply with a minimum level of family law specific and family violence and trauma specific training to comply with their governing bodies' requirements for registration.

In respect of legal practitioners in particular, the AFCC submits that any practitioner who nominates the area of Family Law on their application for a Practising Certificate, ought be required to complete, as a component of their existing annual continuing legal education (**CLE**), a specific number of units in Family Law as well as at least one unit in family violence and associated trauma and best practices in facilitating successful FDR on an annual basis.

It is also suggested that Family Law Specialist Accreditation courses across the country be expanded to include a module on family violence and associated trauma and that 'bolt-on' courses in this area be offered to existing accredited specialists.

Question 10-1

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

The AFCC submits that the needs of current and future users of the Family Law system in Australia would be better met by a legal profession that is more focused and dedicated to early participation in non-adjudicative FDR processes than in adopting a highly litigious path as a 'one size fits all' approach. It is suggested that best practice guidelines regarding such a shift away from a more litigious model should be released and that there be a greater emphasis on training for legal practitioners, practising in Family Law, in non-adversarial FDR options including less adversarial negotiation techniques, mediation in the context of both parenting and property matters, child inclusive FDR options and Collaborative Practice.

Proposal 10-8

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

The AFCC supports consideration of family violence aptitude in appointments to the FCFCA. For this to be a meaningful proposal however it is submitted that an assessment of aptitude must go beyond participation in judicial education or completion of family violence courses and must include the practice of family law matters involving family violence.

It is the experience of AFCC members that the realities of practicing in the family law jurisdiction and appearing for both victims and perpetrators of family violence provides a unique understanding of how family violence impacts on families within the system that is well beyond academic research and readings.

FCFCA litigants experiencing family violence often have great difficulty in participating in family law litigation and an understanding of the impacts of this is essential to an assessment of their presentation and the presentation of their case.

It is submitted that this is best achieved by appointments of experienced family law practitioners and cannot be replicated through reading of course participation.

Question 10-4

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

The AFCC recommends that the criteria for judicial appointment of federal judicial officers exercising family law jurisdiction should include as an essential requirement that the candidate have significant practical experience as a legal practitioner practicing family law.

It is further recommended, as detailed below, that a National Judicial Commission be established and that they be tasked as a function with setting core competencies for judicial appointments.

Proposal 10-9

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

The AFCC has long been of the view that a national training program and accreditation ought to be developed for federal experts and private experts preparing both court funded and privately commissioned family reports. In consultation with the Attorney-General's department, the AFCC has begun to develop such a training course for private experts.

Private experts generally have a background in psychiatry, psychology or social work. It follows that the manner, style and content of a private family report is reflective of the writer's training, which in turn can lead to an inconsistency of approach and style across the field.

There will need to be some consideration given as to how previous experience as a family report writer and/or Single Expert Witness should be taken into account in the context of these new accreditation requirements.

The AFCC observes that there is much emphasis on lawyers understanding social science, but less emphasis on report writers understanding family law. The AFCC has therefore been designing a course to ensure that in addition to relevant graduate and post-graduate academic qualifications and on-going professional development in those fields, private family report writers have training in:

- part VII of the FLA;
- FCFCA processes and procedure;
- rules of evidence, giving evidence in court and being cross-examined; and
- forensic practice.

The AFCC has also scheduled training (both in person and online) in modules including:

- Introduction to Family Law;
- The Legal Interface – understanding evidence and duty to court;
- Introduction assessment of Families and Report Writing
- Risk assessment;
- Competencies required for assessing and interviewing children in separated families;
- Hearing children's voices and opinions;

- Developmental considerations for children in separated families;
- Specialised skills for report writing for the Family Court;
- The obvious and subtle effects of family violence for woman and children;
- Assessment of Family Violence issues in the Family Court;
- Particular issues around assessment of LGBTI populations;
- Competencies for assessment of sexual abuse allegations;
- Assessing mental Health, drug abuse and addiction problems in Family Court; and
- Referrals for specialized programs for parents, children and families in Family Court.

In line with our own endorsement model, AFCC recommends that any form of accreditation involve participants demonstrating their expertise including:

- assignments based on mock files;
- drafting exercises;
- simulated interviews or practical exercises;
- examples of candidates' work; and
- Provision of professional references.

Proposal 10-11

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

The AFCC supports the proposition that orders for the preparation of a report in parenting proceedings, inclusive of those ordered pursuant to s 62G of the FLA, should provide clear instructions as to why a report is being sought and the particular issues that should be reported on. Such orders should not however completely curtail the role of the expert as it may be apparent that in the course of interviewing parents and children that there are other issues which may require recommendation and determination by the courts.

Proposal 10-13

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

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

The AFCC welcomes the proposed amendments to the Act, which would assist to give greater insight and depth of understanding into families' needs, where concerns are raised about a person's parenting ability as a result of a disability. It is hoped that such a greater level of understanding will give rise to more tailored, nuanced and therefore successful solutions for individual families. However, the AFCC emphasises the need to ensure the 'requisite skills' of such report writer include particular expertise, knowledge and experience of the disability in question as well as those matters which relate to the best interests of children within the meaning of the Act so as to ensure the results, being the purpose of the proposed amendment, are achieved. Our comments in this regard also pertain to reports prepared in respect of children with disabilities.

Proposal 10-14

The Family Law Act 1975 (Cth) should be amended to provide that in parenting proceedings involving an Aboriginal or Torres Strait Islander child, a cultural report should be prepared, including a cultural plan that sets out how the child's ongoing connection with kinship networks and country may be maintained.

The AFCC supports the use of cultural reports in proceedings for Aboriginal and Torres Strait Islander families. It is however essential that for this proposal to be successful such reports need to be prepared by experienced and appropriate members of Aboriginal and Torres Strait Islander communities. It must also be recognised that different mobs have different cultural beliefs and needs and so report writers must, where possible, be members of the relevant local clan or community.

The AFCC also has concerns about the serviceability of this Proposal without significant additional resources being applied within the family law system. Currently, there are insufficient qualified staff within the court system for this proposal to prove successful.

The AFCC suggests that an additional proposal be made to ensure proper application of this proposal such as:

- a) cultural reports prepared in proceedings involving Aboriginal and Torres Strait Islander children be prepared by qualified and competent persons with knowledge of the specific cultural needs of the child's local community and kin; and
- b) competency of cultural report writers shall be determined by reference to the writers':
 - i. links to the child's community and country;
 - ii. recognised standing within the child's community and country;
 - iii. knowledge of Aboriginal and Torres Strait Islander culture; and
 - iv. experience in working with Aboriginal and Torres Strait Islander children and families.

Question 10-6

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

The AFCC recommends that cultural reports be limited to matters where there is a possibility that the child will be placed outside of country or without kinship care. Consistent with concepts of self-determination, it is submitted that cultural assessment is not required when children remain within their community or kin structures.

Chapter 11. Information Sharing

Proposal 11-1

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

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

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

See page 64 for response.

Proposal 11-2

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

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

See page 64 for response.

Proposal 11-3

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

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

See page 64 for response.

Question 11-2

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

The AFCC notes that although there are cases where it is important for the Court to have access to health records and that information about the process and outcomes of Court ordered therapy should be available to a Court, there is also a need to balance the production of health records with protecting a person's confidentiality and circumvent the abuse of such confidentiality by way of subpoena. This can, in some cases, be a form of family violence.

By way of example, amendments to the *Evidence Act 1906* (Western Australia) enacted in the Evidence and Public Interest Disclosure Legislation Amendment Bill 2011 (Part 2) (Western Australia) support this requirement for confidentiality. This means that if a psychiatrist or psychologist is summonsed to Court to produce documents he/she can claim privilege in respect of any confidential communication he/she has had with the patient.

Proposal 11-4

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

The AFCC supports the expansion of the National Domestic Violence Order Scheme to incorporate family law orders when made.

It is submitted that this measure would be beneficial to courts exercising family law jurisdiction and those exercising jurisdiction in relation to protection orders.

It is submitted that this measure may also work to reduce breaches of protection orders by increasing the chances of protection orders being made that are consistent with family law orders in place.

It will also allow access to current enforceable protection orders by courts in family law matters, which it is suggested will be a significant source of information in urgently listed matters where documents are lacking and subpoena are not available.

Proposal 11-5

State and territory governments should consider providing access for family courts and appropriate bodies and agencies in the family law system to relevant inter-jurisdictional and intra-jurisdictional child protection and family violence information sharing platforms.

See page 64 for response.

Proposal 11-6

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

See page 64 for response.

Proposal 11-7

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

The AFCC supports the co-location of child protection workers and family violence workers in courts exercising family law jurisdiction. This measure will allow litigants in crisis to access support services immediately and given the statistical prevalence of family violence within the family law system, this could create a significant child protection service.

It is also submitted that this proposal would allow immediate access to child protection information during duty lists and the hearing of urgent applications. This exchange of information at short notice will assist in reducing adjournments necessitated by the need to obtain information and allow for urgent matters to be prioritised.

With respect to family violence workers, it is submitted that co-locating these to FCFCA registries will again provide significant support to the courts in urgent matters where allegations of family violence are made. If such workers were in a position to assist the courts briefly with social science evidence in respect of family violence, and available service provisions for the family involved, then it is submitted again that adjournments would be reduced and the use of family consultants for short form reports could be allocated more readily to proposals such as the family violence list.

Proposal 11-8

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

See page 64 for response.

Proposal 11-9

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

See page 64 for response.

Proposal 11-10

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

See page 64 for response.

Proposal 11-11

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

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

See page 64 for response.

In response to proposals 11.1, 11.2, 11.3, 11.5, 11.6, 11.8, 11.9, 11.10, 11.11:

The AFCC supports amendments to legislation that would promote the efficient exchange of information between child protection agencies and the courts exercising family law jurisdiction.

The AFCC raises its concern however that the exchange of information does not of itself resolve the issue that child protection authorities often place a lower priority on investigating complaints arising in family law proceedings given their view that the Court is monitoring the family.

The exchange of information itself, does not place the child protective services under any obligation to investigate the allegations of abuse.

It is the experience of AFCC members that there is a lower priority given to notifications coming through the courts exercising family law jurisdiction and a perception that if the FCFCA is looking at the matter then sufficient protective measures are in place.

The FCFCA do not hold any investigatory capacity and rely on the child protective services to investigate allegations of abuse. When child protective services assume the position that the FCFCA will investigate the allegation there is a significant gap in the protection afforded to children in both the short and long term because without the capacity to formally investigate specific allegations of abuse, the FCFCA is entirely reliant upon the parents' evidence, which is often contradictory, and information able to be garnered by subpoena generally issued by an Independent Children's Lawyer. If the State child protection services have failed to investigate an allegation on the basis that the Court is involved with the family, then such independent material is unlikely to be forthcoming.

Chapter 12. System Oversight and Reform Evaluation

Proposal 12-1

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

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

The AFCC notes that one of the functions of the proposed Family Law Commission is to resolve complaints about professionals and services within the family law system, including through the use of enforcement powers. While the intent to provide greater regulation to the overall family law system is laudable, it is unclear from the Discussion Paper and the AFCC queries how this power, in particular, is intended to operate in light of the current operations of the various regulatory bodies governing the various professions within the family law system. For example, it would appear that complaints could conceivably be made (and enforcement action taken) not only to the Family Law Commission but also to the various regulatory bodies such as the

Australian Health Practitioner Regulation Agency for health practitioners and the various state Legal Services Commissions for legal practitioners.

It is further noted that clarification will be needed to distinguish the role the proposed Family Law Commission from that currently of Legal Aid Commissions in the appointment of Independent Children's Lawyers at the request of the court and the administration and oversight of their work and professional development.

Proposal 12-8

The Australian Government should develop a cultural safety framework to guide the development, implementation and monitoring of reforms to the family law system arising from this review to ensure they support the cultural safety and responsiveness of the family law system for client families and their children. The framework should be developed in consultation with relevant organisations, including Aboriginal and Torres Strait Islander, culturally and linguistically diverse, and LGBTIQ organisations.

The AFCC welcomes the proposal for the development of a cultural safety framework. The AFCC sees this as a significant proposal to address access to justice issues for Aboriginal and Torres Strait Islander children and families. It is however suggested that that the Proposal be amended so as to reflect a specific consultation and engagement process with Aboriginal and Torres Strait Islander people, as distinct from other groups and that it be mandatory for respected members of Aboriginal and Torres Strait Islander workers to be engaged in development of the cultural safety framework.

Question 12-2

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

If a Judicial Commission is to be established, the AFCC submits that it would be inappropriate to limit such Commission only to judicial officers exercising jurisdiction under the FLA. The AFCC would welcome the establishment of a National Judicial Commission, if such were to include all federal judicial officers. It is submitted that such a proposal would assist in restoring confidence in a system that has been reported by litigants and professionals to experiences lapses in transparency and consistency.

The AFCC recommends that the Judicial Commission of New South Wales be used as a model and that the functions of the National Judicial Commission be set as:

- a) Examining complaints against federal judicial officers;
- b) Organising and supervising an appropriate scheme of continuing education and training of federal judicial officers;
- c) Establishing criteria of essential or recommended core competencies for judicial appointments proposed to adjudicate family law matters.