Submission to the Australian Law Reform Commission's Review of the Family Law System

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This brief submission relates to the Discussion Paper and does not repeat points made in my earlier submission on the Issues Paper.

Proposal 3-1: I agree that the Family Law Act 1975 (Cth) (FLA) should be redrafted to simplify readability and usability, particularly by Self-represented litigants (SRLs).

Proposal 3-2: I agree that a single set of forms should be used for all courts exercising jurisdiction under the FLA. Please note that this is not an expression of agreement with the concurrent proposals by the Attorney-General to merge the Family Court of Australia and Federal Circuit Court of Australia, an issue that should be considered by the ALRC in tandem with this inquiry.

Proposal 3-3: I agree that Part VII of the FLA is currently badly drafted. I appreciate the reasoning behind the proposal to amend the paramountcy principle so that it refers to the child's 'safety and best interests' rather than 'best interests'. However, I think safety must be defined in the provisions to ensure that there are no unintended consequences from the change. Safety could be defined simply as protection from family violence or abuse.

It is not possible to look at proposal **3-3 or 3.4** in isolation from removal of the presumption of equal shared parental responsibility (Family Law Act 1975 (Cth) (FLA) s 61DA) and the linked requirement for courts proposing to make such orders to also consider making orders for shared time (FLA s 65DAA). Without the removal of those requirements it is hard to see how the new paramountcy principle would have any effect.

Proposals 3-11, 3-18: I agree that greater attention should be given in financial settlements to the relevance of family violence in both property division and spousal maintenance orders.

Proposal 3-12: I agree. Research might consider the adoption of the scheme suggested by Belinda Fehlberg and Lisa Sarmas in 'Australian Family Property Law: "Just and Equitable" Outcomes?' (2018) 32 *Australian Journal of Family Law* 81 mentioned at p.60 of the Discussion Paper.

Question 3-3: I commented in my submission to the Issues Paper that I think the ability to make binding prenuptial financial agreements should be removed from the FLA. That is my preferred answer to this question.

Chapter 4: Many of the proposals in this chapter depend upon substantial resourcing. It is very difficult to comment on some of the proposals in isolation from Federal government funding commitments.

The FASS service does seem to be providing a very valuable service in the registries in which it operates although I note that evaluation has not yet been released. The Better Family

Law inquiry did state that clear improvements to the safety of families affected by family violence have been identified by some stakeholders as a result of the service. If evaluation is positive it would be essential for the Federal Government to increase funding to Legal Aid Commissions to fully service FASS before rollout into further registries.

Proposals 7-8-7-10: My current research has involved interviewing ICLs about parenting matters which involve allegations of violence and at least one of the parties is a SRL. I am happy to provide the ALRC with draft findings in relation to that research. It is clear from the interviews that, as mentioned by National Legal Aid in submission 163 to the ALRC Issues Paper, that ICLs are absolutely crucial and pivotal to promoting the best interests of children, particularly where at least one of the parents is a SRL. I agree that huge and growing demands are being placed on ICLs given the increasing complexity of cases in which they are being appointed. It is clear from my interviews that panel practitioners, whilst being passionate about their work as ICLs, consider they work as pro bono work as Legal Aid pay rates have not increased for many years.

As such, I think that in relation to **Question 7-1**, a separate legal representative should be appointed in at least all cases in which one of the parties is an SRL. As Richard Chisholm wrote in the *Family Court Violence Review* at p. 168:

> The importance of appropriate legal representation can hardly be overstated in parenting cases, especially those that involve issues of family violence. Where one or both parties are unrepresented, even with the benefits of increased judicial involvement arising from Division 12A, it can be almost impossible for the court to receive the sort of evidence and argument that can lead it to make an informed decision about the child's best interests.

He went on to state that at p.170:

> I would urge that if there are insufficient funds to provide lawyers for the child as well as the parties, **the priority should be to have the child represented**. In my view although there are almost always difficulties when any party is unrepresented, it is generally better to have the child represented even if one or both of the parties are unrepresented rather than to have one party legal aided and the other party and the child unrepresented. I suspect that it would generally be better to have the child alone represented than having both parties represented and the child unrepresented, but this may vary from case to case.

I would agree that a legal representative is essential to protect the best interests of the child in any cases involving allegations of FV and/ or where there is a SRL. This would be in addition to an appointment of a children's advocate who would appear to serve a different role and function. Once again increased funding to State and Territory Legal Aid Commissions should be provided to properly resource children's representation.