

Office of the NSW Legal Services Commissioner

**Submission in response to the Australian Law Reform Commission
[ALRC] Discussion Paper 'Review of the Family Law System'**

November 2018

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1. Introduction

I am pleased to have the opportunity to comment on the ALRC's discussion paper 'Review of the Family Law System' ('Discussion Paper').

This submission begins by providing an overview of the role and functions of the Office of the NSW Legal Services Commissioner, and our experience handling complaints about lawyers, including those practising in the area of family law.

This submission then provides comment on certain aspects of the Discussion Paper, with a focus on Chapter 12 (System Oversight and Reform Evaluation).

1.1 Office of the NSW Legal Services Commissioner

The Office of the NSW Legal Services Commissioner ("OLSC") receives complaints about solicitors and barristers in NSW. Such complaints may include consumer matters and/or disciplinary matters. Since 1 July 2015, we have operated under the *Legal Profession Uniform Law 2015* ('the Uniform Law').

The OLSC is an independent statutory body, which works as part of a co-regulatory system, together with the Law Society of NSW and the NSW Bar Association. The function and purpose of the OLSC is to deal with complaints efficiently and expeditiously, reduce complaints about lawyers, and promote professionalism within a framework of consumer protection and protection of the rule of law (see also section 260 of the Uniform Law).

Under the Uniform Law, regulatory agencies can make findings of unsatisfactory professional conduct (under section 299), and orders in relation to consumer matters (under section 290). Regulatory agencies can also initiate and prosecute disciplinary proceedings in the New South Wales Civil and Administrative Tribunal, including where the alleged conduct may amount to professional misconduct (see section 300).

As the Legal Services Commissioner, I have an absolute discretion to conduct an internal review of my own decisions, as well as decisions made by the Law Society and the NSW Bar Association (section 313 of the LPUL). Otherwise, decisions of regulatory agencies can only be challenged through the normal process of administrative law.

In addition to complaint-handling, the OLSC conducts audits of the compliance of law firms in NSW with the Uniform Law, Uniform Rules, and other applicable professional obligations, pursuant to section 256 of the Uniform Law.

The OLSC also runs an inquiry line, which responds to queries from the general public, and provides callers with information about our role and powers, the complaint process, suggestions for potential avenues of

resolution of their dispute, and referral to other organisations where appropriate.

1.2 Complaints in the area of family law

The OLSC can receive complaints relating to any area of law, including family law. As was noted in our 2016-2017 Annual Report:

“As has been the case for a number of years, more complaints were lodged in relation to family and de-facto law matters in this reporting year than any other area of law. Complaints in relation to personal injuries, and probate, wills or family provision claims are also common.

The most commonly made complaint was negligence, followed by poor communication and then overcharging.”¹

Similarly, the OLSC's 2015-2016 Annual Report stated:

“Family law is not just the most volatile area of law, it now makes up 17.8% of all complaints lodged with the OLSC. A significant proportion of these complaints come from opposing parties and there are a far greater proportion of unrepresented litigants lodging complaints in this area.”²

We note the following statistics in relation to complaints received by the OLSC:

1. In the 2017-2018 financial year, 6,431 calls were made to the OLSC Inquiry Line. Of these, the largest percentage of calls relating to a particular area of law (13.2 per cent), related to family law.

The next most common area of law was 'other civil' (12.7 per cent). The percentage of calls that related to family law is broadly consistent with earlier years (2014-2017).³

2. In the 2017-2018 financial year, the OLSC received 2,645 written complaints. Of these, the largest percentage (18.8 per cent) related to family law. Again, this is broadly consistent with previous years.⁴

3. Of the written complaints received in 2017-2018 relating to family law:

¹ The Office of the Legal Services Commissioner Annual Report 2016-2017, page 6. Available at: <http://www.olsc.nsw.gov.au/Documents/2016%202017%20OLSC%20AnnRep.pdf>.

² The Office of the Legal Services Commissioner Annual Report 2015-2016, page 9. Available at: <http://www.olsc.nsw.gov.au/Documents/2015%202016%20OLSC%20AnnRep%20accessible.pdf>.

³ The Office of the Legal Services Commissioner Annual Report 2016-2017, page 19. Available at: <http://www.olsc.nsw.gov.au/Documents/2016%202017%20OLSC%20AnnRep.pdf>.

⁴ The Office of the Legal Services Commissioner Annual Report 2016-2017, page 23. Available at: <http://www.olsc.nsw.gov.au/Documents/2016%202017%20OLSC%20AnnRep.pdf>.

- 3.1. 55.9 per cent were dealt with as consumer matters.
 - 3.2. 44.1 per cent were characterised as disciplinary matters.⁵
 - 3.3. 29.6 per cent were made by (or on behalf of) an opposing party.
 - 3.4. 25.1 per cent were summarily closed (under section 277(1)(a) of the Uniform Law).
 - 3.5. The most frequent complaints or conduct issues identified were:
 - overcharging - 18.6 per cent
 - negligence (or quality of service) - 16.7 per cent
 - communication - 12.1 per cent
 - misleading conduct - 10.3 per cent.⁶
 - 3.6. Our data reveals that delay was an issue in around 3.8 per cent of complaints. However, it is likely that this does not reflect the frequency with which delay in family law proceedings is raised by complainants, or otherwise evident from the material before us. Of course, delay is not always attributable to the lawyers involved in the proceedings.⁷
4. In terms of complaints received from 1 July 2015 (when the Uniform Law commenced) to 30 June 2018, which related to family law and which were dealt with as disciplinary matters:
- 21 complaints resulted in a finding of unsatisfactory professional conduct (under section 299 of the Uniform Law);
 - Two complaints resulted in the initiation of Tribunal proceedings (under section 300 of the Uniform Law).

It is worth noting that the most frequent conduct issues arising in complaints relating to family law is not dissimilar to the overall picture of complaints received in the same period. Of the total number of complaints received in the 2017-2018 reporting period, the most frequent conduct issues were:

⁵ Noting this figure includes complaints that are not capable of being dealt with as a consumer matter, such as complaints by an opposing party.

⁶ Note that these are the primary conduct issues identified when complaints are first received by this Office, and do not necessarily capture the totality of a complainant's concerns. Conduct issues may be clarified, added or amended when a complaint is dealt with by the relevant regulatory authority.

⁷ Delay in family law proceedings also impacts upon our ability to deal with complaints efficiently and expeditiously. It is the usual practice of my office to suspend complaints that raise matters that are also the subject of ongoing Court proceedings, until those proceedings have concluded.

negligence (or quality of service), communication, overcharging, and misleading conduct.

2. System Oversight and Reform Evaluation

This part addresses some aspects of Chapter 12 of the Discussion Paper (System Oversight and Reform Evaluation), particularly regarding the proposed new oversight body for the family law system.

Proposal 12.1 relates to the establishment of a new oversight body for the family law system (the Family Law Commission), while Proposal 12.2 deals with practitioner accreditation and complaints.

Proposal 12.1 is that the responsibilities of the Family Law Commission include *"resolving complaints about professionals and services within the family law system, including through the use of enforcement powers"*.

I note that 'professionals and services within the family law system' does not appear to be defined with any specificity in the Discussion Paper. It appears, however, that 'professionals' is intended to include legal practitioners. Paragraph 12.21 specifically includes legal practitioners among the professionals that would be required to obtain accreditation under the proposed Accreditation Rules.

It appears that the proposal is that the Family Law Commission should handle complaints alongside existing regulatory bodies. Paragraph 12.29 of the Discussion Paper states:

12.29 The complaints-handling function should be in addition to, rather than instead of, any existing complaints mechanisms administered by the organisations and professional bodies to which the relevant professionals already belong. The Family Law Commission should limit its investigation to any potential breach of the core competencies relating to family law service providers, and its powers should be limited to cancelling or suspending the professional's accreditation in relation to the provision of family law services only.

For the reasons set out below, it is my view that any proposal that lawyers who practise in family law be subject to an additional regulatory scheme should be very carefully considered before being the subject of a recommendation by the ALRC.

The OLSC does not play a direct role in setting or monitoring the training or accreditation requirements for lawyers. The comments in these submissions are therefore limited to the proposed complaint handling functions of the Family Law Commission with respect to lawyers.

I acknowledge, however, that the family law system (not unlike some other areas of law) benefits from lawyers having broader skills and knowledge than those traditionally taught at law school. Understanding of and ability to identify

family violence and child abuse and neglect, as well as cultural competency, trauma-informed practice and disability awareness, are some examples of this.

2.1 Complaints about lawyers in NSW under the Uniform Law

As noted earlier, under the Uniform Law complaints about lawyers may be characterised as a consumer matter, a disciplinary matter, or a 'mixed complaint' (a complaint containing both a consumer and a disciplinary matter).

A disciplinary matter is defined in section 270 of the Uniform Law as:

so much of a complaint about a lawyer or a law practice as would, if the conduct concerned were established, amount to unsatisfactory professional conduct or professional misconduct.

Unsatisfactory professional conduct is defined in section 296 of the Uniform Law as including:

conduct of a lawyer occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.

Professional misconduct is more serious, and it includes substantial or consistent failures to reach or maintain a reasonable standard of competence and diligence (see section 297 of the Uniform Law).

A consumer matter is defined in section 269(1) of the Uniform Law as follows:

A consumer matter is so much of a complaint about a lawyer or a law practice as relates to the provision of legal services to the complainant by the lawyer or law practice and as the designated local regulatory authority determines should be resolved by the exercise of functions relating to consumer matters.

A costs dispute is a form of 'consumer matter', and is defined in section 269(2) of the Uniform Law.

Putting aside costs disputes, consumer matters (as the definition suggests) usually concern quality of services issues which might include poor communication, rudeness or delay (where such conduct is not sufficiently serious to amount to unsatisfactory professional conduct).

Under the Uniform Law, the OLSC has an obligation to attempt to informally resolve consumer matters as soon as practicable (see section 287). The Uniform Law also contains provisions relating to the mediation of consumer matters, and pursuant to section 290 a regulatory authority can determine a consumer matter by making various orders, including compensation orders and orders waiving or reducing fees charged for work.

It is plain from the above that under the Uniform Law, regulatory agencies have the capacity to deal with complaints about a wide spectrum of conduct by lawyers (including personal conduct in serious cases).

However, unlike the previous regulatory regime,⁸ complaints under the Uniform Law can only be dealt with as a consumer matter if there is a lawyer/client relationship between the complainant and the respondent lawyer. A large number of complaints relating to family law are made about opposing legal representatives, and these cannot be dealt with as consumer matters under the Uniform Law. In most cases, these complaints do not result in a finding of unsatisfactory professional conduct (or professional misconduct).

2.2 Proposed role of the Family Law Commission in dealing with complaints about lawyers

The section in Chapter 12 of the Discussion Paper on 'De-accreditation and complaints' contains some detail about the proposed complaint-handling functions of the Family Law Commission, including the following:

12.28 Under this proposal, the Family Law Commission will be responsible for receiving and considering complaints against all professionals accredited under the Accreditation Rules, where that complaint relates to one of the identified core competencies required of family law service providers. [...]

12.32 The complaints-handling function should assess whether the professional involved has adhered to the standards and obligations set out in the Accreditation Rules.

It is unclear from the Discussion Paper what precisely is envisaged with regard to the 'standards and obligations' that it is proposed would apply to lawyers under the Accreditation Rules.

It appears that 'core competencies' is primarily addressed in Chapter 10 of the Discussion Paper: 'A Skilled and Supported Workforce'. The core competencies outlined in Proposal 10.3 all relate to knowledge ('understanding') of various matters, including family violence and child sexual abuse and neglect. The discussion in Chapter 10 appears to be largely directed at the importance of training in improving these core competencies, particularly with regard to legal practitioners.⁹

Outside the sphere of training and accreditation requirements, it is unclear what conduct obligations (if any) it is proposed should be included in the Accreditation Rules for legal practitioners. It is also unclear how a complaints handling body would deal with complaints about conduct relating to the core competencies identified.

⁸ The *Legal Profession Act 2004* (NSW).

⁹ For example, Proposal 10-6 'Legal practitioners and family violence training' and related discussion (pages 246-248 of the Discussion Paper).

Given the lack of specificity of the proposed scheme with respect to lawyers, these submissions are limited to general observations.

First, lawyers are already subject to one of the strictest regulatory regimes in Australia. Lawyers must comply with conduct rules, as well as relevant common law and any other legislation. As the commentary to the *Australian Solicitors' Conduct Rules 2011* states on page 4:

"a solicitor is required to observe the higher of the standards required by these Rules and the common law and/or legislation, in any instance where there is a difference between them in any jurisdiction".

Lawyers in NSW and Victoria are subject to the Uniform Law *Australian Solicitors' Conduct Rules 2015*. Lawyers providing services in family law must also comply with additional rules, principally those set out in the *Family Law Act 1975*, and the *Family Law Rules 2004*.¹⁰

In addition to these rules, the Law Council of Australia's 'Best Practice Guidelines for Lawyers doing Family Work' contain detailed guidance on the provision of legal services in family law, and address a number of the core competencies identified in Proposal 10-3.¹¹

Little would be gained from any overlap between existing conduct rules, and standards or obligations in the proposed Accreditation Rules governing the conduct of lawyers providing services in family law matters. Indeed, any such overlap risks creating unnecessary complexity and confusion.

Further, the core competencies identified in Proposal 10-3 are clearly important to other areas of law, notably criminal law, child protection law, migration law, and some areas of civil law. It is unclear whether there is a good rationale for not subjecting lawyers providing services in these areas to similar accreditation requirements and oversight (although I acknowledge these areas fall outside the ALRC's Terms of Reference).

Second, in our experience there is unlikely to be a clear distinction between complaints about lawyers that relate 'to one of the identified core competencies required of family law service providers', and other complaints about legal services and/or the conduct of lawyers in the area of family law.

Complaints about lawyers often concern a number of issues, incidents and/or allegations, and it is unclear how it is proposed that any 'mixed' complaints be handled under the proposed scheme.

¹⁰ See, for example, *Family Law Rules 2004*, Rule 1.08, Parts 19.1-19.2 (Rules 19.03 and 19.04), Rule 19.10, and Schedule 1, Clause 6; *Family Law Act 1975*, sections 12E, 60D and 63DA.

¹¹ Law Council of Australia (Family Law Section), *Best Practice Guidelines for Lawyers doing Family Law Work* (Fourth Edition). Available at: https://www.familylawsection.org.au/images/documents/20170720_BestPracticeGuidelines.pdf.

It is also unclear which body would be the 'first port of call' for complaints about lawyers providing family law services, or whether it is envisaged that complainants could make complaints to either body and/or both bodies. We note that in NSW, all complaints about lawyers must be made to the OLSC first, and the OLSC then delegates certain complaints to the Law Society or the Bar Association.

If 'mixed' complaints are to be dealt with by both regulators, either concurrently or consecutively, there is the risk that the handling of such complaints will be drawn out, which is in the interests of neither the complainant nor the respondent lawyer. Such double handling also raises double-jeopardy issues on the one hand, and on the other the possibility that complaints may not be dealt with by either body due to blurred lines of regulatory responsibility.

2.3 Risks of dual regulation

Putting aside potential jurisdictional difficulties with the proposal that the Family Law Commission be able to handle complaints about the conduct of lawyers, canvassed above, in my view this proposal risks increasing the burden on lawyers practising in this area.

It raises the prospect, for example, that the same complaint could be made to (and potentially dealt with by) the legal regulator, the Family Law Commission and in some cases other bodies, such as Legal Aid. We note, for example, that it is not uncommon for complaints about Independent Children's Lawyers (in particular) to be made to both the OLSC and LegalAid NSW.

We acknowledge that many lawyers find responding to complaints to be stressful and sometimes time consuming. A risk of dual regulation, such as that proposed, is that some lawyers will decide not to practice in family law. It may also have other effects, including that lawyers may be diverted from providing services to their clients, and placed under increased pressure in what is frequently a stressful, challenging and emotive area of law.

None of this will improve the capability and performance of the workforce, and it raises 'access to justice' issues, particularly for regional or remote areas. Given that many complaints about family law raise concerns about delay, this is not an insignificant concern.

In this respect, we suggest it may be instructive to consider the recent history of the regulation of lawyers and migration agents in Australia. The situation of migration agents is referred to in paragraph 12.23 of the Discussion Paper, which deals with 'Accreditation'.

Under the *Migration Act 1958*, the Office of the Migration Agents Registration Authority (OMARA) had functions including the following:

- to investigate complaints in relation to the provision of immigration assistance by registered migration agents;

- to take appropriate disciplinary action against registered migration agents or former registered migration agents;
- to investigate complaints about lawyers in relation to their provision of immigration legal assistance, for the purpose of referring appropriate cases to professional associations for possible disciplinary action.

The 2014 Independent Review of the Office of the Migration Agents Registration Authority ('Independent Review') found that:

*dual regulation of lawyers risks confusing those seeking migration assistance and imposes an unjustified burden on lawyer agents who, as lawyers, are already subjected to one of the strictest regulatory regimes of any profession in Australia.*¹²

The Independent Review also found that: "*The costs of dual regulation for lawyers are onerous and competent lawyers are arguably discouraged from engaging in a legal practice area much in need of solid legal representation. This fails to benefit anyone.*"¹³

The first recommendation made by this review was that:

*"lawyers be removed from the regulatory scheme that governs migration agents such that lawyers: cannot register as migration agents; and are entirely regulated by their own professional bodies."*¹⁴

The Migration Amendment (Regulation of Migration Agents) Bill 2018, which is currently before Parliament, contains provisions that would give effect to this recommendation.

2.4 Purpose of proposed dual regulation and alternatives

As we understand it, the rationale for a Family Law Commission which, among other functions, deals with complaints about professionals (including lawyers) in the family law system is:

- to monitor the operation of the family law system, the quality of service it delivers to families, and accreditation processes for professionals (12.7);

¹² 2014 'Independent Review of the Office of the Migration Agents Registration Authority: Final Report', Dr Christopher N Kendall, September 2014, page 18. Available at: <https://www.homeaffairs.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/omara-review.pdf> (accessed 24 October 2018).

¹³ 2014 'Independent Review of the Office of the Migration Agents Registration Authority: Final Report', Dr Christopher N Kendall, September 2014, page 19. Available at: <https://www.homeaffairs.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/omara-review.pdf> (accessed 24 October 2018).

¹⁴ 2014 'Independent Review of the Office of the Migration Agents Registration Authority: Final Report', Dr Christopher N Kendall, September 2014, see Recommendation 1, page 28. Available at: <https://www.homeaffairs.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/omara-review.pdf> (accessed 24 October 2018).

- ensuring a skilled workforce adheres to established professional standards (12.10);
- more consistent approaches to mechanisms for performance monitoring and improvement, accreditation and complaints handling across the system (12.11);
- that a more transparent and independent avenue for the resolution of complaints against a range of professionals across the system including legal practitioners is required (12.12).

Given the concerns about dual regulation, set out earlier, further consideration should be given to whether these aims may be better achieved through other mechanisms, such as information sharing with legal regulators.

Decisions of the New South Wales Civil and Administrative Tribunal in relation to proceedings initiated and prosecuted by me or my delegates (under section 300 of the Uniform Law) are publicly available online.

Other information that could be shared with the Family Law Commission to promote its function of systemically monitoring performance (either periodically or on an ad hoc basis) might include:

- data relating to complaints about family law and/or lawyers providing services in family law;
- information about decisions made by regulators with regard to complaints in the area of family law;
- information about determinations made (whether consumer or disciplinary) with regard to complaints in the area of family law;
- information about the outcome of compliance audits that raise issues about services provided by a law practice in the area of family law; and/or
- information about disciplinary histories of family law practitioners.

To this end, I note that Part 9.4 of the Uniform Law contains provisions regarding cooperation and information sharing. The OLSC entered into a Memorandum of Understanding with the OMARA to establish processes to share information and facilitate timely communication and advice on regulatory matters.¹⁵

¹⁵ This Memorandum is available as Attachment C to the 2014 'Independent Review of the Office of the Migration Agents Registration Authority: Final Report', Dr Christopher N Kendall, September 2014, page 185. Available at: <https://www.homeaffairs.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/omara-review.pdf> (accessed 24 October 2018). It should be noted that this memorandum was made under the (now repealed) *Legal Profession Act 2004*.

In relation to the other rationales for the (regulatory functions of the) Family Law Commission, identified above, I make the following further observations.

Like many legal regulators in Australia, the OLSC is an independent statutory body. The OLSC aims to deal with all complaints consistently and transparently, and indeed the Uniform Law contains provisions that promote the transparent handling of complaints.¹⁶ The OLSC also has oversight of, and can review decisions made by our co-regulators, including upon the request of the complainant.

I acknowledge that lawyers are regulated at a state/territory level, and that complaint handling may vary across jurisdictions. However, I note that the Uniform Law currently applies in Victoria and NSW, and that the Commissioner for Uniform Legal Services Regulation has the function of ensuring that dispute resolution and professional discipline arrangements set out in Chapter 5 of the Uniform Law, are implemented consistently and effectively. Other jurisdictions are encouraged to join the Uniform Law, and may do so in the future.

Secondly, any specific rules or obligations applying to lawyers providing legal services in family law matters (including the proposed Accreditation Rules) may be relevant to the work of legal regulators in NSW in dealing with complaints.

I refer to the definition of 'unsatisfactory professional conduct', set out above. I note also that the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* contain the following fundamental ethical duties:

- the duty to deliver legal services competently, diligently and as promptly as reasonably possible (Rule 4.1.3); and
- the duty to comply with the *Solicitors' Conduct Rules* and the law (Rule 4.1.5).

Any guidelines, standards or rules applying in relation to a particular area of law are relevant to a consideration of whether a lawyer's conduct has fallen short of the standard of competence reasonably expected, as well as any assessment of quality of service concerns.

I do not oppose guidelines or rules establishing additional professional standards for lawyers in the area of family law, to the extent these address matters specific to that area of law (rather than duplicating existing rules). As noted earlier, there is already a precedent for this in the *Family Law Rules 2004*, and the Law Council of Australia's 'Best Practice Guidelines for Lawyers doing Family Work'.¹⁷

¹⁶ See, for example, *Legal Profession Uniform Law*, sections 300, 313, 316 and 318.

¹⁷ See, for example, *Family Law Rules 2004*, Rule 1.08, Parts 19.1-19.2 (Rules 19.03 and 19.04), Rule 19.10. See also Schedule 1, Clause 6; and sections 12E, 60D and 63DA of the *Family Law Act 1975*; and Law Council of Australia (Family Law Section), *Best Practice Guidelines for Lawyers doing Family Law Work* (Fourth Edition). Available at:

2.5 Other aspects of the proposed complaint handling functions of the Family Law Commission

This section considers some other aspects of the proposed complaint-handling functions of the Family Law Commission.

Proposal 12-1 states that one of the responsibilities of the proposed Family Law Commission should be to '*resolve complaints about professionals [...], including through the use of enforcement powers*'. It is unclear what precisely is meant by 'enforcement powers'.

However, in paragraph 12.29 it is proposed that the Family Law Commission's powers '*should be limited to cancelling or suspending the professional's accreditation in relation to the provision of family law services only*'. This is a very serious outcome for lawyers (as for any professional), and it is unclear whether it is proposed that the Commission have the power to make less serious orders (such as issuing a caution or reprimand).

It is almost inevitable that any secondary regulatory scheme will employ different terminology and processes for complaint-handling than the Uniform Law (and equivalent legislation in other jurisdictions). For example, the Uniform Law distinguishes between complaints that can be resolved (consumer matters), and disciplinary matters.

Paragraph 12.30 of the Discussion Paper states:

"In order to exercise its complaint-handling function, the Family Law Commission should need to be satisfied that the complainant has already attempted to resolve the complaint with the professional or organisation being complained about."

The Uniform Law contains a similar pre-requisite in relation to consumer matters only (see section 286). However, an exception applies where '*it would be unreasonable to expect the complainant to be involved in such an attempt*'. Such an exception may be particularly pertinent in some family law matters. Further, it may not be helpful, and may well be counter-productive or inappropriate, to require that complainants attempt to resolve disciplinary matters or serious conduct concerns.

I agree with the proposal in 12.31 that any Family Law Commission have the power to dismiss complaints that it considers vexatious, frivolous or not made in good faith. I suggest that consideration be given to expanding this to a power to dismiss complaints that are misconceived and/or lacking in substance.¹⁸

https://www.familylawsection.org.au/images/documents/20170720_BestPracticeGuidelines.pdf.

¹⁸ See for example the *Legal Profession Uniform Law*, section 277.

2.6 Privacy provisions

Proposal 12-11 relates to privacy provisions that restrict publication of family law proceedings to the public, namely section 121 of the *Family Law Act 1975* (Cth).

As noted in paragraph [12.61] of the Discussion Paper, there is already an exception to this restriction for the communication of such information to legal profession regulators, and for the purposes of disciplinary proceedings.

That exception is set out in section 121(9)(b), which provides as follows:

- (b) *the communication of any pleading, transcript of evidence or other document to:*
 - (i) *a body that is responsible for disciplining members of the legal profession in a State or Territory; or*
 - (ii) *persons concerned in disciplinary proceedings against a member of the legal profession of a State or Territory, being proceedings before a body that is responsible for disciplining members of the legal profession in that State or Territory;*

Notwithstanding the above, I support the ALRC's proposal that this provision be clarified to ensure that it includes the use of accounts of family law proceedings by professional regulators in connection with their regulatory functions.¹⁹

3. Children in the Family Law System

Chapter 7 of the Discussion Paper raises the issue of a disjuncture between the expectations of professionals in the family law system with regard to the role of Independent Children's Lawyers (ICLs), and those of parents and children/young people.

This is consistent with our experience of complaints about ICLs, and I broadly support proposals to clarify the role of ICLs.

I note that the OLSC cannot deal with complaints about ICLs as consumer matters and, in many cases, we cannot deal with complaints about ICLs as a disciplinary matter. This may be because:

- the complaint relates to ongoing proceedings under the supervision of the Court;
- the complaint reflects a misunderstanding of the role and responsibilities of ICLs; and/or

¹⁹ See proposal 12-11 and paragraph [12.72].

- the *Family Law Act 1975* and national guidelines for ICLs allow for a wide variation in practice and approach, and give ICLs significant discretion in how they conduct a matter.



John McKenzie
Commissioner

12 November 2018