

# Review of the Family Law System

## Submission

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*This submission reviews various aspects of the Australian Law Reform Commission's proposals contained in its Discussion Paper on the family law system. It evaluates the proposals against the benchmark of what ordinary Australians told the Commission that they wanted from the reform process, and makes twenty recommendations for how to proceed from here.*

*The submission concludes that while there is much to praise in the DP, particularly the proposals on dispute resolution and adjudication processes, other proposed reforms are not adequately justified or well thought out. In particular, the ALRC will need to establish priorities for new expenditure and examine whether and why such expenditure is preferable to better resourcing of the courts and existing services.*

## List of Recommendations

**Recommendation 1:** The ALRC should examine issues surrounding the assessment of parenting capacity and risk to children, particularly for cases of alleged child sexual abuse. This examination should include consideration of more funding for expert reports in cases where parents cannot reasonably afford to meet these costs from their own resources.

**Recommendation 2:** The ALRC should consider issues concerning the recruitment and skillset of family consultants, including the levels of remuneration needed to attract highly qualified and experienced child psychologists or other social science trained professionals to write family reports.

**Recommendation 3:** There should either be a specialist federal child protection service or family consultants should be given an investigatory role in cases where this is needed.

**Recommendation 4:** The ALRC should propose a simplification of Part VII which will retain the emphasis on the importance of both parents in children's lives subject to the paramount consideration of their best interests.

**Recommendation 5:** The ALRC should propose a simplification of Part VII that still requires courts to consider substantial and significant time in cases where the parents are to retain joint parental responsibility and where it is reasonably practicable in the circumstances.

**Recommendation 6:** The ALRC should consider how its proposals will assist the courts to determine cases of relocation, and other difficult cases where issues of family violence may not be significant factors in decision-making.

**Recommendation 7:** The ALRC should not proceed with its proposed changes to s.60B, s.60CA, and s.60CC and should instead revisit the proposals made by Prof. Chisholm as the basis for simplification, taking into account the recommendations above.

**Recommendation 8:** While maintaining a discretionary framework for the division of property, the ALRC should, as a minimum, recommend principles of quantification in terms of how to assess contributions, adopting a starting point of equality of contribution in relation to all property acquired during the course of the relationship otherwise than by gift or inheritance; adopting a broad and discretionary tracing approach to assets owned before the relationship began or acquired by inheritance; adopting a formula to assess contributions to superannuation to approximate the increase in value of a superannuation fund during the course of the relationship; stating clearly the *Biltoft* principles in relation to debts; and dealing with other issues where the law is uncertain. It should also make proposals on which s.75(2) factors ought to be relevant to the division of property, as opposed to spousal maintenance, and any new factors that should be included, such as the housing needs of children.

**Recommendation 9:** The ALRC should recommend some principles for when and how family violence should be deemed to affect contributions, resolving the current incoherence in the law, and offering some principles of quantification for how violence reaching the relevant threshold should affect the outcome of cases. If this proves impossible (as is likely), then it should recommend that the family courts be authorised to make compensatory awards, unaffected by statutes of limitation, which should be calculated on common law principles.

**Recommendation 10:** The ALRC should consider what changes to the law concerning arbitration would lead to its greater use in property proceedings. Consideration should also be given to its use in children's matters, especially for interim parenting orders.

**Recommendation 11:** Whatever recommendations the ALRC makes for qualifications in relation to the appointment of members of Parenting Management Hearing panels should be consistent with its recommendations for appointment of judges.

**Recommendation 12:** The ALRC should reconsider the groups that need to be consulted in implementing various proposals, giving priority to widely-recognised representatives of those who are most affected by the proposals or whose perspectives are relevantly different from mainstream users of the services.

**Recommendation 13:** The ALRC should do further research on the background to laws which it recommends be deleted or amended, providing clear justification, based upon the available research, for those changes.

**Recommendation 14:** The ALRC should do further research on reports and other policy documents published prior to 2012, as well as academic research, which is relevant to issues on which it makes proposals for reform.

**Recommendation 15:** The ALRC should identify with precision, the deficiencies that exist in the current provision of information concerning the family law system, whether online or through other means of communication, and make specific proposals to rectify those deficiencies.

**Recommendation 16:** The ALRC should clarify whether any amendment is needed to the existing legislation concerning parenting arrangements for Aboriginal or Torres Strait Islander children.

**Recommendation 17:** The ALRC’s proposals for Families Hubs should be modified, so that it makes recommendations for an evolution of the existing role of Family Relationship Centres.

**Recommendation 18:** The ALRC should identify which outposted workers from existing services supporting families could most usefully be added to the staffing complement of Family Relationship Centres, if space and resources permit.

**Recommendation 19:** The ALRC should endeavour to cost its proposals for major new spending and compare the value to be gained from these initiatives against the value to be gained from increasing resources for existing services, including courts.

**Recommendation 20:** The ALRC should endeavour to rank in order of importance its proposals for major new spending and explain how each of its top ten priorities will significantly improve the family law system for ordinary Australians.

## Introduction

The Australian Law Reform Commission (the ALRC) has been given an enormous task, in a limited timeframe with few resources.<sup>1</sup> Essentially, the former Attorney-General, the Hon George Brandis, asked the ALRC to review everything – the Act, the system, and even such fundamentals of a common law system as the adversarial process.<sup>2</sup>

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<sup>1</sup> For details of the Review of the Family Law System, see <https://www.alrc.gov.au/inquiries/family-law-system>.

<sup>2</sup> The ALRC was asked to consider: the appropriate, early and cost-effective resolution of all family law disputes; the protection of the best interests of children and their safety; family law services, including (but not limited to) dispute resolution services; family violence and child abuse, including protection for vulnerable witnesses; the best ways to inform decision-makers about the best interests of children, and the views held by children in family disputes; collaboration, coordination, and integration between the family law system and other Commonwealth, state and territory systems, including family support services and the family violence and child protection systems; whether the adversarial court system offers the best way to support the safety of families and resolve matters in the best interests of children, and the opportunities for less adversarial resolution of parenting and property disputes; rules of procedure, and rules of evidence, that would best support high quality decision-making in family

The ALRC has now released its Discussion Paper (DP),<sup>3</sup> and while there is much to praise in the extraordinary effort that the ALRC team has made under the leadership of Prof. Helen Rhoades, it is clear that the chickens are coming home to roost in terms of the unmanageable task that Mr Brandis gave them.

This submission reviews several aspects of the DP and explores five central questions about the proposals made in the Discussion Paper. These are hard questions, but they need to be asked if the final report of the ALRC is to live up to the very high hopes that some have placed in this process as a means of achieving major reform to the family law system. The questions are as follows:

1. To what extent do the proposals for reform meet the needs and expectations of ordinary Australians as revealed in the Commission's consultation processes?
2. How, given the brevity of the Discussion Paper, can the Government and Parliament be assured that proposals for significant changes to the law have been the result of adequate consultation and research?
3. How do the proposals for new initiatives and services relate to the existing infrastructure of systems and services?
4. If there is to be an increase in resources allocated to the family law system, what is the balance to be found between new services and additional resources for existing services?
5. Given that a taxpayer dollar can only be spent once, and each additional taxpayer dollar needs to be justified, which of the many proposals for major new expenditure should be given priority?

Before considering these in detail, it is necessary to lay some foundations in terms of the challenges facing an inquiry of this magnitude.

## **I The challenges of a broad-ranging inquiry**

Such a broad inquiry gives rise to a multitude of problems. The first is knowing where to start. In the Issues Paper,<sup>4</sup> the ALRC relied quite heavily on recent inquiries to set an agenda, such

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disputes; mechanisms for reviewing and appealing decisions; families with complex needs, including where there is family violence, drug or alcohol addiction or serious mental illness; the underlying substantive rules and general legal principles in relation to parenting and property; the skills, including but not limited to legal, required of professionals in the family law system; restriction on publication of court proceedings; improving the clarity and accessibility of the law; and any other matters related to these Terms of Reference.

<sup>3</sup> DP 86, *Review of the Family Law System* at <https://www.alrc.gov.au/publications/review-family-law-system-discussion-paper>.

<sup>4</sup> IP 48, *Review of the Family Law System* at <https://www.alrc.gov.au/publications/family-law-system-ip>.

as the parliamentary inquiry on domestic violence.<sup>5</sup> However, there are risks involved in so doing. One is that the focus is on already well-travelled pathways such as improving the legal system's response to family violence, while continuing to ignore vital, but neglected issues, such as how the legal system can better deal with issues of mental illness,<sup>6</sup> such as parents with personality disorders and others who are not sufficiently impaired to require a litigation guardian.<sup>7</sup>

Another risk is that with a plethora of issues that *could* be considered, the review team, for the most part, just plucks out issues that are particularly of interest or importance to them as individuals, or their favoured constituencies.

There are indications that this is the case. For example, the Discussion Paper reflects strongly the concerns of Women's Legal Services Australia, particularly the reform proposals contained in its Safety First in Family Law Campaign,<sup>8</sup> but seems to have almost entirely ignored the concerns of another significant advocacy group, Bravehearts.<sup>9</sup> It proposes major changes to the law of parenting after separation, along lines long advocated by some women's groups, but makes no attempt to explain the concerns of fathers' groups expressed to parliamentarians over the last 25 years, that have led to the emphasis on the involvement of both parents in children's lives. Pages of the DP revisit yet again the definitions of family violence and child abuse in the Act, proposing further 'definition inflation' as more and more behaviour which is to be regarded as reprehensible is classified as 'family violence' rendering the core meaning of the term ever more obscure. Another long part of the DP concerns whether there is a need for court authorisation for medical treatment of children born with ambiguous genitalia, but the lack of clarity concerning principles for the division of family property is an issue hardly deemed worthy of discussion. This selectivity makes the DP look imbalanced and insufficiently responsive to the range of concerns for ordinary Australians.

The second issue is how to engage in professional and public consultation when the range of potential issues is so wide. If a Discussion Paper is 1000 pages long, busy professionals won't read it, or will read only selected portions of interest to them. If the final report is too long, few outside of the Attorney-General's Department will read more than the executive summary.

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<sup>5</sup> House of Representatives Standing Committee on Social Policy and Legal Affairs, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (2017).

<sup>6</sup> Bryan Rodgers, Bruce Smyth, & Elly Robinson, 'Mental health and the family law system', (2004) 10 *Journal of Family Studies* 50.

<sup>7</sup> There is a good discussion of the issue of litigation guardians in chapter 9.

<sup>8</sup> Women's Legal Services Australia, *Safety First in Family Law*, <https://safetyinfamilylaw.org.au/the-solutions>.

<sup>9</sup> <https://bravehearts.org.au/what-we-do/lobbying-and-reform>.

Sensibly, the ALRC kept its Issues Paper to 93 pages and its DP to 313 pages. However, with such a broad scope to the Inquiry, even greatly narrowed down to the issues the ALRC decided to explore, the risk is that little analysis is provided either of the problem or the proposed solution. This risk is evident in the DP, which makes a large number of proposals about issues which have been explored in depth in book length reports or scholarly articles over the years. These are dealt with in just a few sentences, paragraphs or pages - with the analysis often failing to explain or justify the proposals adequately. The analysis is equally brief in explaining why the ALRC sees no need to reform certain areas despite representations to do so.

With the benefit of hindsight, it might have been better to have several issues papers, and perhaps several discussion papers, focusing on different aspects of the family law system. Few if any constituencies have an interest in all the issues raised in the DP.

A third issue with such a broad-ranging review is that it raises expectations of bold new initiatives and magic wand fixes. There have been bold new initiatives in the past. The establishment of the Child Support Scheme in the late 1980s was one such – transforming the way child support is both assessed and collected.<sup>10</sup> The establishment of the Family Relationship Centres in the mid-2000s was another bold initiative that has garnered attention around the world.<sup>11</sup> In terms of litigation, the Children’s Cases Program was an innovative attempt to move away from the adversarial system and to adopt a more structured and inquisitorial approach to adjudication in parenting matters.<sup>12</sup>

Governments like to claim responsibility for bold new initiatives, but to the extent that they involve new taxpayer-funded services, they often require a significant investment of new public funds for the indefinite future. Perhaps for this reason, green fields initiatives are the exception. For the most part, in any established and mature service system, change is incremental. A law reform process must work out readily implementable ways to get from where we are to a better future, with the goal of bringing about at least modest improvements.

Yes, the result of a review could be a breakthrough new invention – the legal equivalent of a first generation smart phone or a new means of extracting gas from coal seams. However, it is more likely that any change law reform generates will be modest and evolutionary. The claims of law reform bodies notwithstanding, a substantial majority of recommendations in such reports or similar reports of committees and councils are not implemented at all, or not in a

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<sup>10</sup> *Child Support (Registration and Collection) Act 1988; Child Support (Assessment) Act 1989.*

<sup>11</sup> See e.g. the special issue devoted to the centres: vol 51(2) of the *Family Court Review* (2013). For interest in FRCs in South America, see e.g. Patrick Parkinson, ‘La Experiencia Australiana En Los Centros De Relación Familiar’, (2013) 41 *Cuaderno Jurídico de Familia* 6.

<sup>12</sup> Margaret Harrison, *A Better Way* (Family Court of Australia, 2007); Jenn McIntosh, Diana Bryant and Kirsten Murray, ‘Evidence of a Different Nature: The Child-Responsive and Less Adversarial Initiatives of the Family Court of Australia’ (2008) 46 *Family Court Review* 125.

manner which tracks closely the intent of the recommendation.<sup>13</sup> The recommendations least likely to be implemented are either aspirational or expensive, or both.

Bold new initiatives are easiest to justify when a law reform body or other such committee has the benefit of a green field on which to build in order to solve a problem that the Government really wants to solve. So it was when the Fogarty Committee designed the Child Support Scheme.<sup>14</sup>

The fundamental difficulty with the Review of the Family Law System is that it is a green fields review of what is already a rather densely populated urban environment. That is, there are already courts, services and whole industries of professionals working to assist people to resolve disputes in the aftermath of relationship breakdown. Change is necessarily incremental unless governments want to take a nuclear option to reform of a sector.

## **II The densely populated family law environment**

The densely populated urban environment that is the family law system has a number of elements to it.

First, there is the built environment. Yes of course, there are courts; but there is a lot more infrastructure devoted to the family law system than just courts. There are 65 Family Relationship Centres all over the country, and part of the design brief for this network was that the centres be highly visible and accessible - not located kilometres away from the nearest train or bus station.<sup>15</sup>

Then there are the buildings occupied by other taxpayer-funded services – domestic violence services, legal aid offices, community legal centres, and a range of other services that people going through separation might need to access, such as housing services. Some of these are specialist services focusing on the population of separating or separated parents; but far more are general population services, with people involved in family law issues being just a small part of their clientele. The built environment supporting the current system is extensive, and proposals for major changes to the physical location of services require a cost-benefit analysis that looks at infrastructure.

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<sup>13</sup> This is true, for example, of many ALRC inquiries. Despite the huge effort put into its Freedoms Inquiry by so many people and groups writing submissions, nothing came of it: *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (2016). Few recommendations of the ALRC reports on family violence actually led to changes in legislation that closely reflected the text of the recommendations: see Australian Law Reform Commission & New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, (2010); *Family Violence and Commonwealth Laws—Improving Legal Frameworks* (2012). This can be the fate of other inquiries also.

<sup>14</sup> Child Support Consultative Group, *Child Support: Formula for Australia*, (AGPS, 1988).

<sup>15</sup> Patrick Parkinson, 'Keeping in Contact: The Role of Family Relationship Centres in Australia' (2006) 18 *Child and Family Law Quarterly* 157.

Second, there is the informational environment – that is the number of publications, websites, apps, videos, telephone advice lines and other resources that are currently available to provide people with information and to help them navigate the family law system. Professionals are part of the informational environment as well. Lawyers in private practice, legal aid lawyers and staff in community legal centres are just some of the professionals who provide information and assist people to get the help they need if they have a family law issue.

Third, there is the professional environment. There is quite a large industry of professionals who make their living from family law. These include family law solicitors and specialist family law firms, barristers who appear in family law matters, mediators, arbitrators and private Chapter 15 experts who prepare reports for the Court.

Fourth, there is the service environment. This is the network of services that governments, both state and federal, pay for to assist people to resolve disputes, in particular about parenting after separation. Some have been long-standing such as the family consultants and registrars in the courts. Others are newer, such as contact centre services and post-order programs to address contact disputes. These services were greatly expanded as part of the 2006 reforms.<sup>16</sup>

Fifth, there is the legislative environment. Nearly 45 years on from the enactment of the Family Law Act 1975, the legislation reflects decades of reform efforts and incremental changes recommended by one committee and council after another – as well as amendments generated by politicians in Canberra. The Family Law Council (now abolished in practice but surviving in theory) generated a large volume of reports.<sup>17</sup> There have been many reviews of aspects of the Act by parliamentary committees.

The Act now represents the cumulative outcome of multiple and extensive revisions. All of those revisions had a purpose – a legislative intent. All were addressing issues that the Parliament thought needed addressing. All represented a sufficient consensus on policy to get through both Houses of Parliament, and usually survived a change of government. Some of those changes are very recent and made with bipartisan support – notably the changes to Part VII in 2006, modified in 2011.

Finally, there is the interpretation of the law, which at least in terms of the division of family property, has changed radically since 1975. The court's approach to the assessment of

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<sup>16</sup> Sue Pidgeon, 'From Policy to Implementation—How Family Relationship Centres Became a Reality' (2013) 51 *Family Court Review* 224; See also KPMG, *Future Focus of the Family Law Services: Final Report* (Report prepared for Attorney-General's Department (Cth), 2016).

<sup>17</sup> The more recent of these are published on the Attorney-General's Department website. See <https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Pages/FamilyLawCouncilpublishedreports.aspx>.



contributions is now being given a rather different interpretation to its meaning back in 1975 as modified in 1983.<sup>18</sup>

### **III Meeting the needs and expectations of ordinary Australians**

Early in the Discussion Paper, the ALRC team identifies well, from its consultations with the general public, some key issues that people wanted addressed. Respondents wanted:

- changes to the law and decision-making processes to ensure children are protected from harm and their parents are safe;
- simpler and clearer legislation and information about the law to support people to sort out arrangements by themselves;
- more affordable and less confrontational processes for resolving post-separation problems;
- legal services that are delivered in a way that does not exacerbate or extend their dispute; and
- greater support to navigate the system to ensure that all of the person's needs can be met in a seamless way.

These are not unreasonable expectations. They provide a yardstick by which the proposals the ALRC makes can be evaluated.

The proposals in the Discussion Paper go some way towards fulfilling these expectations. In particular, there are excellent proposals in Chapter 5 on dispute resolution and Chapter 6 on adjudication processes. There are also sensible and practical proposals for simplification of court forms and for the use of online forms that will prepopulate with previously supplied data.<sup>19</sup> There is much that can be done with technology, using document assembly software and decision-tree technology. Online questionnaires can automatically skip questions that are, in the circumstances of the case, inapplicable.

However, in responding to these community concerns, there are gaps in the DP's coverage and problems with several of the ALRC proposals.

#### *The safety of children and their caregivers*

The ALRC team proposes changes to the law to focus more on children's safety and to help ensure that their parents are safe. To that extent, the proposals are uncontroversial. The courts deal with quite a large number of serious child protection and family violence cases. Ensuring that children and their primary caregivers are safe, is an essential aspect of making orders that are in the best interests of the child.

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<sup>18</sup> Patrick Parkinson, 'Quantifying the Homemaker Contribution in Family Property Law' (2003) 31 *Federal Law Review* 1.

<sup>19</sup> Proposal 3.2.

This focus is not new. Since 1995, family violence has been prominent in the matters the judge must consider in making decisions about a child's best interests, and the courts have been required to make decisions that as far as possible do not expose a child's parent to an unacceptable risk of violence.<sup>20</sup> The issue of protecting the child from harm resulting from abuse or exposure to violence was made one of two primary considerations in 2006. Family violence was also listed in the additional factors to be considered. Since 2011, protection of the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence has been given priority over other considerations.

Given that it is already a strong focus of Part VII, and indeed every litigant in a parenting case in the Federal Circuit Court must complete a Notice of Risk, it is questionable whether yet more legislative amendment, essentially restating the same principles in different, or repositioned words, will lead to any different outcomes. Legislative amendment is only the answer if the legislation is the problem; but there is simply no evidence to suggest that the legislation, as most recently amended in 2006 and 2011, inhibits judges from making protective decisions. Indeed, even before the 2011 amendments, one of the Family Courts' strongest critics conceded that courts were generally making protective orders in appropriate cases.<sup>21</sup> The AIFS evaluation of the family violence reforms in 2011 offered a cautiously optimistic assessment of their efficacy and did not identify any significant legislative issues to be addressed.<sup>22</sup>

It follows, that the case for yet more textual change to the Act to emphasise family violence has not been made out. More useful may be the proposal for a family violence list,<sup>23</sup> especially if only certain judges, with knowledge and experience in dealing with family violence, are assigned to the list. The proposal is similar in many respects to the long-established Magellan list for child sexual abuse cases – indeed it represents an incremental expansion of the Magellan program.

Where the DP leaves gaps is in terms of recommendations to improve assessment of disputed allegations of violence, abuse or other risk of harm to children. For example, there is little discussion of how the system might be improved to assist services and courts in dealing with parents who suffer from an addiction, even though dealing with drug or alcohol addiction were specifically referred to in the terms of reference. Courts have to rely on evidence. Improving

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<sup>20</sup> This is currently s.60CG of the Act: In considering what order to make, the court must, to the extent that it is possible to do so consistently with the child's best interests being the paramount consideration, ensure that the order... does not expose a person to an unacceptable risk of family violence.

<sup>21</sup> Renate Alexander, 'Behind closed doors: Family violence cases under the Family Law Act outlined and analysed' (2009) 20 *Australian Family Lawyer* 1; Renate Alexander, 'Moving forwards or back to the future? An analysis of case law on family violence under the Family Law Act 1975 (Cth)', (2010) 33 *University of NSW Law Journal* 907.

<sup>22</sup> Rae Kaspiew et al, 'Evaluation of the 2012 Family Violence Amendments: Synthesis Report' (Australian Institute of Family Studies, 2015).

<sup>23</sup> Proposal 6-7.

the quality of the evidence and assessment before the Court, both for interim and final orders, is surely a key issue.

Issues that commonly arise concerning risk of harm to children include not only the impact of family violence on children and their safety in a parent's care. Many other matters, such as alleged child sexual abuse, parental alienation and the physical or emotional neglect of children often require an investigatory capacity which the family law system lacks. In many cases, no other substantial investigation has occurred beyond an initial, rudimentary assessment, whether from police or child protection services.

Where such investigation and assessment is needed, there is a question about who should conduct it, what skillset these professionals need, and who should pay for it. These problems are particularly acute where the sexual abuse of children under about 7 is alleged. This is recognised internationally as a difficult problem requiring careful assessment.<sup>24</sup> At present, assessments are carried out by Chapter 15 experts, usually child psychiatrists, who can be exceedingly expensive and who may have little training or expertise in assessing the veracity of a child's apparent disclosure of sexual abuse. The DP does touch on this issue briefly, but mainly in terms of having a new accreditation and complaints process for family report writers.<sup>25</sup> Developing skills in this area is also discussed as a feature of the proposed workforce capability plan.<sup>26</sup>

The more fundamental issue of how less affluent litigants can afford to pay for reports which may cost a quarter of their annual gross income remains to be addressed. Years ago, the Family Law Council presented a detailed proposal to the Government for a federal Child Protection Service to conduct such investigations where they have not already occurred.<sup>27</sup> If the focus is now to be much more on children's safety, it may be time to revisit this proposal as a system enhancement priority.

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<sup>24</sup> See e.g. Kathryn Kuehnle and H.D Kirkpatrick, 'Evaluating Allegations of Child Sexual Abuse Within Complex Child Custody Cases' (2005) 2 *Journal of Child Custody* 3; Nick Bala & John Schuman, 'Allegations of Sexual Abuse When Parents Have Separated' (2000) 17 *Canadian Family Law Quarterly* 191; Nico Trocmé & Nick Bala, 'False Allegations of Abuse and Neglect when Parents Separate' (2005) 29 *Child Abuse and Neglect* 1333; Nick Bala, Mindy Mitnick, Nico Trocmé & Clare Houston, 'Sexual Abuse Allegations and Parental Separation: Smokescreen or Fire?' (2007) 13 *Journal of Family Studies* 26; Toni Cavanagh Johnson, 'Young Children's Problematic Sexual Behaviors, Unsubstantiated Allegations of Child Sexual Abuse, and Family Boundaries in Child Custody Disputes', (2006) 2 *Journal of Child Custody* 111.

<sup>25</sup> DP p.254ff.

<sup>26</sup> DP p.238ff.

<sup>27</sup> Family Law Council, *Family Law and Child Protection* (2002).

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**Recommendation 2:** The ALRC should consider issues concerning the recruitment and skillset of family consultants, including the levels of remuneration needed to attract highly qualified and experienced child psychologists or other social science trained professionals to write family reports.

**Recommendation 3:** There should either be a specialist federal child protection service or alternatively family consultants should be given an investigatory role in cases where this is needed.

#### *Simpler and clearer legislation*

A strength of the DP is that it offers some sensible suggestions for how to simplify the legislation, or at least reduce its volume. It proposes that the Family Law Act and its subordinate legislation should be comprehensively redrafted with the aim of simplification and assisting readability.<sup>28</sup> It also proposes removing provisions establishing the Family Court of Australia and the Australian Institute of Family Studies to separate legislation; and removing provisions defining parentage – also into separate legislation. This is consistent with the Family Law Council’s report on parentage that called for a federal Status of Children Act.<sup>29</sup>

What is more troubling is that under the rubric of simplification, the ALRC team is proposing a radical departure from the philosophy underlying the 1995 and 2006 reforms, as modified only a little by the 2011 amendments.<sup>30</sup> While there is a strong case for simplification of Part VII,<sup>31</sup> the ALRC team goes far beyond this to propose removing most references to the importance of both parents in children’s lives, or at least qualifying those statements heavily.<sup>32</sup> These proposals are made without very much analysis of defects in the existing law and, surprisingly, without any reference to the major evaluation of the 2006 amendments to the Act.<sup>33</sup> The AIFS evaluation of the 2006 reforms, a comprehensive review involving exhaustive

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<sup>28</sup> Proposal 3.1.

<sup>29</sup> Family Law Council, *Report on Parentage and the Family Law Act* (2013).

<sup>30</sup> Proposals 3-4 and 3-5.

<sup>31</sup> Richard Chisholm, ‘Re-Writing Part VII of the Family Law Act: A Modest Proposal’ (2015) 24(3) *Australian Family Lawyer* 17.

<sup>32</sup> Proposals 3-3-3.5.

<sup>33</sup> For commentary on this, see Patrick Parkinson, *The Payoffs and Pitfalls of Laws that Encourage Shared Parenting: Lessons from the Australian Experience* (2014) 37 *Dalhousie Law Journal* 30.

research,<sup>34</sup> lends no support to reforms of the radical nature proposed. The AIFS reported that:<sup>35</sup>

“The philosophy of shared parental responsibility is overwhelmingly supported by parents, legal system professionals and service professionals.”

Richard Chisholm has commented that:<sup>36</sup>

“...a good reform process would be based on a careful review of the relevant evidence. That evidence would obviously include all the research done to date, including the important AIFS evaluation of the 2006 amendments. It should also draw on the experiences of practitioners and others under the amendments of 2006 and 2011. It should also draw on overseas experience: there has been quite a lot of law reform and review in countries with legal systems similar to our own, and we should learn as much as we can from their experience.

The DP has none of this.

The radical nature of the proposed changes can be seen first of all in the ALRC team’s proposals in relation to s.60B – the objects and principles. Under their proposals, gone would be the object enacted in 1995 that the law should seek to ensure that children receive adequate and proper parenting to help them achieve their full potential, and the principles that:

- children have the right to know and be cared for by both their parents
- children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives); and
- parents jointly share duties and responsibilities concerning the care, welfare and development of their children.

Gone would be the object of the legislation, enacted in 2006, to seek to ensure that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with their best interests.

Replacing this would be a shorter list of principles focused, somewhat repetitively, on safety. Three out of five proposed principles refer to safety. The fourth provides a general reference to the conventions on the rights of the child and people with disabilities, while the fifth concerns indigenous children.

The emphasis on the importance of both parents in children’s lives in the current s.60B does not disappear entirely in the ALRC’s proposals. It would be replaced with the qualified objective that

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<sup>34</sup> Kaspiew et al, above n.22.

<sup>35</sup> Kaspiew et al, p. 365.

<sup>36</sup> Above n.31 at 3.

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.

The ALRC team also proposes a much shorter list of factors to consider in s. 60CC. Two out of the five specific considerations listed refer to safety. There is a paucity of guidance to judges on what factors to consider and how to consider them in those cases where safety is not a significant issue – for example, many relocation cases or cases where the main issue is that one parent wants to spend more time with a child than the primary carer will agree to.

Amongst the many proposed deletions from s.60CC are the provisions which require courts to assess the nature of the relationship of the child with each of the child’s parents; the extent to which each of the child’s parents has taken, or failed to take, the opportunity to participate in making decisions about major long-term issues in relation to the child, to spend time with the child and to communicate with the child; and the extent to which each of the child’s parents has fulfilled, or failed to fulfil, the parent’s obligations to maintain the child. It follows that important aspects of the history of the parents’ involvement with the child would no longer be factors that judges must consider. That is surprising, for the best predictor of the future is the past and present. A number of other factors are proposed to be deleted.

If practitioners are not asked to adduce evidence on matters, or to make submissions about them at the end of a hearing, a trial judge may gain an incomplete picture.

The problem with these changes is not the emphasis on safety. That is already there in the legislation in bold red ink with double underlining. It could hardly be clearer. The difficulty is that the ALRC team’s proposals about decision-making in parenting cases seem premised upon a binary divide between children being ‘safe’ and ‘unsafe’. If the child will be safe, she will be allowed to maintain relationships that are significant to her, including relationships with her parents. If she will not be safe, then presumably she will not be permitted to do so. The principles and discretionary factors are stated in quite stark terms, reinforced by the fact that the paramount consideration should be “children’s safety and best interests”.<sup>37</sup>

Richard Chisholm, in a report commissioned by the Attorney-General, has criticised this bifurcation:<sup>38</sup>

Good parenting can be compromised by other things in addition to violence and abuse. A parent may be disabled from responding properly to a child’s needs by reason of adverse mental health, or physical health. A parent may be indifferent to a child, and leave the child unattended for long periods; or seriously neglect the child. A parent may lack the necessary dedication and skills to respond to the special needs of a severely handicapped child. Parents may each be capable and willing parents in many ways, but the conflict between them might be such as to distress and damage the children. In these and many other situations, difficult issues may arise in determining

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<sup>37</sup> Proposal 3-3.

<sup>38</sup> Hon Richard Chisholm, *Family Courts Violence Review* (Attorney-General’s Department, Canberra, 2009) at 128.

what arrangements will be best for children, even though the problems might not fall within categories such as 'violence' or 'abuse'.

For these reasons it may not help in the identification of the child's best interests if the law appears to assume that there are two basic types of case, namely the ordinary case, and the case involving violence or abuse.

There are undoubtedly circumstances where one parent should be forbidden contact with a child; but often, judges are called upon to make hard choices between two parents both of whom have significant parenting deficits, both of whom complain about physical or emotional abuse by the other in the past and sometimes the present, both of whom are responsible in some measure for the state of high conflict. As the AIFS evaluation of the 2006 reforms found, consistently with all other general population research, it is very common that parents who no longer live together both make allegations of violence or emotional abuse against one another. The Kaspiew et al evaluation in 2009 reported that 26% of mothers and 17% of fathers said they had been physically hurt by their partners. A further 39% of mothers and 36% of fathers reported emotional abuse, defined in terms of humiliation, belittling insults, property damage and threats of harm during the course of the relationship.<sup>39</sup> Safety, in these contexts, is not a binary divide but a spectrum. Based upon previous history, the risk of harm in the future can be said to be remote, minimal, significant, substantial, or grave.<sup>40</sup>

The wisdom of an approach to parenting after separation that provides that children should maintain a relationship with both parents only where it does not expose them to abuse, family violence or harmful levels of ongoing conflict can be tested by a few examples. Would the ALRC team wish to cut off contact with a mother who was in a new relationship where she experiences any violence? If the answer is no, what is the threshold that needs to be crossed before placing the child in the care of the other parent and depriving the mother of contact? Is any exposure to family violence to be disqualifying?

Other questions arise. What should be the principle guiding the courts where both parents have a less than optimal record in terms of physical abuse of the children but the situation is not grave enough that the child protection authorities need to take the child into foster care? What if the court finds that the levels of high conflict are disproportionately the fault of the parent who is also best qualified, on other grounds, to be the primary caregiver of the child? There are no easy answers in these situations. What can be said is that a bright line principle that does not take account of the difficult decisions courts must make is not fit for purpose in guiding judicial discretion.

A final issue concerns how the proposed elimination or qualification of factors that focus attention on the importance of both parents in children's lives in s.60B and s.60CC is to be reconciled with other provisions in Part VII of the Act. Since law reform is typically about

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<sup>39</sup> Kaspiew et al, above n. 22 at p.26.

<sup>40</sup> Patrick Parkinson, 'Possibilities, Probabilities and the Standard of Proof in Determining an Unacceptable Risk of Sexual Abuse', (2015) 29 AJFL 1.

incremental change – modest alterations or additions to the built environment of existing legislation – there is a need to explain in some detail how the proposed new amendments will relate to the existing provisions and decision-making pathway contained in the Act. The DP does not do this. There is a very brief discussion of the encouragement, contained mainly in s.65DAA, for courts to consider at least some form of shared care.<sup>41</sup> However, the most that the ALRC team is prepared to say is that “the legislation should make it clear that in determining what arrangements will best promote the child’s safety and best interests, the court must determine, on all of the material before it, what is best for the particular child in their particular circumstances.”<sup>42</sup> That suggests that they want to remove all references to substantial and significant time, for example; but their present thinking on this issue is not made clear.

**Recommendation 4:** The ALRC should propose a simplification of Part VII which will retain the emphasis on the importance of both parents in children’s lives subject to the paramount consideration of their best interests.

**Recommendation 5:** The ALRC should propose a simplification of Part VII that still requires courts to consider substantial and significant time in cases where the parents are to retain joint parental responsibility and where it is reasonably practicable in the circumstances.

**Recommendation 6:** The ALRC should consider how its proposals will assist the courts to determine cases of relocation, and other difficult cases where issues of family violence may not be significant factors in decision-making.

**Recommendation 7:** The ALRC should not proceed with its proposed changes to s.60B, s.60CA, and s.60CC and should instead revisit the proposals made by Prof. Chisholm as the basis for simplification, taking into account the recommendations above.

*Supporting people to sort out arrangements by themselves*

One of the goals of simpler and clearer legislation ought to be to assist people to sort out arrangements by themselves. That makes it all the more surprising and puzzling that the DP omits any serious examination of problems in the law of family property. The ALRC is required by its terms of reference to examine “the underlying substantive rules and general legal principles in relation to... property”. In the Issues Paper it had almost nothing to say on either the substantive rules or the general legal principles except in relation to family violence. By

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<sup>41</sup> DP, p.53.

<sup>42</sup> Ibid.



the time of the DP, it had concluded that no change to the substantive rules and general legal principles was needed.

There are sensible recommendations concerning how to assist parties to divide debts and to make it easier for them to know how superannuation entitlements might be split. There is also a recommendation concerning a simplified process for dealing with small property pools. All of these are to the good; and these reforms could help if there were more clarity in the law about the principles of how to assess contributions to superannuation funds where a substantial balance existed prior to the commencement of the relationship<sup>43</sup> and when courts will leave one party to pay off his or her own debts accumulated in the marriage. The best information in the world will be no use if all that people can be told is that it is up to the wide discretion of the judge. People want to avoid judges, and to work things out for themselves without the huge cost and uncertainty of going to trial.

The difficulties in relation to family property are well-known. In simple cases, experienced legal practitioners can readily predict the outcome that would be achieved in court within a range of 10% of the asset pool. This usually allows for compromises to be reached after negotiation. However, there is uncertainty at the heart of the law when it comes to dealing with substantial pre-relationship property, inheritances, and assets acquired after separation, as well as working out shares of superannuation and how to deal with substantial debts to third parties.<sup>44</sup> Full Court decisions on these issues can be wildly inconsistent, demonstrating fundamental differences of approach that are, ultimately, differences concerning the interpretation of the intentions of Parliament.<sup>45</sup>

This jurisprudential confusion makes it harder for people to sort out the division of property for themselves. Even very experienced family lawyers can differ markedly in their assessment of what the outcome should be on the same set of facts.<sup>46</sup> Reform has been recommended by

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<sup>43</sup> See eg *M and M* (2006) FLC 93-281, departing from *Coghlan and Coghlan* (2005) FLC 93-220 at 79,646 and decrying a mathematical approach, but not offering any other explanation for how contributions should be assessed. See also *Palmer and Palmer* [2012] FamCAFC 159 for yet another approach.

<sup>44</sup> Patrick Parkinson, 'Why Are Decisions on Family Property So Inconsistent?' (2016) 90 *Australian Law Journal* 498.

<sup>45</sup> See for example the inconsistent approaches and different theoretical explanations on how to assess contributions when substantial assets are brought by one party into the relationship: see e.g. *Lee Steere and Lee Steere* [1985] FLC 91-626; *Bremner and Bremner* [1995] FLC 92-560; *Aleksovski and Aleksovski* [1996] FLC 92-705, *Pierce and Pierce* [1999] FLC 92-844, *Cook v Langford* [2008] FLC 93-374; *Williams and Williams* [2007] FamCA 313, *Cabbell and Cabbell* [2009] FamCAFC 205 and *Agius and Agius* [2010] FLC 93-44.

<sup>46</sup> John Wade, 'Arbitral Decision-making in Family Property Disputes — Lotteries, Crystal Balls, and Wild Guesses' (2003) 17 *AJFL* 224 (expert family lawyers in Australia who wrote arbitral decisions on an identical set of facts reached decisions which were apart by at least 35%). See also Rosemary Hunter et al, *Legal Services in Family Law*, 166-167 (2000) (58 solicitors in 8 different registries were asked to state the norm in a house and garden case of a 10 year + marriage. The mean percentages ranged from 59.4% to the wife in Adelaide to 75% in Dandenong.)

the Productivity Commission<sup>47</sup> and the Australian Dispute Resolution Advisory Council,<sup>48</sup> amongst others.

Young and Goodie have argued that the reason why there is such limited appellate guidance on many aspects of family property law is that judges cannot agree on what would be a fair outcome.<sup>49</sup> That seems an accurate observation. If appellate judges cannot agree on the principles, or what a fair outcome would be in a great range of commonly encountered situations, the best way to mask that disagreement is by saying that Parliament intended to leave it up to each trial judge to work out what he or she thinks is fair.

Despite all of this, the ALRC felt able to say there is no problem in the law without any discussion of the “substantive rules or the general legal principles” and the difficulties that have been identified with them.<sup>50</sup> While there was support from some for the retention of a discretionary system,<sup>51</sup> the question is how the principles can be articulated afresh in up to date legislation which will leave less room for inconsistency in decision-making.

The ALRC team, with respect, set up a false dichotomy between rule-based prescription and discretion, when there is a myriad of options in between.<sup>52</sup> Discretion may be guided by more clearly articulated principles than are provided by merely setting out a list of factors to consider - without any guidance how to do so. Various proposals for providing clearer guidance have been suggested.<sup>53</sup>

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<sup>47</sup> Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 2, 2014) 874.

<sup>48</sup> Submission to the ALRC cited in DP p. 59.

<sup>49</sup> Lisa Young and Jo Goodie, ‘Is There a Need for More Certainty in Discretionary Decision-Making in Australian Family Property Law?’ (2018) 32 *Australian Journal of Family Law* 162 at 187. Parkinson, above n.44 at 523-5, proposing an approach similar to that in the *Family Law (Scotland) Act* 1985.

<sup>50</sup> DP p.61.

<sup>51</sup> See DP at p.60.

<sup>52</sup> Carl Schneider, ‘Discretion and Rules: A Lawyer’s View’ in K. Hawkins (ed), *The Uses of Discretion* 47 (Clarendon Press, Oxford, 1992).

<sup>53</sup> See e.g.; Belinda Fehlberg and Lisa Sarmas, ‘Australian Family Property Law: “Just and Equitable” Outcomes?’ (2018) 32 *Australian Journal of Family Law* 81.

**Recommendation 8:** While maintaining a discretionary framework for the division of property, the ALRC should, as a minimum, recommend principles of quantification in terms of how to assess contributions, adopting a starting point of equality of contribution in relation to all property acquired during the course of the relationship otherwise than by gift or inheritance; adopting a broad and discretionary tracing approach to assets owned before the relationship began or acquired by inheritance; adopting a formula to assess contributions to superannuation to approximate the increase in value of a superannuation fund during the course of the relationship; stating clearly the *Biltoft* principles in relation to debts; and dealing with other issues where the law is uncertain. It should also make proposals on which s.75(2) factors ought to be relevant to the division of property, as opposed to spousal maintenance, and any new factors that should be included, such as the housing needs of children.

The one area concerning property law to which the ALRC does give consideration is the inclusion of family violence as a factor in decision-making on how to divide property. Essentially, it wants to codify *Kennon and Kennon*<sup>54</sup> in the statute, and also to include family violence as a s.75(2) factor. This reflects advice given to the government by the Family Law Council many years ago.<sup>55</sup> The difficulty with this proposal is knowing what the *Kennon* principle is and how it should affect assessment of contributions in percentage terms. The principle, as stated in *Kennon* itself, is that where there is a course of violent conduct by one party towards the other during the marriage which is demonstrated to have had a significant adverse impact upon that party's contributions or to have made his or her contributions significantly more arduous, then this should be taken into account. However, subsequent Full Court decisions have held that there need not be a course of conduct<sup>56</sup> and it need not be during the marriage.<sup>57</sup> These decisions appear to contradict the very basis of the *Kennon* doctrine. Eastel, Warden and Young conclude from their research that:<sup>58</sup>

The *Kennon* factor ... is a complex combination of vague phrases and it is not surprising then that, possibly like some legal practitioners, there are judicial officers who appear to be unclear about the test in general and whether it fits the facts in a particular case... the *Kennon* principle leaves too many grey areas resulting in judicial indeterminacy with diverse interpretation of its wording.

It follows that if the ALRC recommends that the principle be codified, it will first be necessary to articulate what the principle is and how it should change the outcome of cases compared

<sup>54</sup> (1997) FLC ¶92-757.

<sup>55</sup> Family Law Council, 'Letter of Advice: Violence and Property Proceedings', (2001).

<sup>56</sup> (2005) FLC 93-246 (violence need not be frequent although a degree of repetition was required).

<sup>57</sup> *Baranski and Baranski* (2012) 259 FLR 122 (post-separation violence could be considered).

<sup>58</sup> Patricia Eastel, Catherine Warden & Lisa Young, 'The *Kennon* 'factor': Issues of indeterminacy and floodgates' (2014) 28 AJFL 1 at 24.

with comparable cases where there is no violence that reaches the *Kennon* threshold. Effectively, *Kennon* operates as a form of compensation for violence, but expressed as a percentage of the parties' combined assets in cases where it makes any difference to the outcome at all.<sup>59</sup> It is difficult to defend an arbitrary approach to the calculation of damages based upon a percentage of the parties' combined wealth. It would make more sense for a statutory damages award to be calculated on normal common law principles and for this amount to be paid from the perpetrator's share of the assets after the s.79(4) and s.75(2) assessments – or the equivalent sections for de factos - have been made.

**Recommendation 9:** The ALRC should recommend some principles for when and how family violence should be deemed to affect contributions, resolving the current incoherence in the law, and offering some principles of quantification for how violence reaching the relevant threshold should affect the outcome of cases. If this proves impossible (as is likely), then it should recommend that the family courts be authorised to make compensatory awards, unaffected by statutes of limitation, which should be calculated on common law principles.

#### *More affordable and less confrontational processes*

The strongest parts of the DP are chapters 5 and 6 on dispute resolution and adjudication. There are many sensible proposals in these chapters, few of which are new but most of which are welcome and will help focus judicial resources on the cases that most need judicial involvement. A gap in the recommendations concerns arbitration of family property proceedings, where changes to the Act and/or regulations, may reduce resistance to adoption.

The proposals for better triaging of cases as they come into the court will, if properly implemented, help to narrow the issues and make the eventual resolution of the dispute more affordable in many cases. The reforms proposed in the Discussion Paper complement new provisions in the *Federal Circuit and Family Court of Australia Bill 2018* to require litigants and their legal representatives to act consistently with the overarching purpose that matters be resolved as quickly, inexpensively and efficiently as possible.<sup>60</sup> This is supported by numerous powers contained in the Bill to limit written material and oral argument, and to dismiss applications or defences, whether in a case as a whole or just part of a case, that have no reasonable prospect of success. The proposals in the DP and the provisions in the Bill will also go some way towards supporting the goal that legal services are delivered in a way that does not exacerbate or extend their dispute. However, much depends on the willingness of judges to

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<sup>59</sup> Research by Eastal et al (supra) indicates that in 11 out of the 24 cases studied which had successful *Kennon* claims, the increased percentage was not specifically articulated. In those where a percentage was articulated, it was most commonly 10%, followed by 5%.

<sup>60</sup> On the justification for many of these proposals, see Patrick Parkinson & Brian Knox, 'Can There Ever Be Affordable Family Law?' (2018) 92 *Australian Law Journal* 458.

confront and penalise behaviour by a minority of lawyers that drives up costs and causes delay unnecessarily.

The ALRC team also appear to endorse the proposed pilot of Parenting Management Hearings<sup>61</sup> – a multidisciplinary tribunal intended mainly for self-represented litigants which adopts a structured case management approach to the adjudication of parenting disputes that do not require the extensive forensic examination of a full-dress trial.<sup>62</sup> It recognises “the strong support for a less adversarial adjudication approach for families with complex needs”.<sup>63</sup>

The DP echoes the calls of some interest groups that every Panel should sit with at least one member who has expertise in sexual assault, family violence, child abuse and trauma-informed practice, and that panel members have a thorough knowledge of the impacts of family violence on children. Interest groups also sought guidelines to ensure cultural competency of panel members and the cultural safety of hearing processes for Aboriginal and Torres Strait Islander and culturally and linguistically diverse families.

Oddly, the ALRC team did not suggest that judges should have similar qualifications for appointment to the Federal Circuit Court or Family Court, where the more difficult parenting cases will be heard. Nonetheless, they thought that knowledge, experience and aptitude in relation to family violence ought to be a “relevant” criterion for appointment as a federal judge exercising family law jurisdiction, if not an essential requirement.<sup>64</sup> Consistency would suggest that there should be the same qualifications for appointment for all decision-makers exercising jurisdiction in parenting matters, with perhaps more extensive training offered to those who are dealing with the most complex parenting cases.

**Recommendation 10:** The ALRC should consider what changes to the law concerning arbitration would lead to its greater use in property proceedings. Consideration should also be given to its use in children’s matters, especially for interim parenting orders.

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<sup>61</sup> *Family Law Amendment (Parenting Management Hearings Bill 2017 (Cth)*. In March 2018, the Senate Committee on Legal and Constitutional Affairs recommended minor amendments to the Bill and otherwise that it be passed. Report, March 26<sup>th</sup> 2018, available at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/ParentingManagement/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/ParentingManagement/Report).

<sup>62</sup> Parkinson and Knox, above n 60.

<sup>63</sup> DP, p.144.

<sup>64</sup> DP pp. 252-3.

**Recommendation 11:** Whatever recommendations the ALRC makes for qualifications in relation to the appointment of members of Parenting Management Hearing panels should be consistent with its recommendations for appointment of judges.

## IV The adequacy of consultation and research

One of the difficulties arising from such a broad inquiry is that it makes proper consultation all the more challenging. The ALRC has made 124 proposals based upon consultations around the country and responses to a very general Issues Paper.

### *The dominance of special interest and advocacy groups*

What is apparent from the limited discussion in the DP and the citations in footnotes more generally, is that the proposals are influenced, to a significant extent, by special interest groups, the community legal sector and taxpayer-funded services.

This is not a criticism. It may well reflect the respective weight of informed submissions and the consultations that the ALRC has held. There is great expertise in the community legal sector and in taxpayer-funded services that work with individuals or families experiencing difficult separations, including family violence services. The difficulty is that there is likely to have been, to date, both overrepresentation and underrepresentation in the consultation process. Community legal centres and specialist services primarily serve disadvantaged people, or people with particular characteristics or needs (for example indigenous people, or people with disabilities, or victims of family violence). Community legal centres and specialist services see advocacy and law reform work as part of their core business. Suburban family law practitioners, who see a much greater proportion of the separating population, do not.

This is not to say that the views of private sector lawyers are unrepresented in the Discussion Paper. However, there are just a few submissions, mainly from organisations. These may not necessarily be all that representative of the views of the family law profession, if submissions are primarily drafted by leaders from specialist family law firms servicing a disproportionate number of high net worth clients, or senior members of the Bar with a similar client base.

The dominance of submissions from taxpayer-funded organisations representing the disadvantaged may be one explanation for why there is almost no discussion of the problems in the current regime concerning property division and maintenance, apart from in relation to family violence. It may also explain why yet further reform is proposed in relation to the definitions of violence and child abuse<sup>65</sup> only eight years after an exhaustive examination of the subject by the ALRC and in other inquiries, leading to legislative change.

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<sup>65</sup> DP pp. 182ff.

The DP also indicates a lot of reliance on submissions from advocacy groups that have organised themselves around particular issues or causes. Examples are LGBT+ and disability groups. The DP is replete with recommendations that various changes should be developed in consultation with such groups. For example, proposal 2-2 is that:

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.

The same list of groups is invoked in every recommendation of this kind, with additional groups referred to for some proposals.<sup>66</sup> Conversely, there is no recommendation to consult organisations supporting separated fathers or mothers, who might be regarded as prime users of the service system. This seems to reflect an approach to public policy, most evident in the Issues Paper, that the problems in a given sphere of public policy arise from inadequate attention being paid to the needs of favoured minorities. This translates, in the area of law reform, to a disproportionate focus on these minorities rather than on how the system meets, or fails to meet the needs of everyone, irrespective of gender, ethnicity, sexual orientation or other characteristics.

Consultation is, of course, important, if groups have, for whatever reason, particular perspectives and needs in the family law system. However, it is often difficult to understand the rationale for consulting certain groups on matters which do not appear to raise issues or concerns for those sectors specifically. So, for example, it is not clear why LGBT groups are consistently included in the list of groups to be consulted, when almost no specific issues of concern to them are identified in the DP. The only issue involving persons with intersex characteristics discussed is the very rare situation<sup>67</sup> where a child is born with a mix of male and female genitalia which may require surgery.

The flip side of this is that the focus on submissions from such advocacy groups underrepresents people who have no groups to advocate for them – for example people with modest incomes who are not served by Legal Aid or community legal centres and who navigate their way to an outcome with the assistance of solicitors in private practice. There are also no groups for people who left school at the end of year 10; or who happen to live more than two hours from the nearest family law registry; or who do not speak English as a first language but also do not belong to a well-represented migrant community. There are no obvious groups to represent children who have experienced child abduction or parental alienation; or who are

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<sup>66</sup> See eg proposal 2-8. Proposal 4-4 adds specialist family violence services and legal assistance services to the list of groups to be consulted i5-5 in relation to the Families Hubs. The list is larger in Proposal 5-10.

<sup>67</sup> While it is sometimes claimed that 1.7% of the population are ‘intersex’, this relies upon a very wide definition of intersex that includes a great many who do not have conditions requiring surgical intervention to assign a gender. For the statistic of 1.73% of the population being intersex persons, see Melanie Blackless et al, ‘How sexually dimorphic are we? Review and synthesis’ (2000) 12 *American Journal of Human Biology* 151. The definition used in this article is people who "deviate from a Platonic ideal of sexual dimorphism" at the chromosomal, genital, gonadal, or hormonal levels.

growing up with a mentally ill or drug-addicted parent. These are the voiceless ones – but they are also people who have some of the most critical needs in the family law system.

**Recommendation 12:** The ALRC should reconsider the groups that need to be consulted in implementing various proposals, giving priority to widely-recognised representatives of those who are most affected by the proposals or whose perspectives are relevantly different from mainstream users of the services.

*Contextualising the DP within the research literature*

Another way to gauge public and professional opinion is to examine the published research literature and the reports from previous inquiries and public consultations.

The DP has extensive references to relatively recent reports from the Australian Institute of Family Studies written or co-authored by one of the project team, but relatively little reference to other published research or to reports before about 2012. This may again be because the ALRC team wanted to keep the DP to a manageable length. There seems to be no reference, for example, to the ground-breaking work of the Pathways Committee (2001) led by Des Semple which established a framework for much of the thinking about the family law system in the decade after 2001 and which has great continuing relevance to the subject-matter of this DP.<sup>68</sup> There is scarcely any reference to the enormous volume of work done between about 2000 and 2007 by the Family Court in case management, and through pilot programs such as the Children’s Cases Program. Nor is there reference to Family Law Council reports, even on matters that the ALRC team discuss in some detail. Thus a raft of proposals on post-order conflicts between parents failed to reference) the Family Law Council’s major report on Improving Post-Parenting Order Processes in October 2007.

There is also very little reference to the research or reports that laid the foundation for changes to the Family Law Act that are reflected in the current system and legislative framework. This lack of reference to previous work in the DP may be because the submissions tend to be written by people wanting further change and who are not much interested in understanding the reasons why things are as they currently are. However, family law is constantly being ‘reformed’, so it is important to identify clearly the mischief that led to past reforms and to evaluate how successfully the reforms ameliorated that mischief, before proposing further major change or government expenditure on new initiatives.

Surprisingly, despite proposing major changes to the objects, principles and factors to consider in making parenting decisions, there is no reference to the unanimous parliamentary report on

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<sup>68</sup> Family Law Pathways Advisory Group, *Out of the Maze: Pathways to the Future for Families Experiencing Separation* (2001).



which the 2006 amendments were based,<sup>69</sup> and to the findings of the comprehensive review of the impact of the 2006 legislation conducted by the AIFS,<sup>70</sup> nor to any of the other research or reports commissioned prior to the 2011 amendments.<sup>71</sup> These various reports help answer the question of what the mischief was that earlier amendments had sought to remedy, and how successful they were in doing so. They needed to be considered carefully before making proposals to undo, almost completely, the work they sought to do.

In short, it is important not to reinvent the wheel without the benefit of all the thinking that has gone on before and the evaluation of how previous reforms have addressed the mischief for which they were a perceived remedy.

**Recommendation 13:** The ALRC should do further research on the background to laws which it recommends be deleted or amended, providing clear justification, based upon the available research, for those changes.

**Recommendation 14:** The ALRC should do further research on reports and other policy documents published prior to 2012, as well as academic research, which is relevant to issues on which it makes proposals for reform.

## V The relationship between new initiatives and what already exists

Part of the challenge of working on a reform agenda within a densely populated urban environment is that any additions or alterations need to fit together with what already exists.

The ALRC team propose many new services, but it is not always clear how they relate to the existing ones and to what extent they will add value to what is already there.

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<sup>69</sup> House of Representatives Standing Committee on Family and Community Affairs, *Every Picture Tells a Story: Report of the Inquiry into child custody arrangements in the event of family separation* (Parliament of Australia, Dec. 2003).

<sup>70</sup> Kaspiew et al, above n.22.

<sup>71</sup> On violence, see Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues*, Canberra: Commonwealth of Australia, 2009; Hon Richard Chisholm, *Family Courts Violence Review* (Attorney-General's Department, Canberra, 2009); Australian Law Reform Commission & New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, (2010). On shared care, see J Cashmore, et al, *Shared Care Parenting Arrangements since the 2006 Family Law Reforms: Report to the Australian Government, Attorney-General's Department* (2010).

### *The provision of information*

An example is in Chapter Two. The ALRC team adopts what appears to be a green fields approach to the provision of information to the public. Proposal 2-5 is that:

The Australian Government should convene a standing working group with representatives from government and non-government organisations from each state and territory to advise on the development of a family law system information package to facilitate easy access for people to clear, consistent, legally sound and nationally endorsed information about the family law system.

This sounds like an important new green fields initiative. It is only when readers reach para 2.31 of the DP, that the ALRC team note:

There are existing Australian Government initiatives that provide Australian families with a centralised source of information. The Family Relationship Advice Line is a national telephone-based service funded by the Commonwealth Attorney-General's Department that provides information, referrals and advice to families affected by separation or relationship issues. In June 2018 the Australian Government also relaunched the Family Relationships Online website, which provides information about available services and dispute resolution options, including factsheets in community languages, and a 'find local help' feature to help link people with nearby services. The National Enquiry Centre (NEC) also provides procedural information and assistance to people in relation to matters in the federal family courts. The NEC can be contacted by telephone, email or web-chat.

The ALRC team goes on at para 2.34 to propose that “the information package be developed with reference to existing government and non-government information resources and services, with the aim of consolidating and enhancing, rather than replacing, existing resources and services.” It might have been better for the ALRC just to identify the gaps and deficiencies of the existing informational resources, and to make specific proposals for consolidation or enhancement where there are deficiencies. That would not have appeared as a bold initiative, but it is what is needed, given the already substantial informational environment.

**Recommendation 15:** The ALRC should identify with precision, the deficiencies that exist in the current provision of information concerning the family law system, whether online or through other means of communication, and make specific proposals to rectify those deficiencies.

### *Aboriginal and Torres Strait Islander children*

Another example, this time in the legislative environment, concerns parenting arrangements for Aboriginal and Torres Strait Islander children.<sup>72</sup>

The ALRC also proposes that some specific consideration regarding culture should be provided, in a separate provision, for Aboriginal and Torres Strait Islander children. Ensuring that an Aboriginal or Torres Strait Islander child maintains their connection to family, community, culture and

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<sup>72</sup> DP, p.51.

country is of fundamental importance for Aboriginal and Torres Strait Islander people. The ALRC accordingly proposes that legislation should provide that, in considering the best interests of an Aboriginal or Torres Strait Islander child, there be a requirement that this connection be considered.

There is, surprisingly, no reference to the legislative provisions that are already there. Section 60CC(3)(h) requires the court to consider “the child’s right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture); and the likely impact any proposed parenting order under this Part will have on that right. Section 60CC(6) refers to the right of an Aboriginal or Torres Strait Islander child to maintain a connection with that culture and to have the support, opportunity and encouragement necessary to explore the full extent of that culture. It is not clear therefore, what new provision the ALRC has in mind and how it would differ from the existing legislative provisions.

**Recommendation 16:** The ALRC should clarify whether any amendment is needed to the existing legislation concerning parenting arrangements for Aboriginal or Torres Strait Islander children.

### *The Families Hubs*

The starkest example of the need to consider how proposed new initiatives relate to the existing environment concerns the proposed Families Hubs. At para 4.3 the DP explains the idea as follows:<sup>73</sup>

[The ALRC] proposes the development of clearly designated community-based Families Hubs to act as a supported entry point to a range of legal and support services to meet the needs of separating families and their children outside the courts. The Families Hubs would build on the work of the Family Relationship Centres (FRCs), established in 2006, by bringing together, under one roof, embedded on-site workers from a range of local services, including legal assistance services, specialist family violence services (for men and women), family dispute resolution services, therapeutic services, financial counselling services, housing assistance services, health services, children’s contact services and parenting support or education services.

It goes on to explain the rationale:<sup>74</sup>

The proposal for Families Hubs aims to advance the safety and wellbeing of families and children by providing an initial needs assessment and linking clients with appropriate services and coordinating their engagement with these services over time.

This is, of course, one of the roles of the Family Relationship Centres, and has been since their inception. The current Operational Framework says that “Family Relationship Centres are a

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<sup>73</sup> DP, pp.79-80.

<sup>74</sup> DP, p.80.

critical entry point or gateway to the broader family law and family support service system”.<sup>75</sup> Under the heading “Helping Families Use Other Services” it states:<sup>76</sup>

Family Relationship Centres make available information about other services or assist people by helping to identify their needs, helping them to access relevant information, and helping them identify and access a relevant service (whether at the Centre or by referral to another organisation).

The FRCs had a greater focus on this than they do now. The original Operational Framework said that the “Centres will be a highly visible entry point or gateway to a whole service system.”<sup>77</sup> The original intent was that everyone coming to the Centre would be offered an individual interview to assess their needs and to refer them to services that could assist them, whatever their needs might be.<sup>78</sup> The need for this personal session with an adviser recognised that people may need a range of services in the aftermath of separation.<sup>79</sup> They may need to have advice on a range of issues, such as benefit entitlements, debt management and housing needs. They might also need help with depression and suicidal ideation.<sup>80</sup>

The ALRC’s proposal for Families Hubs seeks to fulfil the same objectives as originally envisaged for the FRCs, but in a different way. FRCs were never intended to be a one-stop shop. While some services would be delivered on site – in particular education programs for separated parents and mediation – there would be a process of referral to the myriad of other services people might need, including “warm referrals”.<sup>81</sup> This remains part of the Operational Framework.<sup>82</sup>

The proposed Families Hubs have the same objectives,<sup>83</sup> but represent a different model for how people should be assisted to access services. The proposal seems to be somewhere between a one-stop shop and a services fair. The Hubs, so the proposal goes, should have on-

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<sup>75</sup> Commonwealth of Australia, *Operational Framework for Family Relationship Centres*, 2 (2014).

<sup>76</sup> Ibid.

<sup>77</sup> Commonwealth of Australia, *Operational Framework for Family Relationship Centres*, 2 (2007).

<sup>78</sup> Patrick Parkinson, ‘The Idea of Family Relationship Centres’ (2013) 51 *Family Court Review* 195.

<sup>79</sup> Gillian Douglas & Richard Moorhead, ‘Providing advice for lone parents: from parent to citizen’ (2005) 17 *Child and Fam. LQ*, 55.

<sup>80</sup> Patrick Parkinson, ‘Keeping in Contact: The Role of Family Relationship Centres in Australia’, (2006) 18 *Child & Family LQ* 157.

<sup>81</sup> This is defined as a “live three way conversation in the presence of the client (whether face to face or by telephone) in which the referring organisation introduces the client, explains what has already been done to assist the client and why the client is being referred.” Commonwealth of Australia, *Operational Framework for Family Relationship Centres*, 30 (2014).

<sup>82</sup> Ibid.

<sup>83</sup> See proposal 4-1. The Hubs are supposed to 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.

site out-posted workers from a range of relevant services, including: specialist family violence services; legal assistance services (such as community legal centres); family dispute resolution services; therapeutic services (such as family counselling and specialised services for children); financial counselling services; housing assistance services; health services (such as mental health services and alcohol and other drug services); gambling help services; children's contact services; and parenting support programs or parenting education services.

The ALRC team acknowledged the closeness of their proposal to the intent for the FRCs. However, they explained, while the focus of the FRCs was on helping parents to cooperate despite their own relational conflicts, the orientation of the Hubs would be on safety.<sup>84</sup> They went on to say that the proposed Families Hubs should build on and support FRCs, rather than replacing them, and indeed that workers from FRCs should be embedded in Families Hubs. However, Families Hubs should become the publicly recognised first port of call for separating families.<sup>85</sup> In addition to identifying the needs that clients have, the Hubs should have client support officers who fulfil a case management function.

This is an ambitious proposal and there are aspects of it that would certainly enhance service delivery – not least person to person referrals within the Hub rather than by telephone. The client support officers who would case manage service provision to families with complex needs could also assist greatly those parents whose children are most at risk of abuse and neglect. In small communities, such as many country towns, co-location of most or all of the services that families in crisis or difficulty may need, could be entirely feasible. There are obvious benefits to co-location if the services are meeting the needs of the same group of troubled families.

Densely populated cities create more difficulties. The Hubs, like the FRCs, would need to be conveniently located. The ALRC suggests that they could be housed in or adjacent to existing FRCs, legal aid commissions, or state and territory magistrates courts.<sup>86</sup> This presupposes there is room, or that room could be made, in such central locations.

The obvious question to ask is whether at least some of this enhanced functionality could not be achieved by expanding the FRCs and restoring their original focus on a holistic approach to people's needs, particularly when the ALRC suggested the Hub could be located in or adjacent to FRCs. The ALRC team recognised that:<sup>87</sup>

As with FRCs, Families Hubs are intended to be community-based, clear entry points to the range of services that separating families may need outside of the courts.

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<sup>84</sup> DP pp.85-86.

<sup>85</sup> DP p.86.

<sup>86</sup> Ibid.

<sup>87</sup> DP p.85.

It also recognised that FRCs have already proved very innovative in service delivery.<sup>88</sup> The ALRC team’s proposal would take this function from them and turn them into just being mediation centres.

The Families Hubs could prove to be enormously expensive, especially if they are centrally located, as they would need to be if they are to be a first port of call for separating parents. The costs include renting very sizeable buildings to house the outposted staff from so many different services – including representatives of a number of different health services. The large amount of money spent on renting or purchasing buildings would not add a single extra worker to meet the needs of people going through separation; it would just make it easier for people to connect with services.

Furthermore, not all the outposted staff will actually provide any advice or support. So for example, the representative of the local Children’s Contact Services provider will just be providing information to potential clients. Will the additional staff time committed to client recruitment be at the expense of the staff complement where the service is located, or will it be an additional expense? Will there also be efficiency losses? Will the outposted representative of the gambling counselling organisation, for example, be busy all day, every day? The question might be multiplied across the range of more specialised services. The proposal needs to be thought through much more.

It may be that the desire for a bold new initiative, representing the most visible fruit of the ALRC team’s labours, distracted from proper consideration of a more incremental approach of building, in a cost-effective way, upon existing services and infrastructure.

**Recommendation 17:** The ALRC’s proposals for Families Hubs should be modified, so that it makes recommendations for an evolution of the existing role of Family Relationship Centres.

**Recommendation 18:** The ALRC should identify which outposted workers from existing services supporting families could most usefully be added to the staffing complement of Family Relationship Centres, if space and resources permit.

## VI New services versus additional resources for existing services

The proposal for Families Hubs illustrates a broader issue with the DP. Should the focus be on new services or proper resourcing of the existing services? There would be widespread agreement that existing services have been severely depleted by years of ‘efficiency dividends’

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<sup>88</sup> DP p.87.

and lack of increases in funding to address inflation and population growth. Family lawyers have, for example, long called for more resources for the courts.

The proposal for Families Hubs is only one of a great many proposals for new services, or the expansion of existing services, which presumably will be taxpayer funded. These include, for example, expanding the Family Advocacy and Support Service;<sup>89</sup> co-location of family law registries and judicial officers in local court registries, including local courts in rural, regional and remote locations;<sup>90</sup> development of a post-order parenting support service to assist parties to parenting orders to implement the orders and manage their co-parenting relationship;<sup>91</sup> significant modifications or extensions to family court premises, including circuit locations and state and territory court buildings that are used for family law matters, some of which may not be possible without building new court complexes;<sup>92</sup> the appointment of a children's advocate for all children involved in family law proceedings, in addition to the current provision of an independent children's lawyer, to be renamed a 'separate legal representative';<sup>93</sup> the creation of a Children and Young People's Advisory Board,<sup>94</sup> a new system of accreditation of Children's Contact Service workers;<sup>95</sup> a national accreditation system for private family report writers;<sup>96</sup> the appointment of assessors in certain cases concerning children;<sup>97</sup> co-location of child protection and family violence support workers at each of the family law court premises;<sup>98</sup> and a new regulatory body, the Family Law Commission.<sup>99</sup> None of these proposals seem to have been costed at this stage.

This raises a question about whether any more money should be made available for existing services, such as more judges or registrars, pay increases for existing staff, more competitive salaries for family consultants to attract experienced child psychologists, more money for legal aid, more funding for community legal services, increased funding for the FRCs to account for increased demand and population growth since their establishment, more funding to help pay for Chapter 15 experts to assess risks to children from alleged child sexual abuse or other harms – and so the list could go on.

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<sup>89</sup> Proposals 4-5-4-8.

<sup>90</sup> Proposal 6-8.

<sup>91</sup> Proposal 6-9-6.11.

<sup>92</sup> Proposal 6-12.

<sup>93</sup> Proposals 7-8-7.10

<sup>94</sup> Proposal 7-13.

<sup>95</sup> Proposal 10.7.

<sup>96</sup> Proposal 10-9.

<sup>97</sup> Proposal 10-12.

<sup>98</sup> Proposal 11-7.

<sup>99</sup> Proposal 12-1-12.6.

**Recommendation 19:** The ALRC should endeavour to cost its proposals for major new spending and compare the value to be gained from these initiatives against the value to be gained from increasing resources for existing services, including courts.

## VII Priorities

This leads to the final question. What should be the spending priorities to improve the family law system, if the Government is minded to commit another taxpayer dollar on a recurring basis?

It may well be that the proposals for new and expanded services will gain enthusiastic support from taxpayer-funded organisations that, quite understandably, would like to have more resources to meet their client's needs or could see the benefit to their clients of additional services. Indeed, it will be astonishing if the great majority of the ALRC's proposals for new or expanded services do not get enthusiastic endorsement from a range of existing services and advocacy groups.

Does that mean they should all be recommended by the ALRC in its final report? Possibly; but the danger is that such a report will go the way of almost all others that look to solve public policy problems with a substantial increase in taxpayer-funded services on a recurrent basis. There is also the difficulty of starving existing services of any increases in funding.

It is all very well flagging all the different ways that the Government could double the budget for family law services. At the end of the day, the ALRC team will need to establish priorities not only between the many and various proposals for new or expanded services, but between new and existing services.

**Recommendation 20:** The ALRC should endeavour to rank in order of importance its proposals for major new spending and explain how each of its top ten priorities will significantly improve the family law system for ordinary Australians.

## Conclusion

A great deal of work has gone into the DP, responding to a large number of submissions and consultations. In the end, the proposals for incremental change, even if not bold and exciting, are most likely to be implemented. Major new initiatives and spending proposals may well get up, but their rationale needs to be fully explained and the need for them justified. Proposals for legislative change which reverse the direction of reforms that have been based upon a decades-



long bipartisan consensus need to be thoroughly grounded in research and consultation across a wide range of stakeholders.

It is commendable that the ALRC team has achieved so much in the limited time available and with the limited resources at their disposal. If there are significant deficiencies in the DP, it is at least in part because the team was given a task that it was impossible to do well within these constraints.