

**NEW SOUTH WALES BAR ASSOCIATION  
SUBMISSION IN RESPONSE TO THE AUSTRALIAN LAW REFORM  
COMMISSION'S DISCUSSION PAPER 86  
REVIEW OF THE FAMILY LAW SYSTEM**

**EXECUTIVE SUMMARY**

1. The New South Wales Bar Association (**the Association**) was pleased to make a submission to the Australian Law Reform Commission's (ALRC) Review of the Family Law System in May 2018 in response to Issues Paper 48 (**the Issues Paper**). The Association's submission concerned the importance of ensuring that Australia's family law system, including the Courts, is properly resourced, maintained and supported to administer justice for those in need of family law assistance in matters of all complexities.
2. The Association thanks the ALRC for the opportunity to make a further submission in response to Discussion Paper 86 (**the Discussion Paper**).
3. The Association has had the benefit of considering the Law Council of Australia's (LCA) submission in response to the Discussion Paper. Members of the New South Wales Family Law Bar are represented in the LCA's Family Law Section and have actively contributed to preparing the LCA's submission, which comprehensively addresses each of the 33 questions and 124 proposals contained in the Discussion Paper. The Association commends the LCA's submission to you.
4. In addition to endorsing the LCA's submission, the Association is pleased to assist the ALRC by providing a complementary adjunct submission informed by the expertise and experience of our members in NSW.
5. This submission comprises three parts:
  - (i) Part I outlines the Association's concern about the continued under-resourcing of the family law system and the capacity to fund the reform proposals outlined in the Discussion Paper;
  - (ii) Part II considers the importance of the ALRC's review to inform consideration of a proposal currently before the Parliament to restructure the federal courts by in effect abolishing the specialist Family Court; and
  - (iii) Part III provides comment on eleven proposals put forward by the Discussion Paper, informed by the expertise and experiences of the Family Law Bar in NSW.

## I RESOURCING

6. The rights of children and families cannot be protected without a properly funded family law system, including a properly resourced court.
7. There is much to be commended in the ALRC's Discussion Paper. However, without a significant funding and resourcing commitment from the Government, many of the proposals for reform identified in the Discussion Paper cannot be progressed.
8. There is much frustration with Australia's current family law system. A primary contributor to that frustration has been the fact that the family law system has been adversely affected by a chronic and sustained lack of resources, including in both the Federal Circuit Court and the Family Court, resulting from an absence of commitment by successive Governments to the proper funding of the system and legal aid. This has resulted in unacceptable waiting times, case backlogs, stress and costs for families and crippling, unsustainable workloads for judges in both Courts.
9. In turn, this has undermined public confidence in the system and affected the morale of those working within the system.
10. Resourcing was identified as an area in need of urgent reform in the 2017 inquiry by the House of Representatives' Standing Committee on Social Policy and Legal Affairs into *A better family law system to support and protect those affected by family violence*. The Committee recommended that "the Australian Government considers the current backlog in the federal family courts and allocates additional resources to address this situation as a matter of priority".<sup>1</sup>
11. The problem of under-resourcing is not confined to the Courts but is endemic in the family law system as a whole. The Chief Justice of the Family Court, the Hon John Pascoe AC CVO, stated in May 2018 that "many of the difficulties apparent with the system, and particularly with the Family Court, can be solved by an injection of funds, and particularly into legal aid...".<sup>2</sup>
12. While the Association supports many of the proposals put forward by the Discussion Paper, these initiatives are resource-intensive and involve substantial cost. These initiatives must not be funded by diverting existing resources away from other parts of the system, especially the Courts. While budget and funding considerations are ultimately decisions taken by the Executive and endorsed by the Legislature through the passage of appropriation bills, the Association believes it is appropriate for the ALRC to address these issues in its

<sup>1</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) Recommendation 31. [8.92].

<sup>2</sup> Family Court of Australia, *Submission by the Honourable John Pascoe AC CVO, Chief Justice of the Family Court of Australia* (18 May 2018) [8] <[https://www.alrc.gov.au/sites/default/files/subs/family-law\\_-68.\\_family\\_court\\_of\\_australia\\_-\\_submission\\_revised\\_redacted\\_version\\_14.06.18.pdf](https://www.alrc.gov.au/sites/default/files/subs/family-law_-68._family_court_of_australia_-_submission_revised_redacted_version_14.06.18.pdf)>.

recommendations and final report to the Attorney-General as these issues are fundamental to the success of the reform proposed by the Discussion Paper.

13. The Association encourages the ALRC to address the urgent issue of resourcing and the financial implications of the proposals outlined in the Discussion Paper in the ALRC's ultimate recommendations to Government. Without doing so, there is a real risk that the work done by the ALRC will not be capable of meaningful implementation and may divert resources from an already strained system to catastrophic effect.

## II REFORM

14. The ALRC's Review is being undertaken in a context where the Commonwealth Government has committed to fundamental change to the structure and operation of the Courts within the family law system. The Discussion Paper raises a number of proposals and issues relating to the operation of the court system without apparent regard to the changes proposed to the structure and operation of the Courts as, in turn, those changes have no apparent regard to the ALRC's Review.
15. The Association has considerable concern as to these two processes occurring at the same time and without apparent regard to each other, notwithstanding the evident importance of each to the other – as demonstrated by the matters raised in the Issues Paper. The Association has further concern as to the statements by both the Attorney-General and the ALRC that there is no necessary relationship between the two processes. Such a proposition is inconsistent with the content of the Discussion Paper.
16. If the ALRC Review is to offer a holistic review of the family law system then it ought not exclude the structure and operation of the court system at its heart from that review and, as the Discussion Paper demonstrates, it cannot. The risk to the Review is that in not directly addressing either that issue in a substantive way, and in not otherwise addressing the place of the Courts in the family law system, it can only offer a partial and fragmented answer to the terms of reference. The risk of the structural and operational changes proposed to the court system is that without regard to and a proper consideration of the results of the Review, it cannot offer an informed and meaningful answer to the issues identified by the Review and the changes that may occur consequent upon it.
17. Since the Association made its submission to the Issues Paper, the Commonwealth Government has introduced the Federal Circuit and Family Court of Australia Bill 2018 (Cth) and the Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018 (Cth) (the Bills) into Parliament.
18. The Bills propose to restructure the federal courts by merging the Family Court into the Federal Circuit Court and removing the Family Court's appellate jurisdiction to the Federal Court. Stakeholders including the Association have raised concern that the proposed

restructure will have the effect of abolishing a specialist superior court of record and produce a significant diminution in the quality of the family law justice system, to the detriment of Australian children and families in need of its services.

19. In a submission to the Senate Legal and Constitutional Affairs Committee's inquiry into the Bills, the Association's recommendations included that:
  - a. the Bills should not be debated in the Senate before the ALRC has completed its review of the family law system; and
  - b. before any restructure, and before completion of the ALRC's final report, the terms of reference of the ALRC Review should be changed to specifically remit to the ALRC the review of the structure and role of the Courts within the broader family law system as it is not feasible or responsible to consider policy development and reform of the family courts as independent of and from policy development and reform of the family law system.
20. The ALRC's review represents a unique opportunity, as the first root and branch review of the *Family Law Act 1975 (Cth)* (FLA), to provide a prognosis and meaningful blueprint for comprehensive reform of Australia's family law system.
21. The Association encourages the ALRC to promote an understanding of the Courts as an interrelated component of a live family law system that requires a nuanced funding basis, holistic policy direction and administration in order to operate efficiently and effectively.

### III SPECIFIC PROPOSALS FOR REFORM

22. As noted above, the Association supports the LCA's submission in response to the Discussion Paper. This Part details the Association's complementary comments and concerns, as informed by our members' expertise and particular experiences of the family law system in NSW. We address the following specific initiatives in the Discussion Paper:
  - A. Ensuring court forms are 'fit for purpose';
  - B. Family violence;
  - C. Spousal Maintenance;
  - D. Procedural and structural reform;
  - E. Appropriate Court facilities;
  - F. The Children's Advocate;
  - G. The Protected Confidences proposal;
  - H. Regulatory regime;
  - I. Judicial appointments;

- J. A national judicial commission;
- K. Cultural competency and safety.

#### A ENSURING COURT FORMS ARE 'FIT FOR PURPOSE'

- 23. Prima facie a comprehensive review of courts forms to enhance usability, as suggested in the Discussion Paper's proposal 3-2, is very welcome. Practitioners would embrace technological innovations that save time and reduce costs for clients, such as pre-populating forms with previously inputted data and ensuring all forms are expressed in plain English.
- 24. Creating a single set of forms for all Courts exercising jurisdiction under the FLA is sensible. However, policy-makers should be alive to the following concerns in seeking to implement this measure.
- 25. First, use of 'live-chat' to assist in completing forms may have some utility but care must be taken to ensure that those who provide such assistance are aware of the need to avoid giving instruction as to content as well as the need to avoid anything that may be characterised as legal advice.
- 26. Second, use of an alternative form for people with limited English or literacy seems at first blush to be an appropriate access to justice measure. However, the better approach may be to improve accessibility by ensuring the availability of translators and support persons, and that plain English forms express as simply and accurately as possible the information they are required to convey.
- 27. Third, special attention should be paid to any reformulation of the Financial Statement, as this is not a "one size fits all" form to capture all relevant financial information. The use of smart technology to assist in completing Financial Statements may enhance the capacity to remind litigants of their duty of disclosure.

#### B. FAMILY VIOLENCE

- 28. The prevalence of family violence in society and the capacity for Australia's family law system to provide timely protection to vulnerable victims remains a significant concern.
- 29. In relation to the settlement of property and financial issues following relationship breakdown, the Discussion Paper notes that:<sup>3</sup>

the ALRC considers that a range of amendments would assist in simplifying and clarifying these provisions. In addition, better responses to family violence are clearly needed across all of these areas.

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<sup>3</sup> *Discussion Paper* [3.88].

30. The Association appreciates the sentiment behind the Discussion Paper's Proposal 3-11. However, we do not recommend that the proposed amendment be embedded in the FLA as the Courts are already able to take into account domestic violence under current legislation and jurisprudence.<sup>4</sup> Further, there is a risk the proposed amendment may produce added costs, delay and complexity, and result in victims being exposed to more extensive cross-examination without achieving a tangible improvement in just outcomes.
31. As presently framed by section 79(4), a consideration of the 'contributions' of parties during a relationship is undertaken so as to determine that order which is just and equitable having regard to the identified interests of the parties. Neither that process, nor the consideration arising pursuant to section 79(4)(e), is undertaken so as to determine whether either party ought receive an entitlement based upon any notions of compensation or fault.
32. In an appropriate case, and where family violence has had a demonstrable impact upon a parties' contributions, that is a matter that can be and is already taken into account. That this occurs in a relatively narrow band of cases is not reflective of any inappropriate recognition being afforded to such issues, but rather as to the limited relevance of such issues to the assessment of contributions.
33. In the context of the contribution assessment, proposal 3.11 would add nothing to the current position as framed, save perhaps to encourage greater litigation with a consequent increase in costs, delay and the impact on victims of the testing of evidence concerning such issues.
34. If an amendment was to be considered, care would need to be taken to provide direction as to the manner in which family violence was to be taken into account in any such assessment, including to make clear whether any compensatory element was intended to be introduced – a concept otherwise foreign to the FLA as currently drawn and interpreted. If a compensatory element was intended, consideration needs to be given as to its interaction with common law and victims' compensation rights and entitlements.
35. Paragraph 3.118 observes that "a strong consensus has emerged in favour of identifying and managing family violence in dispute resolution for safety reasons". With respect, it is considered that legislative amendment to section 79(4) for such reason is misdirected and likely to have far greater adverse consequences. The identification of family violence and safety issues can be achieved far more effectively by other means.
36. If the intent underlying the proposal is to ensure that, where appropriate, safety issues which require financial recognition in the course of any property settlement are capable of being recognised by the Court, then the Association recognises the importance of this. Whilst this is already able to be achieved by the existing provisions of section 75(2), a greater focus and awareness could be achieved by an amendment to raise for consideration "the extent to

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<sup>4</sup> See *Kennon and Kennon* [1997] FamCA 27.

which either party is required to take steps to ensure their personal safety or that of a child in their care as a result of family violence inflicted by the other” in section 75(2). Such an amendment would represent a proportionate response to the issues raised, limiting the concerns as to the potential adverse consequences already addressed.

37. The remaining issue to be touched upon is the definition to be adopted for the purpose of any amendment to section 79(4) or 75(2) in the context of financial proceedings. The current definition of the phrase in section 4AB is very broad and, whilst appropriate for parenting proceedings, has the potential to cause significant difficulties if the breath of the amendment contemplated by proposal 11 was to be implemented.

### C. SPOUSAL MAINTENANCE

38. Question 3-4 of the Discussion Paper asks what options should be pursued to improve the accessibility of spousal maintenance to individuals in need of income support and whether consideration should be given to:

- The greater use of registrars to consider urgent applications for interim spousal maintenance;
- Administrative assessment of spousal maintenance; or
- Another option.

39. This question is considered here in the broader context of Proposal 6-1, which provides:

The family court should establish a triage process to ensure that matters are directed to appropriate alternative dispute resolution processes and specialist pathways within the court as needed.

40. Interim spousal maintenance applications are often made in circumstances of urgency where there is a significant financial power imbalance between parties.
41. These applications often involve issues that cross over with preservation of assets, for example mortgage repayments on a former matrimonial home. They can also involve issues of housing security for a spouse with whom children live, and have implications in terms of where spouses and children can live, attend school and participate in their community.
42. Spousal maintenance is one species of financial orders, and as such applications for maintenance require consideration of some factors that the Court will consider in attempting to resolve other types of financial orders.
43. While spousal maintenance can be a very effective interim remedy, it is sometimes underutilised by the profession and litigants in the broader context of attempting to resolve parenting and property disputes. This may in part be due to a perception that having a

maintenance application listed and heard in a reasonable time at present encounters significant obstacles.

44. The creation of an alternative administrative pathway is likely to duplicate matters for a person who requires determination in the context of a broader property dispute and to a lesser extent a parenting dispute, as maintenance applications rarely occur in isolation to other relief sought. An applicant for maintenance is likely to be a Court user in any event, and ought not be diverted into a second process of administrative assessment.
45. It is also likely that an applicant for Spousal Maintenance will have exhausted the pre-litigation options and will require a judicial determination for any relief to flow. A diversion to alternative dispute resolution processes is likely to be ineffective and simply create further delay.
46. It may be desirable to triage interim spousal maintenance through a Registrar of the Court upon filing, with the Registrar to make a determination as to the urgency of listing on that specific issue.
47. As interim applications, spousal maintenance applications are discrete matters which involve limited considerations, which for the most part can be contained within a few hours of judicial time. It is possible for a Senior Registrar to hear and determine urgent and interim spousal maintenance issues. Unfortunately, there is only one Senior Registrar in New South Wales at this time, and that Registrar is only resourced for very limited hearing days.
48. Ideally, the interim hearing list before a Senior Registrar would be a specific 'maintenance list' run at regular times in the judicial calendar. One obvious benefit to a specific list would be an adjustment to the expectations of the parties and the profession as to what issue will be dealt with, and a crystallisation of that issue within the matter.
49. This may increase the 'accessibility' of orders for spousal maintenance in the mind of the profession and of litigants, and in turn increase their use in appropriate circumstances.
50. Nothing in the creation of the specialist list, or a Senior Registrar's general list, would impede the capacity of a Registrar in the triage process to list the matter before a Judge for determination if that is most appropriate.
51. Non urgent interim matters would continue to be listed with the other relief sought, if any, and proceed in the ordinary course.
52. However, it is important to note that giving greater power to, or increasing reliance upon, Registrars to deal with urgent and interim spouse maintenance applications would require funding support. Any triage process must not contribute to creating further cost and delay, nor should it absorb judicial resources that would be better applied elsewhere to the determination of matters.



53. This proposal reiterates the need for holistic consideration of both the interaction between the family law system and the Courts, and the issue of resourcing, in order to develop meaningful and effective proposals for reform.

#### D. PROCEDURAL AND STRUCTURAL REFORM

54. The Discussion Paper does not draw upon the learnings of the Family Court's history in relation to procedural and structural reform.
55. Much of this history is comprehensively outlined by Margaret Harrison's paper *Finding a Better Way: A Bold Departure from the Traditional Common Law Approach to the Conduct of Legal Proceedings*.<sup>5</sup>
56. From 1976 to 2004, the Family Court implemented a series of significant changes to its procedures, ranging from the introduction (and later removal) of pleadings, the development of case management guidelines, differential case management, the special management of complex cases and the trial management of child abuse cases.<sup>6</sup>
57. The catalysts for these developments varied from legislative amendments and recommendations by external reviewers, to internal analyses of workloads, responses to delays, increased awareness of issues like family violence, and a recognition of the pressures placed on the system by increasing numbers of self-represented litigants.<sup>7</sup> Many attracted criticism from the legal profession and litigants, who cautioned that constant change was confusing to clients, costly and unnecessary.<sup>8</sup>
58. Procedures in the Family Court were originally governed by executive authorised Family Law Regulations.<sup>9</sup> Initiating applications for ancillary relief were to be commenced by Application which was to include the names and addresses of parties, the place and date of marriage and details of any divorce application then filed and precise details of the orders sought. The Application was to be supported by an affidavit. In child matters the affidavit was to set out "shortly" the arrangements proposed for the child and the facts relied on in support of the application. In financial matters only, a Statement of Financial Circumstances was to be filed.
59. From 1983, Family Court judges possessed the power to make rules, and the first set of Rules came into effect two years later.<sup>10</sup> Management guidelines were also prepared and

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<sup>5</sup> Margaret Harrison, *Finding a better way: A bold departure from the traditional common law approach to the conduct of legal proceedings* (2007, Family Court of Australia) <[http://www.familycourt.gov.au/wps/wcm/connect/03b6fe90-12d4-4840-9ef5-4cbaf690b297/Finding\\_Better\\_Way\\_April\\_2007.pdf?MOD=AJPERES&CONVERT\\_TO=url&CACHEID=ROOTWORKSP ACE-03b6fe90-12d4-4840-9ef5-4cbaf690b297-1h-nfrG](http://www.familycourt.gov.au/wps/wcm/connect/03b6fe90-12d4-4840-9ef5-4cbaf690b297/Finding_Better_Way_April_2007.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSP ACE-03b6fe90-12d4-4840-9ef5-4cbaf690b297-1h-nfrG)>.

<sup>6</sup> Harrison, 18.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

pioneered in 1985, prompted by recommendations by the Court's Committee on Standardisation of Practices and Procedures.<sup>11</sup> These guidelines were designed to clearly articulate the Court's practice and expectations as to the progress of litigation, consistent with case management principles, and to ensure consistency across the Court, and were to have no direct impact on the adjudication of substantive or procedural issues.<sup>12</sup>

60. The Family Court's case management guidelines were subsequently amended on numerous occasions and eventually became the "case management directions".<sup>13</sup> In 1989 pleadings were introduced as an early effort to contain costs by identifying issues in dispute from the start of litigation.<sup>14</sup> While pleadings were a well recognised management tool in general civil cases, they proved less effective in the family law system, including because of the lack of familiarity with this approach and the inherent difficulties in seeking to state or define issues in family law cases.<sup>15</sup> Within six years pleadings had been abandoned.
61. Historically, court statistics suggested that an average of between five-six per cent of applications filed went to trial.<sup>16</sup> Consequently, case management and other procedural initiatives were originally directed at the majority of separated families who successfully resolved their disputes outside of court,<sup>17</sup> such as by encouraging early negotiated resolution.
62. The Simplification of Procedures Committee was established in 1992, following concerns by the then Chief Justice about the increasing complexity of court procedures.<sup>18</sup> The Committee's 1994 Report defined the aims of an ideal procedure and identified the tension between the Court's advanced alternative dispute resolution system, the associated high rate of early settlement and the Court's insistence on the completion of compulsory procedures that assumed matters would proceed to trial, which therefore required the preparation and filing of material which was rarely needed.<sup>19</sup>
63. The Committee's recommendations included the introduction of information sessions with a child and property component as part of the conciliation service, to be available for parties prior to the filing of an application or before the first return date.<sup>20</sup> The Committee also addressed the need for trial management powers, which the second Joint Select Committee had recommended be granted to the judges.
64. Several procedural improvements were made following the Committee's recommendations and after significant changes to the Family Court Rules in 1996.<sup>21</sup> Case management

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<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid, 19.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid, 20.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid, 21.

guidelines went through several revisions to better complement those rules, and were reissued in April 1997.<sup>22</sup> A year later, as recommended by the Committee, the Committee's proposals were re-evaluated and further suggestions made for amendments to the FLA and the Court rules, forms and procedures.<sup>23</sup>

65. In 1988 the Court developed a strategic plan and set up a Future Directions Committee to oversee improvements to court services.<sup>24</sup> The Future Directions Committee was tasked with reviewing the case management guidelines, the use of expert evidence and proposals for shortening trials and for using judge time more effectively.<sup>25</sup> As a result of the Committee's work, a new pre-trial case management system was implemented nationally in 2001.<sup>26</sup> As Harrison noted, "A major characteristic of this system was the discrete separation of the resolution phase from the determination phase of case management, plus the introduction of new procedures for the preparation and listing of cases for trial, the introduction of a case assessment conference and a prohibition on the allocation of trial dates until all evidence was filed and the case was ready for trial".<sup>27</sup>
66. Thus, by 2004 the Family Court had developed a very advanced, workable and effective case management system that was defined by the experience of the previous 28 years. The Court had undertaken number of internal inquiries into procedures and pre-trial case management systems and in so doing sought and obtained external assistance.
67. Unfortunately, subsequent to 2004, this experience has largely been ignored by the Federal Magistrates Court (now Federal Circuit Court) and abandoned by the Family Court.
68. The Association recommends there should be a review of procedures and case management in both the Family Court and the Federal Circuit Court, as well as the management and allocation of judicial time.

#### E. APPROPRIATE COURT FACILITIES

69. The Association notes the concerns expressed in the Discussion Paper in relation to the appropriateness of court facilities and supports proposal 6-12.
70. The NSW Family Law Bar practices in regional areas including Lismore and Coffs Harbour, which provide a useful case study.
71. The facilities in Lismore are inadequate and located in what would otherwise be office space. The courtroom is windowless. The practitioners room is cramped and only four small conference rooms are available, adjoining a waiting area which on busy days is very

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<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

crowded. These inadequate facilities make it impossible to ensure that everybody can have a conference in confidence, as it is not even possible to find a quiet corner of the common area to talk to your client. If a matter involves questions of family violence, whether between the parents or involving children, there is a very real prospect of these parties crossing paths.

72. Similar concerns are reported by practitioners working in Newcastle. The Discussion Paper's concerns reflect the experience of the NSW Bar and the recommendation is well-founded.
73. The new court complex at Coffs Harbour combines the local, district, supreme and Federal Circuit courts. The complex is better-suited in terms of its general appearance and usability of courtrooms. Unfortunately, insufficient thought has been given to its design and the very issue the subject of recommendation 6-12. One of the conference rooms which perhaps is not intended to be a conference room has the appearance and dimensions of a prison cell. Other rooms intended to serve as conference rooms have been converted into administration rooms for different social welfare facilities. Again, there are simply not enough rooms to meet demand.
74. It is suggested that a sensible way forward would be for the federal and state governments to collaborate and pool resources into the development of new, shared court complexes in the regions, to improve infrastructure across the family law system.

#### F. THE CHILDREN'S ADVOCATE

75. The Association does not support Proposal 7-8. The Association believes the appointment and involvement of both the Children's Advocate and the Independent Children's Lawyer as contemplated by the Discussion Paper is inappropriate and would not enhance the current ability of children's views to be appropriately represented before the Court. Rather, the Association submits that improved outcomes for children could be realised through better funding and resourcing of existing arrangements.
76. A mechanism for providing, in an admissible form, the views of the children concerning the dispute between their parents already exists. The purpose of Child Inclusive Conference Memoranda and Family Reports, as currently used in both the Family Court and the Federal Circuit Court, is to identify the issues and place before the Court the children's views in the parenting proceedings.
77. This has been a revolutionary step since the introduction of the FLA and recognises the rights of children to be heard in accordance with the relevant article of the *United Nations Convention on the Rights of the Child* (UNCROC). The difficulty has been finding sufficient time for the court-employed family consultants to undertake this important task. With the appropriate level of funding, this could be implemented more quickly and give effect to the rights of the child.

78. The Independent Children's Lawyer advocates for the children's best interests whilst communicating with the children in order to ascertain their views. There are restrictions on the appointment of an Independent Children's Lawyer in proceedings under the *Family Law (Child Abduction Convention) Regulations*, and in parenting proceedings an Independent Children's Lawyer is appointed if proceedings fall within the categories identified by the Full Court in the 1994 decision of *Re K*.<sup>28</sup>
79. These guidelines have been applied with regularity since the decision. As noted in *Re K*, on one view of the UNCROC all children should be represented in any proceedings. Ultimately, the appointment of children's representatives and the funding of that representation is a political decision and not a legal one.
80. It must be acknowledged that often children will repeat and reflect their parents' views about proceedings in order to protect their emotional and psychological alignment with that particular parent. This means that sometimes children change their views depending upon which parent has more influence over the children's emotional and psychological state at any particular time during the litigation. If the proposed Children's Advocate is to act upon direct instructions from the child and advocate the instructions received from that child in the parenting proceedings, the likelihood is that the best interests of that child may not be the subject of evidence and the testing of that evidence before the Court. Rather, what will be advocated will be the child's interpretation of their strategy to maintain connections with their parent with whom they feel most psychologically or emotionally aligned. Children are sometimes motivated by explicit and sometimes implied promises and gifts to state a particular viewpoint to the Court.
81. In order to ensure that the child's views are accurately represented to the Court, a document prepared by the Independent Children's Lawyer or by the child with the assistance of the Independent Children's Lawyer might be made admissible evidence in the Court proceedings without the requirement of cross examination of the person who provided assistance in preparation of that document. This would obviate the need for a separate office.
82. Documents of this nature are often prepared in the New South Wales Children's Court in proceedings under the *Children and Young Persons (Care and Protection) Act 1998* (NSW) where children are always granted legal representation.
83. A child can under the current law be a party in his or her own right in proceedings. An example of this can be seen in *Pagliariella and Pagliariella*,<sup>29</sup> where Hannon J made an order on the application of a 14-year-old child to be joined as a party to the proceedings. His Honour stated that the ICL was also of importance in the following passage:<sup>30</sup>

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<sup>28</sup> (1994) FLC 92-461; 17 FamLR 537; 117 FLR 63.

<sup>29</sup> (1993) FLC 92-400.

<sup>30</sup> *Ibid*, 80,107-8.

The court will not be assisted in this regard by counsel for N because her counsel will be bound by the instructions which she gives either directly or through a next friend if an appointment is made. Although the wife maintains the position she held at the previous trial she is unlikely to be represented and therefore may not be able to adequately put her case. It is not of any relevance that the wife's case may correspond with the views reached by the separate representative. The only independent assistance which would be available to the court is that which can be provided by a separate representative who though obliged to put N's wishes before the court is not bound to submit that they should be accepted. In fact it is the duty of the separate representative to submit to the contrary if he or she considers on all the evidence that it is in the interests of the child's welfare to do so. In the present case it is the separate representative who would be able to highlight the issues, to cross-examine the witnesses and to assist the court in assessing the weight to be given to the evidence of N's wishes.

84. Legal Aid NSW has appropriately represented and funded private legal practitioners to assist many children through Independent Children's Lawyers appointed by the Court. They have developed over the years an extensive body of expertise in representing children's interests. The Courts almost without exception respect and value the representation of children provided through the Independent Children's Lawyers.
85. Therefore, the Association is of the view that funding comprehensive training of appropriately qualified Independent Children's Lawyers will better serve children's interests than the proposal in the Discussion Paper to create a separate body.

#### G. THE PROTECTED CONFIDENCES PROPOSAL

86. Proposal 8-6 suggests that the FLA should empower the Courts to exclude evidence of "protected confidences", in response to community concerns about the use of sensitive records and materials in family law proceedings, as outlined in the Discussion Paper.<sup>31</sup>
87. The Association opposes this proposal and suggests that the existing legislative regime, including that provided by the *Evidence Act* and the FLA, including Division 12A, provide a sufficient and proper balance between the appropriate use and protection of such material.
88. As drafted, the proposal appears to establish a presumption that such evidence would be excluded unless a particular test is satisfied.
89. The proposal suggests that:

The court should exclude evidence of protected confidences where it is satisfied that it is likely that harm would or might be caused, directly or indirectly, to a protected

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<sup>31</sup> *Discussion Paper*, 203-208.

confider, and the nature and extent of the harm outweighs the desirability of the evidence being given. Harm should be defined to include actual physical bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm (such as shame, humiliation and fear).

90. This definition of potential harm is very broad.
91. The proposal also suggests that the Court should consider the probative value and importance of the evidence to the proceedings and the effect that allowing the evidence would have on the protected confider. Accordingly, with such a “double standard”, evidence might be highly probative as to any order the Court might make in the best interests of a child and still not be admissible.
92. It is suggested that the “paramount consideration” pursuant to section 60CA be applied to the question of excluding such material. There is no inherent difficulty with that, however the effect of this would be to impose a third test, ie:
  - a. First, does the evidence have probative value?
  - b. Second, what effect does the evidence have on the confider?
  - c. Third, is excluding/admitting the evidence in the best interests of the child?
93. It is suggested that the protected confider may consent to the evidence being admitted. Subject to how the legislation is drafted, this may not be sufficient.<sup>32</sup>
94. What is missing from the ALRC’s analysis is due consideration of the purpose and role of the Court. The Court only becomes involved when parties call upon it. The Court is only engaged when there is a dispute. As noted above, the vast majority of separated families do not require the assistance of the Court and it is only matters which cannot otherwise be reconciled or resolved which end up before the Court.
95. The role of the Court is ultimately as a finder of fact. Once the facts are known, then the Court applies the jurisprudence. In a parenting matter when making a particular parenting order in relation to a child, a Court must regard the best interests of the child as the paramount consideration.
96. If material would be of assistance to the Court in making an Order in the best interests of a child, it should be available. Put another way, it should not be reasonably contemplated that the Court’s capacity to make an Order in the best interests of a child would be constrained.
97. Additionally, the Discussion Paper proposes “inserting a provision into the *Evidence Act 1995* (Cth) or the *Family Law Act* to require courts to consider the harm that could occur if

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<sup>32</sup> See *Unitingcare – Unifam Counselling & Mediation v Harkiss* (2011) 46 Fam LR 12.

the records are used in a court process”.<sup>33</sup> This would appear to reverse the onus from the best interests of the child to the potential harm to a third person.

98. It is also proposed that “a party should be required to ask the Court for permission to request the production of records and ensure the other party has notice of the request”.<sup>34</sup> This suggestion is problematic for three reasons. First, this will undoubtedly increase costs and strain on the Court as it will produce an exponential rise in objections. Second, it is unclear as to why such an obligation should include an ICL. Third, this proposal is inappropriately blunt and un-nuanced. There should presumably be a distinction between children who are pre-verbal, as those records could only go to medical care. A distinction should also be drawn for medical treating records (as opposed to counselling notes) and records of a school or preschool.
99. The Discussion Paper acknowledges that a “range of concerns” have been raised in submissions, research and consultations regarding the use of “confidential records”.<sup>35</sup> Reasons identified in the Discussion Paper include the suggestion that “such records are likely to be of limited probative value because they are not produced for forensic purposes”. However, this is incorrect and misunderstands the nature of the process. What is contained in such records, and also what is omitted, can be of great assistance to a Court in determining the Order in the child’s best interests.
100. Further, the Discussion Paper sets out other considerations,<sup>36</sup> all of which have some weight. The primary question is what is the paramount consideration.
101. Proposal 8-6 also suggests that “Subpoenas in relation to evidence of protected confidences should not be issued without leave of the court.” The Discussion Paper notes at [8.110] that “*Family Law Rules* already provide that a subpoena can be issued only with permission from the court, other than in applications for interim, procedural, ancillary or other incidental proceedings”. A requirement that leave be required to issue a subpoena at any stage including interim proceedings would effectively mean that information may be denied to the Court in the most urgent of cases because there is no time to obtain the requisite leave.
102. Three reports were issued in 2009 which provide important insights on this issue:
- a) the Family Law Council 2009 Report -- Improving Responses to Family Violence in the Family Law System (FLC Report);<sup>37</sup>

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<sup>33</sup> *Discussion Paper*, [8.97].

<sup>34</sup> *Ibid.*

<sup>35</sup> *Discussion Paper*, [8.103].

<sup>36</sup> *Ibid.*

<sup>37</sup> Family Law Council, *Improving Responses to Family Violence in the Family Law System* (2009) <<https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Improving%20responses%20to%20family%20violence.pdf>>.



- b) the Australian Institute of Family Studies report titled *Evaluation of the 2006 family law reforms* (AIFS Report);<sup>38</sup> and
- c) the Report to government by Professor Richard Chisholm titled *Family Courts Violence Review* (the Chisholm Report).<sup>39</sup>

103. In 2003 the Family Court of Australia reported that in 74.7% of cases where a judge determined a parenting case there were allegations of family violence.<sup>40</sup> A key finding of the FLC Report was that although allegations were common and often serious, they appeared to have only minimal impact on court sanctioned parenting outcomes. However, the research indicated that when evidence of the existence of family violence was appropriately presented to the federal family Courts, the judiciary made orders aimed at protecting the victims of that violence when framing parenting orders. The lack of supporting evidence suggested to the authors that legal decision-making was often taking place in the context of widespread factual uncertainty.

104. The AIFS Report noted that:<sup>41</sup>

While communication in relation to privileged and confidential disclosures made in assessment and FDR processes raises some complex questions, investigation of how such communication could potentially occur may be an avenue for achieving greater coordination and ensuring expeditious handling of these matters. Currently, much relevant information may be collected by family relationship service professionals in screening and assessment processes, but this information is not transmissible between professionals in this sector and professionals in the legal sector, or between other agencies and services responsible for providing assistance. Effectively, families who move from one part of the system to the other often have to start all over again. For families already under stress as a result of family violence, safety concerns and other complex issues, this may delay resolution and compound disadvantages.

105. Further, the Chisholm Report noted in the context of discussions regarding screening for family violence that:<sup>42</sup>

An important part of the process would be obtaining relevant information from sources outside the court. A great deal of relevant information will often be available, held by police, child protection departments, other agencies and, in particular, family relationships centres and other agencies providing dispute resolution services. If that

<sup>38</sup> AIFS, *Evaluation of the 2006 family law reforms* (2009) <<https://aifs.gov.au/publications/evaluation-2006-family-law-reforms/16-summary-key-findings-and-conclusions>>.

<sup>39</sup> Richard Chisholm, *Family Courts Violence Review* (2009) <<https://www.ag.gov.au/FamiliesAndMarriage/Families/FamilyViolence/Documents/Family%20Courts%20Violence%20Review.pdf>>.

<sup>40</sup> See *FLC Report*, 33-4.

<sup>41</sup> *AIFS Report*, [16.2].

<sup>42</sup> *Chisholm Report*, 76.

information could be available at an early stage, the court would be better placed to assess any risk, and deal appropriately with it...

An obvious difficulty here is that some of these records, including the records of the dispute resolutions services, will be confidential, as a result of legislative provisions that both prevent the officers from disclosing the material, and prevent it from being admitted into evidence. The confidentiality of the process comes at a price, because it seems clear that the protection of children and other family members would in some cases be enhanced if the material were available. The question whether the rules about confidentiality should be modified to allow the information to be available to the court is a large question that falls outside the reasonable scope of this Review, as does the relationship between the court and other parts of the family law system. For this reason I simply note that in my view the court's ability to conduct a risk assessment process, and its capacity to protect the children and families that come before it, would almost certainly be enhanced if it had access to relevant information held by external agencies, including dispute resolution agencies. It would be appropriate, in my view, for this issue to be separately considered.<sup>43</sup>

106. This last quotation from the Chisholm Report followed directly after discussion of a case study where a long and difficult hearing was avoided between parties with diametrically opposed demonstrations of the facts. It settled precisely because material was available on subpoena which, once inspected, demonstrated where the truth lay.
107. A common theme of these three reports was that the Court's ability to make Orders appropriately responsive to family violence was a direct function of what information was available and how it was presented.
108. In cases where allegations of family violence are made, proper evidence must be available to the Court. Without supporting evidence, legal decision-making will take place in the context of widespread factual uncertainty. The Courts already have significant powers to protect confiders, control subpoenas and the admissibility of evidence.
109. Frankly, subpoenas and the material produced in response to them, are often the only sources of reliable or expositive information.

## H. REGULATORY REGIME

110. The Association has carefully considered the proposals contained in chapters 10 and 12 of the Discussion Paper regarding the importance of promoting public confidence in the family law system through effective governance arrangements and the proposed establishment of a Family Law Commission. It is unclear to what extent, if any, the proposals referring to

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<sup>43</sup> Ibid, 79.

“legal practitioners” and “state and territory law societies” are intended to capture barristers who practice in family law.

111. The ALRC does not distinguish in its discussion of “legal professionals” between solicitors and barristers. This is problematic as barristers and solicitors serve different but complementary roles in our legal system, and accordingly bear different ethical and professional obligations. Any regulation imposed upon legal practitioners must address this nuance appropriately.
112. The Association agrees that robust and transparent regulation is critical to promote quality and empathetic legal services, accountability and assurance to clients who rely on the services of lawyers. However, the Association believes that appropriate admission, training, continuing professional development and complaints procedures to regulate barristers already exist under the *Legal Profession Uniform Law (LPUL)* and other state and territory legal profession legislation and regulation.
113. The Association is concerned that the establishment of a new statutory Family Law Commission would be expensive and would unnecessarily duplicate the work and responsibilities of professional regulatory bodies including the Legal Services Commissioner to a significant extent. This duplication would create confusion and uncertainty for both practitioners and anyone seeking to press a complaint, including clients.
114. The LPUL is intended to serve as comprehensive legislation to regulate the profession and promote consistency across state and territory jurisdictions. Under the LPUL, barristers have legal and professional obligations and duties to serve the Court, and owe their paramount duty to the administration of justice.<sup>44</sup> Further, barristers must “promote and protect fearlessly and by all proper and lawful means the client’s best interests to the best of the barrister’s skill and diligence and do so without regard to his or her own interest or to any consequences to the barrister or to any other person”.<sup>45</sup> Barristers have additional obligations under the FLA to act in the best interests of children.
115. The LPUL requires that legal costs charged must be “no more than fair and reasonable in all the circumstances”,<sup>46</sup> and regulates the requisite disclosures that must be made.
116. Additionally, all barristers have a professional duty under the Legal Profession Uniform Conduct (Barristers) Rules 2015 (*Barristers’ Rules*) to inform their clients or instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client, to permit the client to make decisions about the client’s best interests in relation to the litigation.<sup>47</sup>

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<sup>44</sup> *Barristers’ Rules* rules 4(c), 23.

<sup>45</sup> *Barristers’ Rules* rule 35.

<sup>46</sup> LPUL, section 172.

<sup>47</sup> *Barristers’ Rules* rule 36.

117. The LPUL provides a statutory framework for the Legal Services Commissioner to examine complaints made against barristers. Anyone can make a complaint under the LPUL,<sup>48</sup> including barristers, solicitors, clients and others in the court system.
118. The Association has long held the view that there should be a single source of regulation for barristers that is common across all areas of practice, to promote consistency, certainty, accountability and transparency for barristers and clients alike. Consequently, the Association does not support the creation of a Family Law Commission that would overlay an additional regulatory, training and complaints process for a select group of barristers on top of existing arrangements under the LPUL. As family law intersects with a multitude of other practice areas, including but not limited to criminal and property law, it would be difficult to determine precisely when, which and how barristers practising in family law would come within a regulatory scheme administered by the Family Law Commission, and when they would come within the existing scheme provided for by the LPUL.
119. It is also important to note that barristers appearing in family law matters may be briefed in different ways, in some cases via a “direct access” brief. It is critical therefore that any regulation imposed in this space is sufficiently nuanced to account for and satisfactorily regulate these different forms of practice. The Association is of the view that the LPUL currently provides a suitable balance between the competing tensions of permitting direct access arrangements in appropriate cases and ensuring that barristers are able to exercise their judgment and experience as to those matters where it is not.
120. In relation to proposal 10-6 in the Discussion Paper, the Association acknowledges the importance of barristers undertaking relevant training and professional development to best serve their clients and the administration of justice. However, it would be difficult to impose mandatory family law specific Continuing Professional Development requirements upon barrister family law practitioners as the only way to identify practitioners to whom the requirement would apply would be through self-nomination. Barristers practising in New South Wales are required to renew their practising certificates annually and, with some exceptions, are required to earn at least ten CPD points in a practising year. These points must include activities in each of the following categories:
- a) Ethics and Professional Responsibility;
  - b) Practice Management and Business Skills;
  - c) Substantive Law, Practice and Procedure, and Evidence; and
  - d) Barristers’ Skills.
121. Additionally, barristers in NSW are accredited as arbitrators pursuant to the FLA and also as mediators.

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<sup>48</sup> LPUL section 266(1).

122. Accordingly, the Association does not support the creation of a Family Law Commission or the imposition of additional regulation upon barristers in NSW.

## I. JUDICIAL APPOINTMENTS

123. Proposal 10-8 suggests that:

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

124. Judges working in family law not only require specialist technical knowledge, legal reasoning, fact finding and analytical skills, they also require highly effective communication and interpersonal skills and experience in social dynamics. Judges perform this important work in a difficult, high-pressure environment that carries the risk of physical danger to themselves and their families, as well as the gravity of knowing that their decisions, especially regarding children, could in some instances provoke extreme responses resulting in violence to a child or a party, or in some tragic cases death.
125. One of the Family Court's most admired features is the fact that only those who "by reason of training, experience and personality"<sup>49</sup> are suited to deal with family law cases ought be appointed as its Judges, in accordance with section 22(2)(b) of the FLA.
126. This same requirement does not apply to Federal Circuit Court judges who hear family law matters, as was acknowledged last year by the Standing Committee on Social Policy and Legal Affairs' Report *A better family law system to support and protect those affected by family violence*, which stated that:<sup>50</sup>

Under the Family Law Act, judges cannot be appointed to the Family Court unless they are deemed suitable to preside over family law matters 'by reason of training, experience and personality'. However, judges appointed to the Federal Circuit Court do not need to meet the same requirements because the Court exercises jurisdiction in general federal law matters, despite the fact that 87 per cent of the total family law workload is heard in that court.

127. The Council of Single Mothers and their Children expressed concern to the Senate Legal and Constitutional Affairs Legislation Committee in July that:<sup>51</sup>

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<sup>49</sup> *Family Law Act 1975* (Cth) section 22(2)(b).

<sup>50</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) [8.21] (citations omitted)  
<[https://parlinfo.aph.gov.au/parlInfo/download/committees/reportrep/024109/10e\\_pdf/Abetterfamilylawssystemtosupportandprotectthoseaffectedbyfamilyviolence.pdf;fileType=application/pdf](https://parlinfo.aph.gov.au/parlInfo/download/committees/reportrep/024109/10e_pdf/Abetterfamilylawssystemtosupportandprotectthoseaffectedbyfamilyviolence.pdf;fileType=application/pdf)>.

<sup>51</sup> Council of Single Mothers and their Children, Submission 6 to the Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Family Law Amendment (Family Violence and Cross-examination of parties) Bill 2018* (2018), 2.

Many of the most disconcerting stories we hear occur in the Federal Circuit Courts where issues of family violence are disregarded in comments from the Bench, or in interactions with lawyers who sometimes advise clients against raising concerns or even, refuse to raise them. While the training of judicial officers may seem beyond the scope of this committee in relation to this legislation, we nevertheless recommend this be considered for inclusion and/or referred to the Family Law System Review. The behaviours of Judges and other court officials that is based on knowledge about the impacts of family violence, beliefs and personal judgements, is key in legislation such as that proposed, where judicial discretion and a lawyers' interpretation and representation are critical to decisions and fair hearings.

128. Accordingly, the Association supports proposal 10-8.

## J. CULTURAL COMPETENCY AND SAFETY

129. The Association recognises the importance of ensuring that the family law system is culturally safe for all Australian families and children in need of its services.

130. This submission draws upon the advice and expertise of the Association's First Nations Committee, comprised of 12 appointed barristers, including four senior counsel, and one academic member.

131. The Association supports Proposals 5-10, 12-8, 12-9 and 12-10.

132. The most significant changes proposed by the Discussion Paper in relation to Aboriginal and Torres Strait Islander Children are:

- a. to amend the FCA to insert "safety" as an additional paramount consideration together with their 'best interests' when making decision regarding children (Proposal 3-3); and
- b. that decisions about the care of an Aboriginal or Torres Strait Islander child should support the child's right to maintain and develop the child's cultural identity, including the right to (Proposal 3-4):
  - (a) maintain a connection with family, community, culture and country; and
  - (b) have the support, opportunity and encouragement necessary to participate in that culture, consistent with the child's age and developmental level and the child's views, and to develop a positive appreciation of that culture.

133. There is a concern that proposal 3-4 is arguably inconsistent with the general proposition that a child has a right to grow up with a family, and specifically article 7(2) of the *United Nations Declaration on the Rights of Indigenous peoples* which provides that:

Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

134. There is also concern that the safety of the child will be taken into account in isolation and without consideration of inter-generational and early-life trauma where there has been no or very little culturally appropriate trauma-informed support for the parent/s.
135. In answer to Question 10-6, the Association recommends that cultural reports should be mandatory in all parenting proceedings involving an Aboriginal or Torres Strait Islander child. To this end, we recommend that proposal 10-4 be amended to read as follows:

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

#### K. A NATIONAL JUDICIAL COMMISSION

136. The Association has consistently supported the LCA's call to establish a national judicial commission. A federal judicial commission, as considered by question 12-2 of the Discussion Paper, would promote transparency and accountability of all judges, from the heads of jurisdiction to the newest appointees. It is the Association's view that such a commission should not be limited only to those exercising family law jurisdiction but should provide oversight across all Commonwealth judicial officers.
137. The Judicial Commission of New South Wales has been effective in training judges and resolving complaints about alleged misbehavior and incapacity for more than 30 years. The Commission has enhanced public confidence in the state's judiciary.
138. The Association has suggested that a similar model should operate at a federal level to provide not only a fair and transparent manner to deal with complaints about judges by members of the public but also a fair process for federal judges who are the subject of allegations currently aired publicly through media reports.

#### CONCLUSION

139. The ALRC's Review represents an unprecedented opportunity to improve the administration of justice in Australia's family law system and secure improved outcomes for Australian families and children.
140. The Association submits that the ALRC's findings will be of most value to policy makers if these address the crucial issue of resourcing and the importance of adopting a holistic

approach to family law reform that acknowledges, rather than seeks to sever, the fundamental nexus between the family law system and the Courts.

141. The Association would be pleased to provide any additional information or answer any further questions the ALRC may have.
142. Thank you again for the opportunity to provide input into this important review.

3 December 2018