FAMILY COURT OF AUSTRALIA

REVIEW OF THE FAMILY LAW SYSTEM BY THE AUSTRALIAN LAW REFORM COMMISSION

SUBMISSION BY THE HONOURABLE WILLIAM ALSTERGREN, ACTING CHIEF JUSTICE OF THE FAMILY COURT OF AUSTRALIA

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Introduction

1. The Family Court of Australia ("the Family Court" or "the Court") again welcomes the opportunity to contribute to the Review by the Australian Law Reform Commission ("ALRC" or "the Commission") of the family law system.

2. I provide this submission in my capacity as Acting Chief Justice of the Family Court of Australia, and the views expressed herein have been developed in consultation with a small committee chaired by Justice Strickland, the Judge responsible for advising the Chief Justice on matters of law reform, and with input from several other Justices. Whilst they do not purport to represent my views specifically, those of all or any Family Court Justices or the Court as a whole, I anticipate that these views would be widely accepted by the judges.

3. Although the Family Court welcomes the opportunity to contribute to the Review, the nature and wide-ranging extent of the Discussion Paper, comprising as it does some 124 proposals and 33 questions in its 313 pages, does not permit a considered and detailed response in the short time made available for that purpose, even with the extension generously provided to the Court.

4. Many of the extensive submissions made by the Court in response to the Issues Paper, provide answers to the proposals and questions outlined in the Discussion Paper. Indeed, a careful perusal of the response would reveal that a number of the proposals are already in place in the Court to varying extents. For example, proposals 3-13, 6-1, 6-2, 7-3, 7-7, 7-10, 8-6 and 10-11, to identify a few.

5. Thus, the purpose of this response is to provide brief comments on some of the topics raised in the Discussion Paper which are relevant to the Court, but primarily to refer the Commission to some of the key issues raised, and recommendations made by the Court, in response to the Issues Paper which have not been picked up in the Discussion Paper, but which address many of the proposals and questions in that Paper.[1]

[1] Disclaimer – the fact that the Court in this submission does not specifically refer to all proposals in the Discussion Paper is not to be taken as indicating that the Court either agrees or disagrees with those proposals not referred to.

Overview

6. The Court and its processes

6.1 In the Court's submission in response to the Issues Paper, the Court urged that it is important not to lose sight of the fact that the Family Court is a superior court of record, and it is not, nor should any court be, a social service agency. Further, the Family Court is only one component, albeit a significant one, of the family law system.

6.2 That fundamental point must be borne in mind when considering, for example, that part of the Discussion Paper under the heading of "Addressing Concerns about Adversarial Processes", and in particular what is suggested in paragraphs 6.64, 6.65, and 6.66. Those proposals overlook the fact that the role of the Court is to hear and determine the most significant and complex family law cases, in a timely fashion. What is proposed though is not a court of law having that role in family law.

6.3 To emphasise that point, it is noted that those proposals are put forward in the context of considering the Parenting Management Hearings which are the subject of legislation currently before Parliament. However, that legislation establishes **an Administrative Tribunal** with a multi-disciplinary panel, and not a court of law.[2]

6.4 The Court also refers the Commission to what the Court said about a problem-solving approach in paragraphs 275 and 276 of our submission. We specifically note what the Commission correctly recognised in paragraph 219 of the Issues Paper, namely the limitations on the capacity of Federal Judges because of constitutional restraints to engage in problem-solving approaches. The recognition of that issue does not appear to have carried over to the Discussion Paper.

6.5 The Court will elaborate further on this important issue later in this submission.

7. Approach to review and implementation

7.1 As submitted in the Court's response to the Issues Paper at paragraph 6, it is a mistake to approach the review from the position that all aspects of the system need change,

[2] See Family Court of Australia, Submission No 68 to the Australian Law Reform Commission, *Review of the Family Law System Issues Paper*, 18 May 2018 ("Court's submission") [277] together with Appendix 13.

and that "if there is to be any change introduced, that change can only be worthwhile if it creates a better system".

7.2 The innovative work of the Family Court over the 40 plus years of its existence was detailed in the Court's earlier submission. A few examples of that are to be found in the information provided in the response to Questions 3, 4, 5, 6, 7, 8, 11, 12, 20, 21, 23, and 30 in the Issues Paper. That information clearly reinforces the point that while improvement should be constantly pursued, not all aspects of the system need change.

7.3 As was emphasised in the Court's earlier submission, while the task of the Commission is to review the family law system and make recommendations, it is equally important to consider the transition and implementation of any recommendations that are made. There is no definitive plan or road map suggested in the Discussion Paper to implement the proposals.

8. That leads into what the Court considers to be a fundamental issue, which if not addressed undermines the utility of any consideration of the proposals.

9. As submitted in the Court's response to the Issues Paper at paragraph 8, it must be recognised that many of the difficulties apparent with the system, and particularly with how the family law courts operate, can be solved by an injection of funds, and particularly into legal aid, as recommended by the Productivity Commission in its final report into Access to Justice Arrangements.[3]

10. The Family Court can only provide the service that it is set up to provide if it is adequately funded, and always has the requisite number of judges, registrars, family consultants and staff to enable it to carry out its core function. The Family Court has been chronically under-funded and under-resourced for many years, with one result being a number of services that were offered having to be cut or reduced dramatically, and another result being limitations being placed on the introduction of innovative and cutting edge improvements to its operations, something for which this Court has been renowned for the world over.

11. There is nothing in the Discussion Paper as to the funding and resources that would be required to implement the proposals, but plainly, significant funding will be required. Further, it is worth noting that if the funding required to implement the proposals contained in the

[3] Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72 (2014).

Discussion Paper was made available to the family law courts, it is the Court's strong submission that many of the perceived failings of the Court could be addressed effectively by, for example, the expansion of our existing services and the introduction of long-needed reforms. Further, as a consequence, the family law system as a whole would be in far better shape than it is now. One only needs to carefully read the Court's submission to appreciate this point. For example, in the area of triaging, in the application of the less adversarial process, in liaising with Aboriginal and Torres Strait Islander peoples, and in the work that the Court's Child Dispute Services and registrars undertake.

12. The Court also notes that, as referred to above, access to justice would be significantly improved for all disadvantaged people if legal aid was provided to the level that recognises and acknowledges that facility as an important indicia of a civilised society.

13. Unfortunately, the Court considers that many of the proposals in the Discussion Paper, if able to be funded, will inevitably increase and not reduce complexity in the system.

14. What is proposed is the introduction of a Family Law Commission, a Children and Young People Advisory Board, community-based Family Hubs, children's advocates, working groups, litigation representatives, and the use of assessors. That is in addition to the existing bodies and individuals, namely the Family Law Council, the Australian Institute of Family Studies, Family Relationships Centres, Independent Children's Lawyers ("ICLs"), family consultants, and case guardians. What is absent is a consideration of how existing services, bodies and roles could provide the functions proposed if adequately funded.

15. Apart from the issues of funding, resourcing, and the provision of personnel, which are simply not addressed in the Discussion Paper, there are no proposed guidelines as to the interaction between these bodies and individuals in order to avoid unnecessary duplication, and the imposition of additional layers of bureaucracy.

16. The roles of family consultants, proposed children's advocates, and ICLs, provide but one example. There is no clear statement as to their interaction or even areas of responsibility once children's advocates are introduced. Further, there is no explanation of why the combination of a family consultant and an ICL cannot and does not currently effectively do what a children's advocate will be expected to do.

17. In the Court's view, the introduction of a children's advocate is unnecessary, and importantly, would add another professional person that a child will need to engage with. The case is

simply not made out in the Discussion Paper as to how that is in the best interests of that child. There is a complete lack of reality checking with the proposed introduction into the system of not only the children's advocate, but also the other organisations and individuals. Again though we will say more about this later in this submission.

18. The Court reiterates that the processes adopted by the Family Court are not necessarily "adversarial" as suggested in the Issues Paper. Many provisions of the Act, including Division 12A, and the case management processes contained in the *Family Law Rules 2004* (Cth) ("the Rules") demonstrate that the Court has the ability and the flexibility to manage how proceedings, and particularly parenting proceedings, are run. That important point is not apparent to a reader of the Discussion Paper.

19. Finally, the Court strongly recommended that the Commission examine the many issues that arise as a result of the Federal/State constitutional divide. That being, where responsibility for family violence and child protection is with the States and family law is with the Commonwealth. However, the only consideration of that issue in the Discussion Paper is in the context of ensuring information sharing. Plainly information sharing and proper processes to ensure that that occurs is essential, but what is needed as part of a review as comprehensive as this has become, is to address the constitutional divide itself.

Family Law Act 1975 (Cth) ("the Act")

20. The Court's submission recommended simplification of the Act in some areas, including to the central provisions of Part VII. The Court did not, however, recommend an entire redraft of the Act as is proposed by proposal 3-1 of the Discussion Paper.

21. Furthermore, the Court's submission recommended a number of amendments to the Act which have not been addressed in the Discussion Paper. They include:

    i. the modernisation of the principles contained in s 43 of the Act to reflect the people and relationships that the Act addresses;[4]

    ii. the insertion of Pt 1.2 of the Rules into the Act[5] (the suite of provisions designed to "ensure that each case is resolved in a just and timely manner at a cost to the parties and the Court that is reasonable in the circumstances of the case"); and

[4] Court's Submission 9–10 [40] – [41].
[5] Court's Submission 23 [83].

iii. the re-drafting of the enforcement provisions in Division 13A.[6]

22. Best interests

22.1 It is proposed in proposal 3-3 of the Discussion Paper that the phrase "best interests" be amended to read "safety and best interests".

22.2 Given that the Court will be called upon to interpret this new phrase in the legislation if this proposal is taken up, it is inappropriate for the Court to do anything other than highlight the difficulty that it sees with this proposal.

22.3 The aim of this and other proposed legislative changes is said to be to make the current "complex pathway for decision-making by courts", "simpler and clearer for families". However, the Court submits that in this instance the opposite will occur and the proposed change will create unnecessary complexity.

22.4 The term "best interests" is a term that is well understood and is universally applied as the test to determine arrangements for children. Importantly, it already includes "safety" as a key component.

22.5 Thus, the primary concern with the proposed change is what is the interrelationship between "safety" and "best interests" as separate concepts?

22.6 In paragraph 3.42 of the Discussion Paper the Commission suggests that "the amendment would send a strong message to families who rely on the legislation about the centrality of safety to a child's best interests, and its fundamental importance as a consideration in all matters relating to parenting arrangements". Plainly, that is diluted when they are turned into separate concepts.

22.7 This proposal is fraught with danger, and should be reconsidered. That is amply demonstrated by the chequered history of changes to key words and key phrases in the legislation.

Access and Engagement

23. The Court recognises that there are significant barriers to accessibility in the family law system for culturally and linguistically diverse ("CALD") communities, Aboriginal and Torres Strait Islander people, people with disability, and lesbian, gay, bisexual, transgender,

[6] Court's Submission 34 [143] – [148].

intersex and queer ("LGBTIQ") families. In that regard the Court's submission made the following comments and recommendations.

Culturally and linguistically diverse communities

24. The Court has already implemented strategies to improve efficiency and access to justice for people from CALD backgrounds. Notably, the Court has developed, and aims to annually review, an online eLearning package 'Let's Talk: Cultural Competency.' This package is specifically designed to improve the individual cultural competency of staff who provide services to people from CALD backgrounds.

25. Further, the Family Court and the Federal Circuit Court of Australia ("the Federal Circuit Court") have developed protocols for the use of interpreters in the courts. These policies aim to ensure that court users are made aware of their right to an interpreter, are asked whether they need an interpreter, and are provided an appropriate interpreter where necessary. Notably, a large portion of the budgets of the Family Court and the Federal Circuit Court is spent on interpreters annually ($1.5 million in 2016-17).

26. In order to further improve access for CALD clients, the Court's submission recommended the implementation of the recommendations of the 2012 report of the Family Law Council "Improving the family law system for clients from culturally and linguistically diverse backgrounds".[7]

Aboriginal and Torres Strait Islander Communities

27. The barriers to accessibility to the legal system for Aboriginal and Torres Strait Islander people have been long recognised. The Family Court, in consultation with members and representatives of indigenous communities, has developed a number of key initiatives in an attempt to respond to the many of the problems that have been identified.[8]

28. To advance access to Aboriginal and Torres Strait Islander clients, the Court's submission recommended the implementation of the recommendations of the 2012 report of the Family Law Council "Improving the family law system for Aboriginal and Torres Strait Islander clients", as was also recommended by the House of Representatives Standing Committee on

[7] Court's Submission 18 [57].
[8] See Court's Submission 15 – 16.

Social Policy and Legal Affairs in their report "A Better Family Law System to Support Those Affected by Family Violence".[9]

29. The Court does note though that the Discussion Paper proposes that the definition of family member in subs-section 4(1AB) of the Act be amended to be inclusive of Aboriginal and Torres Strait Islander concepts of family (proposal 9-8), and that a cultural report be prepared in parenting proceedings which would include a cultural plan for the maintenance of a child's ongoing connection with kinship networks and country (proposal 10-14). However, it was pointed out in the Court's submission that previously when the funding was available such a report was undertaken, but that funding has not been available for some time.[10]

People with disability

30. The Court provides a range of services and facilities to assist clients with disability. For example, the Court has developed an online eLearning package "Let's Talk: Access to Justice for people with disability", which is specifically designed for staff who provide services to people with disability.

31. The Court's submission provided the Commission with a copy of the submission of the former Chief Justice dated 17 January 2014 to the ALRC Issues Paper 44: Equality, Capacity and Disability in Commonwealth Law. The final report of the ALRC was tabled on 24 November 2014 and to the Court's knowledge, none of the recommendations have been implemented.

32. In that respect, we note that the Discussion Paper proposes that the Act be amended to include a supported decision making framework for people with disability which incorporates the National Decision Making Principles and Guidelines set out in the ALRC's Equality, Capacity and Disability report (proposals 9-3 to 9-5).

33. However, the Court reiterates that there is a continuing inability in the Court to make effective orders for the appointment of case guardians. With this in mind, the Court recommended that a properly funded panel of qualified persons be established to undertake that role.[11] This recommendation was not addressed by the Discussion Paper.

[9] Court's Submission 16 [46].
[10] Court's Submission 16, fn 11.
[11] Court's Submission 18 [58].

LGBTIQ Clients

34. The Court has moved to implement a number of changes following the passing of the *Marriage Amendment (Definition and Religious Freedoms) Act 2017*, which amended the *Marriage Act 1961*, to recognise same-sex marriages. For example, it has made arrangements for the alteration of court forms, including to update references to 'husband' and 'wife' to 'applicant' and 'respondent' and replace reference to gender to now include 'female', 'male' and 'X'.

35. The Court's submission agreed with paragraph 89 of the Issues Paper that the recognition of same-sex parenthood is complex in relation to parenting matters, which extends broadly to surrogacy. The Court noted that the current drafting of the provisions has recently resulted in the parentage of a child being left in doubt.[12] The Discussion Paper did not take the opportunity to explore this point.

People living in rural, regional and remote areas

36. The Court's submission notes that the Federal Circuit Court now undertakes all circuits through Australia, save and except for Launceston and, of course, Western Australia.

37. However, litigants from rural, regional and remote areas that seek to access the Family Court can do so through various forms of communication technology, including e-filing, and telephone and video attendances.

38. In the Court's submission, we recommended that accessibility to the family law system for people living in rural, regional and remote areas would be improved if the Court and litigants were readily able to access technology available in other agencies in locations remote from the Court including State facilities and Commonwealth agencies such as Centrelink and the Australian Taxation Office.[13]

39. The Court notes that proposal 6-8 of the Discussion Paper deals with this submission to an extent. Namely, that the Australian Government work with state and territory governments to develop and implement co-location of family law registries and judicial officers in local court registries, including local courts in rural, regional and remote locations.

[12] Court's Submission 20 – 21 [70].
[13] Court's Submission 22 [78].

Costs

40. The Court is mindful of the costs of litigation. Accordingly, r 19.04 of the Rules provides that a solicitor is required to provide cost disclosure letters before specific court events to enable clients to consider the utility of litigation and undertake a serious cost benefit analysis before proceeding further. The Court acknowledges that there is often non-compliance with this rule and that greater attention could be given by the Court to ensure compliance.[14]

41. The Court made a number of further suggestions in its submission to reduce the cost to clients of resolving family law disputes.

42. First, the Court recommended the insertion of Pt 1.2 of the Rules into the Act; provisions designed to ensure that each case is resolved in a just and timely manner at a cost to the parties and the Court that are reasonable in the circumstances of the case.[15]

43. Secondly, the Court identified that one of the dilemmas facing the Court, and thus, likely to be contributing to the high costs of litigation, is the shortage of people with the requisite expertise to undertake expert reports. Accordingly, the Court recommended that the Commission consider what could be done to encourage more experts to agree to give evidence in the courts.[16]

44. Further, the Court suggested that savings to litigants could be made if the system had the capacity to provide more court funded family reports by Child Dispute Services, including earlier in case management.[17]

45. Those suggestions/recommendations have not been addressed by the Discussion Paper.

Unrepresented Parties

46. The Court's submission notes that the Court has taken substantial steps to simplify processes and forms with unrepresented parties in mind. Specifically, the Court has reformed the Rules to provide for the process in as accessible manner as possible. The Court is committed to constantly reviewing its forms to ensure that the Court receives essential information which unrepresented parties may not appreciate needs to be provided.[18]

[14] Court's Submission 22 [80].
[15] Court Submission 23 [83].
[16] Court's Submission 22 – 23 [81].
[17] Court's Submission 23 [84].
[18] Court's Submission 24 [86].

47. It is against that background that the Court notes that the Discussion Paper proposes a review of the usability of court forms with the aim of taking advantage of better use of technology (proposal 3-2).

48. The Court accepts the comments of the Commission in the Issues Paper, that notwithstanding the simplification of forms and processes, a complex family law case without legal representation is difficult to run. The Court has continuously commented about how difficult it is for unrepresented litigants and the costs involved in bringing these cases to a proper outcome. There is a limit to the capacity of any court to make up for the disadvantage faced by unrepresented litigants. Access to legal representation for litigants who both need and desire that representation is vital for them but more importantly for achieving a proper outcome. This necessarily highlights the pressing need for adequate legal aid.

49. The Court's submission also suggests that Legal Aid Commissions should be sufficiently resourced so that they can provide a duty solicitor service to all courts exercising jurisdiction under the Act.[19] This suggestion has not been incorporated into the Discussion Paper.

Safe and accessible court environment

50. Proposal 6-12 of the Discussion Paper recommends that the Australian Government should ensure that all family court premises and other court buildings used for family matters are safe for attendees, including: ensuring the availability and suitability of waiting areas and rooms for co-located service providers; safe waiting areas and rooms for court attendees who have concerns for their safety; private interview rooms; multiple entrances and exits; child friendly spaces; and adequate security staff and equipment.

51. The premise behind this proposal, that court buildings must be safe for all attendees, is of course supported by the Court. As earlier observed, however, the need for significant increased resources to implement the proposal cannot be ignored. Specifically the Court noted that servicing "safe waiting areas" and additional exits would require increased resources, and the courts already have very limited budgets for court security. Further concerns raised by the Court include the inadequacy of space to implement the above proposal and the impracticalities of having multiple entries and exits in family court buildings.[20]

[19] Court's Submission 25 [90].
[20] Court's Submission 26 [91] – [93].

Parenting Arrangements

52. The Court's submission supports a rewrite of the central parts of Part VII of the Act to create a simpler suite of provisions. Specifically, the Court identified that the parenting provisions are currently too complex and repetitious. Two consequences that flow from that are, first, it is difficult for a lawyer, let alone an unrepresented litigant to work their way through the legislative pathway and secondly, it is difficult to deliver judgments that are readily understood and promptly available.[21] The Court recommended that a rewrite might be along the lines of the proposed draft by the Hon Richard Chisholm.[22]

53. The Discussion Paper does not pick up on the Court's recommendation to ensure that, in any redrafting, the diversity of families in which children are cared for are taken into account. The Court recommends the extension of sections in the Act that refer to a parent, to include any other person concerned with the child's care, welfare or development. This, in the Court's view, would better support decision making by the courts in cases where children are living in non-traditional families.[23]

54. The Court also recommended that Division 12A remain unamended.[24] That Division contains the principles which frame the ability of the Court to be receptive and flexible in conducting and managing primarily parenting proceedings, to ensure the best outcome for families, and, in particular, children. History has demonstrated that even carefully drawn amendments can have unfortunate and unintended consequences.

Shared parental responsibility

55. Sub-section 65DAC(2) of the Act provides that an order for shared parental responsibility is taken to require the decision to be made jointly by those persons. Sub-section 65DAC(3) also requires each of those persons to consult the other in relation to the decision to be made about that issue and to make a genuine effort to come to a joint decision about that issue.

56. The Commission asks (Question 3-1), how should confusion about what matters require consultation between parents be resolved? The Court addressed this topic in paragraphs

[21] Court's Submission 28 [106].
[22] Court's Submission 29 [110]; see also Richard Chisholm 'Re-Writing Part VII Family Law Act: A modest proposal' (2015) 24(3) *Australian Family Lawyer* 17.
[23] Court's Submission 38 [170].
[24] Court's Submission 34 [142].

127-131 of its earlier submission, but no reference is made to this in the Discussion Paper, and the Court's submission has not been addressed.

57. The Court's submission notes that there may be a need to slightly redraft ss 65DAC(2) so as to avoid an interpretation that the section creates an obligation to cooperate and make joint decisions, without specifying what the parties have to do.

58. Accordingly, the Court recommended that the Act be amended to clarify the *effect* of a court order for shared parental responsibility on all or any major long term issues as well as a requirement for courts to spell out what the requirements are on each parent for consultation and making a genuine effort to reach a joint decision.[25]

59. Further, the Court noted that in the event that the Commission found that the "presumption of equal shared parental responsibility" in making court orders was misunderstood, (namely, that the word 'equal' means 'equal shared time'), the Court recommended replacing it with a clearer presumption or no presumption.[26]

60. We note that the Commission has incorporated a proposal (proposal 3-7) to replace the term 'parental responsibility' with a more easily understood term, such as 'decision making responsibility', but we suggest the further concerns already raised should also be addressed.

Changes to the definition of family violence in the Act to better support decision making about the safety of children and their families

61. The Court has a breadth of experience in dealing with victims and perpetrators of family violence and their children.

62. The definition of family violence is contained in s 4AB of the Act. The Court's submission outlines the amendments to that provision by way of the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011*.[27]

63. Sub-section 4AB(2) provides a non-exhaustive list of conduct which may constitute family violence. The Court accepts that provided the core components of the definition are shared across state and territory legislation, it does not matter that the examples included in the Act may differ from the examples included in other legislation.[28]

[25] Court's Submission 32 [131].
[26] Court's Submission 36 [156].
[27] Court's Submission 35 – 36 [153].
[28] Court's Submission 36 [154].

64. The Court notes that the Commission proposes to update the definition of family violence in s 4B to respond to contemporary knowledge about the nature and scope of family violence and abuse (proposal 8-1) and to include "misuse of systems and processes" as an example of behaviour that may constitute family violence in ss 4AB(2) (proposal 8-3).

65. The Court acknowledges that litigation can be used to harass a person, and therefore, we refer the Commission to the point we made in our submission, that careful consideration be given to whether of itself (that is, absent any other conduct which would satisfy the definition) misuse of systems and process, such as litigation, could properly be categorised as family violence.[29]

Property and financial matters

Property division

66. The Issues Paper sought submissions with respect to the changes that could be made to the current property regime in the Act, to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes.

67. The Court's submission cites a number of statistics contained in the Court's Annual Reports, which demonstrate that, in the vast majority of cases, separating couples neither seek nor require judicial determination to resolve their financial disputes. In the Court's view these statistics demonstrate that the existing law and system is sufficiently understood, simple, fair and predictable to enable the majority of separating married or de facto couples to achieve resolution of financial issues either without resort at all to the filing of any application in court or, in the minority of such cases where an application is filed, without ultimately requiring a judicial determination.[30]

68. Additionally, there is now almost 40 years of jurisprudence emanating from the High Court of Australia and the Full Court of the Family Court which provides further guidance to the manner in which the financial dispute provisions apply and the manner in which the discretion conferred is to be exercised.

69. Despite this, the Discussion Paper proposes that the core provisions of Part VIII be redrafted, albeit only with the purpose providing clarity on the process used by the courts for determining

[29] Court's Submission 36 [155].
[30] Court's Submission 40 – 41 [175] – [176].

the division of property (proposal 3-10). For the reasons already articulated, the Court regards that as not only unnecessary, but potentially retrograde.

70. We refer in that regard to the lengthy submissions already made in support of the retention of a discretionary, rather than a prescriptive system of property adjustment. This included reference to the benefits of the discretionary systems in Singapore, Scotland, California and Ireland, as well as an analysis of the prescriptive approach in New Zealand.[31] None of that analysis or argument put forth by the Court is referred to or cited in the Discussion Paper.

71. We note that the Commission has determined that, on balance, the case has not been made out for a shift from the current discretionary system to an alternative prescriptive system before further research on property adjustment on relationship breakdown is undertaken. The Court's submission canvasses many of the issues that should be the focus of that research.

72. As to the issue of taking family violence into account in determining the division of property (proposal 3-11) the Court said[32] that it should neither be a threshold issue nor a consideration which allows for compensation/damages. Further, consistent with *Kennon & Kennon*[33], it could only be a factor to be taken into account in determining the respective contributions of the parties. Although the Commission proposes that it also could be a factor in assessing the future needs of a party, there is no detail of what an amendment to provide for that would look like, namely how family violence would be taken into account, and equally importantly, there is no indication of what would need to be proved.

Spousal Maintenance

73. With respect to spousal maintenance, the Court's view, as outlined in the Court's submission, is that the Act is clear and comprehensive and does not require improvement, save and except for the fact that some of the factors that courts are required to take into account under ss 75(2) of the Act (and ss 90SF(3) for a de facto relationship) are not relevant for property settlement and some are not relevant to maintenance. This, in turn, can cause confusion for litigants.

74. Accordingly, the Court recommended separate sections for property and maintenance.[34] We note that the Commission has taken up the above proposal (proposal 3-18).

[31] Court's Submission 44 – 49 [186] – [209].
[32] Court's Submission 49-50 [211].
[33] (1997) FLC 92-757.
[34] Court's Submission 51 [215].

75. We further note that the Court did not oppose the introduction of a requirement that the Court consider the impact of family violence on a party's ability to adequately support themselves or to provide support (proposal 3-19). However, the Court emphasised[35] that spousal maintenance is about the need for support and the ability to pay, and plainly where family violence is established, as opposed to being alleged, that can readily be seen as a factor affecting need, but the ability to pay must still be established.

Triaging

76. The Discussion Paper proposes that 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 (proposals 6-1 – 6-2).

77. It proposes that the Act be amended to include, specialist court pathways for:

- simplified property claims processes;
- a specialist family violence list; and
- the Indigenous List (proposal 6-3).

The Discussion Paper also proposes that family courts should develop protocols to support implementation of the simplified process.

78. As noted in the Court's submission, the Court already employs a triage approach to court applications.[36] This approach is designed to ensure that urgent cases are identified and dealt with expeditiously and that families are referred to a resolution pathway which is appropriate to their needs, including mediation and other dispute resolution services.

79. The Court utilises a case management model which involves a teamed docket system comprising judicial officers, registrars and case coordinators.

80. However, that is not to say that it cannot be improved, particularly if there is more funding and more resources available. For example, it is important that there be an initial screening by family consultants using a standardised screening tool, and that that screening process should be ongoing, and particularly at key points in the proceedings. However, the family consultant assigned to the triaging role would be excluded from undertaking the forensic assessment

[35] Court's Submission 51 [216].
[36] See Court's Submission 58 [223].

should one be ordered in the matter. Consideration would also need to be given to the status of information provided to the family consultant undertaking the triage, in regard to its admissibility. Undoubtedly though additional resourcing is essential to carry out this triaging function.

81. With respect to small property claims, as the Court identified in its submission, the Rules and case management processes already provide flexibility for hearing and determining a matter depending upon the nature and complexity of the dispute, including a pathway for single issue disputes and expedition of the final trial for cases that require it. Of course the division of work between the Family Court and the Federal Circuit Court means that small property claims are rarely heard in the Family Court.

82.

82.1 The Court understands that the objective of the proposal to have a specialised family violence list is to ensure that matters involving family violence are managed in a way that is sensitive to victims' needs and ensures the safety of victims and their children. The Court agrees that, given the high rate of family violence allegations, there would need to be specific eligibility criteria for this list, as it would otherwise become so large as to negate its specialist classification. While the Court considers the criteria proposed in the Discussion Paper to be appropriate, there is a concern that any such criteria could not be guaranteed to capture the matters that might meet the elements of the specialised process. The Court would be keen to ensure that adequate family consultant resources remain available in all matters where there are family violence risks, regardless of whether or not the matter was in a specialised list. In addition, the Court would be concerned if the specialist family violence list was given this nomenclature, as parties who have concerns about family violence, but whose matters were not selected for this list, may interpret this as the Court not taking their safety concerns seriously.

82.2 Of course, the Court has for many years successfully employed a Magellan program, designed to ensure that the cases which are the most resource intensive, and which involve the most vulnerable children are dealt with as effectively and efficiently as possible. [37] The framework to implement the Commission's proposal is already there. All that is needed is more funding and resources, and particularly more family

[37] Court's Submission 55 [222], 58 – 59 [224].

consultants.

Children and the Family Law System

83. The Family Court is required to consider any views expressed by a child in deciding whether to make a particular parenting order in relation to that child. Accordingly, in the majority of child related matters that proceed to trial in the Family Court, an attempt is made to ascertain (but not coerce) the children's views.

84. As the Court's submission notes, this is usually done by having regard to a family report and/or appointing an ICL, or by such other means as the Court thinks appropriate (ss 60CC(3)(a); 60CD; 62G(3A); 68LA(5)(b)).

85. As referenced in the Overview above, the Discussion Paper proposes that children involved in family law proceedings should be supported by a "children's advocate" – being a social science professional with training and expertise in child development and working with children (proposals 7-8 – 7-9). Apparently the role of the children's advocate will be to explain to the child their options for being heard, supporting the child in expressing their views, ensuring the child's views are communicated to the decision maker and keeping the child informed of the progress of the matter.

86. The Discussion Paper also proposes that the Act make provision for the appointment of a legal representative for children involved in family law proceedings in appropriate circumstances, whose role is to gather evidence that is relevant to an assessment of a child's safety and best interests and assist in managing litigation (proposal 7-10).

87. Finally, the Court notes that the Discussion Paper proposes that children should be able to express their views in court proceedings and family dispute resolution processes in a range of ways, including:

- a report prepared by the children's advocate;
- meeting with the decision maker, supported by the children's advocate; or
- directly appearing, supported by a children's advocate (proposal 7-11).

The Discussion Paper also proposes that guidance be developed to assist judicial officers where children seek to meet with them or otherwise participate in proceedings.

88. We repeat what was said in the Court's submission.

89. Until 2010 the Rules made provision for a judicial officer to interview a child who was the subject of proceedings (r 15.02 now repealed). However, even without that provision, it has always been open to a judge to interview a child the subject of proceedings before the Court. That being the case, and noting the conflicting views on the issue, it is the Court's view that with the effective representation of children, there is no obvious utility in judges meeting directly with children the subject of proceedings. To do so would be inconsistent with transparency.[38]

90. Currently, a child can participate in a case by a case guardian or personally, if the Court is satisfied a child understands the nature and possible consequences of the case and is capable of conducting the case.

91. Further, while the ICL is not the child's legal representative and is not obligated to act on the child's instructions, the ICL *is* obligated by the existing legislation to ensure any views of the child are fully put before the Court.

92. ICLs are required to undertake specific training and are subject to national guidelines. An ICL who fails to fulfil his or her statutory obligations or comply with the guidelines can be removed by the Court, however, the child cannot remove the ICL.

93. The Court recommended that the provisions which clarify the role of the ICL be retained without amendment.[39] We note that the legal representative, as proposed in the Discussion Paper, is to be given a new title, namely a title that was done away with by legislative amendment some time ago.

94. We reiterate the point made in our submission that the scale of fees paid by Legal Aid Commissions to ICLs is modest at best, and if it is manifestly inadequate, it has the potential to compromise effective advocacy for children.[40] Accordingly, this is an issue that will need to be further addressed in considering this proposal.

95. There are three points which the Court seeks to make in respect of the Commission's proposed "new model for supporting children's participation" in family law proceedings. First, it is unclear what interaction it is intended there will be between the ICL (or separate legal representative), the children's advocate and the family consultant. Secondly, the child will be required to relate to, deal with and be interviewed by at least one additional professional; that

[38] Court's Submission 78 [303].
[39] Court's Submission 34 [141].
[40] Court's Submission 78 [312].

increases the risk of systems abuse for the child. Thirdly, this plainly adds to the complexity of the system; as a result, it has the potential to create rather than reduce delays in the resolution of parenting cases.

96. As to the second issue, while the Court supports all efforts to ensure that children are supported, informed and consulted when their family is engaged in family court proceedings, the Court is troubled by the proposal to introduce an additional role to work with children. Family consultants are acutely aware of the confusion that children already experience by interacting with different professionals in the course of their family's litigation. This experience of confusion was also reported by the Australian Institute of Family Studies when, in the course of conducting their research into children and young people's experience of the family law system, they determined that many children were unable to identify whether the professional they saw was a family consultant, an ICL, or a counsellor.

97. The Court is strongly of the view that children do not need additional professionals to meet with, but rather that they would be better supported if the professionals that they did meet with were able to provide them with ongoing support and information throughout the proceedings. Each of the children's advocate functions contained in proposals 7-9 and 7-11, apart from those functions which could only be undertaken by an ICL, are functions that are either currently undertaken by family consultants or could be undertaken by family consultants if resources allowed. Indeed, it is the view of the Court that these functions would be better achieved by professionals who are working within the courts, namely a family consultant, than by an additional type of social science professional working in an organisation external to the courts.

98. In relation to proposal 6-9, the Court is of the view that the functions of a post-order parenting support service could be conducted by family consultants, and indeed, in earlier times when funding and resources were more abundant, family consultants undertook this task under the auspices of s 65L of the Act.

99. Family consultants of course could not undertake dispute resolution or decision making in relation to implementation of parenting orders, but with an increase in funding and resources family consultants are ideally placed to deliver all other aspects of post-order support, as they have the requisite expertise and, as Court employees, they would bring a level of authority to the role that would enhance party engagement with the service.

100. In relation to proposal 10-11, the Court points out that any order made under s 62G of the Act pertains only to reports prepared by family consultants. While family consultants always pay specific attention to any issues the judge has identified, in the majority of matters, when making an order under s 62G a judge is seeking recommendations about what arrangements would be in the children's best interests, with the expectation that the formulation of these recommendations will be based on a comprehensive assessment of the family.

101. The Court's Child Dispute Service has developed a detailed suite of clinical governance documents outlining how an assessment is to be conducted and what information is to be covered in the family report. This allows the family consultant to report on any issues that the Court was unaware of at the time of making the order. This clinical governance framework also enhances the quality of the family consultant reports. If judges were required to identify the particular issues to be reported on in each s 62G order, the Court believes this would create wide-ranging variations in what was required of family consultants when conducting an assessment, and would result in reports that would provide less value to the Court.

Adjudication in parenting cases

102. In paragraphs 6.50 and 6.70 of the Discussion Paper, the ALRC discusses the idea that the current court based processes for adjudication in parenting cases:

- are ill-suited for dealing with family relationship issues [6.51];
- take money from people on average or less average income [6.53];
- add to stress in difficult times [6.53];
- replicate the power imbalance for women experiencing family violence [6.54];
- deter victims of family violence from pursuing remedies to which they are entitled [6.55];
- are not sufficiently solution focused [6.59]; and
- do not focus on the preservation of the ongoing relationship between parents [6.63].

103. The discussion paper speaks of:

- A "less adversarial… style of judging that is more restorative, interventionist or inquisitorial in nature than the more traditional curial practices" and suggests family drug treatment courts and Mental Health Tribunals as possible models [6.62]; and
- Having "[j]udicial oversight of a person's engagement and process in making behavioural change, typically by the use part-heard proceedings" [6.65].

104. The discussion paper suggests as "a main reform direction", "the development of a multi-disciplinary **panel** process" [6.66]. The discussion paper invites submissions as to how this approach could be applied for families with complex needs [6.70].

105. Question 6.3 is:

> What changes to the design of the Parenting Management Hearings process are needed to strengthen its capacity to apply a problem-solving approach in children's matters? Are other changes needed to this model?

106. Question 6.4 is:

> What other ways of developing a less adversarial decision making process for children's matters should be considered?

Dealing with family violence

107. It is suggested that an adjudicative panel needs to be introduced to ensure the adjudicator "has expertise in sexual assault, family violence, child abuse and trauma- informed practice and a thorough knowledge of the impacts of family violence on children" [6.68]. However, any implication that judges with the requisite experience in family law do not have that expertise or access to expert evidence relevant to those issues is unfounded.

108. The Family Court has a long track record of screening for family violence, creating safety plans for an individual case and implementing those plans with the assistance of family consultants and court security staff. A trial judge has the ability to remove one of the parties to another part of the Court premises and have them participate in the proceedings by way of electronic means.

109. If a new tribunal, hearing complex parenting cases, was for both security and financial reasons co-located in current court buildings, it is difficult to understand how a victim of family violence would find the experience less daunting than going into an existing court room.

110. The majority of parenting cases that come before the Court for adjudication involve allegations of some form(s) of family violence. Often those allegations are denied. Fact finding is a central feature of these cases. Where the allegations of family violence or child abuse are serious, the rules of evidence can be applied (subs-s 69ZT(3)) as the most reliable method of assessing the truth of the allegation(s) or whether or not there is unacceptable risk to a child.

111. In addition, there are some cases where a parent alleges that the other parent's new partner is a perpetrator of family violence but the alleged victim denies that is so. It cannot be assumed that family violence exists, or exists in the way it is alleged, simply because disputed allegations are made. It is not clear how the replacement of the courts with panels will produce a better mechanism of fact finding in these often very factually contentious cases.

Solution focused

112. In cases coming before the Court, the "problem" for which a "solution" is being sought in a children's case is resolving what parenting arrangements are in the best interests of the child. This is currently achieved by applying the law to the facts as found. If it is accepted that fact finding is necessary in contentious and often complex cases, the question again arises as to how a radical move to a panel/tribunal based system improves the process of fact finding.

The constitutional issue

113. In December 2003 the House of Representatives Standing Committee on Family and Community Affairs, in their report "Every picture tells a story" recommended radical change. The committee concluded that only a new non-adversarial administrative tribunal specifically established to determine disputes about future parenting arrangements would bring about any real change.[41]

114. The committee identified the possible constitutional issues involved in such a radical change in the following way:

[41] House of Representative Standing Committee on Family and Community Affairs, *Every Picture tells a Story*, Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation (2003) 66 [4.5].

> The major constraint of the Constitution is that the judicial power of the Commonwealth – to make enforceable orders – must be exercised by a court established in accordance with the requirements of Chapter III of the Constitution. The judges and magistrates of those courts, and any officers to whom responsibility is delegated, must act judicially. However, the committee has been advised that, while this is the position with respect to decisions about adjusting existing legal rights, decisions which are essentially about adjustment of rights in the future, based on what is in the best interests of the child, can be made administratively. The committee is proposing that this be done by a new Families Tribunal.

115. The advice to which this committee referred has never been released.

116. The design of the Parenting Management Hearings has sought to avoid any constitutional issue by requiring all relevant parties to consent before a hearing can be conducted before a panel.[42] That consent would need to be real and informed.

117. Questions also arise as to the capacity of a tribunal to enforce its decisions and how it would sit within or outside the framework set by the Act. It is likely that decisions of the tribunal can only be enforced by the family law courts.

118. The Commission would need to seriously consider these constitutional issues when making any recommendations for radical change in its final report.

The legislative framework under which private judging in respect to children currently operates

119. As a result of the impetus provided by the "Every picture tells a story" report and the pilot Children's Cases Program trialled in the Family Court, significant changes relating to the conduct of child related proceedings were made to Part VII of the Act by the introduction of Division 12A in 2006.

120. Those changes were designed to provide a range of legislative support for a less adversarial approach in all child related proceedings under the Act. Since the amendments, judicial officers are required to actively manage the proceedings in a way that is mindful of the impact

[42] See Family Law Amendment (Parenting Management Hearings) Bill 2017 s 11KC.

of the proceedings on the child and encourage parents to focus on their parenting responsibilities. The amendments included:

- The relaxation of evidentiary rules (although not their elimination);
- The development of principles for conducting child related proceedings including the consideration of the likely stress on the child and conflict between parents;
- The requirement that the proceedings were to be conducted in a way that had parents focus on their children's needs and on their ongoing relationship as parents;
- The Court having the ability to adjourn proceedings (possibly making interim orders) to enable either of the parties or both the parties to attend therapeutic processes; and
- The need to consider making orders that a child attend family counselling.

121. The Court is required to actively direct, control and manage the conduct of the proceedings rather than the parties having that control. Thus, allegations of violence and abuse can be dealt with at an early stage in the Court process if appropriate. Indeed, the amendments were designed in order that judicial officers were better able to ensure that proper evidence was before the Court relating to issues of family violence and child abuse. The Court is required to decide which of the issues, identified by the parties, actually require full investigation and hearing and whether or not the likely benefits of taking a step in the proceedings justifies the cost of taking it. It is intended that the Court take an active role in creating opportunities for successful negotiations to take place, using resources from both inside and outside the Court.

122. Section 60I of the Act was introduced to make it compulsory for parties to attend family dispute resolution (often at the newly created Family Relationship Centres). Section 69ZS of the Act allowed the Court to designate an in-house family consultant to assist in the proceedings. Section 69ZW of the Act provided a short cut mechanism for the Court to access important information from Government Agencies relating to notification assessments and reports in relation to child abuse and family violence effecting the child. Further, the Family Court for many years prior to the introduction of Division 12A operated the Magellan Program which has a fast tracked case management protocol in cases where there are serious allegations of physical and sexual child abuse. For example, in the Parramatta Registry of the Family Court, currently more than 40% of child related proceedings are dealt with under the Magellan Protocol.

123. Sub-section 69ZN(7) of the Act made it clear that the intention was that proceedings be conducted without undue delay. Similar provisions are provided in child welfare laws. Most parenting cases in the Family Court involve intractable disputes about matters such as whether a parent has been violent or has abused a child and where mental health and/or addiction are features.

124. The first day of a less adversarial trial ideally works best with the family consultant playing an important role in educating the parents and, when judges have time at this court event, to enable each parent to "have their say" about resolution of the dispute. Over time the positive impact of the amendments has been diminished as there are an insufficient number of family consultants to fulfil this role, judges have insufficient time to allocate to such hearings and delays mean that appointments with family consultants and such hearings cannot be scheduled early enough in the dispute to lessen the chances of an intractable dispute worsening. Few suggest that judges are not working as hard as they can. Sadly, the current delays in the system are not a function of the legislative structure but the progressive lack of resourcing of that structure and the increasing proportion of cases in the Court which are complex.

The Family Court as a hub

125. Paragraphs 6.62 to 6.64 of the Discussion Paper refer to a style of judging and processes utilised in other judicial settings which it is suggested may be utilised in family law disputes with a view to producing better outcomes for families. In particular it is suggested that the authority of the Court be harnessed to effect behavioural change where behavioural problems complicate the resolution of legal disputes.

126. Subject to overcoming the practical difficulties identified in paragraphs 275 and 276, of the Court's response to the Issues Paper, the Family Court would welcome the ability to being able to offer parents Government funded external resources and to make orders, in appropriate cases, that a parent avail themselves of those resources and that the progress of the parent's interaction with those resources be monitored by the Court, as a condition of that parent spending time with the child.

Using family drug treatment courts as a model

127. There are a number of points of distinction between the way in which those courts utilise these processes, which raise serious questions as to whether that model can be readily adopted by courts dealing with family law disputes.

Services are engaged after factual findings made

128. These processes are generally utilised after the **central factual dispute is resolved or there is no dispute about the behaviour which needs to be treated or changed.** For example in drug courts in the criminal justice system (such as those which exist in virtually all state jurisdictions) there is a plea or finding of guilt about the offence charged and there is no dispute that the defendant has a substance misuse problem that needs to be treated. The offender then commences a program of court monitored and supervised treatment in which he or she receives the necessary services and the judicial officer engages therapeutically with him or her at court events which generally occur on multiple occasions over a lengthy period of time. Successful completion (or otherwise) of such programs then informs the sentencing process. Similarly, in a family drug treatment court (in the child protection or care/welfare jurisdiction) a parent receives court supervised and monitored treatment for substance misuse to bring about change where there is no dispute that the parent misuses substances which have impacted upon his or her capacity to care for a child. Once again, the success or otherwise of treatment is highly relevant to the question of whether a child who has been removed by state authorities will be restored to the care of a parent

129. In cases in the criminal justice system where the behaviour sought to be changed is violence, the Court can order a perpetrator to undergo a family violence program which may be monitored by correctional services after it has been established that the offender has engaged in such conduct. Such intervention cannot commence or be effective unless a perpetrator admits or is found to have been violent.

130. Family law disputes always involve the resolution of facts, such as whether a parent has engaged in violence as alleged, whether a parent suffers from a mental illness or uses substances which impair his/her parenting capacity, or whether a parent's conduct caused a child to inexplicably reject the other parent. In the family law context the only way in which courts could connect litigants with services in a similar manner to problem solving courts is by making the appropriate findings for the need for such services first.

Public Law/Private Law

131. The processes utilised by drug courts in the criminal justice or child protection systems involve courts exercising a public law jurisdiction in which the judicial officer appropriately exercises authority utilising "the carrot and the stick" to encourage behaviour change. For

example in drug court programs the "reward" for compliance with treatment is a reduced sentence. This "reward" is used by the judicial officer to encourage compliance by the offender at regular scheduled court events while non-compliance typically results in the judicial officer imposing sanctions which may include periods in custody. Further, services which are essential to the effectiveness of participation in the program such as very regular urinalysis, rehabilitation programs and therapy are generally paid for by the State on the basis that this is a less expensive alternative to the costs associated with incarceration or, in the case of child protection drug treatment programs, state care.

132. The basis for intervention and a court's capacity to use coercion and the state funding for such services is more difficult to conceptualise in a private law setting. Whilst a parent being able to spend time with the child will be the main "carrot", the ability to compel a parent to actively participate in a treatment program or urinalysis or other drug testing is currently not an option and the constitutional basis to pass a law of that nature is uncertain.

Court Monitoring

133. As noted at paragraph 6.65 of the Discussion Paper, in family drug treatment courts, the effectiveness of a person's progress in behaviour change is monitored by the judicial officer at numerous regular court events over a lengthy period of time. Once again there is a significant difference between court appearances which involve the exercise of public law as opposed to private law. Under drug court programs all participants are typically represented by a legal aid lawyer attached to the program and funded for this purpose whereas in private law civil settings each court event is paid for by the individual unless he or she has a grant of legal aid.

Funding and resources

134. The proposals mooted in paragraphs 6.50 – 6.70 relating to a 'less adversarial decision making process' have not been costed. Radical change is likely to be more expensive than evolutionary change. Government will have a certain amount of money to spend on funding the resolution of child related disputes. Rather than simply asserting that the current system is not operating to an optimal level, and needs to be replaced, one has to consider the cause of the current system's underperformance. If it is as a result of underfunding and under-resourcing, then a proper analysis of the cost required to bring it to the level envisaged in the 2006 reforms should be conducted. Once this is done it can then be compared with the cost of

implementing a radically new proposal for adjudication by a panel/tribunal in child related proceedings.

135. The recommendation to establish a tribunal in the 2003 "Every picture tells a story" report was not implemented. It is reasonable to assume one of the principal reasons why it was not was the costs of its implementation.

Conclusion

136. Overall, it can be argued that the Family Court already utilises the tools of therapeutic jurisprudence. This mode of operation could undoubtedly be more effective if there were not extensive delays in the system so that litigants and their families could be seen by a family consultant and appear before a judge soon after commencing proceedings thereby capitalising on the crisis of separation as a catalyst for behaviour change (one of the principles applied in problem solving courts). There would also be room for an increase in the time a judge could spend with litigants at these early court events if the Court had greater judicial resources. If the services to which litigants are referred were guaranteed to be available and affordable and litigants accepted that court monitoring involves delays, the Court may be in a position to operate more fully in the ways envisioned by the 2006 reforms.

Judicial appointments

137. Proposal 10-8 suggests as follows:

> 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.

138. However, this proposal overlooks the rationale behind the unique requirements of sub-s 22(2)(b) of the Act, namely that a person **shall not** be appointed as a [family court] judge unless by reason of training, experience, and personality, the person is a suitable person to deal with matters in family law.

139. Experience and knowledge in relation to family violence is just one aspect, albeit an extremely important aspect, of the qualification for appointment as a family court judge. That aspect, along with all other aspects of the qualifications required are plainly encompassed by what is provided in sub-s 22(2)(b).

140. Further, as was emphasised in the Court's submission,[43] appointments to the Court have generally had a wealth of experience, not only in family law, but also in other areas of law and practice. As such, they will have been exposed to issues such as family violence and have had to address it in a legal context. Thus, judges in the Family Court, come with considerable experience and knowledge.

141. That said, the Court also repeats what was said in its earlier submission as to the importance of judges participating in continuing education to maintain pace with legislative reforms and advances in social science, relevant to the issues involved in family law proceedings.[44] And in that regard the Court is strongly committed to providing on-going judicial education, and in providing continuing professional development for its judges.

142. The Court also reminds the Commission of the programs and initiatives that the Family Court has put in place, particularly in the area of family violence.[45]

Privacy provisions

143. In proposal 12-11 the Commission suggested that:

> to ensure public confidence in family law decision making, an obligation should be placed on any courts exercising family law jurisdiction, other than courts of summary jurisdiction, to publish anonymised reports of reasons for decision of final orders.

144. The text relating to this proposal is found in paragraphs 12.79 and 12.80 where it is said as follows:

> 12.79 The family law courts have a long-standing practice of publishing anonymised reports of decisions. However, this is not required by the *Family Law Act*, and many individuals submitters believed that s 121 allows the courts to avoid scrutiny by preventing details of their decisions being shared.
>
> 12.80 To address these concerns, the ALRC proposes that the existing practice of publishing anonymised decisions be codified and made mandatory under the Act.

[43] Court's Submission 82 [324].
[44] Court's Submission [325].
[45] Court's Submission [332], [333].

145. The Court takes exception to the ALRC relying on the "belief" of unnamed individual submitters "that s 121 allows the courts to avoid scrutiny by preventing details of their decisions being shared".

146. Indeed, this is an extreme example of what the Court said in paragraph 7 of its earlier submission.

147. The fact of the matter is that save and except where there is a non-publication order, all decisions of the Family Court are anonymised and published electronically in the public domain, and to suggest that that practice should be codified and made mandatory under the Act on the basis of the above-mentioned belief is an affront to the Court.

A National Judicial Commission

148. At Question 12-2 the Commission asks the following:

> Should a Judicial Commission be established to cover at least Commonwealth judicial officers exercising jurisdiction under the *Family Law Act 1975* (Cth)?

149. This same question was asked in the Issues Paper (Question 47). In response, the Court alerted the Commission to the two Acts which govern the current system for handling complaints against judicial officers, and set out the reasons given by Government for not setting up a standing Judicial Commission.[46]

150. This is referred to in the Discussion Paper, but without any analysis of the efficacy of the current system, the Commission has still raised the question of the introduction of a National Judicial Commission.

151. Clearly, there would need to be far more work done before such a proposal could be legitimately advanced. The process that is in place now is open and transparent, and readily accessible to members of the public by reference to the Court's webpage.

152. The Court also takes this opportunity to highlight a major flaw in the proposal, namely, the Commission is only suggesting that there be a Judicial Commission to cover Commonwealth Judicial Officers exercising jurisdiction under the Act. The issue of a **National** Judicial Commission is one which is much broader than the family law system, which is the focus of

[46] Court's Submission 91 [381], 91– 92 [384].

the Commission's Inquiry, and it would need to involve all Federal Courts and Tribunals. Thus, as the Court said in its submission, this issue is a matter for a different Inquiry.[47]

[47] Court's Submission 92 [388].