Review of Family Law System
Submission to ALRC

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Objectives and principles

Question 2
What principles should guide any redevelopment of the family law system?

I consider that section 43 should be repealed and that a new set of principles should be developed. It has always seemed extraordinary, although understandable given societal views in 1975, that the Act which provided for simpler and more dignified divorces should commence its principles with reference to 'the need to preserve and protect the institution of marriage …'. In fact the FLA is not about preserving marriage: it is about divorce and separation and assisting families to resolve disputes after family breakdown or other family disharmony that requires resolution in relation to children, property, income distribution, personal safety and other matters.

It would be more useful to have a principles section that is written from the basis that this Act deals with separating and disunited families and emphasises finding solutions which are in the best interests of any children and allocate property and other financial resources in ways that are fair to all parties but provide support to the most vulnerable parties wherever possible.

Some matters which could be considered are:

- That the best interests of children should be paramount in all decision-making, including financial matters;
- that parties should be encouraged to reach agreement through negotiation / mediation processes where they are safe for all parties;
- that all family structures be respected and that no particular type of family be presumed more likely to provide for the best interests of children than any other family structure;
- that professionals who practice in the family law system be expected to develop their knowledge and understanding of relevant social issues;
- the family law system should foster ethical professional practices and encourage integrity and honesty to promote the best interests of children.

Access and engagement

Question 6
How can the accessibility of the family law system be improved for people from culturally and linguistically diverse communities?

- Certainty in the availability of well-trained interpreters;

- Further judicial training and education in respect of issues relevant to CALD communities;
- training and education on such matters for other professionals in the family law system including legal practitioners, family dispute resolution practitioners, family consultants, counter staff and other administrative officers;
- training for interpreters on the Australian family law system and on social issues likely to arise such as domestic and family violence

Legal principles in relation to parenting and property

Question 14
What changes to the provisions in Part VII of the Family Law Act could be made to produce the best outcomes for children?

In answering this question I have firstly provided an overview of my concerns and then set out a more detailed consideration of some of those issues.

Overview of Concerns

I consider that the current shape and detail of Part VII are problematic and have created confusion for the community and complexity for professionals and clients in the family law system. Despite enacting special provisions, implementing procedures and developing guidelines and databases of information, the family law system still struggles to deal appropriately with cases involving domestic and family violence (DFV). This is clear from the *Issues Paper* and many of the reports which it cites.

I have critiqued the structure and language of Part VII arguing that they cajole clients and professionals in the system towards shared parenting outcomes (both parental responsibility and time) – whether in out-of-court processes or in litigation. I contend that the presumption was an inappropriate legal device to use.[1] It legislatively drives a particular ideal of post-separation parental responsibility as the 'norm' (because a presumption should be something that is expected) when in fact that ideal can only work in some families - particularly those who do not litigate!

I also consider that a number of provisions encourage actors to look towards the future, rather than assessing and building from the past.[2] These include the first primary consideration[3] (and its reflection in the objects),[4] with its emphasis on the importance of future 'meaningful relationships' in the post-separation world.[5] This risks agreements being reached and orders being made which minimise the relevance of domestic and family violence and maximise the desire for future relationships for the children with both parents.

[1] Z Rathus, 'Social Science or "Lego-science"? Presumptions, Politics and Parenting and the New Family Law' (2010) 10(2) *Queensland University of Technology Journal of Law and Justice* 164.
[2] Z Rathus 'Shifting the Gaze: Will past violence be silenced by a further shift of the gaze to the future under the new family law system?' (2007) 21 *Australian Journal of Family Law* 87.
[3] s 60CC(2)(a)
[4] s 60B(1)(a)
[5] This view was affirmed by the Full Court of the Family Court in *McCall v Clark* (2009) FamCAFC 92.

Although the second primary consideration inferentially deals with domestic and family violence I think that the drafting of this provision also focuses on the future rather than acknowledging the importance of the past. The actual words 'the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence' encourage decision-makers to look to the future - will the child be safe? - rather than the past. Instead of making a decision about post-separation children's arrangements in the light of violence they have experienced and who perpetrated it, the combination of the two primary considerations invites decision-makers to try to find an arrangement where the relationship with the perpetrator can be continued without placing the children in at an 'unacceptable risk'..

I have also argued that the use of language that sounds like it comes from the social sciences has blurred the lines between social science and law in a confusing way. On the one hand the talk of 'meaningful relationships' makes it seem like the law must be in tune with social science research. However, the ongoing calls for reform of Part VII suggest that this is not the case.[6] In my study into the history of the use of social science research in published judgments of the family courts I demonstrated a clear spike in the use of literature by judges shortly after the 2006 amendments became operational.[7] I argued that this may have occurred precisely because the legislation impelled decision-making in a direction which was not always in the best interests of the children before the court. Judges then turned to social science research to support their decision-making when it did not comfortably conform to the law.

At a practical level perhaps the most damaging aspect of the structure of Part VII is the legislative link between orders for equal shared parental responsibility (ESPR) and time outcomes for children. The time section (s 65DAA) is triggered when the presumption is applied and an order for ESPR is made, but it is also triggered if an order for ESPR is made in any other situation. A judicial officer can decide that the presumption should not be applied because of a history of family violence or abuse, or should be rebutted for some other reason, but can still make an order for ESPR.[8] Then the wording of the introductory phrase of s 65DAA means that equal and substantial significant time must be considered.

It is apparent from the AIFS Evaluations of the 2006 and 2012 reforms, other official reports, independent research[9] and the preliminary consultations for this *Issues Paper* that orders

[6] A number of authors have considered the disconnect between reforms to the FLA and what is known from the social sciences: John Dewar, 'Can the Centre Hold?: Reflections on Two Decades of Family Law Reform in Australia' (2010) 24 *Australian Journal of Family Law* 139; Regina Graycar 'Family Law Reform in Australia, or Frozen Chooks Revisited Again?' (2012)13 *Theoretical Inquiries in Law* 241; Helen Rhoades, 'The Dangers of Shared Care Legislation: Why Australia Needs (Yet More) Family Law Reform' (2008) 36 *Federal Law Review* 279.

[7] Z Rathus, 'Mapping the Use of Social Science in Australian courts: The example of family law children's cases' (2016) 25(3) *Griffith Law Review* 352

[8] This was made clear quite early in *Good v Goode (No2)* [2007] FamCA 315 at [63] and has been followed by other judges.

[9] See for example: L Laing, *No Way to Live: Women's Experiences of negotiating the family law system in the context of domestic violence*, New South Wales Health, University of Sydney and Benevolent Society, 2010; D Bagshaw, T Brown, S Wendt, A Campbell, E McInnes, B Tinning, B Batagol, A Sifris, D Tyson, J Baker and P Fernandez Arias**,** *Family Violence and Family Law in Australia: The Experiences and Views of Children and Adults from Families who Separated Post-1995 and Post-2006*, April, 2010.

and agreements for equal time, substantial and significant time and other significant time sharing arrangements are made even where there is a history of DFV. In some families this will be detrimental to the well-being of the children, in others it will be devastating and dangerous.

This link to time was largely created to appease fathers' rights groups who had lobbied for a presumption of equal time, but policy in family law needs to be developed to serve the best interests of children and protect the vulnerable, not to satisfy certain lobby groups. The determination by the legislature to satisfy this group is also reflected more insidiously in s 63DA which sets out details of the issues to be covered in conversations between professionals (or 'advisers') in the family law system and their clients. The section applies to lawyers, family dispute resolution practitioners, family consultants and counsellors. It is a strangely (and confusingly) worded section stating that if an 'adviser' gives advice to people about parental responsibility, then they *must* give advice about developing a parenting plan. It then goes on to *require* the adviser to advise such people to consider equal and substantial and significant time option *if* they have advised about a parenting plan – but advising about a parenting plan is compulsory. Therefore it seems to me that every adviser who parents meet throughout their journey in the family law system is required to talk to them about these very specific time arrangements that will only suit some families – and are most appropriate for families requiring the least intervention from advisers!

I consider this section to be an unacceptable intrusion into the relationship between a professional and their client. One of the deepest and most treasured aspects of being a professional is that one is expected to have the skills, training and knowledge to exercise discretion. This section stifles discretion and professional jugment. It specifically provides that reaching agreement using a parenting plan and that equal and / or substantial and significant time outcomes should always be discussed with parties. Ultimately this must impact on the practice framework of professionals working in family law and means that parents and other parties in dispute repeatedly receive the message that time sharing is the outcome desired by the system.

More Detailed Analysis

<u>The Presumption</u>

I argue that the legal devise of a presumption was completely the wrong tool to use in the way it has been in the FLA. A presumption at law should be used only in situations where what is presumed is extremely likely to be true. Presumptions should reflect the expected state of affairs. For example, the presumption contained in s 69P(1) FLA provides that if a child is born to a married woman, the husband of that woman is presumed to be the father. This makes sense. It is most likely to be the case, but, of course, may not be. It should not

have to be proved in a court unless there is a dispute about paternity, in which case the presumption can be rebutted by appropriate evidence.[10]

But the presumption contained in s 61DA is not of this nature. The idea that the best interests of children are served by parents having equal shared parental responsibility is an entirely different type of construct. It is a policy, or perhaps a social science, ideal that is not applicable in many families – and therefore is dangerous when it performs the role of a presumption – perhaps invisibly or unnoticeably inviting limited evaluation and encouraging acceptance of its truth.

During the process of amendment of the UK *Children Act 1989* a number of commentators expressed concern about the introduction of a presumption similar to ours.[11] After a major process of consultation and Review[12] is notable that the presumption ultimately introduced is much less definitive than the Australian one – and a number of qualifications are built into the relevant section. To be clear, I do not support this presumption as an alternative – but I think the careful drafting of the sections speak volumes about the level of concern wrought by a presumption. The UK presumption says that a court is 'to presume, unless the contrary is shown, that involvement of [each] parent in the life of the child … will further the child's welfare'.[13] Involvement is widely defined as 'involvement of some kind, either direct or indirect, *but not any particular division of a child's time*'.[14] This last phrase severs any expectation of a link between the presumption and time arrangements – and renders this presumption of very different effect than ours.

International scholarship has also recognised the problems of presumptions in a system that deals with human relationships and expert social science evidence about families.[15] Peter Jaffe has argued against any presumptions that apply to parents who are litigating:

> … parents who enter the justice system to litigate about child custody or access have passed the point where shared parenting should be presumed or even encouraged.[16]

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[10] s 69U

[11] J Herring, 'The Welfare Principle and the Children Act: Presumably It's about Welfare?' (2014)36(1) *Journal of Social Welfare and Family Law* 14; F Kaganas, 'A Presumption that "Involvement" of Both Parents is Best: Deciphering Law's Messages' [2013] CFLQ 270 at <https://www.familylaw.co.uk/news_and_comment/a-presumption-that-involvement-of-both-parents-is-best-deciphering-laws-messages-2013-cflq-270#.WukvS3--nWU>; and Annika Newnham, 'Private Child Law' in R Lamont (ed), *Family Law*, Oxford University Press, 2018.

[12] Eg: Family Justice Review Panel, *Family Justice Review: Final Report*, Ministry of Justice, the Department for Education and the Welsh Government, 2011 at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/217343/family-justice-review-final-report.pdf

[13] *Children Act 1989* (UK) Chapter 41, Part I, section 1(2A).

[14] *Children Act 1989* (UK) Chapter 41, Part I, section 1(2B).

[15] J Bowermaster, 'Legal Presumptions and the Role of Mental Health Professionals in Child Custody Proceedings' (2001-02) 40 *Duquesne Law Review*, 265; N Ver Steegh and D Gould-Saltman, 'Joint Legal Custody Presumptions: A Troubling Legal Shortcut', (2014 52(2) *Family Court Review* 263; M Brinig, L Frederick and L Drozd, 'Perspectives on Joint Custody Presumptions as Applied to Domestic Violence Cases', 52(2) (2014) *Family Court Review* 271; P Jaffe, A Presumption Against Shared Parenting for Family Court Litigants', 52(2) (2014) *Family Court Review* 187.

[16] P Jaffe, A Presumption Against Shared Parenting for Family Court Litigants', 52(2) (2014) *Family Court Review* 187 at 187.

Other scholars have noted that exceptions about family violence which are built into presumptions often fail to prevent inappropriate applications of the presumption, because of the difficulties of disclosure and being believed.[17]

I argue that the introduction of the presumption that ESPR is in the best interests of children has been significant in skewing family law outcomes since 2006. Although the relevant section states that the presumption does not apply when there has been family violence or child abuse, research conducted after the 2006 amendments suggests that this exception is not strongly applied and that parents end up with shared parental responsibility in many cases where there has been family violence, abuse or serious conflict or where serious allegations have been made.

It is clear that the legislative connection between shared parental responsibility and the kind of time orders that have to be considered by judges, other professionals and parents is particularly influential regarding the practical outcomes for children and the way in which their actual post-separation parenting arrangements are structured.[18] The words used by the Full Court of the Family Court in *Goode v Goode* within six months of the operation of the presumption further encouraged this attitude:

> In our view, it can be fairly said there is a legislative intent evinced in favour of substantial involvement of both parents in their children's lives, both as to parental responsibility and as to time spent with children, subject to the need to protect children from harm, from abuse and family violence and provided it is in their best interests and reasonably practicable.[19]

The Evaluation of the 2006 amendments published by AIFS in 2010 showed the small extent to which allegations of violence and abuse impacted on the making of orders for ESPR. Even where both family violence and child abuse had been alleged, over 75% of these cases led to orders for ESPR, whether made by a judge or by consent.[20] Where the only allegation related to family violence, the ESPR outcomes rose to nearly 80%, suggesting that the exceptions contained in the presumption section were not working as intended by the legislature. It should, however, be noted that where orders for sole parental responsibility were made in favour of the mother family violence and child abuse were quite often cited as the reason.[21]

AIFS has also undertaken an evaluation of the family violence amendments which became operative in 2012.[22] This allowed a comparison of court and settled outcomes before and after those changes. The evaluation showed that shared parental responsibility orders were still being made in cases where there were allegations of child abuse and / or family violence, but there were differences depending upon whether allegations of both kinds

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[17] M Brinig, L Frederick and L Drozd, 'Perspectives on Joint Custody Presumptions as Applied to Domestic Violence Cases', 52(2) (2014) *Family Court Review* 271 at 276-277.
[18] Z Rathus, 'Social Science or "Lego-science"? Presumptions, Politics and Parenting and the New Family Law' (2010) 10(2) *Queensland University of Technology Journal of Law and Justice* 164.
[19] *Goode v Goode* [2006] FamCA 1346 at [72].
[20] R Kaspiew et al, *Evaluation of the 2006 Family Law Reforms*, 2010, AIFS, p 190.
[21] R Kaspiew et al, *Evaluation of the 2006 Family Law Reforms*, 2010, AIFS p 188 (31% family violence and 18.7% abuse, which may overlap).
[22] R Kaspiew et al, *Court Outcomes Project*, AIFS, October, 2015.

were made and whether the orders were judicially imposed or consented to. The overall results were:

Table 3.26: Children in shared parental responsibility arrangements, by whether there were allegations of family violence and/or child abuse, pre- and post-reform

	Pre-reform (%)	Post-reform (%)
Both family violence and child abuse	72.3	69.9
Either family violence or child abuse	79.5	83.7
Neither family violence nor child abuse	89.9	89.9

Note: Percentages are based on weighted data. Differences between pre- and post-reform periods are not statistically significant.

As can be seen, although the allegations make some difference, many parents share ongoing parental responsibility for their children post-separation despite a history of family violence or abuse.[23] The most significant change occurred in respect of shared parental responsibility orders made by judges, which reduced from 51% pre-reform to 40% post-reform.[24] However, it must be remembered that only a tiny percentage of applications commenced in the court end with a judicially determined order. Where parents consented to the orders made, whether before or after initiating proceedings, orders for ESPR are present in about 90% of cases. There were much smaller shifts in terms of changes to orders for shared care time. These largely remained stable after the amendments, despite the relevance of a history of family violence or abuse to the actual living arrangements of children.

It is notable that eminent scholars such as Helen Rhoades[25] and Richard Chisholm have called for a re-writing of Part VII of the FLA, and Chisholm has proposed a new draft that bears consideration.[26]

Over the last few years I have been involved in research regarding how family reports deal with family violence. The research team from that project has provided a separate submission to this Inquiry in regard to Qs 41, 45 and 47. An overview of our research is provided in that submission. It was clear from that research that the presumption played a significant role in how family law professionals interpreted the FLA and encouraged parents towards orders and agreements for ESPR and some kind of shared time.

We provided information about that research to the SPLA Committee in 2017 and our submission and similar issues raised by other contributors were discussed in the Report.[27] This Committee recommended that the presumption be repealed.[28] I support this recommendation. I also recommend that the confusing language of equal shared parental responsibility be removed and that an alternative expression such as 'joint parental responsibility' be used instead.

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[23] It is understood that not all the allegations of family violence and abuse made can or could be proved.
[24] R Kaspiew et al, *Court Outcomes Project*, AIFS, October, 2015, p 66.
[25] H Rhoades, 'Rewriting Part VII of the Family Law Act' (2015) 24(3) *Australian Family Lawyer*
[26] R Chisholm, 'Rewriting Part VII of the Family Law Act: A modest proposal' (2015) 24(3) *Australian Family Lawyer*
[27] *SPLA Report*, 2017, paras 6.22 to 6.39 and 6.123 to 6.130.
[28] Recommendation 19

The Primary Considerations

In terms of the first primary consideration, I argue that the language of the ideal of ongoing 'meaningful relationships'[29] between children and their parents is sometimes given more importance than a history of family violence. A number of the focus group participants in our research identified this concept as influencing how family report writers dealt with family violence. They said that family report writers tend to be looking for ways to continue and grow the post-separation relationships between the children and their parents, perhaps at the expense of fully considering issues of physical and emotional safety.

One legal practitioner's comment in the focus groups summarised this view:

> [The FLA] clearly says that they need to protect the child from … [various forms of] harm. It's supposed to be given greater weight than the benefit to the child of having a meaningful relationship ... but that's I think what they look for, meaningful relationship, and then they pay lip service to the domestic violence...the meaningful relationship still seems to be the driver.

As I noted in my overview of concerns regarding Part VII, I also see problems with the language of the second primary consideration. The focus on safety and protection in the future can mask the nature and extent of the DFV. It turns the gaze from the past to the future by asking courts to seek elusive predictive evidence from a social scientist about what might happen when the children spend time with the perpetrator of DFV, rather allowing judges to examine the factual evidence about what has happened in the past and its impact.

Recommendations

- that the presumption of ESPR be repealed;
- that the language of equal shared parental responsibility be removed and that new terminology be employed;
- that s 65DAA(5) be repealed and that the FLA contain no reference to specific time arrangements
- that s 60D and s 63DA be repealed so that professionals can conduct their conversations with their clients using their own discretion. The overarching principle that the best interests of children are paramount is sufficient;
- that the primary considerations be repealed and the list of additional considerations be refreshed and then retained as the best interest considerations
- the that objects contained in s 60B(1) be repealed

[29] s 60CC(2)(a)

Question 15
What changes could be made to the definition of family violence, or other provisions regarding family violence, in the Family Law Act to better support decision making about the safety of children and their families?

I believe that the current definition of family violence is problematic. I have analysed this section in detail and concluded that the words chosen have created an unfortunate conflation of a feminist concern to have coercive control understood as a central feature in much DVF and the American typology literature about family violence.[30] I do not wish to rehearse the detailed critique of the typology literature which has occurred in Australia and other countries in this submission, but in a nutshell, my concern is that DFV experienced by some women is diminished in seriousness and relevance to parenting disputes by being mistakenly categorised as 'situational couple violence' (and therefore probably mutual), 'separation instigated violence' (and therefore temporary in nature) or violent resistance (she can give as good as she gets).[31] Although some research suggests that new definition may have allowed more instances of family violence to be deposed to in affidavits, it is clear from judgments and other research that this definition creates an exclusionary structure whereby violence must be coercively controlling or cause fear to fall within the definition.[32]

There is also the problem that the structure of the section renders it narrower than the words suggest on initial reading. The definition is entirely encased in s 4AB(1) and s 4AB(2) only provides a list of examples which only become relevant if the conduct qualifies as family violence under subsection one. I believe that the definition should be the list of behaviours which can amount to DFV and should include behaviour that is coercive and controlling and behaviour that causes fear. However, those characteristics should not need to be present in every instance before conduct can be said to amount to family violence. I commend the definition in the Queensland *Domestic and Family Violence Act 2012.* This definition includes threats of suicide which are not included in the list in s 4AB.

It is possible that judges and other decision-makers currently spend time trying to categorise the type of DFV and then think about what that category of DFV might mean for future arrangements for the children. Perhaps one way of encouraging clear-eyed consideration of the DFV which has occurred, the damage it might have wrought and the consequences that should flow would be to require consideration of what happened in a more qualitative manner. The Victorian *Crimes Act* contains a section aimed at understanding why victims of DFV might sometimes commit crimes of violence against, or

[30] Z Rathus, 'Shifting Language & Meanings between Social Science and the Law: Defining Family Violence', (2013) 36(2) *University of NSW Law Journal* 359. See the articles discussed in *Maluka v Maluka* (2009) FamCA 647 and *Maluka v Maluka* (2011) FLC 93-464.
[31] An idea well embedded in family law: See: T Dick, 'She Gave as Good as She Got? Family Violence, Interim Custody/Residence and the Family Court' (1998) 14 *Queensland University of Technology Law Journal* 40.
[32] J Wangmann, (2016) 'Different types of intimate partner violence - What do family law decisions reveal? 30(2) *Australian Journal of Family Law* 77. The same problem has ben identified in the USA. See: J Meier, (2017) 'Dangerous Liaisons: Social Science and Law in Domestic Violence Cases' 13(51) *Women, Gender and the Law eJournal.*

under the duress of, their perpetrator.[33] This section invites a careful analysis of the violence. A similar section could be inserted into the FLA:

Evidence of family violence

(1) Evidence of family violence, in relation to a person, includes evidence of any of the following—

a) the history of the relationship between the person and a family member, including violence by the family member towards the person or by the person towards the family member or by the family member or the person in relation to any other family member;
b) the cumulative effect, including psychological effect, on the person or a family member of that violence;
c) social, cultural or economic factors that impact on the person or a family member who has been affected by family violence;
d) the general nature and dynamics of relationships affected by family violence, including the possible consequences of separation from the abuser;
e) the psychological effect of violence on people who are or have been in a relationship affected by family violence;
f) social or economic factors that impact on people who are or have been in a relationship affected by family violence.

(2) In this section—

…

"family violence", in relation to a person, means violence against that person by a family member;

"violence" means—

a) physical abuse; or
b) sexual abuse; or
c) psychological abuse (which need not involve actual or threatened physical or sexual abuse), including but not limited to the following—
    i. intimidation;
    ii. harassment;
    iii. damage to property;
    iv. threats of physical abuse, sexual abuse or psychological abuse;
    v. in relation to a child—
        A. causing or allowing the child to see or hear the physical, sexual or psychological abuse of a person by a family member; or
        B. putting the child, or allowing the child to be put, at real risk of seeing or hearing that abuse occurring.

(3) Without limiting the definition of *violence* in subsection (2)—
    a) a single act may amount to abuse for the purposes of that definition; and
    b) a number of acts that form part of a pattern of behaviour may amount to abuse for that purpose, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.

[33] s 322J *Crimes Act (Vic)* 1958.

To assist in considering these matters, judges should be encouraged to order expert DFV reports.

Recommendations

- That the definition of family violence under the *Family Law Act* be amended to remove the requirement that conduct must be coercive and controlling or cause fear to amount to family violence;
- that the definition include a list of behaviours that may constitute family violence and the list should include behaviour that is coercive and controlling or that causes fear;
- that the definition in the Queensland *Domestic and Family Violence Act 2012* be considered.
- That a new section inviting an examination of exactly the nature of the DFV which has occurred should be inserted – the Victorian *Crimes Act* model should be considered
- Provisions should be included which encourage judges and ICLs to consider the need for an expert DFV report where this is an issue in a case.

Question 16
What changes could be made to Part VII of the Family Law Act to enable it to apply consistently to all children irrespective of their family structure?

I believe that the current structure and wording of Part VII largely assumes that children are always born into, and initially nurtured and raised by, families of two heterosexual people who are their biological and genetic parents. This is simply no longer the case, and perhaps there always has been more diversity on this issue than is generally acknowledged.[34] The word 'parent' occurs alone many times and I think there are ways that this could be expanded in existing and any new sections proposed out of this review.

As indicated in my answer to Q 14, I believe that s 60CC(2) should be repealed. This will assist by removing the powerful symbol of the nuclear family as being the blueprint for every family – even in separation. It is in s 60(2)(2)(a) that the word parent creates the more exclusionary effect. In s 60CC(3) the words 'or other applicant, respondent or party' could be added after the word 'parent' on all occasions and this would allow relevant evidence on the best interest considerations to be provided by any party.

It might also be helpful to call the orders 'children's orders' rather than 'parenting' orders.

Recommendations

- That s 60B(1) and 60CC(2) be repealed;
- that the words 'or other applicant, respondent or party' be inserted after the word 'parent' in a new best interests list that would be based on s 60CC(3);

[34] Eg. traditional Torres Strait Islander adoption has existed for 100s, if not 1000s of years, but is not formally acknowledged in law – although parental responsibility orders can be made by the FCA in recognition of existing arrangements – but *parentage* orders are not available.

- that ‘parenting’ orders be called ‘children’s’ orders.

Resolution and adjudication processes

Question 24
Should legally-assisted family dispute resolution processes play a greater role in the resolution of disputes involving family violence or abuse?

The most important feature of FDR for a survivor of DFV is to be assisted by an advocate who has prepared the woman for the process and is able to attend with her and advocate on her behalf.

Question 29
Is there scope for problem solving decision-making processes to be developed within the family law system to help manage risk to children in families with complex needs? How could this be done?

The *Issues Paper* has made reference to the Parenting Management Hearings Panel currently in a proposed Bill. While I understand the desire to search for alternatives to current adversarial system, I consider the PMH model quite problematic. I attach the submission I put forward to the Committee hearings on the Bill.

A major concern is that Bill speaks of the simpler cases it will be hearing, but does not exclude cases involving family violence. Pragmatically those cases have to be included because we know those are a significant proportion of the cases that will enter and persist in the system. They will be the cases where the parties have been unsuccessful at FDR, are ineligible for legal aid and unable to afford legal representation. There will be nothing simple about these cases. The families will be the poor, the vulnerable, parents who have children with disabilities and disagree about the seriousness (eg autism), parents who misuse alcohol and other substances, double and triple-blended families, abusive men who relish the closeness to their victim brought about by a lack of lawyer and informality and women and men exhausted emotionally and financially by their separation and the family law system.

I am concerned that if the PMHP goes ahead it will soon be swamped with complex cases which it will not have time to properly respond to – all while implementing a totally new way to resolve family law cases in Australia.

Children’s experiences and perspectives

Question 34
How can children’s experiences of participation in court processes be improved?

Refer to the submission relating to family reports of the research team of which I am a member.

Question 36

What mechanisms are best adapted to ensure children's views are heard in court proceedings?

The role of judges in the direct participation of children in the family law system remains a contentious issue in the family law world. Inexplicably, some countries which are legally and culturally similar to Australia regularly practice judicial interviewing of and meeting with children. However, Australian family law judges have shown a resistance to direct interaction with children. In fact, in 2010, the judges repealed the specific *Family Law Rule* which allowed judges to meet children in Chambers with a counsellor.[35]

We understand that judges and others hold valid concerns about meeting with children.[36] Special skills are required to do this well and judges have no training for this task. There are questions about who should be present and how the interaction should be recorded and reported. And exactly what can a judge do with anything they learn through the interaction? But it is also clear that in 2018 many children expect to participate in decisions about their lives. This is encouraged at schools, in many homes and public spaces. It is unsurprising that children feel excluded when the case is all about them but they are the ones who are specifically kept out of the court room and away from the judge.

Although we acknowledge that more research will be required and a training program would have to be developed and implemented, we believe that Australian family law judges should become more active in their direct engagement with children.

Question 37
How can children be supported to participate in family dispute resolution processes?

Others more informed on the research in this area will submit on this question but I think we have to continue to expand ways of supporting children to participate in various aspects of the family law system. The children of 2018 are very different to the children of 1975. They are used to being consulted and involved in decision-making that concerns them and it is clear from research that in general children wish to participate in family law cases about them, even if they do not want to make the final decisions.

Question 38
Are there risks to children from involving them in decision-making or dispute resolution processes? How should these risks be managed?

There are obvious risks for children with abusive or violent parents in terms of being directly involved in family law processes. There is always concern that specific comments made or attitudes displayed by children will be communicated to the violent parent and that retribution will follow. Great care needs to be taken in terms of any parenting time

[35] Judges control the Rules of Court. See Explanatory Statement, Select Legislative Instrument 2010 No 238, *Family Law Amendment Rules* 2010 (No 1) which repealed Rule 15.02 to 'reflect that a judge interviewing a child subject to proceeding is most unusual'.

[36] N Flatters and L Yasenik, 'The Seven Reasons Judges Should Not Interview Children: but If They Have To…' World Congress on Family Law and Children's Rights, Dublin, June, 2017

arrangements which take place around the time the children are participating in any form of decision-making or FDR.

Professional skills and wellbeing

Question 41
What core competencies should be expected of professionals who work in the family law system? What measures are needed to ensure that family law system professionals have and maintain these competencies?

Refer to the submission relating to family reports of the research team of which I am a member.

Governance and accountability

Question 45
Should s 121 of the Family Law Act be amended to allow parties to family law proceedings to publish information about their experiences of the proceedings? If so, what safeguards should be included to protect the privacy of families and children?

Refer to the submission relating to family reports of the research team of which I am a member.

Question 47
What changes should be made to the family law system's governance and regulatory processes to improve public confidence in the family law system?

Refer to the submission relating to family reports of the research team of which I am a member.