Australian Government

Government Response to ALRC Report 135: *Family Law for the Future – An Inquiry into the Family Law System*

MARCH 2021

Terminology used in this response

Act	*Family Law Act 1975* (Cth)
AIJA	Australasian Institute of Judicial Administration
AFCA	Australian Financial Complaints Authority
ALRC	Australian Law Reform Commission
ALRC Discussion Paper	Discussion paper released by the ALRC as part of its Review of the Family Law System, October 2018
ALRC Report	ALRC Report 135: *Family Law for the Future – An Inquiry into the Family Law System*, March 2019
ALRC Report 124	ALRC Report 124: *Equality, Capacity and Disability in Commonwealth Laws*, November 2014
ALRC Review	ALRC's Review of the Family Law System, commenced in September 2017
CAG	Council of Attorneys-General
CCSs	Children's Contact Services
CRPD	United Nations Convention on the Rights of Persons with Disabilities
DVU	Domestic Violence Unit
Family Law Rules	*Family Law Rules 2004* (Cth)
FASS	Family Advocacy and Support Services
FCC	Federal Circuit Court of Australia
FCFC	Federal Circuit and Family Court of Australia
FDR	Family dispute resolution
Federal Court Act	*Federal Court of Australia Act 1976* (Cth)
FFVO	Federal Family Violence Order
FRAL	Family Relationships Advice Line
FRC	Family Relationship Centre
Government	The Commonwealth Government of Australia
Henderson Inquiry	House of Representatives Standing Committee on Social Policy and Legal Affairs *Inquiry Into a Better Family Law System to Support and Protect Those Affected By Family Violence*, December 2017
HJP	Health Justice Partnership
ILOs	Indigenous Liaison Officers
PPIs	Personal protection injunctions
Regulations	*Family Law (Family Dispute Resolution Practitioners) Regulations 2008*

Introduction

The Australian Government welcomes the Australian Law Reform Commission (ALRC) Report 135: *Family Law for the Future – An Inquiry into the Family Law System*.

The Government is committed to ongoing improvements to the family law, courts and legal assistance systems to ensure that they help families separate in a safe, child-centred, supportive, accessible, and timely way. This is why the Government commissioned the ALRC to undertake the first comprehensive review of the *Family Law Act 1975* (Cth) (the Act) since its commencement in 1976.

In commissioning the review, then Attorney-General, Senator the Hon George Brandis QC, noted the greater diversity of family structures in contemporary Australia and the importance of ensuring that the Act meets the needs of those families and individuals who need the assistance of the family law system to resolve their disputes. Family and relationship breakdown are often traumatic and devastating experiences for all involved. For those going through the family law system during this harrowing time, it's important that the systems they have to go through work as well as they can.

The terms of reference for the ALRC Review focused on key areas of importance to Australian families, including the protection of the best interests of children and their safety; the appropriate, early and cost-effective resolution of family law disputes; collaboration, coordination and integration between the family law system and other Commonwealth, state and territory systems including the family violence and child protection systems; the underlying substantive rules and general legal principles in relation to parenting and property; and the clarity and accessibility of the law.

The ALRC Report contains many practical and well-considered recommendations to improve the Act, and the institutions, procedures and support services that make up the rest of the family law system. The Government is also committed to looking beyond the ALRC Report on these and other issues, to ensure that appropriate reforms to the family law system outside the confines of the ALRC's recommendations are identified and implemented.

As such, the response to the ALRC Report will be complemented not only by action already taken by the Government, but also by further reforms informed by consultation, earlier reports (including the House of Representatives Standing Committee on Social Policy and Legal Affairs *Inquiry Into a Better Family Law System to Support and Protect Those Affected By Family Violence* (the Henderson Inquiry) report), the Joint Select Committee inquiry on Australia's Family Law System, and consideration of issues that may arise for families due to or arising from the COVID-19 pandemic.

Unfortunately, there is no one reform that can address all the issues. Some reforms will take some time to develop, require significant stakeholder consultation, and need to be informed by existing or new pilots, data and evaluations. Furthermore, the issues are complex and emotive, and the safety and wellbeing of Australian children and their families depend upon well thought-through and appropriately balanced reforms.

The Government has detailed its position on each of the ALRC's recommendations below. The Government is committed to ongoing engagement with stakeholders on family law reform, including on those reforms set out in this response and their implementation. The Government's response to each recommendation indicates its position on the recommendations, but remains subject to further consultation and consideration of stakeholder views, including on the exact form implementation of recommendations will take. For instance, where the ALRC has proposed a particular approach to an issue, there may be alternative mechanisms that would achieve the same outcome. Relatedly, some of the ALRC's recommendations had not previously been considered and were not consulted on through the Discussion Paper process. In some cases, further consideration and consultation is required to determine whether, or how precisely, these recommendations should be pursued. The vast majority of the recommendations of the ALRC propose amendments to the Act, and as such, input provided by stakeholders will also be considered in the course of the drafting of legislative amendments.

The Government is committed to pursuing a strong agenda of changes that, over time, will build a family law system that meets the needs of Australian families and supports them to resolve their disputes in a safe, child-centred, accessible and timely way. Importantly, this response will build upon the many recent family law reform initiatives that the Government has introduced.

The Government provided additional funding to improve the sustainability of the federal family law courts and for court building refurbishments in the 2015-16 Budget, and funding for additional family consultants in the 2017-18 Budget.

On 18 February 2021, the Government passed legislation to deliver structural reform of the federal family law courts. The legislation will bring together the Family Court of Australia and the Federal Circuit Court of Australia (FCC) to be known as the Federal Circuit and Family Court of Australia (FCFC). The FCFC will become a single point of entry into federal family law jurisdiction, and create a consistent pathway for Australian families to have their family law disputes dealt with in the federal courts. Reform of the federal family law courts is an important step, but is not the only family law reform that the Government is progressing.

Within the family law system, the Government has implemented significant measures to help protect women and children experiencing family violence. This includes the establishment, and now permanent funding, of specialist domestic violence units (DVUs) and health justice partnerships (HJPs) which support women affected by family and domestic violence, in 21 locations around the country. Specialist domestic violence units provide legal assistance and other support, such as assisting clients to access financial counselling, tenancy assistance, trauma counselling, emergency accommodation, and employment services. Health justice partnerships involve lawyers working at hospitals and health centres, to provide women with legal assistance in safe locations. They also train health professionals to recognise if women have legal problems related to domestic violence and help facilitate their access to specialist legal assistance. The Government has also established and extended Family Advocacy and Support Services (FASS) that see duty lawyers and social workers situated at family law courts to assist and provide legal and social support services to people who have experienced or are experiencing family violence. These measures have been part of the more than $1 billion the Government has invested to prevent and respond to violence against women and their children since 2013.

In 2018, the Government passed legislation that prohibits perpetrators of family violence from cross-examining their victims in family law proceedings, and in the 2019-20 Budget, funding was provided to co-locate state and territory family safety officials in family law courts to improve information sharing between the family law, family violence and child protection systems.

The Government has also progressed a number of measures aimed at helping separating families to resolve financial matters. This includes new funding for property mediation services and a trial of lawyer-assisted property mediation, to help families divide their property after separation. To assist those families who use the courts, the Government has also commenced a pilot of a simpler and faster court process for cases with small property pools, and has funded the Australian Taxation Office to develop and implement an electronic information-sharing system to make superannuation information available to the family law courts.

In December 2019, the Government announced funding for the federal family law courts to pilot in three registries a systematic approach to screen for family safety risks, triage family law matters according to the level of risk identified, and establish a specialist family violence list to resolve high-risk cases. The specialist list would be run by the FCC and presided over by judges with expertise and experience dealing with family violence. In November 2020, the Family Law Amendment (Risk Screening Protections) Bill 2020 was passed by the Parliament to support the operation of the pilot. The pilot commenced in the Adelaide registry of the FCC on 7 December 2020 and in the Brisbane and Parramatta registries on 11 January 2021. This measure allows for the early identification of risks, immediate steps to provide safety planning and service referrals, as well as a specialist pathway for the intensive management and faster resolution of high-risk cases, lessening the time families spend in the court system.

The Government is also committed to further protections from family violence by allowing family law courts to make family violence orders that would be enforced nationwide and for which a breach would be a criminal offence. The Government is working with police, courts and justice agencies in all jurisdictions to ensure that such orders – to be known as Federal Family Violence Orders (FFVOs) – can be effectively enforced by state and territory police. Currently, in order to enforce a family law personal protection injunction (PPI) the protected person is required to initiate civil proceedings in a family law court. The availability of a criminally enforceable family violence protection order will mean that people who are in the family law system will not be required to initiate separate proceedings in a state or territory court for a protection order. They will be able to apply for an order in the family law court in which their matter is already being heard, and be assured that police will respond to a breach incident. To support the implementation of this reform, the Government provided $1.8 million as part of the 2020-21 Budget.

The Government also recognises that legal assistance is a critical element of an accessible family law system. From 1 July 2020, the National Legal Assistance Partnership (NLAP) increased funding for front-line legal services, taking Commonwealth funding to more than $2 billion over five years to legal aid commissions, community legal centres and Aboriginal and Torres Strait Islander legal services. Under the NLAP, family law is a Commonwealth service priority. The NLAP enables legal assistance service providers to deliver legal advice and assistance on family law matters to vulnerable Australians. This includes people experiencing, or at risk of, family violence, who are specified in the NLAP as a national priority client group. In response to the onset of the COVID-19 pandemic, the Australian Government has also provided an additional $63.3 million in funding to support the delivery of frontline

services. Of this, $13.5 million supported service providers to rapidly improve their IT capabilities as they shift to virtual service delivery, with the remaining $49.8 million for additional legal assistance services. Forty per cent of the additional legal assistance services is to support those affected by family violence.

The 2020-21 Budget has further demonstrated the commitment of the Government to the family law system. As well as the funding for the implementation of FFVOs, the Government is providing $87.3 million over the forward estimates from 1 July 2021 for family law services, to ensure they are not affected by the cessation of the Social and Community Services wage supplementation. These services, which can help keep separating families out of court, provide supports including counselling, dispute resolution, and supervised contact of children. The Government has also provided additional funding of $4.8 million for the Family Violence and Cross-examination of Parties Scheme.

The Government has also continued to invest in the family law courts in the 2020-21 Budget. To improve the safety, security and experience for court users in Launceston and Rockhampton, the Government is providing an additional $7.7 million to upgrade the FCC registries in these locations. The Government is also providing $2.5 million to the Family Court of Western Australia for its transition to a new case management system.

As a response to COVID-19, the FCC and Family Court of Australia each instituted a court list dedicated to dealing exclusively with urgent family law disputes that have arisen as a result of the COVID-19 pandemic. The list is designed to quickly identify and deal with the cases that need urgent attention due to the COVID-19 crisis. Applications that are eligible to be dealt with through the COVID-19 List, especially those involving issues of risk and family violence, receive immediate attention and are triaged by a dedicated Registrar who will assess and list the matter within 72 business hours. To support the courts to continue to operate the COVID-19 List, the Government is providing $2.5 million over the next two years for additional registrars.

In addition to this specific funding for the COVID-19 List, through the 2020-21 Budget, the FCC will receive $12.8 million over the forward estimates to support an additional family law judge and additional family law registrar resources, as part of a broader measure to increase FCC funding. These additional resources will allow the FCC, which deals with the overwhelming majority of family law matters, to finalise more cases and reduce the time it takes for Australian families to have their matters resolved.

As part of the implementation of the FCFC legislation, the Government has agreed to also provide an additional FCFC (Division 1) judge, two additional FCFC (Division 2) judges, and an additional judicial registrar to support the Adelaide registry, and will provide $14.3 million in further legal assistance in South Australia to establish a pilot programme for family law matters. The Government will also re-establish the Family Law Council.

Notwithstanding the action already taken by this Government, and the recommendations of the ALRC, there remain a number of critical issues for families accessing the family law system that warrant further consideration. This is why the Government established a Joint Select Committee on Australia's Family Law System, chaired by the Hon Kevin Andrews MP. The terms of reference for the inquiry were broad, and allowed for the examination of a range of matters that have a real and practical impact on Australian families. This inquiry provided an important opportunity for parliamentarians to hear from those Australians across the country who have been through the system and can share their story and experience.

On 15 March 2021, the Committee tabled its second interim report, detailing the Committee's views and recommendations on the family law system. The Committee's report will further guide future reforms to the family law system, and will be considered by the Government in progressing its response to the ALRC recommendations and those of earlier inquiries. The Government will respond separately to the Committee's reports and recommendations.

The Government extends its thanks to the ALRC, and in particular Commissioners in Charge Professor Helen Rhoades (27 September 2017 to 5 November 2018), and the Hon Justice Sarah Derrington (from 6 November 2018), for ably leading the inquiry. The Government also wishes to thank Part-time Commissioners the Hon Justice John Middleton of the Federal Court of Australia, the Hon John Faulks, Mr Geoffrey Sinclair, Dr Andrew Bickerdike, the Hon Cheryl Edwardes AM GAICD, and the Hon Michelle May AM QC, as well as the many legal, research, executive and administrative staff, interns and students who supported the inquiry. Finally, the Government would like to thank the members of the ALRC's Advisory Committee, who generously provided their time and expertise to ensure the review was informed by their practical and academic expertise.

Response to recommendations

Recommendation 1 The Australian Government should consider options to establish state and territory family courts in all states and territories, to exercise jurisdiction concurrently under the *Family Law Act 1975* (Cth), as well as state and territory child protection and family violence jurisdiction, whilst also considering the most efficient manner to eventually abolish first instance federal family courts.

Not Agreed.

Given the absence of any indication of the potential for a recommendation of this type in the ALRC Discussion Paper, and so the absence of any substantive submissions on a concept of this breadth and complexity, the Government was surprised at the inclusion of this recommendation.

While the Government understands frustration with what has been described as the failed experiment of sharing jurisdiction between two federal courts and running family law matters in separate courts with separate rules and procedures, the Government does not support this recommendation.

This recommendation proposes one way to fix the broken split court system presently causing unnecessary cost, delay and resources, but the alternative structure it proposes represents radical change to the federal, state and territory court systems and in the best possible scenario, would take years to fully implement, and in the most likely case scenario would not succeed past the early stages. There are significant issues associated with its implementation, including: constitutional limitations around the appointment of judges; potential duplication of court structures over an extended transitional period; accommodation issues; inconsistent appeal pathways; and potential costs to families, legal and social service providers, the Commonwealth, states and territories associated with the new model. Under current arrangements, the states have had the ability to adopt this option since the commencement of the Act, and state and territory courts have shown a reluctance to exercise the family law jurisdiction already conferred upon them.

The Government's current priorities in delivering a safer and more efficient family law system will create substantial improvements, allowing families to navigate the existing family law framework more safely and effectively. These priorities include structural reform of the federal family law courts, for which legislation has recently been passed by the Parliament. It also extends to early risk screening and triage in court proceedings, early intervention and information sharing, and ensuring that family law orders issued for the purpose of providing protection from family violence can be criminally enforced. The Government will continue to progress these reforms as a matter of priority, with the following benefits:

- Structural reforms to the federal courts, including the harmonisation of court rules and processes, will help Australian families resolve their disputes faster by improving the efficiency of the family law system, reducing the backlog of matters before the family law courts, and driving faster, cheaper and more consistent dispute resolution.
- The development of pilots of an early risk screening and triaging process in the federal courts, including a specialist pathway for the safe and expedient resolution of high-risk cases. This will help ensure that family violence and other safety risk factors are

identified and appropriately managed throughout court proceedings from the point of filing.

- Legal and social support services such as the FASS, DVUs and Health Justice Partnerships (HJPs) provide wrap-around support to improve safety and wellbeing of clients and their children, as well as a reduced likelihood of protracted family law proceedings.
- Enhancing information sharing about family safety concerns between the family law courts, investigative agencies and relevant state and territory courts. Timely access to relevant information, with the right safeguards, is critical to informing decisions, managing risk and closing the jurisdictional gaps between federal and state systems.
- Making breaches of family law orders issued for the purpose of providing protection from family violence a Commonwealth criminal offence, and working to have them enforced by state and territory police, will mean that people who are in the family law system will not be required to initiate separate proceedings in a state or territory court for a protection order, and will not have to initiate civil proceedings in the family law courts to enforce a breach, which is currently the case for a PPI.

The Government will continue to consider options to reduce fragmentation between the family law, child protection and family violence systems. This will include mechanisms to increase the exercise of family law jurisdiction by state and territory courts, noting that reducing the complexity of the Family Law Act may be conducive to this purpose.

Recommendation 2 The Australian Government should work with state and territory governments to develop and implement a national information sharing framework to guide the sharing of information about the safety, welfare, and wellbeing of families and children between the family law, family violence, and child protection systems. The framework should include:

- the legal framework for sharing information;
- relevant federal, state, and territory court documents;
- child protection records;
- police records;
- experts' reports; and
- other relevant information.

Agreed.

Recognising this issue, the Government has already commenced work with states and territories to improve information sharing between the family law, family violence and child protection systems through the Council of Attorneys-General (CAG), supported by the Family Violence Working Group of justice officials.

This work has included the development of a proposed national framework for the appropriate sharing of information relevant to family safety risks. The Government will continue to work collaboratively with the states and territories on a comprehensive national information sharing framework intended to cover all the matters raised in this recommendation.

The Government is also developing arrangements under which information about orders issued under the Family Law Act for the purpose of providing protection from family violence will

be shared between the family law courts and policing agencies across Australia, once criminal offences for breaches of such orders commence.

Recommendation 3 The Australian Government, together with state and territory governments, should consider expanding the information sharing platform as part of the National Domestic Violence Order Scheme to include family court orders and orders made under state and territory child protection legislation.

Agreed.

As part of the Government's $340 million funding package under the Fourth Action Plan of the *National Plan to Reduce Violence against Women and their Children 2010–2022*, the Government provided $11 million to improve information sharing between the family law, family violence and child protection systems. This initiative will be implemented in two parts:

1. through the co-location of child protection and policing officials in the family law courts, and
2. through the scoping of a national technological solution to support longer term information sharing.

The implementation of the co-location measure in family law court registries across Australia commenced in early 2020, and is supporting the timely sharing of information, including in relation to current or past family violence orders and child protection, across different jurisdictions by integrating state and territory officials with the family law system.

Recognising this issue, the Government has already provided for the scoping of technological solutions to enhance information sharing between the family law, family violence and child protection systems, with the issue being considered by the CAG Family Violence Working Group. Accordingly, the Government agrees with consideration of a technological platform to facilitate the sharing of court orders as recommended by the ALRC, with appropriate safeguards.

The Government will await the outcomes of the scoping work and of discussions with states and territories in considering the best practical way to proceed, and whether the technological infrastructure that is being developed to support the National Domestic Violence Order Scheme is the most viable solution for the sharing of other court orders or whether the same outcome can be better achieved in some other way.

The Government is already working with police, courts and justice agencies in all jurisdictions to ensure that family law orders issued for the purpose of providing protection from family violence can be recognised on the National Domestic Violence Order Scheme and enforced by state and territory police, once Commonwealth criminal offences for breaches of such orders commence.

Recommendation 4 Section 60B of the *Family Law Act 1975* (Cth) should be repealed.

Agreed in Part.

Submissions to the ALRC Review raised consistent concerns that the current legal framework governing parental responsibility is not well understood by readers of the legislation, and the broader community.

The Government notes that this recommendation is closely linked with Recommendations 5, 6, 7 and 8, which recommend changes to the legislative framework for making parenting orders for children.

Section 60B of the Act provides the objects of, and principles underlying, Part VII of the Act. Submissions to the ALRC Review made it clear that the interaction between the objects and principles provision and the substantive law is unclear. Many of the principles overlap with the child's best interests factors in section 60CC, causing confusion.

The Government agrees that it is desirable to remove any duplication between these provisions. However, it may be important to retain, in some form, certain elements of existing section 60B which are not replicated elsewhere in the Act.

Recommendation 5 Section 60CC of the *Family Law Act 1975* (Cth) should be amended so that the factors to be considered when determining parenting arrangements that promote a child's best interests are:

- what arrangements best promote the safety of the child and the child's carers, including safety from family violence, abuse, or other harm;
- any relevant views expressed by the child;
- the developmental, psychological, and emotional needs of the child;
- the benefit to the child of being able to maintain relationships with each parent and other people who are significant to the child, where it is safe to do so;
- the capacity of each proposed carer of the child to provide for the developmental, psychological, and emotional needs of the child, having regard to the carer's ability and willingness to seek support to assist with caring; and
- anything else that is relevant to the particular circumstances of the child.

Agreed in Part.

The Government agrees that the six factors recommended by the ALRC are sound, but notes the importance of the two current primary considerations of protecting children from harm, which is required to be given greater weight, and children having a meaningful relationship with both parents. Noting that section 60CC is central to the operation of the family law system, while the Government considers that a simplification of section 60CC is achievable, the Government considers that protecting children from harm and children having a meaningful relationship with both parents are key factors.

Submissions to the ALRC Review raised concerns that the current legal framework governing parental responsibility is not well understood by readers of the legislation, and the broader community. Currently, under section 60CC of the Act, the factors that a court must take into account in determining the best interests of the child comprise the two primary considerations noted above, thirteen additional considerations, and 'any other matter that is relevant'. Stakeholder submissions to the ALRC Review raised a range of concerns about the lengthy, complex and repetitive list of factors. Concerns included that the factors are: confusing, contribute to unnecessary costs and delays, and do not necessarily capture the issues that are particularly relevant to a case.

This recommendation is closely linked with Recommendations 4, 6, 7 and 8 which recommend changes to the legislative framework for making parenting orders for children. The Government supports amendments to the decision-making framework for children's matters to ensure that it:

- promotes the best interests of children, and recognises that ultimately parenting arrangements should be shaped around the circumstances of the particular child
- is easy to understand, particularly by families trying to come to their own arrangements, and
- facilitates efficient judicial decision-making for the very small proportion of separating families that require a court to make a parenting order.

How best to achieve this will be subject to additional stakeholder consultation in the course of developing legislative amendments.

Recommendation 6 The *Family Law Act 1975* (Cth) should be amended to provide that in determining what arrangements promote the best interests of an Aboriginal or Torres Strait Islander child, a court must consider the child's opportunities to connect with, and maintain the child's connection to, the child's family, community, culture, and country.

Agreed in Principle.

Ensuring that an Aboriginal or Torres Strait Islander child maintains their connection to family, community, culture and country is of fundamental importance for Aboriginal and Torres Strait Islander people.

Currently, under section 60CC of the Act, when the court determines what is in a child's best interest, an Aboriginal or Torres Strait Islander child's right to enjoy his or her culture is one of the thirteen 'additional considerations'.

A specific provision in the Act recognising connection to culture may ensure that a child's Aboriginal and Torres Strait Islander status, cultural rights and other cultural issues are brought to the attention of judicial officers determining the child's best interests at an early stage. It is important that further consultation occurs with Aboriginal and Torres Strait Islander people and other stakeholders on the form and benefits of such a legislative amendment.

Recommendation 7 Section 61DA of the *Family Law Act 1975* (Cth) should be amended to replace the presumption of 'equal shared parental responsibility' with a presumption of 'joint decision making about major long-term issues'.

Agreed in Part.

The key aim of the ALRC's recommendation is to improve the understanding and clarity of the operation of section 61DA, whilst maintaining the accepted and important principle of shared parental responsibility. Importantly, and of particular note, the ALRC stated that it supports the idea that a presumption of shared parental responsibility serves as a good starting point for negotiations between parties and recommended the concept be retained. It is also relevant to note that presumptions with respect to aspects of parenting arrangements are a part of the family law systems in a number of other countries, including for example, England and Wales, Sweden, Denmark and parts of the United States.

The significant reforms to family law in 2006 emphasised the importance to children of maintaining meaningful relationships with both parents, where it is safe to do so. The presumption of equal shared parental responsibility was a key feature of those reforms. The Government remains committed to the policy underlying the presumption – that is, ensuring that children benefit from both parents being responsible for and involved in making important decisions about their children post-separation, where this is consistent with their best interests.

The ALRC also noted however that outside of family law system professionals, and particularly for self-represented litigants, confusion persists about the meaning of equal shared parental responsibility. That included that there are, at times, misunderstandings that it means requiring children to spend equal time with both parents.

This would not seem to be solely or primarily the result of the drafting or a reading of the Family Law Act itself, as the presumption contained in section 61DA(1) is accompanied by a note expressly stating that this does not provide for a presumption about the amount of time to be spent with each parent. Nonetheless, the ALRC's recommendation is to replace the existing form of language that gives effect to the principle that a presumption of shared parental responsibility serves as a good starting point for negotiations, with another form of language to give effect to the same general principle.

In large part, the ALRC's reasoning in this regard is that the reformulation of the words will diminish confusion of the concept of equal shared parental responsibility with the concept of equal time. However, the Government does not consider that it is sufficiently certain that merely replacing the words 'equal shared parental responsibility' with the words 'joint decision making about major long-term issues' will end confusion, particularly noting that the existing confusion does not seem to be based on an actual reading of section 61DA of the Family Law Act.

Given that the ALRC found that a presumption of shared parental responsibility serves as a desirable starting point, the Government is concerned that, as a matter of language, the existing use of the word 'responsibility' gives better effect to this accepted principle. The term 'responsibility' is also the terminology used in Article 18 of the United Nations Convention on

the Rights of the Child. A further change of language to give effect to the accepted underlying principle may simply add to current confusion.

However, the Government will consider options to minimise confusion such as giving greater prominence to the note accompanying subsection 61DA(1) of the Family Law Act, and clearer articulation of the circumstances where the presumption does not apply. As identified by the ALRC, having provisions regarding the effect of shared parental responsibility separately located in the Act contributes to confusion. Mechanisms beyond the Act, such as clear guidance material, could also serve to ensure there is a better understanding of the operation of the Act.

This recommendation is closely linked with Recommendations 4, 5, 6 and 8 which recommend changes to the legislative framework for making parenting orders for children. The focus of the recommendations is to simplify the language and readability of the relevant provisions as a means to make them easier to understand for users of the system. On this broader issue, the Government supports reducing confusion arising from the legislation, and notes that submissions to the ALRC Review raised concerns that the current legal framework governing parental responsibility is not well understood by readers of the legislation and the broader community. The Government understands and accepts the ALRC's observations that misunderstanding with respect to a number of provisions may influence the negotiations between parties over parenting arrangements. This can include having the effect that the primary focus is not necessarily the best interests of the children, and users can be confused about the consequences of an order for equal shared parental responsibility.

To the extent that this recommendation is closely linked with Recommendations 4, 5, 6 and 8, which recommend changes to the legislative framework for making parenting orders for children to the end of making them easier for court users to understand and apply, the Government supports a process of designing amendments to the decision making framework for children's matters to ensure that it:

- promotes the best interests of children, and recognises that ultimately parenting arrangements should be shaped around the circumstances of the particular child
- is easy to understand, particularly by families trying to come to their own arrangements, and
- facilitates efficient judicial decision-making for the very small proportion of separating families that require a court to make a parenting order.

Given the position of the ALRC on the underlying principle of a presumption of shared parental responsibility, the Government will focus on improving drafting to minimise confusion between this concept and the concept of equal time with children whilst preserving the agreed principle. The Government will engage with stakeholders in the course of this.

The Government notes that, aside from a presumption about parental responsibility, existing section 61C of the Act provides that, subject to a court order, each parent has parental responsibility for a child.

Recommendation 8 Section 65DAA of the *Family Law Act 1975* (Cth), which requires the courts to consider, in certain circumstances, the possibility of the child spending equal time, or substantial and significant time with each parent, should be repealed.

Not Agreed.

The requirement to consider equal time, in circumstances where a court orders equal shared parental responsibility, was a key element of the 2006 reforms to the family law system. The Government remains committed to ensuring that courts appropriately consider children spending equal time, or substantial and significant time, with each parent in determining disputes about children's arrangements. This approach must, of course, also recognise that there are reasons, including for safety, or relating to practicalities, why it will not always be in the best interests of a child that equal time or substantial and significant time be spent with each parent.

Notwithstanding this commitment, the Governments notes again, as indicated in the response to Recommendation 7 above, that in practice some community confusion persists that equal shared parental responsibility means equal time. With respect to this confusion it is important to stress, as detailed by the ALRC, that these are different concepts.

Where the court makes an order for equal shared parental responsibility, section 65DAA of the Family Law Act requires the court to separately and subsequently consider whether equal time with each parent, or if not that, substantial and significant time, is in the best interest of the child, and is reasonably practical. It should be stressed that the requirement under section 65DAA, is only that courts consider making such an order. Even more importantly, the court can only make such an order where the court considers it to be in the best interests of the child, and reasonably practicable. Section 65DAA also does not apply unless the court has made or will make an order for equal shared parental responsibility, which must itself be considered to be in the best interests of the child, and, of course, there is no presumption to that effect where there are reasonable grounds to believe that a parent has engaged in family violence or abuse of the child.

As noted above, the Government supports reducing confusion arising from the legislation, and notes that submissions to the ALRC raised concerns that the current legal framework governing parental responsibility is not well understood by readers of the legislation, and the broader community. Given that these provisions may influence the negotiations between parties over parenting arrangements, the principle that the primary focus should be the best interests of the children, can be lost.

The Government also accepts the ALRC's position that the legislation be redrafted to minimise confusion and make clear that in determining what arrangements are made for the care of a child, the court must determine, on all the material before it, what is best for the particular child in their particular circumstances, as expressed at paragraph 5.115 of the ALRC Review. In this sense, Recommendation 8 must also be considered in the context of its close linkage with Recommendations 4, 5, 6 and 7.

The Government agrees with Recommendations 4, 5, 6 and 7, either wholly, in principle or in part, such that the Government supports amendments to the decision-making framework for children's matters to ensure that it:

- promotes the best interests of children, and recognises that ultimately parenting arrangements should be shaped around the circumstances of the particular child
- is easy to understand, particularly by families trying to come to their own arrangements, and
- facilitates efficient judicial decision-making for the very small proportion of separating families that require a court to make a parenting order.

However, while the Government accepts the need for redrafting to improve the operation of the relevant provisions for making parenting orders for children, and will seek to ensure any redrafting minimises confusion amongst users, the Government also remains committed to ensuring that, in circumstances where it is appropriate, there be consideration by the courts of children spending equal time, or substantial and significant time, with each parent. Ultimately, and as currently required by the Family Law Act, it remains absolutely appropriate that such an order is only to be made where it is in the best interests of the child, and reasonably practicable. The precise scope and nature of the redrafting as it occurs will be subject to additional consultation.

Recommendation 9 Section 4(1AB) of the *Family Law Act 1975* (Cth) should be amended to provide a definition of ***member of the family*** that is inclusive of any Aboriginal or Torres Strait Islander concept of family that is relevant in the particular circumstances of the case.

Agreed in Principle.

The current definition of *member of the family* in the Act covers a range of relationships based on legal marriage, cohabitation, and adoption involving inter-generational (grandparent, parent, child) and intra-generational (sibling) relationships.

The definition of a family member is engaged in the application of various parts of the Act, including in the application of parenting orders provisions, the definition of family violence, and provisions in relation to family violence orders. Implementing this recommendation may better enable the courts to consider and make orders in relation to people in Aboriginal and Torres Strait Islander peoples' kinship networks.

The Government will consult on the details of this definition to ensure that any amendment appropriately captures Aboriginal and Torres Strait Islander traditions of family and kinship.

Recommendation 10 Combined rules for the Family Court of Australia and the Federal Circuit Court of Australia should provide for proceedings to be conducted under Pt VII Div 12A of the *Family Law Act 1975* (Cth) by judges of both courts. Both courts should be adequately resourced to carry out the statutory mandate in s 69ZN(1) of the *Family Law Act 1975* (Cth).

Agreed in Principle.

The Government supports the courts' use of the principles for conducting child-related proceedings contained in Part VII, Division 12A of the Act.

The Government will explore options to facilitate the greater use of Part VII, Division 12A with the courts, including addressing the barriers that are currently inhibiting the uptake of these principles, including any cultural change concerns or other factors.

Recommendation 11 The *Family Law Act 1975* (Cth) should be amended to:

- specify the steps that a court will take when considering whether to make an order to alter the interests of the parties to the relationship in any property; and
- simplify the list of matters that a court may take into account when considering whether to make an order to alter the interests of the parties to the relationship in any property.

Agreed.

The Government agrees the provisions of the Act regarding property settlement are complex, and do not assist separating families to understand the process that a court would use to make an equitable division of property. Amending the Act to provide a clear and easily understood decision-making framework for property matters would assist users, legal advisors and the courts. It would also provide more certainty for users of the family law system, lead to more equitable property division outcomes, and improve satisfaction with property settlements.

In line with this objective, the Government agrees with the recommendation to specify in the Act the steps a court should take when considering whether to order an alteration of property interests, and to simplify the list of factors to be considered when making these orders.

The Government will consider the scope of the legislative amendments to implement this recommendation, including the matters that should be included in the list of factors that the court may take into account.

Recommendation 12 The *Family Law Act 1975* (Cth) should be amended to include a presumption of equality of contributions during the relationship.

Not Agreed.

The Government considers there is limited data and evidence to support this recommendation. It considers that this recommendation would detract from the necessary process of the court

considering the individual circumstances of cases, which process is made necessary by the fact that individual circumstances in relationships differ and cannot be reduced to some kind of average or presumption of an average. Accordingly, the retaining of broad judicial discretion in property matters provides judicial officers with the necessary scope to order a division of property that is just and equitable according to the individual circumstances of each case.

The Government notes however, that the introduction of a simplified decision-making process for property matters (i.e. implementing Recommendation 11) will assist parties in understanding the steps involved in making a property settlement. It is also the case that other options are available to simplify property settlements without detracting from the courts' ultimate recognition that individual circumstances should be the ultimate determination of joint property settlements. Tools such as 'amica' can give parties a reliable indication of what a reasonable property split would be in their individual circumstances.

'amica' is an online dispute resolution system, developed by the Legal Services Commission of South Australia on behalf of National Legal Aid and funded by the Australian Government. 'amica' provides an innovative approach to family law disputes by giving separating couples the option of using an online tool to resolve their property dispute. The tool draws on information input by the couple and smart technology including artificial intelligence that considers legal principles to suggest an equitable property division arrangement. 'amica' has the potential to keep even more Australians out of court by assisting and empowering them to resolve their family disputes between themselves. The public launch of 'amica' occurred on 30 June 2020.

Recommendation 13 The *Family Law Act 1975* (Cth) should be amended to provide that the relevant date to ascertain the value of the parties' rights, interests, and liabilities in any property is the date of separation, unless the interests of justice require otherwise.

Not Agreed.

The Government considers there is limited data and evidence to support this recommendation, and that amending the Act to provide that the relevant date to ascertain the value of the parties' property rights is the date of separation rather than the date of hearing is unnecessary.

The Government is concerned that doing so would result in increased complexity, including by requiring the court to ascertain the market value of assets at a past point in time. It may also result in more litigation to resolve valuation disputes, and disputes over what the date of separation was in a particular case.

Recommendation 14 The family courts and the Australian Financial Complaints Authority should develop a protocol for dealing with jurisdictional overlap with respect to debts of parties to family law proceedings. The protocol should provide that:

- disputes about the enforceability of a debt against one or both parties under the *National Consumer Credit Protection Act 2009* (Cth) are dealt with by the Australian Financial Complaints Authority; and
- disputes about the reallocation of a debt between parties to a family law proceeding are dealt with by the family courts.

Noted.

The Government recognises that dividing responsibility for the repayment of debts, especially joint debts, is a real issue for many families following relationship breakdown. In particular, joint debt is one of the most difficult issues for people who have experienced, or are experiencing, family violence to resolve with financial institutions.

The Government supports measures to improve the process for dealing with joint debt, but considers there are some limitations in the recommended approach, and some care should be exercised in considering its viability.

The Government notes that the Australian Financial Complaints Authority (AFCA)'s existing jurisdiction allows it to consider complaints brought by borrowers about debts owed to their credit providers, subject to the jurisdictional limits in AFCA's Rules.

AFCA has an important role to play in resolving complaints against credit providers about joint debts, including in the case of parties to family law proceedings. However, several features inherent in AFCA's role as an external dispute resolution (EDR) scheme impact its ability to provide finality for some complaints involving joint debts. Among other things:

- AFCA can only consider complaints against credit providers which are lodged with it by consumers and, in the case of joint debts, cannot compel both co-borrowers to engage in the dispute resolution process;
- AFCA's determinations are binding on credit providers but are not binding on consumers (i.e. who may choose to reject them) or on third parties, such as a co-borrower; and
- AFCA is limited to considering and resolving complaints against financial firms who are members of the scheme. AFCA is also not available as a forum to resolve issues of debt owing for household services such as utility companies, which are often some of the most pressing concerns for users.

As part of the 2020 Women's Economic Security Statement the Government announced that it will develop a plain English, user friendly information guide explaining how relationship debt is treated by family law courts in property settlement disputes. The guide will provide practical information explaining to separating couples how debts are treated by the family law courts, and the application and effect of indemnities as well as options for dealing with debt outside of the family law courts and where to seek help.

Recommendation 15 The *Privacy Act 1988* (Cth) and the *National Consumer Credit Protection Act 2009* (Cth) should be amended to provide that when a court has ordered that one party (Party A) be responsible for a joint debt and indemnify the other party (Party B) against any default, credit providers are prohibited from making an adverse credit report against Party B to any credit reporting business as a consequence of the subsequent actions of Party A.

Noted.

The Government supports the underlying intent of this recommendation, but notes that the purpose of the credit reporting system is to balance an individual's interests in protecting their credit information (a type of personal information) with the need to ensure sufficient credit information is available to credit providers to facilitate responsible lending practices.

The credit reporting system allows credit providers and credit reporting bodies to report a person's credit information—including active credit accounts, repayment history, and default information. The credit information on a person's credit report is a factual summary of their credit position—it does not affect the legal rights in a credit contract between the person (including on a joint basis) and their credit provider. As such, changes to the credit reporting system would not affect the continuing legal relationship (joint debt) between the parties.

As referred to above, as part of the 2020 Women's Economic Security Statement the Government will develop a guide to how relationship debt is treated. The Government will also engage with stakeholders on further mechanisms to minimise the avenues for economic abuse following a relationship breakdown.

Recommendation 16 The *Family Law Act 1975* (Cth) should be amended to provide a presumption that the value of superannuation assets accumulated during a relationship are to be split evenly between the parties.

Not Agreed.

Consistent with the response to Recommendation 12, the Government considers there is limited data and evidence to support this recommendation. The Government considers this recommendation would detract from the necessary process of the court considering the individual circumstances of cases, which process is made necessary by the fact that individual circumstances in relationships differ and cannot be reduced to some kind of average or presumption of an average.

The Government considers that retaining broad judicial discretion in property matters, including with respect to superannuation, provides judicial officers with the necessary scope to order a division of property that is just and equitable according to the individual circumstances of each case. Superannuation is often the most significant asset in a property pool, which means the approach to splitting superannuation assets can have a significant impact on the financial wellbeing of the parties.

The Government notes however, that the introduction of a simplified decision-making process for property matters (i.e. implementing Recommendation 11) will assist parties in understanding the steps involved in making a property settlement.

Recommendation 17 The *Family Law Act 1975* (Cth) should be amended to simplify the process for splitting superannuation including:

- developing template superannuation splitting orders for commonly made superannuation splits; and
- when the applicant is suffering economic hardship, requiring superannuation trustees to limit the fees they charge members and their former spouse for services provided in connection with property settlement under Pt VIII to the actual cost of providing those services.

Agreed in Principle.

The Government notes that superannuation splitting is a complicated and often expensive process. Whilst many superannuation funds provide guidance and instructions on how to complete splitting orders, the drafting of orders can be a confusing and complicated task, particularly for self-represented parties. This can cause delays to the superannuation splitting process, particularly in circumstances where errors have been made in the orders or during the compliance with procedural fairness requirements.

The development of template splitting orders would reduce the procedural burden, and associated time delays, for those seeking to split superannuation assets in common scenarios. In addition to the proposed use of illustrative examples by superannuation funds, the availability of templates would provide greater clarity for parties on how to accurately draft an order. Where appropriate, the presumption that procedural fairness requirements are deemed to have been met if the template orders are utilised will also have the benefit of reducing delays, and so the Government agrees to the first part of this recommendation.

The Government notes that the MySuper Fee Rules in the *Superannuation Industry (Supervision) Act 1993* require that activity fees charged to members with a MySuper product be on a cost recovery basis. This means that for default members, the fees charged for family law splitting services are already limited to the cost of providing these services.

In addition, the Government has undertaken significant reforms in recent years to reduce the incidence of duplicate superannuation accounts in the superannuation system. Building on these, the *Your Future, Your Super* package, announced in the 2020-21 Budget, will implement reforms to further reduce the number of duplicate accounts held by Australians and support a new comparison tool to encourage more competition in the system to lower fees. Over time, the reduction of duplicate accounts can be expected to simplify processes and fees associated with property settlements that involve superannuation.

Under the 2018 Women's Economic Security Statement, the Australian Taxation Office is receiving funding to develop an electronic information sharing mechanism with the family courts to allow the superannuation assets held by parties to family law proceedings to be identified swiftly and more accurately. This mechanism will also help parties in family law proceedings avoid the cost and complexity involved in seeking superannuation information from multiple superannuation funds, consistent with this recommendation.

Recommendation 18 The *Family Law Act 1975* (Cth) should be amended so that:

- the spousal maintenance provisions and provisions relating to the division of property are dealt with separately under the legislation; and
- access to interim spousal maintenance is enhanced by the use of Registrars to consider urgent applications.

Agreed.

The Government considers that amending the Act to remove the cross-reference between the property provisions and spousal maintenance provisions will make the legislation clearer and easier to understand.

The Government also supports amendments to make it easier and quicker for vulnerable parties to access urgent interim spousal maintenance orders in the period directly after separation, when they are in immediate need of financial assistance.

Currently, family court registrars are able to make interim orders for spousal maintenance under regulation 18.05(1) of the *Family Law Rules 2004* (Cth) (the Family Law Rules). Deputy registrars can also make interim spousal maintenance orders under regulation 18.06(1) in limited circumstances.

The Government supports the appropriate use of registrars and deputy registrars to make interim spousal maintenance a more accessible and cost effective option for parties.

The Government believes that these reforms should be complemented by comprehensive guidance material for parties, the judiciary and the legal sector on the purpose of spousal maintenance and the process for assessing spousal maintenance applications.

Recommendation 19 The *Family Law Act 1975* (Cth) should be amended to include a statutory tort of family violence that would provide remedies consistent with existing common law remedies.

Noted.

The Government will further consider how the impacts of family violence would be addressed by a statutory tort of family violence. This will include whether the establishment of a statutory tort, being a civil remedy required to be sought and proved by a party, is the most appropriate reform option.

The Government believes that a tort of family violence may increase conflict and acrimony between parties, with a subsequent impact on children, and have limited applicability due to the need to prove loss or damage. Additionally, the tort may be costly and result in lengthy hearings, potentially causing delays in the resolution of family law property matters. Consultation with key stakeholders has indicated a lack of support for this recommendation.

Recommendation 20 The *Family Law Act 1975* (Cth) should be amended to extend s 69ZX to property settlement proceedings.

Agreed.

The Government supports appropriate protection of parties in family law property proceedings where allegations or findings of family violence are present.

In 2018, the Government introduced the *Family Law Amendment (Family Violence and Cross-examination of Parties) Act 2018*, which commenced in 2019. The provisions in the Act partially address this recommendation, by introducing new mandatory safeguards for victims of family violence in all family law proceedings, including property proceedings. This includes a ban on direct cross-examination in certain circumstances.

In making this recommendation, the ALRC has endorsed Recommendation 18 of the Henderson Inquiry. That recommendation refers to amending sections 69ZN and 69ZX of the Act to extend to property division matters. Section 69ZN contains principles for conducting child-related proceedings, and section 69ZX sets out the court's general duties and powers relating to evidence when giving effect to the principles in section 69ZN. Both sections are contained in Part VII, Division 12A – 'Principles for conducting child-related proceedings' of the Act.

Recommendation 21 The *Family Law Act 1975* (Cth) should be amended to:

- require that parties take genuine steps to attempt to resolve their property and financial matters prior to filing an application for court orders; and
- specify that a court must not hear an application unless the parties have lodged a genuine steps statement.

A failure to make a genuine effort to resolve a matter should have costs consequences.

Agreed in Principle.

The Government encourages greater use of non-court based avenues to resolve property and financial matters where appropriate, and agrees that access to courts should be retained to resolve matters where proportionate and justified. The Government agrees in principle that some legislative system of incentives to resolve matters prior to filing an application for court orders and/or disincentive for filing an application for court orders without proper effort prior to this point is appropriate. The Government is also cautious on this point and notes the difficulty inherent in designing a system that operates effectively and justly in practice.

The Government is considering the most appropriate way to achieve this outcome, while not creating a regime that is unnecessarily onerous for parties to comply with. It will be necessary to clearly define what constitutes 'genuine steps', what would satisfy the requirement, and what exemptions from complying with the requirement are considered appropriate (for example, matters involving family violence). The Government's consideration of this recommendation will also include how this should align with parenting matters, and be informed by the work to be done as part of the Government's response to Recommendation 23. The Government will give further consideration to the costs consequences aspect of this recommendation, based on

alternative legislative models for instituting cost consequences designed to increase resolution of matters prior to filing an application for court orders.

It is notable in relation to this recommendation that the Government has invested in services to provide practical support to parties to achieve resolution of their property and financial matters outside the court system. Under the 2018 Women's Economic Security Statement, the Government has provided new funding for property mediation services and to trial lawyer-assisted property mediation.

This includes the following initiatives that are currently in place:

- $13 million each year on an ongoing basis to the 65 Family Relationship Centres across Australia to provide property mediation services, and
- $10.3 million to legal aid commissions across Australia to trial lawyer-assisted mediation for property matters with net asset pools of up to $500,000.

The Government also provided $5.9 million to the federal family courts to trial simpler and faster court processes for family law property cases with net asset pools of up to $500,000, where such matters do come before the courts.

Recommendation 22 Regulation 25 of the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth), which refers to 'equality of bargaining power between the parties', should be amended to refer to the 'equality of bargaining power between the parties, including an imbalance in knowledge of relevant financial arrangements'.

Not Agreed.

The definition of '*family dispute resolution*' in section 10F of the Act is very broad and covers both parenting and property disputes. Therefore, the accompanying regulations, the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (the Regulations), apply to both types of dispute.

The Government does not consider that regulation 25, which provides a non-exhaustive list of factors which a family dispute resolution (FDR) practitioner is obligated to consider in determining suitability for FDR, requires amendment. The Government considers that equality of bargaining power between the parties already requires consideration of any imbalance in knowledge of relevant financial arrangements.

The Attorney-General's Department will clarify this issue in the existing suite of web-based fact sheets which will be communicated to FDR practitioners.

Recommendation 23 The *Family Law Act 1975* (Cth) should be amended to require Family Dispute Resolution Providers to provide a certificate to the parties in all matters where some or all of the issues in dispute have not been resolved.

Noted.

The Government notes that this recommendation should be read together with the ALRC's proposal at paragraph 8.103 of its Report, that section 60I certificates should apply to both parenting and property matters, with the current categories of certificates to be amended as outlined at paragraph 8.98 of its Report.

There are a variety of views in the family law sector about the efficacy and purpose of section 60I certificates, whether the current certificate categories are appropriate and understood, or whether similar certificates could be applied in property mediations. The Government will consider this recommendation in the context of those issues, as well as in the context of Government's consideration of Recommendations 21 and 24.

Recommendation 24 Sections 10H and 10J of the *Family Law Act 1975* (Cth), which provide for confidentiality and inadmissibility of discussions and material in Family Dispute Resolution in relation to parenting matters, should be extended to Family Dispute Resolution for property and financial matters. The legislation should provide an exception for a sworn statement in relation to income, assets, superannuation balances, and liabilities that each party signs at the start of Family Dispute Resolution, which should be admissible.

Noted.

The Government notes that the ALRC made this recommendation to support implementation of FDR in property and financial matters (Recommendation 23 relates). As noted by the ALRC, confidentiality and inadmissibility in FDR is the subject of some debate and changes to the existing position were not canvassed as part of the ALRC Review.

As referred to in response to Recommendation 21, the Government encourages greater use of non-court based avenues to resolve property and financial matters where appropriate. The Government also strongly supports ensuring parties comply with their obligation to provide full disclosure of their financial assets and refers to its agreement and response to Recommendation 25. The Government will further consider this recommendation in the course of the development of legislative amendments, as well as in the context of its consideration of Recommendations 21 and 23.

Recommendation 25 The *Family Law Act 1975* (Cth) should be amended to clearly set out the disclosure obligations of parties, and the consequences for breach of those obligations.

Agreed.

The Government considers that disclosure obligations are fundamental to the principle of transparency, and to the fair resolution of property disputes. Non-disclosure is raised as a

commonly encountered problem in property matters, and can perpetuate financial abuse. The duty of disclosure is currently contained in the Family Law Rules and *Federal Circuit Court Rules 2001* (Cth), although the duty is expressed differently in the two sets of rules.

The Government agrees that it is more appropriate to include the disclosure obligations in the Act rather than the rules, to make them more prominent and visible to users, legal practitioners and other relevant advisers. The Government also supports including the consequences of a breach of these obligations in the Act.

As noted above, the Government has provided funding under the 2018 Women's Economic Security Statement to the Australian Taxation Office to develop an electronic information-sharing system to give family law courts improved visibility of parties' superannuation assets when making property orders. This measure will strengthen the operation of the disclosure obligations under the Act by making it harder for parties to hide or under-disclose their assets.

Recommendation 26 The *Family Law Act 1975* (Cth) and the *Child Support (Assessment) Act 1989* (Cth) should be amended to increase the scope of matters which may be arbitrated, whether or not upon referral from a court. Those matters should include all financial issues, including child maintenance and child support, subject to limitations. Appropriate occasions for arbitration would not include disputes:

- relating to enforcement;
- under ss 79A or 90SN of the *Family Law Act 1975* (Cth) (subject to limitations); and
- in which a litigation guardian has been appointed.

Agreed.

The Government supports strengthening arbitral processes and encourages parties to use arbitration in their family law matters, where appropriate. This is consistent with the Government's overarching objective of encouraging timely and more cost-effective methods of resolving family law disputes outside the court system. The Government is considering how to appropriately expand arbitration to all financial issues, including child maintenance and child support, and appropriate limitations, noting this recommendation was not specifically proposed in the ALRC Discussion Paper.

In the context of this recommendation, the ALRC Report also noted that the Family Law Act currently has two different lists of the types of financial disputes that can be arbitrated for the purposes of the Act – one list for court-ordered arbitration, and another list for private arbitration. The list of matters which may currently be arbitrated as part of a court-ordered arbitration is more extensive than private arbitration. In line with the objective of promoting the use of arbitration, and given that both forms of arbitration require the consent of the parties, the Government will consider the appropriateness of removing the distinction between court-ordered and private arbitration in relation to the matters that may be referred.

Recommendation 27 The *Family Law Act 1975* (Cth) should be amended to remove the opportunity for a party to object to registration of an arbitral award, while maintaining appropriate safeguards for the integrity of registered awards.

Agreed.

The Government agrees that the Act be amended to remove the opportunity for a party to object to registration of an arbitral award, as this will increase the certainty of arbitral awards, and reduce legislative complexity in the arbitration process.

Parties who have concerns with an arbitral award will continue to be able to raise these concerns by applying to have the award reviewed under section 13J, or set aside under section 13K of the Act. The Government considers that any concerns around a lack of due process, procedural fairness, or a question of law as part of an arbitral award will be able to be dealt with under these existing provisions.

Recommendation 28 The *Family Law Act 1975* (Cth) should be amended to allow some children's matters to be arbitrated. Appropriate occasions for arbitration in children's matters would not include disputes:

- relating to international relocation;
- relating to medical procedures of a nature requiring court approval;
- relating to contravention matters;
- in which an Independent Children's Lawyer has been appointed; and
- involving family violence which satisfy ss 102NA(1)(b) and (c) of the *Family Law Act 1975* (Cth).

Agreed in Principle.

As the ALRC Report notes, there are a number of sensitivities in relation to arbitration of children's matters. These include:

- the extent to which states must remain involved in decisions regarding the best interests of children in order to fulfil their obligations under the United Nations Convention on the Rights of the Child
- the need to ensure any scheme of arbitration does not impermissibly bestow judicial functions on a non-judicial body contrary to the Constitution, and
- limitations on the types of matters that can be arbitrated as being beyond what a parent can authorise and requiring the court's sanction under the traditional *parens patriae* jurisdiction of the courts.

In light of these sensitivities, the ALRC recommends that arbitration of children's matters should only proceed upon referral from a court, with the consent of the parties, and that the legislation should provide guidance as to when a matter is not appropriate for arbitration. The ALRC also propose that an arbitral award in relation to a children's matter should not take effect by way of registration (as occurs in financial cases), but should only become an order of the court after a court has reviewed the matter and satisfied itself that the order should be made. As an additional protection, the ALRC considers the Act should explicitly empower an

arbitrator of a children's matter to terminate an arbitration and refer it back to the referring court, should issues emerge during the course of the arbitration which are inconsistent with the referral made by the judge.

The Government agrees with the principle that the desirability of increased resolution by arbitration extend to children's matters but is taking a cautionary approach, noting that even with the protections proposed by the ALRC, a number of complexities in respect of arbitration of children's matters must be analysed further to assess whether such a change would benefit parties to proceedings and promote arrangements that would be in the best interests of children. These include evidentiary issues such as the evidence upon which a judge would determine a matter is suitable for arbitration; how family reports would be ordered and used in the arbitral process; how children's views would be taken into account; the potential costs to parties; and the competencies and accountabilities of those who might conduct arbitration in children's matters.

Recommendation 29 The *Family Law Act 1975* (Cth) should be amended to provide that upon application by an arbitrator, or by a party to an arbitration, a court has power to make directions at any time regarding the further conduct of the arbitration, including power to make a direction terminating the arbitration (whether or not the arbitration was referred from a court).

Agreed.

The Government supports increasing efficiency within the arbitration process, to ensure that parties who choose arbitration will be provided with an efficient and timely resolution to their dispute.

Currently, parties to an arbitration may apply to a court to make orders to facilitate the effective conduct of the arbitration. The Government agrees that it is appropriate for arbitrators to also be able to make such an application where necessary to facilitate the effective conduct of the arbitration.

The Government also agrees that it is appropriate for a court to have the power to terminate an arbitration process, upon application by an arbitrator or a party. Given that an arbitrator can currently terminate an arbitration if they consider a party does not have capacity to take part in the arbitration, the Government considers it appropriate to legislate for a court to have similar powers.

Recommendation 30 The *Family Law Act 1975* (Cth) should include an overarching purpose of family law practice and procedure to facilitate the just resolution of disputes according to law, as quickly, inexpensively, and efficiently as possible, and with the least acrimony so as to minimise harm to children and their families.

Agreed in Principle.

The Government agrees with the principle that stronger statutory case management powers, including an overarching purpose provision, will enable the family courts to resolve matters in a faster, more efficient and inexpensive manner. There is precedent for this recommendation

in the analogous case management provisions in the *Federal Court of Australia Act 1976* (Cth) (the Federal Court Act) and various pieces of state and territory legislation that provide for a similar 'overarching purpose'.

Sections 67 and 190 of the *Federal Circuit and Family Court of Australia Act 2021* (the FCFC Act) introduce new case management provisions which address, at least in part, ALRC Recommendation 30. The FCFC Act provides that the overarching purpose of the family law practice and procedure provisions is to facilitate the just resolution of disputes according to the law and as quickly, inexpensively and efficiently as possible. Parties will have a duty to act consistently with the overarching purpose. Breach of the duty will have costs consequences for the person who fails to act in accordance with the overarching purpose.

The Government will give further consideration to whether the overarching purpose should also include drafting which notes a specific reference to resolving matters 'with the least acrimony so as to minimise harm to children and their families' as proposed by the ALRC. It is appropriate to receive views from relevant stakeholders as to whether a different form of words is more appropriate, to avoid any potential that this wording could be interpreted to discourage the disclosure of family violence due to concerns that such disclosure may be perceived as acrimonious.

Recommendation 31 The *Family Law Act 1975* (Cth) should impose a statutory duty on parties, their lawyers, and third-parties to cooperate amongst themselves, and with the courts, to assist in achieving the overarching purpose. Breach of the duty will have costs consequences for the person who fails to act in accordance with the overarching purpose.

Agreed in Principle.

The Government agrees with the principle that a statutory duty to cooperate in achieving the overarching purpose will, in theory, enable the family courts to resolve matters in a faster, more efficient and inexpensive manner. Similarly to Recommendation 30, there are analogous provisions in the Federal Court Act and various pieces of state and territory legislation that provide statutory duties to comply with the relevant 'overarching purpose' provision, along with provisions creating costs consequences for its breach.

Sections 68 and 191 of the FCFC Act introduce new case management provisions which address, in substantial part, ALRC Recommendation 31. The court will be able to order that a party's lawyer bear costs personally if the lawyer fails to take account of the parties' duty to act consistently with the overarching purpose, described under Recommendation 30, and assist the party to comply with the duty.

For example, if a party wanted to prolong litigation as a strategy to increase costs to the other party, their lawyer will be obliged to explain that this is contrary to the overarching purpose and may have adverse cost consequences.

The intention of these amendments is to bring about a cultural change in the conduct of proceedings before the courts to have parties focus on resolving disputes quickly and efficiently, thereby reducing the personal, emotional and financial costs of prolonged litigation.

The Government agreeing in principle also recognises however that further analysis is required in respect of the best and most practical way to draft other parts of the proposed statutory duty set out in the recommendation, including the duty to be imposed upon parties to cooperate among themselves, with lawyers and with the court. While there are undoubtedly unnecessary uncooperative practices occurring that result in increasing costs to parties in the present operation of the system, it is not necessarily clear, and would likely be a contestable concept on any given facts, as to what constitutes 'cooperation between lawyers'. Further, detailed consideration would need to be given to how the duty to cooperate interacts with legal professional privilege and other legal obligations. It is also unclear how the duty would apply to third parties. While the Federal Court Act imposes a similar duty on parties to act consistently with the overarching purpose, this recommendation proposes extending this duty to lawyers and third parties. The Government notes that under the Federal Court Act and as will be introduced by the FCFC Act, lawyers must 'take account of the duty' and 'assist the party to comply with the duty', which are directed at the same overall objective.

Further consideration will also need to be given to stakeholder concerns about whether such a provision would have family safety implications and whether there are appreciable risks of circumstances arising in which it could be used by parties in a manner contrary to the intended purpose.

Recommendation 32 The *Family Law Act 1975* (Cth) should be amended to provide the courts with a power to make an order requiring a litigant to seek leave of the court prior to making further applications and serving them on the other party where the court is satisfied that such an order is appropriate for the protection of the respondent and/or any children involved in the proceedings, having regard to the overarching purpose of family law practice and procedure.

Agreed in Principle.

The Government agrees in principle that the present vexatious proceedings and summary dismissal powers do not provide sufficient scope for courts to make appropriate orders in cases where one party oppresses the other by repetitive filing of applications and the serving of those applications on the other party.

Broadly, the Government considers that this recommendation is an appropriate means of ensuring that the court has sufficient power to protect parties from proceedings that may have a detrimental effect on that person's wellbeing or parenting capacity. There is clear research, and persistent submissions from stakeholders, in relation to the serious negative consequences that the misuse of court processes can have on parties to proceedings and their children. It is important to ensure that the vexatious proceedings provisions in the Act adequately balance an individual's right to access the courts and justice against the potential harm that serial proceedings may have on parties and their children. Given the significance that the family law system and the Act place on the best interests of the child, consideration will need to be given to the most appropriate way to address the gap in the court's power identified in the case of *Marsden & Winch* (2013) 50 FamLR 409.

Recommendation 33 Section 45A of the *Family Law Act 1975* (Cth) should be amended to provide that the courts' powers of summary dismissal may be exercised where the court is satisfied that it is appropriate to do so, having regard to the overarching purpose of family law practice and procedure.

Agreed in Principle.

The Government agrees with the principle that the court should be empowered and act proactively to dismiss unmeritorious applications. However, the Government also notes that the powers proposed in this recommendation are very broad, and it is reasonable to assess through consultation whether such powers are needed given the already broad powers provided in section 45A of the Act relating to vexatious proceedings or proceedings that have no reasonable prospects of success. Further consideration is required to ensure that any proposed amendments to implement this recommendation do not make it more difficult for stakeholders to navigate the legislation or are otherwise duplicative.

Given that adopting the recommendation would expand the court's present powers by directly referencing the overarching purpose provision proposed in Recommendation 30 (thereby allowing the court to take into account additional factors in deciding how to exercise its discretion under section 45A), the implementation of this recommendation will be contingent upon whether, and how, the recommendations relating to an overarching purpose of family law practice and procedure are implemented.

Recommendation 34 The family courts should consider promulgating a joint Practice Note for Case Management which describes the courts' approaches to the family law practice and procedure provisions.

Noted.

The Government is broadly supportive of the ALRC's recommendation and its suggested inclusions for a joint Practice Note for Case Management, and notes the recommendation in acknowledgement of the fact that it is a matter for the family courts whether to adopt such a Practice Note and to determine its contents.

The Government notes that bringing together the Family Court of Australia and the FCC will improve user experiences with the courts by facilitating, for the first time, consistent case management processes.

The ALRC recommended that the Practice Note for Case Management include specialist lists for Magellan cases, high risk domestic violence cases, fast track small property matters, and any other sub-specialty the courts think appropriate.

The Government is investing $13.5 million, over three years, to support the federal family law courts to pilot a systematic approach to risk screening, triaging of matters according to identified risks and a specialist family violence list to hear high-risk matters at three court locations. This pilot will run over a two year period and be independently evaluated to inform future Government decisions. This is in addition to the Government's investment of

$5.9 million over three years to trial in four locations a simpler, faster court process for dividing small property pools of up to $500,000. In response to the COVID-19 pandemic, the courts have established a specialist COVID-19 List for matters arising as a result of the pandemic, and the Government has provided $2.5 million to ensure the COVID-19 List can continue while the impacts of COVID-19 continue to be felt.

Recommendation 35 The *Family Law Act 1975* (Cth) should be amended to provide for the appointment and protection of referees in the same terms as provided for in ss 54A and 54B of the *Federal Court of Australia Act 1976* (Cth).

Noted.

Whilst the Government supports increasing efficiency in family law proceedings with a view to minimising expense and length of trial for litigants, it considers more consultation is required on the appropriateness and potential efficiencies of appointing referees in the family law context before this recommendation is adopted.

The Government notes that the Federal Court of Australia can refer proceedings, or any part of proceedings, to a referee for inquiry and report. That court has discretion to deal with a referee's report as it considers appropriate. The Government notes that the power to appoint referees in the Federal Court of Australia is intended to promote the efficient resolution of proceedings in court, where technical expertise is required and it is neither cost-effective nor appropriate for a judge to gain the necessary in-depth expertise to pronounce on technical questions. In light of the differences in nature between the jurisdiction exercised by the Federal Court of Australia and the family law courts, the Government is considering this matter before determining whether this model should be adopted in the family law context. Given the narrower jurisdiction of family law matters, in comparison to the Federal Court of Australia, the family law courts may less often have a need for the evidence of referees than in the Federal Court.

Recommendation 36 Section 117 of the *Family Law Act 1975* (Cth) should be amended to:

- remove the general rule that each party to proceedings under the Act bears his or her own costs; and
- articulate the scope of the courts' power to award costs.

Noted.

The current general principle in family law matters that parties bear their own costs recognises that, unlike other civil matters, there are seldom clear 'winners' and 'losers' in family law matters, and that, in parenting matters, the primary consideration is the best interests of children. The general rule that parties bear their own costs is also intended to make access to the family courts as fair and equitable as possible.

The Government is committed to the underlying intent of this recommendation, that is, to reduce unnecessary and expensive legal disputes, and to ensure that family law proceedings aren't pursued unreasonably, or in some cases where excessive costs render it such that is not in the best interests of the parties, or the children in the matter. However, the removal or amendment of the general rule is necessarily and fundamentally linked to how a court would otherwise award costs in the majority of cases and upon what alternative principles that

allocation might be determined. The basis on which the court would award costs in the majority of cases is not identified by the ALRC, and this recommendation was not specifically proposed in the ALRC Discussion Paper.

It is possible that removal of the principle as it is currently set out in section 117 (the section 117 principle) may encourage more adversarial litigation in some cases, particularly where a high degree of animosity already exists between the parties, in order to ensure cost orders are not made against them. Additionally, removal of the section 117 principle would seemingly require the court to make a costs order for every matter. This may increase the burden on courts and parties and contribute to further delays in resolving family law matters.

Subject to the above, the Government agrees that a clarifying amendment that better articulates the scope of the courts' power under section 117, particularly in cases of systems abuse and matters where the overarching purpose and practice of family law and the obligations on parties and their lawyers are not complied with (see also Recommendations 30 and 31), coupled with approaches to facilitate court practice to make more liberal use of costs orders in appropriate cases, may better assist to ensure costs are appropriately contained and fairly allocated and to deter parties from engaging in protracted and vexatious proceedings.

Recommendation 37 The *Family Law Act 1975* (Cth) should be amended to provide courts with an express statutory power to exclude evidence of 'protected confidences'. In determining whether to exclude evidence of protected confidences the court must:

- be satisfied that it is likely that harm would or might be caused, directly or indirectly, to a protected confider, and the nature and extent of the harm outweighs the desirability of the evidence being given; and
- ensure that in parenting proceedings, the best interests of the child is the paramount consideration when deciding whether to exclude evidence of protected confidences.

Agreed in Principle.

The Government considers that this recommendation seeks to appropriately strike the balance between protecting sensitive medical and other records from going into evidence, whilst also recognising the importance of parties being able to rely on relevant subpoena material, and ensuring that decision-makers have sufficient evidence before them to inform their decision.

Although there is some existing capacity for the uniform Evidence Acts and the common law to enable courts to exclude evidence of protected confidences, these mechanisms are not comprehensive or, in relation to the common law, easy to articulate with any certainty. An express power to exclude protected confidences would recognise the public interest in ensuring that parties receive therapeutic assistance as required, while further enshrining in legislation that the best interests of the child is the paramount consideration when determining whether to exclude evidence in parenting proceedings.

Recommendation 38 The *Family Law Act 1975* (Cth) should be amended to require parties to meet with a Family Consultant to assist their understanding of the final parenting orders made by a court following a contested hearing.

Noted.

The Government recognises the intense frustration that parents and others experience when parenting orders are contravened and is strongly supportive of measures to ensure families comply with parenting orders as a means of reducing conflict and achieving better outcomes for families and children.

Enforcement of parenting orders is a complex and contentious issue. Courts considering enforcement actions may be faced with difficulties in balancing the interests of upholding orders of the court, fulfilling expectations of litigants, instituting appropriate deterrents for non-compliance and making decisions in a child's best interest.

The ALRC notes that entrenched conflict is characteristic of contravention matters, with research showing that few applications for enforcement represent one-off disputes, but tend to be part of an ongoing conflict involving multiple proceedings with contravention applications often reflecting a range of relationship issues, such as unresolved feelings about the breakdown of the marriage, grievances about child support payments or other financial matters, and anxieties about step-parents, rather than simply being a dispute over compliance with parenting orders.

The Government notes the ALRC's finding that a lack of understanding of orders is one reason for non-compliance, and the Government supports increasing this understanding for parties, but considers that this recommendation is unlikely to be a panacea to one of the most challenging problems in the present system.

The Government considers that substantial further work is necessary with the family courts and other relevant stakeholders on the most appropriate ways to ensure court orders can be better understood by those parties for whom this is an issue, as well as other options to address non-compliance with, and enforcement of, court orders. Further consideration of the issue of non-compliance with orders will include consideration of the role of Family Consultants.

Recommendation 39 The *Family Law Act 1975* (Cth) should be amended to provide that:

- in all parenting proceedings for final orders, the courts must consider whether to make an order requiring the parties to see a Family Consultant for the purposes of receiving post-order case management; and
- the appointed Family Consultant has the power to seek that the courts place the matter in a contravention list or to recommend that the court make additional orders directing a party to attend a post-separation parenting program.

Noted.

As discussed in the response to Recommendation 38 above, the Government supports helping families comply with parenting orders to reduce conflict and achieve better outcomes for families and children.

The provision of appropriate post-order support may assist the efficiency of the courts by avoiding matters unnecessarily being listed for contravention hearings (and thus reducing case burdens) and/or where appropriate, seeking matters to be placed on contravention lists and advising on orders for the parties to attend post-separation programs.

The Government will work with the family courts and other relevant stakeholders on the most appropriate options to address non-compliance with, and enforcement of, court orders. This will include with respect to the role of Family Consultants.

Recommendation 40 The *Family Law Regulations 1984* (Cth) should be amended to require leave to appeal interim parenting orders. Leave should only be granted where:

- the decision is attended by sufficient doubt to warrant it being reconsidered; and
- substantial injustice would result if leave were refused, supposing the decision to be wrong.

Agreed in Principle.

While the Government agrees in principle with this recommendation, further consultation and consideration is required, noting it was not proposed in the ALRC Discussion Paper and has not been widely canvassed with stakeholders.

A requirement to seek leave before appealing interim matters is a common feature across appeal courts, and applies to orders by the family courts in non-parenting matters. By requiring parties to seek leave to appeal, and refusing leave for applications lacking merit, meritorious applications would be heard more promptly. As outlined by the ALRC, the leave application assessment process would also allow the court to identify elements of cases which they wish to fast track, for example where there is a substantial risk of family violence or harm to a child if the interim decision stands.

Recommendation 41 The *Family Law Act 1975* (Cth) should be amended to explicitly state that when a new parenting order is sought, and there is already a final parenting order in force, the court must consider whether:

- there has been a change of circumstances that, in the opinion of the court, is significant; and
- it is in the best interests of the child for the order to be reconsidered.

Agreed.

The Government agrees with the ALRC that the principle, as stated in the case of *Rice & Asplund* (1978) 6 Fam LR 570, should be clarified in legislation.

Given the principle is particularly important to parties seeking variations to parenting orders, its codification would assist with making the law clearer to the public, particularly for unrepresented litigants.

Recommendation 42 Part VII Div 13A of the *Family Law Act 1975* (Cth) should be redrafted to achieve simplification, and to provide for:

- a power to order that a child spend additional time with a person;
- a power to order parties to attend relevant programs at any stage of proceedings; and
- a presumption that a costs order will be made against a person found to have contravened an order.

Agreed.

The Government supports re-writing the compliance and enforcement provisions (Part VII Div 13A of the Act). Drafting the legislation so that it is clear and concise will assist parties understand the consequences of non-compliance with parenting orders and the types of remedies that can be sought.

The Government supports this recommendation and notes that the courts already have powers to make orders for additional time, to attend a post-separation parenting program, and to award costs if the circumstances warrant such an order, with a requirement to consider making a costs order in certain circumstances. Simplification and clarification of these provisions, including the cost provisions, would make the enforcement provisions clearer for parties, and for judges to apply. The Government supports in principle a presumption that a costs order will be made against a person contravening an order without reasonable excuse, noting that such a presumption would need to be rebuttable and allow for a respondent to satisfy the court that such an order should not be made.

Recommendation 43 The *Family Law Act 1975* (Cth) should be amended to:

- replace 'family consultants' with 'court consultants'; and
- redraft s 11A to include a comprehensive list of functions that court consultants would provide to children, families, and the courts.

Agreed in Principle.

The Government is supportive of a family law framework which is clear and reduces duplication to the greatest extent possible. In this context, the Government sees merit in clarifying the expansive functions of family consultants through a redraft of section 11A of the Act. The Government, notes, however, that none of the items in the list of functions proposed by the ALRC are inconsistent with those already prescribed by sections 11A and 65L. The Government is also not averse to the idea of changing the name of family consultants, to clarify their court-based role and attempt to distinguish them from private family law practitioners.

Recommendation 44 Section 68LA(5) of the *Family Law Act 1975* (Cth) should be amended to include a specific duty for Independent Children's Lawyers to comply with the *Guidelines for Independent Children's Lawyers*, as promulgated from time to time and as endorsed by the family courts.

Noted.

Guidelines for Independent Children's Lawyers are published on the Family Court of Australia's website, and have been endorsed by the Chief Justice of the Family Court of Australia, the Family Court of Western Australia and the FCC. The Guidelines provide information and guidance on the courts' general expectations.

The Government questions the benefit in enshrining the guidelines in the Act, as applying the guidelines is already a requirement of the Family Law Rules.[1] Further, as the Guidelines are not prescriptive in nature, and do not compel engagement with children, or have any consequences for non-compliance, it is not clear what would be achieved by including the provisions in the Act.

The Government is aware of stakeholder concerns regarding the variation in practice and perspectives of Independent Children's Lawyers in meeting their obligations upon appointment to meet with the child and assist their understanding of and participation in the family court process. However, it is unclear how the recommendation would address this issue and the Government is further considering how to achieve the outcomes of furthering children's participation through engagement by competent professionals.

[1] Rule 1.08(k) of the Family Law Rules (which apply to all courts exercising jurisdiction under the Act with the exception of the Federal Circuit Court) provides that each party has a responsibility to be aware of, and abide by, the requirements of any practice direction or guideline published by the court. Additionally, section 43(2)(a) of the *Federal Circuit Court of Australia Act 1999* provides that the Family Law Rules are capable of application to the practice and procedure of the Federal Circuit Court, in circumstances where the Federal Circuit Court Rules are insufficient.

Recommendation 45 The Australian Government should ensure the availability of Indigenous Liaison Officers in court registries where they are required.

Agreed in Principle.

Aboriginal and Torres Strait Islander families can face barriers in accessing the family law system. For example, Indigenous families may be reluctant to use family law services due in part to concerns about court processes and language barriers. Indigenous women and children are also disproportionately affected by family violence.

The Government considers that Indigenous Liaison Officers (ILOs) can play a vital role by engaging extensively with the Indigenous community, and will monitor where they may be required. The role of the ILO can include building relationships between the courts and local communities, referring Indigenous litigants to services, preparing cultural reports, liaising with community elders, and producing and delivering culturally appropriate programs for litigants, and explaining court processes and orders.

The Government notes that the FCC continues to take steps to provide greater access to justice for Aboriginal and Torres Strait Islander people through the expansion of their Indigenous Lists. In 2019-20, the FCC expanded the family law Indigenous Lists into Adelaide, Alice Springs, Darwin and Sydney. Indigenous Lists differ from other court lists as they adopt a degree of informality. The Judge sits at the bar table with the parties, their legal representatives and any other family members or extended kin, there are specialised support services available on the day, and the court is closed to the public.

Recommendation 46 The *Family Law Act 1975* (Cth) should be amended to include a supported decision making framework for people with disability consistent with recommendations from the ALRC Report 124, *Equality, Capacity and Disability in Commonwealth Laws*.

Noted.

The Government considers further work is required across Government to determine whether, and if so, how, to implement this recommendation.

As distinct from the current 'substituted' decision making – where a third party makes a decision for the represented person – supported decision making enables and encourages individuals with disabilities to make their own decisions about their lives with the support of others.

Supported decision making is an emerging area of law and how to properly achieve it in practice is the subject of ongoing conversations with academics, disability advocates and guardianship tribunals. At this time, there is limited empirical evidence about how supported decision making works in practice. The Government will monitor developments in other relevant contexts, including guardianship and medical treatment at the state and territory level and in the National Disability Insurance Scheme at the Commonwealth level, to inform a family law system response. The Government also considers that improved disability awareness and training for family law professionals would benefit this process.

Recommendation 47 The *Family Law Act 1975* (Cth) should include provisions for the appointment of a litigation representative where a person with disability is unable to conduct the litigation. These provisions should be consistent with the recommendations of the ALRC Report 124, *Equality, Capacity and Disability in Commonwealth Laws*.

Noted.

The Government considers further work is required across Government to determine whether, and if so, how, to implement this recommendation.

Currently, the Act and associated court rules provide for the appointment of a litigation representative (also known as a 'litigation guardian' or 'case guardian'). Litigation guardianship is a form of substituted decision making. The ALRC recommends a re-conceptualisation of the role and duties of litigation representatives in family law proceedings so that their primary role is to support people with disability to exercise their legal capacity. However, as noted in the response to Recommendation 46 above, there is no consensus understanding of how best to implement supported decision making, and the ongoing role of litigation guardianship in Australia should thus continue to be considered in this emerging and evolving context.

Recommendation 48 The Australian Government should work with state and territory governments to facilitate the appointment of statutory authorities as litigation representatives in family law proceedings.

Agreed in Principle.

The Government notes the broader considerations relating to this recommendation's full implementation are in the responses to Recommendations 46 and 47, above. Improving the process to more easily secure the appointment of litigation representatives is crucial to reforms in this area.

The *Civil Law and Justice Legislation Amendment Act 2018* (Cth), which commenced in 2018, made amendments to section 117 of the Act to alleviate the issue of costs implications. Before that amendment came into effect, persons who were appointed as a guardian *ad litem* could be personally liable for costs in proceedings. This discouraged suitable people, who would otherwise be willing to undertake the role, from agreeing to the appointment. To ensure that people are not discouraged from acting as a litigation guardian, the amendment provided protection from costs within appropriate limits.

The Attorney-General is reliant upon state and territory guardianship tribunals and disability advocacy organisations to support this function in the family law courts. The Government will discuss these issues with state and territory governments, disability advocates and the courts.

Recommendation 49 Section 115 of the *Family Law Act 1975* (Cth) should be amended to expand the Family Law Council's responsibilities to include:

- monitoring and regular reporting on the performance of the family law system;
- conducting inquiries into issues relevant to the performance of any aspect of the family law system, either of its own motion or at the request of government; and
- making recommendations to improve the family law system, including research and law reform proposals.

Agreed in Principle.

The Government agrees that the nature and importance of the family law system means that it is necessary that it be subject to regular reviews, including on developing issues.

The Government's commitment to ensure the performance of the family law system is actively monitored is evidenced by the range of recent inquiries it has established, including the House of Representatives Standing Committee on Social Policy and Legal Affairs' 2017 inquiry, *A better family law system to support and protect those affected by family violence*, chaired by Senator the Hon Sarah Henderson, the ALRC's Review, and the Joint Select Committee on Australia's Family Law System.

Regular review of the system's performance in meeting the needs of users builds an evidence base for ongoing improvement and reform, and the Government has committed to re-establishing the Family Law Council, coinciding with the completion of the Joint Select Committee's inquiry.

Recommendation 50 The Family Law Council should establish a Children and Young People's Advisory Board, which would provide advice and information about children's experiences of the family law system to inform policy and practice.

Noted.

The Government agrees that the experience of children is an important factor in policies and legislation about the family law system, noting that the processes and outcomes of family law matters can have very significant impacts on their lives. The Government will undertake further investigation on how the intended outcome of this recommendation can be effected.

Recommendation 51 Relevant statutes should be amended to require that future appointments of all federal judicial officers exercising family law jurisdiction include consideration of the person's knowledge, experience, skills, and aptitude relevant to hearing family law cases, including cases involving family violence.

Agreed.

The Government carefully considers all potential appointees to ensure that only appropriately qualified candidates are appointed. The Government recognises that nuances and complexity exist in family law, as they do for many other areas of law, and considers it reasonable to enact

a requirement that a decision maker expected to exercise family law jurisdiction has the ability to understand the issues that arise in such proceedings.

The passage of the FCFC Act strengthens the appointment criteria for judges who are appointed to deal with family law matters. Section 11 of the FCFC Act provides that a person is not to be appointed as a judge of the FCFC (Division 1) unless by reason of knowledge, skills, experience and aptitude, the person is a suitable person to deal with family law matters, including matters involving family violence.

Section 111 of the FCFC Act provides that a person is not to be appointed as a judge of the FCFC (Division 2) unless by reason of knowledge, skills, experience and aptitude, the person is a suitable person to deal with the kinds of matters that come before the FCFC (Division 2). To avoid doubt, subsection 111(3) provides that if the kinds of matters that may be expected to come before a person as a judge of the FCFC (Division 2) are family law matters, the person, by reason of their knowledge, skills, experience and aptitude, is a suitable person to deal with those matters, including matters involving family violence.

Recommendation 52 The Law Council of Australia should work with state and territory regulatory bodies for legal practitioners to develop consistent requirements for legal practitioners undertaking family law work to complete annually at least one unit of continuing professional development relating to family violence.

Noted.

This recommendation is not directed to the Government.

The Government supports state and territory regulatory bodies developing requirements for legal practitioners undertaking family law work to complete annual continuing professional development relating to family violence.

The Government has supported increased family violence education and competency for family law professionals by funding the National Domestic and Family Violence Bench Book, and delivering specialised training, including in family violence, for judicial officers across all jurisdictions, family consultants, and Independent Children's Lawyers.

The Government is working with states and territories to consider options for improving the family violence competency of legal practitioners through the Attorneys-General Ministerial Council, supported by the Family Violence Working Group of justice officials. In late 2019, the Government and Family Violence Working Group members circulated a consultation paper to state and territory legal professional bodies and other stakeholders on options to enhance the family violence competency of legal practitioners. Forty-three submissions were received in response to the consultation paper. The Attorney-General's Department is continuing work based on the outcomes of the consultation, to inform recommendations for the Family Violence Working Group members' consideration.

Recommendation 53 The Australian Government Attorney-General's Department should develop a mandatory national accreditation scheme for private family report writers.

Agreed in Principle.

The Government supports ensuring professionals in the family law system are appropriately qualified, trained and accountable. The Government will explore options to improve the competency, quality and overall number of professionals involved in writing family reports, noting the importance of their assessments in assisting the court to determine parenting arrangements in the child's best interests, and also obtaining and representing children's views to the court.

Recommendation 54 The *Family Law Act 1975* (Cth) should be amended to:

- require any organisation offering a Children's Contact Service to be accredited; and
- make it an offence to provide a Children's Contact Service without accreditation.

Agreed in Part.

The Government supports the establishment of an accreditation system for Children's Contact Services (CCSs). The regulation of CCSs through the development of accreditation standards would require all CCSs to be delivered to, and maintained at, a minimum standard that would professionalise the service and ensure the safety and well-being of children, their families and staff. The Government will seek to amend the Act to define what a CCS is and what minimum standards are required for the delivery of such a service.

The Government will explore whether it would be appropriate to make it an offence to provide a CCS without accreditation, noting that this recommendation was not canvassed in the ALRC's Discussion Paper.

Recommendation 55 The *Family Law Act 1975* (Cth) and its subordinate legislation should be comprehensively redrafted.

Agreed in Principle.

The Government recognises the overarching desirability of a family law framework which is as accessible and comprehensible as possible for families who need to use it.

The Government supports in principle the ALRC's suggestions to:

- simplify provisions in the Act to the greatest extent possible
- restructure legislation to assist readability
- redraft the Act in ordinary English to the extent possible, and
- remove or rationalise overlapping or duplicative provisions as far as possible.

However, the Government considers that a targeted redraft of priority areas of the Act is an appropriate first step and will be of greater practical benefit to families than attempting to repeal

and redraft the whole Act. A comprehensive redraft of the Act and its subordinate legislation would be a significant and complex exercise, taking years. In developing legislative amendments to implement other recommendations of the ALRC's Report, the Government will look to simplify and rationalise related provisions with the scope of amendments to be determined based on further consideration and consultation. As subordinate legislation is updated, it will similarly be reviewed and amended to rationalise and simplify provisions.

Recommendation 56 Privacy provisions that restrict publication of family law proceedings to the public, currently contained in s 121 of the *Family Law Act 1975* (Cth), should be redrafted.

Agreed.

The Government agrees that section 121 of the Act should be redrafted to clarify the scope and operation of the privacy obligations owed under the Act. As part of this process, the Government will ensure that the final provision is necessary and proportionate to maintaining privacy, while ensuring it does not unduly prohibit parties' freedom to comment on their own matters.

The Act seeks to strike a balance between competing principles of open justice and the rights of children and families to privacy. The intent of section 121 is to protect the privacy of families and children from intrusive media reporting by prohibiting the publication or dissemination of an account of family law proceedings that may identify a party, witness or other person associated with the proceeding. As family law matters can involve intimate and deeply personal details, there is a need to protect parties and their children from widespread publication of such details with identifying information.

Submissions to the ALRC criticised the current provisions as being difficult to understand and prone to misinterpretation by the public. The ALRC highlighted a number of resulting issues, including confusion about:

- whether private communications are prohibited
- whether information can be shared with professional regulators, family law and family violence service providers, child welfare authorities or government agencies
- the relationship between the offences provided under subsections 121(1) and (2) and the exceptions to these offences under subsection 121(9), and
- whether publication of information on social media is prohibited.

The Government's implementation of this recommendation will work to enhance public understanding of section 121 and the obligations and prohibitions it imposes.

Recommendation 57 The Family Advocacy and Support Service's social support services should be expanded to provide case management to clients who are engaged with the family law system.

Noted.

The FASS are currently funded to provide integrated front-line legal services with social support services. The legal services provide advice and court representation, as well as

explaining the nature and purpose of family law proceedings to self-represented litigants, helping them to identify relevant evidence and documentation. The social support services conduct risk assessments and make safety plans, provide counselling, identify and address issues such as drug and alcohol abuse, and make referrals to appropriate services. These services are generally provided on a one-off basis.

The Government will give further consideration to this recommendation, and whether this role is best performed by FASS, given the range of different support services provided across state, territory and federal governments. The range of services includes the establishment by this Government of DVUs, which provide legal assistance and other support, including access to non-legal services.

Recommendation 58 The Australian Government should work with Legal Aid Commissions in each state and territory to expand the Family Advocacy and Support Service to court locations that have a demonstrable need and to ensure the provision of adequate and appropriate services.

Noted.

The FASS currently operates in 15 family law court registries across Australia, as well as two Northern Territory Local Court registries and eight circuit locations across Tasmania, Western Australia and South Australia. The Government is proud to have funded the establishment and extension of the FASS in family law court registries across Australia, and considers they provide a valuable service to people who have experienced, or are experiencing, domestic and family violence who are accessing the family law system.

The Government will give further consideration to this recommendation, in consultation with National Legal Aid, to identify options to support families in the remaining family law court registries and circuit locations.

Recommendation 59 Family Relationship Centres should be expanded to provide case management to clients with complex needs who are engaged with the family law system.

Noted.

In 2006, the then Government established Family Relationship Centres (FRCs) as a gateway to the family law system, as part of a package of reforms to bring about a cultural shift in the management of parental separation, away from litigation and towards co-operative parenting.

The Government will explore options to better support the growing number of families with complex needs, and appropriate referral pathways for those families.

Recommendation 60 The Australian Government should work with Family Relationship Centres to develop services, including:

- financial counselling services;
- mediation in property matters;
- legal advice and Legally Assisted Dispute Resolution services; and
- Children's Contact Services.

Noted.

FRCs provide Australian families with access to a range of services. FRCs can provide legally assisted dispute resolution, including legal advice, to enable clients to access legal support while they are resolving their family law disputes.

Since July 2019, FRCs have been receiving additional funding through the 2018 Women's Economic Security Statement to deliver mediation services to help separated families reach agreement on dividing their property.

Some FRCs are co-located with CCSs which means that clients have access to supervised changeovers or visits at the same location that they can access other support services through the FRC. However, CCSs generally operate distinctly and separately from FRCs. At a local level, CCSs are often operated by a different organisation to that of the FRC. They require specific features to operate safely and effectively, and these features may not be available at the FRC facility.

The Government funds a range of organisations to deliver financial counselling services to people in, or at risk of, financial hardship. Some of these funded organisations are also funded separately to deliver FRCs.