Law Council
OF AUSTRALIA

Joint Select Committee on Australia's Family Law System

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2019 Executive as at 14 September 2019 are:

- Mr Arthur Moses SC, President
- Ms Pauline Wright, President-elect
- Dr Jacoba Brasch QC, Treasurer
- Mr Tass Liveris, Executive Member
- Mr Ross Drinnan, Executive Member
- Executive Member, Vacant

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council of Australia acknowledges that this submission has been prepared by the Executive of its Family Law Section, with assistance from the Business Law Section.

The Family Law Section is the largest of the Law Council's specialist Sections. Since its inception in 1985, the Family Law Section has developed a strong reputation as a source for innovative, constructive and informed advice in all areas of family law reform and policy development. With a national membership of more than 2,400 it is committed to furthering the interests and objectives of family law for the benefit of the community.

The current members of the Family Law Section Executive are:

- Paul Doolan (Chair)
- Michael Kearney SC (Deputy Chair)
- Di Simpson (Treasurer)
- Wendy Kayler-Thomson (Immediate Past Chair)
- Dr Jacoba Brasch QC
- Minal Vohra SC
- Greg Howe
- Jaquie Palavra
- Nicola Watts
- Jason Walker
- Marcus Turnbull

Law Council Constituent Bodies

The Law Council is grateful to the following Constituent bodies for their assistance with the preparation of this submission:

- Law Society of New South Wales;
- Law Society Northern Territory;
- Law Institute of Victoria; and
- Queensland Law Society.

Acronyms and abbreviations

The following key terms are utilised in this submission:

Acronym	Meaning
ALRC	Australian Law Reform Commission
ALRC Report	Australian Law Reform Commission Final Report, *Family Law for the Future – An Inquiry into the Family Law System* (Report, April 2019)
ALRC Discussion Paper	Australian Law Reform Commission, *Review of the Family Law System* (Discussion Paper, October 2018)
AFCC	Association of Family and Conciliation Courts, Australian Chapter
FCoA	Family Court of Australia
FCC	Federal Circuit Court of Australia
FLA	*Family Law Act 1975* (Cth)
Law Council	Law Council of Australia
Law Council Response to the Discussion Paper	Response of the Law Council of Australia to the Australian Law Reform Commission, *Review of the Family Law System* (Discussion Paper, October 2018), dated 16 November 2018
Law Council Response to the Issues Paper	Response of the Law Council of Australia to the Australian Law Reform Commission, *Review of the Family Law System* (Issues Paper 48), dated 7 May 2018

Executive Summary

1. The Law Council of Australia (**Law Council**) welcomes the opportunity to provide a further submission to the inquiry of the Joint Select Committee on Australia's Family Law System (**Joint Select Committee**). On 25 September 2019, the Law Council provided the Joint Select Committee with preliminary submissions focused on the scope of the inquiry. This follow-up submission engages directly with the Terms of Reference and provides substantive views on the matters before the Joint Select Committee.

2. The Law Council and its Family Law Section (**FLS**) are committed to promoting the administration of justice and development of meaningful policies and law reform in the best interests of the families, children and community we serve. This inquiry provides a critical opportunity to examine all options for holistic reform with full stakeholder consultation and engagement.

3. Where parties cannot resolve matters themselves following relationship breakdown, the Australian family law system must deliver justice in the form of multiple avenues by which a timely, efficient and cost-effective resolution of disputes can occur and which provides protection for the vulnerable and for victims of family violence. However, there will always be a need for a properly resourced and functioning court system to provide both a forum within which disputes can be resolved and a just means by which those not otherwise able to be resolved, can be determined.

4. To this end, the Law Council views the proper resourcing of the court system as a critical issue requiring urgent consideration. Those in Government have a duty to ensure the FCoA and FCC are properly resourced, and the Joint Select Committee must not overlook the dire need for more resources for the family law system. The Law Council considers recent attempts to restructure the family law system as short-sighted, and intended improvements are better and more effectively achieved by proper funding of the existing court system, timely appointment of judicial officers, improved case management, more intensive use of Registrars, proper funding of Legal Aid, and/or the structural reforms to the family law courts system put forward in the Semple Report[1] and by the New South Wales Bar Association.

5. In 2014, the Productivity Commission recognised the net public benefits to the community of legal expenditure and the 'false economy' of not doing so, given that the costs of unresolved problems were often shifted to other areas of government spending such as health care, housing and child protection (see discussion below).[2] It recommended that the Commonwealth, state and territory governments should provide additional funding of around $200 million per annum for civil legal assistance services. The implementation of this recommendation is a key step in addressing the chronic under-resourcing of Australia's family law system.

6. The Law Council supports steps taken to move to a single point of entry, harmonisation of rules and forms, and unification of procedures in the family law courts. This initiative will assist users of the family law courts system and the practitioners who operate within it and lead to reduced costs and greater certainty of outcomes.

7. While the harmonisation project will have significant benefits, the Law Council continues to strongly oppose the proposed merger of the FCoA and the FCC. The

[1] Des Semple, *Future Governance for Federal Family Law in Australia: Striking the Right Balance* (August 2008) <https://www.ag.gov.au/LegalSystem/Courts/Documents/court-reform-semple-report.PDF>.
[2] Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, 2014) 30-1.

merger proposal results in the abolition of the FCoA and of a specialised and focused court dealing with family law issues. The proposed single court will have jurisdiction across the entirety of federal law – from immigration to bankruptcy, employment issues to copyright along with family law issues. Australian families and children will compete with all of those matters for resources and hearing time and will have the same rights of appeal.

8. In terms of holistic reform of the Family Law System, the Law Council is of the view that the Joint Select Committee should:

   (a) consult with the community and the legal profession;

   (b) work towards meaningful reform and a comprehensive policy response that will offer an effective family law system for Australian children and families; and

   (c) provide an immediate funding and resourcing commitment and encourage the use of the existing rule-making powers to continue to progress a consistent single set of court rules.

9. Further and detailed submissions on each of the Joint Select Committee's Terms of Reference are listed in turn throughout this submission.

Responses to the Terms of Reference

Term of Reference (a)

Ongoing issues and further improvements relating to the interaction and information sharing between the family law system and state and territory child protection systems and family and domestic violence jurisdictions; including:

i. the process, and evidential and legal standards and onuses of proof, in relation to the granting of domestic violence orders and apprehended violence orders; and

ii. the visibility of, and consideration given to, domestic violence orders and apprehended violence orders in family law proceedings.

Information sharing

10. The following tools are available to the federal courts exercising jurisdiction under the FLA, all of which assist these courts in accessing information relevant to child protection and domestic violence concerns:

    (a) For the FCC, a Notice of Risk: this is a document which must be filed by both parties at the commencement of parenting proceedings in the FCC. A copy of the Notice of Risk is attached at **Annexure A** – it is an expansive document which allows each party to set out any concerns or allegations over a range of topics, including:

        (i) any child protection concerns, including the very broad definition of abuse to a child;

        (ii) any domestic violence concerns, including the very broad definition of family violence and abuse;

        (iii) any concerns that a child is at risk because a party to the proceedings, or another person relevant to the proceedings, suffers mental ill-health;

        (iv) any concerns that a child is at risk because a party to the proceedings, or another person relevant to the proceedings, abuses drugs or alcohol;

        (v) any concerns that a child is at risk because a party, or another person relevant to the proceedings, suffers a serious parental incapacity; and

        (vi) any concerns that the child is otherwise at risk.

    (b) The FCC's Notice of Risk comes before Registrars at first instance and where relevant, will be then be provided to child protection authorities so they may assess the concerns from a child protection perspective and take whatever action they consider appropriate. The child protection authorities prepare a summary of relevant notifications and engagement by the authority with the subject family and that summary/report is provided to the Court prior to the first court event.

    (c) The FCC Notice of Risk also comes before Judges, so they too have access to these broad ranging inquiries in a discrete and easily accessible format which is the result of the parties having turned their minds to the specific matters set out above. The Judges take this Notice of Risk (and any summary provided by

the child protection authority) into account as part of the body of evidence, both for interim hearings and final trials, when making orders in the best interests of the child.

(d) Similarly, the FCoA has two forms:

(i) Notice of Child Abuse, Family Violence or Risk of Family Violence (Application for Consent Orders); and

(ii) Notice of Child Abuse, Family Violence or Risk of Family Violence (Current Case).

(e) These forms are attached at **Annexure B** and **Annexure C**. They too come before Registrars and Judges in the same way as explained above.

(f) The *National Domestic Violence Bench Book* (**Bench Book**) is a rich resource available to all federal judicial officers.[3] Its genesis and purpose is described as follows:[4]

> *In its review of the legal response to domestic and family violence in Australia, Family Violence – A National Legal Response, published in 2010, the Australian Law Reform Commission and New South Wales Law Reform Commission recommended that a National Domestic and Family Violence Bench Book ("this bench book") should be developed. Recommendation 31.2 states:*
>
> *The Australian, state and territory governments should collaborate with relevant stakeholders to develop and maintain a national bench book on family violence, including sexual assault, having regard to the Commissions' recommendations in this Report in relation to the content that should be included in such a book.*
>
> *Consequently this bench book complements efforts under The National Plan to Reduce Violence against Women and their Children 2010 – 2022 by assisting the education and training of judicial officers so as to promote best practice and improve consistency in judicial decision-making and court experiences for victims in cases involving domestic and family violence across Australia.*
>
> *…*
>
> *The purpose of this bench book is to provide a central resource for judicial officers considering legal issues relevant to domestic and family violence related cases that will contribute to harmonising the treatment of these cases across jurisdictions along broad principles and may assist them with decision-making and judgment writing. This bench book does not seek to represent the opinions or preferences of judicial officers, or to direct judicial officers as to the manner in which they should respond to domestic and family violence related cases. Rather, it provides background information and knowledge supported by research, links to a range of legal and related resources, and practical guidelines for*

[3] Attorney-General's Department, Australian Government, 'Contents', *National Domestic and Family Violence Bench Book* (Web Page) <https://dfvbenchbook.aija.org.au/>.
[4] Attorney-General's Department, Australian Government, 'Purpose and Limitations', *National Domestic and Family Violence Bench Book* (Web Page, July 2019) <https://dfvbenchbook.aija.org.au/purpose-and-limitations/>.

courtroom management that judicial officers may consult when considering the breadth of issues and appropriate course of action in any individual case. In deciding whether, or how, a particular issue may be dealt with, the judicial officer must necessarily balance the interests of all participants in a case.

(g) The Bench Book covers a broad range of topics and issues, as set out in the Bench Book's Table of Contents, extracted below:[5]

3. Terminology
    3.1. Understanding domestic and family violence
        3.1.1. Physical violence and harm
        3.1.2. Sexual and reproductive abuse
        3.1.3. Economic abuse
        3.1.4. Emotional and psychological abuse
        3.1.5. Cultural and spiritual abuse
        3.1.6. Following, harassing and monitoring
        3.1.7. Social abuse
        3.1.8. Exposing children to domestic and family violence
        3.1.9. Damaging property
        3.1.10. Animal abuse
        3.1.11. Systems abuse
        3.1.12. Forced marriage
    3.2. Parties
    3.3. Protection order
4. Dynamics of domestic and family violence
    4.1. Myths and misunderstandings
    4.2. Factors affecting risk
    4.3. Typological approaches
    4.4. Vulnerable groups
        4.4.1. Women
        4.4.2. People with children
        4.4.3. Children
        4.4.4. Young people
        4.4.5. Older people
        4.4.6. Pregnant people
        4.4.7. People with disability and impairment
        4.4.8. People with mental illness

[5] Attorney-General's Department, Australian Government, 'Contents', *National Domestic and Family Violence Bench Book* (Web Page, July 2019) <https://dfvbenchbook.aija.org.au/contents>.

4.4.9. People from culturally and linguistically diverse backgrounds

4.4.10. Aboriginal and Torres Strait Islander people

4.4.11. People living in regional, rural and remote communities

4.4.12. People affected by substance misuse

4.4.13. People who are gay, lesbian, bisexual, transgender, intersex and queer

4.4.14. People with poor literacy skills

5. Fair hearing and safety

5.1. Impact on consent and disclosure

5.2. Victim experience of court processes

5.3. Safety and protection of victim and witnesses

5.4. Legal representation and self-represented litigants

5.5. Interpreters and translators

5.6. Support person in court

5.7. Referral to support services

5.8. Adjournments and timely decision making

5.9. Information sharing

5.10. Implicit bias

6. Evidence issues

7. Protection orders

7.1. Purpose

7.2. Management of application proceedings

7.2.1. Cross-examination

7.3. Information sharing

7.4. Conditions

7.5. Property

7.6. Duration

7.7. Related family law proceedings

7.8. Parenting orders

7.9. Recognition of interstate orders

7.10. Breach

7.11. Undertakings

7.12. Summary of considerations

7.13. Sample conditions

8. Perpetrator interventions

9. Responses in criminal proceedings

9.1. Bail

9.2. Evidence

9.2.1. Relationship, context, tendency and coincidence evidence

9.2.2. Expert or opinion evidence

9.2.3. Vulnerable or special witnesses

9.3. Sentencing

9.3.1. Sentencing considerations - breaches of protection orders

9.3.2. Specific considerations - Aboriginal and Torres Strait Islander people

9.3.3. Listening to victims

9.3.4. Options

9.3.4.1. Imprisonment

9.3.4.2. Intermediate sanctions

9.3.4.3. Fines

10. Family law proceedings

10.1. Foundational information

10.1.1. FCA/FCCA Family Violence Best Practice Principles

10.1.2. Key statutory provisions in Family Law Act (Cth) and Family Court Act (WA)

10.1.3. Intersection of legal systems

10.1.4. Jurisdiction of FCA/FCCA

10.1.5. Jurisdiction of the Family Court of Western Australia

10.1.6. Jurisdiction of state/territory courts

10.1.7. Prevalence of domestic and family violence in the family law system

10.1.8. Impact of domestic and family violence on children and parenting capacity

10.1.9. Independent children's lawyer

10.2. Family dispute resolution

10.3. Court and case management

10.3.1. Child-related proceedings

10.3.2. Cross-examination

10.3.3. Self-represented litigants

10.3.4. Vexatious proceedings

10.4. Family consultants and expert witnesses

10.5. Information sharing

10.6. Unacceptable risk and best interests

10.7. Parenting orders and impact on children

10.7.1. Allegations of domestic and family violence

10.7.2. Court-based parenting outcomes

10.8. Property proceedings

(h) The Bench Book also contains a Case Update, meaning Judges can search comparable cases, as well as a section on key literature to:

> *… promote a greater understanding of the dynamics and behaviours associated with domestic and family violence identified in a significant body of academic research conducted in Australia and internationally over recent decades.*[6]

(i) Both Courts have developed a resource entitled, *Family Violence Best Practice Principles*[7] (**the Principles**) which are 'designed to provide practical guidance to courts, legal practitioners, service providers, litigants and other interested persons in cases where issues of family violence or child abuse arise'.[8] The Principles provide:

> ***Statement of principle***
>
> *These Best Practice Principles have been developed by the Family Court of Australia and the Federal Circuit Court of Australia. They contribute to furthering the courts' commitment to protecting children and any person who has a parenting order from harm resulting from family violence and abuse.*
>
> *The Best Practice Principles recognise:*
>
> - *the harmful effects of family violence and abuse on victims;*
> - *the place accorded to the issue of family violence in the FLA; and*
> - *the principles guiding the Magellan case management system for the disposition of cases involving allegations of sexual abuse or serious physical abuse of children.*
>
> *The Best Practice Principles are applicable in all cases involving family violence or child abuse or the risk of family violence or child abuse in proceedings before courts exercising jurisdiction under the FLA. They provide useful background information for decision makers, legal practitioners and individuals involved in these cases.*

(j) Both Courts also provide family violence training to their Judges and Registrars.

11. In its submission to the Law Council, the Law Institute of Victoria (**LIV**) noted that the Courts have taken steps to promote information sharing:

> *For example, in the Melbourne Registry, there is a Child Protection Liaison Officer who may be approached by a Family Report Writer or an Independent Children's Lawyer (ICL) to obtain information about current and past investigations. In this way up-to-date information can be accessed to guide whether and to what extent further information is required and can be sought by more formal means. It also assists the parties to immediately identify*

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[6] Attorney-General's Department, Australian Government, 'Purpose and Limitations', *National Domestic and Family Violence Bench Book* (Web Page, July 2019) <https://dfvbenchbook.aija.org.au/purpose-and-limitations/>.

[7] Family Court of Australia and Federal Circuit Court of Australia, *Family Violence Best Practice Principles* (4th ed, December 2016) <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/publications/family+violence/family-violence-best-practice-principles>.

[8] Ibid 4.

whether there is a serious risk being investigated, and to act accordingly or not act as appropriate in the circumstances.

12. In addition to the above, the Law Council is aware the Attorney-General's Department (**AGD**) formed a working group (or some entity of similar name) in 2017/18, to look at what practically can be done to break down the silos that prevent the transition and transmission of information between these three subject matters areas. The Queensland Law Society (**QLS**) supports initiatives announced by the Attorney-General's Department earlier this year, aimed at improving information sharing and co-ordination between family law, family violence and child protection systems.[9] The announced funding will primarily be used to pilot a colocation model, whereby state and territory child protection and police officers are present in family court registries around Australia. Funding will also be provided for improving technology to facilitate information sharing between family law courts and state and territory child protection systems. The Law Council does not know how that project is progressing, but alert the Joint Select Committee to this line of further inquiry.

13. The Joint Select Committee will have the benefit of the work undertaken through a range of prior inquiries, including but not limited to, the recommendations of the ALRC, in particular, recommendations 2 and 3 and the reasoning behind such proposals. The Law Council also draws attention to a report commissioned by the AGD and conducted by Inside Policy, *An Evaluation of the Family Advocacy and Support Services,*[10] which evaluated various initiatives designed to assist parties with complex needs, in particular family violence issues and child protection challenges, through the court processes as efficiently as possible.

Sub-clause (i) of the term of reference (a)

14. Improvements aimed at addressing the ongoing issues for further improvements relating to the process, evidential and legal standards and onuses of proof, should take into consideration that each of these systems serves a particular purpose and strives to meet specific ends. It is not for the family law courts to interfere with those purposes.

Sub-clause (ii) of the term of reference (a)

15. As the Law Council and its FLS have highlighted many times, the statutory pathway under Part VII of the FLA to the making of parenting orders involves 42 different considerations, with family violence featuring in several of those considerations.[11]

16. The outcomes of domestic violence order applications are a relevant consideration under the FLA when determining the best interests of the child. Whether or not a party will or should consent to a domestic violence order is a question to be determined in accordance with the legislation governing domestic violence orders in the particular state or territory. However, once an application for a domestic violence intervention order is made, the substance and the outcome of the application are relevant to the family law issues.

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[9] Attorney-General's Department, Australian Government, 'Family Violence', *Marriage and Families* (Web page) <https://www.ag.gov.au/FamiliesAndMarriage/Families/FamilyViolence/Pages/default.aspx#_National_Plan_to>.

[10] Inside Policy, *An Evaluation of the Family Advocacy and Support Services* (Final Report, 18 October 2018) <https://www.ag.gov.au/Publications/Documents/fass-final-evaluation-report.pdf>.

[11] Grant Riethmuller, 'Deciding Parenting Cases under Part VII – 42 Easy Steps' (2015) 24(3) *Australian Family Lawyer*.

17. Separately, family violence will be taken into account in property proceedings under the FLA where a party can establish that the family violence occurred (a course of conduct), and, importantly, that the family violence made that party's contributions more onerous.[12] Many consider this too high a hurdle to overcome, but that is the state of the law.

18. In its response to the ALRC Report extracted below, the FLS stated in respect of Recommendation 19:

7. A SIMPLIFIED APPROACH TO PROPERTY DIVISION	
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.
Report reference:	Pages 240 - 245; Paragraphs 7.101 - 7.124
Response:	No settled position as yet
Comment:	The Law Council Response to the Issues Paper and Law Council Response to the Discussion Paper addressed the pros and cons of the various manners in which family violence can be addressed in the context of the financial consequences of relationship breakdown. There are competing views available: **<u>View in favour</u>** The creation of a statutory tort of family violence, jurisdiction for which is given to the family law courts, represents a measured and appropriate balancing of the difficult legal, evidentiary, protection and social factors. Careful consideration of the drafting would be required. It also allows for compensation for injury and loss is available for victims of family violence even if there is no or little property. Compensation could be sought from the ongoing income or property obtained in the future from the perpetrator of violence in these circumstances. **<u>View against</u>** The pollution of the discretionary process attending section 79 proceedings with tortious proceedings is going to blow the conduct of trials and related costs etc. There is no evident consideration as to what is going to constitute an actionable cause (given the breadth of the FV definition; what is to constitute a 'pattern of behaviour'; or what is the relationship to be with section 79 entitlements, including where damages are awarded for economic loss. Presumably there is to be a corresponding provision which precludes such issues being taken into account in the assessment of contributions (i.e. *Kennon*)?

[12] *Kennon v Kennon* (1997) 22 Fam LR 1.

	The FLS view: FLS is concerned that adopting a statutory tort pathway will not achieve the stated goal of the reform, in that it will be more costly for litigants, increase the time that hearings take and thus further impact judicial resources, and not adequately address the financial consequences of family violence. One of the perceived problems with the *Kennon* approach is that Judges have historically been constrained from making any adjustment unless an evidentiary basis has been established to support a finding that the contributions of a party have been made more arduous as a direct consequence of the conduct in question (albeit some recent case law has adopted a more liberal approach to this issue). FLS proposes that the matter is best addressed by a legislative amendment to what is presently subsection 75(2) and subsection 90SF(3) by the insertion of an additional factor namely "*the effect of family violence on a party to [the marriage/the relationship] or a child [of the marriage/the relationship/the household]*". By including the amendment in subsection 75(2) and subsection 90SF(3) it applies in respect of both property and maintenance cases, it is not a contributions factor, and there will not be an additional requirement in the statute that requires a causal link between a contribution being made more arduous and the conduct in question.

19. The existence of Family Violence Orders (noting that different names apply in different jurisdictions) are taken into account in all parenting proceedings under the FLA, but it cannot be said that the mere presence of an order controls the *final* outcome. Proper consideration of the evidence relating to the family violence asserted will occur and a risk assessment will be undertaken. Indeed, in some jurisdictions, a Consent Family Violence Order without admissions is only proof that the requisite relationship existed and no more.

20. The FLA enables the Courts to place greater weight on orders, or not place weight on orders, as they see fit. For example, the Court may elect to place greater weight upon a domestic violence order that is made following a consideration of evidence in chief and cross-examination, than it would upon a domestic violence order made by consent between the parties (and often on the basis that no admissions are made as to the alleged conduct by the respondent).

21. Further, subsection 69ZX(3) of the FLA provides (emphasis added):

(3) The court may, in child-related proceedings:

(a) receive into evidence the transcript of evidence in any other proceedings before:

(i) the court; or

(ii) another court; or

(iii) a tribunal;

and draw any conclusions of fact from that transcript that it thinks proper; and

(b) adopt any recommendation, finding, decision or judgment of any court, person or body of a kind mentioned in any of subparagraphs (a)(i) to (iii).

22. The Law Council highlights the use of the non-mandatory term 'may' and the discretion still reposed in the FLA judicial officer. In other words, the fact of a Family Violence Order does not bind the family law judicial officer, nor fetter his or her discretion in determining, under the FLA, what is in the best interests of a child. However, the Law Council adds a caveat to this below.

23. When a state or territory court makes a Family Violence Order (however so named across the various jurisdictions), especially:

    (a) an Order by Consent without Admissions (i.e., the allegations are not tested by cross-examination);

    (b) where the accused is unable to access legal advice to assist in determining whether the accused ought to contest the matter, or not; or

    (c) the accused is unable to access legal representation, and runs the family violence trial him/herself in an inadequate way; then

    (d) the making of that Order can have material consequences if FLA proceedings are also on-foot or later commenced.

24. An interim hearing in the family law courts is an abridged process where cross examination of parties seldom occurs and where findings about disputed facts can rarely be made. Thus, on the strength of the Family Violence Order, a FLA Judge may, on an *interim basis*, determine to act cautiously (balancing risk) and constrain the child's time with the alleged perpetrator (say by supervision, or day-time time only and in a public place), until the matters of family violence can be properly tested at a FLA trial. The delays between that interim FLA hearing and the final trial can be lengthy. If the allegations are *not* ultimately made out at final FLA trial, then the child's and accused parent's time has been constrained between interim hearing (where the Judge determined to act cautiously), and final trial (where the evidence is tested). The burdens of delay between interim hearing and final hearing in the family law courts (which in some instances may be measured in years) is keenly made out in this example - the months or years where the parent-child relationship has been so constrained can never be restored.

25. To try and overcome this risk, some Judges have used discrete issue hearings to determine the risk allegations as soon as possible. However, the Law Council understands that the experience of those Judges is that having effectively two trials (the risk trial and then the parenting dispute) is more expensive and time consuming for the parties and is a double-up of judicial resources. This allocation of resources negatively impacts the progress of other, equally deserving, matters. It may also give rise to circumstances where a Judge, having made credit findings in the first hearing, then cannot sit in judgment at subsequent hearings for the same parties.

26. It might be thought that giving matters where allegations of family violence are made a priority trial may be the solution. However, given the sheer number of matters where

family violence is alleged, there would likely be so many matters that fall into the category, as to make the scheme self-defeating.

Comments by the Law Society of NSW

27. The Law Council has received the following submission from Law Society of New South Wales (**LSNSW**) in relation to sub-clauses (a) and (b):

> *The Law Society is of the view that further improvements can be made relating to the interaction and information sharing between the family law system and state and territory child protection systems. In the experience of our members, the state and territory child welfare agencies and the Family Court of Australia and Federal Circuit Court ("family courts") are both regularly dealing with the same issues relating to child abuse and neglect, family violence and the safety and welfare of children.*
>
> *The Law Society considers that the public child protection system and family law system should be better integrated. In our submission to the ALRC Review of the Family Law System Issues Paper we noted that families in crisis often have their first interaction with the legal system via the care and protection or criminal jurisdictions, but in our view, where there is family breakdown, often the most effective solutions lie within the family law jurisdiction.*[13]
>
> *We also recommend coordinated reforms to state legislation that enable the Children's Courts to make orders under the Family Law Act 1975 (Cth) ("Act"), including parenting orders, recovery orders and Family Law Watch List Orders. This is consistent with the Family Law Council's recommendation*[14] *that ss 69J and 69N be amended to remove any doubt that Children's Courts, no matter how constituted, have the power to make orders under Part VII. In our view, the Children's Courts should also have the power to transfer appropriate cases to the family courts.*
>
> *The Law Society notes that the Council of Attorneys-General is currently working on improving responses to family violence, including:*
>
> - *increasing the competency of professionals in the family violence and family law systems;*
> - *assessing the merits of expanding the state and territory courts' exercise of the family law jurisdiction; and*
> - *improving information sharing between the family law, child protection and domestic violence systems.*
>
> *We support initiatives aimed at improving information sharing and achieving better collaboration between the child welfare agencies, the police and the family courts to better protect children and family violence survivors. We note funding has recently been announced to pilot a co-location model, which will*

[13] Law Society of New South Wales, Submission to Law Council of Australia, *Australian Law Reform Commission, Review of the Family Law System – Final Report* (26 August 2019) 2.
[14] Family Law Council, *Families with Complex Needs and the Intersection of Family Law and Child Protection Systems* (Final Report, 2016) 203.

embed state and territory family safety officials (such as child protection or policing officials) in family law courts across Australia.[15]

We recommend the continuation of this and other work with state and territory governments to develop and implement a national information sharing framework between the family law, family violence and child protection systems to guide the sharing of information about the safety, welfare and well-being of children and families. This work is consistent with recommendations arising from the ALRC's Review of the Family Law System.[16]

Process, and evidential and legal standards and onuses of proof relating to AVOs and DVOs

The Law Society considers the appropriate evidential and legal standard of proof for domestic violence orders and apprehended violence orders is that which currently applies in Australian jurisdictions: the civil standard of the balance of probabilities. In our view, it is appropriate that the complainant bear the burden of proof of establishing they have reasonable grounds to fear family violence, with certain exceptions: for example children who present with a cognitive impairment or where there has been a history of family violence. We support recommendations arising from the ALRC and NSW Law Reform Commission ("NSWLRC") in their Report on Family Violence — A National Legal Response that the complainant should not bear the onus of proving a likelihood of further family violence.[17]

We agree with recommendations arising from the Royal Commission into Family Violence that not enough effort is focused on the prevention of family violence or early intervention to protect those experiencing violence before it escalates.[18]

Visibility of, and consideration given to, domestic violence orders and apprehended violence orders in family law proceedings

The Law Society supports the recommendations of the ALRC and NSWLRC that there be a national register of family violence orders which is readily accessible by family courts.[19] *We also support improved information sharing between police and the courts in order to better protect those experiencing family violence.*

In addition we have previously recommended amendments that enable family violence to be taken into account for the purpose of determining spousal maintenance (s 75) and alteration of property interests (s 79).[20]

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[15] Attorney-General's Department, Australian Government, *Family Violence* (Web Page) <https://www.ag.gov.au/FamiliesAndMarriage/Families/FamilyViolence/Pages/default.aspx>.
[16] Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family Law System* (Final Report 135, March 2019) 146 Recommendation 2.
[17] See Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence — A National Legal Response* (Report 114, 2010) 786-7 [7.122]-[7.126].
[18] *Royal Commission into Family Violence* (Summary and Recommendations, March 2016) 6.
[19] Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence — A National Legal Response* (Report 114, 2010) 1449 Recommendations 30.13, 1457 Recommendation 30.18.
[20] Law Society of New South Wales, Submission to Law Council of Australia*, Australian Law Reform Commission, Review of the Family Law System – Final Report* (26 August 2019) 5.

Term of Reference (b)

The appropriateness of family court powers to ensure parties in family law proceedings provide truthful and complete evidence, and the ability of the court to make orders for non-compliance and the efficacy of the enforcement of such orders.

28. There are four parts to the terms of reference:

    (a) the ability of the court to ensure parties provide truthful evidence;

    (b) the ability of the court to ensure parties provide complete evidence;

    (c) the ability of the court to make orders for non-compliance; and

    (d) the ability of the court to enforce orders related to non-compliance.

The ability of the Court to ensure parties provide truthful evidence

29. Robust processes dictate how evidence is to be received in legal proceedings, including in family law proceedings. Family law proceedings require parties to provide sworn evidence on affidavit and *viva voce*[21] at a hearing. Litigants in family law proceedings are therefore no different to litigants in any other court or tribunal in Australia. They swear an oath to tell the truth. If they lie, then they are potentially committing perjury.

30. Individuals are very rarely prosecuted for perjury in Australia. Whether in family law proceedings or any other, it is very difficult to prove that a witness is wilfully lying beyond all reasonable doubt.

31. Simply because a party's evidence is not accepted, it does not necessarily follow that that party is wilfully not telling the truth. It is commonly stated by Judges when assessing evidence that they 'prefer' one party's evidence over the other by virtue of the assessment of the evidence given by both parties. It is also commonly stated by Judges words to the effect that 'each party has provided their evidence in accordance with their particular perception of events'. The evidence given by parties in family law proceedings, as in many civil claims between natural person litigants, is coloured by their perception of the history, by their psychological state and their agenda, not necessarily an intention to be untruthful. A witness's perception of history forms part of the complex fabric of evidence that Judges must assess. Memory is fallible. It is not uncommon for one party's evidence to be countered by other evidence (often documentary evidence) that proves their position cannot be sustained. The consequence is that their evidence overall may be not accepted or their evidence in relation to a point of dispute will not prevail. In those circumstances it is extraordinarily difficult for there to be criminal consequences for a party whose evidence is simply 'not accepted' by a Judge. It is difficult to imagine what else could be done to make parties more 'truthful'.

32. Professor Richard Chisholm in his report *Family Courts Violence Review* made the following observations, when considering this issue:[22]

[21] Refers to evidence which is given orally to a court by a witness.
[22] Richard Chisholm, *Family Courts Violence Review* (27 November 2009) 47.

It is equally obvious that fairness means that the court should not approach a case by assuming it is likely that either the allegation or the denial will be fabricated. As in other respects, men and women, and those alleging violence and those denying it, must be able to approach the court believing, correctly, that they will get a fair hearing. For this reason, too, it is important that the legislation should not give the impression that the court will approach a case with some preconception about the likelihood of one or other party seeking to mislead the court. I should add that although much opinion was expressed on the subject, I am not aware of any good evidence to suggest that allegations of violence are more or less likely to be untrue, or to be fabricated, than denials; or that any evidence about family violence is more or less likely to be unreliable than evidence about anything else.[23]

33. It is interesting to note that Professor Chisholm in his Review considered the then section 117AB of the FLA, which has now been repealed. The former section 117AB made it mandatory for a Court to make a costs order against a party where the Court was satisfied that false allegations had been made.[24] Professor Chisholm recommended that the provision be repealed. He also recommended that section 117 be amended to insert a new paragraph in subsection 2(A) to the following effect 'whether a party has knowingly given false evidence in proceedings'.[25] That amendment was not made by the Parliament to section 117 of the FLA.

34. Professor Chisholm also made some insightful observations in relation to allegations of violence:

It is sometimes said that allegations of violence or abuse are easy to make, but difficult to disprove.[26] *The second part is often true: it can indeed be difficult to prove that one has not been violent, or that one has not misbehaved in other ways. But is it really easy to make allegations of violence or abuse?*

In one sense it is, namely that it is a simple act to write down allegations and file an affidavit to that effect. However while the physical act of filing the affidavit may be easy, the evidence indicates, I think, that for many people who have been victims of violence or abuse, it is embarrassing and painful to make that experience public. The National Legal Aid submission says this:

> *… it is the experience of Legal Aid lawyers that there are a number of reasons why family violence is not disclosed and that non-disclosure does not necessarily mean there has been no family violence. Some reasons for non-disclosure are:*
>
> - *an attempt to reduce conflict;*
> - *as a show of good will;*
> - *insufficient legal advice;*

[23] Richard Chisholm, *Family Courts Violence Review* (27 November 2009) 48.
[24] *Family Law Act 1975* (Cth) s 117AB, as repealed by *Family Law Legislation Amendment (Family Violence and Other Measures Act 2011* (Cth).
[25] Richard Chisholm, *Family Courts Violence Review* (27 November 2009) 120.
[26] See, eg, 'concerns expressed, in particular that allegations of family violence and abuse can be easily made and may be taken into account in family law proceedings': Explanatory Memorandum, Family Law Amendment Bill 2005 (Cth); 'allegations of family violence and abuse which can be easily made but, when false, are still difficult and costly to refute': *Claringbold and James* (Costs) [2008] FamCA 57 ¶35 (Bennett J).

- *the misguided assumption that there is an obligation to mediate at all costs;*
- *an inability to define a partner's unacceptable behaviour as family violence; and*
- *a belief that reaching an agreement is preferable to going to court; and*
- *fear of not being believed and being perceived as alienating/not friendly, with the feared consequences being more time to the other parent and the child/ren being at prolonged risk, and/or fear of other penalty.*

The cliché that violence is 'easy to allege' is in my opinion misleading. It fails to recognise the serious inhibitions people often have about publicly disclosing the fact that they have been in a violent or abusive relationship, and the variety of reasons why they might be reluctant to do so in family law proceedings.

Much of the literature relates to women victims of violence, but the experience may be at least as difficult, and perhaps in some ways more difficult, for men who have been exposed to violence. It is important that the family law system should not be seen to favour either men or women, or to favour either those who allege family violence or those who deny it. Indeed, as the former Government correctly noted, ultimately it is of limited relevance what proportion of people give false evidence about particular sorts of matters: the family law system must be ready to deal with each case on its merits, and determine as best it can where the truth lies in each case. Its capacity to do this will be greater if it is seen as fair and unbiased by all those who deal with it.[27]

35. Judicial officers in family law court matters are regularly asked to adjudicate in relation to the complex evidence detailed above. It demonstrates the need for judicial officers to have specialised experience, knowledge and training. Judges dealing with such difficult and nuanced evidence, in the pressurised environment of long lists (especially in the FCC) and extensive delays, are placed in an invidious position — trying to give their full and proper attention to the issues in each case, while managing the overwhelming judicial workload under which they operate (due to the inadequate level of Judges that have been appointed to hear FLA cases in each court).

36. Allegations of family violence are widespread and are likely to be the subject of evidence in the majority of family law cases.[28] Importantly, the Law Council notes the lack of empirical evidence to support the notion that false allegations of family violence are regularly made in an attempt to gain an advantage in family law proceedings. In contrast, extensive research confirms the difficulties victims of domestic and family violence encounter when disclosing their experience to courts; including fear of not

[27] Richard Chisholm, *Family Courts Violence Review* (27 November 2009) 11.
[28] Australian Bureau of Statistics, *Personal Safety, Australia, 2016* (Catalogue No 4906.0.0, 2017) <https://www.abs.gov.au/ausstats/abs@.nsf/mf/4906.0>; Julie Ayre et al, *Examination of the Burden of Disease of Intimate Partner Violence Against Women In 2011* (Australia's National Research Organisation for Women's Safety, 2016) https://www.anrows.org.au/publication/examination-of-the-burden-of-disease-of-intimate-partner-violence-against-women-in-2011-final-report/>.

being believed and fear that disclosure will increase the risk of violence to them or their children.[29]

37. In cases where there are allegations of family violence the judicial enquiry in determining parenting disputes requires, *inter alia*:

    (a) the application of a presumption of equal shared parental responsibility.[30] This requires Judges to make orders that child(ren) spend equal or significant and substantial time with each parent;[31]

    (b) identifying the alleged conduct and assessing whether and to what extent that alleged conduct (if true) represents an unacceptable risk to the child(ren); and

    (c) if there is unacceptable risk, considering whether such risk can be managed in some way so that the risk is ameliorated.

38. In appropriate cases, the presumption of equal shared parental responsibility does not apply if there are reasonable grounds to believe family violence or abuse has occurred[32] and may not apply in interim hearings if the court is satisfied that such is not in the best interests of the child.[33]

39. The Law Council notes that family violence as a concept is nuanced and can cover behaviours that range from physical abuse to less overt behaviours such as coercive/controlling or isolating conduct. It can be situational (such as occurring in the context of relationship breakdown), or it can have occurred over a long period of time. Understanding the detail and nature of the alleged conduct helps the Court understand whether and to what extent unacceptable risk may arise from that conduct.

40. Further, the impact of family violence on a victim can be complex and multi-dimensional. This inquiry would benefit from receipt of evidence from social scientists and the medical profession about the immediate, medium-term and long-term consequences of exposure to family violence, both upon the immediate victim and for those close to them (including children). The complex impacts of family violence include upon a person's functioning and decision making including upon whether the alleged conduct is reported and to whom it is reported. Criticisms of victims for 'failing to report' or 'failing to leave' are often misplaced and ill-founded and fail to appreciate the range of social, familial, psychological and material pressures that may exist for that person. In the case of children, the consequences of being subjected to family violence can be immediate and can also impact on their long-term mental health.

41. Family violence is also conduct which rarely takes place in the presence of independent witnesses. This means that often the only available evidence is the direct evidence of specific incidents as articulated by the parties. The absence of corroboration in these circumstances cannot in itself justify the exclusion of, or limited weight being applied to, the matters alleged. It is that evidence (together with the response of the other party) which must be considered and evaluated in the context

[29] Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence — A National Legal Response* (Report 114, 2010); Also see Richard Chisholm, Richard Chisholm, *Family Courts Violence Review* (27 November 2009); Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009).
[30] *Family Law Act 1975* (Cth) s 61DA.
[31] Ibid 65DAA.
[32] Ibid s 61DA(2).
[33] Ibid s 61DA(4).

of the family law case insofar as it represents an unacceptable risk to the child(ren) or a risk of further family violence to the victim parent.

42. In the past the FLA was amended to impose penalties to parties found to have made unsubstantiated allegations of family violence. The undesirable effect of that provision was that family violence was under-reported, which in turn potentially exposed children to unsafe situations.

43. The consideration of family violence issues in family law matters will inform the inquiry's consideration of many of the Terms of Reference. It is recognised that family violence is alleged in around 70 per cent of the matters before the family law courts.[34] Given the significance of this issue, the Law Council submits that this Term of Reference (and others) cannot be properly considered unless the Joint Select Committee members are appropriately trained in issues of family violence (including its subtle forms) and its consequences. An understanding of family violence will also assist when engaging with the relevant external stakeholders who work within, and experience, the family violence jurisdiction.

The ability of the Court to ensure parties provide complete evidence

44. The next consideration is the completeness of evidence. Presumably this is a reference to each party making full disclosure. The responsibility of each party to make full and frank disclosure is enshrined in the Rules of each Court.[35]

45. Although orders for discovery in the FCC require leave (section 45 of the *Federal Circuit Court of Australia Act 1999* (Cth) (**Federal Circuit Court Act**), the court is still empowered to require documents to be produced (rule 14.04 of the *Federal Circuit Court Rules 2001* (Cth) (**Federal Circuit Court Rules**)) and can make orders in default (rule 13.03A-B of the Federal Circuit Court Rules). Both courts can make orders for discovery and there are consequences, including not being allowed to rely on a document, if there is non-disclosure (eg, rule 13.14 of the Family Law Rules).

46. Ultimately, if there is non-disclosure at the point of the hearing then the fact of that non-disclosure can weigh heavily against the non-disclosing party:

> *...we appreciate that this is something of a broad brush approach, but as we have said, where there is clear evidence of non-disclosure as there was here, the court should not be unduly cautious about making findings in favour of the other party...*[36]

47. Relevant documents are also produced to the Court via subpoenas. For example, in parenting cases, police, hospital, medical and school records. Subpoenas are also often used in property matters where disclosure is at issue or a party is unable to produce the documents.

48. In complex children's matter, an Independent Children's Lawyer (**ICL**) is often appointed where the relevant criteria is met and having regard to funding.[37] The ICL usually issues subpoenas and or obtains expert reports, so it is relatively rare for circumstances to arise where non-disclosure is a real issue in a parenting case. The

[34] House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (Report, December 2017).
[35] *Family Law Rules 2004* (Cth) r. 12.2 and r. 13.03-04.
[36] *Weir v Weir* (1993) FLC 92-338.
[37] *Re K* (1994) FLC 92-461.

strength and veracity of parties' positions and allegations are often tested against the material received on subpoena and through cross-examination.

49. It is submitted there be ought to be amendment to the rules about the discovery processes already available. The rules should be amended to require discovery in the FCC without the necessity for a grant of leave under section 45 of the Federal Circuit Court Act.

The ability of the Court to make orders for non-compliance

50. The next consideration is the ability of the Court to make orders for non-compliance. There are existing powers in both Courts that deal with non-compliance. There are provisions in the FLA that enable a Court to make orders penalising parties if they have contravened a parenting order[38] and other orders including financial orders.[39] The Courts can enforce an obligation to pay monies.[40] The Courts also have the power under section 117 of the FLA to order costs against a party who does not comply with orders and the fact of non-compliance with an order is one of many factors the Courts take into account in determining whether there are circumstances that justify a departure from the general rule that each party to proceedings should bear his or her own costs.

51. The Law Council therefore submits that the issue relates not so much to the Court's ability to take action to enforce its orders, but rather the practicality of being able to take such action.

The ability of the Court to enforce orders related to non-compliance

52. The final consideration is that of ability to deal with non-compliance. The lack of adequate funding and inadequate judicial and registrar resources in both the FCoA and FCC, are the overwhelming contributors to difficulties relating to the enforcement of orders.

53. The process of filing and dealing with contravention proceedings has previously been the subject of submission by the Law Council to the ALRC. The Law Council has recommended that consideration be given to the proposals for amendment to Division 13A of Part VII of the FLA in relation to the contravention of parenting orders as set out in the article by Professor Richard Chisholm.

54. Professor Chisholm's proposed amendments seek to simplify the current contravention regime which is repetitious and difficult to follow. Professor Chisholm states:

> *The drafting style of the present legislation was no doubt intended to minimise uncertainties and ambiguities, but it is done so in a way that makes the legislation difficult to understand and apply in practice.* [41]

55. Professor Chisholm refers to Division 13A as being long and difficult to follow. He refers to considerable repetition in the sections, making it difficult to read and understand. He states that Division 13A burdens the reader with a daunting amount of material, refers to some sections re-stating the law and therefore having no actual effect and notes that the sequence of topics set out in the sections appear to be out

[38] *Family Law Act 1975* (Cth) div 13A.
[39] Ibid pt XIIIA.
[40] *Family Law Rules 2004* (Cth) ch 20; *Federal Circuit Court Rules 2001* (Cth) ch 25D.
[41] Richard Chisholm, 'Compliance with Parenting Orders: A Modest Proposal to Re-draft Division 13A of Part VII' (2018) 27(2) *Australian Family Lawyer*, 6.

of sequence.[42] Professor Chisolm adds that a reader is left unsure as to what orders a Court can make in the event of a contravention.

56. One of the complexities of the current section is that it divides the subject matter of contravention matter into two topics: the less serious (subdivision E) and more serious (subdivision F). Professor Chisolm states:

> *This division (which may be associated with the desire to create a three-tier structure discussed above) has led to considerable repetition and some complexity. The idea of separate subdivisions appears to be based on an assumption that it will be apparent at the commencement of the case which category it is. But this is not correct. The Court has a discretion to treat otherwise serious cases as non-serious, and vice-versa but the Court can exercise that discretion only after hearing all the evidence and the argument, ie. at the end of the hearing. So, while of course the outcome of the case will be affected by the seriousness of the breach, there seems to be no advantage in having two categories.*[43]

57. Professor Chisholm seeks to simplify Division 13A to be much easier to read and provide greater certainty to the litigants and the Court. He also makes important recommendations in relation to cost orders including a provision that in circumstances where there is a finding of a contravention, it is presumed that a costs order be made pursuant to section 117 of the FLA.

58. If a contravention hearing occurs and a Judge makes findings against a party, that Judge may be precluded from hearing any later substantive proceedings between the parties. In regional centres with only one Judge, bringing a contravention application can lead one to losing the Judge at trial, potentially creating further delays while a visiting Judge is sourced to hear the matter.

59. The process of enforcing alleged non-compliance of discovery orders and procedural directions is also in need of improvement. There should, subject to funding improvements, be the ability to refer simple breaches of such orders to a Registrar for quick resolution. Currently, an application in a case and a supporting affidavit must be filed. That application is allocated a hearing date which can be weeks or months later (depending upon the pressures in the particular Registry) and then must be reached (time wise) in already over-stretched court lists. The costs and complication of that process are frankly found by lawyers as often not worth the effort.

60. The inability for the courts to effectively, and in a timely and cost-effective manner, enforce its own orders can have the potential to undermine the integrity and power of the court. It is also having a significant impact on families. If parenting orders cannot be enforced quickly and without a cumbersome, costly and ineffective process, then it is ultimately the children's best interests that are put in jeopardy. Non-compliance of orders can lead to parents not spending time with their children and not moving their cases through the court process in an effective and efficient manner.

61. As noted above, several recommendations were made by the ALRC Report in relation to issues raised by this particular term of reference. For example, the ALRC recommended that Division 13A of the FLA be amended so that it is simplified and streamlined. Implementation of that recommendation alone would do much to improve the court process and benefit those families in the system.

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[42] Ibid.
[43] Ibid 7.

Term of Reference (c)

Beyond the proposed merger of the Family Court and the Federal Circuit Court any other reform that may be needed to the family law and the current structure of the Family Court and the Federal Circuit Court.

62. The Law Council welcomes consideration by the Joint Select Committee of the structure of the Courts tasked primarily with exercising jurisdiction under the FLA. It is critically important to the broader family law system to have a properly functioning court structure as part of the system in order to provide:

    (a) proper protection for children and other people in need, including from abuse and violence;

    (b) a forum in which people are able to advance and protect their rights and entitlements according to law in the event that they are otherwise unable to address their differences; and

    (c) benchmarks and guidance for the determination of the rights and entitlements in order to facilitate the settlement of disputes without recourse to the Courts – that is, so that people can negotiate in an informed and certain way in the 'shadow of the law'.

63. It is to be recognised that at the core of any properly functioning court system is the need for proper resourcing and funding. Put simply, without an ongoing commitment to proper resourcing and funding, any court system will inevitably fail.

64. It is further to be recognised that many of the issues confronting and criticisms directed at the current system are the direct result of a sustained under-funding of the existing court system over many years by successive governments of all persuasions.[44]

65. It is in this context that the issues raised by this Term of Reference are to be considered.

66. The Law Council recommends, and this aspect of the submissions will address in turn, that:

    (a) the proposed merger is one reform proposal that ought not proceed;

    (b) a commitment is required to maintenance of an independent specialised court system for the determination of family law issues;

    (c) the Australian Government should respond to the ALRC recommendations as to the reform of the 'family law' and further consultation in relation to those recommendations proposed to be implemented should then occur, in order to identify the reforms to be progressed; and

    (d) subject to and within the ALRC process, consideration be given to the maintenance of the Court Counselling Service, the establishment of specialist court lists and a review of enforcement provisions and procedures.

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

Recommendation 1

67. The Law Council and FLS have long opposed the proposed merger of the FCoA and the FCC and continue to do so. The Law Council's Business Law Section (**BLS**) is also concerned as to the impact which such a merger would have on the operation of the FCC's current general jurisdiction, that is, in matters such as personal insolvency.

68. An earlier iteration of the proposed merger was the subject of a report by the Senate Legal and Constitutional Affairs Legislation Committee (**Senate Committee**) dated 14 February 2019.[45] The hearing process highlighted the deficiencies in the PricewaterhouseCoopers report relied upon by the government as establishing the business case for the merger proposal.[46] The PricewaterhouseCoopers report relied on in support of the court merger does not adequately demonstrate an increased capacity to properly hear and determine family law matters, particularly complex matters, without additional funding. There has been no further cogent rationale, as opposed to aspirations, advanced for pursuit of the merger proposal as opposed to any other form of structural reform, since that time.

69. Notably, following the release of the Committee's report, then Senator Ian McDonald described the merger proposal as a 'short term fix'.[47] No proposal, let alone one wreaking such fundamental and irreversible reform as this one, ought to proceed on such a basis.

70. The Law Council's submissions to the Senate Committee examining the original proposed Federal Circuit and Family Court of Australia Bill 2018 and the Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018 (**Merger Bills**) stated as follows (noting that the excerpts below refer to a forthcoming ALRC Report, which has now been received, and that Report has made 60 Recommendations to which the Australian Government is yet to respond):

    When examining the Bills, and being cognisant of the concurrent ALRC Review the LCA has considered:

    - *what problems the Bills are designed to address;*
    - *how the Bills propose to address such problems;*
    - *the ability for the Bills achieve those goals, and the likely cost, both in financial and justice terms; and*
    - *whether other or better solutions exist.*

    There are Objects of the Bills and statements made within the accompanying Explanatory Memoranda to the Bills, that LCA supports as essential to the maintenance and continued development of the Australian family law system.

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[45] Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Federal Circuit and Family Court of Australia Bill 2018, Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018* (Report, 14 February 2019).
[46] PricewaterhouseCoopers, *Review of Efficiency of the Operation of the Federal Courts* (Final Report, April 2018) <https://www.ag.gov.au/LegalSystem/Courts/Documents/pwc-report.pdf>.
[47] Arthur Moses, 'Commonwealth Best to Fix Broken Families, Child Violence', *The Australian* (online) 7 June 2019 <https://www.theaustralian.com.au/business/legal-affairs/commonwealth-best-to-fix-broken-families-child-violence/news-story/aec4069c957fe52a708db80f06008585>.

The Explanatory Memorandum for the FCFC Bill (at paragraph 5) provides that the structural reform proposed would:

- *improve the efficiency of the existing split family law system – the LCA agrees with that aim and notes that the FLS has long advocated against a dual court system;*

- *provide appropriate protection for vulnerable persons – the LCA agrees with that aim and notes it is the subject of ongoing consideration by the ALRC (see for example Part 8 of the ALRC Discussion Paper at pages 181-210); and*

- *ensure the expertise of suitably qualified and experienced professionals to support those families in need - the LCA agrees with that aim and notes it is the subject of ongoing consideration by the ALRC (see for example Part 10 of the ALRC Discussion Paper at pages 237 -266).*

It is the mechanism by which those goals and aims are to be achieved where views differ and where the LCA expresses its ongoing concern about the inappropriateness of forging ahead with structural reform to the family law courts – the largest changes since the establishment of the FCoA more than 40 years ago – and where the concurrent ALRC Review (to use the expression from the PwC Report) is some 4 months from delivery.

The LCA notes the following submission from the NSWLS:

> *The Family Court of Australia should be a priority and choice as to where public money is spent.*
>
> *Family law impacts a broad range of Australians, not just court users. The social, economic and emotional costs of having a system that is chronically under-funded and under-resourced are immense.*
>
> *Many other nations look to Australia as a 'gold' standard for the provision of specialised family law services. Countries such as Hong Kong, Singapore, Japan and Fiji have turned to Australia to emulate many of our family law systems. We must not dissolve what we have, so hastily and without proper consultation.*

The LCA notes the following submission from the LIV:

> *The LIV fully supports the objectives of the proposed restructure. Unfortunately, the proposal as it stands is unlikely to deliver on these expectations and is likely to instead have extensive and unintended adverse consequences for the families and children who participate in the family law system.*

In 1999, the then Shadow Attorney-General, Robert McClelland, used the debate in the House of Representatives on the Federal Magistrates (Consequential Amendments) Bill 1999, to state:

> *The magistracy will neither achieve what the government wants — that is, providing greater access to justice — nor remove these horrific delays that exist, particularly in the Family Court…*

it is fanciful to suggest that it will have any realistic effect at all on the court lists. [48]

The Government has now acknowledged that which appears otherwise universally accepted for a substantial time, namely that the dual family law courts system is and has been a failure.[49]

Criticisms of the decision to create dual courts, its structural inefficiencies and the manner it which it has meant less resources for the FCoA, are not new. In an article 18 years ago entitled 'Family Law and the Family Court of Australia: Experiences of the First 25 Years', then Chief Justice Nicholson of the FCoA and Margaret Harrison observed:

The Family Court has, on a number of occasions, pointed out the unacceptable complexities in its structure to various governments and parliamentary inquiries. Specifically, it has sought the appointment of specialist 'Chapter III' federal magistrates within the Court itself, and the establishment of something akin to a small claims tribunal to allow the summary disposition of minor disputes. Instead, the Government decided to establish the [then] Federal Magistrates Service as a separate entity under Chapter III, notwithstanding that scarce funds would be diverted from the Family Court into the administrative establishment and other costs of the Federal Magistrates Service. [50]

The Bills do not resolve that issue. Users of the family law system will (under the Bills) have Division 1 and 2 of the FCFC and a separate appeals court in the Federal Court of Australia. Rules, forms and practice directions (let alone the physical venue) will diverge between the FCFC and the Federal Court of Australia in many cities. The promise of efficiencies and cost savings cannot be readily identified, although mere dollars and statistics are not an adequate means by which the delivery of justice can be weighed. Were the Parenting Management Hearings legislation to pass (see the Family Law Amendment (Parenting Management Hearings) Bill 2017), some litigants would of course have part of their case (parenting) in that tribunal style forum and another part (financial) before a court, and with different appeal or administrative routes in each case. Some may in fact have part of their parenting case before the Parenting Management Hearing and another part before the FCFC.

One of the difficulties in examining the Bills and weighing the structural reforms it proposes, is that much is also dependent on the rules of court of any new FCFC that will ultimately govern matters of practice and procedure, case management and practice directions. That detail is not yet known.

The Bills give to the new Chief Justice alone the rule making power, a substantial departure from the prevailing position in the FCoA (section 123 of the FLA) and the FCCA (section 81 of the Federal Circuit Court Act). Whilst the LCA supports harmonisation of the rules and forms in the family law system, a move to grant to the Chief Justice alone that power is at odds with existing practice and legislative grant of power in the federal family law courts,

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[48] Commonwealth, *Parliamentary Debates*, House of Representatives, 18 October 1999, 11,786-7.
[49] Christian Porter MP, Attorney-General, 'The State of the Nation' (Speech, Opening Plenary Session of the 18th Biennial National Family Law Conference, 3 October 2018) <https://www.attorneygeneral.gov.au/media/speeches/speech-opening-plenary-session-state-nation-18th-biennial-national-family-law-conference-3-october-2018>.
[50] Alastair Bothwick Nicholson AO RFD QC, 'Family Law and the Family Court of Australia: Experiences of the First 25 Years' (2000) 24(3) *Melbourne University Law Review* 756.

and counter to the position elsewhere.[51] No reasoning has been advanced by the government that would justify such a radical departure from the usual process for the making of procedural rules.

The LCA notes the following submission from LIV:

> *The LIV recommends harmonising the Rules and forms of the FCoA and the FCC to create a clearer and more accessible system for litigants to navigate. The LIV notes this recommendation reflects Proposal 3-2 of the ALRC Review of the Family Law System and recommendation 5 of the House of Representatives Standing Committee on Social Policy and Legal Affairs report A Better Family Law System to Support and Protect Those Affected by Family Violence.[52] The LIV submits uniform rules and forms will be particularly advantageous for the increasing numbers of self-represented litigants attempting to navigate the system alone. The LIV submits this would increase certainty and therefore, increase efficiency.*
>
> *The LIV recommends consideration be given to a legislative change requiring the FCC to adopt the Family Law Rules 2004 and forms of the FCoA when conducting family law matters. Similarly, the FCC could then adopt the Federal Court Rules 2011 and forms of the FC in non-family law matters. The LIV considers issues arising from differences in the procedures of the two courts may be overcome by slightly altering the wording in some rules. For example, the rules relating to case assessment conferences could be altered to read 'in the event there is a case assessment conference …'.*
>
> *The LIV notes the Government's proposed model merely provides a framework to facilitate cooperation between the two divisions with the aim of ensuring common rules of court and forms, and does not create them.[53] In fact, the proposal specifically provides for the continuity of the Rules of Court currently in force, stressing that the amendments alter who has the power to make the rules, and not what they contain.[54]*
>
> *The only requirement in the Government's proposal is that the Chief Judge and Chief Justice must work cooperatively with the aim of ensuring common rules of court and forms.[55] The LIV notes that this is already occurring. The FCC and FCoA are working cooperatively to harmonise the rules of court, with working groups being organised, and a scope of work and budget being prepared.[56]*

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[51] See, eg, *Supreme Court Act 1970* (NSW) ss 123-4; *District Court Act 1973* (NSW) ss 18B, 18D; *Federal Court of Australia Act 1976* (Cth) s 59; *Supreme Court Act 1986* (Vic) s 26; *Supreme Court Act 1991* (Qld) ss 85, 89; *Supreme Court Act 1935* (SA) s 72; *Supreme Court Civil Procedure Act 1932* (Tas) s 197; *Supreme Court Act 1935* (WA) s 168.

[52] Australian Law Reform Commission, *Review of the Family Law System* (Discussion Paper 86, 2018) 40; House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (2017) 154 [4.254] <https://apo.org.au/sites/default/files/resource-files/2017/12/apo-nid124021-1201011.pdf>.

[53] *Federal Circuit and Family Court of Australia Bill 2018* (Cth) cl 5(c).

[54] *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018* (Cth) sch 1, pt 2, item 264; Explanatory Memorandum, *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018* (Cth) 85 [532].

[55] *Federal Circuit and Family Court of Australia Bill 2018* cls 55, 183.

[56] Chief Justice Pascoe, 'State of the Nation' (Speech, 18th Biennial National Family Law Conference, 3 October 2018) <http://www.familycourt.gov.au/wps/wcm/connect/FCoAweb/reports-and-publications/speeches-conference-papers/2018/speech-cj-nflc>.

Further, the Government anticipates creating the new Court Rules will take time and effort and occur throughout 2019.[57] This indicates that the profession will not have access to the Rules, which are solely responsible for achieving the objects of the restructure, in order to assess the necessity of the restructure. In addition, the community will be left in a period of uncertainty during which the new court will exist, but there will be no rules to match.

The Attorney-General envisages a 'once in a generation opportunity' to re-design the rules using the 'collective wisdom' of practitioners and stressing the importance of consultation 'I am sure that the new Chief Justice and Deputy Chief Justice will seize the opportunity to have maximum input from the people at the practical legal coal face as to what works and what doesn't'.[58]

The LIV respectively cautions that, instead of fostering an environment of consultation, the Government's proposal limits the input of Judges in the family law jurisdiction. Currently under section 123 of the Family Law Act 1975 a majority of Judges is required in order to make rules governing the practice and procedure of any court exercising jurisdiction under the Act. Under the proposals, the Chief Justice and Chief Judge alone are required to make the Rules of Court for their respective divisions.[59] This not only does not create a uniform set of rules, forms and procedures, it entirely relies on the Government's 'clear intention that there would be a single Chief Justice holding a dual commission' to both Divisions.[60] Therefore, the Government's proposal does nothing more than set the scene for a possible change to the rules, forms and procedures of the federal courts exercising family law jurisdiction.

Further, the LIV considers that the proposal removes the considerable benefits of judges from different registries crafting rules that take in different perspectives formed in diverse environments. The LIV notes that not all of the registries are facing similar problems, and that having more than one judges' perspective to help form the rules ensures the rules will not be so narrow as to be inappropriate for one or more parts of the country.

The LIV notes that its recommendation has the advantage of actually achieving the objectives of the reforms, and in the alternative, suggests that the Courts be allowed to continue the project of harmonising the rules, forms and procedures on which they have already embarked.

The LCA notes the following submission from the NSWLS:

Assuming Division 1 will retain "Family Court" matters (Magellan, international issues, matters more than four days final hearing), the issue of transfers will continue, and it is as yet unclear how matters will be allocated to the different Divisions, so as to alleviate unnecessary transfers.

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[57] Christian Porter MP, Attorney-General, 'The State of the Nation' (Speech, Opening Plenary Session of the 18th Biennial National Family Law Conference, 3 October 2018).
[58] Ibid.
[59] *Federal Circuit and Family Court of Australia Bill 2018* (Cth) cls 56, 184.
[60] Explanatory Memorandum, *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018* (Cth) 183 [1011]; *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018* (Cth) sch 2, items 469, 476.

The Bill still provides for transfers between the courts in certain circumstances, including where it is in the interests of the administration of justice (see sections 34 and 117). As such, there is an implicit understanding that matters will still need to be transferred.

Having a single point of entry for both courts will hopefully assist in having fewer transfers between the courts. The difficulty in saying that transfers between courts are part of the problem and are causing delays is that it is not always evident at the start of a matter whether it is complex or likely to require more than four days of hearing. For example:

- *a party may file for parenting orders only, and only later seek property orders, or the respondent seeks property and parenting orders;*
- *a filing party may be unaware of substance abuse or mental health issues or criminal behaviour of the other party and this only becomes evident once the other party raises these issues or when subpoenas are issued and inspected;*
- *a lack of financial disclosure, or the existence of complex family trust structures for property matters may only come to light later in the proceedings.*

The LCA notes the following submission from the QLS:

QLS supports the creation of a single, specialist court for determining family law matters with one set of rules, procedures and processes. In our view, this would better facilitate timely and cost-effective resolution of disputes.

However, the amalgamation of the Family Court and the Federal Circuit Court, as proposed in the Bills, does not achieve this. The structure proposed in the Bills continues to separate the Courts into two divisions, whereby the current Family Court of Australia will become the Federal Circuit and Family Court of Australia (Division 1) and the Federal Circuit Court will become the Federal Circuit and Family Court of Australia (Division 2).

In effect, there is no true amalgamation of the courts. It is therefore unclear how the issues around the complexity of the system will be properly resolved through the proposal. While we acknowledge the intention for a common case management approach to be adopted across both divisions, the structure does not appear to assist in reducing complication for those engaged in the system to a substantial extent.

The concept of a single point of entry for users to the federal family law courts is supported by LCA. Again however, the Bills do not achieve this, rather they just give the rule making power to ultimately achieve it and the LCA concern as to the vesting of that power in a single Judge is expressed above.

71. Fundamentally, and stepping back from the detail of the reforms, the merger proposal results in the abolition of the FCoA and of a specialised and focused court dealing with family law issues. The proposed single court will have jurisdiction across the entirety of federal law – from immigration to bankruptcy, employment issues to copyright, along with family law issues. Australian families and children will compete with all of those matters for resources and hearing time and will have the same rights of appeal.

72. Equally so, litigants in matters in the Court's general jurisdiction (that is, in matters as different as immigration, bankruptcy, employment and intellectual property) will be competing for judicial time and expertise with Australian families and children. Similar concerns as to the exercise of general jurisdiction were raised by the Insolvency and Reconstruction Committee of the BLS in 2005 at a time when the government had sought to expand the jurisdiction of the Federal Magistrates Court to cover corporate insolvency.[61] The BLS had drawn attention to the instances of significant delays in the determination of bankruptcy matters and the concern that such delays were exacerbated by: an inadequate number of Federal Magistrates to cope with the Court's workload; the priority that had been given to family law related matters as opposed to the Court's general jurisdiction; and the background experience of most of the Federal Magistrates at that time, who appeared to have experience in family law rather than areas that are the subject of the Court's general jurisdiction.

73. The court merger, as proposed, will involve a move away from family law specialisation within the court. The proper determination of family law matters requires a high level of skill and extensive knowledge of a wide range of issues and areas of substantial law. In the experience of our members, a lack of expertise in family law can result in erroneous decisions and poorer outcomes for families. There is a significant risk that the quality and propriety of family law decisions will be compromised where determinations are made by judicial officers without family law expertise. These decisions are also more likely to be appealed, further increasing the demand on court services (or not appealed, despite there being a proper basis to challenge the orders made, where the cost of an appeal may be beyond the financial means of many users of the court).

74. The skill necessary to understand the complex dynamics of domestic and family violence and identification of risk is critical to the practice of family law and the proper determination of family law disputes. Decisions made without this skill and expertise can place survivors of family violence, including children, at increased risk.

Recommendation 2

75. The Law Council submits that the courts of the family law system should be restructured to ensure the preservation of a dedicated, independent and specialised court for determining family law issues.

76. The Law Council has adopted and advocates for the proposal of the NSW Bar Association, described as Family Court of Australia 2.0, whereby:

    (a) the FCC ceases to operate as a separate, third federal court;

    (b) the FCC's current family law jurisdiction and workload, which reportedly represents 90 per cent of the FCC's work, be transferred into a new lower level division to be created in the Family Court;

    (c) the FCC's remaining 10 per cent work be transferred to a lower level division to be created in the Federal Court of Australia (**Federal Court**);

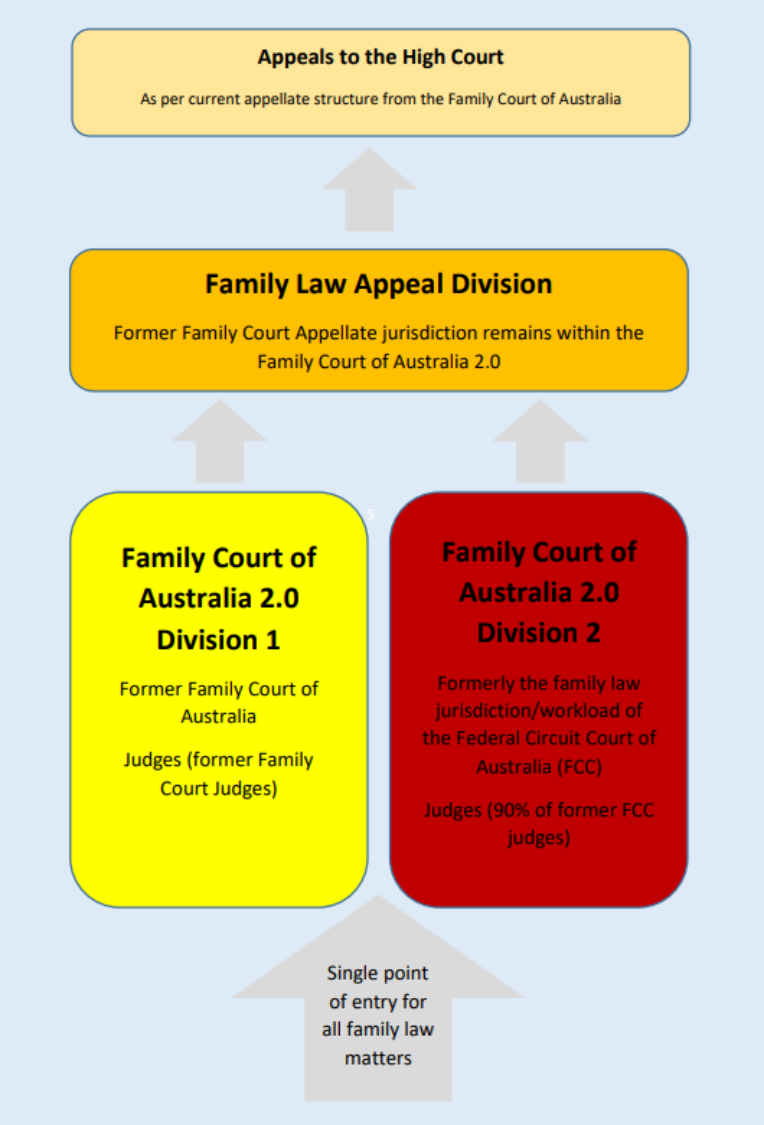
    (d) the FCC's resources be divided and allocated between the new divisions of the Family Court and the Federal Court in a 90:10 ratio consistent with the proportion of work undertaken; and

[61] Law Council of Australia, Submission to Corporations and Financial Services Division of The Treasury, *Federal Magistrates Court Legislation Amendment Bill 2004* (24 March 2005).

(e) the Family Court retain its appellate jurisdiction.

77. There should be a national discussion to consider whether reducing three federal courts — the Family Court, FCC and Federal Court – into two federal courts (a specialist Family Court 2.0 and the Federal Court, each with a lower level division to resolve less complex disputes) will streamline resourcing, reduce costs and provide greater consistency, as well as opportunities for specialisation, career development and progression of Judges. A diagram of the NSW Bar's proposed structure is included below. Most importantly, this proposal consolidates and strengthens a single, specialised Family Court 2.0 with one point of entry, unified court rules and procedures across divisions and inherent appellate jurisdiction.

78. This proposal largely creates the structure recommended by the Semple Report,[62] and it is also a similar structure to that already in place in Western Australia. The Family Court of Western Australia (**FCWA**) functions well in this structure when properly resourced.



Source: NSW Bar Association, 'Time to Talk about the Family Court of Australia 2.0' (Media release, 31 July 2018) 19 Diagram C.

[62] Des Semple, *Future Governance for Federal Family Law in Australia: Striking the Right Balance* (August 2008) <https://www.ag.gov.au/LegalSystem/Courts/Documents/court-reform-semple-report.PDF>.

Recommendation 3

79. Another area requiring reform is the Family Court Counselling Service. Since inception the FCoA and the FCC have offered in-house counselling to parties involved in parenting matters. As a result of budgetary cuts these services have diminished. Parties are increasingly denied the opportunity to negotiate settlements with a family consultant's assistance. There is a trend for Expert Reports in parenting matters to be outsourced, leading to increased costs and delay and it keeps children within the system, sometimes for years.

80. Family counselling is conducted by family consultants. Their function is set out at section 11A of the FLA. As well as providing assessment reports with recommendations to assist Courts and parties, the family consultants are also charged with *helping people involved in the proceedings to resolve disputes that are subject to the proceedings*.[63] Budgetary cuts have led to fewer family consultants being employed. This directly impacts the number of families being assisted (including helping them to reach a final agreement about the care of their children) at an early stage.

81. The Courts must have a properly funded Family Court Counselling Service. If a greater number of properly qualified family consultants are employed, more families may access the service, leading to a greater number of settlements and a reduction in court lists, costs and delays. Early settlement gives the greatest chance of parties preserving relationships, resulting in better outcomes for children.

82. Registrars also ought to be able to hold conferences in children's matters (where the Registrar facilitated settlement discussions between the parties). This was once commonplace, but current resourcing has almost eradicated the process. Settlement rates and positive outcomes for families will improve if the Court is properly resourced to re-offer this service.

83. Part of the role exercised by Registrars and Deputy Registrars is to mediate property disputes. The success rate of such mediations is high. Again, if there were more Registrar conferences, there would be higher settlement rates.

84. In the FCoA, a Registrar's Conciliation Conference is usually the first court event after a property proceeding being filed with the Court. This is an efficient way to identify issues in dispute and, in many cases, resolve the dispute. Unfortunately, in the FCC the same process is not followed. When an Application is filed in the FCC, the matter is (normally) listed before a judicial officer (although the FCC is now trialling greater use of Registrars on first return dates) before being allocated a conference (and a conciliation conference at the court will often only be allocated if the property pool is less than $500,000; for those with a property pool in excess of $500,000, a private mediation is usually 'required' to be arranged).

85. There are additional costs to the user and within the FCC in having first return dates conducted by Judges as opposed to Registrars. Some lawyers try and file in the FCoA to obtain the conference because it is a better process for the client but the matter may be transferred to the FCC if it does not resolve or transferred automatically by the FCC in any event.

86. By virtue of sustained under-funding, there is a lack of Registrars (particularly in the large Registries) able to provide the mediation to assist with the early settlement of matters. As with family consultants, the role of mediator is being increasingly

[63] *Family Law Act 1975* (Cth) s 11A(c).

outsourced, which can lead to unnecessary delay and expense. If more Registrars were employed by the Court, there would be a greater level of settlement, and the large lists that Judges currently must manage would be reduced.

87. A reform which is the subject of Pilot Programs is the establishment of a 'short causes list' to deal with less complex property claims in a timely and cost-efficient manner. This, however, is only possible if the Court is properly funded, with specialised and experienced judicial officers.

88. The Law Council in its response to the ALRC Discussion Paper submitted that a simplified Court procedure to deal with smaller property cases potentially creates the danger of creating a second and lesser tier of justice for those with smaller property pools.[64]

89. The Law Council submitted:

> *The most appropriate way in which to deal with 'smaller' property matters is to ensure that such matters are appropriately identified early in the case management process; that there are Registrars available to refine and define the issues on a timely basis; and if there is, where necessary, a Judge available to determine the matter on a timely basis.*[65]

90. The Law Council went on to submit:

> *The LCA repeats prior submissions advanced in relation to the proper approach to case management, including the role that Registrars should have. Registrars should be used for case management as identified together the conduct of conciliation conferences, the latter of which continues to occur in the Family Court where resources permit.*
>
> *Small property pool cases do not make those matters necessarily easier to determine as every percentage point and every dollars counts. They need special care and attention not a formulaic approach.*[66]

91. The current process of enforcing orders (particularly parenting orders) is time consuming, cumbersome and complicated. Parties that seek to enforce orders are at risk in relation to costs and establishing a contravention can often be complicated, costly and a lengthy process.[67] Even if successful, the outcome can be less than satisfactory.

92. Along with the changes suggested by Professor Chisholm, consideration ought also be given to simplifying the process of enforcement of financial orders and obligations.[68]

93. Whatever changes are made to the FLA and the Rules of the Court relating to enforcement and contravention, there must be an improvement to the process of bringing such proceedings before the Court. Currently, if an application for contravention is filed, it is listed before a judicial officer in a busy list. It is time consuming and an expensive process. Even if the contravention is proved, the penalty (particularly in relation to a first stage of contravention of a parenting order) offers little

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[64] Australian Law Reform Commission, *Review of the Family Law System* (Discussion Paper 86, 2018) 41.
[65] Ibid.
[66] Ibid 42.
[67] See, eg, *Family Law Act 1975* (Cth) s 70NCB.
[68] *Family Law Act 1975* (Cth) s 112AA; *Family Law Rules 2004* (Cth) ch 20.

deterrence. It is the view of many that it is often not worth the trouble in bringing the application.

94. The Court orders must be able to be enforced, in a timely manner. A process needs to be put in place to ensure efficient, timely and cost-effective means of enforcing all orders, whether they be parenting, financial or procedural.

95. Many of the matters referred to in this Term of Reference have already been considered by the ALRC.[69] For example, recommendations have been made in relation to amendment to Division 13A,[70] the use of family consultants post Order,[71] amendments to costs provisions of the FLA,[72] changes to rules around case management, efficiency and accountability,[73] and simplification of the FLA in relation to both children and property matters (noting the Law Council does not agree with all of the recommendations in this regard).[74]

96. The Law Council has received the following submission from LSNSW in relation to key matters for consideration, including court resourcing, structure of and entry point into the Family Courts and the importance of specialisation in the family law jurisdiction:

> *Structural elements of the family law system*
>
> *Combining the family law jurisdiction at federal or state level*
>
> *We note that recommendations arising from the ALRC Review of the Family Law System include consideration of options to establish state and territory courts to exercise concurrently family law, child protection and family violence jurisdiction.[75] In our response to the Final Report we have suggested that a preliminary question is whether there is merit in combining these jurisdictions at one level. We have recommended this issue be further explored through further consultation and/or investigation.[76]*
>
> *Court resourcing*
>
> *In the meantime, there is an urgent need to address the delays currently experienced by family law litigants caused by underfunding of the courts and associated services. We understand it is not unusual for matters at call-over to be listed for further directions on a date 12 months later, for consideration for listing for hearing. We commend the Chief Justice for initiating measures such as callover days to alleviate the current backlog. Nevertheless, the system is significantly understaffed and in urgent need of the appointment of additional Judges, Registrars and family consultants.*
>
> *In addition, we recommend measures be taken to ensure judicial vacancies are filled. When Judges in the family courts take extended leave or retire, other Judges are required to take up their caseload. The resulting judicial*

[69] Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family Law System* (Final Report 135, March 2019).
[70] Ibid 353 Recommendation 42.
[71] Ibid 343 Recommendation 39.
[72] Ibid 331 Recommendation 36.
[73] Ibid 297 Recommendation 31.
[74] Ibid 162 Recommendation 4, 165 Recommendation 5, 218 Recommendation 11.
[75] Ibid 113 Recommendation 1.
[76] Law Society of New South Wales, Submission to Law Council of Australia*, Australian Law Reform Commission, Review of the Family Law System – Final Report* (26 August 2019) 2.

workloads exacerbate the delays experienced by parties in having their matter determined.

Resources are also required to strengthen the courts' expertise in responding to issues concerning vulnerable parties, including survivors of family violence, people experiencing economic disadvantage, people experiencing disability, and those who identify as Aboriginal and Torres Strait Islander, CALD or LGBTIQ.

In our view, such additional resources will benefit the existing system, and will go a long way to alleviating the current problems experienced across the system, irrespective of any future structural reforms.

Common leadership and entry point and procedures

The Law Society commends the provision of common leadership and management of the family courts, including the appointment of a single head of jurisdiction. We welcome current initiatives for the development of common rules and forms, and common practices and procedures across the family courts, noting the importance that solicitors be consulted on any draft Rules and have ample opportunity to provide input. We note also the ALRC's recommendation that the courts be adequately resourced to carry out their statutory mandate to implement the rules.[77]

We also support the introduction of a single point of entry for all family law matters. This will increase efficiencies for parties and the courts, and reduce issues created by parties filing in the wrong forum.

Proposed merger of the Family Court of Australia and Federal Circuit Court

The Law Society supports the Law Council's view that reintroduction of the merger Bill should be postponed pending the findings of this Inquiry. We call on the Government in the meantime to release the current draft Bill to enable proper consultation with users of the family law system.

The merger proposal is premised on a report prepared by PwC which outlines cost-savings projected to result from the merger. We have previously stated that while we appreciate cost-saving measures could free up funds for reinvestment in the system, we do not accept that the report demonstrates a sufficient case for the merger as it does not address the quality of justice that would be delivered. For example, the conclusions in the report are premised on an assumption that the work undertaken by the Family Court and the Federal Circuit Court are predominantly the same; in fact the types of matters and work performed in the two courts are different.[78] *We are concerned that merging the two courts as proposed will simply change the structure around the problems they face.*

Retaining the specialisation of the family law jurisdiction

Although there are acknowledged problems with the current family courts structure, in our view the specialisation of the family court system should be

[77] See Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family Law System* (Final Report 135, March 2019) 185 Recommendation 10.
[78] Law Society of New South Wales, Submission to Law Council of Australia, *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018* (6 November 2018) 2.

strengthened, so that those working in the system can better understand and respond to issues experienced by vulnerable parties.

We are concerned that if the merger provides a dual system and the potential for matters to be referred between Divisions 1 and 2, it will not achieve this objective. There is a risk that, together with the family law jurisdiction of the Local Courts, the family law jurisdiction would be spread across three forums overall.

Term of Reference (d)

The financial costs to families of family law proceedings, and options to reduce the financial impact, with particular focus on those instances where legal fees incurred by parties are disproportionate to the total property pool in dispute or are disproportionate to the objective level of complexity of parenting issues, and with consideration being given amongst other things to banning "disappointment fees", and:

i. capping total fees by reference to the total pool of assets in dispute, or any other regulatory option to prevent disproportionate legal fees being charged in family law matters; and

ii. any mechanisms to improve the timely, efficient, and effective resolution of property disputes in family law proceedings.

Introduction

97. Access to legal assistance in the early stages of a dispute can prevent or reduce the escalation of legal problems and reduce cost to the justice system overall. Private legal practitioners generally provide high quality, tailored family law advice and play an important role in resolving family law matters, including by identifying relevant issues and providing relevant information to the Court. Access to legal advice and representation is key in the resolution of matters and helps to ensure litigants are properly informed.

98. The Law Council notes that sustained funding shortfalls and cuts to the legal assistance sector, including legal aid, community legal centres, Aboriginal and Torres Strait Islander Legal Services and Family Violence Prevention Legal Services have impacted the ability of a significant proportion of the community to obtain access to specialist family law advice. Additional funding to the legal assistance sector is essential to improving accessibility to the family law system and reducing cost to clients.

99. Further, the great majority of family law files opened by lawyers, resolve without the need to issue proceedings in a Court.

100. Family lawyers manage this through a variety of methods including the use of early disclosure and valuations in property matters and with the assistance of family dispute resolution (**FDR**) practitioners in parenting matters.

101. Family lawyers make early and effective use of alternate dispute resolution methods such as roundtable conferences, lawyer assisted mediations and collaboration. It is therefore in a minority of cases, which are usually the most difficult and contentious matters, that Court proceedings need to be issued. In financial cases, proceedings may need to be instituted for factors that include:

(a) urgent relief of an injunctive nature;

(b) valuation disputes;

(c) factual and or legal issues about initial contributions, gifts, inheritances, damages awards;

(d) claims involving third parties to the marriage; and

(e) issues around the future needs of either party.

102. Even once proceedings under the FLA are issued, family lawyers take all reasonable steps available to try and ensure matters are resolved prior to any final hearing and judgment. Again, making use of alternative dispute resolution methods even when in the Court system, lawyers are exceptionally adept at resolving disputes. This is borne out in the available statistics. The majority of final hearing matters commenced in both the FCoA and the FCC settle without a final judgment.[79]

103. The 2018-2019 Annual Report of the FCoA, noted that 13,872 applications for Consent Orders were filed during that period, being cases whose only involvement with the Court system was the lodgement with the Court of an application for their proposed Terms of Settlement in respect of parenting and/or financial matters, to be made the subject of a final order by consent by the FCoA.[80]

104. The Pre-action Procedures in the FCoA impose obligations on lawyers both before and after starting a case in respect of costs, conduct of a claim, and settlement.[81]

105. The main purpose of the Family Law Rules is to ensure that each case is resolved in a just and timely manner at a cost to the parties and the court that is reasonable in the circumstances of the case.[82] Rule 1.08 imposes an obligation both on lawyers and parties in achieving that main purpose.

106. Pre-action Procedures under the Family Law Rules require lawyers to make an effort to resolve a matter by negotiation before commencing any proceedings. Those existing provisions in the Pre-Action Procedures to the Family Law Rules provide as follows:

FAMILY LAW RULES 2004 - RULE 19.10

Schedule 1, Part 1(6)

Lawyers' obligations – financial cases

Note : See also rules 1.08 and 19.03.

(1) Lawyers must, as early as practicable:

(a) advise clients of ways of resolving the dispute without starting legal action;

[79] Of applications where final orders sought, 84 per cent were resolved by way other than final judgment; in the FCC 70 per cent of matters seeking final orders were settled: Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family Law System* (Final Report 135, March 2019) [3.55]-[3.58].
[80] Family Court of Australia, *Annual Report 2018-19* (Report, 2019) 17.
[81] *Family Law Act 1975* (Cth) sch 1, pts 1(6), 2(6).
[82] *Family Law Rules 2004* (Cth) r 1.04.

(b) advise clients of their duty to make full and frank disclosure, and of the possible consequences of breaching that duty;

(c) subject to it being in the best interests of the client and any child, endeavour to reach a solution by settlement rather than start or continue legal action;

(d) notify the client if, in the lawyer's opinion, it is in the client's best interests to accept a compromise or settlement if, in the lawyer's opinion, the compromise or settlement is a reasonable one;

(e) in cases of unexpected delay, explain the delay and whether or not the client may assist to resolve the delay;

(f) advise clients of the estimated costs of legal action (see rule 19.03);

(g) advise clients about the factors that may affect the court in considering costs orders;

(h) give clients documents prepared by the court (if applicable) about:

(i) the legal aid services and dispute resolution services available to them; and

(ii) the legal and social effects and the possible consequences for children of proposed litigation; and

(i) actively discourage clients from making ambit claims or seeking orders that the evidence and established principle, including recent case law, indicates is not reasonably achievable.

(2) The court recognises that the pre-action procedures cannot override a lawyer's duty to his or her client.

(3) It is accepted that it is sometimes impossible to comply with a procedure because a client may refuse to take advice, however, a lawyer has a duty as an officer of the court and must not mislead the court.

(4) If a client wishes not to disclose a fact or document that is relevant to the case, a lawyer has an obligation to take the appropriate action, that is, to cease to act for the client.

Schedule 1, Part 2(6) – parenting cases

Lawyers' obligations

Note: See also rules 1.08 and 19.03 and clause 6.03 of Schedule 6.

(1) Lawyers must, as early as practicable:

(a) advise clients of ways of resolving the dispute without starting legal action;

(b) advise clients of their duty to make full and frank disclosure, and of the possible consequences of breaching that duty;

(c) subject to it being in the best interests of the client and any child, endeavour to reach a solution by settlement rather than start or continue legal action;

(d) notify the client if, in the lawyer's opinion, it is in the client's best interests to accept a compromise or settlement if, in the lawyer's opinion, the compromise or settlement is a reasonable one;

(e) in cases of unexpected delay, explain the delay and whether or not the client may assist to resolve the delay;

(f) advise clients of the estimated costs of legal action (see rule 19.03 and clause 6.03 of Schedule 6);

(g) advise clients about the factors that may affect the court in considering costs orders;

(h) give clients documents prepared by the court (if applicable) about:

(i) the legal aid services and dispute resolution services available to them; and

(ii) the legal and social effects and the possible consequences for children of proposed litigation; and

(i) actively discourage clients from making ambit claims or seeking orders that the evidence and established principle, including recent case law, indicates is not reasonably achievable.

(2) The court recognises that the pre-action procedures cannot override a lawyer's duty to his or her client.

(3) It is accepted that it is sometimes impossible to comply with a procedure because a client may refuse to take advice, however, a lawyer has a duty as an officer of the court and must not mislead the court.

(4) If a client wishes not to disclose a fact or document that is relevant to the case, a lawyer has an obligation to take the appropriate action, that is, cease to act for the client.

Note: Section 12E of the Act requires legal practitioners to give to persons considering instituting proceedings documents containing information about non-court based family services and court's processes and services.

107. The provisions in the Family Law Rules make clear the need for the just and timely disposition of cases and the responsibility of parties and lawyers to achieve that main purpose:

FAMILY LAW RULES 2004 - RULE 1.04

Main purpose of Rules

The main purpose of these Rules is to ensure that each case is resolved in a just and timely manner at a cost to the parties and the court that is reasonable in the circumstances of the case.

FAMILY LAW RULES 2004 - RULE 1.08

Responsibility of parties and lawyers in achieving the main purpose

(1) Each party has a responsibility to promote and achieve the main purpose, including:

(a) ensuring that any orders sought are reasonable in the circumstances of the case and that the court has the power to make those orders;

(b) complying with the duty of disclosure (see rule 13.01);

(c) ensuring readiness for court events;

(d) providing realistic estimates of the length of hearings or trials;

(e) complying with time limits;

(f) giving notice, as soon as practicable, of an intention to apply for an adjournment or cancellation of a court event;

(g) assisting the just, timely and cost-effective disposal of cases;

(h) identifying the issues genuinely in dispute in a case;

(i) being satisfied that there is a reasonable basis for alleging, denying or not admitting a fact;

(j) limiting evidence, including cross-examination, to that which is relevant and necessary;

(k) being aware of, and abiding by, the requirements of any practice direction or guideline published by the court; and

(l) complying with these Rules and any orders.

(2) A lawyer for a party has a responsibility to comply, as far as possible, with subrule (1).

Note: The court recognises that a lawyer acts on a party's instructions and may be unable to establish whether those instructions are correct.

(3) A lawyer attending a court event for a party must:

(a) be familiar with the case; and

(b) be authorised to deal with any issue likely to arise.

Note: The court may take into account a failure to comply with this rule when considering costs (see subrule 19.10(1) and subclause 6.10(1) of Schedule 6).

108. If proceedings are issued under the FLA, the most significant factor impacting the costs of those proceedings is often the delay in reaching a final hearing, if one is required.

109. In most FCoA and FCC registries around Australia, there are waiting times of up to two, and in some places three, years from the date of issuing proceedings until the date of any final hearing. If one party to the case has some vested interest in delay because it may benefit an outcome in their favour, then the existence of the lengthy delays to final trial dates does not assist in the prospects of any early resolution of the matter.

110. While most matters do not proceed to a trial, which may be fixed 12 to 18 months in the future, other matters may not be reached and/or finalised on the trial date or may be adjourned part heard. Other matters require extensive consideration at the interim stage before being able to proceed to final determination. This affects the Court's capacity to finalise other matters. At the interim stage, FCC Judges may have 30 matters listed before them daily. Each of the issues to be considered in an individual case may not be able to be fully addressed at the interim stage, requiring further appearances before the Court.

111. Delay also means issues develop whilst the parties wait for a final hearing. Parties do not live in 'suspended animation' while they wait to resolve their case or for a final hearing. Personal and financial circumstances evolve, some of which require engagement and negotiation involving lawyers. New personal relationships are formed and end; children are born and or go through personal changes; jobs are lost; houses are bought and sold; businesses boom and bust; money is invested and gains are made or losses incurred; inheritances are received; people fall ill; housing prices change and the stock market and inflation rates change. Delays in getting to a final trial date, make more likely the need for interim court applications as such issues arise, which can and does add to the costs of the proceedings. A cycle occurs whereby judicial time can be tied up in determining interim matters between parties, but which then means less available time for Judges to hear final trials, which further adds to delays.

112. There are a number of reasons for the delays in final hearing dates, including the chronic under-resourcing of the court system. However even within the resources currently available there are listing practices which can increase delay. The ‘docket system’ in use in the FCC means that once a matter is in a particular Judge’s docket it remains there. If that FCC Judge is part-heard in another matter, then no other case can get on before him or her. A matter that does not get reached is likely then to be adjourned for some months. This situation could be better managed if there were a central case listing system, abolition of the docket system, greater number and usage of Registrars to manage cases and deal with procedural issues, and cases were instead allocated to any Judge available to hear it on its listed final date. The docket system in the FCC may have worked, or been capable of working, if Judges had 100 to 150 cases in their docket. It cannot and does not work where Judges have 500 to 600 cases in their docket.

113. Some FCC Judges also undertake significant non-family law work. If so, then the docketed Judge in a family law matter may have weeks dedicated to non-family law sittings. This means that if a family law matter is in that Judge’s docket and only able to be dealt with by that Judge, there can be greater delay than in other ‘only family law’ FCC Judges’ lists.

114. The FCC routinely 'over-lists' final hearings, on the assumption that many will settle at Court, or not be ready or able to be heard for numerous reasons, and therefore adjourned. A Judge can only hear one matter at a time. Over-listing means some matters cannot be heard on the day they are listed for trial and are then likely to then be adjourned for some months. Over listing is a particular issue in regional areas on circuits. If a matter is not reached or resolved during one circuit, then it must be adjourned to the next circuit.

115. Certainty as to the likely costs of a case cannot be given, when there is such uncertainty in the Court system itself, leaving aside the vicissitudes of life and the myriad events, as exampled above, that can take place and add to the issues and complexity of a matter. The relevant facts in a family law case on which a lawyer is asked to give advice as to outcome in 2019, may be very different to the facts that apply to the same case two or three years down the track as it comes to final hearing.

116. Delay can also be attributed to the rise in the number of self-represented litigants. Successive cuts to legal aid funding over many years has placed increasing restrictions on who may qualify for assistance. Those who do not qualify and cannot afford lawyers are left to act for themselves.[83] Judges are obliged to explain court processes during hearings which contributes to delay, as does the ongoing conflict where parties may be able to settle if they had access to legal advice.

117. A properly resourced court system and support services should promote and contribute to a more efficient court process which will reduce delay, and cost to parties.

Costs orders against lawyers

118. The statutory source of power in respect of costs (as between parties and to make costs orders as against lawyers for a party) is located in section 117 of the FLA:

> ***FAMILY LAW ACT 1975 - SECT 117***
>
> ***Costs***
>
> *(1) Subject to subsection (2), subsections 45A(6) and 70NFB(1) and sections 117AA and 117AC, each party to proceedings under this Act shall bear his or her own costs.*
>
> *(2) If, in proceedings under this Act, the court is of opinion that there are circumstances that justify it in doing so, the court may, subject to subsections (2A), (4), (4A), (5) and (6) and the applicable Rules of Court, make such order as to costs and security for costs, whether by way of interlocutory order or otherwise, as the court considers just.*
>
> *(2A) In considering what order (if any) should be made under subsection (2), the court shall have regard to:*
>
> *(a) the financial circumstances of each of the parties to the proceedings;*

[83] In the FCoA, of parenting matters at trial almost half involved self-represented parties and more than one third in combined parenting and financial final hearings.Iin the FCC in 2017/18, 37 per cent of parenting matters had an unrepresented party, in financial cases only, 21 per cent had an unrepresented party and in combined parenting and financial matters, 11 per cent had an unrepresented party: Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family Law System* (Final Report 135, March 2019) [3.6]-[3.72].

(b) whether any party to the proceedings is in receipt of assistance by way of legal aid and, if so, the terms of the grant of that assistance to that party;

(c) the conduct of the parties to the proceedings in relation to the proceedings including, without limiting the generality of the foregoing, the conduct of the parties in relation to pleadings, particulars, discovery, inspection, directions to answer questions, admissions of facts, production of documents and similar matters;

(d) whether the proceedings were necessitated by the failure of a party to the proceedings to comply with previous orders of the court;

(e) whether any party to the proceedings has been wholly unsuccessful in the proceedings;

(f) whether either party to the proceedings has made an offer in writing to the other party to the proceedings to settle the proceedings and the terms of any such offer; and

(g) such other matters as the court considers relevant.

Costs of independent children's lawyer

(3) To avoid doubt, in proceedings in which an independent children's lawyer for a child has been appointed, the court may make an order under subsection (2) as to costs or security for costs, whether by way of interlocutory order or otherwise, to the effect that each party to the proceedings bears, in such proportion as the court considers just, the costs of the independent children's lawyer in respect of the proceedings.

(4) However, in proceedings in which an independent children's lawyer for a child has been appointed, if:

(a) a party to the proceedings has received legal aid in respect of the proceedings; or

(b) the court considers that a party to the proceedings would suffer financial hardship if the party had to bear a proportion of the costs of the independent children's lawyer;

the court must not make an order under subsection (2) against that party in relation to the costs of the independent children's lawyer.

Limit on orders relating to intervention under section 91B

(4A) If:

(a) under section 91B, an officer intervenes in proceedings; and

(b) the officer acts in good faith in relation to the proceedings;

the court must not, because of the intervention, make an order under subsection (2) of this section against the officer, or against an

entity (including the Commonwealth or a State or Territory) by or on behalf of whom the officer was engaged or employed.

Funding of independent children's lawyer not to affect costs order

(5) In considering what order (if any) should be made under subsection (2) in proceedings in which an independent children's lawyer has been appointed, the court must disregard the fact that the independent children's lawyer is funded under a legal aid scheme or service established under a Commonwealth, State or Territory law or approved by the Attorney-General.

Limit on orders against guardians ad litem[84]

(6) The court must not make an order under subsection (2) against a guardian ad litem unless the court is satisfied that one or more acts or omissions of the guardian relating to the proceedings are unreasonable or have delayed the proceedings unreasonably.

119. Courts have an existing ability, in respect of proceedings under FLA, to make costs orders against lawyers personally, in appropriate circumstances.

120. The FLA provides in subsection 117(2) the existing statutory source of power for the making of costs orders against lawyers.

121. In relation to proceedings in the FCoA, the Family Law Rules make specific provision for the rules of practice for applications for the making of costs orders against lawyers, whether by a party or of the court's own volition.[85]

FAMILY LAW RULES 2004 - RULE 19.10

Costs orders against lawyers

(1) A person may apply for an order under subrule (2) against a lawyer for costs thrown away during a case, for a reason including:

(a) the lawyer's failure to comply with these Rules or an order;

(b) the lawyer's failure to comply with a pre-action procedure;

(c) the lawyer's improper or unreasonable conduct; and

(d) undue delay or default by the lawyer.

(2) The court may make an order, including an order that the lawyer:

(a) not charge the client for work specified in the order;

(b) repay money that the client has already paid towards those costs;

(c) repay to the client any costs that the client has been ordered to pay to another party;

[84] The role of a Guardian ad Litem is to protect or promote the interests of the person for whom they have been appointed.
[85] *Family Law Rules 2004* (Cth) r 19.10.

(d) pay the costs of a party; or

(e) repay another person's costs found to be incurred or wasted.

122. In relation to proceedings in the FCC, the Federal Circuit Court Rules make specific provision for the rules of practice applicable to applications for the making of costs orders against lawyers, whether by a party or of the court's own volition.[86]

FEDERAL CIRCUIT COURT RULES 2001 - RULE 21.07

Order for costs against lawyer

(1) The Court or a Registrar may make an order for costs against a lawyer if the lawyer, or an employee or agent of the lawyer, has caused costs:

(a) to be incurred by a party or another person; or

(b) to be thrown away;

because of undue delay, negligence, improper conduct or other misconduct or default.

(2) A lawyer may be in default if a hearing may not proceed conveniently because the lawyer has unreasonably failed:

(a) to attend, or send another person to attend, the hearing; or

(b) to file, lodge or deliver a document as required; or

(c) to prepare any proper evidence or information; or

(d) to do any other act necessary for the hearing to proceed.

(3) An order for costs against a lawyer may be made on the motion of the Court or Registrar, or on application by a party to the proceeding or by another person who has incurred the costs or costs thrown away.

(4) The order may provide:

(a) that the costs, or part of the costs, as between the lawyer and party be disallowed; or

(b) that the lawyer pay the costs, or part of the costs incurred by the other person; or

(c) that the lawyer pay to the party or other person the costs, or part of the costs, that the party has been ordered to pay to the other person.

(5) Before making an order for costs, the Court or Registrar:

[86] *Federal Circuit Court Rules 2001* (Cth) r 21.07.

(a) must give the lawyer, and any other person who may be affected by the decision, a reasonable opportunity to be heard; and

(b) may order that notice of the order, or of any proceeding against the lawyer be given to a party for whom the lawyer may be acting or any other person.

123. The Full Court of the FCoA has long recognised that subsection 117(2) of the FLA provides the basis for the making of costs orders against lawyers.[87] Recent examples of the exercise of the power include *Kaufman v Sandor* [2018] FCCA 2701 and *Weldon v Levitt (No 2)* [2018] FCCA 436.

124. The question of costs and dispute resolution was a matter that the ALRC raised for consideration during its review of the family law system. The Law Council submissions in response to the ALRC Issues Paper stated in part as follows:

> ***Question 43:***
> ***How should concerns about professional practices that exacerbate conflict be addressed?***

1. The vast majority of lawyers working in family law strive to advance the best interests of their clients, conduct matters respectfully and with a view to assisting their clients to an acceptable resolution of matters in dispute, and to guide their clients in parenting cases to ensure that their decision making is framed by the paramount principle of the best interests of the child. The Best Practice Guidelines for Lawyers Doing Family Work, a joint publication of the Family Law Section and the Family Law Council provides guidance for family lawyers about conduct and communication which minimises, or at least does not exacerbate, conflict.[88]

2. Lawyers have an overriding duty to the Court, and operate under an extensive range of professional obligations which inform our conduct with our clients, the court, our fellow practitioners and the wider community. Lawyers take those obligations very seriously and are rightly proud of the work they do for their clients.

3. CPD obligations on lawyers each year include a component relating to ethics.

4. Each state and territory have a disciplinary process to respond to allegations about unprofessional conduct or professional misconduct by lawyers. The LCA notes that lawyers in practice are subject to an exhaustive range of rules, ethical guidelines and obligations, and duties to the court. There are extensive independent complaint mechanisms available to the public (and to judicial officers) in relation to the conduct of legal professionals

5. Family lawyers deal, day in and day out, with clients who are often going through one of the most stressful periods of their life. They deal with clients who have been subjected to or are themselves

[87] *Re John Patrick Cassidy and Brian Raymond Murray* (1995) FLC 92-633 [17]-[40].
[88] Family Law Council and Family Law Section of the Law Council of Australia, *Best Practice Guidelines for Lawyers Doing Family Law Work* (4th ed, 2017).

perpetrators of family violence, with clients whose children are at risk or been subject to abuse, with families afflicted by alcohol and substance abuse. These are challenges that family lawyers embrace as part of working in the profession and endeavour to guide clients safely through the situation and to secure the best outcome. LCA notes and supports the views of the NSWLS that conflictive behaviour between parties is exacerbated by system delays. As parties become increasingly distressed the potential for lawyers to be drawn into disputes and to lose objectivity also increases. Poor professional practices cannot be viewed in isolation from a system that is stretched and with practitioners that are under high levels of pressure.

6. *Whilst one recent decision of a Judge of the Family Court in Simic and Norton raised concerns about conduct of 1 or more lawyers, the LCA notes that the matters in question remain to be determined by the relevant State body.*[89] *To the extent that the judgment suggested more widespread problems, there was on the face of the judgment, no evidence cited to support any broader observation.*[90]

125. Issues of costs and how to promote dispute resolution, were also addressed in the Law Council submissions to the AGD in response to the ALRC Discussion Paper, parts of which are excerpted below:

5. DISPUTE RESOLUTION	
Proposal 5–3	The *Family Law Act 1975* (Cth) should be amended to require parties to attempt family dispute resolution prior to lodging a court application for property and financial matters. There should be a limited range of exceptions to this requirement, including: • urgency, including where orders in relation to the ownership or disposal of assets are required or a party needs access to financial resources for day to day needs; • the complexity of the asset pool, including circumstances involving third party interests (apart from superannuation trustees); • where there is an imbalance of power, including as a result of family violence; • where there are reasonable grounds to believe non-disclosure may be occurring; • where one party has attempted to delay or frustrate the resolution of the matter; and • where there are allegations of fraud.
Response:	Not agreed.
Comment:	The Law Council submission to the Issues Paper opposed (at paragraphs [222] to [224)] the introduction of family dispute resolution (**FDR**) as a pre-condition to the institution of

[89] *Simic v Norton* [2017] FamCA 1007.
[90] Law Council of Australia, Submission No 43 to the Australian Law Reform Commission, *Issues Paper 48: Review of the Family Law System* (7 May 2018) 99-100.

proceedings for financial relief. That position remains unchanged.

The opposition to the proposal is based on concerns about the potential use of FDR as a tool for delay, cost and oppression to the detriment of vulnerable persons, and the existence already (if not the consistent enforcement by the Courts) of the pre-action procedures in financial cases in the Family Law Rules.

The Law Council notes the ALRC's comments in paragraphs 5.15 to 5.19 of the Discussion Paper and supports increased availability of legally-assisted mediation services in financial cases, particularly to cater for the needs of couples/parties who may not currently be able to afford existing services and/or where the property pool is relatively modest or the identification and valuation of the assets in the pool is relatively simple.

However, the Law Council suggests that making FDR compulsory in all financial disputes is likely to have unintended consequences which are contrary to any overarching goal of reducing costs and minimising conflict. It notes the comparison made between the use of mediation in parenting and financial cases in paragraphs 5.13 and 5.14. The Law Council suggests that such comparisons are misleading and do not take account of the significant differences in the nature of dispute resolution for parenting versus financial disputes. They include:

- in most parenting disputes, both parents have relatively good knowledge of the facts relevant to the dispute – they both know their children's day to day needs and arrangements;
- in most financial disputes, one party, and sometimes both, does not have good knowledge of the other party's or their joint financial circumstances;
- in most parenting disputes, the legal complexities relate solely to the application of the principles in the *Family Law Act 1975* (Cth);
- in many financial disputes, the legal complexities can include the application of the principles in the *Family Law Act 1975* (Cth), but also matters such as valuation methodologies, taxation laws, interpretation of financial statements and trust deeds, tracing of funds, and stamp duty laws;
- in most mediations in parenting disputes, parties do not need significant assistance of lawyers before, at, or during the process; and
- in most mediations in financial disputes where both parties have engaged lawyers, the mediation will occur after the parties have exchanged disclosure, have identified the asset pool and usually will have identified what values they agree or disagree about. That is so because that is the most cost-effective way, in most cases, of preparing a financial dispute for mediation. If that preparatory work was undertaken in the mediation process itself, the mediation would be protracted and expensive. In many cases, having done the preparatory

	work, the parties do not need to incur the costs of a mediation as the issues in dispute have been identified and negotiation via lawyers is more cost-effective. There is available evidence, not referenced by the ALRC, that a significant number of separated couples are already able to resolve their financial dispute (see the Annual Report of the Family Court of Australia which notes that 14,295 Applications for Consent Orders were filed in 2017/18, most of which the Law Council suggests would be in relation to financial matters). If the Government were to decide that financial FDR should be introduced, then the Law Council is of the view that the exceptions must be clearly spelled out and accepted, to provide safeguards for vulnerable litigants and avoid the scenarios spelled out above. The Law Council notes that many aspects of such a proposal would require additional consideration, including questions such as: • Many separated couples currently resolve their financial dispute without recourse to the courts, using a range of services already available in the community including mediation and negotiation – will those services qualify as FDR or as exemptions to compulsory FDR? • What would be the relationship between compulsory FDR and the 'genuine steps statement' in proposal 5-4? • What would be the cost to the general community of expanded FDR services? Would the Government subside FDR in financial cases, as it currently does with some FDR in parenting cases? • Will the introduction of compulsory FDR in financial disputes increase costs for some parties? For those couples who seek the advice of lawyers to resolve financial disputes, an additional layer of 'compliance' by requiring attendance at FDR will inevitably increase their costs. The strategic abuse of compulsory FDR by the stronger party may increase costs for the vulnerable party, thereby reducing their capacity to fund legal proceedings to pursue their legitimate entitlements. • Will the introduction of compulsory FDR in financial disputes lead to the unintended consequence of more litigation, rather than less? For example, will behaviour of some parties become focused on 'gaining the certificate' or gaining the 'right' to issue proceedings, rather than genuine dispute resolution? • What confidentiality will apply to such FDR? For instance, will information or documents disclosed during FDR, or the non-disclosure of relevant financial material by one party during FDR, be able to be used in evidence if the dispute is not resolved and proceedings are issued? • What will happen if the parties are already in court in relation to parenting proceedings? Will they be exempted from

	attending FDR in relation to financial issues so that the parenting and financial dispute can be heard at the same time? Or will the parties need to be involved in two separate sets of proceedings if they can't resolve the financial dispute at FDR? The Law Council notes the following additional comments that have been received from the Law Society of South Australia: *The Society is concerned that compulsory family dispute resolution with respect to property settlement matters, may impact on vulnerable parties, in particular, in the context of a relationship where there is family violence, and a history of control or a power imbalance.* *For example, the proposal would be problematic in situations where one party controls the finances, and the other party has no access to or no knowledge of the workings. This may in some cases, create further power imbalances and could possibly extend insofar as to dissuade the disadvantaged party from leaving an abusive or controlling relationship.* The Law Council notes the following additional comments that have been received from the Bar Association of Queensland: *The ALRC has proposed that the Act be amended to require parties to attempt family dispute resolution prior to lodging a court application for property and financial matters (proposal 5-3). The Association notes the Law Council opposition to this proposal, this opposition being based on concerns about the strategic use of family dispute resolution as a tool for delay, cost and oppression.* *The Association considers that the concerns raised by the Law Council, particularly with respect to proper exceptions to protect vulnerable litigants in parenting matters, are valid.* *However, the Association considers there would be significant benefit in family dispute resolution being required for property matters, and this view is outlined at pages 14 to 17 of the Association's submission to the ALRC on the Issues Paper.* The Law Council notes the concerns of the Victorian Bar that there is an additional risk of increased litigation about whether the exceptions to compulsory FDR do apply or should apply in particular cases, similar to arguments in parenting cases about whether the exemptions to section 60I have been made out. This leads to increased costs and delay.

5. DISPUTE RESOLUTION	
Proposal 5–4	The *Family Law Act 1975* (Cth) should be amended to specify that a court must not hear an application for orders in relation to property and financial matters unless the parties have lodged a genuine steps statement at the time of filing the application. The relevant provision should indicate that if a court finds that a party has not made a genuine effort to resolve a matter in good

	faith, they may take this into account in determining how the costs of litigation should be apportioned.
Response:	Agreed.
Comment:	Provided the form of safeguards as referred to under Proposal 5-3 are in place, then a genuine steps statement is supported by the Law Council. The Law Council suggests that if compulsory FDR is introduced by government, consideration should be given to the filing of a genuine steps statement being an exemption to compulsory FDR. That is, if parties have made attempts to settle their financial dispute through mechanisms other than mediation (such as negotiation between lawyers), they should not be required to bear the cost of attending compulsory FDR. The Law Council queries whether any amendment is required to the terms of section 117, given the breadth of paragraphs 117(2A)(c) and (g). The Law Council is of the view that changes to section 117, in this context, would be superfluous.

5. DISPUTE RESOLUTION	
Proposal 5–8	The *Family Law Act 1975* (Cth) should set out advisers' obligations in relation to providing advice to parties contemplating or undertaking family dispute resolution, negotiation or court proceedings about property and financial matters. Advisers (defined as a legal practitioner or a family dispute resolution practitioner) must advise parties that: • they have a duty of full, frank and continuing disclosure, and, in the case of family dispute resolution, that compliance with this duty is essential to the family dispute resolution process; and • if the matter proceeds to court and a party fails to observe this duty, courts have the power to: (a) impose a consequence, including punishment for contempt of court; (b) take the party's non-disclosure into account when determining how costs are to be apportioned; (c) stay or dismiss all or part of the party's case; and (d) take the party's non-disclosure into account when determining how the financial pool is to be divided.
Response:	Generally agreed.
Comment:	Assuming that the first dot point in Proposal 5-8 signals the intention to largely transpose the pre-action procedures (including obligations upon legal advisers) from the Family Law Rules into the *Family Law Act 1975* (Cth), then this is supported by the Law Council and consistent with the response by the Law Council to the Issues Paper.

	In respect of the second dot point in Proposal 5-8, the Law Council submits that there are already existing legislative provisions in the *Family Law Act 1975* (Cth) that cover each of those matters and case law supportive of same, so it is unclear why they would be duplicated. The Law Council is concerned that proposals of this nature lengthen by unnecessary duplication the *Family Law Act 1975* (Cth), and are irreconcilable with Proposal 3-1 for simpler and clearer legislation.

126. The ALRC Report addressed encouraging the amicable resolution of matters. In the response of the FLS to the ALRC Report, it was stated:

8. ENCOURAGING AMICABLE RESOLUTION	
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.
Report reference:	Pages 258 - 264; Paragraphs 8.48 - 8.77
Response:	Agreed subject to the comments below.
Comment:	The Law Council recommends that "genuine steps" be clearly defined in the FLA and make express reference to processes other than FDR/mediation which will address the proposed (although unclear) costs consequences. See comments in relation to Recommendation 22 and the definition of FDR and the skills of FDRPs. Amendments to the terms of section 60I Certificates will also be required (and consideration of where those requirements will be addressed given the current Part VII context of section 60I). It is suggested that the FLA clarify whether a "genuine steps document" is able to be lodged by one party without the consent or involvement of the other so as to address residual concerns that vulnerable parties will be at risk of exploitation and increased costs (see Law Council Response to the ALRC Discussion Paper at 5-3).

10. CASE MANAGEMENT: EFFICIENCY AND ACCOUNTABILITY	
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.
Report reference:	Pages 331 - 334; Paragraphs 10.134 - 10.144
Response:	Disagree in part.
Comment:	As noted in the ALRC Report, parenting matters are not often amenable to costs orders against a party who can be said to have "won" or "lost". Parenting proceedings are not inter party proceedings as are property matters (see the High Court in M v. M (1988) 166 CLR 69). The Court has an active role to play in their resolution. Previous attempts to make costs follow the cause in parenting proceedings have been repealed as having unintended consequences. For example, the repeal of the provision that unfounded claims of abuse could lead to cost consequences for the parent making the allegation. This was found to have a coercive effect and stifle allegations which should have been subject to forensic investigation by a court. Were it to be found that allegations are maliciously made, or that parenting proceedings were being used as a form of coercion or control, then the general discretion to award costs remains. For property matters the proposed amendments to the costs regime as stated on page 334, paragraph 10.144, are considered worthwhile.

Costs – Notice of estimated costs and instructions from clients

127. Legal practitioners are already subject to regulation in respect of costs and charges by their respective state and territory professional bodies. Solicitors' fees are subject to an overarching requirement that they be 'fair and reasonable'. Gross overcharging is a matter that is characterised as 'professional misconduct'. **Annexure D** provides a summary of how legal costs are regulated under Australian legal profession laws.

128. Lawyers are obliged, under the costs regulatory framework of each state or territory professional association, to provide written advice to their clients about likely costs, before the work is undertaken and to continue to advise their client as to changes to the costs estimate.[91]

129. The Courts require parties to exchange information about costs at each stage of the court process. In addition, specific directions about this are also routinely made by the Courts.

130. The Family Law Rules provide relevantly as follows:

FAMILY LAW RULES 2004 - RULE 19.04

Notification of costs

(1) This rule applies to the following court events:

(a) conciliation conference;

[91] See, eg, *Legal Professional Act 2007* (Qld).

(b) the first day of the allocated dates mentioned in rule 16.10;

(c) any other court events that the court orders.

(2) Immediately before each court event, the lawyer for a party must give the party a written notice of:

(a) the party's actual costs, both paid and owing, up to and including the court event;

(b) the estimated future costs of the party up to and including each future court event; and

(c) any expenses paid or payable to an expert witness or, if those expenses are not known, an estimate of the expenses.

(3) At each court event:

(a) a party's lawyer must give to the court and each other party a copy of the notice given to the party under subrule (2); and

(b) an unrepresented party must give to the court and each other party a written statement of:

(i) the actual costs incurred by the party up to and including the event; and

(ii) the estimated future costs of the party up to and including each future court event.

(4) Immediately before the first day of the trial, an independent children's lawyer must give to the court and each party a written statement of the actual costs incurred by the independent children's lawyer up to and including the trial.

(5) In a financial case, a notice under subrule (2) or a statement under paragraph (3)(b) must specify the source of the funds for the costs paid or to be paid unless the court orders otherwise.

Note: The court may relieve a party from being required to disclose the source of the funds if, for example, the source is a third party (see rule 1.12).

(6) At the end of a court event, the court must return the copy of the notice or statement given under this rule to the person who gave it.

(7) In this rule:

*"**lawyer**" does not include counsel instructed by another lawyer.*

131. The Federal Circuit Court Rules provide relevantly as follows:

1.03 Objects

(1) The object of these Rules is to assist the just, efficient and economical resolution of proceedings.

(2) In accordance with the objects of the Act, the Rules aim to help the Court:

- *to operate as informally as possible*
- *to use streamlined processes*
- *to encourage the use of appropriate dispute resolution procedures.*

(3) The Court will apply the Rules in accordance with their objects.

(4) To assist the Court, the parties must:

- *avoid undue delay, expense and technicality*
- *consider options for primary dispute resolution as early as possible.*

(5) If appropriate, the Court will help to implement primary dispute resolution.

1.04 Dictionary

The dictionary defines terms used in these Rules.

1.05 Application

(1) It is intended that the practice and procedure of the Court be governed principally by these Rules.

(2) However, if in a particular case the Rules are insufficient or inappropriate, the Court may apply the Family Law Rules, the Federal Court Rules or the Federal Court (Criminal Proceedings) Rules 2016, in whole or in part and modified or dispensed with, as necessary.

(3) Without limiting subrule (2):

(a) the provisions of the Family Law Rules set out in Part 1 of Schedule 3 apply, with necessary changes, to family law or child support proceedings; and

(b) the provisions of the Federal Court Rules set out in Part 2 of Schedule 3, apply, with necessary changes, to general federal law proceedings.

Note: These Rules have effect subject to any provision made by an Act, or by rules or regulations under an Act, with respect to the practice and procedure in particular matters: see subsection 81(2) of the Act.

132. Parties are at liberty to engage the lawyer of their choosing (or no lawyer) and the extent of the financial commitment to obtaining legal advice is a matter for the individual.

133. Costs disclosures provided to clients routinely include provisions that confirm to clients that they are at liberty to seek to negotiate the terms of the engagement, seek

legal advice about its contents, or to engage another lawyer who charges different terms and or rates.

134. The fees charged by firms and practitioners vary according to a range of considerations, including experience, seniority, specialisation, location (city or regional, for example) and reputation.

135. Fees incurred in parenting matters are most significantly impacted by the complexity of issues before the court, the number of interim hearings which may be required and the impacts of delay. Some of the most complex and difficult family law matters are parenting cases which may involve allegations of family violence, sexual abuse or parental deficiencies.

136. Lawyers for one party cannot of course advise or control the other party. If the party on the other side of a matter issues extended interim proceedings, breaches court orders, writes many letters, or requires significant engagement by a lawyer for the other side, then legal costs can increase through no fault of the lawyer or his/her client.

137. In *Simic v Norton*,[92] Benjamin J raised concerns about the legal costs incurred by the parties in that case. There is an obligation upon family lawyers, as officers of the Court, to ensure they act appropriately and responsibly when representing parties. Lawyers also have an obligation to act on instructions and at times, despite advice otherwise, clients will instruct lawyers to act such that costs do increase. That is not to suggest that a lawyer can or should blindly follow their client's instructions. It is important to recognise that *Simic v Norton* involved complex parenting issues as well as property matters. The 'proportionality' of legal costs cannot be measured in parenting proceedings against any benchmark.

Cancellation fees

138. 'Cancellation fees' are charged by a limited number of barristers only and are set out in their costs agreements entered into with their instructing solicitor and clients.

139. The solicitor/client may negotiate those terms with counsel and ultimately, the decision to engage alternate counsel may be made, and often is, if the existence of a cancellation fee provision is unacceptable to the client. Those fees are intended to protect counsel from the consequences (and lost fees) arising from the late adjournment or settlement of matters where counsel, in some instances, may have blocked out considerable periods of time to be available to appear and who may have declined other work at that time in order to be available. They are not universally charged, and it is a matter for individual counsel, but for many, they are seen as a necessary shield against the consequences of late changes and systemic delay.

140. The Law Council understands from the LIV that it is unaware of disappointment fees being rendered by members of the Victorian Family Law Bar. The LIV suggests that most practitioners would advise their client of the cost savings that would flow from a negotiated settlement.

Capping fees

141. Creating a class of matters in which legal fees is capped is not a solution and even the identification of the class is of itself problematic.

[92] [2017] FamCA 1007.

142. If there is a dispute about the identification or value of the property pool, then valuations will need to be undertaken in property settlement cases. The costs of the required experts can be extensive particularly if there is forensic accounting evidence (in addition to real property evidence) required. The Court cannot make any decision to adjust property interests until it first establishes the ownership, and value, of the property pool.

143. Many matters involve both parenting and property issues, not just one aspect alone. Costs are incurred for both; capping fees for one aspect of the case and not the other is neither realistic or achievable.

144. Many family law cases involve circumstances of family violence and/or power imbalances. If costs were capped, the result in many cases would see a vulnerable party (normally women who have been the victims of family violence) left without the benefit of independent legal advice to protect their legal rights under the FLA.

145. Litigants who reach any capped cost limit are likely to become self-represented litigants in the family law courts system and take up more judicial time, only increasing the delays that already exist.

146. Further, there is a concern that if a party were advised that their fees would be capped to a particular sum or percentage of the asset pool, this may make them less inclined to accept advice to settle matters or narrow the issues in dispute as there would be no cost incentive for them to do so. Fixed fees would also see the potential for work to cease at a certain stage if the costs are exhausted and reach the fee cap resulting in only perfunctory assistance provided afterwards, if at all.

147. A small property pool does not necessarily make matters easier or simpler. These are often the most difficult matters to resolve or determine. Litigants with smaller levels of assets to divide, at times are more determined to push for higher settlements to protect themselves financially for the future. Streamlined and more effective court systems for dealing with small property pools form a matter that the FCC has already embarked upon with pilot services and is further discussed below.

Streamlining the Court's listings

148. To improve the timely, efficient and effective resolution of property disputes in family law proceedings, proper resourcing of the courts needs to occur. This would reduce the delay in the resolution of matters by providing more Judges, Registrars and family consultants to deal with the volumes of work in the system. The earlier a matter is triaged and resourced, the earlier it is likely to resolve. Earlier final hearings would reduce the necessity of further interim proceedings. Increasing the number of Registrars such that better case management occurs at an early stage of the proceedings and conciliation conferences may more readily be offered to parties, will assist in resolving property matters. The increased use of Registrars would also assist in freeing up judicial time so that Judges can be better utilised as final and interim decision makers, rather than being utilised for administrative case management. It is acknowledged that in the most complex parenting and financial cases, that case management by a Judge may be more effective than by a Registrar.

149. Increased numbers of court family consultants who can provide Issues Assessments and Family Reports will assist in resolving parenting matters. The lack of family consultants in some registries means final hearings cannot even be listed as no Family Report will be available for it. It also leads to two-tiered justice whereby parties who can afford a private Family Report get earlier hearing dates than those who cannot. If a matter involves both property and parenting considerations, then the delay

in the final hearing if there is no Family Report clearly also impacts on delay and costs for the financial aspects of the case.

150. Arbitration will continue to be offered to parties as an alternative to a judicial determination.

151. Different lists and different streaming of matters depending on complexity is considered advantageous. Early triage, management and streaming of matters would likely considerably reduce costs and delay.

152. The Law Council has received the following submission from LSNSW regarding the options it considers may assist in reducing the financial impact of family law proceedings:

Options to reduce the financial impact of family law proceedings on parties

The financial impact of family law proceedings on parties will be reduced most effectively by ensuring:

1. *adequate resourcing of the family law courts;*
2. *efficient procedures and case management processes; and*
3. *effective dispute resolution processes.*

1. Resourcing of the family courts

The experience of our members is that the under-resourcing of the family courts, by creating undue delays in proceedings, generates significant costs for litigants. Costs increase when a hearing date is postponed and the parties are required to attend multiple interim court appearances, generating additional legal fees and travel expenses. In addition, parties are often required to incur the cost of updating evidence which has become outdated.

If the courts operated with adequate numbers of Judges and Registrars, matters could be dealt with in a timely manner, generating less legal work and minimising costs while resolving matters more quickly. In particular there is a need for more resources to conduct circuit work in regional areas.

Costs would also be reduced for parties if further resources were provided for family law consultants, thereby reducing the need for parties to engage private consultants.

2. Procedures and case management processes

Adequate court resourcing would enable courts to implement procedures and case management processes so that matters could be handled more simply and efficiently.

We recommend more extensive use of suitably qualified and experienced Registrars and their greater participation in case management in the early stages of matters. This would help to free up judicial resources for substantive interim hearings, complex interlocutory applications, thereby reducing delays and costs.

As discussed above, costs are increased by the need to attend court on multiple occasions. We welcome the increased scope for use of video and

audio links[93] *which is likely to create efficiencies and better access for parties in regional and remote areas. We recommend greater use of measures such as telephone conferences to deal with minor case management, and the development of an online system for divorce matters.*

3. Effective dispute resolution processes

In our experience, parties to family law disputes are encouraged by their legal representatives to minimise costs by seeking to resolve the dispute without filing proceedings. This includes, where appropriate, engaging in pre-litigation dispute resolution processes including mediation, collaboration and conciliation.

Increasing the availability of affordable mediation, collaboration and conciliation services will increase the likelihood of parties resolving their disputes without the need to file proceedings.

Capping fees

In our view, capping fees according to the value of the assets in dispute would not be an effective or fair mechanism for reducing costs to the parties. The value of the asset pool does not necessarily reflect the parties' capacity to pay legal fees. An older couple, for example, may have substantial assets but be on a modest income.

Term of Reference (e)

The effectiveness of the delivery of family law support services and family dispute resolution processes.

153. Specialist legal advice can be transformative for separated families.

154. Specialist family lawyers are critical to the effectiveness of family law support services and FDR processes.

155. The Law Council has repeatedly drawn attention to the efforts that family lawyers make to resolve issues for their clients without recourse to Court. For example, in the Law Council's submission to the ALRC's *Review of the Family Law System*, it was stated:

> *7. Much of the commentary … focuses on those people who use the family law system who have what might be summarised as 'complex needs'. Many of these people's experience of the family law system is of being a litigant in a court (or multiple courts). Yet the overwhelming majority of separating couples in Australia are able to resolve their financial and/or parenting arrangements without resort to court. They reach agreement in a range of ways:*
>
> *(a)* by discussion between themselves without needing or wanting any assistance from third parties. Some of these couples reach amicable agreements about parenting arrangements or financial arrangements and never document that agreement in any formal way. Some use information available on the internet to document their agreement using,

[93] *Family Law Act 1975* (Cth) ss 168-72.

for instance, parenting plan templates and the family courts' Application for Consent Orders process;

(b) by discussion between themselves, after one or both have received legal advice and/or advice from a child psychologist or social worker. Some of those couples might use lawyers to formally document their agreement;

(c) by participating in mediation via one of the services available to the community via organisations such as Family Relationship Centres or Relationships Australia. Some couples are referred to such services by their lawyer or other agencies. Most of the mediation services of this kind do not involve lawyers directly in the mediation, but many couples seek legal advice before or between mediation sessions. Some couples document their parenting agreements at mediation by signing parenting plans. Other couples use lawyers to document parenting and/or financial agreements reached at mediation or do it themselves using the online court forms;

(d) some couples are able to reach agreement using a range of dispute resolution services offered by lawyers. This includes negotiation, mediation, collaboration and arbitration. Family lawyers have specialised in the alternative resolution of family disputes for decades, and for most solicitors, this forms the majority of their day to day work. Barristers working in family law are also significantly involved in dispute resolution work, including where no court proceedings are on foot. Some alternative dispute resolution also includes the expertise of non-lawyers such as accountants and financial advisers, and child experts. Agreements reached are commonly then documented by lawyers using parenting plans, consent orders, financial agreements and/or child support agreements.

8. *…*

9. *However, it is important to recognise that there are some couples for whom access to timely court intervention is a necessity. Much has been written about the increasing complexity of the circumstances of the people who use the family courts - for example, people who have experienced family violence, families where drug addiction, alcohol abuse and/or mental health issues affects one or both adults or where there are allegations of child abuse. However, it is not the mere existence of those complex personal circumstances that leads to those families becoming involved in litigation – there are many couples with complex needs who, despite those needs, are able to resolve their family law issues. People issue proceedings in the family courts because they haven't been able to resolve those issues between themselves and/or their needs or those issues are so urgent and serious that they cannot delay seeking court intervention. For instance:*

(a) one parent might unilaterally prevent the other parent from spending time with a child(ren). They might do so based on allegations, which are disputed, about the risk that the other parent presents to the child(ren);

(b) one person denies or restricts the other person's access to financial resources sufficient to enable them to support themselves;

(c) one person has dissipated or threatened to dissipate assets of the couple and injunctions are necessary to preserve the asset pool pending a settlement of their respective property settlement claims.

10. In other cases, the issuing of court proceedings by one person comes after genuine but unsuccessful attempts have been made to resolve the family law issues, after using one or a number of the alternative dispute resolution methods outlined above. In some cases, the necessity to commence proceedings in financial cases is caused by the imminent approach of the time limits pursuant to s 44 of the Act.

11. … a properly resourced and functioning court system … provides the framework within and by reference to which those families who do not access the court system determine the issues arising on the breakdown of their relationship. Such a system provides an answer for those who, despite all attempts, are unable to consensually resolve their issues, and ought to ensure that a person is not forced to enter into a resolution of issues because there is no other alternative available.[94]

156. Statistics from a variety of sources including the Australian Institute of Family Studies (**AIFS**),[95] the FCoA 2018-19 Annual Report[96] and National Legal Aid[97] confirm that the overwhelming majority of separated families resolve their affairs by agreement. The statistics indicate that over 90 per cent of court applications are resolved without trial. A similar percentage of separated parents do not require court intervention at all.

157. The AIFS report referred to above considered the experiences of 6,000 families and found that while 16 per cent of separating parents make use of FDR services or lawyers, 97 per cent of separated parents did not 'use court as their main pathway to making parenting arrangements'.[98] The three per cent who did require court intervention were complex cases including those involving family violence and child abuse allegations.[99]

158. If those statistics are an accurate reflection of the experiences of separating families around the country, then the effectiveness of the existing family law support services and/or the FDR process is clear – most separating families have no need for lawyers or the court system. This is not a new phenomenon.

159. The statistics speak to the overwhelming effectiveness of FDR (in relation to both financial and parenting matters) and, potentially, to the effectiveness of support services – although this is a much harder statistic to objectively track and might be more accurately reflected in a review of Contravention Applications. The practical experience of family lawyers – and solicitors in particular – mirrors those statistics. The overwhelming majority of the work of family lawyers involves resolving matters without trial and, wherever possible, without any form of litigation at all. The reports

[94] Law Council of Australia, Submission No 43 to the Australian Law Reform Commission, *Issues Paper 48: Review of the Family Law System* (7 May 2018) 9-10.
[95] Australian Institute of Family Studies, *Parenting Arrangements After Separation* (Research Report, October 2019).
[96] Family Court of Australia, *Annual Report 2018-19* (Report, 2019).
[97] National Legal Aid, Submission No 163 to the Australian Law Reform Commission, *Issues Paper 48: Review of the Family Law System* (2018) 48, 67.
[98] Australian Institute of Family Studies, *Parenting Arrangements After Separation* (Research Report, October 2019) 1.
[99] Ibid.

noted above also make reference to the increasing complexity of family law matters and to the ever-growing numbers of self-represented litigants.

160. Were legal practitioners not actively pursuing and promoting dispute resolutions options and actively discouraging litigation, the percentages of families requiring judicial assistance would undoubtedly be significantly higher.

161. Family lawyers are the only professionals in the family law system qualified to give advice about both the interpretation and application of the law and the practical realities of the available dispute resolution options. On a macro level, they constitute a cost effective and highly knowledgeable resource. On a micro level, specialist family lawyers are able to give individual clients bespoke advice about which of the various dispute resolution methods (and, on an even more skilled micro level, which of the specific service providers) is most likely to bring about timely and lasting resolution given the particular dynamics and issues at play in each matter. In addition, in private practice, specialist lawyers are comparatively uninhibited by time constraints and able to tailor a process to most effectively meet the logistical, financial and emotional needs of clients.

162. Whether conducted in 'the shadow of the court' (i.e. once proceedings have been initiated) or without any reference to the family law courts, legally assisted FDR/mediation is the most powerful dispute resolution process available to separated couples. It provides the opportunity for parties to exercise autonomy over the most significant decisions in their lives with the benefit of an understanding of:

    (a) the applicable legal framework; and

    (b) the options for formalisation of agreements reached during negotiation.

163. The impact of the fact that non-court-based dispute resolution experts – mediators and FDR Practitioners (**FDRP**) – are unable to sanction agreements to create legally enforceable obligations at the conclusion of dispute resolution processes is not always apparent to parties who have not had the benefit of legal advice. FDRPs/mediators are necessarily inhibited in the legal advice they are able to provide and this can be a source of additional stress and tension for parties. Formalising agreements reached at FDR/mediation involves additional time and specialist lawyers possess critical skills in ensuring that parties retain the necessary objectivity and commitment to compromises reached in negotiations/mediation (when tensions and stress levels are invariably high). Without the benefit of legal advice, parties attempting to negotiate parenting and financial arrangements are left in the invidious position of being unable to assess whether the compromise contemplated is legally sound and capable of formalisation. Lawyers consulted in order to document agreements, face the unenviable task of interfering with agreements which inadequately consider and address the relevant legal issues, and into which parties might never had entered had they known the full legal parameters and consequence of their decisions, or of their rights and obligations under the FLA. This risk is exacerbated as government funded, non-legally assisted and financially focussed FDR becomes more widely available.

164. That family lawyers have long regarded the Court as a place of last resort and given advice that reflects that view is undeniable – the sheer number of practitioners in Australia compared to the volume of matters requiring trial make that so.

165. Membership of the FLS totals in the vicinity of 2,400, about 96 per cent of whom are practising family law solicitors and barristers located throughout Australia. The number of separated couples engaging with legal professionals is significant and the

efforts of those professionals in keeping such a large percentage of matters from the court system (other than for the lodging of an application for consent orders in the FCoA) ought not be under-estimated.

166. In addition, what specialist legal practitioners recognise, and more importantly can access and co-ordinate on behalf of clients, are the specialist support services (including psychologists, social workers, and post separation parenting programs) that enable parents to develop the necessary interpersonal and/or parenting skills to reduce ongoing conflict and avoid future interaction with the court system.

167. The health, safety and wellbeing of children is promoted by the appropriate use of properly resourced family support services. These services are particularly important in more difficult matters involving vulnerable parties, such as those experiencing economic disadvantage and survivors of domestic violence. In these matters Child Dispute Conferences, Child Inclusive Conferences and Family Reports can assist by providing detailed evidence that explains the critical risk factors and issues likely to affect the parties' health, safety and wellbeing. Adequate funding for these processes will ensure they are affected in a timely fashion, without undue delay which risks exposing the parties to harm.

168. Whether operating in private practice, community legal centres or legal aid commissions, family law practitioners have been at the forefront of the development of dispute resolution opportunities and processes in this country. Family lawyers and the bodies which represent them, have carefully considered and, to different extents, pioneered processes including mediation, collaboration, arbitration and parenting co-ordination in an effort to find ways of meaningfully and permanently resolving conflict between separated parents. Within those processes family lawyers have also driven skills development in relation to issues such as the treatment of domestic and family violence and the opportunities to progress matters where one party is without legal representation.

169. The day to day efforts of specialist family lawyers has a profoundly positive effect on dispute resolution processes. To focus on the very small percentage of the work that involves trials, is to do an enormous disservice to the breadth of the skill set of specialists who have chosen to work daily with families in crisis and at risk.

170. In 2006, section 60I of the FLA was introduced mandating (with limited exceptions) pre-filing mediation in the form of FDR in parenting matters. That process can be undertaken in government-funded centres or by private providers. FDR may result in no agreement, no documentation of agreement reached, a Parenting Plan (as defined in the FLA) or a Consent Order. While it might be assumed that the introduction of the FDR regime has helped to reduce the number of matters entering the Court system, measuring the effectiveness of such a process is more subjective. The complex and individualistic nature of family dynamics means that settlement during/immediately on conclusion of the FDR session is not necessarily an accurate or the only measure of the effectiveness of this dispute resolution process. Some parties genuinely incapable of reaching resolution at FDR, are able to reach subsequent agreement (some with, but many without, interim court intervention). Other matters unable to be resolved through FDR may be in genuine need of judicial intervention and such an outcome does not automatically render the process ‘ineffective’. The decision by an FDRP that a matter is unsuitable for FDR for reasons of family violence might well be a measure of the effectiveness of the process even though FDR has not occurred or agreement has not been reached.

171. The Law Council has received the following submission from LSNSW in relation to support, early intervention and prevention services and the requirement of FDR under the FLA:

<u>Family law support services</u>

As discussed above, we recommend resources be focused on increasing the availability of court-based family consultants.

Our members report that there are too few court-based family consultants to meet the demand for their services. The delivery of a Family Report can greatly improve the parties' ability to resolve the matter prior to hearing; however the current scarcity of family consultants results in long delays before Family Reports are delivered. We note also that the appropriate use of Child Dispute Conferences and Child Inclusive Conferences can help to minimise the impact of proceedings on the health safety and welfare of children.[100]

As discussed above, we recommend greater focus be given to the prevention of family violence or early intervention to protect those experiencing violence before it escalates.[101] *Options should be available for courts to refer perpetrators to appropriate interventions including therapy and programs aimed at increasing perpetrators' accountability for their actions, promoting compliance with court orders and changing attitudes and behaviour.*

<u>Family dispute resolution services</u>

As discussed above, family law practitioners encourage the use of family dispute resolution as a way of resolving disputes quickly and efficiently. There are many effective family dispute resolution services available including the Law Society's Family Law Settlement Service and the services operated by legal aid commissions, and Family Relationship Centres. Legal practitioners also offer collaborative practice as an alternate dispute resolution process.

While encouraging the use of family dispute resolution in appropriate matters, the Law Society notes that not all matters are suited to that pathway and that some matters will require litigation. To that end, the Law Society suggests it may be appropriate to consider removing the compulsory element of the current provisions in s 60I of the Act.

The Law Society supports the greater use of arbitration as a way of resolving family law disputes. We support the recommendations arising from the ALRC Review of the Family System aimed at expanding the scope of matters which may be arbitrated and removing barriers to arbitration.[102]

[100] Discussed further in relation to Term of Reference (f).
[101] *Royal Commission into Family Violence* (Summary and Recommendations, March 2016) 6.
[102] Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family Law System* (Final Report 135, March 2019) 281-92 Recommendations 26-9.

Term of Reference (f)

The impacts of family law proceedings on the health, safety and wellbeing of children and families involved in those proceedings.

172. Studies demonstrate that poorer outcomes for children are linked with financial disadvantage exposure to inter-parental conflict and family violence, and problematic parenting.[103]

173. At the outset, the Law Council maintains the firm position that safety and well-being of children and their families should at all times remain at the apex of the family law system and services. The Law Council acknowledges the significant impacts of protracted family law proceedings on the health, safety and wellbeing of children and families. The Law Council support prioritisation of safety and wellbeing of children and their families in all family law processes and services. The serious, long-term developmental impacts of parental conflict on children are well documented.[104] Consistently, expert evidence indicates that a key predictor of poor outcomes for children with separated parents is ongoing exposure to parental conflict.

174. This term of reference connotes 'proceedings' as litigation by parties seeking remedies under the FLA in the family law courts. It also suggests it is possible to identify and measure the experience and outcomes for children and families the subject of Court proceedings.

175. The Law Council notes that the relationship breakdown in most cases is stressful and often causes the parties and the children to that relationship a significant sense of sadness and loss. The minority of families who are unable to resolve their disputes without judicial intervention are already vulnerable as a result of the breakdown of the relationship, before they engage in family law proceedings. Unfortunately, the under-resourced family law system impacts those who are already vulnerable.

Identification of the families accessing family law proceedings – what the science and statistics show

176. Despite there being a significant body of research, studies, reports, reviews and inquiries that have been undertaken since the enactment of the FLA and the establishment of specialist family law courts, the direct link between involvement in Court proceedings to health, safety and wellbeing is difficult to discern.

177. The Law Council is aware of only one study that specifically considered at the link between mental health issues and family law suggesting a framework for the family law system to provide better emotional support for families in transition.[105]

178. The Law Council submits there are both positive and negative impacts of the court processes which require equal consideration.

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[103] Ibid 179 [5.102].
[104] See, eg, Jennifer McIntoch, 'Children's Responses to Divorce and Parental Conflict: A Brief Guide for Family Lawyers' (Family Law Education Reform Project, AFCC and the Center for Children, Families and the Law at Hofstra Law School, 2009).
[105] B Rodgers, B Smyth and E Robinson, 'Mental Health and the Family Law System' (2004) 10(1) *Journal of Family Studies* 50.

179. The ALRC in developing its recent ALRC Report undertook an extensive and comprehensive review of the significant body of research which informed the development of its 60 recommendations.

180. It is noteworthy the ARLC has proposed a 'harm minimisation approach' recommending:

> *…amendments to substantive and procedural family law to better protect vulnerable parties, to facilitate access to a range of appropriate dispute resolution processes, and to restore trust in the system with the aim of reducing, as far as possible, the negative impact of legal processes on separating families.*[106]

181. Recommendations include:

(a) the insertion of an 'overarching purpose*'* of family law practice and procedure to facilitate the just resolution of disputes as quickly, inexpensively, and efficiently as possible and with the least acrimony;[107] and

(b) procedures for the minimisation of misuse of process and systems by parties engaging in family violence by amending the FLA to empower the Court to make orders for parties to seek leave prior to making further applications and summarily dismissing applications where it is appropriate to do so.[108]

182. The Law Council supports and agrees with these recommendations.

183. This term of reference does not differentiate between the many ways that parties can resolve their issues but assumes all families require judicial determination as the only means of resolving their legal dispute or seeking the legal remedy they require. In fact, they are the minority.

184. A summary of the empirical evidence by Rae Kaspiew,[109] drawn from the findings from a large research programme conducted by AIFS,[110] suggests the cohort of families accessing the family law courts as a form of dispute resolution is only about three per cent. Another six per cent use lawyer-based negotiation and about ten per cent use FDR as other forms of dispute resolution. Kaspiew notes:

> *The families who use the family law system are troubled. They are much more likely to have a history of family violence, concerns for their own or their children's safety as a result of ongoing contact with the other parent, mental ill health, substance abuse, gambling, problematic social media or pornography use.*
>
> *These characteristics are particularly concentrated among parents who use courts (85% report emotional abuse and 54% report physical violence) and to a slightly lesser extent lawyers (emotional abuse: 85%, physical violence: 38%) and to a lesser extent still family dispute resolution (emotional abuse: 74%, physical violence: 27%). Up to four in ten parents who use courts have*

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[106] Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family Law System* (Final Report 135, March 2019) 66 [2.37].
[107] Ibid 297, 312 Recommendation 30.
[108] Ibid 307 Recommendations 32, 33.
[109] Rae Kaspiew, 'Separated Parents and the Family Law System: What Does the Evidence Say?' *Australian Institute of Family Studies – News & Discussion* (Web Page, 3 August 2016) <https://aifs.gov.au/cfca/2016/08/03/separated-parents-and-family-law-system-what-does-evidence-say>.
[110] Rae Kaspiew et al, 'Separation and Family Law' *Australian Institute of Family Studies – Research Expertise* (Web Page) <https://aifs.gov.au/our-work/research-expertise/laws-and-families>.

several of these issues and it is clear from this that concerns for the well-being and safety of children in these families are particularly relevant.[111]

185. The Law Council notes that the complexity of these families and their needs was the subject of two Family Law Council (**FLC**) reports which made recommendations aimed at improving legal processes to improve safety of children and their families many of whom come into contact with all the family law, child protection and family violence jurisdictions.[112]

186. Recommendations included enhancing collaboration and information sharing between these jurisdictions and other important services such as child protection, mental health, family violence, drug and alcohol, Aboriginal and Torres Strait Islander and migrant services - with two further FLC reports considering accessibility and specific needs of these cohort groups.[113]

187. Consequently, the empirical evidence suggests there is a correlation between families with complex needs and those who require the courts as a form of dispute resolution. These families also tend to have a combination of factors that adversely impact on the health, safety and well-being of children and their caregivers regardless of their involvement in court proceedings.

188. For these families, separation is particularly stressful and increases the risk of harm.

189. Of these families, family violence is often alleged and identified as a risk. Seventy per cent of proceedings before the family law courts involve allegations of or risk of family violence.[114] International studies indicate that separation is considered to increase the risk of more severe violence, possibly even fatal, when a victim is leaving a violent partner.[115]

190. The Law Council notes the existence of both national and international research and literature examining the risk to children and families at separation which may result in homicide, filicide and suicide.

191. In relation to specific risk and harm to children, a comprehensive review of both the research, literature and case studies is contained in a Discussion Paper entitled *'Just Say Goodbye' Parents who Kill their Children in the Context of Separation.*[116] This Discussion Paper concludes:

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[111] Rae Kaspiew, 'Separated Parents and the Family Law System: What Does the Evidence Say?' *Australian Institute of Family Studies – News & Discussion* (Web Page, 3 August 2016) <https://aifs.gov.au/cfca/2016/08/03/separated-parents-and-family-law-system-what-does-evidence-say>.
[112] Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (Interim Report Terms 1 and 2, June 2015); Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (Final Report Terms 3, 4 and 5, June 2016).
[113] Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients and Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds* (Report, February 2012).
[114] House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (Report, December 2017).
[115] C Jacquelyn et al, 'Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study' (2003) 93(7) *American Journal of Public Health* 1089 <https://ajph.aphapublications.org/doi/full/10.2105/AJPH.93.7.1089>.
[116] Domestic Violence Resource Centre Victoria, *'Just Say Goodbye' Parents Who Kill their Children in the Context of Separation* (Discussion Paper 8, January 2013).

(a) it is critical to understand the nature of the relationship between the parents and the child victim and perpetrator to understand the reasons for filicide;

(b) filicide by parents in the context of separation involves perpetrators' depression and/or suicide. However, the perpetrator's mental health, although a contributing factor, needs to be considered in the context of social, cultural and structural factors that are contributing factors to the decision to kill children; and

(c) gender differences exist which highlight that fathers who commit filicide have one or more other elements such as: violence and controlling behaviours towards their partner before and after separation; anger towards their partner and desire for revenge; and an intention to harm their ex-partner by killing the children.

192. The Law Council notes there is empirical evidence to support the proposition that separation also increases the risk of suicidal thoughts and intentions, and that men are more at risk than women.[117] Psycho-social risk factors identified included mental health, history of suicide attempts and internalised shame. Another Australian study identified that newly separated couples were most at risk of suicidal thoughts in the first year of separation with higher levels for people aged in their 20s.[118]

193. Recent separation is a known lethality factor for women. The chapter on 'Separation' in the Australasian Institute of Judicial Administration's *Domestic Violence Bench Book* illustrates:[119]

> *Where violence has occurred during the relationship, it is common for perpetrators to continue or escalate the violence after separation in an attempt to gain or reassert control over the victim, or to punish the victim for leaving the relationship. Where women leave an intimate relationship and first experience or continue to experience violence after separation, their former partner may experience an intense sense of loss of control and the violent response may be severe, life threatening or lethal. The Queensland State Coroner's Office in its 2013-2014 Annual Report noted a strong correlation between separation and homicide. Between 2006 and 2013, 43 per cent of Queensland women killed by their male partner were separated, or intending to separate, from the perpetrator. In the First Report of the Victorian Systemic Review of Family Violence Deaths, 37% of the 133 intimate partner homicide incidents in Victoria between 2000 and 2010 involved individuals who had separated or divorced). The NSW Domestic Violence Death Review Team Annual Report 2012-2013 recorded that in two-thirds of all intimate partner homicides where a female was killed, the victim and perpetrator had either recently separated or were in the process of separating, concluding that the period directly after separation may be high-risk for women in relationships involving domestic and family violence. The Australian Bureau of Statistics reported that in 2015 domestic and family violence-related homicide victims*

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[117] K Kõlves, N Ide and D De Leo, 'Suicidal Ideation and Behaviour in the Aftermath of Marital Separation: Gender Differences' (2010) 120(1-3) *Journal of Affective Disorders* 28 <https://www.ncbi.nlm.nih.gov/pubmed/19428116>.

[118] Centre for Mental Health Research and the Centre for Research on Ageing, Health and Wellbeing, 'Newly Separated Most at Risk of Suicidal Thoughts', *Australian National University Newsroom* (Web Page, 22 May 2014) <https://www.anu.edu.au/news/all-news/newly-separated-most-at-risk-of-suicidal-thoughts>.

[119] Attorney-General's Department, Australian Government, 'Factors Affecting Risk', *National Domestic and Family Violence Bench Book* (Web Page, July 2019) <https://dfvbenchbook.aija.org.au/dynamics-of-domestic-and-family-violence/factors-affecting-risk/>.

accounted for over a third of the total number, and females accounted for almost two-thirds of all victims.

194. More recent statistics on family violence related suicide, homicide and filicide, for example, the Queensland Death Review and Advisory Board 2017-18 report show as follows:

(a) intimate partner homicide victims are more likely to be females (4:1) with males the predominant homicide offender;

(b) in 2017-18 there were 40 apparent suicides in Queensland identified as domestic violence related; a male to female ratio of 4:1 males to women was identified;

(c) in three quarters of the cases the male was identified as the perpetrator of violence;

(d) one half of homicides involved children as deceased;

(e) the presence of mental health issues was more pronounced among family homicide offenders as opposed to intimate partner homicide offenders;

(f) a total of 33 homicide-suicide events have occurred in Queensland since 2006 involving 40 homicide deceased and 33 suicide deceased. The majority of homicide victims were female with the offender/ suicide victim being male. The level of contact with services in this group was low;

(g) for female perpetrators of homicide involving a male deceased, where there was a record of domestic violence (62.6 per cent of cases) the deceased male was identified as the perpetrator of violence;

(h) where the homicide features a male victim, most involved a former abusive spouse killing their primary victim's new spouse;

(i) from 1 July 2015 to 30 June 2018, there were 120 apparent domestic and family violence suicides recorded in Queensland. These included:

(j) 29 apparent suicides in 2015-16;

(k) 51 apparent suicides in 2016-17; and

(l) 40 apparent suicides in 2017-18;

(m) a male to female ratio of 4:1 was recorded across this period, which is reflective of general suicide trends, in which a greater proportion of men die by suicide than women. Similarly, most apparent suicide victims were identified as the perpetrator of domestic and family violence within the index relationship;

(n) there was a peak in apparent suicides in the 35 to 44-year age group, which is consistent with general age trends in suicide;

(o) a history of mental health issues, either formally diagnosed or in the opinion of family and friends, was prevalent in over two-thirds of cases (68.3 per cent). A recorded history of hospitalisation through Emergency Examination Orders or Emergency Examination Authorities was a feature in 30.8 per cent of cases. A prior history of suicide ideation (70.8 per cent) and suicide attempts (48.3 per cent) was also prominent. Further, a history of problematic substance use was

recorded in 67.5 per cent of apparent suicides, with substance use recorded at the time of the death in 53 cases (44.2 per cent); and

(p) actual (55.0 per cent) and pending (14.2 per cent) separation was a feature in the majority of apparent suicides in this reporting period.[120]

195. National statistics obtained by the Australian Domestic and Family Violence Death Review Network illustrate a similar pattern:[121]

(a) between 1 July 2010 and 30 June 2014 there were 152 intimate partner homicides in Australia which followed an identifiable history of domestic violence (including a reported and/or anecdotal history of violence) (**IPV homicides**);

(b) the majority of these IPV homicides involved a male killing their female (current or former) intimate partner (n=121, 79.6 per cent), and the majority of those males who killed a female had been the primary abuser against that female prior to her death (n=112, 92.6 per cent); and

(c) fewer IPV homicides involved a female killing her male (current or former) intimate partner (n=28, 18.4 per cent of all IPV homicides), and of these cases, most of the female homicide offenders were primary victims of violence who killed a male abuser (n=17, 60.7 per cent of female perpetrated IPV homicides).[122]

196. Similar statistics are also highlighted in the Australian Institute of Health and Welfare (**AIHW**) in its 2019 report *Family, Domestic and Sexual Violence in Australia: Continuing the National Story*:[123]

(a) one woman is killed every nine days and one man is killed every 29 days by a partner;

(b) between 2014–15 and 2015–16, the National Homicide Monitoring Program recorded 218 domestic homicide victims from 198 domestic homicide incidents;

(c) over half (59 per cent, or 129) victims were female and 64 per cent (82) of these female victims were killed by an intimate partner;

(d) there were also 89 male domestic homicide victims, with over one in four (28 per cent, or 25) killed by an intimate partner; and

(e) between 2000–01 and 2011–12, 238 incidents of filicide (the killing of a child by a parent or parent-equivalent), in which 284 victims were killed, were recorded by police in Australia. Nearly half of children killed by a parent were killed by their custodial mother.[124]

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[120] Domestic and Family Violence Death Review and Advisory Board, Queensland Government, *2017-18 Annual Report* (2018) 27 <https://www.courts.qld.gov.au/__data/assets/pdf_file/0003/586182/domestic-and-family-violence-death-review-and-advisory-board-annual-report-2017-18.pdf>.
[121] Australian Domestic and Family Violence Death Review Network, *Data Report 2018* (Report, May 2018) <http://www.ombudsman.wa.gov.au/Reviews/Documents/FDV/ADFVDRN_Data_Report_2018.pdf>.
[122] Ibid xii.
[123] Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence in Australia: Continuing the National Story* (Report, 2019) <https://www.aihw.gov.au/getmedia/b0037b2d-a651-4abf-9f7b-00a85e3de528/aihw-fdv3-FDSV-in-Australia-2019.pdf.aspx?inline=true>.
[124] Ibid 50.

Impact on these families involved in family law proceedings

197. It is largely already vulnerable families who access courts to resolve their disputes. As the research, studies, literature and reports highlight, these families are already presenting with various complexities compounded by the breakdown in their relationship, separation and unresolved conflict. This, combined with underfunded and resource strained family law courts and family service system, can exacerbate the stress and/or risk factors caused by the below factors.

Access

198. Families from Aboriginal and Torres Strait Islander and culturally and linguistically diverse backgrounds, LGBTIQ people and their families, persons with a disability and families in some regional, rural and remote areas, struggle with accessing family law services including the Courts, to assist in the resolution of their disputes.

199. This may be due to:

    (a) a lack of culturally competent and safe family law services;

    (b) a lack of appropriate funding and processes for the appointment of litigation representatives and supported decision making;

    (c) a lack of family relationship services (such as Family Relationship Centres, collaborative parenting or supporting children after separation programmes and counselling);

    (d) a lack of or limited access to existing contact centres, with continuing challenges with respect to adequate funding, long delays for families to access their services and cost barriers for users (in the private/user pays services). There are delays for most families being able to access contact centres, with huge waiting lists in some areas. This has a negative impact on children and their families where contact is either limited or does not occur at all;

    (e) the prohibitive costs of accessing appropriate services where travel is required; and/or

    (f) the safety and security of certain court locations which are co-located or standalone.

200. The Law Council, in its submissions to the ALRC Issues Paper 48, outlines in greater detail these access issues.[125]

201. Costs in accessing the family law system are prohibitive for those families who cannot afford private legal representation and who do not qualify for a grant of legal aid. This can lead to parties self-representing in family law proceedings increasing levels of stress, anxiety and fear or relinquishing a remedy available to them under the FLA.

202. The Law Council considers there is an urgent need to increase funding to legal aid commissions to enable more of legal representation of families and to enable them to improve the availability and quality of ICLs, including to fund the return of senior, experienced private practitioners to ICL work. The Law Council submits that older children in family law proceedings can be disenfranchised if not provided with

[125] Australian Law Reform Commission, *Review of the Family Law System* (Issues Paper 48, 12 March 2018) 19-37.

independent representation. Where there is no ICL appointed, the views of older children, and their best interests, can be overlooked or assumed by the parents.

Delays due to lack of resources

203. Significant and unacceptable delays exist in family law courts between the time a case is commenced and a final hearing, in some registries more than three years due to lack of judicial resources. Of considerable concern is the delay in obtaining interim hearings.

204. There are not enough family consultants to prepare Family Reports or Child Dispute Memorandums (section 11F of the FLA), which contributes to further delay in the resolution or finalisation of cases.

205. There are not enough Registrars to assist with the procedural management of cases or to conduct court events, such as Conciliation Conferences which assist parties to resolve their cases.

206. These delays, caused by sustained under-funding of the courts and the consequent lack of court resources, can have negative impacts on children's relationships with their families and caregivers, on the safety risks to children and families where protective concerns have been raised, and may result in outcomes which may not be in the children's best interests, or which may disadvantage one party, because parties have consented to orders simply to bring to an end the proceedings.

207. Evidence given to the House of Representatives Standing Committee on Social Policy and Legal Affairs' (**Committee on Social Policy and Legal Affairs**) *Parliamentary Inquiry into a Better Family Law System to Support and Protect those Affected by Family Violence* by the then Chair of the FLS, Wendy Kayler-Thomson, poignantly describes the risk of harm to families as follows:

> *If a man applied to the Family Court of the Federal Circuit Court today seeking contact with his children, the first thing is that that is not treated as an urgent issue by the court. You will not get an urgent hearing for that, because the Court simply does not have the resources to give them an urgent hearing. So it is not uncommon these days for a man who is not seeing his children to wait six months for a hearing and then another, say, three months for there to be some identification by a family consultant of the dynamics in the family. There might be really good reasons why he should not be seeing his child, but the risk that that puts the woman in while the man is not seeing his children exponentially grows. We all know that women, particularly those who are victims of coercive and controlling violence, are at most risk of homicide in the 12 months post-separation. If you make him wait to have a proper determination, where he has a chance to say his story, even if he is going to be unsuccessful, you really raise the risk for that woman.*[126]

System abuse

208. Some children, particularly vulnerable children, may be further traumatised by the different systems (courts, child protection or other state welfare authority), which they encounter, which are appointed to make decisions about the child and which may

[126] Evidence to House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, Canberra, 30 May 2017, 2 (Ms Wendy Kayler-Thomson, Chair, Family Law Section, Law Council of Australia).

result in repeated interviewing of children and exposure to parental conflict, polarisation and risks to safety and well-being.

Misuse of processes and systems

209. Some victims of family violence may continue to experience abuse by ongoing misuse of legal processes and systems by the abuser. A comprehensive list of examples and the negative impact on the victim are contained in the ALRC Report.[127]

210. As indicated above, the Law Council agrees and supports Recommendations 30, 32 and 33 of the ALRC Report.

Timely and effective triaging and assessment of risk to children and caregivers affected by family violence

211. The need for effective and timely risk identification and assessment by the Courts was a recommendation by the Hon Professor Chisholm AM in the Family Courts Violence Review.[128] Professor Chisholm observed that '[t]here are few more difficult or more important challenges for the family law system than dealing with cases where family violence is an issue'.[129]

212. The Law Council endorses the ALRC's Recommendation 43 for the family consultant's function to include a triage function to undertake screening for the purpose of risk identification and provision of information for case management planning.[130]

213. Potential risks which may be identified include family violence, child abuse, mental health issues, substance misuse, and child abduction.

214. The Law Council notes the current practice of the Family Law Courts for family consultants to undertake risk assessments whilst preparing Child Dispute/Child Inclusive Conferences (section 11F Memorandums).

215. However, this does not and cannot occur for every family due to the lack of resources and funding pressures of the Courts.

216. The Law Council recommends the Australian Government increase funding to the Courts to enable crucial and timely risk assessments to take place for vulnerable children and their families.

217. The Law Council in its submissions[131] to the ALRC Issues Paper also supported Family Reports being prepared earlier in proceedings so that children's views, and their maturity to express same, are known to the court as soon as possible, and preferably before any interim hearing. This would also ensure any risk issues to either the children or their family are identified, assessed and appropriate recommendations made.

218. The Law Council notes the recommendation of the FLS in response to Recommendation 52 of the ALRC Report concerning continuing professional

[127] Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family Law System* (Final Report 135, March 2019) [10.26]-[10.27].
[128] Richard Chisholm, *Family Courts Violence Review* (27 November 2009).
[129] Ibid 4.
[130] Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family Law System* (Final Report 135, March 2019) 369 [12.46].
[131] Law Council of Australia, Submission No 43 to the Australian Law Reform Commission, *Issues Paper 48: Review of the Family Law System* (7 May 2018) [361].

development in family violence that requires all legal practitioners to undertake 1 core unit of family violence training.

219. The Law Council also suggested that all legal practitioners could benefit from developing capabilities listed in Table 1 of the *Options for Improving the Family Violence Competency of Legal Practitioners: Consultation Paper*[132] which included understanding family violence, family violence risk identification, assessment and management, working with perpetrators, working with diverse/vulnerable clients and legal knowledge to understand professional obligations and build capability to work with clients affected by family violence where capacity may be in issue.

Jurisdictional fragmentation, overlap and lack of information sharing

220. In 2017, the Committee on Social Policy and Legal Affairs identified, and made recommendations to address, a number of key challenges of the current family law system's response to family violence.[133]

221. These challenges included the inappropriateness of the adversarial system for resolving family law disputes, the inaccessibility of the system for most families, and the exposure of families to greater risk of harm as a result of jurisdictional fragmentation, where the structure and interaction with other jurisdictions, including state and territory family violence legislation and child protection systems, was fragmented, leading to inconsistent approaches.

222. Jurisdictional fragmentation and lack of appropriate information sharing between these systems are key features of this and other reports which highlight the level of risk and potential for further harm to these families navigating different legal systems.[134]

223. This was considered by the ALRC Report leading to a recommendation for the implementation of an 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.[135] The Law Council agrees and supports this recommendation.

Experience of the family law system by children and families

224. The Law Council notes the experiences of children and families of the family law system have been the subject of more recent research by AIFS.[136] These experiences raised family violence and safety concerns, ability of children to participate and have a greater say in decisions about them, suitability of care-time arrangements,

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[132] Council of Attorneys-General Family Violence Working Group*, Improving the Family Violence Competency of Legal Practitioners* (Consultation Paper, 30 September 2019).
[133] House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (Report, December 2017).
[134] Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (Interim Report Terms 1 and 2, June 2015); Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (Final Report Terms 3, 4 and 5, June 2016); Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients and Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds* (Report, February 2012).
[135] Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family Law System* (Final Report 135, March 2019) 146 Recommendation 2.
[136] Rachel Carson et al, Australian Institute of Family Studies, *Children and Young People in Separated Families: Family Law System Experiences and Needs* (Final Report, June 2018); Rae Kaspiew et al, *Experiences of Separated Parents Study* (Report, October 2015).

experiences of the family law system, disclosure of family violence and safety concerns, views about the efficacy of the family law system and the need to know and understand the legal process.

225. AIFS observed that since the 2012 family violence amendments to the FLA, there was some evidence of increased emphasis in identifying family violence and child safety concerns, parents disclosing those concerns and seeking support from family law system services consistent with the intention of the reforms, but there was also some evidence that reforms have had a limited effect.

226. The ALRC Report contains a number of recommendations which aim to address the risk and safety concerns and experiences of the family law system by children and their families, which the Law Council in large part supports. These include:

    (a) an increased level of funding for ICLs to meet with children, liaise with Court Consultants and other relevant health practitioners and/or educational institutions on an ongoing basis to assist in resolving disputes where alleged contravention of orders is asserted and continuing education;[137]

    (b) increased funding for family law courts to:

    (c) increase the number of in-house family consultants and increase fees for Regulation 7 Consultants;

    (d) expand use of Best Practice Guidelines for Family Reports to also apply to private Family Report writers;

    (e) strengthen the Guidelines in partnership/collaboration with social scientists to improve the Guidelines and endorsed by their governing/regulatory bodies;

    (f) fund an 'endorsement' scheme and training for social scientists currently being developed by the AFCC for those entering the field; and

    (g) fund ongoing training for social scientists in family law, court processes, procedures, duties to the court, rules of evidence, giving evidence and forensic practice;[138]

    (h) the amendment to the FLA to require parties to meet with a family consultant to assist in their understanding of the final parenting orders made by the Court following a contested hearing. The Law Council recognises the significant preventative benefits of this and suggests access to this service be provided to parenting matters resolved by consent, but after proceedings have commenced;[139]

    (i) increased funding to support the amendment to the FLA to provide for parties to receive post-order case management;[140] and

    (j) inclusion of a comprehensive list of functions court consultants could provide to children, families and the Courts.[141]

[137] Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family Law System* (Final Report 135, March 2019) 371 Recommendation 44.
[138] Ibid 410 Recommendation 53.
[139] Ibid 341 Recommendation 38.
[140] Ibid 343 Recommendation 39.
[141] Ibid 365 Recommendation 43.

227. The Law Council acknowledges the negative impact on children and parties where there is ongoing litigation but submits that sometimes, due to the non-compliance and attitude of some parties, this is unavoidable.

228. The ALRC Report notes that the adversarial aspects of family law court proceedings which exist are also important. They enable 'stringent testing of the evidence before the court—a process that is essential where a decision will have a lifelong effect on children and their parents or caregivers'.[142]

229. In financial matters, family law proceedings may be the only means for parties to obtain relevant disclosure, financial relief and enforcement of their rights.

230. The importance of court processes to enforce rights cannot be overstated, particularly in such a life changing moment such as a breakdown of relationships which can have major social, emotional, health and wellbeing and financial implications for children and their families. As noted in the Report of the Committee on Social Policy and Legal Affairs:

> *Relationship breakdown is well recognised as a contributing cause of poverty in Australia, and a lack of equitable access to financial assets can be 'a major barrier' to the recovery of families affected by violence. Family violence is the most common factor contributing to homelessness among women and their children. Indeed, a property settlement can bring 'huge material relief' to families in financial hardship and is crucial to preventing entrenched poverty following family violence.*[143]

What are some of the positive things implemented to manage risk and lessen negative impact on children and their families?

231. The Law Council acknowledges the many significant and positive initiatives of Australian Government, the Courts, family lawyers, legal assistance services, family relationship services and social science professionals and bodies, developed over many years with the aim of keeping children and their families' safe, and maintaining their health and well-being during an extremely difficult and highly emotional period in their lives.

232. Some of these positive initiatives include:

    (a) focusing on the best interests of children and minimisation of harm to families, the family law courts developed and published on the Courts' website, a Fact Sheet to inform, guide and assist families in their resolution pathway, in line with the research[144] which links high parental/caregiver conflict that increases the risk to children developing emotional, social and behavioural problems in addition to difficulties with concentration and educational achievement;

    (b) recognising the need to better cater for and support parties and families accessing the Courts to resolve their legal dispute, the Courts in 2009

[142] Ibid 65 [2.35].
[143] House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (Report, December 2017) 159.
[144] J B Kelly, 'Risk and Protective Factors Associated with Child and Adolescent Adjustment Following Separation and Divorce: Social Science Applications' in K Kuehnle and L Drozd (eds), *Parenting Plan Evaluations: Applied Research for the Family Court* (Oxford University Press, 2012) 49-84.

developed a Skilling and Client Support Program[145] with funding from the Department of Health and Aging, under the National Suicide Prevention Strategy. The programme aims:[146]

(c) to provide clients with access to the resources, counselling, and support they need to look after their mental health and overall wellbeing (these are services that are not available in the courts);

(d) to ensure clients, particularly those who may be mentally ill or distressed, are treated with respect and without judgement by staff; and

(e) to ensure clients receive services tailored to their particular needs, with particular attention paid to the needs of culturally and linguistically diverse clients and clients with fears for their safety;

(f) the Courts have a mental health and emotional wellbeing page on the Courts' website which provides information to and support services parties can access to maintain their mental health and emotional wellbeing;[147]

(g) to raise awareness, increase safety and manage risk, the family law courts have developed the *Family Violence Best Practice Principles* and *Family Violence Plan*;[148]

(h) the Child Dispute Services of the Courts also developed a *Family Violence Policy Statement*[149] and information publications for parties and children to assist them to better understand and participate in Court processes;[150]

(i) implementation of recommendations arising from the earlier reports by the Australian Government which include development of the *Domestic Violence Benchbook*, the establishment of the National Family & Domestic Violence Order Register, current work underway to improve information sharing between legal systems and the ban on direct cross-examination in family law trials;

(j) the establishment of the Family Advocacy and Support Service at various Courts and funded by specific funding allocation to National Legal Aid which provides extended family law duty lawyer services to parties appearing in Court without legal representation with risk identification, assessment, safety planning

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[145] Family Law Courts, Attorney-General's Department, Australian Government, *Integrated Client Service Delivery Featuring Mental Health Support: A Family Law Courts' Skilling and Client Support Program* (Final Report, January 2009).
[146] Ibid 6-7.
[147] Family Court of Australia, 'Useful Information & Resources', *Mental Health and Emotional Wellbeing* (Web Page) <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/home/audience/mental-health-and-emotional-wellbeing>; Federal Circuit Court of Australia, 'Useful Information & Resources', *Mental Health and Emotional Wellbeing* (Web Page) <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/home/audience/mental-health-and-emotional-wellbeing>.
[148] Family Court of Australia and Federal Circuit Court of Australia, *Family Violence Best Practice Principles* (4th ed, December 2016) <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/publications/family+violence/family-violence-best-practice-principles>; Family Court of Australia and Federal Circuit Court of Australia, *Family Violence Plan* (April 2019) <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/policies-and-procedures/fv-plan>.
[149] Family Court of Australia and Federal Circuit Court of Australia, 'Family Violence Policy Statement' (Version 2, August 2017) <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/2d5dc7c2-1e0c-4a84-9ae4-0b35d4258192/CDS+-+Family+ViolenceV2.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE-2d5dc7c2-1e0c-4a84-9ae4-0b35d4258192-mhtl-7c>.
[150] Family Court of Australia, 'What is Child Dispute Services', *Family Law Matters* (Web Page, 3 May 2016) <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/family-law-matters/child-dispute-services/>.

and facilitated referrals to social and emotional well-being service providers, including men's behaviour change programmes;

(k) legal aid commission lawyer assisted FDR programmes, some of which provide child inclusive/informed mediations;

(l) the development of case management practices designed to limit the adversarial nature of family law proceedings such as the Children Cases Program,[151] the evaluation of which concluded:

> *[t]hrough the eyes of the parents who participated in this study, the core impacts of the Children's Cases Pilot process centred around the creation of 'no further harm' to their co-parenting relationship, nor to their children's adjustment. Importantly, they report lower conflict and acrimony with their former partner post court. In many cases, it is a process that seems to have allowed a degree of recovery from the psychological hostility felt for their child's other parent.*[152]

(m) the Less Adversarial Trial[153] and the inclusion of Division 12A in the FLA;

(n) the development and funding of post separation services to support caregivers and children through the Parenting Orders, Supporting Children After Separation and Parenting Co-ordination Programmes;[154]

(o) the development of Collaborative Practice, on the recommendation of the FLC,[155] through a model of lawyer assisted dispute resolution involving lawyers working together and/or in conjunction with other collaboratively trained professionals to facilitate child and family focussed discussions and negotiations between the parties. The process involving transparent and confidential negotiations and focusing on an interest based teamed approach rather than a right-based adversarial one;[156]

(p) redesigned and up-dated ICL training and resources which includes a national website[157] containing information and resources for the profession and the public about the role of the ICL and social science and other valuable resources for lawyers; and

(q) the FLA itself does provide some protection to those in the family law system in that:

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[151] Family Court of Australia, 'New Court Program Puts Children First' (Media Release, 27 February 2004) <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/media-releases/2004/FCOA_New_Court_Program>.

[152] Jennifer E McIntosh, Family Court of Australia, *The Children's Case Pilot Project* (Final Report, March 2006) 39 <http://www.familycourt.gov.au/wps/wcm/connect/a04b82d0-82a1-4842-bf9e-014a5a8a3c01/McIntosh_CCP_pilot_final.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE-a04b82d0-82a1-4842-bf9e-014a5a8a3c01-lhWxDSo>.

[153] Family Court of Australia, 'Less Adversarial Trials' (Brochure, 12 March 2013) <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/publications/court-events/less-adversarial-trials>.

[154] Relationships Australia, Anglicare and CentaCare/CatholicCare.

[155] Family Law Council, *Collaborative Practice in Family Law* (December 2006) <https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Collaborative%20Practice%20in%20Family%20Law.pdf>.

[156] Caroline Counsel, 'What is This Thing Called Collaborative Law' (2010) 85 *Family Law Matters* 77 <https://aifs.gov.au/publications/family-matters/issue-85/what-thing-called-collaborative-law>.

[157] National Legal Aid, 'Independent Children's Lawyers' (Web Page) <https://icl.gov.au/>.

(r) the Court is required pursuant to subsection 79(2) of the FLA to independently assess all applications for property settlement are just and equitable notwithstanding the parties file Consent Orders without or during the course of family law proceedings;

(s) Orders that are one-sided are rejected by the Court until the reasons for any perceived inequity are explained and/or the Orders are amended; and

(t) the Court is able to make urgent Orders for interim spousal maintenance when a need is shown and a capacity for payment exists.

233. As mentioned above, the Less Adversarial Trials process allows parents and/or parties to engage with the Judges. The process demonstrates the utility of enabling the court to interact appropriately with the parties as a way of reducing conflict between them. Children of substantially shared parenting where the parents are in continuing conflict.[158] The results suggest the capacity of children, particularly those 10 years and under, to adjust to changes in the family dynamic can be seriously compromised when they are exposed to ongoing parental conflict. An environment of high conflict has been associated with internalising and externalising behaviour problems, self-blame and shame in children.[159] It has been found that, in such an environment, children are more likely to exhibit signs of stress and fearfulness, and to display poorer interpersonal skills, insecure attachments and generalised insecurities.[160] Another measure which can reduce the adversarial nature of family law litigation is the use of video-conferencing. The Law Council supports the greater use of technology in circumstances where there are safety issues or concerns about the wellbeing of parties and their children.

ALRC Recommendations to better support children and their families

234. The Law Council adopts the recommendation of the ALRC for the establishment of a Children and Young People's Advisory Board to provide advice and information about children's experiences of the family law system to inform policy and practice.[161]

235. The Law Council considers separating or highly conflictual families would benefit from universal services such as the Victorian Orange Door Support and Safety Hubs which could provide holistic services ranging from risk and needs assessments to referrals to social, emotional, legal and mental health services, similar to the idea of Family Hubs recommended in the ALRC Discussion Paper.

236. The Law Council notes this recommendation did not make its way in the Final Report for a number of reasons with duplication of already existing services being one of them.[162]

237. The Law Council submits that funding first point of contact services such as the Victorian Orange Door Support and Safety Hubs would assist in harm minimisation

[158] J McIntosh and R Chisholm, 'Shared Care and Children's Best Interests in Conflicted Separation – A Cautionary Tale from Current Research' (2007) 20(1) *Australian Family Lawyer*.
[159] M Pruett, T Williams et al, 'Family and Legal Indicators of Child Adjustment to Divorce among Families with Young Children' (2003) 17(2) *Journal of Family Psychology*.
[160] C Buehler et al, 'Interparental Conflict Styles and Youth Problems Behaviours; A Two-Sample Replication Study' (1998) 60 *Journal of Marriage and the Family* 119; K D Pruett and M K Pruett, 'Only God Decides: Young Children's Perceptions of Divorce and the Legal System' (1999) 38 *Journal of the American Academy of Child and Adolescent Psychiatry* 1544. See also J Neoh, 'Unwitting Harm: Dealing with Litigating Parents' (2018) *InPsych, Australia Psychological Society*, 40-1.
[161] Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family Law System* (Final Report 135, March 2019) 395 Recommendation 50.
[162] Ibid 455-6 [15.40]–[15.45].

and prevent social, emotional and legal problems from escalating by having a central point of access such as exists with the Family Relationship Centres.

Positive impact

Case Study from FLS

A mother obtained a grant of legal aid and to commence proceedings seeking a recovery order for her infant son, after she separated from the child's father who withheld the child from her following a domestic violence incident and eviction from the paternal grandparents' home where the couple lived.

The mother was a teenager, a victim of domestic violence, trilingual, with strong connection to her Torres Strait Islander culture and heritage. She was also very traumatised and turned to alcohol at around 13 years old as a means of self-medicating.

An ICL was appointed. Following an interim hearing, the court determined that the child should remain living with the father as a result of the mother's alcoholism. Through the course of the proceedings, the mother worked with a number of support services to complete parenting courses, attend alcohol management counselling and commence studies in the field of early childhood education. The mother had another child.

The father continued to perpetrate domestic violence against the mother despite a Domestic Violence Order and on one occasion at handover, assaulted the mother in public. The handover service became so concerned for their staff's safety that they also locked down their own facility.

This resulted in orders for the child to live primarily in the care of the mother. The proceedings, though stressful for the mother, motivated her to engage with support services and reflect on the life she wanted for herself and for her child. The mother retained primary care of the child on a final basis.

Term of Reference (g)

Any issues arising for grandparent carers in family law matters and family law court proceedings.

238. The FLA recognises the importance of children having a relationship with their grandparents. The 2006 reforms added section 65C to the FLA, which specifically states:

A parenting order in relation to a child may be applied for by

(a) either or both of the child's parents; or

(b) the child; or

(c) a grandparent of the child; or

(d) any other person concerned with the care, welfare or development of the child.

239. Grandparents usually become carers of their grandchildren in one of three ways:

(a) by way of a parenting Order made by a family law court under the FLA;

(b) as a result of an application by a child welfare authority to the state/territory Court for a care and protection Order that results in the child being placed in the care of the state who in turn place the child in the care of the grandparents; or

(c) through an informal agreement between the grandparents and one or both parents or the grandparents and the state child protection authorities.

240. With respect to matters before the family law courts, grandparents can apply for Orders that their grandchildren live with them, spend time with them and/or communicate with them.

241. Grandparents can make such an application whether the parents of the children are together or separated, but application can only be made when a certificate has been obtained showing the grandparent has tried to resolve matters through FDR (or has obtained an exemption to FDR).

242. Despite section 65C, grandparents do not have an automatic right to spend time with their grandchildren. They must prove that they are concerned with the care, welfare and development of their grandchildren, and the Court must be satisfied that it is in the children's best interests to have a relationship with the children. An Order that the children spend time with grandparents, when the parents of the children are estranged from their own parents, should not detrimentally affect the children's relationships with their own parents.

243. It remains the opinion of the Law Council, as set out in its response to Question 16 of the ALRC Issues Paper, that the current structure of the FLA, which has a starting point of the presumption of equal shared parental responsibility as between parents, ought be altered and a general discretion to make orders in the best interests of the child should instead be the starting position of decisions of the family law courts. In the consideration of best interests currently in the FLA, paragraph 60CC(2)(a) deals with specific considerations for children of Aboriginal or Torres Strait Islander descent. It is the view of the Law Council that such specific consideration for these children ought to remain, especially as they are over-represented in state welfare proceedings.

244. Further, the FLA can and ought to be appropriately amended to allow for a consideration of people other than legal parents who may appropriately apply for parenting orders. The presumption of equal shared parental responsibility, as it is currently worded, applies only to persons who are found to be 'parents'.

245. However, within Aboriginal and Torres Strait Islander families it is not unusual for aunties, uncles and/or grandparents to raise children as their own. Paragraph 60CC(2)(a) of the FLA is premised on Anglo-Saxon based family relationships and structures and does not apply to many Aboriginal and Torres Strait Islander families. It should be broadened to recognise the significant parenting and cultural roles played by a child's clan group and extended kinship system.

246. The proposed amendment of paragraph 60CC(2)(a) (or its equivalent in any new legislation) is the benefit of the child of having a meaningful relationship with parents, and in the case of Aboriginal and Torres Strait Islander children or children from culturally and linguistically diverse backgrounds, their family, clan group and extended kinship system.

247. Research by the AIFS suggests post-2006 reforms have had a positive impact on consideration of grandparents in post separation arrangements for children and found that it is a widely held view amongst parents, that it is important to maintain the same

level of contact between children and grandparents following separation as was in place during the relationship.[163]

248. It is accepted that there is a significant intersection between family law and state child protection jurisdictions and often grandparents are called upon to become carers of their grandchildren when the children are deemed not to be safe in the care of their parents. The AIHW annual reports provide statistics on the number of grandparents who have primary care responsibilities in the child protection system.

249. Often a child in the care of the Department of Child Protection (or its equivalent in each state) is placed in the care of their grandparents whilst in the Department's care. This has the advantage of children living with their extended family instead of foster carers, whilst at the same time giving the grandparents support to deal with any health or psychological issues the children may have. The Department will also provide the grandparents with financial support to care for the children.

250. If the child welfare agency deems that the children are appropriately placed with their grandparents, they may discontinue their involvement with the family. Once the Care and Protection Order is discharged, if the grandparents want an Order to ensure the children continue to live with them and/or spend time with them they will need to access the family law courts for parenting orders at their own expense.

251. Some access to justice issues may arise if this is the case when grandparents wish to obtain a parenting order to maintain the children's stability, but are unable to obtain legal aid due to falling outside the assets or means tests, or because they live in remote, rural or regional areas.

252. There are also financial implications for grandparents providing primary care to their grandchildren. They may either leave and/or reduce paid employment or struggle with pension/self-funded retirement income to be available to care for the children.

253. Grandparents who have taken the role as primary carers can apply for child support from both parents, and, if eligible, child protection kinship carer payments and parenting payment/family tax benefits may be available to grandparent caregivers. However, the AIFS has found that grandparents who step in to care for their children may have several issues.

254. The AIFS study, *Grandparents as Primary Carers of their Grandchildren*, found the dominant reason for grandparents becoming primary carers was that the parents of their grandchildren had substance abuse problems, followed by parental neglect of the children, parent's mental health issues and domestic violence.[164] It follows that the grandparents are unlikely to get significant financial support from parents when caring for their grandchildren.

255. As a result, the AIFS study found that children living in the homes of their grandparents were financially disadvantaged, with more than 70 per cent of homes having less than the national average income with more than a third of those surveyed suggesting they had difficulty in getting government support to care for their grandchildren.[165]

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[163] See, eg, Deborah Brennan and Bettina Cass, Australian Institute of Family Studies, *Grandparents as Primary Carers of their Grandchildren: Policy and Practice Insights from Research* (May 2014) <https://aifs.gov.au/sites/default/files/fpl12.pdf>.
[164] Ibid.
[165] Ibid 112.

256. Other issues faced by grandparent carers according to the AIFS study were related to the physical accommodation issues of caring for grandchildren, stresses on their own relationships and physical health and social isolation.[166]

257. The Law Council submits that these issues are not directly related to the Family Law Courts proceedings, or indeed family law, but a lack of government support for grandparents stepping in to care for children when their own parents cannot.

258. The Law Council has received the following submission from LSNSW regarding the caring role of grandparents:

> *In the experience of our members, grandparents can play an important role in the lives of their grandchildren through providing care. The importance of their role is reflected in the parenting provisions in the Act. For example:*
>
> - *Under paragraph 60B(2)(b), grandparents are included as a category of person with whom, as a general principle, children have the right to spend time, and communicate on a regular basis.*
>
> - *Under subsection 65C(ba), grandparents have standing to apply for parenting orders, which may allow them to spend time with, or have the majority of care of, their grandchildren and/or have 'parental responsibility'.*
>
> - *Standing to apply for parenting orders enables grandparents to attend family dispute resolution with the parents and partake in determining living arrangements that are in the best interests of the children.*
>
> *Determining what is in the child's best interests*
>
> *Section 60CC requires the court, in determining what is in the child's best interests, to consider the nature of the child's relationship with other persons including grandparents (subparagraph 60CC(3)(b)(ii)) and the likely effect of separation from other persons such as grandparents (subparagraph 60CC(3)(d)(ii)). The ALRC has recommended simplifying the factors taken into account pursuant to section 60CC so that they refer more generally to the child's "carers" (including grandparents). The Law Society supports this recommendation.*
>
> *The case law applying section 60CC suggests that, when grandparents or any other person concerned with the care, welfare and development of a child applies for parenting orders, the relevant factors are to be considered and weighed by the court and there is no hierarchy of applicants for parenting orders.*
>
> *A body of case law has also developed as a result of grandparents bringing court proceedings against parents in an intact relationship, where the grandparents seek orders enabling them to spend time with their grandchildren. In these challenging cases the court must weigh the importance of relationships within the nuclear family against the benefit of relationships with grandparents.*

[166] Ibid 112-4.

In light of these developments, we recommend amendments to section 60CC that require consideration of the best interests of the child in relation to their "carers", rather than distinguishing parents and grandparents.

Families and grandparents in Aboriginal and Torres Strait Islander communities

The Law Society recommends consideration be given to incorporating in the Act the concept of family and the involvement of grandparents and other family members within Aboriginal and Torres Strait Islander kinship structures.

Within these kinship structures, it is not unusual for aunties, uncles and/or grandparents to raise children as their own. Section 60CC(2)(a) imports Anglo-Saxon concepts of family relationships and structures which do not necessarily apply in Aboriginal and Torres Strait Islander communities.

Accordingly, we recommend the Act be broadened to recognise the significant parenting and cultural roles played by a child's clan group and extended kinship system. We support the ALRC's recommendation of a definition of "member of the family" that includes any Aboriginal or Torres Strait Islander concept of family that is relevant in the particular circumstances of the case.

Term of Reference (h)

Any further avenues to improve the performance and monitoring of professionals involved in family law proceedings and the resolution of disputes, including agencies, family law practitioners, family law experts and report writers, the staff and judicial officers of the courts, and family dispute resolution practitioners.

259. The Law Council considers it vital that the Australian Government supports and encourages continuous improvement in the performance of all professionals involved in the family law system, but also, importantly, that it supports the improvement of the family law system as a whole.

Performance and monitoring of the family law system

260. The Australian Government plays an important role in ensuring the effective operation of the family law system. A focus on the performance of professionals involved in the family law system without addressing areas within the Australian Government's responsibility which require urgent attention is purposeless.

261. As identified in the ALRC Report 'there is currently no independent entity formally tasked with systematically monitoring the performance of the family law system as a whole and making recommendations for its improved functioning'.[167]

262. The ALRC recommended an expanded role for FLC, with the FLC to be responsible for '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

[167] Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family Law System* (Final Report 135, March 2019) 386.

'making recommendations to improve the family law system, including research and law reform proposals'.[168]

263. The Law Council supports that recommendation, and indeed, had suggested such a reform in its Response to the ALRC Discussion Paper.[169]

264. The FLC is established pursuant to section 115 of the FLA, but relies entirely on the Australian Government to appoint its chairperson and members, and for its funding. The FLC has been dormant since 2016 due to a failure by the Australian Government to appoint members to it. The Law Council supports the proposal by the ALRC that section 115 be amended to provide that the Australian Government must (rather than may) establish a FLC, as well as its proposals for amendments to the FLC's terms of reference, and to the broadening of its membership.[170] The Law Council considers that a reconstituted FLC is well placed to provide continuous monitoring of the family law system as a whole and to make recommendations for ongoing improvements and reform.

265. Nevertheless, the Law Council cautions that an enhanced role for the FLC is unlikely to lead to significant improvement in the overall operation of the family law system without a commitment by the Australian Government to implement recommendations for changes, and to support and fund the system. The Australian Government plays an important role in ensuring the effective operation of the family law system. The dedication and skills of individuals working in the system are vital to the day to day operation of the family law system, but there is only so much that skill and dedication can achieve if the system is not sufficiently supported and funded by the Australian Government.

266. The Law Council submits that a properly resourced family law court system would assist in greater meeting the demands placed on the Courts by the number of filings and the increasing complexity of matters.

267. The Law Council notes that 'overwhelming lists and time pressures placed on decision makers [judges] exercising family law jurisdiction can also lead to a dubious application of proper process, compromised decision making and unjust outcomes for Australian children and families'.[171]

268. In the FCoA, 6,157 matters remain pending out of 19,588 filed during 2018-19. Thus, 31 per cent of cases are currently unresolved.[172] During the same period the FCC finalised 83,640 out of 85,234 cases, representing a finalisation rate of 98 per cent.[173] The difference between the relative finalisation rates of these courts could be due to the difference in the complexity of matters, such as the Magellan matters in the FCoA as compared with those before the FCC. Further, the FCC deals with relatively simple divorce applications (44,342 applications of 85,234).

269. To the extent that there are delays in the system, the Law Council submits that this is a result of increasingly complex cases, and under-resourcing of the family law courts,

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[168] Ibid 388 Recommendation 49.
[169] Law Council of Australia, Submission No 285 to the Australian Law Reform Commission, *Discussion Paper 86: Review of the Family Law System* (16 November 2018) 76.
[170] Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family Law System* (Final Report 135, March 2019) 388-92.
[171] Law Institute of Victoria, Submission to the Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Family Law Courts* (23 November 2018) 9.
[172] Family Court of Australia, *Annual Report 2018-19* (Report, 2019) 17.
[173] Federal Circuit Court of Australia, *Annual Report 2018-19* (Report, 2019) 31.

via adequate funding for the Courts, Court supports (such as legal aid commissions and community legal centres) or past delays in judicial appointments.

270. In particular, the Law Council highlights the following areas of Australian Government responsibility for the effective operation of the family law system that require urgent attention:

    (a) funding of federal courts exercising family law jurisdiction, including proper funding of appropriate Court buildings and infrastructure to meet the needs of family law litigants in both capital cities and regional areas, and sufficient funding for the appointment of Judges, family consultants and support staff to ensure that cases can be dealt with a timely and expert way, commensurate with the workload and complexities of that workload;

    (b) funding of the legal aid, community legal centres, Aboriginal and Torres Strait Islander Legal Services and Family Violence Prevention Legal Services to ensure access to family law legal advice, representation and alternative dispute resolution options for disadvantaged members of the community;

    (c) resourcing for the preparation of Family Reports, which provide valuable expert evidence about the family dynamic and the child's relationships with the important figures in their life – however, the cost of which varies but seems to generally fall within the range of $5,000-$10,000 and in some metropolitan areas such as Sydney can regularly be approximately $15,000 plus GST (or more);

    (d) a commitment to the prompt appointment of skilled Judges upon the retirement of serving Judges; and

    (e) a commitment to pursuing, in a timely way, legislative amendments identified as being necessary to improve the operation of family law.

271. In addition, increased resourcing for supervised contact centres is necessary. In some centres, it is necessary to commence time between a child and parent on a supervised basis. Government-funded supervised contact centres play an important role in those cases as they provide a secure but child-focused environment in which the contact visit may take place, which is priced accessibly and the visits are supervised by appropriately qualified professionals. The contact centre supervisors are able to provide the Court with independent evidence about the progress of the visits. Where there may be significant distrust and conflict between parties, the availability of independent evidence enables the Court to make decisions about the development of contact with a parent. The demand for such contact centres is considerable. In some cases, the waiting list may be nine months or longer. This impacts on the Court's capacity to deal with cases in an expeditious way.

272. This inquiry, like many before it, will make a range of recommendations for improvements to the family law system. The Law Council considers it likely that many recommendations will simply repeat what has been recommended by inquiries in the past. The Law Council is concerned that the Australian Government responses to the deficiencies in the family law system have included many inquiries, with limited subsequent action by the Australian Government to the consideration and implementation of recommendations made by such inquiries. The Law Council encourages the Joint Select Committee to consider mechanisms by which the Australian Government's role in ensuring the effective operation of the family law system can be monitored by Parliament.

Performance and monitoring of professionals in the family law system

273. The question of the performance and monitoring of the professionals working in the family law system was extensively considered in the ALRC Report. In its Discussion Paper, the ALRC raised for consideration the option of the establishment of a new independent statutory body, the Family Law Commission, to oversee the family law system, including to 'manage accreditation of professionals and agencies across the system' and to 'resolve complaints about professionals and services with the family law system, including through the use of enforcement powers'.[174]

274. After extensive feedback, the ALRC abandoned the option of the establishment of the Family Law Commission in its Final Report:

> *The ALRC does not recommend the establishment of a new body, primarily due to concerns about resourcing and overlap with the responsibilities of existing bodies, such as the Family Law Council.*[175]

275. In its response to the ALRC Discussion Paper, and in support of its proposal for an enhanced role for the FLC, the Law Council submitted:

> *The LCA considers that a Family Law Commission would duplicate many of the responsibilities of existing bodies including:*
>
> - *the responsibility of Government to appropriately manage and resource matters over which it has constitutional responsibility;*
> - *the responsibility and powers of the regulatory bodies for a number of professional groups within the family law system, including the various the state and territory legal profession regulation bodies and associations, the Australian Health Practitioner Regulation Agency, state and territory medical practitioner boards, the Australian Psychological Society;*
> - *the existing statutory body established under the Family Law Act to provide advice and make recommendations to the Attorney General about the family law system, the Family Law Council; and*
> - *the existing statutory body established under the Family Law Act to provide research about issues affecting Australian families, including family law related issues.*
>
> *The LCA considers that at a time when the resources for the essential services within the family law system are stretched beyond capacity, it cannot be justified as a matter of public policy for a new statutory body to be established and funded. The LCA considers that such a body would require significant initial and ongoing funding, and that such funds, even if they were available, would be better directed to providing front line services.*[176]

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[174] Australian Law Reform Commission, *Review of the Family Law System* (Discussion Paper 86, 2018) Proposal 12-1.
[175] Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family Law System* (Final Report 135, March 2019) 393 [13.31].
[176] Law Council of Australia, Submission No 285 to the Australian Law Reform Commission, *Discussion Paper 86: Review of the Family Law System* (16 November 2018) 75-6.

276. Specifically, in response to the suggested power of a Family Law Commission to regulate and accredit lawyers in the family law system, the Law Council noted:

> *In so far as the legal profession and family lawyers are concerned, they must adhere to rigorous regulatory requirements to maintain their certificate to practise each year, and for those family lawyers that are accredited specialists, they must adhere to further regulatory requirements including additional continuing legal education in family law each year and submit to re-accreditation every three years. Those regulatory requirements for lawyers are expensive to maintain. The LCA suggests that adding yet another regulatory scheme for family lawyers would inevitably increase costs for the users of the system. It may also discourage professionals from working in the system.*[177]

277. The Law Council notes a number of independent legal industry regulatory bodies made similar submissions to the ALRC Discussion Paper regarding the establishment of a Family Law Commission, raising concerns about the risk of duplication of existing regulatory systems and the costs involved in such a proposal.[178]

278. The Law Council supports the proper regulation of all professionals working in the family law system. Solicitors operate under a range of professional obligations, which inform conduct with clients, the court, fellow practitioners and the community. The overwhelming majority of solicitors comply with their ethical duties and professional responsibilities in undertaking their work. Practitioners who engage in family law work generally demonstrate the sensitivity and understanding of complex dynamics relating to family violence. This skill is vital to practitioners' ability to identify risk. Practitioners who engage in family law practice are encouraged to undertake ongoing education around issues including domestic and family violence, child development and family dynamics.

279. The Law Council, and its Constituent Bodies, support the continued professional development of lawyers working within the family law system. The FLS, for instance, hosts and delivers the largest regular legal conference in Australia, providing three days of professional development presentations and seminars to family lawyers and other family law professionals, aimed at improving the knowledge and skills of those professionals.

280. The ALRC Report recommended that lawyers undertaking family law work complete one annual unit (one hour) of continuing professional development relating to family violence. The Law Council instead proposes that all lawyers complete such regular training. It considers that such a requirement would benefit the whole community. It would avoid the likely extra costs involved in identifying, regulating and monitoring only those lawyers who do family law work. The Law Council notes that whilst many lawyers specialise in family law, there are many other lawyers who only occasionally undertake family law work, and identifying those in the latter category and monitoring them is likely to be time consuming and costly.

281. Other professionals working within the family law system, like lawyers, are also subject to rigorous regulation by independent bodies. For example, psychologists who perform work as Family Report writers in the family law system are subject to

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[177] Ibid 78.

[178] See NSW Legal Services Commissioner, Submission No 324 to the Australian Law Reform Commission, *Discussion Paper 86: Review of the Family Law System* (November 2018); Victorian Legal Services Board and Commissioner, Submission No 277 to the Australian Law Reform Commission, *Discussion Paper 86: Review of the Family Law System* (8 November 2018); Legal Profession Board of Tasmania, Submission No 276 to the Australian Law Reform Commission, *Discussion Paper 86: Review of the Family Law System*.

regulation by the Australian Health Practitioner Regulation Agency. The AGD manages the accreditation of FDRPs.

282. In addition to lawyers, the ALRC considered the performance monitoring of several other particular professionals in the family law system – ICLs, Family Report writers and Judges.

283. Any enquiry into the performance of professionals working within the family law system should be conducted on the basis of well-informed reports and adequate research of a parties' actual experiences in the family law system including all of the factors that resulted in the particular outcome. Research into individual cases may reveal whether there is in fact an issue requiring further investigation.

Independent Children's Lawyers (ICLs)

284. The ALRC Report recommends a legislative change to subsection 68LA(5) of the FLA to include a specific duty for ICLs to comply with the Guidelines for ICLs, as endorsed by the family courts from time to time.[179]

285. The Law Council generally supports that recommendation, particularly if it assists in developing more consistency in ICL practice around Australia. However, the Law Council has some concerns that the current level of funding provided to ICLs (particularly those in private practice) means that practitioners are simply unable to comply with some of the Guidelines, not because they do not want to do so, but because they are not properly compensated for all the work that needs to be done to comply. For example, funding is not always provided for meetings with children in their own communities and/or away from city offices. Funding is often not provided for multiple meetings with children and/or for liaising with Court Consultants, other relevant health practitioners and/or educational institutions on an ongoing basis. Funding is not often provided when Contravention of Orders is asserted to assist in resolving issues for the benefit of the children and parties. Funding is not provided for continuing education of ICLs. Thus, if compliance with the Guidelines is to become a statutory requirement then funding must be increased accordingly.

286. The Law Council also has reservations about enforcement or consequences for failure (actual or perceived) to comply with these Guidelines, noting in particular that in some cases any dissatisfaction with an ICL by a disaffected parent/party may be linked to the ICL's lack of support for that person's side of the case.

Family Report writers

287. The ALRC recommended that the AGD develop a mandatory national accreditation scheme for private Family Report writers.[180]

288. In its Response to the ALRC Discussion Paper on this topic, the Law Council opposed the introduction of such a scheme (albeit that in the Discussion Paper, the Law Council proposed that the Family Law Commission develop the scheme). The Law Council submitted:

> *The LCA considers that appropriately skilled family report writers are essential elements of a properly functioning family law system. However, the LCA is concerned that the ALRC has not fully appreciated the reasons why there*

[179] Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family Law System* (Final Report 135, March 2019) 371 Recommendation 44.
[180] Ibid 410 Recommendation 53.

might be problems with the quality of some reports, and the adverse implications of their proposal for the development of a national accreditation scheme.

The LCA considers that problems with the quality of some family reports are caused by:

- *a significant shortage in the number of psychologists, psychiatrists and other qualified social scientists who are prepared to do this work;*
- *a diminution in funding, over time, of the family courts' in-house family consultants service; and*
- *a diminution in funding, over time, for Regulation 7 family consultants.*

The effect has been that there is a significant shortage of private family report writers in Australia, and as a result, some social scientists with less than the desired level of skill and experience, are engaged to do the work.

In addition, the LCA is aware that many experienced family report writers will no longer do the work – a result of many factors, but including, the poor rate of remuneration offered to Regulation 7 family consultants compared to the remuneration in other areas of psychiatry and psychological practice, vexatious complaints made against them by litigants (and the APS and APHRA's relative lack of knowledge and skill to deal with complaints against single expert witnesses) and personal threats made by litigants.

The LCA is concerned that the risk of an accreditation scheme is that the numbers of qualified social scientists willing to do this difficult work will reduce, placing even more pressure on the system. Any new system which increases the costs of compliance for social scientists and which opens them up to yet another complaint mechanism, is likely to cause many to choose not to do this work.

*The LCA favours a system which encourages highly skilled social scientists working in other similar fields to do this work. The LCA is aware that the Australian Chapter of the Association of Family and of Conciliation Courts (**AFCC**) is currently developing an 'endorsement' scheme and has developed a training course for psychologists considering entering the field.*

The LCA also suggests an expanded use of the Best Practice Guidelines for Family Reports that governs family consultants (those employed by the courts and Regulation 7 family consultants). Those Best Practice Guidelines are generally accepted to be the 'minimum standard' for the proper preparation of family reports. The courts could be encouraged to change their Rules requiring all private family report writers to be given the Guidelines at the time of their appointment in each case and that they be ordered to follow them.

The LCA also suggests that psychologists, psychiatrists and other qualified social scientists collaborate with other stakeholders to improve those Guidelines.

Industry practice could encourage compliance, thus encouraging the use of private family report writers who adopt the Guidelines.

In addition, there is an urgent need to increase the funding available to the family courts to increase its number of in-house family consultants and to increase the fees paid to Regulation 7 family consultants.

Judges

289. The Law Council considers that there are three particular areas of reform in relation to Judges in the family law system that warrant further investigation:

    (a) the criteria for appointment as a Judge exercising family law jurisdiction;

    (b) the transparency and independence of the process of appointment of family law Judges; and

    (c) the process and appropriate body to investigate complaints against family law Judges.

Criteria for appointment of family law Judges

290. Subsection 22(2) of the FLA provides that a person 'shall not be appointed as a Judge' [of the Family Court of Australia] 'unless…by reason of training, experience and personality, the person is a suitable person to deal with matters of family law'.

291. The inclusion of that provision reflects a recognition by Parliament that particular skills are necessary to effectively adjudicate private family law disputes. Those skills are not just a thorough understanding of the law, but also experience in dealing with the many social and psychological issues affecting many family law litigants (such as family violence, mental health issues, drug addiction, children's behaviour, child abuse, grief and interpersonal conflict). With a significant number of litigants appearing in family courts without legal representation, the 'personality' or competence of a person to appropriately interact with people affected by those social and psychological issue is even more critical.

292. The FCC now deals with more than 80 per cent of all cases filed in the Family Courts, yet there is no equivalent of section 22 in the *Federal Circuit Court of Australia Act 1999* (Cth) regarding the appointment of Judges to that Court or even for those who ultimately do only family law and not general federal law work. The ALRC Report recognised that deficiency and recommended that legislative changes be made to ensure that appointments of all federal judicial officers exercising family law jurisdiction include 'consideration of the person's knowledge, experience, skills, and aptitude to hearing family law cases, including cases involving family violence'.[181]

293. The Law Council supports the extension of scope of section 22 to Judges of the FCC who do family law work, and supports a slightly different iteration of that section to include 'aptitude' and to refer to family violence.

Process of appointment of family law Judges

294. One of the deficiencies of section 22 of the FLA is that there is no obvious consequence that might flow if the Australian Government appoints a Judge who does not fit within the criteria of that section. The process of appointment of Judges to the Family Courts is a matter for the government of the day, and the processes adopted

[181] Ibid 397 Recommendation 51.

by each of the major parties in relation to appointments to the Family Courts is different.

295. The Law Council has long advocated for a judicial appointment process which is more transparent and less open to political interference. In light of the obligations contained in section 22, as well as the special skills required of family law Judges, a process which involves a higher degree of rigour to assess the suitability of candidates for appointment to the family courts is highly desirable.

296. The ALRC Report reported that 'the Australian Government should consider more transparent processes for appointing judicial officers generally', however noted that since such processes might apply to other jurisdictions, it was beyond the scope of their inquiry to make recommendations for a specific process.[182] Nevertheless, the ALRC Report does include a helpful summary of the more transparent judicial appointment processes that have been adopted in similar jurisdictions overseas.[183] The Judicial Appointments Commission that has operated in the United Kingdom since 2006 is particularly worthy of further examination. An independent body, the UK Commission, is responsible for selecting candidates for judicial office (such selections to be made in accordance with specified criteria) and to make recommendations for appointments to the Lord Chancellor. The selection process is rigorous and may include, for instance, qualifying tests, panel interviews, situational questioning, role play simulation of a court case and presentations by candidates. If the Lord Chancellor considers a recommendation to be inappropriate, he or she must give reasons in writing.

297. The Law Council urges this inquiry to consider making a recommendation for the introduction of such an independent and transparent process.

Complaints against Judges

298. The ALRC Discussion paper asked whether a Judicial Commission should be established to investigate complaints against federal Judges exercising family law jurisdiction.[184] In its Final Report, the ALRC proposes that such a commission should operate in relation to all federal Judges, not just those exercising family law jurisdiction, and indicated that such a proposal was beyond the scope of its inquiry.[185]

299. The Law Council has advocated for many years for the establishment of a Federal Judicial Commission. In its submission in response to the Australian Government's Consultation Paper regarding a proposed model for the establishment of a Commonwealth Integrity Commission (**Consultation Paper**), the Law Council advocated for the establishment of a separate Judicial Commission to investigate misconduct by the federal judiciary, rather than including Judges within the scope of the proposed Commonwealth Integrity Commission (**CIC**).[186]

300. While it is suggested in the Consultation Paper that consideration will be given as to whether the public sector division of the Commission could be given jurisdiction over members of the federal judiciary, the Law Council considers that the oversight of federal judicial officers should not be done by the CIC but rather by a separate Federal Judicial Commission established by a separate Act of Parliament and possibly based

[182] Ibid 401 [13.57].
[183] Ibid 402 [13.61].
[184] Australian Law Reform Commission, *Review of the Family Law System* (Discussion Paper 86, 2018) 308.
[185] Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family Law System* (Final Report 135, March 2019) 403.
[186] Law Council of Australia, Submission to the Attorney General's Department, Parliament of Australia, *A Commonwealth Integrity Commission - Proposed Reforms* (31 January 2019).

on the model operating in NSW which has an independent judicial commission. This NSW judicial commission is established pursuant to section 5 of the *Judicial Officers Act 1986* (NSW) which can, *inter alia*, conduct an investigation into any complaint made by members of the public or otherwise into the conduct of any NSW judicial officer. If the complaint is found to be substantiated, a report is prepared which is sent to Parliament to consider or the matter can be referred to the appropriate agency.

301. In relation to members of the federal judiciary, it is noted that there is already legislation in place to address 'judicial misbehaviour' being the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth) that provides for a commission to be established pursuant to section 9 of that Act by the Houses of Parliament to:

    investigate, and to report to them on, alleged misbehaviour or incapacity of a Commonwealth judicial officer, so they can be well informed to consider whether to pray for his or her removal under paragraph 72(ii) of the Constitution.[187]

302. This may be a more appropriate legislative basis to establish a commission of inquiry in relation to any allegation of judicial misconduct, including corrupt conduct.

303. The Law Council considers that to subject the judiciary to the regulation of the CIC could be open to constitutional challenge as it has the potential to infringe the separation of powers established in Constitution, which vests judicial power only in the judiciary as per section 71 of the Constitution.[188] Furthermore, subsection 72(ii) of the Constitution provides that it is for the two Houses of Parliament to investigate and decide on whether a judicial officer has engaged in misbehaviour and to then remove that officer, if appropriate.

304. A further issue is that there may be the need for judicial review of decisions made by the CIC. It is essential to the protection of the rule of law that there be a strong and independent judiciary, separate to, rather than subject to, review by the executive arm of government. This separation of judicial from executive power is of central significance in protecting the rights of all citizens from arbitrary, unlawful interference with their rights and must not be diluted by classifying the judiciary into the same category as other staff of the public service employed in the executive arm of government under the *Public Service Act 1999* (Cth) (although it does apply to their staff).

305. A separate Federal Judicial Commission could also have an important education role to assist and train members of the federal judiciary in matters that would support the effective fulfilment of judicial functions.

306. The Law Council has received the following submission from LSNSW regarding the education and training of family law practitioners and monitoring of performance of judicial officers:

    Education and training

    The Law Society has previously expressed the view that legal practitioners should undertake education and training to develop competencies focused on responding to the physical, psychological and financial abuse of vulnerable

[187] *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth) s 3.
[188] Judicial power is vest in the members of the judiciary as set out in the *Australian Constitution* ch III.

people including survivors of family violence, elder abuse, child abuse and discrimination.

In relation to developing competency to respond to family violence, we recommend all practitioners be required to develop competency in this area. We suggest education be incorporated into the core curricula in Practical Legal Training ("PLT") courses, rather than into elective units, as not all lawyers who practise in family law form the intention as PLT students to do so. Moreover, in our members' experience, family violence issues can arise in the context of many other areas of practice.

In our view there should also be a focus on providing practitioners with skills in managing client relationships so as to minimise the risk of physical danger to themselves and vicarious trauma. Also required is an understanding of professional obligations regarding client confidentiality and taking instructions if the mental capacity of the client is in question. We emphasise, however, that practitioners should not be required to assist beyond providing legal information, legal advice and appropriate referrals.

Examples of this type of training include the Law Society's continuing professional development (CPD) programs which incorporate skills-based training in areas such as family violence and 'fundamentals' for family law practitioners. We understand Legal Aid NSW also offers comprehensive training for panel solicitors, and that private consultancies offer training on trauma informed practice.

The above recommendations also apply in relation to professionals working in the family law courts. The critical issues continue to be adequate budgetary allocation and adequate staff time for this training to take place.

Performance measures

We support the ALRC's recommendation to expand the role of the Family Law Council to encompass providing ongoing advice and guidance to the Government with respect to the family law system as a whole, noting that the effectiveness of such measures would depend on appropriate resources.

It is the Law Society's view that the existing performance measures for legal practitioners and other professionals in the family law system are generally adequate.

We note that legal practitioners are subject to the scrutiny of judicial officers and, in the event of a complaint, regulatory bodies.

Family consultants are also subject to the scrutiny of the court; their work is routinely subjected to cross-examination and overseen by the Family Court's Child Dispute Services to ensure it is of a high standard. The efficacy of these arrangements relies on their being appropriately tasked and adequately resourced. As discussed above, it is our experience that the current lack of family consultants results in delays in the resolution of proceedings.

The performance of family dispute resolution practitioners, including those provided through legal aid commissions, is managed through an accreditation system overseen by the Attorney-General's Department. This system includes continuing professional development requirements and procedures for

cancellation or suspension of accreditation on the failure to meet professional standards.

Options for improving the monitoring and performance of judicial officers in the family courts include the establishment of a Commonwealth Judicial Commission, similar to the Judicial Commission of New South Wales.

Term of Reference (i)

Any improvements to the interaction between the family law system and the child support system.

307. Since 1989, the payment of child support in Australia has been determined by reference the *Child Support (Assessment) Act 1989* (Cth) (**the CSAA**).

308. In 2015-16, a total of $3.5 billion was transferred in child support payments, supporting approximately 1.2 million children.[189]

309. The payment of child support is the financial issue most likely to arise between separating parents in Australia. Even in circumstances where separated parents have little or no assets to divide between them, the legal (and moral) obligation to pay child support will exist in almost every case.

310. The child support scheme (**CSS**) involves an administrative assessment of child support by application of the child support formula by the Department of Human Services – Child Support (**DHS-CS**), formerly the Child Support Agency (**CSA**).

311. Prior to the introduction of the CSAA and the administrative assessment scheme in 1989, child maintenance was a matter privately pursued between parents. The quantum to be paid by way of child maintenance was judicially determined by application to the FCoA or in the FCWA (or the in the state magistrates' courts exercising jurisdiction under the FLA) for a maintenance order pursuant to Division 7 of Part VII of the FLA.

312. At that time, the operation of maintenance provisions in Part VII gave courts a discretionary power to make orders for child maintenance, taking into account the needs of the child and the capacity of the liable parent to pay child maintenance.

313. Pursuing orders for the payment of child maintenance was a costly and time-consuming process. Court orders for the payment of child maintenance were often criticised for lacking consistency and generally being in low amounts, which did not necessarily reflect the true costs of caring for children.

314. At the time, the FLA required Judges to take into account the custodian's eligibility for a pension, allowance or benefit and as a result, courts would not order amounts of child maintenance that resulted in social security being reduced, effectively putting a ceiling on the quantum ordered to be paid.[190]

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[189] Australian National Audit Office, *Child Support Arrangements between the Department of Human Services and the Australian Taxation Office* (Performance Audit Report, 15 May 2017) <https://www.anao.gov.au/work/performance-audit/child-support-collection-arrangements-between-ato-and-dhs>.

[190] Belinda Fehlberg et al, *Australian Family Lawyer: The Contemporary Context* (Oxford University Press, 2015) 416.

315. Compliance with orders for the payment of child maintenance under the FLA was also a significant issue. Parents receiving child maintenance were left with the difficultly of having to enforce the child maintenance order against the paying parent, with all the attendant cost, both personally and financially, of yet further court proceedings. Typically, the parent (usually the mother) lacked the income and financial resources to enforce child maintenance orders whilst at the same time shouldering the burden of a child or children to financially support.

316. There were also widespread concerns about the poverty of women and children following separation and divorce and the increasing welfare cost to the Australian Government (and the taxpayer) of maintaining children where the other parent did not contribute towards their children's upbringing.

317. As noted by the Ministerial Taskforce on Child Support (**Ministerial Taskforce**) in 2005:

> *The current Scheme grew out of concerns about the effects of marriage breakdown on the living standards of children, especially those living in sole-parent households with their mothers. There was also concern about the increase in the numbers of separated parents dependent on welfare; low amounts of child support being paid by non-custodial parents; and the difficulties in updating and enforcing child maintenance obligations through the courts.*[191]

318. The introduction of the *Child Support Act 1988* (Cth), which later became the *Child Support (Registration and Collection) Act 1988* (Cth) (**CSRC**), was the first significant step in the evolution of the new CSS.

319. As it stands, section 3 of the CSRC Act provides:

> *The principal objects of this Act are to ensure:*
>
> *(a) that children receive from their parents the financial support that the parents are liable to provide; and*
>
> *(b) that periodic amounts payable by parents towards the maintenance of their children are paid on a regular and timely basis; and*
>
> *(c) that Australia is in a position to give effect to its obligations under international agreements or arrangements relating to maintenance obligations arising from family relationship, parentage or marriage.*

320. The CSRC Act created the CSA to carry out the collection of amounts court ordered to be paid for child maintenance on behalf of payees. The beneficiary of a child maintenance order could simply register the court order with the CSA for collection, with the effect that the child maintenance debt became a debt owed to the Commonwealth of Australia and enforceable by CSA. The legislation also provided for the money received by the CSA to be paid to the beneficiary of the orders.

321. The second significant step in the CSS was the introduction of the CSAA, which provided for the administrative assessment of child support.

322. As it stands, section 3 of the CSAA provides:

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[191] Ministerial Taskforce on Child Support, *In the Best Interests of Children – Reforming the Child Support Scheme* (1 May 2005) 1.

(1) The parents of a child have the primary duty to maintain the child.

(2) Without limiting subsection (1), the duty of a parent to maintain a child:

(a) is not of lower priority than the duty of the parent to maintain any other child or another person; and

(b) has priority over all commitments of the parent other than commitments necessary to enable the parent to support:

(i) himself or herself; and

(ii) any other child or another person that the parent has a duty to maintain; and

(c) is not affected by:

(i) the duty of any other person to maintain the child; or

(ii) any entitlement of the child or another person to an income tested pension, allowance or benefit.

323. As it stands, section 4 of the CSAA provides:

(1) The principal object of this Act is to ensure that children receive a proper level of financial support from their parents.

(2) Particular objects of this Act include ensuring:

(a) that the level of financial support to be provided by parents for their children is determined according to their capacity to provide financial support and, in particular, that parents with a like capacity to provide financial support for their children should provide like amounts of financial support; and

(b) that the level of financial support to be provided by parents for their children should be determined in accordance with the costs of the children; and

(c) that persons who provide ongoing daily care for children should be able to have the level of financial support to be provided for the children readily determined without the need to resort to court proceedings; and

(d) that children share in changes in the standard of living of both their parents, whether or not they are living with both or either of them; and

(e) that Australia is in a position to give effect to its obligations under international agreements or arrangements relating to maintenance obligations arising from family relationship, parentage or marriage.

324. When the CSS was introduced on 1 October 1989, the administrative assessment of the amount of child support was generally based on a percentage of the paying parent's income, with the percentage increasing as the number of children increased.

An exempt amount was excluded from the paying parent's income before child support was calculated. The receiving parent's income would only be taken into account if it was higher than the 'disregarded income amount' which was significantly higher than the exempt amount.

325. The percentages were 18 per cent for one child, 27 per cent for two children, 32 per cent for three children, 34 per cent for four children, and 36 per cent for five or more children.

326. As and from 1 October 1989, the CSS applied to all eligible children whose parents separated after that date, were born after that date or who had a sibling born before that date.[192]

327. The introduction of the administrative assessment process by the Registrar of Child Support (**the Registrar**) made applying for child support relatively simple and straightforward. At the time, to obtain an administrative assessment of the amount of child support that ought to be paid by the liable parent, a carer of dependent children lodged a form at Centrelink or the CSA. For many years now, the application can be made online.

328. The CSS made the payment of child support a normal feature of separation and since 1989, it would be the exception for a person with dependent children to not seek an administrative assessment. If they are seeking social security payments from Centrelink, they must do so.

329. The CSS also introduced an internal administrative review process. As the CSS operates today, particular decisions of the Registrar can be objected to by parents, which objection is then conducted by a Review Officer.

330. As it stands, subsection 80(1) of the CSRC Act provides that parties to an assessment can object to the following decisions by the Registrar that were made under the CSAA:

    (a) a decision to accept an application for assessment (unless the ground of objection is that the person is not the parent of the child);

    (b) a decision to refuse to accept an application for assessment (unless one of the reasons for refusal was that the Registrar was not satisfied that a person who was to be assessed in respect of the costs of a child is a parent of the child);

    (c) a decision as to the particulars of a child support assessment;

    (d) a decision as to the particulars of a notional child support assessment;

    (e) a decision to make or refuse to make a determination under Part 6A of the CSAA (change of assessment);

    (f) a decision to accept or refuse to accept a child support agreement;

    (g) a decision to terminate a limited child support agreement;

    (h) a decision to refuse to accept an election of a new year to date income for an income estimate;

    (i) a decision to determine a new year to date income for an income estimate; and

[192] *Child Support (Assessment) Act 1989* (Cth) ss 18-22.

(j) a decision to refuse to remit an estimate penalty in whole or part.

Reforms to the CSS

331. There have been numerous reviews of the CSS.

332. The Joint Select Committee on Certain Family Law Issues conducted *an Examination of the Operation and Effectiveness of the Child Support System* in 1993-94.[193] Some of the key changes resulting from this inquiry were:

(a) the introduction of a $260 a year minimum child support liability;

(b) an increase to the payer 'exempt income amount' for self-support;

(c) a decrease to the payee 'disregarded income amount';

(d) the ability to credit up to 25 per cent of a child support liability through in-kind payments; and

(e) the introduction of an internal objections process.

333. In 2003, the House of Representatives Standing Committee on Family and Community Affairs (**Committee on Family and Community Affairs**) undertook an inquiry on child custody arrangements in the event of family breakdown.[194] The report of the Committee on Family and Community Affairs, *Every Picture Tells a Story*, recommended changes to the presumptions of family law regarding shared care, and recommended that a ministerial taskforce be established to examine the child support formula.

334. In 2005, the Ministerial Taskforce reviewed the child support formula and other aspects of the CSS. Its report, *In the Best Interests of Children – Reforming the Child Support Scheme*, was released in May 2005.[195]

335. The Ministerial Taskforce made a number of recommendations for reforms to recognise changes in the way separated parents support and care for their children. In its Report, the Ministerial Taskforce explained:

> *The essential feature of the proposed new Scheme is that the costs of children are first worked out based upon the parents' combined income, with those costs then distributed between the mother and the father in accordance with their respective shares of that combined income and levels of contact (see section 6). The resident parent is expected to incur his or her share of the cost in the course of caring for the child. The non-resident parent pays his or her share in the form of child support. Both parents will have a component for their self-support deducted from their income in working out their Child Support Income.*[196]

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[193] Joint Select Committee on Certain Family Law Issues, Parliament of Australia, *Child Support Scheme: An Examination of the Operation and Effectiveness of the Scheme* (Report, November 1994).
[194] House of Representatives Standing Committee on Family and Community Affairs, Parliament of Australia, *Every Picture Tells A Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation* (Report, December 2003).
[195] Ministerial Taskforce on Child Support, *In the Best Interests of Children – Reforming the Child Support Scheme* (1 May 2005) 1.
[196] Ibid 5.

336. The Australian Government accepted many of the Ministerial Taskforce's recommendations and a series of major changes were implemented in three stages from 2006 to 2008 and form the basis of the current CSS.

337. Some of the key changes implemented by these reforms were:

    (a) from 1 July 2006:

    (b) separated parents with 14 per cent care or more were eligible for the 'with child' rate of certain income support payments;

    (c) introduction of fairer assessment of parents' capacity to earn income;

    (d) increasing the amount of liability able to be credited by prescribed payment from 25 per cent to 30 per cent;

    (e) from 1 January 2007:

    (f) independent review of child support decisions by the Social Security Appeals Tribunal;

    (g) providing separating parents more time (up to 13 weeks) to work out parenting arrangements before their FTB Part A is affected;

    (h) improved arrangements for parents who dispute a child's paternity;

    (i) from 1 July 2008:

    (j) a new child support formula which uses both parents' incomes, recognises the costs of providing care, and is based on research into the costs of raising children in Australia;

    (k) changes to the eligibility and rates of FTB for separated parents;

    (l) allowing parents to have extra income that was earned after separation excluded from their child support assessment, in certain circumstances; and

    (m) more flexible arrangements, with better legal protection for parents who want to make agreements between themselves.

338. In March 2014, the then-Minister for Social Services, the Hon Kevin Andrews MP, requested that the Committee on Social Policy and Legal Affairs inquire into the scheme. Its report, *From Conflict to Cooperation: Inquiry into the Child Support Program*, was tabled in Parliament on 20 July 2015.[197]

339. The Committee on Social Policy and Legal Affairs found that the CSS works well in the majority of cases. The Inquiry report made 25 recommendations relating to child support policy and legislation, administration of the scheme by DHS-CS, family law, including the funding of family support services and the enforcement of tax return lodgement. Recommendation 5 was in relation to the child support formula:

    In conducting a review of the child support formula, the Committee believes that the Australian Government should have regard to a range of guiding principles including the best interests of the child/ren involved, whether fair

[197] House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *From Conflict to Cooperation: Inquiry into the Child Support Program* (Final Report, 20 July 2015).

and amenable private shared parenting arrangements have been successfully entered into, and whether any family violence is present in the family dynamic.

Taking into account the framing principles of the Child Support Program which aim to ensure that the system operates in the best interests of the child, the Committee recommends that the Australian Government review the Child Support Program to ensure the adequacy of calculated amounts and equity of the program for both payers and payees with respect to:

- *the current self-support amount and indexation mechanisms;*
- *the cost of children table and indexation mechanisms;*
- *the use of gross income levels for child support payment calculations; and*
- *consideration of child support income management where there are substantiated allegations of child support payments not being adequately spent on the needs of the child.*[198]

340. At that time, the Australian Government agreed in part with the recommendation, stating:

The Government agrees to a review of the following components of the child support formula:

- *the self-support amount and the indexation mechanism;*
- *the cost of child table and indexation mechanism; and*
- *the use of gross income levels.*[199]

341. In the 2017-18 Budget, the Australian Government committed to implementing its response to three priority recommendations (8, 12 and 22) made in the Inquiry report.

342. These three recommendations were identified as areas in which the current policy can lead to outcomes that are inconsistent with the objectives of the CSS, or may require parents to undertake onerous court or administrative processes to achieve correct outcomes.

343. The measures addressed long standing issues in the CSS relating to care disputes, amended tax assessments, child support agreements and payee overpayments.

344. Legislation for the priority recommendations was introduced into Parliament on 14 September 2017 and the *Family Assistance and Child Support Legislation Amendment (Protecting Children) Act 2018* (Cth) passed on 9 May 2018. Royal Assent was granted on 22 May 2018. The key changes were:

(a) from 23 May 2018:

(b) stronger incentives for parents to comply with court orders or participate in dispute resolution processes about care;

(c) amended taxable incomes to be used in child support assessments in a broader range of circumstances;

(d) from 1 July 2018

(e) changes in circumstances more easily reflected where parents have a child support agreement; and

(f) payees with overpaid child support treated more consistently with payers with debts.

The current child support system

345. Child support payments are calculated according to an administrative formula that uses an income shares approach and is based on research into the cost of raising children in Australia.

346. The formula:

(a) uses the combined income of both parents to calculate child support payments;

(b) excludes the same self-support amount from both parents' incomes, treating them in the same way;

(c) calculates child support payments based on the costs of raising children, according to the incomes of both parents; and

(d) recognises both parents' contributions to the cost of their children through care.

347. Pursuant to section 98B of the CSAA, if, at any time when an administrative assessment is in force in relation to a child:

(a) the liable parent concerned; or

(b) the carer entitled to child support concerned;

is of the view that, because of special circumstances that exist, the provisions of CSAA relating to administrative assessment of child support should be departed from in relation to the child, the liable parent or carer may, by written application, ask the Registrar to make a determination.

348. The vast majority of these changes of assessment applications do not involve lawyers (although lawyers are often asked to advise clients on the merits of making or defending applications, and to assist with preparation of the documents).

349. Subsection 117(2) of the CSAA sets out the grounds upon which the DHS-CS might depart from an administrative assessment:

Reason 1: *The costs of raising the child are significantly affected by the high costs of spending time or communicating with the child.*

Reason 2: *The costs of raising the child are significantly affected because of the child's special needs.*

Reason 3: *The costs of raising the child are significantly affected because the child is being cared for, educated or trained in the way both parents intended.*

Reason 4: *The child support assessment is unfair because of the child's income, earning capacity, property or financial resources.*

Reason 5: *The child support assessment is unfair because money, goods or property has been transferred from the payer to the child, the receiving parent or a third party, for the child's benefit.*

Reason 6: *The costs of raising the child are significantly affected by the parent or non parent carer's child care costs, and the child is under 12 years of age.*

Reason 7: *The necessary expenses of the parent significantly reduce capacity to support the child.*

Reason 8: *The child support assessment is unfair because of the income, earning capacity, property or financial resources of one or both parents.*

Reason 9: *A parent's capacity to support the child is significantly reduced because of the legal duty to maintain another person or other children*

Reason 10: *A parent's responsibility to support a resident child significantly reduces capacity to support another child.*

350. Appeals from decisions of the Registrar usually go the Administrative Appeals Tribunal (**AAT**).

351. Applications to the Social Services and Child Support Division of the AAT (**the Division**) for review of decisions about child support comprised 14 per cent of all applications received by the Division in 2018–19 with marginally fewer applications lodged in the reporting period than in 2017–18.[200] Applications for review of Centrelink decisions comprised 85 per cent of all lodgements in the Division in 2018–19, an increased by 29 per cent from 2017–18.[201]

352. A party who is dissatisfied with a decision made by the Division to affirm, vary or set aside any Centrelink decision or select child support and paid parental leave decisions can apply to the AAT's General Division for a second review. There were 1,882 applications for second review of Centrelink decisions lodged in 2018–19 and 88 applications about child support decisions.[202]

353. In the year ending 2019, 489 child support decisions were affirmed by the AAT (21 per cent of all outcomes) and 762 decisions were set aside or varied (33 per cent of all outcomes). 211 applications were dismissed by consent (9 per cent of all outcomes), 283 were withdrawn by the applicant (12 per cent of all outcomes) and 174 dismissed (8 per cent of all outcomes). 315 applications (14 per cent of all outcomes) were finalised on the basis that the decision is not subject to review by the AAT, the applicant did not have standing to apply for a review, the application had not

[200] Administrative Appeals Tribunal, *Annual Report 2018-19* (Report, 2019) 43.
[201] Ibid 41.
[202] Ibid 45.

been made within a prescribed time limit or the AAT refused to extend the time for applying for a review.[203]

354. Appellants who are dissatisfied with the AAT's decision can appeal to the Federal Court or FCC on a question of law.

355. There were 27 Social Services and Child Support Division court appeals lodged in the 2018–19 year, representing one per cent of the proportion of total AAT decisions. Of those appeals, 24 were finalised, with three allowed and 21 dismissed or discontinued.[204]

356. The FCoA and the FCC have the power to hear certain types of child support applications. In most situations, parents or eligible carers must first satisfy all administrative requirements with the DHS-CS.

357. The FCC can hear:

    (a) an appeal from a decision of the AAT in a child support first review, and

    (b) an appeal from a decision of the Child Support Registrar to issue a departure prohibition order.

358. The FCC can also hear:

    (a) an application for a declaration that a person is or is not a parent of a child for the purposes of paying or not paying child support;

    (b) an application for recovery of child support paid when a person is not liable to pay child support;

    (c) an application for leave to depart from an administrative assessment for a period over 18 months but less than seven years ago;

    (d) an application for child support to be paid in a form other than periodic amounts (or an application to discharge, suspend, revive or vary a previous court order about child support);

    (e) an application to set aside a binding child support agreement if the agreement was obtained by fraud, undue influence or duress or there are exceptional circumstances;

    (f) an application to set aside a limited child support agreement if there has been a significant change in circumstances of one of the parties or the annual rate of child support is not proper or adequate;

    (g) an urgent application for the payment of child support;

    (h) an application for a stay order, which is a temporary order that suspends or reduces the payment of child support until a final order is made. From 1 July 2008, stay orders can address a specific collection action of the DHS-CS. For example, a stay order could:

    (i) order the DHS-CS to cease collecting from a payer's salary;

[203] Ibid 144.
[204] Ibid 47.

(j) order the DHS-CS to withdraw or modify a garnishment notice;

(k) order the DHS-CS not to collect a payer's taxation refund;

(l) order the DHS-CS not to disburse monies held to the payee; or

(m) order the DHS-CS to cease any and all administrative collection;

(n) an application about child maintenance or overseas child maintenance orders;

(o) an application to recover a child support debt by the Child Support Registrar or payee; and

(p) an application by the Child Support Registrar to set aside a transaction (or restrain a person from entering into a transaction) to reduce or defeat a maintenance liability.

359. Of the 85,234 filings in the FCC in 2018-19,[205] there were 22 child support appeals from the AAT, three less than the previous year.[206]

360. While the FCC shares the review jurisdiction with the Federal Court, most appeals proceed before the FCC.[207]

361. A significant proportion of the enforcement workload of the FCC is, however, in relation to applications for enforcement of the arrears of child support.[208] The FCC has created discrete child support enforcement lists in the larger registries as a means of dealing with this workload.

362. Additionally, there are cases in the FCoA and the FCC where the child support dispute is a component of a property settlement dispute, and where, as a consequence, it is in the interests of the parties to consider the change of assessment application at the same time as the property settlement (paragraph 116(1)(b) of the CSAA).

Child Support Agreements

363. Since the introduction of the CSS parents have been able to make their child support arrangements in three ways. Parents can opt for DHS-CS to collect payment in accordance with an administrative assessment and transfer child support to the receiving parent, payment in accordance with an administrative assessment can be made directly between parents or parents can privately agree upon the level of child support to be paid and the method of payment.

364. Experience suggests that most parents use private collect arrangements, often formalising private child support arrangements by either a 'limited' child support Agreement or a 'binding' child support agreement pursuant to Part 6 of the CSAA.

Limited Child Support Agreements

365. A Limited Child Support Agreement operates for a limited time only, which cannot exceed a period of three years (insofar as either party can terminate it as of right thereafter).

[205] Federal Circuit Court of Australia, *Annual Report 2018-19* (Report, 2019) 31.
[206] Ibid 33.
[207] Ibid.
[208] Ibid.

366. Section 80E of the CSAA provides that parties can enter into a Limited Child Support Agreement if:

    (a) the Agreement is in writing;

    (b) the Agreement is signed by parties to the Agreement; and

    (c) there is an administrative assessment of child support in place at the time the parties apply to the Registrar to accept the Agreement.

367. For a Limited Agreement to be accepted, the amount of child support represented in the Agreement must also be at least the annual rate of child support that would otherwise be payable under an administrative assessment, or otherwise payable as a result of a change of assessment, court order or prior agreement.

368. A Limited Child Support Agreement cannot be varied. However, it can be terminated as follows:

    (a) by a subsequent Limited Child Support Agreement or Binding Child Support Agreement (**BCSA**) providing that the previous Agreement is terminated;

    (b) by an agreement in writing providing that the agreement is terminated;

    (c) by a Court Order setting aside the agreement, but the conditions precedent to setting aside agreement are extremely onerous on the applicant and such Orders are difficult to obtain;

    (d) if a parent entitled to receive child support ceases to be an 'eligible carer' for the purposes of the CSAA, as outlined below;

    (e) if the administrative assessment made changes by more than 15 per cent from the previous assessment in circumstances not contemplated by the Agreement, either party can elect to terminate the Agreement within 60 days of receiving notice of the new assessment by notifying the DHS-CS; or

    (f) after three years passing from the date of entering into the agreement, by either party giving written notice of termination to the DHS-CS. In those circumstances, the Agreement will be terminated 28 days after the written notice is received by DHS–CS.

Binding Child Support Agreements

369. A BCSA can operate, subject to the terms of the agreement, until a child attains the age of 18 years and finishes their secondary school education if he or she turns 18 in the same year.

370. Pursuant to section 80C of the CSAA, a child support agreement is a BCSA if:

    (a) the Agreement is in writing;

    (b) the Agreement is signed by parties to the Agreement; and

    (c) each party has had independent legal advice about how the Agreement affects their rights, and whether it is to their advantage or disadvantage, at the time they enter into the Agreement, to enter into the Agreement, and that the Agreement contains certificates that reflect that each party to the Agreement

has been provided with specific independent legal advice prior to signing the Agreement.

371. Unlike Limited Child Support Agreements, parties can enter into a BCSA in the absence of an administrative assessment of child support issued by the Agency.

372. The amount agreed on by the parties and provided for in a BCSA may be more or less than the amount that the payer would be assessed as paying under the CSAA's child support assessment formula.

373. A BCSA cannot be varied after it has been entered into other than by agreement between the parties.

374. The mechanisms for varying or terminating a BCSA as set out in the CSAA are as follows:

    (a) through the creation, by both parents, of a new child support agreement which expressly negates the operation of the earlier agreement;

    (b) through a 'termination agreement' entered into between both parents; and

    (c) by way of a court order. To obtain a court order, the party seeking to terminate the agreement must establish that:

    (d) exceptional circumstances exist relating to a party to the agreement or the child;

    (e) those exceptional circumstances have arisen since the agreement was made; and

    (f) the applicant or the child will suffer hardship if the agreement is not set aside (even where this is established, the court has discretion as to whether or not to set aside the agreement).

375. A BCSA could also be set aside if it is established that there was fraud or failure to disclose material information, or through undue influence, duress or unconscionable conduct such that it would be unjust not to set the BCSA aside;

376. A BCSA could also be terminated on notifying the Registrar that the party receiving child support is no longer an 'eligible carer'. The CSAA has recently been amended to include this provision. The amendments intend to make it easier for BCSAs to be terminated where the child's care arrangements change. Subsection 80D(2A) of the CSAA permits the Child Support Registrar to terminate a BCSA where the party receiving child support ceases to be an 'eligible carer'. Accordingly, the Child Support Registrar can now administratively terminate a BCSA (without the need for a court order) where the:

    (a) party receiving child support (the payee) begins to have less than 35 per cent care of the child;

    (b) period in which the payee has less than 35 per cent care of the child is at least 28 days;

    (c) BCSA has not been suspended (either by virtue of a provision in the agreement itself, notification to the Registrar, or a decision of the Registrar); and

    (d) payee would otherwise continue to be entitled to child support in accordance with the BCSA.

Arbitration in child support matters

377. The ALRC in its Report recommended that:

> *The FLA and the CSAA 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.*[209]

378. Appropriate occasions for arbitration would not include disputes:

(a) relating to enforcement;

(b) under sections 79A or 90SN of the FLA (subject to limitations); and

(c) in which a litigation guardian has been appointed.

379. The Law Council supports this recommendation in relation to child support matters. Parties to child support agreements may be in disagreement about the interpretation and effect of a child support agreement or whether it is indeed binding. In those situations, rather than issuing proceedings in the FCC, they could avail themselves of the advantages of arbitration.

Conclusion

380. When relationships break down, parents have to address arrangements for the care of their children, including the financial support of their children. Arrangements for the care of children are determined by reference to the objects and principles underlying Part VII of the FLA, including the paramount principle of the best interests of the child.

381. The CSS is designed to ensure that children receive from their parents the financial support that the parents are liable to provide.

382. The current CSS reflects the community expectation that parents share in the cost of supporting their children according to their capacity, rather than burden the taxpayer.

383. The experience of FLS members is that grievances about child support at times have their genesis in concerns about other aspects of family law, such as difficulties in enforcing orders for time or communication with children or even disagreement with the 'no-fault' basis of divorce law.

384. The reality is that 'no administrative program can fix the emotional and psychological results of a broken relationship, nor can it resolve differing priorities or approaches to parenting'.[210]

385. The CSS cannot address these sort of issues—although 'its design should minimise unnecessary conflict and should be responsive to the strong emotions at play when separated parents are required to work together to provide continuing support for their children'.[211]

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[209] Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family Law System* (Final Report 135, March 2019) 281 Recommendation 26.
[210] House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *From Conflict to Cooperation: Inquiry into the Child Support Program* (Final Report, 20 July 2015) 2.
[211] Ministerial Taskforce on Child Support, *In the Best Interests of Children – Reforming the Child Support Scheme* (1 May 2005) 16.

386. As also noted by the Ministerial Taskforce in 2005:

> *a formula-based approach to assessing child support is administratively straightforward, transparent and efficient by comparison with more discretionary alternatives, such as relying on the courts. It provides the mechanism for the costs of children to be distributed equitably in accordance with the parents' capacities to pay. Its outcomes are more predictable. Its administration is also more efficient and cost-effective.*[212]

387. Whilst no system of a CSS is perfect, nor will any CSS ever be immune from complaint, and recognising that the child support formula has been in place since 2008, it is the experience of members of the FLS that the CSS works for most families. That experience accords with the evidence of the low number of appeals to the AAT and from the AAT to the FCC.

388. The Law Council has received the following submission from LSNSW regarding the Harman principle:

> *We note the Family Court and Federal Circuit Court Rules impose an obligation on parties not to use a document that has been disclosed to them for another purpose. The rules express a broader principle known as the Harman principle or Harman obligation, which is also expressed as an implied undertaking to the court, and which can therefore only be released by leave of the court or by legislation.*
>
> *In the context of family law, the courts have been willing to release parties from the Harman obligation in very limited circumstances, for example:*
>
> - *in the case of an admission, by an adult, in respect of child abuse or disclosure by a child in respect of such matters; and*
> - *in "special circumstances" involving criminal proceedings in which a party has been charged.*
>
> *In some matters, however, the resolution of a Part VIII property dispute would be assisted by bringing evidence that has been brought in an application for orders for departure from administrative assessment ("departure orders"), or vice versa. We recommend consideration be given to reviewing the application of the Harman obligation to cases involving both Part VIII family law proceedings and an application for departure orders.*

[212] Ibid 3.

Term of Reference (j)

The potential usage of pre-nuptial agreement and their enforceability to minimise future property disputes.

389. While the Terms of Reference refer to 'pre-nuptial agreements', this is a colloquial expression. The FLA makes provision for 'Financial Agreements' (more often called Binding Financial Agreements or BFAs) and subject to various technical requirements they can be entered into by parties in a variety of different circumstances and not just prior to marriage.

390. The ALRC Report contained a general discussion about Financial Agreements and the different views as to their effectiveness, strengths and weaknesses.[213] However, the ALRC made no recommendations about changes to the laws governing Financial Agreements, the focus of the report being on other matters:

> *Binding financial agreements … cannot be considered separately from the property division provisions of the Family Law Act. Uncertainty and lack of clarity in those provisions encourages many parties, particularly those with significant wealth, to consider BFAs as a way of avoiding uncertainty as to how the court would divide their property upon separation. At the same time, the lack of clarity in Pt VIII also makes it difficult for any party who is asked to sign a BFA to assess how the financial terms compare to their entitlements under the Act and a likely award from the courts on separation. Accordingly, the ALRC considers that the primary attention of reform efforts should be on providing certainty and clarity to Pt VIII of the Act through Recommendations 11–17.*[214]

391. It is important to understand the technical background to these Financial Agreements.[215]

Background matters

392. Prior to 27 December 2000, parties to a marriage could not waive their rights to property settlement or spouse maintenance, nor contract out of Part VIII of the FLA by entering into a Financial Agreement.

393. At common law, contracts entered into prior to marriage which made provision for future separation or which purported to oust the power of the Courts to adjudicate on issues of property settlement and spouse maintenance were unenforceable and void as being against public policy.[216]

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[213] Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family Law System* (Final Report 135, March 2019) 210-2 [6.64]-[6.75]
[214] Ibid 236 [7.82]
[215] The material that follows under the heading 'Background matters' is largely drawn from two papers: Paul Doolan, Family Law Section of the Law Council of Australia, 'Financial Agreements – Everything You Wanted To Know, But Were Too Afraid To Ask' (Paper presented at Family Law Intensive Series) <https://nqla.com.au/images/stories/attachments/conf_11/family/P_Doolan_presentation.pdf>; Paul Doolan and Sheridan Emerson, Family Law Section of the Law Council of Australia, 'Financial Agreements – Salvage and Survival' (Paper presented at Family Law Intensive Series).
[216] *Hyman v Hyman* [1929] AC 601; *Plut v Plut* [1987] FLC 91-834 (Strauss J).

394. In answer to community and legal concerns raised in the 25 years since the inception of the FLA, the Australian Government introduced Part VIIIA of the FLA, which took effect on 27 December 2000.

395. The most striking feature of the legislation was that it enabled parties to an impending marriage (or who are married or even after divorce) to enter into a Financial Agreement, the effect of which, if binding, is to exclude the jurisdiction of a Court in whole or in part to make Orders for property settlement and/or spouse maintenance on marriage breakdown. Those provisions were expanded to include parties to a de facto relationship or anticipated de facto relationship, upon the referral of powers to the Commonwealth and the introduction of Part VIIIAB of the FLA.

396. The Full Court of the FCoA, when dealing with cases regarding challenges to Financial Agreements, has emphasised the situation that applied prior to the introduction of the Financial Agreement provisions in 2000, namely that the parties could not by agreement, outside the confines of legislation, contract out of the right to institute proceedings for property settlement and spouse maintenance. Given those matters, the Full Court in *Black v Black*[217] made clear that 'strict compliance with the statutory requirements is necessary to oust the Court's jurisdiction to make adjustive orders under s79' of the FLA:

> *40. The Act permits parties to make an agreement which provides an amicable resolution to their financial matters in the event of separation. In providing a regime for parties to do so the Act removes the jurisdiction of the court to determine the division of those matters covered by the agreement as the court would otherwise be called upon to do so in the event of a disagreement. Care must be taken in interpreting any provision of the Act that has the effect of ousting the jurisdiction of the court. The amendments to the legislation that introduced a regime whereby parties could agree to the ouster of the court's power to make property adjustment orders reversed a long held principle that such agreements were contrary to public policy...*
>
> *42. The underlying philosophy that had guided the courts in enunciating that principle was seen to place too many restrictions on the right of parties to arrange their affairs as they saw fit. The compromise reached by the legislature was to permit the parties to oust the court's jurisdiction to make adjustive orders but only if certain stringent requirements were met.*[218]

397. As a consequence of problems as identified by the Full Court in *Black v Black* case, amendments were made to the FLA to try and rectify the problems.[219] The then Federal Attorney-General, the Hon Robert McClelland (now the Hon Deputy Chief Justice McClelland of the FCoA) when making the Second Reading Speech to the House of Representatives on 3 December 2008, said of that amending legislation:

> *The Bill amends the Family Law Act to ensure that people who have made an informed decision to enter into one of these Agreements cannot later avoid or get out of the Agreement on a mere technicality, resulting in Court battles that the Agreement was designed to prevent. These amendments will restore confidence and certainty in the binding nature and enforceability of Financial and Termination Agreements under the Family Law Act.*

[217] (2008) 38 FamLR 503.
[218] Ibid ¶40, 42, 45.
[219] Federal Justice System Amendment (Efficiency Measures) (No 1) Bill 2008 (Cth).

I commend this Bill.[220]

Statutory provisions

398. Where there has been compliance with the statutory requirements imposed by Part VIIIA, the effect of a BFA is to oust the Part VIII jurisdiction of the Court by virtue of section 71A of the FLA, and in respect of the de facto provisions in Part VIII AB by virtue of section 90SA of the FLA:

Section 71A

(1) This Part does not apply to:

(a) financial matters to which a financial agreement that is binding on the parties to the agreement applies; or

(b) financial resources to which a financial agreement that is binding on the parties to the agreement applies.

(2) Subsection (1) does not apply in relation to proceedings of a kind referred to in paragraph (caa) or (cb) of the definition of matrimonial cause in subsection 4(1).

399. As noted by Murphy J in *Fevia v Carmel-Fevia*,[221] the Court's power to make Orders pursuant to Part VIII is 'curtailed only in respect of financial matters to which a Financial Agreement applies and only if any such Financial Agreement is binding'.[222]

400. It is important to note the scope of the definitions of 'financial matters' and 'financial agreement' as provided for in section 4 of the FLA (and the definition of 'Part VIII AB financial agreement' in section 4):

***'financial agreement'** means an agreement that is a financial agreement under section 90B, 90C or 90D, but does not include an ante-nuptial or post-nuptial settlement to which section 85A applies.*

***'financial matters'** means:*

(a) in relation to the parties to a marriage – matters with respect to:

(b) the maintenance of one of the parties; or

(c) the property of those parties or of either of them; or

(d) the maintenance of children of the marriage; or

(e) in relation to the parties to a de facto relationship – any or all of the following matters:

(f) the maintenance of one of the parties;

(g) the distribution of the property of the parties or of either of them;

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[220] Explanatory Memorandum, Federal Justice System Amendment (Efficiency Measures) (No 1) Bill 2008 (Cth).
[221] [2009] FamCA 816.
[222] *Fevia v Carmel-Fevia* [2009] FamCA 816 ¶174.

(h) the distribution of any other financial resources of the parties or of either of them.

The categories of financial agreements

401. By way of broad overview, the available categories of Financial Agreements are as follows:

(a) section 90B – Financial Agreements made before marriage;

(b) section 90C – Financial Agreements during marriage;

(c) section 90D – Financial Agreements after a divorce order is made;

(d) section 90J – Termination Agreement;

(e) section 90UB – Financial Agreements before de facto relationship;

(f) section 90UC – Financial Agreements during de facto relationship;

(g) section 90UD – Financial Agreements after breakdown of a de facto relationship;

(h) section 90UE – Agreements made in non-referring States that become Part VIIIAB Financial Agreements; and

(i) section 90UA – Part VIIIAB Termination Agreement.

402. It is also important to make note of the relevant provisions in Part VIIIB in relation to Superannuation Agreements, that may also apply:

(a) section 90MH – Superannuation Agreement to be included in a Financial Agreement if about a marriage; and

(b) section 90MHA – Superannuation Agreement to be included in a Part VIIIAB Financial Agreement if about a de facto relationship.

403. The relevant statutory provisions (in sections 90B, 90C, 90D, 90UB, 90UC and 90UD) specify with particularity the requirements imposed for the making of a Financial Agreement. These were summarised by Cronin J in *Ruane v Bachmann – Ruane* v Anor[223] (in the context of a section 90C Financial Agreement) to be threefold:

(a) there must be a written agreement with respect to any (but not necessarily all) of the property, financial resources and/or maintenance of the parties;

(b) the parties to the Financial Agreement cannot be parties to any other BFA with respect to the matters in (a) above (i.e. there cannot be two such agreements in operation at the same time); and

(c) the Financial Agreement must be expressed to be made under sections 90B, 90C, 90D, 90UB, 90UC or 90UD (as the case may be).

The transitional provisions for state and territory cohabitation agreements

404. The *Federal Justice System Amendment (Efficiency Measures) Act (No 1) 2009* (Cth) contained provisions recognising pre-existing Cohabitation Agreements entered into

[223] [2009] Fam CA 1101.

under state or territory laws. Where a validly made de facto Cohabitation Agreement was in force such that a state Court could not, under the relevant state law, make an Order inconsistent with the agreement, then that Agreement becomes a Part VIIIAB Financial Agreement which can only subsequently be enforced, varied, terminated or otherwise set aside under the FLA.

Family Law Amendment (Financial Agreements and other Measures) Bill 2015 – currently dormant

405. The Family Law Amendment (Financial Agreements and Other Measures) Bill 2015 (**the Bill**) was introduced into the Australian Senate on 25 November 2015.

406. The intention of the Bill was *inter alia* to try and address a series of problems with Financial Agreements that have rendered them liable to challenge, made them less certain, and made them less capable of enforcement.

407. In a media release on the date of the Bill's introduction, the then Attorney-General, Senator the Hon George Brandis QC, stated that:

> *The Bill … contains measures to improve binding financial agreements which outline how property and other financial matters will be dealt with should a relationship breakdown. This will assist separating couples in resolving their financial arrangements without involving a court.*[224]

408. The Explanatory Memorandum stated that the Bill would amend the financial agreement regime in the FLA to:

    (a) remove existing uncertainties around requirements for entering, interpreting and enforcing agreements;

    (b) make changes to the coverage of spousal maintenance matters in agreements;

    (c) introduce a statement of principles to outline their binding nature; and

    (d) reinforce the binding nature of the agreement to offer certainty to parties.[225]

409. The Bill was referred to the Senate Committee's inquiry into the Family Law Amendment (Financial Agreements and Other Measures) Bill 2015.

410. The Law Council made submissions to that Committee and appeared as a witness at public hearings. The Law Council was supportive of the Bill with some modifications. A copy of the written submissions of the Law Council dated 19 January 2016 are **Annexure E**.

411. Despite a majority report recommending passage of the Bill with some amendments, the Bill did not return to the Senate and lapsed. Copies of the reports from the Committee in 2016 are hyperlinked for ease of reference:

    (a) Senate Committee;

    (b) Labor (dissenting); and

[224] The Hon George Brandis QC, Attorney-General, 'New Measures to Provide Greater Protections for Australians Affected by Family Violence' (Media Release, 25 November 2015).
[225] Explanatory Memorandum, Family Law Amendment (Financial Agreements and Other Measures) Bill 2015 (Cth) 1 [4].

(c) Greens (dissenting).

412. The Law Council remains of the view that the relevant provisions (referable to Financial Agreements) of the Bill should be re-introduced (and augmented by matters referred to below), and the Law Council again relies upon the submissions made in late 2015 and early 2016 around the terms of the Bill.

Other changes to the FLA which would make Financial Agreements more effective[226]

413. The distinction between section 90B, 90C and 90D agreements, and the corresponding de facto equivalents in section 90UB, 90UC and 90UD, should be abolished. It serves no discernible purpose except to add another layer of complexity. In de facto cases, the line between intending to enter into a de facto relationship and the commencement of the relationship is blurred, which places in jeopardy an agreement said to have been made under section 90UB of the FLA, if the Court later finds that the parties were in a de facto relationship when the agreement was made such that it should have been made under section 90UC of the FLA. All BFAs should just be 'Family Law Agreements'.

414. An agreement should allow the removal of the whole of the Part VIII or Part VIIIAB property jurisdiction. As it presently stands, the wording in the FLA only gives protection to property during the course of the marriage, not to after acquired property, For example, paragraph 90C(2)(a) of the FLA provides for (emphasis added):

> *how, in the event of the breakdown of the marriage, all or any of the property or financial resources of either or both of the spouse parties at the time when the agreement is made**, or at a later time and during the marriage,** is to be dealt with.*

415. That wording leaves open the possibility of bringing proceedings for *property acquired after divorce*.[227] This issue was highlighted in the following exchange at the Senate Committee hearings:[228]

> *Mr Doolan: It is a rather technical point but the way the legislation works, it almost assumes that once a relationship ends that people stop acquiring assets or stop earning income. The legislation talks only about giving protection to assets acquired. Financial agreement can say, for example, any assets acquired during the relationship will be protected by this agreement. It does not refer to any assets you might acquire after the relationship breaks down. Unfortunately the case law is littered—not in this particular case of prenups—with people who, for better or for worse, have managed to win the Lotto three days after their marriage breakdown and then the Family Court ends up in a giant fight about who gets those Lotto winnings. The relationship had finished but the courts tend to value assets at the date of trial, not the date of separation. In this day and age, I tell clients that it will be three or four years from the date you see me until the date you get a final trial in the Family Court at the moment. We have this enormous problem, because of the delay, of assets constantly changing over three or four years. That is the kind of example dealing just with the marriage situation. But there is an argument*

[226] The Law Council acknowledges the assistance of Mr Martin Bartfeld QC of Owen Dixon Chambers East, Victorian Bar, for his assistance and comments relating to the question of further amendments in respect of Financial Agreements.
[227] See, eg, *Orwin v Richards* [2019] VSC 375.
[228] Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 12 February 2016, 25 (Paul Doolan, Family Law Section, Law Council).

potentially out there that we think could be run by a smart lawyer—or not even a terribly smart lawyer—that this prenuptial agreement did not give protection to any asset that came into existence after the relationship ended because of the way the legislation is worded. We got the Black decision saying that we take a very strict approach to these laws. They are excluding the jurisdiction of the court. The court's jurisdiction should only be excluded to the extent that the law directs. The law, at the moment, says it only gives protection to assets acquired during the relationship. It says nothing about those after a relationship. You could run into a situation where someone says, 'I agree the prenuptial agreement is valid and in force and I cannot get any of those assets over there. But for these over here that came into existence after the relationship broke down, I am not covered by the agreement and the Family Law Act gives no protection to them on a strict reading of the legislation.' So what we had suggested was—

CHAIR: Because the agreement did not say it might apply to assets acquired afterwards?

Mr Doolan: It is because the agreement cannot say that. Because of the way that the act is worded, it only refers to assets acquired during the course of the relationship. It says nothing of assets acquired after the breakdown of the relationship and that is the distinction here.

CHAIR: Why would your submission not say: let us put it beyond doubt that the assets must be valued at the time the breakdown occurs, not at the time the matter eventually gets to court four years later?

Mr Doolan: We are perhaps at cross-purposes. What we are saying is that if parties enter into a prenuptial agreement and that agreement says that neither of us shall ever make any claim on the assets of the other party, the way the legislation seems to work is that will give a complete coverage if it is a binding agreement to anything they acquired during the course of their relationship together. But there seems to be very clear technical argument that if someone acquired an asset after the relationship broke down, that agreement could not as a matter of law give it any protection because, the way the legislation is worded, it only gives protection under a financial agreement to assets acquired prior to the breakdown of the relationship. What we are trying to do is cover off loopholes that are going to come up constantly because people are always looking for ways to get out of prenuptial agreements.

CHAIR: So that would invalidate the prenuptial agreement because it did not allow for—

Mr Doolan: The prenuptial agreement would still be valid and it would still protect those assets that it could cover. What we are saying is the way the act operates—

CHAIR: It could not protect the assets acquired afterwards.

Senator JACINTA COLLINS: So there is a window between when the relationship breaks down and the matter is heard?

Mr Doolan: Potentially, if someone receives an inheritance two years after the relationship breaks down but they have not enforced or finalised the breakdown of the relationship from the financial agreement and someone puts in a claim, they will not be claiming any of the assets that were covered by the

prenuptial agreement because they cannot but there is nothing to stop them, under the Family Law Act, from claiming the inheritance received.

CHAIR: What does your proposal and 35.3 suggest?

Mr Doolan: It suggests there should be a recognition that the prenuptial agreements can apply to assets acquired even after the end of the marriage or the breakdown of the de facto relationship, just a simple wording change in that regard.

CHAIR: So that is what your recommendation 35.3 says?

Mr Doolan: Yes. In summary form, yes.

CHAIR: Again, did you get an indication from the attorney's office on why they did not go with that?

Mr Doolan: I do not recall. I would have to check and take that on notice.

CHAIR: I can ask the department later on but it seems eminently sensible to me—but that does not mean much, I might say.

416. The decision of the Western Australian Court of Appeal in *B v W* [2019] WASCA 152, identified that the advice a solicitor must give in relation to advantages and disadvantages in section 90G of the FLA is unlimited as to its scope. The Law Council recommends that section 90G of the FLA be amended such that the advice required to be given by a lawyer should be limited to advantages and disadvantages in relation to proceedings and remedies under the FLA. Otherwise a failure by a lawyer to advise on taxation or commercial aspects, may give rise to an attack on the BFA as not having complied with the requirements of section 90G of the FLA.

417. If the Parliament seeks to provide better certainty to Financial Agreements and leave them less open to challenge, the signing by a lawyer of the Statement of Independent Legal Advice should be deemed to be conclusive proof of compliance with section 90G of the FLA. If the advice given by a particular lawyer is inadequate and does not meet the necessary professional standards, the client has remedies against that lawyer. It should not be the case that a client can rely upon their own lawyer's failings, as the basis to avoid their obligations under a Financial Agreement.

418. The Law Council received the following submission from LSNSW. However, it notes that the position of LSNSW in relation to the broadening of the court's power to vary or set aside agreements if there has been a material change in circumstances relating to a child, is not a recommendation or submission that the Law Council adopts:

The Law Council has previously recommended re-introduction of the relevant amendments proposed by the Family Law Amendment (Financial Agreements & Other Measures) Bill 2015.[229] *The Law Society supports this recommendation in principle, subject to the following comments.*

The Law Society supports the proposition that parties should be able to contract out of the financial provisions of the Act, if they do so voluntarily and with full understanding of their rights and obligations. In our view, however, there is a need to simplify and clarify the provisions in Part VIIIA, in particular

[229] Law Council of Australia, Submission No 43 to the Australian Law Reform Commission, *Issues Paper 48: Review of the Family Law System* (7 May 2018) 64.

to clarify when financial agreements are binding and when they can be set aside.

We also recommend consideration be given to broadening the court's powers to vary or set aside an agreement. At present ss 90K(1)(d) and 90UM(1)(g) allow a court to set aside an agreement if there is a material change in circumstances relating to a child. We recommend the court's power be extended to setting aside or varying an agreement where there has been a material change in circumstances of a party. Many agreements are entered into at the early stages of the relationship, and as time passes the parties experience material changes in circumstance which are unconnected to the children, such as age-related health conditions. In our view the court should be able to make orders that respond to these changes in circumstances.

Our members report that a proportion of those who enter into a financial agreement pursuant to Part VIIIA agree to an outcome significantly less favourable than the likely outcome of proceedings instigated pursuant to Part VIII, despite having obtained independent legal advice. This can be due to a lack of understanding of the effect of the agreement or, in some cases, an element of undue pressure or influence. In the experience of our members, the issue is more likely to arise in cases involving vulnerable parties, where there is family violence involved, or where the agreement is signed in haste prior to the wedding.

For vulnerable parties, bringing proceedings pursuant to s 90K can be financially onerous. While it is open to a party to make an application pursuant to s 117 for interim property settlement orders in order to fund a s 90K application, recent case law suggests that few such applications are successful.[230] *We recommend additional funding be made available (for example via legal aid) to enable eligible parties to bring an application to set aside their financial agreement.*

Term of Reference (k)

Any related matters.

419. As noted in paragraph 76 of this submission, the Law Council favours a model in which the FCC's current general jurisdiction (that is, not in family law), which accounts for approximately 10 per cent of the FCC's work, is transferred to a lower level division to be created in the Federal Court. Judges exercising that general jurisdiction would have appropriate experience in such jurisdiction, without having to balance priorities and dedicate resources away from family law matters.

420. The need for urgent attention in many general jurisdiction matters means that balancing priorities of a mixed jurisdiction becomes very difficult. For example, in the bankruptcy jurisdiction, when uncontested bankruptcy petitions are determined by a registrar of the FCC, a bankrupt has a right to seek review before a Judge. Such matters can drag on, and if the ultimate decision is that the bankruptcy order is set aside, then a trustee in bankruptcy, having been appointed under the order that has been set aside, will have carried out statutory duties yet have no entitlement to remuneration. In *Kyriackou v Shield Mercantile Pty Ltd (No. 2)*,[231] Weinberg J said:

[230] *Norton v Wilkins* [2017] FamCA 992; *Monaghan v Farrer* [2018] FamCA 178.
[231] [2004] FCA 1338.

It would be quite wrong, in my view, to burden Mr Kyriackou, who is the successful appellant in this proceeding, with the costs of administering a bankrupt estate that should never have been made the subject of a sequestration order. Regrettably, that leaves the Official Trustee with no obvious and immediate recourse against either the appellant, or the first respondent. It also leaves him with what might be considered to be a legitimate sense of grievance. He may be out of pocket for doing no more than what he was required by statute to do.[232]

421. Hence, such review matters need to be given priority and determined quickly. There can be just as much need for priority in the general jurisdiction of the FCC than is observed and much needed within the family law jurisdiction of the FCC.

422. Further, under the current model, registrars who determine uncontested bankruptcy matters or who carry out other functions within the general jurisdiction of the FCC (such as supervising bankruptcy public examinations under section 81 of the *Bankruptcy Act 1966* (Cth)) are also registrars of the Federal Court and have experience in such matters. Any consideration of a merger of functions of the FCC into the FCoA needs to take into account such ancillary functions which, in the submission of the Law Council, will be better suited to being performed within a lower level division of the Federal Court.

Conclusion

423. The Law Council welcomes the opportunity to comment on any other related matters that may be raised by the Joint Select Committee, or by other persons or entities who contribute to the work of the inquiry. The Law Council otherwise refers to and relies upon its various submissions in respect of the Issues Paper, Discussion Paper and the ALRC Report, and its written submissions to the Senate Committee in respect of the proposed Merger Bills.

[232] Ibid [40]. See also *Pattison v Hadjimouratis* (2006) 155 FCR 266.

FEDERAL CIRCUIT COURT OF AUSTRALIA

Instructions for completion

NOTICE OF RISK

1. This is a mandatory form to be used by any person who files an application or response seeking parenting orders on or after 12 January 2015 and as the prescribed notice when allegations for the purposes of subsections 67Z(2) or 67ZBA(2) of the *Family Law Act 1975* are raised on or after 12 January 2015 (see Question 2 of the form).

   Note: The form also fulfils the court's obligation under paragraph 69ZQ91)(aa) of the Family Law Act 1975.

2. If you are completing this application by hand and you need more space in any section attach extra page/s as required. The form must be completed by typing or hand printing in ink.

3. Once completed and signed the form must be filed. Before the notice is filed you must make sufficient copies to have one for each person to be served and a copy for your own records.

4. Service is by ordinary service and the following must be served:

   - Each party to the proceedings;
   - The Independent Children's Lawyer (ICL) – if one has been appointed;
   - The alleged abuser or the person from whom the child is alleged to be at risk of abuse when allegations for the purposes of subsections 67Z(2) or 67ZBA(2) are raised.

   Note: IF YOU TICK 'YES' TO QUESTION 2 OF THE FORM, the prescribed child welfare authority must be provided a copy of this Notice of Risk by the Registry Manager who may provide such other court documents and information as is required to enable investigation of the contents of the Notice of Risk.

5. An affidavit setting out the evidence on which the allegations are based must be filed with this form unless the evidence relied on is contained in the affidavit filed with the Application or Response (see rule 4.05 *Federal Circuit Court Rules 2001*).

6. **Note: the form will not be accepted unless the specific details of the alleged abuse, or risk of abuse, are clearly particularised in the space provided (**see over for examples of the appropriate particulars required and relevant legislation**)**

Examples of the appropriate particulars required:

Do you allege that a child to whom the proceedings relate has been abused?

On <date> the child Jason was struck on the back of the head by the respondent's partner Jane because Jason had refused to complete his household chores. The assault caused a 3cm laceration and bleeding. Jason was taken to a GP for treatment where he was diagnosed with a mild concussion, received 6 stitches and was prescribed pain relief medication. Jason was absent from school for 2 days as a result of his injuries.

Do you allege that a child to whom the proceedings relate is <u>at risk of abuse</u>?

The children are at significant risk of serious harm as the respondent was evicted from their home on <date> and has been sleeping in the car with the children for the last 2 weeks with no access to bathroom or kitchen facilities. It is not known how the 3 month old baby's bottles are being sterilised or how formula is being heated.

Do you allege that there has been family violence or there is risk of family violence?

Between <date> and <date> the child has witnessed domestic abuse of his mother (Anne) by his father (John). Incidents occurred weekly including the father yelling at, threatening to assault and threatening to kill the mother. Incidents included physical violence perpetrated by the father including hitting, kicking, pushing, hair pulling and throwing objects. As a result of the domestic abuse the mother has sought medical attention for injuries on at least one occasion and police have attended the home on 3 occasions over the last 12 months.

Details of the adults and children involved in these risks are to be provided to enable them to be clearly identified. The list must include the children or adults at risk. For example:

Examples of relevant adults or children:

Name	Last Known Address	Date of Birth	Description/Role
John Smith	21 Known Pde, Kew	02/03/1985	Applicant Father
Jane Smith	304 Unknown St, Kew	04/05/1985	Respondent Mother
Jason Smith	304 Unknown St, Kew	06/07/2008	Child of parties
Pete Newe	304 Unknown St, Kew	Unknown	Partner of Mother

Relevant Legislation – *Family Law Act 1975*

s.67Z Where interested person makes allegation of child abuse

(1) This section applies if an interested person in proceedings under this Act alleges that a child to whom the proceedings relate has been abused or is at risk of being abused.

(2) The interested person must file a notice in the prescribed form in the court hearing the proceedings, and serve a true copy of the notice upon the person who is alleged to have abused the child or from whom the child is alleged to be at risk of abuse.

(3) If a notice under subsection (2) is filed in a court, the Registry Manager must, as soon as practicable, notify a prescribed child welfare authority.

(4) In this section:

interested person in proceedings under this Act, means:

(a) a party to the proceedings; or

(b) an independent children's lawyer who represents the interests of a child in the proceedings; or

(c) any other person prescribed by the regulations for the purposes of this paragraph.

prescribed form means the form prescribed by the applicable Rules of Court.

Registry Manager means:

(a) in relation to the Family Court—the Registry Manager of the Registry of the Court; and

(b) in relation to the Family Court of Western Australia—the Principal Registrar, a Registrar or a Deputy Registrar, of the court; and

(c) in relation to any other court—the principal officer of that court.

s.67ZBA Where interested person makes allegation of family violence

(1) This section applies if an interested person in proceedings for an order under this Part in relation to a child alleges, as a consideration that is relevant to whether the court should make or refuse to make the order, that:

(a) there has been family violence by one of the parties to the proceedings; or

(b) there is a risk of family violence by one of the parties to the proceedings.

(2) The interested person must file a notice in the prescribed form in the court hearing the proceedings, and serve a true copy of the notice upon the party referred to in paragraph (1)(a) or (b).

(3) If the alleged family violence (or risk of family violence) is abuse of a child (or a risk of abuse of a child):

(a) the interested person making the allegation must either file and serve a notice under subsection (2) of this section or under subsection 67Z(2) (but does not have to file and serve a notice under both those subsections); and

(b) if the notice is filed under subsection (2) of this section, the Registry Manager must deal with the notice as if it had been filed under subsection 67Z(2).

Note: If an allegation of abuse of a child (or a risk of abuse of a child) relates to a person who is not a party to the proceedings, the notice must be filed in the court and served on the person in accordance with subsection 67Z(2).

(4) In this section:

interested person in proceedings for an order under this Part in relation to a child, means:

(a) a party to the proceedings; or

(b) an independent children's lawyer who represents the interests of the child in the proceedings; or

(c) any other person prescribed by the regulations for the purposes of this paragraph.

prescribed form means the form prescribed by the applicable Rules of Court.

Registry Manager has the same meaning as in section 67Z.

s.69ZQ General duties

(1) In giving effect to the principles in section 69ZN, the court must:

(aa) ask each party to the proceedings:

(i) whether the party considers that the child concerned has been, or is at risk of being, subjected to, or exposed to, abuse, neglect or family violence; and

(ii) whether the party considers that he or she, or another party to the proceedings, has been, or is at risk of being, subjected to family violence;

Definitions:

When completing this form you should carefully read the specific definitions of the terms '**abuse**' and '**family violence'** in the *Family Law Act 1975*, which provides:

4 Interpretation

(1) In this Act, the standard Rules of Court and the related Federal Circuit Court Rules, unless the contrary intention appears:

abuse, in relation to a child, means:

(a) an assault, including a sexual assault, of the child; or

(b) a person (the first person) involving the child in a sexual activity with the first person or another person in which the child is used, directly or indirectly, as a sexual object by the first person or the other person, and where there is unequal power in the relationship between the child and the first person; or

(c) causing the child to suffer serious psychological harm, including (but not limited to) when that harm is caused by the child being subjected to, or exposed to, family violence; or

(d) serious neglect of the child.

(1AB) For the purposes of … section 4AB … a person (the first person) is a member of the family of another person (the second person) if:

(d) the first person is or has been married to, or in a de facto relationship with, the second person; or

(e) the first person is or has been a relative of the second person (as defined in subsection (1AC)); or

(f) an order under this Act described in subparagraph (i) or (ii) is or was (at any time) in force:

(i) a parenting order (other than a child maintenance order) that relates to a child who is either the first person or the second person and that is in favour of the other of those persons;

(ii) an order providing for the first person or the second person to have custody or guardianship of, or a right of access to, the other of those persons; or

(g) an order under a law of a State or Territory described in subparagraph (i) or (ii) is or was (at any time) in force:

(i) an order determining that the first person or the second person is or was to live with the other of those persons, or is or was to have custody or guardianship of the other of those persons;

(ii) an order providing for contact between the first person and the second person, or for the first person or the second person to have a right of access to the other of those persons; or

(h) the first person ordinarily or regularly resides or resided with the second person, or with another member of the family of the second person; or

(i) the first person is or has been a member of the family of a child of the second person.

(1AC) For the purposes of subsection (1AB), a relative of a person is:

(a) a father, mother, grandfather, grandmother, step-father or step-mother of the person; or

(b) a son, daughter, grandson, grand-daughter, step-son or step-daughter of the person; or

(c) a brother, sister, half-brother, half-sister, step-brother or step-sister of the person; or

(d) an uncle or aunt of the person; or

(e) a nephew or niece of the person; or

(f) a cousin of the person; or

(g) if the person is or was married--in addition to paragraphs (a) to (f), a person who is or was a relative, of the kind described in any of those paragraphs, of the person's spouse; or

(h) if the person is or was in a de facto relationship with another person--in addition to paragraphs (a) to (f), a person who would be a relative of a kind described in any of those paragraphs if the persons in that de facto relationship were or had been married to each other.

4AB Definition of *family violence* etc.

(1) For the purposes of this Act, family violence means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member), or causes the family member to be fearful.

(2) Examples of behaviour that may constitute *family violence* include (but are not limited to):

- (a) an assault; or
- (b) a sexual assault or other sexually abusive behaviour; or
- (c) stalking; or
- (d) repeated derogatory taunts; or
- (e) intentionally damaging or destroying property; or
- (f) intentionally causing death or injury to an animal; or
- (g) unreasonably denying the family member the financial autonomy that he or she would otherwise have had; or
- (h) unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support; or
- (i) preventing the family member from making or keeping connections with his or her family, friends or culture; or
- (j) unlawfully depriving the family member, or any member of the family member's family, of his or her liberty.

(3) For the purposes of this Act, a child is exposed to family violence if the child sees or hears family violence or otherwise experiences the effects of family violence.

(4) Examples of situations that may constitute a child being exposed to family violence include (but are not limited to) the child:

- (a) overhearing threats of death or personal injury by a member of the child's family towards another member of the child's family; or
- (b) seeing or hearing an assault of a member of the child's family by another member of the child's family; or
- (c) comforting or providing assistance to a member of the child's family who has been assaulted by another member of the child's family; or
- (d) cleaning up a site after a member of the child's family has intentionally damaged property of another member of the child's family; or
- (e) being present when police or ambulance officers attend an incident involving the assault of a member of the child's family by another member of the child's family.

Remove these instruction sheets before filing

FEDERAL CIRCUIT COURT
OF AUSTRALIA
REGISTRY:

File number:
COURT USE ONLY
Court Location:
Court date:
Court time:

Applicant

Respondent

Other party (if applicable)

Repeat as necessary for additional parties

NOTICE OF RISK [Subrule 2.04(1B)]

1. This Notice is filed by:

Applicant	☐	Respondent	☐
Other	☐	Specify:	

Please proceed to question 2 on the next page.

Filed on behalf of

Prepared by Lawyer's code

Name of law firm

Address for service in Australia

State Postcode

Email* DX

Tel Fax Attention

*Please do not include email or fax details unless you are willing to receive documents from the Court and other parties this way.

Allegations relating to child abuse

2. Has a child to whom the proceedings relate been abused or is a child to whom the proceedings relate at risk of being abused?

(See sections 67Z and 67ZBA and 4 and 4AB of the *Family Law Act 1975*)

Yes ☐ No ☐

If you tick '**no**' go straight to question 3.

NOTE (1): If you tick 'yes' to this question, further particulars must be provided at (a) – (d) below. This information will be reported to the relevant child welfare authority, as required by sections 67Z and 67ZBA of the Family Law Act 1975.

NOTE (2): This form also fulfils the Court's obligation under paragraph 69ZQ(1)(aa) of the Family Law Act 1975.

(a) Do you allege that a child to whom the proceedings relate has been abused by a party to proceedings or any other person who is relevant to these proceedings?

Yes ☐ No ☐

Particulars of alleged abuse to a child:

1)

(b) Do you allege that a child to whom the proceedings relate is at risk of being abused by a party to proceedings or any other person who is relevant to these proceedings?

Yes ☐ No ☐

Particulars of alleged risk of abuse to a child:

1)

(c) If 'yes' is ticked to question (a) or (b) please select all of the categories that cover the alleged abuse or risk of abuse.

Physical assault	☐	Serious psychological harm	☐
Sexual assault or abuse	☐	Serious neglect	☐

(d) Have these allegation/s been reported to an external authority?

Yes ☐ No ☐

If you tick '**yes**' to question (d), specify to whom the allegation/s have been reported.

Police	☐
Child Welfare Authority	☐
Medical Practitioner	☐
Other (please specify)	☐

Allegations relating to family violence

3. Has there been family violence or is there a risk of family violence by a party to the proceedings or any other person who is relevant to these proceedings?

(See sections 67Z and 67ZBA and 4 and 4AB of the *Family Law Act 1975*)

Yes ☐ No ☐

NOTE (1): *If you tick 'yes' to this question, and a child or children have suffered or are at risk of suffering abuse in the form of serious psychological harm caused by being subjected to or exposed to family violence, you should also answer 'yes' to Question 2 above.*

NOTE (2): *This form also fulfils the Court's obligation under paragraph 69ZQ(1)(aa) of the Family Law Act 1975.*

Particulars of alleged family violence or risk of family violence:

1)

(a) Have these allegation/s been reported to an external authority?

Yes ☐ No ☐

If you tick '**yes**' to question (a) specify to whom the allegation/s have been reported.

Police ☐

Child Welfare Authority ☐

Medical Practitioner ☐

Other (please specify) ☐

Allegations related to other risk

4. Are there any other facts or circumstances that you allege pose a risk to a child who is the subject of the proceedings?

(a) Do you allege that a child is at risk because a party to the proceedings, or another person relevant to the proceedings, suffers mental ill-health?

Yes ☐ No ☐

(b) Do you allege that a child is at risk because a party to the proceedings, or another person relevant to the proceedings, abuses drugs or alcohol?

Yes ☐ No ☐

(c) Do you allege that a child is at risk because a party, or another person relevant to the proceedings, suffers a serious parental incapacity?

Yes ☐ No ☐

(d) Do you allege that a child is otherwise at risk?

Yes ☐ No ☐

Particulars of facts or circumstances alleged in questions 4(a) to (d):

1)

Details of the identity of all relevant adults and children

5. Details of the identity of all relevant adults and children:

**NOTE* *If you fear for your safety or the safety of your children, you do not need to disclose your or your children's residential address*

Name	Last Known Address*	Date of Birth	Description/Role

The evidence of the allegations must be set out in an affidavit accompanying this form.

Signature of person filing notice

Signed	Date:
	/ /

This notice was signed by:
- ☐ person(s) filing this notice
- ☐ lawyer for person(s) filing this notice

This notice was prepared by:
- ☐ person(s) filing this notice
- ☐ lawyer for person(s) filing this notice

PRINT NAME AND LAWYER'S CODE

FAMILY COURT OF AUSTRALIA

Notice of Child Abuse, Family Violence or Risk of Family Violence (Application for Consent Orders)

www.familycourt.gov.au

This form is to be used in the Family Court of Australia in conjunction with an Application for Consent Orders which includes proposed parenting orders:

(a) when allegations of child abuse or risk of child abuse are made and a prescribed child welfare authority must be notified of the allegations (Section 67Z of the *Family Law Act 1975* and Rule 2.04D(1)(b) of the Family Law Rules 2004), or

(b) if, in a case where an Application for Consent Orders is made to the court for a Part VII order in relation to a child, a person alleges that there has been abuse of a child or family violence or there is a risk of abuse of a child or family violence and the allegation of abuse, family violence or risk of abuse or family violence is relevant to whether the court should grant or refuse the application (Section 67ZBA of the *Family Law Act 1975*, and Rule 2.04D(1)(b) of the Family Law Rules 2004).

NOTE: If you are applying for parenting orders and have current proceedings use the *Notice of Child Abuse, Family Violence or Risk of Family Violence (Current Case)*.

This is a mandatory form.

This form is to be used in the Family Court of Australia in conjunction with an Application for Consent Orders which includes proposed parenting orders:

(a) when allegations of child abuse or risk of child abuse are made and a prescribed child welfare authority must be notified of the allegations (Section 67Z of the *Family Law Act 1975* and Rule 2.04D(1)(b) of the Family Law Rules 2004), or

(b) if, in a case where an Application for Consent Orders is made to the court for a Part VII order in relation to a child, a person alleges that there has been abuse of a child or family violence or there is a risk of abuse of a child or family violence and the allegation of abuse, family violence or risk of abuse or family violence is relevant to whether the court should grant or refuse the application (Section 67ZBA of the *Family Law Act 1975*, and Rule 2.04D(1)(b) of the Family Law Rules 2004).

NOTE: If you are applying for parenting orders and have current proceedings use the *Notice of Child Abuse, Family Violence or Risk of Family Violence (Current Case)*.

Section 4(1) of the Family Law Act states as follows:

Abuse, in relation to a child, means:

(a) an assault, including a sexual assault, of the child; or

(b) a person (the **first person**) involving the child in a sexual activity with the first person or another person in which the child is used, directly or indirectly, as a sexual object by the first person or the other person, and where there is an unequal power in the relationship between the child and the first person; or

(c) causing the child to suffer serious psychological harm, including (but not limited to) when that harm is caused by the child being subjected to, or exposed to, family violence; or

(d) serious neglect of the child.

A family violence order is an order (including an interim order) made under a prescribed law of a state or territory to protect a person from family violence.

Family violence means:

- violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the **family member**), or causes the family member to be fearful; and
- a child is exposed to family violence if the child sees or hears family violence or otherwise experiences the effects of family violence (Section 4AB).

NOTE: The Registry Manager **must** provide a copy of this *Notice of Child Abuse, Family Violence, or Risk of Family Violence (Application for Consent Orders)* to the prescribed child welfare authority and may provide such other court documents and information as is required to enable investigation of the contents of the Notice.

The forms for use in the Federal Circuit Court and Family Court of Western Australia and information about procedures in these courts is available on the Federal Circuit Court and Family Court of Western Australia websites **www.federalcircuitcourt.gov.au** and **www.familycourt.wa.gov.au**.

For more information, including access to the *Family Law Act 1975*, the Rules of court and any forms or publications:

- go to **www.familycourt.gov.au**
- 

on the website
- call 1300 352 000, or
- visit a family law registry near you.

Making copies of the form for filing, service and yourself

The completed and signed original of the form is filed at the Court. Before you file it you must also make sufficient copies to have one for each person to be served and a copy for your own records.

Filing fee

Nil

What you file with this form

This form must accompany an *Applications for Consent Order* where there are allegations of child abuse, neglect, family violence or a risk of child abuse, neglect or family violence.

Who you serve

- The person who is alleged to have abused the child, or exposed the child to family violence
- The person from whom the child is alleged to be at risk of abuse or family violence.

How you serve this form

By ordinary service. The *Service Kit* provides instructions on how to do this.

What is filed in response

Nothing

In completing a Court form, you must

- Use the court's prescribed form.
- Complete the form by typing (e.g. on a computer or typewriter) or hand printed in ink.

Notice of Child Abuse, Family Violence or Risk of Family Violence (Application for Consent Orders)

Family Law Rules ~ RULE **2.04D(1)(b)**

Please type or print clearly and mark [**X**] all boxes that apply. Attach extra pages if you need more space to answer any questions.

Filed in:

☐ Family Court of Australia

Filed on behalf of:

Full name _____

MARK [**X**] IN THE BOX THAT APPLIES TO YOU

☐ Father
☐ Mother
☐ Other (specify) _____

Applicant's Client ID _____

Respondent's Client ID _____

File number _____

Filed at

Filed on

Court location

Next Court date (if known) _____

This form is to be used in the Family Court of Australia in conjunction with an Application for Consent Orders which includes proposed parenting orders.

(a) when allegations of child abuse or risk of child abuse are made and a prescribed child welfare authority must be notified of the allegations (Section 67Z of the *Family Law Act 1975* and Rule 2.04D(1)(b) of the Family Law Rules 2004), or

(b) if, in a case where an application made to the court for a Part VII order in relation to a child, a person alleges that there has been abuse of a child or family violence or there is a risk of abuse of a child or family violence and the allegation of abuse, family violence or risk of abuse or family violence is relevant to whether the court should grant or refuse the application (Section 67ZBA of the *Family Law Act 1975*, and Rule 2.04D(1)(b) of the Family Law Rules 2004).

Part A About the notice

This notice alleges:

☐ Child abuse or risk of child abuse

☐ Family violence or risk of family violence

☐ Child abuse or risk of child abuse and family violence or risk of family violence

MARK [**X**] IN THE BOX THAT APPLIES

Part B About the person filing this notice and parties

1 Who is giving this notice?

Family name as used now	Given names

Family name as used now	Given names

2 At what address can you be contacted? (THIS NEED NOT BE WHERE YOU LIVE)
If you give a lawyer's address, include the name of the law firm.

State	Postcode
Phone	Fax *
DX	
Email *	Lawyer's code

* **Please do not include email or fax addresses unless you are willing to receive documents from the Court and other parties in that way.**

3 What are the names of the other interested persons and parties?

Family name as used now	Given names

Family name as used now	Given names

Part C About the children to whom the notice relates

4

Child 1

Child's family name

Given names

☐ Male ☐ Female

Child's date of birth / /

Child's address

State Postcode

Name of the person with whom the child lives

Child 2

Child's family name

Given names

☐ Male ☐ Female

Child's date of birth / /

Child's address

State Postcode

Name of the person with whom the child lives

Child 3

Child's family name

Given names

☐ Male ☐ Female

Child's date of birth / /

Child's address

State Postcode

Name of the person with whom the child lives

Child 4

Child's family name

Given names

☐ Male ☐ Female

Child's date of birth / /

Child's address

State Postcode

Name of the person with whom the child lives

IF THERE ARE MORE CHILDREN ATTACH EXTRA PAGES ANSWERING PART C

Part D About the alleged abuse

Before you complete Part D you should carefully read the definition of 'abuse' in section 4(1) of the Family Law Act.

5 Describe any acts or omissions that you allege constitute abuse.
Please include the identity of the alleged abuser(s), if known.

NUMBER EACH PARAGRAPH AND ATTACH EXTRA PAGE/S IF YOU NEED MORE SPACE

1.

6 State briefly in numbered paragraphs how the proposed order/s attempt/s to deal with the allegations described above:

NUMBER EACH PARAGRAPH AND ATTACH EXTRA PAGE/S IF YOU NEED MORE SPACE

1.

7 What is the last known address of the alleged abuser(s) if known?

State	Postcode	Phone

NOTE: A copy of this notice must be served on the person identified in Item 5 as the alleged abuser (section 67Z(2) and section 67ZBA(2) of the *Family Law Act 1975*).

Part E About the alleged risk of abuse

Before you complete Part E you should carefully read the definition of 'abuse' in section 4(1) of the Family Law Act.

8 Describe the facts alleged to constitute any risk of abuse.
Include the name of any person(s) from whom a child is alleged to be at risk of abuse, if known.

NUMBER EACH PARAGRAPH AND ATTACH EXTRA PAGE/S IF YOU NEED MORE SPACE

1.

9 State briefly in numbered paragraphs how the proposed order/s attempt/s to deal with the allegations described above:

NUMBER EACH PARAGRAPH AND ATTACH EXTRA PAGE/S IF YOU NEED MORE SPACE

1.

10 What is the last known address of the person(s) from whom the child is alleged to be at risk of abuse?

State	Postcode	Phone

NOTE: A copy of this notice must be served on the person identified in Item 8 as the person from who a child is alleged to be at risk of abuse (section 67Z(2) and section 67ZBA(2) of the *Family Law Act 1975*).

Part F About the alleged family violence

Before you complete Part F you should carefully read the definition of 'abuse' in section 4(1) and 'family violence' in section 4AB (1) and (3) of the Family Law Act.

11 Describe any acts or omissions that you allege constitute family violence. Please include the identity of the alleged perpetrator(s).

NUMBER EACH PARAGRAPH AND ATTACH EXTRA PAGE/S IF YOU NEED MORE SPACE

1.

12 State briefly in numbered paragraphs how the proposed order/s attempt/s to deal with the allegations described above:

NUMBER EACH PARAGRAPH AND ATTACH EXTRA PAGE/S IF YOU NEED MORE SPACE

1.

13 What is the last known address of the person(s) from whom the child is alleged to be at risk of abuse?

State	Postcode	Phone

NOTE: A copy of this notice must be served on the person identified in Item 11 as the alleged abuser (section 67Z(2) and section 67ZBA(2) of the *Family Law Act 1975*).

Part G About the alleged risk of family violence

Before you complete Part G you should carefully read the definition of 'abuse' in section 4(1) and 'family violence' in section 4AB(1) of the Family Law Act.

14 Describe the facts alleged to constitute any risk of family violence.
Include the name of any person(s) from whom a child is alleged to be at risk of family violence.

NUMBER EACH PARAGRAPH AND ATTACH EXTRA PAGE/S IF YOU NEED MORE SPACE

1.

15 State briefly in numbered paragraphs how the proposed order/s attempt/s to deal with the allegations described above:

NUMBER EACH PARAGRAPH AND ATTACH EXTRA PAGE/S IF YOU NEED MORE SPACE

1.

16 What is the last known address of the person(s) from whom it is alleged there is a risk of family violence?

State	Postcode	Phone

NOTE: A copy of this notice must be served on the person identified in Item 14 as the person from who a child is alleged to be at risk of family violence (section 67Z(2) and section 67ZBA(2) of the *Family Law Act 1975*).

Part H Signature of person filing notice

Signed | Date

/ /

This notice was signed by:
- ☐ person(s) filing this notice
- ☐ lawyer for person(s) filing this notice

This notice was prepared by:
- ☐ person(s) filing this notice
- ☐ lawyer

PRINT NAME AND LAWYER'S CODE

Where to file this form

You can file your *Notice of Child Abuse, Family Violence or Risk of Family Violence (Application for Consent Orders)*, in person or by post, at any one of the following family law registries.

AUSTRALIAN CAPITAL TERRITORY

Canberra
(Nigel Bowen Commonwealth Law Courts)
Cnr University Ave and Childers St
Canberra ACT 2600
GPO Box 9991 Canberra 2601

NEW SOUTH WALES

Albury
Level 1, 463 Kiewa St Albury NSW 2640
PO Box 914 Albury NSW 2640

Dubbo
Cnr Macquarie and Wingewarra Sts
Dubbo NSW 2830
PO Box 1567 Dubbo NSW 2830

Lismore
Level 2, 29-31 Molesworth St Lismore NSW 2480
PO Box 9 Lismore NSW 2480

Newcastle
61 Bolton St Newcastle NSW 2300
PO Box 9991 Newcastle NSW 2300

Parramatta
1-3 George St Parramatta NSW 2123
PO Box 9991 Parramatta NSW 2123

Sydney
(Lionel Bowen Commonwealth Law Courts)
97-99 Goulburn St, Sydney NSW 2000
GPO Box 9991 Sydney NSW 2001

Wollongong
Level 1, 43 Burelli St, Wollongong NSW 2500
PO Box 825 Wollongong NSW 2500

NORTHERN TERRITORY

Darwin
Supreme Court Building, State Square,
Darwin NT 0800
GPO Box 9991 Darwin NT 0800

QUEENSLAND

Brisbane
(Harry Gibbs Commonwealth Law Courts)
119 North Quay Brisbane QLD 4000
PO Box 9991 Brisbane QLD 4001

Cairns
Level 3 and 4, 104 Grafton St Cairns QLD 4870
PO Box 9991 Cairns QLD 4870

Rockhampton
46 East St (Cnr Fitzroy St) Rockhampton QLD 4700
PO Box 9991 Rockhampton QLD 4700

Townsville
Level 2, 143 Walker St Townsville QLD 4810
PO Box 9991 Townsville QLD 4810

SOUTH AUSTRALIA

Adelaide
(Roma Mitchell Commonwealth Law Courts)
3 Angas St Adelaide SA 5000
GPO Box 9991 SA 5001

TASMANIA

Hobart
(Edward Braddon Commonwealth Law Courts)
39-41 Davey St Hobart Tas 7000
GPO Box 9991 Hobart Tas 7001

Launceston
Level 3, ANZ Building,
Cnr Brisbane and George Sts Launceston Tas 7250
PO Box 9991 Launceston Tas 7250

VICTORIA

Dandenong
53-55 Robinson St Dandenong Vic 3175
PO Box 9991 Dandenong Vic 3175

Melbourne
(Owen Dixon Commonwealth Law Courts)
305 William St Melbourne Vic 3000
GPO Box 9991 Melbourne Vic 3001

Help in other languages

If you need to contact the courts, call the Translating and Interpreting Service on **13 14 50**.
This is a free service.

If you need an interpreter to assist you at court, please tell court staff at least one week before your court appointment or hearing. Court staff will arrange a professional and independent interpreter to assist you free of charge.

ARABIC

إذا كنتم بحاجة إلى الاتصال بمحاكم قانون العائلة، اتصلوا بخدمة الترجمة الخطية والشفهية على الرقم 13 14 50. هذه الخدمة مجانية.
وإذا كنتم بحاجة إلى مترجم لمساعدتكم في المحكمة، الرجاء إعلام موظفي المحكمة وذلك قبل موعدكم أو جلستكم في المحكمة بمدة أسبوعين على الأقل، وسيقوم موظفو المحكمة بالترتيب لمترجم مؤهل ومستقل لمساعدتكم مجانا.

CANTONESE

如果您需要聯絡家事法院，請致電翻譯與傳譯服務處，電話：13 14 50。這是一項免費服務。
如果您在出庭時需要傳譯員幫助，請在法庭預約或聆訊之前，至少提前兩周通知法院工作人員。法院工作人員會安排獨立的專業傳譯員免費為您提供幫助。

CROATIAN

Ako morate kontaktirati Obiteljski sud, nazovite Službu za prevođenje i tumačenje, na broj telefona 13 14 50. Ove su usluge besplatne.
Ako vam je na sudu potreban tumač, molimo vas da o tome obavijestite naše osoblje, barem dva tjedna prije zakazanog sastanka ili sudskog postupka. Osoblje suda će za vas organizirati besplatnu pomoć profesionalnog i nezavisnog tumača.

FARSI

اگر نیاز به تماس گرفتن با دادگاه قانون خانواده دارید، به سرویس ترجمه کتبی و شفاهی، شماره ۱۳ ۱٤ ۵۰ تلفن بزنید. این یك سرویس رایگان است.
اگر احتیاج دارید که یك مترجم در دادگاه کمکتان کند، لطفاً حد اقل دو هفته قبل از وقت ملاقات یا تشکیل جلسه دادگاه، به کارمندان دادگاه بگویید. کارمندان دادگاه ترتیبی خواهند داد که یك مترجم حرفه ای و بی طرف مجاناً به شما کمك کند.

ITALIAN

Se avete bisogno di mettervi in contatto con uno dei Tribunali della famiglia (Family Law Courts), telefonate al Servizio interpreti e traduttori al numero 13 14 50. Questo servizio è gratuito.
Se avete bisogno dell'aiuto di un interprete presso il tribunale, siete pregato di farlo presente al personale del tribunale almeno due settimane prima dell'appuntamento o dell'udienza in tribunale. Un impiegato organizzerà la presenza di un interprete indipendente e di professione che vi aiuterà gratuitamente.

MACEDONIAN

Ако треба да се јавите во Семејниот суд, јавете се во Преведувачката служба на 13 14 50. Оваа услуга е бесплатна.
Ако ви е потребен преведувач за да ви помага во судот, ве молиме кажете му на персоналот на судот најмалку две недели пред вашиот закажан разговор или расправа. Персоналот на судот ќе ангажира професионален и независен преведувач бесплатно да ви помага.

MANDARIN

如果你要与家庭法院联系，请致电口笔译服务处，电话号码13 14 50。这项服务免费。
如果你在法院需要口译员的协助，请至少在你的法庭预约或听证日期前两个星期告诉法院工作人员。法院工作人员将安排独立的专业口译员为你免费提供协助。

POLISH

Jeśli potrzebujesz skontaktować się z Sądem Rodzinnym, zadzwoń do Serwisu Tłumaczy Ustnych i Pisemnych pod nr. 13 14 50. Usługa ta jest bezpłatna.
Jeśli potrzebujesz, aby tłumacz asystował Ci w sądzie, powiadom o tym personel sądu na co najmniej dwa tygodnie przed terminem rozprawy lub spotkania w sądzie. Personel sądu zamówi dla Ciebie nieodpłatnie niezależnego, wykwalifikowanego tłumacza.

RUSSIAN

Если вам нужно связаться с Семейным Судом, то позвоните в Телефонную переводческую службу по номеру 13 14 50. Эта услуга предоставляется бесплатно.
Если вам нужен переводчик в суде, то сообщите об этом работникам суда не менее чем за две недели до назначенной встречи или судебного заседания. Работники суда вызовут для вас профессионального независимого переводчика, услуги которого предоставляются бесплатно.

SERBIAN

Ако треба да контактирате Породични суд, назовите Службу преводилаца и тумача на 13 14 50. Услуга је бесплатна.
Ако вам је потребан преводилац да вам помогне на суду, молимо вас да то кажете судском особљу најмање две недеље пре вашег заказаног разговора или судске расправе. Судско особље ће ангажовати професионалног и независног преводиоца да вам помогне бесплатно.

SPANISH

Si necesitara contactar al Juzgado de Familia, llame al Servicio de Traducción e Interpretación en el 13 14 50. Este servicio es gratuito.
Si necesitara la asistencia de un intérprete en el juzgado, por favor comuníqueselo al personal del juzgado con un mínimo de dos semanas de antelación de su cita o audiencia en el juzgado. El personal del juzgado concertará los servicios de un intérprete profesional, independiente y gratuito para usted.

TURKISH

Aile Mahkemesi ile görüşmeniz gerekiyorsa, 13 14 50 numaralı telefondan Tercümanlık Hattını arayınız. Bu servis ücretsizdir.
Mahkemede size bir tercümanın yardımcı olmasını istiyorsanız, mahkeme randevunuzdan ya da duruşma gününden en az iki hafta önce bunu mahkemeye bildiriniz. Mahkeme size ücretsiz olarak profesyonel ve tarafsız bir tercüman temin edecektir.

VIETNAMESE

Nếu cần liên lạc với Tòa án Gia đình, xin gọi cho Dịch vụ Thông Phiên dịch qua số 13 14 50. Dịch vụ này miễn phí.
Nếu cần có thông dịch giúp quý vị tại tòa, xin báo cho nhân viên tòa án biết ít nhất hai tuần lễ trước ngày hẹn với tòa án hoặc phiên xử. Nhân viên tòa án sẽ sắp xếp thông dịch chuyên nghiệp và độc lập để trợ giúp quý vị miễn phí.

FAMILY COURT OF AUSTRALIA

Notice of Child Abuse, Family Violence or Risk of Family Violence (Current Case)

www.familycourt.gov.au

This form is to be used in a current case:

(a) when allegations of child abuse or risk of child abuse are made and a prescribed child welfare authority must be notified of the allegations (Section 67Z of the *Family Law Act 1975* and Rule 2.04D(1)(a) of the Family Law Rules 2004), or

(b) if, in a case where an application is made to the court for a Part VII order in relation to a child, a person alleges that there has been abuse of a child or family violence or there is a risk of abuse of a child or family violence and the allegation of abuse, family violence or risk of abuse or family violence is relevant to whether the court should grant or refuse the application (Section 67ZBA of the *Family Law Act 1975*, and Rule 2.04D(1)(a) of the Family Law Rules 2004).

NOTE: If you are applying for parenting orders by filing an Application for Consent Order use the *Notice of Child Abuse, Family Violence or Risk of Family Violence (Application for Consent Orders)*.

This is a mandatory form.

This form is to be used in a current case:

(a) when allegations of child abuse or risk of child abuse are made and a prescribed child welfare authority must be notified of the allegations (Section 67Z of the *Family Law Act 1975* and Rule 2.04D(1)(a) of the Family Law Rules 2004), or

(b) if, in a case where an application is made to the court for a Part VII order in relation to a child, a person alleges that there has been abuse of a child or family violence or there is a risk of abuse of a child or family violence and the allegation of abuse, family violence or risk of abuse or family violence is relevant to whether the court should grant or refuse the application (Section 67ZBA of the *Family Law Act 1975*, and Rule 2.04D(1)(a) of the Family Law Rules 2004).

NOTE: If you are applying for parenting orders by filing an *Application for Consent Order* use the *Notice of Child Abuse, Family Violence or Risk of Family Violence (Application for Consent Orders)*.

Section 4(1) of the Family Law Act states as follows:

Abuse, in relation to a child, means:

(a) an assault, including a sexual assault, of the child; or

(b) a person (the **first person**) involving the child in a sexual activity with the first person or another person in which the child is used, directly or indirectly, as a sexual object by the first person or the other person, and where there is an unequal power in the relationship between the child and the first person; or

(c) causing the child to suffer serious psychological harm, including (but not limited to) when that harm is caused by the child being subjected to, or exposed to, family violence; or

(d) serious neglect of the child.

A family violence order is an order (including an interim order) made under a prescribed law of a state or territory to protect a person from family violence.

Family violence means:

- violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the **family member**), or causes the family member to be fearful; and
- a child is exposed to family violence if the child sees or hears family violence or otherwise experiences the effects of family violence (Section 4AB).

NOTE: The Registry Manager **must** provide a copy of this *Notice of Child Abuse, Family Violence, or Risk of Family Violence (Current Case)* to the prescribed child welfare authority and may provide such other court documents and information as is required to enable investigation of the contents of the Notice.

The forms for use in the Federal Circuit Court and Family Court of Western Australia and information about procedures in these courts is available on the Federal Circuit Court and Family Court of Western Australia websites **www.federalcircuitcourt.gov.au** and **www.familycourt.wa.gov.au**.

For more information, including access to the *Family Law Act 1975*, the Rules of court and any forms or publications:

- go to **www.familycourt.gov.au**
- 

on the website
- call 1300 352 000, or
- visit a family law registry near you.

Making copies of the form for filing, service and yourself

The completed and signed original of the form is filed at the Court. Before you file it you must also make sufficient copies to have one for each person to be served and a copy for your own records.

Filing fee

Nil

What you file with this form

An affidavit or affidavits setting out the evidence on which the allegations in the *Notice of Child Abuse, Family Violence or Risk of Family Violence (Current Case)* are based (Rule 2.04D(1)(a)).

How to complete Parts E, F, G and H

The answers to questions 10, 14, and 18 are to be a concise summary of the precise allegations and details of each of them including dates they occurred, and any other particulars which reflect the contents of the affidavit evidence.

Who you serve

- Each party to the case
- The person who is alleged to have abused the child, or exposed the child to family violence
- The person from whom the child is alleged to be at risk of abuse or family violence
- Any independent children's lawyer who represents the interests of the child.

How you serve this form

By ordinary service. The *Service Kit* provides instructions on how to do this.

What is filed in response

Nothing

In completing a Court form, you must

- Use the court's prescribed form.
- Complete the form by typing (e.g. on a computer or typewriter) or hand printed in ink.

Notice of Child Abuse, Family Violence or Risk of Family Violence (Current Case)

Family Law Rules ~ RULE **2.04D(1)(a)**

Please type or print clearly and mark [**X**] all boxes that apply. Attach extra pages if you need more space to answer any questions.

Filed in:

☐ Family Court of Australia

Filed on behalf of:

Full name _____

MARK [**X**] IN THE BOX THAT APPLIES TO YOU

☐ Father
☐ Mother
☐ Other (specify) _____

Applicant's Client ID _____

Respondent's Client ID _____

File number _____

Filed at

Filed on

Court location

Next Court date (if known) _____

This form is to be used in the Family Court of Australia in all current proceedings (other than an Application for Consent Orders) for an order under Part VII.

(a) when allegations of child abuse or risk of child abuse are made and a prescribed child welfare authority must be notified of the allegations (Section 67Z of the *Family Law Act 1975* and Rule 2.04D(1)(a) of the Family Law Rules 2004), or

(b) if, in a case where an application is made to the court for a Part VII order in relation to a child, a person alleges that there has been abuse of a child or family violence or there is a risk of abuse of a child or family violence and the allegation of abuse, family violence or risk of abuse or family violence is relevant to whether the court should grant or refuse the application (Section 67ZBA of the *Family Law Act 1975*, and Rule 2.04D(1)(a) of the Family Law Rules 2004).

Part A About the notice

This notice alleges:

☐ Child abuse or risk of child abuse

☐ Family violence or risk of family violence

☐ Child abuse or risk of child abuse and family violence or risk of family violence

MARK [**X**] IN THE BOX THAT APPLIES

Part B About the person filing this notice and parties

1 Who is giving this notice?

Family name as used now	Given names

Family name as used now	Given names

2 At what address can you be contacted? (THIS NEED NOT BE WHERE YOU LIVE)
If you give a lawyer's address, include the name of the law firm.

State	Postcode
Phone	Fax *
DX	
Email *	Lawyer's code

* **Please do not include email or fax addresses unless you are willing to receive documents from the Court and other parties in that way.**

3 What are the names of the other interested persons and parties?

Family name as used now	Given names
Family name as used now	Given names

Part C About the independent children's lawyer

4 Independent children's lawyer family name | Given names

Firm name

Part D About the children to whom the notice relates

Child 1

5 Child's family name

Given names

☐ Male ☐ Female

Child's date of birth / /

Child's address

State Postcode

Name of the person with whom the child lives

Child 2

Child's family name

Given names

☐ Male ☐ Female

Child's date of birth / /

Child's address

State Postcode

Name of the person with whom the child lives

IF THERE ARE MORE CHILDREN ATTACH EXTRA PAGES ANSWERING PART D

Part E About the alleged abuse

Before you complete Items 6-13 you should carefully read the definition of 'abuse' in section 4(1) of the Family Law Act:

***Abuse**, in relation to a child, means:*

(a) an assault, including a sexual assault, of the child; or

*(b) a person (the **first person**) involving the child in a sexual activity with the first person or another person in which the child is used, directly or indirectly, as a sexual object by the first person or the other person, and where there is unequal power in the relationship between the child and the first person; or*

(c) (c) causing the child to suffer serious psychological harm, including (but not limited to) when that harm is caused by the child being subjected to, or exposed to (see subsection 4AB(3)), family violence (see subsection 4AB(1)) of the Family Law Act; or

(d) serious neglect of the child.

6 Describe any acts or omissions that you allege constitute abuse.
Please include the identity of the alleged abuser(s), if known.

NUMBER EACH PARAGRAPH AND ATTACH EXTRA PAGE/S IF YOU NEED MORE SPACE

1.

7 Identify the application/response where you seek orders to which the allegation(s) described in Item 6 are relevant.

Application/response	Date filed

8 Identify the affidavit(s) containing evidence of the allegations described in Item 6.

Name of the person swearing or affirming the affidavit	Date of filing	The paragraphs of the affidavits which relate to each allegation

9 What is the last known address of the alleged abuser(s) if known?

State Postcode Phone

NOTE: A copy of this notice must be served on the person identified in Item 6 as the alleged abuser (section 67Z(2) and section 67ZBA(2) of the *Family Law Act 1975*).

Part F About the alleged risk of abuse

Before you complete Part F you should carefully read the definition of 'abuse' in section 4(1) of the Family Law Act (set out at Part E of this form for your information)

10 Describe the facts alleged to constitute any risk of abuse.
Include the name of any person(s) from whom a child is alleged to be at risk of abuse, if known.

NUMBER EACH PARAGRAPH AND ATTACH EXTRA PAGE/S IF YOU NEED MORE SPACE

1.

11 Identify the application/response where you seek orders to which the allegation(s) described in Item 10 are relevant.

Application/response	Date filed

12 Identify the affidavit(s) containing evidence of the allegations described in Item 10.

Name of the person swearing or affirming the affidavit	Date of filing	The paragraphs of the affidavits which relate to each allegation

13 What is the last known address of the person(s) from whom the child is alleged to be at risk of abuse?

State	Postcode	Phone

NOTE: A copy of this notice must be served on the person identified in Item 10 as the person from who a child is alleged to be at risk of abuse (section 67Z(2) and section 67ZBA(2) of the *Family Law Act 1975*).

Part G About the alleged family violence

Before you complete Items 14-21 you should carefully read the definition of 'abuse' in section 4(1) and 'family violence' in section 4AB (1) and (3) of the Family Law Act as follows:

Family violence *means:*

Violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the ***family member****), or causes the family member to be fearful.*

A child is ***exposed*** *to family violence if the child sees or hears family violence or otherwise experiences the effects of family violence.*

Abuse*, in relation to a child, means:*

(a) an assault, including a sexual assault, of the child; or

(b) a person (the ***first person****) involving the child in a sexual activity with the first person or another person in which the child is used, directly or indirectly, as a sexual object by the first person or the other person, and where there is an unequal power in the relationship between the child and the first person; or*

(c) causing the child to suffer serious psychological harm, including (but not limited to) when that harm is caused by the child being subjected to, or exposed to (see subsection 4AB(3)), family violence (see subsection 4AB(1)); or

(d) serious neglect of the child.

14 Describe any acts or omissions that you allege constitute family violence. Please include the identity of the alleged perpetrator(s).

NUMBER EACH PARAGRAPH AND ATTACH EXTRA PAGE/S IF YOU NEED MORE SPACE

1.

15 Identify the application/response where you seek orders to which the allegation(s) described in Item 14 are relevant.

Application/response	Date filed

16 Identify the affidavit(s) containing evidence of the allegations described in Item 14.

Name of the person swearing or affirming the affidavit	Date of filing	The paragraphs of the affidavits which relate to each allegation

17 What is the last known address of the alleged perpetrator(s), if known?

State Postcode Phone

NOTE: A copy of this notice must be served on the person identified in Item 14 as the alleged abuser (section 67Z(2) and section 67ZBA(2) of the *Family Law Act 1975*).

Part H About the alleged risk of family violence

Before you complete Part H you should carefully read the definition of 'abuse' in sections 4(1) and 'family violence' in section 4AB(1) of the Family Law Act (set out in Part G of this form for your information)**.**

18 Describe the facts alleged to constitute any risk of family violence.
Include the name of any person(s) from whom there is alleged to be a risk of family violence.

NUMBER EACH PARAGRAPH AND ATTACH EXTRA PAGE/S IF YOU NEED MORE SPACE

1.

19 Identify the application/response where you seek orders to which the allegation(s) described in Item 18 are relevant.

Application/response	Date filed

20 Identify the affidavit(s) containing evidence of the allegations described in Item 18.

Name of the person swearing or affirming the affidavit	Date of filing	The paragraphs of the affidavits which relate to each allegation

21 What is the last known address of the person(s) from whom it is alleged there is a risk of family violence?

State Postcode Phone

NOTE: A copy of this notice must be served on the person identified in Item 18 as the person from who a child is alleged to be at risk of family violence (section 67Z(2) and section 67ZBA(2) of the *Family Law Act 1975*).

Part I Signature of person filing notice

Signed | Date

/ /

This notice was signed by:
- ☐ person(s) filing this notice
- ☐ lawyer for person(s) filing this notice

This notice was prepared by:
- ☐ person(s) filing this notice
- ☐ lawyer

PRINT NAME AND LAWYER'S CODE

Where to file this form

You can file your *Notice of Child Abuse, Family Violence or Risk of Family Violence (Current Case)*, in person or by post, at any one of the following family law registries.

AUSTRALIAN CAPITAL TERRITORY

Canberra
(Nigel Bowen Commonwealth Law Courts)
Cnr University Ave and Childers St
Canberra ACT 2600
GPO Box 9991 Canberra 2601

NEW SOUTH WALES

Albury
Level 1, 463 Kiewa St Albury NSW 2640
PO Box 914 Albury NSW 2640

Dubbo
Cnr Macquarie and Wingewarra Sts
Dubbo NSW 2830
PO Box 1567 Dubbo NSW 2830

Lismore
Level 2, 29-31 Molesworth St Lismore NSW 2480
PO Box 9 Lismore NSW 2480

Newcastle
61 Bolton St Newcastle NSW 2300
PO Box 9991 Newcastle NSW 2300

Parramatta
1-3 George St Parramatta NSW 2123
PO Box 9991 Parramatta NSW 2123

Sydney
(Lionel Bowen Commonwealth Law Courts)
97-99 Goulburn St, Sydney NSW 2000
GPO Box 9991 Sydney NSW 2001

Wollongong
Level 1, 43 Burelli St, Wollongong NSW 2500
PO Box 825 Wollongong NSW 2500

NORTHERN TERRITORY

Darwin
Supreme Court Building, State Square,
Darwin NT 0800
GPO Box 9991 Darwin NT 0800

QUEENSLAND

Brisbane
(Harry Gibbs Commonwealth Law Courts)
119 North Quay Brisbane QLD 4000
PO Box 9991 Brisbane QLD 4001

Cairns
Level 3 and 4, 104 Grafton St Cairns QLD 4870
PO Box 9991 Cairns QLD 4870

Rockhampton
46 East St (Cnr Fitzroy St) Rockhampton QLD 4700
PO Box 9991 Rockhampton QLD 4700

Townsville
Level 2, 143 Walker St Townsville QLD 4810
PO Box 9991 Townsville QLD 4810

SOUTH AUSTRALIA

Adelaide
(Roma Mitchell Commonwealth Law Courts)
3 Angas St Adelaide SA 5000
GPO Box 9991 SA 5001

TASMANIA

Hobart
(Edward Braddon Commonwealth Law Courts)
39-41 Davey St Hobart Tas 7000
GPO Box 9991 Hobart Tas 7001

Launceston
Level 3, ANZ Building,
Cnr Brisbane and George Sts Launceston Tas 7250
PO Box 9991 Launceston Tas 7250

VICTORIA

Dandenong
53-55 Robinson St Dandenong Vic 3175
PO Box 9991 Dandenong Vic 3175

Melbourne
(Owen Dixon Commonwealth Law Courts)
305 William St Melbourne Vic 3000
GPO Box 9991 Melbourne Vic 3001

Help in other languages

If you need to contact the courts, call the Translating and Interpreting Service on **13 14 50**.
This is a free service.

If you need an interpreter to assist you at court, please tell court staff at least one week before your court appointment or hearing. Court staff will arrange a professional and independent interpreter to assist you free of charge.

ARABIC

إذا كنتم بحاجة إلى الاتصال بمحاكم قانون العائلة، اتصلوا بخدمة الترجمة الخطية والشفهية على الرقم 13 14 50. هذه الخدمة مجانية.
وإذا كنتم بحاجة إلى مترجم لمساعدتكم في المحكمة، الرجاء إعلام موظفي المحكمة وذلك قبل موعدكم أو جلستكم في المحكمة بمدة أسبوعين على الأقل، وسيقوم موظفو المحكمة بالترتيب لمترجم مؤهل ومستقل لمساعدتكم مجانا.

CANTONESE

如果您需要聯絡家事法院，請致電翻譯與傳譯服務處，電話：13 14 50。這是一項免費服務。
如果您在出庭時需要傳譯員幫助，請在法庭預約或聆訊之前，至少提前兩周通知法院工作人員。法院工作人員會安排獨立的專業傳譯員免費為您提供幫助。

CROATIAN

Ako morate kontaktirati Obiteljski sud, nazovite Službu za prevođenje i tumačenje, na broj telefona 13 14 50. Ove su usluge besplatne.
Ako vam je na sudu potreban tumač, molimo vas da o tome obavijestite naše osoblje, barem dva tjedna prije zakazanog sastanka ili sudskog postupka. Osoblje suda će za vas organizirati besplatnu pomoć profesionalnog i nezavisnog tumača.

FARSI

اگر نیاز به تماس گرفتن با دادگاه قانون خانواده دارید، به سرویس ترجمه کتبی و شفاهی، شماره ۱۳ ۱٤ ۵۰ تلفن بزنید. این یك سرویس رایگان است.
اگر احتیاج دارید که یك مترجم در دادگاه کمکتان کند، لطفاً حد اقل دو هفته قبل از وقت ملاقات یا تشکیل جلسه دادگاه، به کارمندان دادگاه بگویید. کارمندان دادگاه ترتیبی خواهند داد که یك مترجم حرفه ای و بی طرف مجاناً به شما کمك کند.

ITALIAN

Se avete bisogno di mettervi in contatto con uno dei Tribunali della famiglia (Family Law Courts), telefonate al Servizio interpreti e traduttori al numero 13 14 50. Questo servizio è gratuito.
Se avete bisogno dell'aiuto di un interprete presso il tribunale, siete pregato di farlo presente al personale del tribunale almeno due settimane prima dell'appuntamento o dell'udienza in tribunale. Un impiegato organizzerà la presenza di un interprete indipendente e di professione che vi aiuterà gratuitamente.

MACEDONIAN

Ако треба да се јавите во Семејниот суд, јавете се во Преведувачката служба на 13 14 50. Оваа услуга е бесплатна.
Ако ви е потребен преведувач за да ви помага во судот, ве молиме кажете му на персоналот на судот најмалку две недели пред вашиот закажан разговор или расправа. Персоналот на судот ќе ангажира професионален и независен преведувач бесплатно да ви помага.

MANDARIN

如果你要与家庭法院联系，请致电口笔译服务处，电话号码13 14 50。这项服务免费。
如果你在法院需要口译员的协助，请至少在你的法庭预约或听证日期前两个星期告诉法院工作人员。法院工作人员将安排独立的专业口译员为你免费提供协助。

POLISH

Jeśli potrzebujesz skontaktować się z Sądem Rodzinnym, zadzwoń do Serwisu Tłumaczy Ustnych i Pisemnych pod nr. 13 14 50. Usługa ta jest bezpłatna.
Jeśli potrzebujesz, aby tłumacz asystował Ci w sądzie, powiadom o tym personel sądu na co najmniej dwa tygodnie przed terminem rozprawy lub spotkania w sądzie. Personel sądu zamówi dla Ciebie nieodpłatnie niezależnego, wykwalifikowanego tłumacza.

RUSSIAN

Если вам нужно связаться с Семейным Судом, то позвоните в Телефонную переводческую службу по номеру 13 14 50. Эта услуга предоставляется бесплатно.
Если вам нужен переводчик в суде, то сообщите об этом работникам суда не менее чем за две недели до назначенной встречи или судебного заседания. Работники суда вызовут для вас профессионального независимого переводчика, услуги которого предоставляются бесплатно.

SERBIAN

Ако треба да контактирате Породични суд, назовите Службу преводилаца и тумача на 13 14 50. Услуга је бесплатна.
Ако вам је потребан преводилац да вам помогне на суду, молимо вас да то кажете судском особљу најмање две недеље пре вашег заказаног разговора или судске расправе. Судско особље ће ангажовати професионалног и независног преводиоца да вам помогне бесплатно.

SPANISH

Si necesitara contactar al Juzgado de Familia, llame al Servicio de Traducción e Interpretación en el 13 14 50. Este servicio es gratuito.
Si necesitara la asistencia de un intérprete en el juzgado, por favor comuníqueselo al personal del juzgado con un mínimo de dos semanas de antelación de su cita o audiencia en el juzgado. El personal del juzgado concertará los servicios de un intérprete profesional, independiente y gratuito para usted.

TURKISH

Aile Mahkemesi ile görüşmeniz gerekiyorsa, 13 14 50 numaralı telefondan Tercümanlık Hattını arayınız. Bu servis ücretsizdir.
Mahkemede size bir tercümanın yardımcı olmasını istiyorsanız, mahkeme randevunuzdan ya da duruşma gününden en az iki hafta önce bunu mahkemeye bildiriniz. Mahkeme size ücretsiz olarak profesyonel ve tarafsız bir tercüman temin edecektir.

VIETNAMESE

Nếu cần liên lạc với Tòa án Gia đình, xin gọi cho Dịch vụ Thông Phiên dịch qua số 13 14 50. Dịch vụ này miễn phí.
Nếu cần có thông dịch giúp quý vị tại tòa, xin báo cho nhân viên tòa án biết ít nhất hai tuần lễ trước ngày hẹn với tòa án hoặc phiên xử. Nhân viên tòa án sẽ sắp xếp thông dịch chuyên nghiệp và độc lập để trợ giúp quý vị miễn phí.

REGULATION OF LEGAL COSTS: AN OVERVIEW

1. Purpose

The purpose of this Paper is to provide an overview of the regulation of legal costs, in relation to legal costs arising on a legal practitioner-client basis.

2. Introduction

There are three core elements of the system for regulating the legal profession and the provision of legal services: the comprehensive legal profession legislation of the States and Territories; self-regulation through rules of professional conduct; and the inherent jurisdiction of the courts to control and discipline legal practitioners as officers of the court.

This Paper focuses on State and Territory legal profession legislation touching upon regulation of legal costs. The relevant legislation applying across New South Wales and Victoria is the *Legal Profession Uniform Law*, which came into effect on 1 July 2015 to establish a common legal services market across those States, facilitated by uniform legislation and associated rules. Western Australia has announced its intention to join the Uniform Law Framework from 1 July 2020. The legal profession legislation in the remaining States and Territories is contained in Legal Profession *Acts* (in South Australia the *Legal Practitioners Act 1981*). This legislation is based on Model Laws devised between 2002 and 2006 to bring about greater uniformity and/or harmonisation of legal profession regulation, including in relation to legal costs.

This Paper will focus primarily upon the regulation of legal costs in New South Wales and Victoria under the Uniform Law Framework, noting any significant differences that exist in the legislation of the other States and the Territories.

3. Objectives of regulating legal costs

Part 4.3 of the Uniform Law deals with legal costs. The objectives of this Part of the Uniform Law are:

- to ensure that clients of law practices are able to make informed choices about their legal options and the costs associated with pursuing those options; and
- to provide that law practices must not charge more than fair and reasonable amounts for legal costs; and
- to provide a framework for assessment of legal costs. 1

4. Fair and reasonable legal costs

The basic principle [2]is that a law practice must, in charging legal costs, charge costs that are no more than fair and reasonable in all the circumstances and that are, in particular:

- proportionately and reasonably incurred; and
- proportionate and reasonable in amount.

[1] Section 169
[2] Section 172(1)

The Uniform Law[3] sets factors that must be had regard to in considering whether the requirements of proportionality and reasonableness are satisfied. Those factors are:

- the level of skill, experience, specialisation and seniority of the lawyers concerned; and
- the level of complexity, novelty or difficulty of the issues involved, and the extent to which the matter involved a matter of public interest; and
- the labour and responsibility involved; and
- the circumstances in acting on the matter, including (for example) any or all of the following—
    - the urgency of the matter;
    - the time spent on the matter;
    - the time when business was transacted in the matter;
    - the place where business was transacted in the matter;
    - the number and importance of any documents involved; and
- the quality of the work done; and
- the retainer and the instructions (express or implied) given in the matter.

Further, a law practice must not act in a way that unnecessarily results in increased payable by a client, including a requirement to act reasonably to avoid unnecessary delays in handling the client matters.

5. Disclosing costs to clients

Law practices must be open and transparent about legal costs. This is achieved in the following ways:

- after a client has given initial instructions in a matter the law practice must provide written information to the client which discloses the basis on which legal costs will be calculated and an estimate of the total legal costs[4];
- at that time the client must also be provided with information about the client's rights to:
    - negotiate a costs agreement;
    - negotiate the billing method;
    - to receive a bill and if necessary, to request an itemised bill; and
    - to seek assistance from a designated local regulatory authority in the event of a dispute about legal costs.[5]
- if there is any significant change to what was previously disclosed to the client, the law practice must provide written information to the client about the change, any about any significant change to the legal costs that will be payable[6];
    - at that time, the client must be given a sufficient and reasonable amount of information about the impact of the change on the legal costs that will be payable to allow the client to make informed decisions about the future conduct of the matter.[7]
- when a law practice makes a disclosure about legal costs (including any significant change) the law practice must take all reasonable steps to satisfy itself that the client has understood and given informed consent to the proposed course of action and the proposed costs.[8]

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[3] Section 172(2)
[4] Section 174(1)(a)
[5] Section 174(2)(a)
[6] Section 174(1)(b)
[7] Section 174(2)(b)
[8] Section 174(3) This requirement is not legislated in the States and Territories that are not part of the Uniform Law Framework.

Some of the other obligations that apply to a law practice in disclosing legal costs are:

- if a law practice intends to retain another law practice on behalf of the client (for example, where counsel might be retained), the law practice must make similar disclosures in relation to the costs of that other law practice[9];
- if a law practice negotiates a settlement of a litigious matter on behalf of the client, the law practice must, before the settlement is executed, disclose to the client a reasonable estimate of the costs payable by the client if the matter is settled, and a reasonable estimate of any contributions towards those costs likely to be received from another party.[10]

6. Consequences of not meeting disclosure obligations

Significant consequences can arise if a law practice fails to comply with its disclosure obligations[11]:

- the costs agreement (if any is void);
- the client or an associated third party payer (i.e. another party that has assumed responsibility for payment of costs) is not required to pay the legal costs until they are assessed, or any costs dispute has been determined by a local regulatory authority;
- the law practice must commence or maintain proceedings for recovery of any unpaid costs until the costs have been assessed or the costs dispute has been determined; and
- a contravention of the disclosure obligations is capable of constituting unsatisfactory professional conduct or professional misconduct of any principal of the law practice or any legal practitioner associates involved in the contravention.

7. Costs agreements

A client of a law practice has a right to require and have a negotiated costs agreement with the law practice.[12] A costs agreement is essentially a contract between the law practice and (most commonly) the client and must be written and evidenced in writing.[13] In addition to a standard costs agreement, the Uniform Law (and the legislation in the other States and the Territories) allows for conditional costs agreements under which payment of some or all of the legal costs is conditional on the successful outcome of the matter[14], or under which an additional fee (an "uplift fee") may be payable upon the successful outcome of the matter.[15] Legal profession legislation throughout Australia currently prohibits contingency fees (i.e. where the amount payable to the law practice is calculated by reference to any award, settlement or value of property recovered).[16]

8. Bills and progress reports

A law practice may give a client a lump sum bill or an itemised bill[17], and where a lump sum bill is given, a client (or third party responsible for payment) can request an itemised bill within certain time limits.[18] In

[9] Section 175(1)
[10] Section 177(1)
[11] Section 178
[12] Section 179
[13] Section 180
[14] Section 181
[15] Section 182
[16] Section 182
[17] No charge can be made by a law practice for preparing or giving a bill – section 191
[18] Section 186 and 187

addition, a law practice must give a client written progress report where the request is reasonable. Progress reports must be provided within a reasonable period and without charge to the client.[19]

9. Disputes and assessment of legal costs

The Uniform Law Framework provides two avenues for the independent review of legal costs:

1. By way of a formal request for a costs assessment under the applicable costs assessment laws of the jurisdiction concerned, where the costs assessment is made by an independent costs assessor[20]; or
2. By way of a consumer matter complaint under Chapter 5 of the Uniform Law (Dispute Resolution and Professional Discipline).

10. Costs assessment

Where a costs assessment is undertaken, the costs assessor must determine:

- whether a valid costs agreement exists; and
- whether legal costs are fair and reasonable and to the extent they are not, the amount of legal costs (if any) that are to be payable.

The costs assessor will apply the same factors set out above about consideration of whether legal costs are fair and reasonable, and may also have regard to, for example:

- whether the law practice and legal practitioner associates involved have complied with the Uniform Law and rules;
- what disclosures were made to the client and whether it would have been reasonably practicable to disclose the total costs at the outset; and
- any relevant advertisements as to the law practice's costs or skills.[21]

11. Consequences of charging unreasonable legal costs

Where a costs assessment has been undertaken, the costs assessor may refer a matter to the designated regulatory authority if the costs assessor does not consider that the legal costs charged were fair and reasonable. In addition, a costs assessor must refer a matter to the designated regulatory authority if the costs assessor considers the costs charged, or any other issues raised in the assessment may amount to unsatisfactory professional conduct or professional misconduct.[22] These referrals can form the basis of disciplinary action against the principal or principals of the law practice responsible for the bill and each legal practitioner involved in giving or authorising the bill.[23]

12. Consumer disputes – costs disputes

The Uniform Law provides an alternative mechanism for resolving complaints made by a client to the (independent) complaints-handling body about legal costs.

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[19] Section 190

[20] Division 7 of the Uniform Law. An application for a costs assessment may be made by the client, the law practice, a third-party payer or another law practice retained by the law practice to act on the client's behalf.

[21] Section 200

[22] Section 202

[23] Section 207

All complaints made about legal practitioners and law practices go through a preliminary assessment[24], following which the complaint may either be closed (in specific circumstances)[25] or investigated[26]. Where a complaint is about a consumer matter, including a costs dispute (but not a disciplinary matter) the Uniform Law sets out a graduated process for resolving the complaint.

Regulatory authorities are not able to take steps toward resolution of a consumer matter (these are matters relating to the provision of legal services or disputes about costs, that do not involve disciplinary matters) unless at least one of the parties has made (where reasonable to do so) an attempt to resolve the matter without intervention by the regulatory authority.[27]

Where an attempt by the parties to resolve the matter between themselves has been unsuccessful, the regulatory authority is required to attempt to resolve the consumer matter by informal means as soon as practicable.[28]

If informal resolution between the parties is not successful, a regulatory authority can order the parties to attend mediation in good faith in an effort to resolve the complaint.[29] If the mediation succeeds a settlement agreement may be concluded and the complaint will be closed.[30] If the mediation does not succeed the regulatory authority may proceed to investigate the complaint and may resolve the consumer matter by way of a formal determination that the regulatory authority considers fair and reasonable in the circumstances.[31]

Consumer matters involving costs disputes can only be resolved by a binding determination where the total bill for legal costs is less than $100,00, or if the total bill is more than $100,00 the total amount in disputes is less than $10,000. Costs disputes that do not satisfy these limits cannot be determined by the regulatory authority, and will need to be referred for a costs assessment.[32] Where the regulatory authority is unable to resolve a dispute that does satisfy these limits and the total amount of legal costs still in dispute is less than $10,000 the regulatory authority can make a binding determination as to the amount of legal costs payable, based on the regulatory authority's assessment of what is fair and reasonable in the circumstances, applying the same considerations as would apply in a formal costs assessment.[33]

It is noted that there are differences in the way disputes involving legal costs are dealt with and resolved under the Uniform Law compared to the legal profession legislation in other States and the Territories, although the objective is to provide alternative means by which these disputes may be resolved without recourse in all cases to formal costs assessment process.

13. Disciplinary consequences

Legal profession legislation throughout Australia uses the terms *unsatisfactory professional conduct* and *professional misconduct* as descriptors, rather than exhaustive definitions, or conduct that result in disciplinary action against a legal practitioner.

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[24] Section 276
[25] Section 277
[26] Section 282
[27] Section 286
[28] Section 287
[29] Section 288
[30] Section 289
[31] Section 288(4) and 290
[32] Section 291
[33] Section 292

Unsatisfactory professional conduct is the lesser of the two disciplinary scenarios and is focused on a failure to meet standards of competence and diligence that a member of the community is entitled to expect from a reasonably competent lawyer. *Unsatisfactory professional conduct* can, and usually is, dealt with by the regulatory authority. There are a range of sanctions that can be applied when a determination of unsatisfactory professional conduct has been made, which can be said to primarily have a remedial or compensatory focus.

Professional misconduct is the more serious of the two disciplinary scenarios, and involves repeated unsatisfactory professional conduct, or any other kind of conduct that calls into question whether or not the person is a fit and proper person to be practising law. Professional misconduct matters must always be referred by the regulator for determination by a disciplinary tribunal. There is an extended range of sanctions where *professional misconduct* is made out, in addition to the remedial sanctions mentioned above. These extended sanctions have a protective purpose and can range from restrictions on practising entitlements to a recommendation to the Supreme Court that the lawyer be struck off the roll.

Legal profession legislation sets out particular kinds of conduct that are capable of constituting *unsatisfactory professional conduct* or *professional misconduct*. Common to all legal profession is the inclusion of charging excessive legal costs (under the Uniform Law the reference is to charging more than a fair and reasonable amount for legal costs in connection with the practice of law.[34])

14. Summary

All aspects of legal costs are subject to extensive regulation under the State and Territory legal profession laws. While there are differences in terminology and approaches there is a common framework in place addressing the basic principles of disclosure, costs agreements, billing, independent costs assessment, resolution of complaints relating to legal costs and the specific inclusion in disciplinary matters of charging excessive legal costs (or costs that are not fair and reasonable) having regard to objective criteria.

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[34] Section 298(d)

Law Council
OF AUSTRALIA

19 January 2016

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Committee Secretary

Family Law Amendment (Financial Agreements and Other Measures) Bill 2015

1. The Law Council of Australia welcomes the opportunity to provide comments on the *Family Law Amendment (Financial Agreements and Other Measures) Bill 2015*.

2. The Law Council is the national peak body for the legal profession. Further information about the Law Council is at **Attachment A**.

3. This submission has been prepared by the Law Council's Family Law Section (FLS). The Family Law Section is the largest professional association for family law practitioners, with a membership of almost 2,500 from all Australian States and Territories together with a number of international members. It exists to positively influence the development and practice of family law for the benefit of its members and the general community, and to promote professional excellence and influence decision making, so that the family law system in Australia is fair, respected, functional and responsive to community needs.

4. The FLS has, for over a decade, made submissions to Government and called for amendments to address inadequacies in the legislative provisions in dealing with financial agreements.

5. Many of the concerns initially raised by the FLS, came to a head in the decision of the Full Court of the Family Court of Australia in ***Black v Black*** which is referred to below.

6. The FLS notes that the post *Black* amendments to the legislation, that came into operation in January 2010, did not address many of the concerns raised by the FLS regarding the financial agreement provisions in the *Family Law Act 1975* (**the Act**).

7. Many of the issues identified by the FLS both prior to and subsequent to the *Federal Justice Amendment (Efficiency Measures) Act 2008*, were unfortunately, not dealt with and are now the subject of the amendments to be made by the terms of the amending Bill now before the House.

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8. We have set out the following for the assistance of the Committee:

    - Some comments on the legislative policy behind financial agreements;
    - Highlighted problems that emerged under the original legislation and the amending legislation;
    - Noted some aspects of interpretation of the legislation by the courts;
    - Highlighted additional areas where the FLS has proposed some amendments, but which are not captured by the Bill currently before the House.

9. It is important to note that a number of the proposed amendments are to have retrospective effect. The FLS supports the provisions of the Bill as drafted, insofar as it seeks to give certain sections retrospective operation. There are literally thousands (if not tens of thousands) of financial agreements now in existence. Retrospective operation of the relevant parts of the Bill as drafted, will help cure the problem for the public, the legal profession and the courts, of many of those agreements otherwise being declared non-binding due to relatively minor technical deficiencies. The FLS does not seek any further change to the other provisions of the Bill as drafted that do not have retrospective effect, and FLS recognises that some of the amendments can and should only apply to agreements entered into after that legislation is enacted.

10. There has been significant publicity in recent months highlighting the massive problems facing the Family Court and Federal Circuit Court due to lack of resources and under funding. It is imperative that legislative steps are taken to ensure that the workload of the courts is reduced. Giving retrospective operation to curative legislative provisions, may assist, at least in part, in keeping many parties out of the courts by giving full force and effect to the financial agreements they previously made together.

THE LEGAL FORMALITIES

11. For a financial agreement to be binding it must comply with certain formalities set out in the Act (s90G for married couples; s90UJ for de facto couples); and in particular:

    - The agreement must be specified to be made under the appropriate section of the Act and be signed by both parties: s90B, C and D; s90UB, UC and UD.
    - Before the agreement is signed, each party must be provided with independent legal advice.
    - Signed statements of independent advice must be provided to each of the parties and exchanged.

12. These formalities have varied over time[1] and the history and impact of those changes and their effect has recently been considered and explained by the Full Court of the Family Court in ***Wallace & Stelzer*** [2013] FamCAFC 199.

13. An agreement may only be terminated by another agreement complying with all of the same formalities as apply to the initial entry into the agreement, or by a court setting it aside.

14. However financial agreements between de facto couples also terminate automatically if the parties subsequently marry: s90UJ(3).

[1] *Family Law Amendment Act 2003; Federal Justice System Amendment (Efficiency Measures Act) (No1) 2009*

LEGISLATIVE POLICY

15. The policy underlying the legislation is clear.

16. In his Second Reading speech introducing the Part VIIIA amendments in 1999, the then Attorney-General, the Hon Daryl Williams AM QC, identified the aim of such agreements as being to encourage couples to agree about how property should be distributed and spouse maintenance dealt with, in the event of, or following, separation:

> "*Agreements will allow people to have greater control and choice over their own affairs in the event of marital breakdown. Financial agreements will be able to deal with all or any of the parties' property and financial resources and also maintenance. An agreement may cover how property would be divided, or how maintenance would be paid. Particular assets, such as rural properties, would be able to be preserved.*"

17. He also noted that agreements "*will be of particular benefit to people who are entering into subsequent marriages as well as to people on the land and those who own family businesses*".

18. This reflected the policy outlined in an earlier media release by the Attorney-General and Minister for Justice on 15 October 1996 that:

> *"Importantly, financial agreements can encourage people to take responsibility for their own financial affairs, rather than relying on outside intervention to resolve their affairs when the relationship breaks down"*

THE DECISION IN *BLACK* BY THE FULL COURT OF THE FAMILY COURT

19. Some of the issues around financial agreements came to a head in ***Black and Black***[2] where the husband sought to have an agreement set aside on the 'technical' ground that although a certificate of independent legal advice was attached to the agreement and the provision of advice was referred to in the preamble, the statutory requirement that "*the agreement contains ... a statement ...that the party ...has been provided ...with independent legal advice*" was not met as this was not found within the body of the agreement (just in the attached certificate) .

20. Justice Benjamin, at first instance, dismissed this, holding:

> "*The strict interpretation approach takes away from the legislative meaning and the better approach is the objective approach. The intention* [of the legislation] *is to enable ordinary people to enter into financial agreements which will deal with property and spousal maintenance and avoid the necessity of court proceedings ... Such a strict and inevitably narrow construction ... is not the legislative intent.*
>
> *The form should not defeat the substance ...* [the legislation] *is not designed to set up word traps for the unwary, it is designed to ensure that each party has independent advice, and that such advice addresses the matters set out in the sub-section".*

[2] [2008] FamCAFC 7; (2008) FLC 93-357

21. However the Full Court of the Family Court, on appeal, rejected the trial judge's reasoning, holding:

> "*The amendments to the legislation that introduced a regime whereby parties could agree to the ouster of the court's power to make property adjustment orders reversed a long held principle that such agreements were contrary to public policy ... The underlying philosophy that had guided the courts in enunciating that principle was seen to place too many restrictions on the rights of parties to arrange their affairs as they saw fit. The compromise reached by the legislature was to permit the parties to oust the court's jurisdiction to make adjustive orders but only if certain stringent requirements were met ... We are of the view that strict compliance with the statutory requirements is necessary to oust the court's jurisdiction to make adjustive orders."*

THE LEGISLATIVE RESPONSE TO *BLACK*

22. The Full Court decision in *Black* caused considerable consternation for the legal profession and the public. The following extracts from the Parliamentary debate reflected the degree of dissatisfaction:

> "*The decision in **Black v Black** was one which, without wanting to criticise the courts, is difficult to understand."*
>
> *"**Black v Black** … makes the whole operation of binding financial agreements more murky and more difficult."*
>
> *"**Black v Black** is one of those decisions which the Full Court of the Family Court … got wrong. I think the Judge at first instance got it absolutely right."*

23. The Government moved to attempt to rectify the situation and to restore the integrity of, and public confidence in, financial agreements. Amending provisions were included as a schedule to the *Federal Justice Amendment (Efficiency Measures) Bill 2008* which was going through Parliament at the time, and made a number of changes to the requirements for a financial agreement to be binding.

24. The amendments made in 2008 did not address all the concerns expressed by the profession, through the FLS, and endeavored to deal only with certain areas of the financial agreement legislation.

25. The then Attorney-General, the Hon Robert McClelland, when making the Second Reading Speech to the House of Representatives on 3 December 2008 said:

> *"The Bill amends the Family Law Act to ensure that people who have made an informed decision to enter into one of these Agreements cannot later avoid or get out of the Agreement on a mere technicality, resulting in Court battles that the Agreement was designed to prevent. These amendments will restore confidence and certainty in the binding nature and enforceability of Financial and Termination Agreements under the Family Law Act. I commend this Bill."*[3]

26. The amendments had bi-partisan support. They were passed into law on 7 December 2009 and commenced operation on 4 January 2010.

[3] Second Reading Speech, Wednesday 3 December 2008, House of Representatives, *Federal Justice System Amendment (Efficiency Measures) Bill (No 1) 2008*, the Hon. Robert McClelland MP, Attorney-General of the Commonwealth

27. The amendments were introduced into the Act via Schedule 5 to the Amendment Act, and the net effect was to retrospectively validate existing agreements which might otherwise have been at risk of being set aside as a result of technical deficiencies (but not to resurrect agreements which had already been set aside by the court as technically defective).

28. The provisions of Schedule 5 of the Amending Act were, with due respect, confusingly drafted; however their meaning and effect (and the constitutionality of their retrospective impact on agreements which predate the commencement of the amendments) has now been considered and explained by the Full Court in ***Wallace & Stelzer*** [2013] FamCAFC 199.

29. The amendments also inserted new provisions [s90(G)(1A) and (1B); s90UJ(1A) and (1B)] – sometimes referred to as the "get out of jail" provisions – which empowered the court to make an order declaring an agreement binding on the parties notwithstanding that it did not comply with all of the technical requirements for a binding agreement if the court:

> *"is satisfied that it would be unjust and inequitable if the agreement were not binding on the spouse parties to the agreement (disregarding any changes in circumstances from the time the agreement was made)."*

30. The purpose of those aspects of the amendments was explained and confirmed by the Full Court in ***Kostres & Kostres*** (2009) FLC 93-420.

31. The Full Court in ***Parker & Parker***[4] has since made it clear that the provisions in sections 90G(1A), (1B) and (1C) – being "remedial" or "beneficial" – should be construed "generously"; ie, given a *'"fair, large and liberal' interpretation rather than one which is 'literal or technical'"*.[5] Their application has more recently been further considered by the Full Court in ***Hoult & Hoult***.[6]

32. These amendments – and the extension of the ability to enter into binding financial agreements to de facto and same sex partners – reflect a strong policy commitment to encouraging and enabling parties to regulate the financial aspects of their relationship outside the formal legal framework, and to free themselves from the jurisdiction of the courts by appropriately documenting their wishes and intentions subject to certain safeguards.

33. However, it must with respect be said, that inadequate drafting of legislative provisions (both originally and in the previous amending legislation) and an ongoing failure to address the underlying problems appropriately, gave rise to a further raft of problems and difficulties - in addition to the long standing issues with the legislation.

THE MATTERS REMAINING TO BE ADDRESSED

34. The FLS has welcomed the opportunity to consult and confer with the Attorney-General's Department over several years, to voice concerns in relation to the legislative provisions dealing with financial agreements. Many of these matters are now reflected in the Bill.

35. There are a number of matters where submissions made by the FLS have not been included in the Bill, and we highlight 3 in particular of them below:

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[4] [2012] FamCAFC 33)
[5] Coleman J citing *I W v The City of Perth and Others* [1997] 191 CLR 1
[6] [2013] FamCAFC 109 delivered on 26 July 2013

35.1 Whilst the provisions of s90GA and 90UJA go a long way to preventing agreements being the subject of attack in respect of the content of the legal advice provided, FLS had submitted that matters would be made clearer, by the legislation containing a **deeming provision** that once a signed statement of independent legal advice has been provided, the requirements are met and the legal advice cannot be further scrutinised as a basis for declaring an agreement non-binding.

35.2 Section 90K(1)(d) and the similar provision in the de facto sub-section of s90UM relates to circumstances where a court can set aside a financial agreement in circumstances relating to the care, welfare and development of a child. The FLS had submitted that the threshold should be uniformly lifted from the current "material change" of circumstances test, to an "exceptional circumstances" test. That would be consistent with s79A of the Family Law Act and s136(2)(d) of the *Child Support (Assessment) Act 1989*, and further lessen the likelihood of agreements being set aside by courts.

35.3 The FLS has submitted that the Outline and Object sections of the amending legislation, should recognise that financial agreements can deal with property acquired *after* relationship breakdown or divorce, and not just property and financial resources received or acquired *prior* to that time.

36. The FLS would be happy to provide further clarification if this would be of assistance to the Committee.

Yours sincerely,



S. Stuart Clark AM
President
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Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2016 Executive as at 1 January 2016 are:

- Mr S. Stuart Clark AM, President
- Ms Fiona McLeod SC, President-Elect
- Mr Morry Bailes, Treasurer
- Mr Arthur Moses SC, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Michael Fitzgerald, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.