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Inquiry into Australia's Family Law System

**Attorney-General's Department submission to the
Joint Select Committee on Australia's Family Law
System**

Contents

1. Introduction	3
2. Primary interventions	6
3. Safety and information sharing processes	9
4. Services and system accessibility.....	12
5. Law, policy and processes.....	21
6. Access and use of the federal family courts	23
7. Family law workforce.....	26

1. Introduction

The Attorney-General's Department (the department) appreciates the opportunity to provide a written submission to the Joint Select Committee on Australia's Family Law System.

The department's submission focuses on key areas within the family law system that require reform, and draws the Committee's attention to aspects of these that could benefit from the Committee's detailed consideration.

The department notes the recent completion of the Australian Law Reform Commission's (ALRC's) review of the family law system, and the release of its report 135, *Family Law for the Future – An Inquiry into the Family Law System*.¹ The ALRC's review considered a broad range of issues across the family law system and provided 60 recommendations focusing primarily on matters of substantive and procedural law. The ALRC's recommendations focus on reforms to the legal aspects of the family law system, and include detailed suggestions to improve the *Family Law Act 1975* (the Family Law Act), amend court and other procedures, and increase governance and regulation of professionals. The Government is carefully considering these recommendations.

However, the Committee's terms of reference are not limited to the legal aspects of the family law system, and include those parts of the system which promote the timely, affordable and accessible resolution of family law matters outside of the courts. The Commonwealth funds services to provide families with support and pathways to alternative dispute resolution, but more can be done to ensure that families who are willing and able to cooperatively resolve family law matters without court intervention are enabled to do so. Many of the issues highlighted in this submission relate to non-legal mechanisms to better support families in resolving matters outside of court in a safe, child-centred, supportive, inexpensive and efficient manner.

Topics within the family law system that the Committee may wish to consider can be conceptualised under seven themes:

- Primary interventions
- Enhancing safety through triage and improved information sharing
- Services and system accessibility
- Law, policy and processes
- Access and use of the federal family courts
- Family law workforce

¹ Australian Law Reform Commission, *Family law for the future – An inquiry into the family law system*. Report No 135, 2019.

Each of these themes is discussed in greater depth below, including matters that could benefit from detailed consideration by the Committee.

Who are the users of the family law system?

Only a minority of separated parents use the family law system to a significant extent. While many separating parties will access parts of the family law system at some stage in or after their separation, most parents resolve parenting and property arrangements with no, little or limited engagement with family law services. The parents who do use services (family dispute resolution/mediation, lawyers and courts) are often those affected by a range of complex issues correlated with family breakdown, including family violence, child safety concerns, mental ill health and substance abuse.² Some who use court services extensively may also do so because they are seeking to protract the dispute to abuse, punish or coerce the other party.³

Relationship between family breakdown and other forms of disadvantage

Financial disadvantage is both a predictor and a consequence of a relationship breakdown. Recipients of government income support payments have been found to be more than twice as likely to separate as non-recipients of income support.⁴ There are also findings that family breakdown can result in financial and other forms of disadvantage.⁵

Though few separating families extensively use the family law system, families who are at risk of, or are already experiencing, some form of disadvantage are more likely to fall within the minority of people who are reliant on the family law system to resolve their issues. The Law and Justice Foundation of New South Wales 2008 Legal Australia-Wide Survey⁶ found that people with a disability, single parents, people who were unemployed and people living in disadvantaged housing had the highest vulnerability to experiencing legal problems.⁷ Approximately 77 per cent of respondents who were involved in a family law problem reported that it was substantial ('substantial' legal problems were those reported by respondents as having a 'moderate' or 'severe' impact on everyday life).⁸ Those facing a substantial legal problem reported lower rates of finalisation of their

² Australian Institute of Family Studies, *Evaluation of 2012 family violence amendments – Synthesis report*. 2015, p 17.

³ Senate Standing Committee on Social Policy and Legal Affairs, *A better family law system to support and protect those affected by family violence*. 2017, pp 64-5.

⁴ B Bradbury and K Norris, 'Income and separation' (2005) 41 *Journal of Sociology* 425.

⁵ Australia Social Inclusion Board, *Social inclusion in Australia: How Australia is faring*. 2011, pp 33, 58.

⁶ N.B.: This is the most recently reported data set available from the Law and Justice Foundation of New South Wales.

⁷ Law and Justice Foundation of New South Wales, *Legal Australia-Wide Survey – Legal need in Australia*. 2012, pp 69.

⁸ *Ibid*, pp 61-62.

matter, indicating the majority of matters were protracted or were not being pursued.⁹ Further, the likelihood of a given matter being finalised decreased where a respondent was experiencing co-occurring legal problems.¹⁰

Those experiencing disadvantage in some form who are also dealing with family law issues are often engaged with multiple services delivered across Commonwealth portfolios and within state and territory jurisdictions. This has the potential to complicate referral pathways and may deter users of the family law system from engaging with yet another service such as alternative dispute resolution.

Reforms already underway

The Government is already pursuing a range of reforms to the family law system that are relevant to the Committee's Terms of Reference, including measures that respond to recommendations of the House of Representatives Standing Committee on Social Policy and Legal Affairs' *Inquiry Into a Better Family Law System to Support and Protect Those Affected By Family Violence* report, handed down in December 2017. Some of these measures are discussed in the body of this submission. A summary of these measures is at **Attachment A** for the Committee's information.

Relevant law and background information

For the Committee's information, the department has prepared a separate document detailing the law and other background information relevant to each of the Committee's terms of reference (**Attachment B**).

⁹ Law and Justice Foundation of New South Wales, *Legal Australia-Wide Survey – Legal need in Australia*. 2012, p 139.

¹⁰ *Ibid.*

2. Primary interventions

Helping as many families as possible to resolve their matters safely and quickly is critical to a well-functioning family law system. Supporting families to resolve matters between themselves where possible has been found to produce higher satisfaction rates for families, as determining matters between themselves meant that parents felt heard, that their children's needs were adequately considered, and that the result was what they had expected.¹¹

However, the benefits of determining family law matters outside of the court system will not only accrue to the individuals involved. Providing families with support services and tools to determine matters between themselves reduces demand on family dispute resolution services and the courts which, in turn, helps to reduce costs and delays for those families who do require more intensive assistance through the courts. In many cases, society will benefit from reduced welfare expenditure if early intervention reduces the need for associated complex and costly social services.¹²

Primary interventions

The department supports an approach in the family law system that achieves greater resolution of family law matters outside of the courts. This approach includes prevention, targeting policies and interventions at a broad population initially. Then, where problems do occur, more intensive interventions are provided to address those problems quickly, minimise harm and prevent reoccurrence. Systems employing this model consist of:

- Primary interventions, which target the whole population and provide information and services to prevent problems from occurring.
- Secondary interventions, which target those at increased risk and provide a greater level of support to resolve problems before they escalate.
- Tertiary interventions, which target those who are already experiencing problems and aim to minimise harm and prevent reoccurrence.

Primary interventions, in particular, can help to reduce the financial costs of family law proceedings to families (term of reference (d)) and improve the effectiveness of family law support services (term of reference (e)). Primary interventions include measures such as the provision of information, awareness and education materials, and services.

¹¹ Australian Institute of Family Studies, *Evaluation of 2012 family violence amendments – Synthesis report*. 2015, pp 64-5.

¹² Productivity Commission, *Access to justice arrangements*. Report No 72, 2014, p 847.

Currently, the Government funds a range of programs and services aimed at primary intervention. The Family Relationship Advice Line (FRAL, 1800 050 321) is a national advice phone line dedicated to providing information and referrals to assist families affected by relationship or separation issues. The FRAL provides free information on family relationship issues, advice about parenting arrangements after separation, and referrals to other services. It also includes a family dispute resolution service which assists families to reach agreement about parenting arrangements online or over the phone, and a legal advice service which provides simple legal advice and information. The Government also maintains a website, Family Relationships Online,¹³ which provides the public with information about the family law system and details of services that can help families to resolve their matters.

The Government is also supporting the development of an Online Dispute Resolution System (ODRS), an innovative approach to family law dispute resolution which will provide separating couples with the option of using an app to resolve property and parenting matters rather than going to court. The app draws on information put into the app by the separating couple alongside machine learning (using legal precedents) to suggest an equitable property division arrangement and to mutually agree parenting arrangements. The ODRS has the potential to enable families to resolve their property and parenting matters out of court by assisting and empowering them to determine their arrangements between themselves.

Family law system users report difficulties in finding information that is relevant to their matter, applying that information to their circumstances, and understanding the steps they need to take to resolve their matter. Submissions to the ALRC inquiry suggested that barriers to locating reliable information about the family law system arise due to information being scattered across various websites and sources and a lack of knowledge about the existence of authoritative sources, such as the Family Relationships Online website.¹⁴

The department notes that the ALRC Discussion Paper and Final Report included a range of primary intervention proposals, such as a national education and awareness campaign, a family law system information package, and other specific information resources targeted at culturally and linguistically diverse (CALD) individuals, children, Aboriginal and Torres Strait Islander families and people with disabilities.

Opportunities for greater use of technology

The department is conscious that future users of the family law system will increasingly be 'digital natives', who have been interacting with technology since childhood. These users are likely to require

¹³ Family Relationships Online, *Family relationships online – Helping families build better relationships*. Canberra, 2019. <<https://www.familyrelationships.gov.au/>>

¹⁴ Australian Law Reform Commission, *Family law for the future – An inquiry into the family law system*. Report No 135, 2019, pp 449-50.

more interactive, automated, and on-demand services than previous generations. Expanding existing services to include options that target this group of users will increase service reach and effectiveness, and provide another avenue for family law system users to receive low-cost help and support to resolve their matter. An area which would benefit from the Committee's consideration is the extent to which there may be further opportunities to employ artificial intelligence and other forms of technology, such as the ODRS app referred to above, to provide low-cost options to family law system users and improve the accessibility and reach of early intervention measures.

3. Safety and information sharing processes

The majority of family law matters that end up in court involve allegations of family violence or other safety risks which must be considered, alongside other factors, in determining appropriate parenting and property arrangements. It is therefore critical that the family law system is responsive to family violence and safety risks at every stage in the process.

Family law matters in court

Research by the Australian Institute of Family Studies (AIFS) indicates that, of separated parents resolving their family law matter through the courts in 2014:

- 53.7% reported allegations of physical violence
- 85.3% reported allegations of emotional abuse
- 38.1% presented with four or more risk or complexity issues (such as family violence, alcohol or drug use, mental health issues and gambling problems).¹⁵

The same study found that, overall, the use of formal legal mechanisms (lawyers and the courts) to resolve parenting matters was most common among those parents who reported the greatest level of complexity in their circumstances.¹⁶

Reporting of family violence

Research conducted by the Australian National Research Organisation for Women's Safety (ANROWS) indicates that many victims of family violence do not seek help or report the incident to police. This which suggests that the actual rate of family violence may be higher than police and court data indicates.¹⁷ The family courts must be equipped to deal effectively with this particularly vulnerable cohort of separating families.

Government measures to improve information sharing

Improving information sharing and the visibility of family violence and child protection information in family law proceedings is one way in which safety risks in the family law system may begin to be addressed (term of reference (a)).

The Australian Government has been working with state and territory governments and the family law courts to ensure timely access to relevant information about safety and risk. The Government is

¹⁵ Australian Institute of Family Studies, *Evaluation of 2012 family violence amendments – Synthesis report*. 2015, p 16.

¹⁶ *Ibid*, p 17.

¹⁷ Australian National Research Organisation for Women's Safety, *Violence against women: Accurate use of key statistics*. 2018, p 8.

currently implementing a pilot to co-locate state and territory child protection and policing officials at family law court locations across Australia. Building on successful models already in place in Victoria and Western Australia, the co-located officials will help facilitate improved information-sharing practices and promote a more cooperative and collaborative response to family safety issues in family law proceedings. The Government is also working with state and territory governments to develop a national information sharing framework to improve information sharing between the family law, family violence and child protection systems.

It is important that information regarding family violence is routinely shared with family law judges, enabling them to appropriately consider family violence evidence in family law proceedings (term of reference a(ii)) and develop an understanding of how domestic violence and apprehended violence orders are issued. Under the Family Law Act, family law judges have discretion to consider a domestic violence or apprehended violence order submitted as evidence in family law proceedings, and to determine the weight they will give that evidence. Given the unique nature of each family law matter, it is appropriate that judges have this level of discretion to allow consideration of domestic violence or apprehended violence orders in the context of all evidence presented in relation to a particular matter when making decisions.

To ensure that judges are well equipped to make informed decisions about family violence evidence in family law proceedings, the Government funded the development a National Domestic and Family Violence Bench Book,¹⁸ an online educational resource for judicial officers across Australia. The Bench Book was completed in June 2017 and updated in July 2019. The Government also funded the National Judicial College of Australia to deliver family violence training to family law and other judges.¹⁹ Additionally, the Federal Circuit and Family Court of Australia (FCFC) Bill (referred to under item 6, below) provides for new qualification provisions for proposed judicial appointments to the Federal Circuit and Family Court of Australia for judges who are expected to hear family law matters. Under these provisions, a person is not to be appointed as a Judge unless the person is a suitable person to deal with family law matters, including matters of family violence.

Given its prevalence in family law matters, family violence is relevant to a number of the Committee's other terms of reference, including term of reference (f) – the impacts of family law proceedings on the health, safety and wellbeing of children and families involved in those proceedings. The challenges of adequately responding to family violence, including by sharing information to enhance the safety of families in the family law system has been a key focus of stakeholders, system users, the states and territories and the Australian Government in recent years. The department's website provides further information about current key family safety initiatives and programs, including

¹⁸ The Australian Group of Judicial Administration, *National domestic and family violence bench book*. Melbourne, 2019. <<https://dfvbenchbook.aija.org.au/>>

¹⁹ The National Judicial College of Australia, *Family Violence in the court program*. Canberra, 2018. <<https://njca.com.au/family-violence-in-the-court-program/>>

actions under the National Plan to Reduce Violence Against Women and their Children 2010-2022, and the Women's Economic Security Package.²⁰

²⁰ Attorney-General's Department, *Family violence*. Canberra, 2019.
<<https://www.ag.gov.au/FamiliesAndMarriage/Families/FamilyViolence/Pages/default.aspx>>

4. Services and system accessibility

To meet the needs of families from a diverse range of backgrounds and circumstances, the family law system should be straightforward and affordable to access, providing dispute resolution and legal assistance services which are responsive and fit for purpose.

The Government funds a range of specialised family law services which empower families to determine issues by agreement, as well as legal services to assist those families who cannot resolve their matter without greater intervention. Some family law matters are not suitable for resolution by agreement, requiring families to engage with legal practitioners, and in very protracted matters, the family law courts to determine their dispute. Commonwealth-funded family law services and legal assistance services are aimed at improving the accessibility of the family law system for all Australians, by providing families with out-of-court dispute resolution options where suitable and low or no cost legal representation where a court determination is needed.

Government-funded services are only one part of the solution to ensuring Australians can access the family law system, and the Committee may wish to consider matters that relate to improved consistency in court processes, more effective case management, unbundling and more affordable private legal services, the use of family consultants, and parenting coordination.

Commonwealth-funded family law services

The Government funds a range of services designed to enable low or no cost access to the family law system, dispute resolution outside of court, and other support which may be required after separation. These services are collectively referred to as family law services, and include:

- Family Relationship Centres (FRCs), which provide families experiencing separation with information, advice and dispute resolution services to help them reach agreement on parenting arrangements without going to court.
- Family Law Counselling, which helps couples and families to manage relationship issues arising out of relationship changes, separation and divorce, through counselling, therapeutic intervention, support, information and referral.
- Family Dispute Resolution Services (FDR), which provide a specialist mediation process conducted by independent, accredited practitioners to help members of families, including separated families, resolve family law matters without going to court.
- Regional FDR services, which are designed to meet the particular needs of regional communities, providing a range of services to help separating families resolve family law matters without going to court.

- Children's Contact Services, which assist children of separated parents to establish and maintain a relationship with their other parent and family members through supervised visits or changeover services.
- the Parenting Orders Program – Post Separation Cooperative Parenting Program, which helps separating families to manage matters about parenting arrangements and increase cooperation and communication, using child focused and child-inclusive interventions with the support of a case worker. This program offers education and support to parents where conflict is affecting their relationships with their children.
- the Supporting Children after Separation Program, which helps children from separating families to deal with issues arising from the breakdown in their parents' relationship, and allows children to participate in decisions that affect them.

There are no eligibility criteria for accessing Commonwealth-funded family law services. The services are operated by not-for-profit, community-based providers who are permitted to charge fees in accordance with their organisation's fee policy. Fees are generally charged on a sliding scale according to a client's income, but service providers must take into account the client's capacity to pay. Support is available to all individuals including Australian and Torres Strait Islander clients, CALD clients, and clients with a disability.

In 2012, the department commissioned the Allen Consulting Group to review family law services and to identify opportunities for improving the value of the Government's investment in these services.²¹ The review found that:

- FRCs were operating effectively to assist in matters that could be resolved outside of court and filter these matters out of the court system.
- the co-location of services and integrated service models enable FRCs to deliver efficient and effective client responses.
- more intensive assistance offered by FRCs, such as counselling and child-focused practice, deliver value beyond reaching parenting agreements, for example, providing skills to assist parties to maintain parenting agreements.

In 2018-19, Commonwealth-funded family law services provided support to approximately 170,000 clients through 500,000 sessions, such as an intake process, a joint dispute resolution session, or a counselling session. In the same period:

- 62% of clients reported a positive improvement in their circumstances after using the services
- 70% of clients agreed that the services had a positive impact on helping them to achieve their goals

²¹ The Allen Consulting Group, *Research on Family Support Program family law services*. 2013, p 73.

- 90% of clients were satisfied with the services provided to them.

In its Final Report, the ALRC recommended that FRCs should be expanded to provide case management to clients with complex needs, and that service delivery offerings should be broadened to include financial counselling services, mediation in property matters, legal advice, legally assisted dispute resolution services and Children's Contact Services.²² The Government has funded FRCs to undertake family law property mediation from 1 July 2019 and is considering the other recommendations made by the ALRC.

Commonwealth-funded legal assistance services

The Government also provides funding for the delivery of legal assistance through Legal Aid Commissions, Community Legal Centres, Aboriginal and Torres Strait Islander Legal Services and Family Violence Prevention Legal Services.

In 2018-19, 93% of legal representation services provided by Legal Aid Commissions, 52% of dispute resolution services delivered by Community Legal Centres, and 57% of dispute resolution services delivered by Aboriginal and Torres Strait Islander Legal Services related to family law matters.²³ In the same time period, approximately 705,000 Commonwealth-funded legal assistance services were provided for family law matters in total.²⁴

From 1 July 2020, the Australian Government's investment for front-line legal assistance services will increase to over \$2.0 billion over five years under the proposed *National Legal Assistance Partnership 2020-25* (NLAP). The NLAP will provide structural and systemic reforms to Commonwealth legal assistance arrangements with state and territory governments, the legal assistance sector and other service providers to create a unified mechanism for Government legal assistance funding. The NLAP will also set aside Commonwealth funding for the delivery of targeted legal assistance services relating to family law and family violence, including \$69.5 million over five years in baseline funding for Community Legal Centres. The NLAP also includes specific Commonwealth funding for specialist Domestic Violence Units and Health Justice Partnerships and the Family Advocacy and Support Services.

Outside of the NLAP, the Australian Government has also increased funding for Family Violence Prevention Legal Services by an additional \$3 million over three years. This increase means the Government is investing over \$75 million from 2020-21 to 2022-23 to Family Violence Prevention Legal Services for frontline family violence and support services that directly improve safety for women and children, and provide better access to legal support.

²² Australian Law Reform Commission, *Family law for the future – An inquiry into the family law system*. Report No 135, 2019, pp 464.

²³ 2018-19 data reported under the *National Partnership Agreement on Legal Assistance Services 2015-20*.

²⁴ Includes only legal assistance services provided by Legal Aid Commissions, Community Legal Centres and Aboriginal and Torres Strait Islander Legal Services. Data relating to Family Violence Prevention Legal Services was not available at the time this submission was prepared.

Addressing the high cost of legal services

Notwithstanding a significant investment in legal assistance services, for many families the costs of private legal representation for advice or family court proceedings are prohibitive. Some family law matters are unable to be resolved without the assistance of legal practitioners and the courts, due to issues such as family violence. While many high-income Australians in this situation can afford to pay private legal fees to enable them to resolve their family law disputes, the high cost of private legal representation is prohibitive to most, and means that some families who are not able to resolve their matter by agreement must resort to self-representation in court, partial private representation, or leave their family law issues unresolved.²⁵ This is a key issue affecting system accessibility, and of interest to the Committee (term of reference (d)).

In 2018, PwC estimated that litigants in the Family Court of Australia can spend over \$110,000 per matter and, in the Federal Circuit Court, over \$30,000.²⁶ In some cases costs can reach into the millions of dollars. These costs are out of reach for many families. One judgment in a matter in which the legal fees totalled over \$800,000 states that '[t]hese amounts are, on their face, outrageous levels of costs for ordinary people involved in family law proceedings'.²⁷

Tailored approaches and technological solutions can be used to make private legal services more affordable and accessible for families. Examples of this are already evident in the non-government sector in Australia and internationally. For example, there are programs where non-legal staff or volunteers are employed to provide information and assistance to individuals with legal problems, without providing legal advice. The Launceston Community Legal Centre has one such program where volunteers are trained to assist individuals to understand whether they need legal advice, and to complete non-legal tasks such as court forms, before they seek legal assistance.²⁸

By way of international comparison, a more tightly regulated approach has been implemented in Washington State, where qualified 'Limited Licence Legal Technicians' can become accredited to provide legal advice and assistance, but not representation.²⁹ The Productivity Commission recommended that limited licences (to enable some tasks traditionally performed by lawyers to be performed by non-lawyers) be considered in its 2014 report, *Inquiry into Access to Justice Arrangements*.³⁰

²⁵ The World Justice Project reported that 62 per cent of Australians had experienced a legal problem in the last two years, yet only one third were able to access any kind of help, for instance from a lawyer, trade union, religious organisation, family or friend. This data relates to legal problems generally; not to family law matters.

²⁶ PwC, *Review of efficiency of the operation of the federal courts*. 2018, p 65.

²⁷ *Simic & Norton* [2017] FamCA 1007, 14.

²⁸ Launceston Community Legal Centre, *Becoming a legal literacy volunteer with LCLC*. Launceston, 2019. <www.lclc.net.au/volunteers/legal-literacy-volunteers.html>

²⁹ Washington State Bar Association, *Limited license legal technicians*. Washington State, 2019.

<www.wsba.org/for-legal-professionals/join-the-legal-profession-in-wa/limited-license-legal-technicians>

³⁰ Productivity Commission, *Access to justice arrangements*. Report No 72, 2014, p 281.

There may also be merit in further exploring how the private legal profession could provide more affordable family law services to address the increasing demand on publically-funded legal assistance services. This might include the consideration of any systemic issues with the provision of, and access to, affordable legal services, taking into account:

- costs and fee structures
- legislation, rules and regulations governing the legal profession (i.e. Legal Professional Rules) including practising certificate requirements, legal education requirements and professional pathways, and the self-regulation of the profession
- the 'unbundling' of legal services
- interactions with other support service delivery practitioners
- frameworks for self-represented litigants.

'Unbundling' legal services is an option to decrease legal costs which was raised by a number of stakeholders in submissions to the ALRC's review, although it was not the subject of a specific recommendation in the Final Report. Unbundled legal services are services which are marketed or charged as separate tasks, rather than as part of a package. Traditionally, lawyers are engaged for the duration of a legal matter based on a detailed cost estimate, and then charge according to the time spent or units of work completed on the matter. Unbundling involves a lawyer assisting a client with one or more discrete tasks, rather than on an ongoing basis. Unbundling presents opportunities for consumers to manage their costs while retaining control over strategy in their legal matter. This is particularly beneficial for parties who would be unable to afford full representation. Through unbundled services, parties can seek specific, discrete assistance at key points, which can improve outcomes for those who would otherwise be unrepresented and navigating the system alone.

Unbundling already occurs in the legal assistance sector, but is difficult for the private sector to implement in the current regulatory and common law environment. The need for uniform rules to deal with unbundled legal services was identified through the 2014 Productivity Commission Inquiry into access to justice,³¹ and again, more recently, through the stakeholder feedback process of the ALRC Issues Paper.³²

Regulation of legal practice is the responsibility of the states and territories, and a uniform approach to unbundling across all states and territories is required. The former Law, Crime and Community Safety Council agreed to consider uniform rules to deal with unbundled legal services at its meeting on 19 May 2017,³³ and this work continues under the Council of Attorneys-General. Victoria is leading this work.

³¹ Productivity Commission, *Access to justice arrangements*. Report No 72, 2014, pp 644-52.

³² Australian Law Reform Commission, *Review of the Family Law System – Issues Paper*. 2018, p 36.

³³ Law, Crime and Community Safety Council, *Communique: 19 May 2017*. Melbourne.

Reducing adversarialism

The department notes that there are longstanding concerns about the appropriateness of adversarial approaches in the context of resolving post-separation family law matters,³⁴ relevant to term of reference (f) regarding the ‘impacts of family law proceedings on the health, safety and wellbeing of children and families involved in those proceedings’.

Consistent with findings and observations documented in previous expert reports and inquiries, the ALRC identified a strong theme that, in a family law setting, adversarial processes escalate conflict between separating parents and, more generally, that the use of an adversarial model is poorly adapted for dealing with family conflict.³⁵ Importantly, the ALRC identified that this theme was also expressed by children and young people who shared their experiences and views about the family law system.³⁶

Stakeholders called for the system to have a ‘greater focus on problem-solving and conflict reduction’, and sought ‘non-adversarial responses’ to become the ‘mainstream’ component of the system.³⁷

The ALRC’s Final Report also noted the significant role that FDR and Legally Assisted Dispute Resolution (LADR) play in supporting the resolution of post-separation issues, granting the potential to provide flexible and accessible options for parenting and property matters in a range of geographic areas and to a range of groups and communities. The ALRC found that many stakeholders support an increased role for LADR as a preferable alternative to court in circumstances where a matter may involve issues that render FDR unsuitable, such as where there are family violence or safety concerns, through measures such as co-mediation or a shuttle mediation approach. Further, according to National Legal Aid, across all family law matters which have been through LADR conducted by legal aid commissions since 2007, three out of four matters reached settlement outside of the court system.³⁸

The ALRC has suggested that the department work with relevant stakeholders, including FDR/LADR providers and user groups (including Aboriginal Controlled Community Organisations, CALD and

³⁴ House of Representatives Standing Committee on Family and Community Affairs, *Every Picture Tells a Story: Report on the inquiry into child custody arrangements in the event of family separation*. 2003, pp 75-80; Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protections System*. 2016, p 22; Senate Standing Committee on Social Policy and Legal Affairs, *A better family law system to support and protect those affected by family violence*. 2017, pp 48-51.

³⁵ Australian Law Reform Commission, *Review of the Family Law System – Discussion paper*. 2018, p 10; Australian Law Reform Commission, *Family law for the future – An inquiry into the family law system*. Report No 135, 2019, p 50.

³⁶ Australian Law Reform Commission, *Review of the Family Law System – Discussion paper*. 2018, p 11.

³⁷ *Ibid*, p 13.

³⁸ Gabrielle Canny, ‘FDR pays its way by settling cases’. *The Australian*, 15 November 2019.

LGBTI groups) to support the further development of FDR and LADR.³⁹ The Government is conducting a pilot of LADR for CALD families and Aboriginal and Torres Strait Islander families experiencing family violence which is currently being evaluated.

In addition to proposals to mainstream and improve access to non-adversarial dispute resolution processes, the ALRC Discussion Paper highlighted stakeholder concerns that less-adversarial adjudication options are not always accessible or available to parents, particularly where an agreement about parenting arrangements cannot be reached through FDR. Some stakeholders emphasised a need for those adjudicating family law matters to incorporate a problem-solving approach,⁴⁰ consistent with the evidence that supporting parents to reduce conflict is beneficial for children's wellbeing.⁴¹

The Government has previously introduced legislation to establish a new forum for resolving parenting matters outside of court, to be called 'Parenting Management Hearings'. Under the proposed legislation, parents would have been able to consent to having their parenting matter determined by a Parenting Management Hearing Panel made up of family law practitioners, family violence specialists, psychologists, and social workers. The Parenting Management Hearing Panel would have the power to make binding parenting decisions that would be enforceable in court. The intention was for the Parenting Management Hearings to be conducted in an inquisitorial rather than adversarial manner, with panel members actively managing the hearings and no legal representatives present. The proposed model for Parenting Management Hearings received limited support from stakeholders, being particularly opposed by the legal profession, and the legislation has since lapsed.

The ALRC's Final Report recommended reinvigoration of the framework in Division 12A of Part VII of the Family Law Act, which was enacted in 2006, and which sets out principles for conducting child-related proceedings and provides the foundation for a less-adversarial approach in all children's matters (recommendation 10).⁴² The ALRC's recommendation noted that this framework has not been utilised to its full potential and stated that the courts should be adequately resourced to implement it.

The ALRC's Final Report also recommended amending the Family Law Act to allow for the use of arbitration in a wider range of property matters and, in some cases, children's matters

³⁹ Australian Law Reform Commission, *Family law for the future – An inquiry into the family law system*. Report No 135, 2019, p 272.

⁴⁰ Australian Law Reform Commission, *Review of the Family Law System – Discussion paper*. 2018, p 142.

⁴¹ J Kelly, 'Risk and protective factors associated with child and adolescent adjustment following separation and divorce: Social science applications', *Parenting plan evaluations: Applied research for the Family Court*. 2012, p 49.

⁴² Australian Law Reform Commission, *Family law for the future – An inquiry into the family law system*. Report No 135, 2019, p 185.

(recommendation 26 and 28).⁴³ Arbitration can allow a matter to be resolved by an impartial adjudicator (usually a family lawyer), and the resulting arbitral award can be registered as if it were an order of the court on the consent of both parties. Currently, arbitration is only used in the family law system to resolve property matters and can be undertaken through private agreement between the parties or by referral from a court. While arbitration is usually cheaper than going to court, the cost of private arbitration can be prohibitive for some parties. The department notes there are a range of sensitivities in relation to arbitration of children's matters that require further consideration, including: obligations under the United Nations Convention on the Rights of the Child for the state to remain involved in decisions concerning children; constitutional considerations when conferring functions on a non-judicial body; limitations on what a parent (rather than a court) can authorise to be arbitrated; how family reports and other professional services would be ordered and considered in an arbitral model; and the competencies and accountabilities of arbitrators.

Supporting compliance

More than 70 per cent of separated couples resolve parenting and property arrangements between themselves, without the need for court involvement.⁴⁴ Many of these couples also maintain amicable or good relationships post-separation. These couples are more likely than those who have parenting orders issued by a court to agree on changes to their parenting arrangements over time in response to the changing needs of their children and other factors, and are therefore more likely to avoid court altogether. Parents whose children are the subject of 'parenting orders' made by a court, in contrast to those who agree on parenting arrangements outside of court, are more likely to be involved in further court proceedings down the track.⁴⁵

Stakeholders observe that there is a tendency for inter-parental conflict to escalate and solidify during family court proceedings, and this leaves parents ill-equipped to manage co-parenting arrangements after proceedings come to an end.⁴⁶ Ongoing parental conflict is also a key factor contributing to non-compliance with court orders and returns to court.⁴⁷ Applications for court enforcement of parenting orders are more likely to be part of an ongoing conflict involving multiple court proceedings, rather than one-off matters.⁴⁸

⁴³ Australian Law Reform Commission, *Family law for the future – An inquiry into the family law system*. Report No 135, 2019, p 185, pp 281, 289.

⁴⁴ Rae Kaspiew (Australian Institute of Family Studies), *Separated parents and the family law system: What does the evidence say?* Melbourne, 2016. <aifs.gov.au/cfca/2016/08/03/separated-parents-and-family-law-system-what-does-evidence-say>

⁴⁵ Australian Law Reform Commission, *Review of the Family Law System – Discussion paper*. 2018, p 145.

⁴⁶ Ibid.

⁴⁷ H Rhoades, 'Contact Enforcement and Parenting Programmes – Policy Aims in Confusion?' (2004) *Child and Family Law Quarterly*.

⁴⁸ Australian Law Reform Commission, *Review of the Family Law System – Discussion paper*. 2018, p 146.

The ALRC recommended the use of Family Consultants to help families understand their final orders and to assist with post-order case management (recommendations 38 and 39).⁴⁹ The ALRC considered, but did not recommend in the Final Report, other non-court based service options such as 'parenting coordination'. Parenting coordination is a non-adversarial, quasi-legal, quasi-mental health process that combines assessment, education, case management, conflict resolution and decision-making support to help families implement and comply with parenting agreements or orders.

Other non-legal avenues to support compliance could include using behavioural economics to develop methods which influence compliance behaviour. Examples suggested by the Hon Professor Richard Chisholm AM in his submission to the ALRC inquiry included the provision of illustrations or videos when parenting orders are made, which demonstrate parents overcoming difficulties and working out how to comply with parenting orders or agreeing to child-focused changes. Professor Chisholm submitted to the ALRC that the use of this type of material could encourage parties to see compliance as a given and learn strategies to achieve it.⁵⁰

⁴⁹ Ibid, pp 341, 343.

⁵⁰ Australian Law Reform Commission, *Family law for the future – An inquiry into the family law system*. Report No 135, 2019, Australian Law Reform Commission, *Review of the Family Law System – Discussion paper*. 2018, pp 342-3.

5. Law, policy and processes

The usability of the law is critical to the effectiveness of the family law system. The majority of families resolve post-separation issues between themselves or through non-legal interventions, therefore the appropriateness of the outcomes achieved is directly related to the ease with which those families can navigate, understand, and apply legal principles to their own circumstances.

The prescriptive, complex, and inaccessible nature of the Family Law Act was a central theme of the ALRC inquiry into the family law system. The Government is considering the ALRC's recommendations regarding the re-drafting of parts of the Family Law Act.

The complexity of the Family Law Act has contributed towards community misunderstanding of key elements of the law, which particularly affects self-represented litigants and those seeking to resolve their matters outside of the courts. The ALRC found that the presumption of equal shared parental responsibility has been, at times, misinterpreted as meaning 'equal shared care'.⁵¹ This gives rise to concerns that the provisions can lead unrepresented parties to agree to equal time and enter into informal agreements based on a misapprehension of the law, resulting in parenting arrangements that are not necessarily in the best interest of the child. While the operation of legal presumptions may be understood by lawyers, submissions to previous inquiries have suggested that users navigating the system without the benefit of legal assistance may misunderstand their effect.

In the absence of a presumption about parental responsibility, existing section 61C of the Family Law Act provides that, subject to a court order, each parent has parental responsibility for a child.

Parenting arrangements, including time spent with each parent, are only made by court order in about 3 per cent of family law matters.⁵² This includes court orders by consent - where the parties reach agreement between themselves, including with the assistance of a family dispute resolution practitioner or a lawyer, and apply to the court to make the parenting order, so that it is legally binding. Otherwise, the vast majority of parents agree parenting arrangements between themselves. This may be through an informal (not legally enforceable) 'parenting plan', which may be established with the assistance of a family dispute resolution practitioner or lawyer.

Where parenting orders are made by a court:

- orders for no contact with one parent are rare (3% of parenting orders determined by courts)
- court orders are less likely to result in fathers having no contact with their children (3% of parenting orders determined by courts) compared to the separated population generally (9%), and

⁵¹ Australian Law Reform Commission, *Family law for the future – An inquiry into the family law system*. Report No 135, 2019, p 39.

⁵² Australian Institute of Family Studies, *Parenting arrangements after separation*. 2019, pp 1, 4, 5.

- arrangements where children spend the majority of their time with their father are more common (10-19% of parenting orders determined by courts) compared to the separated population generally (2%).⁵³

Contravention processes

Enforcement of family law orders, particularly parenting orders, is a complex and contentious issue, with no easy answers or one-size-fits-all solution. Family law matters are different in nature from other civil law matters, particularly where children are involved. Courts considering enforcement actions may be faced with difficulties in balancing the interests of upholding orders of the court, fulfilling the expectations of litigants, instituting appropriate deterrents for non-compliance and making decisions in a child's best interest.

Enforcement of interim orders is also a significant issue, particularly in matters which may take a number of years to resolve on a final basis. In these cases, interim orders can be in place for 12 months or more, and non-compliance can have a serious impact on relationships between the parties and the child during the course of proceedings.

In submissions to the ALRC, some stakeholders proposed that a contravention or enforcement list in the courts would assist with a timely response to issues that arise in respect of implementation of court orders. A review of existing contravention lists found that this approach helps to significantly reduce the number of contravention applications proceeding to a judge.⁵⁴ The ALRC has suggested that the use of contravention lists should be proposed as best practice as part of the recommended joint Practice Note on Case Management (recommendation 34).⁵⁵

Whilst the department considers that support services are a key part of addressing enforcement and compliance, streamlining enforcement processes for those matters requiring court intervention could have a range of benefits. These include reducing the time and cost to parties involved in enforcing family law orders and minimising the flow-on effects of repeated non-compliance on the safety, health and wellbeing of the parties and children involved in the matter.

⁵³ Australian Institute of Family Studies, *Parenting arrangements after separation*. 2019, pp 1, 5.

⁵⁴ Australian Law Reform Commission, *Family law for the future – An inquiry into the family law system*. Report No 135, 2019, pp 316-7.

⁵⁵ *Ibid*, p 316.

6. Access and use of the federal family courts

The department acknowledges the difficulties experienced by those families who find themselves in the family law courts. These families can face high legal costs, lengthy delays, complex and adversarial processes, and safety concerns. Improving the structure and functionality of the family law courts is an important step in addressing accessibility challenges faced by those who instigate family law proceedings.

Court Reform

The often negative experience of users in the family law courts has been a focus of earlier reviews and the Government has acknowledged the need for systemic change in the family courts for some time. On 5 December 2019, the Government introduced Bills in Parliament to bring together the Family Court of Australia and the Federal Circuit Court of Australia, to be known as the Federal Circuit and Family Court of Australia (FCFC). If these Bills are passed into law, the FCFC will resolve the existing split-court problem by establishing a single point of entry for first instance federal family law matters. The FCFC will also improve the experience of court users by enabling consistent court rules, case management processes, forms and procedures, which will mean a reduction in the delays, confusion and cost experienced by families engaged with the court system for family law matters.

Some commentators suggest that these reforms will abolish the Family Court, resulting in a loss of judicial specialisation and a stand-alone specialist court. This is not correct. The court reform Bills currently before the Parliament clearly provide that the Family Court will continue in existence as the FCFC (Division 1) and the Federal Circuit Court will continue in existence as the FCFC (Division 2). The FCFC (Division 1) will retain its appellate jurisdiction, with all FCFC (Division 1) judges able to hear family law appeals either as a single judge or as part of the Full Court. Further, the Bill provides that regulations may prescribe the number of FCFC (Division 1) judges. The Attorney-General has committed to prescribing a minimum of 25 judges, as previously recommended by the Semple Report.⁵⁶

There will be no loss of specialisation as a result of the reforms, with existing judges of the Family Court and Federal Circuit Court transitioning into the new court structure. The Bills will strengthen the appointment criteria for new judges who are expected to hear family law matters, providing that a person is not to be appointed as a judge to either Division unless the person is a suitable person to deal with family law matters, including matters involving family violence. Additionally, it is a misconception that the Federal Circuit Court does not have family law expertise and specialisation. The Federal Circuit Court currently hears approximately 90% of all federal family law matters, including a great number of highly complex parenting and property matters. Consistent with this

⁵⁶ Des Semple & Associates, *Future governance options for federal family law courts in Australia - Striking the right balance*. 2008, p 9.

current division of family law matters, the FCFC (Division 2) will be the point of entry to the federal family law courts for first instance family law and child support matters.

The FCFC Bills include case management provisions for the FCFC which will address, in part, the ALRC's recommendations 30 and 31. The FCFC Bills provide that the overarching purpose of the family law practice and procedure provisions within the legislation is to facilitate the just resolution of disputes according to the law and as quickly, inexpensively and efficiently as possible. Parties will be required to act consistently with the overarching purpose, and courts will have the power to make an order that a party's lawyer bear costs personally if the lawyer fails to take account of the duty or assist the party to comply with the duty.

The Committee's terms of reference include consideration of 'any other reform that may be needed to the family law and the current structure of the Family Court and the Federal Circuit Court', beyond the proposed amalgamation of the courts (term of reference (c)). The department notes that the Federal Circuit Court and Family Court are already considering and progressing a range of further initiatives to complement the FCFC Bills, including through the work of the joint Rules Harmonisation Working Group to develop a common set of rules, forms and case management processes. These reforms will ensure consistency in the way matters are dealt with by the federal family law courts, reducing confusion for Australian families and make the family law court system simpler and more accessible for those same families to use.

The Government's court reform model should be properly progressed and implemented to ensure that structural inefficiencies in the federal family courts are addressed and the significant anticipated benefits of the reforms are realised before any consideration of further changes to improve the court experience for users is undertaken.

Issues for further consideration

High legal costs, addressed earlier in this submission, are another factor which increases the emotional and financial stresses felt by families experiencing the court system. The majority of family law matters which are heard at court involve additional factors that increase the complexity of the matter and affect the wellbeing of the parties, including family violence, drug and alcohol abuse, amongst other issues. Noting the Committee's interest in the impacts of family law proceedings on the health, safety and wellbeing of children and families involved in those proceedings (term of reference (f)), the department considers that the supports available to families prior to, during, and after court proceedings warrant particular consideration.

In submissions to the ALRC inquiry, stakeholders raised concerns about the current mechanisms that exist for involving children in proceedings, namely the appointment of an Independent Children's Lawyer and the preparation of family or expert reports. In regards to both of these mechanisms, stakeholders noted that children's views were often 'filtered' as part of professionals' broader

assessment of the circumstances and the best interests of the child.⁵⁷ In its Discussion Paper, the ALRC canvassed a proposal to establish a new professional role, titled 'Children's Advocate', to support the participation of children in proceedings.⁵⁸ However, the proposal received mixed feedback in further submissions and was not included as a final recommendation. There would be benefit in further exploration of opportunities to better support children's participation in family law proceedings.

⁵⁷ Australian Law Reform Commission, *Family law for the future – An inquiry into the family law system*. Report No 135, 2019, pp 375-6.

⁵⁸ Australian Law Reform Commission, *Review of the Family Law System – Discussion paper*. 2018, p 170.

7. Family law workforce

An effective family law system relies on the competency and professionalism of the people working within it. There are many hard-working and dedicated professionals within the family law system who help families resolve their matters in the least harmful way possible. However, there have been reports of others who intentionally exacerbate conflict for their own benefit, or who do not have the expertise or skills required to assist families in a safe, child-centred, or professional manner.

Professional competency

The Committee's terms of reference include consideration of avenues to improve the performance and monitoring of professionals involved in the family law system (term of reference (h)). This was also a key focus of the ALRC's inquiry, which received a range of submissions raising concerns about the competency of various professionals within the family law system.⁵⁹ The ALRC's Final Report contained three specific recommendations relating to the competency of family law professionals which the Government is considering, including:

- that the Law Council of Australia work with state and territory regulatory bodies to develop consistent requirements for family lawyers to complete at least one unit of continuing professional development on family violence annually (Recommendation 52).
- that the department develop a mandatory national accreditation scheme for private family report writers (Recommendation 53).
- that the Family Law Act be amended to require Children's Contact Centres to be accredited (Recommendation 54).

In addition, the Council of Attorneys-General is considering measures to improve the family violence competency of professionals across the family violence and family law systems.

Accreditation and professional competency measures can go some way towards ensuring a professional and accountable workforce, but there is also a role for professional oversight to provide safeguards and avenues for redress where appropriate.

Consumer redress and regulation of the legal profession

An area where further oversight may be appropriate is the regulation of legal practitioners, particularly in relation to consumer complaints and redress. Knowledge imbalances often exist between legal practitioners and the consumers of legal services, leaving clients vulnerable to

⁵⁹ Australian Law Reform Commission, *Family law for the future – An inquiry into the family law system*. Report No 135, 2019, p 420.

exploitative practices such as overcharging and negligence. This appears to particularly affect clients within the family law system – across all jurisdictions, the majority of complaints made to legal services regulatory bodies relate to areas of family law or probate.⁶⁰ It is therefore essential that consumers of legal services have a visible, accessible and effective complaints avenue available to them.

Currently, individuals who are unhappy with the costs charged by their lawyer, their lawyer's conduct, or the quality of their lawyer's work can make a complaint to the relevant state or territory legal services regulatory body. However, lay people often do not have the legal literacy or knowledge to detect when their lawyer had acted unethically or incompetently, and existing regulatory bodies have limited powers to formally discipline lawyers or award compensation to clients. Further, the threshold for disciplinary action against legal professionals is high when compared with other professions and areas of consumer protection. A consumer must prove that a lawyer's behaviour amounts to professional misconduct or unsatisfactory professional conduct in order to obtain redress or trigger disciplinary action.⁶¹ In contrast, a consumer who purchases a product which is not 'fit for purpose' is entitled to a refund or an exchange under Australian consumer law, and medical practitioners are subject to disciplinary action based on whether such action is needed to protect the public.⁶² These are both standards which are more easily deciphered and accessible to most users of legal services. The high bar to consumer redress for legal services is compounded by the fact that the legal profession is itself regulated by legal professionals, whose standards for professional conduct may not align with the expectations of lay-people.

In 2014, the Productivity Commission made a number of recommendations relating to the expansion of the powers afforded to legal regulatory bodies, noting that these relate to state and territory legislation.⁶³ Recommendations which could go some way to addressing the above issues, but are yet to be uniformly realised across all jurisdictions, include:

- providing legal regulatory bodies with the power to take disciplinary action for consumer matters, including the ability to make orders requiring compensation to be paid to the client and work to be redone at no charge. A failure to comply with these orders should itself be capable of amounting to a breach of professional conduct and subject to disciplinary action.
- providing legal regulatory bodies with the power to suspend or place restrictions on a lawyer's practicing certificate while serious allegations of misconduct are being investigated.
- ensuring legal regulatory bodies take a consumer-centred, public protection focus through explicit legislative objectives, public reporting obligations and the incorporation of lay-people's views when determining complaints.

⁶⁰ Productivity Commission, *Access to justice arrangements*. 2014, p 219.

⁶¹ *Ibid*, p 228.

⁶² Australian Health Practitioner Regulation Agency, *Concerns about practitioners*. Melbourne, 2019. <www.ahpra.gov.au/Notifications.aspx>

⁶³ Productivity Commission, *Access to justice arrangements*. 2014, p 220-34.

The Committee may wish to consider regulation of the legal profession, including the relevant recommendations of the Productivity Commission.