Australian Government
Attorney-General's Department

# Attachment B: Relevant Law and Background Information

## Introduction

This document provides factual information about the relevant law, policies, procedures and services currently in place that relate to each of the Terms of Reference of the Joint Select Committee inquiry into Australia's Family Law System (the inquiry).

Term of reference (k) – any related matters – has been excluded, but the department can provide information about any other specific topics not otherwise covered below on request.

## Brief history of family law reform

The family law system is one that has undergone significant review and reform since the commencement of the *Family Law Act 1975* (Cth) (the Family Law Act). Key tranches of reforms of particular relevance to the Committee's terms of reference were introduced in 2006 and 2011. These are summarised below.

### 2006 reforms

In 2006, the then Government implemented changes to the Family Law Act through the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth), and significant changes to the family relationship services system. In broad terms, the aim of the reforms was to bring about "generational change in family law" and a "cultural shift" in the management of parental separation, "away from litigation and towards co-operative parenting". The changes were partly shaped by the recognition that the focus must always be on the best interests of the child and that many of the disputes over children following separation are driven primarily by relationship problems rather than legal ones and are often better suited to community-based interventions (AIFS, 2006 evaluation).

The policy objectives of the 2006 changes to the family system included encouraging greater involvement by both parents in their children's lives after separation, and also protecting children from violence and abuse; and helping separated parents agree on what is best for their children (rather than litigating), through the provision of useful information and advice, and effective dispute resolution services.

The changes to the service delivery system included the establishment of 65 Family Relationship Centres (FRCs) throughout Australia, the Family Relationship Advice Line (FRAL) and Family Relationships Online (FRO), funding for new relationship services, and additional funding for existing relationship services.

The legislative changes comprised four main elements that:

- required parents to attend family dispute resolution (FDR) before filing a court application, except in certain circumstances, including where there are concerns about family violence and child abuse (section 60I of the Family Law Act)
- placed increased emphasis on the need for both parents to be involved in their children's lives after separation through a range of provisions, including the introduction of a presumption in favour of equal shared parental *responsibility*, with a linked obligation on courts to consider making orders for equal or substantial and significant *time* when orders for equal shared parental responsibility pursuant to the presumption were made
- placed greater emphasis on the need to protect children from exposure to family violence and child abuse, and
- introduced Division 12A of Part VII of the Family Law Act, which enshrines a series of powers, duties and obligations that are intended to support court proceedings in relation to children's matters being conducted in a less adversarial manner.

## 2011 reforms

In 2011, the then Government introduced the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth) to improve the family law system's response to family violence. It aimed to better support the disclosure of concerns about family violence, child abuse and child safety by parents engaged in the family law system, and to encourage professionals to respond to disclosures in a manner that prioritises protection from harm.[1]

The reforms responded to a number of reports indicating that the Family Law Act was not adequately protecting children and other family members from family violence and child abuse.[2] The Act was amended to, among other things:

- broaden the definitions of "family violence" and "abuse" (section 4AB and section 4(1))
- clarify that in determining the best interests of the child, greater weight is to be given to the protection of children from harm where this conflicts with the benefit to the child of having a meaningful relationship with both parents after separation (section 60CC(2A))
- improve reporting requirements and obligations with a view to ensuring the family courts would have better access to evidence of abuse and family violence
- amend the additional best interests consideration relating to family violence orders (section 60CC(3)(k)); and
- amend or repeal provisions that might have discouraged disclosure of concerns about child abuse and family violence.

[1] Australian Institute of Family Studies, Evaluation of the 2012 Family Violence Amendments to the *Family Law Act 1975*
[2] See the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011: Explanatory Memorandum, 2010-11,

# Relevant law and background information on each term of reference

## Term of reference (a)

**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;**

### Current information sharing initiatives

As part of the Fourth Action Plan of the *National Plan to Reduce Violence against Women and their Children 2010–2022*, the Australian Government has committed funding to improve information sharing between the federal family law system and the state and territory based child protection and family violence systems. This will be achieved by trialling the placement of state and territory child protection and policing officials in family law courts across Australia to facilitate information exchange; and the scoping of technological solutions to develop a national information sharing platform.

Under this pilot program, the co-located officials will perform a variety of functions to bridge jurisdictional gaps and facilitate the timely sharing of critical information in order to identify and respond to child welfare and family safety concerns in family law proceedings. It is also intended to enhance cooperation, collaboration and mutual understanding between the different systems. The pilot program is based on successful existing co-located child protection practitioner models in Victoria and Western Australia. In terms of how information is currently shared between child protection agencies and the family law courts, section 69ZW of the Family Law Act is frequently used. However, there are limitations to the sharing of information under this provision in a policing context, therefore future legislative amendments to this section may need to be considered to improve information sharing practices.

Through the Family Violence Working Group of the Council of Attorneys-General, the Australian Government is also developing a national framework for the sharing of information between the family law, child protection and family violence systems. The framework will examine ways in which legal barriers to information sharing can be broken down and information sharing protocols can be developed, enhanced or implemented. The framework will provide national agreement on how information can best be shared and to improve collaboration across different jurisdictions in order to ensure that decisions about child welfare and family safety are made in light of all relevant information.

### Family violence orders

Under Australia's federal system of government, family violence orders (FVOs) (also known as domestic violence orders, apprehended violence orders, intervention orders, or restraining orders) are made under state or territory laws and proceedings for FVOs are consequently heard in state or territory courts (with the exception of Personal Protection Injunctions – see below). A FVO is a civil court order, issued by the court to prohibit certain behaviours and protect people in domestic and family violence situations. A breach of these orders is a criminal offence. All FVOs issued in an Australian state or territory from 25 November

2017 are automatically recognised and enforceable across Australia, under the National Domestic Violence Order Scheme.

The relevant legislation providing for the issue of FVOs in each state and territory is as follows:

| **Jurisdiction** | **Legislation** |
|---|---|
| New South Wales | *Crimes (Domestic and Personal Violence) Act 2007* |
| Victoria | *Family Violence Protection Act 2008* |
| Queensland | *Domestic and Family Violence Protection Act 2012* |
| Western Australia | *Restraining Order Act 1997* |
| South Australia | *Intervention Orders (Prevention of Abuse) 2009* |
| Tasmania | *Family Violence Act 2004* |
| Australian Capital Territory | *Family Violence Act 2016* |
| Northern Territory | *Domestic and Family Violence Act 2007* |

Section 60CC of the Family Law Act provides that, when making a determination on what is in the best interests of a child, the court may consider any relevant inferences that can be drawn from a FVO which applies to the child or a member of the child's family. When considering the FVO, the court is to take into account the circumstances in which the order was made, the evidence admitted in proceedings, any findings made by the court, or any other relevant matter.

Section 60CG requires the court, to the extent that it is possible to do so consistently with the child's best interest being the paramount consideration, ensure that the orders it makes are consistent with any FVOs and does not expose a person to an unacceptable risk of family violence. Section 68P places positive obligations on the court where the court makes a specific order or injunction that is inconsistent with an existing FVO, including specifying in the order or injunction that it is inconsistent, and providing a copy of the order or injunction to the relevant court which made the FVO and the Police Commissioner of the state or territory in which the person protected by the FVO resides.

Section 68Q provides that where an order or injunction referred to in section 68P is made and that order or injunction is inconsistent with an existing FVO, the FVO is invalid to the extent of the inconsistency.

## Personal Protection Injunctions

The family law courts and the federal circuit courts are able to issue personal protection injunctions (PPIs) under sections 68B and 114 of the Family Law Act. PPIs may be issued for the personal protection of a child, a parent of a child, a person with whom the child has to live or spend time with under a parenting order, a person who has parental responsibility for the child, or a party to a marriage.

PPIs are useful to persons who are already before a family court, are in need of protection, and do not have an existing FVO. The availability of a PPI means that that these persons would not be required to initiate separate proceedings in a state or territory court for a protection order, but could apply for a PPI in the family law court in which their other matter is already being heard. This reduces the need for parties to navigate multiple courts and systems to address their legal needs, which can create delay, confusion and prolonged exposure to risks of violence.

Currently, PPIs are enforceable through civil procedures only. The Government intends to criminalise breaches of PPIs once enforcement arrangements are agreed with states and territories. Commonwealth,

state and territory police, justice and courts senior officials have been working together through the National Personal Protection Injunction Working Group to consider options for ensuring that family law PPIs can be effectively enforced by state and territory police.

Under section 114AB of the Family Law Act, a person is precluded from applying for a PPI if there is already a FVO in place in relation to the same matter.

Where a family law court makes a parenting or recovery order, or grants an injunction, that expressly or impliedly requires or authorises a person to spend time with a child, and this is inconsistent with an FVO, section 68P places a number of obligations on the court, including:

- to specify in the order or injunction that it is inconsistent with an existing FVO, and
- give a detailed explanation in the order or injunction of how the contact that it provides for is to take place.

The Family Law Act, under section 68R, also provides state and territory courts with the power to revive, vary, discharge or suspend a PPI where the state or territory court is making or varying a FVO. This allows the state and territory courts to amend the PPI to ensure that the PPI is consistent with the orders issued under the FVO.

## Term of reference (b)

**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;**

A deliberate failure to provide truthful evidence in family law proceedings, on a matter material to judicial proceedings could constitute the criminal offence of perjury under the *Crimes Act 1914* (Cth).

The Family Law Act and relevant rules of court impose a duty on parties to provide full and frank disclosure of information, and provide the court with a range of powers to make certain findings, orders and impose penalties where a party fails to provide truthful and complete evidence, including:

- contempt of court, the offence of which includes punishment by imprisonment, fines or both
- making of cost orders
- varying or setting aside orders
- staying or dismissing part or all of a case, and
- referring to the Australian Federal Police to investigate perjury.

### General duty to disclose

Rule 13.01 of the *Family Law Rules 2004* provides that parties have a duty to give full and frank disclosure of all information relevant to the case, in a timely manner. This duty of disclosure includes the disclosure of financial circumstances, the disclosure and production of documents and the disclosure of information by answering specific questions in certain circumstances. The *Federal Circuit Court Rules 2001* provide a similar duty of disclosure (rule 24.03). Failure to comply with the general duty of disclosure may result in the court imposing a punishment for contempt of court. If the disclosure relates to a document, rule 13.14 of the Family Law Rules provides that the court may make an order for costs or stay or dismiss all or part of the party's case. In addition to the court's powers relating to contempt under section 112AP of the Act, it is an offence for a party to make a statement or sign an undertaking that the party knows, or

should have reasonably known, is false or misleading in a material particular (Rule 13.15(2), Family Law Rules).

## Contempt of court

Section 112AP of the Family Law Act states that the court has a general power to punish a person for contempt of court which refers to behaviour that interferes with the administration of justice. Rule 21.04 of the Family Law Rules provides examples of actions that may be contempt, including disrespect or other misbehaviour in the court. Contempt of court may be punishable by imprisonment, or fine, or both. The relevant standard of proof for contempt is the criminal standard of proof, beyond a reasonable doubt.

Cost orders

Section 117 of the Family Law Act provides the court the broad power to award costs where it is of the opinion that there are circumstances which justify it doing so, which includes consideration of the conduct of the parties to the proceedings. Examples of conduct that may lead to costs orders include: giving false or misleading evidence, especially where extra time and expense is occasioned to disprove the evidence;[3] failure of a party to provide proper information or obstruction in the collection of material;[4] and providing a distorted estimate of the value of property.[5]

## Varying or setting aside orders

The family courts have the power to vary or set aside certain orders in certain circumstances where it is satisfied that there has been fraud (Rule 17.02 of the Family Law Rules and Rule 16.05 of the FCC Rules), or a miscarriage of justice, including by perjury or by the giving of false evidence.[6]

## Perjury

Section 35 of the *Crimes Act 1914* (Cth) provides that a person commits a criminal offence if they knowingly give false testimony in a judicial proceeding, or for the purpose of instituting a judicial proceeding and the testimony touches a matter material to that proceeding. The maximum penalty for the offence is imprisonment for 5 years. The burden of proof for a criminal matter requires the charge to be proven *beyond reasonable doubt*.

Where there is an allegation of perjury, the family courts may refer the allegation to the Australian Federal Police (AFP) for investigation. The family courts do not independently investigate such allegations, as they are criminal, not civil, matters. The AFP may refer a matter of perjury to the Commonwealth Director of Public Prosecution for prosecution.

## Compliance with and enforcement of orders

As family law matters are civil proceedings, a court cannot take enforcement action without first receiving an application from one of the parties. Applicants may choose to:

- seek a variation of the existing parenting order
- file a 'Contravention application' if a party is seeking an order from the court imposing punishment or other sanctions/consequences against a person who has breached an order.
- file a 'Contempt application' if the party alleges there has been a contempt of court.

[3] *Penfold and Penfold* (1980) FLC 90-800, applying section 117 of the Family Law Act
[4] *Greedy and Greedy* (1982) FLC 91-250, applying section 117 of the Family Law Act
[5] *Talbot v Talbot* (1979) FLC 90-696, applying section 117 of the Family Law Act
[6] This applies to divorce orders (section 58), orders for child or spousal maintenance (sections 66S(3)(d) and 83(2)(c)), orders that alter property interests (sections 79A and 90SN(1)(a)) and financial agreements or termination agreements (sections 90K(1)(a) and 90UM(1)(a)).

Police have no jurisdiction under the Family Law Act to enforce parenting orders unless directed by a court under a Warrant of Arrest issued for contravention of an order or to enforce a Child Recovery Order.

## Variation of orders

A party may apply to the court to vary an existing parenting order. The court, applying the principle in *Rice and Asplund*, will consider whether there has been some change in circumstances that would justify reconsideration of the orders.[7] A party seeking a variation of existing orders must also comply with the compulsory family dispute resolution obligation, unless a relevant exception applies.

Parties, if they can agree between themselves, may also implement a parenting plan even though they have a parenting order in place (section 64D). The orders will be subject to the terms of that subsequent parenting plan. This will, in effect, change the arrangements that are in place under the parenting order without requiring the parties to return to court.

A parenting plan is not a legally enforceable agreement. However, the court will consider the most recent parenting plan in relation to a child when making any future parenting orders (section 65DAB). In exceptional circumstances, the Court may make a parenting order that can only be varied by a subsequent court order (subsection 64D(2)). Parenting plans are a relatively quick, low cost method for updating parenting orders without needing to go to court.

## Contravention applications

A contravention application may be brought against a party to an order, or any other person that prevents compliance by aiding or abetting contravention of the order by a party. Contravention occurs where a person has knowingly failed to comply with the order without reasonable excuse.

In parenting matters, the obligation to attempt family dispute resolution before filing an application in court applies for contravention applications, so parties must attempt family dispute resolution and/or obtain a section 60I certificate before filing their application. An exemption exists where the contravention application is made within 12 months of the date of the original order and there are reasonable grounds to believe the person contravening the order has behaved in a way that shows a serious disregard for his or her obligations under the order.

## Remedies and penalties in relation to parenting orders

Division 13A of Part VII of the Family Law Act sets out the enforcement framework. The enforcement options available to the court depend upon whether there was a reasonable excuse and the seriousness of the contravention. The range of remedies and penalties that may apply include:

- a variation of the existing order
- compensation for time lost with a child
- an award of compensation for reasonable expenses incurred by a party (such as airfares or other tickets purchased but not used)
- a costs order where there is either a series of breaches or a serious disregard of court orders
- a bond for all breaches of orders, and
- in very serious cases, an order for the contravening party to participate in community services or undertake a sentence of imprisonment.

In addition, the court may also make such orders as it considers necessary to ensure compliance with the order that was contravened.

[7] *In the Marriage of Rice and Asplund (1978) 6 FamLR 570.*

### Property orders

The Family Law Act gives the courts powers to make orders imposing sanctions for contravention of orders, or other obligations, that do not affect children, such as property orders. Available sanctions include bonds, fines, or a sentence of imprisonment. The Family Law Rules provide for the enforcement of financial orders or obligations.[8]

## Term of reference (c)

**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;**

### Current structure of the Family Court and the Federal Circuit Court

One challenge in family law is that, for those matters that do come to court, there are two different federal family law courts – the Federal Circuit Court, in which approximately 89% of federal family law matters are filed, and the Family Court. The two separate courts have separate processes and procedures for dealing with family law matters.

The Family Court of Australia (Family Court) is a superior court of record established by Parliament in 1975 under Chapter III of the Constitution. The Court operates under the *Family Law Act 1975* and is responsible for the resolution of more complex family disputes.

The Federal Circuit Court of Australia (Federal Circuit Court) was established by the *Federal Circuit Court of Australia Act 1999* as an independent federal court under Chapter III of the Australian Constitution. The purpose of the Federal Circuit Court is to provide a simple and accessible alternative to litigation in the Family Court and the Federal Court of Australia (Federal Court) and to provide registry services to assist the respective courts to achieve their stated purpose.

The jurisdiction of the Federal Circuit Court includes family law and child support and the following areas of general federal law: administrative law, admiralty law, bankruptcy, consumer law (formerly trade practices), human rights, industrial, intellectual property, migration and privacy. The Federal Circuit Court shares these jurisdictions with the Family Court (in respect of family law and child support) and the Federal Court (in respect of general federal law).

### Structure of the proposed Federal Circuit and Family Court of Australia

The Government has committed to structural reform of the federal family courts as a targeted measure to assist those families whose matters are not able to be resolved before entering the family court system. The Government is confident that its proposed court reform will increase efficiencies and reduce delays which will lead to a quicker resolution of matters before the family courts for the benefit of Australian families.

The *Federal Circuit and Family Court of Australia Bill 2019*, and the *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2019*, would bring the Federal Circuit Court and the Family Court together into an overarching, unified administrative structure to be known as the Federal Circuit and Family Court of Australia (FCFC). The structural reforms facilitated by the Bill would create a consistent pathway for Australian families in having their family law disputes dealt with in the federal courts. There will be a single set of rules, procedures, case management and practices, to assist families to navigate the family court system during a period of great stress in their lives.

[8] *Family Law Rules 2004* (Cth) Chapter 20

The FCFC would comprise two divisions. The Federal Circuit and Family Court of Australia (Division 1) (FCFC (Division 1)) would be a continuation of the Family Court. The Federal Circuit and Family Court of Australia (Division 2) (FCFC (Division 2)) would be a continuation of the Federal Circuit Court.

The FCFC would provide a single point of entry into the family law jurisdiction of the federal court system. Matters would be filed in the FCFC (Division 2) and then transferred to the FCFC (Division 1) as appropriate. The FCFC would operate under the leadership of one Chief Justice, supported by one Deputy Chief Justice, with each holding a dual commission to both Division 1 and Division 2. The Deputy Chief Justice would hold a dual commission as Deputy Chief Judge (Family Law) of the FCFC (Division 1). There would also be a second Deputy Chief Judge (General and Fair Work) of the FCFC (Division 2).

The Federal Circuit Court's existing general federal law jurisdiction and fair work jurisdiction would be preserved in FCFC (Division 2).

### Other proposed reforms

In March 2019, the Australian Law Reform Commission (ALRC) released its Final Report *Family Law for the Future – An Inquiry into the Family Law System*, which contained the following recommendation relating to the structure of federal family courts:

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

The Government is carefully considering the ALRC's recommendations. Implementation of recommendation 1, even if agreed by all states and territories, and aside from issues with this recommendation, would be a long-term process. The Government is prioritising reforms that will deliver immediate benefits to families and that will provide a safer and more efficient family law system.

## Term of reference (d)

**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;**

### Costs provisions under the Family Law Act and Rules

The general rule in family law proceedings is that each party bears his or her own costs (subsection 117(1)).

Section 117 of the Family Law Act provides a broad power for the court to make such orders as to costs and security of costs, as the court considers just. The Family Law Rules and the Federal Circuit Court Rules

specifically provide for cost orders to be made against lawyers personally, including in circumstances of improper conduct or undue delay.[9]

## Family law proceedings – the legal framework

Property settlement proceedings are dealt with under the Family Law Act. The majority of matters are dealt with in the Federal Circuit Court. The more complex matters are dealt with in the Family Court of Australia. In Western Australia the Family Court of Western Australia and the Magistrates Court of Western Australia deal with all family law proceedings in that State.

For **married couples,** property, spousal maintenance and maintenance agreements are provided for in Part VIII of the Act. Financial agreements entered into before, during and after marriage, including pre-nuptial agreements, are provided for in Part VIIIA of the Act.

Financial matters relating to **de facto couples** in all jurisdictions except WA, including property settlements, maintenance and financial agreements, are dealt with in Part VIIIAB of the Act. The financial matters relating to separating WA de facto couples are dealt with under WA state law.

Superannuation interests, including superannuation splitting, in relation to married and de facto couples – except for de facto couples in WA - are dealt with in Part VIIIB of the Act.

Most separating couples agree on how to divide their property without going to court, either independently, through family dispute resolution or through arbitration. Besides making an informal agreement about how to divide property, separating couples can:

- enter into a financial agreement (which can also include an agreement about how to split their superannuation interests as well as other assets such as a house or cars)
- file consent orders with the court (which set out the agreement and are enforceable), or
- if none of the options above are suitable, litigate their property settlement in court.

Family law courts may make two types of property orders: a declaration of existing interests in property and consequential orders giving effect to that declaration (section 78; section 90SL); and an order altering the property interests of parties, in the event that it is just and equitable to do so (section 79; section 90SM). In the latter case, the court must consider the contributions of each party and their future needs.

Measures that are currently being progressed to improve the timely, efficient and effective resolution of property disputes in family law proceedings include:

- Small claims property pilot
  - $5.9 million over three years is being provided to the family courts and the department to conduct and evaluate a two year trial of a simpler and quicker process for distributing property of less than $500,000 between parties following a relationship breakdown. The pilot will run from January 2020 to December 2021.
  - The pilot is aimed at reducing the cost to families of resolving small property disputes, leaving more in the asset pool to be distributed between the parties.
- Increased property mediation
  - $13 million of new on-going funding provided from 1 July 2019 for Family Relationship Centres to undertake family law property mediation.
  - These mediation services will support families to reach agreement on their property disputes through mediation, helping them recover financially more quickly after separation.
- Legally-assisted property mediation pilot
  - $10.3 million provided over three years for Legal Aid Commissions in each state and territory to conduct a two year trial of lawyer-assisted property mediation for matters

[9] *Family Law Rules 2004* (Cth), r 19.10; *Federal Circuit Court Rules 2001* (Cth), r 21.07.

with a property pool of up to $500,000, excluding debt. The pilot will run from January 2020 – December 2021.
- This trial will support separating families who require legal advice to mediate and reach agreement on a property settlement without going to court.

## Term of reference (e)

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

The Australian Government funds a range of Family Law Services to assist separated and separating families with their parenting, property and related matters. These services provide information and advice, family dispute resolution (including legally-assisted dispute resolution), supervised contact and changeovers for children, simple legal advice (through the Family Relationship Advice Line), counselling, parenting education programs, and support programs for children.

Family dispute resolution services help parents to focus on the needs of their children, instead of on the conflict with the other parent. These services are well equipped to help families with complex needs, including those with family violence issues. For those who are unable to access face to face services, the Family Relationship Advice Line provides online and telephone based family dispute resolution.

A family dispute resolution process involves a number of steps:
- an intake and assessment process
- a group session/s for parents to help them to focus on the needs of their children
- individual interviews with each parent to help them prepare for the joint session, including to identify issues and options that could be considered in a parenting agreement
- a joint session conducted face-to-face (with parents in the room), shuttle (with each parent in a separate room), or using technology such as a telephone, video, and/or online.

Parenting agreements reached through family dispute resolution may be in the form of a Parenting Plan and may deal with a range of issues, for example, the living arrangements for the child, how and when the child will communicate with family members, the arrangements for the handover of the child, and where the child will attend school.

Family dispute resolution is conducted by accredited Family Dispute Resolution Practitioners (FDR practitioners). FDR practitioners are neutral and independent of the parties in dispute. In assessing the suitability of parties to undertake family dispute resolution, FDR practitioners may consider whether parties would be best assisted by undertaking legally-assisted family dispute resolution. Lawyers may be engaged from Community Legal Centres, Legal Aid Commissions or parties may engage private lawyers.

Parents who are in high conflict may need ongoing, intensive support through a Parenting Orders/Post Separation Cooperative Parenting Program. A case worker will work closely with the family to help parents understand the impact of their conflict on their children, and to help them to focus on their children's needs.

Many families need help with managing contact arrangements, including where there are safety concerns. Government funded Children's Contact Services provide a safe, reliable and neutral place to assist parents with the changeover of children, or to supervise visits between children and a parent. These services work closely with children to help them to establish and maintain a relationship with their other parent and family members. A court may order a family to use these services.

Family breakdown can be a difficult time and many people will need help with managing relationship issues, conflict and change. Family Law Counselling provides one-off or ongoing therapeutic help to any member of a family. The Supporting Children after Separation Program provides specialised support for children to help them to deal with the breakdown of their parents' relationship and to be able to participate in decisions that impact them.

Services conduct an intake, screening and assessment process to ensure the needs of the family are well understood and that any safety issues are identified and able to be managed. Services must have collaborative arrangements with other organisations to ensure families are linked to other services that may assist them with their other needs (for example, drug and alcohol issues, problem gambling, or legal issues). These processes are required by the Grant Opportunity Guidelines that apply to each service type.

The Australian Government also provides funding for legal assistance services which help vulnerable people facing disadvantage who are unable to afford private legal services to engage effectively with the justice system, including the family law system, in order to address their legal problems.

The Australian Government provides funding to primarily four types of providers for the delivery of front-line legal assistance services: Legal Aid Commissions, Community Legal Centres, Aboriginal and Torres Strait Islander Legal Services and Family Violence Prevention Legal Services.

- Legal Aid Commissions are independent statutory bodies established under state and territory legislation. Legal Aid Commissions determine eligibility for their legal services and the extent of assistance they provide in individual cases. Applications for grants of legal aid are means and merits tested against guidelines determined by each Legal Aid Commission.
- Community Legal Centres are not for profit, community-based organisations that provide free legal advice, casework and information and a range of community development services to their local or special interest communities. Community Legal Centres have the discretion to determine the extent of assistance they will provide in individual cases.
- Aboriginal and Torres Strait Islander Legal Services are community based organisations that deliver culturally appropriate, accessible legal assistance services to Aboriginal and Torres Strait Islander people. Aboriginal and Torres Strait Islander Legal Service provide legal assistance services in the areas of criminal, family and civil law in addition to undertaking community legal education, prisoner through-care and law reform and advocacy activities.
- Family Violence Prevention Legal Services provide specialist, culturally safe legal services and support to Aboriginal and Torres Strait Islander victims and survivors of family violence across Australia. Family Violence Prevention Legal Services provide frontline legal assistance services relating to family violence law, child protection, family law and assistance to victims of crime, early intervention, prevention and community legal education activities.

These four providers are collectively referred to as the legal assistance sector and provide a continuum of services which include information, discrete legal assistance, non-legal support services, duty lawyer services, legal representation in courts and tribunals, community education and community legal education and legal advocacy[10].

Commonwealth-funded legal assistance services relating to family law matters are prioritised to:

- family violence matters
- matters where the safety or welfare of children are at risk
- matters involving complex issues about the living arrangements, relationships and financial support of children

[10] See the *National Legal Assistance Data Standards Manual* for specific definition of the different types of legal assistance services.

- assisting people with property settlement matters if they are experiencing financial disadvantage or are at risk of homelessness, and
- the representation of children in family law proceedings.

Commonwealth-funded legal assistance services are also prioritised towards 11 national priority client groups, which includes people experiencing, or at risk of, family violence, single parents, children and young people, Aboriginal and Torres Strait Islander people and people who are culturally and linguistically diverse.

## Term of reference (f)

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

### Children's wellbeing

The strongest single predictors of child wellbeing outcomes (whether in separated or non-separated families) are family violence and inter-parent conflict. Both have direct negative effects on child wellbeing, as well as indirect effects through their impact on parenting and parent mental health.[11] Ongoing conflict and tension between parents has consistently been shown to have a negative impact on children's adjustment.[12] There are clear associations between persistent negative, hostile behaviours between parents and patterns of anxiety, depression and disruptive behaviours in childhood and depression, suicidal ideation and marijuana use in older adolescents.[13] Conversely, if parents can cooperate, communicate and problem-solve effectively, this has beneficial effects on child wellbeing.[14]

While research has focused on the negative consequences of parental separation for children, there are circumstances where it has a beneficial effect. Research has shown that parental separations that remove children from home environments marked by chronic discord and violence appear to result in improvements rather than decrements in wellbeing.[15]

A range of research has been conducted into children's perceptions of the family law system, and views put forward by entities including relevant national, state and territory children's commissioners.[16]

### Family Advocacy Support Services

The Australian Government provided $18.5 million over three years (2016- 2019) for legal aid commissions to establish Family Advocacy and Support Services (FASS) in family law court registries and other locations across Australia. The Government has committed a further $22.6 million to extend the existing FASS for three years from 1 July 2019.

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[11] CHILD WELLBEING AFTER PARENTAL SEPARATION A Position Statement prepared for the Australian Psychological Society by the APS Public Interest Team July 2018 p5

[12] https://aifs.gov.au/cfca/2014/09/04/caring-children-after-separation-or-divorce

[13] Child Wellbeing After Parental Separation: A Position Statement prepared for the Australian Psychological Society by the APS Public Interest Team, July 2018, p 10

[14] Ibid, p 5

[15] Ibid, p11

[16] For example see:

- National Children's Commissioner, submission 271 to the ALRC review of the family law system Discussion Paper.
- Commissioner for Children and Young People SA – What Children and Young People Think Should Happen When Families Separate, 2018, submission 360 to the ALRC review of the family law system
- Speaking Out About Family Separation - The views of children and young people with experience of separation and the family law system in WA, Commissioner for Children and Young People WA, April 2019 (see also submission 391 to the ALRC review of the family law system)
- Talking with Children and Young People about Participation in Family Law proceedings, ACT Children and Young People's Commissioner, August 2013 (see also submission 87 to the ALRC review of the family law system)
- Australian Institute of Family Studies – Children and young people in separated families: Family Law system experiences and needs, Final Report 2018.

The FASS is an initiative that increases the capacity of duty lawyer services in family law court registries and integrates family violence support services, to help families affected by family violence with matters before the family law courts. Services are operational in all states and territories, at 17 court locations and include outreach to six circuit locations in Western Australia, Tasmania and South Australia.

Both men and women, whether they are an alleged victim or an alleged perpetrator, are eligible for FASS services. Services include assisting with the preparation of applications and notices of risk, developing safety plans, assisting parties to manage matters across the family law, state domestic violence and child protection systems, and ensuring appropriate social support referrals for clients' non-legal matters.

An independent evaluation[17] (October 2018) has found the FASS to be an effective program which fills a gap in both legal and social service provision to family law clients with family violence matters. The FASS received strong positive feedback from the majority of stakeholders consulted in the evaluation, including clients, legal practitioners and the courts. The evaluation found that provision of legal advice to self-represented parties in the family law courts is beneficial for both parties to a matter. Provision of support to self-represented parties impacted positively on their preparedness, the completeness of evidence and contributed to a reduction of court time spent on self-represented matters.

### FASS Dedicated Men's Support Workers

In the 2019-20 Budget, the Government committed $7.84 million over three years for dedicated men's support workers to be engaged in all FASS locations. The dedicated men's support workers provide access to appropriate support services for both alleged perpetrators and male victims of family violence involved in family law proceedings, including parenting programs and men's behavioural change programs.

This measure is intended to improve men's engagement with the court system, contribute to a reduction of court time, and enhance victim safety. Providing social support for men, particularly alleged perpetrators of family violence, can improve justice outcomes for woman and child victims by changing the behaviour of those who choose to use violence and making them accountable for their behaviour.

## Domestic Violence Units and Health Justice Partnerships

To help vulnerable women receive the legal advice and support they need, the Australian Government is providing ongoing funding to 17 community legal service providers to deliver specialist domestic violence units and health justice partnerships in 21 locations around the country plus one online model in Victoria. Specialist domestic violence units provide front-line legal assistance and other holistic support, tailored to each woman's circumstances. The units assist clients to access services such as financial counselling, tenancy assistance, trauma counselling, emergency accommodation, and employment services.

Health justice partnerships involve lawyers working at hospitals and health centres, to ensure women can access legal assistance in a safe location. Lawyers are also training health professionals to recognise when women have legal problems related to domestic violence, and to help facilitate their access to specialist legal assistance safely.

## Family Violence and Cross-examination of Parties Scheme

The *Family Law Amendment (Family Violence and Cross-examination of Parties) Act 2018* commenced on 10 March 2019 and applies to cross-examinations that occur from 10 September 2019. The Act protects victims of family violence in family law proceedings, by banning direct cross-examination in certain circumstances, and requiring instead that cross-examination be conducted by a legal representative.

[17] A copy of the evaluation can be found at: https://www.ag.gov.au/Publications/Documents/fass-final-evaluation-report.pdf

The ban exists because personal cross-examination by an alleged perpetrator can expose victims of family violence to re-traumatisation and affect their ability to give clear evidence.

The ban may apply in any family law proceeding where there is an allegation of family violence between the parties. The ban may be applied automatically or the court may use its discretion to impose a ban.

### Automatic ban

If any of the following circumstances apply, the ban will apply automatically:

- either party has been convicted of, or is charged with, an offence involving violence, or a threat of violence, to the other party.
- a family violence order (other than an interim order) applies to both parties.
- an injunction for the personal protection of either party is directed against the other party under sections 68B or 114 of the Family Law Act.

### Discretionary ban

The court can make an order to ban personal cross-examination even if those circumstances do not apply. The court can decide to ban personal cross-examination itself, or following an application by either party, or an independent children's lawyer.

If the court decides not to ban personal cross-examination, the court must put in place other appropriate protections. The available protections are set out in the Family Violence Best Practice Principles.

### Legal representation

When the ban applies, cross-examination of both parties must be conducted by a lawyer. As part of the Women's Economic Security Package, announced on 20 November 2018, the Government is providing ongoing funding for the Family Violence and Cross-examination of Parties Scheme. Legal aid commissions are funded to legally represent parties subject to the ban on direct cross-examination – the usual means and merits tests do not apply.

## Term of reference (g)

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

Section 60B, which sets out the object and general principles underlying Part VII relating to children, provides that 'children have a right to spend time, on a regular basis, with both their parents and with other people significant to their care, welfare and development (such as grandparents and other relatives)'. The Family Law Act contains several provisions designed to facilitate greater involvement of extended family members in children's lives and ensures that the children's relationship with their grandparents is taken into consideration when a relationship breaks down.

The Act establishes the best interests of the child as the paramount consideration in parenting disputes. The Act focuses on the rights of children and the responsibilities that people with parental responsibility have towards their children, rather than on parental or grandparental rights.

Grandparents and other relatives may be parties to parenting plans under section 63C(2A). If the parents of a grandchild have been able to reach agreement outside of court about parenting arrangements, time spent, or communication, with a grandparent may be included in that parenting plan.

Grandparents are specifically mentioned as being able to apply for a parenting order under section 65C(ba). Therefore, grandparents are able to apply to the court for orders that specify, for example, that:

- they have communication with their grandchild, by skype, facetime, telephone or providing gifts etc
- for their grandchild to physically spend time with them, or
- that the child live with them.

As with other applications to court for parenting orders, grandparents must first attend Family Dispute Resolution. If the Family Dispute Resolution is not successful then a section 60I certificate will be issued allowing the grandparents to proceed to court.

Section 60CC of the Act provides the factors that the court must consider in determining what arrangements are in the child's best interests. A number of these factors explicitly recognise the importance to the child of their relationship with their grandparents. These include:

- the nature of the relationship of the child with a grandparent (section 60CC(3)(b))
- the likely effect of any change of the child's circumstances particularly in relation to separation from a person with whom the child has a relationship, such as a grandparent (section 60CC(3)(d)), and
- the capacity of the parent or any other person, including grandparents, to provide for the child's needs (section 60CC(3)(f)).

Section 13C provides that a court, at any stage in the proceedings, may make an order requiring the parties to attend family counselling, family dispute resolution or another appropriate course, program or other service. Such an order may require the parties to encourage the participation of grandparents or other relatives in attending these services (section 13C(3)).

Section 66F(1)(ba) of the Family Law Act specifies that grandparents may apply for a child maintenance order.

Section 67K of the Family Law Act specifies that grandparents may apply for a location order in relation to a child in cases of child abduction. A location order would require a person, a Department or an appropriate authority of a Commonwealth instrumentality to provide the court with information that they have about the child's location. Section 67T enables grandparents to apply for recovery orders to secure the return of a child in cases involving child abduction.

Aside from these specific provisions, section 69C provides, more generally, that grandparents can institute any other kind of proceedings under the Family Law Act unless a contrary intention appears.

## Term of reference (h)

**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;**

The Government has undertaken the below measures to improve the performance of professionals in the family law system.

### Judicial officers

The Government has funded the National Judicial College of Australia (NJCA) to develop and deliver 'Family Violence in the Court' training for judicial officers. The program commenced in August 2017. In May 2019 the Australian Government, states and territories agreed to co-fund the delivery of this training for judicial officers in all Australian jurisdictions.

The Government has also funded the NJCA develop and deliver a family law training program for state and territory judicial officers. It commenced in 2018. The objective of the training is to enhance the ability of state and territory judicial officers to exercise their jurisdiction under the Family Law Act. There are two training packages – one covering family law parenting matters and one covering family law property matters.

The Government funds the National Domestic and Family Violence Bench Book (the Bench Book), an online educational resource for judicial officers in all Australian jurisdictions, which is delivered jointly by the Australasian Institute of Judicial Administration (AIJA) and the University of Queensland. The Australian

Government, states and territories have agreed to co-fund AIJA to maintain and regularly update the Bench Book until 2021-22.

### Family consultants

In the 2017-18 Budget, the Government provided the Federal Court of Australia with additional resourcing to employ up to 16 family consultants and $180 000 over two years to improve the training available to these consultants. The funding was assigned to the Federal Circuit Court's budget and has been used to develop new induction training and an advanced family violence training program for family consultants.

### Independent Children's Lawyers

The Government has provided funding for the redevelopment of the national training program for Independent Children's Lawyers, to ensure they are receiving appropriate guidance on the role of Independent Children's Lawyers and the necessary skills and competencies required to perform the role. This training was developed by Legal Aid New South Wales on behalf of National Legal Aid, and is a prerequisite for entry to the Independent Children's Lawyer practitioner panel maintained by legal aid commissions in each state and territory.

### Legal practitioners

One of the terms of reference of the Council of Attorneys-General Family Violence Working Group (FVWG) is to identify options for improving the family violence competency of professionals working in the family law and family violence systems. In 2019 the FVWG has been conducting a consultation process on 'options for improving the family violence competency of legal practitioners'. A consultation paper was developed which seeks feedback on family violence capabilities required by legal practitioners, and at which stage in their careers they should be addressed. Submissions closed on 14 October 2019 and the Department is currently analysing the 43 responses that were received. The FVWG will be reporting back to the Council of Attorneys-General in mid-2020.

### Family Dispute Resolution Practitioners

The Family Law Act establishes the legal framework for family dispute resolution (FDR) including a competency based accreditation scheme for FDR practitioners. The *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* sets out the accreditation scheme for FDR practitioners.

The aim of the scheme is to ensure nationally consistent standards for FDR practitioners, including competency in screening and assessing families for family violence and child abuse. Under the scheme, FDR practitioners are required to meet certain obligations including maintaining a suitable complaints mechanism and undertaking ongoing professional development in areas relevant to FDR. If FDR practitioners breach the required obligations under the Regulations, their accreditation may be suspended or cancelled or a condition may be imposed on their accreditation.

By applying national standards to FDR practitioners, the accreditation system supports the requirement, under section 60I the Act for parties to attempt FDR with an accredited FDR practitioner before filing an application for an order in relation to a child under Part VII of the Act.

## Term of reference (i)

**i. Any improvements to the interaction between the family law system and the child support system;**

The Attorney-General's Department offers the following information and overview about the interaction between the child support and the family law systems (specifically the family court and the Family Law Act). However, as the Department of Social Services is responsible for policy and legislation related to the

child support system, and Services Australia delivers services under the system, any specific questions about the child support system are best addressed to these agencies.

The *Child Support (Assessment) Act 1989* (CSA Act) and *Child Support (Registration and Collection) Act 1988* (CSRA Act) provide for the administration of child support, including the determination of administrative child support assessments and the registration, collection and enforcement of child support liabilities. Under the Family Law Act, the family courts may make provision for child maintenance in situations where an administrative child support assessment cannot be made for a child. This may occur, for example, where a child is over 18 years old and has a physical or mental disability.

While the Child Support Registrar in Services Australia will generally use administrative methods of enforcing a child support payment in the first instance, they may also resort to taking action in a court to enforce a child support obligation. The Family Court of Australia and the Federal Circuit Court of Australia are vested with jurisdiction by the CSA Act (section 99) and CSRC Act (section 104) to hear child support matters arising under those Acts.

The CSA Act and CSRC Act, and the relevant rules of court, provide the family courts with certain powers in relation to child support matters, including the power to enforce a child support liability or recover a child support debt. Section 113 of the CSRC Act provides that a child support liability may be recovered in a family court by a child support Registrar or payee of a liability. Section 100 of the CSA Act provides that the majority of provisions of the Family Law Act apply to proceedings under the CSA Act. This includes that the family law enforcement provisions of Division 13A of Part VII (relating to consequences of failure to comply with orders, and other obligations, that affect children). Part XIII and Part XIIIB also apply to decrees made by a court under the CSA Act.

The child support formula includes an assessment of the level of care parents provide for their children. This level of care is generally based on the actual care of children, which may differ from those determined in the parents' court order, parenting plan or written agreement. However, Services Australia, in certain circumstances where a parent is not following the care arrangements set out in a parenting order made by a family court or parenting plan, may, for an interim period, base a child support assessment on the care arrangement set out in the parenting order or parenting plan, rather than on the actual care of the child.

In family law matters, when making property settlement orders, the Family Law Act requires the court to take into account a number of considerations. Section 79(4)(g) requires the court to consider any child support a party has provided, is to provide or might be liable to provide in the future for a child. The same consideration must be taken into account in the making of a spouse maintenance order (section 75(2)(na)).

## Term of reference (j)

**j. The potential usage of pre-nuptial agreements and their enforceability to minimise future property disputes;**

Under the Family Law Act, couples can enter into a pre-nuptial agreements (which are referred to as 'financial agreements') before they marry or enter into a de facto relationship, without the need to go to court. Couples can also enter into a financial agreement during their marriage or de facto relationship or after their marriage or de facto relationship has broken down.

The financial agreement regime was introduced in 2000 to provide couples with greater control, certainty, and choice over how their property interests should be distributed upon relationship breakdown without having to get approval from a court. In essence, they allow parties to 'contract out' of the discretionary nature of the family court system, and theoretically minimise future property disputes.

The financial agreement provisions are contained in Part VIIIA of the Family Law Act for married couples and Part VIIIAB of the Family Law Act for de facto couples. Financial agreements can cover how property is to be divided, whether spousal maintenance should be paid, and other incidental issues in the event of relationship breakdown. For a financial agreement to be legally binding, both parties to the relationship must have received independent legal and financial advice, and have signed the agreement. A court may set aside a financial agreement on a number of grounds, including if the agreement was obtained by fraud or as a result of unconscionable conduct.

In 2015 the Government introduced the Family Law Amendment (Financial Agreements and Other Measures) Bill 2015 (FLAFAOM) which sought to amend the financial agreement regime in the Family Law Act to increase the certainty of financial agreements. After introduction, the Bill was referred to the Senate Legal and Constitutional Affairs Committee. The Bill subsequently lapsed. The amendments relating to financial agreements have not been reintroduced.