



## **Association of Family and Conciliation Courts Australian Chapter**

**Submission in response to the Parliamentary Inquiry by the Joint Select  
Committee on Australia's Family Law System**

**17 December 2019**

**TO:**

The Joint Select Committee on Australia's Family Law System  
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## **About the Association of Family and Conciliation Courts ("AFCC")**

AFCC is an interdisciplinary, international association of professionals dedicated to improving the lives of children and families through the resolution of family conflict. AFCC promotes a collaborative approach to serving the needs of children among those who work in and with family law systems, encouraging education, research and innovation and identifying best practices. Worldwide membership of AFCC stands at approximately 6,000.

### **Vision:**

A justice system in which all professionals work collaboratively through education, support and access to services to achieve the best possible outcome for children and families.

### **Values:**

- Collaboration and respect among professions and disciplines;
- Learning through inquiry, discussion and debate;
- Innovation in addressing the needs of families and children in conflict;
- Diversity in family structures and cultures; and
- Empowering families to resolve conflict and make decisions about their future.

## AFCC - Australian Chapter



The Australian Chapter of AFCC (AFCC Australia) brings together Australian Family Law professionals including judicial officers, lawyers, psychologists, social workers, other mental health professionals, mediators, educators, researchers, academics, welfare groups and administrators to share in formal and informal opportunities for education, training, research and professional collaboration.

The chapter offers a range of professional development activities, conferences and presentations to enhance family law practice and provide opportunities to expand on current knowledge about how best to serve families and children.

The chapter has also established a training course and endorsement for family report writers in Australia and internationally.

## Introduction and Executive Summary

AFCC Australia made submissions in response to both the Issues Paper and the Discussion Paper released by the Australian Law Reform Commission (ALRC) in 2018 in its Review of the Family Law System originally commissioned by the Honourable George Brandis QC, then Attorney-General of Australia.

The overall theme of the submissions was a focus on the improvement of the Family Law System via:

1. the protection of users including from domestic and family violence and from systems abuse;
2. the simplification and re-drafting of the *Family Law Act 1975* (Family Law Act) and subordinate legislation;
3. the avoidance of duplication across all aspects of the Family Law System;
4. increasing the levels of competency, expertise and education, including in the area of family violence, for those working in the Family Law System;
5. national accreditation of experts dealing with children and families;
6. a recognition of the need to provide tailored approaches to users of the Family Law System from Aboriginal and Torres Strait Islander groups, culturally and linguistically diverse groups, LGBTIQ groups and those with disabilities;
7. a recognition of the need to improve information sharing between courts, jurisdictions and other relevant government bodies to improve safe access to justice for all; and
8. building upon existing networks and systems that would facilitate these objectives.

AFCC Australia members strive to assist and empower families to safely resolve conflict and make decisions about their future whilst acknowledging the diversity in family structures in the Family Law System.

Understanding the high proportion of self-represented litigants in the Family Law System, AFCC Australia supports reforms to that will result in the simplification of the language within the family law legislative framework, the applicable Court Rules and Court processes.

Also understanding that family violence is a prevalent feature in families using the Family Law System, AFCC Australia is of the view this social dilemma will require wholesale change in societal attitudes and tolerance by all. As such, AFCC Australia considers that the Family Law System must be a model in this regard and

lead by example in taking the position that family violence is not to be tolerated or minimised.

The Family Law System must prioritise the safety and wellbeing of children and families who experience family violence, systems abuse, and exposure to unnecessarily repetitive or duplicated evidentiary investigations.

The Family Law System ought to strive to provide clear and safe pathways towards resolution for those parties who cannot agree on matters arising from the breakdown in their relationships. However, AFCC Australia is mindful that children's experiences often get lost in the cacophony of parental disputes. AFCC Australia acknowledges that children besieged by parental conflict often struggle to know what is true, tell parents what they want to hear and show psychological disturbance that parents oftentimes relate to the child rather than their situation.

AFCC Australia is supportive of reform to the Family Law System. However, such reform must be formulated with the best interests of children and families in mind, and following extensive consultation with the key stakeholders. Reform simply for the sake of reform or to improve target KPI's on a balance sheet should be discouraged. Foremost, is the need for any proposed reforms to the Family Law System to deliver:

1. clear common objectives;
2. simplified functionality, efficiency and accessibility;
3. transparency of process;
4. safe access to justice for its users;
5. skilled professionals across all levels with the ability to identify and respond to the needs of users; and
6. public confidence in the services delivered and outcomes achieved.

Many family law matters are extremely complex and can often present with overlapping features of family violence, substance abuse, mental health difficulties and/or the specific needs of Aboriginal and Torres Strait Islander groups, culturally and linguistically diverse groups, LGBTIQ groups or those with disabilities.

In order to achieve a Family Law System that meets such goals in the face of the difficult and complex matters with which it deals, AFCC Australia is of the view that the Family Law System must be equipped for purpose and retain its high level of specialisation.

All professionals in the Family Law System, judicial officers not excepted, must demonstrate key competencies including relevant training and experience in

meeting the needs of children and families coming into contact with the Family Law System.

Professionals, including legal practitioners, judges and experts working with children practising in the area of family law are at the coalface of assisting families, including victim survivors of family violence, their children and perpetrators as they navigate the Family Law System.

Currently, there is no requirement for legal practitioners practising in the area of family law to undertake training in the area of family violence. AFCC Australia is supportive of introducing measures to ensure minimum standards of compulsory ongoing professional development and competency in the area of family violence for legal practitioners undertaking family law and children's law work. When considering the prevalence of family violence in our society generally and in family law matters specifically, AFCC Australia submits that training in family violence including understanding the dynamics of family violence, the recognition of risk factors for clients and the ability to practise in a trauma informed and responsive manner, is vital for legal practitioners practising in family law and children's law.

AFCC Australia recognises and endorses the need to enhance protection measures offered to those who have experienced family violence, when navigating the Family Law System, not least of which in the assurance of a skilled workforce with a minimum standard of competency in dealing with family violence.

AFCC Australia was pleased to see Recommendations supporting these views included in the Final Report released by the ALRC as follows:

*Relevant statutes should be amended to require that future appointments of all federal judicial officers exercising family law jurisdiction include consideration of the person's knowledge, experience, skills, and aptitude relevant to hearing family law cases, including cases involving family violence.<sup>1</sup>*

*and*

*The Law Council of Australia should work with state and territory regulatory bodies for legal practitioners to develop consistent requirements for legal practitioners undertaking family law work to complete annually at least one unit of continuing professional development relating to family violence.<sup>2</sup>*

In its submissions to the ALRC, AFCC Australia promoted its long held the view that a national training program and accreditation process ought to be developed for all experts preparing both court funded and privately commissioned family reports.

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<sup>1</sup> Australian Law Reform Commission: Family Law for the Future – An Inquiry into the Family Law System – Final Report, March 2019 (**ALRC Report 135**): Recommendation 51

<sup>2</sup> ALRC Report 135: Recommendation 52

Prominently, AFCC Australia was recognised for its work in developing such a training course for private experts in consultation with the Attorney-General's department. The ALRC Final Report suggested:

*“If this training program is progressed, the Attorney-General’s Department may consider developing and maintaining a publicly available list of expert report writers who have successfully completed the training, which could include information about their areas of expertise. This would allow parties and their legal representatives to identify appropriately skilled and experienced expert report writers, including in relation to areas of specialisation such as child sexual abuse, mental health or disability, as well as providing surety as to their completion of the recommended training. This would respond to stakeholder concerns about the lack of freely available information about the qualifications, skills and experience of private report writers—aiming to improve transparency and support consumer choice.”<sup>3</sup>*

Relevantly, the ALRC Final Report included a specific recommendation that the Attorney-General’s Department should develop a mandatory national accreditation scheme for private family report writers<sup>4</sup>.

While AFCC Australia notes that this recommendation applies only to private family report writers, it was submitted by AFCC Australia, and noted in the ALRC report<sup>5</sup>, that this accreditation scheme ought to be extended to court-based Family Consultants.

It is also noted that the ALRC recommended contact centres be accredited<sup>6</sup>. AFCC Australia supports and welcomes such recommendation.

AFCC Australia maintains and repeats its views and the corresponding recommendations made by the ALRC in the context of its submission to the present inquiry.

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<sup>3</sup> ALRC Report 135: at paragraph 13.102

<sup>4</sup> ALRC Report 135: Recommendation 53

<sup>5</sup> ALRC Report 135: at paragraph 13.97

<sup>6</sup> ALRC Report 135: Recommendation 54

## **Responses to Terms of Reference**

- a. **ongoing issues and further improvements relating to the interaction and information sharing between the family law system and state and territory child protection systems, and family and domestic violence jurisdictions, including:**
- i. **the process, and evidential and legal standards and onuses of proof, in relation to the granting of domestic violence orders and apprehended violence orders, and**
  - ii. **the visibility of, and consideration given to, domestic violence orders and apprehended violence orders in family law proceedings;**

AFCC Australia supports the expansion of the National Domestic Violence Order Scheme to incorporate family law orders when made. It is submitted that this measure would be beneficial to courts exercising family law jurisdiction and those exercising jurisdiction in relation to protection orders.

It is submitted that this measure may also work to reduce breaches of protection orders by increasing the prospects of protection orders being made that are consistent with family law orders in place.

It will also allow access to current enforceable protection orders by courts in family law matters, which, it is suggested, will be a significant source of information in urgently listed matters where documents are lacking and subpoenas are not available.

AFCC Australia supports amendments to legislation that would promote the efficient exchange of information between child protection agencies and the courts exercising family law jurisdiction.

However, AFCC Australia is mindful that the exchange of information does not of itself resolve the issue, because child protection authorities often place a lower priority on investigating complaints arising in family law proceedings on grounds that the Family Law Courts are monitoring the family.

The Family Law Courts do not hold any investigatory capacity and rely on the child protective services to investigate allegations of abuse. When child protective services assume the position that the Family Law Courts will investigate allegations there is a significant gap in the protection afforded to children in both the short and long term because without the capacity to formally investigate specific allegations of abuse, the Family Law Courts are entirely reliant upon the parents' evidence, which is often contradictory, and information able to be garnered by subpoena generally issued by an Independent Children's Lawyer. If the State child protection services have failed to investigate an allegation on the basis that the Court is involved with the family, then such independent material is unlikely to be forthcoming.



The legislation governing Domestic violence orders and apprehended violence orders are state based and therefore different in each state, whereas the *Family Law Act* is a federally based jurisdiction and therefore unified throughout all states except WA where jurisdiction is retained by the state. Having said this, the practice of family law in WA is premised on the basis of the *Family Law Act*.

The process of obtaining a domestic or apprehended violence order differs around the country. Such orders, when made in the first instance do not give rise to criminal charges or convictions. As such the standard of proof, required for the making of such orders is at the lower standard, being 'on the balance of probabilities' which is consistent with the standard of proof for making findings in respect of family violence under the *Family Law Act*. AFCC Australia considers that such standard of proof is appropriate.

AFCC Australia considers it vital that the Family Law Courts have immediate access to information about the existence of active domestic and apprehended violence orders for the timely adjudication of decisions, in particular urgent interim decisions, for families where domestic and family violence is a feature. Being equipped with readily available, reliable and up-to-date information when deciding urgent interim matters will increase the safety for children and users of the Family Law System where domestic and family violence is a concern.

**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;**

AFCC Australia has previously submitted that there is currently insufficient emphasis placed on compliance with the requirement to make full, frank and timely disclosure. It is quite often to the strategic advantage of one of the parties to delay making full and early disclosure, which can result in overly prolonged proceedings and increased costs. It is further submitted that the implications of such behavior in circumstances where family violence is a feature of the matter can be even greater.

AFCC Australia would welcome measures taken to impose stricter compliance requirements with Rules and directions. Greater use of costs orders would also be appropriate as well as taking into account any non-disclosure when determining a final division of property.

It is further suggested that all too often, issues of non-disclosure are not fully addressed or taken into consideration until a final hearing of a matter. In circumstances where the vast majority of matters are resolved prior to reaching a final hearing it is suggested that many instances of delinquent behavior by litigants in terms of their obligation to provide full, frank and timely disclosure are left unchecked and unaddressed.

AFCC Australia therefore supports harsher penalties for parties where it is found that they have intentionally failed to provide full, frank and timely disclosure. However, AFCC Australia suggests that measures to appropriately identify and address this issue early and throughout the lifespan of proceedings are warranted, to alleviate situations where one party is left in the position of having to bring interlocutory proceedings to address such issues, often at significant cost.

The process by which litigants give their evidence in the Family Law Courts is via written, sworn documents, which is then capable of being tested through cross examination at a final hearing. Parties' accounts of events are very often also captured through the process of a Family Report being prepared, which is another way in which any discrepancies can be identified. Further, evidence can also be obtained from documents produced by third parties under subpoena to corroborate and/or distinguish the evidence given by parties.

The Court has the power to make notifications to various governmental departments including to the Attorney-General's Department or to the Commissioner of Taxation in circumstances where parties have been found, on the balance of probabilities, to have made false allegations.

**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;**

AFCC Australia has previously submitted in the context of the ALRC inquiry as to the need for the *Family Law Act* to be simplified. AFCC Australia submitted that measures ought to be taken to considerably simplify the *Family Law Act* in order to substantially improve readability and usability and to remove, so far as is possible, all duplication or overlap of provisions. Specifically at paragraph 14.37 of the ALRC report, AFCC Australia is quoted:

*"One submission suggested that the Family Law Act should include a list of relevant subordinate legislation to be read in conjunction with the Act; the same numbering style and format should be used in the Act and the subordinate legislation; definitions should be consistent across the Act and subordinate legislation; and cross-references between multiple pieces of subordinate legislation on any particular topic should be minimised. The ALRC agrees."*<sup>7</sup>

AFCC Australia was pleased to see this view enshrined in a recommendation for the comprehensive redrafting of the *Family Law Act* and its subordinate legislation<sup>8</sup> and repeats such view for the purposes of this inquiry.

**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**

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<sup>7</sup> ALRC Report 135: at paragraph 14.37

<sup>8</sup> ALRC Report 135: Recommendation 55

**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;**

AFCC Australia acknowledges that the financial cost of proceedings in family law matters can be very high. There is also a great cost to parties in terms of time and the stress associated with ongoing litigation.

It is submitted by AFCC Australia that amendments to the *Family Law Act* that mandate parties to comply with the requirements of section 60I of the *Family Law Act* (or similar) prior to filing applications for a division of property and/or spousal maintenance would greatly assist in early resolution of matters and, in turn, reduce the financial cost to parties.

For those applications that are filed in the Family Courts, as an overriding principle, AFCC Australia would support and welcome the establishment of an early and comprehensive triage system designed to quickly identify the needs of clients and thereafter to have the ability to streamline matters into specialised lists and programs suited to their needs, including to highly specialised dispute resolution services designed to support families where family violence is a feature.

It is suggested that Legal Aid commissions, might, with further funding, establish panels of private practitioners who are able to offer 'un-bundled' legal services to parties involved in small property matters, both in a representative capacity and in the capacity as a family dispute resolution facilitator.

For those matters where family violence is a feature and as such, identified as not being appropriate for FDR in accordance with the exceptions set out in sections 60I(9)(b)(i)-(iv) of the *Family Law Act*, it is submitted that with the assistance of a triage system, such matters might be diverted to a specialised conciliation conference lead jointly by a Registrar and a Family Consultant within the court structure. This was a process that the Family Court of Australia introduced, but it was unable to be maintained because of the lack of funding. It is accepted that this would require an increase in the resources available to the courts to be reintroduced.

Quite often legal fees associated with litigating a family law matter are increased through the delays encountered with the court system, long wait periods to engage with a family dispute resolution service provider or family report writer and the subsequent need to obtain updated valuations of assets, updated family reports and engage in multiple rounds of updated disclosure. It is submitted by AFCC Australia

that with increased resources available to intensively triage matters at an early stage the scope of disputes can be narrowed quickly and an increased number of early resolutions reached. AFCC Australia submits that the best way to reduce the legal fees associated with litigation is to assist parties to reach early resolution to their matters.

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

See above.

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

As noted above, AFCC Australia acknowledges that the impact of family law proceedings on litigants and their families can be significant, not least of which is the impact on the lives and wellbeing of users of the Family Law System. AFCC Australia repeats its comments above that the best way to reduce the impact of family law proceedings on families is to provide the services and supports necessary for families to safely reach early resolution to their disputes. To achieve this it is acknowledged that greater resources are needed to the Family Law System.

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

Grandparents are currently able to bring proceedings in relation to their grandchildren by virtue of section 65(C)(ba) of the *Family Law Act*. It is also specifically part of the objects of the Part of the *Family Law Act* dealing with children and the principles underlying it that children have the right to spend regular time with and communication on a regular basis with their parents AND other people significant to their care, welfare and development such as grandparents.

As such, AFCC Australia does not consider that there are any further issues arising for grandparent carers beyond what is ordinarily required to be considered in any parenting matter, all of which is based on ensuring that the best interests of the child are met.

**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;**

*Judicial Officers*

AFCC Australia supports consideration of family violence aptitude in judicial appointments to the Family Law Courts. For this to be a meaningful, however, it is submitted that an assessment of aptitude must go beyond participation in judicial

education or completion of family violence courses and must include the prior practice of family law matters involving family violence.

It is the experience of AFCC Australia members that the realities of practising in the family law jurisdiction and appearing for both victims and perpetrators of family violence provides a unique understanding of how family violence impacts on families within the system that is well beyond academic research and readings.

It is therefore submitted that for all future federal judicial appointments exercising family law jurisdiction there should be consideration of the person's knowledge, experience and aptitude in relation to family violence and the practice of family law in line with the current requirements in relation to judicial appointments to the Family Court of Australia and as set out in section 22(2)(a) of the *Family Law Act* which states:

***“A person shall not be appointed as a Judge unless:***

- a) the person is or has been a Judge of another court created by the Parliament or of a court of a State or has been enrolled as a legal practitioner of the High Court or of the Supreme Court of a State or Territory for not less than 5 years; and*
- b) by reason of training, experience and personality, the person is a suitable person to deal with matters of family law.”***

[emphasis added]

### Legal Practitioners

AFCC Australia submits that training in family violence ought to be undertaken throughout a legal practitioner's career on an ongoing basis to ensure continuing competency and knowledge of best practice guidelines as these develop.

This could be achieved through various means and at various stages of a legal practitioner's career, including ensuring ongoing components of mandatory training focused on family violence competency for all legal practitioners. In this way, legal practitioners have an onus to maintain their own knowledge and training.

AFCC Australia also supports amendments to the competency standards of Practical Legal Training courses to include family violence. It is submitted that not only are such competency standards fundamental for entry-level family lawyers but would be highly beneficial for entry-level lawyers across all jurisdictions. As such, AFCC Australia supports the inclusion of family violence into the existing compulsory standards within all Practical Legal Training Courses.

AFCC Australia submits legal practitioners working in the Family Law System should have to comply with a minimum level of family violence and trauma specific training to comply with their governing bodies' requirements for registration. In this regard,

AFCC Australia considers that any practitioner who nominates the area of family law on their application for a practising certificate, ought be required to complete, as a component of their existing annual continuing legal education (CLE), a specific number of units in family law as well as at least one unit in family violence and associated trauma on an annual basis.

AFCC Australia supports a Family Violence Accreditation system and suggests that Specialist Accreditation courses in the areas of family law, children's law and criminal law across the country be expanded to include comprehensive training in family violence and associated trauma and that 'bolt-on' courses in this area be offered to existing accredited specialists. Assessment components specific to family violence should be mandatory in at least one of the written and oral segments.

### Experts working with Children

AFCC Australia has long been of the view that a national training program and accreditation ought to be developed for federal experts and private experts preparing both court funded and privately commissioned family reports. In consultation with the Attorney-General's department, AFCC Australia is developing and rolling out such a training course for family report writers.

Private experts generally have a background in psychiatry, psychology or social work. It follows that the manner, style and content of a private family report is reflective of the writer's training, which in turn can lead to an inconsistency of approach and style across the field.

There will need to be some consideration given as to how previous experience as a family report writer and/or Single Expert Witness should be taken into account in the context of these new accreditation requirements.

AFCC Australia observes that there is much emphasis on lawyers understanding social science, but less emphasis on report writers understanding family law and the specialist and broad based knowledge required to complete assessments on families who are litigating after separation. AFCC Australia has therefore been designing a course to ensure that in addition to relevant graduate and post-graduate academic qualifications and on-going professional development in those fields, family report writers have training in:

- a) part VII of the *Family Law Act*;
- b) Family Courts processes and procedure;
- c) rules of evidence, giving evidence in court and being cross-examined; and
- d) forensic practice.

AFCC Australia has also scheduled training (both in person and online) in modules including:

- a) Introduction to Family Law;
- b) The Legal Interface – understanding evidence and duty to court;
- c) Introduction assessment of Families and Report Writing;
- d) Risk assessment;
- e) Competencies required for assessing and interviewing children in separated families;
- f) Hearing children's voices and opinions;
- g) Developmental considerations for children in separated families;
- h) Specialised skills for report writing for the Family Court;
- i) The obvious and subtle effects of family violence for woman and children;
- j) Assessment of Family Violence issues in the Family Court;
- k) Particular issues around assessment of LGBTI populations;
- l) Competencies for assessment of sexual abuse allegations;
- m) Assessing mental health, drug abuse and addiction problems in Family Court;
- n) Referrals for specialised programs for parents, children and families in Family Court;
- o) Slicing and dicing data in Family Law evaluations;
- p) Two Big Bits of the Specialist Report: The BIC and Ten Top Tips for Interviewing Children;
- q) Addiction: Why care?;
- r) Weaponised Children: Wars, Ghosts and the adults the children will become;
- s) Family Violence: How to conduct convergence risk assessment – A case study approach. What to do when one partner kills another?; and
- t) Sexual Abuse Allegations in the Family Court: Formal Risk Assessments and Risk Management Recommendations.

In line with our own endorsement model, AFCC Australia recommends that any form of accreditation must involve participants demonstrating their expertise including:

- a) formal qualifications and registration as a psychologist or psychiatrist;



- b) a Working with Children (or similar) permit (involving police history check)
- c) assignments based on mock files;
- d) drafting exercises;
- e) simulated interviews or practical exercises;
- f) examples of candidates' work;
- g) provision of professional references; and
- h) a panel based interview.

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

The child support system is governed by the *Child Support (Assessment) Act 1989* and *Child Support (Registration and Collection Act) 1988*. While the Family Law Courts hold jurisdiction to hear matters concerning child support in certain circumstances, at first instance most matters relating to child support are administered by the Child Support Agency, being a section of the federal department of Human Services.

Both pieces of child support legislation have numerous examples of multi-tiered cross-referencing, within each Act and also between Acts and are overly complicated and cumbersome making interpretation difficult. AFCC Australia recommends a significant re-drafting of the legislation to achieve simpler, more consolidated and streamlined legislation which, so far as is possible, removes all duplication or overlap of provisions and significantly reduces multi-tiered cross-referencing. It is submitted, such measures will improve accessibility and understanding of child support legislation for all users.

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

AFCC Australia notes that the scope of this inquiry is limited to 'pre-nuptial style agreements'. There are other financial agreements which can be entered into pursuant to the *Family Law Act* for parties during a marriage/de facto relationship and after a marriage/de facto relationship.

Financial Agreements (particularly pre-nuptial style agreements) have been the subject of significant judicial scrutiny in recent years and several iterations of the legislation governing them with the result that they are complex and difficult documents to draw correctly and effectively. Currently to be enforceable both parties to any financial agreement must obtain legal advice and their solicitor must sign a certificate to the effect that such advice was given. Naturally, this will involve a cost to parties. Typically such agreements are more suited to parties where:



- there is a large disparity in financial positions as between the parties at the commencement of the relationship;
- either or both parties have had previous relationships (i.e. have had 2<sup>nd</sup> or 3<sup>rd</sup> marriages) and/or with children from such relationships; or
- there is high net wealth.

It is AFCC Australia's observation that pre-nuptial style agreements are less utilised by parties:

- in the early stages of their life;
- in first time relationships with no children;
- of relatively similar financial circumstances; or
- with meagre or no assets.

Further, given the nature of a pre-nuptial style financial agreement is to contract out of one's entitlement to orders for the division of property as set out in the Act, poorly drafted agreements which fail to give proper consideration to changes in circumstances, particularly regarding the birth of children, are likely to be challenged.

A corollary of the general usage of these agreements is that their enforceability may be the subject of later dispute in the Court, should a party seek to set it aside, particularly where there has been a significant change in circumstances regarding children or where one party alleges a miscarriage of justice for various reasons currently enshrined in s90K of the *Family Law Act*. An increase in the usage of pre-nuptial style agreements will inevitably lead to an increase in applications to have such agreements set aside, which would be contrary to the intended purpose of attempts to reduce litigation. As a result, the effectiveness of such agreements to minimise future property disputes is undermined.

Therefore, AFCC Australia has reservations in the general usage of 'pre-nuptial style agreements' for all parties to a relationship as a mechanism by which to reduce litigation.

**k. any related matters.**

It is submitted that the Joint Select Committee have regard to the Final Report released by the ALRC which, AFCC Australia respectfully submits should be read in conjunction with submissions made to this inquiry, given the extensive terms of reference of that inquiry, the extensive stakeholder consultation and the currency of the recommendations.