
Joint Select Committee on Australia's Family Law System

Improvements in family law proceedings

Interim report

October 2020

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List of Recommendations

There are no recommendations in the report.

Terms of Reference

That a joint select committee, to be known as the Joint Select Committee on Australia's Family Law System, be established to inquire into and report on the following matters:

- (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;
- (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;
- (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;
- (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;
- (e) the effectiveness of the delivery of family law support services and family dispute resolution processes;
- (f) the impacts of family law proceedings on the health, safety and wellbeing of children and families involved in those proceedings;
- (g) any issues arising for grandparent carers in family law matters and family law court proceedings;
- (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;
- (i) any improvements to the interaction between the family law system and the child support system;
 - (j) the potential usage of pre-nuptial agreements and their enforceability to minimise future property disputes; and
 - (k) any related matters.

Acronyms and abbreviations

1980 Family Law Act Report	Joint Select Committee on the Family Law Act, <i>Report</i> , July 1980
2015 Child Support Report	House of Representatives Standing Committee on Social Policy and Legal Affairs, <i>From conflict to cooperation: Inquiry into the Child Support System</i> , June 2015.
2017 Family Violence Report	House of Representatives Standing Committee on Social Policy and Legal Affairs, <i>A better family law system to support and protect those affected by Family Violence</i> , December 2017
AAT	Administrative Appeals Tribunal
ABF	Australian Brotherhood of Fathers
ABS	Australian Bureau of Statistics
ADR	Alternative Dispute Resolution
ADRAC	Australian Dispute Resolution Advisory Council
AFCC	Association of Family and Conciliation Courts, Australian Chapter
AGD	Attorney-General's Department
AICA	Aboriginal and Islander Cultural Advisor
AIFLAM	Australian Institute of Family Law Arbitrators and Mediators
AIFS	Australian Institute of Family Studies
ALRC	Australian Law Reform Commission
ALRC 2019 Report	Australian Law Reform Commission, <i>Family Law for the Future – An inquiry into the Family Law System</i> , Final Report, Report 135, March 2019
ALWSA	Aboriginal Legal Service of Western Australia Limited
ANROWS	Australia's National Research Organisation for Women's Safety
ARTK	Australia's Right to Know
ATO	Australian Tax Office
AVO	Apprehended Violence Order
AWAVA	Australian Women Against Violence Alliance
BFA	Binding Financial Agreement
CALD	Culturally and linguistically diverse
CCP	Children's Cases Program

CCS	Children's Contact Services
Centacare	Centacare Family & Relationship Services
CFDR	Coordinated Family Dispute Resolution
CLC	Community Legal Centre
COAG	Council of Australian Governments
committee	Joint Select Committee on Australia's Family Law System
CSA Act	<i>Child Support (Assessment) Act 1989</i>
CSMC	Council for Single Mothers and Their Children
CSRC Act	<i>Child Support (Registration and Collection) Act 1988</i>
CSS	Child Support Scheme
Cth	Commonwealth
Divorce Partners	Divorce Partners Pty Ltd
DPO	Departure Prohibition Order
DSS	Department of Social Services
DVAC	Domestic Violence Action Centre, Queensland
DVO	Domestic Violence Order
Family Court	Family Court of Australia
Family Law Act	<i>Family Law Act 1975 (Cth)</i>
Family Law Council 2015 report	Family Law Council Report to the Attorney-General, <i>Families with complex needs and the intersection of the family law and child protection systems</i>
Family report writers (FRW)	Family consultants and expert witnesses appointed to write family reports
FASS	Family Advocacy and Support Services
FCFC	The proposed merged entity to be known as the Federal Circuit and Family Court of Australia
FCFC Bill	Federal Circuit and Family Court of Australia Bill 2019
FCWA	Family Court of Western Australia
FDR	Family Dispute Resolution
FDRC	Family Dispute Resolution Conferences
FDRP	Family Dispute Resolution Practitioner
FECCA	Federation of Ethnic Communities' Councils of Australia
Federal Circuit Court	Federal Circuit Court of Australia
Federal Court	Federal Court of Australia
FLPAWA	Family Law Practitioners Association (WA)

FLPAQ	Family Law Practitioners' Association of Queensland
FRCs	Family Relationship Centres
FRW (Family report writers)	Family consultants and expert witnesses appointed to write family reports
FVO	Family Violence Order
HRCLS	Hume Riverina Community Legal Service
ICL	Independent children's lawyer
LAC	Legal Aid Commission
LADR	Legally Assisted Dispute Resolution
LAFDR	Legally Assisted Family Dispute Resolution
LAT	Less Adversarial Trial
Law Council	Law Council of Australia
LGBTIQ	Lesbian, gay, bisexual, transgender, intersex and queer
Matrimonial Causes Act	<i>Matrimonial Causes Act 1959–1973</i>
MSB	Mediator Standards Board
NDVO	National Domestic Violence Order
NCPP	Non-Custodial Parents Party
NCSMC	National Council of Single Mothers and their Children
NLA	National Legal Aid
NLAP	National Legal Assistance Partnership 2020–25
NMAS	National Mediator Accreditation System
ODRS	Online Dispute Resolution System
PMH	Parenting Management Hearings
QLS	Queensland Law Society
RANT	Relationships Australia Northern Territory
RANZCP	Royal Australian and New Zealand College of Psychiatrists
Registrar	Child Support Registrar
SA Family Law Pathways Handbook	Family Law Pathways Network South Australia, <i>The Family Law System in South Australia: A Handbook and Service Directory for Separated Families</i>
the scheme	Australia's Child Support Scheme
Shared Parental Responsibilities Act	<i>Family Law Amendment (Shared Parental Responsibilities) Act 2006</i>
SPIKOK	Single Parenting Is Killing Our Kids
VOCAL	Victims of Crime Assistance League Inc. NSW

Chapter 1

Introduction

Referral and terms of reference

- 1.1 The Joint Select Committee on Australia's Family Law System (the committee) was appointed by resolution of the Senate on 18 September 2019 and resolution of the House of Representatives on 19 September 2019.¹
- 1.2 The committee was established to inquire into and report on the following matters:
 - (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
 - (i) the visibility of, and consideration given to, domestic violence orders and apprehended violence orders in family law proceedings;
 - (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;
 - (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;
 - (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;

¹ *Journals of the Senate*, No. 18, 18 September 2019, pp. 542–545 and *Votes and Proceedings*, No. 19, 19 September 2019, pp. 288–289.

- (e) the effectiveness of the delivery of family law support services and family dispute resolution processes;
 - (f) the impacts of family law proceedings on the health, safety and wellbeing of children and families involved in those proceedings;
 - (g) any issues arising for grandparent carers in family law matters and family law court proceedings;
 - (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;
 - (i) any improvements to the interaction between the family law system and the child support system;
 - (j) the potential usage of pre-nuptial agreements and their enforceability to minimise future property disputes; and
 - (k) any related matters.
- 1.3 The committee was due to present its final report by 7 October 2020. The Senate and House of Representatives granted an extension of time for presentation of the final report until the last sitting day in February 2021.²

Conduct of the inquiry

- 1.4 Details of the inquiry were placed on the [committee's website](#).

Submissions

- 1.5 The committee invited submissions from individuals and organisations by 18 December 2019. The committee provided an extension to organisations and individuals to lodge submissions up to 31 January 2020. Due to the significant interest in this inquiry, the committee continued to accept submissions beyond this date to ensure that it heard from a wide cross-section of the community on these important issues.
- 1.6 The committee developed a submission template to assist submitters to share their experiences and address the inquiry's terms of the reference. The submission template was made available on the committee's website. The committee also made arrangements to assist people who had difficulty with reading and writing to make a submission.
- 1.7 The committee received **1692** submissions (to 6 October 2020). The submissions received by the committee are listed at **Appendix 1**.

² *Journals of the Senate*, No. 63, 31 August 2020, p. 2189 and *Votes and Proceedings*, No. 67, 31 August 2020, p. 1107.

Hearings

1.8 It was the committee's decision to first hear from individuals and organisations prior to hearing evidence from the Family Court of Australia (Family Court), in order to obtain evidence directly from individuals about their experiences of the family law system. Evidence from individuals has been received at in camera (confidential) hearings, and evidence from organisations at public hearings. The committee has held the following public hearings:

- 14 February 2020 in Canberra
- 10 March 2020 in Townsville
- 11 March 2020 in Rockhampton
- 12 March 2020 in Brisbane
- 13 March 2020 in Sydney
- 27 May 2020 (by video/teleconference)
- 24 June 2020 (by video/teleconference)
- 8 July 2020 (by video/teleconference)
- 22 July 2020 (by video/teleconference)
- 19 August 2020 (by video/teleconference)
- 16 September 2020 (by video/teleconference)

1.9 The committee intends to hold further public hearings prior to tabling its final report. It also intends to hear from the Family Court prior to tabling its final report.

1.10 As a consequence of the COVID-19 pandemic, hearings that occurred after the hearing of 13 March 2020 were conducted primarily by videoconference and teleconference. A list of witnesses who gave evidence at the public hearings is available at **Appendix 2**. The Hansard transcript of the evidence provided at the public hearings may be accessed through the committee's website.

1.11 As at 31 July 2020, the committee had held 13 in camera or confidential hearings. While the committee was able to hold in camera hearings in Queensland in early March, the remainder of the in camera hearings were conducted by teleconference. In total, the committee heard from 85 individual witnesses about their personal experiences of the family law system.

Submission and hearing protocols and other information on procedures

1.12 The committee agreed to protocols in relation to submissions and hearings. The protocols were made available on the committee's website.

1.13 Those protocols provided that any submission that identified parties to a family law matter, made allegations of domestic violence, or contained adverse reflections would be accepted by the committee as confidential. The protocols also noted, in relation to hearings, that the committee was mindful of the need to ensure the safety of witnesses.

1.14 To ensure the safety of witnesses, parties to a family law dispute, and children, the committee put in place safety measures, including by providing counsellors at interstate hearings, hearing evidence in camera and/or hearing evidence by teleconference.

1.15 The committee also released a 'Statement on Submissions' which noted:

In accepting submissions and hearing evidence of your experience, the committee must consider the right to privacy of all parties involved in the family law process. Although submitters may request that their submission be published, under these protocols, the committee may decide that it be accepted as confidential.

About this interim report

1.16 In light of the committee's extension to its reporting date, the committee agreed to table an interim report. The report is designed to summarise the wide range of views and issues raised during public consultation. The committee has not yet made recommendations and reproduction of comments from submissions in this report should not be taken as the committee expressing agreement with those views.

1.17 A significant number of submissions from individuals sought to specifically recount and re-prosecute their particular family law dispute, raising allegations of fact that were simply not possible for the committee to test or verify as the committee was only hearing from one party of a dispute. As such, the committee makes no comment or finding on the truth of the allegations.

1.18 The committee notes that a significant number of submissions, both from individuals and organisations, have provided evidence about the prevalence of family violence allegations in family law disputes. While not making any recommendations at this interim stage, the committee considers that a primary task of the committee's work is to identify measures that reduce the risk of harm to children and parents traversing the family law system.

1.19 The committee acknowledges the concerns raised in submissions and correspondence that many victim-survivors would choose not to participate in the inquiry to avoid re-traumatisation. As discussed in paragraphs 1.14 and 1.15, the committee was acutely aware of the sensitivities around individuals providing evidence of their personal experience. Accordingly, the committee put in place protocols to support those witnesses who did choose to provide oral evidence to the committee.

Summary of submissions

1.20 This section provides a snapshot of the statistics in relation to submissions received by the committee **up to, and including, 6 October 2020**.

Individual submissions

1.21 The committee received **1523** individual submissions by **6 October 2020**.

- 1006 were received prior to the submission closing date of 18 December 2019; and
- 517 were received after the submission closing date.

Organisational submissions

1.22 At **6 October 2020**, the committee had received **169** submissions from organisations, academics and other professionals. Of these:

- 79 were received prior to the submission closing date of 18 December 2019; and
- 90 were received after the submission closing date.

Classification of individual submissions

1.23 The following table sets out the categorisation of the **1523** individual submissions received up to **6 October 2020** according to acceptance by the committee.³

Table 1.1 Categorisation of submissions accepted by the committee

<i>Submission type</i>	<i>Percentage</i>
Public (name and submission public)	2 per cent
Name withheld (submission public)	4.5 per cent
Confidential (in camera)	93.5 per cent
TOTAL	100 per cent

³ Some submitters requested that their submissions be accepted as both name withheld and confidential.

Geographic spread of submissions

1.24 The following table sets out the categorisation of the **1523** individual submissions, and the **169** organisational submissions processed at **6 October 2020**.

Table 1.2 Geographic location of submitters for individuals and organisations

<i>State/Territory</i>	<i>Individuals</i>	<i>Organisations</i>
Australian Capital Territory	11	12
New South Wales	165	29
Northern Territory	6	4
Queensland	132	17
South Australia	31	5
Tasmania	14	6
Victoria	101	32
Western Australia	72	10
Overseas	4	-
Unknown	987	54

Individual submitters who have engaged with the court process

1.25 The following table sets out the engagement of individual submitters in family dispute resolution, as well as those submitters who have been issued with a section 60I certificate.⁴ These figures are an approximation only, as in some submissions it was unclear whether submitters engaged in family dispute resolution and/or were issued a section 60I certificate.

⁴ Section 60I of the Family Law Act requires that, prior to making an application for an order under Part VII, the parties make a genuine effort to resolve their dispute by family dispute resolution. A family court is unable to hear an application for a Part VII order unless the applicant files with the application a certificate from a family dispute resolution practitioner. These are known as section 60I certificates and there are five different types of certificate which can be issued, based on the reasons why the family dispute resolution was not successful.

Table 1.3 Engagement by submitters with the court process

<i>Type of court engagement</i>	<i>Percentage</i>
Family dispute resolution only	4.2 per cent
Section 60I certificate only	25.3 per cent
Family dispute resolution and section 60I certificate	7.3 per cent
No family dispute resolution, no section 60I certificate	55 per cent
Unknown	8.2 per cent

Work of the committee

- 1.26 Since its inception the *Family Law Act 1975* (Family Law Act) has been amended by over 110 separate Acts of the Commonwealth Parliament.⁵ It has grown from around 55 pages to well over 600 pages. The family law system has also been the subject of numerous reviews, which are listed in **Appendix 3**. Some of these reviews, and the resulting legislative changes, are discussed further in Chapter 2.
- 1.27 What is clear from all of those inquiries, and this current inquiry, is that the family law system is struggling to meet the needs and expectations of those who use it. Many of the issues raised by witnesses have plagued the family law system, in one way or another, since the introduction of the Family Law Act.
- 1.28 The work of this committee has followed from two recent and extensive inquiries into the family law system—the House of Representatives Standing Committee on Social Policy and Legal Affairs (House Committee), the report was tabled in December 2017, and the Australian Law Reform Commission (ALRC), the report was tabled in Parliament in March 2019.⁶
- 1.29 The Government has provided a response to the House Committee's report and a number of those recommendations have been implemented. In relation to other recommendations, the Government indicated that it would await consideration of the ALRC report. The Government has yet to provide a response to the ALRC report.
- 1.30 **Appendix 4** sets out the recommendations of the House Committee, alongside the Government's response to each, as well as the recommendations contained in the ALRC's report.

⁵ A full list of the Acts which have amended the *Family Law Act 1975* can be found at: <http://www.legislation.gov.au/Series/C2004A00275/Amendments>.

⁶ Both of these inquiries are discussed in detail in Chapter 2, and throughout this report.

- 1.31 The committee understands that the Government wishes to give full consideration to the ALRC's report and looks forward to the Government providing its response.
- 1.32 In the absence of a response to the ALRC report, the committee is aware that there are programs being piloted and measures progressed to improve the family law system.⁷ The committee was particularly interested in non-legal reforms—namely, those primary and secondary interventions that may assist Australians to avoid the costly and emotionally damaging litigation that typically accompanies the breakdown of family relationships. The committee appreciates that while some of these measures have been evaluated, some are only in the early stages of being trialled and it may be too early to determine if they are achieving their intended purpose.
- 1.33 Since its establishment in September 2019, the committee has undertaken significant work in gathering evidence pursuant to the terms of reference—first through submissions, and secondly through both the public and in camera hearings. In the course of the inquiry, the committee has heard from individuals who have direct personal experience of the family law system, advocacy groups and other organisations, academics and members of the legal profession.
- 1.34 There are a number of themes that have emerged from the evidence including the costs associated with the family law system, delays in the court system and the appropriateness of the legal framework. Many submitters and witnesses have offered constructive suggestions on ways to improve this system and to ensure better outcomes for the fathers, mothers and children who are engaging with this system every day.
- 1.35 While the committee is disappointed that the travel restrictions associated with the COVID-19 pandemic have limited its ability to hold in-person hearings, the committee has endeavoured to continue its work through the use of videoconference and teleconference. However, it is clear that the size and scope of the inquiry means that the committee will not meet its reporting date of 7 October 2020. The committee has therefore resolved to table this interim report, which sets out the evidence it has received to date. As mentioned earlier, the committee has sought and been granted by both Houses of Parliament an extension to the reporting date until the last sitting day in February 2021. This extension will enable the committee to hold further hearings and, travel restrictions permitting, to undertake some site visits to courts.

⁷ Attorney-General's Department, *Submission 581*, Attachment 1.

Structure of the report

1.36 This chapter is an introductory chapter which outlines the administrative and procedural details of the committee's work. The remainder of the report is structured as follows:

- Chapter 2 provides a brief overview of the family law system, particularly the courts, and summarises the reforms to the Family Law Act since its introduction and the outcomes of the House Committee's and ALRC's recent inquiries.
- Chapter 3 is a snapshot of the issues raised in the many individual submissions in the inquiry.
- Chapter 4 focuses on the recurring systemic issues in the family law system, including the perceptions of bias within the system; the role of family consultants and expert witnesses; whether the adversarial nature of the family law courts could be improved; misuse of systems and processes; and professional misconduct.
- Chapter 5 looks at legal fees and costs.
- Chapter 6 examines delays in the court system.
- Chapter 7 outlines the issues in relation to family violence and the family law system.
- Chapter 8 explores parenting matters.
- Chapter 9 deals with matters in relation to the division of property following separation.
- Chapter 10 looks at child support and its interaction with the family law system.
- Chapter 11 details the support services within the family law system.
- Chapter 12 explains alternative dispute resolution within the family law system.

Acknowledgements

1.37 The committee thanks the many individuals who made written submissions. Every relationship which breaks down is unique in its circumstances. However, what the committee heard was that there is additional trauma beyond the ending of a relationship, which is brought about by interactions with the family law system. The opportunity to hear directly from so many people about their experiences with the family law system has significantly enhanced the committee's work and the committee thanks all submitters for sharing their personal stories.

1.38 The committee also wishes to acknowledge those individuals who shared their private circumstances and experiences with the family law system at the in camera hearings. The opportunity to speak with so many people, to hear a diverse range of experiences, to ask questions about the failings in the system from the viewpoint of those most affected, and to receive proposals for

improving the system, added further to the committee's deliberations. The committee appreciates that recounting of these experiences can be difficult and traumatic and the committee thanks those individuals for bringing such a candid and personal perspective to the inquiry. Unfortunately, the committee was not able to hear from all those submitters who wished to give evidence at the in camera hearings, but nevertheless thanks those submitters who volunteered to share their stories.

- 1.39 The committee extends its thanks to the organisations, academics and professionals who provided submissions and appeared at public hearings. This evidence also greatly assisted the committee.
- 1.40 Finally, the committee would like to extend its gratitude to the counsellors from Lifeline that attended each interstate hearing to provide support to both those that gave evidence as well as to the members of the public who listened to the evidence.

Chapter 2

Australia's Family Law System

Introduction

- 2.1 Courts are an integral component of the family law system, however, the system itself consists of a 'broad range of organisations and programs to help ensure separating families can access the specific assistance they need'.¹ Those organisations and programs include: legal advice and representation, alternative dispute resolution, family violence services, family relationship services, child support and other social services providing assistance with counselling, health and housing. The system 'exists to help separated families work through the legal and personal issues that arise when couples separate'.²
- 2.2 However, as the Australian Law Reform Commission (ALRC) noted, it is '... somewhat of a misnomer to describe this collection of courts and legal and social service providers as a 'family law system'.³ The ALRC went on to refer to the observation by the Family Law Pathways Advisory Group in 2001 that 'it was not designed as a system and does not always operate coherently'.⁴
- 2.3 Detailed information about the family law system, its components and operation is readily available.⁵ According to *The Family Law System in South Australia: A Handbook and Service Directory for Separated Families*, (SA Family Law Pathways Network Handbook) the family law system adheres to the following principles:
- The safety and welfare of all parties, adults and children, is paramount.
 - Where children are involved, their best interests will be the primary consideration in all decision making.

¹ Family Law Pathways Network South Australia, *The Family Law System in South Australia: A Handbook and Service Directory for Separated Families*, May 2012, p. 2 (SA Family Law Pathways Handbook).

² SA Family Law Pathways Handbook, p. 2.

³ Australian Law Reform Commission (ALRC), *Family Law for the Future – An Inquiry into the Family Law System*, ALRC Report 135, March 2019, p. 55 (ALRC 2019 Report).

⁴ ALRC 2019 Report, p. 55.

⁵ See, for example, SA Family Law Pathways Handbook; Family Violence Law Help, *How does the family law system work?*, 2019, <https://familyviolencelaw.gov.au/family-law/how-does-the-family-law-system-work> (accessed 18 August 2020); Attorney-General's Department (AGD), *Family Law System*, <https://www.ag.gov.au/families-and-marriage/families/family-law-system> (accessed 18 August 2020).

- Where appropriate, parties are encouraged to resolve their parenting, property and other disputes without resorting to contested court proceedings.⁶

2.4 This chapter provides a brief overview of:

- services within the family law system available for couples and families to resolve disputes;
- the respective roles of the federal family law courts, their funding and caseloads;
- the state courts that can exercise family law jurisdiction; and
- government support and funding for the broader family law system.

2.5 The chapter then sets out a summary of the reforms since the introduction of the *Family Law Act 1975* (Family Law Act) and discusses current initiatives and pilot programs.

Services that couples use to resolve disputes following separation

2.6 While a significant number of the individual submissions received by the committee have focussed on personal experiences with the Family Court of Australia (Family Court), the Federal Circuit Court of Australia (Federal Circuit Court) or the Family Court of Western Australia (FCWA), the reality is that only a small proportion of separating families have their family law disputes determined by the courts. The majority of families do not engage with the family law system at all. As an Australian Institute of Family Studies (AIFS) 2014 report on post-separation parenting, property and relationship dynamics after five years shows, the most utilised resolution pathways for parents resolving parenting arrangements were:

- | | |
|--|----------------------------|
| • discussions between parents themselves | 52.6 per cent |
| • nothing specific, it just happened | 19.1 per cent |
| • counselling, mediation or family dispute resolution services | 9.7 per cent |
| • a lawyer | 8.9 per cent |
| • the courts | 7.4 per cent |
| • focus child decided | 0.5 per cent |
| • other | 1.8 per cent. ⁷ |

2.7 For property matters, the AIFS study found that parties were more dependent on the services of a lawyer to resolve the property settlement and, while still

⁶ SA Family Law Pathways Handbook, p. 2.

⁷ Lixia Qu et al, *Post-separation parenting, property and relationship dynamics after five years*, 2014, p. 54. Figures are from a total of 5 960 participants, figures may not total 100 per cent due to rounding. Almost all child-related questions asked of parents in the study focused on one child born of the separated relationship, this is the reference to the 'focus child' in the table, see p. xiii.

the most utilised resolution pathway, less use was made of discussions between the parties and of mediation as compared to parenting matters:

- discussions 39.3 per cent
- a lawyer 29.3 per cent
- nothing specific it just happened 18.8 per cent
- the courts 7.1 per cent
- mediation or dispute resolution services 4.2 per cent
- other 1.4 per cent.⁸

2.8 The Attorney-General's Department (AGD) noted in its submission that:

Though few separating families extensively use the family law system, families who are at risk of, or are already experiencing, some form of disadvantage are more likely to fall within the minority of people who are reliant on the family law system to resolve their issues. The Law and Justice Foundation of New South Wales 2008 Legal Australia-Wide Survey found that people with a disability, single parents, people who were unemployed and people living in disadvantaged housing had the highest vulnerability to experiencing legal problems.⁹

2.9 The AGD further stated:

The parents who do use [family law] services (family dispute resolution/mediation, lawyers and courts) are often those affected by a range of complex issues correlated with family breakdown, including family violence, child safety concerns, mental ill health and substance abuse. Some who use court services extensively may also do so because they are seeking to protract the dispute to abuse, punish or coerce the other party.¹⁰

2.10 This is supported by research published in 2015 by AIFS in which they surveyed recently separated parents who had resolved their parenting matter through the courts and asked whether seven issues were of relevance to their situation prior to separation. Over 85 per cent (85.3 per cent) of respondents reported allegations of emotional abuse, 53.7 per cent reported allegations of physical violence, and 38.1 per cent reported four or more issues (alcohol or drug use, mental health, gambling, problematic Internet or social media use, pornography use, emotional abuse and physical violence).¹¹

2.11 The earlier 2014 AIFS report also found that a protracted process of reaching agreements was linked with a greater use of lawyers or the courts.¹²

⁸ Lixia Qu et al, *Post-separation parenting, property and relationship dynamics after five years*, 2014, p. 98. Figures are from a total of 6 900 participants, figures may not total 100 per cent due to rounding.

⁹ AGD, *Submission 581*, p. 4.

¹⁰ AGD, *Submission 581*, p. 4.

¹¹ Ray Kaspiew et al, *Evaluation of the 2012 family violence amendments: Synthesis report*, 2015, p. 16.

¹² Lixia Qu et al, *Post-separation parenting, property and relationship dynamics after five years*, 2014, p. 54.

- 2.12 Mr James Steel, President, Family Law Practitioners Association of Queensland provided the following evidence concerning use of the family law system in matters that lawyers are engaged in:

The [legal] profession continues to assist the vast majority of separated families to resolve their matters by way of alternative dispute resolution. Only approximately five per cent of cases end up requiring a determination by the court.¹³

Overview of the family law courts

- 2.13 The legal issues experienced by families at the time of a relationship breakdown can be complex and may involve the need to engage with multiple court systems and agencies, across both federal and state/territory jurisdictions. In particular, individual submissions to the inquiry detailed experiences with the federal family law system and child support agency, as well as state and territory family violence jurisdictions and child protection system.

- 2.14 As the 2017 House of Representatives Standing Committee on Social Policy and Legal Affairs report into *A better family law system to support and protect those affected by Family Violence* (2017 Family Violence Report) stated:

It is important to note that neither the Commonwealth nor the states and territories have exclusive legislative competence in the area of family law, which has resulted in 'an especially fragmented system with respect to children'. With the exception of Western Australia, all states referred state powers with the effect that the federal parliament has jurisdiction over marriage, divorce, parenting and family property on separation. All states and territories retain jurisdiction over adoption and child welfare.

Rather than referring its powers to the Commonwealth, Western Australia established a state family court, the Family Court of Western Australia, which exercises both federal and state jurisdiction.¹⁴

- 2.15 States and territories also retain jurisdiction over family violence, both with regard to criminal offences and family violence protection orders. As the 2017 Family Violence Report noted, the role of state and territory family violence jurisdictions and the federal family law system are different:

Protection orders made under state and territory family violence legislation are aimed at providing immediate and future personal protection from family violence. Whereas family law resolves separation

¹³ Mr James Steel, President, Family Law Practitioners Association of Queensland, *Proof Committee Hansard*, 10 March 2020, p. 1.

¹⁴ House of Representatives Standing Committee on Social Policy and Legal Affairs, *A better family law system to support and protect those affected by family violence*, December 2017, (2017 Family Violence Report), pp. 21–22.
https://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/FVlawreform/Report
(accessed 31 July 2020).

disputes, including parental responsibility and property division and also safety.¹⁵

2.16 Chapter 7 discusses family violence orders in more detail and the overlap between these and family law orders.

Federal family law courts

2.17 There are currently two federal family law courts—the Family Court and the Federal Circuit Court. The Service Charter for the two courts sets out their respective roles as follows:

Family Court

The Family Court of Australia is a superior court of record created by the *Family Law Act 1975*. The Family Court deals with the most complex family law disputes, including those involving serious allegations of physical and sexual abuse.

The Court's purpose is to:

- determine cases with complex law, facts and multiple parties
- cover specialised areas, such as applications pursuant to the Hague Convention on International Child Abduction, special medical procedures, child sexual abuse, and international relocation, and
- provide national coverage as the appellate court in family law matters.

The focus of the Court is on helping families to resolve their disputes by agreement rather than proceeding to a formal hearing by a judge.

Federal Circuit Court

The [Federal Circuit Court] is a federal court dealing with both family law and general federal law matters, although most of its work is in the area of family law. Previously known as the Federal Magistrates Court, it was established with the aim of providing a simple and accessible alternative to litigation in the superior federal courts.

...

In family law, the [Federal Circuit] Court primarily deals with nearly all first instance divorce applications, applications for parenting and/or property orders and child support and enforcement issues. The Federal Circuit Court of Australia Act directs the Court to operate informally and to use streamlined procedures. This complements the Parliament's initiatives to encourage people to engage in a range of dispute resolution processes.¹⁶

2.18 Chapters 8 and 9 address parenting and property matters respectively.

¹⁵ 2017 Family Violence Report, p. 21.

¹⁶ Family Court of Australia and the Federal Circuit Court of Australia, *Service Charter*, p. 2.

Funding and caseloads in the federal family law courts

- 2.19 The Family Court and Federal Circuit Court are primarily funded through departmental appropriations. In 2018–19, the budget funding for the courts totalled approximately \$45 million and \$97 million, respectively.¹⁷ As at 30 June 2019, the Family Court had 34 judicial positions, including the Chief Justice and the Deputy Chief Justice; while the Federal Circuit Court had 69 positions, including the Chief Judge.¹⁸ The Chief Justice of the Family Court holds a dual appointment as the Chief Judge of the Federal Circuit Court.
- 2.20 Family law comprised 90 per cent of the applications filed in the Federal Circuit Court in 2018–19, a total of 85 234 applications.¹⁹ Of these, 52 per cent (44 342) comprised divorce applications, 26 per cent (22 115) were interim applications, 20 per cent (17 070) were applications for final orders and two per cent (1 707) were other applications.²⁰ In the Federal Circuit Court, excluding divorce applications, 51 per cent of applications related specifically to matters relating to children, 36 per cent related only to property matters, and 13 per cent related to children and property matters.²¹
- 2.21 The Family Court had 19 588 applications filed in its original jurisdiction over the same period—71 per cent (13 872) were for consent orders, 17 per cent (3 236) were interim applications, 11 per cent (2 225) were applications for final orders and one percent (255) were other applications.²² For the applications for final orders in the Family Court, 52 per cent of matters related to financial orders, 32 per cent were for parenting orders, 14 per cent were for parenting and financial matters and two per cent for other matters.²³

¹⁷ See, Family Court of Australia, *Annual Report 2018–19*, 21 October 2019, p. 62 at Table A.1.1 (Family Court Annual Report); and Federal Circuit Court of Australia, *Annual Report 2018–19*, 21 October 2019, p. 68 at Table A1.1 (Federal Circuit Court Annual Report). The budget funding for 2017–18 and 2016–17 for the Family Court according to the Annual Reports was approximately \$44.7 million and \$44.1 million, respectively. The budget funding for 2017–18 and 2016–17 for the Federal Circuit Court according to the Annual Reports was approximately \$94.1 million and \$91.6 million, respectively.

¹⁸ See, Family Court Annual Report, p. 63 at Table A.1.1; and Federal Circuit Court Annual Report, p. 69 at Table A1.1. Judicial numbers for the Family Court at 30 June 2018 and 2017 according to the Annual Reports were 33 and 32 (noting that at 30 June 2017 there was a vacancy in Adelaide and the Deputy Chief Justice position was also vacant). Judicial numbers for the Federal Circuit Court at 30 June 2018 and 2017 according to the Annual Reports were 69 and 63, respectively.

¹⁹ Federal Circuit Court Annual Report, p. 27.

²⁰ Federal Circuit Court Annual Report, p. 30.

²¹ Federal Circuit Court Annual Report, p. 31.

²² Family Court Annual Report, p. 17.

²³ Family Court Annual Report, p. 17.

State courts exercising family law jurisdiction

2.22 As discussed above, the FCWA is the only state Family Court in Australia. Along with the Magistrates Court of Western Australia, it:

... exercises federal jurisdiction under the [Family Law Act] in relation to matrimonial causes where there is a nexus to Western Australia between married parties, or unmarried parents of a child located outside Western Australia.²⁴

2.23 For remaining family law matters pertaining to unmarried parties, these courts exercise jurisdiction under state law.

2.24 In all other states and territories, courts of summary jurisdiction, usually local or magistrates' courts, have limited jurisdiction under the Family Law Act.²⁵ This jurisdiction hears the following:

- Defended property proceedings in relation to property with a total value up to \$20 000 or such higher amount as prescribed by regulation. Where the value of the property exceeds \$20 000 or such higher amount as prescribed by regulation, these courts can only hear the matter with the consent of all parties.²⁶
- Children's matters. These courts can only hear defended proceedings for a parenting order where all parties consent. However, even where consent is provided, the court may still transfer the matter on its own initiative.²⁷

2.25 Should the parties not consent to the court determining the matter, then the court of summary jurisdiction or prescribed court must transfer the matter to the Federal Circuit Court or the Family Court.²⁸

²⁴ Australian Government, *National Domestic and Family Violence Bench Book*, June 2020, 10.1.5 (National Domestic and Family Violence Bench Book), <https://aija.org.au/publications/national-domestic-and-family-violence-bench-book/> (accessed 31 July 2020). See also, *Family Law Act 1975*, s. 41.

²⁵ See, *Family Law Act 1975*, s. 39, s. 38B and s. 69J.

²⁶ See, *Family Law Act 1975*, s. 46.

²⁷ See, *Family Law Act 1975*, s. 69N. See also, *National Domestic and Family Violence Bench Book*, 10.1.6.

²⁸ See, *Family Law Act 1975*, s. 46 and s. 69N. See also, *National Domestic and Family Violence Bench Book*, 10.1.6.

Government support for family law services

2.26 There are a range of specialised family law services funded by the Australian Government that 'are designed to enable low or no cost access to the family law system'.²⁹ These include:

- Family Relationship Centres (FRCs), which provide families experiencing separation with information, advice and dispute resolution services to help them reach agreement on parenting arrangements without going to court.
- Family Law Counselling, which helps couples and families to manage relationship issues arising out of relationship changes, separation and divorce, through counselling, therapeutic intervention, support, information and referral.
- Family Dispute Resolution Services, which provide a specialist mediation process conducted by independent, accredited practitioners to help members of families, including separated families, resolve family law matters without going to court.
- Regional Family Dispute Resolution services, which are designed to meet the particular needs of regional communities, providing a range of services to help separating families resolve family law matters without going to court.
- Children's Contact Services, which assist children of separated parents to establish and maintain a relationship with their other parent and family members through supervised visits or changeover services.
- the Parenting Orders Program—Post Separation Cooperative Parenting Program, which helps separating families to manage matters about parenting arrangements and increase cooperation and communication, using child focused and child-inclusive interventions with the support of a case worker. This program offers education and support to parents where conflict is affecting their relationships with their children.
- the Supporting Children after Separation Program, which helps children from separating families to deal with issues arising from the breakdown in their parents' relationship, and allows children to participate in decisions that affect them.³⁰

2.27 In addition to funding these specialised family law services, the Australian Government also 'provides funding for the delivery of legal assistance through Legal Aid Commissions, Community Legal Centres, Aboriginal and Torres Strait Islander Legal Services and Family Violence Prevention Legal Services'.³¹

²⁹ AGD, *Submission 581*, p. 12.

³⁰ AGD, *Submission 581*, pp. 12–13.

³¹ AGD, *Submission 581*, p. 14.

Family law matters make up a considerable amount of the legal services provided. For example:

In 2018–19, 93% of legal representation services provided by Legal Aid Commissions, 52% of dispute resolution services delivered by Community Legal Centres, and 57% of dispute resolution services delivered by Aboriginal and Torres Strait Islander Legal Services related to family law matters. In the same time period, approximately 705,000 Commonwealth-funded legal assistance services were provided for family law matters in total.³²

2.28 From 1 July 2020, the Australian Government's funding for front-line legal assistance services will be over \$2 billion over five years under the proposed National Legal Assistance Partnership 2020–25 (NLAP). Under the NLAP, funding will also be provided for the delivery of targeted legal assistance services relating to family law and family violence, including \$69.5 million over five years in baseline funding for Community Legal Centres. It will also include specific Commonwealth funding for specialist Domestic Violence Units and Health Justice Partnerships and the Family Advocacy and Support Services.³³

2.29 In addition to the implementation of the NLAP, the AGD advised the committee that:

... the Australian Government has also increased funding for Family Violence Prevention Legal Services by an additional \$3 million over three years. This increase means the Government is investing over \$75 million from 2020–21 to 2022–23 to Family Violence Prevention Legal Services for frontline family violence and support services that directly improve safety for women and children, and provide better access to legal support.³⁴

2.30 The Australian Government also supports measures aimed at:

- primary intervention, such as the Family Relationship Advice Line, the website Family Relationships Online and the development of an Online Dispute Resolution System for family law disputes;³⁵ and
- supporting judicial education on family violence, such as the online National Domestic and Family Violence Bench Book and the funding of the National Judicial College of Australia to deliver family violence training to family law and other judges.³⁶

³² AGD, *Submission 581*, p. 14.

³³ AGD, *Submission 581*, p. 14.

³⁴ AGD, *Submission 581*, p. 14.

³⁵ AGD, *Submission 581*, p. 7.

³⁶ AGD, *Submission 581*, p. 10.

Establishment and reforms to the family law system

2.31 The Family Law Act commenced on 5 January 1976. It replaced the *Matrimonial Causes Act 1959–1973* (Matrimonial Causes Act) which required matrimonial fault for divorce. The Family Law Act also provided a legislative framework for additional areas of family law such as maintenance, custody and matrimonial property, which were, at that time, dealt with under state legislation.

2.32 One of the key differences identified in the Explanatory Memorandum between the Family Law Bill 1974 (the Family Law Bill) and the Matrimonial Causes Act was that 'procedures will be simplified, hearings will be less formal and costs will be reduced'.³⁷ Conciliation provisions under the Family Law Bill were also strengthened and greater use was to be made of welfare officers. The Explanatory Memorandum further provided:

All proceedings are to be heard in closed court, that is, only relatives or friends of either party, marriage counsellors, welfare officers and legal practitioners may be present in court, and the court has the power to exclude any of these persons. The Judge and counsel are not to robe and the court is to proceed without undue formality. It is to endeavour to keep proceedings from being protracted.³⁸

2.33 Senator the Hon Lionel Murphy, the then Attorney-General, further expounded on the purpose of the Family Law Bill in his second reading speech on 1 August 1974:

The main purpose of the Bill is to eliminate as far as possible the high costs, the delays and indignities experienced by so many parties to divorce proceedings under the existing Matrimonial Causes Act. The main way in which the Bill seeks to achieve this is by replacing the existing fault grounds of divorce with a single, no fault ground—irretrievable breakdown of the marriage—to be provable only by 12 months' separation of the parties up to the date of hearing of the divorce application ...³⁹

2.34 Aside from providing for no-fault divorce, the Attorney-General noted that the main purpose of the Family Law Bill would be advanced by other provisions, which:

... provide for more simple procedures, require courts to proceed without undue formality, and for proceedings to be heard in private. Apart from exceptional circumstances, when the court may make an order, each party to proceedings under the Bill will bear his or her own costs. Legal aid will be available to every person in need who is a party to proceedings under the Bill.⁴⁰

³⁷ Family Law Bill 1974, *Explanatory Memorandum (EM)*, p. 2.

³⁸ Family Law Bill 1974, *EM*, p. 9.

³⁹ Senator the Hon. Lionel Murphy, Attorney-General, *Senate Hansard*, 1 August 1974, p. 758.

⁴⁰ Senator the Hon. Lionel Murphy, Attorney-General, *Senate Hansard*, 1 August 1974, p. 758.

2.35 With regard to the custody of children, the Attorney-General stated:

... the main improvements contained in the Bill over existing law are: The requirement for greater use of welfare officers to try and achieve a settlement between the parties; greater opportunity for the wishes of the child whose custody is in dispute to be ascertained; and more effective enforcement of custody and access orders.⁴¹

Key legislative changes

Family Law Amendment Act 1983

2.36 The *Family Law Amendment Act 1983* implemented a number of changes recommended in the 1980 report of the Joint Select Committee on the Family Law Act (1980 Family Law Act Report).⁴² The amendments included the:

- provision that proceedings in the Family Law Court should be open to the public and heard in open court, subject to a discretion in the Court to exclude certain persons;
- specification of certain criteria relevant to the welfare of the child that a court is required to take into account in custody and like proceedings;
- inclusion of definitions for the purpose of the Act of 'guardianship' and 'custody';
- provision that the Family Law Court shall as far as practicable make such order as is least likely to lead to the institution of further proceedings with respect to the custody or guardianship of the child; and
- replacement of the requirement for a court to give effect in custody and like proceedings to the wishes of a child who has attained the age of 14 years by a provision enabling any wishes expressed by children of any age to be taken into account to the extent appropriate.⁴³

2.37 The 1980 Family Law Act Report noted that there appeared to be some confusion about the terms guardianship and custody used in the Family Law Act and concluded:

... it would seem that a need exists for precise meaning to be attached to terms such as guardianship, custody, care and control as these assume considerable importance where the rights of a child and adults in relation to that child are enunciated by courts.⁴⁴

2.38 The 1980 Family Law Act Report also stated that it was 'necessary to provide safeguards in the legislation that will limit the scope of parties and their

⁴¹ Senator the Hon. Lionel Murphy, Attorney-General, *Senate Hansard*, 1 August 1974, p. 759.

⁴² Joint Select Committee on the Family Law Act, *Family Law in Australia*, July 1980. Appendix 3 provides an outline of relevant family law system reviews.

⁴³ See, Family Law Amendment Bill 1983, *Explanatory Memorandum*.

⁴⁴ Joint Select Committee on the Family Law Act, *Family Law in Australia*, July 1980, p. 49.

advisers to conduct endless litigation over the rights in respect of young children'.⁴⁵ This led to the recommendation that:

... in order to reduce as far as possible the unnecessary bitter and prolonged custody and access proceedings, [a provision should be inserted] providing that in proceedings with respect to the custody and guardianship of a child of a marriage, the court shall, as far as practicable make such orders as will avoid further proceedings.⁴⁶

2.39 Similarly, the 1980 Family Law Act Report recommended that, in order to facilitate the more immediate settlement of disputes over custody, criteria should be drafted that the court must consider. The report stated that:

If the outcome of custody cases was more readily predictable by the parties, their legal advisers and by court counsellors, an inducement to settlement of disputes by negotiations between the parties would be provided.⁴⁷

Family Law Reform Act 1995

2.40 In 1995, the then Australian Government implemented further changes to the Family Law Act through the *Family Law Reform Act 1995*. The legislative amendments were part of the Government's response to the 1992 report of the Joint Select Committee into Certain Aspects of the Operation and Interpretation of the *Family Law Act 1975*.⁴⁸ The Family Law Reform Act also repealed and replaced Part VII of the Family Law Act to establish a new approach to dealing with children.⁴⁹

2.41 The amendments sought, inter alia, to:

- facilitate the greater use of mediation, counselling and arbitration, in the resolution of family law disputes, both within the court and in approved organisations in the community⁵⁰; and
- replace the concepts of custody and access, which carry ownership notions and may lead to the belief that the child is a possession of the parent who is granted custody, with the notion of parental responsibility which reflects

⁴⁵ Joint Select Committee on the Family Law Act, *Family Law in Australia*, July 1980, p. 58.

⁴⁶ Joint Select Committee on the Family Law Act, *Family Law in Australia*, July 1980, p. 59.

⁴⁷ Joint Select Committee on the Family Law Act, *Family Law in Australia*, July 1980, p. 59.

⁴⁸ Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act, *The Family Law Act 1975: Aspects of its operation and interpretation*, November 1992.

⁴⁹ These reforms were based on a letter of advice of March 1994 from the Family Law Council on the operation of the *Children Act 1989* (United Kingdom). See, Family Law Reform Bill 1994, Explanatory Memorandum (EM), p. 1.

⁵⁰ Family Law Reform Bill 1994, EM, p. 1.

the duties, powers, responsibilities and authority which by law parents have in relation to their children.⁵¹

2.42 An interim Report by researchers at the University of Sydney into the Family Law Reform Act stated that the amendments to Part VII were intended to achieve the following objectives:

- to effect an attitudinal shift, particularly to encourage both parents to remain involved in the care of their children after separation, and to see them continuing to share their parenting responsibilities despite their separation;
- to reduce disputes between parents following separation, by removing the proprietary notion of children inherent in custody battles. Underpinning this aim is the idea that neither parent should be considered more important, regardless of where the children live or who is the child's primary carer;
- to emphasise the idea that children have 'rights', while parents have 'responsibilities' by directing attention to the rights and interests of children rather than the needs and concerns of their parents in post-separation arrangements and decision making;
- to encourage parents to enter into private agreements about the future care of their children, through the use of 'primary dispute resolution', rather than resorting to a litigated solution; and
- to ensure that contact would not expose people to a risk of violence because of inconsistent contact orders and 'family violence orders', and to ensure that evidence of domestic violence is taken into account when making parenting orders.⁵²

Family Law Amendment (Shared Parental Responsibility) Act 2006

2.43 The *Family Law Amendment (Shared Parental Responsibilities) Act 2006* (Shared Parental Responsibilities Act) responded to recommendations of the 2003 House of Representatives Standing Committee on Family and Community Affairs report, *Every picture tells a story*.⁵³ The AGD provided this summary of the 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

⁵¹ Family Law Reform Bill 1994, EM, pp. 1–2.

⁵² Professor Helen Rhoades, Emeritus Professor Reg Graycar, and Ms Margaret Harrison, *The Family Law Reform Act 1995: Can changing legislation change legal culture, legal practice and community expectations?* Interim Report, April 1999, pp. 7–8.

⁵³ Family Law Amendment Bill (Shared Parental Responsibility) Bill 2005, Explanatory Memorandum, p. 1. See also, House of Representatives Standing Committee on Family and Community Affairs, *Every picture tells a story*, December 2003.

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.⁵⁴

2.44 The policy objectives of the 2006 changes 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 throughout Australia, the Family Relationship Advice Line and Family Relationships Online, funding for new relationship services, and additional funding for existing relationship services.⁵⁵

2.45 The AGD stated that the 2006 legislative changes comprised four main elements that:

- required parents to attend family dispute resolution before filing a court application, except in certain circumstances, including where there are concerns about family violence and child abuse
- 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.⁵⁶

⁵⁴ AGD, *Submission 581*, Attachment 2, p. 1.

⁵⁵ AGD, *Submission 581*, Attachment 2, pp. 1–2.

⁵⁶ AGD, *Submission 581*, Attachment 2, p. 2.

Family Law Amendment (Family Violence and Other Measures) Act 2011

2.46 In its submission, AGD described the purpose of the *Family Law Amendment (Family Violence and Other Measures) Act 2011* which:

... 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.

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.⁵⁷

2.47 The AGD provided the committee with the following summary of the 2011 reforms:

The Act was amended to, among other things:

- broaden the definitions of 'family violence' and 'abuse';
- 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;
- 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; and
- amend or repeal provisions that might have discouraged disclosure of concerns about child abuse and family violence.⁵⁸

Recent reviews of the family law system

2.48 As noted in Chapter 1, the two most recent reviews into the Family Law Act have been the 2017 Family Violence Report⁵⁹ and the ALRC's *Family Law for the Future—An Inquiry into the Family Law System* (ALRC 2019 Report).⁶⁰

2017 Family Violence Report

2.49 As noted above, in December 2017, the House of Representatives Standing Committee on Social Policy and Legal Affairs presented the report for its

⁵⁷ AGD, *Submission 581*, Attachment 2, p. 2. See the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011, Explanatory Memorandum, 2010–11, p. 1. The following reports are referenced as part of this submission: Rae Kaspiew et al, *Evaluation of the 2006 family law reforms*, 2009; Professor Richard Chisholm, *Family Courts Violence Review*, 27 November 2009; Family Law Council, *Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues*, December 2009.

⁵⁸ AGD, *Submission 581*, Attachment 2, p. 2.

⁵⁹ 2017 Family Violence Report.

⁶⁰ ALRC 2019 Report.

inquiry into how Australia's family law system can better support and protect those affected by family violence. The report made 33 recommendations and advocated 'for an accessible, equitable and responsive family law system which better prioritises the safety of families.'⁶¹

2.50 In line with the issues that this committee has heard to date, the report identified a number of key concerns about the family law system's approach to family violence, including:

- the adversarial system is inappropriate for resolving family law disputes;
- it does not respond appropriately to reports of family violence;
- it is inaccessible for most families [due to the legal fees and complex court procedures];
- it is open to abuse of process, including ongoing coercion and control of victims;
- it does not respond sufficiently to perjury and false allegations; and
- the structure and interaction with other jurisdictions including the state and territory family violence legislation and child protection systems is fragmented, leading to inconsistent approaches and exposing families to a greater risk of harm.⁶²

2.51 Proposals in the 2017 Family Violence Report respond to these key concerns in the following way:

- a nationally developed risk assessment tool for use across the family law system and by all professions working within and adjacent to the family law system;⁶³
- greater use of legally-assisted family dispute resolution for families affected by family violence, thereby reducing the number of cases which proceed to court, which frequently leads to lengthy delays in resolving disputes and prohibitive costs;⁶⁴
- reform to ensure that the determination of family violence occurs earlier in proceedings, which must be supported by a stronger initial assessment of risk;⁶⁵
- improved case management of family law matters involving family violence, including the adoption of a single point of entry to the federal family courts so that cases may be appropriately triaged and actively case managed;⁶⁶

⁶¹ 2017 Family Violence Report, p. iii.

⁶² 2017 Family Violence Report, pp. 47–48.

⁶³ 2017 Family Violence Report, Executive Summary, p. iv. See also, Recommendation 2 at p. xxix.

⁶⁴ 2017 Family Violence Report, p. iv. See also, Recommendation 4 at p. xxx.

⁶⁵ 2017 Family Violence Report, p. iv. See also, Recommendation 7 at p. xxxi.

⁶⁶ 2017 Family Violence Report, p. iv. See also, Recommendation 5 at p. xxx.

- implementation of more uniform rules and procedures to reduce complexity as well as stronger referral pathways and penalties for abuse of process, perjury and non-compliance with court orders.⁶⁷

2.52 The 2017 Family Violence Report also included other recommendations for reform that are relevant to this committee's terms of reference, such as:

- an expanded information sharing platform that would include state and territory domestic violence orders, orders issued under the Family Law Act and orders issued under state and territory child protection legislation;⁶⁸
- the impact of family violence be expressly considered in all aspects of property division⁶⁹ and an early resolution process for small claim property matters be adopted;⁷⁰
- to abolish private family consultants, with family consultants to be only engaged and administered by the Court itself and an agreed fee schedule be developed to regulate the costs of family reports and other expert witnesses;⁷¹
- that the Australian Government develop a national and comprehensive professional development program for judicial officers from the family courts and from states and territory courts that preside over matters involving family violence,⁷² as well as a national, ongoing, comprehensive, and mandatory family violence training program for family law professionals, including court staff, family consultants, Independent Children's Lawyers, and family dispute resolution practitioners;⁷³ and
- that it is critical for children's perspectives to be provided to courts and recommended further exploration of this issue by the Australian Law Reform Commission's review of the family law system.⁷⁴

2.53 The AGD advised the committee that as at 6 December 2019, of the 33 recommendations made, 18 recommendations have been implemented in full or in part, 13 recommendations are currently under consideration, and the

⁶⁷ 2017 Family Violence Report, p. iv. See also, Recommendation 5 at p. xxx.

⁶⁸ 2017 Family Violence Report. Recommendation 6 at p. xxx.

⁶⁹ 2017 Family Violence Report. Recommendation 13 at p. xxxii.

⁷⁰ 2017 Family Violence Report. Recommendation 14 at p. xxxii.

⁷¹ 2017 Family Violence Report. Recommendation 22 at p. xxxiv.

⁷² 2017 Family Violence Report. Recommendation 27 at p. xxxvi.

⁷³ 2017 Family Violence Report. Recommendation 28 at p. xxxvii.

⁷⁴ 2017 Family Violence Report. Recommendation 23 at p. xxxv.

remaining two recommendations are not Australian Government recommendations.⁷⁵

ALRC 2019 Report

2.54 On 27 September 2017, the then Attorney-General, Senator the Hon George Brandis QC announced that he had 'commissioned the [ALRC] to undertake the first comprehensive review of the family law system since the commencement of the Family Law in 1976'.⁷⁶ The then Attorney-General stated:

The review of the family law system will be broad and far reaching, focusing on key areas of importance to Australian families. These include ensuring the family law system prioritises the best interests of children, best addresses family violence and child abuse, and supports families, including those with complex needs to resolve their family law disputes quickly and safely while minimising the financial burden.⁷⁷

2.55 The ALRC produced an Issues Paper in March 2018 and a Discussion Paper in October 2018, before delivering its final report in March 2019 which contained 60 recommendations. The Discussion Paper 'proposed a public health approach to frame changes to the family law system'⁷⁸ comprising primary, secondary, and tertiary interventions. However, in the Final Report the ALRC, while considering that the family law system 'should focus on strengthening its primary and secondary responses',⁷⁹ focussed primarily on tertiary issues. With regard to primary and secondary interventions, it stated:

Important though these initiatives are, they sit within the broader conceptualisation of a family 'wellbeing' system, which is underpinned by the family law. They are the 'clinical and social services' that support separating families. As such, they do not lend themselves readily to law reform. The law cannot, and cannot be expected to, provide a solution to the complex emotional, cultural, social, health, and economic issues that underlie the breakdown of an intimate relationship. The ALRC agrees that the notion of 'complex needs' in family law is not intrinsically linked to legal complexity, and that 'funneling families with ... co-occurring psycho-social needs into the courts' is a failure to respond properly to the needs of the family. A law reform commission has neither the expertise nor

⁷⁵ Attorney-General's Department, answer to question on notice LCC-SBE19-66, Senate Legal and Constitutional Affairs Supplementary Budget Estimates 2019–20, October 2019 (received 6 December 2019).

⁷⁶ Senator the Hon. George Brandis QC, Attorney-General, 'First comprehensive review of the Family Law Act', *Media Release*, 27 September 2017.

⁷⁷ Senator the Hon. George Brandis QC, Attorney-General, 'First comprehensive review of the Family Law Act', *Media Release*, 27 September 2017.

⁷⁸ ALRC 2019 Report, p. 60. For further discussion of the approach, see paragraphs 2.18–2.26 on pp. 60–62.

⁷⁹ ALRC 2019 Report, p. 63.

the mandate to address the underlying matters of human behaviour and circumstance that cause this complexity (such as mental health, homelessness, poverty, substance misuse, violence, and criminality).

The law is, however, the last resort when primary and secondary levels of intervention have not assisted parties to resolve their disputes—a proposition which seems to be accepted even by stakeholders who reject the current legal paradigm. The ALRC has therefore focused its attention at the tertiary level.⁸⁰

2.56 The ALRC recommendations were based on a harm minimisation approach. In the media release announcing the release of the final report, the ALRC stated that implementing the 60 recommendations will:

- promote an integrated court response to family law matters, child protection matters and matters involving family violence, providing better protection to individual litigants and their children;
- assist separated couples and the courts to arrive at parenting orders that promote the best interests of the child;
- assist separated couples to understand and comply with parenting orders, reducing conflict thus contributing to the welfare of children;
- increase the proportion of separated couples who are able to resolve their parenting matters, and property and financial matters, outside the courts through a process that ensures fairness and reduces ongoing conflict;
- reduce acrimony, cost and delay in the adjudication of family law disputes through the courts and ensure family law matters are subject to rigorous case management by the courts to reduce delay and cost; and
- ensure that families who seek assistance from the family law system with legal and other support needs receive that support in a coordinated and efficient manner.⁸¹

Recent and current initiatives in the family law system

2.57 There are currently a large number of reforms to the family law system being pursued by the Australian Government, but which are in their infancy and have yet to be evaluated. The AGD has provided the committee with a summary of 17 reforms recently implemented or in the process of being implemented by the Government.⁸² These reforms relate to parenting and property matters, family violence, legal assistance and structural reform of the courts and include:

- a small claims property pilot of a simpler and quicker process for distributing property of less than \$500 000 between parties following a relationship breakdown from January 2020 to December 2021;

⁸⁰ ALRC 2019 Report, pp. 63–64.

⁸¹ ALRC, 'ALRC Family Law System Review—Final Report', *Media Release*, 10 April 2019.

⁸² AGD, *Submission 581*, Attachment 1, pp. 1–2.

- increased property mediation with ongoing funding for FRCs to undertake family law property mediation and funding for Legal Aid Commissions to conduct a two year pilot from January 2020 to December 2021 of lawyer-assisted property mediation for matters with a property pool of up to \$500 000, excluding debt;
- funding from 1 June 2017 to 30 June 2020 for pilots of legally-assisted and culturally appropriate family dispute resolution services for parenting matters for Indigenous and Culturally and Linguistically Diverse families who have experienced family violence;
- the piloting from January 2020 of the co-location of state and territory child protection and policing officials, in family law courts across Australia to increase the information on family violence being shared between these systems; and
- funding to represent parties to a family law hearing who are subject to the ban on direct cross-examination under Part XI Division 4. The implementing legislation requires this Division to be reviewed as soon as possible two years after commencement.⁸³

2.58 A number of these measures are aimed at providing support to parties to resolve their parenting, property and other disputes without resorting to contested court proceedings. All of them are aimed at improving the engagement of parties with the family law system. However it is too early to understand the impact that these reforms will have on the system.

2.59 In addition to these reforms, the AGD also provided evidence about an additional reform that is to be piloted in the Federal Circuit Court. The Australian Government has committed \$13.5 million over three years to pilot a screening and triage program for matters being considered by family law courts, with three interconnected processes: screening parenting matters for family safety risks at the point of filing; triaging matters to an appropriate pathway based on the identified level of risk; and maintaining a specialist list to hear matters assessed as involving a high risk of family violence. The pilot will commence soon and is expected to be operational in three registries initially, the Parramatta, Brisbane and Adelaide registries (which together constitute 42 per cent of filings in the Federal Circuit Court).⁸⁴

⁸³ See, s. 102NC of the *Family Law Act 1975* (as amended by the *Family Law Amendment (Family Violence and Cross Examination of Parties) Act 2018*).

⁸⁴ Ms Alexandra Mathews, Assistant Secretary, Family Safety Branch, AGD, *Proof Committee Hansard*, 14 February 2020, p. 8.

- 2.60 To support the effecting implementation of this triage pilot, the Government introduced the Family Law Amendment (Risk Screening Protections) Bill 2020 into Parliament on 26 August 2020. The Bill will amend the Family Law Act to:
- ensure that information obtained or generated through the risk screening process cannot be disclosed, except in limited circumstances, such as where disclosure is necessary to protect a child from the risk of harm, or to prevent or lessen serious threats to the life, health or property of a person;
 - ensure that information obtained or generated through the new risk screening process is inadmissible in any court or tribunal, except where the family safety risk screening information or evidence indicates that a child has been abused or is at risk of abuse; and
 - provide immunity for court officials, such as registrars and family counsellors, when undertaking new non-judicial roles as part of the risk screening process.⁸⁵
- 2.61 These measures are all consistent with existing family counselling provisions of the Family Law Act and will ensure that parties are able to freely and confidentially participate in the processes being trialled in the pilot and that court workers are appropriately supported to carry out their new functions.⁸⁶
- 2.62 Two new services that have been positively piloted and evaluated in the last few years by the Australian Government and have therefore been continued are the Family Advocacy and Support Service (FASS)⁸⁷ and Domestic Violence Units and Health Justice Partnerships.
- 2.63 The Australian Government provided \$18.5 million over three years (2016–2019) for legal aid commissions to establish the FASS in family law court registries and other locations across Australia. This 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.⁸⁸

⁸⁵ See Family Law Amendment (Risk Screening Protections) Bill 2020, Second Reading Speech, Senate Hansard, 26 August 2020, Senator Duniam, Assistant Minister for Forestry and Fisheries and Assistant Minister for Regional Tourism, pp. 60–61.

⁸⁶ See Family Law Amendment (Risk Screening Protections) Bill 2020, Second Reading Speech, Senate Hansard, 26 August 2020, Senator Duniam, Assistant Minister for Forestry and Fisheries and Assistant Minister for Regional Tourism, pp. 60–61.

⁸⁷ The Hon Christian Porter MP, Attorney-General, 'Additional funding for Family Violence Support Services', *Media Release*, 18 December 2018.

⁸⁸ Senator the Hon George Brandis QC, 'Improving family violence support in family law courts', *Media Release*, 17 May 2017.

- 2.64 After a positive independent evaluation released in October 2018,⁸⁹ the Australian Government committed a further \$22.6 million to extend the FASS for three years from 1 July 2019, as well as \$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.⁹⁰
- 2.65 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 units⁹¹ 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.⁹²

Related reforms

- 2.66 A number of the initiatives discussed above have been funded through the following family safety initiatives and programs: the National Plan to Reduce Violence Against Women and their Children 2010–2022, and the Women's Economic Security Package.
- 2.67 The National Plan to Reduce Violence against Women and their Children 2010–2022 was endorsed by the Council of Australian Governments (COAG) and released in February 2011. The National Plan is being delivered over 12 years through a series of four three-year action plans and brings together the

⁸⁹ Prepared by Inside Policy for the AGD, *An evaluation of the Family Advocacy and Support Services: Final Report*, 18 October 2018.

⁹⁰ AGD, *Submission 581*, Attachment 2, pp. 13–14.

⁹¹ Prepared by Social Compass for the AGD, *Evaluation of the pilot programs of the specialist domestic violence units and health justice partnerships established under the women's safety package: Final report*, February 2019.

⁹² AGD, *Submission 581*, Attachment 2, p. 14.

efforts of governments across Australia to make a real and sustained reduction in the levels of violence against women.⁹³

- 2.68 On 9 August 2019, the COAG endorsed the Fourth Action Plan of the National Plan to Reduce Violence against Women and their Children 2010–2022, agreeing on five national priorities to reduce family, domestic and sexual violence.⁹⁴
- 2.69 On 20 November 2018, the Australian Government announced a package of measures to improve women's economic security. The Women's Economic Security package is built around the following three pillars:
- increasing women's workforce participation;
 - supporting women's economic independence; and
 - improving women's earning potential.⁹⁵

Proposal to merge the Family Court and the Federal Circuit Court

- 2.70 On 5 December 2019, the Australian Government introduced the Federal Circuit and Family Court of Australia Bill 2019 (the FCFC Bill) which proposes unifying the administrative structure of the Family Court and the Federal Circuit Court to create the Federal Circuit and Family Court of Australia, comprised of Division 1 (which will be a continuation of the Family Court) and Division 2 (which will be a continuation of the Federal Circuit Court). The Attorney–General, the Hon. Christian Porter MP, explained the benefits of these reforms in his second reading speech:

[This legislation] will reduce the costs and delays that thousands of Australian families experience as a result of a split federal family law court system. This legislative package will create greater efficiencies in the federal family law court system and, in turn, assist families navigating the court system during what can be some of the most difficult and distressing times of their lives.

... This bill creates a consistent pathway for Australian families in having their family law disputes dealt with in the federal courts. Under the government's reforms, there will be a single point of entry for the federal family law jurisdiction and, ultimately, a common set of rules, procedures, practices and approaches to case management. The reforms enabled by

⁹³ Australian Government, *National Plan to Reduce Violence Against Women and Their Children*, <https://plan4womenssafety.dss.gov.au/> (accessed 27 July 2020).

⁹⁴ Department of Social Services, *The National Plan to Reduce Violence against Women and their Children 2010–2022*, <https://www.dss.gov.au/women/programs-services/reducing-violence/the-national-plan-to-reduce-violence-against-women-and-their-children-2010-2022> (accessed 27 July 2020).

⁹⁵ See, Commonwealth of Australia, Department of the Prime Minister and Cabinet, *Women's Economic Security Statement 2018*, pp. 5–6, <https://www.pmc.gov.au/sites/default/files/publications/womens-economic-security-statement-2018.pdf> (accessed 27 July 2020).

these bills will improve user experience for those Australian families that unfortunately need the assistance of the courts to resolve their disputes and promote improved practices by both courts and legal practitioners.⁹⁶

- 2.71 In addition, the FCFC Bill provides that the overarching purpose of the family law practice and procedure provisions within the legislation is to facilitate the just resolution of disputes according to the law and as quickly, inexpensively and efficiently as possible. Parties will be required to act consistently with the overarching purpose, and courts will have the power to make an order that a party's lawyer bear costs personally if the lawyer fails to take account of the duty or assist the party to comply with the duty.⁹⁷
- 2.72 The FCFC Bill has been referred to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report by 20 November 2020.⁹⁸

⁹⁶ The Hon. Christian Porter MP, Attorney-General, *House of Representatives Hansard*, 5 December 2019, p. 7054. A related bill, the Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2019, was introduced at the same time.

⁹⁷ See, AGD, *Submission 581*, p. 24; and Federal Circuit and Family Court of Australia Bill 2019, Explanatory Memorandum, p. 5.

⁹⁸ Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the provisions of the Federal Circuit and Family Court of Australia Bill 2019 and Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2019*, 14 February 2019.

Chapter 3

The experience of parties to family law matters

Introduction

- 3.1 A central part of this committee's work has been hearing from individuals with first-hand experience of the family law system in Australia. At the heart of this inquiry are the men, women, children and their extended family who engage with different parts of this system on a daily basis.
- 3.2 The committee received over 1500 submissions from individuals with experience of the family law system to 17 September 2020 and held thirteen in camera hearings receiving evidence from 85 individuals. These written submissions and subsequent oral evidence have provided the committee with an important insight into the impacts that the family law system has on the lives of Australian families. These individual accounts have illustrated the failings of the system, highlighted the long lasting injustices that some participants feel and painted a very personal picture of the systemic issues that the committee considered. This evidence has also informed much of the committee's work and understanding of how Australia's family law system currently operates in practice and been a source of possible areas for improvement and reform.
- 3.3 The quotes in this chapter are a representative view of the issues repeatedly raised throughout submissions. On some issues, submissions spoke with one voice; on other matters, the committee heard differing and sometimes contradictory viewpoints.
- 3.4 The most common theme raised in submissions was the profound impact that family and relationship breakdown has had on the immediate and extended members of a family. Regrettably, many people have felt that their interactions with the family law system have exacerbated an already distressing event in their lives. This chapter highlights this issue and a number of other common themes explored in individual submissions including in relation to:
- challenges in engaging with the legal system;
 - parenting arrangements;
 - child support;
 - domestic violence; and
 - property matters.

Impacts on people's lives

- 3.5 Many submissions and witnesses have commented on the immense personal trauma that a relationship and family breakdown can cause. These breakdowns inevitably lead to significant change to the lives of parents,

children, grandparents and other extended family. Living arrangements can change including one or both parents having to move out of the family home, and children may spend less time with one or both parents. In addition, there may be financial implications and stresses as family assets—primarily the family home—are sold to enable separate residences to be established for the separated couple.

- 3.6 Common themes emerged with one submitter reporting about going into 'shock and severe depression',¹ whilst another described himself as being made to 'feel worthless' as a consequence of his family breakdown.² One submitter noted that 'dealing with courts causes great stress and anxiety and in many cases depression' adding that 'it is hard and family are unable to help and you are left to flounder on your own or find a support person or team'.³ One witness summarised his current situation:

I have got to the point where I am financially and emotionally stretched, to the degree that I have decided I will accept to make the best I can of the current situation that has developed, especially in regard to seeing my children, without spending any more time or money fighting the system, which I feel has beaten me.⁴

- 3.7 Tragically, a number of submitters indicated that their family law matter had been so distressing that they had contemplated suicide. One submitter observed that 'we hear of so many suicides of men that relate back to a broken marriage and the loss of their children'.⁵ Another submitter highlighted that 'the high suicide rates of separated fathers indicates the deep pain felt by fathers that have their children taken away from them'.⁶

- 3.8 Separation also marks the point of greatest risk for individuals who have been subject to family violence during the course of their relationship:

Although the signs of an abusive relationship were there earlier, they did not become apparent to me until I fell pregnant. We were living in a domestic violence situation and I was preparing to leave the relationship. After experiencing a violent outburst when I was trying to call the police, I was chased up the stairs by my ex-partner, tackled down on the ground, with my face pressed down onto the floor. My hands were twisted behind my back and there was a knee pinning my body to the ground. All this happened with my ex-partner holding our ... baby in his arms.

¹ Confidential, *Submission 177*.

² Confidential, *Submission 187*.

³ Confidential, *Submission 128*.

⁴ In camera Hansard, 11 March 2020.

⁵ Confidential, *Submission 129*.

⁶ Confidential, *Submission 139*.

That day I ran away from home. I had no family in Australia, or financial support, only a tiny baby in my arms. In the following months, the abuse escalated to threats to our safety and two promises, one to make me and my family suffer for the rest of our lives, and second, that my son would never be able to go and see our family ...⁷

3.9 The committee also heard that family violence and other controlling and abusive behaviours did not necessarily cease once a relationship ended. In some circumstances, the family law process extended this type of abusive behaviour:

... leaving a domestic violence relationship with a baby was highly distressing, but it was the experience in the family court system and the consequences of this experience which produced the most trauma for myself and my son, giving the abuser ammunition to use against us for the many long years that followed.⁸

3.10 Extended members of the family are also affected by a loss of connection to children:

This had a very severe effect on my parents, who appeared to suffer greater distress than I did. They thought they would never see their grandchildren again, despite being totally devoted to them.⁹

3.11 Another submitter also articulated the impact on extended family:

It has been 3 years since I have seen my children ...

And their sister (my stepdaughter, ...) has not seen them in this time either, nor have their grandmother, uncles, aunties and cousins.¹⁰

3.12 The remainder of this chapter focuses on the more specific impacts on individuals.

Challenges in engaging with the legal system

3.13 The committee received a significant body of evidence detailing a range of concerns with legal proceedings including in relation to the following matters:

- delays;
- perceived bias;
- expert witnesses;
- legal costs; and
- mediation and dispute resolution.

⁷ Confidential, *Submission 151*.

⁸ Confidential, *Submission 151*.

⁹ Confidential, *Submission 139*.

¹⁰ Confidential, *Submission 1006*.

Delays

3.14 A significant issue raised during this inquiry was the length of time a matter can take to resolve from start to finish.

3.15 A submitter described their son's experience with a court appearance stating that not enough time is initially allocated when a case is listed; that each additional day in court costs extra money, and that once the case is concluded, parties must then wait for a decision:

Our son's Lawyers have said it can take up to three years for a decision to be made. I find this totally unacceptable. I do not understand why a quick decision is not made while everything is fresh in the mind of the Judge. We are living the nightmare and at times things become foggy to us.¹¹

3.16 One submitter succinctly put forward his assessment of the reasons for delays in the court:

... disputes are protracted by delays occasioned by resource constraints in the courts and also by the conduct of parties who are unable or unwilling to resolve their dispute quickly and without acrimony.¹²

3.17 This was supported, and added to, by others such as this submitter:

The incredible delays are exacerbated by a revolving door of magistrates and judges assigned to our case—

Court set deadlines for official documents/ affidavits and other requirements are not upheld or reinforced. All of these deadlines were in my case ignored, often for several months, with no consequences or repercussions.¹³

3.18 The committee heard that these delays can have significant impacts on children and parents:

The court says it would like parties to negotiate but if they could negotiate, they wouldn't be there. They go back to court after failed negotiations. 'We need a report' so \$5000 is spent on a report. 'I won't actually order the report's recommendations as we will see if the parties can sort it out'.

Several hearings later, all of which have been 'I don't have time to make an order, we will review it later'.

One year later, the report still hasn't been implemented and the court says 'This is a year old now and out of date, I can't do anything until I get a new report'.

By now the children have had almost 2 years of minimal parenting by the non-custodial parent and minimal exposure to their other set of grandparents ...¹⁴

¹¹ Confidential, *Submission 129*.

¹² Name withheld, *Submission 105*, p. 3.

¹³ Confidential, *Submission 183*.

¹⁴ Name withheld, *Submission 185*, p. 1.

3.19 Delays during legal proceedings are discussed further in Chapter 6.

Perceived bias

3.20 The committee heard that there is a perception that the family law system is biased against men. One submitter described this perception in the following way:

It is accepted that 'both parents should have equal input to the upbringing of the children'...A decision was made unilaterally by the mother that my children...would stay with me for only the odd day in the first few months, eventually 3 days per fortnight, and then 2 years later 4 days per fortnight. I would be very surprised if a court took 2 years to decide on a resolution if this was the father so significantly restricting access of the mother. I would be very surprised if the court would then rule that the children's needs are best met by spending 10 days per fortnight away from their mother ...¹⁵

3.21 A different submitter made the following assertions:

The judge ... accepted not only false information but hearsay as evidence and would not even consider my version of events. The family report writer was heavily biased towards my former partner and I was not allowed to question this. The [Independent Children's Lawyer] was not independent at all. There's no proof whatsoever that she took my situation into consideration and favoured [the] mother as the primary care giver and accepted lies told about me as fact.¹⁶

3.22 Another submitter commented on his experience:

For some months I could not see my children without another adult ..., the [court ordered] [counsellor] had a definite bias against me and at the conclusion of the months of meetings she said she had not believed me because I was [too] intense! She also advised that I could have requested another [counsellor]. I was never given that advice until the process concluded. Without doubt that [counsellor] caused more grief and distress simply because of the incompetence and arrogance of the [counsellor].¹⁷

3.23 Some claimed that some court mediators were not always impartial:

I am lodging official complaints against the court mediators for their unprofessional, predetermined and incompetent conduct and failing the children's rights. Their methods were not of a mediating nature, and were not child focussed rather to incite conflict and raise accusations not relevant to the case or children then taunted the father.¹⁸

¹⁵ Confidential, *Submission 183*.

¹⁶ Confidential, *Submission 147*.

¹⁷ Confidential, *Submission 273*.

¹⁸ Name withheld, *Submission 825*, p. 1.

- 3.24 Notwithstanding these claims, the committee heard from women who felt they had also been treated unfairly:

The family report was not based on evidence but heuristic biases. The information was cherry picked to suit a preconceived result. Important evidence was ignored and when presented with important information against the biased opinion, it was disregarded. In cross examination, when evidence was presented, instead of addressing it, repeated 'this mother is unfit'.¹⁹

- 3.25 Another mother shared her reflections on the family law system:

The lawyers—the mediation. I understand that, with some judges, if they're biased against you, then you don't stand a chance in court. I understand that most do get child alienation, but in my circumstances I've done everything right and I still can't win. The system has let me down. It's the lawyers, child support, family law, the judges. We don't win.²⁰

Expert witnesses

- 3.26 A number of concerns were raised about the role that expert witnesses play in legal proceedings. Many of these complaints centred on independent children's lawyers (ICLs) and family consultants who are appointed to write family reports (family report writers).

- 3.27 Submitters alleged that there are some ICLs who do not comply with their responsibilities as outlined in the *Family Law Act 1975* (Family Law Act).

We have numerous ICLs who are not following those orders. They're not interviewing the children. They're not seeking their wishes. In a case ... an ICL recommended that the mother have unsupervised contact with the children after she had had two restraining orders against her. A previous judge of the family law court had put her under supervised contact, and that same judge stopped the contact six months later because the children were ... being affected by the contact with their mother, because of her previous abuses. This ICL, with a new judge at a mention, sought to have unsupervised contact with the mother. At the very first unsupervised contact, at [a] contact centre, the mother bashed two of the children. So we have an ICL here who took no notice of the previous judge's order or the mother's previous abusive history and who allowed the children to be harmed, and she's still in business.²¹

- 3.28 The submitter added that 'there's something wrong with the system when these professionals are not doing their job properly and the courts are not upholding the rights of the child'.²²

¹⁹ Confidential, *Submission 151*.

²⁰ In camera Hansard, 10 March 2020.

²¹ In camera Hansard, 6 April 2020. See, s. 68LA of the *Family Law Act 1975*.

²² In camera Hansard, 6 April 2020. See, s. 68LA of the *Family Law Act 1975*.

3.29 The committee heard the experience of another submitter with respect to an ICL and family report writer:

I spent over 3 years in the family law system ... and in that time, my ex-wife and the ICL both provided documents (subpoena documents from DV services and child safety) that had zero basis of any factual evidence, claims that were unproven and uninvestigated [sic] yet the ICL and the judge (and the so called 'independent' family report writer ...) were allowed to use this unproven 'evidence' as a basis for making claims and pushing for orders against myself, limiting my time with my children for over 3 years causing massive amounts of emotional distress, anxiety, depression and suicidal thoughts.²³

3.30 Others were even more scathing in their assessment:

I think ICLs are the biggest load of hogwash God ever gave breath to. We have had four different ICLs in our matter and not a single one of them has talked to any of my children, even my oldest son. None of them have taken the time or anything else. They have had numerous amounts of evidence put before them, and they don't care. They are extremely biased. They're of course government paid, because they're funded by legal aid. They are there simply to pretty much sit on their thumbs and become a biased party to the proceedings, because, after all, it's the ICLs who are picking who the child is to live with. We need to abolish them. They are absolutely the biggest hogwash.²⁴

3.31 Some submitters felt that family report writers do not currently spend sufficient time with families prior to making recommendations about past and future parenting arrangements:

Family Report Writers need more access to children. It is very difficult in a couple of hours to determine [whether] the child [is] being abused, alienated etc in my case this went on for 2 years and it was not necessary.²⁵

3.32 Some submitters argued that family report writers could sometimes reach contradictory positions in subsequent reports:

The same [family report writer] wrote another report, this time in support of me and recommending no contact with the father. Even though I was overjoyed in the recommendation, I now had two reports, written by the same [family report writer] with completely different recommendations. And this is where I can show that the [family report writer] Reports are complete garbage. In the First report, negative towards me, there was absolute rubbish written about me. In the Second report, negative towards the father, there was absolute rubbish written about him. These reports are useless and are based on who can present themselves 'nicer' to the [family

²³ Confidential, *Submission 327*.

²⁴ In camera Hansard, 10 March 2020.

²⁵ Confidential, *Submission 128*.

report writer]. They are based on preconceived beliefs and should not be used at all.²⁶

- 3.33 Matters relating to family report writers, ICLs and other court experts are examined further in Chapter 4.

Legal costs

- 3.34 The committee received a substantial amount of evidence about the disproportionately high legal costs of parties to family matters. For instance, the committee were told that some people were spending up to \$200 000 in legal fees.²⁷ In one case, the committee heard of a separated couple spending nearly \$900 000 in legal fees against an asset pool of \$1 million.²⁸ Whilst this is an extreme example, it was not uncommon for the committee to hear from submitters and witnesses about legal fees that consumed a significant proportion of matrimonial assets:

Our son owned his own home, he also owned a flat he had rented out, a large piece of land he planned to subdivide as well as a healthy bank account when he met his ex. With all the valuations, accountants, expert witnesses and legal costs he has incurred he has had to sell up everything ...²⁹

- 3.35 One submitter pointed out the high fees that legal professionals charge relative to the modest incomes earned by their clients:

The majority of parties in family court proceedings are average income earners. Legal firms cannot justify the very high legal fees of greater than \$350 per hour. Nor Barristers that charge >\$2000 per day.³⁰

- 3.36 Another submitter described the regular court appearances and the mounting legal costs:

I have also had to take my ex back to court because he wouldn't follow the orders, and sometimes I wouldn't even get to see our son, he would just withheld [sic] him. He hasn't once complied with the orders and yet the system lets them get away with it. I have been to two mediation sessions which has cost me nearly \$5,000 dollars, I've had to get a new lawyer and I'm still trying to pay her off plus the last court/lawyer fees from the last fight. So here I am again working for nothing, to pay lawyers and fight in court again just so my ex can adhere to the orders, and I can move on with my life. I have been to court 3 times so far ...³¹

²⁶ Confidential, *Submission 136*.

²⁷ Confidential, *Submission 124*.

²⁸ In camera Hansard, 12 March 2020.

²⁹ Confidential, *Submission 129*.

³⁰ Confidential, *Submission 123*.

³¹ Confidential, *Submission 131*.

3.37 The committee was told that the legal sector appeared to be primarily driven by financial motives:

In my opinion it is an industry driven by financial gain where common sense and fairness doesn't exist. The right of parents, generally fathers, to care equally for their children without having to incur exorbitant legal costs must be addressed.³²

3.38 Many other submissions echoed this view, for example:

The legal system has a vested interest (more fees) in prolonging cases, which only adds to the financial costs of both parents at a time when the finances are strained. It also adds to the tensions between the parties. Why is a barrister needed at \$10,000 a day to resolve cases which are very common in nature? Not to mention the need to have an attendant solicitor at around \$5,000 per day. And to make it worse the lawyers avoid any resolution until just before the court date which ensures full legal payment. And the result may be dependent on which judge is hearing the case! Then resolution is quick so that the lawyers get full payment with minimal effort! And some judges admonish a party because they were represented only by a solicitor. An average contested custody and financial settlement costs about \$100,000 for each party.³³

3.39 The motivations of some ex-partners were also called into question:

Some parties just keep going (prolonging the process, lying etc) in order to cost the other party as much as possible—hoping they will give up as they cannot afford to continue, cannot deal with the lies (they are trying to maintain their reputation) and do not see their children.³⁴

3.40 The committee also heard that it is difficult for men to obtain access to legal aid support:

My ex-wife obtained legal aid support, and changed lawyers about 8 times during the period. I was unable to get any aid.³⁵

3.41 Another submitter put forward a similar view:

My son tried to access legal aid and was told the only company he could go to was about $\frac{3}{4}$ of an hour drive away from where he lived.

Perhaps more legal aid companies could be offered so it is easier for people to access.³⁶

3.42 Legal costs are discussed further in Chapter 5.

³² Name withheld, *Submission 832*, p. 1.

³³ Name withheld, *Submission 559*, p. 2.

³⁴ Confidential, *Submission 202*.

³⁵ Confidential, *Submission 273*.

³⁶ Name withheld, *Submission 811*, p. 2.

Mediation and dispute resolution

3.43 The committee heard that one reason that mediation fails is that one or both parties fail to engage with the mediation process in good faith:

Two attempts at mediation were made but our ex daughter-in-law and her legal team were not interested in trying to settle.³⁷

3.44 This view was supported by others who noted that outcomes from mediation were often not legally binding until they are filed with the court. This extra step in the process can cause conflict:

One party should not be able to refuse to attend mediation or if attends mediation and signs off on an agreement then refuses to sign the court copy ...³⁸

3.45 One submitter described mediation as a box ticking exercise:

Mediation was a disaster because the mediator was totally inadequate and my partner was never going to be reasonable when your target is 70%. This was just a blatant waste of money and time when as my lawyer put it to me when it was over 'that we had just ticked a box'. In other words the system requires us to mediate and we had done so even if a complete waste of time and money for us but not of course for the lawyers.³⁹

3.46 Similarly, another submitter expressed frustration about the rules around mediation:

At present The Family Law Act allows mediation to be less than ten minutes. It should be redefined to be two half-day sessions.⁴⁰

3.47 Matters relating to mediation and arbitration are more fully explored in Chapter 12.

Parenting arrangements

3.48 The development of parenting orders were brought up by a number of submitters and witnesses who described these orders as being 'unjust towards me and my children'.⁴¹ Some argued 'that 50/50 time between mothers and fathers should be mandatory'.⁴²

3.49 Many submitters called for the parenting responsibilities of children to be shared equally between parents on separation unless there were extenuating

³⁷ Confidential, *Submission 129*.

³⁸ Confidential, *Submission 202*.

³⁹ Confidential, *Submission 190*.

⁴⁰ Name withheld, *Submission 188*, p. 2.

⁴¹ Confidential, *Submission 123*.

⁴² Confidential, *Submission 138*.

circumstances such as child safety issues or family violence. One submitter summarised the views of many submitters and witnesses:

The default position should be that, in the absence of any reason otherwise, the 'shared care' of the children means equal time with the 2 parents from separation. It should not be possible for either parent to unilaterally restrict access of the other parent, without reason, and then require a 2 year court process to try to reverse that.⁴³

3.50 Another submitter elaborated on this and reasoned that:

It is not right that one parent can deny the rights of children to share equal time with their other parent, particularly when they are law abiding.⁴⁴

3.51 In addition, some submissions emphasised the rights of the child 'to be raised by a father and a mother (as recorded in the Convention of the Rights of the Child)'.⁴⁵ Others wrote about the rights of parents having been 'permanently terminated' as a result of family court proceedings.⁴⁶ However, some submitters felt that 'father's rights' were placed above those of the child, even in some circumstances where a father may not have had an active interest in a child's life prior to separation.⁴⁷

3.52 The committee heard from some that the family court did not put the 'best interests of the child' first despite this being the primary requirement that the court must take into consideration.⁴⁸ One submitter told the committee that:

The system does not have the best interests of the child in mind. There was no supervised visits my children have lost half of their identity being alienated from their Father, Brother, Grandparents, Aunts, Uncles, and cousins ...⁴⁹

3.53 Other submitters took a different view on the ability of both parents to adopt an equal primary caring role after separation:

On children I am opposed to equal time because I think it messes children up. And while there are many, many good men who can cope the overwhelming majority of males are hopeless at day to day parenting. My ex was insistent on it and it lasted 8 months. The idea sounds fair, but it is too hard in reality. The children suffer. Some children not, but that's where the father is outstanding.⁵⁰

⁴³ Confidential, *Submission 183*.

⁴⁴ Confidential, *Submission 486*.

⁴⁵ Name withheld, *Submission 13*, p. 2.

⁴⁶ Confidential, *Submission 122*.

⁴⁷ Confidential, *Submission 137*.

⁴⁸ Confidential, *Submission 123*.

⁴⁹ Confidential, *Submission 1045*.

⁵⁰ Name withheld, *Submission 196*, p. 2.

- 3.54 The committee also heard about the complex issues that are raised when one parent decides to move away from the town or location where the family lived prior to separation:

My ... area of concern is when one parent moves away from the family town possibly with the children, and I feel that that area has to be considered very carefully. I think moving away from where the marital home was can be disruptive to the children because they may have to move schools or house. And it can be difficult for the parent who's left behind, who may have difficulty accessing the children. Obviously if parties are in agreement then there's no problem, but I feel that those types of decisions need to be made very carefully by the family law system-to allow one parent to move away possibly with the children.⁵¹

- 3.55 Sometimes, children can be adversely affected by a decision of the court including that parenting orders 'are made which at times places the children in the care of an abusive parent that has access to inflict further abuse upon the child/ren'.⁵² One witness elaborated on this:

You can't put a young child with an ex-partner who's violent or who has no structure or routine. That poor child gets neglected and no one's there to put him in a safe environment, to protect the child.⁵³

- 3.56 Conversely, a 'child not seeing a parent [can also cause] trauma'.⁵⁴

Enforcement

- 3.57 The issue of a lack of compliance with the orders was also raised with the committee. One submitter advised that his ex-partner contravened parenting orders 95 times.⁵⁵ Another submitter described their difficulties with non-compliance:

It would seem pointless to have a court and a court order that then can be ignored with no consequences to the offending party. It appears that the woman can keep the children (for whatever reason she believes is good enough) on days that are [meant] to be the male's days—with no consequences. However, the male is informed that he cannot do the same without there being consequences to him. WHY? These parenting orders must be able to be enforced by both parties and there should be consequences for breaching them.⁵⁶

⁵¹ In camera Hansard, 12 March 2020.

⁵² Confidential, *Submission 1054*.

⁵³ In camera Hansard, 10 March 2020.

⁵⁴ Confidential, *Submission 942*.

⁵⁵ Confidential, *Submission 1018*.

⁵⁶ Confidential, *Submission 202*.

3.58 One witness described the impact of non-compliance with parental orders:

I think there need to be tougher penalties when parents don't follow parental orders. For myself, I had to stop fighting because I couldn't financially afford it. I don't qualify for legal aid. I had to return to my work, which enabled me to fight in court. But I've got other children to support; I can't keep fighting and paying court costs. So I just let him breach the orders, and I can't do anything about it.⁵⁷

3.59 Other submitters agreed, arguing that the current mechanisms of enforcement through a court were taking too long:

Police should have the power to act on parental orders when orders on contact with the erased parent are clearly breached. It should not have to go back through an ineffective court system to maybe sometimes act on visitation and contact breaches years later.⁵⁸

Alienation of parents

3.60 The committee understands that there is contention around 'parental alienation'. At this point the committee is not expressing a view on whether parental alienation is a recognisable disorder. However, it remains that many submitters wrote to the committee of their experience and that evidence is set out below.

3.61 One witness put forward his experience of parental alienation and its subsequent impact on parenting responsibility for his daughter:

I think it's fair that the family court considers the wishes of the child regarding whether the child wants to spend time with the parents or not. I think that's a fair idea. What I am concerned about is that the court does not currently do enough to seek to understand the reasons for a child's opinion. What if the child's opinion has been skewed, and what if parental alienation is present? I was in the process of going to court to get court ordered access to my youngest daughter and my family lawyer gave me advice, which was: 'This could take a year or 18 months. It could cost \$50,000 to \$100,000. And the court won't require your eldest daughter to spend time with you. And the court will ask your youngest one what she wants to do.' At that point, because I knew that she'd already been influenced ... I dropped it. So I never went to court to pursue that.⁵⁹

3.62 One submitter suggested that 'if a parent is illegally preventing the kids from seeing the other parent (parental alienation) this should never be rewarded'.⁶⁰ Another submitter expressed his concern that state-based child safety agencies 'do not recognise parental alienation as a form of emotional child abuse' and as

⁵⁷ In camera Hansard, 10 March 2020.

⁵⁸ Confidential, *Submission 208*.

⁵⁹ In camera Hansard, 11 March 2020.

⁶⁰ Name withheld, *Submission 14*, p. 1.

such do not remove children from the care of parents in these circumstances.⁶¹ Some witnesses told the committee that there needed to be broader recognition of parental alienation, particularly in the courts.

- 3.63 There was a divergence of views on whether parental alienation occurs and this is examined further in Chapter 8. Rights of various parties particularly with regards to custodial issues and the 'best interests of the child' are also discussed further in Chapter 8. Enforcement of orders is explored further later in the chapter specifically in relation to family violence and related orders.

Child support

Paying too much

- 3.64 Child support is another area where there were a range of views put forward by submitters. The committee heard about cases where parents believed that they were paying too much child support:

My ex-partner is a builder, but because he's self-employed he's able to drop his income. I work, but it's fifty-fifty care, and I have paid him maintenance. I've fought child support that many times—I was paying over \$1,500 a month, and they've just dropped it down \$450. And then they told me that, in July, I'm going to have to fight it again.⁶²

- 3.65 Another submitter described how he manages to pay his child support obligations:

I've had to sell assets to assist with paying child support, my wage alone puts me in financial stress to pay Child Support alone.⁶³

- 3.66 Other individuals agreed, noting in particular when there were other bills to pay:

... it's causing me great financial and emotional stress and if I can't pay Child Support it will be deducted directly from my wages giving me no opportunity to meet other debts and obligations including feeding my son.⁶⁴

- 3.67 A grandparent commented on the child support arrangements for their grandchildren:

We recognise that our grandchildren need child support in monetary terms however our son who has since remarried appears to be penalised because he is on a higher income and when he received an increase in salary child support increases the amount above what he is currently paying.⁶⁵

⁶¹ Confidential, *Submission 142*.

⁶² In camera Hansard, 10 March 2020.

⁶³ Name withheld, *Submission 127*, p. 1.

⁶⁴ Name withheld, *Submission 169*, p. 1.

⁶⁵ Name withheld, *Submission 9*, p. 1.

- 3.68 Some submitters felt that a more specific breakdown of living costs should be incorporated into the child support calculation to more accurately reflect the contribution of each parent:

Child support needs to factor in so much more than where the kids sleep as the calculation for primary care. It needs to break down on a weekly basis per category (food, medical, education, activities, etc) and the hours spent in each category per parent. Allowing each parent to disclose a more accurate reflection of how care is shared. If a child goes to sleep with a parent this should not have a 100% bearing under the classification of 'care' for a child, but should only factor in the care if a child needs attention during that period (e.g. if a child has medical conditions).⁶⁶

- 3.69 Furthermore, many submitters also argued that some parents will try to increase their share of the children's parenting responsibilities in order to increase the amount of child support they are eligible to receive. The following scenario was asserted by many submitters:

... she has persuaded my children to not want to see me to increase her child support payments.⁶⁷

- 3.70 Some submitters put forward a view that the establishment of new relationships and families puts further strain on individuals as they meet their child support obligations to their ex-partner and children:

I have a new wife now and will be starting a new family; but the more that I work for my new family means that the ex-wife takes a larger gouge too.⁶⁸

- 3.71 There were also concerns that child support payments were not being used to support the child or children. One submitter put forward this view:

Too many parents, mostly women, are relying on child support to fund their lifestyle and not directing it towards the care of the child, all while draining their ex-partner's funds and denying them the opportunity for any financial prosperity.⁶⁹

- 3.72 One submitter claimed that some 'mothers are claiming for multiple children from multiple fathers then living like queens with thousands of dollars a week and not having to work a day'.⁷⁰

⁶⁶ Name withheld, *Submission 14*, p. 1.

⁶⁷ Name withheld, *Submission 102*, p. 1.

⁶⁸ Confidential, *Submission 482*.

⁶⁹ Confidential, *Submission 1064*.

⁷⁰ Confidential, *Submission 408*.

Late or not enough

3.73 Conversely, the committee also heard about parents who did not pay an appropriate level of child support in a timely manner to their ex-partner. The committee heard the following story many times:

Child support is collected through [Services Australia], however payments are often delayed or the full payment is not paid. I cannot rely on this financial support to be paid on time. There is never any advice that payments will be deferred for whatever reason, so [I can't] plan to use this money for anything.⁷¹

3.74 One submitter observed that they 'couldn't afford to live when child support [from their former partner] was late' because the 'family assistance' payment was lowered as a result of this late payment.⁷²

Administration

3.75 Many submitters also expressed concerns about the administration of child support, in particular, with Services Australia. The committee were told that:

... the child support agency acted as a very dysfunctional agency. It was very unhelpful and it really aggravated the emotional issues that parties have to deal with when going through child support and a divorce case. The child support agency is highly bureaucratic. It deals in a way that significantly makes things worse instead of helping parties to deal with child support.⁷³

3.76 Another submitter made the point that communication from the Services Australia could be improved:

At the moment from what I can see whoever can tell a good story gets the support of the child support system and again it is often the men that get bullied by staff. I have been in the same room as our son when he has rung to get information from the Child Support System. In a lot of cases he is told someone will call back. This often does not happen and sometimes I have heard women being quite aggressive for no reason.⁷⁴

3.77 There was a call for greater transparency, particularly where one partner may have an undeclared income such as a cash-in-hand job as this can increase the economic burden on the partner with a declared income source.⁷⁵ The issue of child support will be examined further in Chapter 10.

⁷¹ Name withheld, *Submission 126*, p. 1.

⁷² Name withheld, *Submission 12*, p. 1.

⁷³ In camera Hansard, 11 March 2020.

⁷⁴ Confidential, *Submission 129*.

⁷⁵ Name withheld, *Submission 121*, p. 1.

Domestic violence

3.78 The committee received a substantial amount of evidence in relation to domestic and family violence. The majority of submitters and witnesses agreed that any form of violence against a family member is not acceptable. However, there were a wide variety of perspectives around how allegations of family violence are dealt with within the family law system.

The use of domestic violence and associated orders

3.79 The application and use of court orders, particularly in relation to domestic and family violence was a consistent theme raised by submitters and witnesses. Concerns were raised about the apparent ease with which domestic violence orders could be obtained and the consequential effects of such orders on family law proceedings. A number of submitters described their perception of a 'very unbalanced or biased legal system regarding domestic violence intervention orders'⁷⁶ and a family court system that was 'extremely biased against men'.⁷⁷ One submitter described a common complaint in relation to family violence orders (FVOs):

The process of obtaining a [FVO] against a parent (especially father) is far too easy because it does not require any evidence on the part of the accuser. Moreover, the 'benefits' of having a [FVO] issued against an opposing parent are so numerous (including access to state- and court-funded services, DV shelters, legal aid, etc) that mothers, in particular, are effectively encouraged to make up claims of DV in order to gain an advantage over their partners. In my case, my ex-wife openly boasted to her friends that she was using this strategy to get an advantage over me (I have affidavits from her now ex-friends stating this).⁷⁸

3.80 Conversely, some submitters pointed to the difficulty in obtaining protection orders from family violence:

I had to try twice over three years to apply for a protection order from the father. There was and still is ongoing horrid abuse, mental abuse, and emotional abuse, there was also financial and physical abuse. The Magistrates court on BOTH occasions severely warned the father that this behaviour must not continue ... but at the time both granted it was not 'necessary or desirable at the time' all because there were family law proceedings, and a child involved. My safety and that of my sons was, and is not protected.⁷⁹

3.81 Other submitters commented on the detrimental effects that such orders can have on a parent's access to children during a separation and whilst family law

⁷⁶ Confidential, *Submission 123*.

⁷⁷ Confidential, *Submission 139*.

⁷⁸ Confidential, *Submission 139*.

⁷⁹ Confidential, *Submission 483*. Capitalisation in original.

proceedings are underway reflecting the view that FVOs were being obtained merely as they were seen as an advantage in family law proceedings:

Prior to separation from my wife, we had numerous verbal disputes which resulted in 3 [FVO's] against me that I did not agree with but I accepted without concessions as to not further agitate issues. At no point was there any issues relating the safety of our children etc.

I then separated from my wife ... Initially [it] was [amicable] however she started reducing access to our 3 children (over a six month period including – blocking all phone call access, not allowing any overnight weekend stays, not allowing me to take then on week long holiday over Easter break that was already agreed and paid for.⁸⁰

3.82 However, the committee also heard that there were opposing views that FVOs did not offer any advantage in family law proceedings with one submitter highlighting concerns where both parties are forced to be in the same room prior to court or during Family Dispute Resolution, saying 'stop pushing people to be in the same room' when there are intervention orders in place.⁸¹

3.83 Another submitter put forward a view that the definition and interpretation of violence should only be for physical violence:

It would appear that these [FVOs] and [Apprehended Violence Order] (AVOs) are actually not what one believes they are—Violence in these orders can be texts messages wanting to know about the child/children, lies told about the person etc. This is absolutely ridiculous. Violence in these cases [FVO] should only mean actual physical serious violence and must be proven. Many of these [FVOs] are only instigated after separation and for a purpose. There can be no evidence of any violence etc before separation.⁸²

A reluctance to raise allegations

3.84 Many victims of domestic and family violence raised concerns about not being able to make allegations in a family court setting for fear of losing parenting responsibility:

I was told by my solicitor to not bring up domestic violence as it was 1) years ago and 2) go against me so I said nothing in the beginning. It was only found through subpoenas of my medical records.⁸³

3.85 Sometimes when allegations are made, they are not believed:

While being assessed by Family Court Counsellor, I was informed that she did not have any of the fathers' criminal records or state services records. The Counsellor found me to be a complete liar and recommended the child be sent to live with the father. An hour before the court case was to be

⁸⁰ Confidential, *Submission 201*.

⁸¹ Confidential, *Submission 257*.

⁸² Confidential, *Submission 202*.

⁸³ Confidential, *Submission 550*.

heard, she had access to the fathers' criminal record. She found that there was evidence of Child Sexual Abuse and Domestic Violence in his criminal history. She decided she had made a mistake and changed her mind.⁸⁴

3.86 Another submitter made a similar observation:

I feel under enormous pressure to constantly gather evidence that I am not being adversarial, conspiring to demonise my ex-husband and am a mentally fit parent. This is an example of a well-researched tactic used by perpetrators of family violence: I was threatened many times that I would be labelled with a mental illness if I left my ex-husband and this appears to be his current defence in court. The court perpetuates this pattern.⁸⁵

3.87 Some submitters described the difficulty in reporting non-physical violence, particularly for men:

I've observed that a man will almost never report visual, verbal and virtual violence. If they were to report [visual, virtual and verbal violence], men might feel embarrassed and full of shame. They may feel that they will be laughed out of a workplace, court or a police station ... Physical violence is a lot easier to identify and rule on. However, the violence of the future, which is here to stay unless we do something about it, is ... [visual, virtual and verbal violence], which doesn't leave bruises.⁸⁶

False allegations

3.88 On the other hand, the committee heard that some ex-partners were making false allegations about assault and abuse as a means to influence the outcome of a family law matter. One submitter claimed that false allegations had been made against him:

After about three years, and after financial separation was completed, I had still not heard from my children, so I decided to go to court, to find out if I could get to see my children at all, in fact I really would have liked to see copies of school reports etc even, so as to know how my children were going. It was then, at the family law court, (after all these years) I found out that my ex-wife had told [Relationships Australia] that I was a violent person and they lived in fear for their lives. I was also accused of sexually abusing my children. None of this was true at all. At this point I had a breakdown, I was left in the court interview room for hours, as I was unable to move and was crying uncontrollably. The interviewer from that day seemed to have no interest in believing me whatsoever, in fact used one of my own sentences from the interview to ensure I never saw my children.⁸⁷

⁸⁴ See, for example, Confidential, *Submission 136*.

⁸⁵ Confidential, *Submission 173*.

⁸⁶ Confidential, *Submission 1134*.

⁸⁷ Confidential, *Submission 144*.

3.89 A typical example of claims relating to false allegations is outlined below:

During Family Law proceedings, numerous Family Violence allegations were levelled against me, by my ex-wife. My ex-wife also alleged that I had physically abused our son, and had sexually abused our daughter. These heinous allegations were made to gain a strategic advantage in the Family Law proceedings.⁸⁸

3.90 The submitter continued detailing their defence of the matter:

At significant financial, reputational and psychological cost, I defended the allegations and, on each and every occasion, they were found to be baseless and dismissed by the courts.

There is no mechanism, nor it seems was there any interest from authorities to level sanctions against those who deliberately make false statements. Paradoxically, this abuse of the system prevents resources from being deployed to those genuinely in need of these services and protection.⁸⁹

3.91 Some submitters and witnesses indicated that there should be more stringent consequences for those who do make false allegations.

I also believe that, where accusations are made, they need to be proven with evidence, and, in instances where they are proven to be false, charges should ensue without delay. In the event of DVOs, these need to be fully investigated and, where they are found to be false and malicious allegations, the offender should be charged with perjury to discourage those who use this as a way of getting back at the other party.⁹⁰

3.92 Matters relating to domestic violence will be expanded upon in Chapter 7.

Enforcement of orders

3.93 Another submitter expressed reservations about the effectiveness of orders made by a court:

I have never felt safe having a protection order on, as it hasn't ever protected me either. No punishment is ever given to the ones who break the orders, but the ones who do the right thing nothing ever goes there way. I feel so let down by the Family court/ the lawyers I used and the police. I have been abused constantly since I [have] had our son 4 years of abuse, even when I had a [Protection Order] on nothing was never done, when it expired I didn't bother to go get a new one, as I felt the system has let me down. I have put up with my ex for 4 years not complying with orders, and nothing has been done.⁹¹

⁸⁸ Confidential, *Submission 745*.

⁸⁹ Confidential, *Submission 745*.

⁹⁰ In camera Hansard, 11 March 2020.

⁹¹ Confidential, *Submission 131*.

3.94 Generally, there was a strong view that there needed to be greater enforcement of orders in the event that they were not complied with:

I firmly believe that all orders need to be enforced, and this includes contravention and breaches of orders. I honestly believe there needs to be a 'three strikes and you're out' type of system. Too often, people are getting away with numerous breaches.⁹²

3.95 Enforcement of orders was touched on earlier in this chapter and is expanded on in Chapters 7 and 8.

Property matters

3.96 The committee heard many stories of property settlements which some parties have felt were unfair. One submitter relayed the following:

Despite being the legal owner of the family home and owning the property prior to the relationship commencing, over the next years while the property settlement was negotiated, I continued to finance the property and pay child support, whilst my former partner lived rent free.

The unencumbered family home was relinquished as part of the property settlement.⁹³

3.97 One witness brought forward a similar view:

Greedy parties can maliciously lie and can remove or steal goods and sell them—goods that are not even theirs—for their own financial gain, and then they expect more than their equal share of the home. Despite in some cases not having contributed to the purchase of the home, the mortgage, the upkeep et cetera for the entirety of the relationship, they somehow feel that they're entitled to more than 80 per cent and will not back down until they get it. The party who is given the funds is able to have a healthy deposit to start again. The person who has to pay has to sell the property and ends up with nothing.⁹⁴

3.98 This same witness highlighted that the perceived unfairness of decisions relating to property matters was often compounded by the perception of unfairness about issues relating to parenting responsibility:

Not only do they lose their right to their children but also they lose their right to their family home.⁹⁵

3.99 The interrelation of property settlements and child support matters was also raised:

[Relocation by the mother] minimizes the father's access due to the tyranny of distance. It maximizes the number of nights of child care and thus the child support payment. Once established in a new environment it is

⁹² In camera Hansard, 11 March 2020.

⁹³ Name withheld, *Submission 832*, p. 1.

⁹⁴ In camera Hansard, 12 March 2020.

⁹⁵ In camera Hansard, 12 March 2020.

difficult to bring the children back to the neighborhood [sic] of the other parent. The initial relocation is often presented as a family holiday.

Even if the 'escaping parent' is bought back by court order this usually incurs extra costs on the other parent (and in known cases the aggrieved parent cannot afford this action). The additional costs are making the family home exclusively available and continuing to pay all running costs while being forced to reside elsewhere. And these extra costs are not counted in assessment of child support (unless a court order specifically advises they are) so the other parent is often left penniless. Even with a court order to return to the former matrimonial home the threat of future relocation is a valuable weapon. A 'returned' parent still determined on relocation does all possible actions NOT to establish social ties for the children at the current location.⁹⁶

3.100 The committee heard that where property settlements are completed in advance of parenting orders being finalised, this can lead to significant delays in parenting arrangements being finalised as there is little motivation for the primary carer to engage in these negotiations in good faith. In addition, some felt that access to children was also being used as a bargaining strategy during property settlement:

The financial settlement took about three years, cost tens of thousands of dollars and eventually I gave her everything including all of my superannuation, on the premise that, as she said 'I will make sure you get to see the Children'.

At the start of the financial settlement and not long after the separation I was at a loss as to why I couldn't see the children, or why they didn't want to see me. I was advised [sic] that I had to go through relationships Australia to do mediation, to which I agreed. All I wanted to do was see my children whom I missed immensely. My ex wife missed all appointments and dragged this process out for longer than a year. In this time I had no idea what was going on and became concerned about my children. At the end of this process I was told that my children didn't want to see me and I wasn't allowed to contact them, or even in fact know where they lived or went to school. She had moved them from the school that they were in while we were together. I wasn't allowed a postal address or anything. To say I was devastated would be an understatement. I complied none the less, believing what I was told by the agency, that if I leave them alone for a while they would seek me out. I have since learnt that is the worst advice I could have ever been given, and feel that the people running that institution have an agenda (only my opinion) ...⁹⁷

3.101 Another submitter argued that 'family law property settlements should be heavily weighted to a default 50/50 split of property and super[annuation]

⁹⁶ Name withheld, *Submission 559*, p. 1.

⁹⁷ Confidential, *Submission 144*.

accrued during the marital period only' and that this is 'based on principles of fairness and natural justice'.⁹⁸

3.102 Others agreed with a more simplified approach as a means to move the majority of property disputes out of the family court:

If the family home or car (etc) is in one name only it remains in one name only. If the family share portfolio or investment property is in 2 names without defining percentage ownership the court must assume it is 50/50 owned and may not rule 70/30, etc. Any disagreements on who bought/owns chattels (TV's, whitegoods, etc) can be taken to Small Claims court. The Family Court will then only be needed as with judgements around separating business ventures (i.e. one party wants to sell their half of a car/house/business but the other owner does not consent).⁹⁹

3.103 Matters relating to property settlements are discussed further in Chapter 9.

⁹⁸ Confidential, *Submission 184*.

⁹⁹ Confidential, *Submission 124*.

Chapter 4

Systemic issues

- 4.1 This chapter sets out a number of issues that were repeatedly raised in evidence to the inquiry from both individuals and organisations and that can be described as systemic issues within the family law system. These include issues of alleged bias; unprofessional and/or unreliable expert witnesses; the adequacy of the adversarial system for resolving family law disputes; the alleged misuse of the family law system or processes; and professional misconduct by the legal profession.
- 4.2 The lack of resources and funding of the family law system was also raised by a large number of submitters. This issue has been discussed in detail in Chapter 6 in the context of its impact on delays experienced in the family law system. Family violence was also raised in the majority of submissions. Issues regarding family violence are discussed in a number of the chapters in this report and is dealt with in significant detail as a dedicated Chapter 7.
- 4.3 This chapter will not revisit the evidence from individual submitters—this was examined in detail in Chapter 3—but will examine the evidence received in submissions from organisations, as well as evidence from the committee's public hearings.

Bias

- 4.4 As outlined in Chapter 3, the committee heard from individual submitters that there is a perception that the family law system is biased against men, and operates in favour of women. This perception was also reflected in some organisational submissions, with other organisations rejecting this assertion and suggesting the opposite. This section examines some of these concerns.
- 4.5 Better Place Australia, which operates a dispute resolution service in Victoria, was one organisation that cited complaints data which showed that 'male [Family Dispute Resolution (FDR)] participants consistently feel that the system has a gender bias in favour of women'.¹ Better Place Australia proffered that 'perceptions of bias are partly due to the gender composition of the [FDR Practitioner (FDRP)] workforce', noting that '[m]ost FDR practitioners are women'.² Better Place Australia suggested that this perception could be addressed by moving toward a more gender-balanced FDRP workforce.³

¹ Better Place Australia, *Submission 229*, p. 34.

² Better Place Australia, *Submission 229*, p. 34.

³ Family dispute resolution is discussed further in Chapter 12.

- 4.6 Justice for Broken Families suggested that the feminist movement has led to the corruption of family law and child support systems, which in turn leads to the alienation of children:

It is the power of the feminist movement that has shifted the Overton window in favour of feminist ideology and resulting policy and law decisions. Our Family Law and Child Support systems have been corrupted by this process. This is why many claim that court decisions are as a general rule very female biased. The recent Final Report submitted by the Australian Law Reform Commission ... in March 2019, when analysed through a Foucauldian lens, shows a high level of bias against men and shared custody. So adopting the findings of this report will just be 'more of the same'.

One worrying result of this bias is the alienation (sanctioned abuse) of children.⁴

- 4.7 The Men's Rights Agency suggested that bias in favour of women and against men is pervasive, stating that:

People suspect the Court personnel; the associated service providers such as family report writers - a particularly protected species whose opinions cannot be qualified; independent children's lawyers, who are unable to represent the children's views effectively because they might never speak to the children or only for the shortest time possible and others associated with the Court are biased towards the mother/child doctrine, whilst ignoring the importance of a father in a child's life.

These specialists and the judiciary are unaccountable. There is no Judicial Commission that can accept complaints of misbehaviour, incompetency and bias unless one is able and can afford to appeal a decision.⁵

- 4.8 On the other hand, Women's Safety NSW referred to anecdotal evidence that family report writers are biased against women, and favour men:

... there have been reported incidents of family report writers accusing mothers who make abuse allegations of being 'hysterical, vindictive and manipulative'. Most concerningly, a number of family report writers continue to ascribe to outdated theories which are violence supportive and victim blaming, such as the debunked Parental Alienation Theory.⁶

- 4.9 The Feminist Legal Clinic also noted that they 'receive many accounts from women of biased treatment by professionals within the family law system'.⁷

- 4.10 Despite this perception of bias by professionals operating in the family law system, the committee heard that there are penalties for such professionals

⁴ Justice for Broken Families, *Submission 817*, p. 2.

⁵ Men's Rights Agency, answers to questions on notice, 12 March 2020 (received 24 April 2020), pp. 6–7.

⁶ Women's Safety NSW, *Submission 727*, p. 54 (citations omitted). The concept of parental alienation is discussed in Chapter 8.

⁷ Feminist Legal Clinic, *Submission 234*, p. 6.

who do not fairly discharge their duties. Mr Craig Ray, of Craig Ray and Associates, spoke to the committee about the professional obligations on family report writers, who are often accused of bias:

I think that these people are experts. They have qualifications. They're discharging a role and a duty to the court, which is a fundamental, important role. If they are in fact not completing that role honestly, then there are consequences for them with respect to the current legislation. They'd be in contempt of the court if they provided false evidence.⁸

- 4.11 The perception of bias within the family law system is not a new issue. The NSW Bar Association quoted a paper from 2000 written by the then Chief Justice of the Family Court of Australia (Family Court), the Hon. Alastair Nicholson AO RFD and Margaret Harrison, Senior Legal Adviser to the Hon. Chief Justice Alastair Nicholson, in which they stated:

In Australia disaffected persons constantly attack the system on the basis of gender bias, arguing that either mothers or fathers gain an unfair advantage in parenting disputes, because judges have particular preferences which the discretionary nature of the legislation accommodates.⁹

- 4.12 The committee also heard about other forms of bias. For example, Rainbow Families Victoria pointed to anecdotal evidence of what one of the respondents to their community survey suggested was 'unconscious bias', stating that:

... judges have allegedly commented on the biological relationships of children in rainbow families to parents and their donors, misused the term 'father' or misrepresented donors as fathers...and misunderstood the role of the parents involved.¹⁰

- 4.13 Women's Legal Service NSW also discussed unconscious bias, and recommended '[o]ngoing training for all working in the justice and family law systems' on a number of issues, including with respect to 'recognising unconscious bias'.¹¹

- 4.14 In its submission, the Royal Australian and New Zealand College of Psychiatrists (RANZCP) expressed its concern that 'biases and stigma in relation to mental illness may operate within the family law system to

⁸ Mr Craig Ray, Principal, Craig Ray and Associates, *Proof Committee Hansard*, 11 March 2020, p. 30.

⁹ NSW Bar Association, answers to questions on notice, 13 March 2020 (received 31 March 2020), p. 6, citing: The Hon. Chief Justice Alastair Nicholson AO RFD and Margaret Harrison, 'Family Law and the Family Court of Australia: Experiences of the First 25 Years' (2000) 24(3) *Melbourne University Law Review* 756 (citations and emphasis omitted).

¹⁰ Rainbow Families Victoria, *Submission 226*, p. 23.

¹¹ Women's Legal Service NSW, *Submission 702*, p. 6. See also, Sexual Assault Support Service Inc., *Submission 608*, p. 6; Women's Legal Service Victoria, *Submission 701*, p. 25; Domestic Violence NSW, *Submission 711*, p. 19.

negatively impact those who are parenting with mental illnesses and/or disabilities'.¹² The RANZCP suggested that:

... appropriate training should be available to family law professionals in relation to mental health issues...and disabilities so that proper assessments can be made in relation to whether the parent's mental illness affects their capacity to parent.¹³

4.15 The RANZCP considered that such training would lead to a decrease in 'the tendency to equate mental illness with a lack of capacity, or with dangerous behaviours' and would thus allow 'more parents with a mental illness to care for and spend time with their children in a meaningful and safe way'.¹⁴

Family consultants and expert witnesses

4.16 As outlined above, many submitters were critical of the perceived bias of expert witnesses. However, submitters also expressed other concerns with respect to expert witnesses, such as the need for accreditation and adequate training. Submissions and witnesses have used many terms to describe those witnesses engaged to appear as experts and/or write reports by the court.

4.17 This section will set out the legal framework by which the court engages family consultants and expert witnesses (both often referred to as 'family report writers'), outline the current regulations, and examine the evidence received with respect to these court-appointed consultants and experts.

Family consultants or family report writers?

4.18 Pursuant to section 62G of the *Family Law Act 1975* (Family Law Act), the court can direct a family consultant¹⁵ to give the court a report on such matters relevant to the proceedings as the court thinks desirable. All family reports prepared by family consultants are funded by the court at no cost to the parties.¹⁶ Notably, the term 'family report writer' is not used or defined in legislation or court rules.¹⁷

4.19 Family consultants can be employees of the court¹⁸ or private practitioners who have been selected as suitable by the court.¹⁹ Both court-employed and private

¹² Royal Australian and New Zealand College of Psychiatrists (RANZCP), *Submission 231*, p. 5.

¹³ RANZCP, *Submission 231*, p. 5 (citations omitted).

¹⁴ RANZCP, *Submission 231*, p. 5.

¹⁵ Defined at s. 11B of the *Family Law Act 1975*.

¹⁶ Attorney-General's Department (AGD), *Submission 89.1* to the House of Representatives Standing Committee on Social Policy and Legal Affairs, *Parliamentary inquiry into a better family law system to support and protect those affected by family violence*, June 2017, p. 8 (2017 Family Violence Report).

¹⁷ AGD, *Submission 89.1* to 2017 Family Violence Report, June 2017, p. 8.

¹⁸ Appointed under s. 18ZI of the *Federal Court of Australia Act 1976*.

¹⁹ Appointed under regulation 7 of the Family Law Regulations 1984.

family consultants who prepare reports for the court pursuant to section 62G of the Family Law Act are usually social workers or psychologists,²⁰ and private consultants are often used when court-based family consultants cannot meet the demand for family reports.²¹

- 4.20 In addition to ordering that a report be prepared by a family consultant, the court may also appoint a private practitioner for the purpose of obtaining expert evidence in a particular matter. Individual parties to a proceeding may also engage an expert witness to provide a report to the court. These private practitioners are referred to as an 'expert witness' or 'single expert witnesses' pursuant to Chapter 15 of the Family Law Rules 2004. These experts are governed by part 15.5 of the Family Law Rules and division 15.2 of the Federal Circuit Court Rules 2001. They are sometimes referred to as 'Chapter 15 Experts'.
- 4.21 As far as possible, the committee has tried to use the terms 'family consultant' and 'expert witness', however in quoting or referring to evidence have adopted the terminology of the submitter or witness. Unless otherwise stated, the committee has assumed a reference to a 'family report writer' to mean either a family consultant or an expert witness, or both.

Accreditation scheme for family consultants and expert witnesses

- 4.22 The Australian Standards of Practice for Family Assessment and Reporting, developed by the family courts, currently provides minimum standards and best practice guidelines for family consultants and Chapter 15 experts.²² These standards are not binding or enforceable, and there is no formal accreditation or monitoring process for compliance in place.²³
- 4.23 The committee received evidence about concerns over the accreditation of family consultants and expert witnesses.
- 4.24 For example, the International Commission of Jurists Australia expressed concern at 'the current use of Chapter 15 experts', stating that '[t]hey are not held to minimum standards of accreditation or best practice and can make mental illness diagnoses of a parent solely on the basis of a brief assessment'.²⁴
- 4.25 The committee heard evidence in support of an accreditation scheme from Ms Zoe Rathus AM, Dr Helena Menih, Dr Samantha Jeffries and Professor

²⁰ AGD, *Submission 89.1 to 2017 Family Violence Report*, June 2017, p. 8.

²¹ 2017 Family Violence Report, p. 271.

²² Family Court of Australia, Federal Circuit Court of Australia, Family Court of Western Australia, *Australian Standards of Practice for Family Assessment and Reporting*, February 2015.

²³ Australian Law Reform Commission (ALRC), *Family Law for the Future—An Inquiry into the Family Law System*, ALRC Report 135, 2019, March 2019, p. 411 (ALRC 2019 Report).

²⁴ International Commission of Jurists Australia, *Submission 418*, p. 5.

Rachael Field who, since 2015, have undertaken research into addressing the issue of family violence in family reports:

There should be a process for proper and rigorous accreditation of private professionals who wish to prepare family reports and an ongoing system of annual certification. These professionals should have access to the resources available to family consultants based at the courts to the greatest extent possible ...

There also needs to be clarity about what documents constitute a 'family report'. During our research we became aware of a range of documents labelled 'family reports' which had been prepared by people who were neither family consultants employed at the court nor [family report writers] appointed under the Family Law Regulations.²⁵

4.26 The concern about the lack of accreditation is not a new issue, and has been examined by previous inquiries.

4.27 For example, in 2017 the House of Representatives Standing Committee on Social Policy and Legal Affairs conducted its inquiry into *A better family law system to support and protect those affected by family violence*, and made the following comments:

Despite the critical role that family reports can play in the outcome of family law proceedings, family consultants are not required to undertake formal training, accreditation or evaluation.

...

Currently family consultants must have a tertiary qualification in the social sciences—usually psychology or social work—and a minimum of five years' practice experience. At present, family consultants are not required to undertake formal family violence training.²⁶

4.28 During the course of the Australian Law Reform Commission (ALRC) *Family Law for the Future—An Inquiry into the Family Law System* (ALRC 2019 Report), concerns were raised by stakeholders with respect to:

... the possible negative outcomes for children in cases where the report writer is not appropriately qualified or expert in the relevant issues, such as an understanding of family violence, trauma and its impacts on adults and children, child abuse, cultural competency, or disability.²⁷

4.29 The ALRC noted that '[t]hese concerns were raised in relation to both court-employed and private family report writers, including Chapter 15 Experts'.²⁸ There were other concerns that were raised with the ALRC, such as

²⁵ Ms Zoe Rathus AM, Dr Helena Menih, Dr Samantha Jeffries and Professor Rachael Field, *Submission 700*, p. 14.

²⁶ 2017 Family Violence Report, pp. 272–273.

²⁷ ALRC 2019 Report, p. 411 (citations omitted).

²⁸ ALRC 2019 Report, p. 411.

the 'limited time both court-based and regulation 7 family report writers spend with families...and the cost of privately commissioned expert reports'.²⁹

- 4.30 The ALRC therefore suggested the introduction of 'a mandatory accreditation scheme with minimum standards for private family report writers who provide reports to the court under regulation 7', which it considered would 'enhance public trust in report writers and the quality of their reports, and contribute to the integrity of the family law system'.³⁰
- 4.31 The ALRC identified the Attorney-General's Department (AGD) 'as the appropriate accreditation body' for this scheme, owing to its existing responsibility for the accreditation of FDRPs.³¹ Previous inquiries have recommended that an accreditation scheme for report writers be modelled on the existing accreditation system for FDRPs.³²

Training of family consultants and expert witnesses

- 4.32 There were consistent calls from submitters and witnesses for increased training and regulation of family consultants and expert witnesses who appear in the Family Court. Submitters and witnesses to this inquiry expressed concerns that expert witnesses often gave evidence which leads to detrimental outcomes for parents and children.
- 4.33 For example, the Council for Single Mothers and their Children (CSMC) observed that:
- Too often, decisions to award custody or shared parenting rights to violent parents (mostly but not always fathers) based on enabling a longer-term relationship have scarred a child for life or in some cases, led to their death. CSMC notes that in some cases, 'expert witnesses' testimony has been directly implicated in these decisions.³³
- 4.34 The CSMC recommended that '[a]ll expert witnesses dealing with children demonstrate current expertise in assessing family violence, the impacts of trauma on victims and children and in communicating with children'.³⁴
- 4.35 The Eeny Meeny Miney-Mo Foundation recommended 'appropriate training and core competencies for all single expert witnesses and family report

²⁹ ALRC 2019 Report, p. 411. Regulation 7 provides that a family consultant may be appointed in writing by the Chief Executive Officer of either the Family Court of Australia or the Federal Circuit Court.

³⁰ ALRC 2019 Report, p. 412.

³¹ ALRC 2019 Report, p. 413.

³² 2017 Family Violence Report, p. 271.

³³ Council for Single Mothers and their Children (CSMC), *Submission 417*, p. 16.

³⁴ CSMC, *Submission 417*, p. 17.

writers', which it suggested should 'include knowledge of and the capacity to reliably assess the following':

- attachment systems;
- personality disorders;
- anxieties, fears and phobias;
- family systems;
- family violence and child maltreatment;
- complex trauma; and
- parental alienation dynamics.³⁵

4.36 The Victims of Crime Assistance League Inc. NSW (VOCAL) suggested that:

It insufficient to assume that because a professional has previously been employed by the court to write reports, that the professional will properly respond to updated legislation, newer research, understanding of the complexities of family violence and remain impartial.³⁶

4.37 VOCAL therefore recommended 'increased training for family court professionals' in the following areas:

- trauma informed practice, including child responses to trauma and abuse
- characteristics of systems abuse.³⁷

4.38 Ms Rathus, Dr Menih, Dr Jeffries and Professor Field, discussed their extensive research into family report writers which suggested:

... that some [family report writers] tend to invalidate coercive control and other forms of family violence when they look for ways to build and maintain the children's relationships with the perpetrator of the abuse.³⁸

4.39 These submitters made the following recommendation with respect to training:

Recommendation 1 – Family Report Writing Training and Processes

- a) family report writer training (to increase knowledge and understanding of coercive control);
- b) the provision of support, supervision and increased family report writer accountability;
- c) making the family report assessment process more thorough (through provision of additional time, utilising a broader range of information, and mandatory risk assessments and/or guidelines);
- d) creating a less sterile/intimidating assessment environment; and

³⁵ Eeny Meeny Miney-Mo Foundation, *Submission 605*, p. 15.

³⁶ Victims of Crime Assistance League Inc. NSW (VOCAL), *Submission 699*, p. 13.

³⁷ VOCAL, *Submission 699*, p. 13.

³⁸ Ms Zoe Rathus AM, Dr Helena Menih, Dr Samantha Jeffries and Professor Rachael Field, *Submission 700*, p. 8.

e) moving to a pro-safety narrative in the family law system.³⁹

4.40 Women's Legal Services Queensland also advocated for standardised training of family report writers—both those working for the courts and the services the courts outsource.⁴⁰

4.41 In its submission, AGD noted that 'additional resourcing' was provided to the Federal Court by the Government in the 2017–18 Budget, to enable the court 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.⁴¹

4.42 The AGD did not refer to any additional funding for expert witnesses.

Other issues

4.43 The committee also heard other concerns with respect to family consultants and expert witnesses.

4.44 For example, Australia's Right to Know (ARTK) coalition recommended the amendment of section 121⁴² of the Family Law Act so that it does not apply to expert witnesses, a recommendation also made by Women's Safety NSW.⁴³ The ARTK provided two examples of how the identity of the expert was in the public interest, one of which is as follows:

Case study 2: Expert witness involved in reporting on child abuse allegations within a custody dispute is himself facing charges of sexual assault against children

Secrecy around the identity of single expert witnesses also prevents the public's right to know about experts who are facing criminal charges.

This anonymity is not afforded to other health professionals in circumstances where there has been disciplinary action taken by regulators or criminal convictions.

The ABC has reported on a single expert witness who is currently before the courts on historical child sex charges whom we are unable to name.

³⁹ Ms Zoe Rathus AM, Dr Helena Menih, Dr Samantha Jeffries and Professor Rachael Field, *Submission 700*, p. 9.

⁴⁰ Ms Bronwen Lloyd, Lawyer, Women's Legal Services Queensland, *Proof Committee Hansard*, 12 March 2020, p. 15.

⁴¹ AGD, *Submission 581, Attachment 2*, p. 17.

⁴² Section 121 of the *Family Law Act 1975* deals with the restriction on the publication of evidence from family law cases.

⁴³ Women's Safety NSW, *Submission 727*, p. 50.

The expert has been involved in Family Court cases where allegations of child sexual abuse have been made.

... his report recommended the child 'continue to live with [the father]' after the mother raised allegations of sexual abuse, saying he 'found no significant evidence' the abuse had occurred.

The psychologist is due to face trial in June 2020 charged with nine counts of indecent assault and two counts of buggery against three 12-year-old boys.⁴⁴

4.45 The ARTK has suggested that parties to Family Court proceedings are potentially 'deprived ... of the opportunity to apply to review the outcome of their cases on the basis of a significant change in circumstance' owing to the fact that these parties are unaware of whether 'single experts have been disciplined, charged or convicted'.⁴⁵

4.46 Women's Safety NSW cited Professor Patrick Parkinson AM who stated that the suppression of the identity of 'family report writers and expert witnesses' has 'made it "almost impossible" to critically evaluate the performance' of these professionals.⁴⁶

4.47 Another issue that was raised with the committee was the lack of accountability of these court-appointed professionals. For example, For Kids Sake stated:

For years, the Family Court – with the acquiescence of the Australian Health Practitioner Regulation Agency – has prevented investigation of its expert witnesses while proceedings are on foot. This has led to a situation where, as happened in 2019, more than seven years had passed between the date of an initial complaint and when a practitioner was brought before a State Administrative Tribunal to be found guilty of professional misconduct.⁴⁷

4.48 Ms Rathus, Dr Menih, Dr Jeffries and Professor Field also discussed this issue in their submission, stating that the 'unsatisfactory nature of the complaints system for [family report writers] has been a problem for many years'.⁴⁸ These submitters recommended the establishment of a complaints unit 'for dealing

⁴⁴ Australia's Right to Know (ARTK), *Submission 530*, pp. 3–4. Underlining in original.

⁴⁵ ARTK, *Submission 530*, p. 4.

⁴⁶ Women's Safety NSW, *Submission 727*, p. 56, citing: Nicola Berkovic, 'Psychologist's misconduct raises questions about family court expert witnesses', *The Australian*, 11 December 2019, <https://www.theaustralian.com.au/inquirer/psychologists-misconduct-raises-questions-aboutfamily-court-expert-witnesses/news-story/9a86d067ca39b8a4f4abac72e6c5d12> (accessed 22 June 2020).

⁴⁷ For Kids Sake, *Submission 607*, p. 25.

⁴⁸ Ms Zoe Rathus AM, Dr Helena Menih, Dr Samantha Jeffries and Professor Rachael Field, *Submission 700*, p. 15.

with complaints against family report writers', which would require the consideration of the following issues:

- who should constitute the panel to hear such matters?
- what would be the basis of complaints – it is something different from unprofessional unethical conduct because it may be more about lack of expertise?
- when should matters be referred to the disciplinary body of the relevant profession?
- what are the consequences of an adverse finding?⁴⁹

4.49 Another issue that the committee examined were the delays in accessing family report writers, and the implications that these delays have on parties to a proceeding, as explained by Ms Deborah Awyzio of the Queensland Law Society (QLS):

In relation to family report writers in Queensland, the waiting time for appropriately qualified family report writers can be three to four months before an interview date is available. And then obviously the family report writer has to give proper consideration to their recommendations and writing the report, so that takes a further four weeks. That's what we're looking at in Queensland at the moment.⁵⁰

4.50 Ms Awyzio confirmed that these delays meant it could be a year before the request was before the judge:

If you file an initiating application there's often a delay of two to three months before the first court date. If, on the first court date, an order is made for a family report, then there is the potential to have that further four- to five-months delay after that. So, yes, that takes it close to a year.⁵¹

4.51 The issue of delays in the courts is discussed further in Chapter 6.

4.52 Professor Parkinson raised another issue with the committee—the prohibitive cost of engaging private family report writers for parties to a family law dispute:

The difficulty in my experience with reports is that, unless one of the court family report writers is writing it, the cost can be prohibitive. Regularly I see in Sydney expert reports costing \$12,000, \$15,000 or \$20,000—well beyond the level that people can afford. The family report writers are overworked and can sometimes take up to 12 months to be able to

⁴⁹ Ms Zoe Rathus AM, Dr Helena Menih, Dr Samantha Jeffries and Professor Rachael Field, *Submission 700*, pp. 17–18.

⁵⁰ Ms Deborah Awyzio, Chair, Family and Domestic Violence Committee, Queensland Law Society (QLS), *Proof Committee Hansard*, 10 March 2020, p. 25.

⁵¹ Ms Deborah Awyzio, Chair, Family and Domestic Violence Committee, QLS, *Proof Committee Hansard*, 10 March 2020, p. 25.

schedule an appointment. So resources are probably the bigger issue in terms of quality of reports in my view.⁵²

- 4.53 Professor Field also agreed that family report writers are overworked, adding that they require further resourcing:

... in order to be able to conduct the process of the report interview properly and with efficacy. They need time, they need to be able to connect with the family appropriately and they also need proper remuneration.⁵³

- 4.54 Ms Rathus also noted that although the Family Court conducts 'great training for its family report writers', the quality of their reports are unknown:

We are unable ... to specifically comment on the quality of the reports that then emerge, and part of the reason for that is the issue of not being able to clearly access court files. We've not been able to read family reports. Yes, they're very well resourced, and we would like to see report writers outside the courts as well resourced. What we don't know is the exact translation of that resourcing into quality.⁵⁴

Adversarial versus inquisitorial systems

- 4.55 A common thread among submissions was the view that the adversarial nature of the family law system is detrimental to all parties. This is especially the case for children, who may be central, but not party, to a family law dispute.

- 4.56 For example, The Benevolent Society submitted that 'the process of engaging in an adversarial court process can mirror the dynamics of an abusive relationship and cause more trauma for the victim-survivors' of abuse.⁵⁵ This point was also made by the Australian Brotherhood of Fathers (ABF) in their submission.⁵⁶

- 4.57 The Aboriginal Legal Service of Western Australia Limited suggested that the adversarial 'win or lose' approach is not 'the best way to reach decisions in the best interests of children - who require their parents and family members to collaborate where possible'.⁵⁷

- 4.58 Professor Bruce Smyth suggested that the processes within the adversarial system 'frequently erode[s] the parental alliance, and the ability of parents to

⁵² Professor Patrick Parkinson AM, Dean of Law, University of Queensland, *Proof Committee Hansard*, 11 March 2020, p. 12.

⁵³ Professor Rachael Field, *Proof Committee Hansard*, 11 March 2020, p. 15.

⁵⁴ Ms Zoe Rathus AM, *Proof Committee Hansard*, 11 March 2020, p. 16.

⁵⁵ The Benevolent Society, *Submission 109*, p. 8.

⁵⁶ Australian Brotherhood of Fathers (ABF), *Submission 1668*, p. 98.

⁵⁷ Aboriginal Legal Service of Western Australia Limited, *Submission 225*, p. 3.

develop a cooperative or even business-like working relationship as parents', identifying that children can suffer as a result of this.⁵⁸

4.59 Some submitters therefore called for a more 'inquisitorial' approach to resolving family law disputes.⁵⁹

4.60 The QLS describes the difference between the adversarial and inquisitorial systems as follows:

In the adversarial system, judges are relatively passive in the collection of evidence. Advocates play the role of calling on and questioning witnesses and producing documents and there are complex rules of evidence which dictate how information is to come before a court. The inquisitorial system allows judges to direct a pre-trial inquiry, actively collect or disregard evidence and call and question witnesses. Rules of evidence under the inquisitorial system are somewhat less restrictive. The collection of evidence is however influenced significantly by the Judge. This control by the arbiter of fact risks a party being denied the opportunity to put evidence they consider significant forward for consideration.⁶⁰

4.61 This section will examine the suitability of the adversarial system, as well as historical and proposed reforms to this system.

Is an inquisitorial system superior to an adversarial system?

4.62 As Professor Parkinson and Mr Brian Knox SC noted, an inquisitorial system is more likely to work out the relevant issues than a system that is reliant upon self-represented litigants to present their cases and to adduce relevant evidence.⁶¹

4.63 The Feminist Legal Clinic stated that the existing system 'is an inappropriate model' for the resolution of family law disputes:

Too often the formal application of the rules of evidence are used to hamper proper airing and consideration of all concerns and places self-represented parties at a distinct disadvantage. Women who are victims of domestic violence typically have less access to financial resources than men and are psychologically vulnerable and are falling through the massive gaps in a severely under resourced legal aid system. As a result, the existing legal system facilitates perpetrators ongoing abuse of their victims.⁶²

⁵⁸ Professor Bruce Smyth et al., *Submission 235*, p. 11.

⁵⁹ See, for example, Caxton Legal Centre, *Submission 744*, p. 10, p. 12; Mr Bede Webster, *Submission 808*, p. 5; Australian Association for Infant Mental Health, *Submission 848*, p. 2.

⁶⁰ QLS, answers to questions on notice, 13 March 2020 (received 19 May 2020), p. 2 (citations omitted).

⁶¹ Professor Patrick Parkinson AM and Mr Brian Knox SC, 'Can there ever be affordable family law?' *Australian Law Journal*, 92(6), 2018, pp. 474–476.

⁶² Feminist Legal Clinic, *Submission 234*, p. 2.

4.64 The Feminist Legal Clinic recommended the adoption of an inquisitorial system:

... with three adjudicators with diverse areas of expertise ... Parties should not need to attend multiple different court hearings and mediations in disparate jurisdictions and locations in an attempt to have the various elements of their dispute resolved.⁶³

4.65 In his submission, Professor Lawrence Moloney proposed the replacement of the existing adversarial system with a two-track system of resolving disputes which distinguishes 'commonplace' family law disputes from 'forensic' disputes, where a commonplace dispute has no allegations involving safety concerns.⁶⁴

4.66 However, the QLS noted its support for the Law Council of Australia (Law Council), who the QLS cited as suggesting that 'the adoption of an entirely inquisitorial system would increase the burden on courts and ultimately the public'.⁶⁵ The QLS further noted that:

The inquisitorial system also introduces the potential for greater political bias. Importantly, there is no evidence to establish and QLS does not accept that the inquisitorial system is more effective or that it would provide greater efficiency in the resolution of family law disputes.⁶⁶

4.67 The ABF submission stated that 'every effort should be made to avoid families being exposed to the ongoing high family conflict of Family Court proceedings and the adversarial process generally'.⁶⁷ The ABF therefore advocated for alternative dispute resolution processes such as mediation as being 'the first point of call'.⁶⁸

Significant reforms to reduce the adversarial nature of the family law system

4.68 The family law system was initially established to be less adversarial than the litigation process in other areas of law, and there has long been reform of the system so as to make it more accessible to individuals experiencing a family law dispute.

4.69 In their submission, the Law Council identified 20 such 'positive initiatives' by the 'Australian Government, the Courts, family lawyers, legal assistance services, family relationship services and social science professionals and bodies'.⁶⁹ These initiatives—which include the Children's Cases Program (CCP)

⁶³ Feminist Legal Clinic, *Submission 234*, p. 3.

⁶⁴ Professor Lawrence Moloney, *Submission 228*.

⁶⁵ QLS, answers to questions on notice, 13 March 2020 (received 19 May 2020), pp. 2–3.

⁶⁶ QLS, answers to questions on notice, 13 March 2020 (received 19 May 2020), pp. 2–3.

⁶⁷ ABF, *Submission 1668*, p. 98.

⁶⁸ ABF, *Submission 1668*, p. 98.

⁶⁹ Law Council of Australia (Law Council), *Submission 2.2*, p. 81.

and the Less Adversarial Trial (LAT) approach, both of which are discussed further below—were 'developed ... with the aim of keeping children and their families' safe, and maintaining their health and well-being during an extremely difficult and highly emotional period in their lives'.⁷⁰ Many of the positive initiatives discussed by the Law Council had the effect of breaking down the adversarial nature of the family law system.

4.70 The ALRC stated that it was as early as 1999 that the then Chief Justice Nicholson recognised that 'increases in the numbers of unrepresented appellants ... [had] a negative effect on the development of family law jurisprudence'.⁷¹

4.71 In 2004, Chief Justice Nicholson suggested that:

... major reform of the adversarial process was necessary to address 'the weaknesses of the traditional processes that allow the parties via their legal representatives (where they have them) to determine the issues in the case, the evidence that is to be adduced and the manner of its use'.⁷²

4.72 This major reform was the CCP. As Margaret Harrison explained:

The CCP pilot was preceded by several years of jurisprudential development, study and investigation, and its introduction was motivated by a growing concern that the traditional adversarial system of determining such disputes (albeit modified in children's cases ...) had failed to provide the optimal method for determining children's best interests, which the Court was statutorily required to do.⁷³

4.73 The CCP was followed by the LAT, which is now encoded in Division 12A of Part VII of the Family Law Act.

4.74 Professor Parkinson described the LAT as follows:

... litigants spoke directly to the judge, explaining what orders they sought and why. Judges could take an active role in determining what evidence might assist the court in coming to the determination of the issues. Family consultants, with expertise in child development, would attend the initial hearing to be a source of neutral and expert guidance on appropriate parenting arrangements in the circumstances of the case. An evaluation of the program by a child psychologist showed demonstrable benefits in

⁷⁰ Law Council, *Submission 2.2*, pp. 81–84.

⁷¹ ALRC 2019 Report, p. 188, citing: The Hon Chief Justice Nicholson, 'Legal Aid and a Fair Family Law System' (Speech, Legal Aid Forum Towards 2010, 1999).

⁷² Professor Patrick Parkinson AM and Mr Brian Knox SC, 'Can there ever be affordable family law?' *Australian Law Journal*, 92(6), 2018, p. 473.

⁷³ Ms Margaret Harrison, *Finding a better way: a bold departure from the traditional common law approach to the conduct of legal proceedings* (Canberra, Family Court of Australia, 2007), p. ix, citing s. 60CA of the *Family Law Act 1975*.

terms of reducing the stress of litigation on parents and therefore indirectly benefiting children.⁷⁴

- 4.75 However, Professor Parkinson observed that '[f]ew if any judges now practice it in the way the process was originally designed' and further noted that '[t]he process was never really adopted in what is now the Federal Circuit Court'.⁷⁵ Professor Parkinson ultimately recommended the revival of the LAT process with modifications where appropriate, and the training of 'at least 30 judges initially, in the methodology and its underlying rationale'.⁷⁶
- 4.76 The Law Council commented in its submission that the LAT 'demonstrates the utility of enabling the court to interact appropriately with the parties as a way of reducing conflict between them', which it suggested was especially important with respect to disputes involving children.⁷⁷

Is there a need for further reforms to the adversarial system?

- 4.77 The question of whether there was a need for further reforms to the adversarial system was most recently examined by the ALRC, which was tasked with determining:

... whether the adversarial court system offers the best way to support the safety of families and resolve matters in the best interests of children, and the opportunities for less adversarial resolution of parenting and property disputes.⁷⁸

- 4.78 In its final report, the ALRC observed that the Family Court is already empowered to implement a less adversarial approach to family law matters:

... that is child focused, protective of children and parties who are exposed to child abuse or family violence, quasi-inquisitorial, interdisciplinary, less formal, accessible to self-represented litigants, and connected with relevant support services.⁷⁹

- 4.79 The ALRC identified four ways in which the Family Court is less adversarial in its approach than other civil courts:⁸⁰

- (a) children, who are non-parties to a family law parenting proceeding, are required to be the 'winners' of the proceeding, rather than the opposing parents who are the parties in the proceeding;⁸¹

⁷⁴ Professor Patrick Parkinson AM, *Submission 93*, p. 67.

⁷⁵ Professor Patrick Parkinson AM, *Submission 93*, p. 7.

⁷⁶ Professor Patrick Parkinson AM, *Submission 93*, p. 7. Recommendation 4.

⁷⁷ Law Council, *Submission 2.2*, p. 814.

⁷⁸ ALRC 2019 Report, p. 6.

⁷⁹ ALRC 2019 Report, p. 50.

⁸⁰ ALRC 2019 Report, pp. 65–66.

⁸¹ This obligation is currently contained in the Family Law Rules 2004, sch. 1 r. 6(1).

- (b) the family court can exercise a power in child-related proceedings on its own initiative,⁸² contrary to other adversarial proceedings where parties present their own evidence on which the court must determine the facts;
- (c) the family court may order that an Independent Children's Lawyer independently represent the child's interests, and may make other orders that are necessary to secure that independent representation of the child's interests;⁸³ and
- (d) the family court may order state or territory agencies to provide the court with documents or information regarding 'suspected abuse of a child to whom the proceedings relate or of suspected family violence affecting the child'.⁸⁴

4.80 However, the ALRC also observed that 'there is little evidence' the Family Court is exercising the above powers, or other powers it has to conduct child-related proceedings.⁸⁵ Further, similarly to Professor Parkinson (see above), the ALRC observed that the Federal Circuit Court, which also presides over family law matters, has never been empowered to adopt the LAT procedures at Division 12A of Part VII of the Family Law Act.⁸⁶

4.81 Despite acknowledging the importance of the adversarial nature of family law proceedings to enable stringent testing of evidence before the courts,⁸⁷ the ALRC ultimately recommended a less adversarial approach in the family law system, such that:

Combined rules for the Family Court of Australia and the Federal Circuit Court of Australia should provide for proceedings to be conducted under Pt VII Div 12A of the *Family Law Act 1975* (Cth) by judges of both courts. Both courts should be adequately resourced to carry out the statutory mandate in s 69ZN(1) of the *Family Law Act 1975* (Cth).⁸⁸

⁸² *Family Law Act 1975* para. 69ZP(a).

⁸³ *Family Law Act 1975* ss. 68L(2).

⁸⁴ *Family Law Act 1975* s. 69ZW.

⁸⁵ ALRC 2019 Report, p. 50. See Div. 12A of Pt. VII of the *Family Law Act 1975*.

⁸⁶ ALRC 2019 Report, p. 50. The ALRC also noted that 'the proper application of the principles in s. 43 depends in large measure on the support provided to the parties through both court based and non-court based services', some of which have 'diminished', and funding for which has not been maintained.

⁸⁷ ALRC 2019 Report, p. 65. The ALRC stated that the adversarial system enables 'stringent testing of the evidence before the court—a process that is essential where a decision will have a lifelong effect on children and their parents or caregivers'.

⁸⁸ Recommendation 10.

- 4.82 The ALRC considered that the legislative mandate exists for a less adversarial approach, but concluded that the courts must be adequately resourced in order to perform their statutory function.⁸⁹
- 4.83 The ALRC also made a number of other recommendations around support to families and vulnerable applicants that would also serve to lessen the adversarial nature of the current system.⁹⁰

Proposed Parenting Management Hearings

- 4.84 The Family Law Amendment (Parenting Management Hearings) Bill 2017 was introduced to the Senate by the Government on 6 December 2017. The bill would have established the Parenting Management Hearings Panel as an independent statutory authority to 'provide self-represented litigants with a more flexible and inquisitorial alternative to the court process for resolving parenting disputes'.⁹¹
- 4.85 The proposed model for the Parenting Management Hearings used both multidisciplinary and inquisitorial hearings to resolve less complex parenting disputes in cases where both parents would continue to have parental responsibility, but cannot agree on their future parenting arrangements in the aftermath of parental separation. The model combined features of the CCP (discussed above) and the Informal Domestic Relations Trial from Oregon in the United States of America⁹² and also drew upon experience of the tribunal sector with multidisciplinary panels.⁹³
- 4.86 The AGD noted that this proposed model 'received limited support from stakeholders' and was 'particularly opposed by the legal profession'.⁹⁴ The bill lapsed at the end of the 45th Parliament.

⁸⁹ ALRC 2019 Report, p. 193.

⁹⁰ See Recommendations 43–45 regarding enhanced support for children and families, and Recommendations 46–48 regarding supported decision making. The ALRC also made a number of related recommendations in respect of skills and training for professionals engaging working in the family law sector.

⁹¹ Family Law Amendment (Parenting Management Hearings) Bill 2017, Explanatory Memorandum, p. 1.

⁹² Mr William Howe and Mr Jeffrey Hall, 'Oregon's informal domestic relations trial: a new tool to efficiently and fairly manage family court trials', *Family Court Review*, 55, 2017, pp. 70–83.

⁹³ Professor Patrick Parkinson AM and Mr Brian Knox SC, 'Can there ever be affordable family law?' *Australian Law Journal*, 92(6), 2018, pp. 474–476.

⁹⁴ AGD, *Submission 581, Attachment 2*, p. 18.

Misuse of system and processes

4.87 This section will examine evidence presented to the committee that perpetrators of family violence can misuse the court systems and processes to further perpetuate abuse.⁹⁵

4.88 For example, the Australian Institute of Family Studies (AIFS) noted that its research has identified a tension between upholding procedural fairness and protecting parties from harm:

... including in relation to experiences suggestive of post-separation systems misuse involving the use of administrative and legal systems or services or other agencies (including family law services) to further perpetuate abuse.⁹⁶

4.89 Some submitters agreed arguing that the unnecessary prolonging of legal processes could constitute a form of family violence:

Vexatious misuse of legal process and courts systems by perpetrators constitutes family violence. By endlessly pursuing legal processes despite evidence or witness statements identifying them as perpetrators, those who use violence can continue to exercise behaviours of control and intimidation pressuring the targets of their violence to enter into court orders that do not address family violence or dragging them through legal procedures that unnecessarily increase costs and stress for the other party.⁹⁷

4.90 AIFS put forward a similar view submitting that its findings suggested:

... the need for a more comprehensive analysis of systems abuse as a form of family violence and greater awareness of the possibility that services, systems and processes may be misused by perpetrators of family violence to perpetuate dynamics of abuse and control.⁹⁸

4.91 Indeed, the Australian Women Against Violence Alliance (AWAVA) informed the committee that '[s]ystems abuse has been consistently identified throughout the Australian and international literature and evidence as being used in the family law proceedings', and provided the following examples:

- 2010 Australian Law Reform Commission report identified systems abuse as 'the vexatious use of cross applications for protection orders and giving false evidence';
- 2014 [Women's Information and Referral Exchange Inc] research reports that examined experiences of 200 women found systemic continuation

⁹⁵ See, for example, Domestic Violence Victoria, *Submission 705*, pp. 14–15.

⁹⁶ Australian Institute of Family Studies (AIFS), *Submission 731*, p. 6. See also, pp. 19–20 for further details of findings.

⁹⁷ YWCA Canberra, *Submission 592*, p. 5. See also, Australian Association of Social Workers, *Submission 594*, p. 4.

⁹⁸ AIFS, *Submission 731*, p. 6.

of financial abuse post separation through legal systems by their violent partners. This included financial costs of protracted legal costs, vexatious litigation, and partners hiding their assets to avoid paying child support;

- 2017 [Australia's National Research Organisation for Women's Safety] research has found that systems abuse type behaviours of perpetrators included: exploiting the intersection between family law, child protection and criminal legal systems to their advantage, raising counter-allegations and unjustifiable applications in family law or personal protection orders; manipulative engagement with family law services, noncompliance with court orders and exhausting women's legal and financial resources;
- [Heather] Douglas in her study [into legal systems abuse and coercive control] reports that women's engagement with the legal systems is experienced as an extension of coercive control. This included frequent requests for adjournments, making counter allegations, calling irrelevant witnesses and initiating excessive litigation in the Family court.⁹⁹

4.92 AWAVA therefore called for 'better training of family law professionals and better procedures to prevent systems abuse and hold perpetrators to account'.¹⁰⁰

4.93 The Australian Dispute Resolution Advisory Council also called for better training, suggesting that foundation and common competencies for professionals working in the family law system needs to include '[u]nderstanding how the family law system can be used to continue and perpetuate abuse'.¹⁰¹

4.94 In its submission, Relationships Australia proposed reforming the Family Law Act 'to include misuse of courts and family dispute-related processes as a form of abuse in family law matters and to clarify court powers to impose consequences for misuse'.¹⁰² Relationships Australia reasoned that this proposal was necessary as:

Powers to identify and respond to abuse of systems and processes need to recognise the multiplicity of systems and processes that can be used, in concert or in succession, to perpetuate abuse, control, intimidation and coercion.¹⁰³

⁹⁹ Australian Women Against Violence Alliance (AWAVA), *Submission 716*, p. 20 (citations omitted).

¹⁰⁰ AWAVA, *Submission 716*, p. 21.

¹⁰¹ Australian Dispute Resolution Advisory Council, *Submission 596*, p. 17.

¹⁰² Relationships Australia, *Submission 606*, p. 32.

¹⁰³ Relationships Australia, *Submission 606*, p. 32.

- 4.95 AWAVA referred the committee to a similar proposal by the ALRC to amend the definition of family violence in the Family Law Act to include the 'use of systems or processes to cause harm, distress or financial loss'.¹⁰⁴
- 4.96 The ALRC put forward this proposal in its discussion paper for its review of the family law system.¹⁰⁵ However, the ALRC ultimately decided against putting this proposal forward as a recommendation in its final report, explaining that:

Whilst the ALRC acknowledges that the very wide range of examples of reprehensible behaviour suggested for inclusion in s 4AB(2) [section 4AB of the Family Law Act provides the definition of family violence] will, if they coerce, control, or cause fear, be examples of family violence, it is not persuaded that there will be sufficient utility, as a matter of law, in making amendments to the list of examples in s 4AB(2). Indeed, it is likely that the longer a list of examples becomes, the more likely it is to be assumed that something not on the list is deliberately excluded, regardless of inclusionary words at the beginning, or end, of the list.¹⁰⁶

Professional misconduct

- 4.97 This section will briefly discuss the issue of professional misconduct by the legal profession, distinct from professional misconduct by family consultants and expert witnesses, which has been discussed above.
- 4.98 As identified in Chapter 3, the committee heard from many individual witnesses that some lawyers practicing in family law did not comply with their professional and legal obligations.
- 4.99 In its submission, the ABF informed the committee of their awareness of:
- ... instances in which a clinical practitioners, judges, solicitors and barristers have been found to have acted improperly in the context of a family law matter, yet these individuals cannot, because of the current operation of s 121 [of the Family Law Act], be named publicly.¹⁰⁷
- 4.100 In the ABF's submission:

The purpose of s 121 is not to shield professionals; it is to protect the privacy of those whose most intimate relationships have become the subject of scrutiny by the courts.¹⁰⁸

¹⁰⁴ AWAVA, *Submission 716*, p. 21.

¹⁰⁵ ALRC, *Review of the Family Law System*, Discussion Paper 86, October 2018, pp. xxv–xxvi, Proposal 8–3.

¹⁰⁶ ALRC 2019 Report, p. 305.

¹⁰⁷ ABF, *Submission 1668*, p. 155.

¹⁰⁸ ABF, *Submission 1668*, p. 155.

4.101 The Law Council referred to such allegations of professional misconduct in its submission, and explained why lawyers are often drawn into family law disputes:

As parties become increasingly distressed the potential for lawyers to be drawn into disputes and to lose objectivity also increases. Poor professional practices cannot be viewed in isolation from a system that is stretched and with practitioners that are under high levels of pressure.¹⁰⁹

4.102 The Law Council discussed how allegations of unprofessional conduct or professional misconduct by lawyers are responded to by the legal profession:

Each state and territory have a disciplinary process to respond to allegations about unprofessional conduct or professional misconduct by lawyers. The [Law Council] notes that lawyers in practice are subject to an exhaustive range of rules, ethical guidelines and obligations, and duties to the court. There are extensive independent complaint mechanisms available to the public (and to judicial officers) in relation to the conduct of legal professionals.¹¹⁰

4.103 Further, the court may make costs orders against lawyers, as the Law Council explained:

Within the Family Law Rules, there are provisions in rule 19.10 in relation to costs against lawyers. In rule 21.07 of the Federal Circuit Court Rules there are provisions for costs against lawyers. There are some examples, I think, at paragraph 123 of our submission in terms of cases in recent times. Rule 1.03 of the Federal Circuit Court Rules deals with the objects of those rules, which impose obligations upon lawyers as well.

When you go to the Family Law Act in section 117, the case law specifically makes clear that these costs orders can be made against lawyers. When you go to those overarching obligations, the practice direction just promulgated by the Chief Justice of the Family Court and the Federal Circuit Court is really designed to reinforce for everyone who practices in our jurisdiction the responsibilities that we as lawyers have to uphold the best traditions of our profession, to make sure that cases are disposed of in a timely and efficient manner. That is what most solicitors and barristers strive to do each and every day.¹¹¹

4.104 Official figures reflect the evidence received by the committee that many parties have complaints about their legal representatives, or those of the opposing party. For example, in the period 2018–2019 the Office of Legal Services Commissioner in New South Wales observed that 'more complaints

¹⁰⁹ Law Council, *Submission 2.2*, pp. 51–52.

¹¹⁰ Law Council, *Submission 2.2*, p. 51.

¹¹¹ Mr Paul Doolan, Chair, Family Law Section, Law Council, *Proof Committee Hansard*, 13 March 2020, pp. 5–6.

were received in relation to family and de facto law matters than any other area of law', and further noted that:

Many of these complaints are made not by the lawyer's client but by the opposing party, and many of the complainants are litigants in person. Often their complaints arise from a misunderstanding of the adversarial system and the role of a lawyer within that system, specifically that they are bound to act on the instructions, and in the best interests, of their own client, which often means putting forward evidence and making submissions that are adverse to the other party.

Complainants commonly complain of discourtesy, unfair tactics, false or misleading affidavits and submissions, and lawyers acting in a conflict of interests, particularly where work has been done for a couple and the lawyer subsequently represents one person from the couple.¹¹²

4.105 The trend was similar in other jurisdictions. For example in South Australia, the Legal Profession Conduct Commissioner observed in respect of the 2018–19 period that, '[a]s has been consistently the case for many years, family law was the area of practice that generated the most complaints, by quite a considerable margin'.¹¹³ In Victoria, family law also led the area of law featured in new complaints to the Victorian Legal Services Board and Commissioner.¹¹⁴

4.106 Indeed, it was observed by the Victorian Legal Services Board and Commissioner that the high rate of complaints in family law—and the other high-complaint areas of probate/estate provisions, conveyancing and commercial law—are areas of law which 'typically involve heightened states of emotion and stress, and often involve substantial sums of money'.¹¹⁵

¹¹² The Office of the Legal Services Commissioner, *Annual Report 2018–2019*, p. 5.

¹¹³ Legal Profession Conduct Commissioner, *2019 Annual Report*, p. 11.

¹¹⁴ Victorian Legal Services Board and Commissioner, *Annual Report 2019*, 15 May 2020, p. 52.

¹¹⁵ Victorian Legal Services Board and Commissioner, *Annual Report 2019*, 15 May 2020, p. 12.

Chapter 5

Legal fees and costs

Introduction

5.1 High legal fees and costs were a consistent theme raised by many submitters and witnesses throughout this inquiry. Chapter 3 of this report canvassed some of the personal stories put forward by submitters and witnesses with the committee hearing that hundreds of thousands of dollars—sometimes more—were spent on legal representation, occasionally leaving one or both parties with little or no assets at the end.

5.2 The potential disparity between the legal costs and the property pool in a settlement has been raised by many submitters and witnesses. At the committee's Sydney hearing, the committee Chair reflected on some of this evidence:

One of the most constant complaints made to this committee in the written submissions and, indeed, in the hearings that we've had with individuals is about costs—about excessive costs and legal fees that are disproportionate to the total assets of the couple. Only three days ago we heard of a case in Townsville where costs were \$170,000 for total assets [of] about \$500,000. The next day we heard of costs of \$800,000 to \$900,000 for total assets of just over \$1 million. And yesterday we heard of total legal costs of \$500,000 where the assets were only \$200,000.¹

5.3 One witness told the committee that two-thirds to three-quarters of the value of their assets were consumed in legal fees:

I would say about half of my wage was going straight to the solicitor for a number of years. That's on top of the child support agency garnishing a third of my wage for the oldest child as well.²

5.4 The Attorney-General's Department (AGD) submitted the following about legal costs for family law matters:

In 2018, PwC estimated that litigants in the Family Court of Australia can spend over \$110 000 per matter and, in the Federal Circuit Court, over \$30 000. In some cases costs can reach into the millions of dollars. These costs are out of reach for many families. One judgment in a matter in which the legal fees totalled over \$800,000 states that '[t]hese amounts are, on their face, outrageous levels of costs for ordinary people involved in family law proceedings'.³

¹ Hon. Kevin Andrews MP, Committee Chair, *Proof Committee Hansard*, 13 March 2020, p. 2.

² In camera Hansard, 20 May 2020.

³ Attorney-General's Department (AGD), *Submission 581*, p. 15.

5.5 The recent inquiry of the Australian Law Reform Commission (ALRC) into the family law system (ALRC 2019 Report) also found that the 'family law system is expensive'.⁴ The ALRC reported that:

People told us that the cost of resolving their family law disputes through the courts and associated services was high. Some people told us about the significant impact this cost had on their financial security and that of their children. Others told us the cost made the system inaccessible to them, particularly if they were ineligible for legal aid.⁵

5.6 This chapter examines some of the challenges associated with legal fees and then looks at some of the ways that they could potentially be reduced:

- the costs of private legal representation;
- cost-saving measures; and
- legal aid.

The costs of private legal representation

5.7 In its submission, AGD noted the high cost of legal services in family law:

... for many families the costs of private legal representation for advice or family court proceedings are prohibitive. Some family law matters are unable to be resolved without the assistance of legal practitioners and the courts, due to issues such as family violence. While many high-income Australians in this situation can afford to pay private legal fees to enable them to resolve their family law disputes, the high cost of private legal representation is prohibitive to most, and means that some families who are not able to resolve their matter by agreement must resort to self-representation in court, partial private representation, or leave their family law issues unresolved.⁶

A fair fee for service

5.8 Some submitters and witnesses argued that legal fees reflected the value of a necessary service. Mr Michael Kearney SC, Chair, Family Law Committee, NSW Bar Association explained that legal professionals charged a broad range of fees depending on their level of expertise and experience and noted that fees for barristers in his chambers ranged from \$800 up to \$20 000 per day. Mr Kearney argued that fees are not an impediment to representation.⁷

⁴ Australian Law Reform Commission (ALRC), *Family Law for the Future — An Inquiry into the Family Law System*, ALRC Report 135, 2019, March 2019, p. 108 (ALRC 2019 Report).

⁵ ALRC 2019 Report, p. 27.

⁶ AGD, *Submission 581*, p. 15.

⁷ Mr Michael Kearney SC, Chair, Family Law Committee, NSW Bar Association, *Proof Committee Hansard*, 13 March 2020, p. 32.

- 5.9 The Queensland Law Society (QLS) asserted the important role of quality legal advice in ensuring timely and positive legal outcomes:

Access to legal assistance in the early stages of a dispute can prevent or reduce the escalation of legal problems and reduce cost to the justice system overall. Private legal practitioners generally provide high quality, tailored family law advice and play an important role in resolving family law matters, including by identifying relevant issues and providing relevant information to the Court. Access to legal advice and representation is key in the resolution of matters and helps to ensure litigants are properly informed.⁸

- 5.10 Ms Pauline Wright, President, Law Council of Australia (Law Council) highlighted that only a small proportion of family law matters actually progressed to trial and that these are usually highly contested. As a consequence, these matters require significant legal resources to resolve:

It's important to remember that 95 per cent of these matters effectively settle before getting to the hearing stage. So the five per cent of these difficult matters that you're reading about are the ones where the parties are really intractably opposed to each other. So they, by their nature, are unusual and exceptional and so they do incur large amounts of costs.⁹

- 5.11 Ms Deborah Awyzio, Chair, Family and Domestic Violence Committee, QLS asserted that lawyers generally attempt to decrease costs for their clients:

It's our experience that family lawyers work with their clients to try and minimise costs. There are lots of examples from family law practitioners where they work out strategies with their clients to minimise costs. For instance, some lawyers talk with their clients about not formally being on the court record for them in between court appearances so that their clients can manage their administrative-type correspondence coming back and forth between parties and then when they are appearing in court the solicitor will come back on the record. We have many examples of lawyers who work with their clients to minimise their costs as much as possible.¹⁰

- 5.12 Furthermore, Ms Wright argued that some legal work can be incorrectly categorised as routine or simple when in fact, it requires considerable expertise and time to complete:

We have to remember that sending an email isn't just the sending of an email. It's all of the work that goes into the advice behind that email. So it's not just the sending of an email at the click of a button. There's a great deal of expertise that goes into the formulating of what's in it.¹¹

⁸ Queensland Law Society (QLS), *Submission 88*, p. 4.

⁹ Ms Pauline Wright, President, Law Council of Australia (Law Council), *Proof Committee Hansard*, 13 March 2020, p. 3.

¹⁰ Ms Deborah Awyzio, Chair, Family and Domestic Violence Committee, QLS, *Proof Committee Hansard*, 10 March 2020, pp. 22–23.

¹¹ Ms Pauline Wright, President, Law Council, *Proof Committee Hansard*, 13 March 2020, p. 3.

- 5.13 Ms Suzanne Christie SC, Chair, Family Law Committee, Australian Bar Association highlighted the problem with focusing on the top tier of barristers and the fees they charge rather than looking at the entire specialisation and the range of fees that are charged:

I think what it does is fail to appreciate the difficulty of the family law matters, in thinking they can go work in another area of law. What it does is give second-class justice to family law litigants, as though their legal issues aren't as important as a corporate issue or a tax issue. What we really want is a cross-section of people, at all cost levels, but with a specialisation, where possible, to provide a proper service from an experience basis and not be dissuaded from doing that work because it's not valued.¹²

- 5.14 Ms Christie also pointed out that in some circumstances, lawyers did not always pass costs on to clients:

... sometimes the cost is shifted to the lawyers. For example, family lawyers very frustrated [for] their clients about delay discount their bills on a daily basis. They say: 'We were there at that court all day but the judge couldn't hear us until 3 o'clock. I cannot in all conscience charge my client for that.' So it will be that family who isn't paying. So the cost burden is shifted not from the court to the litigant but from the court to the lawyer. That's happening regularly and frequently, because we feel bad about what the court can't provide.¹³

- 5.15 Women's Legal Centre ACT highlighted that 'each state/territory already have professional regulatory frameworks and regulations which provide that lawyers must provide adequate costs disclosure to their clients'.¹⁴ This was supported by a number of other submitters in other jurisdictions. The QLS stated in its submission that:

... Solicitors are extensively regulated by the *Legal Professional Act 2007* [(Queensland)] in the manner in which disclosure is to be made and the information which must be provided to clients. Solicitors' fees are subject to an overarching requirement that they be 'fair and reasonable'. Gross overcharging is a matter that is characterised as 'professional misconduct'.¹⁵

¹² Ms Suzanne Christie SC, Chair, Family Law Committee, Australian Bar Association, *Proof Committee Hansard*, 13 March 2020, p. 35.

¹³ Ms Suzanne Christie SC, Chair, Family Law Committee, Australian Bar Association, *Proof Committee Hansard*, 13 March 2020, p. 35.

¹⁴ Women's Legal Centre ACT, *Submission 382*, p. 6. See also, Mr James Steel, President, Family Law Practitioners Association of Queensland, *Proof Committee Hansard*, 10 March 2020, p. 5.

¹⁵ QLS, *Submission 88*, p. 7.

- 5.16 Notwithstanding this, the committee heard from some who argued that legal fees were too high:

Most people in this country work for \$26 an hour on the average worker's wage. I've been with the lawyers recently, again, and they charge \$350 an hour.¹⁶

- 5.17 A parent appearing as a witness was critical of her son's legal expenses:

Our son's barrister had to re-read all the history before this final [court appearance], and for him to appear it cost our son just over \$40,000. I find this amount very, very hard to accept. Our son is still waiting on a result, and his lawyers have told him that this result can take three years from the last court date. I find this unacceptable. To date, our son has spent just over \$950,000 on legal fees, expert witnesses and valuations. His ex has spent approximately \$635,000. We have loaned sums to our son to enable him to pay his legal team.¹⁷

Delays

- 5.18 Mr James Steel, President, Family Law Practitioners Association of Queensland described how delays are a major factor in driving elevated legal costs:

... reducing delays in the court system will greatly improve and lower the costs that the parties are being required to pay. Delays mean more interim applications, multiple family reports inherent in cases often being required, updated subpoenas inherent in cases often being required, updated valuations being required in property matters and updated subpoenas in property matters. If parties can be transitioned through the court process—that's the limited number of parties who need the court process—then their costs will be significantly reduced. If they can be transitioned through quicker their fees will be significantly reduced.¹⁸

- 5.19 Ms Wright explained that 'the single most significant factor impacting costs is the delay in reaching a final hearing, if one is ultimately required'.¹⁹ The difficulty in quantifying the effect of delays on a matter leads to difficulties in anticipating how much a particular case may cost. Ms Awyzio commented:

In respect of the legal fees, our experience has been when providing estimates for clients that we have to factor in the delays that are in the system. So when estimates are provided they're very comprehensive and they set out on a step-by-step basis what clients can expect to pay. They clearly say, 'At the moment, with the way that the system is resourced, there is a chance when you have a trial date assigned that your trial will not be heard on that date and there will be a need to reprepare in six

¹⁶ In camera Hansard, 22 April 2020.

¹⁷ In camera Hansard, 3 June 2020.

¹⁸ Mr James Steel, President, Family Law Practitioners Association of Queensland, *Proof Committee Hansard*, 10 March 2020, p. 5.

¹⁹ Ms Pauline Wright, President, Law Council of Australia, *Proof Committee Hansard*, 13 March 2020, p. 2.

months' time, with further costs incurred like valuations updated.' Unfortunately for family lawyers that is part of our advice-giving to clients. They obviously give very practical advice that is reactive to the system that they are in in the family law system.²⁰

5.20 The Association of Family and Conciliation Courts, Australian Chapter held a similar viewpoint:

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 Association of 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.²¹

5.21 Delays in family law matters are discussed further in Chapter 6.

Cancellation and disappointment fees

5.22 Cancellation fees or disappointment fees were described by the Law Council as intended to:

... protect counsel from the consequences (and lost fees) arising from the late adjournment or settlement of matters where counsel, in some instances, may have blocked out considerable periods of time to be available to appear and who may have declined other work at that time in order to be available.²²

5.23 Some submitters were concerned by the use of these types of fees including the Australian Brotherhood of Fathers (ABF) who argued that disappointment fees should be banned.²³ The ABF elaborated:

For the 'working poor' who engage barristers at the interim hearing stage alone, the need to pay 'disappointment fees' can be devastating in a context in which parties have already been pushed to their emotional and financial limits.²⁴

5.24 The Australian Bar Association noted that as sole traders, barristers can reserve days or weeks of their calendar for a matter. If that matter is suddenly

²⁰ Ms Deborah Awyzio, Chair, Family and Domestic Violence Committee, QLS, *Proof Committee Hansard*, 10 March 2020, pp. 22–23.

²¹ Association of Family and Conciliation Courts, Australian Chapter, *Submission 99*, pp. 11–12.

²² Law Council, *Submission 2.1*, p. 61. See also, NSW Bar Association, *Submission 227*, p. 52. Reservation fees are interchangeable with cancellation fees and disappointment fees.

²³ Australian Brotherhood of Fathers (ABF), *Submission 1668*, p. 8.

²⁴ ABF, *Submission 1668*, p. 92.

cancelled, then they are 'quite possibly left without court work (and so remuneration) for those reserved days or weeks'.²⁵ The New South Wales Bar Association supplemented this by saying:

If a barrister is able to obtain further work for the remainder of the unused days, the barrister will not charge for that period. If, however, the barrister is not able to obtain alternative work, the commercial opportunity to generate fees which would otherwise have been generated has been lost. Reservation fees therefore seek to promote access to justice by offering improved certainty and comfort to clients that a barrister will be exclusively available to them for the duration of the matter, while providing greater certainty for self-employed practitioners.²⁶

5.25 Notwithstanding this, the Law Council added that cancellation fees were rare and always clearly set out in costs agreements.²⁷ Furthermore, barristers may not charge fees which are not 'fair and reasonable, proportionately and reasonably incurred and proportional and reasonable in amount'.²⁸ Mr Kearney explained how he exercised disappointment fees in his practice:

Firstly, I never charge it until the period of time is over, and, secondly, I never charge it on top of other work. I open my diary immediately I am notified. I attempt to obtain other work in lieu of. Then, you are never charged anyway as a basic term of the agreement the full face value of it.²⁹

5.26 Mr Paul Doolan, Chair, Family Law Section, Law Council also confirmed that cancellation fees were more likely to be charged in NSW, in particular Sydney, than anywhere else in the country.³⁰

5.27 Professor the Honourable Nahum Mishin AM, former Judge of the Family Court, also submitted that disappointment fees should be banned and suggested several steps that may be taken to alleviate issues around the cost of legal representation:

- (a) Disappointment fees are iniquitous and should be banned. While I am not familiar with their present use, my experience was that they stemmed from different briefing practices of the various State bars.
- (b) Time costing should be banned in family law. It can, and occasionally does, lead to inefficiency. Time costing should be replaced by event or stage of matter costing. There would need to be a discretion to increase the fees in the event of an unforeseen circumstance. The capping of

²⁵ Australian Bar Association, *Submission 87*, p. 8.

²⁶ NSW Bar Association, *Submission 227*, p. 53.

²⁷ Law Council, *Submission 2.1*, p. 61. See also, Australian Bar Association, *Submission 87*, pp. 7–8.

²⁸ NSW Bar Association, *Submission 227*, p. 53.

²⁹ Mr Michael Kearney SC, Chair, Family Law Committee, NSW Bar Association, *Proof Committee Hansard*, 13 March 2020, p. 30.

³⁰ Mr Paul Doolan, Chair, Family Law Section, Law Council, *Proof Committee Hansard*, 13 March 2020, p. 5.

fees could be approached in that context. Consideration would also need to be given to the relevance of the Uniform Law to such a decision in those States which have enacted that legislation.

- (c) Various legislative provisions require costing to be proportionate to the matters in dispute in the civil law. Any matter which is in issue must have a proper basis. I would be happy to provide the Committee with references to those provisions.
- (d) The re-inclusion of the counselling services in the Court's structure referred to above would also reduce the cost of proceedings to litigants. Anecdotal evidence suggests that some of the charges levied by private professionals who perform assessments in child cases are prohibitive.
- (e) Achieving better outcomes in resolution of property disputes requires better funding of mediators. Improvement of rates of settlement of property matters would be directly impacted by increasing the numbers of skilled mediators.³¹

5.28 Regarding paragraph (c) above, Professor Mushin specifically referred in his evidence to the Civil Procedure Act in Victoria, which requires costs to be proportionate and have a proper basis. He noted that these concepts are also in the uniform law for both solicitors and barristers which has been applied in some jurisdictions.³²

Ancillary costs

5.29 In addition to legal costs, the committee heard that there were other associated costs incurred such as the valuation—and sometimes re-valuation in the event of delays—of assets.³³ Dr Jacoba Brasch QC, President-elect, Law Council made the following comment on non-legal costs:

If your family report is 12 months old, if your forensic accounting report finished in the 2017 financial year, all of that has to be updated. So, if you're meant to have started a trial and it gets moved, the costs of the outgoings can be significant ...³⁴

5.30 The Law Council highlighted the sometimes significant cost of valuations:

If there is a dispute about the identification or value of the property pool, then valuations will need to be undertaken in property settlement cases. The costs of the required experts can be extensive particularly if there is forensic accounting evidence (in addition to real property evidence)

³¹ Additional document, Opening statement of Professor the Honourable Nahum Mushin AM, Public Hearing, 16 September 2020 (received 15 September 2020).

³² Professor the Honourable Nahum Mushin AM, *Proof Committee Hansard*, 16 September 2020, p. 22.

³³ See, for example, Ms Deborah Awyzio, Chair, Family and Domestic Violence Committee, QLS, *Proof Committee Hansard*, 10 March 2020, pp. 22–23; Mr James Steel, President, Family Law Practitioners Association of Queensland, *Proof Committee Hansard*, 10 March 2020, p. 5.

³⁴ Dr Jacoba Brasch QC, President-elect, Law Council, *Proof Committee Hansard*, 13 March 2020, p. 11.

required. The Court cannot make any decision to adjust property interests until it first establishes the ownership, and value, of the property pool.³⁵

5.31 The costs of family reports were raised as one area of significant cost for a family law matter in Chapter 4. Professor Rachael Field stated that many report writers do charge 'very reasonable fees', but that a significant amount of work goes into writing the report. Professor Field explained why people are prepared to pay these fees:

I think what people are paying for, when they're paying large sums of money, is for a quick report, and they're going to somebody who is very highly regarded, in terms of the report writing. That would then be influential in the court because a lot of store is placed in these reports, by judges, in matters. These reports also influence, to a significant degree, negotiations in mediation or private settlement and a person's ability to access legal aid. So it's a complex issue.³⁶

Cost-saving measures

5.32 Throughout the inquiry, the committee has heard a number of suggestions on how private practitioner legal costs might be reduced including:

- capping legal fees;
- unbundling legal services;
- utilisation of processes outside the court system; and
- use of not-for-profit and pro bono legal work.

Capping fees

5.33 Capping legal fees was put forward as one mechanism by which legal costs could be reduced and there was a lot of support for this. One witness maintained that 'there needs to be some sort of cap on those fees, because it's just too expensive for average Australians'.³⁷ The ABF was also supportive of 'capping legal practitioners fees to improve access to justice for people who have limited resources in order to ensure that fees charged do not outweigh the value of the available property pool'.³⁸

5.34 Ms Hayley Foster, Chief Executive Officer, Women's Safety NSW said that their stakeholders were overwhelmingly in favour of capping legal fees:

Seventy-five per cent of domestic violence workers surveyed and 67 per cent of domestic violence survivors surveyed stated that legal fees should be capped based on the pool of assets. We are a voice for those frontline workers and survivors. Some of the stories that we hear are that people are

³⁵ Law Council, *Submission 2.1*, p. 62.

³⁶ Professor Rachael Field, *Proof Committee Hansard*, 11 March 2020, p. 16.

³⁷ In camera Hansard, 6 May 2020.

³⁸ ABF, *Submission 1668*, p. 91.

unable to access the family law system or see it through to its conclusion, and they're appearing unrepresented purely due to a financial cost.³⁹

- 5.35 Other submitters argued that the 'introduction of capped legal fees ... would assist families'.⁴⁰ Justice for Broken Families contended that fees should be capped to ensure that the cost of litigation does not become a 'major obstacle preventing many litigants from seeking legal representation and forcing them to self-represent'.⁴¹
- 5.36 Some reasoned that fee capping could start with a baseline and be capped at a percentage of the property pool and then in cases where the cap was likely to be exceeded, parties to a matter would then be encouraged to engage in Family Dispute Resolution (FDR) or Alternative Dispute Resolution (ADR).⁴²
- 5.37 However, the committee also heard the opposing viewpoint as to why capping would not work. Ms Foster acknowledged that some parties may simply 'ramp up poor behaviour until the cap was reached, rather than facilitating early settlement'.⁴³
- 5.38 The Law Council elaborated on some of the limitations imposed by capping:

Further, there is a concern that if a party were advised that their fees would be capped to a particular sum or percentage of the asset pool, this may make them less inclined to accept advice to settle matters or narrow the issues in dispute as there would be no cost incentive for them to do so. Fixed fees would also see the potential for work to cease at a certain stage if the costs are exhausted and reach the fee cap resulting in only perfunctory assistance provided afterwards, if at all.⁴⁴

- 5.39 At the Sydney hearing, Mr Kearney explained:

... the capping leads to a position where people are unable to be properly represented, because we don't know what happens in capping with the issues. You might have a very simple case where a cap of, let's say, \$20,000 is entirely appropriate and can be done, but, if you have people being denied access by spurious allegations, serious allegations of family violence or multiple court events and applications necessary to deal with it, all you are going to do is force people to be self-represented and force people to have substandard involvement in the process because you try and fit a one-size-fits-all proposition, regardless of the issues that feed into

³⁹ Ms Hayley Foster, Chief Executive Officer, Women's Safety NSW, *Proof Committee Hansard*, 27 May 2020, p. 48.

⁴⁰ Centacare Family and Relationship Services, *Submission 585*, p. 8.

⁴¹ Justice for Broken Families, *Submission 817*, p. 6.

⁴² Conciliate SA, *Submission 874*, p. 3.

⁴³ Ms Hayley Foster, Chief Executive Officer, Women's Safety NSW, *Proof Committee Hansard*, 27 May 2020, p. 54.

⁴⁴ Law Council, *Submission 2.1*, p. 62.

it. That's the great difficulty with capping and it's got nothing to do with the desire of the legal profession to make money.⁴⁵

- 5.40 The NSW Bar Association maintained that the use of a cap did not take into account the unique circumstances of each case and each client:

It is unclear by what mechanism is it proposed that legal fees could be capped. It would be difficult, if not impossible, to create an enforceable, fair system of tying fees to the size of an asset pool.

Even if caps or ceilings could be applied and enforced, the size of an asset pool per se is not reflective of the amount of legal work required to ensure justice is done between the parties in any given matter. It would necessarily be an arbitrary restriction and not justifiable. Legal work is largely directed at gathering evidence of relevant issues in a case.

The size of an asset pool is only one issue. The contributions made by parties, their future needs and the existence of and access to financial resources are other issues which sometimes require extensive investigation, analysis and advice. The extent of this work bears no relationship to the overall size of the asset pool.⁴⁶

- 5.41 In addition to difficulties in people being properly represented, Ms Christie flagged that a cap 'might lead to an exodus of qualified and experienced people into other areas of law that they are highly proficient in and their leaving for family law litigants the inexperienced, the unqualified and the people who are prepared to accept something which isn't market rate for a lawyer'.⁴⁷

- 5.42 Ms Zoe Rathus AM raised concerns about possible unintended consequences of cost-saving measures:

As a note of caution there is always a risk that cost-saving measures can backfire on women seeking to protect themselves or their children from violence or abuse. Women can experience pressure to settle for parenting orders that they do not consider safe or property orders that are not fair and do not provide for themselves and their children effectively. Any measures to prevent the unreasonable escalation of fees must [not] contain principles which might shut down appropriate use of resources for vulnerable clients of the system.⁴⁸

⁴⁵ Mr Michael Kearney SC, Chair, Family Law Committee, NSW Bar Association, *Proof Committee Hansard*, 27 May 2020, p. 32.

⁴⁶ NSW Bar Association, *Submission 227*, p. 50.

⁴⁷ Ms Suzanne Christie SC, Chair, Family Law Committee, Australian Bar Association, *Proof Committee Hansard*, 27 May 2020, p. 32.

⁴⁸ Ms Zoe Rathus AM, *Submission 710*, p. 5.

5.43 Others argued that other measures such as improved case management and increased utilisation of FDR would be more effective at reducing legal costs than capping fees.⁴⁹ The Lone Father's Association of Australia stated:

Rather than cap fees, an investment by community organisations and parents into counselling mediation and conciliation aimed at less costly resolution practices.⁵⁰

5.44 ADR is discussed further in Chapter 12.

Unbundled services

5.45 Unbundling of legal services 'is an option to decrease legal costs' by marketing or charging for separate tasks instead of as part of package. AGD summarised:

Traditionally, lawyers are engaged for the duration of a legal matter based on a detailed cost estimate, and then charge according to the time spent or units of work completed on the matter. Unbundling involves a lawyer assisting a client with one or more discrete tasks, rather than on an ongoing basis. Unbundling presents opportunities for consumers to manage their costs while retaining control over strategy in their legal matter. This is particularly beneficial for parties who would be unable to afford full representation. Through unbundled services, parties can seek specific, discrete assistance at key points, which can improve outcomes for those who would otherwise be unrepresented and navigating the system alone.⁵¹

5.46 Mr Iain Anderson, Deputy Secretary, Legal Services and Families Group, AGD expanded on the concept:

Legal aid commissions, who are actually Australia's biggest family law practices, provide a number of unbundled services, where they might have either a solicitor or another member of staff engage on just one part of a matter rather than every part of a matter. That's, in its essence, what unbundling is. It's not saying that a qualified legal professional needs to address every part of a matter but instead can just focus on a particular thing that they might have expertise in or a particular thing that's more important than other parts. For other aspects people might not have legal representation or they might have representation by a person who's an expert but isn't a fully qualified legal professional.⁵²

⁴⁹ Mallee Family Care, *Submission 712*, p. 13.

⁵⁰ Lone Father's Association of Australia, *Submission 112*, p. 9.

⁵¹ AGD, *Submission 581*, p. 16.

⁵² Mr Iain Anderson, Deputy Secretary, Legal Services and Families Group, AGD, *Proof Committee Hansard*, Canberra, 14 February 2020, p. 8.

- 5.47 Caxton Legal Services explained why unbundling services is a more appropriate approach and how in the absence of such a framework legal costs can increase:

Family law disputes for the most part do not require a full legal representation model and are more suited to the more affordable unbundled legal services model. The development of unbundled legal services has grown largely out of the family law jurisdiction which lends itself particularly well to this more cost effective way of receiving legal advice and assistance. Practitioners who do not have a limited scope retainer consider themselves obliged to manage all communications between their client and the other party, including negotiating minor parenting issues and routine disclosure. These practitioners are also not willing to perform discrete legal tasks.⁵³

- 5.48 This submission went on to describe the current state of play with this type of limited legal service:

The reality is that unbundled family law services are the bread and butter of legal aid lawyers and community legal centre lawyers who add legal ghost-writing to the list of unbundled services. More recently some private practitioners have decided to set up shop offering discrete legal services on a limited retainer agreement with the client and will perform tasks such as drafting documents at a fixed price or reviewing documents already prepared by the client.⁵⁴

- 5.49 The difficulties in expanding the use of unbundled services was raised by AGD:

Unbundling already occurs in the legal assistance sector, but is difficult for the private sector to implement in the current regulatory and common law environment. The need for uniform rules to deal with unbundled legal services was identified through the 2014 Productivity Commission Inquiry into access to justice, and again, more recently, through the stakeholder feedback process of the ALRC Issues Paper.⁵⁵

- 5.50 Furthermore, AGD noted that these matters were the responsibilities of states and territories and were being progressed as part of Council of Australian Governments:

Regulation of legal practice is the responsibility of the states and territories, and a uniform approach to unbundling across all states and territories is required. The former Law, Crime and Community Safety Council agreed to consider uniform rules to deal with unbundled legal services at its meeting on 19 May 2017, and this work continues under the Council of Attorneys-General. Victoria is leading this work.⁵⁶

⁵³ Caxton Legal Centre, *Submission 744*, p. 14.

⁵⁴ Caxton Legal Centre, *Submission 744*, p. 14.

⁵⁵ AGD, *Submission 581*, p. 16.

⁵⁶ AGD, *Submission 581*, p. 16.

- 5.51 Caxton Legal Services declared that specific changes would need to be made to enable private law practices to provide unbundled services:

We consider that changes are required to the Australian Solicitors' Conduct Rules and State Barristers' Conduct Rules to recognise, legitimate and provide a supportive framework for legal practitioners to provide unbundled legal services. Furthermore, legal training ought to include the teaching of unbundled legal services to students in a practical setting to encourage future lawyers to use the practice.⁵⁷

Processes outside the court system

- 5.52 In Chapter 12, alternate forms of dispute resolution including mediation, arbitration and family dispute resolution are canvassed. These methods have been recognised as ways to more quickly resolve disputes compared to court processes. Consequently, they can also be more cost-effective.

- 5.53 A focus of the recent ALRC 2019 Report was reducing delays by directing people to take 'genuine steps' towards earlier resolution to avoid incurring greater costs.⁵⁸ Furthermore, the ALRC recommended in the event that parties do not make a genuine effort that there should be cost implications as a consequence.⁵⁹ The ALRC also recommended that the *Family Law Act 1975* be amended to:

... include an overarching purpose of family law practice and procedure to facilitate the just resolution of disputes according to law, as quickly, inexpensively, and efficiently as possible, and with the least acrimony so as to minimise harm to children and their families.⁶⁰

Specialist tribunals

- 5.54 Professor Patrick Parkinson AM put forward his suggestion for a specialist family law tribunal as a means to assist those for whom legal representation was out of reach:

Each parent who elected to go to the tribunal or was referred to it would be asked to fill in a detailed questionnaire—preferably online, but it doesn't have to be—where they can set out what the argument is all about, the history of the relationship and so on. In [this] model, when both parents have completed the questionnaire it would be analysed by someone like a judges associate, a young law graduate, who could summarise the issues in, say, four or five pages for the chair of the tribunal, who would be a very experienced lawyer. The chair of the tribunal could look at that, call the parties in and make such orders as are required. Maybe there needs to be a drug test ordered and maybe there needs to be a family report ordered.

⁵⁷ Caxton Legal Centre, *Submission 744*, pp. 14–15.

⁵⁸ ALRC 2019 Report, p. 14.

⁵⁹ ALRC 2019 Report, p. 16.

⁶⁰ ALRC 2019 Report, p. 19. See also, Recommendations 31 and 32.

They would move things forward, refer them to mediation if that had not already occurred, and triage the case.⁶¹

- 5.55 On occasions where resolution was difficult, the case would then be referred to a secondary tribunal process:

If it couldn't be resolved, you'd appoint an independent children's lawyer who would then prepare the case for the tribunal. Ideally if it couldn't be resolved within six months from beginning to end the tribunal would set the matter down for a hearing of no more than two hours. This has been done in Oregon, not with a tribunal but with a court, and it has been quite successful in making decisions in less than two hours. Then you would have the decision by the end of the day. This is rapid justice. It may not be perfect, but it would at least give people an answer.⁶²

- 5.56 Professor Parkinson noted that the tribunals could operate with legal representation being optional and that 'generally the tribunal members talk directly to the applicant and the respondent, but lawyers can suggest questions or make submissions'.⁶³

- 5.57 Professor Parkinson explained further how the tribunal would work in practice:

The idea was the tribunal would use questionnaires rather than affidavits to get quickly to the issue. The tribunal would ask the questions that they needed to know. A lawyer chairperson would triage the case in the early stages—somebody with decades of experience in family law. If the case couldn't be resolved, an independent children's lawyer would be appointed and the case would be heard by a three-member panel in a hearing scheduled for no more than two hours. The panel would consist of the lawyer and two other people with expertise in family issues, perhaps a child psychologist or psychiatrist or an expert on drug and alcohol issues—whatever was appropriate to the matter. The idea was that an expert panel would be able to make sensible decisions about a lot of cases in a couple of hours of hearing, rather than two to three days as happens in the courts. This was a perfect model for self-represented litigants.⁶⁴

Collaborative law

- 5.58 The committee heard about the concept of collaborative law which was described by the Australian Institute of Family Law Arbitrators and Mediators as legal practitioners who 'assist clients to resolve disputes without resorting to

⁶¹ Professor Patrick Parkinson AM, Dean of Law, University of Queensland, Proof Committee Hansard, 11 March 2020, p. 13.

⁶² Professor Patrick Parkinson AM, Dean of Law, University of Queensland, *Proof Committee Hansard*, 11 March 2020, p. 13.

⁶³ Professor Patrick Parkinson AM, Dean of Law, University of Queensland, *Proof Committee Hansard*, 11 March 2020, p. 13.

⁶⁴ Professor Patrick Parkinson AM, Dean of Law, University of Queensland, *Proof Committee Hansard*, 11 March 2020, p. 7.

the Court process, focusing on preserving cooperation and assisting dispute resolution within families'.⁶⁵ By resolving disputes outside of the court, there is the potential to reduce costs for parties.

5.59 However, Ms Awyzio said that the collaborative approach was typically how family law matters were resolved through ADR as a matter of course:

You find that these new methods of collaborative practice, mediation and roundtable discussions are regular everyday events that happen in the family law arena in Australia. That is reflected in statistics that you get straight from the Family Court's annual report from 2019. That report states that out of the 19,000 or so applications that were lodged in the Family Court, 13,000 of those were applications for consent orders.

An application for consent order involves lawyers speaking between themselves. They may have engaged in mediation. They may have engaged in a roundtable discussion. They have come to a conclusion for their client, collaboratively, with the other family lawyer involved, resulting in those 13,000 matters not having to have any determination by a judicial officer. So, yes, it is a particular area of law where certain personalities are better suited to practice in than not, but it is a very fulfilling area of law to work in. It's an area where you can assist your clients to transition to the next phase of their life.⁶⁶

5.60 Notwithstanding this, some witnesses such as Ms Patricia Ocelli, Chief Executive Officer, Interrelate Limited called for a more proactive requirement for the use of collaborative family law practice'.⁶⁷ Others suggested that a more compelling requirement for people to engage in mediation or other collaborative approach would be appropriate. Mr David Eagle, Partner, Divorce Partners Pty Limited summarised how this requirement would work: '[i]f one party wants to start mediating or working in a collaborative manner, the other party must join'.⁶⁸

5.61 ADR is discussed further in Chapter 12.

Legal aid

5.62 Legal aid is 'funded by Commonwealth and respective state and territory governments to provide legal assistance services to the public, with a particular focus on the needs of people who are economically and/or socially

⁶⁵ Australian Institute of Family Law Arbitrators and Mediators, *Submission* 415, p. 7.

⁶⁶ Ms Deborah Awyzio, Chair, Family and Domestic Violence Committee, QLS, *Proof Committee Hansard*, 10 March 2020, p. 27.

⁶⁷ Ms Patricia Ocelli, Chief Executive Officer, Interrelate Limited, *Proof Committee Hansard*, 13 March 2020, p. 73.

⁶⁸ Mr David Eagle, Partner, Divorce Partners Pty Limited, *Proof Committee Hansard*, 27 May 2020, p. 13.

disadvantaged'.⁶⁹ Ostensibly, legal aid is a vehicle to ensure that those without means are legally represented.

- 5.63 In 2018–19, Legal Aid Commissions (LACs) received in excess of \$800 million.⁷⁰ Mrs Gabrielle Canny, Director, Family Law Working Group, National Legal Aid (NLA) elaborated on the work of LACs across the country:

Legal aid commissions play a lead role in the delivery of family law services across Australia, across all stages of the family law process. In 2018-19 we provided in excess of two million services to people. One in five of the services requiring the skill of a lawyer were related to family violence, child protection and family law matters.

In the same year, legal aid commissions provided thousands of other family law services across Australia, including arranging and funding the appointment of just over 5,000 independent children's lawyers in family law courts. We held just over 8,000 lawyer assisted mediations in family law disputes, with an extraordinary settlement rate of 77 per cent. We provided duty lawyer services in almost 52,000 family law matters, including through FASS, which is the Family Advocacy and Support Service. That delivers family violence support services to thousands of men and women appearing in our family law courts. Legal aid commissions also administer the newly established Family Violence and Cross-Examination of Parties Scheme.⁷¹

Access to legal aid

- 5.64 Mrs Canny explained how eligibility for legal aid is determined:

... there are formal tests that must be applied making a grant of legal aid. There is a limited bucket of money that's available and it must be fair, so we need to apply tests. We apply a means test and that takes into account income and assets. But we do apply a merits test as well. We also have what's called a guidelines test, and that comes down to how the matter ranks in severity in relation to other applicants for legal aid. Generally, legal aid is granted on guidelines for matters where children are involved in criminal matters where there is a risk of conviction, so those are the sorts of matters that are looked at in relation to guidelines. There are the three prongs of the test, and the aim is for the legal aid applicant be put in the same position as what they call an 'ordinarily prudent self-funded litigant'. That means they can't afford it themselves. Yes, there is merit in the application and, yes, it fits within the guidelines that the particular legal aid commission has enough money to fund those matters.⁷²

⁶⁹ Mrs Gabrielle Canny, Director, Family Law Working Group, National Legal Aid (NLA), *Proof Committee Hansard*, 27 May 2020, p. 31.

⁷⁰ Mrs Gabrielle Canny, Director, Family Law Working Group, NLA, *Proof Committee Hansard*, 27 May 2020, p. 33.

⁷¹ Mrs Gabrielle Canny, Director, Family Law Working Group, NLA, *Proof Committee Hansard*, 27 May 2020, p. 31.

⁷² Mrs Gabrielle Canny, Director, Family Law Working Group, NLA, *Proof Committee Hansard*, 27 May 2020, p. 35.

- 5.65 In addition to eligibility criteria, Ms Kylie Beckhouse, Director, Family Law, Legal Aid NSW, appearing on behalf of NLA, explained how legal aid applications are assessed throughout a family law matter:

A grant of legal aid is done in stages. In a typical matter, for example, someone would apply for a mediation grant, and then if the matter didn't settle at mediation, they would apply to commence court proceedings. Then, at various stages in the court proceedings, they would need to apply to extend the grant of legal aid. At each of those marker points, there is an assessment made of whether the matter still meets guidelines. I suppose it's fair to say that, as matters get to the pointy end or the more expensive end, there is probably more scrutiny on whether this is the type of matter that legal aid should be funding. To do that, they look at the merit of the orders being sought and take into account all of the evidence that is available. It's not correct to say that a legal aid commission would terminate a grant of legal aid on the basis of one family report. In terminating a grant of legal aid or in deciding whether or not to extend it to that expensive part of the proceedings where you would be requiring barristers and solicitors for many days, there is a fairly thorough examination of the merit and whether it is an appropriate case on which money from the public purse should be expended. We're quite conscious of that because we can often be criticised for expending public funds unreasonably or in inappropriate ways.⁷³

- 5.66 In addition to a means test, and as mentioned in the previous section, legal aid also has a merits test, as described by Ms Rathus:

Legal aid has a merit test, so if you have received a family report which is unfavourable to you then legal aid will say, 'You don't have sufficient merit in your case.' I have said for many years, including when I was in private practice and in community legal centres, that it seems to me that that's a complete irony. I'm a lawyer and I now teach law students to become lawyers. The challenge of being a lawyer is to represent the person with the unfavourable report and to show what the problems with it are. But what happens is that the person with the report that's already favourable gets the lawyer, and the person with the really difficult case to argue—doesn't get a lawyer. Often part of the reason the family report is unfavourable is that you have someone who has difficulty articulating their story or is afraid to tell their story.⁷⁴

- 5.67 Ms Bronwen Lloyd, Lawyer, Women's Legal Service Queensland informed the committee that often a negative recommendation that was not supported by the evidence in the family report would be sufficient to rescind legal aid support:

If a client has a family report and it has a negative recommendation, legal aid is often cut off, even if the report has flaws and has made assumptions that aren't supported by the evidence. Often I read reports and I get to the

⁷³ Ms Kylie Beckhouse, Director, Family Law, Legal Aid NSW, NLA, *Proof Committee Hansard*, 27 May 2020, p. 38.

⁷⁴ Ms Zoe Rathus AM, *Proof Committee Hansard*, 11 March 2020, p. 18.

end and I find the recommendations are a bit surprising because they haven't been able to build the process to support the recommendation. I don't think that report would stand up if it were in court. I think we'd be able to expose some of the flaws and perhaps get the report righted to be a bit more flexible in their recommendations. But as soon as that report goes to legal aid, it's often used to show that the client doesn't have merit for legal aid and they'll lose their legal aid funding.⁷⁵

5.68 Ms Lloyd further noted that often people in these situations are the most in need of legal aid as they are not able to pay for legal representation or represent themselves. For example:

... a family report writer will recommend that even though there have been high levels of violence the parents should still have equal shared responsibility for decision-making, and then because the client feels so uncomfortable with that, they'll decide to not agree on that aspect of the family report even though the legislation says that if there is violence they shouldn't have equal shared parental responsibility. So they'll disagree with the family report recommendations and then they'll be regarded as not having merit for their legal aid matter. We get unrepresented women who are victims of family violence who've experienced trauma, and that's when our service tries to help them to represent themselves, and it's very difficult.⁷⁶

5.69 Dr Merrindahl Andrew, Program Manager, Australian Women Against Violence Alliance (AWAVA) told the committee that:

... when people don't have representation, the outcomes are much less fair and also less advantageous to them. It's a real problem that report writers are having an impact on the amount of representation people can get as well.⁷⁷

5.70 The Council of Single Mothers and their Children discussed with the committee the Productivity Commission's report on access to justice, which commented on the numbers of people eligible for legal aid funding:

The 2014 Productivity Commission report on access to justice concluded that many people are neither rich enough to afford legal representation nor poor enough to qualify for Legal Aid. The report estimated that 'only the bottom 8 per cent of households (Australia wide) were likely to meet income and asset tests for legal aid', which is not representative of the proportion of the Australian population who are unable to afford legal representation.⁷⁸

⁷⁵ Ms Bronwen Lloyd, Lawyer, Women's Legal Service Queensland, *Proof Committee Hansard*, 12 March 2020, pp. 36–37. See also, Dr Merrindahl Andrew, Program Manager, Australian Women Against Violence Alliance (AWAVA), *Proof Committee Hansard*, 27 May 2020, p. 25.

⁷⁶ Ms Bronwen Lloyd, Lawyer, Women's Legal Service Queensland, *Proof Committee Hansard*, 12 March 2020, pp. 36–37.

⁷⁷ Dr Merrindahl Andrew, Program Manager, AWAVA, *Proof Committee Hansard*, 27 May 2020, p. 29.

⁷⁸ Council of Single Mothers and their Children (CSMC), *Submission 417*, p. 13.

5.71 Mrs Canny put this statistic into context:

... so 14 per cent of the Australian population at that time, late 2014, were living in poverty, but only eight per cent at that time were eligible for legal aid. That starkly shows that, if all we were aiming to do was to have those living in poverty be eligible for legal aid, we would need a substantial boost to our funding.⁷⁹

5.72 Mrs Canny added:

We have previously stated that the means test used by legal aid commissions are restrictive, reflecting the limited funds available. Income tests are below many established measures of relative poverty. It is not the case that people are too wealthy to be eligible for legal aid; rather, they are not sufficiently impoverished.⁸⁰

5.73 Ms Tina Dixon, Policy Officer, AWAVA told the committee that 'too often women are unable to get legal aid, or keep it'.⁸¹

5.74 Furthermore, when legal aid is not available and the costs of legal representation are too great, the committee heard that this can be particularly hard on some groups including single mothers:

Paying legal costs can set single mother families back by years and some women never recover their previous position. Women who draw on their mortgage or take out a second one sometimes end up having to sell the house to cover their debts and then struggling to find and manage rental accommodation.⁸²

5.75 Notwithstanding this, the committee also received evidence suggesting that 19 per cent of single mothers were accessing legal aid compared to the total population average of eight per cent.⁸³

5.76 One witness made clear the difficulties some fathers have in accessing legal aid which can be exacerbated if the other party does qualify for legal representation:

I live by very, very modest means and I don't have money to spend on a lawyer. But because I have a small amount of equity in a property I don't qualify for any legal aid. The other party in my case has a legal team—a barrister, a solicitor and her assistant are all on her team—and that is gratis, simply because she doesn't have the equity in the block of land that I do.⁸⁴

⁷⁹ Mrs Gabrielle Canny, Director, Family Law Working Group, NLA, *Proof Committee Hansard*, 27 May 2020, p. 37.

⁸⁰ Mrs Gabrielle Canny, Director, Family Law Working Group, NLA, *Proof Committee Hansard*, 27 May 2020, p. 32.

⁸¹ Ms Tina Dixon, Policy Officer, AWAVA, *Proof Committee Hansard*, 27 May 2020, p. 23.

⁸² CSMC, *Submission 417*, p. 14.

⁸³ CSMC, *Submission 417*, p. 14.

⁸⁴ In camera Hansard, 6 April 2020.

5.77 Another father's frustrations were described:

The mother in this arrangement is severely abusive, yet there is no limit to the amount of money being made available to this woman. She's had legal aid for every single hearing, at the drop of a hat, whereas the father, who's actually had the children for the last 3½ years, has had to beg, plead and scream to try and get support. Legal aid's argument is, 'Well, you've got the children, so you don't get legal aid.' This is ridiculous. Legal aid is for people who can't afford lawyers.⁸⁵

5.78 Mrs Canny also said that contrary to popular opinion, legal aid providers do not preferentially fund one party over the other. In some cases, both parties to a matter may receive legal aid funding:

Yes, we will make a grant of legal aid to two parties in the same action. We will not appoint the same lawyers.⁸⁶

Adequacy of legal aid funding

5.79 The adequacy of legal aid funding was raised:

... it's also important to recognise that there are huge gaps in legal aid funding available for legal aid itself but also other legal assistance providers, which means that there are huge numbers of people who are going through unrepresented. I think the pressure of being an unrepresented litigant is huge. It's daunting. For many people when you couple that with a misunderstanding around what it is that the Family Law Act says and a misunderstanding about what's a likely scenario, that also brings to bear a lot of pressure on people to consent to agreements.⁸⁷

5.80 This view was supported by others including Women's Legal Services NSW who said:

Funding for full legal representation of disadvantaged clients in family law matters, including for wrap around services, access to litigation and family dispute resolution (FDR) is imperative and cannot be substituted for duty services such as the [Family Advocacy and Support Services] and [Early Intervention Unit]. The benefits of funding for full legal representation of disadvantaged clients include continuity of legal representation by someone who has a thorough understanding of the matter. Certainty of legal representation may also assist the wellbeing of disadvantaged clients and so help them give the best possible evidence they can give.⁸⁸

5.81 The difficulty in obtaining legal aid combined with the high cost of legal representation means that some judgements—in particular, relatively

⁸⁵ In camera Hansard, 6 April 2020.

⁸⁶ Ms Gabrielle Canny, Director, Family Law Working Group, NLA, *Proof Committee Hansard*, 27 May 2020, p. 35.

⁸⁷ Ms Philippa Davis, Principal Solicitor, Women's Legal Service NSW, *Proof Committee Hansard*, 13 March 2020, p. 62.

⁸⁸ Women's Legal Service NSW, *Submission 702*, p. 31.

straightforward cases—in the Federal Circuit Court of Australia are sometimes not appealed. Mr Doolan advised that:

... the reality is that those cases tend to be less productive appeals for a couple of reasons. One is the complexity or lack of complexity compared to the superior court. The other is also money, sometimes. The people who are going through that system don't have the money or won't get the legal aid to fund an appeal, and that's part of it as well.⁸⁹

Existing and future legal support

5.82 Whilst concerns were raised about the eligibility for, and adequacy of legal aid, the Australian Government currently grants significant funds for legal aid services. As noted earlier in Chapter 2, the Government provides funding for 'the delivery of legal assistance through LACs, Community Legal Centres, Aboriginal and Torres Strait Islander Services and Family Violence Prevention Legal Services' with the majority of these services being for family law matters.⁹⁰ Other programs used to reduce delays and costs such as Family and Advocacy Support Services are discussed in Chapter 11 and the cross-examination scheme in Chapter 7.

5.83 The committee notes that, while the cross-examination scheme received almost universal support from those submitters who raised it, it was initially underfunded which led to a number of matters being delayed pending the securing of additional funding:

Funding the Scheme is crucial to ensure alleged victims and alleged perpetrators alike can access legal assistance, otherwise they would be denied the opportunity to cross-examine a witness, or have their matter delayed and lives put on hold until legal aid funding can be made available from the Government. Regrettably, as outlined below, that has already been the experience of families involved in more than 35 trials in Brisbane alone...

No further funding has been committed over the forward estimates to support the Scheme. This serious underfunding of the Scheme must be addressed as an urgent priority.⁹¹

Not-for-profit and pro-bono legal work

5.84 The committee also heard about other models of legal representation. Mrs Carolyn Devries, Chief Executive Officer, New Way Lawyers informed the committee that 'many individuals are missing out on legal services and are self-representing because they fall through the gap—they aren't eligible for

⁸⁹ Mr Paul Doolan, Chair, Family Law Section, Law Council, *Proof Committee Hansard*, 13 March 2020, p. 6.

⁹⁰ AGD, *Submission 581*, p. 14.

⁹¹ NSW Bar Association, answers to questions on notice, 13 March 2020 (received 31 March 2020), p. 3 and p. 5.

government funded services and they cannot afford the cost of a private lawyer'.⁹² Mrs Devries explained how her law firm operates as a not-for-profit:

New Way Lawyers opened as Australia's first non-profit law firm and thereby established a third type of family law service provider: a not-for-profit incorporated legal practice, or, as it's more commonly known, the non-profit law firm. Over the past 10 years, New Way Lawyers has grown to become one of the largest family law service providers in South East Queensland, with four branch offices and a team of 17 people, who have helped over 3,500 individuals. New Way Lawyers demonstrates that the non-profit law firm model has the ability to reduce the financial cost of family law proceedings. Being a non-profit law firm means that there's no shareholders, partners or directors in the firm seeking to make a profit from families' difficult situations. The purpose of the fees charged is simply to cover costs, not to generate profit. In New Way Lawyers' experience, this has meant that the fees charged for services are generally at least 30 per cent lower than the fees charged by law firms operating on a commercial basis. Lower fees means the model has the ability to respond to the gap in legal services by providing services to individuals who aren't eligible for government funded services and cannot afford a private lawyer.⁹³

5.85 The committee also heard from Mrs Jessica Hatherall, Head of Policy and Strategy, Australian Pro Bono Centre who claimed that family law is consistently in the top five rejected areas of law or practice for pro-bono work. Mrs Hatherall reasoned that:

... due to the unique nature of family law and the needs of the clients in this area, we're finding that it's very difficult for pro bono providers to do work in this family law area. In addition...this is a very specialist area, which I know you heard from the Law Council earlier this morning. So, anyone who wants to provide pro bono work in family law wants to partner up with community legal centres and other family law practitioners and get training to be able to work in this area. So really...with the resource issue in this space, it's hard for them to find people to partner up with to do this kind of work.⁹⁴

5.86 Mr Kearney explained his own and others motivations in providing pro bono services:

Why do I do legal aid work? Whatever views are taken, we are a profession. We do give back. We do represent people who can't afford fees. Some people, because of their fee structures, do that more often than others, or because of demand for their services. You have a combination of very experienced people who like the work; less experienced people who

⁹² Mrs Carolyn Devries, Chief Executive Officer, New Way Lawyers, *Proof Committee Hansard*, 11 March 2020, p. 27.

⁹³ Mrs Carolyn Devries, Chief Executive Officer, New Way Lawyers, *Proof Committee Hansard*, Rockhampton, 11 March 2020, p. 27.

⁹⁴ Mrs Jessica Hatherall, Head of Policy and Strategy, Australian Pro Bono Centre, *Proof Committee Hansard*, Sydney, 13 March 2020, p. 22.

like the work but it's a good way building a practice; and those who view it as part of their professional practice and obligation.⁹⁵

5.87 The next chapter looks at delays in the courts.

⁹⁵ Mr Michael Kearney SC, Chair, Family Law Committee, NSW Bar Association, *Proof Committee Hansard*, Sydney, 13 March 2020, p. 34.

Chapter 6

Delays in the courts

6.1 Earlier in Chapter 3 of this report, the committee outlined evidence received from individual parties to family law matters in relation to delays in the court system. This is a well-recognised issue and has been acknowledged in a recent report by the Australian Law Reform Commission (ALRC). The ALRC found that one of the key themes emerging from its inquiry into the family law system was that it was too slow:

Access to courts and services was so delayed that people told us they had to wait excessive lengths of time to receive assistance or take steps towards resolving their dispute. Many felt frustrated by this, and some said that their disputes escalated and/or they were left in situations that were unsafe for themselves and their children while awaiting access to the courts.¹

6.2 This chapter first looks at the performance of the Family Court of Australia (Family Court) before examining delays and resourcing in the courts as presented in evidence to the committee.

Performance of the Family Court

6.3 In April 2018, PwC provided the Attorney-General's Department (AGD) with a report titled *Review of efficiency of the operation of the federal courts*.² The PwC report looked at the five years from 2012–13 to 2016–17 and found that the percentage of pending cases older than 12 months had grown by 38 per cent in the Federal Circuit Court of Australia (Federal Circuit Court) during that period, compared to five per cent in the Family Court. Around 29 per cent of all Federal Circuit Court pending final order cases were older than 12 months, compared to 42 per cent in the Family Court. In addition, the national median time to trial has grown from 10.8 months to 15.2 months in the Federal Circuit Court, and from 11.5 months to 17 months in the Family Court.³ Further, PwC reported that approximately three per cent of Federal Circuit Court and 11 per cent of Family Court matters are subject to reserved judgments.⁴

¹ Australian Law Reform Commission (ALRC), *Family Law for the Future — An Inquiry into the Family Law System*, ALRC Report 135, 2019, March 2019, p. 27 (ALRC 2019 Report).

² PwC, *Review of efficiency of the operation of the federal courts*, April 2018, available at: <https://www.ag.gov.au/sites/default/files/2020-03/pwc-report.pdf> (accessed 27 July 2020).

³ PwC, *Review of efficiency of the operation of the federal courts*, April 2018, p. 4.

⁴ PwC, *Review of efficiency of the operation of the federal courts*, April 2018, p. 6.

6.4 In answers to questions on notice, AGD offered the following more recent information on the backlog of pending final applications:

According to the 2018–19 annual reports of the Federal Circuit Court and the Family Court, there were a total of approximately 20 500 judicial matters (final order applications) pending across both courts as at 30 June 2019. The Federal Circuit Court had 17 478 pending final orders applications, and the Family Court had 2 979 pending final orders applications.⁵

6.5 With regard to the number of cases that a judge will hear per day, AGD noted that this will differ depending on the type of case and the stage of proceeding, but provided the following general figures:

- Judges in the Family Court may hear between five to 10 cases per day in a duty list for a case management hearing.
- if the Judge is hearing a final hearing, there is usually only one case listed per day.
- Judges in the Federal Circuit Court will hear anywhere between 15 to 25 matters per day in a duty list, which is the first return date for the case (i.e. the first court hearing).
- when Judges are on circuit in regional locations, this figure could be 50 or 60 matters [per day].
- Judges in the Federal Circuit Court may have one to three cases listed per day if they are hearing interim defended hearings, or final hearings.⁶

6.6 In 2018–19, the Family Court established a series of case management initiatives known as a blitz as a means to fast-track cases and reduce the case backlog. Chief Justice The Hon Will Alstergren described the initiative in the Family Court's Annual Report 2018–19:

Between 18–21 March 2019, 196 property cases, 87 matters in Melbourne and 109 matters in Sydney, were called over and referred to private arbitration, mediation or other forms of Alternative Dispute Resolution (ADR).

Parties were also able to seek orders from the Court to assist in progressing matters towards resolution such as for the appointment of single experts, disclosure or updated valuations. Compliance hearings for these matters were listed between May and August 2019. In the Melbourne registry, those matters that were not suitable for referral to [Alternative Dispute Resolution] were able to be listed for trial in the next three months due to the recent appointment of new judges.⁷

⁵ Attorney-General's Department, answers to questions on notice, 14 February 2020, p. 2 (received 9 June 2020).

⁶ Attorney-General's Department, answers to questions on notice, 14 February 2020, p. 16 (received 9 June 2020).

⁷ Family Court of Australia, *Annual Report 2018–19*, 21 October 2019, p. 6.

6.7 Chapter 2 of this report outlined some workload statistics of the Family Court. In its Annual Report 2018–19, the Family Court reflected on its performance record:

For a number of years, the Court had been the subject of criticism regarding the length of time in having matters dealt with, which in some cases, extended up to two to three years.⁸

6.8 The Annual Report further stated:

... that having to wait years to have a family law dispute brought to resolution is unacceptable and now, with the timely appointment of new judges this financial year, the Court is in a much better position to reduce those delays.⁹

6.9 The Family Court claimed that its performance, as measured by the clearance rate of cases, had improved in recent years:

It is therefore pleasing to report that, for the first time in many years, the Court has achieved a clearance rate of 102 per cent for all application types and 107.6 per cent for final order applications. The overall clearance rate in 2017–18 was 100 per cent. These results are outstanding and effectively mean that the Court is completing more cases in a year than the number of filings received. This enables the Court to reduce the backlog of pending cases.¹⁰

6.10 There has been a marginal improvement in clearance rates from 2016–17 to 2018–19, with more cases being cleared than being lodged, with judgments delivered within 3 months and 12 months of trial remaining steady. Table 6.1 displays the statistics for the last three financial years.

Table 6.1 Performance of the Family Court of Australia during the periods 2016–17 to 2018–19

	Clearance rate	Judgments delivered within 3 months of trial	Judgments delivered within 12 months of application
2018–19	102 per cent	79 per cent	93 per cent
2017–18	100 per cent	75 per cent	93 per cent
2016–17	98 per cent	79 per cent	93 per cent

Source: Family Court of Australia, Annual Report 2016–17, Annual Report 2017–18, Annual Report 2018–19. A clearance rate of 100 percent means that the number of new cases equals the number of cases cleared or finalised.

6.11 The majority of applications (87 per cent) to the Family Court were finalised within six months of lodgement. Approximately 92 per cent were finalised

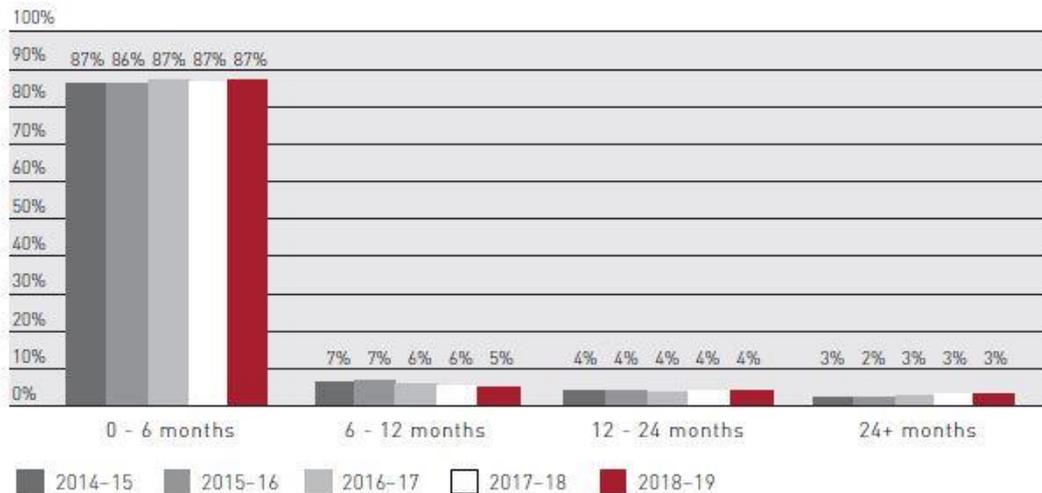
⁸ Family Court of Australia, *Annual Report 2018–19*, 21 October 2019, p. 5.

⁹ Family Court of Australia, *Annual Report 2018–19*, 21 October 2019, p. 5.

¹⁰ Family Court of Australia, *Annual Report 2018–19*, 21 October 2019, p. 5.

within 12 months, 96 per cent within two years, with roughly three per cent of cases taking more than two years. Figure 6.1 shows that the proportion of cases resolved in a specific period of time has remained largely unchanged over the last five financial years.

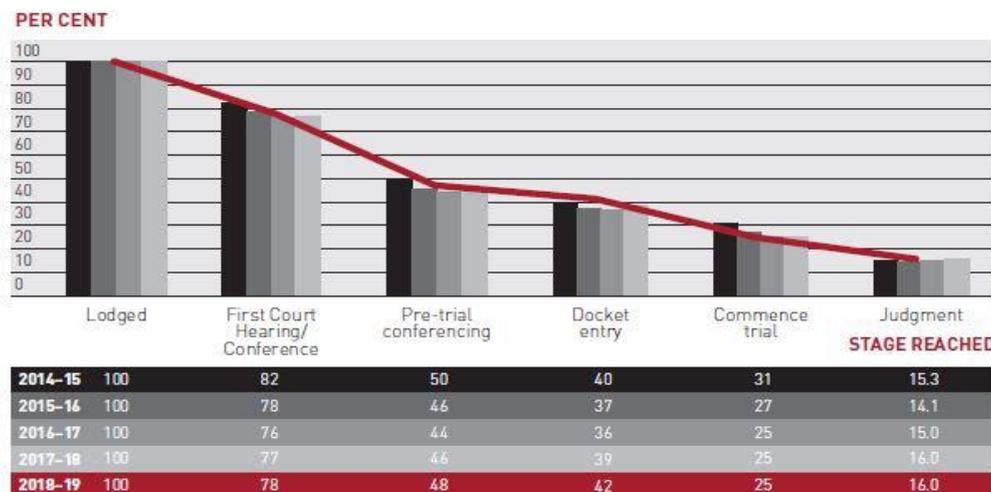
Figure 6.1 All applications to the Family Court of Australia, time to finalise, 2014–15 to 2018–19



Source: Family Court of Australia, Annual Report 2018–19, p. 23.

6.12 Figure 6.2 outlines the percentage of lodged cases that reach various stages in the court process. Similar to the previous figure, the numbers of cases that reach individual stages remained static over the last five financial years with 14–16 per cent of cases lodged reaching a judgment.

Figure 6.2 Case attrition and settlement trend in the court's caseload, 2014–15 to 2018–19



Source: Family Court of Australia, Annual Report 2018–19, p. 18.

6.13 In answers to questions taken on notice, the AGD explained the average time taken from the end of the trial to delivery of judgment:

Family Court of Australia

- The courts have advised the department that in financial year 2018-19 in the trial division of the Family Court of Australia, there were 640 final judgments delivered. The average time from the end of the trial to delivery of judgment was 1.79 months.

Federal Circuit Court of Australia

- The courts have advised the department that in financial year 2018-19 in the Federal Circuit Court of Australia, there were 4761 final family law judgments delivered. The average time from the end of the trial to delivery of judgment was 0.63 months.

Family Court of Western Australia

- The Western Australian Department of Justice has advised that the Family Court of Western Australia (FCWA) does not track decision delivery times, but instead focuses on monitoring reserved decisions to track timeliness of the delivery of the decisions. For the 2019 calendar year, the five FCWA judges delivered all reserved decisions within 3 months from the end of the trial and/or last day for filing of written closing submissions, except for 6 reserved decisions which were delivered within 3–6 months from the end of the trial and/or last day for filing of written closing submissions.¹¹

The impacts of delays

6.14 The President of the Law Council of Australia (Law Council), Ms Pauline Wright told the committee that 'delays and lack of resources continue to let down families at this difficult time in their lives'.¹²

6.15 At the committee's Townsville hearing, Mr James Steel, President, Family Law Practitioners Association of Queensland stated that 'clearly, the longer a matter goes on, the higher the costs will be for the people involved in those proceedings'.¹³

6.16 There are significant financial impacts that delays can have on individuals and families:

From my experience, some of the delays that have occurred in the Family Court have been extraordinary. People have actually ended up having to

¹¹ Attorney-General's Department (AGD), answers to questions on notice, 14 February 2020 (received 9 June 2020).

¹² Ms Pauline Wright, President, Law Council of Australia (Law Council), *Proof Committee Hansard*, 13 March 2020, p. 1.

¹³ Mr James Steel, President, Family Law Practitioners Association of Queensland, *Proof Committee Hansard*, 10 March 2020, p. 2.

go bankrupt while they have waited for a judge to make a decision over two years. It's just ridiculous. So I don't think that it's fair just to levy that at the Federal Circuit Court bench. I think there are some similarities in the Family Court bench as well.¹⁴

6.17 There are also effects on parties more broadly as a result of delays:

The single most significant factor impacting costs is the delay in reaching a final hearing, if one is ultimately required. In court registries across Australia there are waiting times of up to two years and, in some instances, even three years from the date of issuing proceedings until the date of any final hearing. We've got to acknowledge that parties don't live in suspended animation while they wait to resolve their case or for a final hearing. Personal and financial circumstances evolve, and that has significant impacts on the parties. This can then increase the legal advice necessary across the life of the case. It can also increase stresses on the parties and increase the likelihood of family violence.¹⁵

6.18 In some cases, there can be changes to personal circumstances if a case is delayed, Mr Paul Doolan explained the difficulties in delays and provided an example:

They don't stop loving other people. They don't stop buying a business. They don't stop buying real property. Things occur in their lives. The number of cases I've had in the last five years where I'm dealing not with one separation but two separations, in the context of one matter—because one party has in the four years of waiting for a trial repartnered and had a child and that's broken up as well—and you end up with multi-party litigation is remarkable.

Partly, it's just families changing over time. Partly, the delay means, as with valuation reports needing to be updated, personal circumstances changing. For someone I gave advice to in 2016 it was, 'Your matter's pretty simple because you're only in a partnership with her and you only own this business.' But in 2020 it was, 'You've got a child to this new person and you've broken up with her and she wants to bring a claim against you as well, and that business you started didn't go very well but the business your ex-wife started is going really well.' The situation's changed now.¹⁶

6.19 The committee heard that 'because of the delay in achieving a final hearing, the stakes in an interim application are high' and that 'orders made on an interim basis can prevail for years'.¹⁷ Furthermore, the effect of a delay between the granting of an interim and final order is such that during this period, 'children

¹⁴ Mr Craig Ray, Principal, Craig Ray and Associates, *Proof Committee Hansard*, 11 March 2020, p. 30.

¹⁵ Ms Pauline Wright, President, Law Council, *Proof Committee Hansard*, 13 March 2020, p. 2.

¹⁶ Mr Paul Doolan, Chair, Family Law Section, Law Council, *Proof Committee Hansard*, 13 March 2020, p. 11.

¹⁷ NSW Bar Association, *Submission 227*, p. 17.

are likely to lose their relationship' with the non-custodial parent 'without any evidence having been heard or tested'.¹⁸

6.20 Another witness added:

... there needs to be more resources and a far more streamlined approach taken to these matters. I've heard of cases where people are waiting three, four, five and six years just to have a case heard to get a decision, and in the meantime they're not seeing their children.¹⁹

6.21 Ms Megan Mitchell, Commissioner for Children and Young People highlighted the significant consequences of delays on children in particular:

I've had young people come to talk to me who have been involved with the court for six or seven years. I just think that's child abuse, myself—systems abuse. They've been going back and forth in the midst of very vexatious relationships between their parents, and I just think that we need to be really cautious of the way the system is inflicting trauma on the child, as well as the trauma of the separation itself.²⁰

Factors leading to delays

6.22 This section discusses the key reasons for delays including:

- resources of the court; and
- the role of individual parties to family law matters.

Resources of the court

6.23 A number of submitters argued that delays were being caused by a lack of resources in the court. One witness explained:

It does need more resources to move things through more quickly, because if they're able to move things more quickly then it's less stress on everybody.²¹

6.24 Mr James Steel, President, Family Law Practitioners Association of Queensland stated:

The main delay that we're seeing at present is the lack of resources in the courts, so that matters simply cannot be transitioned through the court process in a timely manner.²²

¹⁸ Family Law Reform Coalition, *Submission 597*, p. 14.

¹⁹ In camera Hansard, 6 April 2020.

²⁰ Ms Megan Mitchell, National Children's Commissioner, Australian Human Rights Commission, *Proof Committee Hansard*, 14 February 2020, p. 27.

²¹ In camera Hansard, 22 April 2020.

²² Mr James Steel, President, Family Law Practitioners Association of Queensland, *Proof Committee Hansard*, 10 March 2020, p. 3.

- 6.25 Ms Deborah Awyzio, Chair, Family and Domestic Violence Committee, Queensland Law Society (QLS) told the committee about the current workload of Federal Circuit Court judges:

The statistic we are aware of is that there are judges in the Federal Circuit Court who have up to 600 matters in their docket. So, if you had double the capacity of judges, that reduces it to 300 matters in each judge's particular docket. I would suggest that would have a significant impact on delays.²³

- 6.26 In his submission, Professor Patrick Parkinson AM, Dean of Law at the University of Queensland made a similar observation about judicial workloads:

Some judges' dockets have blown out to 500-600 cases when 300 is probably an absolute maximum to be able to give much serious attention to cases early in the process. Making decisions after only skimming the file briefly is much worse than leaving matters to registrars who can triage cases and refer to judges those issues which need judicial consideration. Making decisions in a rushed manner with a very limited understanding of the facts and issues involved in the case can result in dangerously poor decision-making.²⁴

- 6.27 This view was supported by others including Ms Rachel Field, Member, Family and Domestic Violence Committee, QLS:

Inadequate numbers of judges and other delays in the system are causing people to stress. Also, all other elements of the system need further resources. Those include legal aid, community legal centres and family dispute resolution provisions. In addition to that, in order for people to be able to participate effectively in the system, they need to get access to counselling and other more holistic forms of support. That's our position: rather than reconstructing a whole new family legal system, it is possible for this system to work effectively, but it does need to be adequately resourced in order for that to happen.²⁵

- 6.28 The NSW Bar Association remarked on how delays can be compounded, especially in regional areas:

For example, the Federal Circuit Court sits on circuit, say one week every two to three months in regional areas such as in New South Wales, Broken Hill, Coffs Harbour, Dubbo, Lismore, Orange, Port Macquarie, Tamworth, Wagga Wagga and Wauchope. Due to a lack of Judges and resources to deal with the cases when they are listed, cases may not be reached and are

²³ Ms Deborah Awyzio, Chair, Family and Domestic Violence Committee, Queensland Law Society (QLS), *Proof Committee Hansard*, 10 March 2020, p. 25.

²⁴ Professor Patrick Parkinson AM, *Submission 93*, p. 6.

²⁵ Ms Rachel Field, Member, Family and Domestic Violence Committee, QLS, *Proof Committee Hansard*, 10 March 2020, p. 21.

listed either at the next circuit or taken back to the 'home Registry' of Sydney, Parramatta or Newcastle.²⁶

- 6.29 Overlisting was cited as another reason for delays, as courts attempt to anticipate those cases that settle 'on the steps of the court'.²⁷ The NSW Bar Association explained:

To safeguard against a waste of judicial time a procedure known as 'overlisting' is often invoked. It is a process whereby the court lists for hearing more work than can actually be done so that if a case stops for any reason another one is ready to take its place without loss of judicial time, which is in short supply.

If, however, the first case listed does proceed, the others, sometimes up to three overlisted cases, do not get dealt with. As a consequence, a great deal of the parties' costs and time are wasted.²⁸

- 6.30 Whilst acknowledging some of the initiatives being undertaken currently by the Family Court, Ms Wright argued that these initiatives required additional resources to ensure their success:

The courts themselves are doing the very best they can on the resources that they have—but they are not enough. Changes to the management and streaming of lists that the courts have introduced, early triage and other administrative changes will assist in improving the efficient and effective resolution of family law cases. But these initiatives have to be properly resourced. The dominant difficulty is the chronic underfunding over several decades of the family law system and a failure to make timely appointments of judicial officers and registrars. This has created a backlog of cases, produced delays and frustrated the proper management of the resources that the courts have.²⁹

- 6.31 In an answer to a question taken on notice, AGD explained that the recent initiative to 'pilot risk screening, triage and a specialist family violence list' would also include 'resourcing for four senior registrars, eight registrars and three associates for senior registrars to support the pilot'.³⁰ Notwithstanding this, AGD also explained that 'courts are responsible for the management of their administrative affairs including the appointment of registrars'.³¹

The role of individual parties to family law matters

- 6.32 The committee heard that one or both parties may directly or indirectly be a contributing factor in delay. At the committee's Brisbane hearing, Mrs Susan

²⁶ NSW Bar Association, *Submission 227*, p. 19.

²⁷ NSW Bar Association, *Submission 227*, p. 18.

²⁸ NSW Bar Association, *Submission 227*, p. 19.

²⁹ Ms Pauline Wright, President, Law Council, *Proof Committee Hansard*, 13 March 2020, p. 2.

³⁰ AGD, answers to questions on notice, 14 February 2020 (received 9 June 2020), p. 17.

³¹ AGD, answers to questions on notice, 14 February 2020 (received 9 June 2020), p. 17.

Price, Director, Men's Rights Agency assigned some of the blame for delays on parties themselves.³² Ms Wright agreed observing that sometimes clients could provide instructions that extended the length of a legal matter:

... there are also problems with clients who will listen to your advice but will want to take every procedural point that they can. You wouldn't classify those people as vexatious, but they will certainly take every point that they can, despite your advice.³³

Self-representation

6.33 Some witnesses put forward a view that self-represented litigants are the cause of some delays. Mr Michael Kearney SC, Chair, Family Law Committee, New South Wales Bar Association highlighted research which supported this:

One judge told a research study in 2000, after a very full duty list one day, that the time taken to hear nine matters involving self-represented litigants would have been halved, had they been represented.³⁴

6.34 Mr Kearney attributed this increase in self-representation to the limited legal aid budget and spelt out the consequences:

Underfunding legal assistance has meant a significant number of parties cannot afford legal representation in family law matters and appear, by necessity, unrepresented in court. These factors have contributed to crippling judicial workloads. Both courts now have backlogs of more than a year's worth of cases. Many Federal Circuit Court judges have between 400 and 500 cases in their dockets; some have as many as 630.³⁵

6.35 Mr Kearney added that 'the provision of additional funding for legal aid will go some way to addressing the increase in self-represented litigants and decrease the pressure on the court'.³⁶

6.36 Dr Heather Nancarrow, Chief Executive Officer, Australia's National Research Organisation for Women's Safety drew the committee's attention to more recent research which outlined some of the issues associated with self-representation including:

... potential delays, frivolous claims, cross-examination, inappropriate questioning of other witnesses, use of proceedings to control or intimidate

³² Mrs Susan Price, Director, Men's Rights Agency, *Proof Committee Hansard*, 12 March 2020, p. 7.

³³ Ms Pauline Wright, President, Law Council, *Proof Committee Hansard*, 13 March 2020, p. 11.

³⁴ Mr Michael Kearney SC, Chair, Family Law Committee, New South Wales Bar Association, *Proof Committee Hansard*, 13 March 2020, p. 27.

³⁵ Mr Michael Kearney SC, Chair, Family Law Committee, New South Wales Bar Association, *Proof Committee Hansard*, 13 March 2020, p. 27.

³⁶ Mr Michael Kearney SC, Chair, Family Law Committee, New South Wales Bar Association, *Proof Committee Hansard*, 13 March 2020, p. 29.

a victim, the capacity to effectively present and test evidence, and the possibility of adverse outcomes.³⁷

- 6.37 Dr Nancarrow provided an example citing that 'there's also been confusion, particularly by self-represented litigants, about what equal shared parental responsibility means'.³⁸ Dr Nancarrow pointed out that equal shared parental responsibility does not simply mean equal time but can also include 'joint decision-making about major long-term issues, such as where a child goes to school, or major health issues would no doubt be very useful'.³⁹

Vexatious claims and abuse of process

- 6.38 The use of vexatious claims as a part of proceedings and abuses of process were also raised in Chapter 4 of this report. This section briefly touches on this issue again in relation to delays. In its submission, the National Council of Single Mothers and their Children quoted one member who alleged that an ex-partner continued to 'lodge frivolous and vexatious court applications' for a period of eight years post-separation.⁴⁰ A witness asserted that an ex-partner was 'constantly cancelling mediation' as a way of causing delay:

In my personal opinion, it seemed that she was intentionally doing that to delay the process. She actually had all her mail directed to her parents' house and was saying that she wasn't getting the mail, even though my solicitor was forwarding emails to her as well. So, it did seem as though it was game playing. As to the reporting, she said certain things in that mediation that showed that she didn't want to participate in the coparenting arrangement-it was actually quite the opposite-which I would say appears that she was intentionally stopping access and saying different things in her affidavit to what she said in the mediation portion.⁴¹

- 6.39 This was a trend also observed by Australian Women Against Violence Alliance (AWAVA):

In a survey of victims-survivors run by AWAVA, a respondent indicated: 'My ex has kept me in Family Court for seven years and has perpetrated his violence on me and my children through this institution. This is not recognised as violence, so it's not addressed and services are not developed to support victims.' The family law system at present, instead of validating the experiences of violence that women and their children have been subjected to, allows for the same violent dynamics enacted by

³⁷ Dr Heather Nancarrow, Chief Executive Officer, Australia's National Research Organisation for Women's Safety (ANROWS), *Proof Committee Hansard*, 13 March 2020, p. 45.

³⁸ Dr Heather Nancarrow, Chief Executive Officer, ANROWS, *Proof Committee Hansard*, 13 March 2020, p. 46.

³⁹ Dr Heather Nancarrow, Chief Executive Officer, ANROWS, *Proof Committee Hansard*, 13 March 2020, p. 46.

⁴⁰ National Council of Single Mothers and their Children, *Submission 397*, p. 23.

⁴¹ In camera Hansard, 3 June 2020.

perpetrators to occur—that is, silencing, coercive control and undermining of mother-child relationships.⁴²

6.40 Ms Hayley Foster, CEO, Women's Safety NSW reported that it was sometimes difficult for the court to identify and dismiss vexatious claims:

... the court needs to be able to have the expertise and the knowledge base to be able to do that and to be able to assess when they are unmeritorious and vexatious, and that's not always happening. At the moment, we're finding that people are being dragged through the court process by somebody who's using that process as a vehicle for coercive control ...⁴³

6.41 In addition, Ms Foster argued that an improved process leading to dismissal of vexatious claims would achieve a reduction in delays:

... but if they had the mechanism to dismiss those unmeritorious claims and make the right judgment and expedite those, then it wouldn't drag out.⁴⁴

Different approaches

6.42 The committee has heard about a number of different approaches that are either currently being trialled or proposed as ways to reduce delays.

6.43 The potential use of judicial registrars to triage cases and identify those that can be resolved quickly was suggested. Dr Jacoba Brasch QC, President-Elect, Law Council reasoned that some matters are simply delayed because of the number of other competing matters also needing to be heard and explained how a triage system would work:

... I regularly turn up on the days where there are 30 matters and delays and delays...I'd wonder how much delay was a factor of that. I would love nothing more than to turn up before a registrar on one of 30 matters competing for time. I want my matter to be heard today, not to be delayed off again, because that has cost, expense and delay of itself. If a dad isn't seeing his children, it can be tragic. I'd love to turn up before one person and have them triage it. 'What's your matter?' 'It's going to run.' Oh, Dr Brasch; go over to that judge. He's ready. What's your matter?' 'It's a consent order.' 'Stay here; I'll do that.' 'It's an adjournment.' 'Stay.' That would be a marvellous system.⁴⁵

6.44 National Legal Aid (NLA) also advocated for a similar position noting that NLA was able to 'assist in improving triage and streaming of matters at the family law courts via our family dispute resolution programs and [Family

⁴² Ms Tina Dixon, Policy Officer, Australian Women Against Violence Alliance, *Proof Committee Hansard*, 27 May 2020, p. 23.

⁴³ Ms Hayley Foster, CEO, Women's Safety NSW, *Proof Committee Hansard*, 13 March 2020, p. 54.

⁴⁴ Ms Hayley Foster, CEO, Women's Safety NSW, *Proof Committee Hansard*, 13 March 2020, p. 54.

⁴⁵ Dr Jacoba Brasch QC, President-Elect, Law Council, *Proof Committee Hansard*, 13 March 2020, p. 7.

Advocacy Scheme] services'.⁴⁶ In addition, NLA also noted that triage was not a single point in time exercise, but rather an ongoing process occurring at different stages of a family law matter, particularly for those matters involving allegations of family violence.⁴⁷

- 6.45 Other submitters such as Victoria Legal Aid called for a comprehensive process recommending the 'introduction of an intake, triage, risk assessment and case management process for the family law courts'.⁴⁸ Better Place Australia expounded the benefits of this type of approach including improved service delivery:

The establishment of a teams-based triage process in the family courts would ensure that complex and high-risk matters are directed to appropriate alternative dispute resolution processes and specialist pathways within the court as needed. The development of simplified court procedures would enable client support services both into and out of the court to better facilitate their services in a timelier manner.⁴⁹

- 6.46 In its submission, the Australian Dispute Resolution Advisory Council proposed that 'the family law system prioritise the need to promote self-determination at all stages of the family law system' through the following approaches:

- removing the focus on the court and the adversarial system as the centrepiece;
- introducing a comprehensive triage system at all stages and not only at the tertiary stage;
- actively promoting and channeling disputes to the appropriate [Family Dispute Resolution (FDR)] processes at each tier of the proposed system; and
- applying a rebuttable presumption that all families should be directed towards [Dispute Resolution] until and unless assessed as inappropriate by a specially trained and supported triage system.⁵⁰

- 6.47 There was also a call to limit exclusions to mediation. Relationships Australia explained:

The existence (proven or otherwise) of family violence should not exclude families from the simplified pathway. Exclusion would be problematic because a streamlined pathway could benefit those suffering from family

⁴⁶ Mrs Gabrielle Canny, Director, Family Law Working Group, National Legal Aid (NLA), *Proof Committee Hansard*, 27 May 2020, p. 32.

⁴⁷ Ms Kylie Beckhouse, Director, Family Law, Legal Aid NSW, NLA, *Proof Committee Hansard*, 27 May 2020, p. 39.

⁴⁸ Victoria Legal Aid, *Submission 120*, p. 16. See also, NSW Bar Association, *Submission 227*, p. 43.

⁴⁹ Better Place Australia, *Submission 229*, p. 18.

⁵⁰ Australian Dispute Resolution Advisory Council, *Submission 596*, p. 8.

violence by minimising their exposure to protracted and harmful conventional court processes.⁵¹

- 6.48 Furthermore, Relationships Australia highlighted a position put forward during the ALRC inquiry which explained how cases involving family violence could be mediated effectively whilst still protecting a victim from continued abuse by an alleged perpetrator:

The existence of family violence allegations or family violence orders (whilst a serious issue) should not be seen or presumed to be an automatic impediment to ADR as an appropriately skilled [FDR Practitioner] commonly will arrange for FDR/ADR in a manner, keeping the parties separate and which avoids exposing a party to family violence or otherwise accommodates a vulnerable party by creating a level playing field for negotiations.⁵²

- 6.49 Professor Parkinson detailed the previous approach of case management used by the Family Court:

Towards the end of Alistair Nicholson's time as Chief Justice of the Family Court, the Court developed a sophisticated case management process using registrars and family consultants to manage all the early stages of the litigation process. What that meant was that in most cases, judges did not need to be involved until it was clear that the matter would need to be set down for trial. Since the great majority of cases eventually settle, that was a highly efficient way of managing the caseload, preserving judicial time for trials and judgment-writing, and focusing attention on ways to settle the dispute without going to trial.⁵³

- 6.50 Professor Parkinson put forward his view that this method was displaced by the Federal Circuit Court that had more of a focus on early detailed judicial involvement:

Its processes involved judges in case managing every matter from the beginning, in individual judicial dockets. That approach frequently involves a great deal of routine procedural work that registrars could do, such as making orders for discovery, or requiring a respondent who has not filed a response by the requisite time, to do so within a certain period.⁵⁴

- 6.51 Further to this, Professor Parkinson recommended that priority be given to 'the appointment of more registrars in the Federal Circuit Court with the goal that they triage all family law cases and only refer to judges those matters that require urgent or interlocutory decisions'.⁵⁵

⁵¹ Relationships Australia, *Submission 606*, p. 36.

⁵² Relationships Australia, *Submission 606*, p. 36. This refers to a submission made by the Bar Association of Queensland to the ALRC 2019 inquiry.

⁵³ Professor Patrick Parkinson AM, *Submission 93*, pp. 5–6.

⁵⁴ Professor Patrick Parkinson AM, *Submission 93*, p. 6.

⁵⁵ Professor Patrick Parkinson AM, *Submission 93*, p. 6.

6.52 The Family Law Reform Coalition submitted that the legal process was an inappropriate place to address family separations and that these processes were simply too slow and suggested:

... the need for urgent processing of cases that reach the family court and inevitably involve families that are vulnerable, should be clear. Having families wait for several weeks before a first meeting or hearing, only then to be referred for a case conciliation conference five or six weeks later is simply not good enough; lifelong damage to children can occur in this time.

... an initial, substantial hearing and actual judicial action on day one, as opposed to the mere scheduling of later activities, could resolve many issues and significantly reduce court case loads. International models of much more effective judicial practices are available, particularly in northern Europe, whereby substantive decisions are made within a matter of weeks. A conciliation/arbitration approach to family separation, even within the court system, is the best approach to allow this to happen.⁵⁶

6.53 Mr Anthony Smith, appearing in a private capacity with the Men's Rights Agency put forward the suggestion of using contested interim hearings as a means of circumventing delays, a practice that Mr Smith indicated was commonly used before 1995:

... contested interim hearings, not on the papers, because that gets you nowhere, but with allegations tested in cross-examination. That used to be done in a two hour to a half day type window.⁵⁷

Recent and proposed reforms

6.54 There are also a number of initiatives being pursued by the Government that are aimed at reducing delays in the family law system. This includes the COVID-19 list dedicated to prioritising urgent family law matters that have arisen as a consequence to the COVID-19 pandemic. This list is discussed further in Chapter 8.

6.55 In addition, AGD told the committee about a new pilot program that has been established to fast-track cases involving family violence:

The [Government] committed \$13.5 million towards it. It is operational in three registries initially, the Parramatta, Brisbane and Adelaide registries, but together, as Mr Anderson said in his opening statement, they constitute 42 per cent of filings. We are expecting there to be a significant reach in terms of the initial pilot stage. As you mentioned, there are three elements. The initial part would be: when matters are filed with the court the parties are asked to fill in an online screening process, which is a modified version of [the detection of overall risk screening tool]. It's a clinical tool which was initially developed by Relationships Australia, and the court are modifying that for their purpose. Depending on the outcome

⁵⁶ Family Law Reform Coalition, *Submission 597*, pp. 9–10.

⁵⁷ Mr Anthony Smith, personal capacity, *Proof Committee Hansard*, 12 March 2020, p. 9.

of that risk screening exercise, the matter would be appropriately triaged according to the level of risk. High-risk cases would be intensively case managed. There would be an offer of immediate assistance, safety planning and the like. Moderate-risk cases would be, again, offered a safety plan and alerted to the support services that might be available. Low-risk cases might be assessed as suitable for family dispute resolution. For the high-risk cases, the pilot will establish a specialist family violence list, which will be overseen by a judge and intensively case managed, with a view to having a matter dealt with quickly and with appropriate safety supervision.⁵⁸

⁵⁸ Ms Alexandra Mathews, Assistant Secretary, Family Safety Branch, Families and Legal Systems Division, Legal Services and Families Group, AGD, *Proof Committee Hansard*, 14 February 2020, p. 8.

Chapter 7

Domestic violence

- 7.1 This chapter provides a brief overview of state and territory family violence orders, the relevance of family violence and family violence orders to family law proceedings and details the evidence provided to the committee in relation to the following aspects of how family violence orders work in practice:
- false allegations of family violence;
 - perjury;
 - enforcement of family violence orders;
 - current reforms; and
 - standard of proof.
- 7.2 This chapter also examines:
- consistency between family law and family violence orders;
 - information sharing; and
 - training of the family law profession.
- 7.3 The chapter concludes by examining the measures that are currently being developed to address some of these issues, existing recommendations from recent reports and whether more needs to be done.
- 7.4 The committee notes that there has been a significant divergence in the evidence provided regarding the availability and use of family violence orders for parties subject to family breakdown. The perspectives differ depending on whether someone is alleged to be the perpetrator of the violence, or the victim. Perspectives also differ between those individual submitters who have experienced the interaction of the state and territory family violence jurisdictions and the family law courts first hand and those that practice in these jurisdictions.
- 7.5 As discussed in Chapter 2, allegations of family violence present in the majority of matters that reach the court, with one survey finding that over 85 per cent (85.3 per cent) of respondents reported allegations of emotional abuse and 53.7 per cent reported allegations of physical violence.¹ The Australian Women Against Violence Alliance (AWAVA) stated that nearly 70 per cent of cases brought before the family courts involve family violence.²

¹ Australian Institute of Family Studies, *Evaluation of 2012 family violence amendments – Synthesis report*, 2015, p. 16.

² Australian Women Against Violence Alliance (AWAVA), *Submission 716*, p. 10.

Brief overview of family violence orders

State and territory legislative schemes

7.6 All Australian states and territories have legislation that provides for the making of civil protection orders for the protection of individuals subjected or exposed to family violence. Although the names of these orders vary between jurisdictions (see Table 7.1 below), the way in which they operate is very similar.

Table 7.1 Family Violence Orders in Australian states and territories

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

7.7 This chapter uses the term 'family violence orders' to refer collectively to the civil protection orders issued under state and territory laws for the protections of individuals subjected to family violence. This is consistent with the usage of that term in the *Family Law Act 1975* (Family Law Act).³

7.8 While expressed differently in each jurisdiction, the primary aim of these schemes is to ensure the safety of the victim. However, the schemes also aim to:

- prevent or reduce the occurrence of domestic and family violence;
- reduce children's exposure to domestic and family violence; and

³ See *Family Law Act 1975*, s. 4.

- promote the accountability of perpetrators of domestic and family violence for their actions.⁴

7.9 The 2015 Interim Report of the Family Law Council to the Attorney-General, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (Family Law Council 2015 Report), summarised how these schemes operate:

In most jurisdictions, the 'aggrieved person' who fears for their safety, or a police officer or a representative chosen by them or approved by the court, may apply [to the court] for the order. In some circumstances and in some jurisdictions, a police officer may be obliged to make an application with or without the consent of the aggrieved person.⁵

7.10 In addition, in some jurisdictions the police may issue an order in their own right without court approval.⁶ The Family Law Council 2015 Report continued:

A court may grant a family violence protection order where there are reasonable grounds for believing that an individual will commit a family violence offence if there is no order in place. As a family violence protection order is a civil order, the court must apply the civil standard of proof in considering these matters ... The type of conduct or threatened conduct that may provide grounds for a family violence protection order is relatively similar across all jurisdictions and may extend beyond physical violence and damage to property to emotional and economic abuse and other forms of intimidation.⁷

7.11 Family violence orders may be issued as interim or final orders:

Each statute provides a number of considerations to guide the court in deciding whether to make a final or interim order. Typical of these is a requirement that the court give consideration (or in some cases 'paramount' consideration) to the safety of the affected person and any children who have been subjected to the violence. Some jurisdictions also require the court to consider the parties' accommodation needs, in particular the accommodation needs of the victim and any children affected by the violence.

...

⁴ Family Law Council Report to the Attorney-General, *Families with complex needs and the intersection of the family law and child protection systems*, Interim Report, June 2015, p. 78 (Family Law Council 2015 report).

⁵ Family Law Council 2015 report, p. 79. This report will refer to the person who is applying for the order (or on whose behalf the order is applied for) as the 'protected person', the person against whom the order is issued will be the 'respondent'.

⁶ See, for example, *Family Violence Act 2004* (Tas), s. 14, which concerns police family violence orders.

⁷ Family Law Council 2015 report, p. 79.

Once made, an order will stay in place for a period of time specified by the court, for the maximum period allowed, or until the order is altered or revoked ...⁸

7.12 The courts have broad powers to put in place measures for the protection of the affected person. For example, the respondent may be prevented from:

- entering a property where the protected person resides;
- committing an act of family violence;
- locating, following or contacting the protected person;
- coming within a certain distance of the protected person; and/or
- intentionally damaging, or threatening to damage, the protected persons property.⁹

7.13 In terms of penalties, the Family Law Council 2015 Report stated:

Although family violence protection orders are civil orders, criminal penalties apply to their breach in all jurisdictions. The consequences for breaching a family violence protection order vary across jurisdictions but can include fines or imprisonment. The conduct amounting to the breach of an order may also constitute a separate criminal offence, such as stalking, in addition to the breach of the order.¹⁰

7.14 Mr Shane Bedfell, Men's Worker, Family Advocacy and Support Service Family Violence Practitioner at the Melbourne Registry, No to Violence provided evidence that sometimes there is a misunderstanding as to the nature of these orders:

Intervention orders are all around safety ... It's only when you breach them that they become criminal. So once I explain that to men, they say: 'That makes sense. My partner must be fearful of something.' ... I think men take it as a criminal offence. It's only a criminal offence if you breach it.¹¹

National recognition of family violence orders

7.15 On 25 November 2017, the National Domestic Violence Order Scheme (NDVO Scheme) commenced. The NDVO Scheme aims to better protect victims and their families by ensuring that all family violence orders that are issued in an Australian state or territory after 25 November 2017 are automatically nationally recognised and enforceable across Australia.¹² Prior to the NDVO

⁸ Family Law Council 2015 report, pp. 79–80.

⁹ Family Law Council 2015 report, p. 79. See also, Victoria Legal Aid, *Conditions in a Family Violence Intervention Order*, 13 May 2020.

¹⁰ Family Law Council 2015 report, p. 80.

¹¹ Mr Shane Bedwell, Men's Worker, Family Advocacy and Support Service Family Violence Practitioner, Melbourne Registry, No to Violence, *Proof Committee Hansard*, 24 June 2020, p. 27.

¹² Attorney-General's Department (AGD), *National Domestic Violence Order Scheme*, <https://www.ag.gov.au/ndvos> (accessed 4 August 2020).

Scheme commencing, family violence orders only applied in the jurisdiction in which they were issued, unless the protected person applied to register the family violence order in another state or territory of Australia. As a result of this scheme, a family violence order issued in one state or territory is recognised and can be enforced by police in all other states and territories of Australia, as if the order had been issued in the enforcing jurisdiction.

7.16 Where a family violence order was in existence prior to 25 November 2017, it can become nationally recognised by applying to a court. Local courts across Australia can also amend a nationally recognised family violence order regardless of where it was issued.¹³

Family violence orders and the Family Law Act

7.17 Key provisions in the Family Law Act relating to family violence, as well as avenues through which evidence of family violence and family violence orders can be brought before the court, are set out below.

7.18 Family violence is broadly defined to mean 'violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the *family member*), or causes the family member to be fearful'.¹⁴ Examples of behaviour that may constitute family violence include:

- assault;
- stalking;
- derogatory taunts;
- destroying property;
- deprivation of liberty; and
- financial abuse.¹⁵

Parenting matters

7.19 Before a person can apply to the court for a parenting order, they are required to make a genuine effort to resolve the dispute by family dispute resolution. As will be discussed in greater detail in Chapter 12, the Family Law Act provides that a court must not hear an application for an order in relation to a child unless the applicant files what is referred to as a Section 60I certificate issued by a family dispute resolution practitioner.¹⁶ However, this requirement for a Section 60I certificate does not apply where the court is satisfied that

¹³ Australian Government, *National Enforcement of Domestic Violence Orders*, p. 3, <https://www.ag.gov.au/sites/default/files/2020-03/English-NDVOS-brochure.PDF> (accessed 4 August 2020).

¹⁴ *Family Law Act 1975*, ss. 4AB(1) (emphasis in original).

¹⁵ *Family Law Act 1975*, s. 4AB.

¹⁶ *Family Law Act 1975*, ss. 60I(7).

there are reasonable grounds to believe that there has been, or there is a risk of family violence by one of the parties to the proceedings.¹⁷

7.20 For parenting proceedings before a family court, the Family Law Act sets out principles for conducting child-related proceedings.¹⁸ Principal 3 provides that proceedings are to be conducted in a way that will safeguard the child concerned from being subjected or exposed to abuse, neglect or family violence and safeguard the parties to the proceedings against family violence. The Family Law Act sets out general duties to assist the court to give effect to the principles for conducting child-related proceedings.¹⁹ These include asking each party to the proceedings:

- (i) whether the party considers that the child concerned has been, or is at risk of being, subjected to, or exposed to, abuse, neglect or family violence; and
- (ii) whether the party considers that he or she, or another party to the proceedings, has been, or is at risk of being, subjected to family violence.²⁰

7.21 The court must then, *inter alia*, decide which of the issues in the proceedings require full investigation and hearing and which may be disposed of summarily.²¹

7.22 When a parenting application is before the court, the Family Law Act provides that when deciding whether to make a particular parenting order in relation to a child, the court must regard the best interests of the child as the paramount consideration.²² The court is required to consider a list of matters in determining what is in the child's best interest. The Act sets out two primary considerations:

- the benefit to the child of having a meaningful relationship with both of the child's parents; and
- the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.²³

7.23 Of these, the court is required to give greater weight to the need to protect the child from harm, including family violence.²⁴

¹⁷ See, *Family Law Act 1975*, ss. 60I(9).

¹⁸ *Family Law Act 1975*, s. 69ZN.

¹⁹ *Family Law Act 1975*, s. 69ZQ.

²⁰ *Family Law Act 1975*, para. 69ZQ(1)(aa).

²¹ *Family Law Act 1975*, para. 69ZQ(1)(a).

²² See, *Family Law Act 1975*, s. 60CA.

²³ See, *Family Law Act 1975*, ss. 60CC(2).

²⁴ See, *Family Law Act 1975*, ss. 60CC(2A).

- 7.24 There are 14 additional considerations the court must turn its mind to in determining a child's best interest.²⁵ Of particular relevance are:
- any family violence involving the child or a member of the child's family;²⁶ and
 - if a family violence order applies, or has applied, to the child or a member of the child's family – any relevant inferences that can be drawn from the order, taking into account the following:
 - the nature of the order;
 - the circumstances in which the order was made;
 - any evidence admitted in proceedings for the order;
 - any findings made by the court in, or in proceedings for, the order; and
 - any other relevant matter.²⁷
- 7.25 Parties to proceedings under the Family Law Act are obliged to inform the court of relevant family violence orders placed on a party to the proceeding. A person who is not a party to the proceedings who is aware of an order may also inform the court of the order.²⁸
- 7.26 The court, in considering what parenting order to make, must ensure that the order is consistent with any family violence order, and does not expose a person to an unacceptable risk of family violence. This requirement applies to the extent that it is possible to do so consistently with the child's best interests being the paramount consideration.²⁹
- 7.27 When making a parenting order in relation to a child, the court is required to apply a presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility for the child (the concept of equal shared parental responsibility is discussed in detail in Chapter 8). However, this presumption does not apply where there are reasonable grounds to believe that a parent (or a person who lives with a parent) of the child has engaged in abuse of the child or family violence.
- 7.28 Subdivision D of Division 8 of Part VII of the Family Law Act sets out the requirements where an interested person in the proceedings makes an allegation of child abuse and/or family violence. An interested party includes a party to the proceeding, an independent children's lawyer or any other person prescribed by the regulations. Where an interested person alleges that there has been or is a risk of family violence by one of the parties to the proceedings,

²⁵ *Family Law Act 1975*, ss. 66CC(3).

²⁶ See, *Family Law Act 1975*, para. 66CC(3)(j).

²⁷ See, *Family Law Act 1975*, para. 66CC(3)(k).

²⁸ *Family Law Act 1975*, s. 60CF.

²⁹ *Family Law Act 1975*, s. 60CG.

the person must file a notice in the prescribed form.³⁰ The form is prescribed under Rule 2.04D of the Family Law Rules and is known as the Notice of Child Abuse, Family Violence or Risk of Family Violence. Where the Notice is filed in a matter that is ongoing (that is not an application for consent orders), the Rule requires that the person must file an affidavit or affidavits setting out the evidence on which the allegations in the notice are based.

7.29 Where a notice is filed that alleges that there has been or there is a risk of abuse or family violence and that this is a relevant consideration in whether the court should make the order requested, the court must as soon as practicable after the notice is filed consider what interim or procedural orders (if any) should be made to:

- (iii) enable appropriate evidence about the allegation to be obtained as expeditiously as possible; and
- (iv) to protect the child or any of the parties to the proceedings.³¹

7.30 The court is required to deal with the issues raised by the allegation as expeditiously as possible.³² This includes whether orders should be made to obtain documents or information from state and territory agencies in relation to the allegation and whether an order or injunctions should be made for the welfare of a child.³³

7.31 Division 11 of Part VII explicitly deals with family violence. The purposes of this Division are:

- to resolve inconsistencies between family violence orders and specified Family Law Act orders³⁴ allowing persons to spend time with a child;
- to ensure that those Family Law Act orders do not expose people to family violence; and
- to achieve the objects and principles of Part VII.

7.32 Under this Division, if a court makes an order or injunction concerning when a person can spend time with a child that is inconsistent with an *existing* family violence order then the court must, *inter alia*, specify in the order or injunction that it is inconsistent with an existing family violence order and explain the order or injunction to the applicant and respondent, and if the following people are not the applicant and respondent – the person against whom the

³⁰ See, *Family Law Act 1975*, s. 60ZBA.

³¹ *Family Law Act 1975*, para. 67ZBB(2)(a).

³² See, *Family Law Act 1975*, s. 60ZBB.

³³ See, *Family Law Act 1975*, s. 69ZW and s. 68B.

³⁴ The term 'specified Family Law Act orders' is used in this section to refer to certain orders, injunctions and arrangements made under this Act that provide for a child to spend time with a person or require or authorise a person to spend time with a child (as per s. 68N of the *Family Law Act 1975*).

family violence order is directed and the person protected by the family violence order.³⁵ A copy of the order or injunction is also to be provided to those persons, as well as the state or territory court that last made or varied the existing family violence order, the police and child welfare authorities in the jurisdiction in which the person protected by the family violence order resides. To the extent that the order or injunction is inconsistent with the family violence order, the family violence order is invalid.³⁶

- 7.33 Where a specified Family Law Act order is already in place and proceedings are commenced in a state or territory court to make or vary a family violence order, a state or territory court with jurisdiction under this Part may revive, vary, suspend (or discharge when the family violence order is a final, rather than interim, order) a specified Family Law Act order where the state or territory court has before it information that was not before the court that made the Family Law Act order or injunction.³⁷

Property matters

- 7.34 The provisions in the Family Law Act dealing with the alteration of property interests between parties do not specifically refer to family violence as being a relevant consideration. However, the decision of *Marriage of Kennon*³⁸ has resulted in family violence being relevant to the contributions of the parties. This was discussed in further detail in Part 10.8 of the National Domestic and Family Violence Bench Book:

Sections 79 and 90SM [which go to the alteration of property interests] do not specify domestic and family violence as a factor to be taken into account by the court when considering an appropriate property order. Rather, judicial officers are guided by case law. The leading authority is the 1997 decision, *Marriage of Kennon* [1997] FamCA 27 in which the majority stated that where there is a course of violent conduct by one party towards another during the marriage which is demonstrated to have had a significant adverse impact on that party's contribution to the marriage, or, put the other way, to have made his or her contributions significantly more arduous than they ought to have been, that is a fact which a trial judge is entitled to take into account in assessing the parties' respective contributions pursuant to section 79. The court emphasised that this principle would only apply in exceptional cases.

It has been noted that the Kennon test sets a high threshold for recognition of domestic and family violence in the context of property settlement proceedings as parties alleging violence must prove, on the balance of probabilities, that the violence had a discernible impact on their capacity to

³⁵ See, *Family Law Act 1975*, s. 68P.

³⁶ *Family Law Act 1975*, s. 68Q.

³⁷ See, *Family Law Act 1975*, s. 68R.

³⁸ *Marriage of Kennon* [1997] FamCA 27.

contribute to the marriage, or to the arduousness of making such contributions. Further, the Kennon test does not address the potential relevance of domestic and family violence to the prospective factors set out in section 75(2). The family courts have increasingly recognised the relevance of domestic and family violence in property settlement proceedings; however the Kennon test is difficult to satisfy.³⁹

7.35 Discussion of whether the case of *Kennon* provides an adequate framework for the consideration of family violence in property matters is canvassed in Chapter 10.

Cross-examination in family law hearings

7.36 Where a parenting or property matter is set down for hearing and one or both of the parties is self-represented, and the self-represented party intends to cross-examine the evidence of the other party and there is an allegation of family violence between those parties, section 102NA of the Family Law Act will apply.

7.37 Section 102NA provides for mandatory protections for parties in cases where any of the following are satisfied:

- (v) either party has been convicted of, or is charged with, an offence involving violence, or a threat of violence, to the other party;
- (vi) a family violence order (other than an interim order) applies to both parties;
- (vii) an injunction under section 68B or 114 for the personal protection of either party is directed against the other party;
- (viii) the court makes an order that the requirements of subsection (2) are to apply to the cross-examination;⁴⁰

7.38 Subsection (2) provides that the self-represented party must not personally cross-examine the other party and that the cross-examination must be conducted by a legal practitioner acting on their behalf.⁴¹

7.39 Where the above circumstances are not satisfied and a person is not prevented from personally cross-examining the other party, the court must ensure that

³⁹ Australian Government, *National Domestic and Family Violence Bench Book*, June 2020, 10.1.5 (National Domestic and Family Violence Bench Book), <https://aija.org.au/publications/national-domestic-and-family-violence-bench-book/> (accessed 31 July 2020). Subsection 75(2) of the *Family Law Act 1975* goes to factors to be taken into account in relation to spousal maintenance.

⁴⁰ Subsection 102NA2 of the *Family Law Act 1975* provides that: 'Both of the following requirements apply to the cross-examination: (a) the examining party must not cross-examine the witness party personally; (b) the cross-examination must be conducted by a legal practitioner acting on behalf of the examining party'.

⁴¹ *Family Law Act 1975*, ss. 102NA(2).

there are appropriate protections for the party who is the alleged victim of the family violence when the victim is being cross-examined.⁴²

How does the Family Court obtain evidence of family violence?

7.40 The primary source of evidence in family law proceedings is that given by the parties in their affidavits and supporting materials. However, the Australian Bar Association noted that there are a range of resources and avenues provided to the court with respect to state and territory child protection and family violence matters, including:

- 9.1 Notices of Risk which must be filed in all parenting matters by each parent and party - these Notices put squarely before the court whether any party has any concerns that a child is at risk of abuse, neglect, abuse or violence, or is in a household where family violence may exist;
- 9.2 the requirement to file copies of family violence orders in parenting proceedings;
- 9.3 the availability of s.69ZW Orders, which can require the provision of information held by child protection authorities to the courts making parenting decisions;
- 9.4 the availability of s.91B Orders, wherein the court may request the intervention in the proceedings of an officer of a State, of a Territory or of the Commonwealth, being the officer who is responsible for the administration of the laws of the State or Territory in which the proceedings are being heard that relate to child welfare. When such a request is met, the child welfare officer (in reality, the proper officer of the Department of Child Safety, or however so named in each jurisdiction) becomes a party with all the rights, duties and liabilities of a party;
- 9.5 the capacity to request a file from other courts making decisions in such matters, and to admit into evidence in parenting decisions, transcripts and findings made in child protection and family violence proceedings [see section 69ZX];
- 9.6 the National Family Violence Bench Book: a resource which assists in the education and training of judicial officers so as to promote best practice and improve consistency in judicial decision-making and court experiences for victims in cases involving domestic and family violence across Australia;
- 9.7 the Courts' joint Family Violence Best Practice Principles.⁴³

⁴² *Family Law Act 1975*, s. 102NB.

⁴³ Australian Bar Association, *Submission 87*, pp. 3–4 (citations omitted).

Family violence orders in practice

7.41 As discussed in Chapter 3, there has been a divergence of views in the evidence provided to the committee in relation to family violence.

7.42 Many victims of family violence raised concerns about the difficulty of obtaining a family violence order—one submitter expressed 'shock that the system does not take DVOs seriously, especially for emotional abuse. Society believes that DVOs are easy to obtain but they are not'.⁴⁴

7.43 The Victims of Crime Assistance League Inc NSW (VOCAL) agreed:

There is a misconception within the wider community that [Apprehended Violence Orders (AVOs)] are easy to obtain, and that women only seek AVO's to give them advantage in Family Court. In our extensive experience with clients seeking police assistance, unless there is clear evidence of a physical assault, it is extremely difficult for a domestic violence victim to get assistance from police, let alone protection from State courts.⁴⁵

7.44 Evidence on the difficulty of obtaining orders was provided in respect to both female and male victims of family violence. For example, the committee received evidence from individuals and organisations suggesting that men who had been the victim of domestic violence often had difficulty in obtaining police assistance to obtain a family violence order:

I had a guy that was really on the edge. He felt like he was losing his mind. His executive functioning was offline, big time. He was being affected by domestic violence. He went to the police, and they kind of made a joke of him, because he's obviously a guy. Then they said: 'You have no evidence, mate. Sorry.' So he walked away.⁴⁶

7.45 A confidential submitter also described his experience of seeking assistance from police to obtain a family violence order against his ex-wife. He had video evidence of the assault and seven witnesses to other incidents but the police failed to act and told him to obtain a private order.⁴⁷

7.46 Evidence was also received that police were reticent to issue a family violence order or commence an investigation into an allegation of family violence when family law proceedings were in train or they considered it to be a family law matters:

According to the National Child Protection Alliance (NCPA) in association with the National Council for Children Post Separation, it is commonplace

⁴⁴ In camera Hansard, 10 March 2020.

⁴⁵ Victims of Crime Assistance League Inc NSW (VOCAL), *Submission 699*, p. 3.

⁴⁶ Ms Tania Elaine Murdock, Family Dispute Resolution Practitioner, Dispute Management Australia, *Proof Committee Hansard*, 10 March 2020, p. 11.

⁴⁷ Confidential, *Submission 724*.

for Police and State Territory Departments of Families and Community Services to refuse to intervene when child abuse is reported to them when they know the particular matter is being heard in the Family Court.⁴⁸

7.47 VOCAL advised that:

... many of our clients have been turned away from police stations when attempting to provide evidence of repeated and unwanted, stalking and intimidation, despite having contemporaneous records and previous police event numbers. Often police advice [sic] 'it's a family law issue' and are reluctant to take any further action other than to suggest 'talk to a solicitor'. Yet in the Family Law system victims are often questioned as to why there is no evidence in the form of police reports.⁴⁹

7.48 Other victims claimed that they were not able to raise allegations of family violence in the family court for fear of losing their children or not being believed:

Lawyers counsel their clients not to raise family violence or not to admit to family violence because in either case 'they may lose the children'. These lawyers may do this because they have experienced family violence being handled poorly in court.⁵⁰

7.49 Domestic Violence NSW reported experiences from their members that:

... the protective parent is reluctant to raise family violence or sexual abuse in the family court because they are at risk of being depicted as the hostile parent or accused of parental alienation. Further, in a number of instances, DVNSW has heard directly from victims/survivors where the family court has not taken AVOs, criminal records or disclosures by the victims/survivors (including the children) into consideration when this evidence is presented and the offending parent has gained access to the children through family court orders. Disturbingly, in some circumstances, even when DFV or sexual abuse has been raised, the offending parent has gained full parental custody.⁵¹

7.50 No to Violence explained:

There is an often-broadcast belief that mothers in the family law court fabricate allegations of family violence to help their family law cases. However, the evidence shows that this is not the case and that women are disinclined to raise family violence allegations due to a fear of not being believed. The research shows that false allegations are much rarer than the issue of victim survivors not reporting abuse and the minimisation and denial of abuse by men who use violence.⁵²

⁴⁸ International Commission of Jurists, *Submission 418*, p. 4.

⁴⁹ VOCAL, *Submission 699*, p. 4.

⁵⁰ Council of Single Mothers and their Children, *Submission 417*, p. 21. See also, National Child Protection Alliance (NCPA), *Submission 818*, p. 4.

⁵¹ Domestic Violence NSW, *Submission 711*, p. 7.

⁵² No to Violence, *Submission 739*, p. 13.

- 7.51 Where some submitters and witnesses raised allegations of family violence, they expressed the belief that they were not believed or that the information was not appropriately taken into account by the judge:

The courts do not take Domestic Violence seriously. They do not listen. They claim to be acting in the best interest and only considering the needs of the children and their safety...well I'm failing to understand this statement as they have failed to protect the children in this matter ...

... the courts are causing normal people severe psychological damage and are emotionally traumatising families. I never would of thought that when I left my kids father for being abusive, a drug user and for sexually assaulting me that the federal [circuit] court ... would over throw a genuine victim of domestic violence our protection order and then enable that abuser to re-abuse us all LEGALLY. Let that sink in. Welcome to my life. Where I wake up and feel humiliated, disempowered, fearful, traumatised, helpless and now financially struggling every day. I cry myself to sleep and wake up lying to myself telling myself I got this when I'm being treated as a criminal in a family court. I have to remind myself I didn't break any laws. Yet I am spoken down to, I have no voice, I've been discriminated against and the worst thing is I'm paying! Paying thousands to be treated this way ...⁵³

- 7.52 One submitter stated that in her case the judge did not give any consideration to the family violence order:

The Judge walked into the Courtroom and from the first minute she started to attack myself (the applicant) and my Solicitor. She did not come down on my Ex-Husband or his Legal Team for submitting the paperwork extremely late, she would not let my Solicitor plead our case (as Applicants) as to why we were in court. The Judge was mortified that there was a DV on my Ex-Husband and would not let my Solicitor explain the reason as to why there was a DV ... We believed that no matter what we said, the Judge had decided prior to entering the courtroom, her decision.⁵⁴

- 7.53 On the other hand, a number of individual submitters and witnesses recounted their experience of an ex-partner obtaining a family violence order against them based on allegations that they maintain were false as a means to influence the outcome of the family law matter. For example:

[Domestic Violence Orders (DVOs)] are an important protection for vulnerable parties. However some parties abuse the system. For example in my case, false allegations were made and this gave my ex-wife material advantage. In some instances DVOs seem to be used as an avenue for venting a person's hurt and anger; it can also be a way controlling the other partner, making the DVO is in itself a weapon of 'abuse'.⁵⁵

⁵³ Confidential, *Submission 220*.

⁵⁴ Confidential, *Submission 358*.

⁵⁵ Confidential, *Submission 527*.

7.54 Concerns were also raised about the ease with which family violence orders could be obtained, the consequential effects of such orders on family law proceedings—particularly on the ability of the alleged perpetrator to see their child pending final orders, and the lack of recourse when the subject of the order argues that the order was based on false allegations.

7.55 The committee heard evidence about the impact of a family violence order on the ability of a parent to maintain a relationship with their child:

The interim DVO required me to move out of the house, not contact my ex-wife and have no contact with the children. After about 2 months I was permitted to see the children in the presence of supervisors proposed by my ex-wife.⁵⁶

7.56 When asked during an in camera hearing about whether there was any other evidence apart from his ex-wife's statement considered when a family violence order was made against him, one submitter stated: '[n]o, none at all. They took her statement, and I was basically just told that if I were to fight it would be put on longer. I would just have to accept it'.⁵⁷

7.57 Similarly, another submitter told the committee the judge in the Family Court proceedings accepted the family violence order issued against him without query:

It [the family violence order] was never mentioned. My affidavit, which provided evidence against this, was completely ignored. It clearly influenced the further handling of the case by the judge, or the judges, because I appealed to the Family Court as well, and I was consistently dealt with ... contempt, I have to say-significant contempt. I was silenced. I was not heard. I was actually denied my legal, natural justice rights. I allege that it was all based on starting this settlement and then divorce case with a false domestic violence claim. That apparently impacts massively on how a judge perceives the parties.⁵⁸

7.58 As to whether the current law is adequate in relation to the making and use of family violence orders, Former Justice of the Family Court, Professor Richard Chisholm AM, submitted:

There is no doubt a risk that family violence orders can sometimes be made in circumstances where they are not justified. The seriousness of this risk is related to the resources available to the magistrates (and to legal aid): if their resources were more adequate, they could no doubt deal with these cases more thoroughly, and have ex parte orders in force only for a very short time before the respondent would have a chance to set them aside. However if the law were to be changed to make it harder for applicants to obtain family violence orders, there could be an unacceptable

⁵⁶ Confidential, *Submission 527*.

⁵⁷ In camera Hansard, 11 March 2020.

⁵⁸ In camera Hansard, 11 March 2020.

risk that the many people who really are in danger may go without protection.

Family violence orders are of real value to many who suffer from or fear violence. They provide a degree of immediate protection in the period before the issues can be fully explored. Unfortunately there is a great deal of family violence and abuse, especially in the circumstances of family breakup, and many people are at risk of death or injury. Although there are problems with family violence orders, their value in providing needed protection should not be underestimated.⁵⁹

Consent without admission

7.59 Concerns were also expressed to the committee about the ability of a respondent to consent to a family violence order without admitting to the facts alleged. The committee heard evidence from a number of individual submitters that this was often recommended by their legal representative. For example:

My lawyers instructed me to accept the IVO without admission to avoid being cross-examined against my daughter as they felt it would make the relationship worse. There is nothing more sickening than standing in front of a Magistrate and agreeing not to harm your daughter when it was never something I did or would do.⁶⁰

...

The solicitor advised me to accept the DVO without admission because it wasn't important and because she said I could not afford to fight two court cases (being federal court and dvo court). Once my case got to federal court after many months and ridiculous costs paid to the solicitor, the apparent 'not important' DVO was suddenly the most important item.⁶¹

7.60 One submitter informed the committee that, '[u]nder instruction from a lawyer, I "Consented without admission", on advice that it would very hard to fight a Police Application DVO'.⁶²

7.61 Another submitter informed the committee that they were given advice from the magistrate to consent without admission, despite having clear evidence that the allegations were unfounded:

I was told by the magistrate before proceedings began that the test for domestic violence matters was set very low. I was told that I should enter into an undertaking without admission to avoid the findings being used against me in the [Federal Circuit Court of Australia (Federal Circuit Court)] matter.⁶³

⁵⁹ Professor Richard Chisholm AM, *Submission 849*, pp. 8–9.

⁶⁰ Confidential, *Submission 429*.

⁶¹ Confidential, *Submission 647*.

⁶² Confidential, *Submission 653*.

⁶³ Confidential, *Submission 206*.

7.62 Another submitter expressed their belief that the whole concept of consent without admission to family violence orders is flawed:

Lawyers always advise men to accept 'consent without admission' orders, even if the men are completely innocent of the allegations in a DVO, because it's much too expensive to contest the orders.

Thousands of innocent and non-violent men across Australia are being forced to leave their homes and families every year because there is no practical and affordable way for them to prove their innocence.

Everything about this process is completely and totally unfair. If a man is innocent then the justice system should protect him and should allow him to clear his name quickly and without cost.

It is completely contrary to natural justice that a man is forced to accept the consequences of a 'consent without admission' order simply because the alternative - defending himself against the false allegations - is not possible without spending immense sums on lawyers.⁶⁴

7.63 The Australian Brotherhood of Fathers (ABF) has suggested that this option of consenting to the order without admission should be removed. In their view the respondent should either agree to an undertaking or the application for the order should be tested on the evidence. The ABF stated that 'no party should be coerced to concede to Orders that are grossly impactful and that have possible criminal ramifications'.⁶⁵ They note their experience that, '[i]n heat of the moment, we're finding men who are poorly advised will consent without admission and not fully understand the impact that has on their life.'⁶⁶

7.64 The ABF also discussed how they consider that the consent without admission option fails to hold perpetrators to account:

Our belief is that consenting without admission is allowing perpetrators to get away with the act ... If police do not charge you with an offence, you can sail off into the rest of your life without any finding of facts against you and continue on to potentially commit the same acts against other people.⁶⁷

7.65 The ABF concluded that they are 'not sure consenting without admission is actually, apart from getting people out of the court system quickly, addressing the issue of domestic violence in our society.'⁶⁸

⁶⁴ Confidential, *Submission 1420*.

⁶⁵ Australian Brotherhood of Fathers (ABF), *Submission 1668*, p. 6.

⁶⁶ Mr Leith Erikson, Founder, ABF, *Proof Committee Hansard*, 22 July 2020, p. 13.

⁶⁷ Mr Leith Erikson, Founder, ABF, *Proof Committee Hansard*, 22 July 2020, p. 13.

⁶⁸ Mr Leith Erikson, Founder, ABF, *Proof Committee Hansard*, 22 July 2020, p. 14.

False allegations of family violence

Incidence

7.66 The committee received evidence from a number of submitters and witnesses on the incidence of false allegations of family violence. The Men's Rights Agency submitted that:

Domestic violence is the tool used to gain an advantage in separation. An easily gained domestic violence order will precipitate the removal of a partner from the home, ensure they have no contact with their children. Police suspect one in four DV allegations are false, magistrates suspect only 5% are genuine. Unfortunately, these statistics are several years old. [We] would recommend another round of research be directed towards various police stations, and magistrates' courts to establish up to date findings. No doubt the suggestion will be greeted with howls of derision and claims that it is not necessary, but there is enough evidence from individual police, judges, magistrates to support our claims that a large percentage of DV allegations are false, used purely to gain an advantage in separation and family law actions.

At least if there is an awareness and punishment for false claims then there would be more services, and funds available for genuine victims of domestic violence.⁶⁹

7.67 The submission from *Single Parenting is Killing our Kids* referred to a United Kingdom (UK) study which found high rates of false allegations:

Professor Tommy McKay did a study of 107 children in UK family law contact and residence cases and found that in 70 % of cases the allegations of physical and sexual abuse were deemed false and in 24 % of cases the allegation was unsubstantiated leaving a very small percentage of abuse cases upheld. It was noted that, 'that false allegations increase substantially as cases become more contentious'.⁷⁰

7.68 A few submissions also referred to the 2013 views of retired Justice David Collier reported in the *Sydney Morning Herald*, that allegations of child sexual abuse were being increasingly invented by mothers to stop fathers from seeing their children:

When you have heard the evidence, you realise that this is a person who's so determined to win that he or she will say anything. I'm satisfied that a number of people who have appeared before me have known that it is one of the ways of completely shutting husbands out of the child's life.⁷¹

⁶⁹ Men's Rights Agency, *Submission 603*, pp. 14–15.

⁷⁰ *Single Parenting is Killing our Kids*, *Submission 879*, p. 20, citing: 'False allegations of child abuse in contested family law cases: The implications for psychological practice', *Journal of Educational and Child Psychology*, September 2014.

⁷¹ Harriet Alexander, 'False abuse claims are the new court weapon, retiring Judge says', *Sydney Morning Herald*, 6 July 2013, <https://www.smh.com.au/national/false-abuse-claims-are-the-new-court-weapon-retiring-judge-says-20130705-2phao.html> (accessed 4 August 2020). See also,

7.69 In contrast, the Queensland Law Society (QLS) stated in its submission:

... we note the lack of empirical evidence to support the notion that false allegations of family violence are regularly made in an attempt to gain an advantage in family law proceedings. In contrast, extensive research confirms the difficulties victims of domestic and family violence encounter when disclosing their experience to courts; including fear of not being believed and fear that disclosure will increase the risk of violence to them or their children.⁷²

7.70 In its submission, the Domestic Violence Action Centre, Queensland (DVAC)⁷³ set out a number of Australian and international articles which refer to studies that have disproved that false allegations of violence are prevalent in the family law system.⁷⁴

7.71 Women's Safety NSW noted that:

It must be remembered, however, that the vast majority of women experiencing domestic and family violence do not report that violence to police. In its 2016 Personal Safety Survey, the Australian Bureau of Statistics (ABS) reported that only around 31% of female victims of physical assault and 13% of female victims of sexual assault actually report to police.⁷⁵

7.72 In its submission, the ABF advised that for men, the rate of no reporting was likely to be higher:

Men are 2 to 3 times more likely than women to have never told anybody about experiencing partner violence. 54.1% of males who have experienced current partner violence have never told anybody about it, along with 20.9% of males who have experienced previous partner violence.⁷⁶

Alienated Children Australia, *Submission 878*, p. 2; Professor Augusto Zimmerman, *Submission 6*, p. 7; Justice for Broken Families, *Submission 817*, p. 22.

⁷² Queensland Law Society (QLS), *Submission 88*, p. 3.

⁷³ Domestic Violence Action Centre (DVAC), *Submission 595*, p. 9.

⁷⁴ See, for example, Richard Chisholm, *Family Courts Violence Review*, 2009, pp. 49–50; Jess Hill, *See What You Made Me Do: Power, Control and Domestic Violence*. Australia: Black Inc., 2019, p. 267; Nicholas Bala, 'An historical perspective on family violence and child abuse', *Journal of Family Studies*, 14:2-3, 2008, pp. 271–278; Peter G. Jaffe, Janet R Johnston, Clare V. Crooks and Nicholas Bala, 'Custody Disputes involving allegations of Domestic Violence: Toward a Differentiated approach to Parenting Plans', *Family Court Review*, 46: 3, 2008, pp. 500–522; Bianca Hall, 'A fraction of fathers lose access to their kids: why the court isn't anti-men', *Sydney Morning Herald*, 20 September 2019, <https://www.smh.com.au/politics/federal/a-fraction-of-fathers-lose-access-to-their-kids-why-the-family-court-isn-t-anti-men-20190919-p52syn.html> (accessed 4 August 2020).

⁷⁵ Women's Safety NSW, *Submission 727*, p. 13. In the 2016 Personal Safety Survey, the Australian Bureau of Statistics also reported that approximately one in four women (23 per cent or 2.2 million) and one in thirteen men (7.8 per cent or 703 700) experienced violence by an intimate partner, see: Australian Bureau of Statistics, *Personal Safety, Australia*, Report 4906.0, 8 November 2017.

⁷⁶ ABF, *Submission 1668*, p. 33.

An advantage in family law proceedings?

7.73 There was also conflicting evidence on whether family violence orders provided some form of 'advantage' to the protected persons in family law proceeding. In its submission, AWAVA expressed the view that:

The family law system as it operates at present does not place the safety of victims/survivors and their children at its heart. Cultural perceptions surround family law that indicate that the disclosure of experiences of domestic and family violence will be to the detriment of a victim/survivor. The system itself does not do enough to prove otherwise ...⁷⁷

7.74 AWAVA referred to the following evidence in support of this claim:

The most recent study conducted by Francia, Milliar and Sharman looked at child custody decisions following parental separation where family violence was present. They interviewed 40 parents who experienced family violence (36 female and 4 male). Results revealed that the experience of engaging with the Australian family law system caused considerable anxiety and distress for these separated parents. Francia [et al] highlighted how mothers were labelled as 'alienating' for disclosing family violence. They also reported that disclosures of family violence were not treated seriously. Francia [et al] write: 'They [parents] felt powerless, isolated, and believed their children were at risk of falling through jurisdictional gaps.' Their study has also highlighted that various professionals within the family law system showed a concerning lack of knowledge around family violence. Lastly, study participants reported that they were coerced by professionals not to disclose experiences of family violence. Francia [et al] write that 'mothers and fathers, often under considerable time pressure, were threatened, or warned, that if they did raise concerns about the other parent, that they would lose care of their child or children'.⁷⁸

7.75 Researcher Ms Zoe Rathus AM argued the belief, by some, that family violence orders are regularly applied for as a tactic to gain a more favourable result in family law parenting matters was inaccurate and misunderstood the very limited relevance these orders are given in family courts:

In my experience in talking to women for research purposes, my community engagement work and reading published family law judgments the family courts have little regard to the existence of a domestic violence order in terms of the parenting orders they will make. The mere existence of a DVO is certainly not seen as evidence that there was serious domestic violence nor that any domestic violence that has occurred should be relevant to parenting order. The fact that one or both parents sought a DVO may be considered, but the relevant and effect of that evidence will vary widely depending on the facts.⁷⁹

⁷⁷ AWAVA, *Submission 716*, p. 18.

⁷⁸ AWAVA, *Submission 716*, p. 19, citing: Leanne Francia, Prudence Milliar and Rachael Sharman, 'Addressing family violence post separation – mothers and fathers' experiences from Australia', *Journal of Child Custody*, 16:3, 2019, pp. 211–235.

⁷⁹ Ms Zoe Rathus AM, *Submission 710*, p. 2.

7.76 The Australian Bar Association agreed that these orders are just one piece of evidence to be considered but are not determinative:

If it is suggested that the existence of such orders determines the family law outcome, then such a view is, respectfully, wrong. Parenting proceedings involve (as stated) an unwieldly 42 different steps, with family violence featuring in few of the 42. Further, property proceedings only concern family violence where a party can make out that relevant family violence occurred, and, importantly, that the family violence made that party's contributions more onerous, or impacted on a party's capacity to make contributions or has resulted in ongoing impairment to health or earning capacity.⁸⁰

7.77 However, some submitters put forward a different view with the Men's Rights Agency submitting:

I do not believe it is unreasonable to suggest the change to the family law act to elevate the issue of domestic violence has clearly encouraged more people to use the domestic violence legislation for their benefit, when making an application to the family courts. For if one has a DVO one doesn't need to participate in mediation; one cannot now be cross examined in court by the self-represented litigant trying to get to the truth; one parent can remove the other parent, usually the father from their children's lives; one can claim a greater percentage of property settlement based on alleged DV; one can claim tenancy or residential status over a respondent's rental unit or house they own; emergency housing can be provided; residential status can be granted to immigrants based on just counsellor's reports and one certainly can present oneself to the courts as a victim, needing protection, consideration, empathy and a more sympathetic outcome. One doesn't have to present any proof, just be convincing in your claim to be a victim of domestic violence. The fear you claim doesn't even have to be shown as reasonable anymore!⁸¹

Impact on relationship with children

7.78 While the Australian Bar Association stated that family violence orders are not determinative in the final decision, they may have an impact on interim orders:

There can however be a problem where the existence of a family violence order causes a Judge to act cautiously on an interim basis. Such caution is appropriate until allegations can be tested through cross-examination at a final hearing. The difficulty arises because delays in the courts mean that the cautious approach stays in place until the evidence can be tested much later at trial.⁸²

⁸⁰ Australian Bar Association, *Submission 87*, p .5.

⁸¹ Men's Rights Agency, *Submission 603*, p. 12.

⁸² Australian Bar Association, *Submission 87*, p. 5.

7.79 The Law Council of Australia (Law Council) also discussed the potential impact of family violence orders at interim hearings, stating:

An interim hearing in the family law courts is an abridged process where cross-examination of parties seldom occurs and where findings about disputed facts can rarely be made. Thus, on the strength of the Family Violence Order, a [Family Law Act] Judge may, on an interim basis, determine to act cautiously (balancing risk) and constrain the child's time with the alleged perpetrator (say by supervision, or day-time time only and in a public place), until the matters of family violence can be properly tested at a [Family Law Act] trial. The delays between that interim [Family Law Act] hearing and the final trial can be lengthy. If the allegations are not ultimately made out at final [Family Law Act] trial, then the child's and accused parent's time has been constrained between interim hearing (where the Judge determined to act cautiously), and final trial (where the evidence is tested). The burdens of delay between interim hearing and final hearing in the family law courts (which in some instances may be measured in years) is keenly made out in this example - the months or years where the parent-child relationship has been so constrained can never be restored.⁸³

7.80 The impact of delays in the court system is also discussed in Chapter 6.

7.81 Justice for Broken Families provided the following information detailing the potential impact on the relationship between the accused and their child/ren, particularly where it was demonstrated that the family violence order was based on a false allegation:

To put it quite simply, it appears undeniable that after a false allegation of abuse is made against an otherwise qualified parent, the effects upon the relationship between the child and accused parent are significant and severe. If the claim ends up being unsubstantiated, the accuser has lost out on little, while the child and accused parent have suffered intrusive investigations and a deteriorated connection. Both the child and the falsely accused parent lose precious time with each other, and the image of the accused parent may become tainted in an impressionable child's mind. The accused faces the penalty of the alleged crime before any determination of guilt or innocence has even been made. Within the atmosphere of a custody battle in which a false allegation of abuse has been entered to influence the proceedings, neither the welfare of the child, nor the innocence of the accused, can be realized.

Coupled with the loss of the child, an innocent parent wrongly accused of the horrific crime of abuse also faces heavy financial burdens and loss of reputation. The accused must cover the costs of retaining representation for both custody litigation and possibly criminal prosecution.⁸⁴

⁸³ Law Council of Australia (Law Council), *Submission 2.2*, p. 18.

⁸⁴ Justice for Broken Families, *Submission 817*, p. 24.

7.82 Professor Augusto Zimmerman also discussed the impact of false allegations, noting they can tear entire families apart. He quoted from the work of Dr Adam Blanch, a clinical psychologist working in Melbourne:

The more a single parent can restrict the other parent's access to the children the more financial support they receive from the alienated parent and the government, and a restraining order even when based on allegations that have been unsubstantiated is a great weapon in the fight for primary custody and restricted access.⁸⁵

7.83 As discussed above, a number of individual submitters advised the committee that the family violence order resulted in them not being able to see their child/ren for a considerable period of time. Women's Legal Service Queensland, however, provided a contrasting view:

In our experience, the Magistrates Courts, largely, balance the need to protect victims of family violence with the requirements of procedural fairness, natural justice and are loathed to infringe upon the rights of individuals (respondents) unless there is cogent evidence of such a need.

Child contact is largely maintained with respondents to domestic violence orders, because of the common inclusion in domestic violence orders of 'the family law exception' to enable parents to maintain their relationships with children. The family law exception does not have standardised wording, but is often framed as, '*This condition does not apply to the extent that is necessary for the parties to attend an agreed conference, counselling, mediation session or when having contact with a child as set out in writing between the parties or in compliance with an order of a Court or when having contact authorised by a representative of the Department of Communities (Child Safety) with a child*'.⁸⁶

Perceptions in the legal profession

7.84 The NSW Bar Association referred the committee to a 2015 research project indicating that:

... the belief that women make false or exaggerated claims of family violence to obtain tactical advantage in family law proceedings persists among members of the legal professional and the general community despite having no foundation in research.⁸⁷

7.85 In response to a question on notice about what could be done to dispel that perception, the NSW Bar Association advised:

Promoting respectful, informed and inclusive discussions about the prevalence of family violence and the operation of the family law system -

⁸⁵ Professor Augusto Zimmerman, *Submission 6*, pp. 7–8, citing: Adam Blanch, 'Vigilante Justice: Feminism's Latest Attack on Human Rights', *On line Opinion - Australia's E-Journal of Social and Political Debate*, 22 August 2014.

⁸⁶ Women's Legal Service Queensland, *Submission 715*, p. 20 (emphasis in original).

⁸⁷ NSW Bar Association, *Submission 227*, p. 48.

including the role of a specialist, standalone Family Court- is an important step towards dispelling such perceptions and making known the facts.⁸⁸

Perjury

What is Perjury?

7.86 The issue of perjury was a common discussion point in submissions and in the public hearings.⁸⁹ Perjury is a criminal offence under Commonwealth, state and territory law and prosecution for this offence would take place in a state or territory court. A person commits the offence of perjury if they give false testimony on a matter material to a judicial proceeding.⁹⁰ Perjury in family law proceedings is punishable by imprisonment for up to five years.⁹¹

7.87 In terms of how a matter of perjury would be dealt with in family law proceedings, Mr Iain Anderson, Deputy Secretary, Legal Services and Families Group, Attorney-General's Department (AGD), explained:

If someone believes that false evidence has been given, they can raise that matter with the court. The court can refer the matter to the [Australian] Federal Police for investigation. The family courts themselves don't independently investigate criminal allegations, so they would refer that to the police.⁹²

7.88 In addition to criminal proceedings for perjury, the family court has other powers available to them to assist in dealing with false evidence:

In any litigation, there is the risk that a party will provide false evidence with a view to misdirecting the decision maker. Family law is no different.

⁸⁸ NSW Bar Association, answers to questions on notice, 13 March 2020 (received 31 March 2020), p. 6.

⁸⁹ See, for example, Mr James Steel, President, Family Law Practitioners Association of Queensland (FLPAQ), *Proof Committee Hansard*, 10 March 2020, pp. 3–4; Mrs Susan Price, Administrator, Men's Rights Agency, *Proof Committee Hansard*, 12 March 2020, pp. 1–2; Dr Jacoba Brasch, QC, President-elect, Law Council of Australia, *Proof Committee Hansard*, 13 March 2020, p. 9; Mr Michael Kearney, SC, Chair, Family Law Committee, New South Wales Bar Association, *Proof Committee Hansard*, 13 March 2020, p. 37; His Honour Judge Graeme Henson, Chief Magistrate, New South Wales, and Judge, District Court of New South Wales, *Proof Committee Hansard*, 13 March 2020, p. 41; Ms Gabrielle Craig, Assistant Principal Solicitor, Women's Legal Service New South Wales, *Proof Committee Hansard*, 13 March 2020, p. 62; Dr Merrindahl Andrew, Program Manager, Australian Women Against Violence Alliance, *Proof Committee Hansard*, 27 May 2020, p. 24; Ms Kylie Beckhouse, Director, Family Law, Legal Aid New South Wales, National Legal Aid (NLA), *Proof Committee Hansard*, 27 May 2020, p. 33.

⁹⁰ See, *Crimes Act 1914*, s. 35.

⁹¹ See, *Crimes Act 1914*, s. 35.

⁹² Mr Iain Anderson, Deputy Secretary, Legal Services and Families Group, AGD, *Proof Committee Hansard*, 14 February 2020, p. 3; QLS, answers to questions on notice, 10 March 2020 (received 19 May 2020), pp. 1–2.

Like all Courts, judicial officers in the Family Courts have inherent powers in respect of the proceedings they are determining, including the power to issue a charge that a litigant is in contempt of court for swearing a false oath or otherwise misleading the Court, or referring them to the Director of Public Prosecutions for consideration as to a criminal prosecution for perjury and related criminal offences. The Act, and the Rules of Court, meanwhile establish duties (e.g. of full and frank disclosure) which litigants must abide, and enable any findings as to failure in compliance to be followed by more generous findings in favour of the innocent party (at discretion of the judicial officer). The Act has always reposed in a Judge the ability to order costs. These powers have existed since the enactment [sic] of the Family Law Act. Further, in financial proceedings, non-compliance by a litigant with duties enables a judicial officer to adopt a robust approach when completing the [alteration of property interests] decision making pathway. These powers need not, it is submitted, be augmented.⁹³

Prosecutions for perjury in the family law courts

7.89 Many submissions raised concerns with the absence of a penalty when the other party to the proceedings deliberately made false allegations or provided false evidence to the court. While this was raised primarily in the context of false allegations of family violence, it was also discussed as a relevant issue in financial disclosure in property proceedings.

Throughout the family law proceedings, my ex-wife continued to make false allegations against me without once producing a witness or evidence to support her claims. She was actively caught out in several lies and untruths at trial, which were completely ignored by the court, even when evidence existed of her dishonesty.⁹⁴

7.90 While many submitters were convinced that their ex-partners had indeed committed perjury during the family court proceeding, a number of submitters highlighted that simply because there are conflicting recollections of past events between the parties does not automatically suggest that one party has perjured themselves:

It is common for parties to provide different or conflicting evidence of past events. The reasons for this are varied and there may be no intention to deceive the court. Recollections of past events may be influenced by a person's interests and perspective, psychological state or imperfect memory. Judicial officers are well practiced at assessing the veracity of evidence in these circumstances and may prefer one party's evidence to another. This, however, does not constitute perjury.

Evidence is thoroughly tested in family law proceedings and each party has the opportunity to put their version of events to the court and to make submissions on that evidence. Judges are also able to intervene and ask

⁹³ Family Law Practitioners' Association of Queensland, *Submission 116*, p. 2.

⁹⁴ Confidential, *Submission 346*.

questions of parties and, if additional information or clarification is required.⁹⁵

7.91 Similarly, Mr Anderson advised:

Concern about perjury is quite widespread but as a matter of fact seems to occur relatively rarely ...

... the court would need to be satisfied that there was sufficient evidence that someone appeared to have in fact perjured themselves. It will often be the case in a family law proceeding that there will be disputed views as to the facts. That in itself doesn't mean that someone has in fact lied under oath.⁹⁶

7.92 In answer to a question on notice asking whether there had been any cases of perjury in the family law court that have been successfully prosecuted, AGD advised:

The Commonwealth Director of Public Prosecutions (CDPP) has advised the department that, from 1 January 2014 to 31 December 2019, no briefs of evidence were referred to the CDPP by the AFP or any other investigative agency with respect to family law related perjury offences. Accordingly, no prosecutions were conducted by the CDPP during this period for family law related perjury matters.⁹⁷

7.93 Former Chief Justice of the Family Court of Australia (Family Court), the Hon Diana Bryant AO QC, described her experience of practising in and presiding over family law matters in the court:

Many studies in the area of accuracy of memory and descriptions of significant events, show that memory, even with the best will in the world, is fragile and people can have different perceptions of what has occurred during the same incident. Unsurprisingly, this happens frequently in family law disputes, perhaps because in addition there is an emotional overlay to the perceptions and neither party is an objective observer. It is not uncommon for judges to note that the various competing versions of what is alleged to have occurred appear to be so much at odds that it is as if they are discussing entirely separate events. This is one of the reasons that judges are often reluctant to find that one party has deliberately misled the court, and where it is necessary to make a finding about what actually occurred, judges will often refer to a 'preference' for the evidence of one or another.

That is entirely consistent with my long experience. There are cases in which it can be established that one party has deliberately lied to the court. Most often that occurs in property matters but not exclusively. However, my own experience is that in parenting matters, generally the parties do

⁹⁵ QLS, answers to questions on notice, 10 March 2020 (received 19 May 2020), p. 2.

⁹⁶ Mr Iain Anderson, Deputy Secretary, Legal Services and Families Group, AGD, *Proof Committee Hansard*, 14 February 2020, p. 3.

⁹⁷ AGD, answers to questions on notice, 14 February 2020 (received 9 June 2020), p. 1.

not deliberately set out to misrepresent the facts but believe that their version of the events is the correct one.⁹⁸

7.94 In his evidence to the committee, former Family Court Judge Professor the Hon. Nahum Mushin AM added this observation:

I do not accept the sometimes ventured view that there are frequent circumstances in which evidence, particularly of family violence and child abuse, is 'made up' or 'invented'. Making such an allegation publicly is usually profoundly difficult for a litigant. In my experience, there are circumstances in which a victim of violence is not prepared to allege violence for fear of being disbelieved.

However, there are circumstances in which witnesses exaggerate allegations of violence as distinct from suggesting behaviour which has never occurred. That is not necessarily lying under oath. The human mind has the propensity to come to believe things as a result of the stressful nature of relationship breakdown. Part of a Judge's role is to determine the truth.⁹⁹

7.95 The QLS explained the particular challenges that present in matters involving the giving of evidence in family law matters:

In relation to matters involving domestic and family violence ... victims commonly face considerable difficulty when disclosing their experience to courts; including fear of not being believed and fear that disclosure will increase risk of violence to them or their children. The nature of domestic and family violence is such that, commonly, the only evidence available is that of the victim or perpetrator. Again, a lack of corroborative evidence or conflicting versions in these circumstances in no way constitutes perjury.¹⁰⁰

7.96 Similarly, the Hon Diana Bryant stated:

In family violence matters in particular, to the best of my recollection I have rarely, if ever come across a matter in which I've been satisfied that one party has totally fabricated an allegation of family violence. Where facts are disputed, and found not to be accurate, more often they will be either an exaggeration of what occurred, or a failure to include relevant matters which might reflect upon their own part in this process. It is not absolute, but rarely occurs that the other party when faced with an allegation will totally deny the violence alleged. Again, more often it will be a different account of what occurred and often a suggestion that the other party had some involvement, rather than whether it occurred at all. That is not to say that judges may find one version more compelling than another, but it does suggest that the situation is not always black and white.¹⁰¹

⁹⁸ The Hon. Diana Bryant AO, QC, *Submission 847*, p. 3 (emphasis in original).

⁹⁹ Additional document, Opening statement of Professor the Honourable Nahum Mushin AM, Public Hearing, 16 September 2020 (received 15 September 2020).

¹⁰⁰ QLS, answers to questions on notice, 10 March 2020 (received 19 May 2020), p. 2.

¹⁰¹ The Hon. Diana Bryant AO, QC, *Submission 847*, p. 4.

Increased penalties for perjury?

7.97 Notwithstanding this, there was a strong sentiment expressed in individual submissions that perjury and false allegations need to be taken more seriously by the courts. For example, it was suggested that the committee should:

Introduce serious and severe penalties for false and/or vexatious domestic violence claims, particularly when used to gain an upper hand in the family law system. Give the federal court powers to make such findings and issue penalties accordingly. Where false allegations are made and subsequently withdrawn in local court, and it can be seen as likely the applicant was doing so to gain an advantage in the federal court on a family law matter rather than protection for themselves or their family, similar penalties should also apply with the respondent being eligible to seek reparations/compensation for false or vexatious claims.

[Federal Circuit Court] be given powers and expected to overturn domestic violence orders or applications where the allegations are proven to be false or used to gain advantage in a family law matter, with all records of the order and application to be removed completely and retrospectively.¹⁰²

7.98 When asked what was the one thing the submitter would change in the family law system if they could, they answered:

I would suggest that, as much as I'm aware that DVO orders can be falsely and maliciously used, I also know that there are cases where they are required. There also needs to be a system of equal justice with domestic violence jurisdiction and system that does not automatically presume that the father is the perpetrator and is guilty. We need better investigation strategies to gain evidence to make impartial, correct judgements [sic] for both parties.¹⁰³

7.99 However, a number of submitters acknowledged that the issues surrounding the use of family violence orders and false allegations in family law matters were complex and that potential solutions were difficult to identify:

I realise that to make any necessary reforms to the laws, we first need to have suggestions on how the laws could be made fairer to all parties ... To be honest, I've thought about it long and hard and, no matter how you change the laws, I struggle to see how you can easily stop a person who decides they want to continue to tell blatant lies, and abuse the system or not comply with court orders that they sign themselves, without the other party spending a lot of time and money and having a lot of emotional stress to attempt to be treated fairly.¹⁰⁴

7.100 Despite the difficulty, it has been submitted that an appropriate balance between the rights of the alleged victim to be protected and the rights of an innocent alleged perpetrator to not be falsely accused needs to be found:

¹⁰² Confidential, *Submission 346*.

¹⁰³ In camera Hansard, 11 March 2020.

¹⁰⁴ In camera Hansard, 11 March 2020.

... I believe very strongly that victims of domestic violence need to be protected. But I also think there's the other side, where sometimes it is used by some parties to their advantage when false allegations are made. It makes it a very difficult issue for family lawyers. I don't know whether I have the solution, except I do think that factor has to be recognised. I know I was subject to that, and several other people I know have been subject to that. I think society very strongly and in some ways quite rightly advocates for the victim, but I think there needs to be some advocating for the people who are accused falsely as well, and maybe some consequences for making false accusations, which I feel perhaps doesn't occur at this stage.¹⁰⁵

7.101 Some submitters and witnesses have suggested that where a person is found to have knowingly made a false allegation of family violence or abuse, they should be punished by losing the custody of the child.¹⁰⁶

7.102 The Family Law Practitioners' Association of Queensland (FLPAQ) disagreed, noting that there are already mechanisms by which a litigant's conduct can be taken into account and reflected in a property settlement:

... the Full Court of the Family Court has already made clear that there can be a direct correlation between a litigant's conduct, and the ultimate property settlement outcome – the requirement that any Order be just and equitable is congruent with the weighing of the degree of truthfulness of a litigant and their compliance with duties ...¹⁰⁷

7.103 The FLPAQ continued:

In parenting cases, however, the dynamic is different – the Court is tasked with making orders which achieve a child's best interests. That a child has a parent who is prepared to mislead a Court is not directly relevant to the parenting arrangements which ought be implemented for that child. The reality is that the needs of the child may mean that even a parent who has, for example, perjured themselves ought to continue to provide for those needs.

If the proposition of the Committee is ultimately that the conduct of a parent in litigation ought automatically be reflected in parenting outcomes, and have compulsorily imposed direct impact on orders that a Court would have made, but for that conduct, then it is submitted that this would be to elevate the punitive effect of proceedings, and ameliorate the stated objective of Section 60B (to achieve the best interests of children), and cannot be countenanced.¹⁰⁸

7.104 Evidence was also provided to the committee regarding how family courts historically considered false allegations and the benefits of this approach. Mr Anthony Smith, a retired barrister and contributor to the Men's Rights Agency submission, noted that between 1976 and 1995 the Family Court

¹⁰⁵ In camera Hansard, 12 March 2020.

¹⁰⁶ See, for example, Professor Augusto Zimmerman, *Submission 6*, p. 12.

¹⁰⁷ FLPAQ, *Submission 116*, p 2.

¹⁰⁸ FLPAQ, *Submission 116*, pp. 2–3.

conducted interim hearings with cross-examination which operated as a 'type of clearing house':

Thus, spurious, frivolous, vexatious, piffling and even false claims usually by one parent against the other in respect of the care or lack of capacity to care, guide and nurture in a proper and responsible manner for the children of the marriage, would be dealt with in a quasi-summary fashion. These hearings would normally be over in half a day sometimes less.

What happened therein, more often than not, was that a judicial determination was pronounced about the credit of the maker of the allegations and/or the denier. Absurd and preposterous contentions were given short shrift by the judge. An adverse finding of credit against a parent resisting the other's application for access, as it was then called, invariably resulted in an order for access and more often than not put an end there and then to costly litigation.¹⁰⁹

7.105 There was some discussion at hearings about why these interim hearings no longer happened. For example, Mr Smith informed the committee that:

Before 1995, as I said, the interim proceeding served a very useful function, because what they did was permit counsel to engage in a little mini trial, if you like, right at the beginning, on the first return date when allegations might have been flying around from both sides. A finding was made by judges on credit, frequently, at that very early stage, and the judge would often say at the end: 'I have made these findings. The parties should go and consider their positions.' I can tell you—if experience counts for anything, and I know it sounds anecdotal—80 per cent of the things would resolve there and then, finally, without any further nonsense going on, or within a few weeks of that sort of hearing. Why we went from interim hearings and that sort of contested stuff to: 'We can't deal with these things on an interim basis. They have to go here. They have to go to report. There has to be an independent children's lawyer. There has to be this. There has to be that.' The reason for that was not because the system wasn't working but because there weren't enough judges and court time to deal with it.¹¹⁰

7.106 In respect of reform regarding interim hearings, the committee notes the establishment of the COVID-19 list for expediting cases that have been exacerbated by COVID-19 restrictions and is discussed further in Chapter 8.

7.107 In addition, the ABF has recommended that the Australian Government:

Create a process ... legislative amendments made to the *Family Law Act 1975* (Cth) to require a relevant court to determine domestic violence allegations at the earliest practicable opportunity to urgently assess claims of Domestic Violence in Family Court matters with 14 days of filing ... to prevent unfounded allegations from becoming entrenched:

- a. With adequate court resources and hearing time allocated to fully examine the claims and the evidence relied upon;

¹⁰⁹ Men's Rights Agency, *Submission 603*, pp. 26–27. This submission incorporated a paper from Mr Anthony Smith titled *Fixing the Family Law Mess*.

¹¹⁰ Mr Anthony Smith, *Proof Committee Hansard*, 12 March 2020, p. 6.

- b. With proof of balance of probabilities;
- c. With actions in perjury and cost orders for claims found to be intentionally false or misleading on the balance of probabilities;
- d. With an emphasis to urgently re-establish withheld access to children where safety risks are unfounded or low;
- e. No *ex parte* orders permitted where children are involved.¹¹¹

7.108 The 2017 Parliamentary Inquiry into *A better family law system to support and protect those affected by Family Violence*¹¹² (2017 Family Violence Report) contained significant discussion and recommendations around family violence and the family law system. A number of these were also directed towards the early identification of family violence in family law proceedings, including:

- the development of a national family violence risk assessment tool¹¹³ to be used to conduct a risk assessment for family violence upon a matter being filed at a family court registry;¹¹⁴
- improved case management of family law matters involving family violence, including triaging, to ensure resolution in an expedited time frame;¹¹⁵ and
- a legislative requirement that family violence allegations be determined by the court at the earliest practicable opportunity after filing proceedings.¹¹⁶

7.109 The 2017 Family Violence Report, as part of its recommendation for improved case management of family law matters involving family violence issues, also suggested the development of a stronger regime of penalties including cost orders to respond to abuse of process, perjury and non-compliance with court orders.¹¹⁷

Enforcement of family violence orders

7.110 The committee heard from victims who did have family violence orders for protection who expressed disappointment at the lack of action when they were breached. The National Child Protection Alliance noted that mothers:

... are also aware that such abusers use the Family Courts processes to continue to maintain control over them and their children, often

¹¹¹ Australian Brotherhood of Fathers, *Submission 1668*, p. 6.

¹¹² House of Representatives Standing Committee on Social Policy and Legal Affairs, *A better family law system to support and protect those affected by Family Violence*, December 2017, (2017 Family Violence Report).

¹¹³ See 2017 Family Violence Report, p. xxix. Recommendation 2.

¹¹⁴ See 2017 Family Violence Report, p. xxix. Recommendation 3.

¹¹⁵ See 2017 Family Violence Report, p. xxx. Recommendation 5.

¹¹⁶ See 2017 Family Violence Report, p. xxix, Recommendation 7.

¹¹⁷ See 2017 Family Violence Report, p. xxx, Recommendation 5.

accompanied by stalking and harassment in their homes, outside schools, and on the streets and they have little, if any, protection. DVOs etc. are mere pieces of paper and are no deterrent to a determined violent abuser. In some instances, DVOs have been breached on numerous occasions and reported to the police but no action has been taken.¹¹⁸

7.111 It was also Women's Legal Service NSW experience that police regularly fail to take action on breaches of family law orders, impacting the willingness of the protected person to report breaches again to the police.¹¹⁹ Justice for Children Australia suggested that:

... the state systems are often lacking in integrity and rigor when it comes to protecting children and other victims of family violence with countless examples of police failing to deal properly with allegations of sexual abuse or assault, breaches of AVOs, and other crimes.¹²⁰

7.112 The National Council of Single Mothers and their Children provided the following extract of a women's experiences:

The bullying and shaming of women need to stop. Police need to take action in regard to breaches. 28 breaches reported and not one charge as they excused his behaviour.¹²¹

7.113 The DVAC also provided the following case study:

I even tried to park as far as I could from my ex-husband during contact exchange. It says in my DVO that he is to stay away from me and not come close by 10 meters. However, this is difficult to enforce, [because] if I park away from him, he will follow me. I reported this to police and they said that I am the one that needs to change my behaviour. (Client W)¹²²

7.114 The committee has also heard of instances where men have been coerced or tricked into breaching a family violence order. For example, the ABF outlined the following hypothetical experience of a father under a family violence order:

Conditions of the order tell John he must be of good behaviour toward Mary and only go to their home with her permission. John sends Mary a text message after leaving the police station requesting if he can collect his work clothes and his work car and Mary agrees. When John arrives at their home Mary calls police and tells them that John is being threatening and she is scared. Police attend the family home and arrest John for breaching the temporary protection order ...

¹¹⁸ National Child Protection Alliance, *Submission 818*, p. 5.

¹¹⁹ See Women's Legal Service NSW, *Submission 702*, p. 12.

¹²⁰ Justice for Children Australia, *Submission 703*, p. 10.

¹²¹ National Council of Single Mothers and their Children, *Submission 397*, p. 27.

¹²² DVAC, *Submission 595*, p. 22.

... a 5 year protection order is made with conditions that stop him from going to the family home and stop him from contacting Mary unless it's about their children.

When John contacts Mary to arrange access to their children Mary agrees but demands that he collect the children from the family home. John attends the family home as arranged and Mary calls the police and tells them that he is at the home, is being aggressive and she is in fear. Police attend the family home and arrest John.¹²³

Current reforms

7.115 As discussed in Chapter 2, the Australian Government has a number of reforms underway in the family law system. A number of these have relevance to the issues raised above, particularly in relation to ensuring that allegations of family violence are before the court for consideration, having these allegations considered and dealt with expeditiously; and support for parties in matters where family violence is alleged, including assisting parties to navigate both the federal and state/territory legal systems.

Triaging of matters with family violence allegations

7.116 Of particular relevance is the three year screening and triage pilot currently being undertaken in the Federal Court of Australia (Federal Court), which involves the screening of parenting matters for family safety risks at the point of filing. This will ensure matters where family violence is alleged are identified at an early stage of proceedings. These matters will then be triaged to an appropriate pathway based on the identified level of risk. A specialist list has been created to hear matters assessed as involving a high risk of family violence. The committee was advised that 'high-risk cases would be intensively case managed. There would be an offer of immediate assistance, safety planning and other such measures. Moderate-risk cases would be, again, offered a safety plan and alerted to the support services that might be available. Low-risk cases might be assessed as suitable for family dispute resolution. For the high-risk cases, the pilot will establish a specialist family violence list, which will be overseen by a judge and intensively case managed, with a view to having a matter dealt with quickly.'¹²⁴

Ban on direct cross-examination

7.117 As discussed above, the Australian Government passed legislation in December 2018 which protects victims of family violence from being directly cross-examined by, or having to directly cross-examine, their perpetrators in

¹²³ ABF, *Submission 1668*, p. 162.

¹²⁴ Ms Alexandra Mathews, Assistant Secretary, Family Safety Branch, Families and Legal System Division, Legal Services and Families Group, AGD, *Proof Committee Hansard*, 14 February 2020, p. 9.

family law proceedings.¹²⁵ In practice, this requires the court to make a determination in advance of a hearing whether the ban on direct cross-examination does or should apply, bringing the issue of family violence to the forefront of the court's consideration. Where it does apply, the Government has provided funding to Legal Aid Commissions to legally represent any self-represented parties subject to the ban on direct cross-examination.¹²⁶ This funding applies to both the alleged victim and the alleged perpetrator if they do not have private legal representation.

7.118 These changes were welcomed by a number of submitters.¹²⁷

Family Advocacy and Support Service (FASS)

7.119 The Family Advocacy and Support Service (FASS) has been raised in Chapter 2 and discussed in detail in Chapter 11. As part of the FASS's duty lawyer and social services support for families affected by family violence with matters before the family law courts, the FASS now includes a dedicated men's support worker to provide access to appropriate support services for both alleged male perpetrators and male victims of family violence involved in family law proceedings.

7.120 In addition, one of the key functions of the FASS is 'assisting families to transition between, and manage matters across, the Commonwealth family law, state family violence and state child protection jurisdictions'.¹²⁸ As Commissioner Faulks noted in the Australian Law Reform Commission Report, *Family law for the Future—An inquiry into the Family Law System* (ALRC 2019 Report):

The lawyers engaged in FASS (as the review of the pilot scheme showed), had the great advantage of being involved in both state and federal jurisdictions. They were shown in the review to be able to smooth the pathways, to reduce the confusion and to increase the provision of needed information to the litigants.¹²⁹

Standard of proof

7.121 There has been minimal discussion around whether the standard of proof for the making of family orders is appropriate. A number of individual submitters

¹²⁵ See AGD, *Submission 581*, Attachment 1.

¹²⁶ See AGD, *Submission 581*, p. 15; see also Attachment 1.

¹²⁷ See, for example, Community Legal WA, *Submission 230*, p. 10; Peninsula Community Legal Centre, *Submission 842*, p. 30.

¹²⁸ Project Agreement for Family Advocacy and Support Services, paragraph 10(e), http://www.federalfinancialrelations.gov.au/content/npa/community_services/project-agreement/family_advocacy_and_support_services.pdf (accessed 4 August 2020).

¹²⁹ Australian Law Reform Commission (ALRC), *Family Law for the Future — An Inquiry into the Family Law System*, ALRC Report 135, 2019, March 2019, p. 142 (ALRC 2019 Report).

(as discussed earlier in this chapter) have suggested that there should be more evidence provided to the court that corroborates the statements of the person seeking the order before an order is made. However, the majority of organisations supported the current civil standard of balance of probabilities:

Whilst there are differences between the state and territory family violence systems, the common underpinning is that personal protection is the priority and that if allegations are in dispute, they can be tested at hearing with the balance of probabilities being the standard of proof, unless there are criminal prosecutions arising from the conduct in which case in the criminal prosecution the standard of proof is beyond reasonable doubt. These respective standards of proof are considered appropriate by National Legal Aid (NLA) given the need to protect victims from risk of harm, and the risk to liberty of alleged perpetrators in criminal law proceedings, and ramifications arising in family law proceedings.¹³⁰

7.122 Similarly, the Family Law Practitioners' Association of Western Australia submitted:

... that there is no basis for an alteration to the standard of proof. That is to say, that to uphold the need to protect children, the balance of probabilities in relation to domestic and parental abuse must remain.

To change that standard to 'without reasonable doubt', as is utilised in the criminal jurisdiction, completely disregards the safety of children and victims of domestic violence and as such, it should not be supported.¹³¹

7.123 The North Australian Aboriginal Family Legal Service highlighted that beyond reasonable doubt is an inappropriate standard for civil family violence order matters, especially when considering the purpose of these orders:

The evidential standard of proof for DVOs is the balance of probabilities, and this is considered an appropriate standard to meet. The alternate evidential standard of proof used in criminal matters of 'beyond all reasonable doubt', would be inappropriate for DVO matters. The balance of probabilities standard is appropriate, when considering the purpose of the DVO Act, which is to protect vulnerable persons. Consequently, increasing the threshold for DVOs would make it unnecessarily difficult for our clients to access protection and likely discourage them from making applications.¹³²

7.124 The Hon Diana Bryant considered that when looking at the standard of proof for family violence orders, it was also important to separate the nature of proceedings for protective orders in magistrates courts from proceedings in family courts which relate to the best interests of children and advised:

In the [Magistrates Court] the focus is on protecting the victim in the immediacy of a family breakdown and its associated aftermath ...

¹³⁰ NLA, *Submission 589*, p. 12.

¹³¹ Family Law Practitioners' Association (Western Australia), *Submission 590*, p. 4.

¹³² North Australian Aboriginal Family Legal Service, *Submission 742*, p. 5.

But I think it is important to see the two issues as being different, that is the making of a protective order which is for the immediate protection of parties and children, and limited in time, and then the long-term issue dealt with by family courts of what order should be made in the best interest of the children having regard to the need for their protection from risk of harm. Naturally there is a need for a court dealing with parenting matters to have knowledge of protective orders in the proceedings and to take them into account, but they will not always be definitive, particularly as some orders are made by consent without any admission of the facts alleged. Family courts must have the ability to independently examine the facts when the opportunity arises.¹³³

7.125 With regard to what standard of proof should be applied to family violence orders, the Hon Diana Bryant concluded:

It follows from what I have said that it is important that magistrates courts are able to make protective orders (which should be seen as protective rather than criminal) without the higher standard of proof associated with criminal proceedings such as assault.¹³⁴

7.126 Professor Mushin put forward a similar view, stating 'I support the maintenance of the legal evidentiary standard of the balance of probabilities. There is no reason to change the onus of proof'.¹³⁵

7.127 The standard of proof does not apply where family violence orders are made by consent. In these cases there has been no final judicial determination and the consent has been given without any admission of the facts alleged. Professor Chisholm stated:

It is a common outcome that family violence orders are made by consent and without admission. Because in such cases there has been no judicial examination of the facts, and because I understand the proceedings are relatively swift and inexpensive, it is possible that some applications have little or no justification. For example, the person seeking protection may be mistaken in believing there is a risk, or may have brought the proceedings because of legal advice that such a step is routine. Another possibility is that the application might have been made in bad faith, in order to harm the respondent or take some strategic advantage in later family court proceedings. I don't know of any good evidence about the frequency of such situations, but ideally the legal system should be designed to cope with this range of possibilities, in addition to situations where the applicant is indeed at risk.¹³⁶

¹³³ The Hon. Diana Bryant AO, QC, *Submission 847*, p. 4.

¹³⁴ The Hon. Diana Bryant AO, QC, *Submission 847*, p. 5.

¹³⁵ Additional document, Opening statement of Professor the Honourable Nahum Mushin AM, Public Hearing, 16 September 2020 (received 15 September 2020).

¹³⁶ Professor Richard Chisholm AM, *Submission 849*, pp. 8–9.

Consistency between family law and family violence orders.

7.128 Section 68R of the Family Law Act allows state and territory courts to revive, vary, revoke or discharge specified Family Law Act orders to resolve inconsistencies between family violence orders and Family Law Act orders allowing persons to spend time with a child. However, the committee heard that there may be a lack of knowledge of this provision or a reticence to exercise this power in some cases where state and territory judges issue family violence orders and a Family Law Act order is already in existence. For example, Caxton Legal Service noted that Magistrates in Queensland, outside of specialist domestic violence courts, rarely exercise jurisdiction under section 68R and express a reluctance to deal with family law matters as part of the domestic violence proceedings:

It has been the experience of our domestic violence duty lawyers that on the rare occasions that jurisdiction is exercised under s68R, outcomes can be inconsistent. At our domestic violence duty lawyer office we assisted a Respondent where parenting orders were suspended under section 68R on the basis of allegations revolving around derogatory comments made on social media by the Respondent. On the face of it there was an absence of evidence of risk to the children and similar issues had already been considered by the Federal Circuit Court only months prior.¹³⁷

7.129 To address this issue, Caxton Legal Service suggested that:

One way to improve consistency would be to enshrine in legislation the obligation for Magistrates to provide reasons for their decisions, which refer to the matters required to be taken into consideration under section 68R, particularly the 'relevant considerations' outlined in section 68R(5).¹³⁸

7.130 In at least two jurisdictions, Victoria and South Australia, the state legislation requires the state court making a family violence order to inquire about any relevant Family Law Act orders and then take such steps as is necessary so as to avoid inconsistencies between the two orders. Under the *Family Violence Protection Act 2008* (Vic) the court is explicitly required to exercise its section 68R power to resolve any inconsistency.¹³⁹

7.131 One submitter noted that there is currently no power for a magistrates court judicial officer to make changes to family law orders where one party has been convicted of a family violence offence but there are no family violence orders in place:

It is ridiculous that when a person is found guilty of domestic violence in a magistrates court, they have no jurisdiction over family court orders and in

¹³⁷ Caxton Legal Service, *Submission 744*, p. 3.

¹³⁸ Caxton Legal Service, *Submission 744*, pp. 3–4.

¹³⁹ *Family Violence Protection Act 2008* (Vic), s. 90.

order to protect yourself and child you need to go back to family court who do not like a mother citing domestic violence.¹⁴⁰

Information sharing

7.132 A key issue that has arisen in the evidence provided to the committee, particularly from organisations, has been the need for improved interaction and information sharing between family law courts and state and territory family violence and child protection jurisdictions. This would ensure that all relevant information concerning family violence and the risk to parties is available to the respective courts:

Due to the risk that family violence places on the safety and wellbeing of children and victims, we need to respond to the level of complexity that family violence adds to the Family Law process; and address the systemic gaps and issues to ensure that no further harm is experienced or compounded by the wider system. Better communication and integrated responses are needed between the family law system with child protection, police and hospital as well as specialized services to address the complexities faced by families.¹⁴¹

7.133 This issue was also identified in the ALRC 2019 Report. The ALRC noted that two of the major themes that had emerged from the previous 11 enquiries conducted between 2001–17 were that the family law system does not deal well with violence and there needed to be greater information sharing between the family courts and state and territory child protection jurisdictions.¹⁴² The ALRC considered that:

... the existing jurisdictional framework for the resolution of family law disputes does not provide an appropriate framework for the collaboration, coordination and integration between the family law system and other Commonwealth, state and territory systems, including family support services and the family violence and child protection systems.¹⁴³

7.134 The QLS noted that they have:

... consistently advocated for improved interaction and information sharing between family law courts and state and territory child protection agencies, police and state health authorities, as a means of enhancing the capacity of family law courts to properly assess the risk of family violence.¹⁴⁴

¹⁴⁰ Confidential, *Submission 550*.

¹⁴¹ DVAC, *Submission 595*, p. 7.

¹⁴² See ALRC 2019 Report, p. 111.

¹⁴³ ALRC 2019 Report, p. 112.

¹⁴⁴ QLS, *Submission 88*, p. 2.

7.135 QLS suggested that the colocation of child support and police services within Family Law courts would be beneficial to parties to a family law dispute:

... [we support] initiatives announced by the Attorney-General's Department earlier this year, aimed at improving information sharing and co-ordination between family law, family violence and child protection systems. The announced funding will primarily be used to pilot a colocation model, whereby state and territory child protection and police officers are present in family court registries around Australia. Funding will also be provided for improving technology to facilitate information sharing between family law courts and state and territory child protection systems.¹⁴⁵

7.136 Ms Catherine Gander, Convener, Eliminating Violence Against Women Action Group, Women's Electoral Lobby New South Wales, told the committee about the harms that can result where there is a lack of information sharing between courts:

The jurisdictional gap referred to, with its lack of relevant information flow, can and does place women and children at increased risk of harm through ill-informed parenting arrangements. Commonly unsafe interim parenting orders are made while the family law court seeks further information.¹⁴⁶

7.137 Ms Gander continued:

... We would like a national information-sharing platform established immediately that includes information from the Domestic Violence Order Scheme, the state child protection agencies and the specialist domestic violence sector to provide the Family Court with the robust information needed to make safe family law court decisions ...

An information-sharing platform of this nature would stop women falling between these two systems. The first being the state systems of child protection and the state systems of domestic violence protection, and the second being the family law system that often starts with a blank page and is overly focused on shared parenting outcomes and not on the history of the perpetrator or the current risk they pose to the women and children.¹⁴⁷

7.138 His Honour Justice Graeme Henson, Chief Magistrate, New South Wales, advised the committee that there is no lack of willingness on the part of state courts to share information between the state and federal courts, noting that there has been 'a long history of engagement with the family court in cross-vesting of jurisdiction. There's no reason for that to change at all.'¹⁴⁸

¹⁴⁵ QLS, *Submission 88*, p. 2.

¹⁴⁶ Ms Catherine Gander, Convener, Eliminating Violence Against Women Action Group, Women's Electoral Lobby New South Wales, *Proof Committee Hansard*, 13 March 2020, p. 46.

¹⁴⁷ Ms Catherine Gander, Convener, Eliminating Violence Against Women Action Group, Women's Electoral Lobby New South Wales, *Proof Committee Hansard*, 13 March 2020, pp. 46–47.

¹⁴⁸ His Honour Judge Graeme Henson, Chief Magistrate, New South Wales, and Judge, District Court of New South Wales, *Proof Committee Hansard*, 13 March 2020, p. 40.

However, Justice Henson advised that the problems arise in relation to the incompatibility of information technology systems and resources:

To the best of my knowledge it represents an inability of computer systems to exchange electronic transfers of information. And of course the burden on the state system of providing documentation when, dare I say it, it's under-resourced is also one of the problems.¹⁴⁹

7.139 Centacare Family and Relationship Services explained the impact of victims and children having to repeat the details of the abuse to multiple agencies and courts, and suggested that as part of the information sharing reforms consideration be given to requiring victims to provide their evidence once and for that to be used across all relevant forums:

When we talk about information sharing, one of the things that I think would be helpful for the victims that we work with is not having to repeat their story time and time again to numerous professionals and in numerous settings. From our perspective, a client might call us because they need assistance with domestic violence in their relationship, or they may have had police attend their property due to an incident and then they're referred into our service. In both of those cases the police might speak to them and we might speak to them, and then they'll go to a court setting and potentially have to provide evidence in that situation as well. They then have family law orders that start, and they have to repeat that information; they have to go to their lawyers. So there are a number of repetitions. Often in these cases child protection services become involved. There are a range of stakeholders that have similar information but don't share any of that and constantly ask children and victims of violence to continually repeat the story, and that can be really traumatic. That's part of what actually causes the ongoing harm.¹⁵⁰

7.140 The ALRC further noted that due to the limited investigative powers of federal family courts, they are reliant on receiving information from state and territory courts and agencies about risks to families and children to inform the court's decision-making and better protect against risk.¹⁵¹ The ALRC therefore recommended the following reforms which could 'facilitate more timely and efficient responses to identifying and managing high risk families':¹⁵²

- the development and implementation of a national information sharing framework; and

¹⁴⁹ His Honour Judge Graeme Henson, Chief Magistrate, New South Wales, and Judge, District Court of New South Wales, *Proof Committee Hansard*, 13 March 2020, p. 40.

¹⁵⁰ Dr April O'Mara, Manager, Practice Governance and Research, Centacare Family and Relationship Services, *Proof Committee Hansard*, 12 March 2020, p. 23.

¹⁵¹ See ALRC 2019 Report, p. 143.

¹⁵² ALRC 2019 Report, p. 145.

- the expansion of the National Domestic Violence Order Scheme to include family court orders and orders issued under state and territory child protection legislation.¹⁵³

7.141 The 2017 Family Violence Report also contained similar recommendations directed towards better information sharing.¹⁵⁴ A full list of the recommendations from this report is at Appendix 4.

Current reforms

7.142 The Australian Government is progressing a number of measures to improve information sharing between federal and state/territory courts. These include:

- Together with all State and Territory Governments, a commitment, through the Council of Attorneys-General, to developing an information sharing regime so that family violence, child protection and family law orders, judgments, transcripts and other relevant documentation are accessible at an early stage of investigations and court proceedings to support informed, efficient and effective decision-making in the best interests of children and families at risk of experiencing family violence or abuse.
- \$10.4 million provided over three years to co-locate state and territory officers, such as child protection practitioners and policing officials, in family law courts across Australia. This measure will increase the quality and timeliness of information shared between systems, helping to ensure courts have the right information to support decision-making that promotes the best possible outcomes for children and a court system that is responsive to safety risks.
- Funding committed to consider how technology could assist with sharing information about family violence between the family law courts and the family violence and child protection systems.¹⁵⁵

Training of family law professionals

7.143 The need for specialised training for judges and other professionals engaged in the domestic violence and family law jurisdictions was raised in submissions and oral evidence before the committee:

It is important to recognise that domestic violence is a specialised field with a wide knowledge base (both theoretical and practical). A knowledge and understanding of domestic violence is essential to being able to assist decision-making processes with and for families. Given the high statistics of families with family violence engaged with the family law system it is imperative that professionals in the judicial system are knowledgeable about the issues associated with DFV, what it looks like and the symptoms

¹⁵³ ALRC 2019 Report, pp. 145–146. Refers to Recommendations 2 and 3, respectively.

¹⁵⁴ See, 2017 Family Violence Report, p. xxx, p. xxxiv for Recommendations 6 and 21, respectively.

¹⁵⁵ AGD, *Submission 581*, Attachment 1.

of trauma in order to be able to make accurate assessments and prioritize safety and wellbeing of children. Independent children's lawyers and court report writers and judges especially need the specialized knowledge or at the very least links to specialized knowledge through consultation and working closely with relevant agencies.¹⁵⁶

7.144 Similarly, Ms Liz Snell, spokesperson for Women's Legal Services Australia advised:

There is limited understanding of family violence, trauma, cultural issues and disability amongst many professionals working in the system. This can lead to poor management of risks to the safety of children and women. We need comprehensive and ongoing training of all professionals working within the family law system—including family consultants, lawyers, judges and interpreters—in a range of issues, including family violence and trauma-informed practice, cultural competency, LGBTQ awareness and disability awareness.¹⁵⁷

7.145 This issue has also been identified in a number of previous reports on family law. The ALRC 2019 report stated that the need for professional development opportunities for judicial officers in family law is well recognised and that judges are not legislatively required to have experience or knowledge relating to family violence.¹⁵⁸ The ALRC also noted that there are currently no obligations on lawyers undertaking family law work to undertake any training or professional development in relation to family violence.¹⁵⁹ As such, the ALRC recommended that:

- 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;¹⁶⁰ and
- the Law Council 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.¹⁶¹

7.146 The 2017 Family Violence Report also recommended that the Australian Government develops a national and comprehensive professional development program for judicial officers from the family courts and from

¹⁵⁶ DVAC, *Submission 595*, p. 11.

¹⁵⁷ Ms Liz Snell, Law Reform and Policy Co-ordinator, Women's Legal Service New South Wales; and Spokesperson, Women's Legal Services Australia, *Proof Committee Hansard*, 13 March 2020, p. 59.

¹⁵⁸ ALRC 2019 Report, p. 398.

¹⁵⁹ ALRC 2019 Report, p. 406.

¹⁶⁰ ALRC 2019 Report, p. 22. Recommendation 51.

¹⁶¹ ALRC 2019 Report, p. 22. Recommendation 52.

states and territory courts that preside over matters involving family violence, as well as a national, ongoing, comprehensive, and mandatory family violence training program for family law professionals, including court staff, family consultants, Independent Children's Lawyers, and family dispute resolution practitioners.¹⁶² The recommendations specified that both training programs were to include information on the nature and dynamics of family violence.

Current reforms

7.147 The Australian Government provides funding for specific training and resources in family violence, such as the online National Domestic and Family Violence Bench Book and the funding of the National Judicial College of Australia to deliver family violence training to family law and other judges.¹⁶³ Under the Fourth Action Plan of the National Plan to Reduce Violence against Women and their Children 2010-2022, the Government has also invested \$26.2 million to continue the DV-alert training program. DV-alert provides free, nationally accredited training to build the capacity of health, allied health and community frontline workers to recognise, respond to and appropriately refer domestic and family violence. Frontline workers include legal professionals and court services.¹⁶⁴

7.148 In addition, in the 2017–18 Budget, the Australian Government provided the Federal Court 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 has been used to develop new induction training and an advanced family violence training program for family consultants.¹⁶⁵

7.149 The Council of Attorneys-General Family Violence Working Group is also identifying options for improving the family violence competency of professionals working in the family law and family violence systems. In 2019, the Council conducted a consultation process on options for improving the family violence competency of legal practitioners. A consultation paper was developed which sought feedback on family violence capabilities required by legal practitioners, and at which stage in their careers they should be addressed. The Group was to report back to the Council of Attorneys-General in mid-2020.¹⁶⁶

¹⁶² See, 2017 Family Violence Report, pp. xxxvi–xxxvii. Recommendations 27 and 28.

¹⁶³ AGD, *Submission 581*, p. 10.

¹⁶⁴ Department of Social Services, *Submission 95*, p. 5.

¹⁶⁵ AGD, *Submission 581*, Attachment 2, p. 17.

¹⁶⁶ AGD, *Submission 581*, Attachment 2, p. 17.

Chapter 8

Parenting matters

8.1 In Chapter 3 of this report, the committee outlined evidence received from individual parties to family law matters in relation to issues experienced in finalising the parenting arrangements for their children after separation. Submissions from organisations and academics also raised significant concerns about the way parenting arrangements are currently arrived at. The matters raised have been broad and numerous and span key issues such as:

- the complexity of the legislated decision making pathway to determine a child's best interests;
- whether the presumption of shared parental responsibility should be retained;
- the role of children's voices in family law parenting proceedings;
- parental alienation;
- how non-compliance with orders are dealt with;
- the lack of access to and regulation of children's contact services (CCS); and
- the rights of grandparents to see their grandchildren.

8.2 This chapter will consider the evidence provided to the committee on these issues, as well as current reforms being undertaken to address some of the problems raised and recommendations for reform arising out of recent reports on the family law system.

8.3 As discussed in Chapter 1, the committee considers that a primary task of the committee's work is to identify measures that reduce the risk of harm to children and parents traversing the family law system. The committee recognises the ALRCs approach in its 2019 Report to the decision making framework for parenting matters which :

- emphasises the paramount importance of the best interests of the child;
- provides core factors to be applied in determining what is most consistent with a child's best interests, with an emphasis on safety, while recognising that other factors may be relevant to a particular case; and
- emphasises that parenting arrangements should be shaped around the circumstances of the particular child.¹

Complex legislative framework

8.4 Parenting arrangements are only made by court order in about three per cent of family law matters—this includes court orders by consent.² However, the

¹ Australian Law Reform Commission (ALRC), *Family Law for the Future — An Inquiry into the Family Law System*, ALRC Report 135, 2019, March 2019, p. 164 (ALRC 2019 Report).

families that do utilise the court 'are often those affected by a range of complex issues correlated with family breakdown, including family violence, child safety concerns, mental ill health and substance abuse'.³ Around 38.1 per cent of parents who resolved parenting matters through the court reported four or more of the following issues as relevant to their situation prior to separation: alcohol or drug use; mental health; gambling; problematic Internet or social media use; pornography use; emotional abuse and/or physical violence.⁴ The committee heard that it is important that the law relating to parenting arrangements is clear and easy to understand for these parties (many of whom are self-represented), as well as those families who look to settle parenting arrangements between themselves without recourse to the courts.

- 8.5 Part VII of the *Family Law Act 1975* (Family Law Act) sets out the legislative framework for determining the parenting arrangements for children after separation:

Part [(Pt)] VII provides the family courts with a wide power to make such orders about children's care and living arrangements, parental responsibility, and other matters relevant to a child's welfare ('parenting orders') as it thinks proper. In making parenting orders, Pt VII provides that the best interests of the child must be the paramount consideration.⁵

- 8.6 However, as the Australian Law Reform Commission (ALRC) noted in its 2019 Final Report, *Family law for the Future – An inquiry into the Family Law System* (ALRC 2019 Report), 'the current law imposes on courts a complex set of requirements (sometimes described as a 'pathway') to determine what is in the child's best interests'.⁶

- 8.7 A number of submitters called for the simplification of Part VII of the Family Law Act, highlighting the complexity of the current framework. For example, the Australian Bar Association noted that:

Through a succession of amendments, it now takes 42 separate steps to determine what is in a child's best interests. In turn, to cover each of these steps and to address the relevant considerations each requires makes for longer affidavits, longer cross-examination, longer submissions, longer judgment writing time and longer judgments: i.e., more time, more resources and more money. A simplified Part VII would go a long way to reducing the time, resources and money spent on each of these matters and

² See Attorney-General's Department (AGD), *Submission 581*, p. 21.

³ AGD, *Submission 581*, p. 4.

⁴ Rae Kaspiew, Rachel Carson, Jessie Dunstan, Lixia Qu, Briony Horsfall, John De Maio, Sharnee Moore, Lawrie Moloney, Melissa Coulson and Sarah Tayton, *Evaluation of the 2012 family violence amendments: Synthesis report*, 2015, p. 16.

⁵ ALRC 2019 Report, p. 158. See *Family Law Act 1975* (Family Law Act), s. 65D and s. 60CA.

⁶ ALRC 2019 Report, p. 156.

would make the system far easier to understand and navigate. It would not detract from decision making which is in children's best interests.⁷

8.8 The Attorney-General's Department (AGD) also noted that:

The complexity of the Family Law Act has contributed towards community misunderstanding of key elements of the law, which particularly affects self-represented litigants and those seeking to resolve their matters outside of the courts.⁸

8.9 AGD highlighted in particular the misinterpretation of the presumption of equal shared parental responsibility (discussed in detail later in the chapter) and remarked that, as the majority of families resolve post-separation issues between themselves or through non-legal interventions, 'the usability of the law is critical to the effectiveness of the family law system'.⁹

8.10 The ALRC 2019 Report recommended a number of amendments to Part VII of the Family Law Act, including reducing and simplifying the factors to be taken into account in determining which arrangements are most likely to promote a child's best interests.¹⁰ The ALRC referred to one judge who described the application of the best interests framework in interim matters as causing 'a dilemma of labyrinthine complexity to arise'.¹¹ The ALRC noted that '[t]he legislation needs to provide a decision making framework for judicial decision making, and a guide for parenting decisions made outside the court'.¹²

8.11 Former Justice of the Family Court of Australia, Professor Richard Chisholm AM, expressed his support for the ALRC discussion and recommendations about the provisions that set out guidelines for determining children's best interests contained in the ALRC 2019 Report. He stated that, 'for the reasons set out in that report, the existing provisions are complex and misleading and need to be simplified'.¹³

8.12 Not all submitters to this inquiry supported the ALRC recommendations. For example, Ms Zoe Rathus AM, Senior Lecturer at Griffith University Law School, has expressed concerns about some of the ALRC recommendations for

⁷ Australian Bar Association, *Submission 87*, p. 2. See also, Family Law Reform Coalition, *Submission 597*, pp. 15–16.

⁸ AGD, *Submission 581*, p. 21.

⁹ AGD, *Submission 581*, p. 21.

¹⁰ ALRC 2019 Report, p. 155. See also, Recommendations 4 to 10 at pp. 15–16.

¹¹ ALRC 2019 Report, p. 157, referencing Warnick J in *Zabini & Zabini* [2010] FamCAFC 10, [3].

¹² ALRC 2019 Report, p. 156.

¹³ Professor Richard Chisholm, *Submission 849*, p. 21. See also, for example the following submissions which specifically endorsed or referred the committee to the ALRC's Recommendation 5: Commissioner for Children and Young People Tasmania, *Submission 117*, p. 3; Relationship Matters, *Submission 224*, p. 4; Royal Australian and New Zealand College of Psychiatrists (RANZCP), *Submission 231*, p. 3; Women's Safety NSW, *Submission 727*, p. 46.

simplification of Part VII. While she supported the general direction of these reforms, she did not consider that the ALRC proposed the right formulation, in particular with regard to the list of factors to be considered when determining parenting arrangements that promote a child's best interests.¹⁴

- 8.13 A number of concerns raised by Ms Rathus and other submitters are included in further detail later in this chapter. Further, Ms Rathus' submission is critical of the ALRC's proposal to include in section 60CC of the Family Law Act, when considering the factors relevant to a child's best interest, the requirement that the court consider what arrangements best promote the safety of the child and the child's carers. Ms Rathus stated:

I believe that the word 'safety' is not the best choice for the first factor. Safety is all about looking into the future and, at a practical level, working out if the child might be in danger as result of spending time with someone. This is actually quite a high bar to set and asks the wrong question. I am concerned that this might unintentionally focus attention mostly on physical and sexual safety. Although physical and sexual safety are critical, I submit that it is the impact of having lived with a parent who abuses the other parent which is dealt with most poorly in the current family law system – and that may not be captured in the idea of 'safety'. It is the legacy of living with family violence, not always what might happen in the future, that is a concern.¹⁵

- 8.14 Instead, Ms Rathus suggested that the wording around 'safety' could be replaced with the following formulation:

... ensuring the physical, psychological and emotional safety of the child taking into account any family violence or abuse which has been or may be experienced by the child or to which the child has been, or may be exposed.¹⁶

Presumption of shared parental responsibility

- 8.15 One of the most canvassed issues in submissions before the committee was the issue of whether the presumption of equal shared parental responsibility and the language of equal shared time between parents should be retained, removed or replaced with a starting position of 50:50 shared care.

Legislative framework

- 8.16 The Family Law Act provides that, when making a parenting order, the court must apply a presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility for the child. This presumption does not apply where there are reasonable grounds to believe that a parent has abused the child (or another child in the family) or engaged

¹⁴ Ms Zoe Rathus AM, *Submission 710*, p. 6.

¹⁵ Ms Zoe Rathus AM, *Submission 710*, pp. 7–8.

¹⁶ Ms Zoe Rathus AM, *Submission 710*, p. 8.

in family violence. The presumption will also not apply where the court considers it is not appropriate in the circumstances and it can be rebutted by evidence that it would not be in the best interests of the child to have equal shared parental responsibility.¹⁷

8.17 Despite some confusion, this is not a presumption about the amount of time that the child spends with each parent. Rather, parental responsibility is defined as all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.¹⁸

8.18 Where a parenting order provides for equal shared parental responsibility between a child's parents, the court must consider whether the child spending equal time with each parent is in the best interests of the child and is reasonably practicable.¹⁹ If it is, the court must then consider making an order for the child to spend equal time with each of the parents.²⁰

8.19 Where the presumption does not apply, the courts must then determine what orders regarding parental responsibility and time with each parent are in the best interests of the child. This does not mean that one parent will get 100 per cent care and responsibility for the child. As the Australian National Research Organisation for Women's Safety (ANROWS) states, where orders are not made for equal shared parental responsibility, a court can still decide that equal or substantial and significant time with a parent is best for the child.²¹ It is rare for a court to make an order for the child not to have contact with a parent. The AGD has advised that where parenting orders are made by a court:

- orders for no contact with one parent are rare (3% of parenting orders determined by courts)
- court orders are less likely to result in fathers having no contact with their children (3% of parenting orders determined by courts) compared to the separated population generally (9%), and
- arrangements where children spend the majority of their time with their father are more common (10-19% of parenting orders determined by courts) compared to the separated population generally (2%).²²

¹⁷ *Family Law Act 1975*, s. 61DA.

¹⁸ *Family Law Act 1975*, s. 61B.

¹⁹ *Family Law Act 1975*, s. 65DAA

²⁰ *Family Law Act 1975*, s. 65DAA.

²¹ Australian National Research Organisation for Women's Safety (ANROWS), *Submission 602*, p. 11.

²² AGD, *Submission 581*, pp. 21–22.

Support for removing the presumption

8.20 Women's Legal Service Victoria was one of many organisations that called for the removal of the presumption of equal shared parental responsibility and the language of equal shared time from the Family Law Act.²³ This is in line with the recommendation of the House of Representatives Standing Committee on Social Policy and Legal Affairs' 2017 Report, *A better family law system to support and protect those affected by family violence* (2017 Family Violence Report), to consider removing the presumption of equal shared parental responsibility.²⁴

8.21 Many submitters have expressed concern that the presumption of equal shared parental responsibility and the requirement to consider equal time has caused confusion and contributed to unsafe outcomes for children.²⁵ For example, the Peninsula Community Legal Service stated that the current presumptive provision has:

... given rise to a community misconception that equal shared parental responsibility means 'equal time'. This misconception has created significant concern for many of our Centre's clients and resulted in them agreeing to unsafe arrangements.²⁶

8.22 Women's Safety NSW agreed that an amendment removing the presumption:

... would be important in alleviating any confusion and ensuring that the safety of the child is not subjugated by a mistaken belief that the provision intends for both parents to spend an equal amount of time with their child.²⁷

8.23 The Peninsula Community Legal Service further expounded on the dangers they consider arise with this presumption, explaining that:

... the presumption potentially increases parental conflict and the risk of family violence or child abuse because of the legal requirement that parents must jointly make decisions, involving a degree of cooperation that is inherently not possible in cases involving family violence. These risks are increased in the current situation where family courts do not have a

²³ Women's Legal Service Victoria, *Submission 701*, p. 7. See also, Women's Safety NSW, *Submission 727*, p. 47; Peninsula Community Legal Centre, *Submission 842*, p. 18; Relationships Australia, *Submission 606*, p. 98; Save the Children Australia, *Submission 94*, p. 2; The Benevolent Society, *Submission 109*, pp. 6–7; National Council of Single Mothers and their Children, *Submission 397*, p. 4; Council of Single Mothers and their Children, *Submission 417*, p. 4; Sexual Assault Support Service, *Submission 608*, p. 8.

²⁴ House of Representatives Standing Committee on Social Policy and Legal Affairs, *A better family law system to support and protect those affected by family violence*, December 2017, p. xxxiii. Recommendation 19 (2017 Family Violence Report).

²⁵ See, for example, Ms Zoe Rathus AM, *Submission 710*, p. 6; Carinity Talera, *Submission 601*, p. 7; Domestic Violence Victoria, *Submission 705*, pp. 19–20.

²⁶ Peninsula Community Legal Centre, *Submission 842*, p. 17.

²⁷ Women's Safety NSW, *Submission 727*, p. 47.

dedicated pathway for addressing family violence issues and do not presently determine the issue of family violence or child abuse until final hearing or trial.²⁸

8.24 Professor Chisholm, in discussing the presumptions and requirements that the court consider certain outcomes (such as equal time) provided for in Part VII of the Family Law Act, noted that:

The problem is that even if these ideas are suitable for the majority of families in the community, they can be unhelpful and misleading when applied to the tiny minority of cases that require adjudication by the courts. Those cases are not typical of most families, and present acute difficulties when the court is trying to determine what outcome is best (or often the least damaging) for the child. The court needs to analyse the particular facts with great care, and generalisation based on the majority of less troubled families can distract from that task.²⁹

8.25 Professor Chisholm went on to identify the following additional disadvantages with existing provisions in Part VII:

- They can mislead people into thinking that the law favours certain outcomes for children.
- They can distract courts, and parties attempting to resolve disputes, from the essential task of working out what is likely to be best for the children in the particular circumstances of each case.
- They are clumsy as a means of public education – that task would be better achieved by other means.³⁰

8.26 YWCA Canberra expressed its concern that the family law system does not place the safety of victims and survivors at its heart, observing that in cases where disclosures of family violence are made, the:

... presumption of shared parental responsibility is still being applied in practice by judges, a practice that privileges the rights of those who use violence to maintain contact with their children as opposed to prioritising the safety of the children and the parent who is experiencing or witnessing violence.³¹

8.27 In arguing for the removal of this presumption, YMCA Canberra stated that the presumption is a 'court sanctioned [loop-hole] allowing perpetrators to continue to use violence during sanctioned access and in negotiating access', and that its removal would shift the culture and practice of family courts towards a greater focus on safety and risks to children.³²

²⁸ Peninsula Community Legal Centre, *Submission 842*, p. 17.

²⁹ Professor Richard Chisholm, *Submission 849*, p. 21.

³⁰ Professor Richard Chisholm, *Submission 849*, p. 25.

³¹ YMCA Canberra, *Submission 592*, p. 3.

³² YMCA Canberra, *Submission 592*, p. 5.

8.28 The idea of a cultural shift where the greater focus is on the safety of children was advocated in many of the submissions supporting removal of the presumption. For example, Australian Women Against Violence Alliance (AWAVA) noted:

As each family is unique, rather than focusing on presumptions, decisions about children should be made on a case-by case basis in the best interest of the child and placing a greater focus on safety and risks to children, and not on parental rights.³³

8.29 With regard to the requirement to consider equal time, or significant and substantial time, the ALRC noted that it is not clear why the legislation requires this consideration if neither parent is seeking it. In its 2019 Report, the ALRC stated that to the extent that shared time would improve the outcome of a specific child, it can be considered as part of the best interests of the child and does not require a separate provision, recommending that the Family Law Act should:

... make it clear that in determining what arrangements for the care of a child will best promote the child's best interests, the court must determine, on all of the material before it, what is best for the particular child in their particular circumstances.³⁴

8.30 The ALRC therefore recommended the repeal of section 65DAA which requires the court to consider, in certain circumstances, the possibility of the child spending equal time, or substantial and significant time, with each parent.³⁵

8.31 The committee also heard concerns about the appropriateness of presumptions in family law proceedings. For example, Ms Rathus stated that she has:

... strongly argued that the legal devi[c]le of a presumption was, and continues to be, completely the wrong tool to use in the way it has been in the [Family Law Act]. A presumption at law should be used only in situations where what is presumed is extremely likely to be true ...

The idea that the best interests of children are served by parents having equal shared parental responsibility is an entirely different type of construct. It is a policy, or perhaps a social science, ideal that is not applicable in many families – and therefore is dangerous when it performs the role of a presumption – perhaps invisibly or unnoticeably inviting limited evaluation and encouraging acceptance of its truth.³⁶

8.32 Ms Rathus also pointed to scholars such as Dr Peter Jaffe, who have argued against any presumptions that apply to parents who are litigating.³⁷ Dr Jaffe

³³ Australian Women Against Violence Alliance (AWAVA), *Submission 716*, p. 27.

³⁴ ALRC 2019 Report, pp. 181–182.

³⁵ ALRC 2019 Report, p. 16. Recommendation 8.

³⁶ Ms Zoe Rathus AM, *Submission 710*, p. 10.

³⁷ Ms Zoe Rathus AM, *Submission 710*, p. 10

noted that 'parents who enter the justice system to litigate about child custody or access have passed the point where shared parenting should be presumed or even encouraged'.³⁸

8.33 Women's Legal Service Victoria similarly expressed its strong view that presumptions in family law can lead to unsafe and unfair outcomes, and offered an alternative, namely the:

... discretionary nature of decision making in family law which places a greater emphasis on what is in the best interests of a child or children in parenting matters and fair financial outcomes in property matters. Decisions about children and property should be made on a case-by case basis in the best interest of the child and placing a greater focus on safety and risks to children, and not on parental rights.³⁹

8.34 The AGD also highlighted that, in the absence of a presumption about parental responsibility, current section 61C of the Family Law Act provides that, subject to a court order, each parent of a child has parental responsibility for the child.⁴⁰

8.35 In its 2019 Report, the ALRC considered the problems caused by the presumption and recommended replacing it with a presumption of joint decision making about major long term issues.⁴¹ The ALRC supported:

... the idea that a presumption of shared parental responsibility serves as a good starting point for negotiations between parents and recommends that the concept be retained.⁴²

8.36 However, the ALRC felt that to reduce the confusion surrounding the term 'equal shared parental responsibility' and the conflation with equal time, the presumption should be redrafted to refer to 'joint decision making on major long-term issues'.⁴³

8.37 The committee received limited support for this recommendation.⁴⁴ Save the Children Australia (Save the Children) expressed the more common view that:

³⁸ Ms Zoe Rathus AM, *Submission 710*, p. 10, citing: P Jaffe, 'A Presumption Against Shared Parenting for Family Court Litigants', *Family Court Review*, 52(2), 2014, p. 187.

³⁹ Women's Legal Service Victoria, *Submission 701*, pp. 26–27.

⁴⁰ AGD, *Submission 581*, p. 21.

⁴¹ ALRC 2019 Report, p. 16. Recommendation 7.

⁴² ALRC 2019 Report, p. 176.

⁴³ ALRC 2019 Report, p. 175.

⁴⁴ See, for example, Safe Steps, *Submission 735*, p. 4; No To Violence, *Submission 739*, p. 21; ANROWS, *Submission 602*, p. 11. ANROWS noted that this recommendation would only be effective if there are simultaneous improvements to the family law system relating to the early identification of, and response to family violence, because family violence is a limiting case to the equal shared parental responsibility presumption.

... while this would be an improvement on the current position, the presumption should instead be removed altogether. Save the Children also notes that removing this presumption is not intended to derogate from the important principle that parents should continue to have obligations as a parent to their child, irrespective of the amount of time the child spends with the parent, except in rare circumstances.⁴⁵

Support for retaining or strengthening the presumption

8.38 The committee also received evidence provided in favour of retaining the presumption of shared parental responsibility and the equal time provisions. For example, the Lone Fathers Association Australia (Lone Fathers) expressed their disappointment at the proposed ALRC recommendation to change to the existing presumption of shared care, stating:

There appears to be no evidence that the many separating parents who have gone down this pathway by consent have had their experiences considered, rather we suspect that the presumption for shared care is under attack for reasons considered in respect to parents who are unable to reach any parenting agreement and take the matter to the Federal Circuit Court or the Family Court as their first and only option. There appears to be little or no account for facts which apply to a significant number of successful shared care arrangements by consent.⁴⁶

8.39 The Australian Brotherhood of Fathers (ABF) also strongly opposed the ALRC proposal to amend the presumption of shared parental responsibility:

The 2018 ALRC Review of the Family Law System proposes to undo many of the hard fought of the [sic] improvements brought about by previous changes. The most profound recommendation is pertaining to the presumption of shared parental responsibility. This would profoundly impact children's best interests and rights to have a meaningful relationship with their Fathers.⁴⁷

8.40 The ABF continued:

The proposal is regressive and, if implemented, would, we firmly believe, be highly detrimental to the best interests of children. The proposal fails to acknowledge that the overall interests of a child, including with respect to safety, are best served by promoting the active involvement of both parents in a child's life ...⁴⁸

8.41 A limited number of organisations called for the strengthening of the presumption and shared time provisions by amending the best interest of the child considerations so that the consideration of the child having a meaningful relationship with both parents is given greater weight than the need to protect

⁴⁵ Save the Children Australia, *Submission 94*, p. 2.

⁴⁶ Lone Fathers Association Australia (Lone Fathers), *Submission 112*, p. 1.

⁴⁷ Australian Brotherhood of Father (ABF), *Submission 1668*, pp. 20–21.

⁴⁸ ABF, *Submission 1668*, p. 21.

the child from abuse or family violence in the event of any inconsistency in applying these considerations.⁴⁹

- 8.42 The committee was pointed to a body of research which supported the notion of shared parental responsibility and equal time with each parent. For example, Professor Augusto Zimmermann referred the committee to the research of Canadian sociologist and social worker Dr Edward Kruk, who stated that 'researchers can conclude with confidence that the best interests of children are commensurate with a legal presumption of shared parenting responsibility after divorce'.⁵⁰ Dr Kruk continued:

... without a legal presumption, judges can make decisions based on idiosyncratic biases, leading to inconsistency and unpredictability in their judgements [sic]. And with two adequate parents the court really has no basis in either law or psychology for distinguishing one parent as 'primary' over the other.⁵¹

- 8.43 Professor Zimmerman also noted the conclusion of Dr Sanford Braver, a psychology professor at Arizona State University, that:

... social scientists can now cautiously recommend presumptive shared parenting to policymakers ... shared parenting has enough evidence [that] the burden of proof should now fall to those who oppose it rather than those who promote it.⁵²

50:50 care

- 8.44 A number of organisations and individual submitters also called for a mandatory starting point of 50:50 care for children in all parenting arrangements.⁵³

- 8.45 For example, the Facebook Group, Australians Against the Family Law Courts, suggested a definition of what is in a 'child's best interest' be included in the Family Law Act which would provide, among other definitions, that:

- both parents have equal 50:50 parenting rights, whether they are the primary care-giver or not; and
- start with 50:50 shared parenting, unless valid evidence of abuse or violence.⁵⁴

⁴⁹ See Non-Custodial Parents Party (Equal Parenting), *Submission 1*, pp. 3–4; Parental Alienation in Australia, *Submission 841*, p. 19.

⁵⁰ Professor Augusto Zimmermann, *Submission 6*, p. 10, quoting Edward Kruk Ph.D., 'Countering Arguments Against Shared Parenting in Family Law', *Psychology Today*, 10 October 2018.

⁵¹ Professor Augusto Zimmermann, *Submission 6*, p. 10, quoting Edward Kruk Ph.D., 'Countering Arguments Against Shared Parenting in Family Law', *Psychology Today*, 10 October 2018.

⁵² Professor Augusto Zimmermann, *Submission 6*, pp. 11–12, referencing Sanford L. Braver & Michael E. Lamb, 'Shared Parenting After Parental Separation: The Views of 12 Experts' (2018) 59 (5) *Journal of Divorce and Remarriage* 372–387.

⁵³ See, for example, Justice for Broken Families, *Submission 817*, pp. 31–32.

8.46 The committee also heard from a number of individuals who believed that 50:50 time between mothers and fathers should be mandatory. A snapshot of some of the views expressed are set out below:

50/50 care arrangements must be the default position of the Family Court. Unless by mutual consent and in the absence of any extenuating circumstances such as violence, health issues, drug or alcohol dependencies, both parents have an equal right to care for their children.⁵⁵

...

Mandatory 50/50 shared parenting until a court orders otherwise. Failing the ability for either parent to provide equal shared parenting, a default level of involvement should be established to ensure the child/parental relationship remains intact and a status quo is not established that the courts can later rely upon.⁵⁶

...

The default position should be 50/50 custody. And if this is not adhered to, there should be a simple, cost effective and fast way to ensure the alienating parent does not continue.⁵⁷

...

Settlement of living arrangements for children should be split evenly unless there is evidence of abuse. There are studies out of Sweden that support the 50:50 arrangements. This would reduce the legal issues as parents often use the children as bargaining and allow both parties to work.⁵⁸

...

50:50 custody should be the status quo in all situations where it is possible and wanted. A parent should only be able to provide an argument for WHY NOT after a trial period of 6 months with proof as to why it is not in the child's best interests. This provides children with the ability to have strong and stable relationship with both parents.⁵⁹

⁵⁴ Australians Against the Family Law Courts, *Submission 591*, p. 1.

⁵⁵ Name withheld, *Submission 832*, p. 3.

⁵⁶ Parental Alienation in Australia, *Submission 841*, p. 19.

⁵⁷ Confidential, *Submission 43*.

⁵⁸ Confidential, *Submission 431*.

⁵⁹ Confidential, *Submission 1135*.

Children's views

8.47 The Family Law Act currently provides that, in determining what is in the child's best interests, the court must consider:

... any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views.⁶⁰

8.48 The court may be informed of the child's views through an Independent Children's Lawyer (ICL), a family consultant's report, or by any other means the court considers appropriate.⁶¹ A child cannot be compelled to express their views.⁶²

8.49 Despite the ability of a court to consider a child's views on parenting arrangements, a number of submitters have noted that the views of children are often not adequately sought by family law professionals, are filtered as part of the professional's broader assessment of the circumstances, or are not given due weight by the court.⁶³ The Royal Australian and New Zealand College of Psychiatrists (RANZCP) noted in their submission that:

In many cases, children want to express their views in relation to parenting and care arrangements. Some children have expressed that 'the court processes needed to better focus on the children and young people [involved] as they are the ones experiencing the impact of the court's decisions'. There is also evidence which indicates that being inclusive of children's views in the course of parenting proceedings results in better outcomes for children, including children feel less distressed about their parents' conflict.⁶⁴

8.50 The National Children's Commissioner, Ms Megan Mitchell, shared with the committee the messages she hears from children about their involvement in the family law system:

Children and young people consistently say to me, and to others, that they would like to have more of a say in, and be informed about, legal decisions that affect them. However, there are numerous barriers that are inhibiting child participation in the family law system. This includes a lack of understanding and concerns about children's participation and how to facilitate it. While a child should not be compelled to express a view in a family law matter, the Commission considers that children should be provided with the opportunity to do so in a manner appropriate to their

⁶⁰ *Family Law Act 1975*, paragraph 60CC(3)(a).

⁶¹ *Family Law Act 1975*, paragraph 60CD(2)(b).

⁶² *Family Law Act 1975*, s. 60CC, s. 60CD and s. 60 CE.

⁶³ See RANZCP, *Submission 231*, p. 3; AGD, *Submission 581*, pp. 24–25. See also Caxton Legal Centre, *Submission 744*, p. 25; Save the Children Australia, *Submission 94*, p. 3.

⁶⁴ RANZCP, *Submission 231*, p. 3.

age and maturity. This includes children whose parents are involved in alternative dispute resolution processes.⁶⁵

- 8.51 Relationships Australia expressed support for an assumption that hearing from children should be the default position in both service provision and court processes.⁶⁶ However, Relationships Australia advised against children being the decision-maker:

Advocating for improving opportunities for children to be heard does not mean that children are the decision-makers or that their views should be determinative. Children themselves are generally clear that this is not what they want. Evidence shows that children prefer that the parents make the final decisions. What children and young people do want is information and to have the opportunity to talk to someone, beyond their parents, about their fears, concerns and hopes ... they do want to know that they are being taken into account.⁶⁷

- 8.52 It was Relationships Australia's position that the views of children should be expressed through an intermediary, not directly to parents and caregivers.⁶⁸ The RANZCP similarly suggested that:

... specialist child and adolescent forensic psychiatrists can play an important role in children voicing their views in the context of a family law dispute. They can give the child an opportunity to express their wishes and assess the child for any mental health issues, while also being aware of how best to assist the Court with independent expert evidence.⁶⁹

- 8.53 However, RANZCP cautioned that care should be taken to ensure that children are not re-traumatised through participating in family law matters, especially where family violence is a factor.⁷⁰

- 8.54 Carinity Talera made a similar recommendation:

Children need to be given the opportunity to have their voices heard and listened to in the Family Law Court. However, it is crucial that children's views are put before the court in appropriate ways that do not expose them to harm. In doing this, it is important that children are supported by a practitioner with appropriate qualifications and training in child development, trauma, attachment, and [domestic and family violence].⁷¹

- 8.55 The Caxton Legal Centre noted the view that the adversarial process of family court proceedings has made the participation of children unsafe and

⁶⁵ Australian Human Rights Commission, *Submission 91*, p. 3.

⁶⁶ Relationships Australia, *Submission 606*, pp. 85–86.

⁶⁷ Relationships Australia, *Submission 606*, p. 86.

⁶⁸ Relationships Australia, *Submission 606*, p. 86.

⁶⁹ RANZCP, *Submission 231*, p. 3.

⁷⁰ RANZCP, *Submission 231*, p. 3.

⁷¹ Carinity Talera, *Submission 601*, p. 8.

recommended that, unless there are exceptional circumstances, children should not directly participate in family court hearings.⁷² However, they suggested that 'processes that are child-focused and non-adversarial may provide the safe environment necessary to facilitate their ongoing participation'.⁷³

8.56 The South Australian Commissioner for Children and Young People, Ms Helen Connolly, expressed her view that improving the system to be more child-focused is not impossible.⁷⁴ Ms Connolly noted that overseas jurisdictions are increasingly recognising the importance of child-focused practices and that children in other jurisdictions have the right to make an application to court, are able to communicate directly with the Judge, attend court and be a party to the proceedings.⁷⁵

8.57 For Kids Sake submitted that a primary recommendation of this inquiry should be that more needs to be done to keep children out of the adversarial family court, not that children need to be involved even more.⁷⁶ They stated that the adversarial process tends to promote unhealthy and potentially abusive parent-child interactions and that:

We should not gloss over the profound differences between involving children in a collaborative, conciliatory, problem-solving and child-friendly environment and involving them – often for unconscionably long periods of time – in the hostile, adversarial and torturous environment of the family court. There is a world of difference between empowering children and allowing their voices to be heard in a safe and conciliatory environment and allowing them to participate, even indirectly, in adversarial litigation.⁷⁷

8.58 Ms Rathus noted that the role of judges in the direct participation of children remains a contentious issue in Australia, despite there being similar overseas jurisdictions where 'judicial interviewing of and meeting with children is common'.⁷⁸ She advised that:

Special skills are required to do this well and judges have no training for this task. There are questions about who should be present and how the interaction should be recorded and reported. And exactly what can a judge do with anything they learn through the interaction?⁷⁹

⁷² Carinity Talera, *Submission 601*, p. 27.

⁷³ Caxton Legal Centre, *Submission 744*, p. 26.

⁷⁴ South Australian Commissioner for Children and Young People, *Submission 706*, p. 6.

⁷⁵ South Australian Commissioner for Children and Young People, *Submission 706*, p. 6.

⁷⁶ For Kids Sake, *Submission 607*, p. 32.

⁷⁷ For Kids Sake, *Submission 607*, p. 32.

⁷⁸ Ms Zoe Rathus AM, *Submission 710*, p. 8.

⁷⁹ Ms Zoe Rathus AM, *Submission 710*, p. 8.

- 8.59 While acknowledging that more research is required and a training program would have to be developed and implemented, it was Ms Rathus' view that Australian family law judges should become more active in their direct engagement with children.⁸⁰
- 8.60 Rainbow Families Victoria also expressed support for the position that the experiences of children and young people within the family law system should be urgently updated to ensure a process allowing for active participation by, and engagement with, children and young people.⁸¹
- 8.61 For Kids Sake also submitted that it is a highly specialist skill to interview children and that a majority of professionals within the court system, including judges, do not have the prerequisite, specialist skill to assess children in an adversarial, litigious setting.⁸²
- 8.62 In her submission, Ms Mitchell noted that the Australian Human Rights Commission has previously recommended that:
- ... judicial officers and family law professionals, including Independent Children's Lawyers, family consultants and mediators are provided with training and resources to assist them to engage and communicate effectively with children about family law matters that concern them.⁸³
- 8.63 The committee also heard that it is important that family court processes are clearly explained to children:
- Frustrations with and misunderstandings about the court processes may cause children to feel aggrieved when decisions are made which do not accord with their wishes, particularly in the case of children of an age and/or maturity where they are able to clearly articulate their views and have done so. It is reported by our clients that this causes distress, frustration or resentment towards either the parents themselves or the court process generally.⁸⁴

Independent Children's Lawyers

- 8.64 Where the court determines that a child's best interests or welfare are the paramount, or a relevant, consideration, the court may order that the child interests in the proceedings be independently represented by a lawyer. The appointed ICL is not the child's legal representative, but is required to act in what the ICL believes to be the best interests of the child. However, in doing so, the ICL is required to ensure that any views expressed by the child in

⁸⁰ Ms Zoe Rathus AM, *Submission 710*, p. 8.

⁸¹ Rainbow Families Victoria, *Submission 226*, p. 20.

⁸² For Kids Sake, *Submission 607*, p. 37.

⁸³ Australian Human Rights Commission, *Submission 91*, pp. 3–4.

⁸⁴ Caxton Legal Centre, *Submission 744*, p. 25.

relation to the matters to which the proceedings relate are fully put before the court.⁸⁵

- 8.65 A number of submitters have levelled criticism at the ability of ICLs to ensure that the child's views are before the court. This is particularly due to the fact that ICLs are not required to meet with the child whose best interests they are tasked with representing. It has been submitted that:

Independent Children's Lawyers (ICLs) should be required to meet with the children whose interests they are representing, and to ensure the child's views are presented to court and taken into account. In principle, ICLs can play a valuable role in enhancing children's participation in family law proceedings. In practice, however, ICLs frequently do not meet children, seek their views, seek to have any views of the child taken into account, or sufficiently understand children's needs - particularly in situations of violence and abuse - to represent their best interests.⁸⁶

- 8.66 For Kids Sake questioned whether ICLs serve a valuable purpose:

We largely do not see a role for – and see great dangers in appointing – a Children's Lawyer in many cases. If that lawyer is to represent 'the best interests' of a child rather than the apparent wishes of that child (an important distinction that many children's lawyers do not successfully recognise), then that becomes synonymous with the role of the court itself and of the presiding judicial officer. As such, we believe it is generally more appropriate for a single judicial officer to be appointed for each family/case and for that judicial officer to ensure strict case-management and to conduct hearings with an inquisitorial, problem-solving and urgent approach.⁸⁷

- 8.67 Relationships Australia also expressed that, on balance, the role of ICLs has not provided an effective mechanism for children's participation. Relationships Australia proffered that:

This is not a reflection on the capacity, effort and commitment that so many ICLs bring to their work. Rather, it is an inevitable consequence of unreasonable expectations and function creep. Dividing functions between a children's advocate, a legal representative, and a case manager/counsel assisting would better facilitate children's participation in ways that are safe and developmentally appropriate.⁸⁸

- 8.68 In contrast, National Legal Aid (NLA) highlighted the positive role of ICLs noting:

A high proportion of matters where an ICL is appointed settle 'before trial', with an estimated national average settlement rate of those matters in 2018-19 of 60%. It is suggested that this settlement rate is particularly

⁸⁵ Family Law Act, s.68L and s. 68LA.

⁸⁶ Save the Children Australia, *Submission 94*, pp. 3–4.

⁸⁷ For Kids Sake, *Submission 607*, p. 38.

⁸⁸ Relationships Australia, *Submission 606*, p. 92.

significant as these matters involve issues which are usually highly contested.⁸⁹

8.69 A number of submitters, including NLA, expressed support for the ALRC's recommendation in its 2019 Report, that the Family Law Act be amended to include a specific duty that ICLs comply with the *Guidelines for Independent Children's Lawyers*.⁹⁰ These guidelines provide that ICLs should seek to provide a child with the opportunity to express a view in relation to the matter, and that ICLs should ordinarily meet with a child.⁹¹ The ALRC noted that:

It is essential to the efficacy of the [ICL] role in acting in the best interests of the child that there be adequate funding, both for the appointment of appropriately qualified lawyers and for ongoing training.⁹²

8.70 Save the Children, while supporting the ALRC's recommendation, were concerned about the potential for the guidelines to be amended and the requirement for ICLs to meet with the child weakened.⁹³ Save the Children therefore recommended that the Family Law Act specifically provide that:

... ICLs have a duty to enable the child to be involved in decision-making and, in discharging that duty, should ordinarily meet with the child and put evidence of the child's views before the court.⁹⁴

8.71 The NLA supported the ALRC's view that adequate funding is essential to the efficacy of the ICL role, and proposed that, in addition:

- Adequate funding be provided to ensure that the best interests of children in these most complex and challenging family law matters are appropriately represented.
- Funding be provided for the piloting of a more structured model of case practice involving ICL and social scientist partnership, enhanced child participation, and post order work.⁹⁵

8.72 The AGD noted in its submission that the ALRC Discussion Paper for its family law inquiry canvassed a proposal to establish a new professional role, titled 'Children's Advocate', to support the participation of children in proceedings.⁹⁶ The role would be additional to that of the ICLs. However, AGD advised that the proposal received mixed feedback in further submissions and

⁸⁹ National Legal Aid (NLA), *Submission 589*, p. 9.

⁹⁰ See, for example, NLA, *Submission 589*, p. 10; Save the Children Australia, *Submission 94*, pp. 3–4.

⁹¹ ALRC 2019 Report, pp. 371–372. See Recommendation 44.

⁹² ALRC 2019 Report, p. 377.

⁹³ Save the Children Australia, *Submission 94*, p. 4.

⁹⁴ Save the Children Australia, *Submission 94*, pp. 3–4.

⁹⁵ NLA, *Submission 589*, p. 10.

⁹⁶ AGD, *Submission 581*, p. 25.

was not included as a final recommendation.⁹⁷ In its final report, the ALRC stated that, on balance, it was persuaded that 'introducing an additional professional role within an already crowded suite of professional services within the family law system may do more harm than good'.⁹⁸

8.73 The AGD suggested that there would be benefit in further exploration of opportunities to better support children's participation in family law proceedings.⁹⁹

8.74 Along similar lines, the Australian Human Rights Commission noted that it had urged the ALRC to consider recommending the Family Court establish a children's board or committee similar to the Family Justice Young People's Board in the United Kingdom, to provide ongoing advice to the Family Court on how to better realise children's rights in the family law system.¹⁰⁰ In its 2019 report, the ALRC recommended that the Family Law Council should establish a Children and Young People's Advisory Board, which would provide advice and information about children's experiences of the family law system to inform policy and practice, stating:

The ALRC supports children's participation in family law matters that affect them, as well as broader participation in system oversight and reform. Providing children and young people with a mechanism through which to participate in the governance of the family law system will assist future policy and practice development to be child-centred. An Advisory Board populated with children and young people will allow them to provide feedback, including on their experiences of the system, and to share ideas for its improvement.¹⁰¹

Current reforms

8.75 The AGD advised the committee that the Australian Government has provided funding for the redevelopment of the national training program for ICLs, to ensure they are receiving appropriate guidance on the role of ICLs and the necessary skills and competencies required to perform the role.¹⁰² 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.¹⁰³

⁹⁷ AGD, *Submission 581*, p. 25.

⁹⁸ ALRC 2019 Report, p. 377.

⁹⁹ AGD, *Submission 581*, p. 25.

¹⁰⁰ Australian Human Rights Commission, *Submission 91*, p. 4.

¹⁰¹ ALRC 2019 Report, p. 395. Recommendation 50.

¹⁰² AGD, *Submission 581*, Attachment 2, p. 17.

¹⁰³ AGD, *Submission 581*, Attachment 2, p. 17.

Parental alienation

8.76 Many submitters and witnesses have put forward a polarised range of views on the extent to which a parent can be alienated from their children by another parent or family member. This divergence is particularly stark on the issue of whether parental alienation is a recognised mental disorder. While the term ‘parental alienation’ was used regularly by both individuals and organisations in both submissions and oral evidence, it was clear that the term had different meanings to different witnesses. As highlighted by the differing understandings set out below, the meanings ranged from one parent not letting the other parent have access to their children, to a parent actively seeking to turn a child against a parent, which many considered to be a form of family violence and finally, to a clinical syndrome.

8.77 The Eeny Meeny Miney Mo Foundation set out its understanding of the definition of this process:

Parental alienation is a process of one parent (known as the alienating parent) influencing a child to turn against and reject their other parent (known as the targeted parent) without legitimate justification.

The alienating parent can also be a grandparent, a step parent and even a non-family member. Parental alienation can occur even when the relationship between the targeted child and targeted parent was once a very positive one.

Parental alienation can be viewed as a form of family violence and child maltreatment perpetrated by the alienating parent. This is because the tactics used by alienating parents to turn their child against the other parent are emotionally abusive and coercive behaviours.¹⁰⁴

8.78 Divorce Justice, a legal practice, shared with the committee its experience of parental alienation:

At The Divorce Centre we see so many cases where separated families have high conflict, stress, and anxiety due to very poor co-parenting skills. The total disrespect and disregard for each other has an enormous impact on the children being in a toxic environment. Couples are lacking the awareness of how their behaviour escalates into conflict, being poor role models, and the impacts on the children's development and mental health. Parents punish their ex through parental alienation, poisoning children against the other parent, denying access for children to see grandparents out of spite, or restrict financial access.¹⁰⁵

¹⁰⁴ Eeny Meeny Miney Mo Foundation, *Submission 605*, p. 1.

¹⁰⁵ Divorce Justice, *Submission 4*, p. 3. See also: Divorce Centre, *Submission 5*.

8.79 Ms Tania Murdock, Family Dispute Resolution Practitioner, Dispute Management Australia also relayed her professional experience with parental alienation:

I have specialist training in domestic violence and I have specialist training in parental alienation. I understand clearly what it involves. As part of family mediation, I certainly have witnessed alienation, particularly on the female side. Whether or not that is, once again, a societal kind of process, where the mother regards that she should be in charge of the children, because of old-school societal processes, I'm not sure, but I certainly have experienced it within mediation. And I have experienced fathers being completely distressed, similarly to the gentleman I was mentioning earlier that actually said he was ready to take his own life. He said to me: 'You saved my life, because if I had waited four months for the family relationship centre, I don't think I would have lasted.' He was experiencing parental alienation. The mother was not allowing him to see the child, for no apparent reason. She just said that she didn't think he was fit. There was no actual evidence to say that he wasn't fit. In her determination, he wasn't fit.¹⁰⁶

8.80 Some, like Professor Zimmerman, argued that the current child support system 'actively provides a perverse incentive for parental alienation' by primary caregivers who do not wish to reduce their caregiving time in order to avoid a reduction in child support obligation.¹⁰⁷

8.81 Notwithstanding this evidence, a number of witnesses put forward an opposing view and disagreed with the premise that parental alienation is a recognised mental disorder. For example, Dr Heather Nancarrow, Chief Executive Officer, Australia's National Research Organisation for Women's Safety (ANROWS) contended that 'there has been evidence that has debunked the concept of parental alienation syndrome. It's not something that's accepted in the scientific community'.¹⁰⁸

8.82 Ms Mitchell was quite scathing in her assessment:

I think that's a pretty kooky theory. I think that it's been pretty much debunked. I'm a psychologist by trade, so I've looked at this issue and can see that this theory was something that didn't have an evidence base behind it. The fellow who concocted it back in the 1980s or 1990s had some pretty wacky views, I have to say ... So I think we really need to be careful when we're thinking that this is a thing.¹⁰⁹

¹⁰⁶ Ms Tania Murdock, Family Dispute Resolution Practitioner, Dispute Management Australia, *Proof Committee Hansard*, 10 March 2020, p. 14.

¹⁰⁷ Professor Augusto Zimmerman, *Submission 6*, p. 4.

¹⁰⁸ Dr Heather Nancarrow, Chief Executive Officer, ANROWS, *Proof Committee Hansard*, 13 March 2020, p. 56. See also, Ms Zoe Rathus AM, *Proof Committee Hansard*, 11 March 2020, p. 19.

¹⁰⁹ Ms Megan Mitchell, National Children's Commissioner, Australian Human Rights Commission, *Proof Committee Hansard*, 14 February 2020, p. 30.

8.83 Dr Rachel Carson, Senior Research Fellow, Family Law, Family Violence and Elder Abuse, Australian Institute of Family Studies provided a summary of their research and, specifically, whether parental alienation has been raised as an issue in their surveys of children. Dr Carson noted that parental alienation:

... was not something that was apparent in our research. I know that concerns have been raised in relation to this issue over many years. While acknowledging those concerns, I would say that it's not an issue that's emerged in the context of our very extensive research in the family law and family violence space. In fact, evidence from the AIFS evaluation of the 2012 family violence amendments, for example, emphasises that underdisclosure [sic] and issues associated with screening, identifying, assessing and responding to domestic and family violence and child abuse and other child safety concerns are issues of particular significance in our family law system. In relation to the accounts of children and young people in particular, I would say that they very much reflected their own experiences of domestic and family violence and the safety concerns that they experienced in their case.¹¹⁰

8.84 Dr Mandy Matthewson, Director, Eeny Meeny Miney Mo Foundation conceded that there was some confusion about the terminology used to describe parental alienation.¹¹¹ Whilst maintaining the view that parental alienation was widespread, Dr Matthewson accepted that there was some contention about what is known as parental alienation syndrome and whether it should be formally documented as a mental disorder:

There are thousands and thousands of peer reviewed journal articles and books that show that parental alienation does indeed exist and occur. There is documented evidence that what we now call 'parental alienation' has occurred as early as the 1800s. It's been known by many different terms, but we now refer to it as parental alienation. I understand that there's some confusion about the difference between parental alienation and parental alienation syndrome. During the 1980s a psychiatrist and academic by the name of Richard Gardner coined the term and the phenomenon of parental alienation syndrome. He argues that the syndrome has eight indicators seen in children, and there was a lot of debate about persistence of parental alienation syndrome and whether it should be included in the [Diagnostic and Statistical Manual of Mental Disorders (DSM)] or the [International Classification of Diseases (ICD-11)]. This, I think, confused a lot of debate and understanding of parental alienation, the phenomenon. I think the most recent academic literature now considers parental alienation as a form of family violence that fits within the realm of coercive control and emotional abuse, rather than a disorder that is diagnosing a child. So I think there is ample recognition in

¹¹⁰ Dr Rachel Carson, Senior Research Fellow, Family Law, Family Violence and Elder Abuse, Australian Institute of Family Studies, *Proof Committee Hansard*, 24 June 2020, p. 34.

¹¹¹ Dr Mandy Matthewson, Director, Eeny Meeny Miney Mo Foundation, *Proof Committee Hansard*, 12 March 2020, p. 14.

the literature that parental alienation is a wider problem than people first thought during the 1980s.¹¹²

- 8.85 Whilst acknowledging that alienation can occur in some circumstances, Ms Rathus explained why there can be a perception that parental alienation is occurring when there may instead be other factors at play:

I do not say that no woman has ever alienated the children from their father or joined with them in some kind of resistance. Men and women can do terrible things after separation. The person that they loved is now the person that they hate. The difficulty though with that term is it is so tied up in the baggage of its creation and it is so tied up in a very gendered use that there is no question that parental alienation becomes a very easy answer for men who have been violent, either physically or coercively controlling. As soon as the kids are resistant to seeing them, instead of the men taking responsibility for the violence they might have committed and perhaps working on becoming a more attractive proposition to their kids, they go, 'She's alienating them.' It's too easy to do that, and it then becomes very difficult to unpick the truth in that situation.¹¹³

- 8.86 In addition, Ms Rathus acknowledged the difficulty when two parties fundamentally disagree on whether family violence transpired during their relationship and then in turn, determining the factors that lead children to decide on which parent they would prefer to live with:

... how do we know that the violence wasn't true in a particular situation? For example, if someone is giving evidence here before this committee and they say 'I got alienated from the children. She said I committed domestic violence. I didn't.' we don't really know which party is telling the truth. Sometimes even judgements [sic] get it wrong. So even if a judgement [sic] says 'We don't think there was much violence here, so we're going to say it's alienation.' that could be wrong. It's very difficult to be certain about what has occurred in terms of being able to say: how do we deal with children who choose? Sometimes children choose because there is violence and that violence has been able to be [proved]. I have read hundreds of these alienation cases. Odd things happen in some cases—for example, one child prefers one parent, and the other child happily goes off to the other parent; yet the mother gets accused of alienation. That seems really odd to me. Why would she do that? So kids do make these decisions.¹¹⁴

Enforcement of parenting orders

- 8.87 The Family Law Act contains provisions that enable a court to make orders penalising a party where they are found to have contravened a parenting order.¹¹⁵ These have not been set out in detail as the majority of submissions

¹¹² Dr Mandy Matthewson, Director, Eeny Meeny Miney Mo Foundation, *Proof Committee Hansard*, 12 March 2020, p. 14.

¹¹³ Ms Zoe Rathus AM, *Proof Committee Hansard*, 11 March 2020, pp. 19–20.

¹¹⁴ Ms Zoe Rathus AM, *Proof Committee Hansard*, 11 March 2020, p. 20.

¹¹⁵ See *Family Law Act 1975*, Part VII, Division 13A.

have not questioned the adequacy of the courts legislative powers to deal with non-compliance. Rather, submissions have highlighted the difficulty in having contravention applications heard by the court and the perceived lack of willingness by judges to take action in response to a contravention of an order.

- 8.88 The AGD provided the following insight into some of the issues surrounding enforcement of parenting orders:

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

Enforcement of interim orders is also a significant issue, particularly in matters which may take a number of years to resolve on a final basis. In these cases, interim orders can be in place for 12 months or more, and non-compliance can have a serious impact on relationships between the parties and the child during the course of proceedings.¹¹⁶

- 8.89 The Law Council of Australia (Law Council) expanded on the difficulties of the enforcement process:

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

... there must be an improvement to the process of bringing such proceedings before the Court. Currently, if an application for contravention is filed, it is listed before a judicial officer in a busy list. It is time consuming and an expensive process. Even if the contravention is proved, the penalty (particularly in relation to a first stage of contravention of a parenting order) offers little deterrence. It is the view of many that it is often not worth the trouble in bringing the application.¹¹⁷

- 8.90 The Hon Diana Bryant AO QC, former Chief Justice of the Family Court, also discussed the complexities that arise in the enforcement of parenting orders, acknowledging that questions around how best contraventions could be dealt with had engaged her over the years:

Parenting orders are more problematic. It isn't quite as simple as saying, as people do, 'That order hasn't been complied with.' There may be a reason why it hasn't been complied with. Circumstances change, so you get much more complexity when you are trying to influence. That said, within the court system itself, I have long thought you could perhaps have a standing

¹¹⁶ AGD, *Submission 581*, p. 22.

¹¹⁷ Law Council of Australia (Law Council), *Submission 2.2*, pp. 38–39.

registrar's list where people could come along and act for themselves and get default orders made pretty quickly; and then, if the matter was more complex, it could be referred off to a judge. I think that is possibly one way of dealing with contraventions or noncompliance.¹¹⁸

- 8.91 The Law Council suggested that the lack of adequate funding and inadequate judicial and registrar resources are the overwhelming contributors to difficulties relating to the enforcement of orders.¹¹⁹ Further discussion around the issues of court resourcing is contained in Chapter 6.

Contravention of orders

- 8.92 The committee heard from a large number of individuals and organisations, in submissions and hearings, about the difficulties parties have experienced in making contravention applications in parenting proceedings and the dissatisfying outcomes of these applications.

- 8.93 Men's Rights Agency advised the committee that:

... the court (judiciary) seem to be particularly reluctant to deal with contravention orders where the mother is the alleged offender. The applicant and the respondent will be sent out of the court to discuss amending the orders for contact to a timetable that is more amenable to the offender and any other part of the order causing concern and the contravention is then dismissed. A good talking to might result, but most often an offender, particularly female will leave the court without any penalty being applied. The courts must overcome their reluctance to punish a female offender, then the orders made will have meaning and respect. There appears to be no reluctance on the court's behalf to punish a male offender with heavy fines and in some instances gaol.¹²⁰

- 8.94 The Eeny Meeny Miney Mo Foundation provided evidence on how the contravention process works to the benefit of an alienating parent:

... an alienating parent can withhold ordered contact with a targeted parent until that parent can bring a contravention application before the court, which can in some instances take up to 12-months, by which time significant damage can be done to the parent/child relationship. Legal Aid is not available for the prosecution of contravention applications which are notoriously difficult to run for a self-represented litigant. Any adjournment or procedural delay works to the advantage of the alienating parent. Courts are reluctant to place children in the care of parents with whom they have not had any relationship for long periods of time, which may well not be the fault of the targeted parent seeking to spend time, or even to simply communicate, with their children.¹²¹

¹¹⁸ The Hon. Diana Bryant AO, QC, Board Member, Association of Family and Conciliation Courts, Australian Chapter (AFCC), *Proof Committee Hansard*, 24 June 2020, p. 10.

¹¹⁹ Law Council, *Submission 2.2*, p. 26.

¹²⁰ Men's Rights Agency, *Submission 603*, p. 30.

¹²¹ Eeny Meeny Miney Mo Foundation, *Submission 605*, p. 13.

- 8.95 For Kids Sake also commented on the impact of the time delay between when an order is not complied with and when the court hears the contravention application:

By not making swift, enforced decisions, it is the family court itself that has created the rod for its own back; it has made itself almost powerless to enforce its own orders because it routinely rewards, and fails to punish, those who flout its orders.

... by not pro-actively, automatically and swiftly enforcing their own orders, family courts have incentivised one of the most pernicious and damaging forms of child abuse: the turning of a child against a parent.¹²²

Family Violence

- 8.96 Victims of Crime Assistance League Inc NSW (VOCAL) noted that, in their experience, most victims of family violence do not have the financial capacity, legal knowledge or emotional strength to take a perpetrator back to court for continually breaching consent or final court orders. VOCAL further advised that:

This is not a system that holds people to account for non-compliance or contravening orders. The cost and lengthy time process of contraventions is extensive, and many victims who are subjected to repeat contraventions reluctantly chose not to take it back into the court system. With mandatory Family Dispute Resolution being required, Client feedback includes '*it forces more contact with the abuser*', '*it's too costly*', '*they [the Judge] won't see it as serious*'.¹²³

- 8.97 Women's Legal Services Queensland highlighted that enforcement of parenting orders cannot be considered in isolation of the high levels of domestic violence in family law courts. Women's Legal Services Queensland added:

... a major driver of contravention applications is their use by perpetrators of domestic violence who are attracted to the punitive nature, using them as a vehicle to 'punish' their ex-partner.¹²⁴

- 8.98 Springvale Monash Legal Service also detailed how the contravention process is often abused by the perpetrator of family violence to continue to control their ex-partners, by making multiple contravention applications. They have recommended that the Family Law Act be amended so as to require that, after a prescribed number of failed contravention hearings, family violence perpetrators must seek the permission of the court before they proceed to seek

¹²² For Kids Sake, *Submission 607*, p. 18.

¹²³ Victims of Crime Assistance League Inc NSW, *Submission 699*, pp. 9–10 (emphasis in original).

¹²⁴ Women's Legal Services Queensland, *Submission 715*, p. 31.

further contravention hearings.¹²⁵ They advise that this is based on requirements in the [Victorian] Family Violence Prevention Act.¹²⁶

8.99 A large number of individual submitters also outlined the problems they encountered in seeking to enforce parenting orders where the other party had failed to comply with the terms of the order. Some representative examples of the evidence the committee heard are set out in Chapter 3 and below. For example, one father advised the committee that:

The Family and Federal Circuit Courts are the only courts in the country that I am aware of that there [sic] orders mean absolutely nothing and are not worth the paper they're written on. Parenting orders are routinely ignored and contravened, with all parties aware that the Courts will not hold the contravening party accountable.

... I filed a Contravention application one year ago approx. To date the matter is yet to be heard, and has been repeatedly adjourned, some 5 times in total, due to the Respondent refusing to present to the Court.¹²⁷

8.100 The delay in contravention applications being heard and orders enforced was a source of confusion and frustration for many submitters:

... it's not clear to me why non-compliance of court orders is not enforced, upfront. A contravention application is pretty clear and must determine whether there are any reasonable grounds for the breach or not. If not, this should be dealt with immediately, rather than being attached to invariably protracted proceedings. Where a party is found to be in breach of an order, without reasonable grounds, they need to be dealt with appropriately and immediately. Again, existing legislation does provide for this already.¹²⁸

8.101 The delay experienced by another parent led that parent to recommend that:

Contravention matters need urgent attention in the courts and any one that has lodged in the family court system that is not currently seeing child X should have a court hearing within a month. It's taken almost 2 years for my Contravention matter to have a final hearing date. In that time I am unable to see or have time with my daughter.¹²⁹

8.102 Submitters informed the committee that they were often advised not to pursue contravention of orders:

We have been told that contravention application is not worthwhile due to the cost and the trouble with arguing a successful case. There is no immediate punishment if a parent is non-compliant with the orders and

¹²⁵ Springvale Monash Legal Service, *Submission 729*, p. 10.

¹²⁶ Springvale Monash Legal Service, *Submission 729*, pp. 9–10.

¹²⁷ Confidential, *Submission 149*.

¹²⁸ Confidential, *Submission 256*.

¹²⁹ Confidential, *Submission 250*.

the onus is very much on the other parent to take the non-compliant parent to court after the fact.¹³⁰

...

... I have been advised by that solicitor that the judge does not like-and will not do-contraventions. If I go and do a contravention- he wanted me to sign a bit of paper to say that I was advised not to do it and said, 'You will lose in court.'¹³¹

8.103 When contravention proceedings are initiated and reach court, the committee often heard experiences along the lines of the following:

When I filed a contravention application as a self-represented party, the judge told me that if I ran that application myself he would find against me and also award costs against me! The judge wasn't interested in even hearing the application.¹³²

...

... when seeing the judge, the judge refused to even look at the evidence, changed the Final Orders (my son's rights) that were fought for so hard, to make it easier for the mother to adhere to them and removed rights from my son in the process. I was told if I came back my son would lose the right to communicate with me once per week and I would never speak to him.¹³³

8.104 Another submitter outlined the experience of her son, whom she stated had 100 documented breaches of court parenting orders by his former partner. She advised the committee that every breach that was raised in the court was completely ignored or dismissed by the judge, resulting in the ex-partner continuing to breach the orders without fear or penalty. She submitted that there are two major problems relating to compliance with Family Court orders:

- First, the process of notifying the court of non-compliance is very complex and expensive, requiring a lawyer to submit the paperwork to the court.
- Second, there are generally no repercussions whatsoever for breaches of the orders.¹³⁴

8.105 The submitter recommended that:

... breaches of court orders should be capable of being reported without the involvement of lawyers and without expense, and – if a judge has

¹³⁰ Confidential, *Submission 137*.

¹³¹ In camera Hansard, 11 March 2020.

¹³² Confidential, *Submission 533*.

¹³³ Confidential, *Submission 650*.

¹³⁴ Confidential, *Submission 1420*.

made orders – then the Court should penalise any parent that breaches those orders, especially where the breaches are frequent and serious.¹³⁵

8.106 The committee also heard that being successful in a contravention proceeding does not necessarily result in better compliance by the other party with the court orders. For example, one parent informed the committee that: 'I was successful in the contravention hearing however there were no consequences for my ex-partner and she continues to refuse me any contact with my daughter'.¹³⁶

8.107 A number of submitters called for tougher penalties for contravention of parenting orders, including 'an almost zero tolerance for non-compliance without valid reasons'.¹³⁷ Another suggested that:

There should not need to be an ability for a court to make an order of non-compliance. The penalties are laid out in Court and Parenting Orders. The word 'May' needs to be removed and replaced with the word 'Will' and if a Contravention Order is submitted to the court the court needs to have that person arrested and brought to court (the same thing that happens when there is a breach of a DVO) to show reasons why they have not been complying with the orders. If there is reasonable excuse, they receive a warning. However, if there is no reasonable excuse, they can receive a non-custodial sentence. If there are more than two breaches, they receive the prison sentence of up two years as stated on the Parenting Orders.¹³⁸

Dedicated contravention lists

8.108 Victoria Legal Aid advised the committee that:

The Melbourne registry of the Federal Circuit Court of Australia ... is currently piloting a contravention list. Early indications are that the list is working effectively to streamline contravention hearings and improving enforcement of orders. This pilot is supported by greater use of Registrars to supervise contravention matters, which frees up judicial resources and provides for greater efficiency. However, the matter must still go before a judge for determination because registrars do not currently have power under the Family Law Act to make orders regarding enforcement.¹³⁹

8.109 Victoria Legal Aid therefore recommended that further resourcing be provided to the family law courts to establish contravention lists at registries and regional circuit locations to allow for more contravention applications to be

¹³⁵ Confidential, *Submission 1420*.

¹³⁶ Confidential, *Submission 565*.

¹³⁷ Confidential, *Submission 452*.

¹³⁸ Confidential, *Submission 128*.

¹³⁹ Victoria Legal Aid (VLA), *Submission 120*, p. 15.

heard promptly and that the Family Law Act is amended to provide Registrars with the power to hear and determine contravention applications.¹⁴⁰

8.110 The committee was also informed that the Family Court of Australia and the Federal Circuit Court of Australia have each recently established a court list dedicated to dealing exclusively with urgent family law disputes that have arisen as a direct result of the COVID-19 pandemic. Where a party meets the criteria for the COVID-19 list, the parties will receive a first return date within 3 business days of the application being assessed as suitable.¹⁴¹ These matters are being dealt with by electronic means, such as virtual court hearings and electronic dispute resolution.

8.111 NLA indicated its support for the list and for its continuation beyond the pandemic:

Our view is that it's been a really successful initiative. I think that there are some more lessons to be learnt by all of us about the ability of the court to channel their registrar resources to deal with matters from across the nation. I had a case in our office where, due to a COVID-related issue, a parent had not returned a child in accordance with orders. The application was filed on the Wednesday. It was before the registrar on the Friday and before a judge at 2 pm on the Monday, with the child returned, pursuant to those orders, on that Monday evening. That is a significant game changer in the family law system. We are incredibly supportive of these innovative approaches for the best use of the resources of the court to ensure that matters can be resolved efficiently and with good outcomes for children.¹⁴²

Supporting families to comply with parenting orders

8.112 A number of organisations raised the benefit of a preventative approach to the contravening of parenting orders. The Victoria Legal Aid noted that the Family Law Act currently allows the court to make orders requiring a family consultant to supervise compliance with a parenting order or an order requiring a family consultant to provide assistance to a parent to comply with a parenting order.¹⁴³ However, these orders are rarely made. The Victoria Legal Aid suggested there is significant benefit to families from greater use of these

¹⁴⁰ VLA, *Submission 120*, p. 15. See also, NLA, *Submission 589*, p. 15.

¹⁴¹ Information on the list and the criteria required to be established can be found on the Family Court of Australia website at: <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/covid/covid-list/national-covid-list> (accessed 31 July 2020).

¹⁴² Ms Kylie Beckhouse, Director, Family Law, Legal Aid New South Wales, NLA, *Proof Committee Hansard*, 27 May 2020, p. 39. See also the views of the Hon. Diana Bryant AO, QC, Board Member, AFCC, *Proof Committee Hansard*, 24 June 2020, p. 9.

¹⁴³ See *Family Law Act 1975*, s. 65L.

orders in the period following the making of final family law orders, but recognised the need for adequate resourcing for this to be effective.¹⁴⁴

8.113 The ALRC in its 2019 Report also identified that any approach to compliance must include, in the first instance, preventative measures which promote compliance and support parents to comply with parenting orders. As such, the ALRC recommended that the Family Law Act should be amended to require that:

- all parties (and their children if appropriate) involved in contested proceedings for final parenting orders must meet with a Family Consultant to have their orders explained to them;
- the court must consider whether the parties should be required to see a Family Consultant for the purposes of post-order case management, to assist them in implementing and complying with their orders; and
- the appointed Family Consultant be powered to seek that: the courts place the matter in a contravention list, or recommend the court make additional orders directing a party to attend a post-separation parenting program.¹⁴⁵

8.114 There are also programs available in the community for parents seeking additional support to parent after separation. The AGD advised that the Australian Government currently funds the Parenting Orders Program – Post Separation Cooperative Parenting Program, which helps separating families to manage matters about parenting arrangements and increase cooperation and communication, using child focused and child-inclusive interventions with the support of a case worker. This program offers education and support to parents where conflict is affecting their relationships with their children.¹⁴⁶ These programs are discussed further in Chapter 12.

8.115 The Association of Family and Conciliation Courts, Australian Chapter, noted that it is promoting the role of parenting coordinators, a new role in Australia:

It is a process by which, mostly but not only in complex cases, parties can, with a consent order, agree to have a parenting coordinator who will supervise their dispute, typically for one or two years after the orders are made, to assist them in making sure that the orders work after they've got them and also to help in giving the parties themselves the skills to enable them to continue to negotiate the issues which arise in parenting matters until the children are 18. With the AFCC, we are putting some effort into developing a training course for parenting coordinating matters. That is still in the early stages.¹⁴⁷

¹⁴⁴ VLA, *Submission 120*, p. 15. See also Women's Legal Service NSW, *Submission 702*, p. 17.

¹⁴⁵ See ALRC 2019 Report, pp. 340–343. Recommendations 38 and 39.

¹⁴⁶ AGD, *Submission 581*, p. 12.

¹⁴⁷ The Hon. Diana Bryant AO, QC, Board Member, AFCC, *Proof Committee Hansard*, 24 June 2020, p. 10.

Simplification of the contravention provisions in the Family Law Act

8.116 The Law Council expressed its support for the recommendations suggested by Professor Chisholm in 2018 for amendment to Division 13A of Part VII of the Family Law Act in relation to the contravention of parenting orders. The proposed amendments seek to simplify the current contravention regime which it is claimed is repetitious and difficult to follow.¹⁴⁸

8.117 The ALRC 2019 Report also recommended that Division 13A 'be redrafted to achieve simplification, and to provide for' the following:

- a power to order that a child spend additional time with a person;
- a power to order parties to attend relevant programs at any stage of proceedings; and
- a presumption that a costs order will be made against a person found to have contravened an order.¹⁴⁹

8.118 The Law Council stated that implementation of that recommendation alone would do much to improve the court process and benefit those families in the system.¹⁵⁰

Parenting Management Hearings

8.119 At present, families who are unable to reach agreement on parenting matters, for example, through alternative dispute resolution processes, have no option but to commence court proceedings to have the arrangements determined for them. As mentioned earlier in this chapter and throughout the report, the adversarial process involved in family law proceedings tends to promote unhealthy and potentially abusive interactions between parties.

8.120 As explained in Chapter 4, AGD raised the concept of a tribunal based model as an alternative way to deal with disputed parenting matters called Parenting Management Hearings (PMH):

The Government has previously introduced legislation to establish a new forum for resolving parenting matters outside of court, to be called 'Parenting Management Hearings'. Under the proposed legislation, parents would have been able to consent to having their parenting matter determined by a Parenting Management Hearing Panel made up of family law practitioners, family violence specialists, psychologists, and social workers. The Parenting Management Hearing Panel would have the power to make binding parenting decisions that would be enforceable in court. The intention was for the Parenting Management Hearings to be conducted in an inquisitorial rather than adversarial manner, with panel

¹⁴⁸ Law Council, *Submission 2.2*, p. 26, referencing Richard Chisholm, 'Compliance with Parenting Orders: A Modest Proposal to Re-draft Division 13A of Part VII' (2018) 27(2) *Australian Family Lawyer*, p. 6.

¹⁴⁹ ALRC 2019 Report, p. 21. Recommendation 42.

¹⁵⁰ Law Council, *Submission 2.2*, p. 27.

members actively managing the hearings and no legal representatives present. The proposed model for Parenting Management Hearings received limited support from stakeholders, being particularly opposed by the legal profession, and the legislation has since lapsed.¹⁵¹

8.121 The Law Council asserted that one of the potential issues with the PMH was that although the parenting aspect of a family law dispute would be heard in the tribunal style, financial matters would potentially still need to be heard in the court.¹⁵²

Children's contact services

8.122 The committee has heard concerns from both individuals and organisations about the lack of funding, availability and regulation of CCSs. The CCSs are independent services that enable children of separated parents to have contact with the non-residential parent in a supervised environment or that can facilitate the handover of children between parents without the parents having to meet in person. The key objective of CCSs is to:

... give children the opportunity to re-establish or maintain a relationship with both parents and other significant persons in their lives, while the key goal of CCSs is to help families using the service make the transition to self-managing their parenting time arrangements, when this is a possible and safe option for the family.¹⁵³

8.123 Families who use CCSs are often experiencing high levels of conflict and complex issues such as family violence, mental health problems and drug and alcohol abuse.¹⁵⁴ The majority of families who use CCSs have been referred through a court order.¹⁵⁵ The CCSs can be private or government funded. The 65 government-funded CCSs are required to comply with the AGD's *Children's Contact Service Guiding Principles Framework for Good Practice*.¹⁵⁶ Private CCSs are encouraged to follow these guidelines, however, there is no formal regulation or accreditation of these services.¹⁵⁷

¹⁵¹ AGD, *Submission 581*, p. 18. The proposed legislation was the Family Law Amendment (Parenting Management Hearings) Bill 2017. The bill was referred to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report.

¹⁵² Law Council, *Submission 2.2*, p. 31.

¹⁵³ Joanne Commerford and Cathryn Hunter, *Children's Contact Services: Key issues*, CFCA Paper No. 35, 2015.

¹⁵⁴ Joanne Commerford and Cathryn Hunter, *Children's Contact Services: Key issues*, CFCA Paper No. 35, 2015.

¹⁵⁵ Joanne Commerford and Cathryn Hunter, *Children's Contact Services: Key issues*, CFCA Paper No. 35, 2015.

¹⁵⁶ See AGD, *Children's Contact Service Guiding Principles Framework for Good Practice*, p. 3.

¹⁵⁷ Joanne Commerford and Cathryn Hunter, *Children's Contact Services: Key issues*, CFCA Paper No. 35, 2015.

8.124 The committee heard from a number of individuals about the substantial wait times to get access to CCSs. For example, one submitter advised that:

In South Australia (where I am from and have worked in family law), it is then absolutely typical for there to be a 5-6 month wait to access a children's contact service for supervised visits (private supervision services are almost non-existent and family member supervisors are often not suitable or agreed).¹⁵⁸

8.125 One father advised that these wait times were used by an ex-partner to prolong non-contact as they were permitted by the court to choose the CCS with the longest wait times:

... the Children's Contact Service at Logan which had a wait list of around 2-3 months in comparison [sic] to the Eight Mile Plains Supervised Contact Centre which had a wait list of 6+ months.¹⁵⁹

8.126 One mother described to the committee a number of issues that she experienced with her private contact centre:

The issues that I encountered were that the owners of the centre had assisted another party in breaching a DVO. I wasn't notified of the intent of the respondent by the centre ... These people stalked me on my Facebook. They filed affidavits to the court of contacts they had screenshotted after I posted a GoFundMe campaign to seek help with paying my legal fees, which my lawyer had approved before I posted it. There were a number of issues. The most concerning one, I found, was that one of the centre owners had presented in front of the ... Court in 2015, where they pleaded guilty to a fraud charge.

... When he would bring the kids back he was told to wait there for the 10 minutes ... But they would release him at the same time that I was grabbing the kids from the door.

I recorded him filming me at the centre. He had a camera out and he was deliberately trying to provoke an argument with me one day. The centre directors didn't pull him up on it even though it's in their policy that he's not allowed to do that.¹⁶⁰

8.127 This submitter called for the regulation of these CCSs noting that, as these private centres are completely unregulated, when you have issues, unless you can resolve these with the owner, there is no one to go to for assistance.

8.128 The need for regulation of private services was repeated by other submitters. For example, one submitter identified that:

... this is the big part of the supervised visits: they are not regulated. I have rung everyone-the Attorney-General; I have gone up the list- and no-one wants to listen because they are a private entity. So there is no-one to complain to.

¹⁵⁸ Confidential, *Submission 889*.

¹⁵⁹ Confidential, *Submission 77*.

¹⁶⁰ In camera Hansard, 12 March 2020.

... The supervised service needs to be regulated under the government. They need to have their standards. I should be able to go [to] the ombudsman and complain.¹⁶¹

8.129 This submitter also noted that the private CCSs are expensive and expressed her view that as her ex-partner pays for the service, 'all the control is on him.'¹⁶²

8.130 Another individual submitter recommended that:

... additional resources should be placed into providing resolutions to family dispute such as more Children's Contact Services - for assessment and support of relationships between children and their parents and the provision of safety for women and children.¹⁶³

8.131 The concerns raised by individual submitters are also reflected by organisations. For example, AWAVA referred to Domestic Violence Victoria's submission to the ALRC's recent family law review in which Domestic Violence Victoria:

... raises concerns in relations to the quality, accessibility and availability of contact centres for supervised contact. In their submission they state that their clients 'experience prolonged waiting times for contact services of five months or more, and that the expense of private contact centres make them inaccessible.' This may result in further risks for the safety of mothers and children when they have to arrange contact with fathers outside of contact services, especially when they have parenting orders requiring that contact.¹⁶⁴

8.132 A specific example of wait times for CCSs was provided by Conciliate SA:

For supervised contact, Relationships Australia CCS at Campbelltown and Hindmarsh has a wait time of 12 weeks, and Elizabeth has a wait list of 4-5 months following intake and receipt of forms for both parties. For changeovers, at Campbelltown, Hindmarsh & Elizabeth, there is a 4-6 week wait time on top of the 3-4 week processing and intake time.¹⁶⁵

8.133 Similarly, Ms Patricia Ocelli, Chief Executive Officer, Interrelate Limited, advised the committee that for the six CCSs that Interrelate run, the average wait times is approximately six months, with an average of about 30 families on waitlists at each centre.¹⁶⁶ She further expressed concern about the limited funding provided:

The children's contact services is a very small funding bucket. To give you a sense of what it funds, it would fund about one day of contact on a

¹⁶¹ In camera Hansard, 10 March 2020.

¹⁶² In camera Hansard, 10 March 2020.

¹⁶³ Confidential, *Submission 984*.

¹⁶⁴ AWAVA, *Submission 716*, p. 45.

¹⁶⁵ Conciliate SA, *Submission 874*, p. 5.

¹⁶⁶ Ms Patricia Ocelli, Chief Executive Officer, Interrelate Limited, *Proof Committee Hansard*, 13 March 2020, p. 72.

Saturday for a number of families, so we're able to deliver a Saturday service; we can't afford to deliver any Sunday services. For parents who work during the week, the only option we can offer them is a Saturday service, and the maximum we would be delivering would be one or two afternoons a week of a couple of hours. That's the maximum that that funding buys. And they're very intensive in terms of services because you need to have sites—you need to have a location for that to happen—and you need to have high security arrangements, so they're very costly to set up.¹⁶⁷

8.134 Relationships Australia advised that government-funded CCSs are underfunded and are unable to meet current demand, either in terms of existing locations or in emerging locations with a need for a CCS.¹⁶⁸ They suggested that this prevents these CCSs from 'realising their full potential as enablers of healthy and resilient parenting'.¹⁶⁹ Relationships Australia stated that:

CCSs could provide greater value by assisting families to build capacity, rather than acting narrowly as monitors or supervisors of contact. For example, CCSs could – with adequate funding – be re-positioned to offer more interactive opportunities for parents to learn and enhance parenting skills, as well as offering warm referrals to other specialist services. There are already CCSs that seek to do this, and have had success in moving families from 'high vigilance needs' to 'low vigilance needs' through, for example, facilitating Supportive Parenting Groups.¹⁷⁰

8.135 Relationships Australia acknowledged that such a shift would involve considerable expenditure but observed that:

... the current pattern of spending money on short-term supports for fragile families in crisis only guarantees an ongoing need for recurrent spend into the next generation. It does not enable the community to reap the benefits of healthy families (separated or intact) or enjoy the downstream savings delivered by lower expenditure on health and intergenerational social welfare dependency.¹⁷¹

8.136 Relationships Australia also expressed concern about the lack of regulation of privately run CCSs:

Regardless of whether a facility is government or privately funded, all facilities operating as a CCS must be required to meet certain regulatory standards, to safeguard children. We are deeply concerned by waiting times for CCS appointments, which can exacerbate the difficulties of already fragile and vulnerable families. We know that these waiting lists

¹⁶⁷ Ms Patricia Occelli, Chief Executive Officer, Interrelate Limited, *Proof Committee Hansard*, 13 March 2020, p. 75.

¹⁶⁸ Relationships Australia, *Submission 606*, p. 57.

¹⁶⁹ Relationships Australia, *Submission 606*, p. 57.

¹⁷⁰ Relationships Australia, *Submission 606*, p. 57.

¹⁷¹ Relationships Australia, *Submission 606*, p. 58.

have led to the establishment of private facilities offering these services. Such facilities are under no obligation to comply with good practice or safety requirements. Relationships Australia strongly supports the imposition of high – and uniform – standards for CCSs, which serve some of Australia's most fragile and complex families. Children's Contact Services should be subject to an accreditation process, which would include a requirement that all staff:

- hold valid Working with Children Checks,
- hold qualifications such as a Certificate IV in Community Services or a Diploma of Community Services, and
- be equipped to provide referrals to other specialist services. These would include, for example, services offering coaching in relationship enhancement between parent and child, and training to manage co-parenting and parallel parenting.¹⁷²

8.137 The Australian Children's Contact Services Association (ACCSA) also suggested that a national CCS accreditation system for all CCSs is required, noting that there are currently no requirements whatsoever to operate a private or full fee paying service in Australia.¹⁷³ The ACCSA expressed concern that '[t]his total lack of oversight is having negative effects on vulnerable children and family members who are accessing some of these services'.¹⁷⁴

8.138 Mr Iain Anderson, Deputy Secretary, AGD advised the committee that CCSs is 'one area that does need to be looked at carefully', noting that there is a real question as to whether private sector centres should be regulated in some way.¹⁷⁵ He advised that this issue was being considered as part of the Government's potential response to the ALRC 2019 Report.

8.139 In that report, the ALRC recommended that the Family Law Act be amended to require any organisation offering a CCS to be accredited and that a criminal offence of providing a CCS without accreditation be created, to ensure public confidence in the ability of all CCSs to provide safe and high quality services.¹⁷⁶ The ALRC suggested that AGD may be the appropriate body to manage the accreditation of CCSs and noted that an appropriate body would also need to be identified for handing complaints relating to accredited CCSs.¹⁷⁷ The ALRC suggested that DSS or ACCSA could manage complaints for private CCSs.¹⁷⁸

¹⁷² Relationships Australia, *Submission 606*, pp. 110–111.

¹⁷³ Australian Children's Contact Services Association (ACCSA), *Submission 593*, p. 3.

¹⁷⁴ ACCSA, *Submission 593*, p. 3. See also, Women's Legal Service NSW, *Submission 702*, p. 6; Women's Legal Service Victoria, *Submission 701*, pp. 25–26.

¹⁷⁵ Mr Iain Anderson, Deputy Secretary, Legal Services and Families Group, AGD, *Proof Committee Hansard*, 14 February 2020, p. 15.

¹⁷⁶ ALRC 2019 Report, p. 419.

¹⁷⁷ ALRC 2019 Report, p. 419.

¹⁷⁸ ALRC 2019 Report, pp. 416–418. Recommendation 54.

Grandparents

8.140 The issues impacting grandparents in the family law system were raised by a smaller number of submitters to the committee, but these submissions raised a number of important and diverse issues. The committee heard from a range of organisations, as well as from grandparents who were primary carers for their grandchildren, grandparents explaining the impact of the family law system on their grandchildren and grandparents who had not seen their grandchildren in a considerable period of time.

Grandparent carers

8.141 One submitter, a former grandparent-carer, informed the committee about the difficulties faced when grandparents end up caring for children:

In our situation, we raised our grandson from the age of nine years with no financial support from either parent, and then he was taken away from us. Yet we have no rights, really, in relation to that child. We had to fight for the right to now see the child we raised for nine years every third weekend. We don't get to see him at Christmas. We don't get to see him on birthdays.¹⁷⁹

8.142 This submitter informed the committee that the grandchild 'didn't go to school for two years' after being placed with their father, which the grandparent described as 'another fault that needs to be identified'.¹⁸⁰ There were further issues of non-compliance with court orders by the care-giving parent:

Part of the court orders in our situation was that the father was supposed to report all medical and all educational requirements back to us, which he never did. And when we pursued it, back through our solicitor, one case in the past three years has come forward where information was given.¹⁸¹

8.143 Another grandparent carer spoke about a lack of support and guidance for people in this role:

We felt that there was a lack of support and guidance from the court system, particularly in respect to our situation. My husband and I had never been in trouble with the law ever before, and we were made to feel like we were guilty people and were having to prove ourselves over and over again in respect to being responsible caregivers for our granddaughter.¹⁸²

8.144 The submitter further described to the committee the financial difficulty of being in this situation in their mid-fifties:

... we were becoming full-time carers for a one-year-old child. Our whole financial system changed almost overnight because we were then raising

¹⁷⁹ In camera Hansard, 10 March 2020.

¹⁸⁰ In camera Hansard, 10 March 2020.

¹⁸¹ In camera Hansard, 10 March 2020.

¹⁸² In camera Hansard, 20 May 2020.

another child. So any plans that we had for retirement were then having to be put on hold because we were taking a whole different avenue.¹⁸³

8.145 This grandparent suggested there should be more support persons to assist people who are navigating the family law system, including grandparents:

I think that there should be support for people who are entering into the court system in any arrangement, whether they're grandparents, parents or anything else.¹⁸⁴

8.146 These experiences were similar to those identified by Lone Fathers in their submission, in which they advised the committee that they:

... firmly believe that often grandparents are a significant contributor to the resolution process and unfortunately are too often ignored and we have reports that they are often banned from proceedings. Often Grandparents have been the primary or the joint carers. They have great potential to offer supervisory role until parents develop a post separation parenting skill and agreement. They are often overlooked. Many grandparents report that they are treated disrespectfully by the Family Law Professionals.¹⁸⁵

Current legislation

8.147 The Family Law Act currently recognises the importance of grandparents in the lives of their grandchildren through a number of provisions.¹⁸⁶ For example, 'grandparents are included as a category of person with whom, as a general principle, children have the right to spend time, and communicate on a regular basis'.¹⁸⁷ When determining the best interests of a child, the court must consider the nature of the child's relationships with other persons, including grandparents, and the likely effect of separation from other persons, such as grandparents, with whom they have been living.¹⁸⁸ The Family Law Act also provides standing for grandparents to apply for parenting orders.¹⁸⁹

8.148 The Australian Bar Association proffered that it is difficult to conceive of what further, if anything could be done in the legislation to provide for grandparents.¹⁹⁰ This position is supported by the AFCC, who advised that it:

¹⁸³ In camera Hansard, 20 May 2020.

¹⁸⁴ In camera Hansard, 20 May 2020.

¹⁸⁵ Lone Fathers, *Submission 112*, p. 11.

¹⁸⁶ See, for example, *Family Law Act 1975*, s. 13C, s. 63C, s. 64B, s. 65G, s. 66F, s. 67K, s. 67T and s. 69C.

¹⁸⁷ Law Council, *Submission 2.2*, p. 88. See also *Family Law Act 1975*, para. 60B(2)(b).

¹⁸⁸ See, *Family Law Act 1975*, subparagraph 60CC(3)(b)(ii) and subparagraph 60CC(3)(d)(ii).

¹⁸⁹ See, *Family Law Act 1975*, paragraph 65C(ba).

¹⁹⁰ See, Australian Bar Association, *Submission 87*, pp. 13–14.

... 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.¹⁹¹

8.149 However, the Law Council noted the support of one of its constituent bodies, the Law Society of New South Wales (NSW), for recommendation of the 2019 ALRC report—that the factors to be taken into account when determining the best interests of a child should be simplified so that they refer more generally to the child's 'carers', including grandparents.¹⁹²

8.150 This was a position also advocated for by Relationship Matters in their submission to the committee:

It is important for children to maintain extended family relationships, particularly with grandparents, as in times of family crisis it is often the grandparents who can support their adult children, and meet the safety and development needs of their grandchildren. Strong community and extended family connections are, in our experience, important protective factors for children and parents when their immediate family is in crisis or is fracturing. The Family Law System needs to recognise a family in the broadest sense, when considering the best interests of the child.¹⁹³

8.151 The Law Society of NSW and Victoria Legal Aid also welcomed the ALRC 2019 Report recommendation that the Family Law Act provide a definition of 'member of the family' that is inclusive of any Aboriginal or Torres Strait Islander concept of family, including grandparents.¹⁹⁴

8.152 Lone Fathers went further in their submission making a specific recommendation about grandparents:

The Family Court and [Federal Circuit Court] should give more weight to Affidavits and evidence from Grandparents. If the grandparents have a significant role with the grandchild/children, they should be actively encouraged to participate in the solution and parenting plan.¹⁹⁵

¹⁹¹ AFCC, *Submission 99*, p. 12.

¹⁹² Law Council, *Submission 2.2*, p. 88.

¹⁹³ Relationship Matters, *Submission 224*, p. 5.

¹⁹⁴ Law Council, *Submission 2.2*, p. 89; VLA, *Submission 120*, pp. 28–29.

¹⁹⁵ Lone Fathers, *Submission 112*, pp. 11–12.

Chapter 9

Property matters

- 9.1 While the majority of matters raised with the committee have focused on the arrangements for children when parties separate, the committee has also heard many stories regarding problems with property settlements. Some of these issues have been highlighted in Chapter 3, and Chapter 5 contains an in-depth discussion on the evidence provided to the committee regarding the disparity between the legal costs incurred and the property pool in a number of cases. This chapter will review the evidence provided to the committee more generally concerning the resolution of property disputes, including:
- the difficulties in obtaining disclosure of financial interests;
 - how family violence is considered in property matters;
 - the relevance of the care arrangements of the children;
 - the lack of legal assistance for property matters;
 - the complexity of the current legislation around property settlement; and
 - online dispute resolution tools.
- 9.2 This chapter will also consider the evidence provided to the committee regarding binding financial agreements, current initiatives in family law property matters and recommendations from recent reports.

Property settlement

- 9.3 The *Family Law Act 1975* (Family Law Act) confers on the Family Court of Australia (Family Court) the ability to declare the title or rights that a party has in respect to property and power to alter the interests of a party to a marriage or a de facto relationship in the property.¹ In the 2018 High Court case of *The Commissioner of Taxation v Tomarus*, Justice Gordon provided the following summary of the property settlement provisions in relation to parties to a marriage in the Family Law Act:

In property settlement proceedings, s 79 in Pt VIII provides that a court may make such order as it considers appropriate altering the interests of the parties to the marriage in the property. However, the court must not make an order under s 79 unless it is satisfied that in all the circumstances it is just and equitable to make the order and, in considering what order (if any) should be made in property settlement proceedings, the court must take into account certain matters. Those matters include the financial and non-financial contributions, both direct and indirect, by the parties to the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage; the effect of any proposed order on the earning capacity of either party to the marriage; any other order made

¹ See *Family Law Act 1975*, s. 78, s. 79, s. 90SL and s. 90SM.

under the Family Law Act affecting a party to the marriage; and the matters referred to in s 75(2), so far as they are relevant.²

- 9.4 The term 'property' is interpreted broadly to include all the property of the parties, including both legal and equitable interests, and tangible property, as well as intangible property such as shares.³ With regards to superannuation, Part VIIIIB of the Family Law Act specifically allows for certain payments in respect of a superannuation interest to be allocated between the parties to a marriage or de facto relationship.⁴
- 9.5 As with the case of parenting orders, the majority of separating couples (around 60 per cent) agree to a property settlement without the use of mediation, lawyers or the courts. Of the remainder, approximately 29 per cent used a lawyer, 7 per cent of matters went to court and 4 per cent used mediation.⁵
- 9.6 The 2019 Australian Law Reform Commission (ALRC) report, *Family Law for the Future—An Inquiry into the Family Law System* (ALRC 2019 Report) notes that, on average, mothers receive 57 per cent of the property pool:

However, there was significant variation among couples, with analysis showing the variables affecting the share of property received being:

- the size of the asset pool;
- who initiated the separation, and who left the house—with the person who initiated the separation receiving a smaller share of the property;
- a history of family violence—with experiencing family violence being associated with receiving a lower share of property division; and
- care-time arrangements—with parents who had majority care of a child receiving a higher share of the property pool.⁶

Financial disclosure

Non-compliance with mandatory disclosure requirement

- 9.7 The committee heard significant evidence about the difficulties in ensuring one party to the proceedings complies with their legal requirement to make full and frank disclosure of their financial holdings and the consequent delays this

² *Commissioner of Taxation v Tomaras* (2018) 362 ALR 235, [57] (citations omitted). Subsection 75(2) relates to matters to be taken into consideration in relation to spousal maintenance.

³ *Re Duff* (1977) 15 ALR 476, pp. 483–485.

⁴ See Family Law Act, s. 90XA.

⁵ Lixia Qu et al, *Post-separation parenting, property and relationship dynamics after five years*, 2014, p. 98.

⁶ Australian Law Reform Commission (ALRC), *Family Law for the Future — An Inquiry into the Family Law System*, ALRC Report 135, 2019, March 2019, p. 201 (ALRC 2019 Report), citing Lixia Qu et al, *Post-separation parenting, property and relationship dynamics after five years*, 2014, p. 104.

can cause in finalising a property settlement.⁷ For example, Mrs Susan Price, Director of the Men's Rights Agency, stated:

There's a fair amount of procrastination that takes place and an unwillingness to get valuations or to disclose various bank accounts, shares and all the rest of it, and it can be a difficult process to get everything together into the one bucket to say, 'Well, this is the family pool.' This needs to be speeded up. There's no reason for a delay on it, absolutely no reason. If people are being honest and straightforward then the information is given out and the decisions can be made as to where the split develops.⁸

9.8 Similarly, Victoria Legal Aid noted that 'identifying the value of the asset pool represents a significant hurdle in many family law property disputes' and that failure to make proper disclosure often occurs in property disputes.⁹

9.9 As the Lone Fathers Association of Australia (Lone Fathers) recognised, '[t]he intricate nature of finances within families and such things as family home loans and potential for default require some urgency in finalisation and property settlement is problematic'.¹⁰

9.10 The committee heard that non-compliance with mandatory financial disclosure is a prevalent issue in cases involving family violence. For example, the Association of Family and Conciliation Courts, Australian Chapter (AFCC) 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 behaviour in circumstances where family violence is a feature of the matter can be even greater.¹¹

9.11 In the final report by the Women's Legal Service Victoria, *Small Claims, Large Battles*, it was found that over two-thirds of clients who received legal assistance through this project from 2017–18 experienced delay caused by difficulties obtaining full financial disclosure from their former partner.¹² This

⁷ Federal Circuit Court Rules 2001, paragraph 24.03(1)(a); Family Law Rules 2004, paragraph 13.04.

⁸ Mrs Susan Price, Director, Men's Rights Agency, *Proof Committee Hansard*, 12 March 2020, p. 7.

⁹ Victoria Legal Aid (VLA), *Submission 120*, p. 14.

¹⁰ Lone Fathers Association of Australia (Lone Fathers), *Submission 112*, p. 9.

¹¹ Association of Family and Conciliation Courts, Australian Chapter (AFCC), *Submission 99*, p. 9.

¹² Women's Legal Service Victoria (WLSV), *Small Claims, Large Battles: Achieving economic equality in the family law system*, March 2018.

resulted in many clients being forced to initiate court proceedings where they otherwise might have negotiated a property settlement:

The report findings also demonstrated that there were few effective disincentives for perpetrators refusing to comply with mandatory financial disclosure. Alternative information finding processes, such as issuing subpoenas, were too costly and did not guarantee a return of the required information. The report recommended strengthening mandatory disclosure, through more intensive case management, greater use of registrar powers, or by permitting courts to obtain information about parties' assets from sources such as the Australian Taxation Office (ATO).¹³

9.12 The AFCC advised the committee that they 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.¹⁴

Current powers under the Family Law Act

9.13 There are a number of existing actions available under the Family Law Act and the Family Law Rules 2004 [Family Law Rules] to deal with the issue of non-compliance with the requirement for financial disclosure. For example:

... there are examples of orders that have been made where it's almost like a default hearing takes place: if somebody does not comply with directions about providing full and frank financial disclosure, the judge can determine the matter without further reference to them.¹⁵

9.14 Similarly, the Law Council of Australia (Law Council) noted that '[u]ltimately, if there is non-disclosure at the point of the hearing then the fact of that non-disclosure can weigh heavily against the non-disclosing party'.¹⁶

9.15 The courts also have the power to impose punishment for contempt of court, or to take the non-disclosure into account when considering costs.¹⁷

9.16 While these powers exist at the point of hearing, a number of commentators have called for the mandatory financial disclosure requirement to be strengthened to ensure that all parties have the relevant information necessary to resolve claims efficiently and fairly. The Women's Legal Service Victoria suggested that consideration be given to:

¹³ WLSV, *Submission 701*, p. 16.

¹⁴ AFCC, *Submission 99*, p. 9.

¹⁵ Ms Deborah Awyzio, Chair, Family and Domestic Violence Committee, Queensland Law Society (QLS), *Proof Committee Hansard*, 10 March 2020, p. 25.

¹⁶ Law Council of Australia (Law Council), *Submission 2.2*, p. 25. The Law Council also quoted from *Weir v Weir* (1993) FLC 92-338.

¹⁷ ALRC 2019 Report, p. 277.

- broadening the role of registrars to increase interim case oversight to check compliance with disclosure and encourage greater use of registrar powers to make orders for disclosure;
- encouraging banks and government agencies, such as land titles offices, to reduce fees associated with processing family law subpoenas or title searches consistent with existing fee reduction regimes in the family law courts;
- providing a mechanism for family law courts to be provided with information by the Australian Taxation Office for the purposes of determining if full financial disclosure is being made;
- amending the Family Law Act to enable courts to order forfeiture of assets by one party and redistribution to the other for failure to comply with financial disclosure obligations;
- amending the Family Law Act to encourage greater exercise of courts' discretion to make adverse adjustments to property divisions for parties who do not make full and frank disclosure.¹⁸

9.17 At present the requirement for full and frank disclosure of a party's financial circumstances is contained in the Family Law Rules. A number of commentators support locating these disclosure duties in the Family Law Act. For example, Relationships Australia suggested that:

The *Family Law Act 1975* (Cth) should set out the duties of parties involved in family dispute resolution or court proceedings for property and financial matters to provide early, full and continuing disclosure of all information relevant to the case. It is our experience (and we note that is the experience of various other submitters to the ALRC inquiry) that non-disclosure, or tactical protracted non-disclosure, are associated with financial abuse and misuse of systems and processes. Relationships Australia further supports locating disclosure duties in the Act, as suggested by other submitters to the ALRC inquiry.¹⁹

9.18 The disclosure duties and remedies for non-compliance only apply and are enforceable where the matter is before the court. Where parties are looking to settle matters by agreement or through mediation, there is no obligation to state the assets each party holds. Better Place Australia stated that:

This can create a power imbalance where the nonfinancial party may not have any understanding about the overall financial situation, but the financial party does, and uses their knowledge to manipulate evidence about the true financial situation.²⁰

¹⁸ WLSV, *Submission 701*, pp. 16–17.

¹⁹ Relationships Australia, *Submission 606*, p. 49.

²⁰ Better Place Australia, *Submission 229*, p. 14.

9.19 As such, Better Place Australia proposed a property/financial disclosure requirement, such as a financial statement, be applied at the Family Dispute Resolution stage.²¹

9.20 Victoria Legal Aid also noted that their Family Dispute Resolution Service sees a lack of financial disclosure prior to mediation, which pushes parties to litigation where otherwise they may have been able to resolve the dispute without court proceedings.²² Victoria Legal Aid noted that:

While the court has the ability to deal with parties who fail to properly disclose, such as dismissing a non-compliant party's application or making costs orders at the conclusion of the matter, this is not helpful for parties who are unable to progress to final hearing, especially in small property disputes where finances are constrained.²³

9.21 The location and extent of the financial disclosure obligation was also considered in the ALRC 2019 Report:

Consistent with the principles that the law should be clear, coherent and enforceable, and drafted in manner that is accessible to the parties, the ALRC recommends that the disclosure obligations, and the consequences for breach of those obligations, should be set out transparently and accessibly in the Family Law Act. The provisions should make it clear that the obligations apply to FDR, arbitration and other facilitative dispute resolution processes, as well as court proceedings. They should also set out the corresponding duty of legal practitioners or family dispute resolution practitioners to advise parties of their duties.²⁴

9.22 The ALRC also recommended that the Family Law Act include express reference to the costs consequences for failure to disclose and to reflect that non-disclosure of financial information may be taken into account in apportioning the property pool.²⁵

Current reforms

9.23 Support was expressed for the Australian Government's measure aimed at improving the visibility of superannuation assets in family law proceedings. This measure provides \$3.3 million over three years to the ATO to develop an electronic information sharing mechanism with the family courts to allow the superannuation assets held by parties to family law proceedings to be

²¹ See Better Place Australia, *Submission 229*, p. 14. Family dispute resolution is discussed in detail in Chapter 12 of this report.

²² VLA, *Submission 120*, p. 7.

²³ VLA, *Submission 120*, p. 7.

²⁴ ALRC 2019 Report, pp. 276–277.

²⁵ ALRC 2019 Report, pp. 277–278.

identified swiftly, more accurately and at a lower cost to parties.²⁶ For example, the National Foundation of Australian Women stated:

We are aware that a party to a property settlement may fail to disclose substantial superannuation assets, and it can be difficult for the other party to obtain access to that information. To this extent we welcome the announcement in the 2018 Women's Economic Security Package that the Family Court will be allowed to request information from the Australian Tax Office to facilitate the full disclosure of superannuation holdings in proceedings before the Court.²⁷

9.24 Some commentators have suggested that, once established, it should be expanded to include all financial information held by the ATO. For example, Mallee Family Care suggested that:

Once the aforementioned information sharing scheme is established ... it should be extended to cover all other financial information within the ambit of the ATO that may be of relevance in these matters.²⁸

9.25 The ALRC also recommended that 'the costs consequences for failure to disclose be referred to expressly in the legislation'.²⁹

Family violence

9.26 As discussed in Chapter 7, the provisions dealing with the alteration of property interests between parties do not specifically refer to family violence as being a relevant consideration. However, due to the case of *Marriage of Kennon*, family violence will be taken into account in property proceedings where a party can establish that the family violence occurred and that the family violence made that party's contributions more onerous.³⁰ As the Law Council noted, '[m]any consider this too high a hurdle to overcome, but that is the state of the law'.³¹

9.27 Many submitters suggested that there needs to be better recognition of family violence in property matters, for example, as a specific requirement when assessing a party's future earning capacity.³² The Women's Legal Service Victoria highlighted research by the Australian Institute of Family Studies which has demonstrated that family violence has a negative impact on property settlement outcomes, noting that '[i]n one study, women who

²⁶ Attorney-General's Department (AGD), *Submission 581*, Attachment 1.

²⁷ National Foundation for Australian Women, *Submission 118*, p. 7.

²⁸ Mallee Family Care, *Submission 712*, p. 10. See also WLSV, *Submission 701*, pp. 16–17.

²⁹ ALRC 2019 Report, p. 278.

³⁰ *Marriage of Kennon* [1997] FamCA 27.

³¹ Law Council, *Submission 2.2*, p. 16.

³² See, for example, Domestic Violence NSW, *Submission 711*, p. 14; In Touch, *Submission 598*, p. 17.

reported experiencing severe abuse were approximately three times more likely to receive less than 40 per cent of the property pool'.³³

9.28 The ALRC agreed, stating:

The economic impact of family violence is not adequately addressed under the Family Law Act. Empirical evidence indicates less favourable property outcomes for parties who have experienced family violence and infrequent adjustments for family violence under the *Kennon* principle.

In light of this, the ALRC recommends that the Family Law Act be amended to acknowledge the relevance of family violence to the economic circumstances of the party who has suffered violence.³⁴

9.29 The ALRC therefore recommended that the Family Law Act be amended to include a statutory tort of family violence that would provide remedies consistent with existing common law remedies.³⁵

9.30 The Law Council set out the pros and cons of this recommendation in its submission, concluding it was:

... concerned that adopting a statutory tort pathway will not achieve the stated goal of the reform, in that it will be more costly for litigants, increase the time that hearings take and thus further impact judicial resources, and not adequately address the financial consequences of family violence.³⁶

9.31 Instead, the Law Council proposed:

... that the matter is best addressed by a legislative amendment to what is presently subsection 75(2) and subsection 90SF(3) by the insertion of an additional factor namely 'the effect of family violence on a party to [the marriage/the relationship] or a child [of the marriage/the relationship/the household]'. By including the amendment in subsection 75(2) and subsection 90SF(3) it applies in respect of both property and maintenance cases, it is not a contributions factor, and there will not be an additional requirement in the statute that requires a causal link between a contribution being made more arduous and the conduct in question.³⁷

9.32 Unlike the Notices of Risk required to be filed in parenting proceedings, there is currently no formal system to identify family violence in property only disputes.³⁸ In Touch Multicultural Centre Against Family Violence therefore recommended that:

... [a] risk assessment framework should be developed and systematically employed to identify family violence in all applications before courts

³³ WLSV, *Submission 701*, p. 20.

³⁴ ALRC 2019 Report, p. 240.

³⁵ ALRC 2019 Report, p. 4. Recommendation 19.

³⁶ Law Council, *Submission 2.2*, p. 17.

³⁷ Law Council, *Submission 2.2*, p. 17.

³⁸ See, In Touch Multicultural Centre Against Family Violence, *Submission 598*, p. 6.

exercising jurisdiction under the Family Law Act, which includes parenting, property only, divorce and other applications.³⁹

Children

9.33 In considering what order a court should make in relation to a property settlement, the court is required to take into account the following considerations to which the ongoing care of the children may be relevant:

- (a) the financial contribution made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them, or otherwise in relation to any of that last-mentioned property, whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the marriage or either of them; and
- (b) the contribution (other than a financial contribution) made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them, or otherwise in relation to any of that last-mentioned property, whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the marriage or either of them; and
- (c) the contribution made by a party to the marriage to the welfare of the family constituted by the parties to the marriage and any children of the marriage, including any contribution made in the capacity of homemaker or parent; and
- (d) the effect of any proposed order upon the earning capacity of either party to the marriage; and
- (e) the matters referred to in subsection 75(2) so far as they are relevant; and
- (f) any other order made under this Act affecting a party to the marriage or a child of the marriage; and
- (g) any child support under the *Child Support (Assessment) Act 1989* that a party to the marriage has provided, is to provide, or might be liable to provide in the future, for a child of the marriage.⁴⁰

9.34 The committee heard from a number of submitters that this intersection between parenting orders, child support and the division of property often meant that the parenting arrangement was used as a tool in the property proceedings to maximise one's settlement:

... what happens now is that, with regard to custody of the children, if one parent has custody, which is normally the mother, there is a much higher financial windfall for that particular parent. For example, a rough rule of

³⁹ In Touch Multicultural Centre Against Family Violence, *Submission 598*, p. 6.

⁴⁰ See *Family Law Act 1975*, ss. 79(4).

thumb is that in a property settlement each child is worth about 10 per cent. You start with 50 per cent and each child is worth 10 per cent, so if you have three children in custody you end up with 80 per cent of the assets of the property and the superannuation. So that's an incentive to try and win custody for that particular parent. That's the cause of all of our problems—the financial implications after the divorce or separation.⁴¹

9.35 The committee was advised that this has led to one party seeking greater time with their children to either maximise or minimise (depending on the party) both the amount of the property settlement and the child support payable. Both mothers and fathers have been alleged to have sought additional time with their children solely for the reason of maximising their individual property settlement and influencing the amount of child support to be paid.

9.36 For example, one grandmother stated with regard to her son's property matter:

... she also tried to change the parenting, which at that stage was fifty – fifty. She was trying to change it so that he only got to see the children three days each fortnight.⁴²

I'm convinced that, once this is all sorted and she's got as much as she can possibly get, the children are going to hamper her; they're not going to be as needed anymore. At the moment, they're used as a tool to try and manipulate and get more.⁴³

9.37 The Feminist Legal Clinic also noted that:

Too often parenting claims are being made by fathers with the purpose of reducing liability for child support and gaining an advantage in respect to the division of property. This nexus between contact with children and financial matters must be broken to enable women to escape mercenary and abusive men.⁴⁴

9.38 Many submitters stated that requests for access to their child were responded to by financial demands:

Every letter that I sent to her solicitor about visitation was met with financial demands. I proposed a sum of \$30,000 if we could settle before court. The other party waiting until when both legal representatives met in the foyers before court to agree after I had already paid the substantial fees for a barrister.⁴⁵

9.39 A number of submitters and witnesses recommended that, to address this issue, the parenting arrangements should be finally determined in advance of

⁴¹ Mr John Flanagan, Deputy Registered Officer, Non-Custodial Parents Party (Equal Parenting), *Proof Committee Hansard*, 13 March 2020, p. 16.

⁴² In camera Hansard, 3 June 2020.

⁴³ In camera Hansard, 3 June 2020.

⁴⁴ Feminist Legal Clinic Inc, *Submission 234*, p. 6.

⁴⁵ Confidential *Submission 152*.

the property to minimise these issues. One submitter suggested that this 'should happen in every single case. Children should be sorted first, before there is any mention of money'.⁴⁶

9.40 Similarly, another witness informed the committee that:

... it felt that, in some ways, with one being dependent on the other – that is, you couldn't finalise property until you resolved parenting, and you needed to understand the care percentages before you could finalise property – the ability to resolve parenting and have access to the children settled was delayed. So I would be strongly for a position where you just resolved the parenting as quickly as possible so that you can continue to maintain a relationship with your children and have a meaningful relationship with your children. My preference would be to resolve parenting first and then resolve property.⁴⁷

9.41 Lone Fathers noted that:

Too often property is settled before the children matters are finalised. This is not ideal. We are aware of a parent losing the family home superannuation and cash assets and then having to bring up the children with little or no financial assistance from the other parent who was given 80 percent of the pool. We are aware of a father who lost his work tools, work vehicle and left unemployed. The children ended up back in care with this father without recourse to having assets redistributed.⁴⁸

9.42 In a specific example, one father advised the committee that he had finalised the financial agreement prior to the parenting agreement and now he has not seen his children for over seven years. He submitted the following recommendation for reform:

I would recommend the family law system mandate that a binding child-support agreement cannot be lodged with the Family Court- cannot be lodged- unless accompanied by a binding parenting agreement. As I said in my submission, all the financial stuff was worked out, and was very generous, according to my family lawyer, the financial agreement, but there was no parenting agreement. Once the financial stuff was done, the parenting stuff just disappeared, and it wasn't on the front burner at all, to be honest, throughout the process.⁴⁹

Lack of legal assistance

9.43 The issue of lack of legal assistance has been raised with the committee in various contexts, including with regard to for property proceedings. Australia's National Research Organisation for Women's Safety submitted that there:

⁴⁶ In camera Hansard, 3 June 2020.

⁴⁷ In camera Hansard, 3 June 2020.

⁴⁸ Lone Fathers Association of Australia, *Submission 112*, p. 9.

⁴⁹ In camera Hansard, 11 March 2020.

... is inadequate availability of free or low cost legal advice on financial and property matters after separation, as low cost alternatives, like Women's Legal Services and Family Violence Prevention Legal Services (the latter targeted to Aboriginal and Torres Strait Islander women) provide little support in property matters.⁵⁰

9.44 In 2014, the Productivity Commission found that there were more people living in poverty (14 per cent) than eligible for legal aid (8 per cent), and estimated that an additional \$57 million per annum (\$60.8 million with inflation) was required to relax the means tests of Legal Aid Commissions (LACs).⁵¹

9.45 The Attorney-General's Department (AGD) informed the committee that Commonwealth-funded legal assistance services relating to family law matters are prioritised for:

- 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
- 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.⁵²

9.46 The AGD further advised that these services are 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.⁵³

9.47 Taken all together, this means there is limited Commonwealth-funded legal services for property-only matters available to parties. This is supported by the submission made by Victoria Legal Aid, which stated that, prior to the new mediation trial discussed below, they could only provide legal assistance for family law property matters in very limited circumstances. Victoria Legal Aid noted that in their experience, 'being able to quickly and affordably reach a fair property settlement can mean the difference between financially recovering from separation or the beginning of poverty'.⁵⁴

⁵⁰ Australia's National Research Organisation for Women's Safety, *Submission 602*, p. 17.

⁵¹ Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72, 2014, Appendix H, pp. 1021–1023.

⁵² AGD, *Submission 581*, Attachment 2, pp. 12–13.

⁵³ See, AGD, *Submission 581*, Attachment B, pp. 12–13.

⁵⁴ VLA, *Submission 120*, p. 17.

Pilot programs

9.48 The Australian Government has a number of reforms currently being trialled directed towards simplifying the process for separating families to resolve their small property disputes. With respect to legal assistance, the Government is funding LACs in each state and territory to conduct a two year trial of lawyer-assisted property mediation for matters with a property pool of up to \$500 000, excluding debt. This trial will support separating families who require legal advice to mediate and reach agreement on a property settlement without going to court, and will run from January 2020–December 2021.⁵⁵

9.49 This trial has received significant support. Victoria Legal Aid stated that, in announcing this pilot, the Government also recognised:

... that women are more likely than men to face economic hardship following separation and that women affected by family violence may be especially vulnerable to financial stress. For VLA clients in particular, a property settlement can be crucial to preventing entrenched poverty following the end of a relationship, particularly where there has been family violence.⁵⁶

9.50 Victoria Legal Aid anticipated that this pilot:

... will help to demonstrate the need to give people legal help to fairly and safely reach an agreement about property without always needing to go to court. In some cases, for example where there is a recalcitrant party, going to court may be the only remaining option and it is important, given the complexity of litigation, that vulnerable people have access to ongoing legal representation in such cases.⁵⁷

9.51 In its submission, Victoria Legal Aid discussed the Government's funding support for a two year trial of lawyer-assisted mediation in family law small property disputes and for a one year small property claims court pilot. Victoria Legal Aid noted that prior to this funding it 'could only provide legal assistance for family law property matters in very limited circumstances'.⁵⁸ It recommended ongoing funding for lawyer assisted mediation in family law small property disputes,⁵⁹ noting that 'being able to quickly and affordably reach a fair property settlement can mean the difference between financially recovering from separation or the beginning of poverty'.⁶⁰

⁵⁵ AGD, *Submission 581*, Attachment 1.

⁵⁶ VLA, *Submission 120*, p. 17.

⁵⁷ VLA, *Submission 120*, p. 18.

⁵⁸ VLA, *Submission 120*, p. 17.

⁵⁹ VLA, *Submission 120*, p. 18.

⁶⁰ VLA, *Submission 120*, p. 17.

Dispute resolution

9.52 Alternative dispute resolution will be discussed in detail in Chapter 12, however, it is notable in respect of the resolution of property disputes that the committee was advised that property mediation is not as heavily utilised as mediation in relation to parenting agreements.⁶¹ One reason for this may be that the section 60I requirement to attend family dispute resolution prior to making an application to the court only applies in relation to parenting orders. As stated in Chapter 12, there is broad support for extending the application of family dispute resolution to property matters.

Court reforms

9.53 There will be circumstances where mediation is not appropriate or effective and parties will have no option but to apply to the court for a decision on the settlement of their property. However, where the property pool is small, taking court action can be very expensive. To address this, the Government has funded a two year small claims property pilot at four Registries at the Federal Circuit Court of Australia (Federal Circuit Court), which commenced in January 2020 and will run until December 2021. The pilot will provide a simpler and quicker process for distributing property of less than \$500 000 between parties, with the aim of reducing the cost to families of resolving small property disputes, leaving more in the asset pool to be distributed.⁶²

9.54 The pilot has received broad support from organisations.⁶³ For example, Mallee Family Care noted that it:

... commend[s] the Federal Government for acknowledging the need to reduce the length and costs associated with property matters that, in the majority of cases, are not complex and have small asset pools of less than \$500,000. The Small Claims Property Pilot was announced under the Women's Economic Security Package and commenced this month. Of particular note is the adoption of the 'Registrar-led resolution' whereby a Registrar can assist a couple to prepare and lodge enforceable consent orders with the court, reflecting the agreement reached between them.⁶⁴

9.55 Subject to the outcomes for the pilot, a number of submitters have called for the Federal Circuit Court to be adequately resourced to operate small property court services at all Federal Circuit Court locations, including at regional circuit court locations.⁶⁵

⁶¹ See, for example, Better Place Australia, *Submission 229*, p. 33.

⁶² See, AGD, *Submission 581*, Attachment 1.

⁶³ See, for example, Relationships Australia, *Submission 606*, p. 35; WLSV, *Submission 701*, p. 20; Australian Women Against Violence Alliance (AWAVA), *Submission 716*, p. 56.

⁶⁴ Mallee Family Care, *Submission 712*, p. 15.

⁶⁵ See, for example, Mallee Family Care, *Submission 712*, p. 5; VLA, *Submission 120*, p. 19.

Simplification of the property provisions

9.56 According to Professor Patrick Parkinson AM, Australia has the most discretionary system of property division that he is aware of anywhere in the world.⁶⁶ Professor Parkinson submitted that the law of property division needs to be simplified so that it is fit for purpose for ordinary Australians, stating:

One reason for the disproportionately high cost of property disputes is that the law is so vague and unclear, which invites litigation and makes the resolution of disputes unnecessarily expensive.⁶⁷

9.57 Professor Parkinson further stated:

The difficulties in relation to family property are well-known. In simple cases, experienced legal practitioners can readily predict the outcome that would be achieved in court within a range of 10% of the asset pool. This usually allows for compromises to be reached after negotiation.

However, there is uncertainty at the heart of the law when it comes to dealing with substantial pre-relationship property, inheritances, and assets acquired after separation, as well as working out shares of superannuation and how to deal with substantial debts to third parties. Full Court decisions on these issues can be extraordinarily inconsistent, demonstrating fundamental differences of approach that are, ultimately, differences concerning the interpretation of the intentions of Parliament ...

This jurisprudential confusion makes it harder for people to sort out the division of property for themselves. Even very experienced family lawyers can differ markedly in their assessment of what the outcome should be on the same set of facts.⁶⁸

9.58 Professor Parkinson made the following recommendation to the committee:

Request the ALRC, or an ad hoc expert committee, to review comprehensively the law concerning the division of property after separation, building upon the recommendations made in the ALRC's 2019 Report, with a view to simplification, the reduction in the width of judicial discretion, and greater predictability of outcomes.⁶⁹

9.59 Victoria Legal Aid agreed that greater legislative guidance on what to expect from a property settlement and how contributions are assessed would help to guide parties and reduce costs in property disputes:

The current highly discretionary approach to property settlements is not affordable or useful for many Victorians, especially those who do not meet legal aid eligibility criteria and cannot afford the cost of private legal representation. Additional legislative guidance would help to clarify the

⁶⁶ Professor Patrick Parkinson AM, *Submission 93*, p. 1.

⁶⁷ Professor Patrick Parkinson AM, *Submission 93*, p. 1.

⁶⁸ Professor Patrick Parkinson AM, *Submission 93*, pp. 11–12.

⁶⁹ Professor Patrick Parkinson AM, *Submission 93*, p. 15. Recommendation 8.

decision-making process and provide parties with more confidence to negotiate in the shadow of the law.⁷⁰

9.60 As noted by Professor Parkinson, the ALRC 2019 Report also supported the simplification of the framework for property settlements, so as to create a framework that would:

... assist parties to negotiate a division of their assets that is just to both parties and in the best interests of any children of the parties, without resort to formal dispute resolution processes.⁷¹

9.61 The ALRC Report made 10 recommendations with regard to property division, key among them that:

- The *Family Law Act 1975* (Cth) should be amended to:
- specify the steps that a court will take when considering whether to make an order to alter the interests of the parties to the relationship in any property; and
- simplify the list of matters that a court may take into account when considering whether to make an order to alter the interests of the parties to the relationship in any property.⁷²

9.62 The ALRC set out the following recommended approach to property division:

1. ascertain the existing legal and equitable rights and interests, and liabilities, of the parties in their property;
2. presume equality of contributions unless a statutory exception applies; and
3. determine what adjustment should be made in favour of either party having regard to any matter that is relevant to the particular circumstances of the parties, including:
 - a. the caring responsibilities for any children of the relationship;
 - b. the income earning capacity of each of the parties;
 - c. the age and state of health of the parties; and
 - d. the effect of any adjustment on the ability of a creditor of a party to recover the creditor's debt, so far as that effect is relevant.⁷³

9.63 The ALRC also concluded that the Family Law Act should be amended to provide that the relevant date to ascertain the value of the parties property is the date of separation, unless the interests of justice require otherwise, (Recommendation 13) and to include a presumption of equality of contributions during the relationship (Recommendation 12). The ALRC stated that 'such a presumption would reduce conflict and focus the parties' attention

⁷⁰ VLA, *Submission 120*, p. 19.

⁷¹ ALRC 2019 Report, p. 196.

⁷² ALRC 2019 Report, p. 16. Recommendation 11. See also, Recommendations 12 to 20 at pp. 16–18.

⁷³ ALRC 2019 Report, p. 219.

on the adjustment necessary to take account of each party's future economic circumstances.⁷⁴

9.64 In terms of when the presumption of equality of contributions could be displaced, the ALRC has suggested when there is evidence that a party has:

- wasted assets;
- deliberately or unreasonably damaged property;
- accumulated liabilities for his or her own benefit;
- received compensation awards for pain and suffering or economic loss which have not been dissipated during the relationship and are otherwise traceable; or
- received inheritances and gifts.⁷⁵

9.65 The National Foundation of Australian Women expressed its support for a presumption of equality of contributions:

We support this recommendation as a presumption that can be contested where this results in an unjust outcome. It is increasingly rare to find families where one party is considered the sole breadwinner throughout the relationship, with part time work and sharing of parental duties becoming normalised work patterns. It is appropriate for this to be recognised through the presumption of equal contribution, and an equal sharing of property of the relationship.⁷⁶

9.66 The Women's Legal Service Victoria, however, urged the committee to reject presumptions in family law,⁷⁷ noting their position:

... that presumptions in family law can lead to unsafe and unfair outcomes. Women's Legal Service Victoria supports the discretionary nature of decision making in family law which places a greater emphasis on what is in the best interests of a child or children in parenting matters and fair financial outcomes in property matters.⁷⁸

9.67 There were a number of other suggested changes to the legislation made by submitters, which have already been discussed earlier in this chapter. In addition, the Non-Custodial Parents Party (Equal Parenting) suggested that the value of the assets brought into a relationship by the parties need to be better protected:

In court proceedings, it is found that the value of the assets owned by the person or persons prior to the marriage or the relationship often becomes 'vague' and the original asset value is then often diluted. This is because of the issue of 'future needs'.

⁷⁴ ALRC 2019 Report, p. 217.

⁷⁵ ALRC 2019 Report, p. 219.

⁷⁶ National Foundation for Australian Women, *Submission 118*, p. 6.

⁷⁷ WLSV, *Submission 701*, p. 27.

⁷⁸ WLSV, *Submission 701*, p. 26.

Section 79 [of the Family Law Act] needs to be amended to reinforce the fact that the value of property owned and/or superannuation acquired prior to the marriage or relationship will remain in the possession of the individual that had ownership of the assets at the time of the marriage or the commencement of the relationship. This would include all assets such as shares and/or liquid assets.⁷⁹

Online Dispute Resolution Systems

9.68 The AGD advised that the Australian Government is also supporting the development of an Online Dispute Resolution System (ODRS), describing it as:

... an innovative approach to family law dispute resolution which will provide separating couples with the option of using an app to resolve property and parenting matters rather than going to court. The app draws on information put into the app by the separating couple alongside machine learning (using legal precedents) to suggest an equitable property division arrangement and to mutually agree parenting arrangements. The ODRS has the potential to enable families to resolve their property and parenting matters out of court by assisting and empowering them to determine their arrangements between themselves.⁸⁰

9.69 One submitter, in expressing support for the development of this app, stated:

This sort of innovative approach has the potential to make a greater difference to Australian families than any tinkering with the wording of the Family Law Act or Court restructure. It is to be commended.⁸¹

9.70 At the end of June 2020, ODRS, renamed as amica, was launched nationally.⁸² At the time of the launch, Attorney-General the Hon. Christian Porter stated his expectation 'that the tool will help reduce the legal bills of separating couples and reduce pressure on family law courts'.⁸³ While currently free to use, from 1 January 2021 a nominal fee (between \$165 and \$440 per couple) will be charged to fund ongoing maintenance and development of the service.⁸⁴

9.71 The committee also heard from other submitters about their proposals for online services to resolve financial disputes.⁸⁵

⁷⁹ Non-Custodial Parents Party (Equal Parenting), *Submission 1*, p. 5.

⁸⁰ AGD, *Submission 581*, p. 7.

⁸¹ Ms Carolyn Reid, *Submission 844*, p. 11.

⁸² See, www.amica.gov.au.

⁸³ The Hon. Christian Porter MP, Attorney-General, 'New "amica" online service to assist couples to separate amicably', *Media Release*, 30 June 2020.

⁸⁴ The Hon. Christian Porter MP, Attorney-General, 'New "amica" online service to assist couples to separate amicably', *Media Release*, 30 June 2020.

⁸⁵ See, Divorce Partners Pty Ltd, *Submission 583*; Divorce Justice, *Submission 4*; The Divorce Tango Pty Ltd, *Submission 5*.

Binding Financial Agreements

9.72 As the Law Council noted, the Family Law Act:

... makes provision for 'Financial Agreements' (more often called Binding Financial Agreements or BFAs) and subject to various technical requirements they can be entered into by parties in a variety of different circumstances and not just prior to marriage.⁸⁶

9.73 As set out in *Black v Black*:

The Act permits parties to make an agreement which provides an amicable resolution to their financial matters in the event of separation. In providing a regime for parties to do so the Act removes the jurisdiction of the court to determine the division of those matters covered by the agreement as the court would otherwise be called upon to do so in the event of a disagreement. Care must be taken in interpreting any provision of the Act that has the effect of ousting the jurisdiction of the court ...

The compromise reached by the legislature was to permit the parties to oust the court's jurisdiction to make adjustive orders but only if certain stringent requirements were met.⁸⁷

9.74 The Law Council also noted that BFAs are also known by the colloquial term 'pre-nuptial agreements'.⁸⁸

9.75 The AFCC highlighted that:

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.⁸⁹

9.76 Submissions put forward a range of views regarding BFAs. The Family Law Practitioners Association (WA) (FLPAWA) stated that:

Binding Financial Agreements are already effectively used. Anecdotally, parties are becoming increasingly aware of the option of the pre-nuptial agreements and are utilising the mechanism more often particularly when it comes to second marriages.⁹⁰

9.77 However, the FLPAWA advised that

1. pre-nuptial Binding Financial Agreements are generally negotiated in circumstances where one party is in a significantly disadvantaged bargaining position;

⁸⁶ Law Council, *Submission 2.2*, p. 115.

⁸⁷ *Black v Black* (2008) 38 FamLR 503, [40], [42].

⁸⁸ Law Council, *Submission 2.2*, p. 115.

⁸⁹ AFCC, *Submission 99*, p. 16.

⁹⁰ Family Law Practitioners Association (WA) (FLPAWA), *Submission 590*, p. 9.

2. they present significant difficulties in that they effectively need to anticipate future changes in circumstances and financial position which often results in disputes which require determination; and

3. it is not uncommon that cases which involve questions as in respect of the validity and interpretation of pre-nuptial agreements are more complicated and lengthy than an average case.

As such, whilst Binding Financial Agreements are a useful tool, they should not be seen as a solution to the delays in property settlements in the Court system.⁹¹

9.78 Professor Belinda Fehlberg, Associate Professor Lisa Sarmas and Professor Jenny Morgan, researchers at Melbourne Law School, expressed the view that:

If binding financial agreement provisions of the [Family Law Act] are to be retained, we suggest no further amendment to them. Our preferred position would be that the current provisions are repealed, returning us to the pre-2000 position that such agreements are a relevant factor that courts may consider when determining property disputes.⁹²

9.79 Many submitters expressed caution about using these agreements, as there are too many future unknowns that could potentially leave one party significantly financially disadvantaged. For example, Engender Equality stated that while BFAs may have benefits in providing for what happens to matrimonial property in the event of a separation, they run the risk of forcing parties to sign away future rights and entitlements, unaware of what the future holds.⁹³ Further: '[a] BFA cannot predict future contributions, health, care of children or other factors which would be taken into account during standard property division negotiations'.⁹⁴

9.80 Concerns were also expressed regarding their use where there are significant power imbalances between the parties.⁹⁵ The Women's Legal Centre (ACT) provided the following illustration:

For example, this may be in relationships where one party does not speak English, where one party is the carer of the other party, and in violent relationships, as clients can be coerced into signing these documents. Whilst there are provisions to set aside agreements when there has been duress, this requires lengthy litigation and often there is little corroborative evidence. The [Women's Legal Centre] recommends the limited use of pre-nuptial agreements, and rather, a greater focus on transparency of

⁹¹ FLPWA, *Submission 590*, p. 9.

⁹² Professor Belinda Fehlberg, Associate Professor Lisa Sarmas and Professor Jenny Morgan, *Submission 734*, p. 4.

⁹³ Engender Equality, *Submission 232*, p. 15.

⁹⁴ Engender Equality, *Submission 232*, p. 15.

⁹⁵ See, Women's Legal Centre (ACT), *Submission 382*, p. 12.

decision making and greater education about the property settlement process so people can make informed decisions at the commencement of a relationship.⁹⁶

9.81 National Legal Aid (NLA) and the AFCC are similarly not convinced that increased use would minimise future property disputes, given that the terms of these agreements are usually more favourable for one party.⁹⁷ However, NLA recognised that BFAs do play a role in:

- providing an alternative approach to settling property settlement disputes without engaging in family court litigation;
- promoting individual liberties and the freedom to contract (with appropriate safeguards),
- enabling parties to reach a property settlement in circumstances where the limitation periods under the [Family Law] Act may have expired; and
- family, estate and business planning.⁹⁸

9.82 The AFCC identified that 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 2nd or 3rd marriages) and/or with children from such relationships; or
- there is high net wealth.⁹⁹

9.83 A number of organisations have recommended specific changes to the Family Law Act to make it easier to have these set aside where there is family violence.¹⁰⁰ For example, Embolden recommended that the Family Law Act be amended:

... to specifically set aside provision for circumstances in which family violence (including coercion and financial abuse) has occurred, to help prevent Binding Financial Agreements from being used to perpetrate further violence and abuse.¹⁰¹

9.84 The Law Council noted that the Australian Government had previously introduced the Family Law Amendment (Financial Agreements and Other

⁹⁶ Women's Legal Centre (ACT), *Submission 382*, p. 12.

⁹⁷ See, National Legal Aid (NLA), *Submission 589*, p. 36; AFCC, *Submission 99*, p. 17.

⁹⁸ NLA, *Submission 589*, pp. 36–37.

⁹⁹ AFCC, *Submission 99*, pp. 16–17.

¹⁰⁰ See, Embolden, *Submission 588*, p. 13 and 25; NLA, *Submission 589*, p. 37; Women's Legal Service Queensland, *Submission 715*, p. 54; AWAVA, *Submission 716*, p. 7 and pp. 48–49; Women's Safety NSW, *Submission 727*, p. 64; Community Legal WA, *Submission 230*, p. 16.

¹⁰¹ Embolden, *Submission 588*, p. 13 and p. 25.

Measures) Bill 2015 but that it had lapsed at the end of the 45th Parliament and not been re-introduced:

The intention of the Bill was *inter alia* to try and address a series of problems with Financial Agreements that have rendered them liable to challenge, made them less certain, and made them less capable of enforcement.¹⁰²

9.85 The Law Council expressed its support for the re-introduction of the relevant Financial Agreement provisions, subject to some modifications.¹⁰³

9.86 However, the ALRC made no recommendations in relation to BFA's in its 2019 Report, concluding that:

BFA's cannot be considered separately from the property division provisions of the Family Law Act. Uncertainty and lack of clarity in those provisions encourages many parties, particularly those with significant wealth, to consider BFA's as a way of avoiding uncertainty as to how the court would divide their property upon separation. At the same time, the lack of clarity in Pt VIII also makes it difficult for any party who is asked to sign a BFA to assess how the financial terms compare to their entitlements under the Act and a likely award from the courts on separation. Accordingly, the ALRC considers that the primary attention of reform efforts should be on providing certainty and clarity to Pt VIII of the Act ...¹⁰⁴

¹⁰² Law Council, *Submission 2.2*, p. 119.

¹⁰³ See, Law Council, *Submission 2.2*, pp. 120–122. See also Geoff Wilson et al, *Submission 111*, pp. 2–3, within which support is expressed for a number of the Law Council's proposed modifications.

¹⁰⁴ ALRC 2019 Report, p. 236.

Chapter 10

Child support

Introduction

- 10.1 This chapter discusses the interaction between Australia's Child Support Scheme (the scheme) and the family law system. The scheme facilitates the assessment, collection and transfer of child support payments between separated parents to ensure that children are adequately financially supported.
- 10.2 A number of issues about the scheme were raised in submissions to the inquiry, relating to the administration of the scheme; the collection and recovery of child support payments; interactions with the family law system; and the potential for child support to be a contributing factor to ongoing conflict between separated parents.
- 10.3 This chapter uses the term 'parent' broadly to include any person who provides ongoing care for a child—such as a legal guardian, grandparent or other family member.¹

Background

- 10.4 The *Child Support (Assessment) Act 1989* (CSA Act), the *Child Support (Registration and Collection) Act 1988* (CSRC Act) and their subsequent regulations² provide the legislative framework for the scheme. The legislation delegates decision-making powers to the Child Support Registrar (Registrar)³ and aims to administer child support outside of the family courts where possible.⁴
- 10.5 Aspects of child support are also covered by the *Family Law Act 1975* (Family Law Act). The main function of the Family Law Act in terms of child support is to empower family courts to make provisions for child maintenance when a child support assessment cannot be conducted administratively.⁵ The

¹ See *Child Support Assessment Act 1989*, s. 7B.

² See *Child Support (Assessment) Regulations 2018* (CSA Regulations) and *Child Support (Registration and Collection) Regulations 2018*.

³ Department of Social Services (DSS), *Child Support Guide 1.1.1: The Child Support Scheme*, <https://guides.dss.gov.au/child-support-guide/1/1/1> (accessed 31 July 2020); DSS, *Submission 95*, p. 8.

⁴ Family Law Practitioners Association of Queensland, *Submission 116*, p. 5.

⁵ See, for example, Attorney-General's Department (AGD), *Submission 581*, Attachment 2, p. 18; *Family Law Act 1975*, division 7.

Family Law Act also requires family courts to consider child support when making property settlement orders⁶ and spousal maintenance orders.⁷

- 10.6 Since the scheme was first introduced, the Australian Government has consistently been of the view that assessments for child support should be facilitated by an administrative agency⁸ to relieve pressure from the courts, and so parents are not 'faced with the costs, delays and emotional stress of court proceedings' in the first instance.⁹
- 10.7 While the legislation is administered by the Department of Social Services (DSS), the scheme itself is delivered by Services Australia, which manages applications for child support assessments and facilitates the collection and transfer of child support payments.¹⁰

Previous inquiries and reviews

- 10.8 The first parliamentary inquiry into child support was conducted by the Joint Select Committee on Certain Family Law Issues, which reported in November 1994. The committee inquired into the 'operation and effectiveness' of the scheme¹¹ and made 163 recommendations regarding the role of the then Child Support Agency, payment issues, enforcement and the formula for assessing payments.¹²
- 10.9 In December 2003, the House of Representatives Standing Committee on Family and Community Affairs inquired into and reported on child custody arrangements after separation. The report recommended that a Ministerial Taskforce be established to examine the merits of the assessment formula.¹³
- 10.10 In May 2005, the Ministerial Taskforce on Child Support reported to the Parliament and made several recommendations for further reform to recognise

⁶ *Family Law Act 1975*, paragraph 79(4)(g).

⁷ *Family Law Act 1975*, paragraph 75(2)(na).

⁸ The Child Support Agency administered the Child Support Scheme until 2011 when responsibility for the child support portfolio moved to Services Australia (formerly the Department of Human Services). Since 2011, the Child Support Agency ceased to exist as it was no longer authorised or empowered by the legislation.

⁹ Cabinet Sub-Committee on Maintenance, *Child Support: A Discussion Paper on Child Maintenance*, October 1986, p. 17.

¹⁰ DSS, *Submission 95*, p. 8.

¹¹ Joint Select Committee on Certain Family Law Issues, *Child Support Scheme: An Examination of the Operation and Effectiveness of the Scheme*, November 1994, p. xi.

¹² Joint Select Committee on Certain Family Law Issues, *Child Support Scheme: An Examination of the Operation and Effectiveness of the Scheme*, November 1994, pp. xv–xxxvii.

¹³ House of Representatives Standing Committee on Family and Community Affairs, *Every Picture Tells a Story: Inquiry into Child Custody Arrangements in the Event of Family Separation*, December 2003, p. xxviii.

the care-relationship between separated parents and their children.¹⁴ The Government accepted many of the report's recommendations, which were implemented between 2006 and 2008. The Law Council of Australia (Law Council) submitted that these reforms primarily focussed on changes to aspects of the scheme—such as the meaning of 'shared care', arrangements for paternity disputes and legal protection for parents partaking in self-managed child support agreements.¹⁵

10.11 The House of Representatives Standing Committee on Social Policy and Legal Affairs tabled a report in July 2015 for its inquiry into Australia's child support program (2015 Child Support Report). The report's recommendations emphasised the importance of mediation, the need to improve communication between Government agencies and proposed a 'trial of limited guarantee' for child support payments.¹⁶ The report also recommended that the child support program be amended to 'ensure the adequacy of calculated amounts and equity for both payers and payees'.¹⁷

10.12 A complete list of previous inquiries and reviews into Australia's child support system is available in Appendix 5.

The Child Support Scheme: its purpose and clients

10.13 The scheme has two main functions. Firstly, to assess the appropriate amount of child support to be paid for a child following the separation of his/her parents.¹⁸ Secondly, to collect and transfer child support from one parent to the other.¹⁹

10.14 In 2018–19, the scheme supported approximately 1.2 million children and transferred \$3.7 billion in child support payments.²⁰

10.15 According to section 5 of the CSA Act, a 'child support case, in relation to a child, is the administrative assessments for child support for all children who are children of both of the parents of the child'. DSS commented that:

¹⁴ Ministerial Taskforce on Child Support, *In the Best Interests of the Child: Reforming the Child Support Scheme*, May 2005, pp. 22–38.

¹⁵ Law Council of Australia (Law Council), *Submission 2.1*, p. 105.

¹⁶ House of Representatives Standing Committee on Social Policy and Legal Affairs, *From conflict to cooperation: Inquiry into the Child Support System*, June 2015, p. viii.

¹⁷ House of Representatives Standing Committee on Social Policy and Legal Affairs, *From conflict to cooperation: Inquiry into the Child Support System*, June 2015, p. viii.

¹⁸ DSS, *Submission 95*, p. 5.

¹⁹ DSS, *Submission 95*, p. 5.

²⁰ Services Australia, *Annual Report 2018–19*, p. 111. See also, DSS, *Submission 95*, p. 9; The Hon. Diana Bryant AO QC, *Submission 847*, p. 8.

It is not uncommon for parents who have more than one child support case to be a payer in one case and a payee in another, although the majority (89 per cent) of payees are female and the majority (also 89 per cent) of payers are male.²¹

10.16 The total number of child support cases increased each year from 1991 (103 106 cases)²² to 2014 (795 000 cases).²³ Recent figures from DSS illustrate that the number of child support cases has declined over the past five years:

Table 10.1 Number of child support cases

2014–15	2015–16	2016–17	2017–18	2018–19
789 500	783 078	778 687	777 884	767 247

Source: Department of Social Services, *Annual Report 2015–16*, p. 34; Department of Social Services, *Annual Report 2018–19*, p. 42.

10.17 Approximately 60 per cent of payees and 25 per cent of payers receive some form of income support payment—such as a 'Parenting Payment, Newstart Allowance, Carer Payment or Disability Support Pension'.²⁴ Parents involved with the scheme generally receive lower incomes compared to parents who have not separated.²⁵ According to DSS, the 'median adjusted taxable income of child support payees at June 2019 was \$23 953', whereas the 'median adjusted taxable income of payers was \$47 985'.²⁶

10.18 There are also disparities between the distribution of payments, and responsibility for care. For example, the majority of child support payees (65 per cent) have above 86 per cent care of their children, and the majority of payers (65 per cent) have below 14 per cent care of their children.²⁷

10.19 Over the years, the scheme has received a discordant mix of praise and criticism. Mr Shane Bennett, Acting Deputy Secretary, Social Security at DSS told the committee:

...we are very mindful that there is a balance to be found, both in terms of the highly sensitive nature of these arrangements and the contested perceptions, making sure that we continue to focus on the object of the

²¹ DSS, *Submission 95*, p. 9.

²² Child Support Agency, *Facts and Figures 2007–08*, p. 15, <https://www.servicesaustralia.gov.au/sites/default/files/documents/facts-and-figures-2008.pdf> (accessed 8 September 2020).

²³ DSS, *Annual Report 2013–14*, p. 37.

²⁴ DSS, *Submission 95*, p. 9.

²⁵ DSS, *Submission 95*, p. 9.

²⁶ DSS, *Submission 95*, p. 9.

²⁷ DSS, *Submission 95*, p. 9.

scheme and seeking not to undertake changes that could have unintentional consequences.²⁸

10.20 The committee heard a range of views concerning the merits of the scheme. For example, former Chief Justice of the Family Court of Australia (Family Court), the Hon Diana Bryant AO QC described Australia's scheme as 'one of the most progressive child support systems in the world'.²⁹ However, many submitters wrote to the committee about the scheme's perceived inequality and unfairness. These views are presented throughout this chapter.

Administration of the Child Support Scheme

10.21 Following separation, a parent can apply to Services Australia for a child support assessment 'if they are not living with the other parent ... on a genuine domestic basis' regardless of the level of care that they provide for the child.³⁰

10.22 To be eligible, the child must meet all of the following requirements:

- the child must be under 18 years of age;
- the child must not be a member of a couple;
- the child must not be cared for under a child welfare law of Western Australia or South Australia;³¹ and
- the child must be a citizen or resident of Australia or a reciprocating jurisdiction at the time of the assessment.³²

10.23 The assessment formula bases its calculations for the amount of child support payable on both parents' combined adjusted taxable income and the level of care that they provide for the child.³³

10.24 The basic formula for calculating the amount of child support to be paid consists of eight steps, which determine:

- step 1—each parent's child support income;³⁴
- step 2—each parents' combined child support income;³⁵
- step 3—each parent's income percentage;³⁶

²⁸ Mr Shane Bennett, Acting Deputy Secretary, Social Security, DSS, *Proof Committee Hansard*, 14 February 2020, p. 17.

²⁹ The Hon. Diana Bryant AO QC, *Submission 847*, p. 8.

³⁰ DSS, *Submission 95*, p. 10.

³¹ See, CSA Regulations 2018, s. 6.

³² DSS, *Submission 95*, p. 10.

³³ DSS, *Submission 95*, pp. 5 and 13.

³⁴ Child support income is calculated by deducting a self-support amount (equivalent to one-third of the annual Male Tale Average Weekly Earnings figure) from the parent's adjusted taxable income. See DSS, *Submission 95*, p. 11.

³⁵ Combined child support income is calculated using the combined sum of both parents' child support income. See DSS, *Submission 95*, p. 12.

- step 4—each parent's percentage of care (see Table 10.2);
- step 5—each parent's cost percentage (see Table 10.2);
- step 6—each parent's child support percentage;³⁷
- step 7—the costs of the children (see Appendix 6); and
- step 8—the child support amount.³⁸

10.25 DSS explained how the child support amount is applied:

The parent who has a positive child support percentage under step six will be the payer. The annual rate of child support payable is worked out by multiplying the payer's child support percentage from step six by the costs of the child from step seven.³⁹

10.26 The assessment also accounts for the amount needed to cover a parent's living expenses, any relevant dependent child expenses and if a parent has multiple child support cases.⁴⁰

10.27 Services Australia uses information from the Australian Taxation Office (ATO) to assess the income status of both parents.⁴¹ If a parent has not lodged a tax return for the previous financial year, Services Australia can calculate a provisional income amount and undertake a new assessment once the tax return has been lodged.⁴²

10.28 Parents may apply to have additional income (such as overtime) excluded from the assessment to recognise the 'extra costs to re-establish themselves following separation'.⁴³ A number of submissions were of the view that overtime should not be taken into account as a part of a child support

³⁶ Income percentage is each parent's proportion of the total combined child support income. See DSS, *Submission 95*, p. 12.

³⁷ Each parents' child support percentage is calculated by subtracting the parent's cost percentage from their income percentage. See DSS, *Submission 95*, p. 12.

³⁸ DSS, *Submission 95*, pp. 11–13.

³⁹ DSS, *Submission 95*, p. 13.

⁴⁰ DSS, *Submission 95*, p. 13.

⁴¹ Services Australia, *How Your Income Affects Your Child Support*, <https://www.servicesaustralia.gov.au/individuals/services/child-support/child-support-assessment/how-we-work-out-your-assessment/how-your-income-affects-your-child-support> (accessed 31 July 2020).

⁴² Services Australia, *How Your Income Affects Your Child Support*, <https://www.servicesaustralia.gov.au/individuals/services/child-support/child-support-assessment/how-we-work-out-your-assessment/how-your-income-affects-your-child-support> (accessed 4 June 2020).

⁴³ DSS, *Submission 95*, p. 14.

assessment at all, as it was perceived that this discouraged parents from earning more in order to avoid the requirement to pay more child support.⁴⁴

10.29 For example, Mr Barry Williams, National President of Lone Fathers Association of Australia told the committee:

Many men are paying their child support and they're doing second jobs to try to get a home so they can have access to their kids too, but they're fleeced on that too. The minute you do any overtime or anything like that, or take on a second job so you can buy a house, you get robbed by Child Support again. They're doubling up.⁴⁵

10.30 Each parent's cost percentage is calculated according to their percentage of care:

Table 10.2 Each parent's cost percentage for the child

Percentage of Care	Cost Percentage
0 to less than 14%	Nil
14% to less than 35%	24%
35% to less than 48%	25% plus 2% for each percentage point over 35%
48% to 52%	50%
More than 52% to 65%	51% plus 2% for each percentage point over 53%
More than 65% to 86%	76%
More than 86% to 100%	100%

Source: Department of Social Services, *Submission 95*, p. 12.

10.31 The costs of the child are generally calculated in accordance with the parents' combined total income for the most recent financial year.⁴⁶ Services Australia adjusts the costs of the child each year to reflect current costs and incomes.⁴⁷ The costs of the child set for the year 2020 is available at Appendix 6.

10.32 A number of submissions commented that the costs of the child set by Services Australia do not accurately reflect the actual costs of raising a child in

⁴⁴ See, for example, Dr Andrew Lancaster, *Submission 18*, p. 9; Parental Alienation in Australia, *Submission 841*, p. 19.

⁴⁵ Mr Barry Williams, Lone Fathers Association Australia, *Proof Committee Hansard*, 22 July 2020, p. 43.

⁴⁶ DSS, *Submission 95*, p. 13.

⁴⁷ Services Australia, *The Assessment Formula*, <https://www.servicesaustralia.gov.au/individuals/services/child-support/child-support-assessment/how-we-work-out-your-assessment/assessment-formula> (accessed 31 July 2020).

Australia and called for a review of how these costs are determined.⁴⁸ For example, one submitter described the amount set by the costs of the children table as 'completely fictitious'.⁴⁹

10.33 Conversely, DSS submitted that the level of care is based on the actual care of the child to recognise the 'direct costs parents incur when providing care'.⁵⁰ This in turn assists Services Australia to determine the right amount of financial support that the child needs regardless of custody arrangements.⁵¹

10.34 The five categories of level of care are:

Table 10.3 Level of care

Level of care	Percentage of care	Number of nights
Below regular	0 to less than 14%	0 to 51
Regular	14% to less than 35%	52 to 127
Shared	35% to 65%	128 to 231
Primary	More than 65% to 86%	232 to 313
Above primary	More than 86% to 100%	314 to 365

Source: Department of Social Services, *Submission 95*, p. 14.

10.35 A parent assessed as providing below regular care is assessed as not contributing to the costs of the child; and therefore the level of care will not affect the child support assessment.⁵² A parent assessed as providing regular care or more is recognised to be contributing to the costs of the child and will be assessed as either a payee or payer according to their income.⁵³ A parent who has more than 65 per cent care of the child will not be assessed to pay child support 'even if the formula would otherwise have this result'.⁵⁴

10.36 In its submission, DSS stated that disputes concerning care arrangements were 'best dealt with through mediation or dispute resolution, or pursued through the family law system'.⁵⁵ The Attorney-General's Department (AGD) noted that

⁴⁸ See, for example, Australian Muslim Women's Centre for Human Rights, *Submission 732*, p. 14; Victoria Legal Aid (VLA), *Submission 120*, p. 33; Women's Safety NSW, *Submission 727*, p. 60.

⁴⁹ Confidential, *Submission 481*.

⁵⁰ DSS, *Submission 95*, p. 6.

⁵¹ DSS, *Submission 95*, p. 6.

⁵² DSS, *Child Support Guide 2.2.1: Basics of Care*, <https://guides.dss.gov.au/child-support-guide/2/2/1> (accessed 31 July 2020).

⁵³ DSS, *Child Support Guide 2.2.1: Basics of Care*, <https://guides.dss.gov.au/child-support-guide/2/2/1> (accessed 31 July 2020).

⁵⁴ DSS, *Submission 95*, p. 13.

⁵⁵ DSS, *Submission 95*, p. 7.

for care disputes, Services Australia may determine the level of actual care according an existing arrangement (such as a court order, parenting plan or written agreement formalised by the family courts) until a new assessment has been completed.⁵⁶

10.37 A number of submissions contended that the current formula used by Services Australia worked well in most cases.⁵⁷ For example, the Law Council explained that:

Whilst no system of [the Child Support Scheme (CSS)] is perfect, nor will any CSS ever be immune from complaint, and recognising that the child support formula has been in place since 2008, it is the experience of members of the [family law system] that the CSS works for most families. That experience accords with the evidence of the low number of appeals to the [Administrative Appeals Tribunal (AAT)] and from the AAT to the [Federal Circuit Court of Australia (Federal Circuit Court)].⁵⁸

10.38 Conversely, many submitters identified shortcomings within the assessment process—such as perceived unfairness and perceived incentives for non-compliance.⁵⁹ These issues are discussed below.

Perceived unfairness

10.39 A sentiment presented in many of the name withheld and confidential submissions discussed in Chapter 3 was the perception that the decision made by Services Australia for a child support assessment was unfair for the paying parent. A number of public submissions also shared these concerns.⁶⁰

10.40 For example, a submitter told the committee about the perceived unfairness perpetuated by the assessment formula:

The formula also rewards parents for 'not working' by providing them with a higher amount of child support from the paying parent than if they worked. If both parents do this, it creates a race to the bottom – whoever can work the least wins money from the other parent. The level of income

⁵⁶ AGD, *Submission 581*, Attachment 2, p. 18.

⁵⁷ See, for example, Australian Institute of Family Studies, *Submission 731*, p. 6; the Hon. Diana Bryant AO, QC, *Submission 847*, p. 8; Law Council, *Submission 2.1*, p. 114.

⁵⁸ Law Council, *Submission 2.1*, p. 114.

⁵⁹ See, for example, CatholicCare Victoria Tasmania, *Submission 840*, p. 9; Child Support Australia, *Submission 881*, pp. 1–4; Dr Andrew Lancaster, *Submission 18*, pp. 5–14; Family Law Reform Coalition, *Submission 597*, pp. 17–18; Mr Jordon Hill, *Submission 809*, p. 3; Relationships Australia, *Submission 606*, p. 98; VLA, *Submission 120*, p. 33; Women's Legal Centre ACT, *Submission 382*, p. 11; Women's Legal Service Victoria (WLSV), *Submission 701*, p. 26.

⁶⁰ See, for example, Child Support Australia, *Submission 881*, pp. 3–4; Dr Andrew Lancaster, *Submission 18*, p. 6; Non-Custodial Parents Party (NCP), *Submission 1*, pp. 1, 6; The Divorce Tango Pty Ltd, *Submission 5*, p. 4.

from a father should not affect the amount that one family should demand from another family.⁶¹

10.41 A witness told the committee about the perceived incentive for parents to maximise their care for the child in order to increase the amount of child support that they were entitled to be paid:

Perhaps a simple change to the formula for child-support payments could have a dramatic impact. If a parent is not seeing their children at all and is paying for full child support, it encourages the other parent to keep full custody. If the formula were adjusted for these parents, then it might encourage them to have a healthy custody agreement.⁶²

10.42 Another submitter shared similar concerns:

I currently have 2 kids ... I have to pay \$335 per week in after tax income as child support. I earn \$120,000 before tax, she earns \$30,000 before tax ... When you add in child support and benefits she gets from the government, we are on a similar income after tax ... There is no incentive in this case for the primary carer to change their situation. On the other side, I am close to the point of taking a far less stressful job and earning less money as the same principals apply to me. The system actually encourages people to do less in terms of generating income. I am not suggesting my ex is taking advantage of the system, she is simply using what is available. What I am concerned about is that it leaves both parties in a vulnerable position.⁶³

10.43 In his submission to the committee, Dr Andrew Lancaster proposed a new formula based on the principle that child support should not be paid in situations where parents share equal care of the child:

When care is 50:50, any automatic child support payments are just a kind of income redistribution. It's taking from higher earners to give to lower earners for the sake of it. The payments aren't for the kids because the paying parent is just as likely to spend the money on the kids as the receiving parent. In effect, the payments are only there to try to balance living standards between parents – without boosting living standards for children.⁶⁴

10.44 As discussed in Chapter 8, a substantial amount of submissions supported this sentiment and advocated for '50:50 care' as a mandatory basis for all care arrangements.

⁶¹ Confidential, *Submission 650*.

⁶² In camera Hansard, 12 March 2020.

⁶³ Confidential, *Submission 21*.

⁶⁴ Dr Andrew Lancaster, *Submission 18*, p. 8.

10.45 The Australian Brotherhood of Fathers (ABF) was of the view that calculating child support based on a parent's personal income, as opposed to household income, was unfair:

When a parent repartners, their individual financial circumstances might change dramatically independent of their own personal income. For example, a Mother with primary care might repartner and enter into a household with much greater wealth. She may then chose [sic] to stop working and have additional children. Despite the improve [sic] financial circumstances of the Mother and the children, the payer in this circumstance would be required to pay more.⁶⁵

Perceived incentives for non-compliance

10.46 Many submitters expressed concerns regarding perceived incentives for non-compliance with child support obligations, as set by Services Australia after the assessment is completed.⁶⁶

10.47 For example, Dr Lancaster submitted that parents 'can get the upper hand on their ex by getting their income down and the amount of parenting time up'.⁶⁷ Centacare Family & Relationship Services also observed that 'parents may propose to spend more nights' with their children in order to reduce the amount of child support to be paid.⁶⁸

10.48 Another submitter told the committee that:

Linking child support amounts depending on the number of nights a child spends with the primary carer creates an incentive for the primary carer to argue for restrictive time with the other parent as the more time they have with the child the more money they receive.⁶⁹

10.49 Relationships Australia suggested that the formula should be revised so that care is not calculated according to the number of nights that a child spends with the parent as it can impede Family Dispute Resolution to make decisions based on the child's best interests.⁷⁰

10.50 In its submission, Voice4Kids raised another perceived incentive for non-compliance, regarding the ATO and Services Australia's capacity to

⁶⁵ Australian Brotherhood of Fathers, *Submission 1668*, p. 146.

⁶⁶ See, for example, Centacare Family & Relationship Services (Centacare), *Submission 585*, p. 17; Child Support Australia, *Submission 881*, p. 4; Justice for Australian Families, *Submission 817*, pp. 33–34; Ms Joris van der Greer, *Submission 801*, p. 1; Relationships Australia, *Submission 606*, p. 98.

⁶⁷ Dr Andrew Lancaster, *Submission 18*, p. 6.

⁶⁸ Centacare, *Submission 585*, p. 17. See also, National Child Protection Alliance, *Submission 818*, p. 8.

⁶⁹ Confidential, *Submission 137*.

⁷⁰ Relationships Australia, *Submission 606*, p. 98.

investigate cases where 'a parent is earning more than they are declaring'.⁷¹ Voice4Kids observed that this can result in causing unfair financial strain for the receiving parent, and called for Services Australia to investigate instances where a parent was 'claiming to earn little to no money'.⁷²

10.51 To manage serious instances of non-compliance, Services Australia uses a number of techniques to identify instances of 'fraud, serious child support avoidance or income minimisation'—including optical surveillance and lodgement enforcement action through the ATO for parents who have not submitted annual tax returns.⁷³

10.52 The committee also heard from many submitters that non-compliance with court orders was, in their view, being rewarded by the current child support system. The committee heard on a number of occasions of one parent refusing to provide the other parent the court ordered access to the child/ren and then having the child support amended to recognise that that parent now had 100% care of the children. As one father has explained:

Unfortunately my oldest child has been used as a source of income (mother is long term unemployed) and the child support and welfare system financially reward her with more payments when she contravenes the orders.

- All government agencies should use the court orders as the [level] of care a parent has for all social payments including Centrelink and child support payments to remove the incentive to break the orders. Removing all incentives to contravene orders, particularly financial incentives give the orders some weight. In my view the financial incentives also incentivises parental alienation.⁷⁴

10.53 Similarly, another confidential submitter suggested that:

Anyone who receives Child Support and does not comply with access rights handed down by the Court, should not be financially rewarded for this behaviour, in fact they should be financially penalised so as to discourage alienation.⁷⁵

Collecting child support payments

10.54 There are three methods through which child support can be paid or received:

- Self-management—parents agree upon and manage the amount, method and frequency of child support payments;

⁷¹ Voice4Kids, *Submission 7*, p. 2.

⁷² Voice4Kids, *Submission 7*, p. 3.

⁷³ Services Australia, *Annual Report 2018–19*, p. 165.

⁷⁴ Confidential, *Submission 40*, p. 6.

⁷⁵ Confidential, *Submission 29*, p. 7.

- Private Collect—arranged following a child support assessment, agreement or court order specifying the amount of child support to be paid; or
- Child Support Collect—Services Australia coordinate the frequency and method of child support payments and facilitate collection and transfer between the receiving and paying parent.⁷⁶

10.55 Mr Bruce Young, Acting General Manager, Child Support, Indigenous and Tailored Services Division, Services Australia noted that child support payments are often made voluntarily via deductions from wages, or direct payments—including where payments are collected by Services Australia.⁷⁷

10.56 The DSS reported that Australia has established arrangements with 97 reciprocating jurisdictions⁷⁸ to assist with the collection and transfer of child support, where a maintenance liability has been registered in Australia and either parent lives overseas.⁷⁹

Recovering outstanding child support

10.57 Services Australia cannot collect overdue amounts under self-managed child support arrangements. However, Services Australia can collect overdue payments at any time for Child Support Collect arrangements and for up to three months (or nine months in exceptional circumstances) for Private Collect arrangements.⁸⁰

10.58 Services Australia can employ a number of strategies to attempt to recover unpaid child support before the matter needs to be dealt with by the courts.⁸¹

10.59 In situations where payers are not forthcoming, Services Australia can negotiate arrangements with the parent in the first instance, and if unsuccessful, can seek information from third parties, or garnishee bank

⁷⁶ Services Australia, *Compare Your Child Support Collection Options*, <https://www.servicesaustralia.gov.au/individuals/services/child-support/child-support-assessment/how-manage-your-assessment/compare-your-child-support-collection-options> (accessed 31 July 2020).

⁷⁷ Mr Bruce Young, Acting General Manager, Child Support, Indigenous and Tailored Services Division, Services Australia, *Proof Committee Hansard*, 14 February 2020, p. 19.

⁷⁸ A complete list of reciprocating jurisdictions is available at: <https://www.servicesaustralia.gov.au/individuals/services/child-support/child-support-assessment/what-you-need-know/reciprocating-jurisdictions-and-residency> (accessed 31 July 2020).

⁷⁹ DSS, *Submission 95*, p. 23. See also, Mr Shane Bennett, Acting Deputy Secretary, Social Security, DSS, *Proof Committee Hansard*, 14 February 2020, p. 18.

⁸⁰ Services Australia, *Compare Your Child Support Collection Options*, <https://www.servicesaustralia.gov.au/individuals/services/child-support/child-support-assessment/how-manage-your-assessment/compare-your-child-support-collection-options> (accessed 4 June 2020).

⁸¹ Services Australia, *Annual Report 2018–19*, pp. 7, 113–114.

accounts or wages.⁸² When required, Services Australia can pursue Departure Prohibition Orders and litigation action through the courts.⁸³

10.60 A witness told the committee about her experience trying to recover outstanding child support:

He currently owes over \$12,000. Every time an assessment is done he puts in an objection and then that takes quite some time ... [I]t took ... six months of being called, giving evidence and sending this and that in for them to make that decision ... When I ring Child Support, they go: 'Well, there's not much we can do. You can't get blood out of a stone.' That's all they will do, yet I've had to access my super to keep the family running.

...

He's supposed to pay \$400 a fortnight ... Intermittently he might pay—for the last financial year he's paid a total of \$3,900 for four children. When we were married we used to live off \$2,800 a week ... Everyone I've had in Child Support has been lovely ... but at the end of the day nothing is done to get me that money. They just say: 'You'll get it eventually. When he retires you'll get it out of his super.' It's not going to be much use to me when I'm 70!⁸⁴

10.61 In 2018–19, Services Australia issued 68 314 'nudge letters' to parents who had missed their child support payments.⁸⁵ These letters resulted in the recovery of approximately \$144 million in outstanding payments.⁸⁶ When necessary, Services Australia can set up 'payment arrangements to repay the debt in the shortest possible time based on a parent's capacity to pay'.⁸⁷

10.62 In addition, through its work with the ATO, Services Australia can arrange for any available tax refund to be used to reduce an outstanding child support amount.⁸⁸ Employer withholding can also be initiated and deductions from Centrelink or Department of Veteran's Affairs payments can be arranged to recover a current liability or debt.⁸⁹

10.63 Services Australia can enforce the payment of child support liabilities by stopping debtors from leaving Australia, issuing them with a Departure Prohibition Order (DPO). In 2018–19, Services Australia issued 1921 DPOs,

⁸² Mr Bruce Young, Acting General Manager, Child Support, Indigenous and Tailored Services Division, Services Australia, *Proof Committee Hansard*, 14 February 2020, p. 19.

⁸³ Mr Bruce Young, Acting General Manager, Child Support, Indigenous and Tailored Services Division, Services Australia, *Proof Committee Hansard*, 14 February 2020, p. 19.

⁸⁴ In camera Hansard, 6 May 2020.

⁸⁵ Services Australia, *Annual Report 2018–19*, p. 110.

⁸⁶ Services Australia, *Annual Report 2018–19*, p. 110.

⁸⁷ Services Australia, *Annual Report 2018–19*, p. 113.

⁸⁸ Services Australia, *Annual Report 2018–19*, p. 113.

⁸⁹ Services Australia, *Annual Report 2018–19*, p. 114.

which resulted in the collection of just over \$28 million in outstanding child support payments.⁹⁰

10.64 The National Council of Single Mothers and their Children (NCSMC) submitted that the \$1.6 billion owed in child support payments nationally indicated that the scheme was not 'fulfilling its role' and recommended an inquiry into compliance be undertaken by an appropriate independent body – such as the Productivity Commission.⁹¹

10.65 In its submission, Safe Steps recommended that the Government address the underpayment of child support and noted:

Mothers head more than 80 per cent of single-parent households and government figures show it is mostly fathers who owe child support debt, making up \$1.54 billion of the total \$1.64 billion owed nationally. There is an urgent need for government to prioritise addressing the underpayment of child support by fathers. This will support greater parental equity and improve outcomes for children in the context of family separation as well as supporting their health and wellbeing into the future.⁹²

10.66 In circumstances where the payee does not receive child support on time for the payer, Victoria Legal Aid recommended that Services Australia provide 'clear and timely reasons to receiving parents, while maintaining privacy obligations, on their decision to not enforce a child support debt'.⁹³

10.67 Women's Safety NSW proposed a different approach, where child support payments should be collected by the ATO in a similar way to Medicare levies and Higher Education Loan Scheme repayments.⁹⁴

10.68 Some submitters expressed privacy concerns regarding the appropriateness of the Registrar and staff at Services Australia having access to tax information for child support purposes.⁹⁵ For example, the Non-Custodial Parents Party submitted that section 15D of the CSA Act and section 16C of the CSRC Act should be repealed to 'restore individual privacy' and proposed that greater accountability measures be put in place for child support workers.⁹⁶

⁹⁰ Services Australia, *Annual Report 2018–19*, p. 110.

⁹¹ National Council of Single Mothers and their Children (NCSMC), *Submission 397*, p. 15.

⁹² Safe Steps, *Submission 735*, pp. 4–5.

⁹³ VLA, *Submission 120*, p. 32.

⁹⁴ Women's Safety NSW, *Submission 727*, p. 64.

⁹⁵ See, for example, Ms Joanna Slater, *Submission 837*, p. 7; Non-Custodial Parents Party (NCP), *Submission 1*, p. 8.

⁹⁶ NCP, *Submission 1*, p. 6. See also, Ms Joanna Slater, *Submission 837*, p. 7.

10.69 If these various collection methods used by Services Australia fail, a parent can pursue unpaid child support through the courts.⁹⁷ The interaction between child support and the family law system is discussed in more detail below.

Interactions with the family law system

10.70 In cases where child support matters cannot be dealt with administratively by Services Australia, the legislation provides for a parent to pursue action through the courts.

10.71 The DSS told the committee:

The main interaction between the family law system and the child support system happens where separated parents have formalised their care arrangements for their children through family law processes, such as in a court order or parenting plan.⁹⁸

10.72 The AGD further explained:

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 ... [T]he CSRC Act⁹⁹ provides that a child support liability may be recovered in a family court by a child support Registrar or payee of a liability ... [T]he CSA Act¹⁰⁰ [also] provides that the majority of provisions of the Family Law Act apply to proceedings under the CSA Act.¹⁰¹

10.73 Although unable to take legal action in more than one court at the same time for the same debt, the Registrar may take successive actions using different enforcement processes.¹⁰²

10.74 With this considered, DSS told the committee:

... the child support system recognises a parent's obligation to provide support for their child is not tied to the other parent's compliance with a court order or care agreement.¹⁰³

10.75 A number of matters relating to aspects of the scheme can be pursued through the family law system. This includes change of assessments, reviews and appeals of child support decisions, court orders and child maintenance, as well as issues with proving parenting.

⁹⁷ Services Australia, *Annual Report 2018–19*, p. 113.

⁹⁸ DSS, *Submission 95*, p. 6.

⁹⁹ *Child Support Assessment Act 1989*, s. 113.

¹⁰⁰ *Child Support Assessment Act 1989*, s. 100.

¹⁰¹ AGD, *Submission 581*, Attachment 2, p. 18.

¹⁰² Services Australia, *Child Support Guide 5.4.1: Choice of Court*, <https://guides.dss.gov.au/child-support-guide/5/4/1> (accessed 31 July 2020).

¹⁰³ DSS, *Submission 95*, p. 7.

Change of assessments

10.76 Services Australia can change a child support assessment if they are 'satisfied there are special circumstances and the change would be fair to both parents and the child'.¹⁰⁴

10.77 In its submission, DSS told the committee:

The formula, as it works, is based on adjustable taxable income, where it then is expected to add back a number of benefits to represent the true financial circumstances of ... the payer. If there is a circumstance where someone believes that someone is arranging affairs to be beneficial, they can apply for what is known as a change of assessment.¹⁰⁵

10.78 A parent can apply for a change of assessment if there is evidence of changes to at least one of ten conditions:

- costs of visiting or communicating with the child;
- special needs of the child;
- costs of education or training;
- income of the child;
- additional payments or transfers of money, good or property;
- costs of child care;
- necessary commitments of self-support;
- income, assets and earning capacity; and/or
- responsibility to maintain a resident child.¹⁰⁶

10.79 Most change of assessment applications are managed and decided by Services Australia. DSS reported that there were approximately 17 000 applications for a change of assessment in 2018–19, with 46 per cent resulting in a change which was perceived to better reflect the circumstances of the parent and child.¹⁰⁷ Of these applications, approximately 57 per cent of cases 'related to a parent's income, property, financial resources or earning capacity'.¹⁰⁸

10.80 Applications that are unable to be managed administratively are directed to the relevant court for a decision.¹⁰⁹ For example, section 118 of the CSA Act provides that a parent can apply to a court for a change of assessment decision

¹⁰⁴ Services Australia, *Changing Your Assessment in Special Circumstances*, <https://www.servicesaustralia.gov.au/individuals/services/child-support/child-support-assessment/how-manage-your-assessment/changing-your-assessment-special-circumstances> (accessed 31 July 2020).

¹⁰⁵ Mr Shane Bennett, Acting Deputy Secretary, Social Security, DSS, *Proof Committee Hansard*, 14 February 2020, p. 19.

¹⁰⁶ DSS, *Submission 95*, p. 20.

¹⁰⁷ DSS, *Submission 95*, p. 20. See also, Services Australia, *Annual Report 2018–19*, p. 112.

¹⁰⁸ Services Australia, *Annual Report 2018–19*, p. 112.

¹⁰⁹ DSS, *Submission 95*, p. 20.

in relation to a case that has ended or if a 'child support agreement has been set aside by the court under section 136'.¹¹⁰

Child maintenance payments

10.81 Under the Family Law Act, the Federal Circuit Court and Family Court are empowered to make orders for child maintenance payments for children not covered by child support legislation.¹¹¹ These orders can be made either by the consent of each party, or by the judgment of the court.¹¹²

10.82 Some parents are unable to apply for an administrative assessment to coordinate child support payments as a part of the scheme.¹¹³ By way of example, DSS described that:

... a court order would be required for a child who is aged 18 years or older who has a physical or mental disability, or where the other parent lives in a country that does not have reciprocal arrangements with Australia to accept administrative child support assessments.¹¹⁴

10.83 A court is empowered to order that a payment be made in a lump sum or in periodic payments, impose terms and conditions and set an end date for the order.¹¹⁵ A court can also recover arrears under a child maintenance order.¹¹⁶

10.84 The Law Council highlighted the challenges associated with enforcing child maintenance orders:

Parents receiving child maintenance were left with the difficulty of having to enforce the child maintenance order against the paying parent, with all the attendant cost, both personally and financially, of yet further court proceedings. Typically, the parent (usually the mother) lacked the income and financial resources to enforce child maintenance orders whilst at the same time shouldering the burden of a child or children to financially support.¹¹⁷

¹¹⁰ DSS, *Child Support Guide 2.6.1: When Can the Registrar or a Court Consider Changing an Assessment*, <https://guides.dss.gov.au/child-support-guide/2/6/1> (accessed 31 July 2020).

¹¹¹ See, for example, AGD, *Submission 581*, Attachment 2, p. 18; Services Australia, *Court Ordered Periodic Child Maintenance*, <https://www.servicesaustralia.gov.au/individuals/services/child-support/court-ordered-periodic-child-maintenance/what-you-need-do> (accessed 31 July 2020).

¹¹² DSS, *Submission 95*, p. 22.

¹¹³ DSS, *Submission 95*, p. 10.

¹¹⁴ DSS, *Submission 95*, p. 22.

¹¹⁵ *Family Law Act 1975*, s. 66P.

¹¹⁶ *Family Law Act 1975*, division 7.

¹¹⁷ Law Council, *Submission 2.1*, p. 101.

10.85 Services Australia must be provided with a copy of the order, to enable it to collect payments as required by the order and as part of the scheme.¹¹⁸ Services Australia can also collect payments made pursuant to the following orders:

- parentage overpayment orders;
- orders for step-parents to pay child maintenance;
- spousal and de facto maintenance orders;
- court-registered agreements; and
- registered overseas maintenance liabilities from reciprocating jurisdictions.¹¹⁹

10.86 Depending on the circumstances, child maintenance orders expire either at a specified time or when a particular event occurs – such as the death of a parent or child, when the child finishes secondary school, or when the child turns 18 years of age.¹²⁰

10.87 Springvale Monash Legal Service recommended that the CSA Act be amended to allow the administrative provision of child support for a child until they complete secondary school even if they are already 18 years old, to eliminate the requirement for parents to pursue a child maintenance order through the courts.¹²¹

Enforcement hearings and enforcement orders

10.88 If a paying parent owes child support under a Family Court or Federal Circuit Court order, agreement or child support liability, the payee can apply for an enforcement hearing to recover the outstanding child support by filing an application and an affidavit.¹²²

10.89 At least 14 days prior to an enforcement hearing, the payee must personally serve the payer with the following:

- a copy of the application;
- the affidavit;
- a list of documents to be produced (and written notice demanding the production of those documents); and

¹¹⁸ DSS, *Submission 95*, p. 10. See also, Services Australia, *Court Ordered Periodic Child Maintenance*, <https://www.servicesaustralia.gov.au/individuals/services/child-support/court-ordered-periodic-child-maintenance/what-you-need-do> (accessed 31 July 2020).

¹¹⁹ DSS, *Submission 95*, pp. 10 and 22.

¹²⁰ Services Australia, *Court Order Expiry*, <https://www.servicesaustralia.gov.au/individuals/services/child-support/court-ordered-periodic-child-maintenance/what-you-need-do/court-order-expiry> (accessed 4 June 2020).

¹²¹ Springvale Monash Legal Service, *Submission 729*, p. 12. See also, VLA, *Submission 120*, pp. 31–32.

¹²² Family Court of Australia and Federal Circuit Court of Australia, *Enforcement Hearings*, pp. 1–2.

- a copy of the Family Court and Federal Circuit Court's *Enforcement Hearings* brochure.¹²³

10.90 At the hearing, the court will identify the amount of child support that is owed by the paying parent. It can then make an order for the amount be paid, either in full or by instalments. The payer may also be examined about their financial affairs and be asked to provide evidence in support of their failure to fulfil their obligation to pay child support. The court is unable to assess an order, agreement or child support liability at the enforcement hearing.¹²⁴

10.91 In some circumstances the payer is not required to attend the enforcement hearing:

A payer may, with the agreement of the payee, produce the documents to the payee at a time and place agreed before the day of the enforcement hearing. If the payee is satisfied with the information provided, the payee may give written notice to the payer and the Court, discontinuing the application. In this situation, the payer is no longer required to attend the enforcement hearing.¹²⁵

10.92 The courts can impose a penalty for a parent who does not provide the required documentation, does not attend the hearing, or if the parent fails to provide an answer to the court's satisfaction.¹²⁶

Reviews and appeals of child support decisions

10.93 If a parent does not agree with the decision for child support made by Services Australia, they can formally object to the decision in writing, within 28 days of receiving the Registrar's notice of decision (or 90 days for a parent living in an overseas reciprocating jurisdiction).¹²⁷

10.94 Services Australia can consider objections if the parent believes that Services Australia has used incorrect information, has not considered all related matters, missed important details or not applied the law correctly.¹²⁸ A party

¹²³ Family Court of Australia and Federal Circuit Court of Australia, *Enforcement Hearings*, p. 2.

¹²⁴ Family Court of Australia and Federal Circuit Court of Australia, *Enforcement Hearings*, p. 2.

¹²⁵ Family Court of Australia and Federal Circuit Court of Australia, *Enforcement Hearings*, p. 2.

¹²⁶ Family Court of Australia and Federal Circuit Court of Australia, *Enforcement Hearings*, p. 2.

¹²⁷ See, for example, DSS, *Child Support Guide 4.1.5: Extensions of Time to Lodge Objections*, <https://guides.dss.gov.au/child-support-guide/4/1/5> (accessed 31 July 2020); Services Australia, *Objections to Child Support Decisions*, <https://www.servicesaustralia.gov.au/individuals/topics/objections-child-support-decisions/34686> (accessed 31 July 2020).

¹²⁸ Services Australia, *Objections to Child Support Decisions*, <https://www.servicesaustralia.gov.au/individuals/topics/objections-child-support-decisions/34686> (accessed 31 July 2020).

cannot object to parentage, the collection of payments, changing a Departure Prohibition Order or refusing a Departure Authorisation Certificate.¹²⁹

10.95 For matters unable to be reviewed as part of the objection process by Services Australia, a parent can appeal the decision to the Social Services and Child Support Division of the AAT. In 2018–19, only 14 per cent of applications to this Division related to child support matters (noting that 85 per cent of applications sought to appeal Centrelink decisions).¹³⁰

10.96 The AAT's annual report recorded the following figures for decisions relating to child support matters finalised in 2018–19:

Table 10.4 Decisions finalised by the AAT for child support matters in 2018–19

Decision type	Number of decisions finalised
Care percentage decision	703
Change of assessment	923
Non-agency payment	144
Particulars of the assessment	260
Refusal of extension of time to object	137
Other	226
Total decisions	2356

Source: *Administrative Appeals Tribunal, Annual Report 2018–19*, p. 43.

10.97 If a parent is dissatisfied with the decision made by the Social Services and Child Support Division of the AAT to affirm, vary or set aside the application, they can apply for a second review with the AAT's General Review Division.¹³¹

10.98 Where a parent is still not satisfied with the AAT's decision, they can appeal the decision with the Family Court or the Federal Circuit Court on a question of law.¹³² In 2018–19, only 22 of the 85 234 filings in the Federal Circuit Court were a result of child support appeals from the AAT.¹³³

¹²⁹ Services Australia, *Objections to Child Support Decisions*, <https://www.servicesaustralia.gov.au/individuals/topics/objections-child-support-decisions/34686> (accessed 31 July 2020).

¹³⁰ *Administrative Appeals Tribunal, Annual Report 2018–19*, p. 41. See also, Law Council, *Submission 2.1*, p. 108.

¹³¹ Law Council, *Submission 2.1*, p. 108.

¹³² Law Council, *Submission 2.1*, p. 109.

¹³³ Federal Circuit Court, *Annual Report 2018–19*, p. 33. See also, Law Council, *Submission 2.1*, p. 110.

10.99 The Law Council and the Hon Diana Bryant were of the view that the low number of appeals to the Federal Circuit Court indicated that the application process to the AAT worked well.¹³⁴

Proving parentage

10.100 Services Australia must be satisfied that the persons to be assessed in relation to the costs of the child are the parents of the child.¹³⁵ The administrative scope for this process is limited and parentage disputes often need to be referred to the courts for resolution.¹³⁶

10.101 Where an application for a child support assessment has been refused 'due to lack of evidence as to parentage', a person may apply to a court for a declaration that 'the application should have been accepted because the person named is a parent of the child' under section 106A of the CSA Act.¹³⁷ Conversely, a person may also apply to a court 'for a declaration that they are not a parent of the child under section 107 of the CSA Act'.¹³⁸

10.102 A number of submissions raised concerns regarding the evidence required to prove parentage.¹³⁹ For example, Victoria Legal Aid observed that proving parentage can be challenging in circumstances where 'a person is determined to be the parent through DNA testing but then refuses to sign a statutory declaration to acknowledge [parentage]'.¹⁴⁰

10.103 To enable the Registrar to accept an application using accredited DNA evidence, Victoria Legal Aid recommended that section 106A of the CSA Act be amended to allow DNA evidence, without the requirement for a declaration of parentage.¹⁴¹ Victoria Legal Aid also recommended that the CSA Act be amended to allow the Registrar to end an administrative assessment using DNA evidence as under the current legislation it is only possible to end an administrative assessment through court proceedings.¹⁴²

¹³⁴ Law Council, *Submission 2.1*, p. 114; the Hon. Diana Bryant AO, QC, *Submission 847*, p. 8.

¹³⁵ DSS, *Submission 95*, p. 10.

¹³⁶ See, for example, National Legal Aid (NLA), *Submission 589*, p. 5; Springvale Monash Legal Service, *Submission 729*, p. 12; VLA, *Submission 120*, p. 31.

¹³⁷ DSS, *Submission 95*, p. 11.

¹³⁸ DSS, *Submission 95*, p. 11.

¹³⁹ See, for example, NLA, *Submission 589*, p. 6; Springvale Monash Legal Service, *Submission 729*, p. 12; VLA, *Submission 120*, p. 31.

¹⁴⁰ VLA, *Submission 120*, p. 31. See also, NLA, *Submission 589*, p. 6; Springvale Monash Legal Service, *Submission 729*, p. 12.

¹⁴¹ VLA, *Submission 120*, p. 31. See also, NLA, *Submission 589*, p. 6; Springvale Monash Legal Service, *Submission 729*, p. 12.

¹⁴² VLA, *Submission 120*, p. 31. See also, Springvale Monash Legal Service, *Submission 729*, p. 12.

Conflict and domestic violence

10.104 Many submitters to the inquiry expressed concerns regarding situations where child support is used to perpetuate financial abuse after separation.¹⁴³

10.105 Domestic Violence Victoria raised concerns about the scheme's capacity to effectively identify and manage 'family violence and controlling behaviours'.¹⁴⁴ Engender Equality called for increased training to assist child support workers to identify 'cases where domestic or family violence exists, and to provide the information, support, assistance, and referral that may be required'.¹⁴⁵

10.106 In its submission, DSS outlined the training provided to staff at Services Australia:

Staff have been trained in the use of the Child Support Risk Identification and Referral Model, which provides a systematic method to identify parents with a set of determined risk factors that indicate possible need for intensive support and/or referral ... If a staff member identifies a person experiencing or at risk of family and domestic violence, they record a family violence sensitive issue indicator on their record. This indicator is an internal customer management tool that enables staff to identify and provide appropriate support and referral options to the person. The indicator does not identify the perpetrator.¹⁴⁶

10.107 According to Women's Legal Service Queensland, most women who have experienced domestic violence prefer to seek an exemption from Centrelink—rather than to submit a child support assessment application—to reduce the risk of exposing themselves to further abuse.¹⁴⁷ The Hume Riverina Community Legal Service also noted the 'philosophical tension' associated with applying for such an exemption as it can appear to reward 'perpetrators of violence ... for their conduct'.¹⁴⁸

10.108 The Australian Institute of Family Studies submitted that parents experiencing domestic violence were less likely to receive child support payments in full and on time.¹⁴⁹ This can create more challenges for parents who rely on child support payments to care for their children. Women's Legal

¹⁴³ See, for example, Australia Women Against Violence Alliance, *Submission 716*, p. 7; Embolden, *Submission 588*, p. 18; Hume Riverina Community Legal Service (HRCLS), *Submission 736*, p. 10; NCSMC, *Submission 397*, p. 6; Social Work Practice Group – Family Court of WA, *Submission 846*, p. 4; Women's Safety NSW, *Submission 727*, pp. 62–63.

¹⁴⁴ Domestic Violence Victoria, *Submission 705*, p. 29.

¹⁴⁵ Engender Equality, *Submission 232*, p. 15.

¹⁴⁶ DSS, *Submission 95*, p. 24.

¹⁴⁷ Women's Legal Service Queensland (WLSQ), *Submission 715*, p. 52.

¹⁴⁸ See HRCLS, *Submission 736*, p. 10.

¹⁴⁹ Australian Institute of Family Studies, *Submission 731*, p. 731.

Service Queensland also noted that perpetrators may withhold or intermittently pay child support as a means of financial abuse.¹⁵⁰

10.109 Women's Safety NSW described how the 'refusal to pay child support can be a powerful mechanism by which a person may continue to exert power and control over their ex-partner' and recommended that section 4 of the Family Law Act be amended to recognise child support as a relevant factor in determining the existence of financial abuse.¹⁵¹

Proposal to trial guaranteed child support payments

10.110 A number of submissions proposed a new child support system to guarantee that payments are made to the payee parent.¹⁵² Under this framework, any unpaid child support would become a debt to the Australian Government to be pursued accordingly.¹⁵³

10.111 Such a system was one of the recommendations made by the 2015 Child Support Report.¹⁵⁴ The 2015 Child Support Report recommended that 'the assessment, modelling and potential trial of a limited financial guarantee for either vulnerable families or a randomised sample of [child support] clients'.¹⁵⁵

10.112 The 2015 Child Support Report also recommended that this trial be designed to ensure that it would 'not create a substantial drain on public finances'.¹⁵⁶

10.113 The NCSMC supported the implementation of the trial proposed by the 2015 Child Support Report, and called for the trial of a:

... State Guaranteed Child Support Payment, as recommended by the 2015 Parliamentary Inquiry into the Child Support Program. It would be sensible to commence an agreed trial for women affected by Domestic Violence including postseparation financial abuse. The only safety mechanism for women in the child-support scheme is the option not to pursue childsupport [sic]. The current policy places the burden upon the

¹⁵⁰ WLSQ, *Submission 715*, p. 52.

¹⁵¹ Women's Safety NSW, *Submission 727*, pp. 62–63. See also, Women's Legal Service NSW, *Submission 702*, p. 7.

¹⁵² See, for example, Australia's National Research Organisations for Women's Safety, *Submission 602*, pp. 5 and 18; Council of Single Mothers and their Children, *Submission 417*, p. 6; Family Law Reform Coalition, *Submission 597*, p. 5; NCSMC, *Submission 397*, pp. 5–6; Women's Legal Service NSW, *Submission 702*, p. 7; WLSQ, *Submission 715*, p. 53.

¹⁵³ See, for example, Craig Ray and Associates, *Submission 84*, p. 2; Ms Elspeth McInnes, *Submission 394*, p. 12; WLSQ, *Submission 715*, p. 53.

¹⁵⁴ House of Representatives Standing Committee on Social Policy and Legal Affairs, *From Conflict to Cooperation: Inquiry into the Child Support System*, June 2015, p. 141 (2015 Child Support Report).

¹⁵⁵ 2015 Child Support Report, *From Conflict to Cooperation: Inquiry into the Child Support System*, June 2015, p. viii.

¹⁵⁶ 2015 Child Support Report, *From Conflict to Cooperation: Inquiry into the Child Support System*, June 2015, pp. 141–142.

victim to have knowledge of the exemption process, undertake the application process and then hopefully be granted an exemption. Penalties and/or failures for not pursuing child-support can reduce critical Family Tax Benefit Part A resources. A State Guaranteed Payment would be a second option for women and children affected by domestic violence. Currently, the system provides a perverse incentive that financially reward abusive payers (typically men), as they may be exempt from paying any form of child support.¹⁵⁷

10.114 Women's Legal Service NSW explained that guaranteed payments would assist in improving financial security for mothers after separation, and help to eliminate the risk that child support would be used to perpetrate abuse.¹⁵⁸

10.115 Women's Safety NSW was also of the view that:

...the onus should not be on a victim/survivor of domestic violence and abuse to chase her abuser for necessary payments to support the children's basic needs... allowing the abuser to remain unaccountable.¹⁵⁹

10.116 The Government did not agree with the recommendation to consider a trial of limited financial guarantee by the 2015 Child Support Report and was of the view that:

... the child support scheme should continue to ensure that parents are responsible for the payment of child support. The payment of government family assistance is currently payable at a higher rate if child support payments collected by the Department of Human Services [now known as Services Australia] are not received and would otherwise have reduced the rate payable, and this will continue to apply.¹⁶⁰

10.117 The Law Council shared similar concerns in its submission and noted that the current scheme 'reflects the community expectation that parents share in the cost of supporting their children according to their capacity, rather than burden the taxpayer'.¹⁶¹

¹⁵⁷ NCSMC, *Submission 397*, pp. 5–6.

¹⁵⁸ Women's Legal Service NSW, *Submission 702*, p. 38.

¹⁵⁹ Women's Safety NSW, *Submission 727*, p. 63.

¹⁶⁰ Australian Government, *Australian Government Response to the House of Representatives Standing Committee on Social Policy and Legal Affairs report: From Conflict to Cooperation – Inquiry into the Child Support Program*, August 2016, p. 14.

¹⁶¹ Law Council, *Submission 2.1*, p. 113.

Chapter 11

Support services

Introduction

11.1 Chapter 3 highlighted the profound impact that family and relationship breakdown has on the immediate and extended members of a family. For some, this stress is exacerbated by their interactions with the family law system, and many families and individuals are consequently required to seek professional support for assistance.

11.2 The Australian Law Reform Commission (ALRC) Report, *Family Law for the Future—An Inquiry into the Family Law System* (ALRC 2019 Report), commented that many aspects of the *Family Law Act 1975* (Family Law Act) demonstrate a consideration for 'informality, privacy, and respect for the dignity of separating couples' and:

... illustrate Parliament's intention to identify and treat family law as being different in character from other areas of civil law because of the emotional and financial consequences of relationship breakdown, and its public policy impacts on the wider society.¹

11.3 This idea is most prevalent in section 43 of the Family Law Act, which provides that each jurisdiction have regard to:

- (a) the need to preserve and protect the institution of marriage as the union of 2 people to the exclusion of all others voluntarily entered into for life;
- (b) the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children;
- (c) the need to protect the rights of children and to promote their welfare;
- (ca) the need to ensure protection from family violence; and
- (d) the means available for assisting parties to a marriage to consider reconciliation or the improvement of their relationship to each other and to their children.²

11.4 The scope, effectiveness and accessibility of support services were consistent themes raised by many submitters and witnesses throughout this inquiry. This

¹ Australian Law Reform Commission (ALRC), *Family Law for the Future — An Inquiry into the Family Law System*, ALRC Report 135, 2019, March 2019, p. 357 (ALRC 2019 Report).

² *Family Law Act 1975*, s. 43.

chapter provides an overview of the support services available to families and individuals engaging with Australia's family law system and considers:

- the scope of support services that are available to men, women, children and other groups which are require specialised support;
- the Family Advocacy and Support Services (FASS); and
- services that are funded by the Australian Government.

11.5 This chapter builds on the discussion of services in Chapter 2; Chapter 5; Chapter 8 and Chapter 12.

Scope and availability of support services

11.6 A sentiment expressed in many submissions was that support services needed to be expanded to be more accommodating to families and individuals irrespective of their background or personal circumstances.

11.7 For example, one witness highlighted:

... everyone is equal and everyone has a right to access the same services regardless of any demographic that exists for that individual [which] provides a much better access to social services [and] a better solution within the community.³

11.8 This section examines the range of services providing dedicated support for men, women and children, as well as more specialised support services tailored to meet the needs of Aboriginal and Torres Strait Islander peoples and individuals belonging to groups that are typically underrepresented in the family law system.

Support for men

11.9 The committee heard from a range of organisations that provide specialised support services for men—such as Australian Brotherhood of Fathers; Lone Fathers Association of Australia; Men's Resources Tasmania; Men's Rights Agency; No to Violence and the One in Three Campaign.⁴

11.10 The evidence received by the committee demonstrated two key issues with the provision of support services for men: firstly, the limited range of services available; and secondly, the perceived misrepresentation of males being perpetrators of violence, rather than genuine victims.

³ In camera Hansard, 12 March 2020.

⁴ See, for example, Australian Brotherhood of Fathers (ABF), *Submission 1668*; Lone Fathers Association of Australia, *Submission 112*; Men's Resources Tasmania, *Submission 586*; Men's Rights Agency, *Submission 603*; No to Violence, *Submission 739*; One in Three Campaign, *Submission 383*.

11.11 For example, Mr Andrew Humphreys, Social Worker at the One in Three Campaign highlighted the perceived inequality of services dedicated to supporting men and women:

... we actually need to set up the supports that already exist for women for men as well—for example, when men have to go forward with these issues, they have a counsellor assisting them, and they may have access to a men's legal service, as there is for women to a woman's legal service. There needs to be a men's legal service with these sorts of allegations so that, when a man does gets to the stage of needing an AVO or going to the Family Court, he is being supported, in the same way that many women can access these supports.⁵

11.12 Another sentiment raised by a number of submitters and witnesses was the perception that men presenting as victims of family violence are more likely to be treated as perpetrators of violence than women presenting as victims of family violence. For example, Mrs Sue Price, Administrator, Men's Rights Agency commented:

I would like to see services that are genuine in listening to men and actually believing men that they have a genuine complaint. That's what we're lacking. We have men who complain that, when they've been a victim of domestic violence, and quite serious violence, they're sent off to a men's anger management course ... because there is nowhere else to send them.⁶

11.13 The One in Three Campaign explained that men can feel discouraged from presenting to support services or reporting that they are a victim of family violence and abuse and submitted that:

Many barriers to male victims disclosing their abuse are created or amplified by the lack of public acknowledgement that males can also be victims of family violence, the lack of appropriate services for male victims and their children, and the lack of appropriate help available for male victims from existing services. Such barriers include not knowing where to seek help, not knowing how to seek help, feeling there is nowhere to escape to, feeling they won't be believed or understood, feeling that their experiences would be minimised or they would be blamed for the violence and/or abuse, feeling that services would be unable to offer them appropriate help, fear that they would be falsely arrested because of their gender (and their children left unprotected from the perpetrator).⁷

11.14 For this reason, Mr Jonathan Bedloe, Executive Officer at Men's Resources Tasmania told the committee that men sometimes regretted seeking support:

I think a lot of the time men who have shared their stories or are willing to share their stories find themselves being judged ... A lot of men who have

⁵ Mr Andrew Humphreys, Social Worker, One in Three Campaign, *Proof Committee Hansard*, 8 July 2020, pp. 27–28. See also, Men's Resources Tasmania, *Submission 586*, p. 2.

⁶ Mrs Sue Price, Administrator, Men's Rights Agency, *Proof Committee Hansard*, 12 March 2020, p. 4.

⁷ One in Three Campaign, *Submission 383*, pp. 16–17.

told their stories in counselling sessions or other forums have regretted doing that because of the reception they've received ... There's quite a bit of commentary in the men's sector that men who call as victims at the start end up being categorised as perpetrators. ... I think there's a real problem when, after somebody rings up expressing concern about their experience as a victim, the conversation leads to exploring their perpetration of violence. Even though they may have, if they're not validating their experience then we risk alienating them and potentially becoming part of the ongoing forms of violence against them. That's one area where I think we need to value and validate the stories we hear from men.⁸

11.15 Despite these concerns, No to Violence, which operate a telephone line for men wishing to seek assistance for family violence, told the committee that they are seeing more men contacting their service 'of their own volition':

... indicating ... some of the complexity that goes on in those men's lives but also a hopeful sign that, if we do provide services that are relevant, people will reach out and that maybe ... men are starting to take a bit more responsibility for their own part in whatever is going on in their families. It may also be because we've offered webchat facilities, so people don't always have to pick up the phone and talk with another human being; there's a way of them accessing our service that's a little bit more anonymous and a little bit more shielded for them ... [W]e believe the earlier we can get in on engagement of a man's own understanding of what's happening for him the better chance we have of keeping everybody safer.⁹

11.16 No to Violence also explained their experience as a service provider providing support to men about their use of violence:

Our experience is also that, when men first call us, they often present as victims. Even if they're not the genuine victims of physical or psychological violence, they feel victims. They believe that they're victims of the system. They believe that it's all gone her way. They believe that it's all stacked against them and the courts are wrong, and: 'I told the police I didn't actually punch her. I just punched the wall beside her.' ... We think: 'Okay, so you just punched the wall. I wonder how that was for her.' 'Oh, the kids didn't see it or hear it.' 'Well, how do you know?' 'Because they were upstairs. Because I never hit her when the kids were around.' That's a flag for us. That tells us that he's made a conscious decision to use violence. He's doing it when the kids aren't around because he thinks that they're not going to be harmed. The truth is children are harmed by this. They're harmed by living in families that have extreme tension and where things are going to kick off at any point in time. So we work hard with men to try and engage with them and empathise with where they're at but to also help them reframe it so that they can find a responsible place to be in that space. And that includes this use of legal processes and legal systems. The

⁸ Mr Jonathan Bedloe, Executive Officer, Men's Resources Tasmania, *Proof Committee Hansard*, 8 July 2020, p. 5.

⁹ Ms Jacqui Watt, Chief Executive Officer, No to Violence, *Proof Committee Hansard*, 24 June 2020, p. 23.

men need services too ... because there is so much at stake here for families if we don't build stronger services for the men.¹⁰

Support for women

11.17 The committee also heard from a range of services specialising in providing support for women, including a number of family violence services and several women's legal services.¹¹

11.18 A submitter told the committee about her experience seeking support following her involvement with the family law system:

This situation has had a profound effect on my health and on my family members and my current partner. As a consequence of the court experience, I have developed an anxiety disorder which I had not had before. I am still experiencing the consequences of this disorder 8 years later.

Over the past years we have gone from service to service, seeing various doctors, health care professionals, relationship Australia services, women's refuges, every local service, councillors and psychologists. Our local service, Child and Youth mental health services reviewed our situation and concluded that my son is highly distressed and referred us onto another psychological service that we do not have his father's consent for. Consequently, it meant another dead end ...¹²

11.19 A common concern expressed in the evidence received by the committee was the perceived lack of support services available to women affected by family violence participating in the family law system. For example, the National Council of Single Mothers and their Children recommended that these women have access to affordable legal representation to mitigate against safety risks that may present themselves when victims are required to represent themselves during court proceedings.¹³ YWCA Canberra made a similar point

¹⁰ Ms Jacqui Watt, Chief Executive Officer, No to Violence, *Proof Committee Hansard*, 24 June 2020, pp. 23–24.

¹¹ See, for example, Australian Muslim Women's Centre for Human Rights, *Submission 732*; Australian Women Against Violence Alliance (AWAVA), *Submission 716*; Council of Single Mothers and their Children (CSMC), *Submission 417*; Feminist Legal Clinic, *Submission 234*; National Council of Single Mothers and their Children (NCSMC), *Submission 397*; National Foundation for Australian Women, *Submission 118*; Northern Territory Women's Legal Services, *Submission 740*; Victim Support Service and Women's Legal Service SA, *Submission 741*; Women's Legal Centre ACT, *Submission 382*; Women's Legal Service Queensland, *Submission 715*; Women's Legal Service Australia, *Submission 728*; Women's Legal Service NSW, *Submission 702*; Women's Legal Service Tasmania, *Submission 713*; Women's Legal Service Victoria (WLSV), *Submission 701*; Women's Safety NSW, *Submission 727*; YWCA Canberra, *Submission 592*.

¹² Confidential, *Submission 151*.

¹³ NCSMC, *Submission 397*, p. 4. See also, YWCA Canberra, *Submission 592*, p. 7.

and advocated for a Women Domestic Violence Court Advocacy Service to be rolled out across local and district courts.¹⁴

11.20 In its submission, Women's Legal Service Victoria demonstrated how its services assist women involved in the family law system:

Tara's partner Gareth was physically and emotionally abusive towards her and their three children throughout their relationship. He was financially controlling of Tara and secretive about his income and their finances. Tara did not have her own bank account or independent access to joint funds. Within months of their relationship ending Tara became aware that Gareth withdrew around \$63,000 of savings from his account.

Represented by [Women's Legal Service Victoria], Tara sought and obtained an injunction to prevent Gareth from making further withdrawals. She also obtained procedural court orders for Gareth to make full and frank financial disclosure and account for the money he withdrew.

For eight months Gareth, who had legal representation, failed to provide the financial documentation ordered. No negotiations or agreement could occur at the court ordered conciliation conference because Gareth's financial situation was not known. There was no legal aid available for her property matter and she could not meet the cost of a barrister to argue for her full entitlement in a final hearing.

To ensure she received some financial settlement, Tara was made an urgent application for property orders for her to receive 100% of the balance of Gareth's known savings. Tara, who had care of their three children, received the meagre balance of the account which was known to her, being around \$28,000.¹⁵

11.21 Moreover, the Australian Muslim Women's Centre for Human Rights highlighted that support services that are equipped to identify women and children affected by violence would assist in mitigating instances where:

... women are subjected to coercive controlling violence feel pressure to agree to parenting arrangements and consent orders that are not in the best interest of their children and do not take the experiences of family violence into account.¹⁶

11.22 For some women, these challenges are further impaired by physical and geographical isolation. For example, Mrs Janet Taylor, Managing Principal Solicitor at Central Australian Women's Legal Service summarised the vast scope of barriers to resourcing and funding for services supporting women affected by violence in the Northern Territory:

Resources are a gendered issue ... We say that every legal service, from Legal Aid to Aboriginal Legal Aid, needs to be funded. But I think that women's legal services such as ours, which are specialised, and the

¹⁴ YCWA Canberra, *Submission 592*, p. 7.

¹⁵ WLSV, *Submission 701*, p. 31.

¹⁶ Australian Muslim Women's Centre for Human Rights, *Submission 732*, p. 12.

Aboriginal-controlled organisations that deal with women victims are not funded on the same level as Legal Aid or those that tend to focus more on men. I would say the majority of victims in the Territory go through all of our organisations, but we're not as resourced because it's really set up and geared for criminal proceedings funding and still maintains that form. Obviously it's evidenced based, I'm not making any value judgement [sic] here, but most offenders still tend to be male, so that's where the money goes.¹⁷

Support for children

11.23 A few submissions highlighted inadequate range of support services for children with separated parents participating in the family law system.¹⁸

11.24 For example, Carinity Talera highlighted the need for specialised support services to assist children throughout family law proceedings, including through family violence counselling, to ensure that they 'feel physically and emotionally safe prior to exploring trauma and mourning losses'.¹⁹

11.25 A submitter recounted the impact that the family law process had on his children:

During proceedings, my children subjected to abuse by the mother and evidenced by supervised contact services when attempts to build a relationship. The children had been in serious distress, screaming and crying prior to staff brining [sic] the children out to meet with me. This continued for the entire 8 months, each time for over an hour, staff failed to intervene or make official note to the court.²⁰

11.26 To improve the scope of support services for children, the Benevolent Society recommended that children's advocates be located at family courts and that court officials be provided with the relevant resources and training so that they can appropriately engage with children throughout the court process.²¹

Services tailored to meet the needs of specific groups

11.27 Many submitters and witnesses also expressed concerns about the lack of appropriate and accessible services for Aboriginal and Torres Strait Islander peoples; as well as clients of the family law system from culturally and linguistically diverse (CALD) backgrounds; living with a disability; identifying

¹⁷ Mrs Janet Taylor, Managing Principal Solicitor, Central Australian Women's Legal Service (CAWLS), *Proof Committee Hansard*, 22 July 2020, p. 35.

¹⁸ See, for example, Carinity Talera, *Submission 601*, p. 6; Centre for Excellence in Child and Family Welfare (Inc.), *Submission 92*, p. 2; For Kid's Sake, *Submission 607*, p. 21; Save the Children, *Submission 94*, pp. 3–4; The Benevolent Society, *Submission 109*, p. 10.

¹⁹ Carinity Talera, *Submission 601*, p. 6.

²⁰ Confidential, *Submission 162*.

²¹ The Benevolent Society, *Submission 109*, p. 10.

as LGBTQI+; and from regional, rural and remote areas.²² These views are presented below.

Support for Aboriginal and Torres Strait Islander peoples

11.28 The committee heard from a number of organisations which provide specialised support services for Aboriginal and Torres Strait Islander peoples involved in the family law system—such as Aboriginal Family Law Services; Aboriginal Legal Service of Western Australia; the North Australian Aboriginal Legal Service; and the National Aboriginal and Torres Strait Islander Legal Service.²³

11.29 Two broad concerns were identified in the evidence received by the committee, which included—a lack of culturally appropriate service models for Aboriginal and Torres Strait Islander communities; and a deficiency in the availability of adequately resourced services.

11.30 For example, Dr April O'Mara, Manager, Practice Governance and Research at Centacare Family and Relationship Services told the committee that to assist Aboriginal and Torres Strait Islander families facing challenges such as 'racism, discrimination and ... intergenerational trauma' engage with the family law system:

We believe support for self-determination, responsibility, ownership and cultural pride in family law matters for Aboriginal and Torres Strait Islander families is important, and a system much like the Murri Court system model²⁴ may assist to manage these complex families and their complex needs.²⁵

11.31 Relationships Australia Northern Territory made a similar point, and explained that generic Family Relationship Centre (FRC) models were not equipped to provide the necessary support for Aboriginal and Torres Strait Islander communities as:

... many people from remote communities do not neatly fit into the usual demographic that makes up the majority of the clientele of [FRCs] where a couple is separating and wants to make parenting arrangements for their children. This is more of a rarity in remote indigenous communities where

²² See, for example, Law Council of Australia (Law Council), *Submission 2.1*, p. 76; Relationship Matters, *Submission 224*, p. 5.

²³ See, for example, Aboriginal Family Law Services, *Submission 233*; Aboriginal Legal Service of Western Australia, *Submission 225*; North Australian Aboriginal Legal Service, *Submission 742*; National Aboriginal and Torres Strait Islander Legal Service, *Submission 738*.

²⁴ Murri Courts provide a culturally appropriate court process and access to relevant support services for Aboriginal and Torres Strait Islander people. Murri Courts operate in selected courts throughout Queensland. See, Queensland Courts, *About Murri Court*, <https://www.courts.qld.gov.au/courts/murri-court/about-murri-court> (accessed 8 September 2020).

²⁵ Dr April O'Mara, Manager, Practice Governance and Research at Centacare Family and Relationship Services, *Proof Committee Hansard*, 12 March 2020, p. 21.

families and entire communities can be in dispute and may be affected by a range of safety issues, yet resolutions to their family disputes often don't involve separating or actually leaving a community.²⁶

11.32 In its submission, Women's Legal Centre ACT recommended greater resourcing for legal services to provide non-legal, culturally appropriate support services²⁷ and included a case study illustrating the benefits of holistic support:

Linda* is an Aboriginal woman who contacted [Women's Legal Centre ACT] ... Linda's ex-partner had made an application to the court to see the children ... She could not afford a private lawyer. The Centre's specialist Family Law Solicitor spoke with Linda to understand her views of what was best for her and the children ...

Linda, the Solicitor and Centre's social worker discussed the concept of supervised time and agreed to seek an adjournment of her case to go to mediation to explore this possibility without having to take the matter to court ... The mediation resulted in a very slow introduction of supervised time ... The Centre also stayed in touch with the matter to ensure the support she received was culturally informed. Linda also went to an Aboriginal medical service to access culturally appropriate counselling support. The Centre's multidisciplinary team worked together in way that was led by Linda and mindful of her cultural needs and the effects of trauma in her life and relationships. The Centre worked to support Linda to understand her rights and obligations and her desire to focus on supporting her children and staying safe and keeping the matter out of court.²⁸

11.33 To improve the relationship between officials of the family court and Aboriginal and Torres Strait Islander families, Aboriginal Legal Service of Western Australia recommended that a service similar to FASS be established 'so that Aboriginal social or support workers, preferably from or very familiar with the local area, are collated with family lawyers and can work directly with clients'.²⁹ Similarly, Domestic Violence NSW recommended that 'Aboriginal Liaison Officers' be made available at family court facilities and FRCs.³⁰

Support for people from CALD backgrounds

11.34 A few submissions identified two key barriers faced by people with CALD backgrounds when accessing the family law system and relevant support

²⁶ Relationships Australia Northern Territory, *Submission 395*, p. 3.

²⁷ Women's Legal Centre ACT, *Submission 382*, p. 8.

²⁸ Women's Legal Centre ACT, *Submission 382*, p. 9.

²⁹ Aboriginal Legal Service of Western Australia, *Submission 225*, p. 6.

³⁰ Domestic Violence NSW, *Submission 711*, p. 12. See also, Victim Support Service and Women's Legal Service SA, *Submission 741*, p. 8.

services: a lack of cultural awareness by court officials and support staff; and insufficient availability of interpreters. These points are discussed below.

11.35 In its submission, the Federation of Ethnic Communities' Councils of Australia (FECCA) recommended that training be facilitated for judicial officers to improve their cultural awareness and literacy to assist clients of the family law system belonging to CALD backgrounds to improve their understanding of court procedures and their legal rights.³¹ InTouch Multicultural Centre Against Family Violence (InTouch) raised a similar point and called for more funding to enable specialised support workers to provide referrals and emotional support to 'migrant and refugee women' at court facilities.³²

11.36 The FECCA recognised that qualified interpreters and translation staff play an essential role in ensuring accessibility across all aspects of the family law system.³³ This sentiment was echoed by Ms Amber Russell, Solicitor at Central Australian Women's Legal Service, who stated that:

... the availability of interpreters can mean the difference between a client being actively involved, engaged and included in the legal process or not. If they're not giving evidence and interpreters aren't available, they can sit in the matter and they can see their lawyer is there doing a lot of talking, or the judge is doing a lot of talking, but they don't actually have a full understanding of what's happening.³⁴

11.37 InTouch recommended that interpreters undertake training to ensure that they are proficient in legal terminology and equipped to recognise individuals experiencing family violence.³⁵

Support for people living with a disability

11.38 A few submissions recognised the challenges that people living with a disability face when trying to access various aspects of the family law system and the relevant support.³⁶

11.39 The Australia Women Against Violence Alliance illustrated how a client with a disability involved in the family law system can be disadvantaged due to a lack of awareness and understanding:

³¹ Federation of Ethnic Communities' Councils of Australia (FECCA), *Submission 100*, pp. 2–3.

³² InTouch Multicultural Centre Against Family Violence, *Submission 598*, p. 8.

³³ FECCA, *Submission 100*, p. 2. See also, Jesuit Refugee Service and Refugee Advice and Casework Service, *Submission 604*, pp. 13–14; Ms Zoe Rathus AM, *Submission 710*, p. 6.

³⁴ Ms Amber Russell, Solicitor, CAWLS, *Proof Committee Hansard*, 22 July 2020, p. 31.

³⁵ InTouch Multicultural Centre Against Family Violence, *Submission 598*, p. 8. See also Ms Zoe Rathus AM, *Submission 710*, p. 6.

³⁶ See, for example, ANROWS, *Submission 602*, p. 14; AWAVA, *Submission 716*, p. 13; Domestic Violence NSW, *Submission 711*, p. 13.

During the meeting with the family report writer Ameera could not raise family violence, as she did not have enough evidence to support her claim. In addition, Ameera faced barriers communicating her story because of her developmental disability. This meant that some crucial pieces of information were missed. Neither the family report writer nor the whole system were equipped and trained to adequately respond to Ameera's needs. Unfortunately, even Ameera's lawyer blamed her for not being able 'communicate properly'. 'It's like you completely disappear [within the system]', Ameera told us.³⁷

11.40 Australia's National Research Organisation for Women's Safety (ANROWS) submitted that women living with a disability were more likely to experience domestic violence,³⁸ compared to women who do not live with a disability, and recommended:

Structural changes like improvements to accessibility, for example wheelchair access, and alternatives to verbally calling matters to assist deaf or hard-of-hearing service users to know when their case is being called, need to accompany changes to the attitudes and stereotypes that impede safe access for women with disability experiencing DFV. Regular disability awareness training would be a great start for all people working within the family law response system.³⁹

Support for people from regional, rural and remote areas

11.41 Several submissions discussed the barriers faced by families living in regional rural and remote areas trying to access support services.⁴⁰

11.42 For example, Mrs Taylor explained the challenges facing the delivery and accessibility of services across the Northern Territory:

Our limited services delivery also includes [FRCs], contact centres for changeover, counselling, safe houses for women affected by family violence, police stations—some communities don't have a police station—interpreters where English is not the main language in a community and transport to the nearest town. If I can put this into context, a lot of our clients have to travel several hundred kilometres to come to see us in the office if they cannot contact us by phone or by social media.⁴¹

³⁷ AWAVA, *Submission 716*, p. 55.

³⁸ ANROWS, *Submission 602*, p. 14. See also, AWAVA, *Submission 716*, p. 13; Domestic Violence NSW, *Submission 711*, p. 13.

³⁹ ANROWS, *Submission 602*, p. 14.

⁴⁰ See, for example, AWAVA, *Submission 716*, p. 30; CSMC, *Submission 417*, p. 15; Domestic Violence Victoria, *Submission 705*, p. 21; National Legal Aid, *Submission 589*, p. 27; Relationships Australia, *Submission 606*, pp. 1, 25, 38, and 129–130; Partnerships for Victorian Relationship Centres, *Submission 714*, p. 8; Women's Legal Service Victoria, *Submission 701*, p. 22; Women's Safety NSW, *Submission 727*, p. 25.

⁴¹ Mrs Janet Taylor, Managing Principal Solicitor, CAWLS, *Proof Committee Hansard*, 22 July 2020, pp. 28–29. See also, Northern Territory Women's Legal Service, *Submission 740*, p. 11.

11.43 Relationships Australia also recognised:

... that there are fewer resources available to people in these areas, and that they live with pressures, complexities and uncertainties not experienced by those living in cities and regional centres.⁴²

11.44 Given this, Relationships Australia recommended that services be co-located wherever possible to '[e]nhance accessibility' for families living outside 'major population centres'.⁴³

Support for people identifying as LGBTQI

11.45 Better Place Australia and Rainbow Families Victoria commented on the experiences of LGBTQI individuals and 'rainbow families'⁴⁴ engaging with the family law system:

Rainbow families are largely ignored by the family law system. While there have been improvements in the recognition of rainbow families within the family law system, family law support services are not appropriately funded for the specific work of supporting rainbow families during separation.⁴⁵

11.46 Better Place Australia also highlighted the need for 'specialist LGBTQI+ specific family law services' to appropriately assist LGBTQI families engaging with the family law system and participating in family dispute resolution.⁴⁶ Moreover, Rainbow Families Victoria recommended that 'LGBTIQ and gender diverse culturally responsive' written material be produced to improve inclusivity for rainbow families as clients of the family law system.⁴⁷

Family Advocacy and Support Services

11.47 The committee received a substantial amount of evidence about the effectiveness of FASS and how it assists various aspects of the family law system. For this reason, this section considers the views presented by submitters and witnesses to the inquiry.

11.48 The Attorney-General's Department (AGD) informed the committee that FASS is a means to reduce the delays and costs for clients of the family law system:

The FASS is an integrated duty lawyer and social support service available at court for families affected by family violence with family law matters.

⁴² Relationships Australia, *Submission 606*, p. 1.

⁴³ Relationships Australia, *Submission 606*, p. 30.

⁴⁴ Rainbow Families Victoria used the term 'rainbow families' to describe families with one or more members who identify as LGBTIQ, gender diverse and non-binary. See Rainbow Families Victoria, *Submission 226*, p. 5.

⁴⁵ Better Place Australia, *Submission 229*, p. 26.

⁴⁶ Better Place Australia, *Submission 229*, p. 26.

⁴⁷ Rainbow Families Victoria, *Submission 226*, p. 24.

This is a holistic service that helps clients achieve positive legal and social outcomes, by helping them to connect with social supports they would otherwise not have accessed.

[\$41.1 million provided over six years to fund and evaluate the FASS from 1 July 2016 to 30 June 2022.]

An addition [sic] \$7.84 million over three years has been provided to engage dedicated men's support workers in all FASS registry and circuit locations from October 2019.⁴⁸

11.49 Evidence received by the committee about FASS was generally positive. For example, the Sexual Assault Support Service said that FASS 'appears to be well-received and supported' and should be expanded.⁴⁹ Furthermore, they observed:

An Evaluation of the Family Advocacy and Support Services – Final Report (FASS Evaluation) was released in October 2018, with decisions about future service delivery to be informed by the evaluation. The FASS Evaluation found it to be 'an effective and important program which fills a gap in both legal and social service provision to family law clients with family violence matters. It found that the FASS has increased awareness of family violence, increased feelings of support and levels of help-seeking by clients, and contributed to positive legal and social outcomes for clients.'⁵⁰

11.50 Given this, a number of submissions supported the expansion of FASS across courts throughout all states and territories, including in rural and regional locations, and noted the need for more funding and resourcing.⁵¹

11.51 For example, the Family Court of Western Australia told the committee that that Legal Aid Commissions (LACs) deliver FASS 'during circuits by the family law magistrates in regional areas including Geraldton, Kalgoorlie, Broome, Albany and Bunbury'.⁵² Notwithstanding this, the Hume Riverina

⁴⁸ Attorney-General's Department (AGD), *Submission 581*, Attachment 1, p. 2.

⁴⁹ Sexual Assault Support Service, *Submission 608*, pp. 9–10. See also, AWAVA, *Submission 716*, p. 36. The FASS is located at the following family court registries and circuit locations: NSW—Sydney, Parramatta, Newcastle and Wollongong Family Court Registries; Victoria—Melbourne and Dandenong Family Court Registries; Queensland—Brisbane, Cairns and Townsville Family Court Registries; Western Australia—Perth Family Court of WA Registry and Albany, Broome, Bunbury, Geraldton, and Kalgoorlie circuits; South Australia—Adelaide Family Court Registry and Mount Gambier circuit; Tasmania—Hobart and Launceston Family Court Registries and Burnie circuit; ACT—Canberra Family Court Registry; Northern Territory—Darwin and Alice Springs Federal Circuit Court Registries.

⁵⁰ Sexual Assault Support Service, *Submission 608*, p. 9.

⁵¹ See, for example, No to Violence, *Submission 739*, p. 17; Peninsula Community Legal Service, *Submission 842*, pp. 4 and 6; Women's Electoral Lobby, *Submission 98*, p. 4; Women's Legal Service NSW, *Submission 702*, p. 31; Women's Safety NSW, *Submission 727*, p. 34.

⁵² Family Court of Western Australia, *Submission 90*, p. 12.

Community Legal Service (HRCLS) identified that this scheme could be better resourced in rural and regional areas:

... it is noted that this service does not extend to regional courts such as Albury. Furthermore, it is extremely difficult for self-represented parties to obtain duty assistance at Court, with the NSW Legal Aid family law position currently being vacant, and HRCLS often being involved in matters, or having a reduced capacity to assist. There are no other local services in Albury that can provide assistance on a duty basis.⁵³

11.52 Whilst noting that the FASS does not provide ongoing representation, Women's Legal Service NSW noted that it does fill an important gap:

We acknowledge the benefit in clients receiving the assistance of a duty solicitor at court, for example, to provide legal advice, drafting of a recovery order application and undertaking first mention appearance as well as providing access to family violence and other support services.⁵⁴

11.53 Many submissions recommended that FASS be expanded to provide ongoing case management support to vulnerable clients of the family law system.⁵⁵ For example, Caxton Legal Centre submitted that:

Expanding the FASS model to provide case management would, for clients predominantly focused on their legal issues at court, increase opportunities for engagement and supports that are relevant to the next court appearance.⁵⁶

11.54 CASA Forum—Victorian Centres Against Sexual Assault recommended that FASS be expanded to 'include specialise sexual assault services to assist in identification of risk and ensure the safety, protection and wellbeing of child and young people and their carers'.⁵⁷

11.55 The committee also received a substantial amount of evidence about the introduction of men's support workers at all FASS locations to assist 'both alleged perpetrators and male victims of family violence involved in family law proceedings' by improving men's engagement with the court system, reducing court time and enhancing victim safety.⁵⁸ This initiative is funded as part of the *Fourth Action Plan of the National Plan to Reduce Violence against*

⁵³ HRLCS, *Submission 736*, p. 8. See also, Dr Jane Wangmann, Miranda Kaye and Associate Professor Tracey Booth, *Submission 584*, p. 5.

⁵⁴ Women's Legal Service NSW, *Submission 702*, p. 30. See also, Women's Safety NSW, *Submission 727*, pp. 34–35.

⁵⁵ See, for example, AWAVA, *Submission 716*, p. 6; Caxton Legal Centre, *Submission 744*, pp. 23 and 29; CSMC, *Submission 417*, pp. 4 and 15; Relationships Australia, *Submission 606*, p. 20; Women's Electoral Lobby, *Submission 98*, p. 4.

⁵⁶ Caxton Legal Centre, *Submission 744*, p. 29.

⁵⁷ CASA Forum—Victorian Centres Against Sexual Assault, *Submission 704*, p. 17. See also Sexual Assault Support Service, *Submission 608*, p. 10.

⁵⁸ AGD, *Submission 581*, Attachment 2, p. 14.

Women and their Children 2010–2022, with the 2019–20 Budget committing \$7.84 million over three years.⁵⁹

11.56 In its submission, No to Violence used the following case study to illustrate the effectiveness of FASS:

Steve approached the information desk on the morning of his court hearing in a heightened and aggressive state. Noticing this, the specialist men's FASS worker approached Steve and offered to speak with him to understand his needs. In approaching Steve this way, the specialist men's FASS worker was able to effectively open up a dialogue, explore his concerns and issues, and work with him to reduce his agitation.

By the time Steve presented to the duty lawyer he was frustrated, however no longer aggressive or agitated. The duty lawyer was able to speak with Steve clearly, and while sometimes he sidetracked into providing tangential information that minimised his use of family violence, he was able to be effectively re-directed back to the case and his legal problem on each occasion.

The specialist men's FASS worker sat with Steve throughout court proceedings, ensuring he understood the process and felt supported and heard. Following his experience, Steve reported his faith in the legal system had been 'somewhat restored'.⁶⁰

11.57 No to Violence concluded that Steve's men's FASS worker and duty lawyer were able to effectively and safely provide Steve with the assistance he needed to be supported 'into a frame of mind where he was receptive to legal advice and willing to engage'.⁶¹

11.58 The committee heard from two FASS men's support workers at its public hearing in Canberra on 24 June 2020: Mr Shane Bedwell (Melbourne Registry) and Ms Carolyn Macleod (Dandenong Registry). Mr Bedwell and Ms Macleod explained the challenges involved with men engaging with FASS.

11.59 For example, Mr Bedwell, who engages with approximately 40–50 men each month at the Melbourne Registry,⁶² recounted:

What I see with men is they don't want to engage with the service. There's too much shame or they say, 'I don't need help.' I have to round up these men to engage with the service. Once I'm in those conversations with them, they're quite happy to talk to me and I can give referrals. I find the

⁵⁹ AGD, *Submission 581*, Attachment 2, p. 14; DSS, *Submission 95*, p. 5.

⁶⁰ No to Violence, *Submission 739*, p. 18.

⁶¹ No to Violence, *Submission 739*, p. 18.

⁶² Mr Shane Bedwell, Men's Work, Family Advocacy and Support Services Family Violence Practitioner, Melbourne Registry, *Proof Committee Hansard*, 24 June 2020, p. 22.

difficulty in the court ... is that men engaging with our service find it very difficult, for some reason.⁶³

11.60 Ms Macleod shared a similar experience:

... I have to go up and approach men and have a chat to encourage them to engage with the service. They're not forced; it's voluntary. It takes a bit of work just to help them see that we're there to help them and support them.⁶⁴

Services funded by the Australian Government

11.61 In addition to FASS, the committee notes a number of additional services funded by the Australian Government, which are designed to assist vulnerable families and clients of the family law system. This section provides a brief overview of these services and considers observations regarding their effectiveness expressed by submitters and witnesses to the inquiry.

11.62 Commonwealth-funded family law services administered by AGD include:

- FRCs;
- Family Law Counselling;
- Family Dispute Resolution (FDR) Services and Regional FDR Services;
- Children's Contact Services (CCS);
- Parenting Orders/Post Separation Cooperative Parenting Program; and
- the Supporting Children after Separation Program.⁶⁵

11.63 In 2018–19, these services supported approximately 170 000 clients in through 500 000 sessions.⁶⁶ AGD noted that in the same period:

- 62% of clients reported a positive improvement in their circumstances after using the services
- 70% of clients agreed that the services had a positive impact on helping them to achieve their goals
- 90% of clients were satisfied with the services provided to them.⁶⁷

11.64 AGD explained the requirements for organisations who apply to receive funding from the Government to deliver family law services:

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

⁶³ Mr Shane Bedwell, Men's Work, Family Advocacy and Support Services Family Violence Practitioner, Melbourne Registry, *Proof Committee Hansard*, 24 June 2020, p. 23.

⁶⁴ Ms Carolyn Macleod, Social Worker, Family Advocacy and Support Services Family Violence Practitioner, Dandenong Registry, *Proof Committee Hansard*, 24 June 2020, p. 23.

⁶⁵ AGD, *Submission 581*, pp. 12–13.

⁶⁶ AGD, *Submission 581*, p. 13.

⁶⁷ AGD, *Submission 581*, p. 13.

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.⁶⁸

Family Relationship Centres

11.65 FRCs provide 'information, advice and dispute resolution services' to assist separating families to agree on 'parenting arrangements without going to court'.⁶⁹

11.66 A few submissions commented on the waiting periods that exist for clients trying to access FRCs.⁷⁰ In his submission, Professor Patrick Parkinson advocated for more funding to be invested in these centres to improve their capacity to meet the high level of demand for their services.⁷¹ Professor Parkinson also recognised the capacity for FRCs to assist families through prevention and early intervention, but noted that this was limited by long wait times to obtain an appointment.⁷²

11.67 Dispute Management Australia was critical of FRCs' 'overly time consuming and cumbersome' administrative processes.⁷³ To improve efficiency, Dispute Management Australia recommended that funding for Family Relationship Centres focus on adequately resourcing accredited FDR practitioners and mediation services.⁷⁴

Family Law Counselling

11.68 Family Law Counselling assists 'couples and families to manage relationship issues arising out of relationship changes, separation and divorce, through counselling, therapeutic intervention, support, information and referral'.⁷⁵

11.69 For example, in its submission, CatholicCare Victoria and Tasmania included a case study illustrating how a mother and son used Family Law Counselling to 'repair' their relationship after going through the family law courts:

⁶⁸ AGD, *Submission 581*, Attachment 2, p. 12.

⁶⁹ AGD, *Submission 581*, p. 12.

⁷⁰ See, for example, Australian Institute of Family Law Arbitrators and Mediators, *Submission 415*, p. 2; Dispute Management Australia, *Submission 600*, p. 9; Men's Rights Agency, *Submission 603*, p. 48; Professor Patrick Parkinson AM, *Submission 93*, p. 9.

⁷¹ Professor Patrick Parkinson AM, *Submission 93*, p. 9. See also, Australian Institute of Family Law Arbitrators and Mediators, *Submission 415*, p. 12.

⁷² Professor Patrick Parkinson AM, *Submission 93*, p. 9.

⁷³ Dispute Management Australia, *Submission 600.1*, p. 13.

⁷⁴ Dispute Management Australia, *Submission 600.1*, p. 13.

⁷⁵ AGD, *Submission 581*, p. 12.

The son had Year 10 exams which were imminent and he wanted to be living back at his principal place of residence to study for these. Sessions were held with the young man. Once engaged and his feelings were explored, the mother was engaged for a joint session. This resulted in the mother being encouraged to hear her son's perspective: In particular his experience about being young person increasingly wanting to be self-determining, his right to 'have a voice' and to continue his relationships with both parents unimpeded by conflictual communication that he identified as not having impacted him. The mother was able to sit with this and acknowledge his experience. As a result, a return to her home was negotiated so that the son could be settled in time to study for his up-coming examinations.⁷⁶

Family Dispute Resolution Services

11.70 FDR⁷⁷ services facilitate specialist mediation 'conducted by independent, accredited practitioners' to assist families to 'resolve family law matters without going to court'.⁷⁸ The Government also funds Regional FDR Services, which are 'designed to meet the particular needs of regional communities'.⁷⁹

11.71 Relationships Australia, which manage one-third of Australia's FRCs,⁸⁰ explained that:

Until recently, funding was available for FDR clients at Family Relationship Centres to have one hour of free legal advice, which was an effective way of delivering much-needed services in a way which was accessible and affordable, and which could enable families to avoid lengthy proceedings over what is often a modest property pool (or debts). Unfortunately, this funding has been withdrawn and clients are struggling as a consequence.⁸¹

11.72 To assist FDR clients who are unable to access FDR services due to their financial circumstances, Peninsula Community Legal Centre recommended that the Government needs to provide funding to clients who are not eligible for legal aid, but remain 'vulnerable and disadvantaged'.⁸²

11.73 FDR is discussed in more detail Chapter 12 (Alternative dispute resolution).

⁷⁶ CatholicCare Victoria and Tasmania, *Submission 840*, p. 6.

⁷⁷ Family Dispute Resolution is perhaps the most commonly utilised form of alternative dispute resolution in the family law context.

⁷⁸ AGD, *Submission 581*, p. 12.

⁷⁹ AGD, *Submission 581*, p. 12.

⁸⁰ Relationships Australia, *Submission 606*, p. 1.

⁸¹ Relationships Australia, *Submission 606*, p. 46.

⁸² Peninsula Community Legal Centre, *Submission 842*, p. 28.

Children's Contact Services

11.74 CCSs 'assist children of separated parents to establish and maintain a relationship with their other parents and family members through supervised visits or changeover services'.⁸³

11.75 While Government-funded CCSs must adhere to the *Families and Children Activity Administrative Approval Requirements*, which do not apply to privately operated services, there is no accreditation system in place for providers of CCSs.⁸⁴ As discussed in Chapter 8, a large number of submissions recommended that providers of these services should be subject to more formal accreditation and training regulations to ensure that practitioners are equipped with the necessary skills to support parents interact with their children in a safe, supervised environment.⁸⁵

11.76 In their submission, Dr Jane Wangmann, Ms Miranda Kaye and Associate Professor Tracey Booth told the committee that there was a 'lack of federally funded supervised contact services' and commented that 'waiting lists ... prevent safe contact taking place [and deprive] children of relationships with a parent post-separation where supervision is appropriate'.⁸⁶ Relationships Australia explained that these delays can mean that a child's access to their parent is irregular 'before the court orders large chunks of unsupervised contact'.⁸⁷

11.77 Mallee Family Care, a CCS provider, explained how the lack of funding complicates their ability to provide the service, despite demand:

Due to funding constraints the service currently operates on Wednesday, Fridays, Saturday and Sundays at hours convenient to families. There is presently no vacancy for supervised visitation at the [Children's Contact Services] and will not be for the foreseeable future. Referrals are either court ordered or self-referred and vacancies arise as a result of either the Court moving families through after the parents have worked with our

⁸³ AGD, *Submission 581*, p. 13.

⁸⁴ Australian Children's Contact Services Association, *Submission 593*, p. 6.

⁸⁵ See, for example, ABF, *Submission 1168*, p. 101; Australian Children's Contact Services Association, *Submission 593*, p. 3; AWAVA, *Submission 716*, p. 45; Better Place Australia, *Submission 229*, p. 32; Domestic Violence Victoria, *Submission 705*, p. 28; Domestic Violence NSW, *Submission 711*, p. 19; Family Law Practitioners' Association Western Australia, *Submission 590*, p. 8; Relationships Australia, *Submission 606*, p. 110; Safe Steps Family Violence Response Centre, *Submission 735*, p. 7; Sexual Assault Support Service, *Submission 608*, p. 17; Victim Support Service and Women's Legal Service SA, *Submission 741*, p. 4; Women's Legal Service NSW, *Submission 702*, pp. 6, 37; Women's Legal Service Queensland, *Submission 715*, p. 50; Women's Legal Service Victoria, *Submission 701*, p. 25; Women's Safety NSW, *Submission 727*, p. 60.

⁸⁶ Dr Jane Wangmann, Ms Miranda Kaye and Associate Professor Tracey Booth, *Submission 584*, p. 4. See also Conciliate SA, *Submission 874*, p. 5; Mallee Family Care, *Submission 712*, p. 19.

⁸⁷ Relationships Australia, *Submission 606*, p. 20.

services to build their capacity and improve their parenting and self-manage visitation or after self-referred families feel they have reached this point. With consideration to our current Court Ordered caseload, it is unlikely that this will occur before the following sitting in June 2020.⁸⁸

11.78 CCSs were discussed in more detail in Chapter 8.

Parenting Orders/Post Separation Cooperative Parenting Programs

11.79 As mentioned in Chapter 8, parents experiencing a great deal of conflict can receive 'ongoing, intensive support' through Government-funded Parenting Orders/Post-Separation Cooperative Parenting Programs.⁸⁹

11.80 These programs assist separating families to manage their parenting arrangement through 'child focused and child-inclusive interventions with the support of a case worker'.⁹⁰ Relationships Australia told the committee that this can be 'beneficial for young children and recently-separated families, where periods of time away from parents/caregivers can have significant developmental impacts on children'.⁹¹

11.81 These programs also aim to provide 'education and support to parents where conflict is affecting their relationship with their children'⁹² as:

Parents whose children are the subject of parenting orders made by a court, in contrast to those who agree on parenting arrangements outside of court, are more likely to be involved in further court proceedings down the track.

Stakeholders observe that there is a tendency for inter-parental conflict to escalate and solidify during family court proceedings, and this leaves parents ill-equipped to manage co-parenting arrangements after proceedings come to an end. Ongoing parental conflict is also a key factor contributing to non-compliance with court orders and returns to court. Applications for court enforcement of parenting orders are more likely to be part of an ongoing conflict involving multiple court proceedings, rather than one-off matters.⁹³

11.82 Mallee Family Care was of the view that Post Separation Cooperative Parenting Programs were 'underutilised' and advocated for referrals to these programs to be encouraged by professionals engaged in the family law system:

By way of example, if a judge can see a pattern of breaches occurring and there is high conflict and communication issues between the parties they

⁸⁸ Mallee Family Care, *Submission 712*, p. 20.

⁸⁹ AGD, *Submission 581*, Attachment 2, p. 11.

⁹⁰ AGD, *Submission 581*, p. 13.

⁹¹ Relationships Australia, *Submission 606*, p. 20.

⁹² AGD, *Submission 581*, p. 13.

⁹³ AGD, *Submission 581*, p. 19.

could refer to [Post Separation Cooperative Parenting Program] to assist the parties in working through the issues.⁹⁴

Supporting Children after Separation Program

11.83 The Supporting Children after Separation Program assists children 'to deal with issues arising from the breakdown of their parents' relationship, and allows children to participate in decisions that affect them'.⁹⁵

11.84 Submissions to the inquiry did not provide commentary on the effectiveness of the Supporting Children after Separation Program.

Other Government-funded support services for vulnerable families

11.85 Support services funded by the Department of Social Services complement the family law services funded by AGD.⁹⁶ For example, Family and Relationship Services 'aim to strengthen family relationships, prevent breakdown and ensure the wellbeing and safety of children' by providing 'broad-based counselling and education to families of different forms and sizes', and Specialised Family Violence Services support families affected by domestic and family violence.⁹⁷

11.86 The Government also provides 'ongoing funding for 17 community legal service providers to deliver specialist domestic violence units and health justice partnerships in 21 locations' across Australia. Domestic violence units offer access to 'financial counselling, tenancy assistance, trauma counselling, emergency accommodation, and employment services'. Health justice partnerships facilitate legal access in a safe location for vulnerable individuals with the assistance of lawyers and health professionals.⁹⁸

11.87 The committee notes the Family Violence and Cross-examination of Parties Scheme, which is funded by the Government's Women's Economic Security Package and administered by LACs in courts across Australia.⁹⁹ The *Family Law Amendment (Family Violence and Cross-examination of Parties) Act 2018* banned direct cross-examinations in some circumstances occurring from 10 September 2019 to improve protection for victims of family violence.¹⁰⁰ Previously, personal cross-examinations during family law proceedings exposed victims of family violence to further abuse and trauma perpetrated by

⁹⁴ Mallee Family Care, *Submission 712*, p. 12.

⁹⁵ AGD, *Submission 581*, p. 13.

⁹⁶ DSS, *Submission 95*, pp. 4–5.

⁹⁷ DSS, *Submission 95*, pp. 4–5.

⁹⁸ AGD, *Submission 581*, Attachment 2, p. 14.

⁹⁹ AGD, *Submission 581*, Attachment 2, p. 15.

¹⁰⁰ AGD, *Submission 581*, Attachment 2, p. 14.

their former partner.¹⁰¹ Since 10 September 2019, in cases where there is an allegation of family violence, cross-examinations are conducted by a legal representative on the client's behalf.¹⁰²

11.88 The Government has also committed to investing \$75 million from 2020–21 to 2022–23 to assist Family Violence Prevention Legal Services 'for frontline family violence and support services that directly improve safety for women and children, and provide better access to legal support'.¹⁰³

¹⁰¹ AGD, *Submission 581*, Attachment 2, p. 15.

¹⁰² AGD, *Submission 581*, Attachment 2, p. 14.

¹⁰³ AGD, *Submission 581*, p. 14.

Chapter 12

Alternative dispute resolution

12.1 Alternative dispute resolution is a means by which parties to a family law dispute can seek to resolve their dispute without proceeding to costly and timely litigation. Alternative dispute resolution can include processes such as family dispute resolution, mediation, arbitration and conciliation.

12.2 The Family Court Rules 2004 stipulate that '[b]efore starting a case, each prospective party to the case must comply with the pre-action procedures'.¹ For financial cases,² pre-action procedures can be conducted through dispute resolution, such as negotiation, conciliation, arbitration and counselling.³ For parenting cases, pre-action procedures are governed by section 60I of the *Family Law Act 1975* (Family Law Act).

12.3 Mr Andrew Davies of the Australian Institute of Family Law Arbitrators and Mediators (AIFLAM) explained why pre-action procedures, such as mediation, are important:

That ... has the real opportunity of trying to focus the mind, because, even if they don't settle all of the issues with the mediation, they generally will narrow the scope of the issues in dispute so that, instead of going to have a dispute about five matters, it might be only one. So we see it as being really important that the courts and the profession continue to proactively work at requiring parties to attend mediation wherever possible.⁴

12.4 While the committee heard that for many parties, alternative dispute resolution is used as a way in which to control and harm the other party,⁵ evidence presented to the committee generally highlighted the success of these services. Indeed, the Attorney-General's Department (AGD) noted in its evidence that:

... measures that will take people away from the conflict and help them focus on the best interests of children, where children are involved, and on harm minimisation will help people get to a better position more quickly.⁶

¹ Rule 1.05(1).

² That is, property settlement and maintenance.

³ *Family Law Act 1975*, Sch. 1, Pt. 1, r. 1(1)(a).

⁴ Mr Andrew Davies, Chair, Australian Institute of Family Law Arbitrators and Mediators, *Proof Committee Hansard*, 10 March 2020, p. 10.

⁵ Australasian Centre for Human Rights and Health, *Submission 381*, p. 9; Men's Rights Agency, *Submission 603*, pp. 39, 43–44; Domestic Violence Action Centre, Queensland, *Submission 595*, p. 23 and 26.

⁶ Mr Iain Anderson, Deputy Secretary, Legal Services and Families Group, Attorney-General's Department (AGD), *Proof Committee Hansard*, 14 February 2020, p. 2.

- 12.5 Most submitters and witnesses who discussed alternative dispute resolution processes with the committee did so in the context of the family dispute resolution (FDR) process. However, the committee also heard evidence about other forms of alternative dispute resolution.
- 12.6 This chapter examines the forms of alternative dispute resolution most commonly raised in evidence to the committee. First, this chapter will discuss FDR, including the FDR framework and suggested shortcomings of and improvements to FDR. This chapter will then move to a discussion of three other forms of alternative dispute resolution, namely: mediation, arbitration and conciliation. The chapter will conclude by briefly discussing some suggestions put to the committee about proposed forms of alternative dispute resolution that could be applied to the family law context.

Family dispute resolution

- 12.7 This section examines what is perhaps the most commonly utilised form of alternative dispute resolution in the family law context, FDR. The section begins by setting out the FDR framework, and will then move to a discussion of various shortcomings of and improvements to FDR raised with the committee over the course of the inquiry.

The family dispute resolution framework

- 12.8 The AGD provided background to the FDR process, the legal framework for which was introduced into the Family Law Act in 2006. Section 60I of the Family Law Act requires:

... that all persons who have a dispute about matters that may be dealt with by [a Part VII order] make a genuine effort to resolve that dispute by family dispute resolution before the Part VII order is applied for.⁷

- 12.9 A Part VII order:

... covers applications for several different types of orders relating to children. The most common are applications for parenting orders; that is, an application asking a court to make orders about the parenting arrangements for a child.⁸

- 12.10 The AGD identified the following steps in the FDR process under Part VII of the Family Law Act:

- an intake and assessment process

⁷ *Family Law Act 1975*, s. 60I.

⁸ Family Court of Australia and Federal Circuit Court of Australia, *Fact Sheet: Compulsory Family Dispute Resolution—Court Procedures and Requirements*, http://www.familycourt.gov.au/wps/wcm/connect/5e84f9bf-62bf-4083-ac19-7cce3bf6e8d5/FSCompFDR_0313V2.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE-5e84f9bf-62bf-4083-ac19-7cce3bf6e8d5-ltK1YUT (accessed 9 June 2020), p. 1.

- 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.⁹

12.11 The AGD informed the committee that parenting agreements that are reached through FDR:

... 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.¹⁰

12.12 However, as the Law Council of Australia (Law Council) observed in its submission, 'FDR may result in no agreement, no documentation of agreement reached, a Parenting Plan (as defined in the [Act]) or a Consent Order'.¹¹

12.13 Although mandated under the Family Law Act with respect to parenting orders, the cost to access FDR is dependent on the provider, 'with private providers setting their own fees'.¹² Although a Family Court of Australia (Family Court) and Federal Circuit Court of Australia (Federal Circuit Court) fact sheet provides that it is possible to receive one hour of free FDR through Family Relationship Centres (FRCs) who will often charge after this free hour subject to a client's financial situation,¹³ as outlined in Chapter 11 this funding for FRCs is no longer available.¹⁴ As the Australian Law Reform Commission (ALRC) noted in its report, 'Government funded FRCs and other community organisations are now substantial providers of low cost FDR services for parenting arrangements'.¹⁵

⁹ AGD, *Submission 581*, Attachment 2, p. 11. For a comprehensive discussion of how family dispute resolution operates, see, Australian Law Reform Commission (ALRC), *Family Law for the Future – An Inquiry into the Family Law System*, ALRC Report 135, 2019, March 2019, pp. 251–252 (ALRC 2019 Report).

¹⁰ AGD, *Submission 581*, Attachment 2, p. 11.

¹¹ Law Council, *Submission 2.2*, p. 68.

¹² Family Court of Australia and Federal Circuit Court of Australia, *Reaching an agreement without going to court*, 3 May 2016, <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/family-law-matters/family-dispute-resolution/> (accessed 3 July 2020).

¹³ Family Court of Australia and Federal Circuit Court of Australia, *Reaching an agreement without going to court*, 3 May 2016, <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/family-law-matters/family-dispute-resolution/> (accessed 3 July 2020).

¹⁴ Relationships Australia, *Submission 606*, p. 46.

¹⁵ ALRC 2019 Report, p. 251.

12.14 The ALRC outlined the increasing role of lawyers in FDR:

8.24 Originally, FRC operating frameworks were based on the exclusion of lawyers from the centres. This was relaxed in 2009 when the government funded a program for [Community Legal Centres (CLCs)] and FRCs to partner to offer advice, information, and, to a limited extent, legally assisted FDR.

8.25 Over time, closer relationships have developed between some FRCs, CLCs, and other legal assistance providers. Clients may be encouraged to seek legal advice to support an FDR process ...¹⁶

8.26 As the family law system has evolved, the application of FDR has become increasingly sophisticated, with the development of specialist models in a range of areas, such as the pilots for legally assisted and culturally appropriate dispute resolution in eight FRCs. These pilots are currently being evaluated.¹⁷

12.15 Parties who have engaged in the FDR process under Part VII of the Family Law Act will receive a certificate, which must be provided together with an application to the court for a parenting order.¹⁸

12.16 A certificate will *not* be required if an individual is seeking any of the following:

- interim or procedural orders only (generally these are orders to operate until your case has a final hearing) unless you are applying for these orders at the same time as filing an *Initiating Application (Family Law)*
- financial orders only
- consent orders
- Hague Abduction Convention orders
- property settlement only, even if you have a child/ren
- child support, or
- an amended application (relating to a child that is the subject of the current application).¹⁹

¹⁶ ALRC 2019 Report, p. 252.

¹⁷ ALRC 2019 Report, p. 252 (citations omitted).

¹⁸ Family Court of Australia and Federal Circuit Court of Australia, *Fact Sheet: Compulsory Family Dispute Resolution—Court Procedures and Requirements*, http://www.familycourt.gov.au/wps/wcm/connect/5e84f9bf-62bf-4083-ac19-7cce3bf6e8d5/FSCompFDR_0313V2.pdf?MOD=AJPERE&CONVERT_TO=url&CACHEID=ROOTWORKSPACE-5e84f9bf-62bf-4083-ac19-7cce3bf6e8d5-ltK1YUT (accessed 9 June 2020), p. 1.

¹⁹ For example, applications for financial orders or consent orders—see, Family Court of Australia and Federal Circuit Court of Australia, *Fact Sheet: Compulsory Family Dispute Resolution—Court Procedures and Requirements*, http://www.familycourt.gov.au/wps/wcm/connect/5e84f9bf-62bf-4083-ac19-7cce3bf6e8d5/FSCompFDR_0313V2.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE-5e84f9bf-62bf-4083-ac19-7cce3bf6e8d5-ltK1YUT (accessed 9 June 2020), p. 1.

12.17 Further, even though parties are legally obligated to provide a Section 60I Certificate with an application to the court for a parenting order, a certificate *will not* be required if a party is granted an exemption for the following reasons:

- if the matter is urgent
- if the Court is satisfied that there are reasonable grounds to believe that:
 - there has been child abuse and/or family violence by a party
 - there is a risk of family violence by a party, and/or
 - there is a risk of child abuse if there were to be a delay in applying to the Court
- where a party is unable to participate effectively in family dispute resolution (for example, due to an incapacity to do so or physical remoteness from a family dispute resolution provider)
- if [the] application relates to an alleged contravention of an existing order that was made within the last 12 months, and there are reasonable grounds to believe that the person who has allegedly contravened the order has behaved in a way that shows a serious disregard for his or her obligations under that order.²⁰

12.18 FDR is conducted by an accredited FDR Practitioner (FDRP), who is subject to a competency based accreditation scheme under the Family Law (Family Dispute Resolution Practitioners) Regulations 2008. The AGD provided the following background to this scheme:

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.²¹

12.19 There was little evidence provided to the committee that examined this accreditation scheme in great detail—instead, evidence largely focussed on the

²⁰ Family Court of Australia and Federal Circuit Court of Australia, *Fact Sheet: Compulsory Family Dispute Resolution—Court Procedures and Requirements*, http://www.familycourt.gov.au/wps/wcm/connect/5e84f9bf-62bf-4083-ac19-7cce3bf6e8d5/FSCompFDR_0313V2.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE-5e84f9bf-62bf-4083-ac19-7cce3bf6e8d5-ltK1YUT (accessed 9 June 2020), p. 2. Pursuant to sub-s. 60I(9) of the *Family Law Act 1975*.

²¹ AGD, *Submission 581*, Attachment 2, p. 17.

FDR framework and FDRPs. However, in its submission, National Legal Aid (NLA)—the peak body for Legal Aid Commissions (LACs)—did note that the ALRC 'made six recommendations which could be expected to improve the performance and monitoring of professionals involved in family law proceedings',²² including in those professionals practicing FDR, and expressed support of these recommendations.²³ The NLA also stated that 'any accreditation must address adequate screening for, and understanding about, the dynamics of family violence which also apply frequently in property law matters'.²⁴

12.20 The following section will look at some suggested improvements to the FDR framework that were consistently highlighted in evidence to the committee.

Improving the family dispute resolution framework

12.21 Submitters recognised the success of FDR as a means to resolve family disputes in a non-adversarial, timely and cost-effective manner.

12.22 The Australian Institute of Family Studies (AIFS), which has conducted research on the effectiveness of FDR, noted in its submission that 'FDR is the most commonly used formal mechanism for resolution of parenting arrangements' and stated that its research shows that:

... since the 2006 reforms, FDR has become an increasingly effective mechanism for resolving parenting arrangements. Of the three formal pathways – FDR, lawyers and courts – FDR elicits the most positive evaluations from parents. Between the three formal pathways, the system should, where safe and appropriate to do so, continue to facilitate families to access FDR and mediation options where support is required to resolve their post-separation arrangements.²⁵

12.23 AIFS further informed the committee that:

... research suggests the need for a system that is trauma-informed, child inclusive and holistic, and that facilitates access to support services and dispute resolution options that secure the safety and best interests of children as well as the safety of their parents.²⁶

12.24 Although the committee was presented with evidence that acknowledged the success of FDR since its introduction in 2006, the committee also heard that the FDR framework could be improved.

²² Namely, ALRC Recommendations 49–53, see, ALRC 2019 Report, p. 22.

²³ National Legal Aid (NLA), *Submission 589*, p. 30.

²⁴ NLA, *Submission 589*, p. 32.

²⁵ Australian Institute of Family Studies (AIFS), *Submission 731*, p. 5.

²⁶ AIFS, *Submission 731*, p. 17.

Extending mandatory dispute resolution to property matters

12.25 For example, there was broad support for extending the application of FDR to property disputes. Centacare Family & Relationship Services (Centacare) suggested to the committee that '[t]he introduction of compulsory FDR in property matters is a necessary first step to divert the majority of property matters from litigation'.²⁷

12.26 Relationships Australia expressed its support for 'further development and funding of FDR as a proven means of diverting people from court' by introducing mandatory pre-filing mediation for property matters.²⁸ Relationships Australia noted that it 'regularly sees successful parenting plan undermined by a later, combatively conducted, property dispute'.²⁹

12.27 The Association of Family and Conciliation Courts, Australian Chapter (AFCC) advocated for an expansion of FDR on the basis that 'the best way to reduce the legal fees associated with litigation is to assist parties to reach early resolution to their matters'.³⁰ The AFCC noted 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.³¹

12.28 It also advocated for the introduction of a 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.³²

12.29 The AFCC further 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.³³

12.30 However, in contrast, the Law Council did not support this view:

... the Law Council suggests that making FDR compulsory in all financial disputes is likely to have unintended consequences which are contrary to

²⁷ Centacare Family & Relationship Services (Centacare), *Submission 585*, p. 8.

²⁸ Relationships Australia, *Submission 606*, p. 17.

²⁹ Relationships Australia, *Submission 606*, p. 17.

³⁰ Association of Family and Conciliation Courts, Australian Chapter (AFCC), *Submission 99*, p. 12.

³¹ AFCC, *Submission 99*, p. 11.

³² AFCC, *Submission 99*, p. 11.

³³ AFCC, *Submission 99*, p. 11.

any overarching goal of reducing costs and minimising conflict. It notes the comparison made between the use of mediation in parenting and financial cases ... The Law Council suggests that such comparisons are misleading and do not take account of the significant differences in the nature of dispute resolution for parenting versus financial disputes.³⁴

12.31 In its submission, Better Place Australia advised that the parties who have used FDR to agree to a property settlement will often go to lawyers to have the agreement drawn up and that the agreed settlement will fall apart 'for a variety of reasons'.³⁵ They therefore supported a recommendation that property plans be drawn up by FDRPs, noting that 'this would address a major concern of staff that settlements are not legally binding in financial FDR'.³⁶ It would also reduce the risk of settlements falling apart and:

... would be ideally suited for low value cases without significant legal complexity. The property plan would be prepared by the FDRP and signed by the two parties to document the agreed settlement. It should cover both property and spousal maintenance issues. The [ALRC] proposed Family Law Commission could be engaged to draft some simple pro forma property plans recommended for use by FDRPs.³⁷

12.32 Mallee Family Care similarly expressed its support for consideration to be given to:

... strengthening the outcomes of FDR by allowing for agreements reached during that process to be binding, thus reducing the need for court attendance and prolong resolution of circumstances where parties must wait for a Circuit Court Date which in reality is often many months away.³⁸

12.33 In its report, the ALRC made a number of recommendations that went to expanding the application of FDR, including in respect to property disputes. The ALRC recommended amending the Family Law Act to:

- require that parties take genuine steps to attempt to resolve their property and financial matters prior to filing an application for court orders; and
- specify that a court must not hear an application unless the parties have lodged a genuine steps statement.³⁹

Cost implications for failure to make a genuine effort to resolve a matter

12.34 The ALRC also recommended that '[a] failure to make a genuine effort to resolve a matter should have costs consequences'.⁴⁰

³⁴ Law Council, *Submission 2.1*, p. 53.

³⁵ Better Place Australia, *Submission 229*, p. 15.

³⁶ Better Place Australia, *Submission 229*, p. 15.

³⁷ Better Place Australia, *Submission 229*, p. 15.

³⁸ Mallee Family Care, *Submission 712*, p. 15.

³⁹ ALRC 2019 Report, p. 46. Recommendation 21.

12.35 The Law Council informed the committee that it agreed with this ALRC recommendation, subject to the following:

... that 'genuine steps' be clearly defined in the [Act] and make express reference to processes other than FDR/mediation which will address the proposed (although unclear) costs consequences ... Amendments to the terms of section 60I Certificates will also be required (and consideration of where those requirements will be addressed given the current Part VII context of section 60I).

It is suggested that the [Act] clarify whether a 'genuine steps document' is able to be lodged by one party without the consent or involvement of the other so as to address residual concerns that vulnerable parties will be at risk of exploitation and increased costs ...⁴¹

12.36 The NLA also supported the ALRC's Recommendation 21, but expressed concern that the genuine steps requirement 'will add an extra layer in proceedings without necessarily having achieved its stated intent' and queried how it could be 'evidenced'.⁴²

Legally-assisted dispute resolution

12.37 In its submission, Engender Equity called for more FDR Conferences (FDRC) that are offered through LACs to be funded, explaining that '[i]nvolving solicitors can be productive when there is a power imbalance, particularly in matters where there is family violence'.⁴³ Engender Equity submitted that additional funding would make FDRCs available 'to parties who are not legally aided to assist in matters avoiding Court'.⁴⁴

12.38 The NLA outlined why legally assisted family dispute resolution is important:

Legally assisted FDR represents a legally informed, supported, timely and cost-effective alternative for many matters currently being dealt with in the court system, potentially reducing delays for parties and at the courts. For LAC legally assisted FDR to be available, one party is generally required to qualify for legal aid. All LACs have screening, intake, and referral processes to ensure triaging of matters to appropriate FDR and other services.⁴⁵

12.39 The NLA suggested that '[o]ptions to reduce financial impacts are founded in timely appropriate resolution and final settlement', stating that such options could include:

⁴⁰ ALRC 2019 Report, p. 46. Recommendation 21.

⁴¹ Law Council, *Submission 2.2*, p. 157.

⁴² NLA, *Submission 589*, p. 22.

⁴³ Engender Equality, *Submission 232*, p. 10.

⁴⁴ Engender Equality, *Submission 232*, p. 10.

⁴⁵ NLA, *Submission 589*, p. 26.

Funding to relax LAC means tests so as to increase legal assistance: this would support the expansion of Legally Assisted Family Dispute Resolution (LAFDR) and reduce self-representation and increase early resolution rates.⁴⁶

- 12.40 The NLA also recommended that family dispute resolution be conducted by lawyers with family law property experience.⁴⁷
- 12.41 Many submitters supported the expansion of LAFDR.⁴⁸ For example, Better Place Australia similarly recommended a 'greater investment' in LAFDRs, which it described as 'an effective alternative for complex disputes and provides legal advice to each party'.⁴⁹
- 12.42 One of NLA's constituent bodies, Victoria Legal Aid, also expressed its support for 'expanding access to legally assisted FDR for families' including in respect of 'culturally-safe and specific services for Aboriginal and Torres Strait Islander families'.⁵⁰
- 12.43 The Victoria Legal Aid made a number of recommendations in respect of FDR, including advocating for using legally assisted FDR at all stages of disputes,⁵¹ noting that although most FDR may be effective and appropriate without the use of lawyers, a legally-assisted model which is 'supported by case management for clients and mediation by experienced chairpersons' could lead to the resolution of more disputes outside of court.⁵² This would apply to parties who are screened out of non-legally assisted FDR, including 'parents who have been victims of family violence or where other risk factors have been identified but cannot be mitigated by a non-legally assisted FDR service provider'.⁵³
- 12.44 The Victoria Legal Aid further recommended 'ongoing and sustainable funding for the Family Advocacy and Support Services' at the family courts and in regional circuit locations,⁵⁴ and increasing children's participation in

⁴⁶ NLA, *Submission 589*, p. 20.

⁴⁷ See, NLA, *Submission 589*, p. 3.

⁴⁸ See, for example, Caxton Legal Centre, *Submission 744*, p. 23; No to Violence, *Submission 739*, pp. 19–20; Northern Territory; Peninsula Community Legal Centre, *Submission 842*, p. 28; Women's Legal Services, *Submission 740*, p. 15.

⁴⁹ Better Place Australia, *Submission 229*, p. 22.

⁵⁰ Victoria Legal Aid (VLA), *Submission 120*, p. 6.

⁵¹ VLA, *Submission 120*, p. 6.

⁵² VLA, *Submission 120*, p. 23.

⁵³ VLA, *Submission 120*, p. 23.

⁵⁴ VLA, *Submission 120*, p. 6.

FDR through children meeting with a child consultant where appropriate, so that they can express their views, wishes and concerns.⁵⁵

The use of family dispute resolution in cases of domestic violence

12.45 A common theme in the evidence to the committee was concern about the use of FDR where there had been domestic or family violence. For example, Centacare informed the committee that:

In many cases, when there is family violence and abuse the standard FDR process is not safe or appropriate. Instead, the introduction of FDR processes that are better suited to the needs of families who have experienced and/or are continuing to experience family violence are required. For example, when there is a current Protection Order, families should be able to bypass standard FDR processes and divert to specialist FDR services.⁵⁶

12.46 The Australian Brotherhood of Fathers (ABF) suggested in its submission that the legal industry had acknowledged the use of the exclusion of parties subject to domestic violence from FDR as a way to 'exploit' the Family Law Act, such that 'the Family Dispute Resolution/Mediation process is completely bypassed due to Domestic Violence allegations'.⁵⁷ The ABF further explained:

The s.60I (9)(b) Family Law Act exception is too broadly expressed and all too readily activated in no-one's interest other than the legal practitioners. We feel that except where the impact of violence is severe, FDR is not only preferred by the parties, but it is in the best interests of all, including the children. s 60I certificates should be issued only if it is clear that mediation options have been exhausted or if both sides agree to continue to negotiate via a collaborative process.

We believe that Family Dispute resolution Practitioners too readily facilitate the exception to FDR. When Family Dispute Resolution Practitioners issue a Section 60I Certificate, they need to feel safe enough to be honest with regard to whether a client has indeed made a genuine effort or not. It is well acknowledged that Family Dispute Resolution Practitioners avoid using the 'party or parties did not make a genuine effort' Section 60I Certificate, due to the harassment that can ensue from either the client, or the client's Family Legal practitioners in the aftermath.⁵⁸

12.47 The Benevolent Society was one of the organisations that did consider that FDR was an 'inappropriate' means by which to resolve disputes 'where domestic and family violence is present', owing to the fact that 'it can further increase risk of violence to victim survivors and their children'.⁵⁹ However, it

⁵⁵ VLA, *Submission 120*, p. 27. VLA has funded an initiative called 'Kids Talk' to achieve this end.

⁵⁶ Centacare, *Submission 585*, p. 12.

⁵⁷ Australian Brotherhood of Fathers (ABF), *Submission 1668*, p. 99.

⁵⁸ ABF, *Submission 1668*, p. 99.

⁵⁹ The Benevolent Society, *Submission 109*, p. 8.

did express support for 'a national legally assisted family dispute resolution program' which is 'appropriate for domestic and family violence cases (property and parenting)' and 'is supported by specialist domestic and family violence and trauma informed lawyers and family dispute resolution practitioners'.⁶⁰ It also expressed its support for the following:

- a mediation model with specialist domestic and family violence and trauma informed lawyers and social workers based on the 2012 Co-ordinated Family Dispute Resolution pilot program; and
- culturally tailored models of family dispute resolution which are co designed and led by Aboriginal and Torres Strait Islander communities and organisations and migrant and refugee communities and organisations.⁶¹

12.48 Australia's National Research Organisation for Women's Safety (ANROWS) suggested that there is a question over whether 'FDR can and should be provided in the context of family violence and other challenging situations', further stating that:

Without clear legislative guidance, FDRPs are forced to make those decisions for complex needs clients who lack the financial means to pursue a court-based outcome, on a case-by-case or service-by-service basis.⁶²

12.49 In its submission, ANROWS recommended reforming the FDR framework such that:

... there is a clear pathway for complex needs s60I certificate holders who lack the financial means to pursue a court-based outcome, ensuring appropriate guidance for FDRPs working with these clients toward the resolution of their disputes.⁶³

12.50 Relationships Australia submitted that families who experience family violence should not be excluded from 'the simplified pathway', explaining that:

Exclusion would be problematic because a streamlined pathway could benefit those suffering from family violence by minimising their exposure to protracted and harmful conventional court processes.

The net result of this kind of reform should not be that vulnerable people of limited means are excluded from less expensive, faster and simpler mechanisms.⁶⁴

12.51 Indeed, Women's Legal Service Victoria recommended expanding the existing models of LAFDR in family violence matters, observing that, 'with the support

⁶⁰ The Benevolent Society, *Submission 109*, p. 8.

⁶¹ The Benevolent Society, *Submission 109*, p. 8.

⁶² Australia's National Research Organisation for Women's Safety (ANROWS), *Submission 602*, p. 20.

⁶³ ANROWS, *Submission 602*, p. 20.

⁶⁴ Relationships Australia, *Submission 606*, p. 36.

of trauma-informed mediators and lawyers, potential power imbalances between parties can be addressed', and noting that '[f]amily violence cases can be safely and effectively ... supported in the mediation process'.⁶⁵

12.52 Women's Legal Service Victoria specifically recommended:

- The Australian Government should expand existing models of [LAFDR] in family violence matters.
- The Australian Government resource [LACs] to broaden LAFDR availability for priority clients. This would enable [access to] existing models of LAFDR, with better outcomes for the most vulnerable.
- A nationally consistent risk assessment framework should apply to all LAFDR models to ensure that safety risks are effectively identified and managed throughout the process.⁶⁶

12.53 Many other organisations working in the social and legal support sectors also advocated for the availability of LAFDR for victims of family, domestic and sexual violence.⁶⁷ For example, Peninsula Community Legal Centre submitted that 'trauma informed legally assisted mediation/conciliation services ... can be enormously beneficial for those clients experiencing family violence or abuse' for a variety of reasons, including:

- Safety of victims, and hence their ability to participate in mediation is improved;
- ...
- Victims can participate to the extent they feel comfortable, with the lawyer's role varying to accommodate the client's capacities during the FDR session;
- The presence of legally trained personnel formalises proceedings and tends to limit power imbalances and entrenched methods of intimidation;
- ...
- Unrealistic expectations can be moderated with immediately available legal advice and hence legally represented FDR 'educates' participants;
- ...

⁶⁵ Women's Legal Service Victoria (WLSV), *Submission 701*, p. 21. A similar point was made by Women's Legal Service NSW: 'In our experience LAFDR significantly increases the likelihood that parties will reach a safe parenting arrangement for children and the adult survivor of violence and divert matters away from the court system'—see, Women's Legal Service NSW, *Submission 702*, p. 30.

⁶⁶ WLSV, *Submission 701*, p. 7.

⁶⁷ See, for example, Domestic Violence Victoria, *Submission 705*, p. 23; Mallee Family Care, *Submission 712*, p. 14; Springvale Monash Legal Service, *Submission 729*, p. 9.

- Agreed parenting arrangements are more likely to approximate the form and content of a judge made order, and are therefore more likely to be enforceable if reduced to consent orders.⁶⁸

12.54 CASA Forum – Victorian Centres Against Sexual Assault noted that '[w]here victim-survivors of family violence and sexual assault wish to engage in alternative dispute resolution processes, they need to be supported to access this with affordable legal assistance', and recommended 'the development of effective practice guidelines for providers of FDR services':

In particular we submit that these guidelines should include advice about the need for highly skilled professionals who understand the social context and dynamics of family violence and intra-familial sexual assault; barriers to safety; perpetrator tactics of coercion and control; patterns of grooming of children and young people; and high-level skills in identifying risk and safety concerns.⁶⁹

12.55 Ms Zoe Rathus AM, Dr Helena Menih, Dr Samantha Jeffries and Professor Rachael Field similarly recommended training of FDRPs, as well as family report writers, judges, lawyers and other professionals in the family law system on the issue of 'domestic and family violence that encompasses complex issues such as the clash of societal and legal expectations for victim mothers'.⁷⁰

Indigenous and culturally and linguistically diverse clients

12.56 The committee also heard that FDR could be better suited to the needs of culturally and linguistically diverse communities. For example, Relationships Australia Northern Territory (RANT), recognised the challenge in 'finding a way to engage with people in more remote regions to provide family law services, particularly Indigenous people who tend to rely on outreach services'.⁷¹ RANT outlined the difficulties faced by indigenous clients in remote communities of the Northern Territory (NT):

Likely barriers to using services is that indigenous clients live in isolated areas with financial and transport constraints that prevent them using

⁶⁸ Peninsula Community Legal Centre, *Submission 842*, pp. 26–27.

⁶⁹ CASA Forum – Victorian Centres Against Sexual Assault, *Submission 704*, p. 17.

⁷⁰ Ms Zoe Rathus, Dr Helena Menih, Dr Samantha Jeffries and Professor Rachael Field, *Submission 700*, p. 3. Australian Women Against Violence Alliance (AWAVA) made a similar suggestion about training, suggesting that 'there should be a particular focus placed on training programs developed and delivered for family lawyers including Independent Children Lawyers (ICLs) and Family Dispute Resolution (FDR) practitioners', specifically in respect to 'intersection of family law and family violence, cultural competency in relation to working with Aboriginal and Torres Strait Islander clients, clients of a culturally and linguistically diverse background (including working with interpreters), working with vulnerable clients, trauma-informed practices and working with clients from LGBTIQ communities'—see, AWAVA, *Submission 716*, pp. 42–43.

⁷¹ Relationships Australia Northern Territory (RANT), *Submission 395*, p. 1.

mediation services based in larger centres. They may lack literacy and find it difficult dealing with bureaucratic systems and have a natural reticence and distrust dealing with government agencies, particularly given historic and current experiences of children being removed from indigenous families. It is important to note the unique needs in remote areas of the NT where RANT has found the most effective way to connect with indigenous people in communities is to involve its [Aboriginal and Islander Cultural Advisors (AICAs)].⁷²

12.57 The RANT's submission focused on how AICAs interact with the FDR framework in a way which assists indigenous clients who have family law disputes:

AICAs do the groundwork in connecting clients with Legally and Culturally Assisted mediation and can assist indigenous clients at every step of the process. They deliver Straight Talk developed at RANT which focuses on intergenerational and complex trauma and how it affects behavior and has caused communities to normalise violence. Straight Talk works in with Aboriginal Building Connections which is a program that further highlights the detrimental effects of children living with parental conflict and prepares the way for family dispute resolution services. All the AICA programs involve a respectful process about capacity building and reconnecting indigenous people with their cultural knowledge and skills.⁷³

12.58 In its submission, AGD acknowledged the ALRC suggestion that it 'support the further development of FDR and [Legally Assisted Dispute Resolution (LADR)]' by working with 'relevant stakeholders' such as 'FDR/LADR providers and user groups (including Aboriginal Controlled Community Organisations, [culturally and linguistically diverse (CALD)] and [LGBTIQ groups]'.⁷⁴ AGD informed the committee that it 'is conducting a pilot of LADR for CALD families and Aboriginal and Torres Strait Islander families experiencing family violence which is currently being evaluated'.⁷⁵

Mediation

12.59 The remainder of this chapter examines other forms of alternative dispute resolution that may be more appropriate than FDR for resolving disputes. For example, the Australian Dispute Resolution Advisory Council (ADRAC) suggested that '[s]mall property matters are often suitable for the close attention of small claims arbitration, mediation or conciliation'.⁷⁶

12.60 This section examines the use of mediation in the resolution of family law disputes. As with FDR, the committee heard that mediation was another way

⁷² RANT, *Submission 395*, p. 1.

⁷³ RANT, *Submission 395*, p. 2.

⁷⁴ AGD, *Submission 581*, pp. 17–18.

⁷⁵ AGD, *Submission 581*, p. 18.

⁷⁶ Australian Dispute Resolution Advisory Council (ADRAC), *Submission 596*, p. 11.

in which to resolve disputes quickly, at a low cost and without proceeding to litigation. Mediation can be conducted by a private organisation, or by the courts and can cover both parenting and property matters.

12.61 In its submission, AIFLAM stated that its members:

... suggest that the various forms of family dispute resolution options are effective in resolving matters or at least reducing issues and so reducing the costs and delays associated with going to Court.⁷⁷

12.62 While FDR was only introduced in the Family Law Act in 2006, mediation has long been employed by parties to family law disputes. For example, Relationships Australia informed the committee that it has offered mediation services since 1984 and described how the 2006 changes to the Family Law Act changed the nature of its work:

With the 2006 reforms, the focus shifted to parenting matters and funding constraints have limited the offerings in property and finance mediation. These reforms precluded [Family Relationship Centres (FRCs)] from offering property mediation in isolation from a parenting dispute. Accordingly, FRCs operated by Relationships Australia do not offer property mediation at all. Elsewhere, property mediations are offered by Relationships Australia as a fee-paying service under separate FDR funding. Clients pay a sliding hourly rate based on income and are advised to seek legal advice.⁷⁸

12.63 Relationships Australia further noted that:

International literature suggests that financial outcomes and property settlements are not significantly different when reached through mediation as opposed to litigation, but that mediation enhances the perceived fairness and satisfaction of the parties, increasing compliance with settlements and decreasing the likelihood of further litigation. Such findings seem to relate to degree of perceived control over outcomes.⁷⁹

12.64 The committee also heard about the success of various mediation pilot programs. For example, the Family Court of Western Australia (FCWA) discussed a mediation pilot it is currently trialling 'as a measure to assist parties to reach a final resolution of their family law proceedings without the need to proceed to a defended trial'.⁸⁰ The mediation pilot is available 'to parties involved in parenting and/or financial proceedings, and particularly for cases involving one or more self-represented litigants'.⁸¹ One of the reasons that this pilot program was introduced was that, '[d]ue to resourcing

⁷⁷ Australian Institute of Family Law Arbitrators and Mediators (AIFLAM), *Submission 415*, p. 10.

⁷⁸ Relationships Australia, *Submission 606*, p. 42 (citations omitted).

⁷⁹ Relationships Australia, *Submission 606*, p. 43.

⁸⁰ Family Court of Western Australia (FCWA), *Submission 90*, p. 9.

⁸¹ FCWA, *Submission 90*, p. 10.

constraints, for many years the FCWA has been unable to offer many, if any, internal mediation services in parenting cases'.⁸²

12.65 The one-day, confidential mediation is conducted by a registrar at the FWCA and its success to date has been notable:

Aside from the benefits to those parties in the pilot who reached a partial or total resolution of their family law matter, the pilot has also benefitted the FCWA greatly in terms of savings in judicial time. The total estimated hearing time for trial for the 120 cases in the pilot, before mediation took place, was 275 days. As a result of the mediation process, the estimated hearing time was reduced to 128 days. This amounted to a saving of 147 days of judicial time to hear the trials that otherwise would have proceeded (not including preparation time and judgment writing time).⁸³

12.66 The AIFLAM discussed this pilot in its submission, informing the committee that the last five years has seen a significant take-up of mediation as a principal means of assisting Western Australian parties in family law disputes reach resolutions quickly both on parenting and property. The AIFLAM further noted that:

The Court strongly supports the referral of matters to mediation at an early stage of any court proceedings and the family lawyer culture has now developed to the point that mediation is part of the pre-action procedures. Whilst no statistics are readily available, anecdotally settlements of matters through mediation are high.⁸⁴

12.67 The AIFLAM suggested that there had also been a move by judges of the Federal Circuit Court and the Family Court in other states to refer property matters out for private mediation:

In the last few years the South Australian Federal Circuit Court Judges and Family Court Judges have developed a policy of referring out all property matters to private mediation where the pool exceeds around \$300,000.

Whilst there is no formal Practice Direction, the Judges of the Federal Circuit Court sitting at Melbourne take the view that all matters with a combined property and superannuation pool over \$500,000 must go to private mediation.⁸⁵

12.68 The Aboriginal Legal Service of Western Australia Limited (ALSWA) discussed an earlier successful pilot program in its submission to the committee. The Coordinated Family Dispute Resolution (CFDR) pilot was conducted in 2012–13 at five sites including Perth, and was described by ALSWA as 'an example of a sophisticated mediation model'.⁸⁶ ALSWA

⁸² FCWA, *Submission 90*, p. 10.

⁸³ FCWA, *Submission 90*, p. 11.

⁸⁴ AIFLAM, *Submission 415*, p. 2.

⁸⁵ AIFLAM, *Submission 415*, pp. 6–7.

⁸⁶ Aboriginal Legal Service of Western Australia Limited (ALSWA), *Submission 225*, p. 5.

suggested that this pilot could be rolled out across Australia, and described how it worked in Western Australia (WA):

The model applied to parenting cases involving family violence and involved extensive screening by Legal Aid WA's mediation unit, with each party being allocated a clinical case worker. If both parties were then willing to negotiate, each would work independently with their clinical case worker to positively resolve the violence issues, and then work towards attending multiple conferences (with additional clinical support) to try to finally resolve past issues around family violence and reach agreements about their children.⁸⁷

12.69 The AGD outlined two mediation reform measures that the Australian Government is currently funding:

- 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 [LACs] in each state and territory to conduct a two year trial of lawyer-assisted property mediation for matters 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.⁸⁸

12.70 Earlier in the report, the committee discussed the Government's funding support for a two year trial of lawyer-assisted mediation in family law small property disputes and for a one year small property claims court pilot.

12.71 However, the committee heard that there should be more mediation for funding of different models of mediation that 'prioritise safety, that can provide higher levels of support for some families so that you can divert those away from the court'.⁸⁹

⁸⁷ ALSWA, *Submission 225*, p. 5.

⁸⁸ AGD, *Submission 581*, Attachment 2, pp. 10–11.

⁸⁹ Ms Angela Lynch, Chief Executive Officer, Women's Legal Services Queensland, *Proof Committee Hansard*, 12 March 2020, pp. 32–33.

Training for mediators

12.72 Another issue raised with the committee, as with FDR, was the lack of training mediators had on the diverse backgrounds and needs of clients who use their services. For example, Rainbow Families Victoria referred to the experience of a number of LGBTIQ, gender diverse and non-binary clients who felt that mediators did not have the requisite legal knowledge to work with them,⁹⁰ and recommended:

... the development of pre-service education and training for anyone considering a role in counselling, mediation, dispute resolution, family therapy, child psychology and undertaking any course leading to legal role pertaining to family law, to be required to take compulsory subjects or modules on rainbow families and the LGBTIQ, gender diverse and non-binary parenting communities in Australia.⁹¹

12.73 Notably, the Mediator Standards Board (MSB) also recommended increased training for mediators pursuant to the National Mediator Accreditation System (NMAS):

... the training and assessment process required under Part 2, Sections 2.3 and 2.4 of the NMAS should be the basis for any specialised family dispute resolution practice and processes. NMAS Accreditation ensures that practitioners have the process, skills and attitude required for effective dispute resolution. Maintaining NMAS accreditation requires that practitioners remain committed to continued and current education and experience. The unique complexities of mediating in the family law context require further specialist training and ongoing professional development. However, the MSB would argue that NMAS training is the essential foundation training and that NMAS accreditation should underpin the additional specialist FDR training that will be required.⁹²

12.74 On the other hand, the committee also received evidence from Professor Patrick Parkinson AM that training for mediators was adequate:

... mediation training is quite thorough and organisations engage in ongoing professional development, so I would expect the needs of specific groups in the community for whom accessibility is a problem to be addressed in that training. Beyond this, one of the principles in establishing the FRCs was to 'let a thousand flowers bloom'. That is, the FRCs were given specific guidelines and performance indicators, but within this framework they were encouraged to adapt the model to the specific needs of the communities they serve.⁹³

⁹⁰ Rainbow Families Victoria, *Submission 226*, p. 17.

⁹¹ Rainbow Families Victoria, *Submission 226*, p. 14.

⁹² Mediator Standards Board, *Submission 587*, pp. 2–3.

⁹³ Professor Patrick Parkinson AM, answers to questions on notice, 11 March 2020 (received 5 April 2020), p. 2.

Arbitration

12.75 The AGD discussed how arbitration is used by parties to family law disputes:

Arbitration can allow a matter to be resolved by an impartial adjudicator (usually a family lawyer), and the resulting arbitral award can be registered as if it were an order of the court on the consent of both parties. Currently, arbitration is only used in the family law system to resolve property matters and can be undertaken through private agreement between the parties or by referral from a court. While arbitration is usually cheaper than going to court, the cost of private arbitration can be prohibitive for some parties.⁹⁴

12.76 In its report, the ALRC considered that arbitration was 'an underutilised process in family law'⁹⁵ and made a number of recommendations that applied to arbitration.⁹⁶ It provided background on how arbitration came to be used in the family law context:

When arbitration was introduced into the Family Law Act in 1991, the court was given power to order parties to participate in arbitration irrespective of their consent. However, these provisions were never used because the requisite regulations and rules were not introduced. In 2000, legislative amendments removed the power to order non-consensual arbitration in part due to concerns about the constitutional validity of such a power in light of a decision of the High Court of Australia.⁹⁷

12.77 One of the ALRC's recommendations was that:

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

- relating to enforcement;
- under ss 79A [setting aside of orders altering property interests] or 90SN [varying and setting aside orders altering property interests] of the *Family Law Act 1975* (Cth) (subject to limitations); and
- in which a litigation guardian has been appointed.⁹⁸

12.78 The Law Council expressed its support for this recommendation as it relates to 'child support matters', such as 'all financial issues, including child maintenance and child support, subject to limitations', noting that:

⁹⁴ AGD, *Submission 581*, p. 19.

⁹⁵ ALRC 2019 Report, p. 46.

⁹⁶ ALRC 2019 Report, p. 47.

⁹⁷ ALRC 2019 Report, p. 293 (citations omitted).

⁹⁸ ALRC 2019 Report, p. 36. Recommendation 26.

Parties to child support agreements may be in disagreement about the interpretation and effect of a child support agreement or whether it is indeed binding. In those situations, rather than issuing proceedings in the [Federal Circuit Court], they could avail themselves of the advantages of arbitration.⁹⁹

12.79 The NLA agreed with the ALRC's view that arbitration would be inappropriate in children's matters, and further stated that it is 'generally not supportive of arbitration for children's matters, but is supportive of arbitration being available in property division matters'.¹⁰⁰

12.80 While ADRAC did not refer to the use of arbitration in children's matters, it did note that this form of dispute resolution 'has real prospects in the family field' and identified the following reasons:

- It empowers those families who are unable to reach an amicable decision, and provides flexibility for them to decide who, how and when they will have a decision imposed upon them;
- It gives scope to those persons who would prefer an outcome decided by a trustworthy third party;
- It gives scope to those persons who wish to tell their story, hear a former partner tell their story or, in general terms, have a hearing with or without the costs of affidavit preparation;
- The cost comparisons between an essentially oral short version of hearing and a full blown, adversarial document and affidavit-based contest if presented to the parties, is likely to be persuasive;
- It preserves privacy in ways that are not available in court hearings; and
- It retains the flexibility to choose whether or not participants require the services of an advocate in this process.¹⁰¹

12.81 The Family Law Reform Coalition recommended that arbitration should be used far more broadly than it is currently used, including with respect to childcare arrangements:

If childcare arrangements cannot be resolved within a health-focused environment (including such initiatives as Medicare-supported counselling/coaching & family care), families should be referred to an enhanced conciliation system and, only where necessary, progress into a new, mandatory arbitration process. These systems should not be considered 'alternatives' to the family law system but, rather, the primary mechanisms or interventions for resolving family separations with family courts truly a last resort.

For families unable to reach a mutual agreement, arbitration should create, and be responsible for implementing, binding orders that ensure children maintain and develop positive relationships with both of their parents, and

⁹⁹ Law Council, *Submission 2.2*, p. 113.

¹⁰⁰ NLA, *Submission 589*, p. 16.

¹⁰¹ ADRAC, *Submission 596*, p. 12.

all who care for them, until the arbitration process is complete or until/unless one or both parents is proven unfit. Arbitration decisions should be binding, and this relatively swift, cost-effective process should be publicly funded. Decisions made during arbitration should be appealable to a federal court (i.e. the Family Court of Australia) at which point litigants should generally be required to fund their litigation.¹⁰²

12.82 For Kids Sake also recommended introducing 'a new system of arbitration for both children's and financial matters'.¹⁰³

12.83 However, AGD noted that 'there are a range of sensitivities in relation to arbitration of children's matters that require further consideration', such as:

... obligations under the United Nations Convention on the Rights of the Child for the state to remain involved in decisions concerning children; constitutional considerations when conferring functions on a non-judicial body; limitations on what a parent (rather than a court) can authorise to be arbitrated; how family reports and other professional services would be ordered and considered in an arbitral model; and the competencies and accountabilities of arbitrators.¹⁰⁴

Conciliation

12.84 ADRAC identified conciliation as an underutilised process 'that is likely to be of benefit in the family field'.¹⁰⁵ ADRAC describes conciliation as:

... a dispute resolution process conducted in the shadow of a determinative process and in accordance with particular considerations that bind the parties and the conciliator through applicable legislation. Conciliators working under this legislation are required to encourage parties to resolve a dispute within the confines of the policy of the legislation they are employed to propound.¹⁰⁶

12.85 Caxton Legal Centre stated that sometimes, conciliation is more affordable than mediation:

From our experience, clients seeking assistance with their property settlement negotiations at our family law duty lawyer service or at our day time and evening family law advice sessions, want someone to tell them what is a fair settlement. These clients do not have sufficient resources to pay for private mediation which does not necessarily result in an outcome. Conciliation conferences are an effective means by which property settlements are resolved when those who are experienced at conducting the conferences offer an opinion about the likely outcome.¹⁰⁷

¹⁰² Family Law Reform Coalition, *Submission 597*, p. 3.

¹⁰³ For Kids Sake, *Submission 607*, p. 6.

¹⁰⁴ AGD, *Submission 581*, p. 19.

¹⁰⁵ ADRAC, *Submission 596*, p. 11.

¹⁰⁶ ADRAC, *Submission 596*, p. 11.

¹⁰⁷ Caxton Legal Centre, *Submission 744*, p. 18.

12.86 At present, Registrars and Deputy Registrars in the Family Court conciliate property disputes with what the Law Council describes as a 'high' success rate.¹⁰⁸ The Law Council explained how this works in practice in the Family Court:

... a Registrar's Conciliation Conference is usually the first court event after a property proceeding being filed with the Court. This is an efficient way to identify issues in dispute and, in many cases, resolve the dispute.¹⁰⁹

12.87 The Law Council informed the committee that this same process is not followed in the Federal Circuit Court:

When an Application is filed in the [Federal Circuit Court], the matter is (normally) listed before a judicial officer (although the [Federal Circuit Court] is now trialling greater use of Registrars on first return dates) before being allocated a conference (and a conciliation conference at the court will often only be allocated if the property pool is less than \$500,000; for those with a property pool in excess of \$500,000, a private mediation is usually 'required' to be arranged).¹¹⁰

12.88 However, the Law Council observed that '[t]here are not enough Registrars to assist with the procedural management of cases or to conduct court events, such as Conciliation Conferences which assist parties to resolve their cases'.¹¹¹

12.89 Further, the Law Council noted that Registrars are no longer able to hold conferences in children's matters due to resourcing constraints. Rather, the Family Court and Federal Circuit Court offer in-house counselling to parties involved in parenting matters which is conducted by family consultants.¹¹² It was the Law Council's submission that '[t]he Courts must have a properly funded Family Court Counselling Service', noting that:

If a greater number of properly qualified family consultants are employed, more families may access the service, leading to a greater number of settlements and a reduction in court lists, costs and delays.¹¹³

12.90 The FCWA discussed how conciliation is used in WA. The FCWA stated that '[f]inancial cases are offered a conciliation conference by the FCWA if the parties cannot attend private and external mediation-style conferencing', but did note that 'the efficacy of conciliation conferences has been limited by the amount of time the registrars can devote to each conference'.¹¹⁴

¹⁰⁸ Law Council, *Submission 2.2*, p. 37.

¹⁰⁹ Law Council, *Submission 2.2*, p. 37.

¹¹⁰ Law Council, *Submission 2.2*, p. 37.

¹¹¹ Law Council, *Submission 2.2*, p. 77.

¹¹² Pursuant to s. 11A of the *Family Law Act 1975*.

¹¹³ Law Council, *Submission 2.2*, p. 37.

¹¹⁴ FCWA, *Submission 90*, p. 10.

12.91 The AFCC suggested that conciliation could be used in disputes where parties are screened out of FDR due to a history of family violence:

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.¹¹⁵

12.92 However, the AFCC did observe that such processes require further funding:

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.¹¹⁶

12.93 The AFCC also submitted that when family violence results in a dispute not being appropriate for FDR, 'such matters might be diverted to a specialised conciliation conference lead jointly by a Registrar and a Family Consultant within the court structure'.¹¹⁷

12.94 Indeed, it was the NSW Bar Association's submission that '[w]hen properly resourced, the Family Court has excelled at the provision and application of specialist conciliation and assessment services', further stating that:

Registrars and family consultants, when properly resourced and deployed, are an integral part of case management. They provide an invaluable service in the early identification, narrowing and resolution of issues.¹¹⁸

Other forms of dispute resolution

12.95 The committee also heard about a number of other forms of dispute resolution that are utilised by parties to solve their family law disputes, as well as proposals for new types of dispute resolution.

12.96 For example, the committee heard about 'collaborative practice' from Collaborative Professionals (NSW) Inc.:

Collaborative practice has clients agreeing not to go to court at the start of the process. They have to sign a contract and so do their lawyers not to go to court. The whole process occurs in a series of face to face meetings with the clients and lawyers and any other experts who may be needed.

The method is like mediation, but with a team of experts - including lawyers, social workers, counsellors specialising in children, financial planners and accountants. The experts have to be specially trained – this is vital to the success of the method.

¹¹⁵ AFCC, *Submission 99*, p. 11.

¹¹⁶ AFCC, *Submission 99*, p. 11.

¹¹⁷ AFCC, *Submission 99*, p. 11.

¹¹⁸ NSW Bar Association, *Submission 227*, p. 36.

The clients are the deciders, not a mediator. This adds to their sense of control and satisfaction with the process. They tailor the outcome to their family's own needs. If they don't reach an agreement, then they can go to court, but only then.¹¹⁹

12.97 This organisation recommended collaborative practice be considered a form of dispute resolution for the purposes of section 60I of the Family Law Act, such that collaborative practice practitioners can sign a section 60I certificate that can be lodged with the court.¹²⁰

12.98 Divorce Partners Pty Ltd (Divorce Partners)—'a mediation business that specialises in solving financial disputes for separating couples who cannot afford lawyers'¹²¹—discussed their proposal for an online service to resolve financial disputes 'for couples with less than \$2 million of net wealth',¹²² which would operate as follows:

1. A separating person can commence the process by opening a case on an electronic portal. They disclose their view of the couple's financial position and the system issues a notice to the other spouse requiring they also engage with the system. Disclosure and valuation obligations are imposed on both parties.
2. Each spouse is immediately allocated 35% of their joint wealth. This shrinks the sums in potential dispute to no more than 30% in the first instance. In our experience, this reduces the tension between the couple.
3. The less financially advantaged partner is then allocated at least half of the remaining 30% i.e. 15%, thereby reducing the amount rationally in dispute. By constraining ambit claims and creating normalised parameters for wealth distribution early in the process, we have been able to shrink over 90% of disputes to a smaller gap of around 5 % of the wealth pool.
4. There is then a mandatory requirement to mediate or otherwise negotiate the remaining gap within a prescribed timeframe.
5. If the matter is not resolved, then the remaining disputed portion of wealth is to be placed in a joint bank account, stymying the economic incentives of delay.
6. Participants do not lose their right to commence court action against each other, but in practice few will.¹²³

12.99 In its evidence to the committee, Divorce Partners noted that this proposed portal is yet to be built.¹²⁴

¹¹⁹ Collaborative Professionals (NSW) Inc., *Submission 86*, p. 1.

¹²⁰ Collaborative Professionals (NSW) Inc., *Submission 86*, p. 3.

¹²¹ Divorce Partners Pty Ltd, *Submission 583*, p. 1.

¹²² Divorce Partners Pty Ltd, *Submission 583*, p. 2.

¹²³ Divorce Partners Pty Ltd, *Submission 583*, p. 3.

12.100 Professor Parkinson discussed a pilot program that he worked on together with Mr Brian Knox SC—the enabling bill for which did not pass the Parliament—which Professor Parkinson described as 'a perfect model for self-represented litigants':

One of the most recent of these reforms, for which I was responsible together with Brian Knox, a senior counsel in Sydney, was the idea of piloting an inquisitorial tribunal to decide many children's cases, intended for litigants who cannot afford legal representation. This was a big and bold new idea. The idea was the tribunal would use questionnaires rather than affidavits to get quickly to the issue. The tribunal would ask the questions that they needed to know. A lawyer chairperson would triage the case in the early stages—somebody with decades of experience in family law. If the case couldn't be resolved, an independent children's lawyer would be appointed and the case would be heard by a three-member panel in a hearing scheduled for no more than two hours. The panel would consist of the lawyer and two other people with expertise in family issues, perhaps a child psychologist or psychiatrist or an expert on drug and alcohol issues—whatever was appropriate to the matter. The idea was that an expert panel would be able to make sensible decisions about a lot of cases in a couple of hours of hearing, rather than two to three days as happens in the courts.¹²⁵

12.101 In its submission, ADRAC suggested more than just the expansion of the current FDR framework that many submitters and witnesses advocated for—it recommended a three-tiered non-judicial approach to resolving family law disputes:

The first stage would involve access to an information, triage and [dispute resolution] services, including FDR, as a first stage. The second stage would involve a non-adversarial, administrative decision-making process supported by conciliation, and arbitration. Only in the third stage would there be a court where litigation and the adversarial processes would be available in a limited type of matter or as a last resort. The fact that the matter has moved on to litigation should not preclude a judge from referring parties to [dispute resolution] if considered appropriate.¹²⁶

Hon Kevin Andrews MP
Chair

¹²⁴ Mr David Eagle, Partner, Divorce Partners Pty Ltd, *Proof Committee Hansard*, 27 May 2020, p. 12.

¹²⁵ Professor Patrick Parkinson AM, Dean of Law, University of Queensland, *Proof Committee Hansard*, 11 March 2020, p. 7.

¹²⁶ ADRAC, *Submission 596*, pp. 6–7.

Australian Labor Party Additional Comments

Introduction

- 1.1 The Joint Select Committee on Australia's Family Law System was appointed by resolution of the Senate on 18 September 2019 to inquire and report on matters relating to the family law system. This inquiry follows 67 other inquiries and reports into family law since the *Family Law Act 1975* (Family Law Act) commenced on 5 January 1976.
- 1.2 Prior to this inquiry chaired by the Honourable Kevin Andrews commencing, Labor members had genuine concerns about yet another inquiry into family law being instigated while many recommendations from previous inquiries had not been acted upon and, in some cases, not even responded to by the government. Just the two most recent reports—the House of Representatives Standing Committee on Social Policy and Legal Affairs *Inquiry into a better family law system to support and protect those affected by family violence* report tabled in December 2017 (Henderson Report), and the Australian Law Reform Commission *Family Law for the Future – An Inquiry into the Family Law System* (ALRC Report) tabled in March 2019, have a combined 93 recommendations to the Government to improve the family law system. Most of these recommendations have not been acted on.
- 1.3 Labor members were also concerned that some stakeholders would not participate in the inquiry at all after comments were made publicly by the Deputy Chair.¹
- 1.4 Despite these concerns, the Labor members of this committee have taken their roles on this committee seriously, they have engaged with the inquiry process in good faith, and have diligently participated in the conduct of this inquiry so far.
- 1.5 The committee's interim report documents the extensive work undertaken thus far by the committee. The committee has received more than 1500 individual submissions and 163 submissions by organisations. Although hearings have continued by teleconference and videoconference, the COVID-19 pandemic has impacted on the work of the inquiry. Labor members consider it was reasonable in the circumstances to extend the reporting date to the last sitting day in February 2021.

¹ Judith Ireland, 'Hanson says women lie about domestic violence to get kids in Family Court disputes', *The Sydney Morning Herald*, 18 September 2019, <https://www.smh.com.au/politics/federal/hanson-says-women-lie-about-domestic-violence-to-get-kids-in-family-court-disputes-20190918-p52sfv.html>.

Interim Recommendations by Labor Members

Recommendation 1

- 1.6 The Government should urgently respond to the Australian Law Reform Commission *Family Law for the Future—An Inquiry into the Family Law System: Final Report*.

Recommendation 2

- 1.7 The Government should immediately respond to a longstanding concern of lawyers, academics and users of the family court system and implement the bipartisan recommendation of the *Parliamentary Inquiry into a better family law system to support and protect those affected by family violence to repeal section 61DA of the Family Law Act 1975*.

Recommendation 3

- 1.8 The Government should also immediately implement the recommendation of the Australian Law Reform Commission *Family Law for the Future – An Inquiry into the Family Law System: Final Report* to repeal section 65DAA of the *Family Law Act 1975*.

Recommendation 4

- 1.9 The Government should immediately implement the bipartisan recommendation of the *Parliamentary Inquiry into a better family law system to support and protect those affected by family violence* and the recommendation of the Australian Law Reform Commission in its *Family Law for the Future—An Inquiry into the Family Law System: Final Report* and commence development of a mandatory national accreditation scheme for family report writers.

Recommendation 5

- 1.10 The Government should immediately bring on debate for the Family Law Amendment (Risk Screening Protections) Bill 2020 to allow the Lighthouse Project to commence in the Family Court of Australia and the Federal Circuit Court.

Recommendation 6

- 1.11 The Government should immediately introduce legislation to give courts access to superannuation information held by the Australian Taxation Office as announced by the Government in November 2018 and accompanied by funding of \$3.3 million.

Recommendation 7

1.12 The Government should immediately allocate additional resources, including judicial resources, to address the delays being experienced by families accessing the family law system.

Recommendation 8

1.13 The Government should not proceed with the Federal Circuit and Family Court of Australia Bill 2019.

Previous inquiries and existing recommendations

1.14 This inquiry has tapped into some common issues that have been flagged as concerns in report after report. Some issues have persisted without being addressed for decades. Labor members consider that urgent reform is well overdue and some recommendations, common to many reports, do not need to await the final report of this inquiry before they can be acted upon.

1.15 Prior to the Morrison Government commencing this inquiry there had been 67 other inquiries and reports into the family law system.² Many of these reports have raised the same concerns and the same or similar recommendations for reform:

- The Henderson Report was tabled in December 2017. The report included 33 recommendations for reform.³
- The Government responded to that report in September 2018. Many of the responses by the Government to recommendations were ‘Noted (awaiting ALRC report)’.⁴
- The ALRC Report was handed down in March 2019. The report included 60 recommendations.⁵
- The Government is yet to release its response to the ALRC recommendations. Almost one year ago Senator Payne revealed in Senate Estimates that the government’s response to the recommendations of the ALRC’s inquiry into the family law system was with the Attorney-General.⁶

² A list of family law inquiries and reports is contained in Appendix 3.

³ The 33 recommendations of the House of Representatives Standing Committee on Social Policy and Legal Affairs *Inquiry into a better family law system to support and protect those affected by family violence* tabled in December 2017 (Henderson Report) are contained in Appendix 4.

⁴ The Government’s Response to the 33 recommendations of the Henderson Report are set out in Appendix 4.

⁵ The 60 recommendations of the Australian Law Reform Commission *Family Law for the Future – An Inquiry into the Family Law System* (ALRC Report) are contained in Appendix 4.

⁶ Senate Legal and Constitutional Affairs Committee, Senator Payne, Minister for Foreign Affairs and Minister for Women, *Proof Committee Hansard*, 22 October 2019, p. 37.

Recommendation 1

1.16 **The Government should urgently respond to the Australian Law Reform Commission *Family Law for the Future—An Inquiry into the Family Law System: Final Report*.**

Issues raised in previous reports

1.17 Labor members consider that many of the reforms proposed by submitters and witnesses are common to previous inquiries and reports. These are outlined below.

Presumption of equal shared parental responsibility

1.18 The committee has heard from many witnesses and submitters about the consistent confusion and misapprehension around the presumption of equal shared parental responsibility.

1.19 The *Family Law Amendment (Shared Parental Responsibility) Act 2006* amended the Family Law Act to create a rebuttable presumption that parents equally share parental responsibility for their children.

1.20 Just three years after the presumption was inserted into the Family Law Act by the Howard Government the Family Law Council's Family Violence Committee in their 2009 report, *An advice on the intersection of family violence and family law issues* recommended that the Attorney-General give consideration to clarifying section 61DA as:

... there remains a perception in the community that equal shared parental responsibility equates to equal time (50/50) and that the onus rests on the parent seeking different orders to convince the court that equal time is not appropriate.⁷

1.21 In 2010, a joint report by Monash University, University of South Australia and James Cook University commissioned by the Attorney-General's Department again discussed section 61DA and the other reports that had already considered the problems with that provision, saying:

A number of recent reports have commented that the presumption that the 2006 reforms created in favour of shared equal parental responsibility has created widespread misunderstanding of the operation of the law. Separating parents have believed that equal shared parental responsibility meant that they were entitled to equal time, that is, 50–50 shared care arrangements for their children (Family Law Council 2009; Kaspiew, Gray et al. 2009; Chisholm 2009a). Richard Chisholm encapsulated the general confusion regarding the law: '[M]any people continue to misunderstand

⁷ Family Law Council, *Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues*, December 2009, p. 16. Recommendation 13.

the 2006 provisions as creating a right to equal time, or a presumption favouring equal time' (2009a: 125).⁸

1.22 That report also warned of the dangers of the presumption:

Furthermore, and most importantly, has been the shadow cast over the potential protection of victims afforded by the legislation by the principles in the legislation of 'equal parental responsibility' and 'shared time' for the care of children. The tension set up by the legislation between protecting the child and parental equality of responsibility may not be resolved so as to protect victims, if the person claiming equality of responsibility or equal shared time is the perpetrator of violence and the more powerful member in the partnership. Decisions in the Family Court of Australia illustrate the difficulties courts are having in managing the interaction between these principles and family violence (see *Murphy v Murphy* 2007; Fam CA 79; *Delaney v Delaney* 2008; FMCA FAM 674).⁹

1.23 The Henderson Report recommended that the ALRC as part of its current review of the family law system develop proposed amendments to Part VII of the Family Law Act and 'specifically, that it consider removing the presumption of equal shared parental responsibility'.¹⁰

1.24 The Coalition Government response to that recommendation in the Henderson Report was 'Noted (Government supports consideration by ALRC)'.

1.25 The ALRC Report recommended that:

... [s]ection 61DA of the *Family Law Act 1975* (Cth) should be amended to replace the presumption of 'equal shared parental responsibility' with a presumption of 'joint decision making about major long-term issues'.¹¹

1.26 Although the ALRC Report recommended amending rather than repealing the provision, the report concedes that 'the primary basis for confusion is the presumption of equal shared parental responsibility, rather than the general concept of parental responsibility'.¹²

1.27 The Government is yet to provide a response to that recommendation despite the nexus between the existing provisions and family violence, particularly

⁸ D Bagshaw et al, *Family violence and family law in Australia: the experiences and views of children and adults from families who separated post-1995 and post-2006*, 2 vols, Monash University, University of South Australia, James Cook University, for the Australian Attorney-General's Department, April 2010 (volume 1 and volume 2), p. 71.

⁹ D Bagshaw et al, *Family violence and family law in Australia: the experiences and views of children and adults from families who separated post-1995 and post-2006*, 2 vols, Monash University, University of South Australia, James Cook University, for the Australian Attorney-General's Department, April 2010 (volume 1 and volume 2), p. 14.

¹⁰ Henderson Report, Recommendation 19, p. xxxiii.

¹¹ ALRC Report, p. 41. Recommendation 7.

¹² ALRC Report, p. 176.

violence perpetrated against children, and the Government having received the ALRC Report over 18 months ago.

- 1.28 Witnesses and submitters to this committee more commonly supported the recommendation of the 2017 Henderson Report, that the presumption be removed altogether.
- 1.29 Save the Children Australia encapsulated the more common view about the ALRC recommendation when they told the committee, 'while this would be an improvement on the current position, the presumption should instead be removed altogether'.¹³
- 1.30 Many witnesses told the committee of the widespread misconception of the presumption including Ms Bronwen Lloyd, Lawyer, Women's Legal Services Queensland who said:

There's this presumption that you're supposed to do shared care because there's a presumption of equal shared parental responsibility. It sounds a bit like shared care or shared custody or fifty-fifty, but it's different.¹⁴

- 1.31 Ms Gabrielle Craig, Assistant Principal Solicitor, Women's Legal Service New South Wales also told the committee about the danger for children when parents agree to unsafe living arrangements because of the misunderstanding of the presumption:

There is such a widespread misunderstanding within the community about the meaning of equal shared parental responsibility. Many think it means equal time, and so, many parents enter into these arrangements based on this misbelief—even though they may think these arrangements are unsafe for their children and themselves—and often without seeking legal advice before doing so. We need provisions which, instead of being presumptive, focus on decisions that are made on a case-by-case basis and solely in the best interests of the child.¹⁵

- 1.32 Ms Liz Snell, Law Reform and Policy Co-ordinator, Women's Legal Service New South Wales also spoke about the misunderstanding of the presumption:

... the vast majority of matters are negotiated out of court, often without legal advice, in the shadow of deeply entrenched misconceptions. This is particularly evident in a common misunderstanding that equal shared parental responsibility means equal time. Women negotiating agreements without specialist legal advice often agree to unsafe parenting arrangements for their children and themselves because they believe that the presumption of equal-share parental responsibility requires them to do so, even when there is family violence. This is a key reason we oppose

¹³ Save the Children Australia, *Submission 94*, p. 2.

¹⁴ Ms Bronwen Lloyd, Lawyer, Women's Legal Services Queensland, *Proof Committee Hansard*, 12 March 2020, p. 37.

¹⁵ Ms Gabrielle Craig, Assistant Principal Solicitor, Women's Legal Service New South Wales, *Proof Committee Hansard*, 13 March 2020, p. 60.

presumptions. Each family is unique, so decisions need to be made on a case-by-case basis.¹⁶

- 1.33 Many witnesses provided evidence of the very real difficulties that the presumption of equal shared parental responsibility present for victims of violence including Dr Merrindahl Andrew, Program Manager, Australian Women Against Violence Alliance, who said:

The way the presumption's meant to operate is that it's meant to exclude cases where there's family violence, but it's really problematic, particularly in situations where that violence might not be properly identified and particularly where a victim-survivor of violence doesn't have legal representation through the court system. Although the presumption is not meant to apply in cases of domestic and family violence, women and children are still negatively impacted by that presumption, because it's often hard to identify the violence through the court system.¹⁷

- 1.34 Dr Heather Nancarrow, Chief Executive Officer, Australia's National Research Organisation for Women's Safety said in her evidence to the committee:-

... since presumption of equal shared parental responsibility was introduced in 1996, there has been increased pressure on women not to disclose domestic and family violence lest they be seen as an alienating parent. There's also been confusion, particularly by self-represented litigants, about what equal shared parental responsibility means.¹⁸

- 1.35 Ms Angela Lynch, Chief Executive Officer, Women's Legal Services Queensland said in her evidence to the committee:

... the Australia Institute of Family Studies has done research on this that talks about when shared parental responsibility arrangements are made. In cases where there's both family violence and child abuse, it's made in nearly 70 per cent of cases. Where there's either family violence or child abuse, it's made in 83.7 per cent of matters. That's the Australian Institute of Family Studies research. So the presumption, despite family violence and child abuse being there, is not displaced, and that's our practice knowledge as well.¹⁹

- 1.36 Ms Lynch also gave evidence to the committee of the real consequences of the misconception of the presumption:

In the case of Hannah Clarke we know from media reports she entered into shared care arrangements through mediation giving Baxter 165 nights. We

¹⁶ Ms Liz Snell, Law Reform and Policy Co-ordinator, Women's Legal Service New South Wales, *Proof Committee Hansard*, 13 March 2020, p. 59.

¹⁷ Dr Merrindahl Andrew, Program Manager, Australian Women Against Violence Alliance, *Proof Committee Hansard*, 27 May 2020, p. 25.

¹⁸ Dr Heather Nancarrow, Chief Executive Officer, Australia's National Research Organisation for Women's Safety, *Proof Committee Hansard*, 13 March 2020, p. 46.

¹⁹ Ms Angela Lynch, Chief Executive Officer, Women's Legal Services Queensland, *Proof Committee Hansard*, 12 March 2020, p. 37.

are told he was not happy with these arrangements as this did not equate to equal time and he would not sign consent orders and wanted to pursue his rights in the family courts.²⁰

- 1.37 Ms Zoe Rathus AM appearing in her private capacity, also acknowledged the difficulty of the presumption for victims of violence:

I think the presumption that equal shared parental responsibility is in the best interests of children has actually proved extremely dangerous. I do understand why such an idea is an ideal, but, unfortunately, actually having a presumption at law is an extremely powerful legal tool that really tilts the direction of decision-making. It is intended to do that. To have decided to go with a presumption of equal shared parental responsibility has, I say, in the end made it very difficult for victims of violence to raise it because then they are always seen as flying in the face of a presumption that sits in the legislation.²¹

- 1.38 Ms Deborah Awyzio, Chair, Family and Domestic Violence Committee of the Queensland Law Society confirmed the view of the Law Society in her evidence to the committee that:

... presumptions in relation to parental responsibility unreasonably fetter the discretion of the court. Parental responsibility should be a matter for the court to determine in the circumstances of each case, guided by the paramount consideration principle.²²

- 1.39 Ms Hayley Foster, Chief Executive Officer, Women's Safety New South Wales highlighted the pervasive nature of the presumption to the culture of the entire family law system:

By having that presumption there, how we actually handle those matters filters through the whole system from the very get-go. It's all the way through to that very first mediation that we have when I'm sitting there with a client in a mediation. Having that presumption there is changing the culture of the whole system.²³

- 1.40 The overwhelming evidence to the committee was in favour of repealing the presumption of equal shared parental responsibility. There was very limited support for retaining the presumption.²⁴

²⁰ Ms Angela Lynch, Chief Executive Officer, Women's Legal Services Queensland, *Proof Committee Hansard*, 12 March 2020, p. 30.

²¹ Ms Zoe Rathus AM, *Proof Committee Hansard*, 11 March 2020, p. 16.

²² Queensland Law Society, *Submission 88*, p. 5.

²³ Ms Hayley Foster, Chief Executive Officer, Women's Safety New South Wales, *Proof Committee Hansard*, 13 March 2020, p. 54.

²⁴ Lone Fathers Association of Australia, *Submission 112*, p. 1; Australian Brotherhood of Fathers (ABF), *Submission 1668*, pp. 20-21; Non-custodial Parents Party (Equal Parenting), *Submission 1*, pp. 3-4; Parental Alienation in Australia, *Submission 841*, p. 19; Professor Augusto Zimmermann, *Submission 6*, p. 10.

- 1.41 Ms Lynch concluded her opening statement to the committee by asking them to make an interim recommendation to remove the presumption:

We urge you, as we have urged the government, to make an interim decision to recommend to government the removal of the presumption and emphasis on shared care, at a very minimum, and to replace this with a common law position that recognises both parents can make decisions about children unless a court orders otherwise and that these decisions are made subject to the best interests of children.²⁵

- 1.42 Reports to government since 2009 have been raising concerns about the presumption of equal shared parental responsibility and recommending it be amended or repealed. Labor members of the committee consider there is no need to wait for a recommendation in another report to know that this needs to be fixed urgently.

Recommendation 2

- 1.43 **The Government should immediately respond to a longstanding concern of lawyers, academics and users of the family court system and implement the bipartisan recommendation of the *Parliamentary Inquiry into a better family law system to support and protect those affected by family violence to repeal section 61DA of the Family Law Act 1975.***

Mandated pathway to equal time or substantial or significant time

- 1.44 The inquiry heard of the general confusion around shared care and equal time provisions in the Family Law Act. This issue has been raised in previous reports.
- 1.45 The ALRC Report recommended that section 65DAA be removed from the Family Law Act.²⁶
- 1.46 Section 65DAA requires the court to consider, in certain circumstances, the possibility of the child spending equal time, or substantial and significant time with each parent.
- 1.47 The ALRC considered that:

... it is difficult to justify retention of a provision that leads to misunderstandings about care-time arrangements, increases the complexity of judgments, and likely increases legal costs. The presumption also leads to a focus on the quantity of contact with a child rather than on the extent to which that contact improves the child's wellbeing. To the extent that shared time would improve the outcome for a specific child, it

²⁵ Ms Angela Lynch, Chief Executive Officer, Women's Legal Services Queensland, *Proof Committee Hansard*, 12 March 2020, p. 31.

²⁶ ALRC Report, Recommendation 8, p. 41.

can be considered to feed into the best interests of the child and does not require a separate presumption.²⁷

- 1.48 Ms Rathus told this committee about the difficulty with the presumption of equal shared parental responsibility being tied to the time a child spends with each parent:

To make it clear: the presumption can be not applied, because there's been family violence or some other reason, but that doesn't stop a court from making an order for equal shared parental responsibility. So a judge can say, 'I can't make the presumption here because of this, but I'm going to make an order anyway, not via the presumption; that's just going to be my order.' Once that order has been made, then, on the way that section 65DAA is worded, they have to consider equal time and substantial and significant time.²⁸

Recommendation 3

- 1.49 **The Government should also immediately implement the recommendation of the Australian Law Reform Commission *Family Law for the Future – An Inquiry into the Family Law System: Final Report* to repeal section 65DAA of the *Family Law Act 1975*.**

Accreditation Scheme for Family Consultants and Expert Witnesses

- 1.50 The committee has heard much evidence supporting the establishment of an accreditation scheme for family consultants and expert witnesses who produce family reports for family law proceedings.
- 1.51 Again, this is not a new concern. The 2017 Henderson Report recommended that the Australian Government develop a national accreditation system with minimum standards and ongoing professional development for family consultants modelled on the existing accreditation system for family dispute resolution practitioners.²⁹
- 1.52 The Government response to the 2017 Henderson recommendation was 'Noted (awaiting ALRC report)'.
- 1.53 The ALRC Report also recommended that the Attorney-General's Department should develop a mandatory national accreditation scheme for private family report writers.³⁰
- 1.54 Ms Megan Mitchell, National Children's Commissioner, Australian Human Rights Commission told the committee:

²⁷ ALRC Report, p. 182.

²⁸ Ms Zoe Rathus AM, *Proof Committee Hansard*, 11 March 2020, p. 22.

²⁹ Henderson Report, Recommendation 30, p. xxxviii.

³⁰ ALRC Report, Recommendation 53, p. 53.

A number of children have said to me that they believe that the information that's going into that report doesn't reflect their own feelings, experiences and perspectives. So for me it's really important that those professionals have a strong background in child development and child trauma.³¹

1.55 Ms Rathus told the committee she agreed with the ALRC recommendation:

We gave evidence to that committee and we made submissions to the ALRC which were agreed with by many others as well. That was a very strong theme. Yes, we believe in accreditation and ongoing accreditation. You would do the same thing as for lawyers—there'd be a continuing professional development expectation. At the moment, it depends on which profession the report writers come from and their professional body.³²

1.56 Ms Awyzio agreed that accreditation was important:-

Yes, we definitely support that, particularly around the issue of family violence. It's very important that someone has the appropriate training to deal with that very complex issue.³³

Recommendation 4

1.57 The Government should immediately implement the bipartisan recommendation of the *Parliamentary Inquiry into a better family law system to support and protect those affected by family violence* and the recommendation of the Australian Law Reform Commission in its *Family Law for the Future—An Inquiry into the Family Law System: Final Report* and commence development of a mandatory national accreditation scheme for family report writers.

Risk screening and triaging

1.58 The Attorney-General's Department gave evidence of a pilot project to screen and triage applications for parenting orders.³⁴ The funding of \$13.5 million was announced by the Government on 17 December 2019 as part of the 2019–20 Mid-Year Economic and Fiscal Outlook.³⁵

³¹ Ms Megan Mitchell, National Children's Commissioner, Australian Human Rights Commission, *Proof Committee Hansard*, 14 February 2020, p. 27.

³² Ms Zoe Rathus AM, *Proof Committee Hansard*, 11 March 2020, p. 17.

³³ Ms Deborah Awyzio, Chair, Family and Domestic Violence Committee of the Queensland Law Society, *Proof Committee Hansard*, 10 March 2020, p. 25.

³⁴ Ms Alexandra Mathews, Assistant Secretary, Family Safety Branch, Attorney-General's Department, *Proof Committee Hansard*, 14 February 2020, p. 8.

³⁵ Mid-Year Economic and Fiscal Outlook 2019—20 December 2019.

- 1.59 Legislation, which is necessary to support the implementation of this pilot, was introduced by the Government on 26 August 2020.³⁶ However, this uncontroversial legislation is yet to be brought on for debate.
- 1.60 For the Brisbane, Parramatta and Adelaide registries of the Family Court and Federal Circuit Court pilots to be operational, the Coalition Government must pass the relevant amending legislation.
- 1.61 The committee has heard support from witnesses about the expected commencement of these pilots and for triaging matters where family violence is present.
- 1.62 Dr April O'Mara, Manager, Practice Governance and Research, Centacare Family and Relationship Services told the committee:
- ... any type of triaging process that helps to identify those clients that are most at risk, those children that are most at risk, we would definitely support.³⁷
- 1.63 Ms Kylie, Beckhouse, Director, Family Law, Legal Aid New South Wales, National Legal Aid told the committee:
- Risk assessment processes with clients who are victims of DV need to take place at the different stages of the proceedings, as do our decision-making and recommendations about whether a matter should now be referred back to mediation.³⁸

Recommendation 5

- 1.64 **The Government should immediately bring on debate for the Family Law Amendment (Risk Screening Protections) Bill 2020 to allow the Lighthouse Project to commence in the Family Court of Australia and the Federal Circuit Court.**

Disclosure of assets in financial matters

- 1.65 The 2017 Henderson Report recommended that the Attorney-General develop an administrative mechanism to enable swift identification of superannuation assets by parties to family law proceedings, leveraging information held by the Australian Taxation Office.³⁹
- 1.66 On 20 November 2018, in a joint media release by the then Minister for Women, the Hon Kelly O'Dwyer MP, the Attorney-General, the Hon Christian Porter MP and the Assistant Treasurer, the Hon Stuart Robert MP, the

³⁶ Family Law Amendment (Risk Screening Protections) Bill 2020.

³⁷ Dr April O'Mara, Manager, Practice Governance and Research, Centacare Family and Relationship Services, *Proof Committee Hansard*, 12 March 2020, p. 29.

³⁸ Ms Kylie, Beckhouse, Director, Family Law, Legal Aid New South Wales, National Legal Aid, *Proof Committee Hansard*, 27 May 2020, p. 39.

³⁹ Henderson Report, Recommendation 15, p. xxxii.

Coalition Government announced a scheme to improve visibility of superannuation assets in family law proceedings. It was announced as part of the Coalition Government's Women's Economic Security Package and \$3.3 million was allocated to fund the scheme which would give courts access to superannuation information held by the Australian Taxation Office. Nearly two years later and legislation to implement this measure has still not been introduced to parliament.

1.67 Disclosure of assets in financial matters was raised as a concern by some witnesses, in particular with non-disclosure of superannuation assets.

1.68 Ms Zita Ngor, Chief Executive Officer, Women's Legal Service SA told the committee:

... this is another aspect of coercive and controlling behaviours, and it's not uncommon for a lot of the women we work with—or have limited or no idea about their finances then just being able to identify potential super accounts can be extremely difficult.⁴⁰

1.69 Mrs Susan Price, Men's Rights Agency described to the committee the difficulty with delay in disclosure of assets:

There's a fair amount of procrastination that takes place and an unwillingness to get valuations or to disclose various bank accounts, shares and all the rest of it, and it can be a difficult process to get everything together into the one bucket to say, 'Well, this is the family pool.' This needs to be speeded up.⁴¹

1.70 Ms Jody Knighton, Principal Solicitor, Women's Legal Service SA told the committee the problem with obtaining a 'flagging order' to preserve superannuation funds while proceedings are on foot:

A flagging order must be directed to a particular super fund, say, Australian Super, for example. If the wife doesn't know who the husband's superannuation is with then an order is useless.⁴²

1.71 Ms Ngor went on to explain the added difficulties in the wake of the Government's COVID-19 response which has allowed people to access their superannuation:

... certainly we have seen that happen during this period, where people have recently separated and by the time she gets legal advice about the property settlement he's already removed some funds. There's been at least

⁴⁰ Ms Zita Ngor, Chief Executive Officer, Women's Legal Service SA, *Proof Committee Hansard*, 19 August 2020, p. 19.

⁴¹ Mrs Susan Price, Director, Men's Rights Agency, *Proof Committee Hansard*, 12 March 2020, p. 7.

⁴² Ms Jody Knighton, Principal Solicitor, Women's Legal Service SA, *Proof Committee Hansard*, 19 August 2020, p. 19.

one. I haven't seen too many yet that have done it post 1 July, but certainly the opportunity to do so is there.⁴³

Recommendation 6

1.72 The Government should immediately introduce legislation to give courts access to superannuation information held by the Australian Taxation Office as announced by the Government in November 2018 and accompanied by funding of \$3.3 million.

Resourcing of courts

1.73 The 2017 Henderson Report recommended that the Australian Government considers the current backlog in the federal family courts and allocates additional resources to address this situation as a matter of priority.⁴⁴

1.74 The committee has heard from many witnesses and submitters about the delays experienced by families accessing the family law system.

1.75 Ms Awyzio told the committee:

The statistic we are aware of is that there are judges in the Federal Circuit Court who have up to 600 matters in their docket. So, if you had double the capacity of judges, that reduces it to 300 matters in each judge's particular docket. I would suggest that would have a significant impact on delays.⁴⁵

1.76 Ms Ngor told the committee:

... there are significant delays occurring with family law matters. It's not unusual to have adjournments of matters for up to three to six months.⁴⁶

1.77 Ms Elizabeth Evatt, former Chief Justice, Family Court of Australia, appearing in her private capacity told the committee in relation to delays:

At the present time there are insufficient specialised court counsellors, and that leads to endless delays for parties in getting their matters dealt with by the court ... Overall the court should have sufficient judges and counselling staff to avoid delays.⁴⁷

⁴³ Ms Zita Ngor, Chief Executive Officer, Women's Legal Service SA, *Proof Committee Hansard*, 19 August 2020, p. 19.

⁴⁴ Henderson Report, p. xxxviii. Recommendation 31.

⁴⁵ Ms Deborah Awyzio, Chair, Family and Domestic Violence Committee, Queensland Law Society (QLS), *Proof Committee Hansard*, 10 March 2020, p. 25.

⁴⁶ Ms Zita Ngor, Chief Executive Officer, Women's Legal Service SA, *Proof Committee Hansard*, 19 August 2020, p. 22.

⁴⁷ Ms Elizabeth Evatt, former Chief Justice, Family Court of Australia, *Proof Committee Hansard*, 22 July 2020, p. 1.

1.78 When asked what her priority for the courts would be, Ms Evatt said:

If I had to say one thing, it would be resources, because that would help to overcome some of the delays and costs involved for parties, which are very detrimental... That would be my first priority, yes.⁴⁸

1.79 The Law Council of Australia (Law Council) in their submission to the committee said:

To the extent that there are delays in the system, the Law Council submits that this is a result of increasingly complex cases, and under-resourcing of the family law courts, via adequate funding for the Courts, Court supports (such as legal aid commissions and community legal centres) or past delays in judicial appointments.⁴⁹

1.80 The Law Council identified five areas needing urgent attention for the effective operation of the family law system:

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

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

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

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

(e) a commitment to pursuing, in a timely way, legislative amendments identified as being necessary to improve the operation of family law.⁵⁰

Recommendation 7

1.81 The Government should immediately allocate additional resources, including judicial resources, to address the delays being experienced by families accessing the family law system.

⁴⁸ Ms Elizabeth Evatt, former Chief Justice, Family Court of Australia, *Proof Committee Hansard*, 22 July 2020, p. 5.

⁴⁹ Law Council of Australia (Law Council), *Submission 2.1*, pp. 90–91.

⁵⁰ Law Council, *Submission 2.1*, p. 91.

Merger Bills

1.82 The Coalition Government introduced the Federal Circuit and Family Court of Australia Bill 2019 (FCFC Bill) on 5 December 2019. The Bill proposes to unify the administrative structure of the Federal Circuit Court to create the Federal Circuit and Family Court of Australia, comprised of Division 1 (which will be a continuation of the Family Court) and Division 2 (which will be a continuation of the Federal Circuit Court). The FCFC Bill has been referred to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report by 20 November 2020.

1.83 The proposal that the FCFC Bill seeks to implement has not been recommended by any of the parliamentary inquiries or reports by experts in family law over the 45 years since the Family Court of Australia was established, including the most recent ALRC Report. The only report that recommends a re-structure in similar terms is the April 2018 PricewaterhouseCoopers Australia (PwC) *Review of efficiency of the operation of the federal courts: Final report*. That report was commissioned by the Attorney-General's Department and prepared in just six weeks with no consultation with court users or the legal profession.

1.84 It is noteworthy that the PwC advises in its report:

Where there is likely a divergence in operational changes proposed by this Review and subsequently by the ALRC, advice should be sought from court stakeholders to understand where and how opportunities could be implemented in practice and which would bring about the greatest positive outcomes. Assessment of those opportunities, informed by detailed analysis, should underpin decision-making.⁵¹

1.85 Many witnesses to the committee have expressed their criticism of the proposed merger, including Ms Evatt who said in her submission:

... the proposed merger of the Family Court and the Federal Court is likely to undermine the integrity of the Family Court and lead to undesirable outcomes for the parties.⁵²

1.86 The Law Council in their submission to the committee said:

The merger proposal that was not passed by the 45th Parliament does not meet that aim and should be abandoned in favour of careful consideration of other proposals, including the ALRC's Recommendation 1 and the model proposed by the Semple Report.⁵³

⁵¹ PricewaterhouseCoopers Australia *Review of efficiency of the operation of the federal courts: Final report*, April 2018, p. 69.

⁵² Ms Elizabeth Evatt AC, *Submission 96*, p. 1.

⁵³ Law Council, *Submission 2*, p. 3.

1.87 In evidence to the committee Ms Pauline Wright, President, Law Council said:

... in the Law Council of Australia's view, the current merger proposal of the Family Court of Australia and Federal Circuit Court is not the answer. It would result in the effective abolition of the Family Court of Australia, a respected, specialised and focused court dealing with family law issues. The 2019 merger bills, if passed, would also mean that Australian families and children will have to compete for the resourcing and hearing time with all federal matters—that is, other matters like migration bankruptcy and those sorts of things that the Federal Circuit Courts and the Federal Courts deal with. There must be an increase not a decrease in specialisation in family law and violence issues. This is critical for the safety of children and victims of family violence.⁵⁴

1.88 Ms Snell told the committee:

Yes, we are very concerned about the proposed court merger. We do support a single entry point. We do support harmonisation of rules. But our concern about the current proposed merger is that it would move the specialist Family Court out of its current place and into the... a system where it would be part of a generalised system.⁵⁵

Recommendation 8

1.89 The Government should not proceed with the Federal Circuit and Family Court of Australia Bill 2019.

Conclusion

1.90 Labor members of the committee consider that many submitters to the inquiry have raised practical ideas for reform of the family law system and those ideas are worthy of the committee's continued consideration.

1.91 However, there are reforms, common to many previous inquiries and reports, that have established and continued support, including from witnesses and

⁵⁴ Ms Pauline Wright, President, Law Council, *Proof Committee Hansard*, 13 March 2020, p. 2.

⁵⁵ Ms Liz Snell, Law Reform and Policy Co-ordinator, Women's Legal Service New South Wales and Spokesperson, Women's Legal Services Australia, *Proof Committee Hansard*, 13 March 2020, p. 64.

submitters to this inquiry, that should not need to wait for this inquiry to be finalised before being implemented.

1.92 The safety and well-being of families and children should be a primary government priority.

Mr Graham Perrett MP
Labor Member for Moreton

Senator Helen Polley
Labor Senator for Tasmania

Dr Anne Aly MP
Labor Member for Cowan

Appendix 1

Submissions, Additional Information, Answers to Questions on Notice and Tabled Documents

Submissions

- 1 Non-Custodial Parents Party (Equal Parenting)
 - 1.1 Supplementary to submission 1
- 2 Law Council of Australia
 - 2.1 Supplementary to submission 2
- 3 Rape and Domestic Violence Services Australia
 - 3.1 Supplementary to submission 3
- 4 Divorce Justice
- 5 The Divorce Tango Pty Ltd
- 6 Professor Augusto Zimmermann
- 7 Voice4Kids
- 8 *Name Withheld*
- 9 *Name Withheld*
- 10 *Confidential*
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- 18 Dr Andrew Lancaster
- 19 Mr Jim Skeats
- 20 Mr Richard Barsden
- 21 *Confidential*
- 22 *Confidential*
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83	Seaforth Book Club
84	Craig Ray & Associates
85	Solo Legal Pty Ltd
86	Collaborative Professionals (NSW) Inc.
87	Australian Bar Association
88	Queensland Law Society
89	Australian Family Association (WA)
90	Family Court of Western Australia
91	Australian Human Rights Commission
92	Centre for Excellence in Child and Family Welfare Inc.
93	Professor Patrick Parkinson
94	Save the Children Australia
95	Department of Social Services
96	Ms Elizabeth Evatt AC
97	Magistrates Courts of Queensland
98	Women's Electoral Lobby Australia
99	Association of Family and Conciliation Courts, Australian Chapter
100	Federation of Ethnic Communities' Councils of Australia
101	Our Watch
102	<i>Name Withheld</i>
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108	<i>Confidential</i>
109	The Benevolent Society
110	Shared Parenting Council of Australia
111	Mr Geoff Wilson et al.
112	Lone Fathers Association Australia
113	Australian Pro Bono Centre
114	New Way Lawyers
115	<i>Confidential</i>
116	Family Law Practitioners Association of Queensland

- 117 Commissioner for Children and Young People (Tas)
- 118 National Foundation for Australian Women
- 119 Relationships Australia Victoria
- 120 Victoria Legal Aid
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224	Relationship Matters
225	Aboriginal Legal Service of Western Australia Limited
226	Rainbow Families Victoria
227	NSW Bar Association
228	Professor Lawrence Moloney
229	Better Place Australia
230	Community Legal WA
231	Royal Australian & New Zealand College of Psychiatrists
232	Engender Equality
233	Aboriginal Family Law Services
234	Feminist Legal Clinic Inc
235	Professor Bruce Smyth et al.
236	NSW Chief Magistrate of the Local Court
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- 395 Relationships Australia Northern Territory
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- 398 Family & Relationship Services Australia
- 399 National Judicial College of Australia
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- 416 Tasmanian Government
- 417 Council of Single Mothers and their Children

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- 581 Attorney-General's Department
- 582 Ms Carmel O'Brien OAM FAPS
- 583 Divorce Partners Pty Ltd
- 584 Dr Jane Wangmann, Miranda Kaye and Associate Professor Tracey Booth
- 585 Centacare Family & Relationship Services
- 586 Men's Resources Tasmania
- 587 Mediator Standards Board
- 588 Embolden
- 589 National Legal Aid

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- 590 Family Law Practitioners' Association (Western Australia)
- 591 Australians Against The Family Law Courts
- 592 YWCA Canberra
- 593 Australian Children's Contact Services Association (ACCSA)
- 594 Australian Association of Social Workers
- 595 Domestic Violence Action Centre, Queensland
- 596 Australian Dispute Resolution Advisory Council
- 597 Family Law Reform Coalition
- 598 inTouch Multicultural Centre Against Family Violence
- 599 Minister for Child Safety, Youth and Women and Minister for the Prevention of Domestic and Family Violence
- 600 Dispute Management Australia
- 600.1 Supplementary to submission 600
- 601 Carinity
- 602 Australia's National Research Organisation for Women's Safety
- 603 Men's Rights Agency
- 604 Jesuit Refugee Service (JRS) & Refugee Advice and Casework Service (RACS)
- 605 Eeny Meeny Miney Mo Foundation
- 605.1 Supplementary to submission 605
- 606 Relationships Australia
- 607 For Kids Sake
- 608 Sexual Assault Support Service (Inc.)
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699 Victims of Crime Assistance League Inc. NSW
700 Ms Zoe Rathus, Dr Helena Menih, Dr Samantha Jeffries and
Professor Rachael Field
701 Women's Legal Service Victoria
702 Women's Legal Service NSW
703 Justice For Children
704 CASA Forum – Victorian Centres Against Sexual Assault
705 Domestic Violence Victoria
706 SA Commissioner for Children and Young People
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709 Confidential
710 Ms Zoe Rathus AM, Lecturer, Griffith Law School
711 Domestic Violence NSW
712 Mallee Family Care
713 Women's Legal Service Tasmania
714 Partnerships Victoria

- 715 Women's Legal Service Qld
- 716 Australian Women Against Violence Alliance (AWAVA)
- 717 Harmony Alliance
- 718 Northern Territory Council of Social Service (NTCOSS)
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- 727 Women's Safety NSW
- 728 Women's Legal Services Australia (WLSA)
- 729 Springvale Monash Legal Service Inc.
- 730 Dr Rosie Batty OAM
- 731 Australian Institute of Family Studies
- 732 Australian Muslim Women's Centre for Human Rights (AMWCHR)
- 733 The Salvation Army
- 734 Professor Belinda Fehlberg, Associate Professor Lisa Sarma and
Professor Jenny Morgan
- 735 safe steps
- 736 Hume Riverina Community Legal Service (HRCLS)
- 737 Shoalcoast Community Legal Centre Inc.
- 738 National Aboriginal and Torres Strait Islander Legal Services (NATSILS)
- 739 No to Violence
- 740 Northern Territory Women's Legal Services
- 741 Victim Support Service and Women's Legal Service SA
- 742 North Australian Aboriginal Family Legal Service
- 743 Community Legal Centres NSW
- 744 Caxton Legal Centre
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794 Ms Sylvia Jackson
795 Ms Natalie Renton
796 Ms Elizabeth Pinna
797 Ms Andrea Ng
798 Mr Thomas Franciskovic
799 Mr Stephen Goodwin

- 800 Mr Peter O'Connor
- 801 Joris van der Geer
- 802 Mr Gerard Nicol
- 803 Mr David Richards
- 804 Mr Alan Crawford
- 805 Mr Peter Mares
- 806 Ms Barbara Coltman
- 807 Mr David Dillion
- 808 Mr Bede Webster
- 809 Mr Jordon Hill
- 810 Poursu Bharucha
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- 817 Justice for Broken Families
- 818 National Child Protection Alliance (NCPA)
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- 837 Ms Joanna Slater
- 838 *Confidential*
- 839 Australian Association of Collaborative Professionals
- 840 CatholicCare Victoria Tasmania
- 841 Parental Alienation in Australia
- 842 Peninsula Community Legal Centre

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- 843 Western Australian Commissioner for Children and Young People
844 Ms Carolyn Reid
845 Dr Craig Childress
846 Social Work Practice Group - Family Court of WA
847 The Hon Diana Bryant AO, QC
848 Australian Association for Infant Mental Health
849 Professor Richard Chisholm
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873 Mr Michael Vassili
874 ConciliateSA
875 Children's Advocacy-Network
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878 Alienated Children Australia
879 Single Parenting Is Killing Our Kids
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881 Child Support Australia
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Additional Information

- 1 Clarification of interrupted evidence from Family and Relationship Services Australia at committee's public hearing on 19 August 2020 (received 10 September 2020)
- 2 Additional Information from Professor the Hon. Nahum Mushin AM - Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs' inquiry into a better family law system to support and protect those affected by family violence (Submission 123), provided prior to appearance at the committee's public hearing on 16 September 2020 (received 15 September 2020)
- 3 Additional Information from Professor the Hon. Nahum Mushin AM - Opening statement, provided prior to appearance at the committee's public hearing on 16 September 2020 (received 15 September 2020)
- 4 Additional Information from the Australian Family Association - Supplementary material, provided after the committee's public hearing on 16 September 2020 (received 17 September 2020)
- 5 Additional Information from the The Honourable Emeritus Professor Marica Neave AO - from public hearing on 16 September 2020 (received 28 September 2020)

Answers to Questions on Notice

- 1 Department of Social Services, answers to questions on notice from 14 February, Canberra hearing - Mr Graham Perrett MP (received 28 February 2020)
- 2 Department of Social Services, answers to questions on notice from 14 February, Canberra hearing - Dr Anne Aly MP (received 28 February 2020)
- 3 Department of Social Services, answers to questions on notice from 14 February, Canberra hearing - Senator Helen Polley (received 28 February 2020)
- 4 Department of Social Services, answers to questions on notice from 14 February, Canberra hearing - Senator Larissa Waters (received 28 February 2020)
- 5 Department of Social Services, answers to questions on notice from 14 February, Canberra hearing - Senator Larissa Waters (received 28 February 2020)
- 6 Department of Social Services, answers to questions on notice from 14 February, Canberra hearing - The Hon. Kevin Andrews MP (received 28 February 2020)
- 7 Department of Social Services, answers to questions on notice from 14 February, Canberra hearing - Senator Pauline Hanson (received 28 February 2020)

- 8 Department of Social Services, answers to questions on notice from 14 February, Canberra hearing - Senator Pauline Hanson (received 28 February 2020)
- 9 Department of Social Services, answers to questions on notice from 14 February, Canberra hearing - Senator Pauline Hanson (received 28 February 2020)
- 10 Services Australia, answers to questions on notice from 14 February, Canberra hearing - Dr Anne Aly MP (received 28 February 2020)
- 11 Services Australia, answers to questions on notice from 14 February, Canberra hearing - Senator Hanson and Senator Polley (received 28 February 2020)
- 12 National Children's Commissioner, answers to questions on notice from 14 February, Canberra hearing (received 2 March 2020)
- 13 Attorney-General's Department, answers to questions on notice from 14 February, Canberra hearing (received 9 June 2020)
- 14 Family Law Practitioners Association QLD, answers to questions on notice from 10 March, Townsville hearing (received 1 May 2020)
- 15 Dispute Management Australia, answers to questions on notice from 10 March, Townsville hearing (received 7 May 2020)
- 16 Queensland Law Society, answers to questions on notice from 10 March, Townsville hearing (received 19 May 2020)
- 17 Australian Institute of Family Law Arbitrators and Mediators (AIFLAM), answers to questions on notice from 10 March, Canberra hearing (received 8 August 2020)
- 18 Professor Patrick Parkinson, answers to questions on notice from 11 March, Rockhampton hearing (received 5 April 2020)
- 19 Mr Geoff Wilson, answers to questions on notice from 12 March, Rockhampton hearing (received 12 March 2020)
- 20 Men's Rights Agency, answers to questions on notice from 12 March, Brisbane hearing (received 24 April 2020)
- 21 Mr Geoff Wilson, answers to questions on notice from 12 March, Rockhampton hearing (received 29 April 2020)
- 22 Law Council of Australia, answers to questions on notice from 13 March, Sydney hearing (received 23 March 2020)
- 23 Women's Legal Services NSW, answers to questions on notice from 13 March, Sydney hearing (received 30 April 2020)
- 24 Australian Pro Bono Centre, answer to question on notice from 13 March, Sydney hearing (received 31 March 2020)
- 25 NSW Bar Association, answers to questions on notice from 13 March, Sydney hearing (received 31 March 2020)
- 26 Women's Electoral Lobby Australia, answers to questions on notice from 13 March, Sydney hearing (received 29 April 2020)
- 27 Australia's National Research Organisation for Women's Safety, answers to questions on notice from 13 March, Sydney hearing (received 1 May 2020)

- 28 Women's Electoral Lobby Australia, supplementary answer to questions on notice from 13 March, Sydney hearing (received 6 May 2020)
- 29 Law Council of Australia, answers to questions on notice from 13 March, Sydney hearing (received 7 May 2020)
- 30 Commissioner Children and Young People Tasmania, answers to questions on notice from 27 May, Canberra hearing (received 19 June 2020)
- 31 National Legal Aid, answers to questions on notice from 27 May, Canberra hearing (received 30 June 2020)
- 32 No to Violence, answers to questions on notice from 24 June, Canberra hearing (received 10 July 2020)
- 33 Victorian Legal Aid, answers to questions on notice from 24 June, Canberra hearing (received 13 July 2020)
- 34 Australian Institute of Family Studies, answers to questions on notice from 24 June, Canberra hearing (received 17 July 2020)
- 35 Association of Family and Conciliation Courts, answers to questions on notice from 24 June, Canberra hearing (received 17 July 2020)
- 36 Lone Fathers Association Australia Inc, answers to questions on notice from 22 July, Canberra hearing (received 23 July 2020)
- 37 The Honourable Elizabeth Evatt AC, answers to questions on notice from 22 July, Canberra hearing (received 8 August 2020)
- 38 One in Three, answers to questions on notice from 22 July, Canberra hearing (received 8 August 2020)
- 39 Australian Brotherhood of Fathers, answers to questions on notice from 22 July, Canberra hearing (received 8 August 2020)
- 40 Conciliate SA, answers to questions on notice from 19 August 2020, Canberra hearing (received 14 September 2020)
- 41 Family and Relationship Services Australia, answers to questions on notice from 19 August 2020, Canberra hearing (received 15 September 2020)
- 42 Women's Legal Services (SA), answers to questions on notice from 19 August 2020, Canberra hearing (received 15 September 2020)
- 43 Australian Family Association, answers to question on notice from 16 September 2020, Canberra hearing (received 17 September 2020)

Tabled Documents

- 1 Non-Custodial Parents Party, Draft Family and Child Support Amendment Bill 2020 (tabled at Public Hearing Sydney 13 March 2020).
- 2 National Association of Community Legal Centres (tabled at Public Hearing Sydney 13 March 2020).

Appendix 2

Hearings

Friday, 14 February 2020

Committee room 2S3
Parliament House
Canberra

Attorney-General's Department

- Mr Iain Anderson, Deputy Secretary, Legal Services and Families Group
- Mr Cameron Gifford, First Assistant Secretary, Families and Legal System Division
- Ms Dianne Orr, Assistant Secretary, Family Law Branch
- Ms Alexandra Mathews, Assistant Secretary, Family Safety Branch

Department of Social Services

- Ms Liz Hefren-Webb, Deputy Secretary, Families and Communities
- Mr Shane Bennett, Acting Deputy Secretary, Social Security
- Ms Mary McLarty, Acting Group Manager, Participation Payments and Families
- Mr Bruce Young, Acting General Manager, Child Support, Indigenous and Tailored Services Division, Services Australia
- Ms Cathy Toze, Acting National Manager, Child Support Program Branch, Services Australia

Australian Human Rights Commission (via teleconference)

- Ms Megan Mitchell, National Children's Commissioner

Tuesday, 10 March 2020

Savoy Room
Rydges Southbank
23 Palmer Street, Townsville

Family Law Practitioners Association of Queensland (via teleconference)

- Mr James Steel, President

Australian Institute of Family Law Arbitrators & Mediators (via teleconference)

- Mr Andrew Davies, Chair

Dispute Management Australia (via teleconference)

- Ms Tania Murdock

Queensland Law Society (via teleconference)

- Mr Luke Murphy, President
- Ms Deborah Awyzio, Chair
- Ms Rachael Field, Member
- Mr Stafford Shepherd, Director

The committee will be holding confidential hearings after the adjournment to hear from invited individual submitters.

Wednesday, 11 March 2020

Elizabethan Room

Leichardt Hotel

Cnr Denham & Bolsover Street, Rockhampton

Mr Geoff Wilson (Submission 111) (via teleconference), Private capacity

Professor Patrick Parkinson (via teleconference), Private capacity

Dr Helena Menih, Private capacity

Ms Zoe Rathus, Private capacity

Dr Samantha Jeffries, Private capacity

Professor Rachael Field, Private capacity

Craig Ray & Associates (via teleconference)

- Mr Craig Ray, Principal

Solo Legal Pty Ltd

- Ms Caroline Parsons, Principal Lawyer

New Way Lawyers (via teleconference)

- Mrs Carolyn Devries, Chief Executive Officer

ASD Family Legal

- Ms Melanie Harris, Principal Director

Domestic Violence Action Centre, Queensland (via teleconference)

- Ms Jennyne Dillon, Counselling Team Leader
- Ms Kelly Holcroft, Team Leader, Counselling

The committee will be holding confidential hearings after the adjournment to hear from invited individual submitters.

Thursday, 12 March 2020

Speaker's Hall
 Queensland Parliament
 Cnr George and Alice Street, Brisbane

Men's Rights Agency

- Ms Sue Price, Administrator

Eeny Meeny Miney Mo Foundation (via teleconference)

- Ms Amanda Sillars, Founder, Chief Executive Officer and Director
- Dr Mandy Matthewson, Director

Centacare Family & Relationship Services

- Dr April O'Mara, Manager Practice Governance and Research

Women's Legal Service Qld

- Ms Angela Lynch, Chief Executive Officer

For Kids Sake

- Ms Karen Clarke, Ambassador
- Dr David Curl, Chief Executive Officer

The committee will be holding confidential hearings after the adjournment to hear from invited individual submitters.

Friday, 13 March 2020

Robinson/William Room
 The Sydney Boulevard Hotel
 90 William Street, Sydney

Law Council of Australia

- Dr Jacoba Brasch QC, President-elect
- Mr Paul Doolan, Chair, Family Law Section
- Ms Pauline Wright, President

Non-Custodial Parents Party (Equal Parenting)

- Mr John Flanagan, Deputy Registered Officer
- Mr Andrew Thompson, Party Secretary and Registered Officer

Australian Pro Bono Centre

- Ms Jessica Hatherall, Head of Policy and Strategy
- Ms Sally Embelton, Policy and Project Officer

Australian Bar Association

- Ms Suzanne Christie, Chair, Family Law Committee

NSW Bar Association

- Mr Michael Kearney SC, Chair, Family Law Committee
- Ms Elizabeth Pearson, Director, Policy and Public Affairs

NSW Chief Magistrate of the Local Court

- His Honour Graeme Henson AM, Chief Magistrate

Australia's National Research Organisation for Women's Safety

- Dr Heather Nancarrow, Chief Executive Officer
- Ms Michele Robinson, Director, Evidence to Action
- Ms Jackie McMillan, Project Officer

Women's Electoral Lobby Australia

- Ms Catherine Gander, Convenor, WEL NSW Eliminating Violence against Women Action Group
- Ms Jozefa Sobski AM, Member, WEL Australia National Coordinating Committee

Women's Safety NSW

- Ms Hayley Foster, Chief Executive Officer

National Association of Community Legal Centres

- Mr Nassim Arrage, Chief Executive Officer

Women's Legal Services Australia (WLSA)

- Ms Sophie Quinn, Co-convenor
- Ms Amber Russell, Co-convenor
- Ms Helen Matthews

Women's Legal Service NSW

- Ms Liz Snell, Law Reform and Policy Coordinator
- Ms Philippa Davis, Principal Solicitor
- Ms Gabrielle Craig, Assistant Principal Solicitor

Jannawi Family Centre

- Ms Biljana Milosevic, Director

Jesuit Refugee Service (JRS)

- Ms Carolina Gottardo, Director

Refugee Advice and Casework Service (RACS)

- Ms Sarah Dale, Director and Principal Solicitor

Interrelate Limited

- Ms Patricia Occelli, Chief Executive Officer
- Ms Sharon Grocott, Head of Research and Innovation

Rape and Domestic Violence Services Australia

- Ms Karen Willis OAM, Chief Executive Officer

Wednesday, 27 May 2020

Committee Room 2S3

Parliament House

Canberra

Tasmanian Commissioner for Children and Young People

- Ms Leanne McLean, Commissioner

Divorce Partners Pty Ltd

- Mr David Eagle, Partner
- Elizabeth Whitelock
- Mr Mark Jones

Australian Women Against Violence Alliance

- Dr Merrindahl Andrew, Project Manager
- Ms Tina Dixson, Policy Officer

National Legal Aid

- Ms Gabrielle Canny Smith, Director, National Legal Aid Family Law Working Group
- Ms Kylie Beckhouse, Legal Aid NSW representative, National Legal Aid Family Law Working Group

Wednesday, 24 June 2020

Hearing

Via videoconference

Parliament House, Canberra

Association of Family and Conciliation Courts, Australian Chapter

- The Hon Diana Bryant, Past President * NB. Personal submission also made to the committee (Submission 847)
- Ms Kirstie Colls, Board Member

Victoria Legal Aid

- Ms Nicole Rich, Executive Director, Family Youth and Children's Law
- Ms Gayathri Paramasivam, Associate Director, Family Law

No to Violence

- Ms Jacqui Watt, CEO
- Ms Carolyn Macleod, FASS Worker, Dandenong FLC
- Mr Shane Bedwell, FASS Worker, Melbourne FLC

Australian Institute of Family Studies

- Ms Anne Hollonds, Director

- Ms Kelly Hand, Deputy Director, Research
- Dr Rae Kaspiw, Executive Manager, Family Law, Family Violence and Elder Abuse
- Dr Rachel Carson, Senior Research Fellow

Wednesday, 8 July 2020

Hearing

Via videoconference

Parliament House, Canberra

Men's Resources Tasmania

- Mr Jonathan Bedloe, Executive Officer

Ms Carmel O'Brien, Private capacity

Professor Augusto Zimmermann, Private capacity

One in Three Campaign

- Mr Greg Andresen, Senior Researcher
- Mr Andrew Humphreys, Social Worker

Wednesday, 22 July 2020

Hearing

Via videoconference

Parliament House, Canberra

Ms Elizabeth Evatt (via videoconference), Private capacity

Australian Brotherhood of Fathers (via videoconference)

- Mr Leith Erikson, Founder
- Mr Cody Beck, Principal Lawyer, ABF Legal
- Ms Tyler Bowshire, Solicitor, ABF Legal
- Mr Michael Jose, ABF Consultant

Northern Territory Women's Legal Services (via videoconference)

- Ms Janet Taylor, Managing Principal Solicitor, Central Australian Women's Legal Service
- Ms Amber Russell, Central Australian Women's Legal Service

Lone Fathers Association Australia (via teleconference)

- Mr Barry Williams, National President

Wednesday, 19 August 2020

Hearing

Via videoconference

Parliament House, Canberra

Family & Relationship Services Australia - (via videoconference)

- Ms Jackie Brady, Executive Director

Victim Support Service and Women's Legal Service SA - (via videoconference)

- Ms Zita Adut Deng Ngor, Chief Executive Officer
- Ms Jody Knighton, Principal Solicitor

*Ms Celia Moodie - (via videoconference), Private capacity**ConciliateSA - (via videoconference)*

- Ms Jane Silbereisen, FDRP, Nationally Accredited Mediator, Business Manager

Wednesday, 16 September 2020

Hearing

Via videoconference

Parliament House, Canberra

Australian Family Association - (via videoconference)

- Mrs Terri Kelleher, National President
- Mr Warwick D'Silva, Western Australian State President
- Mr Joseph Devitt

Aboriginal Family Law Services (WA) - (via videoconference)

- Ms Linda Cao, Senior Legal Advisor
- Ms Carrie Hannington, Solicitor
- Ms Stephanie Monck, Principal Legal Officer

*The Hon. Emeritus Professor Marcia Neave AO - (via videoconference), Private capacity**Professor the Hon. Nahum Mushin AM - (via videoconference), Private capacity*

Appendix 3

List of family law inquiries and reports

At the request of the committee, the Australian Parliamentary Library compiled the following list of family law inquiries and report.

The [Family Law Act 1975](#) received Royal Assent on 12 June 1975 and commenced on 5 January 1976. The ALRC noted in its 2019 report that ‘since the inception of the *Family Law Act* and the creation of the Family Court, there have been numerous inquiries into the family law system...more recent inquiries in Australia have focused on the intersection between family violence and family law’.¹

This list excludes parliamentary committee reports into the provisions of family law Bills. The list does not include reports on family law inquiries conducted by state or territory governments. While a broad scope has been adopted in compiling this list of relevant inquiries and reports, there may be some inadvertent omissions.

Year	Family law inquiry and report
1974	Senate Standing Committee on Constitutional and Legal Affairs, Law and administration of divorce and related matters, and the clauses of the Family Law Bill 1974 , Final Report, October 1974.
1980	Joint Select Committee on the Family Law Act, <i>Family law in Australia</i> , August 1980. (volume 1 and volume 2) ²
1986	P McDonald (ed), Settling up: Property and income distribution on divorce in Australia , Australian Institute of Family Studies, 1986.
1987	Australian Law Reform Commission, Matrimonial property , Report No. 39, 1987.
1987	Family Law Council, Access—some options for reform , 1987.
1988	Family Law Council, Arbitration in family law , February 1988.
1991	Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act, The retiring age of judges of the Family Court of Australia , September 1991.
1992	Family Law Council, Patterns of parenting after separation , April 1992.
1992	Family Law Council, The interaction of bankruptcy and family law , June 1992.
1992	Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act, Family Law Act 1975: Aspects of its operation and

¹ Australian Law Reform Commission, [Family law for the future](#), Report No. 135, March 2019, pp. 66–67.

² This was the first inquiry and report into the provisions and operation of the *Family Law Act 1975* (FLA) and had broad terms of reference.

	interpretation , November 1992.
1994	Australian Law Reform Commission, Equality before the law: Justice for women , Report No. 69, Part 1, 1994, Chapter 9: Violence and family law Australian Law Reform Commission, Equality before the law: Women's equality , Report No. 69, Part 2, 1994.
1994	B Smyth (ed), Parent-child contact and post-separation parenting arrangements , Research Report No. 9, Australian Institute of Family Studies, June 2004.
1995	Australian Law Reform Commission, For the sake of the kids: Complex contact cases and the Family Court , Report No. 73, 1995.
1995	Joint Select Committee on Certain Family Law Issues, Funding and administration of the Family Court of Australia , November 1995.
1996	Family Law Council, Family law appeals and review: An evaluation of the appeal and review of family law decisions , June 1996.
1996	Family Law Council, Involving and representing children in family law , August 1996.
1996	K Funder and B Smyth, <i>Family law evaluation project 1996: Parental responsibilities: Two national surveys: (Part one: Report)</i> , Australian Institute of Family Studies, 1996.
1997	Australian Law Reform Commission, Seen and heard: Priority for children in the legal process , Report No. 84, 1997. See: Chapters 13, 15, 16.
1998	Family Law Council, Child contact orders: Enforcement and penalties , June 1998.
1998	House of Representatives Standing Committee on Legal and Constitutional Affairs, To have and to hold: Strategies to strengthen marriage and relationships , June 1998.
2000	Family Law Council, Litigants in person , August 2000.
2001	Family Law Pathways Advisory Group, Out of the maze: Pathways to the future for families experiencing separation , AGD, Canberra, 2001.
2001	Family Law Council, Cultural-community divorce and the Family Law Act 1975: A proposal to clarify the law , August 2001.
2002	Family Law Council, Family law and child protection: Final report , September 2002.
2003	House of Representatives Standing Committee on Family and Community Affairs, Every picture tells a story: Inquiry into child custody arrangements in the event of family separation , December 2003.
2004	Family Law Council, Pathways for children: A review of children's representation in family law , August 2004.
2004	Family Law Council, Recognition of traditional Aboriginal and Torres Strait Islander child-rearing practices: Response to recommendation 22: Pathways report, Out of the maze , December 2004.
2006	Family Law Council, Relocation , May 2006.
2007	Family Law Council, Collaborative practice in family law , February 2007.
2007	J McIntosh and C Long, Children beyond dispute: a prospective study of outcomes from child focused and child inclusive post-separation family dispute resolution ,

	March 2007, prepared for the Attorney-General's Department.
2007	Family Law Council, Improving post-parenting order processes , October 2007.
2007	L Moloney et al, Allegations of family violence and child abuse in family law children's proceedings: A pre-reform exploratory study , Research paper No. 15, Australian Institute of Family Studies, 2007.
2007	D Higgins, Cooperation and coordination: an evaluation of the Family Court of Australia's Magellan case-management model , prepared by the Australian Institute of Family Studies for the Family Court of Australia, 2007.
2008	D Semple, Future governance options for federal family law courts in Australia: Striking the right balance , prepared for the Attorney-General's Department, August 2008.
2009	J McIntosh et al, Children beyond dispute: A four year follow up study of outcomes from child focused and child inclusive post-separation family dispute resolution , April 2009, prepared for the Attorney-General's Department.
2009	R Chisholm, Family courts violence review , November 2009.
2009	Family Law Council, Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues , December 2009.
2009	R Kaspiew et al, Evaluation of the 2006 family law reforms , Australian Institute of Family Studies, December 2009.
2010	Australian National Audit Office, Implementation of the Family Relationship Centres initiative , Performance Audit Report No. 1, 2010–11.
2010	D Bagshaw et al, <i>Family violence and family law in Australia: the experiences and views of children and adults from families who separated post-1995 and post-2006</i> , 2 vols, Monash University, University of South Australia, James Cook University, for the Australian Attorney-General's Department, April 2010. (volume 1 and volume 2)
2010	J Cashmore et al, Shared care parenting arrangements since the 2006 family law reforms: Report to the Australian Government Attorney-General's Department , UNSW, Social Policy Research Centre, May 2010.
2010	J McIntosh et al, Post-separation parenting arrangements and developmental outcomes for infants and children: Collected reports , prepared for the Australian Government Attorney-General's Department, May 2010.
2010	Australian Law Reform Commission and NSW Law Reform Commission, <i>Family violence—A national legal response</i> , Report No. 114, 2 vols, November 2010. (volume 1 and volume 2)
2010	L Qu and R Weston, Parenting dynamics after separation: A follow-up study of parents who separated after the 2006 family law reforms , Australian Institute of Family Studies, December 2010.
2011	National Alternative Dispute Resolution Advisory Centre, Maintaining and enhancing the integrity of ADR processes , February 2011. See: Chapter 6: Family dispute resolution.
2012	Family Law Council, Improving the family law system for Aboriginal and Torres

	<i>Strait Islander clients</i> , February 2012.
2012	Family Law Council, <i>Improving the family law system for clients from culturally and linguistically diverse backgrounds</i> , February 2012.
2013	R Chisholm, <i>Information-sharing in family law & child protection: Enhancing collaboration</i> , Attorney-General's Department, Canberra, March 2013.
2013	Allen Consulting Group, <i>Research on Family Support Program family law services: Final report to Australian Government Attorney-General's Department</i> , May 2013.
2013	Family Law Council, <i>Report on parentage and the Family Law Act</i> , December 2013.
2014	KPMG, <i>Review of the performance and funding of the Federal Court of Australia, the Family Court of Australia and the Federal Circuit Court of Australia</i> , prepared for the Attorney-General's Department, March 2014. (Appendices A-C ; Appendices D-G)
2014	R Chisholm, <i>The sharing of experts' reports between the child protection system and the family law system</i> , Attorney-General's Department, Canberra, 2014.
2014	R Kaspiew et al, <i>Independent children's lawyers study: Final report</i> , 2nd edn, June 2014.
2014	Productivity Commission, <i>Access to justice</i> , Report No. 72, 2 vols, September 2014. (volume 1 and volume 2) Volume 2, chapter 34 deals with the family law system.
2014	L Qu et al, <i>Post-separation parenting, property and relationship dynamics after five years</i> (Evaluation of the 2006 Family Law reforms), Australian Institute of Family Studies, December 2014.
2015	Family Law Council, <i>Families with complex needs and the intersection of the family law and child protection systems: Interim report: Terms 1 & 2</i> , June 2015.
2015	R Kaspiew et al, <i>Evaluation of the 2012 family violence amendments: Synthesis report</i> , (Evaluation of the 2012 Family Violence Amendments), Australian Institute of Family Studies, October 2015.
2015	R Kaspiew et al, <i>Responding to family violence: A survey of family law practices and experiences</i> (Evaluation of the 2012 Family Violence Amendments), Australian Institute of Family Studies, October 2015.
2015	R Kaspiew et al, <i>Experiences of separated parents study</i> (Evaluation of the 2012 Family Violence Amendments), Australian Institute of Family Studies, October 2015.
2015	R Kaspiew et al, <i>Court outcomes project</i> (Evaluation of the 2012 Family Violence Amendments), Australian Institute of Family Studies, October 2015.
2016	KPMG, <i>Future focus of the family law services: Final report</i> , prepared for the Attorney-General's Department, January 2016.
2016	Family Law Council, <i>Families with complex needs and the intersection of the family law and child protection systems: Final report: Terms 3, 4 & 5</i> , June 2016.
2017	House of Representatives Standing Committee on Social Policy and Legal Affairs, <i>A better family law system to support and protect those affected by family violence</i> , December 2017.

2018	PricewaterhouseCoopers (Australia), <i>Review of efficiency of the operation of the federal courts: Final report</i> , April 2018.
2018	R Carson et al, <i>Direct cross-examination in family law matters: Incidence and context of direct cross-examination involving self-represented litigants</i> , Australian Institute of Family Studies, June 2018.
2018	R Carson et al, <i>Children and young people in separated families: Family law system experiences and needs</i> , Australian Institute of Family Studies, 2018.
2019	Australian Law Reform Commission, <i>Family law for the future</i> , Report No. 135, March 2019.

Appendix 4

Recommendations from recent inquiries

This Appendix set out at the recommendations of and Government response to the House of Representatives Standing Committee on Social Policy and Legal Affairs and the Australian Law Reform Commission (ALRC) in respect of their recent reports into the family law system.

Parliamentary Inquiry into a better family law system to support and protect those affected by family violence

The following table sets out the recommendations and Government response to the 2017 report by the House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliamentary Inquiry into a better family law system to support and protect those affected by family violence.

Table 4.1 Parliamentary Inquiry into a better family law system to support and protect those affected by family violence

No	<i>HoR – December 2017¹</i>	<i>Government response²</i>
1	4.226 The Committee recommends that the Australian Government considers extending the Family Advocacy and Support Services (FASS) program, subject to a positive evaluation, to a greater number of locations including in rural and regional Australia.	<u>Agreed</u> FASS program extended to 2022.
2	4.232 The Committee recommends that the Australian Government progresses, through the Council of Australian Governments, the development of a national family violence risk assessment tool. The tool must be nationally consistent, multi-method, multi-informant and culturally sensitive and be adopted to operate across sectors, between jurisdictions and among all professionals working within the family law system.	<u>Noted (action taken)</u> Government committed to developing an alternate approach using 'national principles rather than a national risk assessment tool'.
3	4.240 The Committee recommends that the Australian Government introduces to the Parliament amendments to the <i>Family Law Act 1975</i> (Cth) to require a risk assessment for family violence be undertaken upon a matter being filed at a registry of the Family Court of Australia or the Federal Circuit Court of Australia, using the national family violence risk assessment tool. The risk assessment should utilise the national family violence risk assessment tool and be undertaken by an appropriately trained family violence specialist provider.	<u>Noted (partially addressed)</u> Through the use of 'existing, evidence-based, family violence risk assessment tools'.

¹ House of Representatives Standing Committee on Social Policy and Legal Affairs, *Parliamentary Inquiry into a better family law system to support and protect those affected by family violence*, Report, December 2017.

² All references to *Australian Government response to the House of Representatives Standing Committee on Social Policy and Legal Affairs report: A better family law system to support and protect those affected by family violence*, September 2018.

4	<p>4.246 The Committee recommends, subject to a positive evaluation of the recently announced legally-assisted family dispute resolution pilot, the Australian Government seeks ways to encourage more legally-assisted family dispute resolution, which may include extending the pilot program.</p>	<p><u>Agreed in-principle</u> Extension of FASS program (per recommendation 1).</p>
5	<p>4.254 The Committee recommends that the Attorney-General considers how the Family Court of Australia and the Federal Circuit Court of Australia can improve case management of family law matters involving family violence issues, including:</p> <ul style="list-style-type: none"> ▪ the adoption of a single point of entry to the federal family law courts so that applications, depending on the type of application and its complexity, are appropriately triaged, and actively case managed to their resolution in an expedited time-frame; ▪ the greater use of mediation or alternative dispute resolution by the federal family courts during proceedings to encourage earlier resolution of matters; ▪ the implementation of more uniform rules and procedures in the two federal family courts to reduce unnecessary complexity and confusion for families; ▪ the establishment of formal and expedited referral pathways between state and territory magistrates courts and the federal family courts; and ▪ the development of a stronger regime of penalties including cost orders to respond to abuse of process, perjury and non-compliance with court orders. 	<p><u>Noted (action underway /awaiting ALRC report)</u> Government points to merging of Federal Circuit Court and Family Court of Australia as a means to create a 'single point of entry'. Government will consider the recommendation 'in the context of the ALRC review and in conjunction with the major federal court structural reforms.</p>
6	<p>4.258 The Committee recommends that the Attorney-General progresses through the Council of Australian Governments an expanded information sharing platform as part of the National Domestic Violence Order Scheme to include orders issued under the <i>Family Law Act 1975</i> (Cth) and orders issued under state and territory child protection legislation.</p>	<p><u>Noted (action underway)</u> Government working with states and territories to improve information sharing between systems and jurisdictions through a Council of Australian Governments family violence working group of justice officials.</p>

7	4.261 The Committee recommends the Australian Government introduces to the Parliament amendments to the <i>Family Law Act 1975</i> (Cth) to require a relevant court to determine family violence allegations at the earliest practicable opportunity after filing proceedings, such as by way of an urgent preliminary hearing and, where appropriate, refer to findings made, and evidence presented, in other courts.	<u>Noted (awaiting ALRC report)</u> See also response to recommendation 3.
8	4.262 The Committee recommends that abuse of process in the context of family law proceedings be identified in the list of example behaviours as set out in section 4AB(2) of the <i>Family Law Act 1975</i> (Cth).	<u>Noted (NFA/awaiting ALRC report)</u>
9	4.264 The Committee recommends that the Attorney-General develops stronger restrictions in relation to access by other parties to medical records in family law proceedings.	<u>Agreed (action underway)</u> Attorney-General's Department will work with federal family law courts to ensure appropriate procedures are in place.
10	4.270 The Committee recommends that the Attorney-General works with state and territory counterparts through the Council of Australian Governments to reach agreements (such as in relation to resources, education and court infrastructure) to encourage state and territory magistrates to exercise family law jurisdiction, particularly in specialist family violence courts and courts which deal with a high number of family violence matters.	<u>Agreed (action taken and underway)</u> Government working to encourage and support increased exercise of state and territory courts in family law matters. Government has passed the Family Law Amendment (Family Violence and Other Measures) Bill 2018, which expands and clarifies the family law jurisdiction of state/territory courts.

11	4.272 The Committee recommends that the Attorney-General works with state and territory counterparts through the Council of Australian Governments to establish a trial in one or more specialist state or territory family violence courts (including reaching agreement in relation to resources, education and court infrastructure) enabling family law issues in family violence cases to be determined by the one court, including expedited pathways for breach and enforcement proceedings. One of the trial courts should ideally be located in an area of high Indigenous population.	<u>Agreed (action taken and underway)</u> See recommendation 10.
12	4.275 The Committee recommends the Attorney-General introduces the Family Law Amendment (Family Violence and Cross-examination of the Parties) Bill 2017 into the Parliament for its urgent consideration such that perpetrators of family violence will be prohibited from cross examining the other party including in relation to the qualifications and funding of those appointed to undertake such cross examination.	<u>Agreed (action taken and underway)</u> Government has passed the Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018, which prohibits direct cross examination.
13	5.67 The Committee recommends that the Australian Government introduces to the Parliament amendments to the <i>Family Law Act 1975</i> (Cth) to enable: <ul style="list-style-type: none"> ▪ the impact of family violence to be taken into account in the Court's consideration of both parties' contributions; and ▪ the impact of family violence to be specifically taken into account in the Court's consideration of a party's future needs. 	<u>Noted (action underway/awaiting ALRC report)</u> Courts are already able to take family violence into account.
14	5.71 The Committee recommends that the Australian Government introduces to the Parliament amendments to the <i>Family Law Act 1975</i> (Cth) to include a requirement for an early resolution process for small claim property matters. This process should involve a case management process upon application to the Court for a property settlement, rather than a pre-filing requirement, which will provide greater certainty and more expeditious resolution.	<u>Noted (awaiting ALRC report)</u>

15	<p>5.74 The Committee recommends that the Attorney General:</p> <ul style="list-style-type: none"> ▪ develops an administrative mechanism to enable swift identification of superannuation assets by parties to family law proceedings, leveraging information held by the Australian Taxation Office; and ▪ amends the <i>Family Law Act 1975</i> (Cth) and relevant regulations to reduce the procedural and substantive complexity associated with superannuation splitting orders, including by simplifying forms required to be submitted to superannuation funds. 	<p><u>Agreed in principle</u> Government actively considering options to facilitate the timely disclosure of financial information between parties following separation.</p>
16	<p>5.80 The Committee recommends that the Attorney-General's Department considers options for legislative amendment to the <i>Family Law Act 1975</i> (Cth) to enable the federal family courts to make greater use of court orders for the split or transfer of unsecured joint debt and shared liabilities following the separation of families, particularly those affected by family violence.</p>	<p><u>Agreed in principle (awaiting ALRC report)</u></p>
17	<p>5.83 The Committee recommends that the jurisdictional limit on state and territory magistrates' courts hearing family law property disputes be increased and that the Attorney-General introduces to the Parliament the Family Law Amendment (Family Violence and Other Measures Bill 2017) to give effect to the increase.</p>	<p><u>Agreed (action taken)</u> Government has passed the Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018, which increases the threshold for hearing family law property disputes in state/territory courts.</p>

18	<p>5.86 The Committee recommends that the <i>Family Law Act 1975</i> (Cth) be amended to extend sections 69ZN and 69ZX, which requires the Court to conduct proceedings in a way which safeguards the parties against family violence in parenting matters, to apply in property division matters.</p>	<p><u>Agreed in part (Government supports consideration by ALRC)</u> Amendments in Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018 will partially implement this recommendation by introducing additional safeguards for victims of family violence in both parenting and property proceedings.</p>
19	<p>6.130 The Committee recommends that the Australian Law Reform Commission, as part of its current review of the family law system, develops proposed amendments to Part VII of the <i>Family Law Act 1975</i> (Cth), and specifically, that it consider removing the presumption of equal shared parental responsibility.</p>	<p><u>Noted (Government supports consideration by ALRC)</u></p>
20	<p>6.136 The Committee recommends that the Attorney-General extends the Family Advocacy and Support Services pilot, subject to positive evaluation, to include a child safety service attached to the Family Court of Australia and the Federal Circuit Court of Australia, modelled on the United Kingdom's Children and Family Court Advisory and Support Service. The expanded service, which may require additional infrastructure, should:</p> <ul style="list-style-type: none"> ▪ provide ongoing supervision of the safety of children following orders made by a court; ▪ bring applications to the Court where the risk of a child's safety is of concern and where an exercise of judicial power is required to ensure the child's ongoing safety; and ▪ refer matters to state and territory child protection agencies, where required. 	<p><u>Noted (awaiting ALRC report)</u> See also response to recommendation 1.</p>

21	<p>6.148 The Committee recommends the Attorney-General, through the Council of Australian Governments where necessary, works to improve the information available to courts exercising family law jurisdiction at the earliest possible point in proceedings by:</p> <ul style="list-style-type: none">▪ implementing the Family Law Council’s recommendations in its 2015 Families with complex needs and the intersection of the family law and child protection systems – Interim Report for information sharing protocols between the federal family courts and state and territory child protection departments;▪ establishing a child safety service attached to the Court that operates as a liaison between the federal family courts and child protection departments to ensure all relevant information is available to the Court at the earliest possible stage; and▪ consider the adoption of multi-disciplinary panels by state and territory governments for child abuse investigations which would assist the family law courts to determine whether family violence has occurred; and▪ works with the Family Court of Australia to extend the Magellan program to all parenting matters where there are allegations of family violence.	<p><u>Agreed in part</u></p> <p>Government is working with states and territories to improve information sharing between systems and jurisdictions through the CAG family violence working group, but notes that coordinated approach to information and support is a matter for state and territory governments.</p> <p>Government agrees to work with the federal courts and consider options for extending the Magellan program or establishing a new case management program for matters involving allegations of family violence.</p>
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22	6.156 The Committee recommends the Attorney-General pursues legislation and policy reform to abolish private family consultants, with family consultants to be only engaged and administered by the Court itself. Further, the Committee recommends the development of an agreed fee schedule to regulate the costs of family reports and other expert witnesses.	<p><u>Noted</u> Government acknowledges the need to ensure that independent assessments prepared by family consultants are of a consistently high quality.</p> <p>Government notes that all reports prepared by family consultants are funded by the court at no cost to the parties, but fees charged by private practitioners are not regulated by the Government.</p>
23	6.159 The Committee concludes that the Court must be better informed of children's views, concerns and matters affecting their welfare, and recommends that the Australian Law Reform Commission in its ongoing review of the family law system, examines and propose alternative mechanisms that would ensure children's perspectives are heard in court.	<p><u>Agreed</u> ALRC review established 27/09/17.</p>

24	<p>7.96 The Committee recommends that, as a matter of urgency, the Australian Government implements the Family Law Council recommendations from both the 2012 Improving the family law system for Aboriginal and Torres Strait Islander clients report, and the 2016 Families with complex needs and the intersection of the family law and child protection systems – Final Report, as they relate to Aboriginal and Torres Strait Islander families, including those recommendations addressing:</p> <ul style="list-style-type: none">▪ community education;▪ cultural competency;▪ service collaboration;▪ culturally diverse workforce;▪ early assistance and outreach;▪ legal and non-legal services;▪ interpreters;▪ cultural reports;▪ family group conferences;▪ participation of elders or respected persons in court hearings; and▪ consulting with Aboriginal and Torres Strait Islander representatives in the development of any reforms.	<p><u>Noted (Government supports consideration by ALRC)</u></p>
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25	<p>7.101 The Committee recommends that, as a matter of urgency, the Australian Government implements recommendations from both the 2012 Improving the family law system for clients from culturally and linguistically diverse backgrounds report, and the 2016 Families with complex needs and the intersection of the family law and child protection systems – Final Report, as they relate to culturally and linguistically diverse families, including those recommendations addressing:</p> <ul style="list-style-type: none"> ▪ community education; ▪ cultural competency; ▪ service integration; ▪ culturally diverse workforce; ▪ consultation with culturally and linguistically diverse communities in service evaluation; ▪ interpreters; ▪ cultural connection for children; and ▪ family group conferences. 	<p><u>Noted (Government supports consideration by ALRC)</u></p>
26	<p>7.103 The Committee recommends the Attorney-General extends the Family Advocacy and Support Service pilot to include collaboration and referral pathways to specialist support services for families with additional challenges, using the Children and Family Court Advisory and Support Service model.</p>	<p><u>Noted</u> Government considering extension and expansion of FASS program (per recommendation 1).</p> <p>Government notes that it may not be possible to replicate the same mechanisms used by Children and Family Court Advisory and Support Service in the Australian context.</p>

27	<p>8.82 The Committee recommends that the Australian Government develops a national and comprehensive professional development program for judicial officers from the family courts and from states and territory courts that preside over matters involving family violence. The Committee recommends that this program includes content on:</p> <ul style="list-style-type: none"> ▪ the nature and dynamics of family violence; ▪ working with vulnerable clients; ▪ cultural competency; ▪ trauma informed practice; ▪ family law; and ▪ ‘The Safe and Together Model’ for understanding the patterns of abuse and impact of family violence on children. 	<p><u>Agreed in principle</u> Attorney-General's Department is working with National Judicial College of Australia to develop and deliver training for judicial officers, and state and territory judicial officers.</p>
28	<p>8.83 The Committee recommends that the Australian Government develops a national, ongoing, comprehensive, and mandatory family violence training program for family law professionals, including court staff, family consultants, Independent Children’s Lawyers, and family dispute resolution practitioners. The Committee recommends that this program includes content on:</p> <ul style="list-style-type: none"> ▪ the nature and dynamics of family violence; ▪ working with vulnerable clients; ▪ cultural competency; ▪ trauma informed practice; ▪ the intersection of family law, child protection and family violence; and ▪ ‘The Safe and Together Model’ for understanding the patterns of abuse and impact of family violence on children. 	<p><u>Agreed in principle</u> Government noted its funding to Legal Aid NSW and federal family courts for training.</p> <p>Council of Australian Governments family violence working group will consider this recommendation as part of its forward work program.</p>

29	8.84 The Committee recommends the Australian Government undertakes an evaluation of the Addressing Violence: Education, resources and training (AVERT) family violence training program, with consideration of its content, format, uptake, reach and effectiveness.	<u>Noted</u> Council of Australian Governments family violence working group is considering options for improving the family violence competency of professionals working in the family law and family violence systems, this recommendation would be considered as part of this.
30	8.87 The Committee recommends that the Australian Government develops a national accreditation system with minimum standards and ongoing professional development for family consultants modelled on the existing accreditation system for family dispute resolution practitioners. This system should include a complaints mechanism for parties when family consultants do not meet the required professional standards.	<u>Noted (awaiting ALRC report)</u> See response to recommendation 22.
31	8.92 The Committee recommends that the Australian Government considers the current backlog in the federal family courts and allocates additional resources to address this situation as a matter of priority.	<u>Noted</u> Government has undertaken considered steps to improve the sustainability and effectiveness of the role of the federal courts in the civil justice system through e.g. structural reforms to the Family Court of Australia, also notes past and existing funding allocations in 2015–16 and 2017–18 Budgets.

32	9.40 The Committee recommends the Attorney-General works to introduce 'wrap-around' services co-located in the federal family courts, modelled on the provision of these legal and non-legal support services in the specialist family violence courts of the states and territories.	<u>Agreed in principle</u> Government considers that the establishment of the FASS program mentioned in some of the committee recommendations partially addresses this recommendation.
33	9.44 The Committee recommends the Attorney-General works to establish a systematic court referral mechanism to evidence-based, evaluated, best practice behaviour change programs, through an expanded Family Advocacy and Support Services program, which includes systematic reporting from behaviour change program providers to advise the Court on ongoing risks to families' safety. Further, the Committee recommends that the Attorney-General work with state and territory counterparts to ensure adequate funding of evidence-based, evaluated, best practice behaviour change programs to support the mechanism.	<u>Agreed in principle</u> Evaluation of FASS program (per recommendation 1), after which the Government will be in a position to consider future funding arrangements and the potential expansion of the FASS program.

Family Law for the Future — An Inquiry into the Family Law System: Final Report

The following table sets out the recommendations and Government response and actions to date to the 2019 report by the ALRC, *Family Law for the Future — An Inquiry into the Family Law System: Final Report*.

Table 4.2 Family Law for the Future — An Inquiry into the Family Law System: Final Report

No	ALRC – April 2019 ¹	Government response
Closing the Jurisdictional Gap		On 10 April 2019, the Attorney-General, the Hon Christian Porter MP, issued a media release announcing that the ALRC report was to be tabled in Parliament. ² The Attorney-General stated that his department was considering the ALRC's report and will 'develop comprehensive advice about each of the reforms suggested by the ALRC to ensure that the family law system supports modern Australian families to resolve their disputes safely and as efficiently and cheaply as possible'. The Attorney-General also stated that he envisaged 'a further period of engagement with key stakeholders' to develop 'options for reform and responding to the report, to ensure the family law system is reformed in a manner that delivers just,
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 <i>Family Law Act 1975</i> (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.	
2	<p>The Australian Government should work with state and territory governments to develop and implement a national information sharing framework to guide the sharing of information about the safety, welfare, and wellbeing of families and children between the family law, family violence, and child protection systems. The framework should include:</p> <ul style="list-style-type: none"> ▪ the legal framework for sharing information; ▪ relevant federal, state, and territory court documents; ▪ child protection records; ▪ police records; ▪ experts' reports; and ▪ other relevant information. 	

¹ Australian Law Reform Commission, *Family Law for the Future — An Inquiry into the Family Law System: Final Report*, ALRC Report 135, March 2019.

² Attorney-General for Australia and Minister for Industrial Relations, the Hon Christian Porter MP, 'Australian Law Reform Commission Review of the Family Law System', *Media Release*, 10 April 2019.

		effective and safe outcomes for Australian families'.
3	The Australian Government, together with state and territory governments, should consider expanding the information sharing platform as part of the National Domestic Violence Order Scheme to include family court orders and orders made under state and territory child protection legislation.	Subsequently, on 17 September 2019, in a joint media release with the Prime Minister announcing the Joint Select Committee on Australia's Family Law System, the Attorney-General's stated that: '[t]he Government is also considering the recommendations of the Australian Law Reform Commission report into family law...and will respond in full to all of those recommendations relating to the design of multiple important provisions in the <i>Family Law Act 1975</i> '. ³
Children's Matters		
4	Section 60B of the <i>Family Law Act 1975</i> (Cth) should be repealed.	
5	Section 60CC of the <i>Family Law Act 1975</i> (Cth) should be amended so that the factors to be considered when determining parenting arrangements that promote a child's best interests are: <ul style="list-style-type: none"> ▪ what arrangements best promote the safety of the child and the child's carers, including safety from family violence, abuse, or other harm; ▪ any relevant views expressed by the child; ▪ the developmental, psychological, and emotional needs of the child; ▪ the benefit to the child of being able to maintain relationships with each parent and other people who are significant to the child, where it is safe to do so; ▪ the capacity of each proposed carer of the child to provide for the developmental, psychological, and emotional needs of the child, having regard to the carer's ability and willingness to seek support to assist with 	In Supplementary Budget Estimates, it was revealed by the Attorney-General's Department that it had provided advice to government on the recommendations of the ALRC's inquiry into the family

³ Prime Minister, the Hon. Scott Morrison MP and Attorney-General for Australia and Minister for Industrial Relations, the Hon Christian Porter MP, 'Joint Parliamentary Inquiry into Family Law and Child Support', *Media Release*, 17 September 2019.

	<p>caring; and</p> <ul style="list-style-type: none"> ▪ anything else that is relevant to the particular circumstances of the child. 	<p>law system.⁴ Senator Payne subsequently noted that the government's response to the recommendations of the ALRC's inquiry into the family law system was with the Attorney-General.⁵</p> <p>The Attorney-General's Department also addressed the Government's response to the ALRC report in its appearance before the committee on 14 February 2020.</p>
6	The <i>Family Law Act 1975</i> (Cth) should be amended to provide that in determining what arrangements promote the best interests of an Aboriginal or Torres Strait Islander child, a court must consider the child's opportunities to connect with, and maintain the child's connection to, the child's family, community, culture, and country.	
7	Section 61DA of the <i>Family Law Act 1975</i> (Cth) should be amended to replace the presumption of 'equal shared parental responsibility' with a presumption of 'joint decision making about major long-term issues'.	
8	Section 65DAA of the <i>Family Law Act 1975</i> (Cth), which requires the courts to consider, in certain circumstances, the possibility of the child spending equal time, or substantial and significant time with each parent, should be repealed.	
9	Section 4(1AB) of the <i>Family Law Act 1975</i> (Cth) should be amended to provide a definition of member of the family that is inclusive of any Aboriginal or Torres Strait Islander concept of family that is relevant in the particular circumstances of the case.	
10	Combined rules for the Family Court of Australia and the Federal Circuit Court of Australia should provide for proceedings to be conducted under Pt VII Div 12A of the <i>Family Law Act 1975</i> (Cth) by judges of both courts. Both courts should be adequately resourced to carry out the statutory mandate in s 69ZN(1) of the <i>Family Law Act 1975</i> (Cth).	

⁴ Senate Legal and Constitutional Affairs Committee, Mr Iain Anderson, Deputy Secretary, Legal Services and Families Group, Attorney-General's Department, *Proof Committee Hansard*, 22 October 2019, p. 37.

⁵ Senate Legal and Constitutional Affairs Committee, Senator Payne, Minister for Foreign Affairs and Minister for Women, *Proof Committee Hansard*, 22 October 2019, p. 37.

A Simplified Approach to Property Division	
11	<p>The <i>Family Law Act 1975</i> (Cth) should be amended to:</p> <ul style="list-style-type: none"> ▪ specify the steps that a court will take when considering whether to make an order to alter the interests of the parties to the relationship in any property; and ▪ simplify the list of matters that a court may take into account when considering whether to make an order to alter the interests of the parties to the relationship in any property.
12	The <i>Family Law Act 1975</i> (Cth) should be amended to include a presumption of equality of contributions during the relationship.
13	The <i>Family Law Act 1975</i> (Cth) should be amended to provide that the relevant date to ascertain the value of the parties' rights, interests, and liabilities in any property is the date of separation, unless the interests of justice require otherwise.
14	<p>The family courts and the Australian Financial Complaints Authority should develop a protocol for dealing with jurisdictional overlap with respect to debts of parties to family law proceedings. The protocol should provide that:</p> <ul style="list-style-type: none"> ▪ disputes about the enforceability of a debt against one or both parties under the <i>National Consumer Credit Protection Act 2009</i> (Cth) are dealt with by the Australian Financial Complaints Authority; and ▪ disputes about the reallocation of a debt between parties to a family law proceeding are dealt with by the family courts.
15	The <i>Privacy Act 1988</i> (Cth) and the <i>National Consumer Credit Protection Act 2009</i> (Cth) should be amended to provide that when a court has ordered that one party (Party A) be responsible for a joint debt and indemnify the other party (Party B) against any default, credit providers are prohibited from making an adverse credit report against Party B to any credit reporting business as a consequence of

	the subsequent actions of Party A.	
16	The <i>Family Law Act 1975</i> (Cth) should be amended to provide a presumption that the value of superannuation assets accumulated during a relationship are to be split evenly between the parties.	
17	The <i>Family Law Act 1975</i> (Cth) should be amended to simplify the process for splitting superannuation including: <ul style="list-style-type: none"> ▪ developing template superannuation splitting orders for commonly made superannuation splits; and ▪ when the applicant is suffering economic hardship, requiring superannuation trustees to limit the fees they charge members and their former spouse for services provided in connection with property settlement under Pt VIII to the actual cost of providing those services. 	
18	The <i>Family Law Act 1975</i> (Cth) should be amended so that: <ul style="list-style-type: none"> ▪ the spousal maintenance provisions and provisions relating to the division of property are dealt with separately under the legislation; and ▪ access to interim spousal maintenance is enhanced by the use of Registrars to consider urgent applications. 	
19	The <i>Family Law Act 1975</i> (Cth) should be amended to include a statutory tort of family violence that would provide remedies consistent with existing common law remedies.	
20	The <i>Family Law Act 1975</i> (Cth) should be amended to extend s 69ZX to property settlement proceedings.	
Encouraging Amicable Resolution		

21	<p>The <i>Family Law Act 1975</i> (Cth) should be amended to:</p> <ul style="list-style-type: none"> ▪ require that parties take genuine steps to attempt to resolve their property and financial matters prior to filing an application for court orders; and ▪ specify that a court must not hear an application unless the parties have lodged a genuine steps statement. <p>A failure to make a genuine effort to resolve a matter should have costs consequences.</p>	
22	<p>Regulation 25 of the Family Law (Family Dispute Resolution Practitioners) Regulations 2008 (Cth), which refers to ‘equality of bargaining power between the parties’, should be amended to refer to the ‘equality of bargaining power between the parties, including an imbalance in knowledge of relevant financial arrangements’.</p>	
23	<p>The <i>Family Law Act 1975</i> (Cth) should be amended to require Family Dispute Resolution Providers to provide a certificate to the parties in all matters where some or all of the issues in dispute have not been resolved.</p>	
24	<p>Sections 10H and 10J of the <i>Family Law Act 1975</i> (Cth), which provide for confidentiality and inadmissibility of discussions and material in Family Dispute Resolution in relation to parenting matters, should be extended to Family Dispute Resolution for property and financial matters. The legislation should provide an exception for a sworn statement in relation to income, assets, superannuation balances, and liabilities that each party signs at the start of Family Dispute Resolution, which should be admissible.</p>	
25	<p>The <i>Family Law Act 1975</i> (Cth) should be amended to clearly set out the disclosure obligations of parties, and the consequences for breach of those obligations.</p>	
Arbitration		
26	<p>The <i>Family Law Act 1975</i> (Cth) and the <i>Child Support (Assessment) Act 1989</i> (Cth) should be amended to increase the scope of matters which may be arbitrated,</p>	

	<p>whether or not upon referral from a court. Those matters should include all financial issues, including child maintenance and child support, subject to limitations. Appropriate occasions for arbitration would not include disputes:</p> <ul style="list-style-type: none"> ▪ relating to enforcement; ▪ under ss 79A or 90SN of the <i>Family Law Act 1975</i> (Cth) (subject to limitations); and ▪ in which a litigation guardian has been appointed. 	
27	<p>The <i>Family Law Act 1975</i> (Cth) should be amended to remove the opportunity for a party to object to registration of an arbitral award, while maintaining appropriate safeguards for the integrity of registered awards.</p>	
28	<p>The <i>Family Law Act 1975</i> (Cth) should be amended to allow some children's matters to be arbitrated. Appropriate occasions for arbitration in children's matters would not include disputes:</p> <ul style="list-style-type: none"> ▪ relating to international relocation; ▪ relating to medical procedures of a nature requiring court approval; ▪ relating to contravention matters; ▪ in which an Independent Children's Lawyer has been appointed; and ▪ involving family violence which satisfy ss 102NA(1)(b) and (c) of the <i>Family Law Act 1975</i> (Cth). 	
29	<p>The <i>Family Law Act 1975</i> (Cth) should be amended to provide that upon application by an arbitrator, or by a party to an arbitration, a court has power to make directions at any time regarding the further conduct of the arbitration, including power to make a direction terminating the arbitration (whether or not the arbitration was referred from a court).</p>	

Case Management: Efficiency and Accountability	
30	The <i>Family Law Act 1975</i> (Cth) should include an overarching purpose of family law practice and procedure to facilitate the just resolution of disputes according to law, as quickly, inexpensively, and efficiently as possible, and with the least acrimony so as to minimise harm to children and their families.
31	The <i>Family Law Act 1975</i> (Cth) should impose a statutory duty on parties, their lawyers, and third-parties to cooperate amongst themselves, and with the courts, to assist in achieving the overarching purpose. Breach of the duty will have costs consequences for the person who fails to act in accordance with the overarching purpose.
32	The <i>Family Law Act 1975</i> (Cth) should be amended to provide the courts with a power to make an order requiring a litigant to seek leave of the court prior to making further applications and serving them on the other party where the court is satisfied that such an order is appropriate for the protection of the respondent and/or any children involved in the proceedings, having regard to the overarching purpose of family law practice and procedure.
33	Section 45A of the <i>Family Law Act 1975</i> (Cth) should be amended to provide that the courts' powers of summary dismissal may be exercised where the court is satisfied that it is appropriate to do so, having regard to the overarching purpose of family law practice and procedure.
34	The family courts should consider promulgating a joint Practice Note for Case Management which describes the courts' approaches to the family law practice and procedure provisions.
35	The <i>Family Law Act 1975</i> (Cth) should be amended to provide for the appointment and protection of referees in the same terms as provided for in ss 54A and 54B of the <i>Federal Court of Australia Act 1976</i> (Cth).
36	Section 117 of the <i>Family Law Act 1975</i> (Cth) should be amended to:

	<ul style="list-style-type: none"> ▪ remove the general rule that each party to proceedings under the Act bears his or her own costs; and ▪ articulate the scope of the courts' power to award costs. 	
37	<p>The <i>Family Law Act 1975</i> (Cth) should be amended to provide courts with an express statutory power to exclude evidence of 'protected confidences'. In determining whether to exclude evidence of protected confidences the court must:</p> <ul style="list-style-type: none"> ▪ be satisfied that it is likely that harm would or might be caused, directly or indirectly, to a protected confider, and the nature and extent of the harm outweighs the desirability of the evidence being given; and ▪ ensure that in parenting proceedings, the best interests of the child is the paramount consideration when deciding whether to exclude evidence of protected confidences. 	
Compliance with Children's Orders		
38	<p>The <i>Family Law Act 1975</i> (Cth) should be amended to require parties to meet with a Family Consultant to assist their understanding of the final parenting orders made by a court following a contested hearing.</p>	
39	<p>The <i>Family Law Act 1975</i> (Cth) should be amended to provide that:</p> <ul style="list-style-type: none"> ▪ in all parenting proceedings for final orders, the courts must consider whether to make an order requiring the parties to see a Family Consultant for the purposes of receiving post-order case management; and ▪ the appointed Family Consultant has the power to seek that the courts place the matter in a contravention list or to recommend that the court make additional orders directing a party to attend a post-separation parenting program. 	

40	<p>The Family Law Regulations 1984 (Cth) should be amended to require leave to appeal interim parenting orders. Leave should only be granted where:</p> <ul style="list-style-type: none"> ▪ the decision is attended by sufficient doubt to warrant it being reconsidered; and ▪ substantial injustice would result if leave were refused, supposing the decision to be wrong. 	
41	<p>The <i>Family Law Act 1975</i> (Cth) should be amended to explicitly state that when a new parenting order is sought, and there is already a final parenting order in force, the court must consider whether:</p> <ul style="list-style-type: none"> ▪ there has been a change of circumstances that, in the opinion of the court, is significant; and ▪ it is in the best interests of the child for the order to be reconsidered. 	
42	<p>Part VII Div 13A of the <i>Family Law Act 1975</i> (Cth) should be redrafted to achieve simplification, and to provide for:</p> <ul style="list-style-type: none"> ▪ a power to order that a child spend additional time with a person; ▪ a power to order parties to attend relevant programs at any stage of proceedings; and ▪ a presumption that a costs order will be made against a person found to have contravened an order. 	
Support Services in the Courts		
43	<p>The <i>Family Law Act 1975</i> (Cth) should be amended to:</p> <ul style="list-style-type: none"> ▪ replace ‘family consultants’ with ‘court consultants’; and ▪ redraft s 11A to include a comprehensive list of functions that court consultants would provide to children, families, and the courts. 	

44	Section 68LA(5) of the <i>Family Law Act 1975</i> (Cth) should be amended to include a specific duty for Independent Children’s Lawyers to comply with the Guidelines for Independent Children’s Lawyers, as promulgated from time to time and as endorsed by the family courts.	
45	The Australian Government should ensure the availability of Indigenous Liaison Officers in court registries where they are required.	
46	The <i>Family Law Act 1975</i> (Cth) should be amended to include a supported decision making framework for people with disability consistent with recommendations from the ALRC Report 124, <i>Equality, Capacity and Disability in Commonwealth Laws</i> .	
47	The <i>Family Law Act 1975</i> (Cth) should include provisions for the appointment of a litigation representative where a person with disability is unable to conduct the litigation. These provisions should be consistent with the recommendations of the ALRC Report 124, <i>Equality, Capacity and Disability in Commonwealth Laws</i> .	
48	The Australian Government should work with state and territory governments to facilitate the appointment of statutory authorities as litigation representatives in family law proceedings.	
Building Accountability and Transparency		
49	<p>Section 115 of the <i>Family Law Act 1975</i> (Cth) should be amended to expand the Family Law Council’s responsibilities to include:</p> <ul style="list-style-type: none"> ▪ monitoring and regular reporting on the performance of the family law system; ▪ conducting inquiries into issues relevant to the performance of any aspect of the family law system, either of its own motion or at the request of government; and ▪ making recommendations to improve the family law system, including 	

	research and law reform proposals.	
50	The Family Law Council should establish a Children and Young People's Advisory Board, which would provide advice and information about children's experiences of the family law system to inform policy and practice.	
51	Relevant statutes should be amended to require that future appointments of all federal judicial officers exercising family law jurisdiction include consideration of the person's knowledge, experience, skills, and aptitude relevant to hearing family law cases, including cases involving family violence.	
52	The Law Council of Australia should work with state and territory regulatory bodies for legal practitioners to develop consistent requirements for legal practitioners undertaking family law work to complete annually at least one unit of continuing professional development relating to family violence.	
53	The Australian Government Attorney-General's Department should develop a mandatory national accreditation scheme for private family report writers.	
54	The <i>Family Law Act 1975</i> (Cth) should be amended to: <ul style="list-style-type: none"> ▪ require any organisation offering a Children's Contact Service to be accredited; and ▪ make it an offence to provide a Children's Contact Service without accreditation. 	
Legislative Clarity		
55	The <i>Family Law Act 1975</i> (Cth) and its subordinate legislation should be comprehensively redrafted.	
56	Privacy provisions that restrict publication of family law proceedings to the public, currently contained in s 121 of the <i>Family Law Act 1975</i> (Cth), should be redrafted.	
Secondary Interventions		

57	The Family Advocacy and Support Service's social support services should be expanded to provide case management to clients who are engaged with the family law system.	
58	The Australian Government should work with Legal Aid Commissions in each state and territory to expand the Family Advocacy and Support Service to court locations that have a demonstrable need and to ensure the provision of adequate and appropriate services.	
59	Family Relationship Centres should be expanded to provide case management to clients with complex needs who are engaged with the family law system.	
60	The Australian Government should work with Family Relationship Centres to develop services, including: <ul style="list-style-type: none">▪ financial counselling services;▪ mediation in property matters;▪ legal advice and Legally Assisted Dispute Resolution services; and▪ Children's Contact Services.	

Appendix 5

List of child support inquiries and reports

The following table was compiled by the Australian Parliamentary Library at the request of the committee. The Child Support Scheme commenced operation on 1 June 1988 and is administered by two Acts. The *Child Support (Registration and Collection) Act 1988* established the Child Support Agency (CSA) and provides for the registration, collection and enforcement of court orders and court-registered agreements for child support and spousal maintenance. The *Child Support (Assessment) Act 1989* implements an administrative assessment of child support in accordance with a formula; and came into force on 1 October 1989.

Year	Child support inquiries and reports
1984	National Maintenance Inquiry, A maintenance agency for Australia , 1984.
1986	Cabinet Sub-Committee on Maintenance, Discussion paper on child maintenance , October 1986.
1988	Child Support Consultative Group, <i>Child support: formula for Australia: a report from the Child Support Consultative Council</i> , 1988.
1989	K Funder, Financial support and relationships with children , Child Support Scheme Evaluation Study Report No. 6, Australian Institute of Family Studies, August 1989.
1990	M Harrison et al, <i>Who pays for the children?: A first look at the operation of Australia's new Child Support Scheme</i> , Monograph No. 9, Australian Institute of Family Studies, 1990.
1991	M Harrison et al, Paying for the children: Parent and employer experience of stage one of Australia's child support scheme , Monograph No. 10, Australian Institute of Family Studies, 1991.
1992	Child Support Evaluation Advisory Group, <i>Child support in Australia: Final report of the evaluation of the Child Support Scheme</i> , 2 vols, 1992.
1993	Joint Select Committee on Certain Family Law Issues, "Thanks for listening": a report on the Child Support Inquiry Hotline , August 1993.
1994	Joint Select Committee on Certain Family Law Issues, The operation and effectiveness of the Child Support Scheme , November 1994. ¹

¹. This was the first parliamentary inquiry into the operation and effectiveness of the Child Support Scheme.

1994	Australian National Audit Office, Australian Taxation Office: Management of the Child Support Agency: efficiency audit , Audit Report No. 39, 1994.
1998	Australian National Audit Office, Management of selected functions of the Child Support Agency , Audit Report No. 39, 1998.
1998	Commonwealth Ombudsman, <i>Child support overpayments: Child Support Agency: a case of give and take?</i> , January 1998.
2001	Commonwealth Ombudsman, Review of the Child Support Agency's complaint service , July 2001.
2002	Australian National Audit Office, Client service in the Child Support Agency: Follow-up audit , Audit Report No. 7, 2002-03.
2003	House Standing Committee Family and Community Affairs, Every picture tells a story: Inquiry into child custody arrangements in the event of family separation , Chapter 6, December 2003.
2005	Ministerial Taskforce on Child Support, In the best interests of children—Reforming the Child Support Scheme , 2005.
2005	B Smyth and R Weston, A snapshot of contemporary attitudes to child support , Report No. 13, Australian Institute of Family Studies, 2005.
2007	Australian National Audit Office, Data integrity in the Child Support Agency , Performance Audit Report No. 16, 2007–08.
2008	Department of Families, Housing, Community Services and Indigenous Affairs, Report on the population impact of the new child support formula , August 2008.
2009	Australian National Audit Office, Child support reforms: Stage one of the Child Support Scheme Reforms and improving compliance , Performance Audit Report No. 19, 2009–10.
2009	Australian National Audit Office, Child support reforms: Building a better Child Support Agency , Performance Audit Report No. 46, 2009–10.
2011	Australian Law Reform Commission, Family violence and Commonwealth laws—Improving legal frameworks , Report No. 117, November 2011. See: Part D-Child support and family assistance (Chapters 11–14)
2012	Australian National Audit Office, The Child Support Program's management of feedback , Performance Audit Report, 37, 2011–12.
2014	Australian National Audit Office, Review of child support objections , Performance Audit Report, 28, 2013–14.
2015	House of Representatives Standing Committee on Social Policy and Legal Issues, From conflict to cooperation: Inquiry into the Child Support Program , July 2015.

2017	Australian National Audit Office, <i>Child support collection arrangements between the Department of Human Services and the Australian Taxation Office</i> , Performance Audit Report, 50, 2016–17.
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Appendix 6

Costs of the Children Table 2020 - Services

Australia

The Department of Social Services publishes an annual formula tables and values that are used in calculating assessments made under Part 5 of the *Child Support (Assessment) Act 1989*. A table outlining formulas and values for 2020 can be found below.

Figure 6.1

Parents' combined child support income (2.4.4)						
Fraction of MTAW	0.5	1	1.5	2	2.5	Costs of children do not increase above this cap
No. of children	\$0 to \$38,363	\$38,364 to \$76,726	\$76,727 to \$115,089	\$115,090 to \$153,452	\$153,453 to \$191,815	Income over \$191,815
Costs of the children (to be apportioned between parents)						
Children aged 0-12 years						
1 child	17c for each \$1	\$6,522 plus 15c for each \$1 over \$38,363	\$12,276 plus 12c for each \$1 over \$76,726	\$16,880 plus 10c for each \$1 over \$115,089	\$20,716 plus 7c for each \$1 over \$153,452	\$23,401
2 children	24c for each \$1	\$9,207 plus 23c for each \$1 over \$38,363	\$18,030 plus 20c for each \$1 over \$76,726	\$25,703 plus 18c for each \$1 over \$115,089	\$32,608 plus 10c for each \$1 over \$153,452	\$36,444
3 + children	27c for each \$1	\$10,358 plus 26c for each \$1 over \$38,363	\$20,332 plus 25c for each \$1 over \$76,726	\$29,923 plus 24c for each \$1 over \$115,089	\$39,130 plus 18c for each \$1 over \$153,452	\$46,035
Children aged 13 + years						
1 child	23c for each \$1	\$8,823 plus 22c for each \$1 over \$38,363	\$17,263 plus 12c for each \$1 over \$76,726	\$21,867 plus 10c for each \$1 over \$115,089	\$25,703 plus 9c for each \$1 over \$153,452	\$29,156
2 children	29c for each \$1	\$11,125 plus 28c for each \$1 over \$38,363	\$21,867 plus 25c for each \$1 over \$76,726	\$31,458 plus 20c for each \$1 over \$115,089	\$39,131 plus 13c for each \$1 over \$153,452	\$44,118
3 + children	32c for each \$1	\$12,276 plus 31c for each \$1 over \$38,363	\$24,169 plus 30c for each \$1 over \$76,726	\$35,678 plus 29c for each \$1 over \$115,089	\$46,803 plus 20c for each \$1 over \$153,452	\$54,476
Children of mixed age						
2 children	26.5c for each \$1	\$10,166 plus 25.5c for each \$1 over \$38,363	\$19,949 plus 22.5c for each \$1 over \$76,726	\$28,581 plus 19c for each \$1 over \$115,089	\$35,870 plus 11.5c for each \$1 over \$153,452	\$40,282
3 + children	29.5c for each \$1	\$11,317 plus 28.5c for each \$1 over \$38,363	\$22,250 plus 27.5c for each \$1 over \$76,726	\$32,800 plus 26.5c for each \$1 over \$115,089	\$42,966 plus 19c for each \$1 over \$153,452	\$50,255

[Source: Department of Social Services, *Child Support Guide: Guides to Social Policy, 2.4.2 Formula tables and values*, <https://guides.dss.gov.au/child-support-guide/2/4/2> (accessed 2 July 2020).

Appendix 7

List of parliamentary committee inquiries into the provisions of bills to amend the Family Law Act 1975

At the request of the committee, the following list was compiled by the Australian Parliamentary Library from the Tabled Papers Register and shows all bills proposing to amend the *Family Law Act 1975* (FLA) that have been referred to a parliamentary committee for inquiry and report. This does not include private senators and members bills.

The most recent compilation of the FLA provides a legislation history in the endnotes. The legislation history indicates that there have been 116 Acts that have amended the FLA.

YEAR REPORT TABLED	PARLIAMENTARY COMMITTEE INQUIRIES INTO THE PROVISIONS OF FAMILY LAW BILLS
1995	<i>Senate Legal and Constitutional Affairs Legislation Committee</i> Family Law Reform Bill 1994 and Family Law Reform Bill (No. 2) 1994 (Exposure Draft)– First Report , March 1995; Second Report , June 1995.
1999	<i>Senate Legal and Constitutional Affairs Legislation Committee</i> Family Law Amendment Bill 1999– Report , December 1999.
2000	<i>Senate Select Committee on Superannuation and Financial Services</i> Family Law Legislation Amendment (Superannuation) Bill 2000– Interim Report , November 2000.
2001	<i>Senate Select Committee on Superannuation and Financial Services</i> Family Law Legislation Amendment (Superannuation) Bill 2000– Report , March 2001.
2002	<i>Senate Legal and Constitutional Affairs Legislation Committee</i> Senate Standing Family Law Amendment (Child Protection Convention) Bill 2002– Report , May 2002.
2003	<i>Senate Legal and Constitutional Affairs Legislation Committee</i> Family Law Amendment Bill 2003 [Provisions]– Report , August 2003.
2004	<i>Senate Legal and Constitutional Affairs Legislation Committee</i> Family Law Amendment Bill 2004 [Provisions]– Report , July 2004.
2005	<i>House of Representatives Standing Committee on Legal and Constitutional Affairs</i> Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005– Report , August 2005.
2006	<i>Senate Legal and Constitutional Affairs Legislation Committee</i>

	Family Law Amendment (Shared Parental Responsibility) Bill 2005 [Provisions]— Report , March 2006.
2008	<i>Senate Legal and Constitutional Affairs Legislation Committee</i> Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 [Provisions]— Report , August 2008.
2011	<i>House of Representatives Standing Committee on Social Policy and Legal Affairs</i> Advisory report of the inquiry into the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011— Report , May 2011. [Inquiry did not proceed due to Senate inquiry into Bill] <i>Senate Legal and Constitutional Affairs Legislation Committee</i> Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 [Provisions]— Report , August 2011.
2016	<i>Senate Legal and Constitutional Affairs Legislation Committee</i> Family Law Amendment (Financial Agreements and Other Measures) Bill 2015— Report , February 2016.
2018	<i>Senate Legal and Constitutional Affairs Legislation Committee</i> Family Law Amendment (Parenting Management Hearings) Bill 2017— Report , March 2018.
2018	<i>Senate Legal and Constitutional Affairs Legislation Committee</i> Family Law Amendment (Family Violence and Other Measures) Bill 2017— Report , April 2018.
2018	<i>Senate Legal and Constitutional Affairs Legislation Committee</i> Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018 [Provisions]— Report , August 2018.
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2020	<i>Senate Legal and Constitutional Affairs Legislation Committee</i> Family Law Amendment (Western Australia De Facto Superannuation Splitting and Bankruptcy) Bill 2019 [Provisions]— Report , March 2020.