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Joint Select Committee on Australia's Family Law System
PO Box 6100
Parliament House
Canberra ACT 2600

By email: familylaw.sen@aph.gov.au

Relationships Australia welcomes the opportunity to make a submission to the Joint Select Committee on Australia's Family Law System. This submission is made on behalf of the eight State/Territory Relationships Australia organisations, and complements the submission made by Relationships Australia Victoria.

The work of Relationships Australia

Relationships Australia is a federation of community-based, not-for-profit organisations with no religious affiliations. Our services are for all members of the community, regardless of religious belief, age, gender, sexual orientation, lifestyle choice, living arrangements, cultural background or economic circumstances.

Relationships Australia has, for over 70 years, provided a range of relationship services to Australian families, including individual, couple and family group counselling, dispute resolution, services to older people, children's services, services for victims and perpetrators of family violence, and relationship and professional education. We aim to support all people in Australia to live with positive and respectful relationships, and believe that people have the capacity to change how they relate to others and develop better health and wellbeing.

Relationships Australia State and Territory organisations, along with our consortium partners, operate around one third of the 66 Family Relationship Centres across the country. In addition, Relationships Australia Queensland operates the national Family Relationships Advice Line and the Telephone Dispute Resolution Service.

The core of our work is relationships – through our programs we work with people to enhance and improve relationships in the family (whether or not the family is together) with friends and colleagues, and within communities. Relationships Australia believes that violence, coercion, control and inequality are unacceptable.

We respect the rights of all people, in all their diversity, to live life fully and meaningfully within their families and communities with dignity and safety, and to enjoy healthy relationships. A commitment to fundamental human rights, to be recognised universally and without discrimination, underpins our work. Relationships Australia is committed to:

- Working in regional, rural and remote areas, recognising 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.

- Collaboration. We work collectively with local and peak body organisations to deliver a spectrum of prevention, early and tertiary intervention programs with older people, men, women, young people and children. We recognise that often a complex suite of supports (for example, family support programs, mental health services, gambling services, drug and alcohol services, and housing) is needed by people affected by family violence and other complexities in relationships.
- Enriching family relationships, and encouraging clear and respectful communication.
- Ensuring that social and financial disadvantage is no barrier to accessing services.
- Contributing our practice evidence and skills to research projects, to the development of public policy, and to the provision of effective and compassionate supports to families.

This submission draws upon our experience in delivering, and continually refining, evidence-based programs in a range of family and community settings with diverse identities, including:

- younger and older people
- people who come from culturally and linguistically diverse backgrounds
- Aboriginal and Torres Strait Islander people
- people who identify as members of the LGBTIQ+ communities
- people affected by intergenerational trauma, and
- people affected by complex grief and trauma, intersecting disadvantage and polyvictimisation.

KEY THEMES/RECOMMENDATIONS

1. Replace the 'family law system' with a family wellbeing system, as described in section A of this submission's response to paragraph (e) of the Committee's Terms of Reference, and establish:
 - **Family Wellbeing Hubs** – see section A.2 of this submission's response to paragraph (e) of the Committee's Terms of Reference
 - a **specialist tribunal** to investigate and direct arrangements to further children's best interests – see section A.2 of this submission's response to paragraph (b), and section C.1 of the response to paragraph (f) of the Committee's Terms of Reference
 - **post-order/post agreement services** (including by adopting a Parenting Coordination model for high conflict families who need additional support to implement orders and agreements) – see section D of this submission's response to paragraph (b) of the Committee's Terms of Reference, and

- a **Family Wellbeing and Family Law Commission** to safeguard the integrity of the System through robust accountability, oversight of professionals in the system, and undertaking inquiries into systemic problems – see section B.1 of this submission’s response to paragraph (h) of the Committee’s Terms of Reference.
2. Transform dispute resolution mechanisms to focus on family wellbeing and child development focus by:
 - abandoning processes built around lengthy, expensive and combative litigation, which force parents into binary win/loss outcomes in relation to their children
 - making smarter and more integrated use of services that meet families’ social, emotional, health and financial needs and that divert more families from litigation, at earlier points of time, and
 - introducing mandatory pre-filing FDR for property matters (see section C of this submission’s response to paragraph (d) of the Committee’s Terms of Reference).
 3. Improve focus on children’s safe and healthy development, including during and after separation, through:
 - hearing their voices and keeping them informed of matters that affect them (see section C.2 of the response to paragraph (f) of the Committee’s Terms of Reference)
 - enhancing CCSs through more realistic and enduring funding, and expanding their role, and
 - accrediting CCSs and family report writers (see section C.2 of the response to paragraph (h) of the Committee’s Terms of Reference).
 4. Support these shifts with:
 - a new Act focusing on family wellbeing and child development in separating families (see section B of this submission’s response to paragraph (k) of the Committee’s Terms of Reference),¹ and
 - a stable, ongoing funding base that properly recognises that family wellbeing and healthy child development are vital to a vibrant, prosperous and resilient Australia, and that existing resources pose an urgent existential threat to Australia’s social and economic wellbeing (see section A of the response to paragraph (k) of the Committee’s Terms of Reference).

¹ Proposals for discrete amendments are made throughout the body of the submission.

GLOSSARY

Act means the *Family Law Act 1975* (Cth)

AGD means the Commonwealth Attorney-General's Department

AIFS means the Australian Institute of Family Studies

ALRC means the Australian Law Reform Commission

ALRC DP 86 means the Discussion Paper on the Review of the Family Law System, published by the Australian Law Reform Commission (2018)

ALRC IP 48 means the Issues Paper on the Review of the Family Law System, published by the Australian Law Reform Commission (2018)

ALRC Report 131 means the report *Elder Abuse – A National Legal Response*, published by the Australian Law Reform Commission (2017)

ALRC Report 135 means the ALRC Family Law System Review – Final Report, published by the Australian Law Reform Commission (2018)

CCS means Children's Contact Services, including those not funded by the Commonwealth Government

FamCA means the Family Court of Australia

FASS means the Family Advocacy and Support Services program funded by the Commonwealth Government

FCC means the Federal Circuit Court

FCWA means the Family Court of Western Australia

FDR means Family Dispute Resolution

FDRP means Family Dispute Resolution Practitioner

FLC means the Family Law Council

FRC means Family Relationship Centre

ICL means Independent Children's Lawyer

SPLA Inquiry means the inquiry undertaken by the House of Representatives Standing Committee on Social Policy and Legal Affairs into *A better family law system to support and protect those affected by family violence* (2017)

RESPONSES TO THE TERMS OF REFERENCE

Paragraph (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

This Term of Reference addresses the notorious fragmentation within the ‘family law system’, and between it and related systems. Our response:

- scopes the multiple, sometimes divergent and sometimes intersecting sources of fragmentation and how that can affect families, and
- acknowledges current work to minimise the harmful impacts of fragmentation and identifies some promising options to build on that work, including national databases, cross-jurisdictional orders, co-located services and multidisciplinary networks.

The Attorney-General’s Department worked with Professor Richard Chisolm AM to develop a best practice framework to improve information flows. An initial report was published in March 2013, after which a taskforce was established to undertake further consideration of the issue. The outcomes can be found on the AGD website.² Yet the problem continues to burden Australian families, and has received continued attention in reports of recent related inquiries including:

- the Family Law Council’s inquiry into families with complex needs and the intersection of the family law and child protection systems³
- the inquiry undertaken by the Social Policy and Legal Affairs Committee of the Australian Parliament,⁴ and
- the ALRC inquiry into the family law system.⁵

Relationships Australia notes the ongoing relevance of the FLC’s comments on the impact of fragmentation on the experience of families affected by, for example, family violence, who may potentially deal with: child protection services, police, domestic violence advocates, legal services, family court consultants, ICLs, hospital and medical staff, child health services, counsellors, school teachers, day care staff, school and private psychologists, chaplains, CCSs, and Centrelink.⁶ Research findings and practice experience show that the number of services accessed by families increases as harm from violence or abuse increases.⁷

² See <https://www.ag.gov.au/FamiliesAndMarriage/Families/Pages/Familylawandchildprotectioncollaboration.aspx>.

³ <https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Pages/FamilyLawCouncilpublishedreports.aspx>

⁴ https://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/FVlawrefor m

⁵ <https://www.alrc.gov.au/news/family-law-inquiry-final-report-released/>

⁶ See our submission to the SPLA Inquiry, at Appendix D. See also the submission of the Law Council of Australia on the Family Law Amendment (Parenting Management Hearings) Bill 2017, 7 February 2018, paragraph 18.

⁷ Kaspiw et al, *Responding to Family Violence: A survey of family law practices and experiences*, 2015, <https://aifs.gov.au/sites/default/files/efva-rfv.pdf>, p 132. See also Lee, J, *Are we actually doing more for families*

Case study – highlighting fragmentation and gaps between services and initiating court processes

This case study demonstrates the number of separate services with which families may come into contact. The gap between what can be offered within program guidelines, the law services and court processes, leaves a large void that becomes increasingly difficult to navigate. Better integrated and/or co-located services, including case navigators/managers could be extremely beneficial, particularly for dealing safely with family violence. This could involve coordinating activities between agencies and offer families a seamless pathway through the service and court systems.

This case involves Sally, Simon, Evie, 11, and Ella, 9. The marriage has broken down, Simon suffers from PTSD, and Ella has recently received a diagnosis of autism. Simon, Sally and the children accessed the following Relationships Australia services:

- Relationship Counselling
- Family Dispute Resolution – deemed inappropriate: paragraph 60I (e)
- Supporting Children After Separation – counseling for both of the children
- Children’s Contact Centre- currently using
- Parenting Orders Program – both parents attending court-ordered POP with separate practitioners.

Other services contacted by the family included:

- Support Help and Empowerment (SHE)
- Court, Legal Aid, Women’s Legal Service, Community Legal Service, private lawyers
- Medical professionals including GPs, pediatricians and pediatric nurses
- Veterans’ Affairs Counselling Service
- City Mission, for financial assistance, and
- Police.

Relationships Australia notes that the recent AIFS report on children and young people in separated families reported that parents in their sample had accessed an average of eight services when finalising parenting matters. The main services accessed by parents included:

- lawyers (96%)
- counselling, FDR and/or mediation (94%)
- court services (83%)
- family consultants/report writers (60%), and
- ICLs (36%).⁸

affected by family and domestic violence? (2016); <https://aifs.gov.au/cfca/2016/03/02/are-we-actually-doing-more-families-affected-family-and-domestic-violence>

⁸ Carson et al, *Children and young people in separated families: Family law system experiences and needs*, 2018.

Practice experience, confirmed by research, indicate that:

- people experiencing physical violence in relationships use at least four wellbeing or family law services before or during separation, compared to 1.4 services used by those with no violence in their relationships and 2.9 services used by those facing emotional abuse⁹
- people reporting physical harm before or after separation are twice as likely to use a counselling, relationship or FDR services than a domestic violence service¹⁰
- clients are most likely to seek help from a relationship service for:
 - relationships assistance (61.9%)
 - mental health (28.9%)
 - child's coping (26.1%),¹¹ and
- family and relationship services clients have said that:
 - 34.1% had thought of suicide and 9.5% were currently thinking of suicide
 - 18% had, in the previous year, needed to call police, press criminal charges or have criminal justice system involvement due to behaviour of a partner or ex-partner, and
 - 11.7% were aware of a child protection notification about their family (with 2.8% being currently under investigation).

A Sources of fragmentation for users of family law, family violence, child protection and social services

Fragmentation arises from:

- the limits of Commonwealth Constitutional power, and its relationship with State powers to legislate
- separation of powers in the Commonwealth Constitution
- intersecting legal frameworks, including:
 - child protection and welfare
 - criminal law – family violence
 - criminal law – other
 - adult guardianship law
 - mental health, and
 - succession law
- professional regulators, including in:
 - social sciences
 - medical sciences and allied therapies
 - law
 - law enforcement
- bureaucratic structures at all levels of government
- budgetary rules and processes – funding grants are often structured to align with bureaucratic divisions, so that one service provider must, in relation to even a single family, administer funding for services from several different government departments, at

⁹ Kaspiew et al, 2015.

¹⁰ Kaspiew et al, 2015.

¹¹ Lee & McIntosh, 2019.

- different levels of government; this imposes substantial administrative burdens and costs without contributing to high quality services for users or cost-effectiveness for taxpayers
- competition between services, driven by unproven assumptions that competitive tendering is a necessary and sufficient pre-condition of innovation and efficiency; typically, however, grants of funding also call on providers of the same, or substantially similar, services to collaborate – artificially creating a competitive dynamic that can undermine achievement of the policy objectives,¹² and
 - corresponding to life span phases - rather than focusing on the duration of the family dynamic, and supporting the well-being of families throughout the life span (eg intergenerational conflict, elder abuse, conflict among adult siblings).

Calling the resultant disparate collection of agencies, services, decision-makers and governance mechanism a 'system' is, frankly, quite a stretch.

B Overcoming fragmentation

Significant attention has been paid, over the past few years, to improve collaboration and information sharing between the family courts and state/territory child protection and family violence systems. The ALRC gave prominence to the issue through Recommendation 2 of its final report.¹³

However, 'information sharing is no panacea to the problems caused by the jurisdictional gap.'¹⁴ Accordingly, Relationships Australia recommends:

- funding interventions to, where practicable, de-escalate conflict as early as possible
- enhanced multi-disciplinary training for professionals in the system
- that professionals working in the family law, family violence and child protection systems receive information, training and advice on confidentiality and privacy laws. This could be complemented by an agreement on standardised wording and explanations given to clients (including children, who are being spoken to by counsellors and family assessors) about privacy and confidentiality. Clients interact with multiple government agencies and service providers say that they are confused and frustrated by the different privacy and

¹² Relationships Australia, in commenting on the KPMG final report, observed that collaboration is not the only, or always the best or most efficient approach, or something that can be imposed in grant agreements post-tender. In its draft report on mental health services, the Productivity Commission recently acknowledged the legitimacy of concerns about how competitive contracting by government is managed and the potential adverse effects on NGOs and the delivery of seamless, non-duplicative services (concerns expressed by submitters to that process, including Relationships Australia National, the New South Wales Government (submission 551, p 24) and the South Australia Mental Health Commission (submission 477, p33). See Productivity Commission draft report (<https://www.pc.gov.au/inquiries/current/mental-health/draft>) at p 425.

¹³ At its meeting in November 2019, the Council of Attorneys-General gave in-principle endorsement to a high-level National Strategic Framework for Information Sharing between the family law, family violence and child protection systems. Work will be undertaken over the next 12 months (<https://www.ag.gov.au/About/CommitteesandCouncils/Council-of-Attorneys-General/Documents/Council-of-Attorneys-General-communicue-November-2019.pdf>). The Commonwealth has funded start-up costs to develop a National Child Protection Information Sharing Solution (see submission 95 to this inquiry, from the Department of Social Services, p4). Relationships Australia also encourages monitoring efficacy of information-sharing schemes recently established in Victoria following the Victorian Royal Commission into family violence

¹⁴ ALRC Report 135, paragraph 4.138

confidentiality arrangements. This may lead to under-disclosure of issues for which help could be sought and given without fear of information being weaponised in the context of litigation, and

- where beneficial to users – co-located services;¹⁵ we continue to advocate for Family Wellbeing Hubs.¹⁶

If Hubs are not implemented, then more services, including child protection services, should be co-located within court facilities to foster closer working relationships and more collaborative professional cultures. We acknowledge work currently underway to co-locate child protection and family violence support workers at each of the family law court premises, as well as the establishment of multi-disciplinary Family Advocacy and Support Services.¹⁷ Relationships Australia would add that child protection and family violence support workers should also be co-located at the proposed Families Hubs.¹⁸ Co-location has proved a successful mechanism to improve collaboration and information sharing between systems. National Legal Aid noted that:

The experience of co-location has been transformative. It has enabled improved sharing of information, and a better understanding of perspectives and roles which addresses some of the potential barriers to collaboration occurring.¹⁹

B.1 National database of orders

In 2015, the Family Law Council recommended the development of a national database of court orders, to include orders from all family courts, State and Territory children's courts, State and Territory magistrates courts and (possibly) State and Territory mental health tribunals.²⁰ Subsequently, Australian Governments have collaborated so that all domestic violence orders issued in an Australian state or territory, from 25 November 2017, are automatically recognised and enforceable across Australia. Orders made before that date can be declared to be nationally recognised.²¹

¹⁵ ALRC Report 135 expressed concern that co-located services may be unsafe for users where high conflict and/or family violence is present. This overlooks the fact that many existing services already operate safely and successfully, assessing and managing risk as part of their core business. This includes courts, FRCs, CCSs, and community legal centres.

¹⁶ As described in section A.2 of the response to paragraph (e) of the Committee's Terms of Reference.

¹⁷ ALRC DP 86, Proposal 11-7.

¹⁸ For detail on the proposed Families Hubs, see section A.2 of our response to paragraph (e) of the Committee's Terms of Reference.

¹⁹ Submission 163 to the ALRC inquiry into the family law system. We would also respectfully draw to the Committee's attention the limitations and opportunities for improvement in currently operating co-location models, noted by the ALRC at paragraph 11.54 of DP86.

²⁰ See the 2015 interim report of the Family Law Council; in particular, recommendation 5. See also chapters 5 and 9 of the 2016 final report.

²¹ See <https://www.ag.gov.au/FamiliesAndMarriage/Families/FamilyViolence/Pages/National-Domestic-Violence-Order-Scheme.aspx>

The Australian Government and state and territory governments should consider continued expansion of the National Domestic Violence Order Scheme to include all categories of order identified by the Family Law Council.

B.2 Cross-jurisdictional orders

Relationships Australia supports initiatives to empower, facilitate and appropriately resource State and Territory judges to make orders to help families already before them on other matters (eg protection order applications and child welfare matters). We note that work is currently underway in this regard.²²

B.3 Multi-disciplinary networks

Relationships Australia respectfully draws to Committee's attention the highly successful Family Law Pathways Networks, in operation now for over a decade. These Networks are integral in developing and providing information about family law and family law services through websites, service directories, and printed resources. They foster collaborative relationships between individual professionals and practitioners across an array of services (eg police, teachers, GPs, as well as family relationship services providers, lawyers and judges). These resources support professionals in all parts of the system to help their clients navigate the 'system'. We recommend that the Committee support ongoing resourcing of these Networks.

B.4 Domestic/apprehended violence orders in family law proceedings

We agree with the Law Council of Australia that

The family courts would be assisted by having any relevant information from police and child welfare agencies before them *on the first return date* as happens in the Family Court of Western Australia, which is a state court and where there are protocols in place to ensure family consultants can gather this information and provide same to the judicial officer.²³ [emphasis added]

The family courts should give relevant professionals in the family violence and child protection systems access to the Commonwealth Courts Portal to enable them to have reliable and timely access to relevant information about existing federal family court orders and pending proceedings.²⁴

The Australian Government and state and territory governments should develop a national template for a summary of child protection department or police involvement with a child and family which could be given to family courts.²⁵

²² See <https://www.ag.gov.au/About/CommitteesandCouncils/Council-of-Attorneys-General/Documents/Council-of-Attorneys-General-communique-November-2019.pdf>

²³ Submission 43 to the ALRC inquiry, paragraph 357.

²⁴ ALRC DP 86, Proposal 11-6.

²⁵ ALRC DP 86, Proposal 11-9. See references in notes 77 and 78 to paragraph 11.72.

Relationships Australia considers that governments should work together to require child protection agencies to share with family courts their recommendations, as well as information they have about the nature and degree of risk. Relationships Australia respectfully draws to the Committee's attention Judge Harman's comments about the value of the 'Person History' that can be provided under New South Wales child protection legislation.²⁶

²⁶ See paragraph 11.71 of ALRC DP86.

Paragraph (b)

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

Overwhelming distress and dissatisfaction with the 'family law system' arise from:

- the quality of evidence on which family courts rely in making parenting and property orders, and
- the help available to families who struggle, on a day-to-day basis, to implement agreements or orders.

The ultimate source of these issues is a culture that entrenches and incentivises combative behaviours between parents. It crowns one parent a winner and designates the other a loser – and although most separating families do not end up before a judge, the atmospherics of that prospect pervade and distort all other steps and services with which parents engage.

Accordingly, this chapter shows that the binary win/loss outcomes delivered by the family law system endanger children and disempower parents from being the best parents they can be.

This chapter also:

- offers suggestions to divert more families away from win/loss systems at earlier points, and empower more families to resolve disputes themselves, with outside support as needed
- where court involvement is unavoidable – offers suggestions to reduce the potential harm of win/lose frameworks, and
- identifies options to help families safely and successfully implement agreements/orders.

Our key recommendations are to:

- implement universal screening of families for risk factors
- require parties to undertake pre-filing FDR for property matters
- undertake a national pilot of Interdisciplinary Collaborative Practice services²⁷
- encourage conciliation
- re-invigorate use of the Less Adversarial Trial provisions
- prudent use of case management approaches
- enable early fact finding, to prevent untested allegations becoming entrenched, and
- establish post-order and post-agreement services to help families implement them, and better address non-compliance.

A The adversarial system

In 1979, the first Chief Justice of the Family Court criticised adversarial processes, which produce win/lose outcomes, as being 'destructive of morale and [likely to] create bitterness for all.'²⁸ Successive Parliaments – and courts – have periodically sought to soften the harsher edges of the inherently combative structure baked into the 1975 Act.

²⁷ See also submission 119 to this inquiry, by Relationships Australia Victoria, pp 8-9.

²⁸ Evatt, E, 'The administration of family law', *Australian Journal of Public Administration*, 38(1), 1, at 10.

Yet the history of the family law system, from debates on the 1975 Bill onwards, is marked by recurrent, but ultimately unsuccessful, attempts to:

- minimise conflict between parents
- minimise 'lawyer-led' processes and structures
- reinforce focus on children's best interests and better provide for expression of children's fears, hopes and concerns, and
- minimise legal, bureaucratic and other system barriers to support safe and healthy families, whether intact, separating, separated or blended – or all of these at different stages.

A.1 Limitations of a lawyer-led win/lose system

In Anglo-Australian common law, from which the 'family law system' derives, a court cannot make its own inquiries, and must rely only on the evidence brought by the parties. Each party must present such evidence as supports their case and challenge evidence put by other parties to the dispute. For parties represented by expert advocates, who oversee and conduct their clients' litigation, this process has been historically accepted as reliably delivering outcomes which, while not always representing perfect justice, have enabled workable resolution of disputes between government and governed, between businesses, between businesses and their customers, and among other kinds of litigants.

But disputes arising from family separation are very different:

- increasingly, people represent themselves, and struggle to collect and present evidence that is admissible and probative; this is a significant burden to impose
- there is an imperative, enshrined in law, to support children's ongoing relationships with parents and other people with whom they have a meaningful relationship; where children are involved, parents and caregivers (for example) will often need to co-operate over several years in co-parenting or enabling children to enjoy those relationships
- in disputes involving children²⁹ - the fundamental issues are:
 - not the relative rights of the parties who are in front of the judge, but about the rights of children who are *not* parties and may not have anyone, even the over-stretched ICLs, speaking exclusively for their interests
 - the future wellbeing and healthy development of children - which is not a question of law which can be usefully determined by legal analysis.

Further, the future arrangements meant to safeguard and promote children's best interests are likely to require far more nuance than can be delivered by a win/loss judgment. There is, therefore, a dissonance between what parties to the dispute have been led to expect by the win/loss nature of litigation and the actual nature of the judgment which then has to be implemented by a parent who sees themselves (with a judge's 'stamp of approval') as a winner and a parent who sees themselves as having been – wrongly - branded a loser.

²⁹ Including disputes which are nominally about property, but where the needs of children are considered as part of property matters. If children are involved, a property dispute is never just about property – it will always affect children's development, wellbeing and relationships, too.

Difficulties in identifying probative and admissible evidence mean that family disputes which proceed to judicial determination are unnecessarily drawn out. The quality and timeliness of judicial decisions could be significantly enhanced by better evidence being made available to courts in a more timely and coherent manner.

Further, it has become evident over the past 40 years that a win/lose system, applied to family disputes, attracts and incentivises making unsupported allegations, which – in view of delays in the system – can remain untested for lengthy periods and ultimately distort any final resolution.

Finally, it should be noted that each well-intentioned attempt to pare back the legalism and combative nature of family law proceedings, even those which initially achieve their objectives, has been gradually eroded as problematic features and dynamics are re-asserted. The efforts to retrofit a lawyer-led win/lose system with problem-solving and multi-disciplinary features, have failed.

A different model is needed.

A.2 Self-represented litigants in the family law courts

Issues around the quality of evidence are exacerbated when one or more participants is self-representing. The trend towards self-representation continues to gain pace. The Family Court's Annual Report for 2018-2019 shows

... an increase in matters involving one or both parties not having representation at some point in their proceedings, from **21 per cent in 2017–18 to 29 per cent in 2018–19**. There has also been an increase in trials where both parties are unrepresented from **8 per cent in 2017–18 to 22 per cent in 2018–19**.³⁰ [emphasis added]

Unless legal costs are dramatically curtailed, it is likely that these percentages will continue to increase.³¹

In 2004, the former Chief Justice of the Family Court, the Hon Alastair Nicholson, wrote that increasing numbers of self-represented litigants leads to

Judges find[ing] themselves being presented with reams of unnecessary material, usually dwelling on events long past, adult rather than child focused, and replete with allegations about what each party is alleged to have done to the other. Witnesses who are called can provide little or no relevant information, and trials become lengthier and more expensive. The relationship between the parties – if it is not already in

³⁰ At p 25. The Court noted that it 'revised its counting rule for these figures and as such the values in this section differ from those published in previous reports. The figures now exclude cases that did not have a first court event (i.e. withdrew or discontinued before appearing at court) and so they had not proceeded beyond filing. The information about legal representation in these cases was often incomplete as the parties had not provided this information at the time of filing.' It is clear, nonetheless, that the appearance before Court of self-represented litigants continues to increase. Of clients calling the Family Relationships Advice Line, a high proportion are self-representing.

³¹ Relationships Australia acknowledges that people self-represent for reasons other than cost.

tatters – deteriorates to the extent that they are unable to effectively co-parent their children in the future...³².

Compounding these difficulties is the increasing probability that the capacity of individuals before the court is compromised by poor mental health or substance misuse. These co-occurring needs create complexity which it is unreasonable, and untenable, to expect judges to effectively manage.

With an increasing proportion of self-represented litigants, the justification for retaining a system relying on expert trained advocates retained by each 'side', overseen by a neutral adjudicator, are considerably weakened.

An alternative approach, not requiring legal representation, is needed, as is conferral of the necessary powers and functions on courts which can exercise a mix of judicial and investigative powers.

Relationships Australia proposes the establishment of a specialist tribunal, supported by a Counsel Assisting.³³ Piloting such a model was suggested by the Family Law Council (although limited to cases where parties were unrepresented).³⁴ Even where family members were legally represented, the judge would have far better access to relevant, probative evidence. Relationships Australia acknowledges the Constitutional barriers impeding implementation of an inquisitorial system at the federal level,³⁵ and considers these to give additional weight to the argument that state and territory courts should be better positioned – and including by adequate resourcing shared between the Commonwealth, states and territories – to exercise family law jurisdiction.

The hurdles faced by self-representing litigants would readily be addressed by a counsel assisting approach (including cross-examination of or by vulnerable individuals). This approach would better support ongoing co-parenting than locking parents into win/lose dynamics, as compellingly observed by numerous submitters to this Committee, the ALRC inquiry and the numerous previous inquiries. Courts are not the inevitable, or even preferable, forum in which to resolve issues presenting in high conflict families.

B A better approach – from combat to co-parenting – supporting safe and healthy relationships into the future

Relationships Australia has previously proposed, in its submission responding to ALRC IP48, that matters about children should be dealt with in an inquiry-like proceeding before which parents or caregivers would be witnesses, not parties, and in which counsel assisting would

³² The Hon Alastair Nicholson, 'Sixteen years of Family Law: A Retrospective' (2004) 18 *Australian Journal of Family Law* 131, 144.

³³ See section C.1 of the response to paragraph (f) of the Committee's Terms of Reference.

³⁴ As noted in ALRC IP48, paragraph 118.

³⁵ See, for example, concerns raised by the Opposition in its dissenting report on the Parenting Management Hearings Bill, 26 March 2018.

assist decision-makers by finding and presenting evidence about the nature of the best interests of the child/ren and how those interests can best be promoted.

In this section, Relationships Australia recommends:

- universal screening for risk factors
- requiring pre-filing FDR for property matters
- undertaking a national pilot of Interdisciplinary Collaborative Practice services,³⁶ and
- encouraging conciliation as an alternative to help people resolve their disputes without going to court.

B.1 Universal screening for risk factors

Relationships Australia commends to the Committee FL-DOORS,³⁷ which is a validated tool to screen for risk factors. It is a three-part framework to be used by frontline workers to identify, evaluate and respond to a variety of risks in separated families. The risks targeted by FL-DOORS are

...key historic and current factors associated singly or in combination with increased risks for perpetration or victimization in domestic violence and risks to parent, infant, and children wellbeing.³⁸

The universal use of such tools by family relationship service providers guards against clients underreporting risk factors.³⁹ Using the tool with *all* clients – namely, universal screening – means no client is unfairly targeted; for example, by being asked questions about risk because of gender. Importantly, all clients are asked all risks about victimisation, perpetration and harm to self and to children. Asking clients to self-report gives them permission to disclose risks and gives permission to staff to ask about risk. Skilled practitioners then explore risk with a view to promote safety and wellbeing without needing to investigate allegations, which neither federal family law courts nor service providers are equipped to do.

Wells, Lee et al, 2018, observed that use of FL-DOORS for paired partners yielded responses that corresponded closely; ie that people gave responses about risk factors that corresponded with their partners' responses about those factors. Thus, more widespread use of FL-DOORS by diverse professionals in the system could enable reliable identification of where risk lies and families who could most benefit from targeted services. Use of this tool, at early contact with service providers, would reduce the entrenchment, through protracted legal proceedings, of untested allegations, and enable tailored and more efficient service provision.

³⁶ See also submission 119 to this inquiry, by Relationships Australia Victoria, pp 8-9.

³⁷ McIntosh, 2011.

³⁸ Wells Y, Lee J, Li X, Tan S E and McIntosh J E, (2018) 'Re-Examination of the Family Law Detection of Overall Risk Screen (FL-DOORS): Establishing Fitness for Purpose', *Psychological Assessment* <http://dx.doi.org/10.1037/pas0000581>. Factors targeted by the tool include negative emotions about separation, coping, substance use, infant and child distress, self-safety concerns, whether others are worried about the respondent's safety, whether police have been called, family violence, unemployment, financial hardship, child support, legal problems, housing issues, feelings of isolation, illness/disability, lack of access to transport. See Table 1 of Wells, Lee et al.

³⁹ See O'Doherty et al, 2015.

B.2 Mandatory property FDR

Relationships Australia supports further development and funding of FDR as a proven means of diverting people from court. While the 2006 reforms saw filings in parental matters drop by 25%, filings in property disputes have increased, mainly due to the *de facto* reforms. Relationships Australia regularly sees successful parenting plan undermined by a later, combatively conducted, property dispute.

Pre-filing mediation should be mandated for property matters (and fees be similarly subsidised), as for parenting matters. This would:

- be consistent with the recommendations made in the *Access to Justice* report by the Productivity Commission in 2014
- divert many more families from going to court, or settling 'on the steps of the court' after enduring lengthy, combative and expensive legal proceedings to that point, and
- significantly reduce court workloads, as has been the case for parenting matters.

This proposal is described in more detail in section C of the response to paragraph (d) of the Committee's Terms of Reference.

B.3 Interdisciplinary collaborative practice

There is scope for much broader use of interdisciplinary collaborative practice (ICP) in Australia. Relationships Australia acknowledges that it is generally very costly. However, these would be 'front-loaded' costs which would save the greater cost (to families and taxpayers) of going through to contested hearings and final orders. Relationships Australia recommends that Government recognise ICP as an alternative to FDR, and fund a pilot for selected families who would otherwise (because of complex circumstances) consume significant court time in multiple interim, appeal and/or post-order proceedings. Relationships Australia New South Wales and Relationships Australia South Australia currently offer ICP services.

B.4 Conciliation

Relationships Australia also supports the consideration of conciliation services in parenting and property disputes. In conciliation, practitioners provide advice on the matters under discussion, drawing from their expertise in the content under discussion.

C When court is the only option⁴⁰

There will always be a small cohort of children who need judicial intervention to decide how their parents or caregivers should meet the children's best interests. Where courts must be involved, the inherently combative nature of litigation should be modified by, for example:

- as a minimum - re-commitment to using the Less Adversarial Trial provisions, and

⁴⁰ Court reform proposals are detailed in section C of the response to paragraph (c) of the Committee's Terms of Reference.

- acknowledging that the fundamental issue in parenting matters (better described as ‘children’s matters’) is not one that can be resolved by a judicial process producing win/loss outcomes.

C.1 A minimalist suggestion – revive use of Less Adversarial Trial provisions

The 2006 reforms:

- introduced mandatory family dispute resolution for children’s matters
- established Family Relationship Centres and Family Law Pathways Networks
- emphasised the need for both parents to be involved in their children’s lives, and
- introduced the Less Adversarial Trial provisions in Division 12A of Part VII of the Act.⁴¹

These reforms acknowledged that ‘adversarial legal processes play a part in exacerbating parental conflict and inhibiting the development of parenting capacity.’ They have, over the years, successfully diverted many families away from the win/lose landscape of expensive and lengthy court battles.⁴²

The Less Adversarial Trial processes, set out in Division 12A of Part VII of the Act emerged from the pilots of the Children’s Cases Programme in Sydney and Parramatta.⁴³ This Program was initiated by then Chief Justice Nicholson and was positively evaluated. Over time, however, the Less Adversarial Trial provisions fell into disuse. The Family Court has attributed this to insufficient numbers of family consultants, and insufficient court time.⁴⁴ The ALRC observed that:

...properly resourced and implemented, [the LAT provisions] largely correspond with the essential components of the multi-disciplinary panels or tribunals proposed in submissions...they are expressly child-focused, quasi-inquisitorial, focused on safeguarding children and parties from family violence, designed to promote cooperative child-focused parenting, and are to be conducted without due delay.⁴⁵

C.2 Case management

The ALRC acknowledged:

- the prevalence of complex health, emotional, psychological and financial needs among families who dominate the court lists
- fragmentation of laws, systems and processes, and

⁴¹ See the *Family Law (Shared Parental Responsibility) Amendment Act 2006*.

⁴² By way of illustration, KPMG’s analysis reported that FRCs were attended by 80,000 people per annum.

⁴³ The Children’s Cases Programme was established by the then Chief Justice of the Family Court, the Hon Alastair Nicholson, drawing from inquisitorial processes used overseas; see also the Hon Diana Bryant AO QC in the Foreword to the *Less Adversarial Trial Handbook*, 2009.

⁴⁴ Submission 400 to the ALRC inquiry, cited at ALRC Report 135, paragraph 5.150.

⁴⁵ Paragraph 5.151 of ALRC Report 135. ALRC includes use of both family consultants and court appointed assessors.

- the merits of a public health approach and accessible multi-disciplinary services in helping families affected by serious social, emotional, psychological and economic needs.

In response, it recommended court-centred case management.

However, there are (at least) two strands to case management, which the ALRC conflated. One strand focuses on the family; the other on the litigation. While there is some overlap, a system designed to de-escalate conflict, promote safe and healthy relationships, and minimise use of expensive court resources, would clearly differentiate these.

Case management of the family

The functions of this strand include:

- helping with navigation of inter-locking but fragmented systems
- co-ordinating information sharing⁴⁶
- ensuring the family's holistic needs are met (*especially* those of the children), and
- facilitating children's participation as developmentally appropriate.

This strand of case management must be available irrespective of whether a family ever goes near a court – which is not the case for the overwhelming majority of separating families.

FASS support services could be expanded to provide case management where a client has complex needs and cannot be linked with an appropriate support service providing ongoing case management.⁴⁷ Were Government to prefer it, Relationships Australia would also support the suggestion that courts make available navigators to provide ongoing support and referral.⁴⁸ This function could be performed by child development professionals working in expanded FRCs (including parenting co-ordinators⁴⁹ where orders have been made), and thus aligns with the ALRC's recommendations about expanding services offered by FRCs.⁵⁰

Case management of the litigation

The functions in this strand would be undertaken by the ALRC-envisaged court consultants, employed by the courts, who would shepherd a matter through the court once an application is filed, ensuring deadlines are met, appropriate materials filed in a timely manner, and act as a 'gatekeeper' for interim applications or post-order contravention applications. The functions could include liaising with family case managers and FASS staff where service gaps, diversionary opportunities, or other unmet needs are identified. Having court consultants perform such functions would free up expensive judicial resources.

⁴⁶ Cf paragraph 4.129ff; Recommendation 2 of ALRC Report 135; see also the response to paragraph (a) of the Committee's Terms of Reference.

⁴⁷ ALRC DP86, proposal 4-6.

⁴⁸ See submission 30 to the ALRC inquiry from Peninsula Community Legal Centre.

⁴⁹ See section D of this chapter.

⁵⁰ See recommendations 59 and 60 of the final report of the ALRC, 2019.

Funding case management

Relationships Australia urges the Committee to recommend that funding case management as a discrete service. Currently, there is no allowance in Government funding for case management; case management hours are not reported or counted unless the client is present.

C.3 Greater use of early fact finding by the family law courts

Relationships Australia notes the power conferred by s69ZR of the Act, and the Commission's observation that it is seldom used. On balance, we consider that early fact finding hearings would be beneficial. They could support early prioritisation of safety issues,⁵¹ and help to avoid entrenchment of unfounded allegations. Currently, successive interim orders, covering lengthy time spans, can persist for lengthy periods. This further entrenches interparental conflict and acrimony, and harms children.⁵² Such hearings might also narrow issues to enable faster resolution.

A further potential benefit of early fact finding hearings would be in creating additional and earlier opportunities to direct families to access supportive specialist services; for example, children's contact services, or parenting order programs. Timely access to a CCS and Parenting Orders Programs could enable safe *ongoing* contact between children and both parents while waiting for a hearing. Parenting Orders Programs can facilitate communication about the children and help parents to separate their emotions and focus on the needs of their children. This is particularly beneficial for young children and recently-separated families, where periods of time away from parents/caregivers can have significant developmental impacts on children. At present, delayed access to CCS can mean that children initially lose contact with a beloved parent, then may have supervised contact when a CCS place becomes available, get used to the parent over six visits, and then can lose contact for weeks or months before the court orders large chunks of unsupervised contact.

Families whose matters go to an early fact finding hearing should be given (in a format appropriate for their needs) information assuring them that, regardless of findings in an early hearing, they can still access the full suite of supportive services. Also, because circumstances can change after early fact finding, risk assessment should be dynamic so that complacency does not set in and service providers rely on early, and potentially outdated, findings.

Accordingly, family law courts should be resourced to employ family consultants to write reports earlier in proceedings, and to ensure those family consultants are properly trained and supervised; alternatively, a community or independent statutory agency⁵³ could assume this function.

⁵¹ See submission 55 to the ALRC inquiry, the Australian Psychological Society, 25.

⁵² Noting too the observations in the PwC report, 2018, that interim orders are a proxy for final orders and, to a considerable extent, drive court workloads. If early fact finding hearings can reduce the number and operation of interim orders, then this could benefit families and courts. See also submission 25 to the ALRC inquiry, Australian Association of Social Workers, p 7.

⁵³ Such as a child protection agency, or a statutory agency modelled after the CAF/CASS in the United Kingdom.

D Helping families after an agreement or order is made

The ALRC's Final Report acknowledged stakeholders' insistence on 'the need for improved measures to support highly conflicted parties to implement parenting arrangements and develop positive post-order communication.'⁵⁴ Recommendations 38 and 39 are intended to go some way to address this, but also suffer from court-blinkers and overlook innovations that do not require expensive court resources.

Post-order and post-agreement services, outside the court setting, should be available.⁵⁵ In this section, we respectfully draw to the Committee's attention service models that could prevent families from having to endure repeat court events (whether for interim orders, appeals or enforcement applications).⁵⁶ We note a study of court files published by AIFS in 2015 '...showed a high rate of repeat litigation in children's matters, with nearly four in ten judicially determined cases having previously been before the courts.'⁵⁷

The service models described below could build families' capacities to self-manage, communicate more effectively and de-escalate conflict. Such services could usefully be located in Families Hubs, as described in section A.2 of the response to paragraph (e) of the Committee's Terms of Reference.

D.1 Existing resources

Existing tools, such as *Parenting orders: what you need to know*, published by the Australian Government, could be complemented by an additional resource focusing on child development.

Such resources must be regularly reviewed to ensure that they are up-to-date. Such resources help parents to make sustainable agreements, and build their capacity to communicate and problem-solve issues that may arise with implementation of agreements and orders.

Children and their parents benefit significantly from participation in existing post-order support programmes. Successful participation can minimise repeated court events for matters such as alleged breaches of orders. Even where parents are able to reach agreement through mediation, it is still often difficult to manage implementation (particularly where there is a history of conflict and poor communication). At the point of reaching agreement through mediation or a final court order, parents are still processing their emotions, and they can benefit greatly from support before, during and after court orders or mediation agreements.

Participants in the Family Dispute Resolution Outcomes Study being conducted by Relationships Australia were interviewed about their experiences. They offered the following observations.

⁵⁴ ALRC report 135, paragraph 11.1

⁵⁵ Relationships Australia also notes existing resources, such as that *Parenting orders: what you need to know*, published by the Australian Government.

⁵⁶ See ALRC DP86, paragraphs 6.71, 6.80ff.

⁵⁷ Kaspiew et al, 'Court Outcomes Project (Evaluation of the 2012 Family Violence Amendments)' (Australian Institute of Family Studies, 2015) 49. See also Family Law Council, *Interim Report: Penalties and Enforcements* (March 1998) and *Final Report, Child Contact Orders* (June 1998).

Facilitator: Did you follow up on any of those services, or information that you were given?

Participant: I did that's how I got involved in the Communication Post-separation Course I...and it was absolutely wonderful it was really good...I think it might have been five or six sessions and that was a group workshop quite interesting being the only bloke in that scenario.

Facilitator: Can you talk a bit more about that?

Participant: Being the only guy well, once again handled absolutely wonderfully and in such a way that it was great because I was able to get an appreciation and an understanding and I think it was handled in such a way that they were able then in turn to get it from a male as well you know. Gender's only got X amount to do with something but it is kind of interesting and I especially, I guess when a lot of us in the situation are feeling aggrieved with the situation and the predicament that we're in, so that I must admit was nice and balancing...and as horrible the situation was, it helped me to realise that things just simply were. I wasn't an aberration, because obviously me and my sense of self-worth had obviously diminished incredibly you know, after a seventeen year relationship had folded like that. And so that was really quite valuable in that respect but lots of those tips and I still actually apply a number of them now believe it or not, I mean that's how effective it was.

D.2 Service models - Parenting Co-ordination

Parenting Coordination is a model of service developed in several international jurisdictions to address the needs of high conflict families to more effectively navigate the family law system, resolving problems related to the changing needs of families and reaching agreements that are more enduring and that provide better outcomes for children. Significantly, this service has been shown to reduce demand on court services and achieve more timely resolution of issues, benefiting families and children in particular.

Relationships Australia Western Australia (RAWA), which is using this model, has been a major provider of Family Law Services in Western Australia since 2000. The current range of services includes Family Law Counselling, Family Relationships Centres, Family Dispute Resolution and Legally Assisted Family Dispute Resolution, Child Contact Services and Relationship Education Programs. RAWA has also worked extensively in the domestic violence field with perpetrators, victims and children. Most recently, RAWA was the lead community service provider for Western Australia's implementation of the Family Advocacy and Support Services (FASS) pilot project, providing specialist family and domestic violence support for families accessing the Perth Family Court of Western Australia.

RAWA's extensive experience brought to light the need for a new service type to support families with a history of high conflict, leading to frequent representations to the Family Court of Western Australia. Researches into potential models led to Parenting Coordination. Several variations have been implemented in jurisdictions including several states in the USA, Canada and South Africa. RAWA considers the model of Parenting Coordination implemented in the jurisdiction of South Africa (Western Cape) to be the most appropriate for the Australian context.

Several definitions of Parenting Coordination have currency and flesh out the complex, hybrid nature of the model.

Parenting coordination is a non-adversarial, quasi-legal, quasi-mental health process which combines assessment, education, case management, conflict resolution and decision-making (Parker & Wilson, 2013).

...a child-focused alternative dispute resolution process in which a mental health or legal professional with mediation training and experience assists high conflict parents to implement their parenting plan by facilitating the resolution of their disputes in a timely manner, educating parents about children's need and with prior approval of the parties and/or the court, making decisions within the scope of the court order or appointment contract. (Association of Family and Conciliation Courts, 2006)

The Association of Family and Conciliation Courts (AFCC) has developed Guidelines for Parenting Coordination (Association of Family and Conciliation Courts, 2006). A chapter of the AFCC exists in Australia. Other jurisdictions have adapted and developed additional guidelines suited to their own legislative contexts or disciplinary perspectives.⁵⁸

Parenting Coordination differs from other comparable approaches in several important ways. It is a more intensive intervention than most others. Parenting Coordinators are usually contracted to work with the family for a significant period of time (2 years in some jurisdictions). A Parenting Coordinator works with both parties in the conflict. Processes vary, but usually include meeting individually with each parent and together, depending on the needs of the family. This allows the Parenting Coordinator to develop a thorough understanding of the nature of the relationships in the family they work with including the conflict styles of family members.

Most descriptions of Parenting Coordination stress the importance of the required skills of potential Parenting Coordinators. The positions require a combination of legal and mental health skills or, more specifically, psychological and applied social science typical of psychologists or social workers. What is essential is that Parenting Coordinators have the skills and abilities to work effectively with families in conflict. From a workforce development perspective, there are two options:

- upskilling candidates with a social science/allied health background with the requisite legal knowledge (an in-depth understanding of domestic violence in theory and practice is also essential)
- work with the legal practitioners to develop their capacity to work in a PC role (Henry, Fieldstone, Thompson, & Treharne (2011). There is currently a project underway at the University of Western Australia Law School to develop the capacity of legal practitioners to work with high conflict families (Howieson & Priddis, 2011). RAWA is also involved in this project and has an interest in bringing together the Parenting Coordination pilot and the UWA project as they evolve.

⁵⁸ British Columbia Parenting Coordinators Roster Society, American Psychological Society, Guidelines for Parenting Coordination in South Africa.

Parenting Coordination is not therapy. The focus is on assisting both parents to make decisions in the best interest of the child(ren) (Demby, 2016). The ability to think clinically is an asset that will assist Parenting Coordinators to plan and implement their engagement strategy with each family.

It is important that the Parenting Coordinator maintains at all times a clear focus on the agreed scope of their role and authority. Where Parenting Coordination is mandated by the court,⁵⁹ the scope of the Parenting Coordinator's engagement with the family, the nature and extent of their recommendations/decision making ability will generally be specified in the orders. In less formal circumstances, the scope of Parenting Coordination arrangements will need to be negotiated and clearly agreed by all parties.

A Parenting Coordinator can be appointed to work with families in resolving non-custodial matters. Parenting Coordinators do not make determinations about live with/time spent arrangements or any other significant decisions for which the Family Court of Western Australia is responsible.

The relationship between Parenting Coordination and the Family Court of Western Australia has been carefully considered. RAWA has worked closely with the former and current Chief Justice and the current Principal Registrar of the Court to explore the model and the 'scope of authority' of a Parenting Coordinator, and to develop suitable arrangements. From the outset, the Court has been supportive, acknowledging a strong and consistent need for the program.

A 'Template for Consent Orders Requiring Parenting Coordination' has been provided to all the Judges and Magistrates of the Court. Several cases have been referred to the Parenting Coordination program using this template and the arrangements are working effectively.

Similar arrangements already work in Western Australia in relation to Independent Children's Lawyers (ICLs). Many 'high conflict'/repeat attendees to the Family Court of Western Australia have been appointed an ICL. The ICL acts as the contact point, making decisions related to implementation of Court Orders and Parenting Plans. Parenting Coordination complements and supports ICL's and frees up the ICL to focus on advocating for the child's best interests.

In addition, RAWA's Child Contact Service (CCS) staff have regular contact with ICLs to discuss proposed actions/decisions regarding high conflict families. This can include amendments to court orders. For example, CCS staff may have concerns related to court-ordered telephone contact for the duration of supervised contact and propose an amendment. Staff will run this past the ICL, who either approves or rejects the proposed amendment. These collaborative amendments often extend to matters such as when visits happen, duration of contact, how the contact occurs and which children will attend contact (where concerns relate to some but not all of the children). It is rare that ICL objects to the proposed changes.

⁵⁹ Generally by inclusion in Court Orders.

One of the strongest perceived advantages of Parenting Coordination is continuity of engagement with high conflict parents. This contrasts favourably with the episodic nature of most other interventions in the family law system.

The relatively continuous nature of Parenting Coordination is necessary, given that it is targeted to families identified as experiencing high conflict who are more likely to need continuous (or frequently available) support. Parenting Coordination has the potential to deliver safer and more durable outcomes; for example, by offering an ‘implementation and enforcement’ role; where the Family Court has already made determinations and subsequent orders and a Parenting Coordinator is appointed to monitor compliance.⁶⁰

D.3 Service models – provision for ongoing case management post-order/post-agreement

Reliance on the court paradigm for post-order/post-agreement services, as contemplated by ALRC Report 135,⁶¹ will present the following problems:

- expense will always be a barrier (no matter how well courts are funded, they will always be prohibitively expensive for most people)⁶²
- people are at the mercy of court lists (and so are not as flexible or responsive for timing in dealing with day-to-day issues that arise for families), and
- difficulty in physical access by people in rural, regional and remote areas.⁶³

⁶⁰ The former Chief Justice of the Family Court of Australia, the Hon Diana Bryant AO QC has observed that: ‘A conceivable way around [potential constitutional issues], would be to design a parenting coordination model based on creating, rather than determining rights...that can be characterised as administrative rather than determinative, centred around consent and voluntariness amongst parents, so there is no improper delegation of decision-making powers, conflicting with Chapter III of the Constitution. To a large degree this is what is envisaged with the Government’s proposal for Parenting Management Hearings. Something similar could be setup for Parenting Coordination.’ (Submission 35 to the ALRC inquiry, Part Two). Relationships Australia takes an alternative view: that parenting matters are not about determining or creating parental rights and not, therefore, subject to exercise of judicial power. Nevertheless, we welcome consideration of all possible options to protect and promote children’s well-being.

⁶¹ See Recommendations 38 and 39.

⁶² Because, for example, of fixed costs that courts must manage (eg capital expenses and judicial salaries).

⁶³ Also taking into account travel and accommodation expenses.

Paragraph (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

The following response to this Term of Reference:

- acknowledges current challenges in the family law courts
- identifies reforms to decision-making structures to divert more families from the courts, and
- identifies options to reform existing court processes, procedures and practices.

Key recommendations in this response are to:

- fund courts properly so that they can offer timely disposition of disputes which are best resolved by specialist judicial expertise and experience, such as those raising:
 - complex or novel questions of law
 - complex asset structures and arrangements
 - cross-jurisdictional issues, and/or
 - an ongoing imperative to maintain a constructive relationship between parties⁶⁴
- divert more people from a 'one size fits all' litigation pathway
- reform court practices to better steward scarce and expensive public resources, and
- offer services that better respond to families' safety needs, and social and emotional difficulties.⁶⁵

A Current challenges for court services

In 1991, Brennan J (as he then was) of the High Court remarked that

It seems the pressures on the Family Court are such that there is no time to pay more than lip service to the lofty rhetoric of s. 43 of the act....It is a matter of public notoriety that the Family Court has frequently been embarrassed by a failure of government to provide the resources needed to perform the vast functions expected of the Court under the Act.⁶⁶

⁶⁴ Such cases, which are in the minority, should not drive the process and conceptual framework that is intended to meet the needs of the majority of families whose matters do not raise complex – *legal* – issues.

⁶⁵ Our responses to paragraphs (a), (b), (e), (f), (h) and (k) of the Committee's Terms of Reference describe service models which can better support families through and beyond separation to have safe and healthy relationships, particularly as between children and their parents.

⁶⁶ *Harris v Caladine* (1991) 172 CLR 84, 112.

The courts, as assets of the community, urgently need additional funding. However, increasing court funding can never be a complete answer to the question of how best to support separating families, because:

- a process designed to produce a winner and a loser will never be the best option through which to work through the relationship and child development issues emerging from parental separation, and
- well-funded relationship and health services offer a more helpful and durable response to families' needs.

What are complex needs?

Objections to diverting families away from courts are justified by pointing to the complexity of disputes relating to family separation. It is argued that courts uniquely suited to providing solutions to complex problems.

In the experience of Relationships Australia, over seven decades and across all population cohorts, the complexities experienced by families mired in the family law system are, for the overwhelming majority, *not* legal complexities. Rather:

The dynamics involved in family conflict have complex emotional, cultural, social, health and economic underpinnings. *Characterisation of family conflict as a 'legal problem' does not assist, and frequently exacerbates, dispute. Successful design and implementation of post-separation arrangements, for child issues particularly... requires the co-ordinated input of a range of expertise...*⁶⁷ [emphasis added]

Such complexities, and more appropriate responses to them, were canvassed in the 2015 and 2016 reports of the Family Law Council, to which Relationships Australia commends the Committee's attention. The complex needs described in those reports are not legal in origin, manifestation or (necessarily) remedy. They include, for example, mental health issues, homelessness, poverty, domestic and family violence, problem gambling and substance misuse.⁶⁸

Other issues that are recognised as driving complexity in family disputes,⁶⁹ such as family violence or criminality more broadly, may also attract a legal/justice system response, but that should be distinguished from responses to the relationship difficulties underlying family separation. Indiscriminately funnelling families with complex needs through court room doors in the hope that social and emotional problems can be solved by legal analysis has been amply demonstrated as a failed response to families' needs. Persistence with such a response endangers children.

⁶⁷ Marrickville Legal Centre, submission 137 to the ALRC inquiry, p 4; see also Kaspiew et al, 2015, and submission 53 to the ALRC inquiry, made by Family and Relationships Services Australia, p 44, noting the findings of the AIFS evaluation of the 2012 amendments in relation to the kinds of complexities with which families present to the family law system

⁶⁸ Noting also that 'complex needs' can also be used to refer to single issue, but high risk, families and families experiencing intractable conflict.

⁶⁹ See also AIFS, 2016, *Complex Issues and Family Law Pathways: Synthesis Report, Evaluation of the 2012 Family Violence Amendments*, Table 2.2, p 16.

The voices of parents should receive serious attention from Parliament. Parents interviewed for the ongoing Family Dispute Resolution Outcomes Study being conducted by Relationships Australia made their views very clear:

Participant: I have a fear that the court system isn't really looking at the best interest of the child, it seems very heavily geared to be equal between parents.

Facilitator: Can you tell me a bit about how mediation has affected your relationship with the other parent, if it has? **Participant:** It was very, very rocky there for a while, but I think after listening to what was said and that, I eventually came round to well, I just do my thing and [ex-Partner] does [their] thing, and we just worry about the kids. And we are actually talking more at the moment which is surprising....So we do communicate, it's all for the benefit of the two little rugrats.

When parenting matters are recognised – not only by parents, but by the community and the government - as inquiries about children's safety and best interests, and less about differences between parents, the incongruity of adjudication between adult parties, as to their 'rights and responsibilities' and what is fair to them as individuals, is stark. Acknowledging this opens up options that could resolve parenting matters, supporting parents to be effective co-parents into the future, and maximising opportunities for children to have safe, healthy and meaningful relationships with their parents beyond separation.

Deficiencies of the current landscape include:

- institutionalising and rewarding parental conflict (eg setting up contests of 'who can make their former partner look worse relative to them?')
- decision-makers relying on evidence put before them by parents, who may be self-represented and otherwise ill-equipped to gather probative evidence and present it in a cogent form
- the Constitutional limitations on the capacity of Chapter III courts to undertake investigation
- lengthy delays which entrench conflict, and produce multiple court events (interim and post-final order), in turn producing poor outcomes for children⁷⁰
- numerous court events that parties need to attend (and may need to travel long distances to do so – sometimes only for their matter not to be reached that day because of excessive and unrealistic listing)⁷¹

⁷⁰ PwC report, 2018, 28. See also submission 80 from the Bar Association of Queensland to the ALRC inquiry into the family law system. That submission observes that '...we speak of the horrible and long-term impacts on children where mum and dad cannot agree on a thing; where children pick up on the mega-messages of each parent....children can be negatively affected *even when the proceedings only involve property proceedings.*' (emphasis added) See also ALRC DP86, paragraph 6.51, noting submissions 142 (R Hainwsorth), 40 (Women's Law Centre of WA), 23 (Domestic Violence Victoria), 7 (Fitzroy Legal Service and Darebin Community Legal Centre), 129 (Relationships Australia Victoria), 126 (Interrelate), 118 (For Kids' Sake), 55 (Australian Psychological Society).

⁷¹ The PwC report, 2018, 32-33, attributes this difference largely to the pre-trial case management practices in the FamCoA; in the FCC, the judge manages this process from the point of filing. The PwC report suggests

- the need for, and barriers to, legal representation, particularly for vulnerable users and where there is a disabling imbalance of power between the parties; this need manifests itself many ways, including complex and technical information, forms and processes, and
- court processes (and physical facilities) that enable perpetuation of family violence.

Harm prevention is particularly critical for children. Processes and services that de-escalate conflict and address oppositional behaviour between parents are vital to harm prevention and supporting healthy child development in the context of parental separation. This is the most fundamental failure of the current court-centric system. It expects that children’s best interests can be protected by a winning parent and loser parent emerging, emotionally scarred and financially bruised (if not broken) from the prolonged turmoil of affidavits and cross-examination.

The situation for many children, enmeshed in their parents’ disputes, is dire and long-lasting. In too many instances, its repercussions will echo throughout their lives, bleeding into their relationships with their own partners and children. It is imperative for governments to break this cycle. An advanced society should not fail to protect its children because of blind insistence, in the face of all evidence, on a model that institutionalises and rewards parental conflict by offering only win/lose outcomes.

B Court reforms – making things better for families who do need the courts’ help

A range of potential reforms is set out in the table below. More detailed options are described following the table.

	Proposal	Summary of intended benefit to families
1	(a) Increase circuiting of first instance judges and locating registry staff in state and territory courts (including magistrates’ courts and specialist domestic violence courts). ⁷² This will become increasingly necessary to cope with population growth in rural and regional areas. Relationships Australia strongly encourages facilities being made available that promote safety for families, court staff, practitioners and others who attend premises (for example,	Foster improved collaboration; increasing accessibility by families in regional, rural and remote communities, as well as (for example) in outer suburbs of major population centres where it is difficult and expensive to get to city court precincts

(conservatively) that on a party/party basis, litigants can spend more than \$100,000 per matter in the FamCoA; in the FCC, this is closer to \$25,000. (see p 67). This estimate is expressed as excluding events such as transfer between courts, appeals of interim orders, time away from work, conferences with lawyers, and expert reports.

⁷² Submission 43 to the ALRC inquiry, paragraph 112.

	<p>having two entrances and separate waiting areas).</p> <p>(b) Resource courts in states and territories (including by funding and training) to exercise family law jurisdiction when families come before them with other matters⁷³</p>	
2	<p>Implement recommendation 40 of ALRC Report 135, which would require people to seek leave to appeal interim orders</p>	<p>Reduce court caseload, increasing efficiency for families waiting for hearings.</p> <p>Reduce misuse of expensive court resources for unmeritorious appeals, freeing judicial time for other families</p> <p>Provide more certainty around implementing interim orders</p>
3	<p>Require leave to appeal from the FCC, or first instance judges of the Family Court</p>	<p>Reduce appellate caseload</p> <p>Reduce misuse of expensive court resources for unmeritorious appeals, freeing judicial time for other families</p>
4	<p>Co-locate services wherever possible. This should include co-locating child safety services, and other specialist services, with courts and other services</p> <p>If Family Wellbeing Hubs⁷⁴ are implemented, then they should include court facilities (along the lines of the Collingwood Neighbourhood Justice Centre).</p> <p>In the absence of Hubs, more services, including child protection services, should be co-located within court facilities</p>	<p>Enhance accessibility for families, including in regional, rural and remote communities, as well as (for example) in outer suburbs of major population centres where it is difficult and expensive to get to city court precincts</p> <p>Example of integrated service delivery</p> <p>Relationships Australia New South Wales provides the FASS for men in Wollongong, Sydney, Parramatta and Newcastle family court registries. The service includes Men’s Behaviour Change programs, anger management, navigation, and counselling.⁷⁵</p>

⁷³ Eg child protection or family violence.

⁷⁴ As described in section A.2 of the response to paragraph (e) of the Committee’s Terms of Reference.

⁷⁵ For discussion of the value of men’s services, see section A.2 of the response to paragraph (e) of the Committee’s Terms of Reference.

		<p>Men have said that this service has been very useful and effective.</p> <p>This service also supports male victims of family violence (in the period 2015-17, this service received 129,810 inquiries from the Central Referral Point).</p> <p>FASS staff have worked effectively with men to reduce their emotional valence and support attendance at courses to reduce their potential to use family violence – and have it used against them.</p> <p>However, the capacity to offer services to men is confined, in the Pilot, to one day per week (in contrast to the women’s FASS, which is available throughout the week). The service does have additional funding for 12 months during 2019-2020 and is receiving a steady stream of referrals from judges, lawyers and the men themselves.</p>
5	Establish digital hearing processes ⁷⁶	Enhance accessibility for families, including in regional, rural and remote communities, as well as (for example) in outer suburbs of major population centres where it is difficult and expensive to get to city court precincts ⁷⁷
6	Amend the Act to recognise supported (vs substitute) decision making. ⁷⁸ Reform to the Act in this respect was widely supported by submitters, and would align with the Convention on the Rights of the Child and Article 12 of the	Enhance accessibility of the courts for children, as developmentally appropriate (for more discussion on children’s participation, please see our response to paragraph (f) of the Committee’s Terms of Reference)

⁷⁶ Note the Link Virtual Outreach project (http://womenslegal.org.au/impact_report/projects/project-two/), established by Women’s Legal Service Victoria which ‘... brings specialist legal advice and representation to women experiencing family violence across Victoria. Using Skype and other internet-based tools, the project coordinates a virtual legal practice, allowing WLSV lawyers to meet with clients from multiple locations around the state during any one day. Link provides assistance to some of the most disadvantaged and isolated women in Victoria, partnering with regional social services agencies across Victoria including health centres, family violence refuges and community legal centres (CLCs).

⁷⁷ See also proposal 17 below.

⁷⁸ See ALRC Report 135, paragraph 12.76. See also recommendation 46, p 379.

	Convention on the Rights of People with Disability ⁷⁹	Enhance accessibility of the courts for older people and people living with a disability
7	Amend the 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	<p>Existing court powers to manage unmeritorious or abusive use of the courts, in isolation of other parts of the ‘family law system’ appear to be insufficient to deter or sanction such misuse.</p> <p>The current provisions are confined in their operation to conduct in relation to court or tribunal proceedings. 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.</p> <p>Fragmentation of the ‘family law system’ allows significant scope to someone who wishes to engage in such behaviour without adverse consequences. Responses to misuse of systems and processes cannot be confined to consideration of what happens in legal proceedings before the court, but must also encompass conduct outside the court, but that is connected to the dispute.</p> <p>The definition of family violence in the Act should be amended to include misuse of legal and other systems and processes, by including ‘use of systems or processes to cause harm, distress or financial loss.’⁸⁰ Relationships Australia would encourage further consultation in developing provisions to identify and respond to such misuse. Not all misuse of processes and systems constitutes family violence.⁸¹</p>

⁷⁹ Noting, however, Australia’s interpretative declarations and the UN Committee’s comments on these. See also section C.3 of the response to paragraph (k) of the Committee’s Terms of Reference.

⁸⁰ ALRC DP86, proposal 8-3.

⁸¹ In its submission to the inquiry of the Senate Legal and Constitutional Affairs Committee into the Family Law Amendment (Parenting Management Hearings) Bill 2017, the Law Council of Australia noted that ‘It is widely acknowledged that the AAT child support jurisdiction has come to be used by perpetrators of family violence as a means of committing further family violence by exploiting the opportunity to take legal proceedings against the victim.’ (Submission 20, p 18, paragraph 51). This, in the respectful view of Relationships Australia, underscores the need to legislate to recognise that systems misuse, by parties to family dispute, can be achieved by a number of routes outside the family law courts.

		The characteristics described by the High Court in <i>Rogers v R</i> ⁸² would remain relevant.
8	Re-invigorate the consistent and national use of the Less Adversarial Trial provisions ⁸³	Mitigate the unsuitable features of an innately adversarial system
9	Confer on the Federal Court a concurrent jurisdiction in high value property disputes, especially those involving companies, trusts and substantial third party interests (or conferring a dual commission on selected Federal Court judges)	Ease the caseload for family law courts and reduce delays for families
10	Improve enforcement mechanisms and funding for enforcement, ⁸⁴ to complement post-order/post-agreement services proposed in our response to paragraph (b) of the Committee's Terms of Reference	Reduce the volume of repeat court events for families who are experiencing difficulties in understanding and/or complying with agreements and orders. This would assist in easing the caseload for family law courts and consequently reducing delays. Ensure that agreements and orders are given effect according to their terms, thus supporting the integrity of the system as a whole.
11	Develop case management protocols to support implementation of the simplified process for matters with smaller property pools (as canvassed in the detailed proposals below) ⁸⁵	Increase the family law courts' responsiveness to the particular needs of families with smaller property pools, and reduce court caseloads and delays for families.

⁸² *Rogers v R* [1994] 181 CLR 509.

⁸³ As discussed in our response to paragraph (b) of the Committee's Terms of Reference.

⁸⁴ Relationships Australia notes the submission from the then Chief Justice of the Family Court of Australia, the Hon Diana Bryant AO, to the Senate Legal and Constitutional Affairs References Committee, 28 March 2014, in relation to responses from the Australian Federal Police to referrals made by the Court when a possible breach of a Commonwealth law is suspected.

⁸⁵ See also Proposal 6-6 from ALRC DP86.

Proposal 12 The family courts should establish a common triage process to ensure that matters are directed to appropriate alternative dispute resolution processes and specialist pathways within the court as needed.⁸⁶

We concur with the observation of the Law Council of Australia that

The current family law litigation process imposes the same pathway on each litigated matter, regardless of the complexities of each case.⁸⁷

This is unhelpful, unnecessary and inefficient. It drives excessive demands on the courts, contributing to unreasonable wait lists, and preventing vulnerable families from engaging with specialist services, such as counselling and FDR, at an earlier stage.

Relationships Australia suggests that the first ‘gatekeeper’ in a Family Wellbeing System⁸⁸ should be Families Hubs (as described in section A.2 of the response to paragraph (e) of the Committee’s Terms of Reference). Families Hubs should conduct universal screening, risk assessment and safety planning, and initial triaging (with strong referral pathways into the courts for specialist lists). Risk assessment could then travel through the system with the family, obviating the need to re-tell the story multiple times to multiple people. The courts themselves could also benefit from implementing a robust and nationally consistent triaging system.

Family courts should offer ‘fast track’ services for:

- matters where there is a safety concern (including to enable courts to make earlier findings in relation to allegations of family violence) and prevent unfounded allegations becoming entrenched
- matters in which a parent is denied reasonable contact with children
- property/debt disputes under a particular monetary limit – see Proposal 15, and
- those seeking a parenting order in families where a person with parental responsibility becomes terminally ill, to facilitate the making of appropriate arrangements.⁸⁹

Proposal 13 The common triage process should involve a team-based approach combining the expertise of the court’s registrars and family consultants to ensure initial and ongoing risk and needs assessment and case management of the matter, continuing, if required, until final decision.⁹⁰

Relationships Australia supports a triage process supported by a team-based approach. Relationships Australia South Australia has established the merits of universal risk screening

⁸⁶ This proposal is derived from Proposal 6-1 in ALRC DP86.

⁸⁷ Law Council of Australia, submission 43, paragraph 132.

⁸⁸ See section A of the response to paragraph (e) of the Committee’s Terms of Reference.

⁸⁹ Relationships Australia South Australia has conducted such a service.

⁹⁰ This proposal is derived from Proposal 6-2 in ALRC DP86.

which is ongoing and covers a range of potential risks, not just those relating to family violence.⁹¹

Proposal 14 To provide court services that respond to families' unique needs, all family law courts should establish an Indigenous List.⁹²

We note the success of the Indigenous List in Sydney and support its practices which we understand to include:

- a case management model
- short breaks between court events, to support swift resolution
- a closed court
- allocated time to hear the list, and
- the attendance, outside the court room, of relevant service providers who can then be called upon by the judge to come into the court room so that referrals can be arranged on the spot.

Relationships Australia Northern Territory sees a great need for advisors to work closely with communities and Aboriginal organisations to educate and make explicit the differences between family law and other law as it pertains to child protection and domestic violence. There is very little understanding of the differences of jurisprudence between types of courts and great suspicion towards the law being involved with families.

Relationships Australia welcomed Government funding to re-instate positions in selected family court registries for Aboriginal and Torres Strait Islander people.

Proposal 15 The Family Law Act should be amended to provide for a simplified court process for matters involving smaller property pools.⁹³

This proposal complements the proposal, described in our response to paragraph (b) and section C of paragraph (d) of the Committee's Terms of Reference, to extend pre-filing FDR requirements to property and finance matters. Conciliation and arbitration should be given more prominence as potential pathways.⁹⁴

A fast-track would greatly help families affected by financial abuse and family members who are at risk of homelessness in the absence of an urgent disposition of property and finance matters.⁹⁵ Relationships Australia welcomes the Small Claims Property Pilot, announced by the

⁹¹ For more information on FL-DOORS, see our response to paragraph (b) of the Committee's Terms of Reference.

⁹² This proposal is derived from Proposal 6-3 in ALRC DP86.

⁹³ This proposal is derived from the more detailed Proposals 6-4 and 6-5 in ALRC DP86.

⁹⁴ See submission 43 to the ALRC inquiry, paragraphs 286-290. We agree with the comments of the Law Council of Australia about the need for certainty of the effect of arbitral awards and the need for timely access to arbitration.

⁹⁵ Consideration of the current FASS being piloted in the Family Court of Western Australia would be of value.

Attorney-General in late 2019.⁹⁶ This pilot will run for two years in Federal Circuit Court Registries in Brisbane, Parramatta, Adelaide and Melbourne.

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 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. There is precedent for this occurring, which was the catalyst for the Co-ordinated FDR trials some years ago. Relationships Australia concurs with the Bar Association of Queensland that

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 FDRP (mediator) 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.⁹⁷

Proposal 16 The family courts should consider establishing a specialist list for the hearing of high risk family violence matters in each registry. The list should have the following features:

- a lead judge with oversight of the list
- a registrar with responsibility for triaging matters into the list and ongoing case management
- family consultants to prepare short and long reports on families whose matters are heard in the list, and
- a cap on the number of matters listed in each daily hearing list.

All of the professionals in these roles should have specialist family violence knowledge and experience, as well as expertise in trauma-informed practice and child inclusive practice.⁹⁸

Family violence is rarely present in isolation from other complexities such as substance abuse, mental health problems or personality disorders.⁹⁹ Relationships Australia Western Australia, for example, reports that families presenting with complex needs are prevalent in the Family Court of Western Australia. This Court has been proactive in providing annual family violence training to judicial officers and family consultants. In addition, staff from the Department of

⁹⁶ <https://www.attorneygeneral.gov.au/media/media-releases/pilot-program-save-time-and-money-separating-couples-29-november-2019>.

⁹⁷ Submission 80 to the ALRC inquiry, p 12. See also the submission to the ALRC inquiry from the Australian Psychological Society, submission 55, 29.

⁹⁸ This proposal derives from Proposal 6-7 of ALRC DP86.

⁹⁹ See, for example, the submission of Relationships Australia South Australia in response to ALRC IP48 (submission 62), 4.

Communities are co-located in the Court to assist in managing cases with these complexities. Relationships Australia Western Australia considers that co-locating, in courts, professionals from different disciplines would be preferable to establishing a specialist list for the Court's core demographic.

A general high risk (ie all risks, not just family violence) list should be established, supported by universal risk screening, using a validated screening tool such as FL-DOORS. Eligibility for inclusion on the list should be determined by reference to a combination of high risk and low protective factors, and through a multi-disciplinary lens. Criteria for inclusion could include:

- the existence of AVOs and non-contact orders (or situations when such orders cannot be served)
- if the family has been assessed as not appropriate for FDR
- when only supervised contact is allowed with children
- the presence of financial abuse
- whether child protection authorities have been engaged with the family
- whether there have been suicide threats or attempts, and
- whether mental health problems or personality disorders are known to exist in the family.

Families presenting with a combination of high risk/low protective factors need accelerated access to specialist support, legal assistance and judicial resolution of issues. Again, the presence of family violence, and other complex needs, do not *per se* render FDR unsuitable. People who have experienced family violence, and who generally report not feeling safe with their partners, may prefer FDR to litigation. Set out below are comments from the FDR Outcomes Study conducted by Relationships Australia:

Participant: ...they were really supportive in that you know, if either of us wanted to call time out or if we weren't feeling safe just to let [the mediator] know, and I felt like that support was there for both of us. They weren't more inclined to give the support to the boys' mum, they weren't more inclined to give support to me. It was a very neutral, but very supportive process, yes.

Participant: I can't talk to my ex-husband, because he would scream at me. So I've got a situational anxiety based on him and his behaviours, which our mediator was aware of and...[the mediator] was very diplomatic and there was no bias or anything like that. He was just aware of any triggers and escalation from dad's side and smoothed things over really well....¹⁰⁰

Proposal 17 The Australian Government should work with state and territory governments to develop and implement models for co-location of family law registries

¹⁰⁰ A recent study undertaken by AIFS also confirmed the effectiveness of FDR: see Qu, *Family Dispute Resolution: Use, Timing and Outcomes* (2019), <https://www.onlinelibrary.wiley.com/doi/10.1002/anzf.1349>

and judicial officers in local court registries. This should include local courts in rural, regional and remote locations.¹⁰¹

There appears to be broad agreement among stakeholders about the burdens imposed on families by physical fragmentation (as well as jurisdictional and other forms of fragmentation),¹⁰² and the burdens it places on vulnerable, fraught families. Relationships Australia supports co-location of family law registries and judicial officers in local court registries (including those in rural, regional and remote locations).¹⁰³ There is ample literature demonstrating both the urgent need and the benefits of co-located services for the many Australians who are engaged, simultaneously or consecutively, with multiple court systems. Certainly, a child-focused system needs to embrace co-location, through embedded staff, as a key way in which to prevent children and their families from falling through the cracks.

Services need to be where people actually live their lives, so that they don't need to travel to major population centres to access traditional judicial services. The need to do so raises substantial practical barriers, including availability and cost of transport (public or private), parking, and child care, with all the costs that attend purchase of these services in cities. Technology can and should be part of this solution, through virtual courtrooms and other like services, but is not a complete solution. It offers

...an opportunity to refocus the family law system from being court-centred to '*being seen more as a service rather than a physical venue*', to widen access to justice, and to have '*its primary focus on informing and assisting the public in containing and resolving...disputes...with less intervention by a judge.*' [emphasis in original]¹⁰⁴

Proposal 18 – miscellaneous measures to simplify court processes

Other reforms which could simplify and streamline court processes include:

- a single point of entry into the family court system and a single first instance court
- a single set of rules of court¹⁰⁵

¹⁰¹ This proposal derives from Proposal 6-8 of ALRC DP86. See also our responses to paragraphs (a) and (b) of the Committee's Terms of Reference, suggesting co-location of services as a means to reduce fragmentation and its burdens on families.

¹⁰² See also submission 55 to the ALRC inquiry, the Australian Psychological Society, 32.

¹⁰³ Relationships Australia notes with interest the Australian Psychological Society recommendation to develop a 'rural model for the family law system that better incorporates the use of technology and mobile panels.' (submission 55 to the ALRC inquiry, recommendation 8).

¹⁰⁴ Submission 43 to the ALRC inquiry, paragraph 292, referring to Graham Ross, 'The Online Court – Misunderstandings and Misconceptions when Delivering a Vision for the Future of Justice' (2015) 1 *International Journal of Online Dispute Resolution*.

¹⁰⁵ Harmonisation of court rules was suggested in the PwC report, 2018, 59; see also pages 73-74, 80. Streamlining the court system was supported by Family Law Committee of NSW Young Lawyers, submission 108 in response to ALRC IP48, 3. See also submission 35 in response to ALRC IP48, from the Hon Diana Bryant AO QC.

- registry practices that are nationally consistent¹⁰⁶
- a single set of court forms
- a single interface through which to transmit and enter user data
- use of Easy English to provide court users with comprehensive, accurate and up-to-date information about the courts, and
- consistent processes across individual judges and registries.¹⁰⁷

¹⁰⁶ See Family Law Committee of NSW Young Lawyers, submission 108 in response to ALRC IP48, pp 4-5, noting that diverse registry practices cause 'confusion and the risk of inconsistency of experience and outcome in the court system.'

¹⁰⁷ See section C.1 of the response to paragraph (b) of the Committee's Terms of Reference.

Paragraph (d)

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’

Quotes from Property FDR clients¹⁰⁸

Participant:...if you can work it out together and come out of it the other end without being thousands of dollars short, but also without fighting each other across the court room, you’re a lot better off. For yourself, emotionally, and for your family.

Participant: I think that was one of the best things we both did – to decide to do mediation, together. I think it makes you think about your ex-partner, it makes you think about their wellbeing, it makes you think about their financial wellbeing.

This chapter of the submission explores:

- issues with the current arrangements for disputes about property, finances and debts
- services offered by Relationships Australia to help families with property disputes, and
- options to empower families to resolve disputes themselves, without lengthy court battles.

Key recommendations in this chapter relate to:

- legislative reform:
 - by mandating pre-filing FDR for property/finance disputes¹⁰⁹
 - taking family violence into account in property/finance disputes, and
 - simplifying provisions relating to how superannuation is treated
- support for legally-assisted FDR
- fees for legal services, and
- re-location disputes.

A Setting the scene – complex, unpredictable, expensive and lengthy

During and after separation, many families look for affordable mechanisms for settling property and financial disputes.¹¹⁰ However, the cost of access to legal services and the family courts is prohibitively high - often entirely disproportionate to families’ income, assets and debts.

¹⁰⁸ From a national study of FDR outcomes undertaken by Relationships Australia organisations.

¹⁰⁹ See also section B.2 of the response to paragraph (b) of the Terms of Reference.

¹¹⁰ ALRC DP 86, paragraph 5.18. See also submission 53 from Family and Relationship Services Australia, pp 34ff and submission 137 from Marrickville Legal Centre. Relationships Australia concurs with the observations put forward by Dr Bruce Smyth and Family Relationship Services Australia in their submissions responding to IP48. See Submission 104, 5, referencing submission 13 to the House of Representatives Standing Committee on Social and Legal Affairs, *Parliamentary Inquiry into the Child Support Program*, authored by Dr Smyth and Bryan Rodgers; FRSA submission 53, 38-39, describing various approaches taken by FRSA member organisations.

Further, it is extremely difficult for families (even with legal advice) to make a reliable prediction of how an individual judge might apply the Act in their particular cases; families cannot get useful guidance on how the Act will be applied in even commonly-arising circumstances.¹¹¹ This is because the Act confers on judges very wide discretions, requiring judges to take into account numerous and complex factors in reaching their decisions. This is one reason why

For property and financial matters however, parents are half as likely to use FDR, three times more likely to use lawyers and twice as likely to use courts.... This trend even applies to families with asset pools of \$40,000 or less.¹¹²

The ALRC interpreted evidence given by both users and professionals in the family law system to

suggest that the property settlement regime under the [Act] needs to be *tailored primarily to the needs of the average Australian separating couple, whose assets are relatively small in number and value*. At the same time, the [Act] must provide a framework for the resolution of more complex and high value disputes in a fair and equitable manner.¹¹³ [emphasis added]

In Report 135, the ALRC advised that the Act 'should provide a clear and easily understood framework that provides sufficient guidance for courts, legal advisers, and the public on the factors that are to be considered when adjusting the property and financial interests of parties on the breakdown of a relationship.'¹¹⁴

We agree.

Many Relationships Australia clients are financially stressed, but have just sufficient assets to be excluded from legal aid. They struggle to afford basic legal advice, let alone representation in court, even though early and inexpensive legal advice can be invaluable in enabling clients to resolve disputes themselves.

Thus, cost, complexity and delays contribute significantly to distress and disquiet about the family law system. There is nothing new about this - it has been the case since the days of the *Matrimonial Causes Act 1959*. Relationships Australia considers that the existing 'one pathway for all' is not useful, and denies access to justice for those many families not in a position, for whatever reason, to avail themselves of the avenues currently available. Most importantly, families should have access to options that are proportionate to their resources.

B Supporting separating families to resolve property disputes

Culture transformation is needed, not just among family law and family services professionals, but across the community as a whole, to resist the assumption that judicial resolution is the

¹¹¹ See ALRC Report 135, paragraph 6.18.

¹¹² AIFS submission 396, cited ALRC Report 135, paragraph 8.9-8.10.

¹¹³ ALRC Report 135, paragraph 6.26.

¹¹⁴ ALRC Report 135, paragraph 6.6.

inevitable and best destination for separating families. Society needs to reject the assumption that anything other than 'having your day in court' is a second rate service, or 'justice on the cheap'. In its submission to this Committee, Relationships Australia Victoria observes that

The limitations of the traditional understanding that 'access to justice' is synonymous with access to court are particularly pronounced in the family law field.¹¹⁵

Such beliefs and the limitations they impose, may make good click bait and headlines, but it has benefited no one – not children, not families, not the broader community.

For example, Relationships Australia has offered mediation in property, as well as parenting, matters since 1984. Nationally, Relationships Australia handles between 2000-3000 cases each year involving property, of which around 600 are property-only.¹¹⁶ 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 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.

Most clients who use Relationships Australia Tasmania's property mediation service are seeking to divide a small and uncomplicated asset pool; sometimes, the issue is more about division of debts than division of assets. The latter can sometimes be as a result of financial abuse, or other issues such as gambling addiction. Participants are encouraged to seek legal advice or legal information; this is especially important when financial abuse or family violence is an issue. Relationships Australia Tasmania suggests that where one of these circumstances exist, it is appropriate to ensure that the vulnerable participant has a legally qualified advisor.¹¹⁷

Relationships Australia Western Australia reports that FDR can be beneficial for families with large and complex asset pools. Typically, property mediations conducted by Relationships Australia Western Australia in such matters include:

- assets held within Australia
- assets held overseas
- vehicles
- multiple bank accounts, including offshore accounts
- shares
- superannuation funds, including self-managed funds or defence force superfunds
- family trusts
- credit card debt, and

¹¹⁵ Submission 119, pp 1, 19-23.d

¹¹⁶ Relationships Australia notes the observations of other submitters supporting mandatory FDR on property matters; see, for example, FMC, submission 135 to the ALRC inquiry, 10.

¹¹⁷ As noted previously in this submission, the Attorney-General recently announced a Small Claims Property Pilot: <https://www.attorneygeneral.gov.au/media/media-releases/pilot-program-save-time-and-money-separating-couples-29-november-2019>. Consistent with our submissions about the need for nuanced pathways, we would hope that a similar facility would be offered to families with small property pools beyond the initial pilot.

- personal loans with third parties, often linked to one of the properties.

Many property disputes in which Relationships Australia helped families involve small property matters, and internal evaluations reveal a high settlement rate. The provision of property dispute resolution services enables families to deal with concurrent parenting matters. The Federal Circuit Court has ordered cases to Relationships Australia's lawyer-assisted property conciliation service; these are frequently matters involving small property pools. The services are funded by the FCC and have been provided at no cost to families. Conciliation is a process in which practitioners may assist individuals by providing advice on the matters under discussion, drawing from his or her expertise in the content under discussion. Any development of conciliation services in the system would need careful implementation to ensure that participants are properly protected and practitioners properly trained and supervised.

The success of the recent 'blitz' by the FCC, in which cases on the Court's list were referred to mediation, indicates that many property matters are amenable to resolution through mediation. Relationships Australia would support diversion of participants involved in property disputes into mediation services, subject to those services being staffed with trained mediators who are skilled in family violence assessment and are properly accredited (preferably in FDR).¹¹⁸

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',¹¹⁹ increasing compliance with settlements and decreasing the likelihood of further litigation. Such findings seem to relate to degree of perceived control over outcomes.¹²⁰ The large Longitudinal Study of Separated Families conducted by AIFS pointed to limited use of FDR for property matters, but also showed that participants were more likely to consider their property division 'fair' if they had used mediation than if they had used a lawyer or been to court.¹²¹ Australian commentators consistently identify a 'strong need' for affordable assistance in financial matters, especially property disputes, and particularly low value property disputes.¹²²

The recent national study of FDR outcomes showed that:

- Relationships Australia handles a large number of property matters in FDR, despite the emphasis on compulsory attendance in parenting matters only
- many FDR clients have both parenting and property matters to resolve,¹²³ despite the artificial distinction that is enforced by compulsory attendance for parenting matters only on the one hand, and the exclusion of property matters from FRCs on the other

¹¹⁸ The ALRC declined to recommend a more prescriptive statutory approach, to allow maximum flexibility.

¹¹⁹ Hahn and Kleist 2000, 167. In the recent national study of FDR Outcomes, conducted by Relationships Australia, participants reported satisfaction with most aspects of FDR, and indicated that they considered RA FDR services to be accessible, affordable and safe.

¹²⁰ Kelly 1989; Pearson 1991.

¹²¹ Qu et al. 2014.

¹²² Fehlberg, Millward, and Campo 2010; Productivity Commission 2014; submission 137 to the ALRC from Marrickville Legal Centre.

¹²³ In a national study of over 1700 participants in FDR, 23% of participants identified at intake that they wished to discuss a combination of parenting and property/finance matters.

- while satisfaction with FDR is strongly related to whether or not an agreement is reached, participants also identified positive elements of the FDR experience, regardless of whether an agreement is reached, and
- participants who engaged in FDR (regardless of whether an agreement is reached) recorded greater improvement on a greater number of measures than those who did not engage in FDR; other benefits included:
 - opening channels of communication, often enduring beyond the FDR process
 - being heard, and hearing the other party's perspective, and
 - help with adjusting to separation.

C Options to help families to resolve property matters themselves

How should the Act approach property division?

From time to time, proposals are made to move away from the broad discretions in the Act, and instead adopt a more prescriptive approach, possibly including statutory presumptions.¹²⁴ These have been rejected, to maintain maximum flexibility.¹²⁵ Research indicates that people are generally happy with the fairness of outcomes.¹²⁶

If the Government retains a discretionary approach, Relationships Australia recommends:

- redrafting the core provisions of Part VIII of the Act to more clearly set out the analytical steps in determining a property settlement¹²⁷
- to simplify the Act - merging the financial relief provisions applying to married persons and those applying to people in *de facto* relationships,¹²⁸ and
- commissioning research to better inform a clarified legislative approach that could provide to system users improved certainty and transparency.

Mandatory pre-filing FDR

Relationships Australia considers that:

- pre-filing FDR should be required in property/financial matters as it is in parenting matters; in many instances, property and children matters run in tandem and it can be difficult for parents to separate the two discussions
- exemptions from engaging in pre-filing FDR should apply across all family law matters (following review of the value of current exemptions in section 60I of the Act), and

¹²⁴ See Productivity Commission, *Access to Justice Arrangements*, Report 72, 2014, volume 2, 874; ADRA's submission to ALRC IP48, submission 12, 23;

¹²⁵ Cf Law Council of Australia, submission 43, paragraph 205.

¹²⁶ Kaspiew and Qu, 'Property Division after Separation: Recent Research Evidence' (2016) 30(3) *Australian Journal of Family Law* 1.

¹²⁷ The National Judicial College of Australia invited the ALRC to 'consider recommending the development of programs that specifically address the issues involved in decision-making under a discretionary framework' (submission 113, 4). Relationships Australia would support such a recommendation.

¹²⁸ Law Council of Australia, submission 43 to the ALRC, paragraph 216(a).

- the section 60I process currently in use for parenting matters should be reviewed to improve its utility for parenting matters and to enable the process to be safe and effective in property and finance matters.¹²⁹

For well over a decade now, pre-filing FDR requirements have successfully diverted people from the courts in disputes about arrangements for children. The ALRC acknowledged that

In both parenting and property matters, AIFS research indicates that FDR operates in a way that is more consistent with families' needs than either lawyer-led negotiation or court proceedings.¹³⁰

Notwithstanding its acceptance of evidence about the efficacy of mandated FDR in diverting people from litigation, the ALRC declined to recommend mandatory pre-filing FDR for property and finance disputes,¹³¹ preferring to recommend a 'genuine steps' requirement, accompanied by greater court scrutiny of compliance with that requirement.¹³² The rationale for this appears to have its roots in a perception that mandating FDR for property matters was 'too prescriptive' and inflexible. The ALRC stated that '...for others, lawyer-led and court pathways may be more appropriate for a range of reasons, including personal dynamics, such as family violence, and legal and forensic complexity.'¹³³ Relationships Australia notes that these considerations are currently managed in parenting matters; they are not valid reasons to refrain from mandating pre-filing FDR in property or finance disputes.¹³⁴

Relationships Australia considers that mediation on financial and property matters should centre around an interests-based approach, rather than a positional approach centring on relative percentages of the asset/debt pool. The model of FDR employed by Relationships Australia in property matters is generally described as facilitative, with a focus on problem-solving.

Relationships Australia New South Wales considers it to be vital that, to maximise chances of successful mediation, lawyers provide clients with a range, even if it is as general as

¹²⁹ Pre-filing FDR was supported in the ALRC's inquiry by a range of submitters; see, for example, submission 83 from the Mediator Standards Board, p 4; Central Australian Women's Legal Service, submission 24; submission 137 from Marrickville Legal Centre, 18. The Law Council of Australia would appear to disagree (see paragraphs 222ff of submission 43), on the basis that FDR can be used as a vehicle for burning off a party that is financially or emotionally weaker and to take unfair advantage of such a party. It is the experience of Relationships Australia, however, that such issues arise also in parenting matters, in which FDR has been effective. Relationships Australia Victoria has recommended that Government evaluate the effectiveness of the section 60I system to ensure that appropriate cases are not bypassing FDR services, and are being referred into FDR at an early enough stage. Such an evaluation could also examine whether some services are exempting clients who might benefit from FDR and whether courts are appropriately monitoring and enforcing mandatory FDR. Relationships Australia Western Australia suggests that certificates should avoid subjective language such as 'genuine' or 'non-genuine', and use objective statements such as 'attended FDR with [practitioner] and no agreement was reached.'

¹³⁰ ALRC Report 135, paragraph 8-10.

¹³¹ As advocated by eg ADRAC, Relationships Australia National, Women's Legal Service Victoria, Macarthur Legal Centre, and recommended in 2014 by the Productivity Commission.

¹³² See ALRC Report 135, Recommendation 21.a

¹³³ Citing the Law Council, submission 285.

¹³⁴ See submission 119 to this inquiry, from Relationships Australia Victoria, pp4 ff.

'above/below' 50%. When lawyers suggest to clients a particular percentage (as opposed to a range), that figure appears to be the only thing the client remembers, which can shut down productive discussion.¹³⁵

Qualifications to conduct property mediation

Legal qualifications are not necessary to conduct mediation in finance/property matters; the ALRC accepted this.¹³⁶ This is because a mediator is not a decision-maker and agreements reached through mediation are not, of their own force, legally binding. However, where family violence is present, and/or there are imbalances in knowledge and power, for example, it is preferable to employ legally-assisted dispute resolution.

Legally-assisted FDR

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. In our experience, obtaining legal advice early in FDR can benefit clients by providing 'reality testing' of their expectations, and can be key to setting the scene for successful mediation.

Legally-assisted FDR is particularly useful in areas where there are limited options for low cost legal services. It can offer families continuity of service provision in the same location (which is highly valued by clients who don't wish to be confronted with new faces at every appointment and obliged to re-tell their stories), who will be less likely to 'fall through the cracks' in moving between services. In the experience of Relationships Australia, clients also benefit significantly from having a meeting with their lawyers before and after FDR sessions. The ALRC supported increased use of legally-assisted dispute resolution for families experiencing property and finance disputes.¹³⁷

Property disputes and children's best interests

There is a strong negative association between poverty and children's developmental outcomes. The negative effects associated with low income and poverty carry a significant cost for individuals, families, and the broader community. There are also clear costs associated with

¹³⁵ Online decision-making services are increasingly being used in the United States of America, the United Kingdom and Europe. These include, for example, My Family Wizard, being used in the USA and sponsored by the Association of Family and Conciliation Courts. There are some emerging commercial products and services in Australia which aim to support families to reach property agreements by use of predictive algorithms based on precedents. However, the use of predictive algorithms to support quality decision-making by Australian families is currently hampered by the lack of a consistent jurisprudence around property division and a lack of robust and reliable data about property settlements. In addition, there are a range of communities in Australia who simply do not have access to reliable, high quality online services (not all of these are regional or remote communities).

¹³⁶ The ALRC agreed that legal qualifications should not be required to undertake FDR of property/finance matters: Report 135, paragraphs 13.110-13.111.

¹³⁷ Citing Kaspiew et al, 2015.

children's development and wellbeing - the impacts of which are likely to be amplified later in life for the children who experienced poverty.¹³⁸

Relationship breakdown can be both a cause and an effect of poverty and hardship. The stress of poverty can have a negative effect on relationship quality and stability, and cause greater risk of relationship breakdown. In turn, relationship breakdown can increase the risk of poverty for both children and adults.¹³⁹

Further, in the experience of Relationships Australia, the loss of financial resources can have serious socio-economic impacts on all children, not only those in the poorest or most disadvantaged families. For example, parental separation can:

- require children to move away from known and familiar suburbs (perhaps into two new suburbs for shared care)
- require children to leave private schooling due to disputes about fees
- require children to leave known schools, perhaps with the consequence of losing contact with friendship groups
- require children to withdraw from costly or inconvenient extra-curricular activities
- lead to loss of, or reduced coverage by, private health care, and
- mean that one or both parents may need to work more hours, leading to a loss of physical and emotional availability to their children at an already fraught time.

In short, if children are involved, a property dispute is never just about property – it will always affect children's development, wellbeing and relationships, too.

Accordingly, Relationships Australia considers that, if parties with a property/finance matter have children, then the Act should make clear that the children's best interests are paramount not only in parenting disputes, but also in property and finance matters.

¹³⁸ Warren, D, *Low Income and Poverty Dynamics - Implications for Child Outcomes*. Social Policy Research Paper Number 47 (2017). Available at <https://www.dss.gov.au/publications-articles/research-publications/social-policy-research-paper-series/social-policy-research-paper-number-47-low-income-and-poverty-dynamics-implications-for-child-outcomes>. See also Joan B Kelly, 'Children's Adjustment in Conflicted Marriage and Divorce: A Decade Review of Research', 39 *J. A M. ACAD.CHILD & ADOLESCENT PSYCHIATRY* 963 (2000). Relationships Australia notes that 84% of Australian single parent families are single mother families. In 50% of single parent families with dependants, the age of the youngest child is between 0-9 years of age: Australian Bureau of Statistics (2012), *Labour Force, Australia: Labour Force Status and Other Characteristics of Families*, Cat. No. 6224.0.55.001. There is a strong negative association between poverty and children's developmental outcomes. The negative effects associated with low income and poverty carry a significant cost for individuals and families, as well as the broader community. There are also clear costs associated with children's development and wellbeing - the impacts of which are likely to be amplified later in life for the children who experienced poverty and also the wider society. See Warren, D, *Low Income and Poverty Dynamics - Implications for Child Outcomes*. Social Policy Research Paper Number 47 (2017). Available at <https://www.dss.gov.au/publications-articles/research-publications/social-policy-research-paper-series/social-policy-research-paper-number-47-low-income-and-poverty-dynamics-implications-for-child-outcomes>; Stock, Corlyon et al, *Personal Relationships and Poverty: An Evidence and Policy Review*, a report prepared for the Joseph Rowntree Foundation by the Tavistock Institute of Human Relations, 2014.

¹³⁹ Stock, Corlyon et al, *Personal Relationships and Poverty: An Evidence and Policy Review*, a report prepared for the Joseph Rowntree Foundation by the Tavistock Institute of Human Relations, 2014. Data shows that it is resident mothers and children who are at greater risk of falling into persistent poverty.

Adjustment to property interests where there has been family violence

Relationships Australia supports proposals to ensure that survivors of family violence are not unfairly burdened by debts, particularly debts arising in the course of financial abuse. Relationships Australia supports the proposal to encourage financial product providers to establish voluntary protocols.

The practice experience of Relationships Australia supports the observation made by the Bar Association of Queensland that

...family violence permeates numerous other aspects of family law proceedings, beyond just parenting proceedings.¹⁴⁰

Relationships Australia considers that courts should have a discretion to take family violence into account in spousal maintenance matters.¹⁴¹

Legal fees – caps and budgets

Relationships Australia notes the ALRC's recommendations in this regard, and suggests that the Commonwealth Attorney-General's Department be tasked by the Council of Attorneys-General to develop proposals. This should be done in conjunction with the States and Territories because regulation of the legal profession, and its practices, is a State/Territory responsibility. The proposals should include mechanisms for costs budgeting and cost capping to put courts prospectively in control of costs,¹⁴² as is the case in English and Welsh courts and as recommended by the Productivity Commission.¹⁴³

We further note that the ALRC suggested removal of the general rule that parties bear their own costs (rather than following the event) and articulate court powers in relation to costs¹⁴⁴ and provision that appeal costs should follow the event, to promote finality.¹⁴⁵ If adopted by Government, these measures might impose some restraint on the making of unfounded or unmeritorious claims and appeals and relieve some of the pressure on courts. However, safeguards would need to be built in to ensure that vulnerable individuals (especially children) are protected.

Relationships Australia supports the ALRC's recommendation to amend the Act to make clear the court's power to order costs against a non-party who has had an interest in the litigation,¹⁴⁶ to address the rising presence of litigation funders in family law jurisdictions.

¹⁴⁰ Submission 80 to the ALRC inquiry, paragraph 2.1.1, p 5.

¹⁴¹ See also submission 108 to the ALRC from the Family Law Committee of NSW Young Lawyers, at 8; submission 45 to the ALRC, Women's Legal Services Australia, 29.

¹⁴² Report 135, paragraph 10.115ff.

¹⁴³ Cf Report 135, paragraph 10.125.

¹⁴⁴ P 331. Before the current Family Law Act, the general rule was that the husband bore costs.

¹⁴⁵ Report 135, paragraph 10.142.

¹⁴⁶ Report 135, paragraph 10.143.

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.¹⁴⁷ 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.¹⁴⁸

Relationships Australia agrees with the Law Council of Australia that more frequent use of costs orders should be encouraged.¹⁴⁹ We note the observation by the Australian Bar Association that 'Costs orders too can be a tool of case management.'¹⁵⁰ Relationships Australia would also support recommendations that judges make costs orders against parties who have unreasonably failed to comply with the section 60I process or failed to make a genuine effort to solve their differences.¹⁵¹

Discrete task representation (DTR)

More affordable legal advice or services through DTR may help parents seeking information before or during FDR, as well as in converting a parenting plan or property settlement agreement into legally checked and appropriated framed consent orders. Relationships Australia Tasmania, for example, has several clients who are unable to obtain affordable legal representation for a variety of reasons, and are self-representing. Some of these clients are experiencing family violence or other health/social complexities. Relationships Australia questions whether they are genuinely in a position to self-represent effectively. Provision of DTR could also be assisted and enhanced by technology (eg using apps or other interfaces). A further benefit of DTR would be greater transparency for clients in billing. Clients are entitled to receive clear, timely and detailed bills so that they can better see what they are paying for.

Superannuation

Relationships Australia is concerned that the rarity of superannuation splits may spring from the complexity of provisions allowing for superannuation splitting, which can be overwhelming to parties already suffering the stress of family separation. This tends to produce harsh outcomes for the economically weaker party to the relationship.¹⁵² Relationships Australia supports the ALRC recommendations to simplify superannuation splitting.

¹⁴⁷ See ALRC DP86, proposal 5-6; Relationships Australia would also support proposal 5-7, which relates to consequences of intentional failure to disclose.

¹⁴⁸ Noting in particular the comments by the Law Council of Australia at paragraph 221 of submission 43 to the ALRC, and those of the Family Law Committee of NSW Young Lawyers, submission 108 to the ALRC, 7. That Committee noted its members' experiences that 'parties are often forced to initiate court proceedings due to a spouse who consistently hinders settlement by refusing to provide financial disclosure' and that such behaviour rarely has consequences for the recalcitrant spouse.

¹⁴⁹ Submission 43 to the ALRC inquiry.

¹⁵⁰ Submission 13 to the ALRC inquiry, paragraph 17.

¹⁵¹ See, for example, the Bar Association of Queensland, submission 80 to the ALRC inquiry, 4.2.3, p 11.

¹⁵² See David De Vaus et al, 'The Economic Consequences of Divorce in Australia' (2014) 28(1) *International Journal of Law, Policy and the Family* 26.

Relocation cases

Relationships Australia also wishes to draw attention to the difficulties faced by families involved in re-location disputes. These can cost around \$30,000-40,000 to litigate. The outcomes, too, can carry significant ongoing costs – for example, airfares, which can be particularly expensive where members of separated families live in regional or remote areas and where children are too young to fly unaccompanied.

Relationships Australia suggests the expansion of subsidised legally-assisted dispute resolution (LADR) services to provide to families two LADR sessions of two hours each for re-location matters. Services should also be funded to offer child-inclusive practice. The presence of lawyers is essential in these matters, because of the complexity of the legal issues, and also because they can provide parties with a 'reality check'. There are also differences in how the primacy of the children's best interests operates with the consideration of parental wellbeing, if the desired re-location is not approved, being taken into account by the court. Issues such as parents' employment opportunities and social networks are, in our experience, considered in these matters, because of the bi-directional nature of parental and child wellbeing and adjustment. LADR in re-location cases should be explicitly child inclusive in its approach, to ease some of the pressure that can be placed on children to articulate to each parent a view as to the proposed re-location (and the older the child, the more likely the child is to be asked for their views).

It is the expectation of Relationships Australia that re-location disputes between Aboriginal people are likely to come to the attention of family courts more often in the future. Issues can involve, for example, whether a child is to be brought up in town or on country and whether, when a child is old enough for secondary school, he or she should be sent to boarding school. Communities to which parents belong can be situated thousands of kilometres apart, with road travel the only option. This can be complicated if road travel is unexpectedly impossible, such as when roads are closed for community business or because of weather considerations.

Paragraph (e)

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

I'm not I'm completely not interested in legal services. I don't believe that it is in the best interest of the kids at all. (*father, agreement still in place*)¹⁵³

In delivering a proportionate and effective justice system ... *we should be competing not just with the best jurisdictions around the world, but with every modern consumer experience they have in their lives*, from skyping their family and friends, to online banking, to entering into contracts with businesses on the other side of the planet.¹⁵⁴

...that's actually been a really cool thing that's come out of mediation that I can actually communicate with the boys' mother if it's about the children. I can do it with ease, like, and friendly and respectfully. And I can't speak to her about other things... but through mediation we were reminded a bit you're just focusing on the interests of the children.¹⁵⁵

Existing arrangements should be replaced by a Family Wellbeing System designed around families, not lawyers and legal culture. It would include the following *co-equal* pillars:

- multi-disciplinary and integrated wraparound services, delivered through a combination of physical and virtual Family Hubs
- decision-making mechanisms that centre on sharing parenting responsibilities to maximise child wellbeing and promote child development, and that are not geared to binary win/lose outcomes as between parents, and
- a nationally-integrated funding model that transcends existing funding and bureaucratic silos,¹⁵⁶ ensuring a stable and enduring funding base for public services that are essential to support healthy families and resilient communities.

Prolonged family conflict can utterly deplete the emotional, physical, social and financial resources of families, drive them into hopeless cycles of debt, inhibit productive workforce and social participation, and cause intergenerational conflict and welfare dependency. We know that prevention and early intervention can stop this cycle before it fastens its grip. There is, therefore, every reason for society to take all possible steps to shift social expectations that judicial resolution is inevitable, is the 'gold standard' for family dispute resolution, or guarantees ultimate vindication for aggrieved adults.

¹⁵³ Participant in the study of FDR outcomes being undertaken by Relationships Australia.

¹⁵⁴ The Lord Chancellor, the Lord Chief Justice of England and Wales, and the Senior President of Tribunals, 'Transforming our justice system. (Joint Paper, the Ministry of Justice, September 2016), 16. [emphasis added]

¹⁵⁵ Northern Territory participant in the study of FDR outcomes being undertaken by Relationships Australia.

¹⁵⁶ Perhaps delivered in a national partnership agreement.

Most families do not use the court process, but either make their own arrangements or access supportive services (including legal services) to help them to do so. Most parents after separation describe themselves as friendly.¹⁵⁷ This reinforces the public imperative to support these families to stay out of the courts.

This Chapter sets out a comprehensive proposal for a re-imagined system that puts families, not courts, at the centre. This is a Family Wellbeing System.

A Family Wellbeing System

A.1 Underlying principles

The proposed Family Wellbeing System should be designed according to the following principles:

- the well-being and healthy development of children is paramount and, in the event of conflict, prevails over the rights and interests of adults
- parents should be supported and empowered by services to co-parent safely, promoting healthy child development
- the needs of families should drive design, not existing legal, jurisprudential, administrative, funding or single-disciplinary structures, distinctions and hierarchies
- the aim of all services (including decision-making mechanisms) must be to respond to families' relationship needs, and acknowledge the enduring, rather than 'one off', nature of many family conflicts
- services must be available on the basis of universal service and accessibility,¹⁵⁸ emphasising prevention and early intervention
- services must be proportionate to families' needs and resources (ie not a 'one size fits all' journey with court as the ultimate and most highly valued destination), and
- there must be no wrong door and one door only - service integration and collaboration must happen at the organisational level, invisible to users.¹⁵⁹

The Family Wellbeing System would be supported by legislative amendment, court reforms and a national, integrated funding model. Its services would incorporate features of existing FRCs, CCSs, health justice partnerships and domestic violence units and would be delivered through service delivery hubs.

To achieve this, Relationships Australia recommends the introduction and passage of a new Act of Parliament, not to be called the Family Law Act, but to have a title reflecting that legislation

¹⁵⁷ Qu et al, *Post-separation parenting, property and relationship dynamics after five years*, 2014, p xiii.
<https://www.ag.gov.au/Publications/Documents/Post-SeparationParentingPropertyAndRelationshipDynamicsAfterFiveYears/post-separation-parenting-property-and-relationship-dynamics-after-five-years-full-document.PDF>.

¹⁵⁸ In this connection, the comments by Relationships Australia on the KPMG final report, see out at Appendix E, especially at page 9, noting that '...FL [Family Law] services have successfully provided services to clients with high rates of disadvantage within a universal framework...Without universal access, a proportion of higher income clients will end up in court, and many of these families will end up disadvantaged by the end of this process.' This would undermine policies focused on encouraging timely decision-making.

¹⁵⁹ See the Family Law Council's recommendations in its 2016 report, especially recommendation 1.

and judicial decisions are equal pillars of an overall network of support for families, separating and intact, and thus sit alongside an array of services and decision-making pathways. Legislation should establish simplified decision-making pathways that are proportionate to families' needs and resources, and that accord safety, and children's wellbeing, central importance.

A.2 Family Wellbeing Hubs

The 'hub concept' is flexible and deliberately non-prescriptive here - hubs must take a range of forms to meet the needs and circumstances of the communities which they serve. They could be housed in bricks and mortar premises; they may be online; they may exist by virtue of robust and effective cross-professional collaboration, or they may combine any or all of these. The essential characteristics of 'hubs' in this submission, are:

- one door only/no wrong door
- ease of access, physically, online or in combination
- continuum of assistance, from simply providing information, through navigation, to intensive case management, and
- integration and collaboration between services dealing with the family in a way that is seamless for, and invisible to, the family.

Relationships Australia envisages that the Hubs would extrapolate from the original concept of FRCs as front doors,¹⁶⁰ and some of them could well be located in existing FRC or CCS sites, where infrastructure, community relationships and professional linkages and partnerships are established and have been evaluated as working effectively, having taken FRCs way beyond the initial 'front door' concept.¹⁶¹ This will be particularly important in communities that have been affected by complex trauma, where significant time and effort has already been invested in developing relationships that can have therapeutic benefit. The location of future sites should be informed by demographical data.

Physical hubs

The physical hubs could incorporate space which could, on a visiting basis, host court hearings, along the lines of the Collingwood Neighbourhood Justice Centre. That is, the court would be an ancillary service located in a general services space. They could be totally or partially co-located with existing services, such as FRCs, CCSs or CLCs, or be within or adjacent to places of social significance and ease of access, such as schools, hospitals and health centres, or shopping precincts. Like the Collingwood Neighbourhood Justice Centre,¹⁶² physical Hubs could also offer space after hours for community activities, enhancing their value as community resources.

¹⁶⁰ Originally intended as a 'front door', rather than a 'one stop shop', although many FRCs now have extensive service offerings well beyond simply a 'front door'.

¹⁶¹ Depending on data as to need and existing service offerings; see DP 86, paragraph 4.35.

¹⁶² Or, in the context of multicultural services, Access Gateway in Queensland:
https://www.accesscommunity.org.au/the_gateway.

Virtual hubs

For some communities, a physical hub may not be practical, resource-efficient or helpful to serve the community, and its purposes will be better achieved by virtual and online services, or other flexible means of collaboration. For example, in some smaller communities, people will often need a choice of services to counteract actual or perceived conflicts of interest and to offer appropriate assurance as to privacy and confidentiality. Recruitment and retention of specialised professionals to live and work in particular areas can also pose significant challenges. To varying extents, these considerations are currently addressed through the ways in which various FRCs and FLPNs provide for collaboration, joint training and service provision.

What kinds of services could the Hubs deliver?

The services offered at and through particular Hubs should reflect the needs of the people who live in the community. Potentially, they could include:

- universal risk screening, triage, warm referrals and safety planning as required
- children's advocacy centre (CAC) or Barnahus-type facilities for children who have been affected by violence or sexual abuse¹⁶³
- enhanced children's contact services
- case-management for families with co-occurring needs
- Aboriginal and Torres Strait Islander workers
- CALD workers
- mental health services
- legal practitioners to provide early advice and urgent legal/safety responses
- social workers
- child development professionals
- psychologists
- financial counsellors¹⁶⁴
- addiction counselling
- behavioural change programmes
- housing assistance
- an embedded Centrelink presence
- existing FRC services (including FDRPs and Family Group Conferencing)

¹⁶³ For more information, go to: <http://www.dcac.org/>. Of particular note in the CAC model is (a) the one-time interview of children who may have been abused, which interview is witnessed and recorded from a secure site, and (b) the wraparound services. Potentially, this aspect could also have an investigative capacity, provided by co-located child protection workers. A common complaint about the family courts, from members of the public, is that they do not carry out investigations; however, Ch III courts are unable to carry out such functions. For more information on the Barnahus model, adapted from the US children's advocacy models which developed from the 1980s, see for example <https://www.childrenscommissioner.gov.uk/wp-content/uploads/2017/06/Barnahus-Improving-the-response-to-child-sexual-abuse-in-England.pdf>; and <https://childcircle.eu/2018/02/27/launch-of-renewed-action-to-promote-the-barnahus-model-in-europe/>.

¹⁶⁴ In 2015, Women's Legal Service Victoria completed a pilot in which financial counsellors were involved in the support of family violence survivors, from the initial contact with the service. The pilot, described in the 'Stepping Stones' report, demonstrated that early access to financial counselling can markedly improve the speed and degree by which survivors can recover, financially and psychologically, following separation from abusers.

- police services
- space for supervised contact and parenting capacity building
- space for relationships and personal education programmes to be conducted
- space for circuiting courts – courts visiting the hubs should be in a position to exercise multiple jurisdictions, including: federal family law; State/Territory child protection and welfare law; drugs courts and criminal law,¹⁶⁵ children’s court jurisdictions and adult guardianship and mental health jurisdictions¹⁶⁶
- space for circle courts
- facilities for service users to access, in safety and privacy, online information and online services (including online services), and
- information-sharing databases for professionals, allowing them real time access to relevant information, especially about safety, from any Australian jurisdictions.

It would be optimal to out-post specialist workers not only in the proposed Families Hubs, but also in courts (especially in FASS facilities, where available).

Relationship between Hubs and existing FRCs and CCSs

There are several options that Government could consider and employ in different ways to meet the needs of particular communities. These include expanding the scope of services at existing FRCs and CCSs, as well as establishing new facilities in areas with emergent needs that do not currently have the benefit of FRCs, CCSs and/or FLPNs to provide access to multidisciplinary services. Relationships Australia recommends that, given the substantial investment by Governments in the infrastructure of FRCs and CCSs, enhancing the range and depth of services provided by those facilities might be an efficient way to implement the proposed Families Hubs.

The only absolute is that families have easy access to seamless services that meet their needs, in a place that works for them.

Relationships Australia envisages that the Hubs would extrapolate from the original concept of FRCs as front doors, and some of them could well be located in existing FRC sites, where infrastructure, community relationships and professional linkages and partnerships are established and have been evaluated as working effectively, having taken FRCs far beyond the initial ‘front door’ concept.

It is important to emphasise that Hubs, as conceptualised by Relationships Australia, would not necessarily require services to move into the Hubs, but could (for example) involve outposting

¹⁶⁵ An example of a useful jurisdiction to exercise when making a personal protection order might be victims of crime compensation legislation, to provide a person leaving a violent situation with an amount of money to establish themselves (eg cover a rental bond). Other examples might be to deal with breaches of a personal protection order.

¹⁶⁶ All of these courts would still exist in their current forms. However, courts could visit physical hubs because that is where people with complex needs, only one subset of which is legal need, can go for their services. Where practicable for the community in question, this is an example of client-centred system design.

staff in the Hubs, as occurs at the Neighbourhood Justice Centre in Collingwood. However they are implemented, Families Hubs should:

- focus on safety and wellbeing of children and families (including through ensuring appropriate protection for users such as separate doors, dynamic security, safety rooms, conference rooms, and safe and appealing children's areas)
- emphasise collaborative and joined up service delivery
- offer resources to de-escalate family conflict
- be accessible, including for children and families, and
- build community trust.

Services for children and young people

As gatekeeping services, Families Hubs should also provide, as a primary function, universal risk screening, triaging and service referrals to children and young people. This would:

- remind parents that children's best interests are the paramount consideration, not just an assessment of which parent is the better or less risky
- allow early intervention as required to support children's healthy development
- allow a baseline assessment of children's wellbeing and development which can be repeated at intervals to check that the children are benefiting from existing parenting/caregiving arrangements and service referrals, as applicable.

Families Hubs should offer accessible child care and family-friendly spaces extending to 'all age' children. Lack of child care is often a barrier to newly-separated and single parents accessing services. Youth workers and child-consultants must play key roles in the design and operation of the proposed Hubs.

Families Hubs have the potential to be of particular value to children and young people. In its recent study of the needs and experiences of children and young people, AIFS found that children and young people highly valued tailored services that allowed them both to vent and to be coached in strategies of self-care amidst and beyond parental separation.¹⁶⁷ One respondent said that post-settlement counselling

...strengthened my relationships with my brothers and probably with our mum....I think it helped us to understand my dad's perspective more... (Phoebe, 15+)¹⁶⁸

Peer support was also valued by respondents to the AIFS survey, and Hubs could offer facilities to accommodate that, both organically and in a structured way.¹⁶⁹

¹⁶⁷ See for example, Carson et al, 2018, 33, 44. At p 44, Carson et al noted that 'Counsellors were nominated by participating children and young people as a key means by which their views and experiences were acknowledged...'

¹⁶⁸ Carson et al, 2018, 49.

¹⁶⁹ Carson et al, 2018, 49.

Fostering child-parent relationships – re-imagining Children’s Contact Services

CCSs are intended to provide a safe, child-focused and neutral place for changeover or independently supervised visits for potentially at-risk children. When well-designed and resourced, CCSs support healthy relationships between children and their parents. They can offer support in response to a crisis (eg by providing supervised contact opportunities in circumstances of high family conflict) and, as families stabilise, support parents to (re-)establish healthy relationships with their children (eg with education and referrals to appropriate support services).

Government-funded services have safety standards as part of their funding agreements, but these cannot meet current demand, either in terms of existing locations or in terms of emerging locations with a need for a CCS. This is partly attributable to increased awareness, and identification, of risk, and families needing supervised (rather than unsupervised) contact for longer periods.

There is general agreement among providers and users that existing CCSs are desperately underfunded:

- causing unacceptable delays in accessing services, often to the point of preventing parents from spending any time with their children, despite the courts having ordered that contact be facilitated – this is a source of deep pain and frustration and undermines parents and courts
- preventing Commonwealth-funded CCSs from realising their full potential as enablers of healthy and resilient parenting, and
- incentivising the use of unsupervised providers of uncertain quality and safety.

By definition, each child referred to a CCS has already faced many adverse childhood experiences, yet this service stream is perhaps the most inadequately funded, innovated and researched. The outcome of this is that the most vulnerable children are the ones most at the mercy of facilities that, because of resource constraints, are barely able to carry out the most minimal of their intended functions. This cannot be allowed to continue.

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. A further concern relates to the absence of regulation for children’s contact services, which has the potential to put children at risk. There are models in other sectors, including (for example) the child care National Quality Framework.¹⁷⁰

Even if the Proposal to establish Families Hubs, incorporating CCSs, is not implemented, we would vigorously urge Governments, as a matter of urgency, to fund CCSs to move beyond providing supervised contact to services that support parenting, with gradual reductions in

¹⁷⁰ For more information, see <https://www.acecqa.gov.au/nqf/about>.

services to families as their parenting capacity is supported and promoted by the CCSs. This would involve considerable expenditure; however, 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.

Properly funded and re-conceptualised CCSs, whether as part of Hubs or post-order supportive services would:

- collaborate with other specialist services
- manage transitional arrangements for families, and
- offer long-term support for higher needs families with complex needs (something not addressed by current CCSs operating as standalone services).

We vigorously urge the Commonwealth, as a matter of urgency, to fund these services to not only provide timely supervised contact, but also to offer parenting education and other services. This would enable service provision to tapering off as parenting capability grows.

Properly-funded CCSs would:

- proactively transition families from high to lower need, and ultimately, to self-management, and
- offer longer-term support for higher needs families with complex needs (something not addressed by current CCSs operating as standalone services).

Case study – value-adding in children’s contact services

The four CCS’ run by Relationships Australia New South Wales have implemented a process in which parents who have undertaken an approved parenting course (eg ‘Parenting After Separation’ or ‘Circle of Security’, and who have attended the CCS for six months, may be selected to attend a low vigilance service. These services have a reduced ratio of staff to children, and included ongoing parent education sessions held before and after the children attend. The topics for the parenting education are developed by the parents themselves, in partnership with staff. Having the capacity to move parents to a low vigilance service has contributed to reduced waiting times and transformed the relationship between staff and parents to one which is described by parents as more collaborative. Most important, parents have been supported, through development of improved parenting and communication skills, to move towards self-management of contact with their children.

Services tailored for men

Hubs should offer services tailored for men, including parenting services. The Parenting Centre has reported on data about how fathers seek help and advice about parenting, with a view to developing parenting services targeted to fathers. This research brief noted that, in a survey of

over 1000 fathers, 18% reported that they had experienced symptoms of depression and 19% reported symptoms of anxiety since becoming a parent.¹⁷¹

More funding needs to be applied to men's support services. Where these are available, they have a strong positive impact. Relationships Australia provides services for Male Victims of Domestic Violence, as well as the New South Wales Family Advocacy and Support Service. In 2015-17, these received 129, 810 referrals from the Central Referral Point.

The FASS male service (which has additional funding for 12 months during 2019-2020) receives a steady stream of referrals from judges, lawyers and direct approaches from clients. Additional support for these programs has the potential to change our society by reducing the incidents of men reoffending or being victims. Examples of how Relationships Australia New South Wales involvement in the FASS pilot has benefited men include:¹⁷²

Richard

Richard was shouting and swearing at court staff. On speaking with the FASS Men's Support Worker, he said that he was angry with the advice he was given to attend mediation before court proceedings. He stated that he was not being supported fairly because he was a man and that there is no help for males.

The FASS Men's Support Worker sat with Richard and listened to his frustrations, responding non-judgementally and not providing affirmations or advice. The Men's Support Worker challenged his belief that males are not supported by explaining what the FASS men's service is and that he was here to support men.

Richard calmed down considerably upon his frustrations being heard. The resistance towards listening to the legal advice previously provided was defused as his belief of men not being supported was defused. An openness to family dispute resolution options became apparent when he asked 'What mediation options are there?'

Sam

Sam had issues with homelessness, unemployment and social isolation. His family lives overseas and he had no mobile/contact number. He was distressed with frequent tears and difficulty sitting still. Sam had recently separated from the other party whom he reported was domestically violent towards him. He was couch-surfing with a friend and had been referred by his lawyer who was helping him with parenting matters.

¹⁷¹ Parenting Research Centre, *Focus on Fathers: How are fathers faring and what affects their parenting?*

¹⁷² Names attached to these case studies have been chosen at random and are not the names of the clients. Research indicates that well-designed men's behaviour change programs can change attitudes: cf eg Peacock and Barter, 2014. Peacock and Barker concluded that successful interventions include affirming language, allowing clients to reflect on hegemonic masculinity, are evidence-based, recognise diversity among clients, recognise the wide range of factors involved in family violence and use a range of social change strategies. Of crucial importance is engaging men as fathers, rather than as perpetrators. That being said, Relationships Australia recognises that these programs are under-evaluated and hard to evaluate: Westmarland, Kelly and Chalder-Hills, 2010.

The FASS Men's Support Worker connected him with accommodation services, including an appointment with a case manager. He referred Sam to Centrelink to claim benefits for Newstart and a crisis payment, to assist with his immediate financial difficulties. He was connected to counselling services through victim services, to get help in dealing with social isolation and distress on an ongoing basis.

Sam acted on advice that he obtain mobile phone and a pre-paid sim card. He was linked with accommodation services, received case managed support, and started to receive Centrelink benefits.

Sam subsequently presented with a positive attitude and stated 'he felt like everything was coming together'. He expressed confidence in positive change in his near future. He was able to prepare for accommodation that will be suitable for visits from his children. Furthermore, he is receiving ongoing emotional and psychological support through counselling services.

Geoffrey

Geoffrey was referred to the FASS Men's Support Worker at court by the Legal Aid Duty Lawyer. He was self-represented and presented as being well-educated in his legal matter. Geoffrey's matter was approaching final hearing and he was seeking time with his children whom he had not seen for over a year. Geoffrey identified himself as a perpetrator of domestic violence in the relationship before separation. He was unemployed. Furthermore, Geoffrey stated he had chosen to be homeless because he wanted to save what money he had for his children.

The FASS Men's Support worker provided Geoffrey with information about supportive services and discussed the concerns raised by the Court in relation to safety concerns for the children. Geoffrey presented these as concerns about his domestically abusive behaviour, financial instability and lack of acceptable accommodation for the children. These were individually addressed with the Men's Support Worker by discussing available services and making appropriate referrals.

With the assistance of the Men's Support Worker, Geoffrey engaged in the Men's Behaviour Change program, *Taking Responsibility*, and moved into accommodation that would be appropriate for his children. Geoffrey is now receiving additional financial support from Centrelink, and food staples from services near his new accommodation.

The Court made orders allowing Geoffrey to have his children in his care four nights a fortnight, with an increase to 50/50 custody progressively over a two year period. On following up with Geoffrey, he told the FASS Men's Support Worker that he intends to engage in additional supports, including parenting programs.

Bryan

Bryan presented as agitated, with difficulty sitting or standing still. He stated that the court is against him and he is not afraid to say it. Prior to this, Bryan's legal matter was

adjourned to a later date due to his disruption in court. Bryan yelled out during his hearing and swore at court staff.

Bryan was on a mental health plan and regularly seeing a counsellor for his anxiety disorder. He further stated that when he is stressed, he loses control, swearing, yelling and breaking things. Bryan says he doesn't want to be this way, but he was brought up to stand up for himself and not be weak.

The FASS Men's Support Worker linked Bryan into anger management services to provide him with strategies and the capacity to manage his emotions while at court.

At his next court date, the Men's Support Worker was able to provide a safe space for Bryan to manage his emotions and give him confidence to practise the strategies learned in the anger management sessions. Bryan was able to successfully cope throughout the day, allowing his matter to progress.

Henry

Henry presented as anxious and alert. He was self-represented and was awaiting a single expert report with recommendations involving parenting. Because Henry was self-represented, and there were concerns that the report could trigger significant distress, the Court ordered the report to be released to him by the FASS Men's Support Worker, so that appropriate support would be readily available.

The FASS Men's Support Worker sat with Bryan in the safe room for men and they read the report together. At regular intervals, reading was paused to debrief, process emotions and assist with coping. Tears were shed by Bryan on occasion and could be expressed due to the safety and privacy of the location within the court.

Upon completion of reading the report and expressing his feelings safely, Bryan felt calm and ready to move forward with his matter. The FASS Men's Support Worker provided him with a referral to counselling for ongoing support and organised for him to receive some legal advice from a legal aid duty lawyer at the court to assist with the next step in his legal matter.

The right service at the right time for families

Relationships Australia considers that early responses by multi-disciplinary services can be an effective circuit breaker to prevent families being consumed by a downward spiral of conflict which, ultimately, is only halted – some years later - by judicial resolution. The right service at the right time:

- maximises benefit to families and family members
- minimises costs and trauma, and
- keeps legal solutions for legal problems, not social or health problems – you don't go to your GP when you have a dispute with your plumber, your neighbour or your telco.

Referring families to a service should not be a 'one off' practice. People's experience of family and conflict does not, generally, focus on a single instance of conflict followed by separation.

Nor does recovery from family conflict or separation occur in a linear fashion. As families' needs are complex and non-linear, so will be a system which responds to them. Accordingly, Relationships Australia suggests that court staff and FDRPs be not only trained to continually assess for risk and safety, but also be empowered to refer families with particular characteristics and needs directly to appropriate pathways in the courts (eg fast track processes) and to other providers as the need arises.

Australians should not have to end up before a family court judge to access mental health services.

Hubs must meet the needs of the local community

Existing FRCs and Family Law Pathways Networks, as well as the community, should be involved in the co-design of Hubs that respond to community need.¹⁷³ In some communities (particularly regional and remote communities), physical hubs will not be viable. Existing service centres could be expanded to provide Hub services, and technology may also assist (always recognising that there are communities in which safe, reliable and private access to technology is simply unavailable).

Providers of services for older members of the community must be included in designing Families Hubs.

The design of services and activities offered by the Families Hubs could help to reduce the stigma still around asking for help. Stigma (or perceived stigma) can be a particular barrier to access for men and members of particular CALD communities, among whom accessing post-separation support services can be taboo. Like the Collingwood Neighbourhood Justice Centre, Hubs could offer community education classes and be a focus of other community activities.

Staff should include bi-cultural workers, Aboriginal and Torres Strait Islander workers and workers with lived experience of disability, as well as people from LGBTIQ+ communities. It is important to emphasise that workers should not be recruited primarily on their 'cultural representation', but instead recruitment and induction processes should articulate and demonstrate a particular interest in attracting workers from diverse populations.

There is an urgent need to improve the understanding, among health care professionals, of how to engage with relationship services for the benefit of their patients. For example, our practitioners advise that Medicare-funded mental health services often struggle with the complexities of separated families in conflict. They may have little understanding of the implications of requests by a parent to see a child without the consent of the other parent, for instance. Families Hubs would be able to provide case management with family separation as core business, and enable practitioners to focus on providing their specialist services.

¹⁷³ See ALRC DP86, proposal 4-4.

Navigation

Navigation services could helpfully operate at several points along a continuum of intensity, depending on need and capacity. They might include:

- intake, screening and triaging
- warm referrals (and, where applicable, safety planning)
- ongoing support and case management through a family's time in 'the system', and
- post-engagement follow-up.

There have been some good examples of services that aim to help people to work out where they need to go and what services and help are available to them (such as the Kiosks in some family courts).¹⁷⁴ Elements of navigation support can be seen in existing services within Relationships Australia,¹⁷⁵ and in services operating in other environments, such as the Collingwood Neighbourhood Justice Centre and the Access Gateway in Logan, Queensland.

Ongoing rather than one-off service delivery

Legal systems are traditionally based on working towards a single point in time service – the dispute is adjudicated on, remedies granted or denied, and the parties move on. This is not the case with family disputes, particularly in the context of modern expectations of ongoing co-parenting.¹⁷⁶ However, the 'one off' event model has shaped funding models for alternative dispute resolution in family law disputes. For a range of reasons, families participating in FDR often need multiple sessions to process emotions, develop realistic expectations, and negotiate a workable agreement.

The services offered and the performance measures applied should be premised on models which allow engagement with services in non-linear ways, reflecting the non-linear emotional and psychological experience of family conflict and child development. In multiple session models currently used, clients can trial an agreement for a few weeks, or a month, before attempting to extend the agreement beyond that timeframe. This affords opportunities to re-establish safe and respectful communication, and to acknowledge the important role that the other parent may play in the children's lives. Where possible, a multiple session approach also enhances opportunities for children to have a say in how they are managing the separation of their caregivers.

Relationships Australia urges funding for, and mechanisms to ensure early and ongoing screening and risk assessment for families to enable decision-makers to have access, as early as possible, to high quality information about safety concerns of all kinds. Many professionals in the system, including judges, have expressed serious concern that allegations of family violence are not properly dealt with until final hearing, entrenching conflict. Ongoing

¹⁷⁴ For example, the South Australian Family Law Pathways Network funds such a kiosk in Adelaide. This service is well-used by judges and lawyers who direct litigants to the kiosks to seek help with referrals.

¹⁷⁵ For example, the Family Safety Model run by Relationships Australia Victoria, and described in Relationships Australia's submission to the SPLA Inquiry.

¹⁷⁶ See Moloney, Smyth, Richardson and Capper, 2016.

screening¹⁷⁷ and risk assessment may assist both in defusing conflict caused by delayed determination of these issues, and in facilitating diversion to relationship services. If the current funding envelope is not expanded, then Relationships Australia considers that a high priority for targeting funding increases would be to assist vulnerable clients (those with safety concerns) and to augment FDR services to cope with the additional demand that would be generated by mandatory FDR for property matters.

FDR in a Family Wellbeing System

FDR is not a 'one size fits all' proposition; the services offered can and are tailored to meet specific needs; for example:

- case management
- family group counselling to engage a wider circle of people to assist with problem-solving
- involvement of a Parenting Co-ordinator before, during or after litigation has commenced, whether by agreement or court order,¹⁷⁸ and
- referral by the court to FDR to support decision-making on specific issues; for example, which school a child will attend, and the amount of time spent with particular adults.

There should be a clear process for reporting back to the courts on FDR outcomes, subject to confidentiality considerations.¹⁷⁹ When ordering families to undertake FDR, courts should make clear that FDRPs are not decision-makers undertaking a judicial function.¹⁸⁰

¹⁷⁷ Noting evidence on pro-disclosure factors: cf Cleak and Bickerdike 2016, citing Spangaro et al 2011 and Bailey and Bickerdike, 2005.

¹⁷⁸ For more information on Parenting Co-ordination services, see our response to paragraph (b) of the Committee's Terms of Reference.

¹⁷⁹ Relationships Australia understands that California has arrangements for court-ordered mediation without suitability screening. It is conducted within the court precinct for security reasons. This could be considered.

¹⁸⁰ Currently, Relationships Australia Queensland is further exploring the development of its practice guidelines for Child Practitioners where FDR is assessed as inappropriate through its pilot of *Legally Assisted and Culturally Appropriate Family Dispute Resolution for Aboriginal and Torres Strait Islander and Culturally and Linguistically Diverse Families who are separated and experiencing Domestic and Family Violence*. The pilot works with high risk, intensive needs families to deliver a safe, strength based, collaborative and culturally competent experience for its child clients. In several cases, where mediation has been assessed as not suitable, the family has still transitioned through and experienced the Consolidated Support Model for Legally Assisted and Culturally Aware FDR used by Relationships Australia Queensland. A range of child feedback mechanisms have been adopted, aimed at improving family relationships, and ensuring children feel respected, understood, unburdened and heard. Importantly, the objective is to ensure positive service experience for children, helping them to develop a secure emotional base for post-separation.

B Role of judges, lawyers and the court system in a Family Wellbeing System

Services working with separating families recognise that

The dynamics involved in family conflict have complex emotional, cultural, social, health and economic underpinnings. *Characterisation of family conflict as a 'legal problem' does not assist, and frequently exacerbates, dispute...*¹⁸¹ [emphasis added]

Relationships Australia notes two particular sub-themes in relation to the current role played by the courts, the law and the legal profession in family separation. First, reforms to other categories of civil litigation have not been applied to practice in family courts.¹⁸² The past twenty years have involved transformational advances in processes and the role of lawyers and legal advisers in areas of law including torts and commercial litigation. These reforms have been intended to manage demand for a very expensive public resource (courts) and to deter and sanction poor behaviour by litigants and their professional advisors. Reforms with similar intent in the family law jurisdiction have been fiercely (and generally successfully) resisted by some (though not all) quarters of the legal profession. This has been on the basis of an assumption that family disputes demand a primarily legal service response. Families do not necessarily agree with this:

I'm not I'm completely not interested in legal services. I don't believe that it is in the best interest of the kids at all. (*father, agreement still in place*)¹⁸³

Second, legal issues are given disproportionate weight relative to other issues that may have contributed to legal issues, or co-exist with legal issues, diverting attention and resources away from thinking about children's future and developing needs. However, because family disputes involving parenting matters must be answered by reference to a child's best interests, what is most critically required is expertise in responding to factors such as child development and family dynamics.

Legal services and remedies, however accessible and well-funded and however responsive to families' legal needs, will not repair or remedy other social, emotional, practical or logistical needs which, if not attended to, will result in recurrence of legal needs.

C Measuring effectiveness of the Family Wellbeing System

Most families can, and do, sort out parenting and property arrangements for themselves.¹⁸⁴ Only around 3% of separating couples require judicial resolution. Those matters that do go to

¹⁸¹ Marrickville Legal Centre, submission 137, in response to Issues Paper 48 of the ALRC inquiry into the family law system, p 4. See also the *Evaluation of the 2012 Family Violence Amendments: Synthesis Report*, 2015, at 16).

¹⁸² See the Australian Bar Association submission to the ALRC inquiry, submission 13; Parkinson and Knox, 2017.

¹⁸³ Participant in the study of FDR outcomes being undertaken by Relationships Australia.

¹⁸⁴ See Table 4.8, *Experiences of Separated Parents Study* (2012 and 2014), AIFS.

hearing generally involve health or social complexities such as mental health issues, substance abuse, family violence, or a combination of two or more of these.¹⁸⁵

The success of interventions in this context should not be measured by whether an agreement was reached in particular families; other measures must be considered, such as whether the family could be referred to another service to assist them (for example, coaching for one or problem-solving for one). Outcomes for family law services have been inherently difficult to define and measure over budget or political cycles, due to the complexity and diversity of family circumstances, the nature of why families seek these services, and how they interact with services over time (given the non-linear nature of how family members experience and process family separation).

Consistent with our submissions about the paramountcy of children's best interests, Relationships Australia proposes that the effectiveness of relationships services for families with children should be measured by reference to children's development outcomes. That is, compared to children whose families do not separate, children after separation are no worse on social, emotional, physical or education measures over the long-term.

Relationships Australia study of FDR outcomes

Relationships Australia has undertaken a national study aimed at measuring the outcomes of its FDR services in both parenting and property matters. That survey, of more than 1700 participants, completed a survey at intake appointments for FDR between May and November 2017, and again three months later. These surveys included questions about their dispute and measures of individual wellbeing, conflict (including violence) between separating parties, and children's wellbeing. A twelve-month follow-up survey was also undertaken and we conducted interviews with a subsample of participants.

Although the vast majority of participants in this study (70%) were doing FDR for parenting matters, 23% said at intake that they had a combination of parenting and property/finance issues they wished to resolve. This represented over a quarter of participating FDR clients (28%). More specifically, 377 respondents (22%) reported wanting a property settlement. Three quarters of these 'property clients' were also hoping for a parenting agreement. Conversely, about a quarter (24%) of those reporting parenting issues also wanted to resolve property/finance matters. Excluding those who reported having no shared property to divide, this proportion jumps to 49%. There is considerable overlap of parenting and property clientele, despite the distinction that is reinforced by compulsory attendance for parenting matters only.¹⁸⁶

¹⁸⁵ See Table 2.2, p 16, *Complex Issues and Family Law Pathways: Synthesis Report, Evaluation of the 2012 Family Violence Amendments*, AIFS (2016).

¹⁸⁶ Relationships Australia concurs with the observation made by FMC concerning 'the unrecognised impact upon children from parents in an elevated conflict state due to property dispute....a quicker response and process is required to reduce the detrimental effect of this conflict. This should be a prime consideration for resolving property disputes prior to a court process.' (submission 135 to the ALRC inquiry, 12).

Value of shared property

The asset pools of property clients in the sample were greater than those of parenting clients, which is an expected selection effect when property clients (a) have some property to divide, and (b) have had to attend a fee-paying service. Nevertheless, the pools are far from high:

- a quarter (25%) are under \$200,000 (including 8% where the pool is comprised of debt)
- more than half (53%) are under \$500,000, and
- more than $\frac{3}{4}$ (81%) are under \$1 million.

These values must be considered alongside the cost of going to court. One 2014 estimate was that a more straightforward family law case will cost parties \$20,000-\$40,000, while a complex case can cost in excess of \$200,000 to litigate.¹⁸⁷ For many of the clients in our sample, costs in this range would represent a prohibitive proportion of the total value of the shared assets. For some, the cost of going to court would be greater than the value of the shared property.

Satisfaction

Facilitator: And how would you say that mediation has affected your relationship with your [ex-partner]? **Participant:** Probably made it a lot better to be honest, because we hadn't sat down and spoke about anything for you know, four or five months until we sat down in mediation.

Facilitator: Would you say that that the mediation that you did attend has affected your relationship with your ex-partner in any way? Has it changed some things for you?

Participant: I think if we hadn't gone there would've been maybe suspicion about why do we need to have this sort of agreement in place...Whereas having been through the mediation process we could see this was just about formalising it for clarity as opposed to using it as you know some way of getting back at each other or something like that. So I think that the process that we went through actually helped to de-escalate emotion that might have been linked to that process if that makes sense.¹⁸⁸

Among those who had participated in FDR at the 3-month follow-up:

- 80% agreed that 'Overall, I am satisfied with the way my mediation was carried out'
- 63% agreed that 'Overall, I am satisfied with the outcome of my mediation'

Analysis shows that **outcome** satisfaction is related to whether or not an agreement was reached, as might be expected. However, clients' satisfaction with the **process** is independent of whether or not an agreement was reached, with clients expressing appreciation of the professionalism and quality of mediation services.

D Drastic service cuts from June 2021

From June 2021, current family services will have to turn away up to an extra 400 clients per service per year, because of a massive funding cut baked into the Federal Budget since 2012.

¹⁸⁷ Productivity Commission 2014, volume I, 853.

¹⁸⁸ From interviews conducted during the study.

Failure to stop this cut will undermine progress in addressing a range of key government priorities, including improving:

- service delivery, especially to rural, regional and remote communities
- mental health and reducing suicide rates
- women's economic security (including among the predominantly female workforce in the sector), and
- child safety.

We respectfully urge the Committee to strongly recommend reversal of this cut. This will help to ensure that Australian families do not lose access to services that can keep them out of courts, and parent-child relationships intact.

Services to which this cut will apply are integral, providing both alternative dispute resolution and a range of other services to assist families to prevent separation and through and beyond separation. These services have consistently received favourable evaluations. There has been an increase in demand for services and in the complexity of needs to be met, while funding has remained static since indexation was paused for three years in the 2014-15 Budget.

Background

Since 2012, the Federal Government has delivered additional funding on a range of grants in the community services sector in response to the Fair Work Commission's Equal Remuneration Order (ERO), made in respect of the Social, Community, Home Care and Disability Services Industry Award 2010 (SACS Modern Award). The ERO mandated increases to the award rate of between 23 and 45 per cent over a phase-in period, with the increase to be applied in full by 2020 and beyond.

Acknowledging the significant importance of the ERO, as well as its impact on the sector, Commonwealth funding for SACS supplementation was enshrined in the *Social and Community Services Pay Equity Act 2012*, which established a Special Account from which ERO Supplementation Payments are drawn. Despite the ongoing nature of the ERO itself, the Act, as drafted, will sunset on 30 June 2021, at which time payments into, and out of, the Special Account will cease.

As a result, a great number of organisations in the community services sector will cease to receive ERO Supplementation Payments from July 2021.

For each Relationships Australia state/territory organisation, the total quantum of ERO Supplementation Payment received has fluctuated based on calculations devised by the Commonwealth, as well as variations to the number of relevant Programmes offered and changes to the grant amounts from year to year.

An analysis of the ERO Supplementation Payments received by each Relationships Australia state/territory reveals the financial impact of the ERO Supplementation Payment, resulting in a reduction of between ten and twenty-five percent of funding across affected programs. In dollar terms, this is equal to between \$500,000 for some of the smaller states and territories and over \$2million for others.

The flow on consequences for the services themselves are abundantly clear, resulting in not only a reduction of capacity and therefore service delivery to vulnerable Australians, but also a loss of jobs. By way of example, the below table demonstrates the likely impact on one Relationships Australia member organisation, based on a conservative reduction of 9% across relevant programs.

Name of program	Client impact Client reduction	Staff impact FTE reduction
Find and Connect Support Services	-371	-0.8
Children and Parenting	-31	-0.1
Family and Relationship Services	-344	-5.0
Specialised Family Violence Services (SFVS)	-17	-0.4
Children's Contact Services	-114	-1.0
Family Dispute Resolution	-18	-0.4
Family Law Counselling (Under FARS)	-304	-1.7
Family Relationship Centres	-653	-8.3
Parenting Orders Program	-18	-0.3

It should be emphasised that a number of organisations are expecting larger reductions (of up to 25%), which would have an even greater impact on their service capacity.

The likely reduction in community service providers' capacity to see clients will lead to longer waitlists for services and the potential for clients to be denied access to crucial services. It is well accepted that these services allow for intervention and support at times of great vulnerability and need, without which, there is a greater risk of Australians becoming trapped in unemployment, homelessness and poverty while at the same time leading to growing demand on our courts and other social institutions.

Evidence and research supports the suggestion that early-intervention, wrap-around services, such as those delivered by Relationships Australia in the affected programs, have a considerable impact on supporting mental health, addressing suicidality, and preserving healthy relationships, which provide a firm foundation from which individuals and families are able to contribute to society.¹⁸⁹

We urge the Commonwealth, as a matter of utmost importance, to dedicate a specific appropriation in forward estimates to fund an increase to base funding across impacted grant programs. The appropriation must take effect from 1 July 2021 and be sufficient to ensure that services are not impacted by the cessation of ERO Supplementation Payments at that time.

¹⁸⁹ See also FRSA and SEED, *Strengthening Prevention and Early Intervention Services for Families into the Future*, 2017, <https://frsa.org.au/wp-content/uploads/2016/05/FRSA-Research-Report-Printable.pdf>.

The inclusion of an amount commensurate to the ERO Supplementation Payments within base funding would ensure that funded programs have certainty and stability into the future, thereby guaranteeing the ongoing delivery of services at the necessary levels of expertise.

Relationships Australia recognises that this would require the government to dedicate additional funds for the 2021-2022 financial year and beyond, not currently provided for in the forward estimates. However, the impending funding cliff will have significant and ongoing impact and will result in far greater costs, across a broad range of government funded institutions, well beyond the funding needed to ensure a suitable level of service delivery in the community services sector into the future.

Paragraph (f)

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

... um, I was a bit scared of like - because I didn't want to say anything ... I didn't want to hurt my parents' feelings ... And I didn't really - it didn't really - I wasn't really listened to - I needed to learn - it was kind of just like, well this is just the children, they don't really have a say in - we understood that it was ... no one really listened to you, you're 12 years old ... I didn't want to say anything that would - that would hurt another, another person there ... Because, as a person, I love to keep everyone else that I love ... I love, I love everyone to be happy ... And I just - it's, it's, it's hard when you just - you don't want to say anything that will hurt anyone - anyone's other feelings ... And then you, and then you, if you don't say then they won't get - it won't get through to them. (Ellie, 10-11 years)¹⁹⁰

This chapter explores:

- what parents and children say about the impacts of family law proceedings
- the effects on children of parental disagreements that accompany family separation
- the effects on children of legal battles between their parents
- the effects on parents of legal battles about their children
- how children's best interests have been dominated by legal doctrine
- options to stop the law weaponising parents, their emotions and their resources, and
- options to minimise harm to children whose parents end up in court (including helping children come to terms with separation by giving them developmentally appropriate information and listening to their concerns, fears and hopes).

A Setting the scene

In 1997, ALRC Report 84 reported that children believed that the family law system was 'dominated by legal strategizing by competing parties to maximise their chances of winning the case...The interests of the child often get lost between the warring parties.'¹⁹¹

Regrettably, reforms to fix this have been forcefully resisted by those in favour of the *status quo* (but not by parents or by practitioners with expertise in conflict, violence or mental health). Australians know that the current system – designed to make winners and losers of parents – is not only not working, but is actively harming children and their parents.¹⁹²

From the binary win/loss outcomes that litigation is designed to produce flow all manner of serious and sometimes irreparable harm to children and their families:

- entrenching and deepening conflict between parents

¹⁹⁰ Carson et al, 2018.

¹⁹¹ ALRC report 84, *Seen and heard: priority for children in the legal process*, paragraph 4.25. See also Marrickville Legal Centre, submission 137, 3.

¹⁹² The Law Council of Australia seems also to recognise this – see submission 43, paragraph 162 and paragraphs 381-382.

- incentivising litigation tactics such as burning off and making unfounded allegations
- incentivising other misuse of court processes and other legal systems, and
- incentivising aggressive behaviours intended by one parent to incapacitate the other parent from co-parenting effectively.

This cannot be allowed to continue.

Our society, through its elected governments, has a responsibility to current and future families to reject win/loss models and foster decision-making models that support, encourage and expect co-parenting. After 40 years, it does not appear that a traditional family law system can achieve this. More radical change is necessary.

B Current problems

B.1 Effects on children of adult problems that accompany conflict and separations

The 2012 AIFS survey of recently separated parents found that only 44% of parents agreed that the family law system meets the needs of children and just under half of all parents agreed that the system protects the safety of children. Just over two-fifths of all parents agreed the system effectively helps parents find the best outcome for their children. In its 2018 report on children's involvement with the family law system, one young person observed that the 'winner/loser' approach used in the courts 'should be ditched'.¹⁹³

Prevalence of complex needs

Families with complex health and social needs are *not* a minority or fringe demographic. They are the core clients of the family courts. The national study of FDR outcomes conducted by Relationships Australia involved approximately 1700 participants, of whom:

- nearly a quarter (23%) presented with high levels of psychological distress, and
- 68% reported experiencing at least one form of abuse, with verbal abuse being the most common (64%).

A large proportion (72%) of parenting participants in the Study also reported significant child exposure to verbal conflict between parents, including yelling, insulting and swearing.

¹⁹³ From ALRC DP 86, paragraph 1.43, citing South Australia Commissioner for Children and Young People, *What Children and Young People Think Should Happen When Families Separate* (Office of the Commissioner for Children and Young People, 2018) 15.

Further, an audit of data collected by Relationships Australia South Australia found that clients reported concerns about mental health, violence and harm to children. The audit analysed over 3,200 files from 2013-2018; its findings are summarised in the following table.

DOOR 1 wording*	Clients saying 'Yes'	Sample size	Risk indicator
In the past 2 years, have you seen a doctor, psychologist or psychiatrist for a mental health problem or drug/alcohol problem?	33.9%	3232	Mental health problem
Have things in your life ever felt so bad that you have thought about hurting yourself, or even killing yourself?	18.8%	3189	Mental health
If yes, do you feel that way lately?	9.5%	599 (Yes only)	Suicide risk
In the past year, have you drunk alcohol and/or used drugs more than you meant to?	10.3%	3245	Alcohol or drug abuse
In the past year, have you felt you wanted or needed to cut down on your drinking and/or drug use?	9.4%	3177	Alcohol or drug abuse
Does your young child(ren) have any serious health or developmental problems?	10.5%	1452	Developmental risk (child <5 years)
In the past 6 months, has any professional (teacher, doctor, etc.) been concerned about how your young child(ren) was doing?	14.0%	1411	Developmental risk (child <5 years)
Does your child(ren) have any serious health or developmental problems?	20.6%	2107	Developmental risk (child >=5 years)
In the past 6 months, has any professional (teacher, doctor etc.) been concerned about how your child was doing?	33.7%	2028	Developmental risk (child >=5 years)

Have any child protection reports ever been made about your child(ren)?	13.1%	3095	Child abuse
As a result of the other parent's behaviour, have the police ever been called, a criminal charge been laid, or intervention/restraining order been made against him/her?	28.4%	3228	Family violence (victimisation)
Is there now an intervention/restraining order against other parent?	5.1%	3131	Family violence (victimisation)
As a result of your behaviour, have the police ever been called, a criminal charge been laid, or intervention/restraining order been made against you?	14.3%	3244	Family violence (perpetration)
Is there now an intervention/restraining order in place against you?	4.5%	3130	Family violence (perpetration)

*DOOR 1 was developed by J E McIntosh

Family violence, in the experience of Relationships Australia, is rarely present in isolation from other issues such as substance abuse, mental health problems or personality disorders.¹⁹⁴ Further, family court judges rarely have the luxury of being asked to decide between one option that is safe for the child and one that is not safe. Too often, judges must identify a parenting arrangement that is merely *relatively* safer than other alternatives.¹⁹⁵

Children and family violence

In 2018, AIFS reported that 50% of parents interviewed expressed safety concerns for themselves and/or children as a result of ongoing contact with the other parent. Children and young people also reported instances where they felt unsafe with a parent with whom they were required to spend time.¹⁹⁶ Daniel said

I didn't really get a say [in living arrangements]I think the family court's corrupt...'cause we went to court and the judge said I had to go back with Dad that night.

¹⁹⁴ See, for example, the submission of Relationships Australia South Australia in response to ALRC IP48 (submission 62), 4.

¹⁹⁵ See also Bretherton et al, 2011, 541.

¹⁹⁶ Carson et al, 2018, 33, 40.

Soon after the court event,

I said to my mum that he didn't pick me up. And my dad got really angry, he, um, and because of that he - that night he choked me for a solid minute...¹⁹⁷

Unsurprisingly, researchers have observed that

The struggle that children have in a climate of domestic violence in just feeling safe is immense. There is physical safety... then there is psychological safety....The emotional climate and the child feeling fundamentally cared about and protected from uncertainty needs to be on a par with physical safety. There are very good data on that. *This is not something that is waiting to be demonstrated. It is very clear that this kind of conflict between parents affects children in a bad way.*¹⁹⁸ [emphasis added]

Carson et al related the concerns of one interviewee who contrasted the court processes used to assess the best interests of his sister, with the resolution of his own parenting arrangements outside of the court process (to which he attributed arrangements that enabled him to safely maintain a relationship with both parents):

You need to let children speak up. And be in the, with, have a bit more of a random conversation, rather than planned. Because in my sister's - my sister's case, she was doing a talk with a counsellor, but her dad was there and he's pretty scary. He, um, when my mum were together, he was hitting her. And so my sister's scared of her, him. And at the time, she thought that if she had said that she doesn't want to stay there, he could have hurt her. But, so it's better if it, when she was there, if someone came over randomly and just talked to SISTER. When she hadn't been prepared ... they (father and his family) were also bribing SISTER a bit. They were saying, 'If you come live with us, we'll give you a dog and a big house and a big room,' and all sorts ... And it wasn't fair, because SISTER was young. It's been two or three years and she didn't understand. And now it's crazy because SISTER wants to come home now and she doesn't want to go there and she's not getting another chance ... I don't think my sister's safe at all ... Because I think he's crazy and I don't know what he's capable of, because he's said some really bad things to my mum ... And he has physically assaulted her and I don't think it's safe for my sister to be around him. (Andrew, 12-14 years)¹⁹⁹

These interviews took place against a background of numerous inquiries in Australia about child protection and family violence, and against a background of a Royal Commission that heard extensive and heartbreaking evidence of children who, when they reported harm and threats to their safety, were disbelieved, dismissed, even punished for speaking; their suffering minimised and camouflaged by sustained institutional denial. The adults those children became bear forever the wounds not only of their abuse, but those wounds inflicted by the shameful inaction of those charged to protect them.

¹⁹⁷ Carson et al, 2018, 34.

¹⁹⁸ Zeanah, in Lieberman et al, Attachment Perspectives on Domestic Violence and Family Law, 2011, 530-531.

¹⁹⁹ Carson et al, 2018, 51, 81-82.

Silencing children, by act or omission, does not protect them.

At its commencement, the Family Law Act was silent on family violence and children's safety. The then Attorney-General, Senator the Hon Lionel Murphy QC, noted this expressly in his second reading speech.²⁰⁰ It was thought that family violence was 'an artefact' of the *Matrimonial Causes Act*,²⁰¹ partly because the requirement to prove fault offered an incentive to confect allegations and partly because of frustrations with the five year waiting period if one of the statutory grounds for divorce could not be established. Moreover, in an effort to banish fully any concept of fault, the early Court assiduously avoided any form of interrogation of past conduct, including family violence, in both children's and property matters.²⁰²

The Family Court simply was not 'set up as a court that would deal with issues of family violence,'²⁰³ or complex health and social issues more broadly. Rather, it was established to resolve what were then seen as purely private disputes between individuals: the two adults who were parties to a marriage. Further, in the 1970s, there was not the expectation by society, or by fathers, that they would assume a co-parenting role. In the twenty-first century, however, the value of children having ongoing relationships with their parents is acknowledged and encouraged. Accordingly, fathers rightly expect to co-parent, and a Family Wellbeing System should support and encourage that.

B.2 Effects on children of legal battles between parents – how the family law system weaponises parents and makes them winners/losers in parenting

Conventional civil litigation in common law jurisdictions such as Australia is designed to, and does, deliver win/loss outcomes. The culture, practices, court craft and the rules that apply in court and to professionals working in courts all derive from that. Form follows function. The Family Law Act and the family law courts were modelled, with adaptations, on this. But the adaptations did not change the nature of the outcomes available to families whose disputes fell within the operation of the Act or the jurisdiction of the courts. Thus, the 'family law system' turns parents into winners and losers, and delivers institutional entrenchment and even encouragement of parental conflict.

This is wrong.

Parental conflict predicts poor wellbeing outcomes for children. Mitcham-Smith and Henry (2007) observed that the win/loss nature of litigation in the family law courts can:

- entangle children in perpetual turmoil, as parents navigate through complex, expensive, emotionally, intimidating and too-often prolonged processes
- diminish the role of parents as legitimate protectors of their children
- complicate the child's role identity
- teach ineffective conflict-resolution skills, and

²⁰⁰ Commonwealth Parliamentary Debates, Senate, 3 April 1974, 640, 641.

²⁰¹ See Moloney, 247-8, citing Behrens, 1993.

²⁰² Fogarty, 11, 14.

²⁰³ ALRC Report 114, para 4.33.

- embed shame and self-blame by children if ongoing parental conflict relates to parenting matters, including contact arrangements and child support.

The Australian Psychological Society notes that

...the factors predicting child wellbeing are the same for children in separated families and those in stable families. The *presence of inter-parent conflict and family violence reduces child wellbeing*, while responsive, warm, consistent and authoritative parenting is associated with improved outcomes for children (Sanson & McIntosh, 2018). Additionally, where there is high conflict and family violence, the capacity of parents to enact shared time increases the risk of exacerbating conflict and provides opportunities for those who use violence to continue to intimidate and cause fear to the other parent (Cashmore et al, 2010).²⁰⁴ [emphasis added]

B.3 Effect of legal battles on parents and their parenting

A win/loss system, embedded in the Act in an era when the future wellbeing of children was not at the forefront of the legislature's mind, is not fit for purpose.

Win/lose outcomes do not facilitate, and can entirely thwart, ongoing co-parenting relationships.²⁰⁵ Just as litigation can poison co-parenting, so too can it damage the parenting capacity of each individual parent.²⁰⁶ In 2001, Elrod commented that

The win/loss framework encourages parents to find fault with each other rather than to cooperate. In an attempt to be in the best position to argue for stability, a parent may try to take or maintain possession of the child.... *When an attorney increases hostility between parents, their parenting ability often decreases.* For example, advising clients not to talk to the other spouse, filing for protective orders....[emphasis added]

If society can stop institutionalising conflict between parents, and weaponising their emotions, then parents will have a better chance to be the best parents and co-parents they can be.

High conflict families

In Bretherton et al, 2014, Seligman observed that

Unfortunately, sometimes a parent's core sense of self may become reliant on a variety of purposes and outcomes, which often do not serve the child's purposes. *Things like winning, being vindicated, illuminating the badness of the other, redeeming the past, assuaging of guilt, dealing with their own hurt at the hands of the other parent, real and imagined*, and so on. Sometimes these self-serving ends are mingled with real concerns about the child, but in high-conflict divorces there is a good likelihood that those kinds of things are obscured....

²⁰⁴ Submission 55, 23.

²⁰⁵ Morris et al, 2016, 1 at 3, 14.

²⁰⁶ See, also for example, Crockenberg and Langrock, 2001.

But, it would be unrealistic to expect the adversarial law system to work this way...the legal order of things may well move things toward a kind of developmental risk that is not worth taking.²⁰⁷ [emphasis added]

Savard observed that high conflict divorce 'roughly doubles the rate of emotional and behavioural problems in children', with children enmeshed in chronic high conflict families, experiencing 'chronic stress, insecurity and agitation; shame, self-blame and guilt', as well as fears for their own safety.²⁰⁸

B.4 'Parenting' matters or 'children's' matters?

Relationships Australia considers that terms such as 'parenting matters' or 'parenting orders' should be replaced with 'children's matters' and 'children's orders' throughout new legislation.²⁰⁹ This would deliver a range of benefits, including explicit focus on the purpose of orders to promote a child's wellbeing, and better accommodating the range of family roles, formations and structures in Australian society (for example, grandparent carers and kinship care).

B.5 Legalisation of children's 'best interests'

Legal doctrine and legal methods are not useful tools for understanding children's needs, and how they might best be met.

Children's interests embrace all facets of child development, including attachment, emotional and physical safety, physical and mental health, education, and social development. The inquiry into children's best interests is an inquiry into a dynamic future, as children develop. It is thus sharply distinct from other litigation:

- it is an inquiry about an individual who is not only *not* a party to the litigation but whose views and interests may never be put directly to the decision-maker
- it is an inquiry about that individual's future, from a developmental and *not* a legal perspective, and
- it is *not* an inquiry about the past and existing legal rights of the named parties to the litigation.

²⁰⁷ Bretherton et al, 2011, 547. Relationships Australia notes the observation made by the Australian Bar Association that 'If a [Family Consultant] explained age appropriate parenting arrangements [by reference to attachment theory and its application at different developmental stages], this may assist parties to shift away from a focus on whether they perceive are their adult parenting 'rights'...and to instead focus on the developmental needs of the children.' (submission 13 to the ALRC inquiry, paragraph 23). In submission 83 to the ALRC inquiry, the Mediator Standards Board noted that '...many parties can become so embroiled in the adversarial system that they become unwilling to attempt mediation, even when it might be in their best interests to do so.' (p 3)

²⁰⁸ Savard, 'Through the eyes of a child: impact and measures to protect children in high-conflict family law litigation' (2010). See also Bing et al, 'Comparing the Effects of Amount of Conflict on Children's Adjustment Following Parental Divorce (2009), where the degree of conflict was measured by the level of court involvement; FMC submission 135, 9. See also Mitcham-Smith and Henry, *High-Conflict Divorce Solutions: Parenting Coordination as an Innovative Co-Parenting Intervention*, 2007, and Sroufe and McIntosh, 2011, 470.

²⁰⁹ A similar suggestion was made in the submission from Marrickville Legal Centre (submission 137 to the ALRC inquiry).

These inquiries are not of a kind that must – and indeed can only – be answered through a process that receives and weighs evidence according to legal methodologies.²¹⁰ Instead, the best interests inquiry is more like a guardianship inquiry. Parents are valuable witnesses, but they should not be positioned, by the state, as contestants. Insisting on the virtues of litigation to establish a child's best interests and how these are best met is rather like insisting on the suitability of that process to develop responses to low rates of literacy or the disappearance of bees.

How we got to a place where children's developmental needs are defined by legal doctrine

Once parenting matters were brought under the jurisdiction of a court established under Ch III of the Constitution, the legal principles had to fit within the powers and functions available to judges appointed to courts established under Ch III of the Constitution. These have been strictly defined by the High Court²¹¹ and it was not a comfortable fit. There is a largely unaddressed tension between the paramountcy of the children's best interests and the concept that parenting matters are conceptualised and conducted as *inter partes* proceedings demanding procedural fairness and justice as between the adult parties.²¹² This tension permeates the family law system. It distorts inquiries into children's best interests so that they can be conducted in accordance with rules intended for disputes that are, as noted above, sharply distinct from other litigation.

The Family Court of Australia was intended to enable dignified and private dissolution of marriage. It was not designed or intended to function as an institution largely concerned with children's safety, welfare and healthy development.

Now, however, a different demographic, characterised by complex health, relationship, emotional and social needs, come to court seeking kinds of assistance that cannot be delivered through 'one-off' court decisions. Recurrent appearances before the family courts may make it seem that the families' problems are legal in nature, but focus on this surface image can obscure underlying needs, and prevent referral to specialist services. The cycle of interim applications, enforcement applications, and appeals before multiple courts will only be halted if underlying health, relationship, emotional and social needs are seen and responded to for what they are.

But in a society where courts are seen as the ultimate vindication and the 'gold standard' of decision-making, it is all too easy to imagine that only the courts can make decisions about arrangements for children in separating families. These are, after all, some of the highest stakes issue that many Australians will ever face in their personal lives – the care and wellbeing of their children.

²¹⁰ As suggested by the Law Council of Australia, the inquiry of the Senate Legal and Constitutional Affairs Committee into the Family Law Amendment (Parenting Management Hearings) Bill 2017, submission 20, p 5, paragraph 2. See also the Law Council's submission in response to ALRC IP48, submission 43, paragraphs 20-21, and the Australian Bar Association to the ALRC inquiry (submission 13), paragraphs 23, 31.

²¹¹ *R v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

²¹² See submission 35 to the ALRC inquiry, from the Hon Diana Bryant AO QC: 'The focus of any legislation must be on the best interests of the child and not on perceptions of what may or may not be "fair" to parents.'

However, the question of whether parenting matters involve an exercise of judicial power that must be undertaken by a court established under Ch III of the Constitution, needs to be revisited, informed by contemporary understanding of the rights and agency of children, as recognised in domestic and public international law. In *M v M*, the High Court recognised that, in parenting matters, the court's concern is:

...promot[ing] and protect[ing] the interests of the child', not enforcing a 'parental right'.²¹³

The Court emphasised the future orientation of parenting matters, and their distinctiveness from other litigation:

...the ultimate and paramount issue to be decided in proceedings for custody of, or access to, a child is whether the making of the order sought is in the interests of the welfare of the child.....

Proceedings for custody or access are *not disputes inter partes in the ordinary sense of that expression*: *Reynolds v Reynolds* (1973) 47 ALJR 499; 1 ALR 318; *McKee v McKee* (1951) AC 352, at pp 364-365. In proceedings of that kind the court is not enforcing a parental right of custody or right to access. The court is concerned to make such an order for custody or access which will in the opinion of the court best promote and protect the interests of the child.²¹⁴ [emphasis added]

Their Honours further emphasised the distinctive character of parenting matters later in the judgment:

After all, in deciding what is in the best interests of a child, the Family Court is frequently called upon to assess and evaluate the *likelihood or possibility of events or occurrences which, if they come about, will have a detrimental impact on the child's welfare*.²¹⁵ [emphasis added]

²¹³ *M v M* (1988) 166 CLR 69, joint judgment.

²¹⁴ *M v M* (1988) 166 CLR 69, joint judgment, paragraphs 19-20.

²¹⁵ *M v M* (1988) 166 CLR 69, joint judgment, paragraph 24. Some years before *M v M*, the High Court observed that, in parenting matters, 'Reasons for judgement, necessarily in many cases, especially in a finely balanced case, are a *rationalisation of a largely intuitive judgement* based on an assessment of the personalities of the parties and the child': *Gronow v Gronow* (1979) 144 CLR 513, paragraph 6. See also *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245. [emphasis added] Such intuitions are, we respectfully suggest, more likely to be sound when formed by professionals with expertise in psychology, child development and relational dynamics. The Law Council of Australia referred to the view of the New South Wales Law Society that '... if interim orders are drafted such that therapeutic intervention was linked to or required as a condition of time with or residency of a child, (that is to say, therapeutic jurisprudence) this practice may not be repugnant to the principle in *R v Kirby; Ex parte Boilermakers Society of Australia*'. [emphasis in Law Council submission]. See also Submission 23 to the ALRC inquiry, p 11, paragraphs 41-42, Victorian Family Bar Association; our response to paragraph (b) of the Committee's Terms of Reference.

B.6 Court-led processes can stop relevant matters and circumstances being considered

Family court rules around admissibility and probative value were developed for quite different purposes than understanding a child's needs and how to meet them. While the Family Law Act certainly allows for the modification of such rules, the scope of modification that is permitted (let alone actually used) does not overcome the serious harms done by casting parents as winners/losers and institutionalising parental conflict.²¹⁶

A further complication is highlighted by Rathus' paper on perceptions on the use of research in the family law system.²¹⁷ That is, despite the best efforts of judges and legal advisors,²¹⁸ they cannot be across vast research work that is undertaken in pertinent fields of clinical practice.

Thus, judges are not necessarily receiving the best evidence possible. There is also ambiguity about the extent to which judges can take judicial notice of social science has not been put before them by the parties in the particular case. In turn, judges can create deep unease (and potentially appellable error) if their judgments do reference social science findings that the parties' lawyers have not had an opportunity to test during the hearing. Rathus observes that

On the one hand professionals in the family law system want informed judges who can make meaningful decisions in complex family law cases involving children, but they raise valid concerns about judges employing social science literature as a court room tool.²¹⁹

Bretherton remarks that

...lawyers and parents tended to want you to say what they wanted to hear in order to obtain more time with the child or to score points against the other parent....One of the problems is that: expert witnesses are often hired by the parents or lawyers after they have been assessed to make sure they are going to support the arguments the lawyers/parents want to make. If expert witnesses were, instead, *retained by the court as providers of impartial information*, the situation would be entirely different. As it stands, how would the judge know to what extent the expert witness has been vetted to make sure he or she says 'the right thing' during court proceedings. This does not mean that the expert witness is lying, but this prior vetting may nevertheless bias what arguments he or she brings up in court....

²¹⁶ Other submitters have noted this. See, for example, Caxton Legal Centre, submission 51 to the ALRC inquiry, paragraphs 121-124.

²¹⁷ Zoe Rathus, ' "The research says...": Perceptions on the use of social science research in the family law system' (2018) 45(1) *Family Law Review* (forthcoming).

²¹⁸ Noting not only the severe time constraints on lawyers and judges, but also the barriers faced by many lawyers in accessing social science research: see, for example, Rathus, 2018, 12.

²¹⁹ Rathus, 2018, 15.

*So if anything could be done, then it should be to make the legal aspects of the divorce process less adversarial. That would really help children a great deal.*²²⁰ [emphasis added]

C Solutions

C.1 Placing children's best interests within a Family Wellbeing System, not a Family Law System

If a Family Wellbeing System were to be established,²²¹ then the legal perspective would cease to be the defining lens, and be recognised as an important – but not central – enabler that sits beside other specialised services as a pillar to support separating families. Further, if children's safe and healthy development is genuinely the primary consideration, questions about justice as between the adult parties lessen in significance relative to the importance of facilities and mechanisms to identify risks to children's safety and healthy development, to respond to those risks, and to hear children's voices. In a Family Wellbeing System,

- there would be robust bi-directional pathways for clients between courts and all other services²²²
- the multiple co-occurring needs of parents would be identified early and referrals given to support parents to avoid having to go to court,²²³ and
- it would be explicitly recognised that vulnerable families are better supported by an ongoing relationship with services, for as long as they need it, rather than the 'one off' nature of court events.²²⁴

Establishing children's best interests – a specialist body

Courts hearing children's matters must be equipped to respond to situations 'where behavioural problems complicate the resolution of legal disputes.'²²⁵ Such courts are used effectively in other jurisdictions, as noted by the ALRC, which observed that the benefits

... include the capacity to address behaviours that *underlie and complicate* the legal issues, with a view to reducing the level of risk to others and the potential for ongoing litigation. Such processes are particularly indicated where an *ongoing relationship between the parties needs to be preserved*, such as is the case in most disputes about the care of children....A problem-solving court process harnesses the authority of the

²²⁰ Bretherton et al, "If I could tell the judge something about attachment..." Perspectives on Attachment Theory in the Family Law Courtroom', (2011) 49(3) *Family Court Review* 539, 539-540.

²²¹ See the response to paragraph (e) of the Committee's Terms of Reference.

²²² See also submission 7 to the ALRC inquiry from the Darebin Community Legal Centre and the Fitzroy Legal Service Inc, paragraph 7.

²²³ See also submission 104 to the ALRC inquiry Dr Bruce Smyth, 3; Carson and Qu, 2017; Chisolm, 2009, and Kaspiew et al 2015. Rather, it is families with these kinds of needs that make up the vast majority of the caseloads of the Federal Circuit Court and the Family Court of Australia.

²²⁴ As noted, for example, by the Marrickville Legal Centre: Submission 137 to the ALRC inquiry, 5. See also the Australian Psychological Society, submission 55 to the ALRC inquiry.

²²⁵ See ALRC DP 86, paragraph 6.62.

court to effect behavioural change (and reduce risk) in two ways. The first is by empowering judges to connect litigants with relevant services....The second mechanism involves judicial oversight of the person's engagement and progress in making behavioural change, typically via the use of part-heard proceedings. Underpinning each of these components is the use of a therapeutic justice court craft, which seeks to minimise the potential adverse mental health impacts of legal processes on those who use the courts.²²⁶ [emphasis added]

Relationships Australia concurs with Caxton Legal Centre that

The fact that there is a workforce already in place, including tenured judicial positions...cannot define the response to a need for radical change to the current adversarial system. This system is untenable and the role of a judge and court in resolving parenting issues is questionable.²²⁷

The idea of establishing a multi-disciplinary tribunal to provide a more comprehensive and holistic response in parenting matters is hardly new. It was a key recommendation of the 2003 report, *Every picture tells a story: Report on the inquiry into child custody arrangements in the event of family separation*.²²⁸

Relationships Australia envisages that a tribunal, which would not be exercising judicial power within the meaning of Ch III of the Constitution, would ask 'what are the child's best interests and how will they best be met?' It would, without attributing blame or fault, consider:

- what are the child's developmental vulnerabilities
- what are the child's developmental needs
- how best can the parents/caregivers share responsibility to meet those needs, and
- what supports does the child need through wider family, cultural and professional resources.

It would be more akin to a coronial, guardianship or child protection inquiry, and parents/caregivers would be witnesses, not adversaries.

Tribunal members should be drawn from a range of specialisations.²²⁹ The tribunal should have access to information about court orders and existing agreements, as well as expert reports, including medical reports and family reports.

As previously mentioned, official with a role akin to a counsel assisting would manage the processes, including gathering evidence, and would examine witnesses.

²²⁶ ALRC DP paragraphs 6.63-6.65, references omitted.

²²⁷ Submission 51 to the ALRC inquiry, paragraph 98.

²²⁸ House of Representatives Standing Committee on Family and Community Affairs (2003). Rathus, 2018, notes that 'Family law is inevitably, irrevocably and appropriately interdisciplinary.' (at 10) See also the submissions from Caxton Legal Centre, submission 51, 19 and the Hon Diana Bryant AO QC, submission 35, Part 2.

²²⁹ See also the Australian Psychological Society, submission 55, recommendations 16, 18; p 24.

Relationships Australia urges Commonwealth, State and Territory governments to work together to establish whatever body or combination of bodies is necessary to perform these functions. Such a body should be empowered and resourced to:

- engage with children in developmentally appropriate ways, using child-inclusive and child-focused practice, as required
- inquire about children's wellbeing and needs, including by gathering evidence from relevant people, including teachers, doctors, and other adults with whom children have meaningful relationships, as well as from courts and other authorities (eg police and child protection agencies) about the family (including through, for example, instructing a Family Consultant to undertake inquiries on behalf of the body)
- require parents to undertake parenting and other suitable programmes (eg drug and alcohol counselling)
- resolve disputes about implementation of orders and agreements; this could be the function of a Parenting Coordinator, as described in section D.2 of our response to paragraph (b) of the Committee's Terms of Reference²³⁰
- require parents to trial temporary arrangements, where appropriate
- where necessary, provide ongoing monitoring and support while parental capacity is being developed
- use a range of problem-solving modalities, and
- employ appropriate staff including accredited Family Consultants, Aboriginal and Torres Strait Islander staff, and staff with expertise working with culturally and linguistically diverse communities.

Relationships Australia acknowledges that:

- it is not necessarily the case that an inquiry model for parenting matters would be less expensive to Government; this is not a 'cheap option', and
- a counsel assisting, employed or engaged by the court, would reduce legal costs to parents but would be paid for by government (although there might well be an argument for cost recovery or contribution measures to apply on a means-tested basis).

C.2 Hearing children's voices

This section acknowledges evidence of the importance, to children's development and wellbeing, of letting them express their fears, hopes and concerns in the context of making decisions about their parents' co-parenting arrangements. It canvasses:

- contemporary research
- the views of parents and children
- how children are currently engaged in the family law system, including through:
 - the use of child focused and child inclusive practice

²³⁰ See also submission of Relationships Australia responding to ALRC IP48 (see Appendix I of submission 11, at https://www.alrc.gov.au/sites/default/files/subs/family-law_-_11_relationships_australia_national_office_submission.compressed.pdf).

- independent children’s lawyers (ICLs), who have been progressively loaded with functions to the point at which it is all but impossible for them to discharge their primary responsibility,²³¹ and
- options to better support children, including splitting ICLs’ responsibilities between:
 - a children’s advocate
 - a child’s legal representative, and
 - an in-court case manager or counsel assisting (along the lines described in our response to paragraph (b) of the Committee’s Terms of Reference.

From its commencement, the Family Law Act has always accorded the best interests of children paramount importance, at least in a formal sense.²³² However, ‘the system’ has not always been good at finding and consistently using the safest and most effective ways of hearing children’s voices, as indicated by the AIFS evaluation of Independent Children’s Lawyers,²³³ and recognised in the work of officeholders such as the former Chief Justice of the Family Court, the Hon Diana Bryant AO QC, and the National Children’s Commissioner, Megan Mitchell.²³⁴ Relationships Australia also acknowledges earlier work done by the ALRC in its ‘Seen and heard’ reference, in which it collaborated with the then Human Rights and Equal Opportunity Commission,²³⁵ and the ‘For the Sake of the Kids’ report.²³⁶

Children - their voices, fears, questions and interests – were largely absent from the debate on the Family Law Bill in the 1970s. Argument was very much centred around the process of divorce, and how it was experienced by the adult parties to the marriage, in isolation from their roles as parents. This reflected the social attitudes and expectations of the time; including expectations around gender roles. Sensibilities around children’s views and voices (independent from those of their parents), and the effects on them of family conflict, are relatively recent. This means that the Act has been ‘retrofitted’, *ad hoc*, to attempt to give substance to protecting children’s views and interests in separation and family dispute resolution, as well as to recognise child protection/welfare concerns. The result is the cumbersome, clunky and confusing Part VII. Any new system, legislation or process must *start with and be designed around* the best interests of the children and, in particular, assume

²³¹ See ALRC Report 135, 12.61

²³² Note the Second Reading Speech of the Bill (Commonwealth, Parliamentary Debates, Senate, 3 April 1974, 640, 642).

²³³ Kaspiew et al, *Independent Children’s Lawyers Study*, Final Report, 2nd edition, 2014. The Report noted that the role filled by ICLs is an important one, to comply with Australia’s obligations under a range of instruments. The overall conclusion was that judges were the only cohort of respondents which valued the presence of ICLs. This is because the ICL can often be the only lawyer involved in proceedings, and can assist the Court by identifying and presenting evidence which is both admissible and probative. Parents and children, on the hand, were more critical, asserting bias on the part of ICLs, a lack of training in engaging with children, and criticised a perceived reluctance to directly talk to children.

²³⁴ See, for example, the Commissioner’s 2015 *Children’s Rights Report*, Chapter 4 of which focused on the effect on children of exposure to family violence; Chapter 2 looked at children’s rights under legislation and in court proceedings. Relationships Australia notes, too, that Commissioner Mitchell’s submission to this inquiry (submission 91) supports reforms to enable children’s participation, in developmentally appropriate ways, in both family court proceedings and in alternative dispute processes in which their parents are engaged.

²³⁵ *Seen and heard: priority for children in the legal process*, ALRC Report 84, 1997.

²³⁶ *For the Sake of the Kids: Complex Contact Cases and the Family Court*, ALRC Report 73, 1995.

hearing from children as the default position in service provision and court processes. Opportunities to hear from children should be afforded from first presentation of the family, throughout any related court-proceeding and service provision, and into implementation of orders/agreements.

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.²³⁷ Evidence shows that children prefer that the parents make the final decisions.²³⁸ 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. While they do not want these to determine outcomes, they do want to know that they are being taken into account. Relationships Australia considers that children should not be invited to directly express their views to parents/caregivers, and that their views should be expressed through an intermediary.

Relationships Australia Northern Territory has expressed the view that children should not be directly involved in the FDR process, but that child-inclusive practice continue to be used and funded for FDR matters. The focus of child-inclusive practice is to avoid children being placed in the middle of a dispute and being required (or feeling that they are required) to make a decision between their parents.

Recent years have seen mounting research and commentary favouring the participation of children and young people, and noting the increasingly-articulated desire of children and young people to have a voice in decision making that affects them. The ALRC commented that

This tension between protection and participation is sometimes framed as a contest between competing principles or rights....The Committee on the Rights of the Child has suggested that there is no tension between children's welfare or best interests (art 3) and their right to participation (Article 12). Instead, they are complementary...[at para 7.18]²³⁹

It is now well-established that children and young people should be supported to express their views, where they wish to do so, in family court proceedings and FDR. There is scope to enhance how that participation is facilitated.²⁴⁰

AIFS' recent study of the needs and experiences of children and young people in the family law system found that:

- half of the interviewees indicated that their views were not acknowledged by family consultants/report writers
- most of the interviewees described feeling negatively towards the court process, the family consultants/report writers and the ICLs
- a substantial proportion of the interviewees felt that 'the approaches adopted by service professionals with whom they interacted operated in a way that limited their practical

²³⁷ See, for example, the comments of interviewees in Carson et al, 2018, 85.

²³⁸ See, for example, Banham, Allan, Bergman & Jau, 2017; Parkinson and Cashmore, 2008.

²³⁹ See also the Australian Human Rights Commission, *Children's Rights Report*, 2015.

²⁴⁰ See, for example, Kaspiew et al, 2014.

impact or effectively marginalised their involvement in decision-making about parenting arrangements

- several participants were distressed by perceived inaction, when they raised safety issues (for themselves, parents and siblings)
- most interviewees wanted parents to listen more to their views and for their views to be taken seriously by family law and related services, and
- interviewees indicated that they would like more information about various aspects of the process (including timeframes and outcomes).²⁴¹

In September 2018, Relationships Australia conducted an online survey of more than 900 people asking for their opinions of whether children should have the opportunity, if they wished, to express their wishes, opinions and concerns about post-separation arrangements.²⁴² More than three-quarters (76%) of respondents identified as female, with more female than male respondents in every age group. Just under 85% of respondents were aged between 20-59 years, and more than half (52%) comprised women aged 20-49 years. As for previous surveys undertaken as part of the Relationships Australia monthly survey series, the demographic profile of survey respondents remains consistent with our experience of the groups of people that access the Relationships Australia website.

A substantial majority of survey respondents reported that they (92% of women; 88% of men) believed children should have a right to express their own views and opinions in family disputes.

A smaller, but substantial, majority of men (86%) and women (89%) reported that they considered children should directly participate in family law court proceedings. Just under one-quarter of survey respondents reported that children should be given the chance to directly participate in family court proceedings regardless of age or maturity. Men were more likely than women to agree that children should participate directly if they were a certain age or maturity (36% of men; 28% of women), while women were more likely than men to report that children should only participate indirectly; for example, through a report from a child psychologist or youth worker (29% of men; 38% of women).

The recent AIFS report on the needs and experiences of young people also noted internationally consistent research

...which establishes the importance for children and young people having an opportunity for their views to be heard and considered in decision-making affecting them. In particular, research has highlighted the importance of facilitating these opportunities to be heard, both in relation to matters relevant to deciding the post-separation care and regarding the more general effects of their parents' separation.²⁴³

²⁴¹ Carson et al, 2018, vi-ix. Carson et al further noted that 'Limited Australian research is available in relation to the practices of family consultants/family report writers and in relation to the conduct and quality of family reports/single expert reports in particular.' (at p 56; see also p 92).

²⁴² Relationships Australia, Survey results, September 2018: *Hearing the voices of children in the Family Court*. See also the Australian Psychological Society, submission 55 to the ALRC inquiry, pp 6, 8 (recommendation 12).

²⁴³ Carson et al, 2018, 30.

Carson et al concluded that

While acknowledging concerns regarding the involvement of children in their parents' conflict, these concerns must be considered in light of circumstances where these children are, or have already been, exposed to their parents' conflict or violent and abusive behaviour. As such, affording them the opportunity to participate in the decision-making process relating to their future parenting arrangements emerges as crucial. Hearing the voices of children and young people has been identified as particularly critical in these circumstances, not only because this participation is central to meeting obligations pursuant to the UNCRC but also because it is important from an evidentiary perspective and is consistent with the expressed views of the relevant children and young people in cases characterised by family violence or conflict....²⁴⁴

This Australian and international research is consistent in identifying the importance of: (1) providing children and young people with the opportunity to be heard in the decision-making process; and (2) having the professionals that interact with them invest the time in getting to know them, to listen to their views and experiences, to keep them informed of the progress of their family's matter and to advocate for them in the decision-making process. *The data analysis suggests that the goals of protection and participation can be met with the application of trauma-informed, child-inclusive approaches to participation in the family law context.*²⁴⁵

Carson et al observed that children in high-risk circumstances had a particular need and wish 'to be heard and taken seriously.'²⁴⁶ Some participants felt that they had not been taken seriously when they expressed fears for their safety, or the safety of their siblings. Isabelle reported that

Mmm, they [police] didn't protect SISTER. They thought it was okay to leave her in his custody when they know that stuff was happening in his house, alone...Mum, like, reported everything, but all of them got turned down. [Interviewer: And this was to police or child protection?] Everything. [Isabelle, 12-14 years]

Sadly, children would rarely have their first exposure to parental conflict in the form of having their views sought about legal proceedings between their parents. They will have already been exposed to that conflict and, all too frequently, to family violence.

Child-focused and child-inclusive practice

Child-focussed practice is used where the child is too young to meet with the child consultant (generally this applies to children under 6 years of age). The child consultant meets with the parents to obtain information about the child and provides the parents with information about the likely developmental needs of the child.

²⁴⁴ Carson et al, 2018, 35.

²⁴⁵ Carson et al, 2018, 50.

²⁴⁶ Carson et al, 2018, 42.

Child-inclusive practice is where a child who is deemed to be developmentally able (generally, over six years of age) meets with a child consultant. The consultant explores what the family situation looks like through the child's eyes, their experiences of the separation, and how this affects the child. Children are not asked any questions about things that parents need to decide.

In both processes, the child consultant attends the joint FDR session to support the parents to understand and respond to their child's needs and experiences.²⁴⁷

A well-resourced multi-disciplinary team, accessible as early as possible²⁴⁸ should form the central plank of child-oriented services, making use of tools along the lines of the Scottish F9 form as means to elicit and report on children's views, from an early point in any decision-making process. Perhaps a pilot could be run from one registry, linked to an appropriate research capacity. Relationships Australia Tasmania has suggested that Hobart, with its diverse yet relatively small population, could be an appropriate pilot site.

Relationships Australia is committed to child inclusive practice as offering the best possibilities for outcomes that are in children's best interests.²⁴⁹ Relationships Australia Canberra and Region (Riverina) currently uses the 'Meeting with Children' model of child informed practice, which offers a structured framework for meeting with children and a structure for giving feedback to the parents.

One example of how it can be undertaken is that a child consultant, independent of the mediator, meets with the child to talk to them about their experience of the separation. The child consultant then attends the joint session to talk with parents and caregivers about the child's experience, providing information on the child's perspectives of the separation. Through this process, parents are assisted in focussing on the needs of the child and are encouraged to work towards the best possible parenting arrangements for their children.²⁵⁰

It is acknowledged that supporting children's participation can be resource intensive and, at present, providers bear the cost of this. During intake and in subsequent sessions, FDRPs use child-focused materials in preparing adult participants to undertake FDR and, in discussion with the adult participants, reinforce the need to be child-focused throughout the process. Some Relationships Australia organisations use models in which a case manager ensures that all

²⁴⁷ See Carson et al, 2018, 56. Relationships Australia agrees with Birnbaum (2017) that reports from family consultants/single experts are not a substitute for child-inclusive and child-focused practice.

²⁴⁸ The Cafcass facility in the United Kingdom is only accessible to families who have entered the court system.

²⁴⁹ For more information on how child inclusive practice is undertaken in South Australia, please see the separate submission from Relationships Australia South Australia. Relationships Australia New South Wales is moving toward an 'opt out' system of child-inclusive practice, away from the current 'opt in' approach. This is intended to normalise the participation of children in FDR.

²⁵⁰ For further information, see Mieke Brandon and Linda Fisher, *Mediating with Families*, third edition, 96-7, 539-42; J E McIntosh and CM Long, *Children Beyond Dispute - A Prospective Study of Outcomes from Child focused and Child Inclusive Post-Separation Family Dispute Resolution*, Final Report, Attorney-General's Department, 2006. Note that training is available to become a qualified child consultant; eg through Family Transitions. Relationships Australian Northern Territory, for example, requires its child consultants to undertake this training as a prerequisite to practising as a child consultant.

practitioners engaging with the family know what is happening, and that all components of the process remain consistently focused on the child.

Case study – engaging parents in child inclusive practice

Mary initially contacted Relationships Australia for mediation with her former partner regarding the children. The couple had previously been together for 24 years and had been separated for 8 months when the mediation process was initiated.

Nigel, aged 11, was living with Doug, and Kaitlyn, aged 8, had week about with both parents. Kaitlyn has accessed the school counsellor for psychological support. Mary and Doug each had an intake and second session appointment prior to starting mediation sessions. During this time, the practitioner discussed the child inclusive practitioner and the role that they could play in mediation. Both parents agreed for the children to be part of the mediation process.

Before the child inclusive practice sessions with the children, the parents attended two mediation sessions, to be clear on what they each wanted; this included the establishment of a parenting plan.

The child inclusive practice sessions demonstrated to both parents how much the conflict between them had affected the children. Based on this, the parents reached consensus to change the way they communicated with each other and the children. Both parents were also referred to the counselling after separation program for additional individual support and skill development.

For this family, the process has been significant, with sessions beginning with the initial intake and the final mediation session occurring just over 12 months apart. The child inclusive practice process does extend the timeline but has proven to have worthwhile outcomes for children.

Children and young people want not only to be heard, but to be given information

Relationships Australia agrees with the Law Council of Australia that the current arrangements for keeping children informed is 'haphazard'. This deficiency could be remedied by the judge giving specific directions.²⁵¹ We further agree with the Law Council that 'It is important to ensure that children's views do not get lost or altered within the system.'²⁵²

²⁵¹ Submission 43, paragraph 346; see also paragraph 353.

²⁵² Submission 43, paragraph 356.

Carson et al found that the majority of young participants 'did not necessarily want to know everything...particularly regarding their parents' potentially strong feelings of hatred, anger or frustration at the other parent.'²⁵³ Children and young people did, however, want information on matters such as:

- when and how they could have their say about post-separation arrangements
- to what extent their views would have influence
- whether they would be represented
- how could they get help to communicate their preferred living arrangements to their parents
- timeframes and nature of legal proceedings, the identity and role of decision-makers
- steps associated with negotiating parenting arrangements
- how to get mental health support, access support groups, helplines and legal advice, and
- the potential outcomes and options for their living arrangements.

The report concluded that

Staying informed provided children and young people with a degree of comfort and assurance about the path ahead in the context of the uncertainty and upheaval associated with the separation.²⁵⁴

Independent Children's Lawyers

Um, I wouldn't have a clue. Um, obviously always good to have someone to have a bit of a chinwag to but, um, other than that I wouldn't know ... It's not, like, I feel as though it's not necessarily their fault that they were unhelpful. (Connor, 15+ years)

Not - not good 'cause, I don't know, she just didn't listen. So, I was like what's the point of telling her if she's not going to listen. She spoke like down to me, like 'cause I was a child my views didn't matter. And she had this tone in her voice like she didn't believe anything that I was saying ... Yeah, no, she didn't ask many questions. She kind of said her opinions and yeah, she just yeah, she didn't listen very well at all. Yeah, she - like I said she didn't even write anything down that I said, she didn't listen to what I had to say. She'd already basically picked who she thought was right. And what would happen - what should happen ... (Lily, 12-14 years).

Carson et al spoke to a number of young people who did not feel the appointment of an ICL facilitated their experiences, views and feelings being heard:

Um, like he wasn't listening, like, at all. Um, but yeah, like - what I mean by like just doing his job is like, you know, I felt like he wasn't listening, he was just like waiting for like the phone call to end, you know, and just like, you know, kind of just waiting for the day to go by, like, he wasn't actually genuine. (Eliza, 12-14 years)

²⁵³ Carson et al, 2018, 31.

²⁵⁴ Carson et al, 2018, 42.

...they seemed kind of detached from the situation but in their line of work they also can't, they can't, like, get involved with it personally and, like, actually let it become something to them. Um, but it really kind of made it difficult to want to talk to him about all the questions he was asking me when he seemed really detached ... it wasn't that I had any difficulty sharing anything with him, um, it's just the fact that what I was sharing with him I feel like it - you know, it made no difference to him and his preference of what happened, he was just writing notes that he would then share later on. Um, which in some cases I'm sure is good and some cases I'm sure is bad. (Hamish, 15+ years)²⁵⁵

A New South Wales survey report published in 2016²⁵⁶ canvassed the views of 54 children and young people aged between 7-16. This report indicated that:

- respondents generally had a good understanding of why they were seeing the ICL, but would have liked better explanation of parts of the court process
- many felt anxious about the prospect of talking with the judge but trusted their lawyers to represent their views in Court
- respondents were generally not worried that someone in their family might know what they said to their lawyer, and
- most respondents thought access to a lawyer was beneficial.²⁵⁷

Respondents to the New South Wales survey emphasised 'their appreciation of the opportunity to express their views', knowing that it was a vehicle by which to have their views put to the court. A 15 year old said 'You get to put your thoughts in as well; it's not just your parents' lawyers.'²⁵⁸ Continuity in relationship was important to the respondents.²⁵⁹

On balance, however, the role of Independent Children's Lawyers has not provided an effective mechanism for children's participation, noting the findings presented in the 2014 evaluation by AIFS and the findings presented in a report from the 2018 AIFS study.²⁶⁰ 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.

²⁵⁵ Carson et al, 2018, 52.

²⁵⁶ Anderson, Graham, Cashmore, Bell, Beckhouse and Alex, *Independent Children's Lawyers: Views of Children and Young People*, 2016. The survey was conducted by the Centre for Children and Young People at Southern Cross University, in partnership with Legal Aid NSW. The findings of this survey, together with a comprehensive literature review (Bell, 2015) informed development of a *Family Law: Working with Children Good Practice Guide*, Graham et al, 2016.

²⁵⁷ Anderson et al, 2016, 1.

²⁵⁸ Anderson et al, 2016, 20.

²⁵⁹ Anderson et al, 2016, 21.

²⁶⁰ Anderson, Graham, Cashmore, Bell, Beckhouse and Alex, *Independent Children's Lawyers: Views of Children and Young People*, 2016. The survey was conducted by the Centre for Children and Young People at Southern Cross University, in partnership with Legal Aid NSW. The findings of this survey, together with a comprehensive literature review (Bell, 2015) informed development of a *Family Law: Working with Children Good Practice Guide*, Graham et al, 2016.

Splitting the function, clarifying the responsibilities - Children's advocates

Children should have access to an advocate with expertise and experience in working with children. The burden of unreasonable expectations imposed on ICLs over time has substantially diminished their capacity to engage directly with children. AIFS' 2018 report on the needs and experiences of children and young people noted previous research findings that

...a substantial proportion of ICLs indicat[ing] that they view direct consultation [with children] for the purpose of eliciting views to be beyond their role and expertise (Kaspiew et al, 2014)²⁶¹

Children's advocates should be embedded in Families Hubs and in courts, with strong referral pathways to children's separate legal representatives.

Splitting the function, clarifying the role - Children's legal representatives

A legal representative for children would:

- engage directly with children where the child's advocate advises that this is developmentally appropriate, and
- gather evidence that is relevant to an assessment of a child's best interests.

If current decision-making structures are retained, a separate legal representative should be appointed if:

- there is high conflict between the parents
- there are particular vulnerabilities affecting the parents, preventing them from presenting cogent evidence about arrangements for the child/ren
- both parents are self-represented
- there are legal issues needing to be addressed on the child/ren's behalf, or
- the court forms the view that appointment of a separate legal representative is necessary or desirable.

Splitting the function, clarifying the responsibilities – case management/counsel assisting

The role of assisting in managing litigation, including acting as an 'honest broker' in litigation, should be allocated elsewhere, to prevent (or at least minimise) accretion of unreasonable demands and expectations as has been the case with ICLs. Judges have valued the litigation management function of ICLs. This is a function (particularly given the prevalence of self-representation) that meets a pressing, important need.

Splitting the function, clarifying the role - Family consultants

Carson et al (2018) noted that some children involved in their study felt marginalised by family consultants, noting observations of interviewees who 'saw their views being diminished or

²⁶¹ Cited Carson et al, 2018, 3.

marginalised via their engagement with family consultants',²⁶² or the artificiality of how information was gathered:

And then he [family consultant] - he put me in this glass room ... And through this - the glass that you can - you can't see them, they can see you. It was like, they actually have one of those in one of the, in SUBURB. It was the worst thing. Like, they - they full locked me in the room. And then they, they didn't talk to me, I don't think. They just, they like sent in my mum or my dad ... And they wanted to see how I would react with them. And connect with them. And I'm like, it doesn't make sense because I know you're there. Like, it's kind of freaky trying to talk to someone when you know like, yeah, behind that glass ... this guy's just staring at you ... The room. Probably not - the room's not his idea but just ... yeah, I hated it. It was, I felt like I was a - what was that thing I said to my mum? I felt like I was in a cage or something. Like, it felt weird. Just knowing that I was like locked - not, I wasn't - I was actually locked in that room. And then this guy just staring at you is really weird ... it's the whole, you know, fake thing, it just put me off. (Harry, 12-14 years)

I think it would be better if we had, like, a few separate meetings just to sort of get to know what was actually happening but we didn't really - it wasn't really, like - so if I said something in that conversation and I don't know if I could change my mind after that because we didn't really have any - we didn't really talk to him again. (Dominic, 12-14 years)

Hearing children's voices in FDR

The Royal Australian and New Zealand College of Psychiatrists has expressed support for facilitation of children's participation in FDR. The College notes that

...the participation of children can improve outcomes relating to their care while also providing a potentially protective factor for their mental health.²⁶³

Relationships Australia agrees with the Law Council that, if children are involved in FDR, then participation *must* be supported by appropriately skilled professionals and be structured according to the needs, abilities and preferences of individual children.²⁶⁴

Further research is needed to ensure that child-inclusive practice in FDR is underpinned by a robust evidence base. In particular, Relationships Australia recommends future research that:

- uses rigorous methodological designs (including RCTs to investigate the efficacy of child-inclusive mediation relative to mediation as usual)
- uses larger sample sizes - studies to date have sample sizes of 50 or fewer (with the exception of McIntosh, who had 181 families in the study). The small sample sizes limit ability to investigate predictors of family outcome

²⁶² Carson et al, 2018, 54.

²⁶³ Submission 18 to the ALRC inquiry, 7.

²⁶⁴ Law Council of Australia, submission 43 to the ALRC inquiry, paragraphs 378, 394. See also submission 53 from Family and Relationship Services Australia, pp 14-20.

- includes outcome measures which are standardised, valid and reliable measures of child and parent functioning, parent–child relationships, post-separation parenting alliance, children’s perception of parental conflict, and children’s perception of parental availability and alliance, and
- includes longer term follow-up studies to explore outcomes beyond just immediately post-mediation.

Guidelines for where FDR is assessed as inappropriate need to be updated. The United Nations Convention on the Rights of the Child, Article 12, combined with the principles of Child Aware Approaches, guides innovative service development currently underway among Child Practitioners in Australia. AIFS, in collaboration with practice leaders, academia, and family relationship service providers, would be well-equipped to lead the development of new guidelines. Government should fund the development of practice guidelines for family relationship services that offer child-inclusive services. This is particularly critical in light of the growing body of research showing children’s desires to be heard and to be involved in the separation process where that affects them.²⁶⁵

Systems dealing with children in separating or separated families ‘must continue to develop mechanisms to allow for the safe participation of children.’²⁶⁶ Of course, ongoing assessment of safety will be critical, as will dynamic assessment of the suitability of the means of facilitating participation.

Should judges talk directly to children?

Australian judges could be encouraged – or perhaps required – and supported to meet with children affected by parental separation, to gain an understanding of the impact of parental conflict and separation. This is common practice in other family law jurisdictions. For example, in the German family law system, judges are obliged to hear personally from the child if the feelings, ties or will of the child are thought to be significant to the decision. These child hearings take different formats, depending on the age and development of the particular child. Evaluation of this approach demonstrated that it achieves very positive results for all participants, including the children.²⁶⁷ The central question for the most recent evaluation concerned the effect on children, and their family relationships, of being interviewed by a judge in child custody and access matters. The evaluation found that ‘Altogether the observable signs of stress in children accompanying the judicial interviews can be seen as very moderate’.²⁶⁸ Karle and Gathmann conclude that

²⁶⁵ In addition to the recent AIFS report, Carson et al 2018, see, for example, Campbell, 2004; Graham & Fitzgerald, 2010a; James & Prout, 1997; Mayall, 1994; McIntosh, 2003; McIntosh, Well & Long, 2007; Parkinson & Cashmore, 2008; Smart, Neale & Wade, 2001; Smith, Taylor, & Tapp, 2003). Listening to children’s voices is important – for both children and adults; see Fitzgerald & Graham, 2011a; Goldson, 2006; Lodge & Alexander, 2010; McIntosh, 2000, 2003; McIntosh, Wells, Smyth, & Long, 2008; Moloney & McIntosh, 2004.

²⁶⁶ ALRC DP 86, paragraph 7.50.

²⁶⁷ See Michael Karle and Sandra Gathmann, ‘Hearing the Voice of the Child – The State of the Art of Child Hearings in Germany. Results of a Nationwide Representative Study in German Courts,’ (2016) 54(2) *Family Court Review* 167-185. This article also refers to earlier evaluation of the German approach to hearing from children: see p 180.

²⁶⁸ See Karle and Gathmann, at 179.

Neither in the current study nor in the previous study by Lempp et al (1987) was there any sign of major or lasting stress for the children. The multiple measurement times were able to show that before the hearing, reactions to tension at various levels can be measured and subscribed to the concept of examination anxiety. Immediately before the interview, the tension increases in intensity, but directly after the hearing and four weeks later, tension falls to below the initial level measured.²⁶⁹

Parents, unanimously, supported the judicial child interviews, and the involvement of child advocates.²⁷⁰

Judges noted advantages such as probing how the child is coping, getting to know the child, enhancing evaluation of 'best interests', and enhancing the prospect of parents reaching agreement. Judges experienced in interacting with children were less likely to refrain from engaging with children on the basis of children's ages or concerns about exposing children to stress; Karle and Gathmann concluded that

...there should be no reason to refuse the obligation for hearing all children as far as their interests are concerned, as declared in Article 12 of UNCROC unless specific circumstances in a given case warrant otherwise. This applies particularly to the two arguments most frequently brought up by judges:

1. "Children are too young to be heard"....
2. "Children are placed under too much stress in child hearings".....²⁷¹

Australian family law judges would, of course, need significant support, training and resources to shift practice in this way. In the most recent German evaluation, judges nominated useful professional development courses in the following areas:

- questioning techniques
- communication psychology (including questioning and interviewing techniques for various age groups, registration of non-verbal signals)
- signs of child stress
- developmental psychology, including steps in motor, cognitive, psychological, language competency and social development
- role play, and
- psychological and pedagogical insight into effects of separation.

Relationships Australia acknowledges the barriers to requiring Chapter III judges to undertake training. In view of this, it would be helpful if family courts adopted processes in which parenting matters could only be listed before judges with appropriate training in child inclusive practice, and the other domains relevant to engaging with children and hearing their voices.

²⁶⁹ Karle and Gathmann, at 181.

²⁷⁰ Karle and Gathmann, at 182.

²⁷¹ Karle and Gathmann, at 182. At 183-184, Karle and Gathmann do recommend further evaluation which includes the measurement of neurophysiological stress markers.

Systemic advocacy for children and young people

Relationships Australia notes that a youth advisory council is part of the framework for headspace, the national youth mental health foundation.²⁷² It provides direct input into development of relevant services. The Young Peoples Family Law Advisory Group consumer voice pilot in Adelaide, being run through the South Australian Family Law Pathways Network offers similar opportunities for young people to raise systemic issues.²⁷³ A similar council, composed of people who have lived experience of the system as a child or young person, could be of great value in supporting the development of user-driven services. This is consistent with Recommendation 50 of ALRC Report 135.

C.4 Legislative reform

The 2016 Family Law Council report recommended a comprehensive review of Part VII of the Family Law Act, focusing on the prioritisation of children's safety in decision-making and advice-giving and supporting efficient and expeditious decision-making in light of the complex features of the contemporary client base of the family courts. Relationships Australia supports that recommendation and notes the proposals for a simplified Part VII made by Professor Chisolm in his 2015 paper.²⁷⁴

Provisions relating to children's matters should give standing to any person who is significant in the life of a child. Exhaustive definitions or lists may compromise a child's best interests by inadvertently excluding individuals with whom a child has a significant relationship, if the individual does not fall within conventional notions of family or kinship. Further, laws and service provision arrangements should be technologically-neutral, recognising that it is often difficult for the law to keep pace with technology; children suffer most from these lags.²⁷⁵ It is preferable for the law to take a nuanced and flexible approach not only to the specific question of identification of a child's parents, but also to the broader question of identifying who comprises a child's family.

Further, legislative reform should ensure that decision-making is driven by the children's needs, with clear primacy accorded these relative to adult wishes, including by:

- amending the definition of family violence to include abuse of process²⁷⁶

²⁷² <https://www.headspace.org.au>.

²⁷³ For more information, see <https://www.pathwaysnetworksa.com.au/ypflag/>.

²⁷⁴ Prof Richard Chisolm AM, 'Rewriting Part VII of the Family Law Act: A modest proposal' (2015) 24(1) *Australian Family Lawyer* Volume 1. Chisolm's proposals were supported by the Law Council of Australia (its submission on the Family Law Amendment (Parenting Management Hearings) Bill 2017, paragraphs 20, 22.

²⁷⁵ Such as, for example, children born as a result of overseas commercial surrogacy arrangements which can be unlawful in Australia. See, for example, commentary at <https://www.theaustralian.com.au/news/inquirer/surrogacy-innocents-in-legal-limbo/news-story/1a2ee2de5496828f003e0bdbcd32f0d4>, relating to a 2017 parentage decision by the Family Court.

²⁷⁶ As described in section B, Proposal 7, in the response to paragraph (c) of the Committee's Terms of Reference.

- removing the presumption of equal shared parental responsibility and the language of equal shared time from Part VII²⁷⁷ – the presumption of shared responsibility has been widely misunderstood as a presumption of equal shared time. Provisions about shared responsibility or shared decision-making have no relation to shared time.
- amending the best interests of the child checklist to prioritise children’s safety; the division of factors into ‘primary’ and ‘additional’ has led to confusion, and unnecessarily protracted disputes, as well as inflating legal costs²⁷⁸
- simplifying the decision-making framework for interim parenting matters, noting Judge Riethmuller’s paper on this subject²⁷⁹
- mandating risk assessments for family violence on filing of a matter, and at each hearing or court appearance, and that findings of fact be made about allegations of family violence as soon as practicable after proceedings are filed,²⁸⁰ and
- replacing the Act with a Family Wellbeing and Family Law Act.²⁸¹

A further suggestion is that child support formulae should no longer be calculated by reference to the number of nights a child spends with each parent. This often presents as an underlying, unspoken and unaddressed agenda in FDR, which impedes the achievement of an outcome in the child’s best interests.

Relationships Australia joins with the Australian Psychological Society in recommending that longitudinal research be funded to better discern how shared parenting arrangements support children’s attachment, developmental and other needs.²⁸²

²⁷⁷ Endorsing the comments made on the history of these, and the experience in applying these, set out in Professor Chisolm’s paper.²⁷⁷

²⁷⁸ Chisolm, 2015, see pp 10, 26, in particular.

²⁷⁹ The Hon G Riethmuller, ‘The 42 easy steps for deciding straightforward parenting cases under Part VII of the Family Law Act 1975’ (2015) 24(3) *Australian Family Lawyer* 39.

²⁸⁰ For discussion of early fact finding, see also section C.3 of paragraph (b) of the response to the Committee’s Terms of Reference.

²⁸¹ See section B of paragraph (k) of the response to the Committee’s Terms of Reference.

²⁸² See submission 55 to the ALRC inquiry, p 22, noting also Sanson & McIntosh, 2018, and Smyth, McIntosh, Emery and Howarth 2016.

Paragraph (g)

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

This chapter explores challenges faced by grandparent carers, and how these might be met. This chapter also identifies the need for services that recognise and respond to conflicts between generations; this includes noting the imperative for adequately funded services to respond to elder abuse.

A How grandparents assume parental responsibility

Some grandparents have parental responsibility for their grandchildren through family court orders, some are kinship carers, caring for their grandchildren under state/territory child protection orders, some are informal carers, and others are intermittent primary carers for their grandchildren.

Many parents are unable to care for their children due to alcohol and drug abuse or mental ill-health. Some parents are in jail, others are deceased, have become missing persons or are otherwise absent. The majority of children coming into the care of their grandparents have experienced, at best, instability, and often neglect, abuse and trauma.

Relationships Australia sees grandparents with primary responsibility for their grandchildren across a broad range of programs: some are state-funded programs targeting grandparents, or parents from particular groups (kinship carers or particular linguistic or cultural groups); other grandparents use mainstream counselling or dispute resolution services and children's contact services.

B Challenges faced by grandparent carers

B.1 Financial

In addition to ongoing daily expenses that all parents face, there are often initial establishment costs like cots, prams, car seats, beds and linen, and the extra expenses associated with children who have special needs. At the same time, grandparents are often living on reduced post-work incomes. We have heard from grandparent carers that they:

- find it difficult to navigate social security systems to access benefits
- are unwilling to alert authorities to an informal arrangement, with unknown consequences for them, their adult children and their grandchildren
- sometimes fear their children will take the grandchildren back to what the grandparents may believe is an unsafe situation
- fear that their children will threaten to harm them if the children's parenting benefits are stopped
- are sometimes forced to stay in the workforce longer, or re-enter the workforce, to retain an income, or must sometimes leave the workforce to care for very young children, and
- may, if they have down-sized their living arrangements, be forced to move or extend their accommodation to include grandchildren.

B.2 Health and ageing

Grandparent carers generally range in age from their forties to their seventies, and sometimes beyond. Many are already at an age at which they develop health problems experienced by many older people. Some conditions, like arthritis, are exacerbated by the physical work involved in caring for children. Grandparents often experience poor mental health. They report that they are frequently:

- tired
- anxious about their grandchildren
- worried (and/or angry and resentful) about their own children
- socially isolated because they have had to give up hobbies and interests and cannot fit in with the social activities of their friends or are too tired to join in
- concerned about what will happen to the children if they become ill or die before their grandchildren are independent
- grieving for their loss of their grandparent role. Initially, it can be very confusing for both children and grandparents when the grandparents become principal carers and the relationship changes
- dealing with feelings of shame, guilt and inadequacy: they feel they must have failed as parents and, although they love their grandchildren, they yearn for the retirement they had planned, and
- dealing with the fact that their child may have other children and being realistic that they cannot take on more children (for example, taking on a baby when grandparent is in their sixties and already caring for a four and six year old, or taking on an older sibling when a foster placement breaks down).

B.3 Parenting

Many grandparents feel they are not up-to-date with modern parenting practices. They do not have access to the friendship and other community networks of younger parents that allow easy opportunities for sharing transport, minding each other's children or discussing commonly experienced problems. Modern education is challenging and many grandparents feel inadequate in supporting their grandchildren in their schoolwork and other activities.

Grandparents often dislike being part of the child welfare system. They may find individual workers well-meaning and helpful, but feel constrained by the system that takes away their autonomy. Some feel they have been pressured into caring for the children; others feel they are not free to parent the children as they choose and are overly accountable to the statutory authority. Some grandparents feel constrained by child protection orders that have been imposed (for example, around the extent and nature of the children's contact with their parents).

B.4 Children with special needs

Children in their grandparents' care may have additional physical, emotional and educational needs due to earlier abuse and neglect - this is not only challenging and distressing for the grandparents, but can lead to additional costs being incurred by grandparent carers. Most grandchildren and grandparents are grieving over the death or absence of the children's parent, or worried about their wellbeing if they are incarcerated or have a history of not being able to

care for themselves. Grandchildren with a history of family instability and/or trauma may be difficult to look after and grandparents often struggle to manage and understand their behaviour. Some of these children are severely traumatised and need professional help, as well as patient, loving care.

B.5 Safety

Grandparents may fear for their own and their grandchildren's safety if their children have been violent or irrational in the past due to substance abuse and/or mental ill-health. Some grandparents have had the experience of having their grandchildren snatched away by the parents and, unless there is a court order in place, it can be hard to demonstrate that the children are at risk.

B.6 Legal status

Grandparents who informally care for their grandchildren, permanently or intermittently, are often faced with problems like proving the right to consent to vaccinations, medical procedures, school excursions, and choice of school.

If grandparents wish to access family law courts seeking legal recognition and protection of their caring role, they will often have difficulty obtaining legal aid for advice and representation. This can be particularly important where grandparents may have difficulty establishing that they have, in practice, parental responsibility for their grandchildren.

Once they have a formal order, grandparents can access social security entitlements, but must still bear the additional costs associated with caring for troubled children, often depleting or even exhausting their retirement savings in the process. Kinship carers are given an allowance and access to some services.

Grandparents may avoid drawing attention to themselves by seeking help, because they fear that involving authorities will prompt their children to take the grandchildren back to what the grandparents consider is an unsafe situation. Some grandparents who are intermittent primary carers nevertheless see themselves as the most secure point in the grandchild's life, and feel powerless to make the grandchildren's lives more secure. They are not sure who they can turn to without their children intervening to prevent further contact with the grandchildren.

Aboriginal grandparents may, through their own experiences as stolen children, be particularly reluctant to involve authority figures. Aboriginal agencies and other community sector agencies that have a good working relationship in a community are often better placed to support grandparents than statutory authorities.

B.7 Family conflict

In some cases, grandparents must oppose their own children in legal proceedings to gain the orders necessary to protect and care for their grandchildren. This is extremely distressing and can create ongoing conflict within the family. There can be ongoing conflict with the parents of the children, regardless of legal orders. There is often stress on the grandparents' relationship with each other, especially if one partner is not the biological grandparent of the children. Some

couple relationships break down. Anecdotally, grandmothers tend to bear the greater burden of parenting. Some people raising grandchildren are single.

Many grandparents are strongly supported by their other children, but others are faced with the anger of their other children who think an unfair burden has been placed on their parents and, in some cases, resent the time taken up by the grandchildren and feel that their own children are not receiving sufficient attention from their grandparents. Adult siblings may fear that their inheritance is being spent on the grandchildren being cared for.

All of this can take a heavy toll on the physical, mental and emotional wellbeing of grandparent carers.

C How could government better support grandparent carers?

Government should offer grandparent carers practical support including:

- **readily accessible information and advice** about grandparents' rights, responsibilities and entitlements during the time they are raising their grandchildren. This could be delivered through an information pack with basic information including a list of contacts, regularly updated, and available at schools, medical practices, pharmacies, human services/Centrelink outlets, community websites etc
- improved and easier **access to social security benefits** - support and offer entitlements to all grandparents who offer primary care to their grandchildren, including through informal and intermittent care. Governments could establish a **grandparental responsibility assessment** (similar to an aged care assessment) that assesses individual situations of grandparents caring for their grandchildren, regardless of their legal status
- support to **liaise** with relevant child protection authorities
- funded **respite care**, including after-school care, holiday camps and programs, assistance with travel to other family members for holidays and formal out-of-home care respite
- **emotional support** (counselling, group support and social networks) for grandparents and grandchildren, especially when the children are grieving, acting out, or showing other signs that worry the grandparents. Most grandparents are caring for children who have had adverse experiences in the early months and years of their lives or have been involved in a traumatic experience – caring for these children is not an easy responsibility. Some grandparents feel they cannot manage and ultimately, with great reluctance, relinquish care of the grandchildren
- to seek to **resolve family conflict** when grandparents are primary carers – trauma-informed counselling (for children and grandparents), mediation, and grandparent support / parenting education groups
- **practical help** with household tasks
- help to **plan for future care arrangements** for grandchildren - older grandparents, or grandparents with some medical conditions or disabilities, or grandparents who are raising grandchildren with disabilities, are especially concerned about what will happen to the children when they can no longer able to look after them, or if they die. Help with succession planning would likely provide comfort in these cases

- assistance with **housing** – rent rebates, move to larger public housing accommodation, if needed
- a **grandparent carer hotline**: a chance to talk anonymously. This could be done through existing support lines but grandparents need to be aware of it, and staff and volunteers need to be educated about specific supports available
- **legal aid** in seeking appropriate orders, and
- a **grandparent carer card** that allows them to demonstrate their parenting role to authorities.

Grandparents deserve respect from statutory authorities. They want and deserve the recognition that they are volunteer parents and that they are entitled to having a significant say in how they raise the children.

Governments should also offer to grandparent carers acknowledgement of their caring contribution. Relationships Australia has heard from many grandparent carers that they feel isolated, judged, overwhelmed, and exhausted. Acknowledgement could be, for example, in the form of a letter from government thanking them for the role they have undertaken. We have been told by many grandparents that this would be appreciated.

Support for grandparent carers is an investment which could save significant social and financial cost in the long-term. Grandparents offer their grandchildren security and the chance for healthy development and directly save the cost of out-of-home care.

D Elder abuse and intergenerational conflict

Intergenerational family relationships, and disputes emerging from them, must also be part of the new Family Wellbeing System. As noted in our response to paragraph (f) of the Committee's Terms of Reference, the interests and voices of children were not considered part of the system in the 1970s, and this has led to 30 years of retrofitting the Act, and the constellation of services and programmes orbiting around it, to rectify this failure of foresight.

Australia should not repeat such a failure in respect of addressing elder abuse. We know that elder abuse is a significant issue in our society. We know it is unacceptable. We know that housing pressures, 'inheritance greed', the problem of longer lives with (sometimes) diminishing capacities, and the availability of superannuation in inheritance, will drive intergenerational conflict. We are also aware that violence against older family members can be a manifestation of decades-old family violence dynamics. There are disputes, too, among adult siblings about the care arrangements for older family members. As a nation, we have a responsibility, in designing new structures, to enable families deal with the pressures and conflicts of which we are increasingly aware, and which can cause such ongoing harm and distress.

We have a blueprint for action. The report by the ALRC, *Elder Abuse – A National Legal Response*,²⁸³ was launched on 15 June 2017, and made 43 recommendations. The Commonwealth Government, with support from States and Territories, has embarked on a range of service pilots and other policy initiatives, such as a National Plan to Respond to the

²⁸³ ALRC Report 131, *Elder Abuse – A National Legal Response*.

Abuse of Older Australians. We also have an ongoing Royal Commission into Aged Care Quality and Safety, which has brought to light a range of other situations in which older members of our community are abused and exploited.

If Government accepts the challenge of transforming the family law system into a Family Wellbeing System, then the opportunity ought to be seized to ensure that older people are not invisible to, or excluded from, that system.

Paragraph (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

This Chapter:

- notes serious and persistent concerns with the integrity of the ‘family law system’
- makes suggestions to improve system-wide accountability and governance
- makes suggestions to improve the accountability of FDRPs, staff of Children’s Contact Services, Report Writers and Family Consultants, lawyers, judges, and
- proposes a set of obligations that would apply to all professionals working with separating families.

The central recommendation of Relationships Australia to deal with these matters is the establishment of a Family Wellbeing and Family Law Commission with an explicit statutory mandate to safeguard the integrity of laws and services that shape the everyday lives of so many Australians. This is complemented by suggestions to support high quality research and evaluation of legislation, services and policies, and to amend section 121 of the Act.

A Lack of confidence in the system

Current governance and regulatory processes which apply to various professional groups in the family law system do not enjoy public confidence or support. Regulatory, disciplinary and complaints bodies are seen as being resistant or hostile to hearing, or rigorously investigating, complaints against members and as reluctant to impose effective sanctions.

B Improving systemic accountability

B.1 Family Wellbeing and Family Law Commission with a legislated mandate for systemic oversight and accountability

In Report 135, the ALRC noted the volume and range of public and confidential submissions, and personal accounts, that expressed damning lack of confidence in the family law system, including (perhaps especially) the courts. Relationships Australia supports the ALRC’s recommendation to establish a standing body to:

- undertake ongoing and systemic monitoring, and
- conduct inquiries by reference from Government *or* on own motion.²⁸⁴

The Australian Government should establish a new independent statutory body, the Family Wellbeing and Family Law Commission (‘the Family Commission’), to oversee the Family Wellbeing System, conferring on it a mandate to ensure that it operates effectively and deserves public confidence. The Commission would:

- monitor performance of legislation, policies and programs

²⁸⁴ Recommendation 49, p 388.

- manage accreditation of professionals and agencies. In discharging this function, the Commission should:
 - develop and administer Accreditation Rules and an Accreditation Register
 - establish standards and other obligations that accredited persons must meet to remain accredited
 - establish and administer processes to suspend or cancel accreditation, and
 - establish and administer a process for receiving, investigating and resolving complaints against practitioners accredited under the Accreditation Rules, including to impose and enforce sanctions
- establish a national death review mechanism²⁸⁵
- inform and educate professionals about their legislative duties and functions²⁸⁶
- establish a Children and Young People’s Advisory Board, to inform the Commission through systemic advocacy about the experiences of children and young people²⁸⁷
- develop a cultural safety framework to guide the development, implementation and monitoring of reforms. The framework should be developed in consultation with relevant communities and organisations, including:
 - Aboriginal and Torres Strait Islander communities
 - culturally and linguistically diverse communities
 - organisations that represent older people in our community, and
 - LGBTIQ+ organisations²⁸⁸
- raise public awareness about the roles and responsibilities of professionals and service providers within the family law system²⁸⁹
- make recommendations to Government about research and law reform proposals to improve the system.²⁹⁰

The Family Commission should be tasked, as a matter of urgency, to assist government with identifying priorities for a reform plan and performance indicators.²⁹¹

The Commission should be empowered to undertake own motion inquiries on systemic issues affecting a class of users of, or providers in, the system.²⁹² Legislation to establish the Family Commission should set parameters and thresholds required to trigger an own motion inquiry. Relevant parameters could include the matters set out at paragraph 12.35 of ALRC DP86:

- the number of complaints received about a particular issue
- if there are systemic implications related to a particular issue
- if there is likely to be a public interest in a particular issue, and

²⁸⁵ See Australian Human Rights Commission, *A National System for Domestic and Family Violence Death Review*, 2016. This also appears to have the support of Women’s Legal Services Australia, submission 45 to the ALRC inquiry, 45.

²⁸⁶ ALRC DP86, Proposal 12-5.

²⁸⁷ ALRC Report 135, Recommendation 50.

²⁸⁸ ALRC DP86, Proposals 12-8 to 12.10.

²⁸⁹ ALRC DP86, Proposal 12-4.

²⁹⁰ See the proposals in Chapter 12 of ALRC DP86.

²⁹¹ ALRC Report 135, paragraphs 13.18 and 13.21.

²⁹² ALRC DP86, Proposal 12-3.

- the number of people who may be affected by a particular issue.

B.2 Improving transparency and accountability through research and evaluation

Relationships Australia supports the ALRC's suggestion of

...a regular collation of data based on administrative sources to assess patterns in family court filings and patterns in services usage of the family law services that are funded by the Australian Government...to enable transparent and regular reporting of court, Commission and service use that would be available to stakeholders across the system...²⁹³

We strongly urge the timely publication of as much data as possible, to support community awareness and understanding of how the system is serving the community, and identify areas for improvement.

Relationships Australia supports evaluations of the impact of legislative reforms and of the efficacy of programmes and services. System-wide oversight is currently lacking, and its implementation would offer the community quality assurance in relation to entry-level training, accreditation, registration, complaints, continuing training and development, supervision requirements and other processes and mechanisms.

Service providers could share de-identified data on service usage and outcomes with a central linkage agency such as AIFS. This is already done, to some extent, with the Department of Social Services and the Attorney-General's Department. There is potential to expand this.

The Family Commission should, in consultation with Commonwealth, State and Territory governments, identify research priorities that will help inform whether the family wellbeing system is meeting both its legislative requirements and its public health goals.²⁹⁴ We suggest consultation with State and Territory governments because of their portfolio responsibilities for matters including child protection, family violence, state/territory courts, and health care.

Funding for evaluation of pilots should be built into contracts from the outset (frequently, service providers must absorb the costs of evaluation, and divert resources from service delivery to do so). Evaluation should be timely – that is, not too soon after the commencement of a reform or the start of a pilot or other program. Reforms and programmes need to be given time to operate and to make adjustments in response to emergent issues before evaluation can offer reliable insights.

B.3 Section 121

Relationships Australia recognises the importance of protecting the privacy and safety of families – especially children – and would not wish to see that protection in any way diminished. We concur with the observation of the Bar Association of Queensland that

²⁹³ ALRC DP 86, paragraph 12.44.

²⁹⁴ ALRC DP86, Proposal 12-6.

The privacy of children involved in family law proceedings (whether it be property or parenting) is of the utmost importance..... Family law proceedings are deeply personal and intimate; there is rarely if ever public interest in airing such matters. This is all the more so when the parties have children....

Most of all, whether the proceedings are property or parenting – it hurts the children.²⁹⁵

Relationships Australia is also aware of concerns that s121 operates (even if inadvertently) to prevent public scrutiny of and debate about family law decision making, deficiencies of the family law system, and to silence survivors of family violence. We are aware of instances in which a clinical practitioner has been found to have acted improperly in the context of a family law matter, yet the practitioner cannot, because of the current operation of s 121, be named publicly.²⁹⁶ The public has a legitimate interest in knowing the identity of professionals who have been found to have engaged in misconduct, unprofessional conduct, or similar. 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.

Accordingly, Relationships Australia agrees legislative reform to:

- clarify the intent, effect and scope of s 121 as proposed by the ALRC in its final report
- legislate to require anonymised reports of judgments (which currently occurs, in any event)
- include in the Act an avoidance of doubt provision referring to researchers, as well as 'government agencies, family law services, or other service providers,'²⁹⁷ and
- apply the provisions to parties who disseminate identifying information about family law proceedings on social media or other internet-based media.

C Suggestions relating to discrete professional groups in the family law system

C.1 Family Dispute Resolution Practitioners

There is currently highly-developed training and a registration process for FDRPs which offers a direct pathway for registration as an FDRP through the Attorney-General's Department. The CHC81115 Graduate Diploma of Family Dispute Resolution is a nationally accredited training at level 8 of the Australian Qualifications Framework. This qualification is designed and accredited to enable graduates to demonstrate their knowledge and skills, and their application of knowledge and skills, to work as an FDRP. This is equivalent to a Bachelor Honours degree. Prerequisites for enrolment are:

- undergraduate degree or high qualification in Psychology, Social Work, Law, Conflict Management, Dispute Resolution, Family Law Mediation or equivalent
- accreditation under the National Mediation Accreditation System

²⁹⁵ See submission 80 to the ALRC inquiry, p 21. See also submission 55 to the ALRC inquiry, by the Australian Psychological Society, p 36.

²⁹⁶ See <https://www.theaustralian.com.au/business/media/wa-family-court-judge-wants-final-say-on-news-report/news-story/6968eef9ec780564920a5c37382a5e5d>

²⁹⁷ See ALRC DP 86, paragraphs 11.26, 12.76 and Proposal 12-11.

- the mediation skill set from the Community Services Training Package, or
- documented evidence of previous experience in a dispute resolution environment in a role that involved self-directed application of knowledge with substantial depth in some areas, exercise of independent judgement and decision-making, and a range of technical and other skills.

Practice frameworks for detecting risks during separation, such as family violence, parenting stress, mental health concerns and child harm, are central to the course. Child-focused practice and an introduction to child inclusive mediation are embedded within the course. The course also includes competencies in financial and property dispute resolution. It would be possible to further expand the components on child inclusive mediation. Standard procedures could be incorporated into legislation, along with procedures for interviewing children.

As previously stated in our response to paragraph (d) of the Committee's Terms of Reference, Relationships Australia does not consider legal qualifications to be a prerequisite to undertake mediation in relation to property or finance matters. This is because of the nature of the mediator's role: the mediator is not the decision-maker, and neither is the outcome legally binding on the parties. There are, however, strong reasons to encourage legally assisted FDR in property and finance matters, and matters where one or both party has a particular vulnerability.

FDRPs aspiring to offer services in finance and property matters should undergo basic training to understand, for example:

- contemporary legislation and jurisprudence, and
- the balance between presenting practical options for property division and not providing advice as to the adequacy of the proposed property division (just as the FDRP is neither a legal adviser, nor a financial adviser).

Current training for FDRPs may not be sufficient to deal with the array of matters that would come to them if pre-filing FDR were mandated, and time and money will be necessary to 'skill up' significant numbers of FDRPs. Government could also consider initially limiting FDR in finance and property matters to matters that would fall within the 'small property claims' proposal.²⁹⁸

Relationships Australia South Australia currently offers training in property mediation to FDRPs, through the Australian Institute of Social Relations. Relationships Australia Western Australia has provided FDR for property and financial matters for more than 20 years; its FDRPs do not all hold legal qualifications. As with any qualification, ongoing professional development increases knowledge and skills to be applied within a mediation framework and in accordance with the Family Law Act. It is recommended that FDRPs need to demonstrate that they undertake ongoing professional development specific to property and financial matters to maintain their accredited status. Relationships Australia New South Wales suggests that training be required to ensure that FDRPs who work with property and finance matters understand, among other things:

²⁹⁸ See proposal 11 in section C of this submission's response to paragraph (c) of the Committee's Terms of Reference.

- the concepts of full disclosure, ‘just and equitable’, ‘clean break’
- the provisions applying to de facto couples, and
- valuations.

FDRPs and children

In 2018, Relationships Australia conducted an online survey, *The voices of children in the family court*. More than 50% of survey respondents thought that people working with children during family disputes should be a psychologist or social worker with experience and skills in working with children. More than 13% thought the minimum requirement should be a three-year psychology or social work degree and a further 10% reported that people working with children during family disputes should have a minimum of five years’ experience in working with children. Only 6% of survey respondents considered a legal or dispute resolution qualification was sufficient.

Qualifications and skills of workers	%*
Working with vulnerable people police check	6
At least 2 years' experience working with children	9
At least 5 years' experience working with children	10
Psychology or social work diploma (2 years)	8
Psychology or social work degree (3 years)	13
Legal or dispute resolution qualification	6
Psychologist or social worker with experience and skills in working with children	51
Other	6

*Respondents may have chosen more than one qualification/skill

C.2 Children’s Contact Services

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.²⁹⁹ We know that these waiting lists 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 Checks³⁰⁰
- hold qualifications such as a Certificate IV in Community Services or a Diploma of Community Services, and

²⁹⁹ See also FMC (now ‘Better Place’), submission 135 to the ALRC inquiry, 13.

³⁰⁰ ALRC DP86, Proposal 10-7.

- 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.

Relationships Australia Northern Territory suggests that professionals also have:

- training in child development and child development needs, particularly the key risks and considerations for children 0-4 years of age. This is not intended to enable all professionals to act as experts, but to equip them to be aware of when collaboration with another professional may be helpful, and
- the ability to identify and respond to appropriately to risk should also include mental health and depression.

There should be a mechanism by which to recognise prior experience for existing CCS staff – or additional funding provided to cover the costs of staff who must complete training to continue their employment. If existing staff do need to complete training, new requirements should be implemented in such a way as to not exacerbate existing wait times to access these crucial services.

Were Government minded to enhance the capability of CCSs (as suggested in our response to paragraph (e) of the Committee's Terms of Reference), then it should consider requiring qualifications above the Certificate IV level, so that staff would have the necessary knowledge and skills to provide a fuller array of services in-house. This would ease the burden on fraught parents to travel to attend multiple services, and reduce the risk of some families 'falling through the cracks' in moving between services. It would, however, require investment of funding to attract staff with the higher qualifications.

C.3 Report writers and family consultants

There is widespread disquiet about the practices of private report writers (ie those not employed in the courts), whose reports are relied on in court and which can prove difficult to challenge, particularly for self-represented litigants. Concern has also been expressed about the fees charged by some private report writers.

Relationships Australia supports mandatory national accreditation for private report writers,³⁰¹ Government should prescribe minimum standards for family consultants who are not employed by courts, and ensure that they are subject to adequate supervision and accountability mechanisms. Consideration should also be given to regulating fees that can be charged.

Alternatively, the courts should be funded to employ a full complement of family consultants who would, as public officials, be subject to accountability measures relating to training, ongoing professional development, and complaint-handling. The Act should also provide for family consultants to be involved from as early a stage as possible in families' engagement with the courts.

³⁰¹ ALRC Report 135, Recommendation 53, p 410. See also paragraph 13.101, noting that AFCC and AGD are working on a national training program for experts who are frequently commissioned under Chapter 15 of the Act.

The Australian Government should task the Family Commission to develop a national accreditation system with minimum standards for private family report writers as part of the newly developed Accreditation Rules.³⁰² Relationships Australia would further recommend greater oversight and accountability of report writers whose work is to be relied on in court.³⁰³ High quality family reports can significantly assist decision-makers in proceedings relating to children.³⁰⁴ We are aware of concerns about the quality of private reports in children's matters, and consider greater oversight and accountability to be essential. Relationships Australia agrees with the imperatives of greater transparency and enhanced consumer choice underpinning Proposals 10-9 and 10-10 in ALRC DP86.

Families are often forced to delay court proceedings while they wait for lengthy periods to receive family reports. This problem is particularly acute for families in rural, regional and remote areas. Workforce planning, with attention given to how this capability could be bolstered, would be helpful.

The Family Commission should maintain a publicly available list of accredited private family law report writers with information about their qualifications and experience as part of the Accreditation Register.³⁰⁵ When ordering that a report be obtained, the court should provide clear instructions about why the report is being sought and the particular issues that should be reported on.³⁰⁶

C.4 Lawyers

State and territory law societies should amend their continuing professional development requirements to require all legal practitioners undertaking family law work to complete at least one unit of family violence training annually. This training should be in addition to any other core competencies required for legal practitioners under a workforce capability plan to be developed by the Family Commission described in this Chapter.³⁰⁷

C.5 Judges

Selection

Relationships Australia considers that:

- judicial vacancies should be advertised and applications solicited, making clear that applicants will be assessed against core competencies and experience, as articulated in the proposed workforce capability plan
- the Commonwealth Attorney-General should consult Heads of Jurisdiction of all federal courts and of state and territory child protection courts

³⁰² ALRC DP86, Proposal 12-9.

³⁰³ Relationships Australia notes the current Professional Standards of Practice for Family Assessments and Reporting (2015).

³⁰⁴ Submission 43 to the ALRC inquiry, paragraph 405.

³⁰⁵ ALRC DP86, Proposal 10-10.

³⁰⁶ ALRC DP86, Proposal 10-11.

³⁰⁷ ALRC DP86, Proposal 10-6.

- the Commonwealth Attorney-General should meet with Heads of Jurisdiction at least once a year to identify/confirm upcoming vacancies and emerging need in particular registries and for specialist lists, and
- vacancies should be filled, at the latest, within 3 months of arising, unless they arise unexpectedly; if they are not, the Attorney-General should be required to provide to Parliament a statement explaining why this has not been possible.

Government could require applicants to undergo prescribed training before applying for a judicial appointment. That training could be developed by the National Judicial College of Australia.³⁰⁸ We concur with the observation of the National Judicial College of Australia that section 22 of the Act (if amended) could usefully be amended to recognise the need for, and merits of, ongoing training for judicial officers.³⁰⁹

Relationships Australia strongly agrees with the Law Council of Australia that candidates for judicial office in a specialist family wellbeing system should be assessed for their ‘willingness and enthusiasm to participate in training throughout their judicial careers’.³¹⁰ In its submission to the ALRC inquiry, the National Judicial College of Australia invited the ALRC to recommend that

...judicial officers working in the family law jurisdiction should be supported and encouraged to attend programs within other relevant disciplines...[not so] judges should attempt to become experts in such fields but, rather, that they be assisted to more easily understand these areas.³¹¹

Relationships Australia supports this.

Prerequisites for appointment could include:

- experience working as a lawyer in a family law or children’s jurisdiction
- child development
- trauma-informed practice
- the impact of conflict on children
- exercise of discretions
- an understanding of the mediator role and mediation processes, as well as other ADR processes³¹²
- family violence, and its various forms (including systems misuse),³¹³ and

³⁰⁸ If parenting/children’s matters are moved away from a Chapter III court, as suggested elsewhere in this submission, then there would seem to be nothing to prevent requiring decision-makers to undergo continuous professional development.

³⁰⁹ Submission 113 to the ALRC inquiry, p 2.

³¹⁰ Submission 43 responding to ALRC IP48, paragraph 431.

³¹¹ Submission 113 responding to ALRC IP48, 6.

³¹² Submission 83 to the ALRC inquiry, p 8.

³¹³ See the Australian Psychological Society, submission 55, recommendation 19.

- cultural competence.³¹⁴

Complaints

Relationships Australia recommends that a Judicial Commission be established to cover at least Commonwealth judicial officers exercising jurisdiction under the new Act. This Commission should be required to receive, investigate, examine, hear and decide on the merits of complaints and to impose appropriate sanctions, having regard to the limitations imposed by Chapter III of the Constitution.

C.5 Overarching obligations for all system professionals

Relationships Australia supported Proposal 10-1 in ALRC Discussion Paper 86, to develop a workforce capability plan. We recommend that state and territory governments be involved in development of the proposed plan, given the many and close connections between Commonwealth, state and territory functions in this area. We consider the following to be core competencies of all professionals in the system, including judicial officers:

- family violence
- understanding of a broad range of risks, including suicide risk
- trauma-informed practice³¹⁵
- understanding of the impact on children of conflict and family violence
- vicarious trauma
- an understanding of child abuse, including child sexual abuse and neglect
- cultural competence in relation to Aboriginal and Torres Strait Islander people, LGBTIQ+ families, and culturally and linguistically diverse communities
- disability awareness
- intersectional disadvantage and discrimination
- elder abuse and intergenerational conflict
- lateral violence
- substance abuse and mental health issues (including as these affect children and young people, and how they affect older people)
- problem gambling
- child-inclusive and child-focused practice, and

³¹⁴ See also National Judicial College of Australia, submission 113 to the ALRC inquiry, 4 on the importance of ‘the ability to understand cultural contexts which are different from their own.’

³¹⁵ See Fallot and Harris, 2006, for the five principles of trauma-informed practice: safety, transparency and trustworthiness, choice, collaboration and mutuality, and empowerment.

- child development³¹⁶ and parent-child attachment,³¹⁷ and how attachment needs evolve³¹⁸ as children develop.

The Act should set out advisers' obligations in relation to providing advice to parties contemplating or undertaking family dispute resolution, negotiation or court proceedings about property and financial matters.³¹⁹ In particular, consideration should be given to imposing obligations on advisers to take all reasonable steps to ensure that parties comply with disclosure duties. Relationships Australia Queensland considers that there should be consequences for FDRPs and lawyers who knowingly facilitate a non-disclosure.³²⁰

³¹⁶ In Lieberman et al, 2011, Zeanah notes (at 535): 'It is peculiar, the lack of developmental thinking in the legal system, and it is a huge problem for children. The fact that it's completely, by its nature, un-developmental. So we see the same arrangements ordered for 15-year-olds and 15-month olds. And that is just on its base crazy.'

³¹⁷ In Bretherton et al, 2011, Crowell observes that 'Attachment speaks to the logistics of development, not emotional touchy-feely matters. I think that is where people get mixed up in attachment, and the law does too. Attachment theory if anything encourages us to think on a more practical and organizational level.' (at 546)

³¹⁸ Noting the observation by Seligman that 'As clinicians, we have to actively move family law professionals away from thinking of attachment as if it were acquired at a certain time, or as if one parent-child relationship ticks the box and the other does not. Patterns of early contact are important, but there is a *wide variation between being a parent who is not the primary attachment figure in the beginning, and being someone who is marginalised.*' (See Bretherton et al, 2011, 543-544, emphasis added). Relationships Australia notes that various submitters responding to ALRC IP48 drew attention to what they regarded as misapplication of attachment theory, to the detriment of children; see, for example, Family and Relationship Services Australia, submission 53 in response to ALRC IP48, p 21.

³¹⁹ See ALRC DP86, proposal 5-8. Relationships Australia South Australia provides, on intake, an information pack including matters produced by the Commonwealth Attorney-General's Department. That pack refers to disclosure obligations.

³²⁰ Any framework to impose consequences would need to take into account that FDRPs have a neutral and non-investigative role, which limits their capacity to 'ensure' parties disclose.

Paragraph (k)

Related matters

This Chapter canvasses:

- funding issues
- the urgent need to simplify the legislation, including scrapping the existing Family Law Act
- how a Family Wellbeing System, as described above, should respond to the needs of groups who experience particular obstacles in the current arrangements
- the potential for technology to make engaging with the Family Wellbeing System easier for families, and
- the role of a Family Wellbeing System in promoting family connections with the broader community.

A Funding issues

A.1 Chronic underfunding across the family law system

It is a matter of general agreement in the community, as well as in users and service providers in the family law system, that all components of the system need adequate and ongoing resourcing. Lack of adequate funding has been a chronic issue which has exacerbated other issues people encounter when enmeshed in the family law system. Concerns about underfunding the family courts, for example, are by no means new. As noted previously in this submission, Brennan J (as he then was), sitting in the High Court, remarked that

It seems the pressures on the Family Court are such that there is no time to pay more than lip service to the lofty rhetoric of s. 43 of the Act....It is a matter of public notoriety that the Family Court has frequently been embarrassed by a failure of government to provide the resources needed to perform the vast functions expected of the Court under the Act.³²¹

We share the concerns of the Law Council of Australia about delays in obtaining interim hearings,³²² and delays in obtaining family consultant reports (because of lack of availability and the costs of family consultants).³²³ Relationships Australia agrees that the situation in which families find themselves could be significantly improved by boosted funding to provide more court services (including timely replacement of judges, funding for more judges, registrars and

³²¹ *Harris v Caladine* (1991) 172 CLR 84, 112.

³²² Noting the observation in the 2018 PwC report that, in both the Family Court of Australia (FCoA) and the Federal Circuit Court (FCC), interim orders are the second largest category of applications. PwC noted, at p 30, of its report, that interim orders 'are a proxy for cases requiring judicial direction but which are backlogged....use of multiple interim orders indicates a lack of resolution among the parties pending finalisation.' Further, the use of interim orders has increased over the past five years, particularly in FCoA Canberra, Newcastle, Parramatta, Sydney, Townsville and Cairns: p 104. The Australian Bar Association notes that interim orders can contribute to uncertainty which, in the ABA's view, can incur unnecessary costs (see submission 13 in response to ALRC IP48, paragraph 10).

³²³ See, eg, Law Council of Australia (submission 43 to ALRC IP48), paragraphs 12, 138-143.

family consultants, and funding to enable more families to access supportive specialist services). However, Relationships Australia maintains that:

- increasing court funding – while necessary - can never be a complete answer to the question of how best to support separating families
- a court-centred process will never be the best option through which to work through the relationship issues emerging from family separation (although, in some instances, it will be the necessary last resort), and
- well-funded supportive services, sitting alongside courts, offer a more complete, helpful and durable response to families' needs.

Relationships Australia cautions that it is not necessarily the case that an inquiry model for parenting matters would be less expensive to Government; this is not a 'cheap option'. We further caution that a counsel assisting, employed or engaged by the Court, would reduce legal costs to parents but would be paid for by government (although there might well be an argument for cost recovery or contribution measures to apply on a means-tested basis).

The Government has the following options:

- **do nothing.** This is indefensible when so many are dying by family violence or by their own hand because of stresses associated with family separation, while others are driven into poverty and chronic welfare dependency in the aftermath of separation. Family separation embeds poverty, most particularly with the primary caregiver of any child/ren. Poverty, in turn, is associated with poor outcomes for children³²⁴
- continue to resort to **short-term** announceables and pilots to get past short-term political or media issues and avoid long-term commitment to a system which profoundly affects millions of Australians
- **spend significant amounts of money**, as suggested in 2014 by the Productivity Commission, to **fix the current arrangements**. This would provide temporary relief, but require taxpayers to invest heavily in a system that enmeshes binary win/loss outcomes and is inherently unfit to do what taxpayers now expect of it. This option would be akin to banning handwashing in hospitals, then spending vast amounts of money on antibiotics and hospital beds to treat the inevitable infections and manage ongoing harm caused by the infections

³²⁴ Cf Joan B Kelly, 'Children's Adjustment in Conflicted Marriage and Divorce: A Decade Review of Research', 39 *J. A M. ACAD.CHILD & ADOLESCENT PSYCHIATRY* 963 (2000). Relationships Australia notes that 84% of Australian single parent families are single mother families. In 50% of single parent families with dependants, the age of the youngest child is between 0-9 years of age: Australian Bureau of Statistics (2012), Labour Force, Australia: Labour Force Status and Other Characteristics of Families, Cat. No. 6224.0.55.001. There is a strong negative association between poverty and children's developmental outcomes. The negative effects associated with low income and poverty carry a significant cost for individuals and families, as well as the broader community. There are also clear costs associated with children's development and wellbeing - the impacts of which are likely to be amplified later in life for the children who experienced poverty and also the wider society. See Warren, D, *Low Income and Poverty Dynamics - Implications for Child Outcomes*. Social Policy Research Paper Number 47 (2017). Available at <https://www.dss.gov.au/publications-articles/research-publications/social-policy-research-paper-series/social-policy-research-paper-number-47-low-income-and-poverty-dynamics-implications-for-child-outcomes>; Stock, Corlyon et al, *Personal Relationships and Poverty: An Evidence and Policy Review*, a report prepared for the Joseph Rowntree Foundation by the Tavistock Institute of Human Relations, 2014.

- spend **significant amounts of money and exercise policy leadership by transforming** a court-centric and highly siloed edifice to a wraparound family-focused service that could make proper inquiry into children's development needs and offer ongoing multi-disciplinary support to children and their families to build capacity, and address the social and relational needs at the heart of family separation.

Relationships Australia is aware of arguments that better and less expensive outcomes could be gained simply by giving those structures more funding. That would soften the loud clamour of those seeking to retain the *status quo*, but only temporarily. It is unconscionable to continue drip feeding relatively small amounts of short term money to prop up a system that is not fit for purpose and which, by its inherently combative nature, can never be tweaked into being fit for purpose.

A.2 The trap of short-term funding

Relationships Australia is dismayed at the short-term nature of many funding arrangements for family relationship and legal assistance services. Relationships Australia acknowledges that funding packages must be accounted for to taxpayers within the Budget cycles of three to four years, and that budget processes and rules flow from that. However, short-term pilots and trials should be used far more sparingly than they have been for the last decade. Pilots and trials are, of course, necessary to genuinely test the merits of service models and approaches. But they are too often used to quell advocacy for reform and to sidestep or postpone governments' commitment to enduring transformation of a system that, despite its huge and widespread impact on the population, is not fit for purpose. Further, serial short-term pilots generate waste and inefficiency through their repetitive cycles of establishment, operation, evaluation, termination, and then birth of a new short-term pilot. They offer but false economy:

- funding is fleeting
- relationships with communities – vital to ensure that services can help those communities - cannot be built
- appropriately qualified and experienced staff are difficult to recruit for short terms (especially for rural, regional and remote areas)
- the cost of infrastructure for short periods, borne by service providers, can be prohibitively expensive, and
- evaluation is confined to a relatively brief period of operation, which substantially diminishes the potential for sound data to be collected and evaluated to establish whether the piloted service was, or could with more time or modifications or both, be effective. We note, too, that evaluation is often unfunded, and the cost of it must be absorbed by the service provider.

Programs that are place-based, and intending to effect change at a cultural or intergenerational level, need stable funding over long periods of time; ideally, 20 years. A concerted emphasis on capacity building will eventually reduce the community need for targeted services, but such a shift might not be discernible for 7-10 years. This is very challenging from a budgetary / public accountability / political cycle standpoint. It requires commitment from leaders to accept, communicate and persuade as to the benefits of such longer cycles as are needed to disrupt cycles of entrenched disadvantage and dysfunction and reap the far-reaching and multidimensional socio-economic benefits of doing so.

Australian governments must develop processes that enable funding of trials and pilots that run for a sensible amount of time (to allow for adjustments as data emerges) and the funding of services over longer periods of time (up to 10 years). It really should not be beyond the ingenuity of governments to facilitate this, and also to facilitate the taking into account of downstream savings from investment in primary and secondary interventions to justify short-term expenditure.

Valuing the short-term crisis over long-term prevention

The impulse to rely on announcing short-term pilot programs to respond to crises or sporadic public attention, and then de-funding such services (whether evaluated as successful or not, or not evaluated at all) undermines providing effective services, hinders employment and retention of skilled and experienced staff, and investment in infrastructure.

Clients and community groups frequently express disappointment at the 'here today/gone tomorrow' approach which characterises short-term funding commitments. The electoral cycle is three years, and the budget cycle somewhat longer, but a precondition of transformational change in family and community well-being is trusting relationships between users and services. This does not occur according to a timetable; nor does transformational change, of the kinds suggested by the proposed outcomes, happen in a linear way.

One of the most difficult questions in social and economic policy concerns the tension between the urgency of tertiary services (and the consequences of not providing them) and the benefits of providing universal and preventative/early intervention services. This tension, like the Budget process rules, reflects what in behavioural economics is termed present bias and time-inconsistency in temporal choice. That is, the relative over-valuing of short-term, immediate results and the concurrent discounting of longer-term results.

Funding arrangements should be liberalised to allow service providers to direct scarce resources to emerging and changing priorities (ie shift them between universal and targeted service), as required and without penalty (eg spending more time on targeted client groups without fear of the numbers dropping in future reports to funders).

Relationships Australia would not support diverting more funding to targeted services if to do so would undermine the effectiveness and reach of current universal programs.

Evidence supports the value of co-existence of universal and targeted services, linked by well-designed and effective bi-directional pathways. Universal services may be seen by families as less stigmatising than targeted services, and a 'soft' entry that invites, rather than deters, help-seeking. Well-designed pathways, offering a seamless continuum to targeted services, can then offer more tailored responses.

A.3 SACS/ERO³²⁵

From June 2021, some family services will have to turn away up to an extra 400 clients per service per year, because of a massive funding cut baked into the Federal Budget over the past seven years.

We respectfully suggest to the Committee that they make reversal of this cut a key recommendation to Government. This will help to ensure that Australian families do not lose access to services that can keep them out of courts, and parent-child relationships intact.

Further detail about this issue is in our response to paragraph (e) of the Committee's Terms of Reference.

B Legislation

The Family Law Act is lengthy and cumbersome; a contributing factor has been a series of amendments over decades which 'retrofit' provisions with the aim of addressing specific circumstances or to meet the needs of a specific cohort of users. Relationships Australia recommends the introduction and passage of a new Act of Parliament, not to be called the Family Law Act, but the Family Wellbeing and Services Act. The new Act should reflect that legislation and judicial decisions are pillars of an overall network of support for families, separating and intact, and sit alongside (not above) an array of services and decision-making pathways. Other amendments for specific purposes are suggested throughout the body of this submission.

Family violence provisions

We suggest that the definition of 'family violence' in the current Act should be amended as follows:

- replace 'assault' with 'an act that causes physical harm or causes fear of physical harm'
- replace 'repeated derogatory taunts' with 'emotional or psychological harm'
- add 'including requiring the family member to transfer or hand over control of assets, or forcing the family member to sign a document such as a loan or guarantee' to paragraph 4AB(2)(g)
- add 'including unreasonably withholding information about financial and other resources' to paragraph 4AB(2)(h)
- add reproductive coercion to section 4AB
- add 'community or religion' to subparagraph 4AB(2)(i)
- add to the definition in section 4AB two new examples:
 - using electronic or other means to distribute words or images that cause harm or distress; and
 - non-consensual surveillance of a family member by electronic or other means.

³²⁵ See section D of the response to paragraph (f) of the Committee's Terms of Reference.

Relationships Australia would also propose to add 'fear' to 'cause harm or distress' to the first of the preceding examples for technology-facilitated abuse, and to add '(including, but not limited to, remotely operated aircraft)' to the second of these.

Relationships Australia supports the suggestion, made by the Royal Australian and New Zealand College of Psychiatrists, to include 'medical neglect' within the definition of family violence. The College gives the example of

...obstructing access to medical or psychological care for the child or refusing to attend appointments when the child is in their care.³²⁶

Relationships Australia also supports expanding the definition of 'family violence' in the Family Law Act to include dowry and forced marriage, as Victoria has done in its *Family Violence Protection Act 2008*.³²⁷

C Groups experiencing particular obstacles in the family law system

C.1 Aboriginal and Torres Strait Islander people

Cost, literacy, language, bureaucratic hurdles and lack of confidence in cultural safety can all impede the access of Aboriginal and Torres Strait Islander people to the family law system. Policies made in the context of urbanised clients often do not translate well to the situation of Aboriginal people in the Northern Territory, for example.³²⁸ Distrust of government agencies in matters relating to children is also a significant problem, with fears of another stolen generation very present. Additionally, many of our clients suffer from intergenerational and complex trauma and, in some communities, violence has been normalised.

Cultural safety training and trauma informed practices should be mandatory for all those involved in the family law system. Recommendations from the *Bringing them home* report, the *Little Children are Sacred* report and the report of the Royal Commission into the Protection and Detention of Children in the Northern Territory each offer valuable insights.

Aboriginal and Islander Cultural Advisors

Relationships Australia Northern Territory employs a team of Aboriginal and Islander Cultural Advisors (AICAs) to assist clients to navigate the FDR process, but these supports have ceased to exist in the court system. The AICA team has developed its own presentation around the history of colonisation, lateral violence, how trauma can

³²⁶ Submission 18 to the ALRC inquiry, 4.

³²⁷ Relationships Australia notes support for inclusion of 'dowry-related extortion' by the Royal Australian and New Zealand College of Psychiatrists: submission 18, 4.

³²⁸ For more information on how culturally safe practice is undertaken in South Australia, please see the separate submission from Relationships Australia South Australia. For broader consideration of issues facing Aboriginal and Torres Strait Islander people in engaging with the family law system, see the Family Law Council's 2012 report on Indigenous and CALD clients in the family law system: <https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Pages/FamilyLawCouncilpublishedreports.aspx>, and section 9.3 of the Family Law Council's 2016 report.

impact behaviour, and reactions to address this normalisation before even beginning to discuss how ongoing conflict can affect children.³²⁹

Professional education opportunities for Aboriginal and Torres Strait Islander people should be expanded. There have been some programs which offer this, such as the Diploma of Counselling for Aboriginal and Torres Strait Islander Peoples. Regrettably, current resource constraints do not allow Relationships Australia to offer this programme.

Levels of reciprocal and severe family violence between parents and extended family members can preclude FDR. However, the family law system is challenging for Aboriginal people to pursue. It has been suggested that an option of mediation with a judge (with involvement of police for safety planning) could be useful in extreme violence situations.

A further challenge for some Aboriginal families is navigating the differences and intersections between Aboriginal law, the federal family law system and state/territory domestic violence and child protection law. Often, these families are in all the systems and families may want to discuss the care of the children in a traditional way, but there are difficulties in having that recognised in the family law system. Recognition of kinship relationships requires greater consideration be given to the role of Aboriginal grandparents in making decisions for children.

Case study – barriers to access for Aboriginal and Torres Strait Islander people and the need for investment in services

Relationships Australia Queensland operates an outreach of the Far North Queensland Family Relationships Centre on Thursday Island in the Torres Strait. There are several barriers to effective access to services here, including difficulties recruiting suitably trained staff and the impacts of remoteness. Investment is needed to develop, support and train a Torres Strait Islander workforce. The costs of delivering services are prohibitive, and include travel costs, staff costs, accommodation and property expenses, and the costs of providing adequate and culturally appropriate support and development to staff in these regions. Relationships Australia Queensland has invested in working with the community to develop culturally appropriate and responsive service delivery models. However, we recognise that effective and sustainable access to services in the Torres Strait and Northern Peninsula Area requires community capacity-building and community development, so that communities are able to develop, deliver and maintain services that work best for them.

If Indigenous clients cannot see someone they recognise at the service, they will not attend that service. They need and want choice in the practitioners they see. Sometimes they will request an Indigenous worker and sometimes they will request a non-Indigenous worker. If they request

³²⁹ See also Ross et al, *Model of Practice for Mediation with Aboriginal Families in Central Australia*, 2010, and the recommendations made by the Indigenous Legal Needs Project, 2016.

the latter, then they are likely to want assurance that this person is trustworthy and supported by Indigenous people. As is the case with strategies for attracting Indigenous staff, Indigenous community engagement and outreach are crucial to providing services to Indigenous clients and building trust.

The layer of mistrust attached to mainstream non-Indigenous services adds to well-recognised barriers to participation such as poverty, lack of transport, systems abuse and disengagement experienced by many disadvantaged and vulnerable client groups. However, our services report that even if the vulnerabilities of poverty, violence and addiction were present in both non-Indigenous and Indigenous clients, Indigenous clients would take more time to service due to their complex problems and the need to look after cultural considerations.

Considerable community engagement work takes place out-of-hours through workers attending local sports events, shops or community activities. Children's programs also offer an indirect way of building trust with Indigenous families. Over time, attending and sponsoring local art events and maintaining a presence at the local football club/community group can bring clients into mainstream adult programs. Clients are also supported to get to the service and are helped with paperwork. In one example, the local shopping centre requested some Indigenous art and some of our Indigenous workers got community members involved. Art is a particularly good way of engaging young men, with these types of activities allowing space for relationships to be developed and over time clients trust the service sufficiently to engage. While this work may be done by an Indigenous counsellor, it cannot be counted as a counselling session for reporting purposes.

Our Indigenous clients say 'are you chasing us for numbers?' as other services are chasing the same families as well, due to the pressure to meet targets imposed by Government.

Community relationships and capacity building requires more than getting to know the community elders. It needs real and ongoing commitment to the community and supporting community elders to understand the language, evidence and messages around key social policy issues such as youth suicide and family violence. The elders can then talk within their communities and help people to access the services they need.

Our services report a general level of apathy in relation to accessing services by many of the communities they visit that makes engagement difficult. In remote areas, 'fly in, fly out' services have created a perception of a lack of long-term commitment by service providers. These types of services are costly to provide and do not allow for trust and much-needed people on the ground building multiple relationships. The ability of the services to maintain an ongoing presence in the community is undermined by short funding contracts, lack of flexibility and insufficient allowance for the real costs of delivering services.

For example, it can take two years to establish a service due to the time needed to build up trust and connection with a community. If the contract is only three years, at the end of the period it may look like little direct service provision was undertaken and the program was (incorrectly) assessed as a failure. The constant rolling out of new, short-term, programs imposes significant administrative burdens and diverts funding from providing services to clients.

These cycles lead to client and worker fatigue. Our Indigenous workers report frustration with the lack of appropriateness in the way services are delivered, but in many cases the delivery of programs is constrained by mainstream requirements, such as the client needing to attend a Family Relationship Centre to receive a service. For example, Indigenous clients will not phone if they do not have credit or come in to the service if they have no transport; poverty compounds these access barriers. There is still a great deal of stigma associated with mental health problems and education and awareness initiatives are greatly needed. Some Indigenous people still see social services aligned with stolen children (eg. child protection removals). Our services report the support for Indigenous families must be case managed and provided free of charge to enable access.

There is also frustration with the assumed effectiveness of programs that are now labelled evidence-based. These programs often work for a population similar to where they were developed, but they may not work in Indigenous communities, or for different Indigenous communities. What is needed is consultation with local workers and Indigenous people *and* the flexibility to adapt the program for the local area. Many government reports have identified this as an issue, but recommendations have not been implemented.

Mainstream programs can often be adapted, through consultation, to make them relevant to Indigenous people. For example, the Non-violent Resistance program, for parents whose young people are violent, worked well, but we had to consult with the local Indigenous community to appropriately modify its delivery to community. This can be done with additional time and investment, but does add to establishment costs.

In some areas, our workers note there are too many siloed programs, with each service provider only funded to offer a single program and they all chase the same families. In reality, funding continues to be measured within short-term funding cycles. Parenting programs, for example, are not currently funded to work flexibly, but are gentler and more durable approaches with the potential to support resilience, capacity and wellbeing for the whole community.

Further, the old-fashioned 'office-centred' nature of current mainstream service delivery where we bring disadvantaged clients to our location and provide services to them at that location is often inappropriate for a range of marginalised groups, including Indigenous families. For example, our workers are often seeing clients who are young parents (as young as 12 years). These young people have no role models for parenting. Counsellors can expose them to positive role models by both the male and female counsellor visiting them in community, rather than trying to get them to come into an office to attend a parenting group program. On community, the workers can work with the elders and the young people in their own country and culture.

The RASA experience

Relationships Australia South Australia reports that their service emphasis for Aboriginal and Torres Strait Islander families tends to be in the interactions that those families have with child protection courts, magistrates' courts, and Children's Contact Services, rather than the family courts. Relationships Australia South Australia notes that these services are often tailored to 'wrap around' an entire family or community, rather than the members of what might be considered to be a nuclear family. Beneficial service offerings

tend to focus on dispute resolution and use a restorative practice lens that focuses on children's wellbeing.

To improve the quality and accessibility of family services for Aboriginal and Torres Strait Island people, we offer the following suggestions:

- increase the length of funding agreements where improved access for Indigenous clients is desired
- increase the flexibility of funding agreements to allow for community development and relationship building work, and improve reporting frameworks to accommodate the recording of this effort
- increase consultation with workers, clients and community leaders in the local community before an evidence-based program is implemented
- in funding agreements - allow for adaptation of evidence-based programs
- review the recommendations of previous government reports on best practice service provision for Aboriginal and Torres Strait Island people, and
- legislate that, where proceedings involve an Aboriginal or Torres Strait Islander child, a cultural report should be prepared, including a cultural plan that sets out how the child's ongoing connection with kinship networks and country may be maintained.³³⁰

C.2 People from culturally and linguistically diverse backgrounds

Relationships Australia acknowledges the work being done in the current pilot of legally assisted and culturally appropriate FDR (LACA FDR). However, the pilot is limited to clients who have experienced domestic violence and, as a pilot, may well come to an end without being rolled out. Relationships Australia sees virtue in having CALD-specific services that are broader than focusing only on family violence-affected families, and that are rolled out on an ongoing basis.

Further, there are occasions in which inadvertent barriers are placed in the way of CALD users accessing services. For example, family violence services currently in pilot phase may require that family violence be explicitly named and acknowledged; some of our female clients who are family violence survivors strongly resist naming perpetrator behaviour as family violence, which inhibits access by the family to services that might be of real value. Accordingly, Relationships Australia suggests that all services, but *particularly* services targeted for CALD users, be carefully designed to avoid deterring help-seeking.³³¹

³³⁰ ALRC DP86, proposal 10-14. Relationships Australia notes precedents in other jurisdictions and that this would implement recommendations made by the Family Law Council in 2016, as well as recommendations of the House of Representatives Social Policy and Legal Affairs Committee in its 2017 report on *A Better Family Law System to Support and Protect Those Affected by Family Violence*.

³³¹ For more information on CALD-sensitive practice in South Australia, please see the separate submission to the ALRC inquiry from Relationships Australia South Australia.

C.3 People with disability

Inclusive and accessible services

Relationships Australia is committed to inclusive services predicated on the autonomy and dignity of all individuals,³³² and which are strength, not deficit, based. This commitment should inform the development of all systems and services for Australian families.

The attention of decision-makers in the Family Wellbeing System should be directed to the relevant domestic law relating to discrimination on the grounds of disability.

Supported, not substitute, decision-making³³³

Supported decision-making is central to a human rights compliant family law system.³³⁴ Accordingly, the framework to facilitate it should be included in primary legislation, rather than in rules of court or by other instrument. The Act should also be explicit that, where a supporter is chosen, ultimate decision-making authority remains with the person who requires support.³³⁵

Relationships Australia Tasmania has suggested that a person who is charged with supporting the decision-making of another needs to remain separate from the proceedings and have no interest in the outcome of the proceedings. This may exclude other family members from taking that role.

Relationships Australia urges rigorous evaluation of programs to facilitate supported decision-making.

The Australian Government should ensure that people who require decision making support in family law matters, and their supporters, are provided with information and guidance to enable them to understand their functions and duties. The Australian Government should publish information and guidance for people who:

- need support for decision-making, describing their right to be supported to make decisions that reflect their preferences and choices, and how they can access those supports, and
- provide support for decision-making, setting out their functions and responsibilities in relation to the person whose decisions are to be supported.

Case guardians and litigation representatives

Commonwealth legislation should include provisions for the appointment of a litigation representative where a person with disability, who is involved in family law proceedings, is unable to be supported to make their own decisions. The Act should set out the circumstances

³³² As articulated, for instance, in *Secretary, Department of Health and Community Services v JWB and SMB (Marion's case)* (1992) 175 CLR 218.

³³³ See Proposal 6 in section B of the response to paragraph (c) of the Committee's Terms of Reference.

³³⁴ See Convention on the Rights of Persons with Disability, Article 12. Australia is a party to this Convention, but has made interpretive declarations in respect of implementing supported decision-making.

³³⁵ ALRC DP 86, paragraph 9.33.

for a person to have a litigation representative and the functions of the litigation representative. These provisions should be in a form consistent with recommendations 7-3 to 7-4 of the ALRC Report 124, *Equality, Capacity and Disability in Commonwealth Laws*. Relationships Australia concurs with the Commission's suggestion that the role and duties of litigation representatives be re-conceptualised,³³⁶ and the legislative arrangements to implement this include the elements described at paragraph 9.59 of ALRC DP86.

There is deep concern about the difficulties being encountered in arranging, in a timely manner, the appointment of suitable litigation guardians.³³⁷ We are aware of cases being delayed for considerable periods of time, to the detriment of parties, because willing guardians cannot be found. This is a grave denial of access to justice. Relationships Australia understands that the Attorney-General's Department is aware of these difficulties, and has – over some years now – been seeking to address them, but with little success. A reformed system should ensure that persons with disability have access to the advocacy and, where warranted, decision-making supports, to facilitate their fullest engagement with family services, including legal and decision-making services and frameworks. As a corollary, steps should be taken to remove barriers deterring people from acting as case guardians.

Family courts should develop practice notes explaining the duties that litigation representatives have to the person they represent and to the court. Alternatively, the proposed Family Commission could develop guidance in collaboration with the courts. The Australian Government should work with state and territory governments to facilitate the appointment of statutory authorities as litigation representatives in family law proceedings.³³⁸

Relationships Australia would urge the Commonwealth to make funding available to state and territory public guardians to undertake this work. We welcome Parliament's support for limitations on the courts' powers to order costs against a litigation guardian, as this may remove some of the barriers which are deterring potential guardians from accepting an appointment. Relationships Australia welcomed the amendment to prohibit the court from making an order under ss117(2) of the current Act, unless the court is satisfied that the guardian's conduct has been unreasonable or has unreasonably delayed the proceedings.³³⁹

Family Group Conferencing

There may be unexplored potential to adapt Family Group Conferencing (FGC) to support the participation of people with disability.

Family separation services and the NDIS

The Australian Government should work with the National Disability Insurance Agency to consider how referrals can be made to the NDIA by professionals outside the disability services

³³⁶ ALRC DP 86 paragraph 9.50.

³³⁷ For example, Caxton Legal Centre, submission 51 to the ALRC inquiry, paragraphs 15-19; Law Council of Australia, submission 43 to the ALRC inquiry, paragraph 80.

³³⁸ See ALRC DP86, Proposals 9-3 to 9-5.

³³⁹ See *Civil Law and Justice Legislation Amendment Act 2018*.

sector, and how the National Disability Insurance Scheme could be used to fund appropriate supports for eligible people with disability to:

- build parenting abilities
- access early intervention parenting supports
- carry out their parenting responsibilities
- access family support services and alternative dispute resolution processes, and
- navigate the family law system.

The Australian Government should ensure that the family law system has specialist professionals and services to support people with disability to engage with the family law system.³⁴⁰

Commonwealth legislation should provide that, where concerns are raised about the parenting ability of a person with disability in proceedings for parenting orders, a report writer with requisite skills should:

- prepare a report for the court about the person's parenting ability, including what supports could be provided to improve their parenting; and
- make recommendations to the court.³⁴¹

Relationships Australia agrees with the observations made by the Australian Psychological Society that

Separation and divorce are emotionally challenging for most families, and people coming into contact with the family court and related services may well present as more distressed and confused than they would under normal circumstances. Many parents and families may also be subject to or recovering from family violence and abuse. They may be very anxious, unhappy, irritable or disorganised. This does not mean the parents are mentally unstable, and it does not mean that they are not a caring and effective parent.³⁴²

Our practice experience bears out concerns expressed by submitters about the limited availability of supports currently available to parents with disability.

Case study

Parents (Mr and Mrs H) of two young children engaged in FDR to resolve their financial and property matters. Mrs H had sustained a brain injury, had physical limitations and limited capacity to always accurately recall information and make rational decisions. FDR provided scope for the parents to both be part of the discussion, with Mrs H's attorney present through the discussions to support her participation and contribution towards the decision making process.

³⁴⁰ ALRC Report 135, proposals 9-6 and 9-7.

³⁴¹ ALRC Report 135, proposal 10-13.

³⁴² Submission 55 to the ALRC inquiry, p 17.

A challenge in FDR where another person is present in a 'support person role' is the support person's conscious or unconscious alignment to the party whom they represent/support. In this case, Mr B (the holder of the power of attorney) is also the father of Mrs H. There was potential for the session to be emotive, with Mr and Mrs H staying entrenched in the conflict and continuing the pattern of behaviours around decision-making. The FDRP sought agreement from Mr H and Mrs H to include Mr B as a client rather than a support person. This meant Mr B was in a position to contribute to the discussions, hear Mr H's worries and concerns for Mrs H, and actively participate in the exploration of options and reality testing of ideas.

The FDRP conducted the session using a trauma-informed practice approach. The parties spent some of the sessions together. At other times, each client had separate sessions with the FDRP to assist in managing the impact the injury had on each of their lives, dreams, hopes, aspirations and the financial hardship and uncertainty they have experienced.

Each party felt heard, respected and found common ground. The FDRP's approach removed a sense of burden placed on Mr B to make the best decision possible for Mrs H's financial future. For Mr H, his sense of being dismissed and overshadowed by Mr B was removed. Mrs H felt valued.

Agreements reached were based on a shared understanding of the current situation and future needs of both parents and their children.

In their recent study of the needs of children and young people in the family law system, Carson et al drew attention to the need for structures to be in place to support children with disability to participate in the process.³⁴³

C.4 People living in rural, regional and remote areas

Relationships Australia supports the FLC's recommendations in its 2016 report.

Relationships Australia notes with particular concern that many rural, regional and remote communities are severely impoverished; current drought conditions and the bushfire crisis are further exacerbating existing hardship across the country. Their effects – physical, psychological, economic and social – will be long lasting. In the Northern Territory, for example, there are families living in over-crowded, inadequate housing and struggling to provide basic food and shelter. There is no additional money to access family law services. In addition, remoteness, lack of transport or technology, and access to services and neutral interpreters means that issues in remote communities can go unaddressed.

As discussed below in section D, assumptions that technology can fully fill gaps in service delivery do not accommodate issues of literacy, lack of internet services and safe and appropriate spaces and technology. For example, while online services may work for most urbanised people in cities, Aboriginal people in communities may be suspicious about dealing

³⁴³ Carson et al, 2018, 81, Case Study 2: Hamish and Colleen.

with practitioners other than in face to face settings. CALD groups may have similar sensitivities and, in any event, in dealing with issues as inherently personal as family conflict and separation, many people of all backgrounds may need to engage face to face to tell their stories, to be heard, and to be supported in navigating a strange and formidable network of institutions and services.

A further, and not insignificant, barrier to reliance on technology is constituted by rates of functional illiteracy in Australia. According to the most recent ABS and OECD data, lack of functional literacy is a not uncommon barrier to economic and social participation, including engagement with online media.³⁴⁴ These barriers are particularly high for Indigenous and CALD populations, but by no means confined to these cohorts.

C.5 People within the LGBTIQ+ communities

Relationships Australia supports Recommendation 1 made in the Family Law Council's *Report on Parentage and the Family Law Act (2013)*: that provisions relating to parenting apply to children regardless of their family form, or the way in which their families are formed.

We share the concern, noted at paragraph 93 of ALRC Issues Paper 48, that there are deficiencies in the data about the access to and use of family law services by members of LGBTIQ+ communities, and any specific needs with which they may present. Relationships Australia encourages the capture of such data, to inform relevant and inclusive policy and programmes. Relationships Australia endorses the findings of the Victorian Royal Commission, highlighting the significant and pressing need for policy and programmes to address the risks of family violence which arise particularly as a result of sexuality or gender identity. Further, governments and services need to be aware of using inclusive language. For example, Relationships Australia Northern Territory has received feedback criticising literature which assumes that families are composed of 'a mum and a dad'.

D Role of technology

Relationships Australia supports the exploration of online decision-making processes to support, facilitate and complement face to face services. It remains, however, vital to recognise the persistent barriers of the digital divide as well as other barriers, such as inadequate access to fast, reliable and private online services, illiteracy, cultural considerations and poverty.³⁴⁵ Some of these barriers will diminish over time, but there will – for the foreseeable future - be a cohort of people for whom online services is not a practical way of interacting with service

³⁴⁴ See, the ABS fact sheet on the *Programme for the International Assessment of Adult Competencies*, Australia, 2011-2012, at <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4228.0Main+Features202011-12>. A 2016 study by the Australian Industry Group indicated that 90% of employers were concerned by low rates of literacy and numeracy among their employees.

³⁴⁵ Relationships Australia cautions against conflating telephony and internet based services, and also notes that privacy issues are likely to arise from the use of Cloud technology: see our comments on the KPMG final report, p 10, Appendix E. Relationships Australia Queensland offers technology-enabled services including the FRAL and the Telephone Dispute Resolution Service. The current pilot by Relationships Australia Victoria, of a Family Safety Navigation Model, makes heavy use of telephone-based consultations.

providers. It is vital that the disadvantages suffered by those in that cohort are not compounded by exclusion from services to support resolution of family conflict.

It has been argued that the introduction of interactive, automated, user-pays systems using artificial intelligence would enable and empower users to negotiate separation arrangements (including parenting plans and division of property) in their own time and in a safe space, with transparent and capped costs. It is suggested that, as online dispute resolution (ODR) services mature, increasingly integrated services could be made available, with links to other systems (such as family courts and the Child Support Agency), services and referral pathways. The system could allow users to 'buy in' additional services to assist with resolution. Some systems proposed would include the cost of a lawyer to review the final agreement to ensure that the outcome is fair and equitable, and has not been compromised by a power imbalance. If acceptable, the agreement could then be formalised by final orders by a court.

Relationships Australia understands that similar systems are being used in the United Kingdom, the Netherlands and Canada. The design, flow and content follow the behaviour, needs and emotions of people looking for enduring outcomes.

While the further development of ODR would be a welcome complement to face to face services, there are additional factors which require consideration, beyond the barriers to online participation noted above. There can be great therapeutic benefit in face to face contact with clients, especially when dealing with high emotions – connection with a person can be one way of getting through a difficult situation and moving away from the loneliness or isolation that can be experienced, while also creating a safeguard against trauma.

In addition, the confidentiality, reliability of technology and thorough training for those involved in providing this service would need to be considered, as would capital investment. In this respect, exploration will need to be made of emerging technological capabilities.

Relationships Australia is also aware that, for many Australians, the digital divide remains a reality. The Australian Digital Inclusion Index 2019 reported that

Across the nation the so-called 'digital divide' follows some clear economic, social and geographic contours and broadly Australians with low levels of income, education, employment or in some regional areas are significantly less digitally included.

This report – the fourth Australian Digital Inclusion Index – brings a sharp focus to digital inclusion in Australia and while it is encouraging to see improvement year-on-year, and particularly in regional Australia, it is clear there is still a lot to be done.³⁴⁶

The digital divide is not always a function of technological skill or willingness to learn on the part of the user; many Australians simply do not yet have access to fast, reliable, safe and private internet access (and not only because they live in regional, rural or remote areas). Accordingly,

³⁴⁶ https://digitalinclusionindex.org.au/wp-content/uploads/2019/10/TLS_ADII_Report-2019_Final_web_.pdf. In submission 63 to the ALRC inquiry, the Family Violence Prevention and Legal Services Forum cautions against treating technology as a complete solution: see p 16. See also submission 45 to the ALRC inquiry from Women's Legal Services Australia, 14.

service providers and governments must continue to offer information and services across a range of platforms.

E A Family Wellbeing System must encourage connectedness beyond the family

Isolated families are neither safe nor healthy. Loneliness and social isolation are associated with a range of poor mental, physical and socio-economic outcomes for people and families. Adolescents who do not have close friendships and good social networks, for example, consistently report lower levels of self-esteem, more psychological symptoms of maladjustment, and are at higher risk of suicide. There is also a relationship between social isolation and depression, lower levels of self-worth, life satisfaction and subjective wellbeing. The negative effects of loneliness extend to physical wellbeing. In one review of literature, people who were socially isolated, or did not have good quality social support, were found to be at greater risk of developing coronary heart disease, with one study comparing the impact of loneliness on heart disease to the impact of smoking. Relationships Australia works to support people within their social context, so that they can build and maintain connections in the community.³⁴⁷ These considerations have informed our recommendations to establish a Family Wellbeing System to replace the dysfunctional and dangerous family law system.

CONCLUSION

The diverse elements of the 'family law system' combine to exist as a major touchpoint between the federal government and the nation it serves. It influences the everyday and intimate lives of millions of Australians. Widespread dissatisfaction with, and lack of confidence in, the family law system should, in view of that, readily attract from governments energy, effort, expenditure and a sense of urgency.

Yet it does not.

The grief, the loss, the grinding pain, frustration and disempowerment felt by Australians engaging with the 'family law system' happens largely out of public view. The laudable aim of wrapping family law proceedings around with a cloak of privacy and dignity has rendered invisible the daily hurts endured by children and parents for over 40 years. It allows death, loss, pain, trauma and financial ruin to trickle, day by day, into our broader community. Its invisibility permits systematic under-resourcing and de-prioritising relative to those public issues which can display, to galvanising effect, the effects of chronic underfunding and political disengagement. It allows policy makers to believe that a dysfunctional and dangerous family law system is just another, albeit regrettable, part of modern society, enabling them to prioritise other, more publicly visible problems that can be managed with media-friendly fixes.

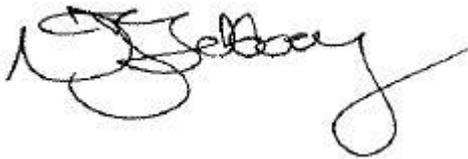
Australian families should no longer be expected to limp along, suffering long-lasting harms through contact with impoverished institutions that cling to win/loss outcomes. It is surely past

³⁴⁷ See Kidd, 2004, Rubin & Mills, 1998, Nangle et al., 2003, Qualter & Munn, 2002, Goodwin, Cook, & Yung, 2001, Chipuer, Bramston & Pretty, 2003, Voltorta, 2016.

time that Parliament recognise that anything short of true transformation will cost Australia its potential to build healthy, resilient families and communities by nurturing healthy, resilient children, whether their families are separated or intact.

We thank the Committee for the opportunity to contribute to its work on this pivotal inquiry, and would be happy to discuss further the contents of this submission if this would be of assistance. I can be contacted directly on (02) 6162 9301. Alternatively, you can contact Dr Susan Cochrane, National Policy Manager, Relationships Australia National, on (02) 6162 9309 or by email: scochrane@relationships.org.au.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Nick Tebbey', with a stylized flourish at the end.

Nick Tebbey
National Executive Officer