AUSTRALIAN LAW REFORM COMMISSION - REVIEW OF THE FAMILY LAW SYSTEM

ISSUES PAPER RELEASED 14 MARCH 2018

Submission from RELATIONSHIPS AUSTRALIA

PART A - The work of Relationships Australia

This submission is written on behalf of Relationships Australia's eight member organisations. It complements submissions provided by Relationships Australia State and Territory organisations.

We are an Australian 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, cultural background or economic circumstances.
Relationships Australia provides a range of family support services to Australian families, including counselling, dispute resolution, 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 their behaviour and how they relate to others.

Relationships Australia has been a provider of family relationships support services for 70 years. Relationships Australia State and Territory organisations, along with our consortium partners, operate around one third of the 66 Family Relationship Centres (FRCs) across the country. In addition, Relationships Australia Queensland operates the 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 within their families and communities with dignity and safety, and to enjoy healthy relationships. These principles underpin our work.

Relationships Australia supports integrated cross sector, multi-disciplinary responses to family and domestic violence which focus foremost on the safety of the victim. Freedom from violence in the family is a human right and Relationships Australia supports a legal framework to respond to inequality, coercion and control, and the use of violence in families, including amendments to the *Family Law Act 1975* to better protect victims of family violence.

Relationships Australia is committed to:

- Working in 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 elders, men, women, young people and children. We recognise that often a complex suite of supports (for example, drug and alcohol services, family support programs, mental health services and public housing) is needed by people affected by family violence and other complexities in relationships.

- Enriching family relationships and encouraging good and respectful communication.

- Ensuring that social and financial disadvantage is not a barrier to accessing services.

- Contributing its practice evidence and skills to research projects, to the development of public policy and to the provision of effective supports to families.

This submission draws upon:

- our direct service delivery experience across urban, regional, rural and remote locations
- our experience in delivering programs in a range of communities, including culturally and linguistically diverse and Indigenous communities
- evidence-based programs and research
- our leadership and policy development experience
- the voices of our practitioners, and
- the experiences and voices of the men, women and children with whom we work to bring to attention to a range of issues affecting the policy and community actions aimed at supporting strong relationships.

PART B- Response to the call for submissions in response to the Issues Paper

B. 1 Introduction

More people come into contact with the family law system, directly or through the experiences of their family and friends, than with any other part of the legal system in Australia. What is at issue in family disputes could hardly be more fundamental – the care and nurturing of children, the ongoing relationships within families (whether separated or intact), access to major family resources such as the family home and superannuation, and access to the social capital of the family.

For some time, Australians who use the system, and professionals who work in the system, have called for wide-ranging reform to meet modern needs. Further, the last four decades have been characterised by profound social changes, giving rise to questions about whether the policy aims underpinning the current system remain salient, and whether there are other aims now to be served.

Public awareness of the dynamics of family violence, and the long-term harm it wreaks on individuals, the family unit and the community at large, has prompted calls for reforms to better prioritise the safety of family members, and support behavioural changes in those who use violence as a response to conflict.

Against this background, Relationships Australia applauds the establishment of this review, and the breadth of the terms of reference, that allow for a full review that encompasses the complexity of contemporary families, the complexity of family conflict, and need for arrangements that can respond effectively to support families throughout the life course.

B. 2 Overview of submission

This submission sets out:

- An overview of the context for the ALRC's review
- Responses to those of the questions, posed in the Issues Paper, on which Relationships Australia feels it can make a contribution
- Appendix A – the Family Axis approach
- Appendix B – identification of miscellaneous discrete reforms that could be pursued in the short to medium term
- Appendix C – a list of key abbreviations used in this submission
- Appendix D – Relationships Australia's submission to the recent Parliamentary inquiry into family violence (the SPLA inquiry)
- Appendix E - Relationships Australia's submission to the review, by KMPG, of the future focus of family law services, 2016
- Appendix F - Relationships Australia's evidence to the Senate Legal and Constitutional Affairs Legislative Committee inquiring into the Family Law Amendment (Parenting Management Hearings) Bill 2017
- Appendix G – restorative practice
- Appendix H – serving Aboriginal and Torres Strait Islander families
- Appendix I – Parenting Co-ordination models

B.3 Context of the ALRC review

B.3.1 Current challenges

Australian Commonwealth, State and Territory governments have overseen a multitude of other inquiries, advisory groups, evaluations, reviews, legislative reforms and pilots in the family law sector. Too often, however, views on proposed reforms are so polarised that actual reform runs aground, or is compromised even to the point of frustrating the intent of reform. This paralysis is exacerbated by perpetual funding shortages for the many components of the sector, whether they be family law services, family relationship services, community legal centres, or the courts, coupled with relatively short-term funding agreements, impeding investment in recruiting and retaining high quality staff and in capital assets. The community demands radical changes to the family law system. While proposed solutions are often the subject of bitter dispute, there is consensus that the system is now not fit for purpose. Concerns of particular note include (in no particular order):

- the growing view that family violence and child welfare are matters of public concern, rather than occurring in a context that was once viewed as entirely private, and that it is appropriate for disputes where these elements are present to be dealt with as matters of public concern
- the failure of the current system to properly protect and promote the well-being and healthy development of children
- the lack of opportunity afforded to children to have their voices heard
- the adversarial approach on which the family law system is premised, which contributes substantially – and innately – to delay, expense, and emotionally damaging processes and outcomes
- poor quality or incomplete evidence brought before the courts, exacerbated by the adversarial nature of proceedings, in which evidence is primarily brought before the courts by parties[1]
- personal cross-examination of and by self-represented litigants[2]
- severe fragmentation of relevant services, leading to limited integration, collaboration and co-ordination, to the detriment of families
- people having to retell their stories multiple times, as they traverse multiple legal systems, multiple bureaucratic entities and multiple service providers, reinforcing trauma, entrenching conflict and taking up time and other resources which might be better used to support families
- silos of information and practice between systems, jurisdictions and practitioners of different disciplines – an issue which has, in its own right, been the subject of extensive research, commentary and policy work over the past decade
- delays in final judicial determination of disputes
- unnecessary complexities in obtaining interim parenting orders
- lack of effective mechanisms by which to enforce orders, and the expense of doing so
- piecemeal legislative amendments contributing to an unnecessarily complex legislative scheme
- a paradigm of gender conflict framing the parameters of reform, too often at the expense of child-focussed reform, and
- high costs to families, services and governments.

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[1] In an adversarial system, the court cannot make its own inquiries, and depends on the evidence brought by the parties. Particularly (although not only) when litigants are self-represented, and where trauma is involved, this is an unreasonable burden. Difficulties in identifying probative evidence mean that matters which proceed to judicial determination are protracted. The quality and timeliness of judicial decisions could be significantly enhanced by better evidence being led in a more timely and coherent manner.

[2] Whether as a matter of tactics or from financial necessity.

B.3.2 Historical context of the family law system

When the *Family Law Act* came into operation on 5 January 1976, its effect on Australia's social and legal landscape was profound. Designed to reflect and respond to evolving social needs and attitudes, the Act gave Australians a nationally consistent legislative framework for separating couples to resolve their disputes privately, outside the public gaze, and – significantly – to 'move on', consistent with the 'clean break' principle. There was really no concept of 'co-parenting'. The Act enshrined 'no-fault' divorce, then a highly contentious innovation,[3] as is evident from reading the Parliamentary debates on the Bill, and press reports of the time. Opponents of the Bill argued vehemently that, far from reflecting community values, the new Bill would poison them, attacking marriage, the family, and the status and dignity of women. A letter to the *Sydney Morning Herald* from the Superintendent of the Central Methodist Mission opined that 'Only a morally sick society would contemplate a bill as morally flabby and irresponsible as the Family Law Bill that is being proposed.'[4] An Auxiliary Bishop to Sydney said that the Bill would lead to 'gross injustices and intolerable indignities, especially to women.'[5] A divorce lawyer said that it would legalise polygamy.[6] Opponents of the Bill feared that, if passed, it would lead to marriage becoming redundant.[7]

Nevertheless, despite public and political division on the matter, the provision of irretrievable breakdown of a marriage, based on a period of separation as the sole ground,[8] was unanimously supported by the Senate Committee considering the Bill.[9] The Committee concluded that the proposed reform would 'bring a degree of honesty and dignity to the administration of Australia's national divorce law', and that 'There should no longer be any encouragement to perjury, exaggeration, false attitudes or the need for discretion statements.'[10] It was hoped, too, that the removal of the requirement to prove fault would prevent, or at least significantly minimise, conflicts over children and property.[11] It was believed that these phenomena arose from the defects of the *Matrimonial Causes Act 1959*. There was a sense of tremendous optimism, which probably explains the eventual successful passage of the Bill into law. A media release by the Attorney-General's Department, issued in late 1975, went so far as to say that the Act would foster 'a new era of calmness and rationality.'[12] Even the *Sydney Morning Herald*, while reporting on criticisms of the Bill and expressing reservations, felt moved to tell its readers:

> …the new Act raises some complex legal questions which may not be sorted out for two years,

which was itself an expression of not inconsiderable optimism.[13]

In his second reading speech in the House of Representatives, on 28 November 1974, then Prime Minister Whitlam noted that introduction of the Family Law Bill had been preceded by

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[3] In 1966, the Archbishop of Canterbury appointed a panel, the findings of which were an early substantive challenge to fault-based divorce: 'Putting Asunder: A Divorce Law for Contemporary Society', SPCK, 1966. This was complemented by recommendations made by the Law Commission in the UK: 'Reform of the Grounds of Divorce: the Field of Choice', Cmnd 3123, cited in Evatt, E, 'The Administration of Family Law', Sir Robert Garran Oration, reported in (1979) XXXIII (1) *Australian Journal of Public Administration* 1, 3.
[4] *Sydney Morning Herald*, 10 February 1975.
[5] Reported in *The Canberra Times*, 3 February 1975.
[6] Reported in the *Sydney Morning Herald*, 24 June 1975.
[7] See, for example, the remarks of the then Liberal Member for Deakin, Mr Alan Jarman MP, House of Representatives, Second Reading Speech, 12 February 1975.
[8] The *Matrimonial Causes Act 1959*, which the *Family Law Act* replaced, set out 14 grounds for dissolution of marriage, generally requiring the establishment of fault on the part of one of the parties to the marriage. The major exception to the need for proof of fault was separation for five years or more. This exception was rarely relied upon: Lawrie Moloney, 'Lionel Murphy and the dignified divorce – Of dreams and data', 25 *Families, policy and the law*, 245, 245.
[9] A majority of four members of the Committee supported the 12 month separation period as proof of irretrievable breakdown of a marriage.
[10] *Report on the Law and Administration of Divorce and Related Matters and the Family Law Bill 1974*, (1974) Parl Pap No 133.
[11] See, for example, Moloney, 24; Evatt, 12.
[12] Cited in The Hon John Fogarty AM, 'Thirty years of Change', (2006) 18(4) *Australian Family Lawyer* 4, 4; Moloney, 25.
[13] *Sydney Morning Herald*, 24 June 1975.

> …a detailed consideration of divorce, custody and family matters by the Senate Standing Committee on Constitutional and Legal Affairs, to which the topic was referred for consideration as long ago as December 1971.

The Prime Minister observed that

> The great weight of evidence and submissions…indicated substantial dissatisfaction with the high costs, delays and indignities of the existing divorce law, and a desire for a no-fault ground of divorce based on a period of separation.

It seems inevitable that the Australian Law Reform Commission will also receive 'a great weight of evidence and submissions' expressing 'substantial dissatisfaction' on these same matters.

Writing on the background of the *Family Law Act*, the then Attorney-General, the Hon Kep Enderby QC MP, remarked on the volume of ministerial correspondence, a flurry of petitions and intense media interest in the Family Law Bill.[14] One of the ways in which media interest was manifested was in the conduct of several public polls[15] on the issue of no fault divorce, and on the length of any waiting period which should apply to the initiation of divorce proceedings. Mr Enderby remarked that both he and his predecessor, Senator the Hon Lionel Murphy QC, had paid attention to these polls because

> …divorce is something that can affect every stratus of society and is a subject on which most persons are capable of having and are likely to have a decided view.[16]

The then Prime Minister also referred to these polls in his Second Reading Speech, saying that

> I should like to emphasise the point that divorce is an area of the law in which the opinion of the community at large is more than usually relevant….the determination of how best to enable broken marriages to be dissolved is ***very much a human, as distinct from a technical, legal problem*****,** and as such is readily understandable to most people. I mention this to underline the importance of the indications in public opinion polls conduct on divorce reform. These show that there is an overwhelming support for the kind of reform contained in the Bill. Indeed, the recently published Morgan Poll was conducted on the basis of the proposal in the Bill that there be a no-fault ground of divorce based on 1 year's separation. The findings showed that 60% of people favoured divorce based on this ground. [emphasis added]

B.3.3 Major reviews

Relationships Australia acknowledges that the family law system, and associated frameworks, have been extensively reviewed over the period in which it has been in existence. Significant reviews include:

- *Family law in Australia*, Report of the Joint Select Committee on the Family Law Act (1980)
- *Domestic Violence* (ALRC 30), (1986)[17]
- *Recognition of Aboriginal Customary Laws* (ALRC 31), (1986)
- *Matrimonial Property* (ALRC 39), (1987)

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[14] Enderby, 'The Family Law Act: Background to the Legislation', (1975) 1 *UNSW Law Journal* 10, 20.
[15] There were six polls, conducted by private pollsters. Each surveyed around 2000 people, and results were broken down by gender and also by reference to religious denominations and political affiliations.
[16] Enderby, 21-23.
[17] This report focused on the ACT. Of particular relevance was the Report's finding that a law enforcement or criminal justice response to perpetrators was not sufficient.

- *The Family Law Act 1975: Aspects of its operation and interpretation,* Report of the Joint Select Committee on Certain Aspects of the Operation of the Family Law Act (1992)
- *Multiculturalism and the Law* (ALRC 57), (1992)[18]
- *Equality before the Law: Justice for Women* (ALRC 67, 69), (1994)[19]
- *For the Sake of the Kids: Complex Contact Cases and the Family Court* (ALRC 73), (1995)
- *Seen and heard: priority for children in the legal process* (ALRC 84) (1997)
- the Family Law Council report, *Litigants in person* (2000)
- the Family Law Council report, *Family Law and Child Protection – Final Report* (2002)
- *Every picture tells a story: Report on the inquiry into child custody arrangements in the event of family separation*, House of Representatives Standing Committee on Family and Community Affairs (2003)
- the Family Law Council Report*, Improving Post-Parenting Order Processes* (2007)
- the Family Law Council report, *Family Violence* (2009)
- *Family Violence – A National Legal Response* (ALRC 114), (2010)
- *Family Violence and Commonwealth Laws – Improving Legal Frameworks* (ALRC 117), (2012)
- the Family Law Council report, *Indigenous and culturally and linguistically diverse clients in the family law system* (2012)
- the Family Law Council report, *Parentage and the Family Law Act 1975* (2013)
- the evaluation of family law services by Allens Consulting Group (2013)
- *Access to Justice Arrangements*, Productivity Commission (2014)
- the evaluation by AIFS of the role and effectiveness of Independent Children's Lawyers (2014)
- the AIFS evaluation of the 2012 family violence amendments (2015)
- the KPMG review of the future nature, location and funding models for family law services (2015)
- the findings of the Victorian Coroner's Court – *Inquest into the Death of Luke Geoffrey Batty* (2015)
- *Not Now Not Ever*, report of the Queensland Special Taskforce on family violence (2015)
- the Royal Commission into the Child Protection Systems in South Australia (2016)
- Report of the Victorian Royal Commission into Family Violence (2016)[20]
- AIFS' study of the experiences of children and young people of family law services (which built on the work undertaken by the National Children's Commissioner in 2014-15)
- Final report of the COAG advisory panel on reducing violence against women and their children (2016)
- the report of the Australian Human Rights Commission, *A National System for Domestic and Family Violence Death Review* (2017),[21] and
- *Elder Abuse – A National Legal Response* (ARLC 131), (2017), and
- the House of Representatives Social Policy and Legal Affairs Committee report on its inquiry into a better family law system to support and protect those affected by family violence (2017) (SPLA report).

[18] Relevantly for this inquiry, this report recommended that, for the purposes of determining a child's best interests, their cultural links should be taken into account by the court.
[19] Relevantly for this inquiry, this report called for changes in Family Court practices to take into account the dynamics of family violence.
[20] While this was a report commissioned by the Victorian Government, it made several recommendations pertinent to the family law system.
[21] See https://www.humanrights.gov.au/our-work/family-and-domestic-violence/publications/national-system-domestic-and-family-violence.

In addition, there has been extensive public advocacy by individuals affected by the system, and by organisations with exposure to the system,[22] as well as calls for radical reform by Parliamentarians.[23]

Family Law Council report on support for families with complex needs

Relationships Australia highlights this review as being of particular significance in laying the foundations for the inquiry on which the ALRC is now engaged. In 2014, the then Attorney-General, Senator the Hon George Brandis QC, asked the Family Law Council to report on how to better support families with complex needs.

The concept of 'complex needs' should be considered here, before referring in more detail to the FLC report. The 2012 Legal Australia-Wide Survey of unmet legal needs referred to 'a co-occurring range of *non-legal* support needs' (emphasis added). Relationships Australia is concerned, however, that the notion of 'complex needs' in family law discourse often assumes that complexity arises from, or is intrinsically linked to, legal complexity and therefore must be dealt with in a legal framework. However, the kinds of co-occurring support needs highlighted in the 2012 survey were the needs informing the Family Law Council's report.[24] They are not legal in origin, manifestation or (necessarily) remedy (such as, for example, mental health issues, homelessness, poverty, and substance misuse). Other issues that are seen as driving complexity, such as family violence or criminality more broadly, may attract a legal/justice system response, but that response tends to be seen by lawyers and judges as being the most central.[25] Relationships Australia considers that funnelling families with these kinds of co-occurring psycho-social needs into the courts, without access to multi-disciplinary teams providing ongoing therapeutic responses, is a failure to properly respond to the family and hinders safe and healthy outcomes in the longer term. Rather, families with co-occurring needs of the kind described in the 2012 survey and considered by the Family Law Council should have access to an array of therapeutic services and decision-making pathways, of which legal services are a co-equal pillar, rather than a central axis.

The Family Law Council provided an interim report June 2015, addressing the prospect of having a streamlined, coherent and integrated approach to improve the overall safety of families and, in particular, children. The final report was provided to the then Attorney-General in June 2016, and focused on enhancements to collaboration and information sharing within the family law system, as well as other support services, including child protection, mental health, family violence, and drug and alcohol services, and services dedicated to servicing Indigenous and migrant communities.[26] The FLC's final report on this reference also, relevantly to this submission, 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.

Action 5.1 of the Third Action Plan of the *National Plan to Reduce Violence Against Women and their Children 2010-2022* calls on Commonwealth, State and Territory agencies to collaborate in implementing various recommendations made by the Family Law Council in its 2015 and 2016 reports. Relationships Australia understands that many recommendations are being progressed through inter-jurisdictional collaboration at Ministerial level, and through Parliamentary processes.

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[22] See, for example, the *Safety First* plan, developed by Women's Legal Services Australia and advocated by Rosie Batty in 2016, and the Braveheart's report on *Abby's Project*, also released in 2016.

[23] See, for example, a cross-bench Senate Notice of Motion moved by then Senator John Madigan on 2 February 2016.

[24] Noting also that 'complex needs' can also be used to refer to single issue, but high risk, families and families exposed to intractable conflict.

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

[26] This built on the 2012 Family Law Council report, *Indigenous and culturally and linguistically diverse clients in the family law system*, and contemporised the 2002 Family Law Council report, *Family Law and Child Protection*.

Relationships Australia notes that measures currently included in this Bill would enable state and territory children's courts to resolve parenting matters, and help families avoid having to appear in multiple courts. For example, a child protection matter may come to an end when the child is placed with a protective person, such as a grandparent. That person may then need to obtain separate family law orders; such as that he or she has sole parental responsibility for the child.

B.3.4 Major tranches of amendments to the Family Law Act

Since the Act was passed, there have been 16 different Commonwealth Governments, most of which have attempted piecemeal, though often significant, adjustments to the family law system. The former Deputy Chief Justice of the Family Court, and Commissioner to this review, the Honourable John Faulks, has counted 116 amending Acts.[27] These have included, for example:

- amendments in 1987 to expand the jurisdiction of the *Family Law Act* to deal with *ex nuptial* children[28]
- the 1991 amendments[29] to include provisions on the handling of child abuse allegations
- the 1995-6 amendments,[30] which effected a significant shift in how the legislation recognised the interests of children in family disputes
- amendments in 2000 intended to improve enforcement of parenting orders and establish binding financial agreements
- the introduction of superannuation splitting in 2001[31]
- the 2006 shared parenting reforms
- the 2008 *de facto* financial matters reforms,[32] and
- the 2012 family violence reforms.[33]

The 1987 amendments of the Act abolished, for the purposes of the family law system, the distinction between children of a marriage (in relation to whom the Commonwealth already had Constitutional power to legislate[34]) and *ex nuptial* children, in relation to whom New South Wales, Victoria, South Australia and Tasmania referred their powers to the Commonwealth. Queensland referred power in 1990. Following Queensland's referral, only Western Australia maintained its own legislative arrangements for *ex nuptial* children, as it had for other family law matters.

The *Family Law Reform Act 1995* was pivotal in giving legislative substance to the notion of paramountcy of children's best interests. It introduced the concept of parental responsibility, shifting language away from any suggestion that parents had 'rights' in relation to children, and emphasised children's rights to know, be cared for, and have contact with both parents.

The 2000 amendments, contained in the *Family Law Amendment Act 2000* split enforcement into three stages:

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[27] Faulks, J, seminar delivered at the Legal Workshop, College of Law, Australian National University, 28 September 2016, p 12, n11. Other key amendments affecting the family law system included legislation such as the *Child Support (Registration and Collection) Act 1988* and the *Child Support (Assessment) Act 1989*.
[28] See the *Family Law Amendment Act 1987*.
[29] See the *Family Law Amendment Act 1991*.
[30] See the *Family Law Reform Act 1995*.
[31] See the *Family Law Legislation Amendment (Superannuation) Act 2001*, which inserted Part VIIIB.
[32] See the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008*.
[33] This list does not include significant innovations initiated by the family law courts themselves, such as the establishment in 2003 of the Magellan List.
[34] See sections 51(xxi) and (xxii) of the Constitution.

- provision of information
- post-separation parenting education, and
- court injunction.

Further, people who breached contact orders could be ordered, by the court, to undergo post-separation parenting education and support services, funded under the Family Relationships Services Program.

The 2000 amendments also removed the previous concept of maintenance agreements and established a legislative framework for binding financial agreements, which could be made before, during, or after, a marriage. If validly made, financial agreements oust the jurisdiction of the court to determine matters to which the agreement applies.[35]

The 2006 reforms[36] introduced mandatory family dispute resolution for disputes about children's arrangements, placed increased emphasis on 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. More broadly, the shared parenting amendments established two primary considerations in determining the best interests of the child – the right of the child to have a meaningful relationship with both parents, and the protection of the child from harm. The Act established a new presumption of equal shared parental responsibility. While the amendments simply required a court to consider whether a child should spend equal (or, failing that, substantial and significant time) with both parents, where practical and not contrary to the child's best interests, this has often popularly been equated with 'equal time'.[37] The presumption does not apply where there are reasonable grounds to believe that a parent of a child (or a person who lives with a parent of a child) has engaged in abuse of the child or in family violence. The presumption of equal shared parental responsibility was an unequivocal departure from the 'clean break' principle which had underpinned the 1975 Act.

These reforms were complemented by almost $400 million in funding,[38] and were aimed at implementing a range of recommendations presented in the *Every Picture Tells A Story* report of the House of Representatives Standing Committee on Family and Community Affairs.[39] Family Relationship Centres, and the Family Law Pathway Networks, were also established on the basis of this report, and supported the newly-required participation in FDR before filing in the family courts.[40] The underlying aim was to promote a culture of cooperation rather than litigation. Subsequent evaluations of FRCs and FLPNs have found that Australian families have benefited significantly from these facilities, which diverted many people away from the courts. This diversion has, however, made more visible in the system those families riven by seemingly intractable conflicts and afflicted by serious and debilitating co-occurring needs.[41]

The 2012 reforms[42] built on the 2006 amendments by requiring family courts to give greater weight to protection from harm in determining a child's best interests, and enacted expanded definitions of family violence and abuse. The reformed definitions were informed by a maturing understanding of the various forms of family violence and abuse, and of broader social, economic and institutional dynamics which can enable and perpetuate it. The amendments also reflected a growing realisation of the harm children suffer from indirect, as well as direct, exposure to family violence. These reforms strengthened

[35] Like all ouster provisions, these have been construed narrowly in successive judgments, and attempts to amend them in such a way as to support their validity and give parties confidence in using them (and lawyers' confidence in drafting them) have, thus far, been unsuccessful.
[36] See the *Family Law (Shared Parental Responsibility) Amendment Act 2006*.
[37] See Professor Chisolm's 2015 paper, 'Re-writing Part VII: A Modest Proposal', 25.
[38] Estimated at $397 million over four years; more precise figures are not available.
[39] Tabled on 29 December 2003.
[40] Subject to exceptions around violence and abuse.
[41] See the 2015 and 2016 reports by the Family Law Council.
[42] Contained in the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011*.

advisers' obligations by requiring family consultants, family counsellors, FDR practitioners and legal practitioners to prioritise the safety of children, and sought to facilitate state and territory child protection authorities to participate in family law proceedings where appropriate.

What had been incremental progress in raising awareness and understanding of family violence, and of the real public interest in having the family law system operate in conjunction with state and territory systems of child protection, was abruptly accelerated by the appalling death of Luke Batty in early 2014. There was broader acceptance both of the proposition that safety – particularly children's safety - should be a central concern of the family law system, and the view that the family law system is not equipped to prevent, address and respond to the needs of those involved in high conflict separations.

Further, the preceding 40 years have seen vast social change, including to the formation and composition of Australian families, approaches to dispute resolution, and expectations both about the role of parents post-separation and of governments in assisting families experiencing conflict amidst a background of complex psycho-social needs. These needs, many of which are hardly 'legal problems' in origin or manifestation,[43] include (as noted above) family violence, child sexual abuse, mental illness, substance abuse, intergenerational conflict, cultural disengagement, poverty, homelessness, and intergenerational welfare dependency. Typically, such families present to the courts and allied services with constellations of these co-morbidities. Increasingly, too, members of families so affected are self-represented in what can become the most intractable and contested of family law disputes. This intractability has its origins not necessarily in the legal concepts involved, but in the families' economic and psycho-social needs, and the inadequacy of the system's responses to those needs, which are, in their essence, legal and adversarial, rather than therapeutic and restorative.

B.3.5 Service delivery issues and initiatives

Family law services play an integral role in the system, providing both alternative dispute resolution and a range of social 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. In 2016, KPMG delivered a report to the Attorney-General's Department on future service needs, future locations and funding models for services. AGD consulted with service providers on the report in 2016; Relationships Australia provided a submission to AGD, a copy of which is attached to this submission.[44] In late 2017, the then Attorney-General, Senator the Hon George Brandis QC, approved rolling over various Family Relationships Services Programme funding commitments to 2022, to allow time for consideration by Government of the recommendations which will emerge from the ALRC's review, and implementation of those recommendations as the Government determines.

Key issues with service delivery at present include:

- **fragmentation** between services and other parts of the systems affecting families[45]
- **case complexity** – it is broadly accepted that all family law services are providing services to families with increasingly complex psycho-social co-occurring needs (see, for example, the reports by the Family Law Council in 2015 and 2016). Many families present with multiple risk factors which place severe strain on service providers' capacity to provide safe and effective services, and

[43] While some of them do, of course, merit a law enforcement response or remedy.

[44] At Appendix E.

[45] See responses to Questions 31-33.

- **delays in accessing children's contact services and service delivery standards in unregulated children's contact services**[46] - CCSs are intended to provide a safe, child-focused and neutral place for changeover or independently supervised visits for potentially at-risk children. 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. This has led to lengthening waiting lists and the growth of unregulated private operators, potentially leaving children and families at risk. Relationships Australia considers that CCSs could provide greater value by assisting families to build capacity, rather than acting narrowly as monitors or supervisors of contact. For example, CCSs could – with adequate funding – be re-positioned to offer more interactive opportunities for parents to learn and enhance parenting skills, as well as offering warm referral of children and their parents to other supports. 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 (see the case study below)[47]. 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.[48]

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.

Recent and current initiatives include:

- specialist domestic violence units and health justice partnerships, established with funding from the Women's Safety Programme
- Family Advocacy Support Services, established under the Third Action Plan of the *National Plan to Reduce Violence Against Women and their Children 2010-2022*
- the Legally Assisted and Culturally Appropriate Dispute Resolution pilot, established under the Third Action Plan of the *National Plan to Reduce Violence Against Women and their Children 2010-2022*
- the post-parenting order pilots, which ended in September 2017

[46] Which have attracted adverse media attention; see, for example, *A Current Affair*, 30 January 2017.

[47] In its submission to the SPLA Inquiry, Relationships Australia expressed concern that 'decisions made in the Family Court that allow unsupervised visits and handovers of children are a court mandated gateway for ongoing abuse of children and mothers: see Appendix D.

[48] For more information, see https://www.acecqa.gov.au/nqf/about.

- collaboration between National Legal Aid and AGD on a national community legal education resource to help people affected by family violence to navigate the different jurisdictional systems, and
- ongoing development of the National Domestic Violence Order Scheme.

A number of these will have been completed, and their efficacy evaluated, by the time of completion of this reference. This should equip the Government of the day with an array of high calibre evidence and analysis with which to inform the necessary transformational reforms.

B.3.6 Looking to the future – the next forty years

This review by the ALRC presents not only an opportunity to make transformational changes to the system to meet existing and immediately foreseeable needs, but also an opportunity (and perhaps a moral imperative) to seek to forecast the needs and expectations of the Australian community, and thus to recommend reforms which incorporate future-proofing. AGD has, in the past five years, commissioned some future-looking work (the Allens report and the KPMG report); however, these have not provided a publicly-available and robust evidence basis for forecasting need and informing sound policy development.

In turning its mind to this aspect of the review, the ALRC might consider other publicly available data on future trends, such as the *Intergenerational Report* (2015) by The Treasury.[49] Some key forecasts made in that Report were that:

- Australians will live longer and continue to have one of the longest life expectancies in the world, with implications for longer and more varied workforce participation by individuals, more intimate partnerships across the lifespan, the provision and regulation of savings and investment products to fund longer lifespans, and more blended families, as well as greater scope for intergenerational conflict[50]
- the effect of technological advances, including in advanced robotics, emerging 5G capabilities,[51] ongoing rollout of the NBN (which aspires to give all Australians access to broadband by 2020), evolving use of social media, and new means of family formation – these will affect the nature of families as well as expectations and capabilities of service delivery (perhaps particularly 'bespoke' service delivery), and changing nature of employment and workforce composition (which, in turn, will affect family life).

B.3.7 Funding sources

Investment in arrangements to support families before, during and after separation should reflect, and be proportionate to, the fundamental importance of safe and healthy families to the overall well-being and success of the nation. Reductions in family conflict have powerful positive impacts through savings to the health system and the criminal and civil justice systems, increased workforce participation, and better employment, health, education and welfare-dependence outcomes. Unsurprisingly, therefore, calls for additional funding for this sector transcend social, institutional, professional and ideological divisions.

Relationships Australia acknowledges the initiatives of the Turnbull and Abbott Governments in funding a range of services and pilots, focussing mainly on responding to family violence and prioritising multi-disciplinary services which can address the various co-

[49] The next such report is not required until 2020.

[50] Treasury projects that 2054-55, there will be around 40,000 people in Australia aged over 100 – over 300 times the number of centenarians as in 1974-75, when the existing family law system was established.

[51] For more information about the forecast impacts of 5G in Australia, see the working paper, *Impacts of 5G on productivity and economic growth*, Bureau of Communications and Arts Research: www.communications.gov.au/publications/impacts-5g-productivity-and-economic-growth

occurring needs of families affected by violence. Relationships Australia further acknowledges that the Australian Labor Party committed to spend $70 million over three years on family violence services,[52] and that the Australian Greens have also committed to funding initiatives for family violence services.[53]

Over the forty years in which the current system has been in operation, community expectations of its various components have transformed in kind *and* degree. For example, contemporary Australia expects governments to intervene in family life if vulnerable people are in danger and to fund a range of therapeutic services and dispute resolution/decision-making pathways. Meanwhile, the volume of demand continues to surge. Government and non-government agencies struggle to implement policy initiatives and deliver services from various dwindling and disjointed funding envelopes that exist in functional isolation from each other.[54]

Relationships Australia supports a greater quantum of investment in systems which support families and, throughout this submission, will make suggestions as to how enhanced investment could be directed. However, there is a broader point to be made. There will never be sufficient money to solve all problems, or to offer bespoke services to every family in need. Choices must be made on the basis of relative priority. This is not a criticism; it is a pragmatic statement of fiscal and political reality. Reasonable people, acting in good faith, can and will hold differing views on how this should occur, and Relationships Australia does not suggest that any one view has the monopoly on merit.

What Relationships Australia does argue is that, in conceptualising a new system to achieve the objectives outlined in the response to Question 1, a holistic and integrated approach should be taken to funding arrangements, as suggested in our comments below on integration and collaboration. Rather than service providers having to navigate a multiplicity of funding sources to deliver on the integrated wraparound services expected by the community and by governments, consideration should be given to scrutinising the full existing array of funding sources (at least from government sources) and taking a national strategic investment approach crossing portfolio and jurisdictional boundaries. This might involve aggregating funding arrangements which currently exist for disparate purposes such as, for example:

- family law services and family relationships services currently administered by AGD and DSS
- Commonwealth and State/Territory legal assistance for legal aid commissions, community legal services, Aboriginal and Torres Strait Islander legal services, and Family Violence Prevention Legal Services
- court funding for Commonwealth, State and Territory courts, and
- various Commonwealth, State/Territory and local health, child protection, justice and other social 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.[55]

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[52] For more detailed information, see https://www.alp.org.au/familyviolence.

[53] See https://greens.org.au/domestic-violence.

[54] So that, for example, an individual service provider, to meet the holistic needs of one family, might be obliged to assemble a service delivery response drawing on bits of funding from multiple funding sources, meeting multiple sets of grant criteria and complying with multiple sets of governance arrangements, all of which has an opportunity cost in terms of time and resources.

[55] See also response to Question 15.

B.3.8 A note on language

Relationships Australia will, in this submission, argue for transformational reform to move away from traditional adversarial concepts. Wherever possible, the submission will refer to 'participants' rather than 'parties' or 'litigants', and to 'decision-making', rather than dispute resolution (which is also intended to emphasise the agency to be expected of adult participants and acknowledge the recurrent (not one-off) nature of many family conflict, which necessitates building families' capacities to self-manage).

B.4 Responses to specific questions

Objectives and principles

Question 1 What should be the role and objectives of the modern family law system?

Once the ALRC delivers its report to Government, that Government will have a once in a generation opportunity to transform how contemporary Australian families are equipped, while intact, during and after separation, to be safe and nurturing. This transformation should focus on safety and non-adversarial processes, and promote collaboration, coordination and integration between different governments, institutions, agencies and service providers.

The primary question is: If starting from scratch, would the needs of those currently caught up in the existing family law system lead rationally to setting up a system within a legal framework, centring on an adversarial dispute resolution approach, or within a different kind of framework?

Relationships Australia considers that these arrangements should be fundamentally re-conceptualised as a network of services for whole families, throughout the life span – albeit with ancillary legal services and complemented by access to courts to set and enforce norms. The majority of families do manage to resolve their difficulties by themselves, raising the question: should we construct a system that is predicated on meeting the needs of the few? Whom is it intended to serve? The answer from Relationships Australia is: all. Any system designed to meet the acute and complex needs of those few who currently seek final judicial disposition is, after all, the system which forms the basis for negotiation and agreement among the many. This is an important consideration.

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

- minimise conflict and adversarialism
- increase – in a practical sense – the focus on the best interests of children, 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 significant reason underlying the repeated failures is that we have been trying to bolt mechanisms to achieve these outcomes onto an innately adversarial system, centred on adjudication of legal disputes as the governing paradigm. Many of the challenges noted in section B.3.1 stem from trying to meet needs which are economic or psycho-social or clinical using the tools of an adversarial legal process. Since the 1970s, the innate limitations of the adversarial system, and the benefits of multi-disciplinary therapeutic interventions, have been openly acknowledged, and more than 40 years, governments have

tried, unsuccessfully, to modify the very nature of the adversarial process to try and make it work. It has not worked, and families are suffering. It is not radical to say so. What is radical is our transparent rejection of a system based on an adversarial principles and methods which four decades of well-intentioned adaptation has failed to render fit for purpose.

This review offers an opportunity to genuinely engage with the following question – should the arrangements which Australia makes to support families in dispute be adversarial at their base, or should they be something else entirely?

It is the position of Relationships Australia that the objectives described below could be achieved, and the principles be expressed, through what we are calling a Family Axis approach. This is comprised of the twin pillars of:

1. multi-disciplinary and integrated wraparound services, delivered through a combination of physical and virtual Hubs, and
2. non-adversarial decision-making mechanisms.

The Family Axis approach would be supported by:

1. new legislation
2. a nationally-integrated funding model, transcending existing funding silos.[56]

This approach is described in greater detail at Appendix A.

Proposed objectives of a modern system

A modern system for Australian families should support:

- healthy whole of family relationships (including intergenerational and adult sibling relationships) throughout the life span
- families to stay together or separate in a way that accords primacy to the safety, development, and other needs of children, including through the establishment of safe and healthy co-parenting relationships, with functional communication and conflict prevention/resolution skills
- financial and economic recovery and stability of separating adults (including ongoing social and economic participation as well as an appropriate division of resources and debt)
- an appropriately trained and equipped professional workforce.

As a pillar of the Family Axis approach, we need decision-making mechanisms which aim to resolve family disputes by the most informal, timely, proportionate and inexpensive means possible. Effort and resources should be invested in services with therapeutic intent and effect, which promote (where safe to do so) co-operation between parents, and with supporting services, to implement arrangements which support family well-being. Interventions should focus on parent/child relationships, rather than parent/parent relationships.

The majority of families can, and do, sort out parenting arrangements for themselves – nearly 70% sort them out 'via discussions'.[57] Approximately 6% resolve

[56] Other than the Family Court of Western Australia. More detail s is set out at Appendix A. Note that the concept of 'hubs' for service delivery, in this submission, is a flexible one, which recognises that hubs can take a range of forms, to meet the needs, circumstances and exigencies of the communities which they serve. They may be 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 governing principles of the 'hub', for the purposes of this submission, are (1) one door only/no wrong door; (2) supported case management and service navigation; (3) integration and collaboration between services dealing with the family in a way that is seamless for, and invisible to, the family.

[57] See Table 4.8, Experiences of Separated Parents Study (2012 and 2014), AIFS.

matters through lawyers, and 3% through the family law courts. Of these, nearly 40% have complex psycho-social support needs[58] which, if they had received an preventative or primary response, may not have led to a need for judicial resolution. To more safely, efficiently and effectively resolve these issues requires early competent screening for, and assessment of, risk *and* needs,[59] and affording access to the services which will build families' capacities to minimise risk and meet those needs.[60] However, the well-known backlogs in the courts mean that matters can span years (sometimes, all of a child's lifespan to date), with 'interim' orders – which are often made without the benefit of adequate information about risk and needs, taking on increased importance. It is noteworthy, in this context, that for every interim decision in a parenting matter, a judge must turn his or her mind to 42 decision points. This is a huge impost on judge-time, and has serious flow-on effects for the preparation of materials by lawyers and their clients.[61]

The Federal Circuit Court currently deals with 87% of first instance family law matters. For final order applications, the backlog of cases is equivalent to the number of new filings (in 2015-16, there were 17,523 final order applications, 16,379 finalised final order applications, and 17,239 pending final order applications). For interim order applications, the backlog is over one-third of new filings (in 2015-16, there were 21,521 interim order applications, 20,367 finalised interim order applications and 7,822 pending interim order applications). For the 2016-17 reporting year, the Federal Circuit Court reported a slight increase in workload, including 17,791 final orders and 22,050 interim orders.[62] In his Foreword to the 2016-17 Annual Report, then Chief Judge of the Federal Circuit Court, John Pascoe AC CVO, remarked that

> The Court, once again, dealt with a very high volume of matters across its wide jurisdiction in both family law and general federal law. A total of 95,181 applications were filed. The majority of matters were filed in the family law jurisdiction (90 per cent of the total filings), followed by Migration (5.2 per cent), Bankruptcy (3.4 per cent) and Industrial Law (1.2 per cent).

A principal architect of the 1975 Act, the then Attorney-General Senator the Hon Lionel Murphy QC, echoed the United Kingdom Law Commission in stating that

> …a good divorce law… should buttress, rather than undermine, the stability of marriage and, when a marriage has irretrievably broken down, it should enable the empty legal shell to be destroyed *without maximum bitterness, distress and humiliation*.[63] [emphasis added]

A Member of Parliament who would later become Attorney-General, the Hon Phillip Ruddock MP, also spoke in the House of Representatives on the 1975 Act. He said that he was

> …not convinced that this Bill will remove all that heartbreak…[or] that there is any method that can be achieved to remove by legal action the sort of heartbreak that emerges when a marriage… is being put aside. I do not believe that the law or the legal profession can be blamed for that.[64]

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[58] Cf AIFS, *Complex Issues and Family Law Pathways: Synthesis Report, Evaluation of the 2012 Family Violence Amendments*, Table 2.2, p 16.

[59] Some Relationships Australia services use DOORS: see submission to SPLA inquiry, section 3, 'Information on the extent to which DOORS has been successfully used across the RA network.' (Appendix D).

[60] An example of the kind of approach which would be invaluable in building the capacity of families to resolve their own disputes is provided by restorative practice: see Appendix G for more information on restorative practice.

[61] See 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.

[62] See Table 1.1 of the Annual Report, Filings and finalisations in family law and general federal law.

[63] Commonwealth, Parliamentary Debates, Senate, 13 December 1973, 2827, 2828.

[64] House of Representatives, Family Law Bill 1974, Second Reading Speech, 28 February 1975.

Relationships Australia agrees that no system can be devised to ameliorate the pain, the disappointment, the loss and the anger that are human reactions to the irretrievable fracture of a relationship entered into, at its best, with mutual love, joy and hope. We can, however, as a society strive towards a system that does not, through its inherent characteristics, entrench or institutionalise grief and conflict, guilt and blame. It is surely within our capacities as a nation to provide families with services and tools to be safe from violence, to effectively co-parent where possible, to preserve family relationships, and to re-build lives. Family services are best placed to offer this, in a system of which multi-disciplinary service provision is a pillar, alongside decision-making mechanisms providing safe, timely and differentiated pathways and services to meet the diverse needs of contemporary families. Where law must be reverted to, it should be through a system devoid of innate conflict, such as the adversarial court system, and without an expectation of linear escalation to court as the ultimate destination. A radical new approach is needed urgently. Relationships Australia suggests an alternative approach at Appendix A to this submission.

Question 2 What principles should guide any redevelopment of the family law system

Relationships Australia supports the idea of overarching principles to guide reforms. Of the principles outlined in the Issues Paper, Relationships Australia supports:

- giving the widest possible protection and assistance to family relationships
- affording safety to those affected by family conflict and violence
- assisting families to resolve conflict safely and in a way that preserves meaningful relationships, and
- the principles outlined at paragraphs 43 and 44 of the Issues Paper.

In addition, Relationships Australia considers that a contemporary system designed to support family relationships, and support families when those relationships are breaking down, should be designed according to the following principles:

- design from and around the needs of families, not around existing legal, jurisprudential, administrative, funding or single-disciplinary structures, distinctions and hierarchies; Relationships Australia respectfully suggests that the ALRC refer to expertise in industrial design and 'user-based' design for advice on how this might be approached
- that services (including decision-making mechanisms) be therapeutic in their aim and effect, and accommodate and respond to the enduring nature of many family conflicts
- as a corollary of the preceding point, that families are supported before, during, and after separation, as necessary
- that there be an emphasis on 'front-loading' costs through prevention, early intervention, capacity-building within families, and follow up
- that families, when separating, be offered pathways and services which are proportionate to their needs and resources (ie not a 'one size fits all' journey with court as the ultimate and most highly valued destination and vindication)
- that there be no wrong door and one door only and, as an enabler of this principle, that service integration and collaboration happen at the organisational level, and do not require active involvement of, or self-navigation by, the family
- that services be available on the basis of universal service and accessibility,[65] and
- above all, that the well-being of children remains paramount (and, as a corollary, will prevail over the rights and interests of adults).

[65] 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.

Access and engagement

Question 3 In what ways could access to information about family law and family law related services, including family law services, be improved?

Fragmentation within the current family law system, and between that system and other related systems,[66] is a significant hurdle in accessing information. For users who approach this environment in great distress, perhaps without access to technology or technological assistance, or with any other needs which might impede access, it can be an impassable barrier. While much is said about the costs of the system, what is too often overlooked is that making information available across multiple platforms, in a comprehensible way, would go some material way to achieving access to justice.

The key principle here must be client-centred design, as noted in our response to Question 2. Flowing from this, information must be:

- accessible to users across Australia
- accessible safely and privately[67]
- available at all hours
- up to date
- comprehensibly expressed, and mindful of particular considerations of likely constituencies of users (eg compliant with applicable disability access standards)
- integrated – ie with references to other relevant services which are easy to use.

Technology can be a great help – well-designed websites, apps and salient engagement with social media should be a given. However, Relationships Australia is also mindful that, for many Australians, the digital divide is a reality. It is important to note, also, that this 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 discreet internet access (and not only because they live in regional, rural or remote areas). Accordingly, service providers and governments must continue to offer information and services across a range of platforms.

In this connection, Relationships Australia also notes the recent investments by the Commonwealth Government in publishing resources such as the Model Parenting Orders Handbook and the Family Violence Benchbook.

In terms of existing structures that support access and engagement, Relationships Australia acknowledges the proven value[68] of Family Law Pathways Networks. These Networks play integral roles in developing and providing information about family law and family law services through websites, service directories, and printed resources. These resources support professionals in all parts of the system to help their clients navigate through the various elements of that system.

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[66] See the response to Question 31 for a more detailed description of the nature and effect of fragmentation.

[67] For an example of an app designed with user safety at the forefront, see Penda, a financial empowerment app from Women's Legal Service Queensland: https://www.wlsq.org.au/resources/legal-toolkit/penda-app/

[68] See independent evaluations commissioned by AGD.

Case study – offering choice and integrated service delivery

Relationships Australia Queensland has operated the Family Relationship Advice Line and the Telephone Dispute Resolution Service since 2006. These services are available nationally and internationally across extended hours, by telephone and online platforms. Clients can access case-managed support and information from qualified social scientists, legal practitioners and FDRPs. Consistently high demand for these services demonstrates the desire of clients to access services through modalities that are flexible and readily available. In 2017, the FRAL responded to over 63,000 calls for support and assistance. These services are in demand from clients within metropolitan areas as well as clients located in rural and remote areas, or where people are separated by distance. Our experience in operating these programs is that accessibility can be improved through technology options that enable users to choose how they access services.

Relationships Australia New South Wales delivers the 'Kids in Focus' parenting program. This program can be delivered both face to face in group sessions, and online, to enable parents to undertake it at a time and location which works best for them.

Relationships Australia supports an integrated approach to use of various platforms, enabling clients to pick the form (or combination of forms) of engagement that best suits them at various points in time. For example, Party A in a joint FDR process can engage online while Party B can engage using offline means, or a client who has been seeing a counsellor in one location, but who is re-locating, can continue with that counsellor using online services.

See also the response to Question 31.

Question 4 How might people with family law related needs be assisted to navigate the family law system?

The responses to Questions 31-33 describe the fragmentation of the current system. However, there will, inevitably, be complexities in any system built to achieve the objectives outlined in the response to Question 1. In addition, 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 the needs are complex and non-linear, so will be a system which responds to them.

Accordingly, there will always be a need for help in navigating the current, or any new, system. As the Issues Paper notes, there are some navigation services available to people affected by cancer, and these could usefully be replicated in this context. 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).[69] Another example of case management/navigation is provided by the FRAL.

The Family Axis approach described at Appendix A suggests an approach to navigation which could operate at several points along a continuum of intensity, depending on need and capacity. It might include:

- sophisticated 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.

Elements of these can be seen in existing services within Relationships Australia,[70] and in services operating in other environments, such as the Collingwood Neighbourhood Justice Centre and the Access Gateway in Logan, Queensland.

While integration may take variable forms, according to the exigencies of the community it serves, the key is that distraught families should not bear the onus of navigating a complex and multi-layered array of services and sources of information. Whether integration takes physical form in co-location, or occurs as part of virtual or other networking structures and approaches, this needs to be seamless and invisible to the end user.

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[69] 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.

[70] For example, the Family Safety Model run by Relationships Australia Victoria, and described in Relationships Australia's submission to the SPLA Inquiry, set out in Appendix D of this submission.

Case study 1 – service integration and collaboration

This case study illustrates how services providers can collaborate effectively to meet multiple complex needs in a family.

Betty is a widow in her early eighties who normally lives alone. She is in quite good health generally, but recently had a knee replacement and needs the other knee done, due to arthritis. Her son John is in his early fifties and came to stay with her to give her a hand after her operation, but also because he and his wife separated six months ago and he had nowhere to live. They have two children who are 19 and 20 who are studying and working part time while still living in the family home.

At first, Betty was very pleased to have John stay with her. He did the shopping, cleaning, cooking and the lawns. John used Betty's ATM card for the shopping and paid some of her bills at the post office. Betty has always managed her finances but recently seemed to be having trouble making ends meet. Bills had been turning up as overdue accounts. When Betty confronted John about money, he became defensive and angry and said that as he had been doing so much for her that he didn't think she would mind if he borrowed a bit of money. He told her that the kids were always asking him for money for this and that, and that he would pay it back.

Betty accepted this initially, but it happened over and over again and John became increasingly rude, impatient and dismissive of her. Betty also noticed that John was drinking a lot. Betty confided in her daughter Jenny who lives in the country. Jenny rang an advocacy service specialising in the needs of older people, who advised her to contact Relationships Australia. Betty and her daughter attended an intake and assessment session. As Betty was reluctant for Relationships Australia to contact her son John, the practitioner suggested that Betty's daughter Jenny talk to her brother and suggest that he contact Relationships Australia about his property separation and sort out his finances.

John took up the suggestion and contacted Relationships Australia for property mediation. During the screening process, he identified that he had financial worries, was concerned about his gambling and drinking and was struggling with depression. This information enabled the practitioner to make a referral to a Gambling Help Service Counsellor. When John attended counselling, he disclosed that he gambled away his redundancy money which he had received ten months ago and that he had also drawn on the mortgage. This was what finally led to his marriage breakdown. John said that he had felt suicidal and had been using alcohol to self-medicate. He admitted to misusing his mother's money to gamble in the hope that he could win back money to fix the financial mess he was in. John stated that he was ashamed of treating his mother this way because she had always protected him from his violent father when he was growing up. The GHS counsellor noticed that his mother had contacted the advocacy service recently. She asked John if he would like to invite his mum to counselling to talk about

how gambling has affected him and others, including his mum. John agreed to the counsellor contacting his mother. When the counsellor contacted John's mother, Betty mentioned that she had recently contacted someone at Relationships Australia. The counsellor suggested that she may wish to work with her, John and the practitioner whom Betty had seen. Betty agreed and counselling was set up with John, Betty, the GHS counsellor and the Elder Relationships practitioner. John and Betty agreed that John wouldn't handle her money anymore and that he would pay back the money that he borrowed by doing chores until Betty is back on track. A financial counsellor linked to the GHS helped Betty to set up electronic banking and bill paying so that she can continue to manage her own finances. John proceeded with property mediation and continues to work to address his alcohol use, gambling and depression with the counsellor. John is learning to manage his frustration and grief through counselling and his interactions with Betty are no longer angry and abusive. John and Betty agreed that when John has completed his property mediation he would move out of Betty's house.	

Questions 5-10 How can the accessibility of the family law system be improved

In its current form, the Family Law Act is lengthy and cumbersome; a contributing factor has been a series of amendments ‘retrofitting’ provisions which make prescriptive arrangements to address specific circumstances or to meet the needs of a specific cohort of users.

Question 5 How can the accessibility of the family law system be improved for 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.[71] 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, most recently, the report of the Royal Commission into the Protection and Detention of Children in the Northern Territory, offer valuable insights into working in a culturally appropriate manner.

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 impact behaviour, and reactions to address this normalisation before even beginning to discuss how ongoing conflict can affect children.[72]

Another important consideration is that of access to family services professionals from Aboriginal and Torres Strait Islander communities, and its necessary enabler of education and training. It is important to expand professional education opportunities for Aboriginal and Torres Strait Islander people. There have been some programs which offer this, such as the Diploma of Counselling for Aboriginal and Torres Strait Islander Peoples. Regrettably, current resources constraints do not allow us 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 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 systems requires greater consideration be given to the role of Aboriginal grandparents in making decisions for children.

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[71] 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.

[72] 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.

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. It is essential that investment be provided to develop, support and train a Torres Strait Islander workforce. The costs of delivering services here 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.

[For further consideration, please see **Appendix H** for a discussion paper, prepared by Relationships Australia National Office, on 'Enhancing the responsiveness of the Families and Children Activity for Indigenous families and children'.]

Question 6 How can the accessibility of the family law system be improved for people from culturally and linguistically diverse communities?

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.

A challenge we see is where one participant is interstate, as many CALD clients prefer to speak with an FDRP in person, rather than access the Telephone Dispute Resolution Service.[73]

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.[74]

[73] Noting, nevertheless, that the FRAL has capacity to undertake calls using interpreters and that the Telephone Dispute Resolution Service has capacity to assist with international family disputes.

[74] For more information on CALD-sensitive practice in South Australia, please see the separate submission from Relationships Australia South Australia.

Question 7 How can the accessibility of the family law system be improved for people with disability?

Relationships Australia is committed to inclusive services which are predicated on the autonomy and dignity of all individuals,[75] and which – accordingly - are strength, not deficit, based. This commitment should inform the development of all systems and services for Australian families.

It is suggested that, while it may not be appropriate to incorporate into legislation the provisions of the Convention on the Rights of Persons with Disabilities (one of the suggestions noted in the Issues Paper), decision-makers' attention should be directed to the relevant domestic law relating to discrimination on the grounds of disability.

One particular difficulty that Relationships Australia would like to highlight in responding to this question is the serious difficulty in finding people willing to be appointed as case guardians. This is a grave obstacle to providing access to justice for persons with disability. Relationships Australia understands that AGD 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.

Finally, Relationships Australia notes that there may be potential to adapt Family Group Conferencing (FGC) to support the participation of people with disability. For more on FGC, see the response to Question 30.

[75] As articulated, for instance, in *Secretary, Department of Health and Community Services v JWB and SMB (Marion's case)* (1992) 175 CLR 218.

Question 8 How can the accessibility of the family law system be improved for lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) people?

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 the Issues Paper, that there are deficiencies in the data about the access to and use of family law services by LGBTIQA+[76] people, 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 mindful of using inclusive language. For example, Relationships Australia Northern Territory has received feedback which criticises literature which assumes that families are composed of 'a mum and a dad'.

[76] Relationships Australia is using the term 'LGBTIQA+' to be as inclusive as possible of all forms of identification.

Question 9 How can the accessibility of the family law system be improved for people living in rural, regional and remote areas of Australia?[77]

Relationships Australia notes with particular concern that many vulnerable communities are severely impoverished. 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.

Assumptions that technology can fully fill gaps in service delivery do not factor in 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 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 have a therapeutic 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.

While the LACA FDR Pilot goes some way towards addressing access for remote clients (travel costs were factored into the tender from Relationships Australia Northern Territory, for instance), it is limited to clients experiencing family violence and, at this stage, is a pilot. Aboriginal workers who visit remote communities have been reporting for many years the frustration about lack of access to services for those in the bush, and that funding only covers the urban centres.

Perhaps the family law system could work with existing bush courts to provide FDR in remote Aboriginal Communities so families can access 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 participation in economic and social participation, including engagement with online media.[78] These barriers are particularly high for Indigenous and CALD populations, but by no means confined to these cohorts.

Finally, and as a general observation, Relationships Australia notes that online services can only ever complement, not substitute, face to face services.

[77] Relationships Australia supports the FLC's recommendations in its 2016 report.

[78] 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.

Question 10 What changes could be made to the family law system, including to the provision of legal services and private reports, to reduce the cost to clients of resolving family disputes?

Cost, complexity and delays are at the heart of 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*. It is notable that the establishment of the Family Court of Australia, recommended by the Senate Committee in its report on the Bill, was a last minute addition to the Family Law Bill that became the *Family Law Act 1975*. The Committee took the view that the creation of a specialist family law court, with an emphasis on reconciling families and 'reducing the area of disharmony and bitterness', would 'put Australia in the forefront of family law reform.'[79] Through no want of effort, commitment or good intent, most stakeholders and actors in the contemporary family law system would agree that these laudable goals have – far from being met – been comprehensively overturned over the ensuing decades.[80]

10.1 Provision of family relationships services

Relationships Australia considers that early intervention by multi-disciplinary services, providing appropriate therapeutic and early decision-making services to the family as a whole, can act as 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. It is worth considering whether the current system diverts clients into dispute resolution at an early enough stage, and whether section 60I certificates are an effective mechanism to encourage the early use of FDR. 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.

This is the main reason why simply providing more funding for the courts is not a sufficient or helpful response to the concerns expressed by the many critics of the family law system. We know far more now than we did in the early 1970s about secure attachment of children, the devastating impact of family conflict on children, and about the importance of engaging with children. We know far more about the causes and effects of family violence. We know far more about the debilitating effect, on all family members, of protracted conflict. In short, in 2018 we have the evidence base absent 40 years ago to demonstrate, beyond question, that prolonged conflict, ending in the courts, can utterly deplete the emotional, physical, social and financial resources of family members, drive them into hopeless cycles of debt, inhibit productive workforce and social participation, and cause intergenerational conflict and welfare dependency. As a corollary, we also now have the evidence base to demonstrate efficacy of early intervention by social science and therapeutic services. 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 as providing ultimate vindication for wronged adults.

Finally, Relationships Australia notes that the majority of families can, and do, sort out parenting and property arrangements for themselves.[81] Only around 3% of separating couples require judicial resolution. Those matters that do go to hearing generally involve

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[79] *Report on the Law and Administration of Divorce and Related Matters and the Family Law Bill 1974*, (1974) Parl Pap No 133, paras 44, 46. The Family Court of Western Australia was established in 1976 as a State court under section 41 of the *Family Law Act*.

[80] For example, there are indications that the high costs of litigation can, in some cases, lead to an outcome favouring the client with the greater capacity to pay, including through tactics such as 'burning off'.

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

psycho-social complexities such as family violence, mental health issues, substance abuse, or a combination of two or more of these.[82]

10.2 Improving court service delivery

That said, Relationships Australia urges that:

- courts in states and territories be properly resourced (including by funding and training) to exercise family law jurisdiction when families come before them with other matters, using inquisitorial, rather than adversarial, processes[83]
- enhanced judicial training be provided across a range of domains, including attachment theory, child-focused practice, trauma-informed practice, cultural fitness, LGBTIQA+ literacy[84]
- courts be resourced to provide 'fast track' services for matters including:
    - matters where there is a safety concern (including to enable courts to make earlier findings in relation to allegations of family violence)
    - matters in which a parent is denied reasonable contact with children
    - property/debt disputes under a particular monetary limit
    - those seeking a parenting order in families where a person with parental responsibility becomes terminally ill, to facilitate the making of appropriate arrangements[85]
- courts be resourced to employ family consultants to write reports earlier in proceedings, and to ensure those family consultants are adequately trained and supervised; alternatively, a community or independent statutory agency (such as a child protection agency) could be engaged to assume this function, to ensure proper expertise and governance
- government 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 could also be given to regulating fee structures for external family consultants
- family consultants, employed by the courts, 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)
- government consider alternative means (other than conventional family reports) by which family courts could obtain reliable and timely information
- courts be resourced to provide improved support for vulnerable witnesses, and
- enhanced welfare supports be provided for judicial officers and court staff.[86]

10.3 Family Law Amendment (Parenting Management Hearings) Bill 2017

Relationships Australia notes that on 6 December 2017, the Government introduced into the Senate a Bill to establish a Parenting Management Hearings Panel, in the form of a pilot program. It is intended that the Panel would be a forum for self-represented litigants, entered into by consent of both parties. The Explanatory Memorandum for the Bill states that the Panel would offer

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

[83] Eg child protection or family violence.

[84] See answers to Questions 41-44.

[85] For more information on this service, please see the separate submission from Relationships Australia South Australia.

[86] See answers to Questions 41-44.

> a more flexible and inquisitorial alternative to the court process for resolving parenting disputes.... aimed at transforming the family law system to support families to resolve their family law disputes as quickly as possible, while adequately managing risks.[87]

During the pilot phase, use of the pilot would be free of charge.

Further to evidence which Relationships Australia provided to the Senate Committee considering this Bill, we support mechanisms which encourage early and rapid intervention and access to multi-disciplinary services,[88] allowing families to spend as little time as possible in 'the system', prolonged exposure to which entrenches the conflict which is so damaging and destructive, especially to children. Relationships Australia supports access to multi-disciplinary services, including early screening and risk assessment and therapeutic interventions,[89] to address family violence, mental health issues, substance abuse issues, gambling dependencies, homelessness and financial crisis. Relationships Australia considers, too, that further work needs to be done to identify and remove barriers to disclosure of factors affecting family safety. Currently, for example, we are aware that many people affected by family violence do not disclose, even when asked.[90] Barriers to disclosure include lack of awareness of the seriousness of violence that they have experienced, a fear of repercussions by the perpetrator and a fear of being judged. Just as concerning is the finding that many people are not asked.[91]

Too often, the assumption is that complexity of a family dispute equates to, or is manifested through, legal complexity, and demands a legal solution as both necessary and sufficient. This is not so. Complexity is not always driven by legal complexity, but by psycho-social factors affecting a family. It follows, therefore, that lawyers and judges are not necessarily the best equipped to respond fully to the needs of families with multiple and intersecting needs.

Should the pilot of Parenting Management Hearings not proceed, Relationships Australia recommends the Government consider piloting a service along the lines of Parenting Co-ordination, which is in use in parts of the United States of America and Canada, as well as in South Africa. Relationships Australia Western Australia is currently running an unfunded pilot of Parenting Co-ordination. Essentially, a family with a court order, or a parenting agreement, can access a parenting co-ordinator for assistance in applying the order or agreement (eg resolving day to day conflicts about application of the order or agreement, or facilitating the variation of an order or agreement that may have become unworkable because of a change in circumstances). Conceptually, it is a specific application of mediation-arbitration. It provides a simpler, faster and less expensive response to families' needs for some assistance in giving effect to orders and agreements, and frees up court resources. Detailed information about Parenting Co-ordination models, the pilot being run by Relationships Australia Western Australia is set out at Appendix I.

10.4 Legal services

There is no doubt the cost of access to legal services is an impediment to resolving family disputes. Many Relationships Australia clients across the country are financially stressed, but have sufficient assets so as not to qualify for legal aid – the 'missing middle'. They

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[87] Explanatory Memorandum, paragraph 1.

[88] Several stakeholders support service models which offer access to multi-disciplinary teams (see, for example, evidence given by Women's Legal Services Australia to the Senate Legal and Constitutional Affairs Legislative Committee hearings on the Family Law Amendment (Parenting Management Hearings) Bill 2017).

[89] For information about how Relationships Australia identifies violence, see our submission to the SPLA Inquiry, at Appendix D.

[90] Cf Kaspiew, Carson, Dunstan, De Maio, Moore et al, 2015. This does not appear, however, to be unique to Australia: see Cleak and Bickerdike, (2016) 9 8 Family Matters 16, 19.

[91] Cf Kaspiew, Carson, Dunstan, De Maio, Moore et al, 2015. This does not appear, however, to be unique to Australia: see Cleak and Bickerdike, (2016) 9 8 Family Matters 16, 19.

struggle to afford basic legal advice, let alone representation in court. Appropriate legal advice can be invaluable to clients who are resolving the issues themselves through FDR; for example, it offers the legal 'reality testing' that FDRPs are not permitted to give (an important aspect to preparing clients for mediation). 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 multi-disciplinary services in a way which was accessible to clients. Unfortunately, this funding has been withdrawn and clients are struggling as a consequence.

Case study – offering collaborative legal and therapeutic services at minimum cost to clients

This case study provides an example of low cost and high quality legal services.

The Legal Advice Service is a component of the FRAL operated by Culshaw Miller Lawyers, who work in collaboration with Relationships Australia Queensland to provide a high quality legal advice service at no cost to clients. A high proportion of clients accessing this service are contemplating, or in the midst of, legal proceedings and the majority are self-represented, or no longer have legal counsel. The role of the Legal Advice Service is to guide clients to a resolution. Approximately 12,000 clients per year are helped through this service.

10.5 Discrete task representation (DTR)

Relationships Australia notes the suggestions made by the Productivity Commission, and noted at paragraph 108 of the Issues Paper.

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 experience with a number of clients who are unable to obtain affordable legal representation for a variety of reasons, and are self-representing. Some of these clients have experienced family violence and 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. Relationships Australia supports clients receiving clear and detailed bills so that they can better see what they are paying for.

Relationships Australia Queensland and Culshaw Miller Lawyers will make a separate joint submission in response to the Issues Paper. That submission will canvass options for expanding the current benefits offered through the collaborative offering of the FRAL and the Legal Advice Service as described in section 10.4.

Question 11 What changes can be made to court procedures to improve their accessibility for litigants who are not legally represented?

Self-represented litigants are increasingly common in the family law courts. The Family Court's Annual Report for 2016-2017 indicated that 23% of finalised cases involved one or more self-representing parties, increasing to 41% for matters which went to trial.[92] Unless legal costs are dramatically curtailed, it is likely that these percentages will continue to increase.[93] Of clients presenting to the FRAL, a high proportion are self-representing. In 2004, the former Chief Justice of the Family Court, the Hon Alastair Nicholson, wrote that increasing numbers of self-represented litigants lead 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 tatters – deteriorates to the extent that they are unable to effectively co-parent their children in the future…[94].

The presence of one or more self-represented party generally requires a greater degree of judicial intervention than would be appropriate where solicitors or counsel are appearing. It could be argued, then, that with an increasing proportion of self-represented litigants, the arguments for retaining an adversarial system – centring around procedural justice - are correspondingly weakened. In an adversarial system, the court cannot make its own inquiries, and depends on the evidence brought by the parties. Particularly (although not only) when litigants are self-represented, and where trauma is involved, this is an unreasonable burden on litigants. Further, in the absence of legal representation for either party, and without an ICL, the onus is increasingly on the judge to ensure that relevant, probative evidence is brought before the court to assist in a decision – a decision which can only ever be as good as the available evidence allows. The quality and timeliness of judicial decisions could be significantly enhanced by better evidence being led in a timelier and more coherent manner.

Compounding the difficulties of that situation is the also ever-increasing probability that the capacity of individuals before the court will be compromised by morbidities including mental health issues or substance abuse. These co-occurring needs create complexities which it is unreasonable, and untenable, to expect judges to effectively manage.

Many of the characteristic features of an adversarial justice system are necessary to afford procedural justice. This imperative cannot be maintained when one or both participants is or are self-represented. The trend towards self-representation is common throughout western family law systems and is clearly a growing phenomenon that is here to stay, absent transformational change in our approach to family disputes. Providing additional resources to courts or legal services does not appear to have the requisite political support, however much we may wish it otherwise. An alternative approach, not requiring legal representation, is needed. Conferral of the necessary powers and functions on courts which can use inquisitorial approaches to provide decision-making services would meet that need.

For these reasons, Relationships Australia considers that a new decision-making approach would be based on an inquisitorial model, with a Counsel Assisting. Piloting such a model

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[92] *Family Court of Australia, Annual Report 2016-17,* 41. The 2016 Annual Review for the Family Court of Western Australia reports that 47.2% of applications for final parenting orders filed in 2016 were made by self-represented litigants.

[93] Relationships Australia acknowledges that people self-represent for reasons other than cost.

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

was suggested by the Family Law Council (although limited to cases where parties were unrepresented).[95] Even where family members were legally represented, the judge would then have far greater control, and access to relevant, probative evidence. Relationships Australia acknowledges the Constitutional barriers impeding implementation of an inquisitorial system at the federal level,[96] and considers these to give additional weight to the argument that state and territory courts should be better positioned – and appropriately resourced – to exercise family law jurisdiction.

[95] As noted in the Issues Paper, paragraph 118.

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

Question 12 What other changes are needed to support people who do not have legal representation to resolve their family law problems?

Relationships Australia supports the suggestions identified at paragraph 117 of the Issues Paper, combined with the suggestions made earlier in this submission, dealing with accessibility of information, and the provision of 'navigation' (as mentioned in the response to Question 4) and case management services, existing along a continuum as described at Appendix A. That continuum might include:

- sophisticated 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.

Question 13 What improvements could be made to the physical design of the family courts to make them more accessible and responsive to the needs of clients, particularly for clients who have security concerns for their children and themselves?

The physical appearance of family courts is often impersonal, alienating and intimidating. To an extent, this is driven by a combination of contemporary security concerns and the traditional characteristics of court rooms, which generally reflect the adversarial character of court proceedings in the common law tradition. While not denying the imperative of the former, there is much that can be done to soften the impact of the latter. Safety and accessibility are of prime importance.

Previously in this submission, Relationships Australia has made suggestions about shifting the paradigm of services supporting separating families away from adversarial litigation and towards a more therapeutic response, and has also made suggestions about the desirability of co-located, multidisciplinary service provision models. To varying degrees, these already exist in many Family Relationship Centres. Were these suggestions to be taken up, then this would provide the opportunity to re-think the physical characteristics and presentation of services. A range of possibilities already exists for consideration.

Centres like the Neighbourhood Justice Centre in Collingwood have a range of features that 'soften' the atmosphere, while not compromising safety of users, the general public, or staff. It is noteworthy that the Collingwood Centre includes court facilities, but these do not physically sit 'at the core' of the Centre. In addition, the kinds of features recommended by the Victorian Royal Commission, and noted at paragraph 120, should be incorporated. Other amenities, such as the presence of free and private access to wifi, inviting cafes, vertical gardens and companion animals,[97] could also be considered. Some of these could readily be trialled in particular locations to evaluate their impact and cost effectiveness.

There should be onsite capacity for screening, risk assessment and safety planning. There should be also capacity to enable people who have experienced family violence, other kinds of abuse, or who have other safety concerns, to give evidence from a separate room by CCTV and, if appropriate, having questions read to them by an officer of the court. Relationships Australia understands that these facilities do exist in several locations.

[97] The Parramatta Family Court has a ground floor to roof atrium. The atrium houses poultry. Other public facilities, including courts in New South Wales, are increasingly availing themselves of the services of companion animals to provide comfort and reassurance to service users.

Legal principles in relation to parenting and property

Question 14 What changes to the provisions in Part VII of the *Family Law Act* could be made to produce the best outcomes for children?

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.[98] Any legislation dealing with parenting matters – whether included in an amended form of the current Act or in a more radically re-imagined Act, should be framed to achieve the objectives, and developed in accordance with the principles, referred to in the response to Questions 1 and 2. In particular, the legislative framework should ensure that decision-making is driven by the children's needs, with clear primacy accorded these relative to adult wishes. In relation to the specific suggestions described at paragraph 133 of the Issues Paper, Relationships Australia takes the following positions:

- including abuse of process as an example in the definition of family violence - **support**
- removing the presumption of equal shared parental responsibility and the language of equal shared time from Part VII – **support** (endorsing the comments made on the history of these, and the experience in applying these, set out in Professor Chisolm's paper)[99]
- amending the best interests of the child checklist – **support the principle** of prioritising the protection of children, but consider that the division of factors into 'primary' and 'additional' has led to confusion, and unnecessarily protracted disputes, as well as inflating legal costs[100]
- simplifying the decision-making framework for interim parenting matters – **support**, noting Judge Riethmuller's paper on this subject[101]
- providing a dedicated pathway for decision-making in cases involving family violence – **support in principle**, but Relationships Australia takes the view that family violence is not the only, or necessarily the most dominant, factor which puts safety at risk, and that it would be preferable to have a dedicated, case-managed pathway for any matters where screening and risk identification suggest the presence of *any* factors which put safety at risk
- 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 – **support in principle**, subject to risk assessment being treated as an ongoing process.

Internationally and domestically, there is a diverse array of models and tools designed to assist families, including high conflict families, to reach and give effect to sustainable agreements on parenting matters. For example, in some USA and Canadian locations the New Ways for Families model has proven of value in equipping high conflict parents with the skills and behaviours to communicate and make decisions together with accountability built in, by having to report to the courts on their progress. Another model, known as New

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[98] Prof Richard Chisholm AM, 'Rewriting Part VII of the Family Law Act: A modest proposal' (2015) 24(1) *Australian Family Lawyer* Volume 1. The proposals described in this paper are also supported by the Law Council of Australia: see its submission on the Family Law Amendment (Parenting Management Hearings) Bill 2017, paragraphs 20, 22.

[99] Chisolm, 2015, see p 20, in particular.

[100] Chisolm, 2015, see pp 10, 26, in particular.

[101] 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.

Ways for Mediation, is being provided at the Alice Springs service of Relationships Australia Northern Territory as part of its Post Separation Co-operative Parenting Program.

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 is often presents as an underlying, unspoken and unaddressed agenda in FDR, which impedes the achievement of an outcome in the child's best interests.

Question 15 What changes could be made to the definition of family violence, or other provisions regarding family violence, in the *Family Law Act* to better support decision making about the safety of children and their families?

The terms of reference require the ALRC to make recommendations concerning the 'protection of the best interests of children and their safety.' Since the ALRC's notable contributions through its 2010 and 2012 reports,[102] awareness of the prevalence, severity and damage done by family violence has led to a far greater willingness to address it as an issue of public concern, not merely a domestic matter. Both Queensland and Victoria held inquiries into family violence, and have been implementing measures recommended by those inquiries.[103]

As a nation, Australia has travelled a long way from the widely-held assumptions about family violence underpinning the original Family Law Act. At its commencement, the Act was – as noted by the ALRC[104] - silent on family violence. The then Attorney-General, Senator the Hon Lionel Murphy QC, noted this expressly in his second reading speech, indicating that he thought that including family violence as a ground for dissolution of marriage would undermine the no fault premise of the Act and that injunctive relief would be adequate as a remedy for those affected by family violence.[105] It was thought, too, that family violence was 'an artefact' of the *Matrimonial Causes Act*,[106] 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.[107]

The Family Court simply was not, as the ALRC has observed, 'conceptually set up as a court that would deal with issues of family violence,'[108] or complex psycho-social issues more broadly. Rather, it was established to resolve what were then seen as purely private disputes between individuals: adults who were the parties to a marriage.

As insight into family violence has grown, however, there has been a series of amendments to the Family Law Act acknowledging the connectivity between presentation before the family law courts and experience of family violence. Increased funding has also been committed to address family violence, and assist those who have experienced it.

Relationships Australia suggests that a further review of the efficacy of the 2012 amendments be undertaken, given that the earlier AIFS evaluation was conducted relatively soon after the commencement of the amendments. Relationships Australia further notes the desirability of any reforms being informed by the evaluation to be undertaken of the current pilots of Legally Assisted and Culturally Appropriate FDR.

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

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[102] *Family Violence – A National Legal Response*, ALRC Report 114, 2010; *Family Violence and Commonwealth Laws – Improving Legal Frameworks* ALRC Report 117, 2012. Relationships Australia also acknowledges the ALRC's earlier 1986 report, *Domestic Violence*, ALRC Report 30, which examined the issue of domestic violence in the ACT. Against a broader background of the social context in which domestic violence manifested, that report looked at law enforcement and judicial responses to complainants, including the limitations on powers which were then available to police and the courts.

[103] Victoria held a Royal Commission into Family Violence, which delivered its report in 2016. The Queensland Government established a Special Taskforce, which delivered its report, *Not Now Not Ever*, in 2015.

[104] ALRC Report 114, para 4.31.

[105] Commonwealth Parliamentary Debates, Senate, 3 April 1974, 640, 641. Noting also that, at time of writing, breach of an injunction issued under the *Family Law Act* remains a civil matter. The Parliament is currently considering a Bill which would amend the Act to criminalise a breach of such an injunction: Family Law Amendment (Family Violence and Other Measures) Bill 2017.

[106] See Moloney, 247-8, citing Behrens, 1993.

[107] Fogarty, 11, 14.

[108] ALRC Report 114, para 4.33.

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, all but ensuring entrenched and during conflict. Ongoing screening[109] and risk assessment may assist both in defusing conflict caused by delayed determination of these issues, as well as facilitating diversion access to therapeutic programs and services. If the current funding envelope were not to be 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.

Relationships Australia has given evidence, in its submission to the SPLA Inquiry (see Appendix D) about the need for family violence court processes to be more child-focused.

For specific proposed amendments, see Appendix B.

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

Question 16 What changes could be made to Part VII of the *Family Law Act* to enable it to apply consistently to all children irrespective of their family structure?

The composition of families, and methods of family formation, have changed considerably since the 1970s, as have community expectations, due to the confluence of a range of social, economic and demographic shifts. Nevertheless, in its 2010 report on family violence, the ALRC noted that 'it is apparent that the notion of the nuclear family – comprising a mother, father and their children - still underlies the Family Law Act.'[110]

Relationships Australia notes the comprehensive commentary on the diversity of family forms, and modes of family formation, in the 2013 Family Law Council Report on *Parentage and the Family Law Act*. We further note that reproduction and child-rearing each have genetic, gestational and social aspects. Each of these aspects needs to be respected and reflected in laws relating to parenting arrangements – and in service provision to support families.

Provisions relating to parenting matters should be structured to 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; in this context, children can suffer from these lags.[111]

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.

[110] *Family Violence – A National Legal Response*, ALRC Report 114, 2010, para 4.43, citing B Fehlberg and J Behrens, *Australian Family Law: The Contemporary Context* (2008), 145.

[111] 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.

Question 17 What changes could be made to the provisions of the *Family Law Act* governing property division to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes?

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 suggests that pre-filing mediation be mandated for property matters (and fees be similarly subsidised), as is currently the case for parenting matters. This is consistent with the recommendations made in the Access to Justice report by the Productivity Commission in 2014. This would be highly desirable for reasons including, most significantly, that:

- the distinction between these two categories is a matter of legal artifice which does not reflect or respond to the experience of separating families, and
- Relationships Australia regularly encounters cases in which an otherwise successful parenting plan is undermined by a subsequent adversarial property dispute.

Mandating FDR for property disputes could significantly reduce the workload currently experienced by courts, and allow many more families to avoid going to court altogether.

Relationships Australia has been providing effective property dispute resolution for more than 30 years, often in collaboration with lawyers. Relationships Australia is in the process of evaluating these services, and will be able to provide a report later in 2018.[112] Through Relationships Australia Victoria, Relationships Australia is providing property conciliation services to cases directed to it by orders of the Federal Circuit Court. This service, too, has been operating in various forms for many years, and has a long history of providing safe and effective outcomes for clients, with settlement rates in excess of 70%. The Chief Judge of the Federal Circuit Court has recently initiated a call over of property cases listed before the Court, requiring cases to go to mediation. Over 60 cases in two months have been diverted to the Relationships Australia property conciliation service, and these are also achieving high settlement rates.[113] These results indicate that many property disputes listed for judicial determination would be suitable for FDR and, arguably, should not be consuming scarce and expensive judicial resources.

Relationships Australia does caution against a simplistic implementation of mandated property FDR. Workforce planning and development is necessary to ensure the availability of practitioners with expertise in assessing risk (including but not limited to risk arising from family violence), child development, and mediation. Clients will also need legal information and advice, whether from private lawyers, legal aid, and augmented community legal centres. Although more expensive, a lawyer-assisted model could be piloted. Alternatively, legal services could be embedded in, or co-located with, FRCs, using the Family Axis approach described in Appendix A to this submission.

Relationships Australia further notes, in this connection, the scope for online decision-making services, as is increasingly the case in the United States of America and the United Kingdom.[114]

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[112] Relationships Australia New South Wales will shortly begin delivering property mediation in FRCs where a property dispute is associated with a parenting matter. This is expected to provide easier and more efficient access to both services, with the same mediators and in the same location.

[113] An evaluation is underway. See also the response to Question 22.

[114] Such as My Family Wizard, being used in the USA and sponsored by the Association of Family and Conciliation Courts. There are some emerging commercial products 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 (and not all of these are regional or remote communities).

Relationships Australia notes the suggestions at paragraph 152 of the Issues Paper, and supports reforms that would simplify the current law and provide greater predictability (and, consequently, greater impetus and certainty when negotiating agreements). In addition, consideration should be given to developing clear guidelines, perhaps in legislative form, around property division. It might also be possible to develop statutory formulae; this could improve the predictability of property outcomes, and thus potentially improve consistency and support public confidence.

Question 20 What changes to court processes could be made to facilitate the timely and cost-effective resolution of family law disputes?

Relationships Australia supports the suggestions identified at paragraph 171. In addition, Relationships Australia supports resources and programs to help families after an agreement is reached or a final judicial determination made. This includes resources and services which help parents to reach sustainable, practical agreements, and to build their capacity to communicate and problem-solve issues that may arise with implementation of agreements and orders. Without such resources and services, high conflict families in particular are destined to end up again in a protracted dispute, with further expense, delays and distress.

As noted in the response to Question 10, Relationships Australia also suggests that court-employed family consultants 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).

Parenting co-ordination services[115] also offer an avenue by which parents can continue to learn about safe and effective co-parenting, communication, and hearing and addressing children's concerns, and by which all family members can be prepared for life after family separation. Parenting co-ordination is subject to judicial supervision. Families in which there is high conflict or enduring conflict (or which meet other relevant criteria) could be required by court order to attend on parenting co-ordination services to help them to resolve their disputes and continue to provide a safe space for children to be heard. In the experience of Relationships Australia Western Australia, it is generally possible to have disputes dealt with by a Parenting Co-ordinator in a fraction of the time that it would take to obtain a court date, which is particularly relevant for those families who would otherwise appear repeatedly before the courts.

If more disputes can be channelled into other resolution pathways – and this submission argues that there is scope for much more to be done in this regard – then this will free up court resources to provide timelier resolution for matters that do require judicial determination. If coupled with more prescriptive property determination processes, this would also improve the cost effectiveness of running those cases which do require judicial determination.

[115] See the response to Question 10 (especially 10.3) and Appendix I for more detail.

Question 21 Should courts provide greater opportunities for parties involved in litigation to be diverted to other dispute resolution processes or services to facilitate earlier resolution of disputes?

Relationships Australia supports courts referring cases to FDR sooner rather than later.

In circumstances where a section 60I certificate has been issued to the effect that FDR is inappropriate, but the court subsequently refers a family back to FDR, then the courts should fund the FDR and additional clinical support.

If FDR is inappropriate, Relationships Australia seeks to offer other services which may assist families, including (but not only) in their engagement with the legal system (see the case studies set out in the boxes below). Further, the existence of family violence does not, *per se*, mean that FDR cannot be helpful. As noted in Relationships Australia's response to questions taken on notice at the SPLA Inquiry, we find that situational violence has a better prognosis for successful outcomes in FDR than other types of violence. Physical violence does not necessary preclude the suitability of FDR, whereas the presence of emotional, psychological and power and control issues will often mean that FDR is unsafe and will be unsuccessful. Also, FDR is not a 'one size fits all' proposition; the services offered can and are tailored to meet specific needs; for example:

- case management
- FGC to engage a wider circle of people to assist with problem-solving[116]
- involvement of a Parenting Co-ordinator before, during or after litigation has commenced, whether by agreement or court order,[117] or
- 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.

Further, there should be a clear process for reporting back to the courts on FDR outcomes, subject to confidentiality considerations.[118] When ordering families to undertaken FDR, courts should make clear that FDRPs are not decision-makers undertaking a judicial function.

The success of the recent 'blitz' by the Federal Circuit Court, 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 professional mediations who are skilled in family violence assessment and are properly accredited (preferably in FDR).[119]

Case study 1 – benefits of service responses where FDR assessed as inappropriate

John approached the FRC to initiate FDR with his former partner, Sandy, about their two children aged 7 and 8 years. He completed universal screening and had an intake and

[116] For more on FGC, see the response to Question 30.

[117] For more on Parenting Co-ordination services, see Appendix I.

[118] 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.

[119] See the response to Question 17.

assessment interview for FDR. John said that Sandy would probably say she was scared of him. He said that he had used alcohol more than he should and had been very low since separation. John was referred to counselling to address these issues.

Sandy was invited to FDR and attended her screening and intake and assessment interview for FDR. Sandy revealed serious concerns around family violence and child protection and said that she was terrified of John and didn't know what to do. Sandy disclosed that although there had been no police involvement, John had seriously assaulted her, the children had been exposed to his violence and that she believed that he may have sexually assaulted her oldest daughter, who had a different father. Sandy had left John a month ago and had been staying with her sister and brother in law with the kids as she felt safe there, but this couldn't go on for much longer as the house was overcrowded and not appropriate for the kids.

The FDRP assessed this case as inappropriate for FDR, did some immediate safety planning, and referred Sandy to a Family Advisor. A Child Protection notification was made. The Family Advisor conducted the family safety risk assessment with Sandy and referred her into the Family Safety Framework. Sandy was also referred to a Family Advocacy Support Service (FASS) through which a social worker is available to support people experiencing family violence. The FASS worker linked Sandy into legal advice and FDV counselling services which organised emergency housing for Sandy and her children. Sandy was also assisted to take out an intervention order against John.

Although FDR did not proceed in this case, John was linked into counselling and eventually attended a behaviour change program. Sandy was linked into multi-disciplinary professional support to assist with safety and child protection issues. Supervised contact was eventually ordered.

Case study 2 – benefits of early intervention and wrap around services

This example shows how wraparound services, based on a tailored assessment of a family's needs, can be used to recognise the emotional complexity of separation and, where necessary, slow down the FDR process and support families to achieve more workable and sustainable outcomes – as opposed to participating in a 'one size fits all' linear FDR process which ultimately escalates to court.

George initiated FDR for property and children's matters. He said that he was living with his parents after being kicked out of his family home by Anna four weeks earlier. He said he wasn't seeing their kids, aged 9 months and 3 years, at all, as Anna wouldn't let

him. George identified that anxiety and depression were ongoing issues for him and said that he was under financial pressure paying the mortgage and child support.

Anna, 25, attended her screening, intake and assessment interview for FDR. She said that she and George had been together since they were 16 and married at 18. They lived with her parents until about four months ago so that they could save for the purchase of a family home. They had just moved into their home when she discovered George had a girlfriend whom he had met at the gym two years ago. As a result of this discovery, she kicked him out. Anna said that she was humiliated and angry, and that she was being pressured by family and friends to take him back. Anna said that she was not going to cave in and that it was over with George. She said that George did not deserve to see the kids or get any of the property.

Anna demanded to have her aunt, who was a lawyer, attend FDR with her.

The FDRP referred both George and Anna to different counsellors to support them throughout the FDR process. Shuttle mediation was chosen due to their high emotions. George consented to Anna's aunt attending with her on the understanding that she would not be giving her legal advice or acting as her advocate. Anna was referred to a family lawyer and George already had a lawyer. Anna had weekly counselling sessions to manage her emotions and scheduled them just before her FDR sessions to help her regulate her emotions. George and Anna both attended the psycho-education session Child Focussed Information Session. They both found that to be very useful.

Anna and George attended three shuttle sessions to negotiate children's issues and made small incremental changes each time. Property was eventually settled after another four sessions. Had it not been possible to fast track George and Anna into suitable supports at such a critical point in time, it is likely that they would have attended one session, not reached agreement and received a section 60I certificate and then had to go to court.

Case study 3 – highlighting gaps between services and initiating court processes

This case study demonstrates how people can fall through the cracks between multiple services, and experience an increasing sense of hopelessness. The gap between what we are able to provide within program guidelines, the law services and court processes, leaves a large void that becomes increasingly difficult to navigate. In these instances, an integrated program, including a case navigator/case manager could provide an effective response, particularly for dealing safely with family violence. This service capacity could involve coordinating activities between agencies and provide to 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.

The first Relationships Australia interaction started with this family five years post-separation. They were married for six years prior to separation. Sally and Simon both had intake, individual sessions and then two mediation sessions occurred, after which it was concluded not appropriate for mediation at this time and a certificate was issued. Soon after, Simon contacted Relationships Australia again and attended a new intake session. Sally attended a new intake appointment some months later. It was once again deemed inappropriate to mediate, given the history of family violence. In the meantime, other Relationships Australia services were accessed, including

- 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.

Simon had legal representation and Sally reported that he presents well in court. He can operate well under the scrutiny of the legal setting and will often allude to his PTSD. Simon has established a good support network from his military days and also a local boxing club.

There were ongoing concerns about how Simon managed his PTSD. This included regularly not sleeping for days, falling asleep and being unable to be roused, excessive alcohol use, previous reported neglect of the children when in his care, and family violence (including psychological, emotional, verbal, financial and sexual violence, towards Sally). Consequently, Sally had serious concerns about the girls being in Simon's care. Therefore, supervised contact was occurring at the child contact centre. Sally accessed the POP to continue to try and navigate her way through the system.

Court proceedings were initiated in light of the section 60I certificates. Sally felt extremely unsupported and unsure throughout the entire process. Some of the services she contacted for assistance were:

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

Sally found herself in an increasingly difficult financial situation and was unable to pay for a lawyer. She was therefore self-representing. Sally spoke with the duty lawyer whose advice only caused more stress in an already stressful situation. Sally lacked a support network and was advised that her 'failure to report any of Simon's violent behavior in the past' would weaken her case. Sally expressed on numerous occasions

	her frustrations and feelings of hopelessness in her case. On reflection, she recognised that she downplayed the violence because she was afraid of what could happen if she withheld the girls. This included concerns for her own physical and emotional safety. Sally found it extraordinarily difficult to open up and relive much of what has happened.	

Question 22 How can current dispute resolution processes be modified to provide effective low-cost options for resolving small property matters?

Relationships Australia agrees with the concerns identified at paragraph 173 of the Issues Paper, and is supportive of the suggestions identified at paragraph 175.

Relationships Australia supports a more differentiated set of options being available for property matters, based on a more nuanced understanding of families' needs than that manifested in the current Act, which reflects a conventional understanding that court is the final destination, and the gold standard of dispute resolution and vindication. It may be that extensive culture change is needed, not just among family law and family services professionals, but across the community as a whole, to raise awareness and appreciation of the value of alternative pathways. There needs to be a culture shift away from assuming that anything other than judicial resolution is a 'second rate' service, or 'justice on the cheap'. This assumption, which admittedly makes good click bait and headlines, has served no one well – not children, not families, not the broader community.

Relationships Australia considers that 'one pathway for all' is not useful, and contributes to denial of access to justice for those many families not in a position, for whatever reason, to avail themselves of the avenues currently available. Families should have access to options that are proportionate to their resources.

For example, many clients presenting for FDR have very small property pools, and often want to mediate about sharing debt. There is a great need for families to have access to FDR in small property matters, and in matters where the main issue is about allocation of debt. There should also be proportionate and expedited[120] decision-making pathways for such matters, perhaps along the lines of small claims courts. Other options might include increasing PSCP funding to include use of tools such as New Ways for Mediation (cf our responses to Questions 14 and 31), and to cover property/debt only cases.[121]

Relationships Australia provides extensive property dispute resolution services across its federation. An internal survey carried out in 2013 found that more than 2500 property disputes per year were handled. This figure is likely to have risen significantly since the survey was undertaken. Many of these cases involved small property matters, and internal evaluations reveal a high settlement rate (a contemporary evaluation is underway and will be completed later in 2018). 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. These are funded by the Court and have been provided at no cost to families.[122]

By way of further example, Relationships Australia Tasmania provides a property mediation service. Most clients who access it are seeking to divide a small and uncomplicated asset pool; there are also occasions where 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.

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[120] To minimise delay in settling the debt.

[121] See also recommendations made in the SPLA report (eg recommendations 14, 17, in the report of the Victorian Royal Commission into Family Violence and the 2016 Family Law Council report.

[122] See also the response to Question 17.

Each of the suggestions at paragraph 175 of the Issues Paper has merit. Relationships Australia notes the Constitutional limitations on federal courts in ordering arbitration;[123] implementation of the suggestion at the third dot point might offer a pathway through that difficulty.

[123] See *Brandy v Human Rights and Equal Opportunity Commission* [1994] 69 ALJR 191, and the Family Law Council's Discussion Paper on arbitration.

Question 23 How can parties who have experienced family violence or abuse be better supported at court?

There needs to be better access, with much-reduced waiting periods, to programs that separately support survivors of family violence (including specialist services for children) and provide behaviour change opportunities for perpetrators.[124]

The considerations raised in the response to Question 13 are also relevant here. In particular, though, Relationships Australia highlights the necessity for:

- concierge, reception and security staff trained in screening and risk assessment issues associated with family violence, as well as in self-care
- discreet, easily accessible safe rooms
- safety planning and case management for families between court events and after the conclusion of court processes
- arrangements for separate parking, entrances and exits
- appropriate support arrangements for alleged perpetrators
- attendance at court by navigators and case managers (cf response to Question 4 and Appendix A), and
- readily-available and reliable remote access to, and appearance at, court for people at risk.

[124] For example, Relationships Australia New South Wales offers the 'Taking Responsibility' programme for male perpetrators and 'Women's Choice and Change' for women. It is introducing further programmes for women who initiate violence and for LGBTIQ+ families. To date, demand has outpaced capacity, and that demand is likely to continue to grow, due to a range of factors. These include, for example, greater community understanding of family violence, and the establishment of multi-disciplinary services such as FASS, specialist domestic violence courts and units, and health justice partnerships, which allow for increased detection of violence and support referral to appropriate services and programmes.

Question 24 Should legally-assisted family dispute resolution processes play a greater role in the resolution of disputes involving family violence or abuse?

Getting families to engage with FDR is not the beginning of a process. Rather, it is the end result of the first phase of intensive work to ensure that family members are adequately equipped and ready to engage. Additional support and expansion of post-separation services, for instance, would be enormously helpful in achieving this.

Relationships Australia agrees that there could be a greater role for legally-assisted FDR in the court system, *and* as an alternative to the court system, including where there is or has been family violence.[125] There is benefit for parents in the long term if they can be supported to have a facilitated discussion (such as is provided LACA FDR Pilot currently run by FRCs), and to also have access to therapeutic programs which may assist in developing parenting skills (including being able to communicate safely and effectively with the other parent when future parenting decisions need to be made). As noted previously, Relationships Australia currently offers a range of FDR services.

Relationships Australia notes the Coordinated Family Dispute Resolution pilot, announced by the Commonwealth Government in 2009. AIFS conducted an evaluation of this pilot, and its report was published in 2012.[126] The pilot was underway at most of the five trial sites by the final quarter of 2010. The evaluation report described the nature of the service as follows:

> CFDR is a process where parents are assisted with post-separation parenting arrangements where family violence has occurred in the relationship. The process involves a case manager/family dispute resolution practitioner (FDRP), a specialist family violence professional (SFVP) for the person assessed to be the "predominant victim" in the language of the model, a men's support professional (MSP) for the person assessed to be the "predominant aggressor" (when they are male), a legal advisor for each party and a second FDRP. Child consultants are part of the professional team and may be called upon to feed into case management decisions.... Specialised risk assessment and management takes place throughout the process, which unfolds over several steps involving screening, intake and assessment, preparation for mediation, mediation (up to four or more sessions) and post-mediation follow-up. The process is applied in a multi-agency, multidisciplinary setting and it aims to provide a safe, non-adversarial and child-sensitive means for parents to sort out their post-separation parenting disputes. The level of support provided to parents is intensive, and this is a key means by which the process attempts to keep children and parties safe and ensure that power imbalances resulting from family violence do not impede parents' ability to participate effectively.

The pilot was not rolled out across Australia, despite evaluation findings validating key principles underlying CFDR; in particular, the efficacy of multi-disciplinary, multi-agency clinical collaboration and support for participants. Since publication of the evaluation report, however, further work has been undertaken to refine and continue advocacy for a safe model of mediation for families which have experienced family violence.[127] Relationships Australia respectfully submits that the ALRC should have regard to this work in considering safe and multidisciplinary service models for families affected by family violence.

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[125] For more information on Legally Assisted FDR in South Australia, please see the separate submission from Relationships Australia South Australia.

[126] See https://www.ag.gov.au/Publications/Documents/ArchivedFamilyLawPublications/CFDR%20Evaluation%20Final%20Report%20December%202012.PDF.

[127] See, for example, Rachael Field, 'A Call for a Safe Model of Family Mediation', (2016) 28(1) *Bond Law Review*; Rachael M Field and Angela Lynch, 'Hearing parties' voices in Coordinated Family Dispute Resolution (CFDR): An Australian pilot of a family mediation model designed for matters involving a history of domestic violence,' *Journal of Social Welfare and Family Law*, 36(4), 392-402.

Relationships Australia notes client feedback that legally assisted FDR is often very outcomes focused, and that some clients report a feeling of pressure to reach an agreement on the day of the FDR ‘event’, which seems to be created by a combination of an outcomes focus and a lack of funding for future FDR services. Optimally for healthy families, FDR should be a process which can be flexible, with several sessions separated by intervals of time to allow individuals to consider proposals, seek advice and address issues before seeking a final agreement. This reflects and responds to the non-linear experience of family separation.

Question 25 How should the family law system address misuse of process as a form of abuse in family law matters?

Relationships Australia supports inclusion of misuse of process as a form of abuse in family law matters.

Relationships Australia notes opportunities for perpetrators to misuse the courts and their processes as a tool for continuing their abuse, and the incentives for controlling perpetrators to do so. Relationships Australia notes that training of professionals in family violence dynamics and trauma-informed practice should include training in identifying misuse of the process as a means to perpetuate abuse, and in implementing measures to counter that. In addition, Relationships Australia notes that any moves away from an adversarial model, to a more inquisitorial model which included a Counsel Assisting, would mitigate the risk of misuse of process by an abuser.[128]

25.1 Consent orders

Relationships Australia is aware of reported instances in which consent orders have masked misuse of processes, and exploitation of a parent's vulnerability. It is conceded that it is impractical (and possibly impermissible) for courts to look behind consent orders – particularly when both parties have the benefit of legal representation. Nevertheless, this limitation underlines the necessity for all professionals involved in family disputes to be able to recognise and counter dynamics of control and violence, and the effects of trauma on the behaviour of family members who have been subject to control and violence, as well as the desirability, where possible, of co-located and multi-disciplinary services to ensure ease of access by lawyers and clients to relevant support services.

[128] Relationships Australia notes that several stakeholders have shown interest in exploring more inquisitorial approaches (see, for example, evidence given by Women's Legal Services Australia to the Senate Legal and Constitutional Affairs Legislative Committee hearings on the Family Law Amendment (Parenting Management Hearings) Bill 2017).

Question 26 In what ways could non-adjudicative dispute resolution processes, such as family dispute resolution and conciliation, be developed or expanded to better support families to resolve disputes in a timely and cost-effective way?

In 1979, the first Chief Justice of the Family Court suggested that adversarial interventions were 'destructive of morale and [likely to] create bitterness for all.'[129] Sharing the recognition that institutionalising adversarial relationships between former intimate partners is not a recipe for minimising ongoing conflict (or, more recently, fostering healthy co-parenting), successive Parliaments – and courts – have sought to instigate measures to soften the harsher edges of an inherently adversarial structure, baked into the 1975 Act by its creators.

The measures have, as noted elsewhere in this submission, included the establishment of FRCs and the diversion of many families to family dispute resolution services.[130] These have been of great benefit to many Australians.[131] The Less Adversarial Trial processes in Division 12A of Part VII of the Act emerged from the pilots, in Sydney and Parramatta, of the Children's Cases Programme.[132] That Programme, and the LAT provisions which emerged from it, acknowledged that 'adversarial legal processes play a part in exacerbating parental conflict and inhibiting the development of parenting capacity.'[133]

Many reviews and reports have identified the need for a less adversarial, and multi-disciplinary, approach to resolving parenting disputes – most recently, the Family Law Council's 2016 report on *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems*.

Relationships Australia acknowledges the Constitutional law considerations, set out in Chapter III of the Constitution, which preclude the exercise of non-judicial powers by Judges of Chapter III courts and the exercise of judicial powers by non-judicial officers.

Australian Parliaments have long sought to address the practical issues presented to families by our federal system. It was the impetus for the *Matrimonial Causes Act*, to replace State laws which had their origins in the colonial governments of the mid to late 19th century. Although most of these were themselves based on the English Matrimonial Causes Act 1857,[134] they came to diverge widely. By the time of the Australasian Federal Convention Debates, there was a recognition that it would be advisable

> …to avoid the great mistake made by the framers of the Constitution of the United States of America, who left the question [of powers to regulate marriage] for the States to deal with…[135]

Hence, the inclusion of ss 51(xxi) and (xxii), to confer the requisite powers on the new Commonwealth Government. Nevertheless, a single and comprehensive national law did not come about until the mid-20th century. Australia still does not have a fully national family law. Further, the ever-increasing incidence of presentation in the family courts of family violence and child protection/child welfare issues has created additional jurisdictional challenges for families to navigate. The community served by the family law system expects seamless information and services – to tell their story on one occasion, in one place. Parties and witnesses are understandably frustrated by the need to re-tell their

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[129] Evatt, E, 'The administration of family law', *Australian Journal of Public Administration*, 38(1), 1, at 10.
[130] Relationships Australia notes current pilots trialling models of LACA FDR for vulnerable families.
[131] By way of illustration, KPMG's analysis reported that FRCs were attended by 80,000 per annum.
[132] 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.
[133] The Hon Diana Bryant AO QC in the Foreword to the *Less Adversarial Trial Handbook*, 2009.
[134] Itself a response to public dissatisfaction with the ecclesiastical systems which had applied up to that time.
[135] Enderby, p 12, n 11, citing R E O'Connor and I A Isaacs in the Australasian Federal Convention debates, Sydney, 1897, quoted in Quick and Garran, *The Annotated Constitution of the Commonwealth of Australia* (1901) 610.

stories at multiple points in multiple processes, with divergent parameters. And the issue is one of far greater concern than simple frustration with unnecessarily complicated bureaucracies – multiple re-telling can also re-traumatise and trigger vulnerable people.

Relationships Australia supports the further development and funding of FDR as a proven means of diverting people from court, and supporting those who do go to court, including by the provision of post-order and post-agreement services. Research on child inclusive practice has long shown the benefit this can confer,[136] but organisations must currently fund this work themselves. As noted in response to Question 22, property FDR in tandem with provision of legal advice is often a useful first step in settling uncomplicated property matters.

Relationships Australia also supports the consideration of conciliation services in both parenting and property disputes. 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.

Many of the clients do not have the means to pay for more post-separation services, so Relationships Australia bears the cost. Expansion of services to not just provide feedback from the children, but also therapeutic assistance to the parents about developmental information relevant to their parenting plans, would benefit greatly those parents who may have little understanding of the needs of young children.

26.1 Scope for development in Australia of interdisciplinary collaborative practice (ICP)?

While interdisciplinary collaborative practice (ICP) has not received broad take up in Australia, there may be scope for greater use of it in some cases. It is generally very costly for clients; there are few low cost options available. However, it is likely that these would be 'front-loaded' costs which could save the greater cost of going through to a contested hearing and final orders. In view of the more therapeutic and less adversarial framework offered by ICP, Relationships Australia recommends that Government recognise ICP as an alternative to FDR.

[136] See, for example, J McIntosh, 'Child inclusion as a principle and as evidence-based practice: Applications to family law services and related sectors': https://aifs.gov.au/cfca/publications/child-inclusion-principle-and-evidence-based-practice.

Case study – ICP in New South Wales[137] - the experience of Relationships Australia New South Wales

Relationships Australia New South Wales offers an ICP services in which lawyers, financial guidance professionals and mental health professionals work together to support decision-making about both parenting and property issues. The service was launched by the then Attorney-General, the Hon Robert McClelland MP, in 2009. Eight years later, this service remains popular, achieving a success rate of over 90%, and Relationships Australia New South Wales continues to build professional capacity in this area, having trained more than 100 professionals in ICP.

26.2 Parenting Co-ordination[138]

Another option is Parenting Co-ordination. Parenting Co-ordination can be court-ordered, or participants can agree to be bound by the views of a Parenting Co-ordinator pending judicial resolution. This would offer participants a service in which the co-ordinator could manage communication between the participants, emerging co-parenting issues and development of a parenting plan. This would reduce the demand on court resources and costs to the participants. Government could mandate attendance at a minimum number of sessions at different stages of separation.

[137] Relationships Australia South Australia is now also offering an ICP service.

[138] See the response to Question 10 (especially 10.3), and Appendix I, for more detail).

Question 27 Is there scope to increase the use of arbitration in family disputes? How could this be done?

Relationships Australia supports the availability of a diverse array of decision-making services, and principles of choice and accessibility to ensure services can meet the needs of contemporary Australian families.

Relationships Australia notes the limits on non-consensual arbitration identified by the Family Law Council.[139] The effect of the High Court's decision in *Brandy v Human Rights and Equal Opportunity Commission,* as described by Council, was that

> …two requirements must be met if a non-consensual arbitration scheme is to be found constitutionally valid. Firstly, it is crucial that judicial power is not conferred on the arbitrator without provision being made for a full rehearing de novo as of right. Secondly, it must be ensured that determinations made in court-ordered arbitration are enforceable only after the involvement of the court and not simply as a result of registration.[140]

Relationships Australia notes that the current provisions which contemplate the use of arbitration[141] are cumbersome, and have enjoyed very little take up,[142] in contrast with the immediate success enjoyed by mediation.[143] In its 2007 Discussion Paper, the Family Law Council suggested that reasons for low take up included:

- lack of funding (mediation having been funded within the $397 million package that accompanied the 2006 reforms)
- lack of recognition, within the legal profession, of arbitration as a viable option, and
- limitations on review of arbitrations have been viewed by the legal profession as too narrow, making arbitration a potentially risky strategy for lawyers to recommend to their clients.[144]

Within Relationships Australia, there have been suggestions that arbitration could be more extensively used as a tool to administer and enforce judicial orders, as well as in particular circumstances (eg disputes involving modest asset pools, where going to court is a disproportionate course of action).

The Legal Aid Queensland arbitration service appears to be a useful way to enable clients with a small asset pool, or an uncomplicated property dispute, to access a timely and proportionate resolution pathway. If such a model could be adapted for use in family law disputes, it should include an educative component to focus participants' minds on the need to consider children's future needs and encourage disputants to maintain respectful communication. Relationships Australia would be well-placed to provide a pre-arbitration service along these lines; it currently does so in respect of FDR, access to CCSs, and in its Parenting Orders Programme.

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[139] See *Brandy v Human Rights and Equal Opportunity Commission* [1994] 69 ALJR 191; the 2007 Discussion Paper on arbitration in family law, published by the Family Law Council: https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Discussion%20paper%20on%20arbitration%20in%20family%20law%20matters.pdf. This Discussion Paper had been preceded, in 1998, by advice from the Family Law Council to the then Attorney-General, the Hon Daryl Williams AM QC MP, about potential amendments to the Act to facilitate arbitration in family law matters: https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Arbitration%20in%20Family%20Law.pdf. In its Discussion Paper, Council outlined a 'Continuum of Compulsion' (Figure 1, p 13) to assist in the development of an arbitration model.

[140] See Family Law Discussion Paper, 2007, paragraphs 6.18, 6.29. In Chapter 7 of the Paper, Council proposed two viable models of discretionary court-ordered arbitration. Each of these provide for a rehearing de novo and seek to confer non-judicial power only on arbitrators: see paragraph 7.4. To seek to deter unmeritorious applications for re-hearings, Council advocated cost sanctions: see paragraph 7.26.

[141] Outlined by the Family Law Council in Chapter 3 of its Discussion Paper.

[142] See Chapter 4 of the Family Law Council's Discussion Paper.

[143] See the Family Law Council's Discussion Paper, paragraph 4.17, for example.

[144] At paragraph 4.23.

Question 28 Should online dispute resolution processes play a greater role in helping people to resolve family law matters in Australia? If so, how can these processes be best supported, and what safeguards should be incorporated into their development?

Relationships Australia supports the exploration of online decision-making processes to support, facilitate and complement face to face services, recognising barriers created by the digital divide and other barriers, such as inadequate access to fast, reliable and private online services, illiteracy, cultural considerations and poverty.[145] While it can be expected that some of these barriers will diminish over time, there will – for the foreseeable future - be a cohort of people for whom online services is not a practical way of interacting with service providers. It is vital for social welfare and social justice 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 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. It would be necessary to ensure that people accessing online services could also access needed therapeutic services.

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, Relationships Australia respectfully suggests that the ALRC undertake consultation with the Department of Communications and the Department of Industry, Innovation of Science. Such consultation could usefully explore the Government's expectations of emerging capabilities, as well as informing recommendations about capability-building in the family services professions to enable them to best harness innovation to serve their constituencies.

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[145] 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 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.

Case study – evaluating and developing online capabilities

This case study demonstrates the imperative for ongoing evaluation and development of innovative service delivery methods.

In 2011, Relationships Australia Queensland published its final report, commissioned by AGD, on the *Development and Evaluation of Online Family Dispute Resolution Capabilities*.[146] Following its publication, the Telephone Dispute Resolution Service, operated by Relationships Australia Queensland as a component of the Family Relationship Advice Line, has offered an online service delivery platform to clients. That platform includes the capacity for document sharing, video conferencing and the capacity to host individual and joint sessions with FDRPs. The service offered is case-managed and directed by the FDRP to ensure client confidentiality and safety. There has been high demand for individual intake sessions on this platform. However, despite significant research (including client consultation and user testing), there has been limited uptake of this service for joint FDR sessions.

Relationships Australia Queensland offers the following observations:

- process design must incorporate client choice and self-determination
- providers must offer multiple platforms and different modalities of access to cater for client accessibility and choice throughout the process (eg online, telephony, face to face, hard copy)
- as noted throughout this submission, case management is vital on any platform (online or otherwise), to ensure that all family members are supported to engage safely and effectively with available support services. There is a role for self-directed support, but only within a case-managed framework.[147]

See also the case study included in the response to Question 3.

[146] Available at https://www.ag.gov.au/Publications/Pages/OnlineFamilyDisputeResolutionEvaluation.aspx.

[147] See the continuum model of navigation/case management referred to in Appendix A.

Question 29 Is there scope for problem solving decision-making processes to be developed within the family law system to help manage risk to children in families with complex needs? How could this be done?

Relationships Australia considers that the use of child-inclusive practice should pervade the practice of family law, and family law service provisions, to better enable the needs of children to be expressed and heard.

There is evidence to suggest that the application of the Less Adversarial Trial provisions is inconsistent, which is concerning given the value they could add to supporting families with safety concerns. In the absence of transformational reform, it would be helpful if judicial training and practices could focus on consistent use of the Division 12A provisions, which would represent solid progress in supporting families while not exacerbating or further entrenching dynamics of conflict and opposition. In addition, families often express concern that family consultants are unable to spend sufficient time with them, and the time spent with children too often occurs in an environment which is unwelcoming and foreign to children. One possibility might be to consider outreach models, where children can be observed in environments with which they are familiar.

Another option could be a funded process that includes coaching / counselling before FDR, with an option to include a child mental health specialist in the joint mediation session - particularly when there are children/young people with significant mental health issues. This would enable a collaborative discussion on what the child's needs are, and how they are going to be met. An increasing number of young people and children are presenting with significant mental health issues, derived from a history of entrenched parental hatred and conflict.

Further, access to parenting co-ordination services[148] could form a useful tool in containing family disputes, allowing participants to be heard, protecting and hearing from children, and supporting participants by equipping them to cope with family separation.

[148] See the response to Question 10 (especially 10.3), and Appendix I, for more detail).

Question 30 Should family inclusive decision-making processes be incorporated into the family law system? How could this be done?

Relationships Australia supports incorporating family inclusive decision-making processes as a mainstream service. While the Family Law Council recently recommended use of FGC[149] for Indigenous families, Relationships Australia sees merit in FGC for families regardless of ethnicity.[150] Relationships Australia is of the view that by 'front-loading' investment in family support, solutions are more likely to be workable and enduring, as well as empowering families through capacity-building. It is vital that FGC outcomes be supported by decision-makers (eg if an agreement goes to court to be registered as a consent order). Consequently, 'back end' costs to Government and taxpayers are minimised.

As with other models described in this submission, Relationships Australia supports taking flexible approaches to meet the needs of particular families. For example, a particular family might do best with co-facilitators including a mediator, counsellors and a cultural advisor.

Relationships Australia Canberra and Region has been using principles of restorative practice for several years, including in child protection work, to reduce the risk of child removals. At the core of this work is FGC.

Care does need to be taken to ensure that children are not placed in the middle of parents' conflict. Research on child inclusive practice shows that asking children to comment on decisions that parents should be making places the children in a no-win situation where they are having to comment on or choose sides between warring parents.

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[149] Which may, potentially, also include members of the child's broader network, such as teachers, adults with whom they have contact in extra-curricular activities, health care providers, or neighbours.

[150] FGC is well-known in child protection and juvenile justice, and is offered as an adjunct to family law services by some providers: see, for example: http://www.lsc.sa.gov.au/resources/FamilyLawConferencing.pdf; http://www.supportingcarers.snaicc.org.au/rights-of-the-child/family-group-conferencing/; http://www.dhhs.tas.gov.au/children/child_protection_services/family_group_conferencing/what_happens_at_a_family_group_conference; https://www.dss.gov.au/sites/default/files/files/about-fahcsia/publication-articles/foi/Document%201.PDF. The family courts can order that a Child Inclusive Conference occur: see, for example: http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/publications/child+dispute+services/child-inclusive-conferences.

Integration and collaboration

Relationships Australia notes the extreme fragmentation of relevant services, and the obstacles it places in help-seeking behaviours and the resolution of family conflict. This fragmentation can be characterised as follows:

- Commonwealth Constitutional power, and its relationship with State powers to legislate
- separation of powers in the Commonwealth Constitution
- interacting legal frameworks, including:
    - child protection and welfare
    - criminal law – family violence
    - criminal law – other
    - adult guardianship law
    - mental health
    - succession law
- disciplinary, including:
    - social sciences
    - medical sciences and allied therapies
    - law
    - law enforcement
- bureaucratic structures at all levels of government
- budgetary – funding grants are often structured in alignment with bureaucratic divisions, so that one service provider can, in relation to even a single family, be administering funding for overlapping services from several different government departments, at different levels of government, which imposes substantial administrative burdens and costs
- competition between services, driven by questionable assumptions that competitive tendering is a necessary and sufficient pre-condition of innovation and efficiency; typically, however, grants of funding also call on services to act collaboratively – artificially creating a competitive dynamic that can undermine achievement of the policy objectives[151]
- corresponding to life span phases - rather than focusing on the duration of the family dynamic, and supporting the well-being of families throughout life span (eg intergenerational conflict, elder abuse, conflict among adult siblings).

Relationships Australia further notes the 2015 and 2016 reports by the Family Law Council, a fundamental theme of which was the impact of this kind of fragmentation on families. Relationships Australia draws to the ALRC's attention its comments on the impact of fragmentation on the experience of someone affected by 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.[152]

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[151] We note, in this connection, our comments on the KPMG final report, at Appendix E, to the effect 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.

[152] 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.

Question 31 How can integrated services approaches be better used to assist client families with complex needs? How can these approaches be better supported?

In its evaluation of the 2012 family violence reforms, AIFS found that the proportion of contested family law cases involving complex psycho-social needs, relating to circumstances including family violence, child abuse, substance addition and serious mental illness, had substantially increased, placing great pressure on a system which had not been conceived of, or designed, to deal with such issues.[153] The 2015 and 2016 reports of the Family Law Council also focused on the issues caused and/or exacerbated by multiple jurisdictions and services which do not operate in an integrated way.

Yet from its commencement, the Act itself contemplated the provision of therapeutic services, to operate *in partnership* with the legal structures it created. The Act provided for a Court Counselling Service, with an emphasis on reconciliation counselling, especially where a separating couple had children.[154] There was also, as noted by former Senior Judge the Hon John Fogarty AM, 'an early realisation that children's cases involved multi-professional skills.'[155] This recognition has informed many Government reforms focusing on services, including the establishment of the FRCs and FLPNs, the previously-mentioned pilot of Co-Ordinated FDR, and the more recently established Health Justice Partnerships, as well as pilots of Family Advocacy Support Services (FASS) and specialist domestic violence services. Significant work has been done on the cultural and systemic barriers to access, and there are theoretical frameworks available to support professional groups to come together and collaborate effectively. Nevertheless, multi-disciplinary collaboration, for the benefit of families, seems still to be far in the distance, leading to families 'falling through the cracks', and to missed opportunities for timely, positive interventions.

Case study – involvement with the FASS pilot

Relationships Australia New South Wales provides the FASS for men in Wollongong, Sydney, Parramatta and Newcastle family court registries. Initial feedback is that this service has been very useful and effective in supporting men through the provision of an interdisciplinary service which also includes assistance in navigating the family law processes. In particular, FASS staff have been able to work 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. 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).

Information sharing, and both the real and perceived conflicts with rules around privacy, confidentiality, admissibility and privilege, remain a real barrier to people being able to received integrated services. In this regard, Relationships Australia notes the

[153] See Kaspiew et al, *Experience of Separated Families Study – Evaluation of the 2012 Family Violence Amendments*, AIFS, 2015.
[154] Evatt, 4, 11, arguing for an expansion of the counselling service, as being 'more effective and less costly than the appointment of more Judges'.
[155] The Hon John Fogarty AM, 'Thirty years of Change', (2006) 18(4) *Australian Family Lawyer* 4, 10.

recommendations at Chapter 6 of the 2015 Interim Report of the Family Law Council. These issues exacerbate risks around re-traumatisation, disrupt effective therapeutic and legal responses to peoples' needs, and allow for the continued perpetration of abuse. The governing principle should be, as has been argued in the past, that safety trumps privilege; but even in the absence of safety considerations, the practical imperatives for users of the system to receive coherent services remain regrettably unmet.

Relationships Australia Northern Territory staff agree with the issues and concerns canvassed in paragraphs 228-9 of the Issues Paper. An increasing number of FDR clients in the Northern Territory presents each year with multiple complex issues. They are unable to access all the siloed services they require without the clinical assistance of a social worker. FDRPs make referrals, but often clients need further help navigating the services. Such assistance is not funded in the FDR programmes.

One option, mentioned in the responses to Questions 14 and 22, is the New Ways for Mediation model, being offered by Relationships Australia Northern Territory in Alice Springs. This model provides conflict coaching to separated couples in Alice Springs as part of their preparation for attending FDR. Clients each have two sessions of two hours each with a counsellor. At these sessions, they learn skills to enable them to think flexibly, to manage their emotions, to look forward not back, and to write proposals. These skills are then used in the FDR session, with the FDRP adapting the traditional mediation model to be based on the individuals' making proposals, asking questions about the proposals being put to them, and offering responses of 'yes, no, or I'll think about it'. The model works well, in our experience, with high conflict families, but of course can be useful for all families. The skills learned through the program can also be used by families after the completion of FDR, when negotiating future decisions.

Another option is the New Ways For Families model (currently used in some jurisdictions in Canada and the United States of America). This model involves parents learning from trained counsellors the New Ways skills, teaching their children, and then returning to court to report on their progress. It makes parents accountable to use flexible thinking, manage their emotions, and provides a way to shift entrenched high conflict cases.

Further, there needs to be more funding of early intervention measures, such as counselling and mandatory parent education sessions to give parents the information and skills to equip them to:

- manage their emotions
- acknowledge the impact of conflict on their children
- develop strategies to resolve conflict, and
- work on their own issues that affect their ability to separate the needs of their children from their own needs.

If services were funded – even within the existing funding envelope - to work with families using a case management model – eg to work with counsellors supporting parents, and then organise a joint mediation – this would provide a basis to work from in mediation and perhaps plant some seeds about the impact of conflict, in the hope that families do not end up going through the legal system for many years.

Question 32 What changes should be made to reduce the need for families to engage with more than one court to address safety concerns for children?

Relationships Australia notes the reports of the Family Law Council on its reference concerning families with complex needs. In these reports, Council comprehensively canvassed existing concerns and hurdles, and offered salient suggestions to improve the connectivity of services, and thus improve children's safety.

Relationships Australia also supports initiatives to empower and facilitate State and Territory judges to make orders to help families already before them on other matters (eg protection order applications and child welfare matters). This includes providing necessary training not only in the applicable law, but also to provide a foundational understanding of relevant social science knowledge and practice. In the absence of specialist courts exercising the full array of jurisdictions, there needs to be better information sharing between jurisdictions, and options to fast track matters between different courts.

The suggestions outlined in paragraph 246 of the Issues Paper warrant consideration and exploration. However, Relationships Australia notes that negotiation and implementation of a national family and child protection system is unlikely to be politically achievable. The current family law system has been in place for more than 40 years, and does not extend nationally (Western Australia continues to maintain a separate system, and there is no indication that this will change in the foreseeable future). Development of any national norms, or even national interoperability of systems such as databases, is slow, painstaking and resource-intensive. While a national system may, from a user's perspective, be ideal – even a matter of common sense – experience suggests to Relationships Australia that a national system is an unattainable goal. This forms a large part of the reasoning that States and Territories, with their responsibilities for child protection and welfare, health systems and criminal justice, should be better equipped to make decisions within the framework of a national Act.

Relationships Australia supports digital hearing processes, as suggested in paragraph 246,[156] and as canvassed in its response to Question 13.

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[156] Note the Link Virtual Outreach project (http://womenslegal.org.au/impact_report/projects/project-two/). This is a service 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).

Question 33 How can collaboration and information sharing between the family courts and state and territory child protection and family violence systems be improved?

Significant efforts have been made, over the past few years, to improve collaboration and information sharing between the family courts and state and territory child protection and family violence systems. In 2012, for example, AGD 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 of this work can be found on the AGD website.[157]

Relationships Australia notes that the Family Law Council recently 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.[158] Such a database would enable courts to better informed of the broader legal context in which a particular matter has arisen, and avoid situations where there are – inadvertently – conflicting orders. This could build on the work of the Australian Criminal Intelligence Commission, which is establishing the National Domestic Violence Order scheme, to share DVO information between police and courts in Australia. There has also been advocacy for registration of documents such as enduring powers of attorney and advance health care directives;[159] if this is progressed, then it would be highly desirable, from the outset, to build in interoperability between State and Territory systems (rather than needing to retrofit this capability at some yet to be determined time). This could be in conjunction with work being done to implement recommendations from the Royal Commission into Institutional Responses to Child Sexual Abuse, in terms of States and Territories sharing information on working with children checks.[160]

In response to the suggestions at paragraph 249 of the Issues Paper, Relationships Australia supports:

- the development of a national database of court orders
- co-located services, where practical. However, if the systems and structures of family services were to be completely re-thought using a paradigm other than the law, then it may be more appropriate to have courts located in other service centres or hubs, as described in Appendix A. Short of a transformational change, then more services, including child protection services, should be co-located with courts
- increased circuiting of first instance family law judges and locating registry staff in state and territory courts (including magistrates' courts and specialist domestic violence courts)
- the development of continuing joint professional development programs
- the recommendation of the Victorian family violence Royal Commission to provide that breach of a personal protection injunction made under federal legislation is a criminal offence.[161]

In addition, and to respond to concerns alluded to in our response to Question 31, Relationships Australia supports the provision of information and training on the scope of obligations of confidentiality and privacy.

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[157] See https://www.ag.gov.au/FamiliesAndMarriage/Families/Pages/Familylawandchildprotectioncollaboration.aspx.
[158] 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.
[159] See ALRC Report 131, *Elder Abuse – A National Legal Response*, especially recommendation 5-3 (establishment of a national online register of enduring documents and court and tribunal appointments of guardians and financial administrators).
[160] See recommendations made in the report on *Working with Children Checks* by the Royal Commission into Institutional Responses to Child Sexual Abuse, 2015.
[161] Relationships Australia notes that legislation to implement this recommendation is currently before Parliament, and urges expedited passage of this amendment: Family Law Amendment (Family Violence and Other Measures) Bill 2017.

Relationships Australia gave evidence to the SPLA Inquiry (at Appendix D) noting the administrative demand and costs associated with delivering family law services for people affected by violence. To an appreciable extent, these costs are driven by the need to share information across jurisdictions and sectors (eg through responding to subpoenas issued by State and Territory courts and, increasingly, the Family Court).

Children's experiences and perspectives

Question 34 How can children's experiences of participation in court processes be improved?

34.1 Historical context

From its commencement, the *Family Law Act* has always accorded the best interests of children paramount importance, at least in a formal sense.[162] However, 'the system' has not always been good at finding the safest and most effective ways of hearing children's voices, as indicated by the AIFS evaluation of Independent Children's Lawyers,[163] 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.[164] 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,[165] and the 'For the Sake of the Kids' report.[166]

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', in an *ad hoc* way, to attempt to bring real substance to protection of 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.[167] Any new system, legislation or process must *start with and be designed around* the best interests of the children and, in particular, assume hearing from children as the default position in service provision and court processes. Arguments for exceptions must be made out. Opportunities to hear from children should be afforded from first presentation of the family, and throughout any related court-proceeding and service provision. Mechanisms to achieve this need to be adequately funded.

In its 2016 final report, the Family Law Council made a series of recommendations aimed at giving children and young people a voice in the family law system. Council observed that

> In Council's view the development of client centred services must incorporate input from children and young people with experience of the family law system. Council notes in this regard the recommendation by the COAG Advisory Panel [on family violence] that all governments 'work with children and young people to design services that can best support them to report violence'. Council supports this recommendation.[168]

Council recommended that

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[162] Note the Second Reading Speech of the Bill (Commonwealth, Parliamentary Debates, Senate, 3 April 1974, 640, 642).
[163] 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.
[164] 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.
[165] *Seen and heard: priority for children in the legal process*, ALRC Report 84, 1997.
[166] *For the Sake of the Kids: Complex Contact Cases and the Family Court*, ALRC Report 73, 1995.
[167] See the response to Question 14.
[168] See Chapter 9, pp 141-2.

1) The Australian Government establish a young person advisory panel to assist in the design of child-focused family law services that build on an understanding of children's and young people's views and experiences of the family law system's services.

2) The Australian Government consult with children and young people as key stakeholders in developing guidelines for judges who may choose to meet with children in family law proceedings.[169]

34.2 The modern imperative to hear children's voices

Relationships Australia urges the development, and consistent use of, mechanisms to hear children's voices. Independent Children's Lawyers, in their current mandated form, do not necessarily achieve this. Relationships Australia suggest that children have access to advocates who are appropriately trained and supervised to engage proactively with children in ways that are appropriate to the child's development.[170] Literature suggests that individual ICLs vary widely in their practices for engaging with children, and in their understanding of children's best interests.

Further, 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, between 2007-2010, demonstrated that it achieves very positive results for all participants, including the children.[171] 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'.[172] Karle and Gathmann conclude that

> 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.[173]

Parents, unanimously, supported the judicial child interviews, and the involvement of child advocates.[174]

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

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[169] See recommendation 13.

[170] See report from the SPLA committee, at 6.119.

[171] 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.

[172] See Karle and Gathmann, at 179.

[173] Karle and Gathmann, at 181.

[174] Karle and Gathmann, at 182.

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"…..[175]

Australian 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 notes 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 described in this submission as relevant in engaging with children and hearing their voices (see also the answer to Question 41).

34.3 Children's voices in the system

Relationships Australia notes that a youth advisory council is part of the framework for headspace, the national youth mental health foundation.[176] It provides direct input into development of relevant services. 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. Another example of such a body is the Young Peoples Family Law Advisory Group consumer voice pilot in Adelaide, being run through the South Australian Family Law Pathways Network.[177] The YPFLAG website explains that:

> The Young Peoples Family Law Advisory Group (YPFLAG) is a new project being run through the South Australian Family Law Pathways Network, a not-for-profit program funded by the Federal Government.
>
> The YPFLAG is a pilot project of the first of its kind held in Australia.
>
> The object of the YPFLAG project is to enable a group of selected young people who have experienced family separation [to have] the opportunity to voice their experiences about their interactions within the family law system, such as contact with the Courts, Family Consultants, counselling, mediation or any other experiences they have had since.

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

[176] https://www.headspace.org.au.

[177] For more information, see https://www.pathwaysnetworksa.com.au/ypflag/.

We hope to make the YPFLAG project into a national program to assist the family law sector now and in the future.

The YPFLAG involves a group of selected young people meeting approximately 4 times a year to discuss their experiences about being involved in the family law system. It is an opportunity for young people to be able to tell their experience of the family law system in a safe and transparent environment.

Finally, Relationships Australia notes that child inclusive practice does not require – and would discourage – children being asked or required to comment on decisions that parents should be making.

Question 35 What changes are needed to ensure children are informed about the outcome of court processes that affect them?

Relationships Australia supports the ALRC's emphasis on exploring children's experiences and perspectives, and on giving children a voice. This review is an opportunity to encourage various professionals in the system to overcome some of the fear about talking with children.

Relationships Australia notes provisions currently being considered by Parliament to clarify the circumstances in which the outcome of court processes must be explained to children. Relationships Australia understands that the intention is to avoid inappropriate exposure of children to parental conflict and to avoid the imposition of information that the child will find difficult to understand, and would support specialist child advocates assuming that role (see the response to Question 34).

Question 36 What mechanisms are best adapted to ensure children's views are heard in court proceedings?[178]

Relationships Australia notes the concerns reported at paragraph 259 about the role of Independent Children's Lawyers. Certainly, we are of the view that ICLs have not, to date, provided a mechanism by which to consistently ensure that children's voices are heard in proceedings affected them; indeed, that is not their statutory role. As noted in the evaluation by AIFS, there is wide variation in the practice of ICLs, and a large disconnect between lawyers' and courts' understanding of their role (which derives from the terms of the Act) and the public's understanding. The term 'Independent Children's Lawyer' has proved to be misleading, encouraging expectations such as that the ICL acts on the child's instruction (or at least expresses the child's views to the court), and that the ICL will meet with the child.

Like all professionals, lawyers need to be trained to be able to identify their capacities and limitations, and when they need to engage with skilled clinicians. Lawyers also need to be trained around self-care and reflective practices and have access to clinical supervision. Compulsory CPD in these skills, and leadership in reinforcing expectations of less adversarial approaches, would also be useful.

Relationships Australia considers that any reform underpinned by principles of child-inclusive practice should include mechanisms by which children's views and voices are sought and taken into account. In line with the principles described at the outset of this submission, Relationships Australia considers that the adoption of a well-resourced multi-disciplinary team, accessible as early as possible[179] should form the central plank of child-oriented services, making use of tools such as 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 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.

The possibility of judges interviewing children (see the response to Question 34) is a powerful mechanism by which to ensure that children's views are heard by Courts. Such a mechanism could work well with a more inquisitorial model.

[178] See also the response to Question 34.

[179] The Cafcass facility in the United Kingdom is only accessible to families that have entered the court system.

Question 37 How can children be supported to participate in family dispute resolution processes?

Relationships Australia considers that reforms should be aimed at normalising the participation of children, and hearing children's voices. Appendix B offers some suggestions how this might be achieved.

Relationships Australia is committed to child inclusive practice as offering the best possibilities for outcomes that are in children's best interests.[180] Child inclusive practice is a way of actively including children in the FDR process. 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.[181]

It is acknowledged that supporting children's participation can be resource intensive and, at present, providers bear the cost of this (in the Northern Territory, for example, many clients would not themselves have the resources to pay for this service). During the intake process and following 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. In some Relationships Australia organisations, there are case managers who ensure that all practitioners engaging with the family know what is happening, and are able to ensure that all components of the process remain consistently focused on the child.

Relationships Australia also acknowledges that Parenting Co-ordination offers children a safe mechanism to express their views in a non-adversarial context.[182]

If recommendations for child inclusive practice are made by the ALRC, and accepted by the Government, then the funding for training and services should reflect this.

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[180] 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.

[181] 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.

[182] See the response to Question 10 (especially 10.3), and Appendix I, for more detail on parenting co-ordination.

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.

Question 38 Are there risks to children from involving them in decision-making or dispute resolution processes? How should these risks be managed?

See the response to Question 34.

Question 39 What changes are needed to ensure that all children who wish to do so are able to participate in family law system processes in a way that is culturally safe and responsive to their particular needs?

See responses to previous questions, including Questions 5-10.

Question 40 How can efforts to improve children's experiences in the family law system best learn from children and young people who have experience of its processes?

Relationships Australia suggests that adults who went through the family law system as children be invited to be interviewed to provide their opinions, and their recommendations should be noted. A formal research project of this nature would provide valuable information and insights to inform current practices and future policy development.

See also the response to Question 34, and proposals at Appendix B, in relation to establishment of an advisory body to give children a voice in considering systemic reform.

Professional skills and wellbeing

Question 41 What core competencies should be expected of professionals who work in the family law system? What measures are needed to ensure that family law system professionals have and maintain these competencies?

National standards of competency, across all professional groups, are necessary to ensure consistency and accountability.

Relationships Australia also draws to the attention of the ALRC the cost of ensuring ongoing training, accreditation and certification across multiple professional bodies.

Relevant competencies

Professionals in any family services should undertake training in the following areas:

- cultural safety training – noting that recommendations from the *Bringing them Home* report, the *Little Children are Sacred* report and, most recently, the report of the Royal Commission into the *Protection and Detention of Children in the Northern Territory*, offer valuable insights into working in a culturally appropriate manner that are relevant to the Northern Territory
- trauma-informed practice
- vicarious trauma training
- child safe accreditation
- family violence (see the submission by Relationships Australia to the SPLA Inquiry, at Appendix D, response to the Term of Reference concerning the making of consent orders)
- legislative and case law developments
- LGBTIQA+ literacy
- disability competency
- strengths-based training
- child inclusive practice, and
- child informed training.

Additional areas of training for FDRP's might include:

- child development
- attachment theory
- family violence (including technology facilitated abuse and image based abuse)
- family dynamics
- high conflict

- parental alienation
- signs and symptoms of mental health issues (suicidal ideation, depression etc), and
- understanding of drug and alcohol addiction.

The recent increase in practice hours to complete FDRP qualifications goes some way in improving competency for emerging FDRPs.

Judges

Relationships Australia acknowledges AGD's efforts to support ongoing training and skills development for professionals working in family law, notably including the *National Domestic and Family Violence Bench Book*, and the judicial training programme intended to complement it. Financial support has been provided to the National Judicial College of Australia to develop training packages for judicial officers, on the nature and dynamics of family violence, and the specific matters judges should consider in dealing with matters involving family violence.

Relationships Australia notes the Constitutional impediments to requiring judges to undergo ongoing training after receiving their commissions.

Family violence

AIFS has found that previous reforms to family law have had limited effects on professionals' (especially lawyers') responses to disclosures of family violence and safety concerns. AIFS found that where parents relied on lawyers and courts for making parenting arrangements against a background of family violence or safety concerns, they were, on average, just as likely after reform as before reform to indicate that they did not consider the professionals' responses to their concerns to be adequate. It is widely acknowledged that there is a need to strengthen the skills of all family system professionals in identifying and understanding the dynamics of family violence.

Relationships Australia supports decision-makers taking an active role in protecting vulnerable witnesses; this would include protections from being personally cross-examined (or having to personally cross-examine) a perpetrator of family violence. Judges should receive training on incorporating into their court craft trauma-informed practice and family violence dynamics to enable them to provide effective protection. Ideally, individuals should not receive judicial commissions unless they have already demonstrated, in their prior practice, an understanding of these issues.

Family consultants

Family Consultants can spend only a tiny window of time with the family and run the risk of shallow observations and conclusions based on assumptions and speculation. This is not a slight on Family Consultants; it is the limitation of the timeframes within which they work. Further, they are often involved quite late in any court process, and are placed in the invidious position of having to work from a set of weighty assumptions based on limited information, to provide advice with far-reaching implications.

FDRPs and FLPNs

FLPN's often host professional development events for FDRPs across Australia. The FLPN encourages organisations and legal professionals who assist families experiencing separation to network, share ideas and information and also to collaborate around training and common issues which our clients our experiencing. At a time when clients may be

accessing multiple services, this can prove invaluable. FLPNs have particular value in regional and remote communities, offering training which otherwise might be inaccessible, due to location and prohibitive costs of travel and accommodation.

FDRPs should be recognised and compensated for the complex work that they do through increases in salary (ie more funding for FRC's to pay at a higher level), and consideration for how FDRPs have ongoing professional development. In regional areas, it is difficult to recruit FDRPs, particularly when NGOs are not able to match government salaries.

Question 42 What competencies should be expected of judicial officers who exercise family law jurisdiction? What measures are needed to ensure that judicial officers have and maintain these competencies.

See the answers to Questions 34 and 41.

Question 43 How should concerns about professional practices that exacerbate conflict be addressed?

Relationships Australia considers that the proposals outlined at paragraph 283 merit consideration by government. However, attention needs to be paid, in developing funding envelopes, to the cost burden on service providers of providing training and maintaining accreditation.

Relationships Australia considers that increased use of inquisitorial, rather than adversarial, processes would go a considerable way to remove institutional and systemic incentives to prolong and exacerbate conflict.

Question 44 What approaches are needed to promote the wellbeing of family law system professionals and judicial officers?

It is important to acknowledge the high potential for burnout and vicarious trauma for those working in conflict situations every day.

Clinical supervision is at the core of supporting staff of Relationships Australia to provide services in a safe and appropriate way in their communities. Effective supervision relies on an honest reflection on practice and an opportunity to learn from successes and challenges. Relationships Australia New South Wales also offers to its clinical staff training in how to most benefit from supervision. Trauma-informed practice training, as well as staff well-being days, are offered to staff in Relationships Australia New South Wales. Relationships Australia considers that legal professionals should also be required to participate in clinical supervision, to ensure that the development of their practice meets contemporary standards.

Relationships Australia Northern Territory, for example, provides staff with an annual Wellbeing Allowance to encourage healthy work/life balance. Vicarious Trauma training is also given to pertinent staff with recognition that Aboriginal staff may receive additional benefit through techniques such as connecting to country.

Governance and accountability

Question 45 Should s 121 of the *Family Law Act* be amended to allow parties to family law proceedings to publish information about their experiences of the proceedings? If so, what safeguards should be included to protect the privacy of families and children?

A principal assumption underlying the 1975 Act was that divorce should be treated as a private matter (remembering that, at the time, divorce proceedings were covered in the media, which could and – particularly with public figures – did, identify the parties). Advocates for change took the view that conducting divorces in the public gaze, and requiring proof of fault on one of the adult parties, was unedifying for the community and demeaning to the families concerned. However, an increasing appreciation of the very real public interest in preventing family violence, 'calling it out' when it occurs and addressing it as a public matter, raises the question of whether section 121 is a measure which provides reasonable protection of privacy, balanced with appropriate accountability and, where necessary, law enforcement.

Relationships Australia considers that there needs to be legislative protection – which is properly enforced – for the privacy of families, especially children. In the absence of such protection, traditional and social media will exploit intensely private matters for public consumption, as the *Courier Mail* did in 2012, in its coverage of an international parental child abduction matter. The paper's coverage of that case included a front page displaying photographs and names of the children. In a rare instance of enforcement, the *Courier Mail* was prosecuted and fined for its conduct.[183] The case reinforces the point that the confidentiality and privacy which the 1975 Act sought to bring to bear cannot be taken for granted as a fixed social parameter.

Nevertheless, Relationships Australia would support proposals to enhance transparency of how family disputes are dealt with in the court system, provided that there were rigorous and readily enforceable safeguards.

[183] See correspondence from the then Chief Justice of the Family Court, the Hon Diana Bryant AO, to the Committee Secretary of the Senate Legal and Constitutional Affairs References Committee, 28 March 2014, in relation to its inquiry into the current investigative processes and powers of the Australian Federal Police in relation to non-criminal offences. Available at www.aph.gov.au.

Question 47 What changes should be made to the family law system's governance and regulatory processes to improve public confidence in the family law system?

Relationships Australia considers that current governance and regulatory processes which apply to various professional groups in the family law system do not enjoy sufficient public confidence or support. Often, regulatory bodies are seen as being resistant to hearing, or effectively investigating, complaints against members and as reluctant to impose effective sanctions. Should the recommendations around multi-disciplinary and co-located services be adopted, it would be of value to establish an overarching independent regulatory body with oversight of all participating professionals.

Further, Relationships Australia strongly supports the re-establishment of the Family Law Council, perhaps as a standing body with statutory responsibilities for providing governance mechanisms, or at least regular advice to Government on the efficacy of governance mechanisms.

B.5 Other issues

B.5.1 Research and data – generation, funding, use, and public education and awareness

In his consideration of whether the 1975 Act had achieved the aim of 'dignified divorce' aimed for by Lionel Murphy, Moloney notes that, in the 1970s, 'virtually no data existed' on a range of indicators, including the efficacy of support services[184] or the characteristics of separating couples.[185] Undoubtedly, the position in 2018 is much improved on this front; family law is extensively researched, benefiting from the attention of researchers from diverse disciplines.

Yet it is also the most extensively mythologised in popular thought, partly due to persistent polarisation around fault lines such as gender and conservatism / progressive politics, as well as increased exposure and credence given through social media to advocates who reject the legitimacy of research methodologies and the 'cult of the expert'. As noted by Professor Chisolm,

> The glimpses we get from reported cases suggest that many cases that are agreed between the parties might well be the result of bargaining in the shadow of a misunderstood law.[186]

With a law of such fundamental importance to people's daily lives, this is of serious concern.

A particularly pressing research need is for longitudinal research that evaluates all pathways followed by families through the family law system. Only real data can answer the misinformation and partisan agendas that circulate in the community. Extreme case examples are too often elevated to the status of truth, 'common sense', or received wisdom when in fact they are used simply to support a particular biased agenda. A prospective study could usefully follow a cohort through the separation process and measure impact and outcomes – and, invaluably, comment on the long-term outcomes for children.

B.5.2 Intergenerational conflict and elder abuse

The report by the ALRC, *Elder Abuse – A National Legal Response*,[187] was launched on 15 June 2017, and made 43 recommendations.

Relationships Australia is of the view that intergenerational family relationships, and disputes emerging from them, need to be part of the design of a new system to support Australian families. As noted throughout this submission, 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, with variable success, 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. 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, from scratch, to ensure that we are equipped to support families to deal with

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[184] Such as the counselling services contemplated by the Act from its passage.
[185] Moloney, 247.
[186] Chisolm, 2015, 25.
[187] ALRC Report 131, *Elder Abuse – A National Legal Response*.

the pressures and conflicts of which we are increasingly aware, and which can cause such ongoing harm and distress.

Relationships Australia is currently providing FDR services to families where there are disputes as to care arrangements for older family members, and to assist developing financial agreements. Relationships Australia has recently run a pilot of Elder Relationships Services, the evaluation of which will be published shortly. In brief, the pilot offered services including:

- counselling
- capacity building and support
- information
- education
- supported referral to police or other specialist legal services.

Where appropriate, the Program supported family meetings, often co-facilitated with a counsellor and a mediator.

PART C APPENDICES

APPENDIX A

THE 'FAMILY AXIS' APPROACH

BEYOND THE *FAMILY LAW ACT 1975* –SAFE, TIMELY, SUSTAINABLE SUPPORTS FOR FAMILIES IN CONFLICT

As noted in our response to Question 1, modern Australian families experiencing conflict should have access to a system which supports:

- healthy whole of family relationships (including intergenerational and adult sibling relationships) throughout the life span
- families to stay together or separate in a way that focuses primarily on the safety, development, and other needs of children, including the establishment of safe and healthy co-parenting relationships, with functional communication and conflict prevention/resolution skills
- financial and economic recovery and stability of separating adults (including ongoing social and economic participation as well as an appropriate division of resources and debt), and
- an appropriately trained and equipped professional workforce.

In our response to Question 2, Relationships Australia expressed its support for the idea of overarching principles to guide reforms; in particular, Relationships Australia endorses:

- giving the widest possible protection and assistance to family relationships
- affording safety to those affected by family conflict and violence
- assisting families to resolve conflict safely and in a way that preserves meaningful relationships, and
- supporting the principles outlined at paragraphs 43 and 44 of the Issues Paper.

In addition, Relationships Australia argued that a contemporary system designed to support family relationships, and support families when those relationships are breaking down, should be designed according to the following principles:

- holistic and integrated design from and around the needs of families, not around existing legal, jurisprudential, administrative, funding or single-disciplinary structures, distinctions and hierarchies; Relationships Australia respectfully suggests that the ALRC refer to expertise in industrial design and 'user-based' design for advice on how this might be approached
- that services (including decision-making mechanisms) be therapeutic in their aim and effect, and accommodate and respond to the enduring, rather than 'one off' nature of many family conflicts
- that services, especially decision-making mechanisms, be non-adversarial
- as a corollary of the preceding point, that families are supported before, during, and after separation
- 'front-loading' costs through prevention, early intervention, capacity-building within families, and follow up
- offering pathways and services 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 vindication)

- that there be no wrong door and one door only and, as an enabler of this principle, that service integration and collaboration happen at the organisational level[188]
- that services be available on the basis of universal service and accessibility,[189] and
- above all, that the well-being and healthy development of children remains paramount (and, as a corollary, will prevail over the rights and interests of adults).

With these considerations in mind, Relationships Australia advocates the establishment of a new and radically different suite of arrangements, called the Family Axis approach, in which therapeutic services and decision-making mechanisms would stand as co-equal pillars to support families to stay together or to separate safely and healthily. These notions are by no means novel; as argued elsewhere in this submission, they could fairly be said to have underpinned not only the conception, over a decade ago, of FRCs, but also to have underpinned the Act as originally formulated in the 1970s.

Therapeutic services would operate collaboratively across disciplines, and be integrated seamlessly and invisibly to the end users, who could be assisted by a continuum of intervention from referrals and the provision of information to navigation assistance to full case management, depending on their needs and capacities. Child-inclusive practice would be assumed, and child safety and healthy development the prevailing consideration. Families would be offered preventative, crisis and ongoing services, and providers would be expected to offer support and education to build families' capacities. In addition, users would be able to choose the medium by which they engage with services: online, offline or a combination.

Decision-making mechanisms would no longer be tied to, or based on, an adversarial justice approach. This may require a fundamental shift in responsibility from federal to state courts, to overcome Chapter III issues. While this would be a radical change, to the extent that constraints flowing from Chapter III inhibit safe, timely and integrated responses to vulnerable families (particularly children), then Relationships Australia considers that it is merited.

The Family Axis approach

The Family Axis approach advocated by Relationships Australia in this submission is comprised of:

1. integrated, multi-disciplinary services, and
2. decision-making services (including existing decision-making pathways and, wherever possible, accessing inquisitorial rather than adversarial mechanisms).

The Family Axis approach would be supported by legislative amendment, court reforms and a national, integrated funding model.

Family Axis Services would be multi-disciplinary, incorporating features of existing FRCs, health justice partnerships and domestic violence units and delivered through service delivery hubs. In this submission, the 'hub concept' of service is flexible and deliberately non-prescriptive - hubs must take a range of forms to meet the needs, circumstances and exigencies 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-

[188] See Council's recommendations in its 2016 report, especially recommendation 1.

[189] 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.

professional collaboration, or they may combine any or all of these. The essential parameters of the 'hub', for the purposes of this submission, are:

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

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 therapeutic space. They could be totally or partially co-located with existing services, such as FRCs 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. The Hubs should be designed with regard to the features noted in the response to Question 13. Like the Collingwood Neighbourhood Justice Centre,[190] physical Hubs could also offer space after hours for community activities, enhancing their utility and image as community resources.

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 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 means for collaboration, joint training and service provision. Other models are also being explored.[191]

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, based on an 'all hazards' approach, and identification, triage, warm referrals and safety planning
- children's advocacy centre (CAC) or Barnahus-type facilities for children who have been affected by violence or sexual abuse[192]
- case-management for families with co-occurring needs
- Aboriginal and Torres Strait Islander workers

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

[191] See, for example, the recently-announced New South Wales trial in which family violence survivors will be housed in purpose-built units with access to on-site support where providers can come to them, as well as access to other social amenities: Anna Caldwell, 'Female domestic violence victims given two-bedroom units to live in, Daily Telegraph, 1 May 2018, quoting the New South Wales Minister for the Prevention of Domestic Violence, the Hon Pru Goward MP.

[192] 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 Barnhus 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/.

- CALD workers
- mental health services
- legal practitioners to provide early advice and urgent legal/safety responses
- social workers
- child development professionals
- psychologists
- financial counsellors[193]
- addiction counselling
- behavioural change programmes
- housing assistance
- an embedded Centrelink presence
- existing FRC services (including FDRPs and FGC)
- 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, [194] children's court jurisdictions and adult guardianship and mental health jurisdictions[195]
- space for circle courts
- facilities for service users to access, in safety and privacy, online information and online services (including online services).
- information-sharing databases for professionals, allowing them real time access to relevant information, especially about safety, from any Australian jurisdictions.

Ongoing rather than one-off service delivery

Research increasingly identifies the need to use a multiple session approach with families who are participating in FDR. However, legal systems tend to be based around 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. 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. Examples of this kind of practice are already at work – in existing multiple session models, clients are given the opportunity to trial an agreement which may span only a few weeks, or a month, before attempting to extend the agreement beyond that timeframe. This, in turn, affords the opportunity to re-establish safe and respectful communication, and to acknowledge the important role that the other parent may play in their 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.

Measuring outcomes

[193] 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.

[194] 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.

[195] 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.

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 are inherently difficult to define and measure, 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).[196] The conceptual framework for measurements could be one of well-being. As noted in our submission to the KPMG Report (see Appendix E), Relationships Australia does not support an approach that ties funding to outcomes that KPMG acknowledges are difficult to measure.

Reform of the Act to support the Family Axis approach - a therapeutic/social services-centred paradigm

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 and judicial decisions are pillars of an overall network of support for families, separating and intact, and thus sit alongside an array of services and decision-making pathways. A new Act would be drafted with provisions to achieve the objectives described in the response to Question 1 and informed by the principles canvassed in the response to Question 2. The legislation should include simplified decision-making pathways that are proportionate to families' needs and resources, and that accord safety, and children's voices, central importance.

Reform of the family courts

Reform of the family courts[197] is a necessary precondition to effective transformation from the current family law system to a family services system, if family disputes remain in the federal jurisdiction. Elements of better court service delivery include:[198]

- at a minimum - better resourcing state and territory courts to exercise family law jurisdiction when dealing with families in relation to state or territory matters, using inquisitorial, rather than adversarial, processes
- enhanced judicial training across a range of domains, identified in the responses to Questions 41-44, and including training in hearing children's voices
- conferring 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)
- improved supports for vulnerable witnesses, and
- consequences for misuse of the court system.

Conclusion

Proposals to reform laws affecting families will always elicit strong, polarised reactions. Often, these are around gender or political fault-lines with insufficient focus on the overarching needs for families in dispute to access services which are safe, simple, timely, resource-proportionate and, most important, child-focused. Those critiques have regrettably and for too long stifled constructive discussion and reform, at the expense of the well-being of Australian children and their families.

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[196] Cf Appendix E.
[197] Other than the Family Court of Western Australia.
[198] See also section 10.2.

Other objections to reforms of family law are based on (1) the misleading conflation of co-occurring economic, psycho-social and medical needs with legal complexity, and (2) the assumption that a system to deal with familial conflict must, *a priori*, be a system which has as its central job the adjudication of relative rights and responsibilities. In that paradigm, lawyers must, necessarily, be the key advisors and judges must, necessarily, be the key decision-makers. If, however, an alternative paradigm (such as the Family Axis approach) is recognised, and new systems built around it, then the legal perspective ceases to be the central and defining lens. It becomes, rather, an important – but not central – adjunct and enabler that sits beside clinical and social services as a pillar to support families to make decisions while intact, and before, during and after separation. Further, if child safety and healthy development is treated as the primary consideration, questions about justice as between adult parties, and provision of the necessary procedural accoutrements to provide that, lessen in significance relative to facilities to identify risks to children's safety and healthy development, to respond to those risks, and to hear children's voices.

Modifications and amendments of the existing arrangements, however well-intentioned and even if fully funded without offsets, are unlikely to meet the community's needs and expectations. The system is already at crisis point; merely altering its parameters won't fix that. Merely injecting money into the court system, legal assistance providers and other service providers, won't be adequate. Families are suffering and in despair. A new paradigm is urgently needed, one with families at the centre and which accords substantive paramountcy to the well-being and healthy development of children.

APPENDIX B

MISCELLANEOUS SHORT AND MEDIUM TERM REFORMS

Family dispute resolution services[199]

- amend regulation 25 of the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* to clarify that the intake and assessment processes undertaken by an FDRP form part of the confidentiality and inadmissibility protections provided under s10H and s10J of the Family Law Act. This amendment would address the comments made by Reithmuller J in *Rastall and Ball* [2010] FMCA Fam 1290, and more recently by Harman J in *McDougall & McDougall* [2017] FCCA 2907, to the effect that the FDR intake processes do not fall under the protection of these sections. A fundamental element of the FDR process is to undertake an intake process, including an assessment as to whether the matter will be suitable for a joint session, and/or whether there would be benefit from participating in therapeutic programs before attending the joint session. The suggestion that this part of the process does not fall under the confidentiality and inadmissibility provisions of the Act poses an anomaly where potentially parts of an FDRP's file could be subpoenaed while other parts of the file would be inadmissible
- amend the Act to put interdisciplinary collaborative practice on equal statutory footing as FDR (perhaps through piloting a subsidised scheme)
- roll out FASS, with particular reference to including investment for men's programmes
- amend the Act to require families to undergo FDR for property matters, with exemptions and funding provisions analogous to FDR for parenting matters.

The courts

- include misuse of process as a form of abuse in family law matters.[200]
- re-invigorate the consistent and national use of the Less Adversarial Trial provisions
- develop a national database of court orders[201]
- co-locate child safety services, and other therapeutic services, with courts and other services
- increase circuiting of first instance family law judges and locating registry staff in state and territory courts (including magistrates' courts and specialist domestic violence courts)
- develop continuing joint professional development programs, bringing together judges, lawyers, and service professionals
- 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)
- improve supports for vulnerable witnesses, and
- amend the Act to provide for consequences for misuse of the court system
- improve enforcement mechanisms and funding for enforcement[202]
- fund the courts to employ family consultants who would 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

[199] See also the response to Question 15.

[200] See also the response to Question 25.

[201] See also the response to Question 33.

[202] 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.

Children and young people[203]

- as recommended by the Family Law Council, establish a young person's advisory panel to assist in the design of child-focused family law services that build on an understanding of children's and young people's views and experiences of the family law system's services.
- also as recommended by the Family Law Council, consult with children and young people as key stakeholders in developing guidelines for judges who may choose to meet with children in family law proceedings
- amend the Act to require that decision-makers 'hear the child's voice'
- amend the Act to establish child advocates to provide more holistic and child-inclusive services than are currently provided by ICLs (eg to prepare the child to engage with decision-making processes in a culturally safe and developmentally appropriate way, to explain the outcomes of the decision-making processes, and to co-ordinate ongoing services for the child)
- establish an accreditation scheme for child consultants, similar to the FDRP accreditation scheme
- regulate children's contact services and develop them to offer to families an array of capacity-building services
- continue research on child-inclusive practice

Family violence

- secure passage of the Family Law Amendment (Family Violence and Other Measures) Bill 2017
- amend the definition of family violence in the Family Law Act to expressly include technology facilitated abuse and image based abuse.[204]

[203] See also answers to Question 34, 35, 36, 37.

[204] See also the response to Question 14.

APPENDIX C

ABBREVIATIONS

AGD means the Commonwealth Attorney-General's Department

AIFS means the Australian Institute of Family Studies

CCS means Children's Contact Service

CFDR means Co-ordinated Family Dispute Resolution

CLC means community legal centre

DSS means the Department of Social Services

Family courts means the Family Court of Australia, the Federal Circuit Court of Australia and the Family Court of Western Australia

FRAL means the Family Relationships Advice Line, a service run by Relationships Australia Queensland and culshaw miller lawyers, a member of the hunt & hunt legal group

FDR means Family Dispute Resolution

FDRP means Family Dispute Resolution Practitioner

FGC means family group conferencing

FLPN means Family Law Pathways Network

FRC means Family Relationship Centre

FRSA means Family and Relationships Services Australia

ICL means Independent Children's Lawyer

KPMG report means the 2016 report by KPMG to AGD about the future focus of family law services

LACA FDR means the pilot of legally assisted and culturally appropriate FDR

PMH means Parenting Management Hearings

SPLA inquiry means the 2017 inquiry by the Social Policy and Legal Affairs Committee of the House of Representatives into a better family law system to support and protect those affected by family violence