

OVERVIEW OF CHANGES IN THE LAW

**Australian Law Reform Commission
discussion paper
Review of the Family Law system**

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The Australian Law Reform Commission Discussion Paper on the Review of the Family Law System was released on 2 October 2018. The Discussion Paper is over 300 pages, asks 33 questions and makes 124 proposals for changes to the family law system. Many other proposals and suggestions are embedded in the Discussion Paper and are not part of the specific proposals. This article is selective and does not aim to give a complete summary of all the proposals.

The ALRC asks for submissions in response to the Discussion Paper by 13 November 2018. Submissions should be emailed to familylaw@alrc.gov.au. The Discussion Paper can be obtained from the ALRC website www.alrc.gov.au.

Terms of Reference

On 27 September 2017, the then Attorney-General George Brandis announced a review of the Family Law Act 1975 (FLA) and stated that it was "the first comprehensive review of the FLA since its commencement in 1976. He announced 15 Terms of Reference, including:

- *The appropriate, early and cost effective resolution of all family law disputes;*
- *The protection of the best interests of children and their safety;*
- *Mechanisms for reviewing and appealing decisions;*
- *The underlying substantive rules and general principles in relation to parenting and property.*

Other Terms of Reference cover such matters as family violence (mentioned three times), the adversarial court system, the integration of the family law system with other Commonwealth state and territory systems, rules of procedure and improving the clarity and accessibility of the law. There is a catch all Term of Reference of "any other matters related to these Terms of Reference".

Interestingly, there is no express reference to child support - which is a fundamental part of family law and continues to impact on families and children for many years after the parents have resolved their property disputes and the Discussion Paper does not deal with it. There is also no express mention of the structure of the Family Law Courts which has been long recognised as problematic. The proposed restructure of the Family Court and the Federal Circuit Court is aimed at "increasing efficiencies and reducing delays" (para 1 of the Explanatory Memorandum to the Federal Circuit and Family Court of Australia Bill 2018) which addresses the first term of reference.

The proposed restructure is also relevant to specific Terms of Reference such as the appealing of decisions and whether the adversarial court system is the best way to support the safety of families and resolve matters in the best interests of children.

The ALRC in its Issues Paper released in March 2018 recognised these 2 deficiencies and also matters of State and Territory responsibility and the child protection system. It said (at para 5):

However, as these issues are so closely related to and frequently interact with the family law system, concerns about the intersections and cooperation between these systems are matters that the ALRC will consider in the course of this Inquiry"

Unfortunately it did not consider or make proposals about the proposed court restructure or child support at all.

Simpler and clearer legislation

The Discussion Paper proposes that the FLA and its related the Rules and Regulations be comprehensively re-drafted with the aim of simplifying them and making them easier for the families who need to use it to read. More specific recommendations include:

1. Using ordinary English. (Part of Proposal 3-1)
2. Restructuring the FLA, particularly the parenting provisions. The more important provisions for clients should be first, similar issues grouped together and the FLA renumbered in a way which allows for future amendments. (Part of Proposal 3-1)
3. Removing parts of the FLA such as those relating to the Australian Institute of Family Studies and parentage to separate legislation. The objective is to make the FLA shorter and more accessible for clients and provides the opportunity to re-draft the parentage provisions in a way which is consistent with state and territory laws and gives greater recognition of parentage in addition to non-nuclear family forms and children born under surrogacy arrangements that cannot be the subject of a parentage order under State or Territory surrogacy legislation. (Part of Proposal 3-1)
4. Changing terms such as "parental responsibility" to "decision making responsibility", "affidavit" to "witness a statement" and "subpoena" to "order to produce information". (Proposals 3-6, paras 3.19 and 3.20)
5. Making better use of the Rules, Regulations, information materials and other documents by removing parts of the FLA, such as the obligations on professionals and other system participants to explain certain matters to shorten the FLA and provide greater flexibility. (Part of Proposal 3-1, paras 3.9, 3.11)
6. Reviewing all forms to improve usability including -
 - 6.1 A single set of forms for all courts exercising FLA jurisdiction;
 - 6.2 Using smart forms which pre-populate information from previously completed forms;
 - 6.3 Using more check-boxes;
 - 6.4 Retaining paper forms for those individuals without access to technology. (Proposal 3-2)

The proposals to restructure the FLA and re-number it are sensible, although the changeover will be painful for legal professionals and others, particularly when referring to judgments delivered before the change. One example of the complexity of the numbering is that there are approximately 120 sections commencing with s 90 and of course numerous subsections of these, beginning with s 90 and ending with s 90MZH. The section 90s cover a broad range of financial matters, stamp duty, orders and injunctions binding third parties, financial agreements, de facto relationships and superannuation interests. A significant proportion of the FLA is squashed into s 90. There are also over 25 section 66s covering parenting and child maintenance.

Whilst the readability of the FLA for clients is an admirable and sensible objective, placing parts of the legislative regime in a greater number of legislative instruments than already exist and forcing clients, legal professionals and others to refer more frequently to other legislative instruments, arguably makes the law less accessible.

Re-writing the parentage provisions in consultation with the States and Territories is an excellent idea - to ensure consistency of the definition of a parent throughout Australia, fill in gaps created by changes in society and technology, and create one comprehensive piece

of legislation which applies for all purposes throughout Australia. To achieve this will, though, require a high degree of co-operation between the States, Territories and the Commonwealth, probably a referral of powers by the States and Territories and consideration as to whether and how the States and Territories can still retain jurisdiction with respect to surrogacy, registration of births and artificial reproduction procedures. It will be an ambitious and challenging undertaking if it proceeds.

Parenting arrangements

The ALRC noted that the current law imposed a complex pathway for decision-making in parenting matters when determining what arrangements will best promote a child's best interests. The ALRC's proposals include:

1. Review of the best interests principle in s 60CA FLA that the child's best interests must be the paramount consideration. Instead, it is proposed that the paramount consideration be "safety and best interests". (Proposal 3-3)
2. The objects and principles of Part VII in s 60B be amended. For example, the existing s 60B(a) and (b) currently read -

"(a) Ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and

(b) Protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence."

The proposed equivalent provisions are -

"· arrangements for children should be designed to advance the child's safety and best interests;

· arrangements for children should not expose children or their carers to abuse or family violence or otherwise impair their safety;

· children should be supported to maintain relationships with parents and other people who are significant to their lives where maintaining a relationship does not expose them to abuse, family violence or harmful levels of ongoing conflict." (Proposal 3-4)

3. Replacing s 60B (which sets out the objects and principles of Part VII (Children) and has inconsistencies with s 60CC) with a new set of principles that largely focus on safety and family violence. (Proposal 3-4)

4. A shorter version of s 60CC with 6 factors rather than 15, which will still have as the final factor "anything else that is relevant to the particular circumstance of the child". (Proposal 3-5)

5. Codify *Rice & Asplund* (1979) FLC 90-725 so that the FLA is clearer as to the circumstances when the court may discharge, vary or revive parenting orders under s 65(2). Clients are unlikely to be aware of the limitations and constant re-litigation about parenting arrangements is unlikely to be in the best interests of the child. The new section would state that in considering whether to allow a new application, consideration should be given as to whether:

- there has been a change of circumstances that, in the opinion of the court, is significant; and
- it is safe and in the best interests of the child for the order to be considered. (Proposal 3-8)

The proposal to reform the paramount interest principle could have unintended consequences. Family violence must already be considered in determining the arrangements which are in the best interests of a child. There are two primary considerations (s 60CC(2)) as well as additional considerations (s 60CC(3)) which are:

"(a) The benefits to the child of having a meaningful relationship with both the child's parents; and

(b) The need to protect the child from physical or psychological harm, from being subjected to, or exposed to, abuse, neglect or family violence."

Family violence is also considered expressly or implicitly in some of the additional considerations (e.g. s 66C(3)(f), (i), (j), (k) and (l)).

The ALRC (at para 3.42) posits that the proposal "may not significantly affect the reasoning that should be applied in deciding litigated disputes". The intention is to send a "strong message" to families of "the centrality of safety to a child's best interests". The unintended consequences which may occur include:

- *Courts may interpret the legislative changes as intending to effect change in meaning and outcomes. Why else change s 60CC when family violence is already given considerable importance?*
- *The importance of a child having a meaningful relationship with both parents is likely to be interpreted as less important than it was before the change. There are, of course, families where the degree or nature of family violence means that a "meaningful relationship" between a parent and child is impossible. However, there are many cases where a "meaningful relationship" is possible and indeed desirable.*
- *Prioritising family violence over a meaningful relationship with a child may produce new generations of children who develop mental health and other problems because they lack the sense of belonging and identity which arises from knowing both parents, albeit flawed parents.*
- *Without any research statistics about how many clients actually read the FLA or what understanding clients have of the existing structure of s 60CC, the proposed change may not be necessary and may not have the intended effect.*

The shorter version of s 60CC will avoid the necessity for parties (and judges) to feel obliged to address all of the existing s 60CC factors, thereby reducing legal costs. The ALRC discussed a simpler pathway for determining parenting disputes (paragraphs 3.36-3.37) but did not make a specific recommendation to do so. Professor Chisholm's proposals which were published in "re-writing Part VII of the Family Law Act: A Modest Proposal" (2015) 24(3) Australian Family Lawyer 17 is footnoted, but not discussed in detail.

Property division

The ALRC recommended that the property provisions be simplified and clarified, and that there be better responses to family violence.

The ALRC also recommended that further research on property and financial matters after separation including property adjustment after separation, spousal maintenance and the economic wellbeing of former partners and their children after separation was required. This would be an update of research done by the Australian Institute of Family Studies (AIFS), such as the 1986 "Settling up" Report and the AIFS 2016 Longitudinal Study of Separated Families Wave 3. The latter study showed on average that mothers received 57% of property pools. There was significant variation among couples but the most important factors affecting the share of property received were:

- The size of the asset pool, with larger asset pools associated with both mothers and fathers reporting that they received a lower proportion of the asset pool (with the pattern being stronger for mothers);
- Who initiated the separation, and who left the house, with the person who initiated the separation receiving a smaller share of the property;
- A history of family violence, with experiencing family violence being associated with receiving a lower share of property division;
- Care/time arrangements, where parents who had majority care of a child receiving a
- Higher share of the property pool.

The ALRC's proposals include:

1. Amend the FLA to more clearly articulate the process used by the courts for determining the division of property. (Proposal 3-10)
2. Require courts to take into account the effect of family violence on a party's contributions and on the future needs of a party. (Proposal 3-11)
3. Undertake further research discussed above (Proposal 3-12) to inform further policy development in the area (para 3.98) including whether there should be a shift from a discretionary system to a prescriptive system in property settlements. (para 3.106)
4. Work with the financial sector to develop protocols for dividing debt on relationship breakdown to avoid hardship for vulnerable parties including for victims of family violence. (Proposal 3-13)
5. Work with the finance sector to make it easier for parties to draft their own superannuation splitting orders. (Proposal 3-17)

The ALRC considered research was required on outcomes for parties with respect to spousal maintenance, property and financial matters and the economic wellbeing of families after separation. Again, child support was not mentioned, but presumably this needs to be included. If there is insufficient research to make substantive proposals for an overhaul of the property and maintenance provisions of the FLA at this time, it seems sensible to defer any tinkering with the FLA until this research has been done.

University of Melbourne academics Belinda Fehlberg and Lisa Sarmas, in their thought provoking submission to the ALRC, supported retention of the discretionary framework, but proposed that different factors be considered:

- *the housing requirements of dependent children;*
- *the material and economic security of the parties;*
- *whether adjustments should be made as compensation for relationship-based loss;*
and
- *equal division of any surplus. (para 3.104)*

Further research would enable these and other options to be considered in more depth.

Making it easier for parties to argue that an alteration of property interests take into account past family violence than occurs currently under the principle in Kennon & Kennon (1997) FLC 92-757 may have some merit, but may increase litigation rather than reduce it, which is contrary to the objectives of the Review.

The proposal to work with the financial sector to develop standard superannuation splitting orders is well overdue. This will not only make it easier for unrepresented parties to have superannuation splitting orders, but will also make legal costs cheaper for represented parties. Each fund has its own preferred wording but there are usually no substantive differences. At least in relation to accumulation funds, which are the majority of superannuation funds, the differences in preferred orders relate more to differences in legal advice given to the funds and personal preferences rather than any real difference in the needs or practical operation of the funds.

Financial agreements

The ALRC considered that there was significant anecdotal evidence to conclude that financial agreements did not produce the level of certainty that was originally envisaged when they were introduced. There was growing concern within the legal profession about professional liability associated with drafting financial agreements if they were eventually set aside, and the difficulties in predicting the circumstances that may lead to a financial agreement being set aside. There were serious questions about whether the financial agreement provisions of the FLA, particularly in relation to prenuptial agreements, were meeting their original policy objectives, and why amendments to the FLA to allow them to do so were possible without unacceptable unintended consequences. The ALRC said that there seemed to be a reasonable case that prenuptial agreements should be removed from the Act.

The ALRC discussion paper asked in relation to financial agreements which, if any, of the following approaches should be adopted to reform the financial agreement provisions in the FLA:

- (a) Amendments to increase certainty about when financial agreements are binding;
- (b) Amendments to broaden the scope for setting aside an agreement where it is unjust to enforce the agreement, for example, because there has been family violence, or a change of circumstances that was unforeseen when the agreement was entered into;
- (c) Replacing existing provisions about financial agreements with an ability to make court-approved agreements; or
- (d) Removing the ability to make binding prenuptial agreements from the FLA and preserving the operation of any existing valid agreements. (Question 3-3)

Clearly, financial agreements are problematic and reform should be considered. It is probably correct to say that the original policy objectives of financial agreements are not being met. Abolishing financial agreements altogether would, though, be a major change. It is unfortunate that the ALRC, while seeking answers to the questions it posed about the future of financial agreements, did not devote more than 3 pages to the topic and give more detail about the submissions it received.

Spousal maintenance

The ALRC considered submissions which suggested that spousal maintenance provisions were underutilised in circumstances where there was clear evidence that family breakdown leads to financial hardship from which women take longer to recover than men.

The ALRC proposed:

1. A dedicated spousal maintenance version of s 75(2) including a requirement that the court consider the impact of any family violence on the ability of the applicant to adequately support themselves. (Proposal 3-18)
2. A requirement that the impact of any family violence on the ability of the applicant for spousal maintenance to adequately support themselves be a consideration in s 75(2). (Proposal 3-19)

In Question 3-4 the ALRC asked what options should be pursued to improve the accessibility of maintenance to individuals in need of income support. Consideration could be given to, for example:

- Greater use of registrars to deal with urgent applications;
- Administrative assessment.

Redrafting the spousal maintenance provisions to more clearly set out for readers the process for assessing spousal maintenance and remove the cross-reference between property orders and spousal maintenance is proposed at paragraph 3.168, but this is not a definite proposal. This seems to be a sensible suggestion, although it would make the FLA longer, not shorter, which is inconsistent with Proposal 3-1.

The Discussion Paper did not deal with child support. The ALRC made recommendations about spousal maintenance but it managed to do this without making reference to the changes in the child support formula which have reduced the amount payable, and how these changes have impacted on the financial circumstances of primary caregivers and the capacity of primary income earners to pay spousal maintenance.

Getting advice and support

To address the complex needs of many families and the fragmentation of services, the ALRC proposed:

1. Community-based family hubs should be operated by the federal government in conjunction with State and Territory governments to provide separating families and their children with a visible entry point for accessing a range of legal and support services. (Proposal 4-1)
2. The hubs should include on-site out-posted workers from a range of relevant services including:
 - Specialist family violence services;
 - Legal assistance services (such as community legal centres);
 - Family dispute resolution services;
 - Therapeutic services (such as family counselling and specialised services for children);
 - Financial counselling services;
 - Housing assistance services;
 - Health services (such as mental health services and alcohol and other drug services);
 - Gambling help services;

- Children's contact services; and
 - Parenting support programs or parenting education services (including a program for fathers). (Proposal 4-3)
3. Expansion of the family advocacy and support service (FASS) in each State and Territory to include information and referral office is providing triage, a family violence specialist legal service and support service and an additional legal service and support service to assist clients who are alleged to have used family violence and clients who are not affected by family violence but have other complex needs. (Proposal 4-5)

The above proposals are arguably idealistic. They may be "best practice", but they require significant expenditure by the Federal Government and State and Territory governments. Such expenditure is likely to be difficult to achieve in the current climate.

Dispute resolution

Building on the success of family dispute resolution (FDR) in parenting which is reflected in the reduction in court filings in children's matters by 25%, the ALRC proposed:

1. Compulsory FDR for property and financial matters prior to instituting proceedings except in a limited range of exceptions. The proposed exceptions are:
 - where there is an imbalance of power, including as a result of family violence;
 - where there are reasonable grounds to believe non-disclosure may be occurring;
 - where one party has attempted to delay or frustrate the resolution of the matter; and
 - where there are allegations of fraud. (Proposal 5-3)
2. Adding a further matter when considering suitability for FDR. Regulation 25 *Family Dispute Resolution Regulations 2008* currently requires a consideration of:
 - (a) history of family violence (if any) among the parties;
 - (b) the likely safety of the parties;
 - (c) the equality of bargaining power among the parties;
 - (d) the risk that a child may suffer abuse;
 - (e) the emotional, psychological and physical health of the parties;
 - (f) any other matter that the family dispute resolution practitioner considers relevant.

The ALRC proposes that there be an additional consideration - namely the extent to which there is an imbalance in knowledge of the parties' financial arrangements. This reflects concerns that one party may benefit from an FDR process as a result of superior knowledge of relevant financial arrangements. (Proposal 5-2, paras 5.26-5.27)

3. A requirement that parties lodge a genuine steps statement at the time of filing an application for property and financial matters, and that if a court finds that a party has not made a genuine effort to resolve a matter in good faith, the court take this into account in determining how the costs of litigation are apportioned. (Proposal 5-4)

4. The provisions for non-disclosure in the FLA be amended to set out clearly that a failure to intentionally provide full, frank and timely disclosure may result in:
 - consequences, including punishment for contempt of court;
 - the non-disclosure being taken into account in determining how costs will be apportioned;
 - the stay or dismissal of the party's case.
5. The development of guidelines for the delivery of legally assisted dispute resolution (LADR) for parenting and financial matters. (Proposal 5-10)

The proposals above are mostly sensible and practical, and the costs involved for the Federal Government are not significant, so they may actually happen.

The introduction of compulsory FDR for property and financial matters is, however, difficult to reconcile with protecting the interests of victims of family violence. The ALRC acknowledges this difficulty and proposes a broader list of exceptions than apply in parenting matters to address possible adverse consequences. In practice though, anecdotally in parenting matters victims of family violence are often intimidated and pressured by their partners into using the FDR procedure before issuing parenting proceedings, even if they are within an exception. The prospects of this occurring in financial matters has the potential to be greater.

The problems are exacerbated by the difficulty of reconciling compulsory FDR with the genuine steps statement. How they fit together is not adequately explained in the Discussion Paper.

Reshaping the adjudication landscape

The ALRC recommended efforts to provide timely and cost-effective adjudication pathways and processes that are adapted to address safety concerns and problematic parenting arrangements. The ALRC's proposals include:

1. The Family Court should have a team-based triage process to ensure that matters are directed to appropriate alternative dispute resolution processes and specialist pathways within the court as needed and ensuring initial and ongoing risk and needs assessment and case management. (Proposals 6-1 and 6-2)
2. Specialist court pathways should include:
 - A simplified small property claims process;
 - A specialist family violence list; and
 - The Indigenous List. (Proposal 6-3)
3. Factors to consider in determining whether the simplified court procedure should apply to a particular matter, include:
 - the relative financial circumstances of the parties;
 - the parties' relative levels of knowledge of their financial circumstances;
 - whether either party is in need to urgent access to financial resources to meet the day to day needs of themselves and their children;
 - the size and complexity of the asset pool; and
 - whether there are reasonable grounds to believe there is history of family violence involving the parties, or risk of family violence.

The court should give weight to each of these factors as it sees fit. (Proposal 6-5)

4. A post-order parenting support service be developed by the federal government to assist parties to parenting orders to implement the orders and manage their co-parenting relationship by providing services including:
 - Education about child development and conflict management;
 - Dispute resolution; and
 - Decision making in relation to the implementation of parenting orders. (Proposal 6-9)
5. Redesigning all family court premises including circuit locations and state and territory court buildings that are used for family law matters to be safe for attendees including ensuring the availability and suitability of waiting areas and rooms, private interview rooms and multiple entrances and exits. (Proposal 6-12)
6. The ALRC, responding to concerns about the Parenting Management Hearings Panel (PMH Panel), legislation for which was introduced to Parliament in December 2017, asked for suggestions as to changes to the proposed model (Questions 6-3 and 6-4). The PMH Panel will provide a multi-disciplinary alternative to court proceedings for less complex matters where parties will not be legally represented.

The ALRC asked what criteria should be used to establish eligibility for the family violence list (Question 6-1). The ALRC noted that family violence was a feature of the majority of matters before the family courts, the ALRC suggested that the list focus on "high risk" cases. Relevant factors in determining "high risk" cases might include:

- the level of urgency and risk;
- involvement of the family in other jurisdictions in relation to civil or criminal family violence matters;
- involvement with child protection agencies;
- one or both parties being self-represented;
- one or both parties being from Aboriginal or Torres Strait Islander backgrounds, culturally or linguistically diverse backgrounds or have a disability. (para 6.32)

A simplified small property claims list is a practical proposal. As the ALRC identified, the implementation of this will need to look at, for example:

- How to deal with small property pools with complex legal issues.
- Large property pools with simple legal issues.
- Differing property values across Australia.
- How to provide for these changes in the simplification of the FLA.
- Increased role for Registrars.
- Streamlined case management. (paras 6.17-6.20)

The Discussion Paper seems to be largely directed to the conduct of trials in small property claims (e.g. discretion in relation to the rules of evidence and case outlines) so much more work needs to be done on the practicalities of the procedure, particularly for those matters that don't reach trial.

The major problem with Proposals 6-1 and 6-2 arises from the high percentage of cases in the family courts which involve allegations of family violence. The ALRC acknowledges this, but suggests that a triage process will be able to sort out which cases should be in the

Family Violence List. In many cases where family violence is alleged, the allegations are denied. Whether or not there was family violence and the degree of it may only be resolved at trial or, if the case settles before trial, it may never be resolved.

Proposals 6-1 and 6-2 also suggest that initial and ongoing triage does not currently occur. This is incorrect. It does occur, particularly in the Family Court and, to the extent possible within a docket list system, it occurs in the Federal Circuit Court system. Greater triage requires greater resources, and directing resources to ongoing assessment requires even greater resources than initial triage. The Family Law Courts have, for many years, successfully held "blitzes" and the recent Conferences conducted in the Family Court with Registrars and Family Consultants resulted in the settlement of many parenting cases.

The ALRC's proposals mostly require additional funding from the Federal Government to the Family Law Courts (and for State and Territory Governments to make physical upgrades to courts where family violence applications are heard) which, in the current environment, appears unlikely to be achieved. The stated objective of the courts' restructure Bills is to create efficiencies and resolve more cases. The Federal Government has not indicated a desire to allocate more funds and other resources to the family law system, in fact to the contrary.

Children in the family law system

The ALRC recommended improvements in the children's right to be heard, whilst prioritising their safety. The proposals include:

1. The FLA should provide that in proceedings concerning a child, an affected child must be given an opportunity (in so far as practicable) to express their views. However, children should not be required to express any views. (Proposal 7-7)
2. Children involved in family law proceedings should be supported by a children's advocate who is a social science professional with training and expertise in child development and working with children. The role of the children's advocate should be to explain to the child their options for making their views heard, support the child to understand their options and express their views, ensure that child's views are communicated to the decision maker and keep the child informed of the progress of a matter and to explain any outcomes and decisions made in a developmentally appropriate way. (Proposal 7-8)
3. The separate legal representative for a child would still have a role. This role would be to gather evidence that is relevant to an assessment of a child's safety and best interests and assist in managing litigation including acting as an honest broker in litigation. (Proposal 7-10)
4. Guidelines be developed to assist judicial officers where children seek to meet with them or otherwise participate in proceedings. (Proposal 7-12)
5. There be a Children & Young People's Advisory Board for the family law system which would provide advice about children's experiences of the family law system to inform policy and practice development in the system. (Proposal 7-13)

The question was asked whether or not a separate legal representative should be appointed in addition to a children's advocate (Question 7-1) and how they would be appointed, managed and coordinated. For example, should a new body be created to undertake this task? (Question 7-2)

Funding for Legal Aid bodies to provide separate legal representation for children is already tight. The ALRC is proposing that all children involved in family law proceedings

be supported by children's advocates as well as some children having separate legal representatives. Again, funding for this proposal seems unlikely.

The idea that judges speak directly to children seems unlikely to be embraced by judges themselves, who prefer to rely on the reports of family consultants who are experienced and trained in speaking with children. There may be problems if the child says something to a judge but wants to be kept confidential. There are also general evidentiary and due process problems. The ALRC recognises these problems but believes they can be overcome. The practices of other jurisdictions in presenting the views of children to courts are discussed by the ALRC, but the reason for the rejection of these other options in favour of a child being able to, at the child's election, speak to the judge when the child expresses a desire to do so (Paragraph 7.98) is not fully explained.

Reducing harm

The ALRC recognised that many families who engage with the family law system have complex needs, including many who have needs associated with family violence and the safety of children. The ALRC's proposals include:

1. The definition of "family violence" in the FLA be amended to:
 - Include emotional and psychological abuse and technology facilitated abuse;
 - Ensure it is clear that the definition of abuse encompasses direct or indirect exposure to family violence;
 - Include misuse of legal and other systems and processes in the list of examples of acts that can constitute family violence in s 4AB(2) by including a new subsection referring to the "use of systems or processes to cause harm, distress or financial loss". (Proposals 8-1 and 8-3)
2. Courts be given the power to exclude evidence of "protected confidences", that is, communications made by a person in confidence to another person acting in a professional capacity who has an express or implied duty of confidence. Subpoenas in relation to evidence of "protected confidences" would not be able to be issued without the leave of the court. The court should exclude evidence of protected confidences where it is satisfied that it is likely that harm would or might be caused, directly or indirectly, to the protected confider, and the nature and extent of the harm outweighs the desirability of the evidence being given. Harm would be defined to include actual physical bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm (such as shame, humiliation and fear). (Proposal 8-6)
3. The Attorney-General's Department should convene a working group comprised of the Family Courts, the Family Law Section of the Law Council of Australia, the Royal Australian & New Zealand College of Psychiatrists, the Australian Psychological Society, the Royal Australian College of General Practitioners, Family Relationship Services Australia, National Legal Aid, Women's Legal Services Australia and specialist family violence services peak bodies and providers to develop guidelines in relation to the use of sensitive records in family law proceedings. (Proposal 8-7)

The "protected confidences" proposal is probably one of the most controversial proposals in the Discussion Paper. The common law and the Evidence Act 1995 (Cth) provide only limited grounds for privilege in relation to documents and other evidence. The ALRC's proposal is modelled on s 126B Evidence Act 1995 (NSW), but this is primarily used in

criminal proceedings to protect the notes of professionals who the victim has consulted from being produced in criminal proceedings. The risks and benefits of such a provision in proceedings relating to the welfare of children is not as clear cut. In a criminal proceeding the notes of a victim's counsellor are arguably of little importance unless the counsellor has given a report and the defendant seeks to challenge the extent of the impact of the crime on the victim. That is very different from the wide ranging nature of notes of professionals in family law proceedings which may reveal discrepancies relevant to the best interests of children in historical accounts and facts asserted by one party and challenge the conclusions reached by a counsellor who may be a "cheerleader" for one of the parties, not having had the opportunity to hear the other party's version of events and assess the other party.

Whilst at Question 8-4, the ALRC asked what, if any, changes should be made to the court's powers to apportion costs under s 117 FLA, the only proposals by the ALRC are to make clearer the court's powers to make costs orders where there has been intentional non-disclosure and to take into account a failure to make a genuine effort to resolve a matter in good faith prior to the institution of proceedings. The former power already exists in s 117(2A)(c) which requires the court to "have regard to ... the conduct of the parties to the proceedings" so it is not a radical change. The latter would be a greater change but is common in other courts, such as in the Federal Court. It is a pre-litigation procedure and therefore does not address the common practice of parties failing to take genuine steps to resolve a dispute once proceedings have commenced and the parties are in possession of greater knowledge of the overall case including the other parties' financial circumstances and the strengths and weaknesses of each other's cases. There was, some years ago, a requirement that after a conciliation conference each party exchange offers of settlement. Perhaps that should be re-introduced?

Additional legislative issues

The ALRC recognised that some parties need assistance with decision-making. Its proposals include:

1. The federal government should work with state and territory governments to facilitate the appointment of statutory authorities as litigation representatives for parties with disabilities in family law proceedings. (Proposal 9-5)
2. The family law system should have specialist professionals and services to support people with disability to engage with the family law system. (Proposal 9-7)

The ALRC proposes that litigation representatives have a different role than current case guardians and litigation guardians (Proposals 9-3 and 9-4) and specifically that they:

- "1. support the person represented to express their will and preferences in making decisions;
2. where it is not possible to determine the will and preferences of the person, determine what the person would likely want based on all the information available;
3. where 1. and 2. are not possible, consider the person's human rights relevant to the situation; and
4. act in a manner promoting the personal, social, financial and cultural wellbeing of the person represented."

The ALRC pointed out at (para 9.67) the benefits of appointing State and Territory authorities to the role include that:

- they do not have the potential conflict of interest issues that others, such as family members, may have;
- they have appropriate skill sets for the role; and
- they should be able to be appointed without delay.

The lack of ready availability of people able and willing to act as case guardians or litigation guardians is a significant barrier for access to justice by parties who lack the capacity to conduct their own litigation. The proposal to work with State the Territory governments to facilitate the appointment of litigation representatives is essential to address this gap.

In part, the implementation of this will be assisted by a provision in the Civil Law and Justice Legislation Amendment Act 2018 (Cth) (referred to as a Bill in the Discussion Paper, but it has now been passed), which inserts a provision into the FLA to prohibit courts from making an order for costs against a guardian unless the court is satisfied that an act or omission of the guardian is unreasonable or has unreasonably delayed the proceedings.

A skilled and supported workforce

The ALRC proposed the development of a workforce capability plan for the family law system, including:

1. Core competencies for the family law system workforce should be identified and training and accreditation identified for the different professional groups. (Proposal 10-2)
2. Core competencies for family law system professionals should include:
 - an understanding of family violence;
 - an understanding of child abuse, including child sexual abuse and neglect;
 - an understanding of trauma-informed practice, including an understand of the impacts of trauma on adults and children;
 - an ability to identify and respond to risk, including the risk of suicide;
 - an understanding of the impact on children of exposure to ongoing conflict;
 - cultural competency, in relation to Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse communities and LGBTIQ people;
 - disability awareness; and
 - an understanding of the family violence and child protection systems and their intersections with the family law system. (Proposal 10-3)
3. State and territory law societies should amend their continuing professional development requirements to require all legal practitioners undertaking family law work to complete at least one unit of family violence training annually. (Proposal 10-6)
4. It is critical that all future appointments of federal judicial officers exercising family law jurisdiction should include consideration of the person's knowledge, experience and aptitude in relation to family violence. (Proposal 10-8)

5. The new Family Law Commission (proposal 12-1) should develop a national accreditation system with minimum standards for private family report writers. (Proposal 10-9)
6. In appropriate matters involving the care, welfare and development of a child, Judges should consider appointing an assessor with expert knowledge in relation to the child's particular needs to assist in the hearing and determination of the matter. (Proposal 10-12)

The proposal that when appointing federal judicial officers exercising family law jurisdiction consideration be given to their knowledge, experience and aptitude in relation to family violence is at odds with the current Federal Circuit Court Act 1999 and the proposed Family Court and Federal Circuit Court Bill 2018 which do not include a requirement for family law expertise, let alone family violence expertise, for Federal Circuit Court judges.

The ALRC noted that, although judicial training is offered by the National Judicial College of Australia and the Family Court of Australia, judicial officers cannot be compelled to attend or participate in training following their appointment to the bench, because of the principle of judicial independence (para 10.60). Their expertise and experience before appointment is therefore vital.

The ALRC recommended that the FLA be reworded to focus on competencies rather than personality (para 10.62), but is silent about judges appointed under the Federal Circuit Court Act although Proposal 10-8 suggests that all judges exercising FLA jurisdiction should have this expertise.

Information sharing

Timely exchange of information between entities within the family law system and between the family law, family violence and child protection systems to promote the wellbeing and safety of families and children through early identification of risk and better co-ordination of interventions. Specifically, the ALRC's proposals include:

1. State and territory child protection, family violence and other relevant legislation should be amended to remove provisions preventing state and territory agencies from disclosing relevant information to courts, bodies and agencies in the family law system in appropriate circumstances and include provisions that explicitly authorise them to do so. (Proposal 11-1)
2. State and territory governments should consider providing access for Family Courts and appropriate bodies and agencies in the family law system to relevant inter-jurisdictional and intra-jurisdictional child protection and family violence information sharing platforms. (Proposal 11-5)
3. Section 121 FLA be redrafted to:
 - make the obligations it imposes easier to understand;
 - clarify that government agencies, family law services, service providers for children and family violence providers are not part of the "public". (Proposal 12-11)

The ALRC asks the question whether social media or other internet-based media should be referred to explicitly in s 121. (Question 12-1)

States and Territories currently differ in their attitudes to information sharing. New South Wales allows information to be exchanged between Child Protection and Family Violence Courts with the prescribed bodies, and Federal and Family Law Courts are prescribed bodies for the purpose of this legislation (para 11.20). By contrast, Victoria imposes penalties for the unlawful sharing of Children's Court clinic reports (para 11.23).

The difficult question of privacy, if publication is allowed to a larger number of organisations under s 121, is not sufficiently addressed in the Discussion Paper.

Question 11-1 raised the question of which databases might be shared or sought about persons involved in family law proceedings, but more work needs to be done in weighing up the privacy of individuals and the extent to which information should be shared and how it is shared.

System oversight and reform evaluation

To promote confidence in the family law system, the ALRC proposes:

1. The federal government should establish a new independent statutory body, the Family Law Commission, to oversee the family law system. (Proposal 12-1)
2. A system of accreditation of family law system professionals with the oversight of the Family Law Commissioner. (Proposal 12-2).

Proposal 12-2 is intended to apply to legal practitioners. How this would interact with the regulation of legal practitioners by the various States and Territories and particularly for young practitioners who are not eligible to seek accreditation as a family law specialist, is not known. The ALRC says at para 12.24:

"It is not anticipated that these new accreditation requirements would simply duplicate the regulatory role that another professional body may already have for a particular professional. Rather, by structuring the accreditation requirements around the core competencies identified specifically for family law service providers in the workforce capability plan ... it is expected that a significant number of the attributes and behaviours to be regulated by the Family Law Commission would be quite distinct from those regulated by other professional bodies."

The ALRC asks whether there should be a judicial commission established to cover at least Commonwealth judicial officers exercising FLA jurisdiction and, if so, what the functions of the Commission should be. The intention is to enable a different process for complaints, other than complaints to the heads of jurisdiction, with greater transparency and independence, so as to improve public confidence in judicial officers exercising family law jurisdiction. There would be constitutional constraints, but the ALRC considers it timely to consider establishing one (Question 12-2).

In the current climate where there have been attacks on the family law judiciary by the Attorney-General and heads of jurisdiction, the question needs to be asked whether establishing a judicial commission solely for the family law judiciary would be seen as a further attack on the competence of those judges. If a judicial commission is to be established, it should arguably cover other federal judges as well.

What did the ALRC miss?

The Discussion Paper was not the "comprehensive review" promised by the Federal Government in its Terms of Reference. The Discussion Paper is over 350 pages long and deals with issues relating to family violence at length, making many proposals to improve the court's processes for victims of family violence. The need for a comprehensive review of family violence in the family law system was clearly necessary, but the ALRC's task was broader than this. Disappointingly, the ALRC has missed an opportunity which may not arise again for many years, to undertake a comprehensive review of the whole of the family law system. The proposed court restructure was not one of its Terms of Reference and the discussion paper does not deal with it head on but touches on issues related to the structure of the courts in passing.

Important areas of family law which were not dealt with comprehensively or at all, but need attention include:

- *Child support which has become an overly complex scheme both in legislative terms and procedures for altering assessments.*
- *The rights of trustees in bankruptcy vs the rights of creditors (particularly where there is a bankruptcy) to intervene in FLA proceedings, e.g. Grainger & Bloomfield (2015) FLC 93-677. For example, the definition of "creditor" in s 75(2)(ha) appears not to encompass the trustee in bankruptcy.*
- *Aligning the property and maintenance provisions which relate to married couples more closely to those that relate to de facto couples. They are similar, but not precisely the same.*
- *Does the definition of a de facto relationship need review?*
- *Which court procedures work best? For example, there is no comparison of the experience of parties whose first court date is a case assessment conference in the Family Court or a listing in open court with other cases in either of the Family Law Courts.*
- *Divorce procedures and requirements.*
- *The involvement of third parties.*
- *Adult child maintenance, which like spousal maintenance, is probably under-utilised, and would benefit from a similar revamping of procedures as is proposed for spousal maintenance.*

Conclusion

The ALRC Discussion Paper raises many practical proposals and asks some useful questions. The fact that it is not the "comprehensive review" promised, is disappointing. The complete omission of child support and the failure to expressly address the structure of the Family Law Courts are major gaps. Despite these deficiencies, the Discussion Paper is an important document which everyone who interacts with the family law system should read and consider making submissions by 13 November 2018 which can be taking into account in the Final Report which is due to be delivered to the Attorney-General on 31 March 2019.

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