

FINANCIAL AGREEMENTS

Will de-federation of the
Family Court fix fragmentation
of family law? An analysis of
the ALRC's final report on
family law

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Family law never stagnates. Legislative reforms since the introduction of the *Family Law Act 1975* (Cth) have often either followed societal developments or, more frequently, led or accompanied them. However, the next 12 months has the potential for even greater change for family lawyers, the family law courts and parties than has ever occurred in a 12 month period since 1975.

The Attorney-General, Christian Porter, says he is committed to the structural reforms of the Family Court and the Federal Circuit Court (the family law courts) he proposed prior to the 18 May 2019 federal election. In a media release on 29 May 2019 he said:

“The highest priority will be the structural reform of the family law courts to ensure families requiring the assistance of the courts to finalise their relationship are able to have their matters dealt with as quickly, efficiently and cheaply as possible.”

Regarding the recommendations of the Australian Law Reform Commission (ALRC) in its Final Report on the Review of the Family Law System released on 10 April 2019 (Final Report) which can be accessed at www.alrc.gov.au/inquiries/family-law-system, Mr Porter said:

“If re-elected, the Government will ... be fully committed to considering and developing individual responses to the complex issues raised in each of the 60 recommendations made in the final ALRC report.

I have asked my department to commence its consideration of the ALRC’s report and to develop comprehensive advice about each of the reforms suggested by the ALRC to ensure that the family law system supports modern Australian families to resolve their disputes safely and as efficiently and cheaply as possible.”

There are many aspects of family law which demand review, but regrettably the ALRC’s Final Report was not the comprehensive review that was promised. Some of the areas it covered are:

1. The *Family Law Act 1975* (Cth) (FLA) and its associated rules and regulations are complex, unwieldy and inaccessible to the many litigants in person. This is exacerbated by the different rules, procedures and forms used in the two family law courts;
2. The shared parenting provisions are complicated, unworkable, build unrealistic expectations and arguably put the interests of parents above those of the children;
3. The current property settlement provisions do not provide a clear path and the FLA should set one out;
4. An increasing number of cases in the family law courts deal with family violence and child abuse, and the law and processes need to change to better deal with these

cases including, in particular, the interaction of family violence orders obtained in state and territory courts with parenting orders obtained under the FLA.

The federal government seems determined to institute major reform to the structure of the family law courts and to family law generally. There are three major questions:

- Which reforms will the federal government focus on?
- Are they the best reforms?
- Will the government be successful in having the changes passed through the Senate where it will need to rely on the support of the cross-benchers if the reforms are not supported by the Labor Party or the Greens?

This article looks at the Terms of Reference of the ALRC's Review of the Family Law System, deficiencies with the Terms of Reference, problems with the Final Report, lists all the Recommendations indicating those which are likely to have significant support, and gives commentary on some of the Recommendations.

Note: The views and opinions expressed in this article are those of the author.

1. Terms of Reference of the ALRC's Review of the Family Law System

On 27 September 2017, the then Attorney-General George Brandis announced a review of the 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 covered 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 was a catch all Term of Reference of "any other matters related to these Terms of Reference".

2. Deficiencies with the Terms of Reference

Whilst the ALRC was undertaking the Inquiry, there was a debate between the federal government, the ALRC and other stakeholders as to whether the Terms of Reference included consideration of structural reform of the family law courts. The Inquiry was promoted by the federal government as the first comprehensive review of the FLA since 1976, so it was reasonable to interpret the Terms of Reference broadly to include structural reform (particularly when structural reform was being considered by Parliament), and other aspects of family law not specifically mentioned but “related to” the Terms of Reference.

The *Federal Circuit Court and Family Court of Australia Bill 2018* and the *Federal Circuit Court and Family Court of Australia (Consequential Amendments & Transitional Provisions) Bill 2018* (the Restructure Bills) were tabled in Parliament on 23 August 2018, while the ALRC was still conducting its Inquiry: after the Issues Paper was released in March 2018, but before the Discussion Paper was released in October 2018. The Bills were 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 being “the appropriate, early and cost-effective resolution of all family law disputes.” Structural reform was a matter which could and should have been considered in depth by the ALRC as part of its “comprehensive review of the FLA”.

Interestingly, there was no express reference to child support in the Terms of Reference although this 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.

The ALRC, in its Issues Paper released in March 2018, recognised two deficiencies in the Terms of Reference: structural reform and child support. It also referred to the quandary it faced because it considered that matters of state and territory responsibility and the child protection system are part of the “family law system”.

3. The ALRC’s Final Report

The Inquiry into the family law system was an initiative of the Coalition government and that government was returned at the federal election in May 2019. The ALRC’s recommendations are therefore likely to be given serious consideration by the federal government and provide a blueprint for reform of the family law system. There will be pressures from stakeholders – the family law courts, lawyers and special interest groups and organisations advocating for family violence victims and men’s rights.

The ALRC’s Final Report is over 570 pages with 60 Recommendations. The ALRC claims that the implementation of its Recommendations will improve the family law system by doing

the following:

- Promoting an integrated court response to family law matters, child protection matters, and matters involving family violence, providing better protection to individual litigants and their children;
- Assisting parties to understand the family law legislation and to resolve their disputes under the umbrella of the law, improving the consistency and fairness of negotiated outcomes;
- Assisting parties and the courts to arrive at parenting orders that best promote the best interests of the child;
- Assisting parties to understand and comply with parenting orders, reducing conflict and thus contributing to the welfare of children;
- Increasing the proportion of separated couples who are able to resolve their parenting matters and property and financial matters outside the courts through a process that ensures fairness and reduces ongoing conflict;
- Reducing acrimony, cost, and delay in the adjudication of family law disputes through the courts; and
- Ensuring that families who seek assistance from the family law system with legal and other support needs receive that support in a coordinated and efficient manner.

The ALRC pointed out (at 1.5) that it was constrained by time limits and by the breadth of the matters it was required to inquire into within a short timeframe. As a result, the ALRC said it had to omit some issues and apologised for not producing a “bold new initiative” or “magic wand fix”. Besides these constraints, the ALRC was also restricted by the narrow Terms of Reference – a major deficit was the omission of an express Term of Reference about the best structure for the family law courts. Whilst the Law Council of Australia and others, argued that the Terms of Reference allowed the ALRC to consider structural reform, the Attorney-General publicly declared that it was not part of the ALRC’s inquiry which was only dealing with principles and legal provisions of the family law system (Media Release 30 May 2018; “Law Council takes aim at Porter over family reforms” *Australian Financial Review*, 10 April 2019).

In the absence of a definition in the Terms of Reference, the ALRC interpreted (at p13) the phrase “family law system” broadly, to refer collectively to:

- The Family Court of Australia;
- The Family Court of Western Australia;
- The Federal Circuit Court of Australia;

- All family law and post separation services including family relationship services (such as government funded family counselling services, post separation parenting programs and children’s contact services);
- Legal aid commissions;
- The community legal sector; and
- Private legal services.

This broad definition, which incorporates matters under state and territory jurisdiction, rather than just federal jurisdiction, meant that the Inquiry made Recommendations which the federal government does not have the power to implement.

4. Over-arching principles

The ALRC said that it was guided by the following over-arching principles in formulating its recommendations:

Principle One	It is essential to the efficacy of the family law system that there are integrated pathways to adjudication, through which both public and private law jurisdiction can be exercised — to protect children and vulnerable parties, and to regulate interpersonal relationships.
Principle Two	It is essential to the rule of law that the substantive and procedural law is clear, coherent, and enforceable so as to enable families to resolve issues arising after separation (without exacerbating parties’ exposure to litigation) in a just, timely, and cost-effective manner that is reasonable in, and proportionate to, the circumstances of the case.
Principle Three	It is essential to the integrity of the family law system that all those who work within the family law system (including judges, registrars, lawyers, and the wide range of medical and social science professionals) are equipped with the skills and the tools necessary to achieve outcomes that are in the best interests of children and fair to the parties, and which are designed to promote conciliation and reduce contention at every step.
Principle Four	The substantive law should be drafted in a manner that assists both lay people and lawyers to locate and apply the law so as to facilitate the resolution of issues arising after separation as quickly and cost effectively as possible.

5. The Recommendations

The Recommendations are listed under the relevant chapters of the Final Report are, with an indication of whether they are likely to receive wide stakeholder support are:

4. Closing the jurisdictional gap		Likely to be widely supported	Comment
Recommendation 1	The Australian Government should consider options to establish state and territory family courts in all states and territories, to exercise jurisdiction concurrently under the FLA, as well as state and territory child protection and family violence jurisdiction, whilst also considering the most efficient		Needs to be part of a full investigation as to the best structure

Recommendation 2	<p>manner to eventually abolish first instance federal family courts.</p> <p>The Australian Government should work with state and territory governments to develop and implement a national information sharing framework to guide the sharing of information about the safety, welfare, and wellbeing of families and children between the family law, family violence, and child protection systems. The framework should include:</p> <ul style="list-style-type: none"> • the legal framework for sharing information; • relevant federal, state, and territory court documents; • child protection records; • police records; • experts' reports; and • other relevant information. 	√	
Recommendation 3	<p>The National Domestic Violence Order Scheme be expanded to include family law court orders and orders issued under state and territory child protection legislation. The benefit of this would be to give the family law courts and professionals in the child protection system more timely and accurate information without the need to apply for subpoenas or rely on the parties' evidence.</p>	√	
5. Children's matters			
Recommendation 4	Section 60B of the FLA should be repealed.		May have unintended consequences
Recommendation 5	<p>Section 60CC of the FLA should be amended so that the factors to be considered when determining parenting arrangements that promote a child's best interests are:</p> <ul style="list-style-type: none"> • What arrangements best promote the safety of the child and the child's carers, including safety from family violence, abuse, or other harm; • Any relevant views expressed by the child; • The developmental, psychological, and emotional needs of the child; • The benefit to the child of being able to maintain relationships with each parent and other people who are significant to the child, where it is safe to do so; • The capacity of each proposed carer of the child to provide for the developmental, psychological, and emotional needs of the child, having regard to the carer's ability and willingness to seek support to assist with caring; and • Anything else that is relevant to the particular circumstances of the child. 		May have unintended consequences

Recommendation 6	The FLA should be amended to provide that in determining what arrangements promote the best interests of an Aboriginal or Torres Strait Islander child, a court must consider the child's opportunities to connect with, and maintain the child's connection to, the child's family, community, culture, and country.	√	Unclear how this fits into the legislative regime
Recommendation 7	Section 61DA of the FLA should be amended to replace the presumption of "equal shared parental responsibility" with a presumption of "joint decision making about major long-term issues".	√	May be opposed by men's rights groups
Recommendation 8	Section 65DAA of the FLA which requires the courts to consider, in certain circumstances, the possibility of the child spending equal time, or substantial and significant time with each parent, should be repealed.	√	May be opposed by men's rights groups
Recommendation 9	Section 4(1AB) of the FLA should be amended to provide a definition of member of the family that is inclusive of any Aboriginal or Torres Strait Islander concept of family that is relevant in the particular circumstances of the case.	√	
Recommendation 10	Combined rules for the Family Court of Australia and the Federal Circuit Court of Australia should provide for proceedings to be conducted under Pt VII Div 12A of the FLA by judges of both courts. Both courts should be adequately resourced to carry out the statutory mandate in s 69ZN(1) of the FLA.	√	
7. A simplified approach to property division			
Recommendation 11	The FLA should be amended to: <ul style="list-style-type: none"> Specify the steps that a court will take when considering whether to make an order to alter the interests of the parties to the relationship in any property; and Simplify the list of matters that a court may take into account when considering whether to make an order to alter the interests of the parties to the relationship in any property. 	√	May have unintended consequences
Recommendation 12	The FLA should be amended to include a presumption of equality of contributions during the relationship.		May have unintended consequences
Recommendation 13	The FLA should be amended to provide that the relevant date to ascertain the value of the parties' rights, interests, and liabilities in any property is the date of separation, unless the interests of justice require otherwise.		Needs further investigation
Recommendation 14	The family courts and the Australian Financial Complaints Authority should develop a protocol for dealing with jurisdictional overlap with respect to debts of parties to family law proceedings. The protocol should provide that: <ul style="list-style-type: none"> disputes about the enforceability of a debt against one or both parties under the <i>National Consumer Credit Protection Act 2009</i> (Cth) are 	√	

	<p>dealt with by the Australian Financial Complaints Authority; and</p> <ul style="list-style-type: none"> disputes about the reallocation of a debt between parties to a family law proceeding are dealt with by the family courts. 		
Recommendation 15	<p>The <i>Privacy Act 1988</i> (Cth) and the <i>National Consumer Credit Protection Act 2009</i> (Cth) should be amended to provide that when a court has ordered that one party (Party A) be responsible for a joint debt and indemnify the other party (Party B) against any default, credit providers are prohibited from making an adverse credit report against Party B to any credit reporting business as a consequence of the subsequent actions of Party A.</p>	√	
Recommendation 16	<p>The FLA should be amended to provide a presumption that the value of superannuation assets accumulated during a relationship are to be split evenly between the parties.</p>	√	
Recommendation 17	<p>The FLA should be amended to simplify the process for splitting superannuation including:</p> <ul style="list-style-type: none"> Developing template superannuation splitting orders for commonly made superannuation splits; and When the applicant is suffering economic hardship, requiring superannuation trustees to limit the fees they charge members and their former spouse for services provided in connection with property settlement under Pt VIII to the actual cost of providing those services. 	√	
Recommendation 18	<p>The FLA should be amended so that:</p> <ul style="list-style-type: none"> The spousal maintenance provisions and provisions relating to the division of property are dealt with separately under the legislation; and Access to interim spousal maintenance is enhanced by the use of Registrars to consider urgent applications. 	√	
Recommendation 19	<p>The FLA should be amended to include a statutory tort of family violence that would provide remedies consistent with existing common law remedies.</p>		Needs further investigation. May lead to more litigation
Recommendation 20	<p>The FLA should be amended to extend s 69ZX to property settlement proceedings.</p>	√	
8. Encouraging amicable resolution			
Recommendation 21	<p>The FLA should be amended to:</p> <ul style="list-style-type: none"> Require that parties take genuine steps to attempt to resolve their property and financial matters prior to filing an application for court orders; and 	√	

	<ul style="list-style-type: none"> Specify that a court must not hear an application unless the parties have lodged a genuine steps statement. <p>A failure to make a genuine effort to resolve a matter should have costs consequences.</p>		
Recommendation 22	Regulation 25 of the <i>Family Law (Family Dispute Resolution Practitioners) Regulations 2008 (Cth)</i> , which refers to 'equality of bargaining power between the parties', should be amended to refer to the 'equality of bargaining power between the parties, including an imbalance in knowledge of relevant financial arrangements'.	√	
Recommendation 23	The FLA should be amended to require Family Dispute Resolution Providers to provide a certificate to the parties in all matters where some or all of the issues in dispute have not been resolved.	√	
Recommendation 24	Sections 10H and 10J of the FLA, which provide for confidentiality and inadmissibility of discussions and material in Family Dispute Resolution in relation to parenting matters, should be extended to Family Dispute Resolution for property and financial matters. The legislation should provide an exception for a sworn statement in relation to income, assets, superannuation balances, and liabilities that each party signs at the start of Family Dispute Resolution, which should be admissible.	√	
Recommendation 25	The FLA should be amended to clearly set out the disclosure obligations of parties, and the consequences for breach of those obligations.	√	
9. Arbitration			
Recommendation 26	<p>The FLA and the <i>Child Support (Assessment) Act 1989 (Cth)</i> should be amended to increase the scope of matters which may be arbitrated, whether or not upon referral from a court. Those matters should include all financial issues, including child maintenance and child support, subject to limitations. Appropriate occasions for arbitration would not include disputes:</p> <ul style="list-style-type: none"> Relating to enforcement; Under ss 79A or 90SN of the FLA (subject to limitations); and In which a litigation guardian has been appointed. 	√	
Recommendation 27	The FLA should be amended to remove the opportunity for a party to object to registration of an arbitral award, while maintaining appropriate safeguards for the integrity of registered awards.	√	
Recommendation 28	The FLA should be amended to allow some children's matters to be arbitrated. Appropriate	√	

Recommendation 29	<p>occasions for arbitration in children's matters would not include disputes:</p> <ul style="list-style-type: none"> • Relating to international relocation; • Relating to medical procedures of a nature requiring court approval; • Relating to contravention matters; • In which an Independent Children's Lawyer has been appointed; and • Involving family violence which satisfy ss 102NA(1)(b) and (c) of the FLA. <p>The FLA should be amended to provide that upon application by an arbitrator, or by a party to an arbitration, a court has power to make directions at any time regarding the further conduct of the arbitration, including power to make a direction terminating the arbitration (whether or not the arbitration was referred from a court).</p>	√	
10. Case management – efficiency and accountability			
Recommendation 30	<p>The FLA should include an overarching purpose of family law practice and procedure to facilitate the just resolution of disputes according to law, as quickly, inexpensively, and efficiently as possible, and with the least acrimony so as to minimise harm to children and their families.</p>	√	
Recommendation 31	<p>The FLA should impose a statutory duty on parties, their lawyers, and third-parties to cooperate amongst themselves, and with the courts, to assist in achieving the overarching purpose. Breach of the duty will have costs consequences for the person who fails to act in accordance with the overarching purpose.</p>	√	
Recommendation 32	<p>The FLA should be amended to provide the courts with a power to make an order requiring a litigant to seek leave of the court prior to making further applications and serving them on the other party where the court is satisfied that such an order is appropriate for the protection of the respondent and/or any children involved in the proceedings, having regard to the overarching purpose of family law practice and procedure.</p>	√	
Recommendation 33	<p>Section 45A of the FLA should be amended to provide that the courts' powers of summary dismissal may be exercised where the court is satisfied that it is appropriate to do so, having regard to the overarching purpose of family law practice and procedure.</p>	√	
Recommendation 34	<p>The family courts should consider promulgating a joint Practice Note for Case Management which describes the courts' approaches to the family law practice and procedure provisions.</p>		Better in the Rules?

Recommendation 35	The FLA should be amended to provide for the appointment and protection of referees in the same terms as provided for in ss 54A and 54B of the <i>Federal Court of Australia Act 1976</i> (Cth).		Needs more consideration
Recommendation 36	Section 117 of the FLA should be amended to: <ul style="list-style-type: none"> Remove the general rule that each party to proceedings under the Act bears his or her own costs; and Articulate the scope of the courts' power to award costs. 		Needs more consideration. May create more litigation rather than discourage it
Recommendation 37	The FLA should be amended to provide courts with an express statutory power to exclude evidence of "protected confidences". In determining whether to exclude evidence of protected confidences the court must: <ul style="list-style-type: none"> Be satisfied that it is likely that harm would or might be caused, directly or indirectly, to a protected confider, and the nature and extent of the harm outweighs the desirability of the evidence being given; and Ensure that in parenting proceedings, the best interests of the child is the paramount consideration when deciding whether to exclude evidence of protected confidences. 		More appropriate to deal with in the <i>Evidence Act 1995</i> (Cth)
11. Compliance with children's orders			
Recommendation 38	The FLA should be amended to require parties to meet with a Family Consultant to assist their understanding of the final parenting orders made by a court following a contested hearing.	√	
Recommendation 39	The FLA should be amended to provide that: <ul style="list-style-type: none"> in all parenting proceedings for final orders, the courts must consider whether to make an order requiring the parties to see a Family Consultant for the purposes of receiving post-order case management; and the appointed Family Consultant has the power to seek that the courts place the matter in a contravention list or to recommend that the court make additional orders directing a party to attend a post-separation parenting program. 	√	
Recommendation 40	The FLA should be amended to require leave to appeal interim parenting orders. Leave should only be granted where: <ul style="list-style-type: none"> the decision is attended by sufficient doubt to warrant it being reconsidered; and substantial injustice would result if leave were refused, supposing the decision to be wrong. 	√	
Recommendation 41	The FLA should be amended to explicitly state that when a new parenting order is sought, and there is	√	

Recommendation 42	<p>already a final parenting order in force, the court must consider whether:</p> <ul style="list-style-type: none"> • There has been a change of circumstances that, in the opinion of the court, is significant; and • It is in the best interests of the child for the order to be reconsidered. <p>Part VII Div 13A of the FLA should be redrafted to achieve simplification, and to provide for:</p> <ul style="list-style-type: none"> • a power to order that a child spend additional time with a person; • a power to order parties to attend relevant programs at any stage of proceedings; and • a presumption that a costs order will be made against a person found to have contravened an order. 	√	
12. Support services in the courts			
Recommendation 43	<p>The FLA should be amended to:</p> <ul style="list-style-type: none"> • replace 'family consultants' with 'court consultants'; and • redraft s 11A to include a comprehensive list of functions that court consultants would provide to children, families, and the courts. 	√	
Recommendation 44	<p>Section 68LA(5) of the FLA should be amended to include a specific duty for Independent Children's Lawyers to comply with the <i>Guidelines for Independent Children's Lawyers</i>, as promulgated from time to time and as endorsed by the family courts.</p>	√	
Recommendation 45	<p>The Australian Government should ensure the availability of Indigenous Liaison Officers in court registries where they are required.</p>	√	
Recommendation 46	<p>The FLA should be amended to include a supported decision making framework for people with disability consistent with recommendations from the ALRC Report 124, <i>Equality, Capacity and Disability in Commonwealth Laws</i>.</p>	√	
Recommendation 47	<p>The FLA should include provisions for the appointment of a litigation representative where a person with disability is unable to conduct the litigation. These provisions should be consistent with the recommendations of the ALRC Report 124, <i>Equality, Capacity and Disability in Commonwealth Laws</i>.</p>	√	
Recommendation 48	<p>The Australian Government should work with state and territory governments to facilitate the appointment of statutory authorities as litigation representatives in family law proceedings.</p>	√	
13. Building accountability and transparency			
Recommendation 49	<p>Section 115 of the FLA should be amended to expand the Family Law Council's responsibilities to include:</p>	√	Seems essential to continue the work started by the ALRC

	<ul style="list-style-type: none"> • monitoring and regular reporting on the performance of the family law system; • conducting inquiries into issues relevant to the performance of any aspect of the family law system, either of its own motion or at the request of government; and • making recommendations to improve the family law system, including research and law reform proposals. 		
Recommendation 50	The Family Law Council should establish a Children and Young People's Advisory Board, which would provide advice and information about children's experiences of the family law system to inform policy and practice.	√	
Recommendation 51	Relevant statutes should be amended to require that future judicial appointments of all federal judicial appointments include consideration of the person's knowledge, experience, skills, and aptitude relevant to hearing family law cases, including cases involving family violence.		Watering down of current s 22(1) FLA
Recommendation 52	The Law Council of Australia should work with state and territory regulatory bodies for legal practitioners to develop consistent requirements for legal practitioners undertaking family law work to complete annually at least one unit of continuing professional development relating to family violence.	√	But queries over implementation
Recommendation 53	The Australian Government Attorney-General's Department should develop a mandatory national accreditation scheme for private family report writers.	√	
Recommendation 54	The FLA should be amended to: <ul style="list-style-type: none"> • require any organisation offering a Children's Contact Service to be accredited; and • make it an offence to provide a Children's Contact Service without accreditation. 	√	
14. Legislative clarity			
Recommendation 55	The FLA and its subordinate legislation should be comprehensively redrafted.	√	
Recommendation 56	Privacy provisions that restrict publication of family law proceedings to the public, currently contained in s 121 of the FLA, should be redrafted.	√	
16. Secondary interventions			
Recommendation 57	The Family Advocacy and Support Service's social support services should be expanded to provide case management to clients who are engaged with the family law systems.	√	
Recommendation 58	The Australian Government should work with Legal Aid Commissions in each state and territory to expand the Family Advocacy and Support Service to court locations that have a demonstrable need and to ensure the provision of adequate and appropriate services.	√	

Recommendation 59	Family Relationship Centres should be expanded to provide case management to clients with complex needs who are engaged with the family law system.	√	
Recommendation 60	<p>The Australian Government should work with Family Relationship Centres to develop services, including:</p> <ul style="list-style-type: none"> • Financial counselling services; • Mediation in property matters; • Legal advice and legally assisted Dispute Resolution Services; • Legally assisted Dispute Resolution; and • Children’s Contact Services. 	√	

There are a number of appendices to the Final Report. Appendix G contains examples of re-drafted parenting provisions. Appendix H sets out a suggested restructure of the children’s provisions. Appendix J sets out the existing and proposed decision making pathways in children’s matters.

6. Problems with the ALRC Final Report

The problems with the ALRC’s Final Report include:

1. Failure to seek submissions on structural reforms of the family law courts, including the Restructure Bills.
2. The ALRC identified two major deficiencies of the current family law system:
 - 2.1 The FLA was “impenetrable” for lay people and even many lawyers;
 - 2.2 The family law system has been deprived of resources to such an extent that it cannot deliver the quality of justice expected of a country like Australia, and to whose family law system other countries once looked and tried to emulate (at 1.8). This has led to a loss of faith in the system.

Although the ALRC made recommendations to address the impenetrability of the FLA it did not make substantive recommendations to address the funding crisis of the family law courts. It recommended that new services be funded, but not increased funding for current services.

3. The emphasis given to qualitative data (rather than quantitative data), which was largely received through the confidential “*Tell us your story*” portal. The ALRC received approximately 800 stories. The key themes which emerged were negative. The likelihood is that people who had neutral or relatively better experiences of the family law system had little incentive to tell their stories. This data bias is known as self-selection bias. The Final Report placed significant reliance on this data.

4. Many, even most, of the proposals in the Discussion Paper did not become Recommendations in the Final Report. More problematic though was that many of the Recommendations in the Final Report were not discussed in the Discussion Paper, so there was no opportunity for those who made submissions to give their views on these Recommendations. It is not clear why the ALRC changed direction. Due to the ill-health of Professor Helen Rhoades (a family law academic) there was a change of chair to Justice Derrington SC (a commercial lawyer). Some of the change of direction was also presumably due to the submissions received to the Discussion Paper. Most of these submissions can be accessed online (except for those of judges and some others). However, the influence on the ALRC of these factors is impossible to gauge. Changes of emphasis included that legislative clarity and support for family law clients were at the beginning of the Discussion Paper but at the end of the Final Report. Family violence had its own chapter in the Discussion Paper as well as featuring in other chapters. Family violence received less focus in the Final Report, but child protection received greater attention. The ALRC's Discussion Paper released on 2 October 2018 can be accessed at www.alrc.gov.au/inquiries/family-law-system. An article on the Discussion Paper by the author can be accessed at **[WKC link]**
5. There is a lack of empirical data regarding the volume of and nature of the crossover between state and territory family violence courts, children's courts and the family law courts. In 2016 the Family Law Council recommended in its report "Families with Complex Needs and the Intersection of the Family Law and Child Protection System: Final Report - June 2016" that this research be undertaken which could then be used to respond to crossover cases more effectively. As the ALRC did not refer to any research, presumably the recommended research which could have informed its Inquiry has not occurred.
6. There was a major shift in the Final Report away from the emphasis on family violence in the Discussion Paper. Many of the proposals in the Discussion Paper which aimed to improve the response of the family law system to victims of family violence were costly to implement. For example, multiple entrances and exits to all family law court premises, including circuit locations and state and territory courts, had the additional difficulty of involving expenditure by states and territories or by the federal government on properties of state and territory governments. However, there were some proposals which were more under the control of the federal government, such as family violence lists in the family law courts for high risk family violence

matters and multiple entrances and exits at least to family law courts. These were not Recommendations in the Final Report. Proposals for reform in the area of family violence which were made in the Discussion Paper but abandoned in the Final Report, were not replaced by other Recommendations in the Final Report.

7. There were no recommendations about many aspects of family law needing reform, such as:
 - 7.1 Child support has become an overly complex scheme both in legislative terms and procedures for altering assessments. The amounts payable are criticised by some for being too high and by others for being too low;
 - 7.2 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. The ability of a bankrupt to continue parenting proceedings in which the bankrupt is the applicant has been called into question in *Sloan & Sloan* [2018] FamCA 610, unless the trustee in bankruptcy elects for it to continue under s 60 *Bankruptcy Act 1966*;
 - 7.3 Aligning the property and maintenance provisions which deal with married couples more closely to those that deal with de facto couples. They are similar, but not precisely the same;
 - 7.4 Does the definition of a de facto relationship need review? Can it be made clearer? There has been no change to the definition since it commenced in 2009, although there is now considerable case law on how difficult the definition is to apply in practice;
 - 7.5 Which court procedures work best? For example, there was no examination of the differing experiences and outcomes of parties whose first court date is a case assessment conference in the Family Court or a listing in a duty list in open court with 10 to 30 other cases in either of the family law courts;
 - 7.6 The involvement of third parties. As family law matters have become more complex, the FLA has been amended and expanded to deal with third parties, but there has been very little review of the effectiveness of these provisions;

- 7.7 Adult child maintenance which, like spousal maintenance, is probably under-utilised, and might benefit from a similar revamping of procedures as proposed by the ALRC for spousal maintenance;
- 7.8 The uncertainty about whether financial agreements are binding or can be set aside. The problems were highlighted by the High Court decision of *Thorne v Kennedy* (2017) FLC 93-807.

7. The ALRC's structural reform proposal

The ALRC stated (at 4.4) that as the structure of the current federal family law system was not within its Terms of Reference, it had not considered the Restructure Bills. However, the ALRC still concluded (at 4.7) that the existing family law court structure may, through no fault of the judges of the two courts, be “no longer fit for purpose”, and recommended a replacement family law court structure.

The ALRC challenged (at 2.12) the assumption that a federal family law court system was still appropriate and effective “for the resolution of family law disputes which involved complex matters of both state and federal law”. It also considered that the current federal family court system hindered the development of “a more holistic approach” to a modern family law system with modern notions of parents and families and different cultural understandings of the meaning of “family”.

The ALRC controversially proposed, as its first Recommendation, the breaking up of the Family Court of Australia so that each of the states and territories have its own family court. Recommendation 1 was not a proposal in the Discussion Paper, so was made without the ALRC having the benefit of the views of stakeholders. In the absence of submissions, the ALRC relied on earlier inquiries and reports which expressed concerns about jurisdictional fragmentation (eg. para 4.3 of the Family Law Council Report *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems Family Law Council Final Report 2016*).

Family violence orders, FLA jurisdiction and child protection are dealt with in different courts, and there is a split of jurisdiction between state and territory courts and federal courts. As a result there can be inconsistency of orders and children at risk are falling through the gap. Some parties have to navigate the fragmented system in potentially three different courts. Unfortunately the extent of the problems was not statistically supported and the various options to address the issues were not fully explored in the Final Report.

As there was no comparison with structural reforms proposed by the federal government and no consultation with stakeholders, Recommendation 1 comes across as a headline-grabbing

after-thought – a belated attempt to present a bold new initiative that was otherwise lacking from the Final Report.

The structural reform options which were most frequently discussed during the period of the Inquiry, but not considered by the ALRC were:

8. The Federal Government's Restructure Bills;
9. Des Semple's "Future Governance Options for Future Federal Family Law Courts in Australia - Striking the Right Balance", 2008 (the Semple Report).

These two reform proposals are discussed in "The Family Court: Restructure, Destruction or Fade Away?" which can be found here [\[WKC link\]](#) and the problems of hastily-introduced structural reforms were pointed out. In the author's submission to the Senate Legal & Constitutional Affairs Committee which was considering the Restructure Bills she recommended that:

"The Australian Law Reform Commission be given extra time to consult before delivering its Final Report, to ensure that it addresses the issue of structural reform of the family law courts, as it indicated in its Issues Report that it would do. If necessary, the Terms of Reference be changed to make this an express Term of Reference."

The New South Wales Bar made a similar recommendation to the Senate Committee:

"Before any restructure, and before completion of the ALRC's final report, the terms of reference of the ALRC Review should be changed specifically to remit to the ALRC the review of the structure and role of the courts within the broader family law system as it is not feasible or responsible to consider policy development and reform of the family courts as independent of and from policy development and reform of the family law system."

It is also unfortunate that the Recommendation in the Final Report for structural reform is inconsistent with many of the other Recommendations. This incoherence is explained by the ALRC as arising from the length of time it will take to implement its structural reform recommendation and, in the meantime, the problems need to be addressed in other ways.

Recommendation 1 has high prominence in any inquiry. It should be a recommendation which the bulk of readers would say "of course", or at least "what a good idea, we should consider that further". Unfortunately, the lack of consultation with stakeholders and the failure to refer to it in the Discussion Paper, means that the public reaction has been negative, or at least muted. It raises many questions, which were not discussed or inadequately discussed in the Final Report including:

1. The proposal is that the Commonwealth maintains legislative responsibility for family law, but the exercise of that jurisdiction be given to the states and territories. This is likely to create confusion and jurisdictional difficulties, particularly in financial disputes

where the availability of bankruptcy jurisdiction, superannuation splitting and *Corporations Act 2001* jurisdiction assist in the resolution of disputes under the FLA. There might also need to be some unbundling or streamlining of previous referrals of powers by the states and territories to the Commonwealth, such as in relation to children born of unmarried parents and property division for de facto couples. The double-bounce is constitutionally mind-numbing. There was no consideration given by the ALRC to the complexities of its proposals. Of course, there are some areas such as property law, trust law and personal injury claims, where there may be benefits not identified by the ALRC if FLA cases are resolved in state or territory family courts. The lack of identification of positives, other than for child protection, reflects the lack of deep deliberation by the ALRC of the challenges and consequences of implementing Recommendation 1.

2. Under s 41(1) FLA if state and territory family courts are established they must be funded by the Commonwealth so there will not necessarily be any cost saving for the federal government, which is an objective of the Restructure Bills. There may also be funding disputes with the states and territories.
3. How will legal aid and community legal centres be funded? The Commonwealth currently funds the state and territory legal aid authorities for FLA matters. Will the Commonwealth reduce funding for FLA matters particularly if the state and territory courts are also exercising state or territory jurisdiction?
4. The Family Court of Australia's trial and appellate divisions will be abolished, but the ALRC considered it important to maintain a federal appellate division "to ensure consistency of jurisprudence across the country" and that could be a division of the Federal Court of Australia. This proposal was also in the Restructure Bills, but was dropped by the federal government because it lacked parliamentary support. It is unknown if, following the re-election of the Coalition government in May 2019, the original proposal will be pursued in the Restructure Bills. Inconsistency of jurisprudence throughout the country may be an outcome of Recommendation 1, regardless of a federal appeal division. Relying upon litigants to spend money on appeals is not a practical method of achieving consistency of legislative interpretation between courts which will not be part of a unified court system. At least the current Family Court of Australia and Federal Circuit Court are a dual court system, not an eight-court system.

5. The ALRC acknowledged (at 4.90) that the Family Court of Western Australia has not frequently exercised its child protection powers. In practice, most child protection matters in that state are dealt with by the Children's Court of Western Australia. So, in the only state where FLA jurisdiction can be exercised by a state court, the child protection jurisdiction is infrequently exercised by that state court. No contrary evidence was relied on by the ALRC as to why family courts in other states and territories would frequently exercise both child protection and FLA jurisdiction if they had the opportunity to do so.
6. The ALRC considered that the creation of state family courts was not (at 4.90) "a substitute for the creation of a single child protection system". The implication of this statement was that a single child protection system was an unstated goal of the ALRC, but it was clearly beyond the scope of the Terms of Reference.
7. The inconsistent rules of the Federal Circuit Court and the Family Court of Australia were identified by the ALRC (at 4.10) as a source of confusion for parties, and harmonisation of the rules of the two courts was a way to achieve efficiencies. The problem of inconsistent rules can and is being addressed by the family law courts without the Restructure Bills having been passed. Inconsistent rules are likely to be a greater problem with all states and territories having their own family courts, and therefore the desire and ability to develop their own forms and rules. The problem of Magistrates' Courts dealing with the inconsistent rules of the family law courts with their local rules of court was acknowledged (at 4.80), but not that state and territory family courts might have similar problems.
8. A problem identified by the PwC Report and the federal government was the bouncing of cases between the Federal Circuit Court and the Family Court of Australia although the reasons for this, and the extent of the problem, is unclear. Under the ALRC's proposal, matters are likely to bounce between courts around the country when parties move. Currently, matters are referred within the same court if another registry in the country is more appropriate but (except for Western Australia) the same forms, rules and interpretation of the law applies. This is unlikely to occur if cases move between the family courts of states and territories.
9. The ALRC was particularly concerned (at 3.94) that 45% of all final order applications in the Federal Circuit Court were referred to child protection authorities. It did not, however, identify how many of these referrals became active files. No statistics were provided as to how many of these referrals were minor matters which the child

protection authorities justifiably find not to be worthy of further investigation. The percentage of referrals may have been simply symptomatic of the number of allegations made in Notices of Risk (which are mandatory to file in the Federal Circuit Court when parenting orders are sought, and mandatory to file in the Family Court of Australia where there are allegations of child abuse or family violence or there is a risk of child abuse or family violence) and reflective of the types of matters litigated in the family law courts. The raw data does not demonstrate a need for family law and child protection matters to be dealt with by the same court. Furthermore, the Western Australian experience suggests that it does not.

Most stakeholders, including the Law Council of Australia, acknowledge that having two federal courts exercising concurrent jurisdiction has been a failure. However, the options discussed in the Final Report to produce a “one court” solution did not consolidate the Family Court of Australia with the FLA jurisdiction of the Federal Circuit Court, but instead looked at ways of linking the child protection jurisdiction exercised by the state and territory courts to the FLA jurisdiction of the federal courts. The opinions considered to consolidate state and territory jurisdiction with FLA jurisdiction included (at 4.47- 4.128):

- Conferring FLA jurisdiction on state and territory magistrates’ and children’s courts. The ALRC noted that this was addressed in the *Family Law Amendment (Family Violence and Other Measures) Act 2018 (Cth)* but was only a partial solution;
- Creation of a national child protection system, through state referrals of power, to allow federal courts to hear child protection matters;
- Amendment of the Commonwealth Constitution to permit cross-vesting by state and territory courts to federal courts of child protection or family violence issues where a matter is otherwise before them;
- Creation of state family courts, as exists in Western Australia, in all other states and territories; and
- The devolution of the exercise of judicial power in family law to appropriate courts within the existing state court hierarchies, leaving the Family Court of Australia and the Federal Circuit Court with no residual family law jurisdiction, except at appellate level.

The ALRC confirmed (at 4.54) that there were constitutional problems with the referral of child protection powers to the federal family law courts unless the Full Court of the Family Court was prepared to revisit the exercise of accrued jurisdiction by the family law courts, suggesting (at 4.57 to 4.65) that the Full Court had taken an overly narrow approach. If accrued jurisdiction was able to be exercised by the Family Court of Australia in relation to child protection and family violence, that would ameliorate some of the consequences of the jurisdictional gap (at 4.65). Altering the Constitution to allow the Commonwealth to exercise

child protection powers requires a successful referendum, but the history of referenda in Australia has not been one of success. The option of the states and territories referring their child protection powers to the family law courts (at 4.56) was only briefly mentioned and not considered by the ALRC to be a solution, relying on the Family Law Council's conclusion (at 4.56) not to recommend it.

The ALRC acknowledged (at 4.32 to 4.36) that the family law courts regularly adjudicate parenting matters with multiple risk factors involving family violence, child abuse, drug and alcohol dependency and/or serious mental illness. However, the ALRC seems to have concluded that the family law courts lacked the capacity to deal with these disputes, in part because they have no independent investigative body akin to a child protection department and cannot compel a child protection department to intervene in a family law case. The evidence for this conclusion is unclear. Although the unwillingness of child protection agencies to engage with FLA proceedings can be problematic, it is arguably an over-reaction to abolish the family law courts altogether for that reason. It is also inconsistent with the criticism by the ALRC of the family law courts for not adopting the approach of Allsop CJ (at 4.64), who interpreted "the proper party to fulfil the parenting responsibilities" as including the State and therefore the family law courts could require child protection departments to participate in FLA proceedings. Given that Recommendation 1 requires the co-operation of the states and territories, another option is to seek that the states and territories agree to their child protection departments being involved more frequently in FLA matters before federal family law courts. This would help to bridge the gap. There are protocols for notifications to child protection departments of allegations that a child has been abused or is at risk of abuse, but the departments rarely become involved in FLA cases.

The law and procedures of the family law courts have been changed at various times to improve communication between the child protection system and the family law courts. The Discussion Paper proposed further changes, such as the co-location of child protection workers at family law court premises. Despite this proposal receiving considerable support, including of the Law Council of Australia, it was not in the Final Report's Recommendations.

The ALRC expressly stated (at 4.8) that they were not suggesting "that specialist family law judges are not essential to the proper administration of justice in family law matters". Instead, it proposed that the federal government reconsider its opposition to state and territory courts becoming the primary fora for resolving family law disputes.

The ALRC did not point out that if state and territory family courts are established, the same judge may not determine all aspects of a family's problems. The history of a family may not

transfer from one dispute to another. For example, family violence orders are frequently made very soon after parties separate. If a judge makes a finding that there should be a family violence order in contested proceedings, that judge cannot hear and determine other matters between the parties as the judge has already made a finding of credit against one party in the earlier proceedings. In family violence proceedings there are no transcripts or judgments which can be relied on in FLA proceedings, even if they are heard in the same court. Requiring, for example, the giving of reasons in family violence matters, may address part of the so-called jurisdictional gap but this was not discussed by the ALRC save that it supported the sharing of transcripts where they exist.

In the absence of submissions on the options for restructure of the family law courts (as these submissions were not sought) the ALRC reviewed previous inquiries and concluded (at 4.43):

“The various inquiries and reports over several decades, and especially those within the last 20 years, have all identified similar structural and systemic problems in the family law system. They have all recommended improved inter-jurisdictional collaboration and cooperation through a variety of protocols, information sharing agreements, and the conferral of enhanced family law jurisdiction on state and territory courts. In spite of those recommendations, the submissions to this Inquiry suggest that little progress has been made in protecting children and vulnerable parties from the ‘jurisdictional gap’.”

The ALRC stated that as the FLA already allowed state and territory family courts to be established, this was the best solution to jurisdictional fragmentation. The ALRC accepted (at 4.9) that its principal recommendation would take significant time to implement and made other recommendations that could be implemented in the short-term to improve collaboration between the federal and state and territory jurisdictions.

There were 7 commissioners involved in the Inquiry when the Final Report was released. Commissioner Faulks dissented on Recommendation 1. He expressed similar concerns (at 4.103-4.112) to those set out in this article. His alternative proposal involved a simplification of the paths between the courts, including that the court file travel with the parties.

8. Funding crisis of the family law courts

The ALRC confirmed that concerns about lack of funding in the family law courts has been problematic for 30 years and was “chronic”. The words of Brennan J of the High Court in *Harris v Caladine* (1991) FLC 92-217 were quoted by the ALRC (at 1.8) and could have been written in 2019:

“It seems the pressures on the Family Court are such that there is no time to pay more than lip service to the lofty rhetoric of s. 43 of the Act. It is a matter of public

notoriety that the Family Court has frequently been embarrassed by a failure of government to provide the resources needed to perform the vast functions expected of the Court under the Act. But the Constitution does not bend to the exigencies of a budget and, if the humanly familial relations create a mass of controversies justiciable before the Family Court, Justices must be found to hear and determine them.”

10. The number of judges hearing family law matters has decreased significantly in the last 10 years. In the Family Court, the number of judges has reduced by 39 or 18%. Whilst in the Federal Circuit Court the number has increased over the same period by 33%, this was a numerical increase of 17 judges only and therefore overall the reduction in the two courts was 22 judges. The ALRC stated these figures (at 3.61) but did not point out that Federal Circuit Court judges also hear general law matters so the reduction in the number of judges hearing FLA matters has been far greater than these raw numbers suggest.
11. The recognition by the ALRC (and the High Court) of the funding crisis of the family law courts underscores the questions as to the validity of the federal government’s stated justification for the Restructure Bills. The objective of the Restructure Bills was to solve the problem of court delays by increasing efficiencies, as recommended by PwC in its report *Review of the Efficiency of the Operation of the Federal Courts* (the PwC Report). The PwC Report assessed the performance of the family law courts primarily by measuring the outputs of final judgments rather than all of the work undertaken by the family law courts. The recommendations in the PwC report were based on a key, but incorrect assumption, that "in practice, both the courts hear matters of similar complexity" (p.3), an assumption further discussed in “The Family Court: Restructure, Destruction or Fade Away?” The PwC report itself said that it had not explored all possible opportunities, assessed all potential implications of each opportunity and recommended that further testing and design was required (PwC report, p.7).
12. Although the ALRC recognised the funding crisis of the family law courts, it did not make recommendations to address the crisis nor even make the observation that some of the problems in the family law system might be solved by greater funding. It referred to the problems created by the lack of funding frequently, but only recommended increased funding for Registrars to deal with spousal maintenance claims, for an expanded role of family consultants including for post-order case management, for independent childrens’ lawyers, for Indigenous Liaison Officers and to better implement and expand the FLA’s Less Adversarial Trial provisions. It did

not recommend an increase in general funding of the existing family law courts including to fund more judges.

13. The absence of an examination of the costs of increasing funding to the current family law courts as against the cost of the measures recommended by the ALRC is a serious deficit in the Final Report.

9. Sharing of information

A number of the ALRC's Recommendations are aimed at better enabling the sharing of information by the family law courts with state and territory family violence and child protection systems.

Recommendation 56 (at 4.164) is that s 121 FLA be redrafted to provide greater clarity. As part of the redrafting it should be clearer that s 121 does not restrict the sharing of information with:

- Professional regulators;
- Government agencies;
- Family relationship services;
- Service providers for children in connection with the provision of services to the family; and
- A family member.

Recommendations 2 and 3 are specific proposals about sharing of information intended to give all the courts in the family law system and professionals working in it more timely and accurate information without the need to apply for subpoenas or rely on the parties' perhaps inadequate evidence. It is a very sensible Recommendation.

10. Children's matters under the FLA

The ALRC deliberately described parenting matters under the FLA as "children's matters".

The ALRC said (at 2.33) that one of the most difficult issues raised in the Inquiry was whether it remained appropriate for children's matters under the FLA to be resolved in a court. It considered other modes of decision-making such as a Parent Management Hearings Panel. There was pending legislation to implement this, the *Family Law Amendment (Parenting Management Hearings) Bill 2017*. However the ALRC (at 2.36) "remained unpersuaded that the additional complexity of another layer of decision making within the family law system is desirable". A court appeal system would still be needed and

a court system was still required for the determination of property rights and for parties unable to reach agreement in relation to children's matters.

Reforming the children's provisions in the FLA

The ALRC proposed major reforms of the shared parenting provisions introduced into the FLA in 2006. It recommended (at 5.23) a reshaped decision making framework for parenting orders:

- Retaining the paramountcy principle in its current form;
- Removing the objects and principles provisions;
- Collapsing the different tiers of considerations within the best interests factors;
- Clarifying, simplifying, and amending the list of considerations for determining what is in the child's best interests;
- Amending the presumption of equal shared parental responsibility to be a presumption of joint decision making about major long-term issues; and
- Removing mandatory consideration of particular arrangements including equal time.

The changed pathway recommended by the ALRC was summarised (at 5.39):

“For care-time arrangements, the ALRC recommends that decision and agreement making should focus on the best interests of children, taking into consideration a more concise list of factors, and any other matters that are relevant. In relation to parental responsibility, the ALRC recommends that the practical effect of the current law be preserved, but that the presumption of equal shared parental responsibility be replaced with a presumption of joint decision making about major long-term issues. The link between a court's decision on parental responsibility and the matters it must consider in relation to care-time arrangements should be removed.”

In its Discussion Paper, the ALRC proposed that the paramount consideration be “safety and best interests” (proposal 3-3) rather than the existing “best interests” in s 60CA FLA. There was considerable concern from stakeholders that this proposal could have unintended consequences and it was not a Recommendation in the Final Report.

However, the ALRC recommended (Recommendation 4) the abolition of s 60B FLA which sets out objects of Pt VII of the FLA. Many submissions referred to there being overlaps and some inconsistency with s 60CC. The abolition of s 60B was recommended by Professor Richard Chisholm AM, a former judge of the Family Court, but possibly with a Statement of Principles replacing it.

One of the changes to s 60CC (at 5.61) removes the presumption that a relationship with a parent is necessarily in the child's interests even when the child has had no relationship with

that parent. The ALRC intended that its proposed shorter version of s 60CC of the FLA will avoid the necessity for parties (and judges) to feel obliged to address all of the existing s 60CC factors, thereby reducing legal costs for matters which proceed to judgment. However, only a minority of cases are affected as most cases settle prior to this.

Although intended to be covered under the catch-all phrase of “anything else that is relevant to the particular circumstances of the child”, there may be concern, or at least disquiet, that there will be no longer any express reference to:

- A child’s right to enjoy their Aboriginal or Torres Strait Islander heritage (existing s 60CC(3)(h));
- Making an order less likely to lead to further proceedings (existing s 60CC(3)(l)).

Whilst the proposed changes to s 60CC were supported by the Law Council of Australia, this was in the context of s 60B remaining in place, with some changes which pick up, for example, the importance of maintaining Aboriginal and Torres Strait Islander identity. Professor Chisholm’s proposal for reform of the parenting provisions recommended that the wording of the current s 60CC(3)(h) be retained and placed in the new section. This seems inconsistent with Recommendation 6 which suggests a re-wording of the FLA to include an expansion of the requirement to consider Aboriginal and Torres Strait Islander identity. It is not clear how the proposals fit together in the absence of a draft of the proposed provisions.

There is some overlapping in the current s 60CC factors, but the slimmed down version may lead to more litigation about what factors are relevant and how the shorter wording of, say, the relevance of a child’s views should be interpreted.

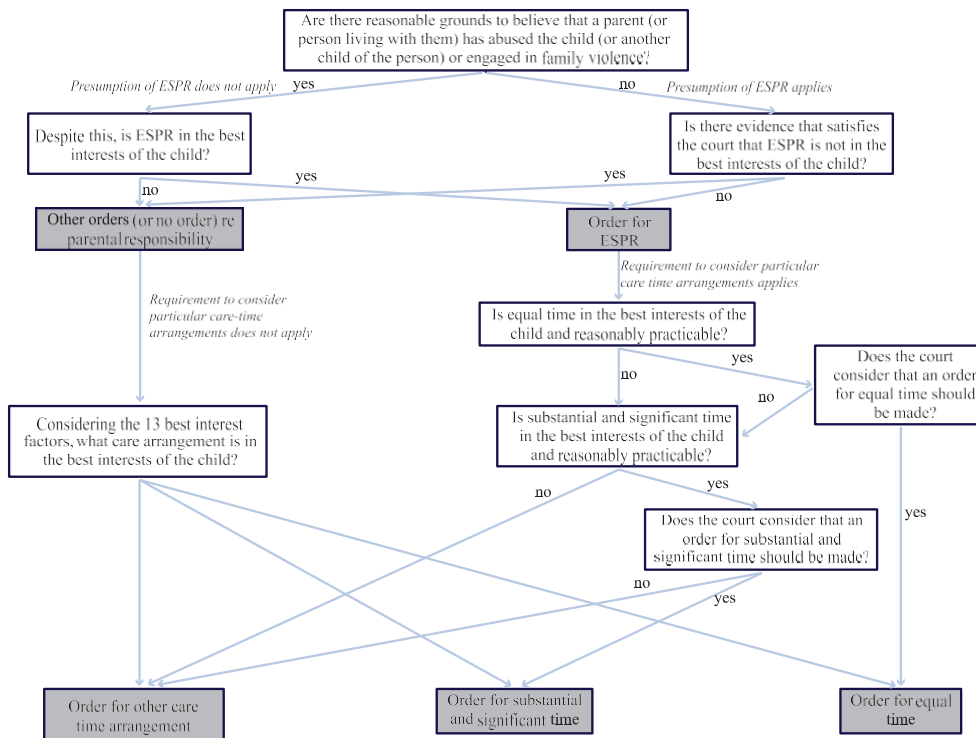
The proposal to repeal s 65BAA will simplify the legislative pathway in parenting disputes. The ALRC considered that this would address the problem of parents assuming that there is a presumption of equal care, enable more appropriate decisions to be made where there is conflict and family violence, reduce the complexity of judgments, and was likely to reduce legal costs and improve outcomes for children.

14. With respect to the presumption of equal shared time, many submissions (at 5.108) criticised the presumption for introducing an unnecessary step in the process for determining care arrangements, detracting focus from the child’s best interests and safety needs and providing scope for exacerbating conflict. The Family Court’s submission pointed out (at 5.113) that the FLA required the court to consider equal time or substantial and significant time, even when neither party sought it. The ALRC proposed (Recommendation 7) that it be renamed as a “presumption of joint decision

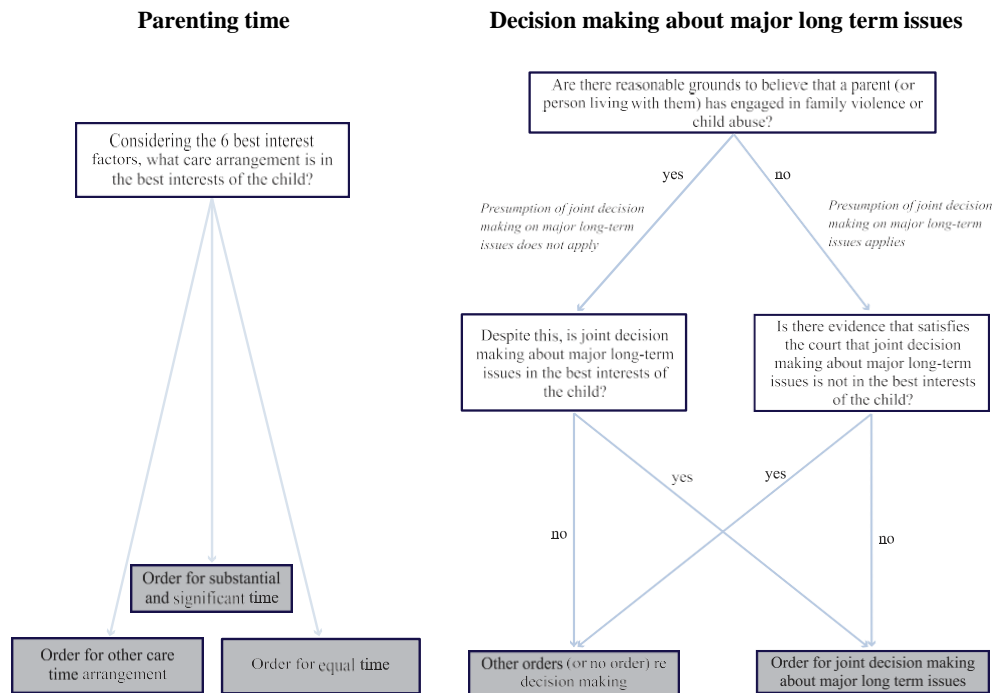
making about major long-term issues”. This removes the link (or possible link) between parental responsibility and time children spend with each parent.

It is unfortunate that the ALRC did not more closely adopt the proposals of Professor Chisholm set out in “Re-Writing Part VI of the Family Law Act – A Modest Proposal” (2015) 24(3) *Australian Family Lawyer* 17,10-11 and reiterated in his submission to the ALRC. Professor Chisholm’s proposal is comprehensive and well thought out.

The current decision making pathway is:



The recommended decision making pathway is far simpler:



Case management of parenting matters

The ALRC recognised (at 5.141) that the Family Court has a philosophy of encouraging alternative approaches to dispute resolution and had:

“been conscious of the inappropriateness of pure adversarial approaches to the resolution of family law disputes since its inception. The very establishment of the Family Court was premised on the acceptance of the belief that the existing courts had been found to be unsuitable and ill-equipped to deal sympathetically and helpfully with the particular problems of family disputes”.

As a result of its approach, the Family Court introduced significant changes to its procedures over the years. The innovations included (at 1.12) a specialist multi-disciplinary court, an in-house counselling section staffed by psychologists and social workers with child welfare expertise, and mediation as a fundamental part of the system. The ALRC recognised that many of the non-legal supports, such as in-house counselling, had been reduced or stripped away from the court and there were some submissions which wanted them to be enhanced or reinstated.

A 2003 survey of cases by the Family Court found that in considering the best interests of children, factors relating to risk of harm were unlikely to be of high or medium importance. Illustrating the change in the types of matters before the family law courts since then (at 5.4):

“In contrast, a 2014 AIFS Study found that 53.7% of parents who used the courts as their resolution pathway in 2014 reported physical violence was relevant to their situation prior to separation. Parents who used the court as their resolution pathway reported a mean of three complex factors and 38.1% reported four or more complex factors.”

The ALRC recommended (Recommendation 10) that the family law courts have combined rules which allow proceedings to be conducted under Pt VII Div 12A FLA – the existing Less Adversarial Trial program (LAT). Judges and courts should be adequately resourced to carry out the statutory mandate in s 67ZN(1) FLA. Section 67N(1) sets out 5 principles that the court is required to follow when hearing parenting matters or when the parties have consented, in property matters applying Div 12A. The principles are:

1. The court consider the needs of the child concerned and the impact that the conduct of the proceedings may have on the child in determining the conduct of the proceedings.
2. The court actively direct, control and manage the conduct of the proceedings.
3. The proceedings be conducted in a way that will safeguard:
 - (a) The child concerned from being subjected to, or exposed to abuse, neglect or family violence; and
 - (b) The parties to the proceedings against family violence.
4. The proceedings, as far as possible, be conducted in a way that will promote cooperative and child focused parenting by the parties.
5. The proceedings be conducted without undue delay and with as little formality and legal technicality informed as possible.

The ALRC noted (at 5.51) that the existing less adversarial trial provisions of the FLA (LAT provisions) largely corresponded with the essential components of the multi-disciplinary panels or tribunal proposed in submissions and also by the federal government in the *Family Law Amendment (Parenting Management Hearings) Bill 2017* (Cth). In particular, the LAT provisions were “expressly child focused, quasi-inquisitorial, focused on safeguarding parenting and ... conducted without undue delay”. This recommendation was, however, subject to the family law courts being properly resourced, a requirement which was mentioned several times (at 5.151, 5.152 and 5.160).

Besides resourcing, the ALRC considered (at 5.152) that it was possible that judicial officers felt constrained to exercise their powers fully under Div 12A because of concerns about the nature of the judicial powers vested in the courts by the Constitution. This concern was emphasised by the High Court in *R v Watson; ex parte Armstrong* (1976) FLC 90-059 where “the High Court held that any discretion exercised by Family Court Judges must be in

accordance with the exercise of judicial power and the duty to act judicially". However, the High Court majority did not reject the ability of the Family Court to dispense with such procedures and formalities as it saw fit with the consent of the parties to the proceeding.

The ALRC referred to practices in the Federal Court of Australia and in the United Kingdom, and somewhat condescendingly reassured the judges of the family law courts (at 5.158) that they "should have little concern that the use of less adversarial processes should be considered anathema to the exercise of judicial power".

Re-emphasising the need for adequate resourcing of the family law courts, the ALRC concluded (at 5.160):

"The Family Court is required, by virtue of s 69ZN, to give effect to the principles that underpin this legislative framework. It cannot comply with its statutory mandate unless it is provided with adequate resources."

The ALRC seemed to accept without question that the LAT method, properly resourced, was better than traditional litigation. It did not accept the opposing view, that the rules of evidence (which are relaxed in the LAT provisions) help to ensure that judges make decisions which are less likely to be appealed against and seem objectively "fair".

11. Property Division

The ALRC made some sensible recommendations to the property settlement provisions of the FLA, as well as others which are more controversial. It omitted making recommendations about many aspects of property settlements which need reform or review including bankruptcy, financial agreements and the definition of de facto relationships. Its recommendation (Recommendation 20) that the LAT provisions be extended to property cases is likely to be controversial because of the relaxing of the rules of evidence.

Small Asset Pool Cases

The problem with small asset pool cases was a focus of the Discussion Paper, which included proposals for a simplified small asset pool process. In a 2014 study, most parents reported asset pools of less than \$300,000. After the release of the Discussion Paper, the federal government announced funding for a court pilot of two options for small asset pool cases. In its Final Report the ALRC (at 10.82) did not make any recommendations with respect to small asset pool cases as it considered "these issues can be appropriately managed by the courts". Whilst the conclusion is probably correct as the family law courts have been open to finding different procedures in the past, the absence of a formal recommendation is disappointing as at present there is only funding for a pilot and ongoing

government funding would be easier to obtain if there was a specific ALRC recommendation. There is also a 2 year trial of funding for legal aid (at 8.36) for small asset pool cases. Funding these types of pilots is important because these cases are challenging to resolve cost-effectively. The same issues can arise as in larger asset pool cases, but resolving them with legal costs proportionate to the size of the pool is not easy.

Simplification of property settlement framework

Introducing into the FLA a structured pathway (Recommendation 11) as to the steps to be followed when altering property interests has merit. Post *Stanford v Stanford* (2012) FLC 93-518, the pathway is less clear than it was prior. The High Court did not endorse the four step approach set out in such cases as *Hickey & Hickey and the Attorney General for the Commonwealth of Australia (Intervenor)* (2003) FLC 93-143 and *JEL & DDF* (2001) FLC 93-075. A structured pathway would assist parties, lawyers and the courts by simplifying and clarifying the legislation.

The ALRC relied on the experiences of individual contributors who (at 7.26) raised concerns about there being no obvious starting point for negotiations and that they had given up on obtaining a property settlement because it was too hard, due to the ambiguous legal framework and the problem of disclosure.

The ALRC sought a simplification of the property settlement framework (at 6.6) as:

“The *Family Law Act* should provide a clear and easily understood framework that provides sufficient guidance for courts, legal advisers, and the public on the factors that are to be considered when adjusting the property and financial interests of parties on the breakdown of a relationship. Such a framework should assist parties to negotiate a division of their assets that is just to both parties and in the best interests of any children of the parties, without resort to formal dispute resolution processes. A clearer and simplified framework should reduce conflict and improve satisfaction with property settlement outcomes.”

15. Submissions to the ALRC expressed a diversity of views as to whether the current discretionary system should continue. One thought-provoking point was raised by the Family Court (at 6.35) that a prescriptive regime might have unintended consequences for people who do not appreciate that they were in a de facto relationship until a court declares that they were. By contrast, married couples know that they are married and can be expected to know that there is a legal system to determine any financial dispute. This links back to the omission by the ALRC to examine whether there should be reform of the definition of a de facto relationship. The ALRC did not support the removal of judicial discretion (at 7.7) as it recognised

“the importance of providing judicial officers with the scope to order a division of property that is just and equitable in each individual case.”

The ALRC recommended that the simplified pathway to property division (at 7.10) be:

1. Ascertain the existing legal and equitable rights and interests, and liabilities, of the parties in their property;
2. Presume equality of contributions unless a statutory exception applies; and
3. Determine what adjustment should be made in favour of either party having regard to any matter that is relevant to the particular circumstances of the parties, including:
 16. 3.1 the caring responsibilities for any children of the relationship;
 17. 3.2 the income earning capacity of each of the parties;
 18. 3.3 the age and state of health of the parties; and
 19. 3.4 the effect of any adjustment on the ability of a creditor of a party to recover the creditor's debt, so far as that effect is relevant.

There is no reference in the pathway to the requirements in s 79 FLA that the order be:

- appropriate (s 79(1));
- just and equitable (s 79(2)).

It is unclear whether the ALRC recommends that those requirements be removed or how they fit in, although the just and equitable requirement (referred to above) appears to remain, and was recognised as important.

Presumption of equal contributions

The ALRC recommended (Recommendation 12) the introduction of a statutory presumption that the parties made equal contributions during the relationship, with limited statutory exceptions. The presumption of equality of contributions could be displaced (at 7.9) with evidence that a party has:

- Wasted assets;
- Deliberately or unreasonably damaged property;
- Accumulated liabilities for his or her own benefit;
- Received compensation awards for pain and suffering or economic loss which have not been dissipated during the relationship and are otherwise traceable; or
- Received inheritances and gifts.

Difficulties with a presumption of equality of contributions were highlighted (at 7.21) by Professor Parkinson. They included complications caused by the rise of de facto

relationships and the increase in second and later marriages. Parties may not pool their property and there may be no expectation that parties will support each other. Whether a couple has children is, according to Parkinson (at 7.22) a better indicator of a change in a couple's relationship than their marital status, and therefore, whether there should be a significant wealth transfer between people following the breakdown of an intimate relationship, which may arise from a presumption of equality of contributions.

The Family Law Council in 1999 supported a presumption of equality of contributions but the ALRC did not point out this recommendation was made 20 years ago, and prior to all states and territories except Western Australia referring to the Commonwealth their powers to make laws about the division of property after the breakdown of de facto relationships. It was also prior to the expansion of jurisdiction under the FLA to include third parties in Pt VIIIAA and superannuation splitting in Pt VIIIB thus increasing the complexity of some cases.

A major problem with the presumption of equal contributions was not discussed by the ALRC. A presumption is a difficult concept for lay people to understand. Earlier in the Final Report, the ALRC discussed how the presumption of equal responsibility had (at 5.19 and 5.114) created "community confusion" resulting in inexperienced parties believing they had no choice but to agree to equal time (at 1.32) and increased legal costs. The impact of presumptions on victims of family violence (see Submissions of Domestic Violence Victoria, No 284; Women's Legal Service, Queensland, No 286) was not discussed in the Final Report with respect to this proposed presumption.

There were sufficient concerns about the operation of the presumption of equal shared parental responsibility in submissions in response to the Discussion Paper to suggest that similar problems might arise in relation to a presumption of equality of contributions in property settlement cases. A different view was taken by Professor Belinda Fehlberg who argued (at 7.23) that women who experienced family violence had significantly worse outcomes in property settlements than those who did not. She considered that a starting point of equal sharing might be advantageous to these women. However, the equality of contribution presumption has the potential to create a single step in many cases, and significantly reduce the property entitlements of the party with greater future needs.

The ALRC stated (at 6.16) that the complexity of s 79(4) and s 75(2) "particularly the lengthy list of factors with no clear hierarchy, does not assist readers to understand the process that a court would use to arrive at a just and equitable division of property".

Needs factors

The ALRC recommended a shorter list of needs factors with respect to property settlements (at 7.8):

- The caring responsibilities for any children of the relationship;
- The income earning capacity of each of the parties;
- The age and state of health of the parties; and
- The effect of any adjustment for need on the ability of a creditor of a party to recover the creditor's debt, so far as that effect is relevant.

The change to the s 75(2) factors by simplifying the list of factors (at 7.30) is intended to make "no change to the substantive law" but reduce the length of judgments and the risk of judicial error. The ALRC did not point out that there is no guarantee that the family law courts will interpret a shorter list in the same way as the existing list and therefore the law may change in ways it did not intend. There was no recommendation for making a hierarchy of factors. The expectation of the ALRC was that the law would not change. If the ALRC is correct, then in practice the law will become less transparent because the courts will consider factors not listed in s 75(2).

Valuing assets at date of separation

Legislating for the date of ascertaining the values of parties' rights, interests and liabilities in property to be the date of separation unless the interests of justice require otherwise (Recommendation 13) has the benefit of making the law clear. The FLA currently does not state when these matters should be assessed. There is, however, decades of family law jurisprudence relying on the date of hearing as being the relevant date (eg. *Farmer & Bramley* (2000) FLC 93-060; *Woodland & Todd* (2005) FLC 93-217; *Omacini & Omacini* (2005) FLC 93-218). The advantages of the change, besides clarity, include removing the need to update valuations and to consider whether parties have spent funds appropriately since separation and allows parties to move on with their lives post separation.

The disadvantages of the change were not discussed in detail by the ALRC. It was not a proposal raised in the Discussion Paper. Possible disadvantages include the unfairness of making orders in a falling housing market based on higher housing values at separation (of course, the contrary applies in the current regime), the lack of recognition of post separation contributions, the difficulties and expense of obtaining retrospective valuations of real properties and the unfairness of leaving a party with property which no longer exists or has a significantly lower value through no fault of that party, such as shares and failed businesses.

There would also be challenges in dealing with superannuation which the ALRC recommended be split equally as to the amount accumulated during the relationship

(Recommendation 16). If the superannuation split is a dollar value rather than a percentage (which is usual) the member of the fund whose interest is split may be left with much less than envisaged if share markets are falling. The superannuation splitting system is designed to give the non-member spouse interest on the base amount which compensates for any delays in the split coming into effect. The system does not assume that superannuation will fall in value, although it may, particularly if there is a significant delay between the date of separation and when the split is implemented.

This Recommendation requires proper consideration of the pros and cons of the change.

Debts and bankruptcy

Although the ALRC indicated that most property pools were modest it devoted only 3½ pages in Chapter 6 and about 5 pages in Chapter 7 to examining how debts were taken into account and the impact of one party being a bankrupt. It had no recommendations as to how they should be dealt with under the FLA, but recommended (Recommendation 14) the development of protocols and reform of other legislation so that where, for example an indemnity was given, this was recognised to the extent that the debt did not result in a negative credit rating of the indemnified person. These Recommendations warrant further consideration.

Financial agreements

20. In the Discussion Paper, the ALRC considered that there was significant anecdotal evidence to conclude that financial agreements did not produce the level of certainty that was 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 in the Discussion Paper that there seemed to be a reasonable case that prenuptial agreements should be removed from the FLA.

The difficulties of financial agreements, although the ALRC acknowledged the impact of *Thorne v Kennedy* (2017) FLC 93-807, were discussed in only 2 pages in Chapter 6 and one

paragraph in Chapter 7 of the Final Report. No substantive recommendations were made to address the problems.

The ALRC raised possible reform options in the Discussion Paper but in the Final Report the ALRC welched on major reform proposals. It concluded that reform efforts should be directed to simplifying the property settlement provisions in the FLA so that it was easier for a party asked to sign a financial agreement to compare their entitlements under the agreement and their likely entitlements under the FLA without the agreement. This was a dramatic back-down in the face of significant ongoing uncertainty and litigation in the area. Significant problems were identified by the ALRC in its Discussion Paper, but the Final Report was a lost opportunity to propose reform of an area in genuine need.

The options for reform raised in the Discussion Paper included to change the FLA to make the requirements clearer for them to be binding and not set aside, abolish them altogether and to require court approval as for the s 87 maintenance agreements which existed previously. Given the significant amount of litigation with respect to financial agreements and the problems of undue influence and unconscionable conduct as recognised by the High Court in *Thorne v Kennedy*, it is quite incredible the ALRC did not recommend real reforms in this area. Simplifying the legislative pathway for determining property settlement is not a solution to the significant problems with financial agreements for clients and for claims against lawyers.

Superannuation splitting orders

The recommendation (Recommendation 17) 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 not usually 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.

Tort of family violence

The introduction of a statutory tort of family violence into the FLA so that past family violence receives greater financial recognition than currently under the principle in *Kennon & Kennon* (1997) FLC 92- 757 may have some merit, but may increase litigation rather than reduce it. It was not a proposal in the Discussion Paper, which instead focused on family violence as a

factor in the consideration of contributions and future needs (Proposal 3-11), leading to concerns about doubling up and not addressing the evidentiary problems (Law Council Submission, No 285).

12. Spousal maintenance and child support

21. Redrafting the spousal maintenance provisions (Recommendation 18) to more clearly set out for parties the process for assessing spousal maintenance and remove the cross-reference between property orders and spousal maintenance seems a sensible suggestion. The ALRC also proposed greater use of registrars to make it easier for urgent applications to be heard.
22. Neither the Discussion Paper nor the Final Report dealt with child support. The ALRC made recommendations about spousal maintenance but managed to do this in a vacuum without 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 carers and the capacity of primary income earners to pay spousal maintenance.

13. Encouraging amicable resolution

The ALRC concluded (at 8.2) that as a majority of property and financial matters settle at the door of the court, stronger legislative encouragement to avoid courts and greater availability of family dispute resolution (FDR) and, for more complex matters, legally assisted dispute resolution (LADR), would mean more families would resolve their issues without litigation.

The settlement rates for property and financial matters which take the litigation pathway is much higher than for parenting matters. Not discussed by the ALRC, but an obvious reason for this, is that it is much easier for a party to weigh up the costs of continuing proceedings as against the risks and possible benefits in financial terms in property proceedings than for parenting matters. Time spent with children cannot be given a dollar value.

The potential impact of the proposed genuine steps requirement (Recommendation 21) will be, according to the ALRC, that (at 8.68) parties will first need to try to resolve their property and financial disputes without using courts, unless an exception applies. Similarly to the Pre-action Procedures in the Family Law Rules 2004 which apply in the Family Court of Australia, the parties can take different approaches including:

- FDR;
- Mediation by a non-FDR qualified mediator; and
- Steps involving lawyers to negotiate a settlement.

Placing the duty of disclosure in the FLA rather than in court rules was (Recommendation 25), the ALRC said (at 8.133) consistent with the principles that the “law should be clear, coherent and enforceable, and drafted in a manner that is accessible to the parties”. It recommended that the consequences for breach of the disclosure obligations by parties, and the obligations of all lawyers and FDRPs to advise clients about their duty of disclosure should also be in the FLA.

14. Arbitration

The ALRC opposed the introduction of compulsory arbitration but recommended (Recommendation 26) the expansion of arbitration to children’s matters except for more complex disputes such as international relocations, medical procedures requiring court approval, interventions, and where an Independent Children’s Lawyer has been appointed.

15. Case management

Recommendation 30 aims to ensure that FLA proceedings and any alternative dispute resolution processes are conducted in a way to facilitate (at 10.7) “the just resolution of the dispute according to law, as quickly and efficiently as possible, and with the least acrimony so as to minimise harm to children and their families”. This is a great objective, but one which has a possible internal contradiction: fast justice may not pick up on the nuances of family violence, child abuse and other risk factors. The problem of court delays impacting on families was raised (at 10.10) by some stakeholders.

Stakeholders raised a number of concerns about the present delays (at 10.10):

- The potential for children and parents to spend long periods living in limbo while waiting for trial;
- The safety risks to parties and children arising from delayed resolution of disputes that involve protective concerns, including contributing to homelessness;
- The scope for delay and uncertainty to exacerbate conflict; and
- The potential for clients to consent to outcomes that fall short of the security and protection a court order could provide.

The ALRC recommended (Recommendation 31) the introduction of an overarching purpose to impose similar obligations on parties, lawyers and third parties to facilitate the just resolution of dispute with the least acrimony and as quickly and inexpensively as possible. The ALRC recommended that, to maintain consistency across federal jurisdictions (despite recommending the establishment of state and territory family courts), the provisions be

modelled on the *Federal Court of Australia Act 1976 (Cth)* with modifications appropriate to family law:

- Including as an objective of the overarching purpose the consideration of the best interests of any child involved in the proceedings when considering how proceedings are being conducted;
- Including FDR within the scope of the obligation; and
- Requiring any person who provides financial assistance or other assistance to any party in so far as that person exercises any direct control, indirect control, or any influence over the conduct of a family law proceeding before the court (including negotiations for settlement) to take account of the duty imposed on the party and/or the party's lawyer and assist the party and/or lawyer to comply with their duties.

In relation to s 117 FLA (the power of a court to award costs in FLA proceedings) the ALRC recommended major revisions including removing the general rule that each party bear their own costs (Recommendation 36). The ALRC sought (at 10.37) that costs orders be made more frequently to act as a "brake" on unnecessary legal skirmishes and to discourage ambit claims. Whilst these are admirable objectives, the party who is financially stronger and has greater knowledge can use their advantage to an even greater extent, by using the threat of a costs order against the weaker party who is less able to pay a costs order. The ALRC also said (at 10.25) that it "be amended to expressly cover persons who provide financial or other assistance, so far as that person exercises any direct control, indirect control, or any influence over the conduct of a family law proceeding". This recommendation is specifically aimed at the parents of a litigant, new partners and well-meaning friends who provide funds for the proceedings and actively direct a party to act in a particular way or risk losing financial support. Third party litigation funders were also identified as problematic.

The ALRC was concerned about the amount of costs paid by parties, but recognised (at 10.135) that:

"Over the years, the nature of the work has changed and the very small percentage of family law disputes not resolved by the parties and that fall to be determined by a court are increasingly complex and lengthy".

The increased complexity of matters and the impact on legal costs was not acknowledged in the PwC report.

The misuse of processes and systems were identified as impeding post-separation re-establishment and recovery from family violence as well as parenting capacity. Although not recommending any amendments to the definition of "family violence" in s 4AB(2) FLA, the

ALRC said (at 10.33) that it was “essential that there be continuing professional development in relation to the nuances and emerging forms of family violence by all those who practice in the family law system, including judges”. Again, the ALRC focused on the specialist nature of family law, including the judiciary, which is not the approach taken by the federal government in the Restructure Bills.

The ALRC recommended that the Family Court and the Federal Circuit Court consider producing a joint practice note covering a long list of case management matters (Recommendation 34). The ALRC did not explain why these matters cannot be addressed in a common set of rules. Practice notes are less accessible to unrepresented clients than court rules.

The ALRC recommended (Recommendation 37) that courts have express authority to exclude evidence of “protected confidences” in specific circumstances, such as where harm might be caused which outweighs the potential benefits of the evidence. “Protected confidences” are records of a sensitive therapeutic nature. These matters might better be addressed (if they are not already) in the *Evidence Act 1995* (Cth), so that all evidentiary matters are together.

16. Compliance with parenting orders

These recommendations address the high rate of parents returning to court following the making of orders, the costs and stress of responding to contravention applications and the need to better support highly conflicted parents to implement parenting arrangements and develop positive communication.

Recommendation 41 largely puts the rule in *Rice & Asplund* (1979) FLC 90-725 into the FLA so that unrepresented litigants have greater awareness of the test for a change in parenting arrangements. The ALRC recommended that the FLA set out the more nuanced test from the cases and not just the *Rice & Asplund* test.

The expanded role of family consultants in post-separation parenting (Recommendation 38) is sensible but needs to be appropriately funded.

17. Legislative clarity

The ALRC was acutely aware that although the legislation is primarily read and used by judicial officers, lawyers and other professionals, key passages or terms are quoted when advising clients. The needs of unrepresented litigants also needed to be considered as they

are significant. Recommendation 55 was the comprehensive re-drafting of the FLA and its subordinate legislation.

The ALRC's specific recommendations (at 14.13) to simplify the FLA and its subordinate legislation are:

1. Dividing the legislative provisions between two statutes, one comprising substantive provisions which indicate to parties how their dispute will be determined (FLA), and the other comprising provisions of greater relevance to professionals rather than parties (*Family Law (Judicial and Administrative Provisions) Act*);
2. Providing for one set of rules applicable in any court exercising family law jurisdiction. (How this would be enforced in the Family Courts or Magistrates' and Childrens' Court states and territories was not discussed);
3. Simplifying provisions to the greatest extent possible;
4. Restructuring legislation to assist readability, for example by placing the most important substantive provisions as early as possible;
5. Redrafting the Act, Regulations and Rules in ordinary English to the extent possible;
6. User testing key provisions for reader comprehension during the drafting process, for example, through focus groups, to ensure that the legislation is understood as intended; and
7. Removing or rationalising overlapping or duplicative provisions as far as possible.

In relation to specific recommendation 1 above, the redrafted FLA would include:

- The substantive provisions regarding children's arrangements and financial matters;
- Provisions regarding procedure and evidence which describe for the parties how the court process will go about resolving any dispute;
- The overarching provisions contemplated in Recommendation 30; and
- Rights relating to appeals.

The other Act would include:

- Part IA 'Protection of Names';
- Parts II, III, IIIA and IIIB relating to court and non-court based services;
- Part IV 'The Family Court of Australia';
- Part IVA 'Management of the Court';
- Part VII Div 13 'State Territory and overseas orders';
- s 62B regarding courts' obligations to inform people about family services;
- s 70Q 'Certain instruments not liable to duty';
- Part IX 'Intervention';
- Part XIA 'Suppression and non-publication orders';
- Part XII 'Recognition of decrees';
- Part XIIIAA Relating to international conventions; and
- Part XIV 'The Australian Institute of Family Studies'.

A simpler restructure of the FLA, not proposed by the ALRC, would put the court structure, the Australian Institute of Family Studies and the Law Council of Australia in a separate Act to the FLA but retain the substantive law provisions such as Pt IX, XIA and XII in the FLA.

The proposals to restructure the FLA and re-number it are sensible and well overdue. New areas of jurisdiction have just been shoved into the middle, making the numbering of sections complex in relation to financial matters and jumbled in relation to parenting matters. The changeover will be painful for legal professionals and others, particularly when referring to judgments delivered before the change but the FLA will be easier to use. One example of the complexity of the numbering is that there are approximately 120 sections commencing with s 90 and numerous subsections of these, beginning with s 90 and ending with s 90XZH. Section 90 covers 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 s 60s 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, arguably makes the law less accessible. There are other ways to make the law accessible, such as putting more resources into fact sheets explaining the law, and better funding legal aid commissions and community legal centres.

The ALRC recommended (at 8.78) that the factors that guide an assessment of suitability for FDR should be moved from subordinate legislation to the FLA. This is sensible as they will be easier for all users to locate. However, proposals that other provisions be moved from the FLA to subordinate legislation or a secondary Act will make them more difficult to locate. It is, for example, proposed in Appendix H that parenting provisions be divided between two Acts.

The ALRC proposed that the parentage provisions be re-written in consultation with the states and territories 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. The writer's views were quoted (at 14.24) in the Final Report:

“redrafting these provisions in consultation with states and territories was an ‘excellent idea’, albeit ‘ambitious and challenging’”.

Achieving this will 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.

The ALRC recommended (at 14.13) although it was not a specific recommendation, that one set of rules be established to cover all disputes in any courts exercising FLA jurisdiction, as differing rules increase complexity, duplication and confusion for professionals and parties. This recommendation, which was also part of the Restructure Bills tabled before the May 2019 Federal Election, is a project which has already been adopted by the family law courts.

18. Accountability and transparency

In its Discussion Paper, the ALRC proposed the establishment of a Family Law Commission. The ALRC said that it received mixed responses to this, generally wary of the cost and additional bureaucracy. Instead the ALRC proposed (Recommendation 49) that the role of the Family Law Council be expanded to continuously monitor and assess the functioning of the overall family law system. The implementation of this Recommendation requires the Attorney-General to revive the Family Law Council as it is currently in abeyance with no new members appointed since 2016. The Family Law Council will also need to develop a set of performance indicators. This seems essential given that the ALRC did not complete the comprehensive review it was tasked with – admittedly a momentous job. Some of the ALRC's Recommendations need further investigation and other areas received only a cursory look or none at all. The Family Law Commission is the most obvious body to do this work.

In making its Recommendation (Recommendation 51) as to the characteristics and expertise of judicial officers in the family law system, the ALRC recognised that (at 13.43):

- Judicial appointments are critical to maintaining public confidence in the family law system and providing optimal outcomes and in-court experiences for litigants;
- That “establishing core competencies from judicial officers at the time of appointment is fundamental to ensuring good decision making” (at 13.44);
- That “the use of training to develop family violence competency for judicial officers is limited by the principle of judicial independence, as judicial officers cannot be compelled to attend or participate in training following appointment to the bench” (at 13.86);
- Whilst not recommending an advisory commission for judicial appointments the ALRC recommended that the process be more transparent than the current process.

However, Recommendation 51 is a watering down of the existing s 22(1) FLA and requires only that future appointments of judicial officers exercising family law jurisdiction “include consideration of the person’s knowledge, experience, skills, and aptitude relevant to hearing family law cases, including cases involved family violence”. The current s 22(1), which applies to Family Court, but not Federal Circuit Court appointments, is mandatory. The ALRC proposal does not set out mandatory requirements, only matters to consider. It is, like the Restructure Bills, a move away from specialist judges at a time when clients increasingly seek specialist expertise in their lawyers (exemplified by the continued growth of the family law specialist accreditation scheme) and the ALRC proposes mandatory continuing professional development (CPD) in family violence for family lawyers.

Recommendation 51 illustrates a significant problem with the ALRC’s proposal. If the states and territories have their own courts exercising FLA jurisdiction the federal government cannot impose the same standards on the judges of those courts, as it can on its own courts.

A Judicial Commission to handle complaints against judges was proposed in the Discussion Paper but was dropped from the Final Report. The ALRC agreed (at 13.63) with the submissions which suggested that any Judicial Commission should cover all federal judicial officers. The ALRC considered this was therefore beyond the scope of the Inquiry. It is difficult to understand the ALRC’s reluctance to make this recommendation.

There was some support from submissions to the Inquiry for mandatory CPD on family violence for all lawyers. The ALRC recommended that all legal practitioners undertaking family law be required to complete at least 1 unit of CPD relating to family violence annually. It left (Recommendation 52) to the Law Council of Australia the difficulty of working with the state and territory regulatory authorities to implement this, including the problem of identifying which lawyers need to do the training. For example, is it only lawyers who self-identify as family lawyers or is it all lawyers who act in at least one matter per year?

19. Reactions to the ALRC Final Report

There has been very little reported public response to the Final Report. Perhaps this is because of the size of the Final Report. Perhaps it is because the tabling of it was delayed until Parliament had almost ceased sitting before the May federal election. Perhaps it is because the focus of stakeholders had already turned to the forthcoming federal election. Perhaps it is because of the surprise by stakeholders about the headline recommendation, Recommendation 1.

The Law Council of Australia said in a Media Release on 11 April 2019 that it would carefully consider the ALRC's Recommendations, but warned that immediate solutions were required to ease pressures on the Family Court and the Federal Circuit Court for the good of Australian families. It saw any transfer of the FLA jurisdiction to the state and territory courts as a 5-10 year project and envisaged problems with that Recommendation.

Referencing the Restructure Bills, the President of the Law Council, Arthur Moses SC, said:

“Renaming a court to solve problems was a mirage – Australian families need real solutions and prompt action. Similarly, shifting responsibility to another jurisdiction can never be the answer to a problem when a lack of resources is at its core.”

The Chair of the Inquiry, Justice Sarah Derrington, was quoted in an article in the *Herald-Sun* on 16 June 2019, “Family Court failure”, as supporting two proposals which were not in the Final Report:

- That magistrates or state-based judges rule on child protection as well as divorce, custody and property matters. There was no reference to the establishment of state-based family courts. It is unclear if this was an error of the journalist or Justice Derrington has changed her position since the publication of the Final Report;
- That divorced parents take turns living in the former matrimonial home with the children, under a radical reverse-custody plan. There was no reference to this in the Final Report. In the author's experience this can work in some families for a short time after separation, but it is usually unworkable for a lengthy period because adults need privacy post-separation from each other, and they start re-building their new lives including establishing separate residences and may want to re-partner or at least date other people.

Justice Derrington referred to the problem of cases dragging on for years and that:

“People become more emotive the longer the proceedings drag on. ... So we've got another generation of children who are going to be damaged because their parents couldn't resolve the matter quickly or efficiently.”

She did not suggest that greater funding and more judges might help the existing family law courts, or that the proposed new courts may be just as under-funded and therefore have as many delays as the existing family law courts.

20. Conclusion

The ALRC referred to earlier inquiries which have raised similar issues to those raised in the Final Report, but the recommendations of which have not been implemented. This is, of

course, a possible outcome for the ALRC's recommendations. However, the federal government, prior to the May 2019 election, demonstrated considerable drive to restructure the family law courts, and said it wanted to see the ALRC's Final Report to consider what other reforms were necessary or desirable.

A good example of a seemingly simple and obvious reform, which may be too expensive for the federal government to prioritise, is the long-overdue re-numbering of the unwieldy FLA. These reforms would make the main Act more accessible for parties, lawyers, the courts and other users. However, the cost of re-drafting the legislation and implementing the changes might be considered too high at a time when the federal government is committed to finding cost savings.

The difficulties the federal government will face in considering what actions to take as a result of the ALRC's reforms include:

1. The Restructure Bills were designed to promote efficiencies and cost-savings. The ALRC's recommendations do not have these objectives and are unlikely to achieve these objectives.
2. The headline restructure reform of the ALRC was made in a vacuum and without consultation.
3. Many of the Recommendations in the Final Report were not in the Discussion Paper.
4. It was not a truly comprehensive review of the FLA and there are many gaps.
5. Most of the Recommendations are uncontroversial and likely to receive significant stakeholder support. The more controversial ones may warrant further examination and discussion, perhaps by a revived Family Law Commission. Hopefully, the federal government and other stakeholders will not be too distracted by the controversy which will undoubtedly be attached to Recommendation 1, the limited recommendations for increased funding (although the ALRC acknowledged it was required), and will give the bulk of the Recommendations proper consideration and, hopefully, implement them.