



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: FLC/DHsp:1466850

25 May 2018

The Executive Director
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001

By email: familylaw@alrc.gov.au

Dear Executive Director,

Australian Law Reform Commission – Review of the Family Law System – Issues Paper

Thank you for the opportunity to provide a response to the Issues Paper.

The information provided within this submission is the result of consultation within the Family Law, Indigenous Issues, and Children's Legal Issues Committees.

The Law Society has provided input to a submission by the Law Council of Australia (LCA), as one of the constituent bodies of that organisation. This submission notes additional or jurisdiction-specific issues which the Law Society considers sufficiently substantial to warrant a separate and independent contribution to this stage of the Review. Where we have not provided a response to a specific question, we support the submissions put forward by the LCA.

Please find our responses to individual questions below.

Question 5 How can the accessibility of the family law system be improved for Aboriginal and Torres Strait Islander people?

The views of the Law Society in respect of Indigenous peoples and the family law system are informed by its standing Indigenous Issues Committee. This Committee is comprised of Aboriginal and non-Aboriginal experts including solicitors, community workers, and judicial officers from both State and Federal jurisdictions. Members of the Law Society's Committee include members who have been instrumental in developing and implementing the pilot Indigenous list at the Sydney registry of the Federal Circuit Court (FCC). Our response is informed by the NSW experience. While contained in the answer to question 5, this part of our submission addresses questions raised in the Issues Paper in respect of access and engagement, resolution and adjudication processes, integration and collaboration and professional skills, specifically relating to Aboriginal and Torres Strait Islander people.

In the Law Society's view, one of the most urgent legal and social issues facing Australia is the rising rate of Indigenous children going into out of home care. "Business as usual" is failing Indigenous children and families, and the costs of failure are, from the perspective of

both individuals and society, far too high.¹ Realigning the family law system to bridge the care and protection and family violence jurisdictions to meet the best interests of Indigenous children will play a significant part of an effective response. As identified in the Issues Paper, Indigenous families generally do not access the private family law system.² In many cases, such access may have prevented the later removal of children through the public welfare jurisdiction.

The Law Society has advocated extensively on these issues in the past, including most relevantly, to the Family Law Council's review of *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* and numerous NSW-specific reviews of its care and protection system.

This submission builds on our previous advocacy and proposes an approach that (1) starts with what Indigenous people want for their children and families; (2) recognises that Indigenous matters often involve complex needs; and (3) builds on what has worked in the past, such as the pilot Indigenous list at the Sydney registry of the FCC and the pilot ADVO Defendant scheme run at Mt Druitt, NSW. In our view, in order for the legal system to provide Indigenous families with complex needs with effective outcomes, the system must adapt to specifically respond to the needs of those families. To do so, it is necessary to deal with Indigenous matters in a way that centrally embeds existing Indigenous leadership, knowledge and expertise.

Challenges identified in the Issues Paper

The experience of our members is consistent with the concerns identified in the Issues Paper. In particular, the family law system client base is evolving, and the jurisdiction now sees families with complex needs, including matters involving child welfare issues and domestic and family violence ([36]). It may be meaningless to insist on a sharp distinction between the public child protection system, and the private family law system as both of these systems deal regularly with the safety and welfare of children, particularly from the perspective of finding safe arrangements for Indigenous children within their family structures. We are of the view that there must be integration to some degree of the family law, care and protection and family violence systems, particularly for Indigenous peoples.

The Issues Paper identifies a number of reports that have made recommendations for the further development of integrated services models ([238]). We agree with the push towards integrated services, noting that legal services are but part of a suite of (therapeutic and other) services required by families in crisis. Families in crisis often have their first interaction with the legal system via the care and protection or criminal jurisdictions, but in our view, where there is family breakdown, often the most effective solutions lie within the family law jurisdiction. There must be effective mechanisms to identify those family law needs as well as to transfer those matters to the family law system for family law solutions. We also agree with the view expressed in the Issues Paper that a better understanding of family violence

¹ The consequences of removing children from their families for the child and for the families are both significant and long-term, and in our view run contrary to the objectives of the Closing the Gap agenda. For example, the drift of children in out of home care to the juvenile justice system, then later to adult incarceration, has been a key consideration for both the Royal Commission into the Protection and Detention of Children in the Northern Territory, as well as the ALRC's report into Indigenous incarceration.

² As noted by the Issues Paper, the barriers to access have been highlighted by previous reports. We strongly agree with the findings over a number of years that mainstream family law services are not designed or delivered in a way that recognises the lived experiences of Indigenous people ([59] of the Issues Paper). In our view those report recommendations identified in [61] and [62] of the Issues Paper should be implemented as a matter of urgency and agree with the contention that there is a need for better understanding of the dynamics of family violence within Indigenous families ([64]).

dynamics in Indigenous families is required ([63]³ - [64]) in order to ensure meaningful access to the family law system for Indigenous families.³

Given the above, in our view, the objectives of the family law system must explicitly include finding safe arrangements for Indigenous children within their families – allowing for Indigenous family members to exercise self-determination in doing so.

Roadmap for culturally effective family law services for Indigenous people

The Law Society has previously expressed the view that (based on the experience of the pilot Indigenous list at the FCC) the family law system has provided better outcomes for Indigenous children and families than the care and protection jurisdiction. In our view, the respective cultures of the family law system, in comparison to the care system, play a large part in producing these outcomes.⁴ The family law system is aimed at protecting a child's best interests, which includes a consideration of a child's right to culture (ss 60B(2)(e), 60B(3), 60CC(3)(h), 60CC(6) and 61F of the *Family Law Act 1975*). The family law system also starts its inquiry about a child's best interests with a presumption that children should enjoy a meaningful relationship with both their parents (s 60CC(2)(a) of the *Family Law Act*).

In NSW, we understand that there are some reforms underway of the care and protection jurisdiction targeted at early intervention and permanency support, aimed at serving children at risk of harm better, particularly Indigenous children. However, this is a slow process.

While this submission will comment on further matters that may improve outcomes for Indigenous children and families within the care jurisdiction, the Law Society's view is that there needs to be a coordinated overall strategy developed to meet the child welfare needs of Indigenous people in the family law system in order to address the rates of Indigenous children in out of home care. Developing and implementing an overall strategy for Indigenous engagement with the family law system will require addressing a number of fundamental issues:

- a) Improving awareness and knowledge of the family law jurisdiction within Indigenous communities, and creating robust pathways for Indigenous people to access family law solutions prior to crises leading to the intervention of state agencies. This should include capacity building for trusted existing Aboriginal community-controlled organisations such as the Aboriginal Medical Services (AMS) and Local Aboriginal Land Councils (LALCs), which are networked across NSW.
- b) Improving timely access to, as well as the quality of, legal, therapeutic and casework assistance that Indigenous people receive. Such services must be child/client centred, and properly coordinated to address the complex and intertwined needs that create the crises pushing Indigenous families into both the care and crime jurisdictions. Lawyers and other service providers are the mechanism for bridging the gap between the various fragments of the legal system, and must be alive at first instance to the key role they play in identifying where individuals and families in crisis could benefit from family law solutions.
- c) Properly equipping all jurisdictions to provide family law solutions for Indigenous families, regardless of the context in which child welfare issues have arisen. This includes

³ The Law Society attaches its submission to the Inquiry into Domestic Violence and Gender Inequality dated 16 April 2016 which provides more detail on these issues.

⁴ The Law Society's submission to the Family Law Council in respect of the review of *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* dealt with the contrasting cultures between the Children's Court of NSW and the family law courts. This submission is **attached** for information.

ensuring that Children's Court and Local Court Magistrates actively engage their family law powers where appropriate, whether to make family law orders, or to transfer appropriate matters to the family courts.

- d) Properly equipping the family law system so that effective access and engagement can be achieved for Indigenous people, whether through a specialised Indigenous list or Indigenous family law courts, or other means such as dual commissions for judicial officers.

The legal framework will require the active support and engagement of Indigenous service providers (including therapeutic services) to provide an enabling scaffold around the legal framework. Some Aboriginal community-controlled organisations may require capacity-building and support to carry out this work across various registries. Judicial officers must be culturally competent and prepared to work from within a therapeutic jurisprudence framework. In our experience, successful family led decision making processes for Indigenous families generally should be preceded by an interim judicial decision that "sets" the rules of engagement for parties. While there have not yet been any appeals from the pilot Indigenous list, in our view, any appeals must be similarly heard in a specialised Indigenous list or by judicial officers who have received cultural competence training.

We examine these issues in more detail below.

a) Pathways to family law for Indigenous people

The Law Society has in the past participated in a number of Aboriginal family law roadshows held in various locations throughout NSW. This initiative was aimed at providing Indigenous community members and service providers with information about the family law jurisdiction – a jurisdiction unfamiliar to many Indigenous people by virtue of being a private jurisdiction, where, unlike the care and crime jurisdictions, Aboriginal people are not respondents to (coercive) matters initiated by State agencies.

Regardless of location, Indigenous participants consistently stated the view that while it may be in an Indigenous child's best interests to no longer live with their mother or father while their parents are in crisis, Indigenous children should remain with their families (more broadly conceived than mainstream definitions of family) and that they must grow up in their own culture. Indigenous participants consistently and strongly stated that they wanted their children to truly know their families, and for their communities to know them. They stated that culture is connection, belonging and a source of resilience, strength and pride, that can counteract shame and destructive behaviours. As noted above, the *Family Law Act 1975* already recognises the central role of culture in determining an Indigenous child's best interests. In our view, more can be done to enliven this right.

The Law Society raises the following issues for consideration, based on what has worked in the past, and on the views expressed by Aboriginal communities throughout NSW:

Indigenous family law pathways roadshows. The Law Society understands that the previous roadshows were auspiced by the Aboriginal Family Law Pathways Network, a part of the Greater Sydney Family Law Pathways Network. Presenters included representatives Aboriginal service providers, legal service providers, Federal Circuit Court judicial officers, the NSW Department of Family and Community Services (FACS) and the Law Society of NSW. These education initiatives addressed the fundamental concept of using the law protectively, the difference between the care, crime and family law jurisdictions, how to access the family law jurisdiction where family members may have child welfare concerns,

and other matters including what it means to be an applicant in a matter, and what an effective relationship between lawyers and clients looks like.

We strongly recommend that this work continue, and that it be auspiced by an Aboriginal community organisation that is appropriately resourced to carry out the work. It would assist to establish a working group that includes state (Children' Court and Local Court) and federal (Family Court of Australia (FCoA) and FCC) judicial officers, legal practitioners, therapeutic services, FACS and police, to achieve cross-agency coordination. As noted by Aboriginal community members at past consultations, "family law must come to community." These education initiatives should continue to be aimed at building Aboriginal community awareness and ability to identify when it is appropriate to make a family law application, and to know how to do so. It must include the capacity to make immediate warm referrals to service providers who are culturally competent and who can provide a pathway into the family law system. This will include educating Aboriginal service providers (case workers, counsellors, and staff at existing Aboriginal organisations such as the AMS and LALCs).

We suggest that in addition to the community education stream, there should be a separate education initiative for professionals working within the care and protection and family law jurisdictions, including training for FACS caseworkers to recognise matters that are appropriate for early referral to the family law system.

Capacity building Aboriginal community-controlled organisations. The Law Society understands that in Indigenous communities, there are trusted organisations that are considered by community members to be culturally safe (and are therefore effective in delivering services to Indigenous people). In our view, it would be useful to direct health/justice funding towards creating positions within Aboriginal community controlled organisations (such as the pre-existing AMS and LALC networks) to provide Indigenous people with child welfare concerns information about the family law system, and to make the appropriate referrals. We understand that, for example, within the AMS, there is already a network of wraparound therapeutic services within which a legal function could fairly seamlessly be included. We note also that these organisations are either networked across NSW already, or provide outreach to the towns where they do not have a presence. Given that many Aboriginal community members may be familiar with each other, there may be confidentiality issues that require consideration, and it may be that the charters of those organisations (such as LALCs) may need some amendment to allow these organisations to carry out this work. Appropriate education and support of those recruited to these roles, and to those organisations undertaking this new function generally, will be necessary.

It may be that the AMS network may be better placed to engage in the early intervention information and referral work, and that the LALC network may be better placed to assisting Indigenous families to meet the obligations of cultural plans (whether made in the care and protection or family law systems).

b) Improving the quality and availability of legal and other services to Indigenous people

This issue covers both the ability of Indigenous people to access legal assistance, as well as the professional skills required of legal (and other) service providers to effectively meet the needs of Indigenous clients.

Access to legal assistance

The critical issue is the access that Indigenous people have to appropriate legal assistance, in both the care and protection and the family law systems. This is particularly true in rural,

regional and remote areas, where in addition to (and because of) the paucity of services available, many people are unable to access legal assistance, including due to conflicts.

For Indigenous clients who are unable to pay for legal assistance, access to justice is dependent on the ability of the legal assistance sector (comprised of Legal Aid Commissions, community legal centres and the Aboriginal Legal Service (ALS)) to meet their legal needs. There are very few private providers providing pro bono services - the lack of availability of pro bono services in family law is well-known.⁵ In our experience, access to Legal Aid is critical, especially given that in NSW:

- ALS is not resourced to maintain a significant presence in respect of civil law needs; and,
- most community legal centres do not undertake family law or care and protection litigation.

Indigenous self-represented litigants are at an even greater disadvantage than other self-represented litigants, given the legal system is not generally designed for Indigenous litigants. Even if an Indigenous litigant is assisted by a duty solicitor but is not legally aided, it is particularly problematic when there is no real management of matters between appearances.

Given this legal assistance landscape, and in addition to supporting the recommendations of the Productivity Commission in its review of access to justice arrangements,⁶ the Law Society notes the following concerns:

Access to Legal Aid: Based on the NSW experience, the legal aid grants systems in place may require review and readjustment, in order for Indigenous families to properly access the family law system. The experience of our members is consistent with the view of the National Association of Community Legal Centres, discussed in the Issues Paper, that people who are ineligible for legal aid but earn less than \$50,000 or \$60,000 a year are unable to afford the private legal fees necessary to access the family law system ([103]). We suggest that access to legal aid be reconsidered for individuals who fall within this income range, particularly for Indigenous families.

There may need to be a reconsideration of the Indigenous family and kinship structures when considering “family members”. In the experience of our members, a broader definition for Indigenous people will assist with finding safe arrangements for Indigenous children within family/kin structures.

There may also need to be a reconsideration of the contributions policies (insofar as they exist in legal aid schemes in other states) for Indigenous people,⁷ which we understand has been a deterrent for Indigenous family members considering family law action in the NSW context. We are aware of one case example, where an Aboriginal grandmother was granted aid. However, she declined to commence family law proceedings for family law arrangements for her grandchild because the legal aid contributions policy required a charge against her family home, worth \$350,000. She was very concerned that this charge would have jeopardised her family home, noting her familial experience of Stolen Generations and Stolen Wages.

⁵ See for example, National Pro Bono Resource Centre, *Pro bono legal services in family law and family violence Understanding the limitations and opportunities - Final Report*, October 2013, available here: <https://www.probonocentre.org.au/wp-content/uploads/2015/09/Family-Law-Report-FINAL.pdf>

⁶ Productivity Commission, *Final Report into Access to Justice Arrangements 2014*, available here: <https://www.pc.gov.au/inquiries/completed/access-justice/report>

⁷ More information is available here: https://www.legalaid.nsw.gov.au/for-lawyers/policyonline/policies/11.-contributions?SQ_DESIGN_NAME=print-chapter

Community legal centres undertaking family law litigation: Given the difficulties encountered by Indigenous people in accessing legal aid, other legal assistance options continue to be critical. The Law Society understands that, generally, community legal centres currently do not undertake family law litigation. We suggest that funding incentives be considered so that community legal centres are equipped to undertake family law/care and protection litigation.

Professional skills

Cultural competency

We comment only in relation to legal services here, but make the general observation that all service providers who have Indigenous clients must be culturally competent, even (and perhaps especially) if they work within mainstream or government organisations. Where service providers are not culturally competent, they are simply unable to provide an effective service to Indigenous clients.

Further, in the experience of our members, a culturally safe, wraparound model where Aboriginal community service providers deliver services together with legal practitioners is key to truly effective service delivery for Indigenous children and families. This is true in respect of the quality of service provided to clients, as well as in respect of the well-being of legal practitioners.

Agility of legal professional and problem solving skills

Most significantly, it is critical for legal practitioners to take a client-centred, proactive, problem-solving approach in order to act in the best interests of their Indigenous clients. It is necessary for service providers to recognise that for example, while matters might take on a care and protection, and/or a family violence complexion, the best outcomes may in fact lie wholly or partially in the family law jurisdiction.

Legal practitioners may best be able to serve Indigenous clients (and indeed any clients with complex needs) by being prepared to work between jurisdictions. As noted above, in our view, legal and therapeutic service providers are the key to bridging the care and protection, family violence and family law systems. Service providers should be aware of this aspect of their role, and be proactive in seeking family law solutions for individuals and families in crisis, regardless of where the matter first arises. This will require legal practitioners to cultivate an adequate degree of fluency in a number of different jurisdictions, or to develop appropriate networks to ensure seamless referrals, or both.

We note by way of example a practice of preparing draft parenting plans for pregnant Indigenous mothers-to-be. This draft plan supports an application to the family court once the baby is born. This practice assists Indigenous parents whose children may be at risk of being assumed into care by providing an opportunity to consider and document a plan for the child that keeps them safe, within family, and where appropriate, provides for meaningful parental contact. In our view, such approaches are preferable to crisis-driven emergency interventions, particularly given Indigenous peoples' fraught relationship with state institutions, including with legal assistance legal service providers. We note that Indigenous people often do not conceive of the law (and lawyers) as having a protective function.

Understanding effective early intervention entry points

Effective service delivery requires an understanding of the importance of early intervention, particularly in the context of care and protection reform. We note that a critical part of successful delivery of early intervention service is recognising what the most effective points of entry for early intervention are likely to be.

Timing is critical in respect of when families are most likely to accept assistance and are ready to take proactive steps to address risk factors for children.

In the experience of our members, parents and families are most likely to be receptive in the following settings:

- on AVO list day at local courts; and
- at police home visits.

In these circumstances, there may be a sense of necessity, crisis or urgency that prompts families to access the support, services and programs on offer. We bring to the ALRC's attention an AVO defendant pilot scheme run at Mt Druitt Local Court, NSW. Within this scheme, a wraparound suite of legal and therapeutic services attended the court on AVO list days. Both criminal and early intervention family lawyers were available to address issues that can lead to breaches of AVOs, including by ensuring defendants understood the terms of the orders and by assisting with parenting/contact plans that were consistent with the AVOs. We understand that this pilot received very positive feedback from the service providers involved, and decreased the rate of AVO breaches. In particular, there were no breaches of final orders where there was some tailoring of orders in relation to children.⁸

Other points of intervention will include situations when parents are accessing other services such as supported accommodation and Tresillian or Karitane. In respect of older children, a critical point for intervention will often be in circumstances where children have been suspended from school. This is a time when children may disengage from school entirely; which may lead to serious consequences.

Family consultants

In our view, there should be a concerted effort to recruit and capacity build Aboriginal and Torres Strait Islander Family Consultants. We understand that there is currently only one Aboriginal Family Consultant. This may require, among other things, a review of the current requirement for five years of professional experience which may act as a barrier to otherwise qualified Indigenous social workers and psychologists.

Funding should be provided to ensure that non-Indigenous Family Consultants are culturally competent.

c) Improving integration and collaboration

As discussed above, issues arise for individuals and families in crisis in a number of different jurisdictions, but where there is family breakdown, practical solutions can often be found in the family law jurisdiction. In our view, one of the strengths of family law orders is the flexibility available.

The issues prompting discussion in respect of the need for better integration and collaboration in respect of care and protection, family law and family violence issues have been comprehensively considered by the Family Law Council in its interim and final reports on *Families with complex needs and the intersection of family law and child protection systems*.

⁸ Legal Aid NSW, *ADVO Defendant Pilot Mt Druitt Local Court Final Review Report*, June 2013, 11, available online: https://www.legalaid.nsw.gov.au/data/assets/pdf_file/0007/16477/Mt-Druitt-pilot-Final-Review-Report-June-2013.pdf

In this regard, the Family Law Council made the following recommendation:

Recommendation 6: A court-based integrated services model

- 1) To provide evidence and a better structured system in a more child-focused way, the Australian Government should consider establishing a client-centred integrated service model to trial collaborative case management approaches to families with complex needs, to be piloted initially in one court registry and evaluated pending further roll out. Part of that trial should include the development of effective information sharing protocols.
- 2) In order to support the development of effective information sharing protocols, Council recommends the government clarify the confidentiality status of family dispute resolution intake assessments.

The Law Society strongly supports this recommendation.

Identified need for integrated services

We note in particular the data provided to the Family Law Council by Victoria Legal Aid that:

around 30% of clients who received assistance with a parenting dispute under a grant of legal aid in 2012-13 also received assistance with a child protection or family violence issue either one year before, or one year after, receiving assistance for the parenting dispute. The most common 'cluster' for this type of client was the combination of a parenting dispute and a family violence matter in the year prior to the parenting dispute. The second and third most common clusters were a parenting dispute with a family violence matter in the year after and family violence issues both before and after receiving assistance for the parenting dispute.

[...]

Thirdly, the VLA data analysis suggests that a common 'pathway' through the legal system for families with complex needs is a family violence protection matter in a state magistrates' court followed by a parenting dispute in a family court, and that an application for family violence protection orders in a magistrates' court is a common first point of contact with the legal system for families with complex needs.⁹

In our members' view, this is consistent with the NSW experience.

Given the co-occurring range of needs involved, and the difficulties presented by having to access different jurisdictions (noting in particular the often unsatisfactory outcomes that result), we note that the Family Law Council's final report discussed the need for wraparound services to be co-located with legal services:

In Council's view, the recent AIFS research, which shows that increasing cohorts of the family law system's clients have a mix of legal and therapeutic support needs associated with family violence, drug and alcohol misuse and mental ill health, highlights the need to provide court clients with access to a broader range of service representatives within the court precinct. These data also indicate that more is needed than simply 'warm referrals' to a range of services, and the critical importance of developing a case management framework and protocols to support the exchange of information between services.¹⁰

⁹ Family Law Council, *Families with complex needs and the intersection of the family law and child protection systems – Interim Report*, June 2015, 27-28: available here: <https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Families-with-Complex-Needs-Intersection-of-Family-Law-and-Child-Protection-Systems%E2%80%93Interim-Report-Terms-1-and-2.pdf>

¹⁰ Family Law Council, *Families with complex needs and the intersection of the family law and child protection systems – Interim Report*, June 2016, 130-131 available here: <https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Family-with-Complex-Needs-Intersection-of-Family-Law-and-Child-Protection-Systems-Final-Report-Terms-3-4-5.PDF>

We strongly agree with this view, and note that the Issues Paper cites the Family Law Council's view that "the best opportunity for realising a 'one court' model is to support state and territory courts of summary jurisdiction to exercise their family law powers where parties with family law needs are already before the court." ([244]). We suggest that there are a number of models and approaches that merit further consideration.

Examples in local courts

We note that in making the recommendation set out above, the Family Law Council discussed the Neighbourhood Justice Centre model. We strongly support further investigation of the Neighbourhood Justice Centre model for adoption in other states. The NJC is multijurisdictional, where the Magistrates Court and Children's Court (crime), as well as the VCAT and Victims of Crime Assistance Tribunal sit in one location. In our view, the primary strengths of this model are its commitment to problem-solving and breaking the cycle of offending, by committing to building relationships between the Magistrate and offenders, allowing the Magistrate to take an inquisitorial approach to sentencing, and building in therapeutic supports and judicial monitoring of offenders' rehabilitation.¹¹

We noted earlier in these comments the Mt Druitt pilot AVO defendants scheme and recommend that the ALRC also consider this model as a successful integrated services model. Noting that state and territory magistrates' courts already have jurisdiction under Part VII of the *Family Law Act* to make consent parenting orders and to determine interim parenting matters with the consent of the parties, this model involved the exercise of family law powers in the Local Court of NSW.

This pilot was relatively inexpensive to implement in the Local Court. Criminal law and family law solicitors attended on a duty basis, as well as a wraparound suite of culturally appropriate therapeutic service providers, offering services to defendants on the AVO list. We understand that support services for victims, such as the Women's Domestic Violence Court Assistance Service, were already available. Where appropriate, family law matters were also dealt with at the time, by reaching family law orders by consent, with structured therapeutic supports in place. We understand that the aim of the pilot was to reduce breaches of AVOs, as a means of improving family safety, as well as decreasing the rates of Indigenous incarceration. We understand further that the pilot did result in decreased rates of AVO breach, and that feedback from offenders and service providers was that it greatly assisted to understand the terms of the orders, and to have family law arrangements in place that were both workable and consistent with the orders.

In our members' experience, nearly all matters in the AVO list will involve family law matters, and families are generally very receptive to intervention measures to protect children at the time their matters are on the AVO list. It may be useful to conduct an analysis to identify Local Courts that deal with high number of AVO matters and/or deal with a large number of Indigenous defendants with a view to expanding this pilot.

Family law orders in the Children's Court

In our view, Children's Courts in particular should be empowered to make family law orders where appropriate. Where Local Courts sit as Children's Courts, legal practitioners in particular can play an active role in identifying appropriate matters, and in seeking family law orders in those matters. It may, for example, assist the court if practitioners prepare a draft form of orders sought.

¹¹ See <https://www.neighbourhoodjustice.vic.gov.au/attend-court/problem-solving-court/understanding-our-court>

We note that there is some uncertainty about the jurisdiction of the Children's Court to exercise federal jurisdiction, and note that the Family Law Council made the following recommendation:

- (i) That section 69J and section 69N of the Family Law Act be amended to remove any doubt that children's courts, no matter how constituted, are able to make family law 104 orders under Part VII of the Family Law Act in the same circumstances that are currently applicable to courts of summary jurisdiction.
- (ii) That the government consider the appropriate process of appeal from family law decisions made by state and territory courts.¹²

The Family Law Amendment (Family Violence and Other Measures) Bill 2017, which is currently before the Senate, seeks to respond to this recommendation.

The Family Law Council also recommended that:

[R]egular meetings of relevant stakeholder organisations [should be convened], including representatives from the children's courts, child protection departments, magistrates courts, family courts, legal aid commissions and Attorney-General's Departments, to explore ways of developing an integrated approach to the management of cases involving families with multiple and complex needs. [Recommendation 5(b)]¹³

and:

Recommendation 15: State and territory courts exercising family law jurisdiction

- 1) The National Judicial College of Australia develop a continuing joint professional development program in family law for judicial officers from the family courts and state and territory children's courts and magistrates courts.
- 2) If the Australian Government accepts Rec 15.1, then Council recommends amendment of the *Family Law Act 1975* to increase the monetary limit for property division by courts of summary jurisdiction.
- 3) Council recommends an increase in Commonwealth funding to state and territory courts of summary jurisdiction to enable them to take on more family law work.¹⁴

We support these recommendations. In our view, enabling the Children's Court to exercise its family law powers is an important part of the effort to addressing the issue of Indigenous overrepresentation in the care and protection system. The Law Society is also aware that, in response to recommendation 96 of the Royal Commission into Aboriginal Deaths in Custody, the Judicial Commission of NSW runs the Ngara Yura judicial education program to develop judicial knowledge on Aboriginal cultural understanding, including in respect of matters relating to Aboriginal customs, culture, traditions and society.¹⁵ It may be fruitful for state and federal judicial officers involved in these areas of law to conference on issues related to cultural education and problem-solving for Indigenous individuals and families in crisis, including through improving access to the family law jurisdiction.

Transfer of appropriate matters to family courts

Where Children's Courts identify matters that should more appropriately be considered in family courts, in our view, barriers to transferring those matters should be limited. We suggest that, particularly for Indigenous matters, consideration be given to removing any

¹² Family Law Council Final Report, 203.

¹³ Family Law Council Final Report, 204.

¹⁴ Family Law Council Final Report, 146.

¹⁵ Ngara Yura terms of reference available here: <https://www.judcom.nsw.gov.au/education/ngara-yura-program/ngara-yura-committee-terms-of-reference/>

legislative barriers to transferring matters from local courts or Children's Courts to the family courts to facilitate finding safe arrangements for Indigenous children within their families.

The Law Society has previously recommended that s 69ZK(1) of the *Family Law Act 1975* be reconsidered. Currently, consent is required from the Minister (or welfare officer) to allow a matter to proceed where Children's Court orders are in place.¹⁶

We reiterate our view that this provision should be amended to require consent only where parental responsibility has been allocated to the Minister. This amendment would facilitate contact, and would avoid a rehearing of a substantial issue (and forum shopping) where parental responsibility is granted to someone other than the Minister, and bring some finality to the process.

d) Specialised Indigenous family law court services

If the aim of the overall strategy is to lead Indigenous clients, who are often clients with complex needs, to engage with the family law system, the family law system must be ready to meaningfully engage with Indigenous clients and to provide effective outcomes. As discussed above, there are a number of matters that require reconsideration and redesign in order to provide for effective access and engagement for Indigenous clients. In our view, this includes the family law court services, which are currently not designed to recognise, mobilise and support Indigenous knowledge, customs and practices.

Principles for redesign

The Family Law Council has identified a need to redevelop the justice system to maximise its effectiveness for families with multiple and complex needs. It identified the following principles for this redevelopment. In the Family Law Council's view, the redevelopment must:

- Ensure a client-centred design, with services that are comprehensible and accessible to families with multiple and complex needs;
- Provide timely responses to child safety concerns, including early assessment of risk and exposure to trauma;
- Support the use of flexible problem-solving approaches to clients' needs, including the exercise by judicial officers of multiple jurisdictions where appropriate;
- Incorporate tailored services for specific problems and demographic groups, including dedicated case-managed responses to family violence and child abuse and specialised services for Aboriginal and Torres Strait Islander families;
- Employ a teamed approach, including integrated legal and support services; and
- Facilitate information sharing and collaboration across jurisdictions.¹⁷

The Law Society strongly supports this view, particularly in respect of meeting the family law needs of Indigenous families.

Model for specialised Indigenous court services

Further to the discussion above in respect of integrated court services at the Local Court/Children's Court level, the Law Society considers it necessary for federal courts to be equipped to engage effectively with Indigenous families who seek to access it, whether those issues are first presented in the Children's Court, Local Court or in the federal system.

This may require investigating and trialling a number of different models of specialisation, and we discuss briefly below some options.

¹⁶ Law Society submission to the Family Law Council.

¹⁷ Family Law Council Final Report, 118.

Experience of Indigenous courts in Victoria

Whether such specialisation takes place on a registry by registry basis, such as through Indigenous lists, or whether such specialisation takes place through a longer term goal of establishing an Indigenous Family Court is a question that requires further, careful consideration. In undertaking this consideration, we suggest that the ALRC further investigate the development and implementation of Koori courts in the Children's Court, Magistrates Court as well as the County Courts in Victoria. In our view, if matters are heard in a specialised Indigenous court/list at first instance, at the very least those judicial officers hearing its appeal should have similar levels of expertise in Indigenous matters, and be culturally competent.

While not in the family law context, we note the successes of the Victorian Koori courts, not least of which is the significantly increased participation of Aboriginal people working in Victorian Courts. We understand that in 2002 there were very few Aboriginal people working in Victorian Courts, and there are now more than 100 Elders and Respected Persons participating in Koori Courts throughout Victoria.¹⁸

Regardless of whether an Indigenous family court model, or an ad hoc Indigenous list model is adopted, we note the key role that Indigenous liaison court officers can and do play in improving Indigenous engagement with the Courts. In our view, each family court registry should employ an Indigenous liaison court officer. Alternatively (or additionally) if Indigenous health/justice officer positions are created within the AMS framework, then it should be part of the remit of those officers to work closely with the courts to improve Indigenous engagement with the family law system.

Dual commissions

We note also the discussion in respect of vesting judicial officers with dual commissions and note that the experience of Western Australia suggests that this is indeed a workable model. The Law Society supports further investigation of this model, and we support efforts to pilot a dual commission model in registries where there are high Indigenous populations, and/or high rates of Indigenous children in out of home care.

Features of a specialised Indigenous court services

We comment below on a number of matters for the ALRC's consideration that we suggest should inform the development of an overall strategy for Indigenous engagement with family law court services. We also provide further information about the pilot Indigenous list at the Sydney Registry of the Federal Circuit Court.

Therapeutic jurisprudential framework

In our view, it is critical for a judicial officer hearing Indigenous matters to be prepared to act within a therapeutic jurisprudential framework.

The ALRC has noted the constitutional limitations on the capacity of federal judicial officers to engage in problem solving approaches ([219] of the Issues Paper). The Issues Paper discusses two models suggested for developing a problem-solving approach to decision making for suitable cases, those being a hybrid model, and an administrative model, such as the proposed Parenting Management Hearing (PMH) Panel.

¹⁸ Information provided by Judge Paul Grant to a Law Society Indigenous Issues Committee member.

The Law Society agrees with the view that in respect of families with complex needs, a less adversarial, problem-solving approach is more effective. However, we have reservations in respect of both those suggested models to produce effective outcomes for Indigenous families.

In our view, the Indigenous list approach (discussed in more detail below) is to be recommended for Indigenous families, noting that orders requiring therapeutic involvement are drafted to be connected to the child's best interests, and are made as a condition of arrangements for time with the child or the child's residence. In our experience, such orders are routinely made, on both an interim and final basis.

If the proposed PMH Panel model is to go ahead, in our view its design should at the outset embed access and engagement measures for Indigenous families.

Involvement of Elders

While the participation of Elders is a key feature in the criminal jurisdiction, the Law Society does not support the mandatory participation of Elders in the family law setting. In the experience of our members, the contribution of Elders is only valuable in Indigenous family law matters if those Elders are from that particular family or kinship structure.

Family Led Decision Making/Family Group Conferencing

We note that our members have had a mixed experience in respect of the effectiveness of family led decision making (FLDM) or Family Group Conference (FGC) processes for Indigenous families. In the experience of some members, FLDM and FDC processes assist in Indigenous matters if the immediate risk issues are first dealt with via an interim judicial decision, putting in place judicial oversight. In the experience of those members, Indigenous litigants respect judicial authority, and mediation can only take place successfully once the initial "rules of engagement" are set. Other members have noted that FGCs have had some efficacy within the care and protection context, for identifying safe family members willing to have the child or children in question to live with them.

Indigenous list, Sydney registry, Federal Circuit Court

The Federal Circuit Court has been running a pilot Indigenous list in its Sydney registry since September 2016. We understand that although the list is Sydney based, it has accepted matters from all over NSW.

From September 2016 to May 2018, we understand that there have been 52 matters listed, and, remarkably, there have been no applicant drop outs.

As at May 2018, of the 52 matters listed, 17 have been finalised, a number of matters transferred, and the rest are still active. Only two matters proceeded to final hearing, but were settled in the course of the hearing.

We understand that the success of the pilot has been largely attributed to the fact that the legal framework is supported by comprehensive, culturally safe (and therefore more effective), wrap-around therapeutic support. Indigenous community services identify and assess appropriate matters for diversion to the Court.

Legal service providers, including the Family Law Early Intervention Unit of Legal Aid NSW, provide timely legal assistance to parties, supported by Indigenous community workers. Indigenous community services attend the otherwise closed Court so that seamless and

effective referrals can be made for assistance, including housing, drug and alcohol, mental health and other therapeutic assistance.

We understand that the NSW Department of Family and Community Services (FACS) has been informed and involved in some of the matters on the Indigenous list, but rarely as a party.¹⁹

We further understand that the Aboriginal Family Law Pathways Network has, over a number of years prior to the establishment of the Indigenous list, put a significant amount of effort into educating Indigenous community members in NSW about the option of proactively seeking protective family law orders for children prior to the involvement of FACS. In our view, the efforts of the legal and Aboriginal therapeutic service providers have been critical in driving Indigenous participation with the Indigenous list. The service providers involved have played a key role in triaging and identifying appropriate matters for diversion into family law, as well as educating Aboriginal community members about the family law system and supporting their engagement with the court processes.

In our view, a specialised Indigenous list is a relatively inexpensive innovation. The Law Society suggests that, in addition to achieving better outcomes for Indigenous children by keeping families together, it is likely to reduce backlogs, result in higher settlement rates, and result in lasting orders. In our view, the Court should be commended for exhibiting the flexibility, commitment and far-sightedness required to support the pilot.

The Law Society has written to the Commonwealth Attorney-General to suggest that this initiative should be closely considered for further resourcing and expansion to other Registries of the FCC. It is an excellent example of an initiative that has succeeded because of, among other factors, the Court's willingness to consult, act on, and work with, local Indigenous leadership. The legal framework is given the opportunity to succeed, because it has been given sufficient time to develop, and is scaffolded by other essential elements including culturally safe and effective education, and therapeutic services. We note that an Indigenous list has recently been established in the Adelaide Registry of the FCC.

Informal feedback received from Indigenous litigants and service providers is that the Indigenous list is a process that is considered culturally safe, and appropriate, so parties are able to be candid about the issues, which allows for better decision-making in the best interests of the child. We suggest that the pilot Indigenous list be formally evaluated, with a view to its expansion.

We also suggest consideration of financial support for Aboriginal family and kin who care for children pursuant to family law orders. These individuals may already be bearing a significant caring burden and may sometimes be in precarious financial situations.

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

In general, the Law Society supports the principles put forward in the LCA submission, and provides additional comments below.

The majority of practitioners in NSW seek to assist their clients resolve family law disputes by consent and in a cost-efficient manner. The provision of effective legal services accords with lawyers' statutory and common law duties, and further assists the profession in building

¹⁹ We understand that FACS has intervened in one matter, but the child involved will stay with family.

positive reputations with clients for referrals, and with other service providers and contacts who feel confident to refer their clients for legal representation.

However practitioners are often frustrated by the evident lack of resources available to properly administer matters in the family law jurisdiction, often leading to lengthy delays and an accompanying increase in legal costs for litigants.

We note that many of the issues are also applicable to other jurisdictions, but given the quantum factor associated with the presently-significant backlog and ongoing high docket entry numbers in NSW, these issues have a substantial effect in this state.

Case/Docket Management

The Law Society considers that the approach of having judges undertaking case management may be worthy of re-examination. Ultimately, we believe that as a general proposition judicial time should be spent on hearing substantive matters, leaving both specific case and broader docket management as a registrar function.

We note that in previous years the courts have undertaken pilots or trials of registrars case-managing particular lists, leaving judges free to preside over substantive matters. It is our understanding that the specific details of these trials, and assessments of their efficacy, might be available from the regional managers of the courts exercising the family law jurisdiction in NSW, and we believe the results of these may be worthy of further inquiry.

Telephone Attendances

The ALRC may wish to consider whether more minor case management could be done by telephone attendance, where possible and practical, with clients excused, and whether this would have the effect of reducing costs of travelling, waiting time, and reducing client stress where their presence is not necessary.

We note that this is already occurring to some extent in NSW. However, we further note that telephone directions hearings are presently unreliable.

In our members' experience, extended waiting periods before telephone conferences proceed are common. In some cases, conferences are cancelled at either short notice or immediately preceding a scheduled conference, due to resourcing issues within the court or registry.

To that end, the ALRC may wish to consider the overall concept, as well the specific, practical use of telephone conferences.

Physical Appearances

Members practicing in NSW note that there appears to be a general increase in the number of attendances being required by the courts, often before different officers of the court.

Whilst we do not question the fact that interlocutory hearings are an innate aspect of all but the most straightforward of matters, the ALRC may wish to consider whether any options are available or could be developed or refined for a more streamlined and efficient case management process that alleviates costs and delays.

More specifically, the ALRC may wish to consider whether reducing the number of physical court attendances, where possible, could make a significant contribution to reducing delays

and ultimately legal costs for litigants, and provide better efficiencies for public expenditure in the Justice portfolio.

Procedural Inconsistencies

We note that many of the issues around case management are not peculiar to NSW. However, they are exacerbated by the presently high number of current and backlogged matters in this jurisdiction. Further adding to the problems associated with delays and increased costs of litigation in NSW are inconsistencies between different registries in relation to procedural processes.

For example, there are different procedures between the two major NSW Registries (Sydney and Parramatta) on even the most straightforward of matters, e.g., bringing an interim application or seeking a listing at short notice.

Practice Notes are generally informative and effectively followed, but individual registries seem to develop procedural peculiarities that are less formal, unpublished, and confusing for practitioners unfamiliar with the registry.

There may be benefit in the ALRC considering the issues associated with non-standardised case management procedures, such as timelines for returns of subpoena, expert reports, and directions hearings.

It is of course accepted that there can be disparity, as a matter of practical requirement, on issues such as hearing date availability between courts and registries, however the divergence of procedures can be problematic and may be worthy of further inquiry.

Lawyer Engagement

Members in NSW have noted that there appears to have been a shift in recent years away from the courts engaging directly with the legal profession for the benefit of overall progress of certain, often minor, short notice, or interlocutory matters.

As a minor example, bringing an urgent application or seeking short service in the Sydney Registry presently requires a party/practitioner to leave documents with the Registry for a duty registrar to consider. It is our experience that commonly there is no duty registrar physically present.

Our members note reports of applications being declined with no notice or discussion, where a simple discussion may address or alleviate minor issues, or documents not being returned in a timely manner.

The latter can result in time limits for review of the duty registrar's decision subsequently lapsing. It is our experience that duty registrar availability to speak with practitioners 'over the counter' is particularly useful in interlocutory, injunctive, or short notice matters generally, where a registrar's assessment of an application can be assisted by a discussion with the legal practitioner and dealt with expeditiously.

To that end, the ALRC may wish to consider options with regard to duty registrar engagement with parties/practitioners on minor, urgent, short notice or interlocutory matters.

Transference between Courts and Registries

Our members note a significant number of matters being transferred between courts and registries for what appears to be resourcing issues. It is not uncommon for cases to be

transferred from the FCC to the FCoA then back to the FCC; or from Sydney to Parramatta then back to Sydney.

As noted by the LCA, if a multi-layer court system is to continue in future, then further inquiry into measures ensuring clear parameters would be helpful for litigants and the profession (and the courts no doubt) in relation to what matters are suitable for which layer of the system.

We consider that, as a general and sensible principle, moving matters between courts and between registries should only be in exceptional circumstances. The ALRC may wish to consider the factors driving these moves and whether any rules of court or Practice Notes may be usefully amended to reduce them.

Cost of Experts Reports

In NSW, and elsewhere, there is an increasing propensity for the court to send litigants to the private sector for family reports, including those to be prepared by experts in parenting cases (Chapter 15 expert reports).

The cost can be prohibitive for many clients; it is not uncommon to be in the vicinity of \$20,000-\$30,000 in Sydney. This expense can be exacerbated by the fact of a report becoming 'stale' on the basis of the current delays and extended periods before report commissioning and final hearing.

Whilst noting that cost of expert reports is largely market-driven, the ALRC may wish to consider measures to address the overall issue.

Legal principles in relation to parenting and property

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

The Law Society supports the principles put forward in the LCA submission, in particular that part VII of the Act should be simplified, and that the principle that the child's best interests principle be retained as the paramount consideration and without the need to consider any particular outcome.

We suggest the following matters may be further considered:

- Whether provision, or practice, should be made for parties to attend mediation in parenting matters at multiple stages of any given litigation, and not just prior to filing in court. We note that even if matters don't settle on a final basis, a mediation process can be usefully engaged to narrow the issues to be litigated, with the effect of reducing hearing time.
- Whether there can or should be clarification on the circumstances where single expert reports can be challenged by parties and an adversarial expert sought to be appointed. We suggest that some issues, such as allegations of bias, are best addressed in cross examination. Further, we consider that in circumstances of family violence and where there are Indigenous cultural issues, a single expert report may not address the best interest factors in s 60CC. We suggest that where this is the case an adversarial report would be justified. The ALRC may wish to consider whether a more prescribed list and/or definition of circumstances would be beneficial.

- Whether parts of the role of the Independent Children's Lawyer (ICL) as described in the Guidelines for Independent Children's Lawyers published by the FCoA should be codified. Specifically, whether this should include matters such as ICL meetings with the child/children, and being able to speak to a child's counsellor or similar.
- Whether s 60D, in relation to advisor's obligations, should be deleted, or in the alternative, remove the requirement as it refers to lawyers.
- Whether equal shared parental responsibility should be displaced by a presumption of shared parental responsibility, and whether there should be further education, information or guidelines on this concept provided to the judiciary, legal profession and wider community.
- Whether there needs to be provision in the Act to deter unfounded allegations, which can result in children not being able to spend time with or having minimal contact with a non-primary carer. How 'unfounded' is defined will need consideration.
- Whether measures should be enacted to prevent parties 'backing out' of agreements made at mediation, where signed but not yet formally filed with the court.

The Law Society notes the reference in the LCA's submission to the proposals of The Hon. Richard Chisholm in his paper presented at the 2014 National Family Law Conference, 'Re-writing Part VII - A Modest Proposal', specifically regarding Aboriginal and Torres Strait Islander children, family and community, but commends the paper more broadly to the ALRC for consideration.

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

The Law Society supports the submissions put forward by the LCA.

We suggest that the following matters may be further considered:

- Whether issues of family violence, either within family law proceedings or in separate criminal proceedings, e.g., allegations made in applications for Apprehended Domestic Violence Orders, could be identified and considered early in family proceedings. We note that delays in allocating family hearing dates for both family and criminal law matters in NSW in particular can leave children vulnerable.
- Whether violence definitions in the Act should be better particularised. We consider that the current definitions may be overly broad and open to misuse as a tool to reduce or minimise one parent's time with a child or children.

Question 19 What changes could be made to the provisions in the Family Law Act governing binding financial agreements to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes?

The Law Society broadly supports the principles put forward in the LCA submission, but notes some additional matters for consideration, as detailed below.

Amendments to the Act have allowed parties to contract out of some or all of the financial provisions since 2000. The expressed aim of introducing Binding Financial Agreements ('Agreements') was to encourage parties to agree on how their property should be

distributed in the event of a separation. Part of the rationale behind the original Part VIIIA and the subsequent Part VIIIAB was to allow parties greater control and choice over their own affairs in the event of a relationship breakdown.

The legislation provides for Agreements to be made:

- in contemplation of a marriage or de facto relationship; or
- during a marriage or de facto relationship; or
- after a divorce or end of a de facto relationship.

It is our experience that parties find the provisions in Part VIIIA and VIIIAB to be confusing and repetitive. The lack of clarity appears to have contributed to some Agreements not being held to be binding on the parties, and our members report cases where Agreements have not been enforced or have been set aside because of difficulty with the language used in them or the manner in which they were entered into.

The Law Society supports the proposition that parties should be allowed to contract out of the financial provisions of the Act, provided they do so voluntarily and with full understanding of their rights and obligations.

The ALRC may wish to consider, however, whether it would be preferable to combine or consolidate all legislative provisions relating to Agreements, whether they are for married or de facto couples and whether they are entered into before, during or after the relationship has ended, such that there are fewer relevant parts of the legislation to read and to follow.

Further, it may be worthy of consideration as to whether the Agreement itself should specify the circumstances in which it is entered into, i.e., whether it is between a married couple or de facto couple and whether it is before, during or after the relationship.

The ALRC may wish to consider whether the provisions relating to the conditions for making an Agreement binding on the parties, and thereby ousting the jurisdiction of the court, should be simplified with the steps set out, perhaps with a flow chart,²⁰ in notes to the relevant legislation.

In relation to this, consideration might be given to considering whether the wording of the required advice to make the Agreement binding (currently set out in ss 90G(1)(b) and 90UJ(1)(b)) should be amended to state that, before signing the Agreement each party was provided with independent advice from a legal practitioner about the effect of the Agreement on the rights of that party under the Act, including the benefits and detriments to that party of the court not being able to consider an application relating to matters covered by the Agreement.

The growing popularity of Agreements entered into prior to relationships has led to more cases where Agreements are challenged at a later time. But, and in addition to the point made in the preceding paragraph, we question whether consideration should be given to the ability of a court to review an Agreement which is no longer just because of a material change in circumstances.

At present ss 90K(1)(d) and 90UM(1)(g) allow a court to set aside an Agreement if there is a material change in circumstances relating to a child. The Law Society recommends

²⁰ Such as that referring to the requirements for admissibility, Pt 3 of the *Evidence Act 1995* (NSW) or relating to making/varying bail decisions in s 16 of the *Bail Act 2013* (NSW).

consideration be given to whether this power of the court should be extended to setting aside or varying an Agreement where there has been a material change in circumstances of a party. We note the Act at ss 90KA and 90UN makes it clear that the court has the same powers as the High Court of Australia in determining the validity, enforceability and effect of an Agreement. However, for abundant caution, the Law Society suggests consideration be given to whether ss 90K and 90UM should be amended to include material changes in circumstances to a party.

The Law Society further suggests thought be given as to whether it should be expressly stated in the Act that if parties enter into an Agreement as a de facto couple and subsequently marry each other, the Agreement will continue unless it is terminated by the parties.

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

The Law Society supports the principles put forward in the LCA submission. We raise for the Review's information the extensive and critical selection process for mediators on the Law Society-administered Family Law Settlement Service panel, operating on an experience and qualification basis, and suggest this may be worthy of further investigation as an effective model for broader application.

Further, the Review may wish to consider legislative recognition, or incorporation into court rules or Practice Notes, of general principles of collaborative practice, including with coaches with social science or psychological expertise.

Integration and collaboration

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

The Law Society supports the submissions put forward by the LCA.

We suggest the following matters may be further considered:

- Any net benefit of increased funding of legal aid commissions or other family law service providers to provide social worker and referral officer support services to family law clients, e.g., the Family Advocacy and Support Service.
- Any positive or negative effect of the removal of the requirement under s 69ZK for the consent of the state child protection services to be given in approaching the family courts when final children's courts orders have been made, in certain prescribed circumstances.

Children's experiences and perspectives

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

The Law Society supports the submissions put forward by the LCA, and suggest the following matters may be further considered:

- Where a child or children express a desire to be more involved in court processes, or want to speak or write to the court directly, should this be provided for in legislation, rules, or Practice Notes.
- Whether there be benefit in greater use of technology in an ICL communicating with children, such as via telephone, Skype, FaceTime, email etc. This would of course be particularly relevant for children in rural and remote areas, but may also be applicable as a general rule recognising changes in social and cultural psychology.

Question 36 What mechanisms are best adapted to ensure children’s views are heard in Court proceedings?

The Law Society supports the submissions put forward by the LCA, and aspects of this submission’s response to Question 34 may be applicable to this question. Further, we suggest the following issue may also be considered.

It is common that families are referred to ‘family therapy’ during proceedings with psychologists and counsellors trained in the family law system and conflict between parents.

The therapy can be confidential or non-confidential, with client professional privilege attaching to restrict access to therapist records. The ALRC may wish to consider, in such cases, whether it would be appropriate and beneficial for family therapists to provide a short report to the court on the views and wishes of the children, and whether this would assist with factual determination without impacting on the integrity of the family therapy or affecting privilege.

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

The Law Society supports the submissions put forward by the LCA.

However, we note for the ALRC’s information that whilst children are able to apply to the Court to be independently represented pursuant to s 68L(4)(b)(i), this provision is rarely used as a matter of practice in this jurisdiction.

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

The Law Society supports the submissions put forward by the LCA.

We further suggest that the ALRC consider whether, where applicable, short, low formality surveys of children after meeting with ICL’s or with family consultants about their experiences, may further/better inform legal and practical reforms.

Professional skills and wellbeing

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

The Law Society supports the submissions put forward by the LCA.

The Law Society in particular supports the comments of the LCA noting the diversity of the clients encountered by family law practitioners, and the importance of engaging with individual experiences rather than making assumptions about a client or party's situation.

In relation to training, the Law Society supports the LCA's submission that there be compulsory family violence training for all solicitors, noting that many lawyers who may come into contact with victims of violence may do so in connection with other legal tasks, rather than just family law work. We note, as a general rule, the efficacy of the Specialist Accreditation offered by most professional bodies.

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

The Law Society supports the submissions put forward by the LCA. We further note that conflictive behaviour is exacerbated by delays; as parties become increasingly distressed, the potential for lawyers to be drawn into disputes and to lose objectivity also increases.

In relation to this, we believe that quality mentoring of junior solicitors in particular is an essential aspect of professional development and substantial factor in the overall efficacy of the family law system. To that end, the ALRC may wish to consider where and how more opportunities to offer mentoring in a formal setting might be available.

Thank you for the opportunity to provide our submissions on this stage of this important review. The relevant Law Society contact officer at first instance is Steve Patrick, Policy Lawyer – Policy and Practice Department, who can be reached on (02) 9926 0212 or steven.patrick@lawsociety.com.au.

Yours sincerely,

Doug Humphreys OAM
President

Encl.



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: FIC:IIC:GUel109927

14 April 2016

Committee Secretary
Senate Finance and Public Administration References Committee
PO Box 6100
Parliament House
Canberra ACT 2600

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

Dear Committee Secretary,

Domestic violence and gender inequality

I am writing on behalf of the Law Society of New South Wales, and refer to the terms of reference of the Inquiry into domestic violence and gender inequality ("Inquiry"). The comments provided below fall within the scope of terms of reference (a) and (c).

The Law Society generally supports the view expressed in the *National Plan to Reduce Violence Against Women and their Children 2010-2022* ("the *National Plan*") that gender inequalities have a profound effect on violence against women and their children¹. However, the Law Society also notes that the *National Plan* recognises that:

[f]amily violence is a broader term that refers to violence between family members, as well as violence between intimate partners. It involves the same sorts of behaviours as described for domestic violence.²

and that family violence

is the most widely used term to identify the experiences of Indigenous people, because it includes the broad range of marital and kinship relationships in which violence may occur.³

The Law Society notes that in the context of Indigenous people, the various drivers of family violence are likely to be complex and intersectional, and gender inequalities may be only one of a number of issues that require attention.

1. The National Plan

The Law Society observes that the *National Plan* is now in the Third Action Plan (2016-2019) – Promising Results phase. 'National Outcome 5 – Justice responses are effective' in the *National Plan* is of most relevance to the legal profession. The Law Society supports the strategies and key actions set out in National Outcome 5.

¹ The *National Plan to Reduce Violence against Women and their Children 2010-2022*, 15.

² *Ibid*, 2

³ *Ibid*.

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The Law Society notes that Strategy 5.2 includes an initiative to implement multi-disciplinary training packages for police, lawyers, judicial officers, counsellors and other professionals working in the family law system. The Law Society supports this initiative and considers that multi-disciplinary training packages for all professionals working in the family law system should educate professionals about the underlying causes of domestic violence, including gender inequality, power imbalances and controlling behaviours.

The Law Society considers that training about the underlying causes of domestic violence is of particular importance for legal practitioners who advise clients about property settlements and parenting arrangements after separation. Training in domestic violence for professionals working in the family law system should be nationally accredited.

The Law Society notes that Strategy 5.3 is about justice systems working better together and with other systems. The Law Society refers to the current Family Law Council reference on *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems*. Families with complex needs include families who have emotional, sexual and physical abuse, family violence, substance abuse, neglect and mental health issues. The Family Law Council is to report to the Commonwealth Attorney-General by 30 June 2016. The Law Society suggests that recommendations contained in the final report of the Family Law Council are considered as part of the implementation of Strategy 5.3 of the *National Plan*.

2. Family violence in Aboriginal and Torres Strait Islander communities

As noted above, in the Law Society's view, the various drivers of family violence in the context of Indigenous communities are likely to be complex and intersectional, and gender inequalities may be only one of the issues that require attention. We note that there may be other relevant factors including intergenerational trauma; homelessness and inadequate housing leading to overcrowding; unemployment; mental illness and substance abuse that may play a role.

Australian Institute of Health and Welfare figures suggest that Aboriginal women are hospitalised at much higher rates than non-Aboriginal women as a result of spouse/domestic partner inflicted assaults (38 times); and that Aboriginal men are also hospitalised at a much higher rate than non-Aboriginal men as a consequence of spouse/domestic partner inflicted assaults (27 times).⁴ These figures are silent on the identity (Aboriginal status or gender) of the perpetrators.

The Law Society further notes a Parliament of Australia research publication on domestic violence in Australia states that:⁵

Indigenous family violence may differ from the stereotypical image of a passive victim battered behind closed doors. It often takes place in public and can involve a number of people. Indigenous women may be more likely to fight back when confronted with violence than non-Indigenous women.⁶

⁴ F Al-Yaman, M Van Doeland and M Wallis, *Family violence among Aboriginal and Torres Strait Islander peoples*, Australian Institute of Health and Welfare (AIHW), Canberra, 2006, 54–55, <<http://www.aihw.gov.au/publication-detail/?id=6442467912>>

⁵ Janet Phillips, Penny Vandenbroek, "Domestic, family and sexual violence in Australia – an overview of the issues," 14 October 2014, *Parliamentary Library Research Papers 2014-15* <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1415/ViolenceAust#_Toc401045304>

⁶ *Ibid*, citing H Blagg, 'Restorative justice and Aboriginal family violence: opening a space for healing,' *Restorative justice and family violence*, Cambridge University Press, Cambridge, 2002, 191–205

The publication notes further:

There are significant deficiencies in the availability of statistics and research on the extent and nature of family violence in Indigenous communities. What data exists suggests that Indigenous people suffer violence, including family violence, at significantly higher rates than other Australians. In addition, a high proportion of violent victimisation is not disclosed to police and rates of non-disclosure are higher in Indigenous than non-Indigenous communities. [footnotes not included]

The Law Society notes also that in the National Aboriginal and Torres Strait Islander Survey in 2008, one in four people surveyed reported that family violence was a neighbourhood or community problem.⁷ The Law Society understands that Aboriginal community members have expressed the view that not only do women and children require support services, but there should also be adequate support services for men. In the experience of the Law Society's members, Aboriginal victims of violence often seek holistic, family-focused solutions.

In this regard, we note that the Victorian Royal Commission into Family Violence tabled its final report ("Report") on 30 March 2016,⁸ and Recommendation 146 made specific mention of the priority that should be given to funding to Aboriginal community controlled organisations for services for Aboriginal women and children; family centred services and programs (and one-door integrated services where family members can obtain a range of supports); culturally appropriate legal services for victims and perpetrators; suitable accommodation for victims and perpetrators; and early intervention and prevention actions in Aboriginal communities, including whole-of community activities and targeted programs.

The Law Society considers that there is a great need for adequately funded culturally appropriate legal services in those critical areas in which family violence intersects with the legal system. This is especially pertinent in care and protection, family law and apprehended domestic violence order proceedings. These services are most effective when funded to provide a holistic service incorporating legal advice and therapeutic support within an early intervention context, and when accompanied by appropriate community legal education initiatives. The delivery of services to Aboriginal families should ideally take place within a therapeutic jurisprudential framework. From the perspective of service delivery, as well as in respect of ensuring the well-being of legal practitioners, legal assistance service providers need the support of Aboriginal community controlled therapeutic services to properly deliver services to Aboriginal families in this context.

It should be noted that in terms of managing conflict, there needs to be a number of different legal assistance providers available in order to deal with both legal and community conflicts of interest. In practice, parties in (violent) conflict with each other cannot be properly served by one organisation, particularly if the various services are located in the same building. There needs to be a number of culturally appropriate litigation services in addition to advice services. In the Law Society's view, this is both an ethical issue and a safety issue.

The Law Society notes that the issue of adequate funding for legal assistance is a pressing and long-standing one. In particular, the adequate funding of civil law legal assistance has been comprehensively considered by the Productivity Commission in its *Inquiry Report on Access to Justice Arrangements*. Recommendation 21.4 of that report notes that the Australian, State and Territory Governments should provide additional funding for civil legal assistance services, and the total annual cost of the requisite services will be around \$200

⁷ ABS, *National Aboriginal and Torres Strait Islander social survey, 2008*, cat. no. 4714.0, ABS, Canberra, 2010, <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/mf/4714.0/>>

⁸ Victorian Government, *Royal Commission into Family Violence, Summary and Recommendations*, March 2016, <http://files.rcfv.com.au/Reports/RCFV_Full_Report_Interactive.pdf>

million. The Productivity Commission also noted in this recommendation that “where funding is directed to civil legal assistance it should not be diverted to criminal legal assistance.”⁹ We understand that the Government has not formally responded to this Report.

Please contact Emma Liddle Policy Lawyer on (02) 9926 0212 or by email to emma.liddle@lawsociety.com.au if you have any questions in relation to this letter.

Yours sincerely,



Gary Ulman
President

⁹ Australian Government Productivity Commission, *Access to Justice Arrangements – Inquiry Report Overview*, No. 72, September 2014, 68 <<http://www.pc.gov.au/inquiries/completed/access-justice/report/access-justice-overview.pdf>>



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: IIC/FLC/JEvk:953429

7 August 2015

Family Law Council Secretariat
C/- Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

By email: flcreference@ag.gov.au

Dear Professor Rhoades,

Family Law Council Reference - Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems

I write on behalf of the Indigenous Issues Committee of the Law Society of NSW ("IIC"). The IIC represents the Law Society on Indigenous issues as they relate to the legal needs of people in NSW and includes experts drawn from the ranks of the Law Society's membership.

The IIC understands that the Attorney-General, Senator the Hon George Brandis QC, has asked the Family Law Council to report on ways of improving responses to families with complex needs who use the family law system. The IIC thanks the Family Law Council for the opportunity to provide comments.

The IIC notes that the first two questions in the reference are:

1. The possibilities for transferring proceedings between the family law and state and territory courts exercising care and protection jurisdiction within current jurisdictional frameworks.
2. The possible benefits of enabling the family courts to exercise the powers of the relevant state and territory courts including children's courts, and vice versa, and any changes that would be required to implement this approach, including jurisdictional and legislative changes.

While the Family Law Council has asked a further six specific questions to guide submissions, the IIC's comments are provided in a more general form.

This submission is made in relation to Indigenous¹ children and families, and is informed by the NSW-based experience of the IIC's members.

¹ In this submission, the terms "Aboriginal", "Aboriginal and Torres Strait Islander" and "Indigenous" are used interchangeably.

SUMMARY OF THE IIC'S RECOMMENDATIONS

The IIC's recommendations are made in relation to the improvement of outcomes for Indigenous children and families through changes in current practice and procedure, as well as in relation to matters that require legislative amendment or longer term reform. These recommendations are summarised below.

Current practice and procedure

- (1) The NSW Department of Family and Community Services ("FACS") should develop relationships and improve its engagement, with Aboriginal service providers pursuant to s 12 of the *Children and Young Persons (Care and Protection) Act 2008* (NSW).
- (2) Where matters involving Indigenous children and families have been initiated and heard in the Children's Court or Local Court:
 - A. The Children's Court should be assisted to make more fulsome contact orders, including orders for cultural contact. This will be greatly assisted by FACS engaging with Aboriginal service providers, and will require the Children's Court to make specific orders for cultural contact beyond establishing identity.
 - B. The Children's Court should consider allocating partial parental responsibility for contact to family or kinship members, even if the child has been placed with an Aboriginal carer who is not from that child's nation or language group.
 - C. If the parties consent, the Children's Court should consider transferring matters to the Family Courts.
 - D. Local Court Magistrates should be encouraged to use their family law jurisdiction to make family law style orders in relation to contact, particularly in rural and regional areas. The Judicial Commission of NSW should be encouraged to meet any ongoing education needs of Magistrates, including cultural education.
 - E. The progress of Legal Aid NSW's Care Alternative Dispute Resolution Program should be monitored as it has the potential to bring together considerations of care and family jurisdictions.
- (3) Where matters involving Indigenous children and families have not been commenced in the Children's Court:
 - A. At the early intervention stage, FACS should be required to take reasonable steps to inform Indigenous families of family law options at the early intervention stage, which might include filing in the Family Courts and seeking family law style contact orders at that forum. FACS should consider developing meaningful relationships with Aboriginal organisations to assist in this process.
 - B. Consideration should be given to vesting the Children's Court with family law powers where an order is being transferred to another state.

Matters requiring legislative amendment or longer term reform

- (1) Consideration should be given to amending s 69ZK of the *Family Law Act 1975* (Cth) to require consent only where parental responsibility has been allocated to the Minister.
- (2) Consideration should be given to the establishment of a specialist court for Aboriginal children, particularly in regional areas. The proposal might be referred for detailed consideration to a law reform commission.

1. Background: current issues for Indigenous children and families in the care and protection jurisdiction

The IIC notes that Aboriginal and Torres Strait Islander children were the subject of a child protection substantiation at eight times the rate of non-Indigenous children in 2012-2013.² According to the Australian Institute of Health and Welfare ("AIHW"), Aboriginal and Torres Strait Islander children are represented in out-of-home care at ten times the rate of non-Indigenous children across Australia.³ According to the AIHW:

At 30 June 2013, there were 13,952 Aboriginal and Torres Strait Islander children in out-of-home care, a rate of 57.1 per 1,000 children. These rates ranged from 22.2 per 1,000 in the Northern Territory to 85.5 per 1,000 in New South Wales...Nationally, the rate of Indigenous children in out-of-home care was 10.6 times the rate for non-Indigenous children. In all jurisdictions, the rate of Indigenous children in out-of-home care was higher than for non-Indigenous children, with rate ratios ranging from 3.9 in Tasmania to 16.1 in Western Australia.⁴

Further, "[t]he rate of Aboriginal and Torres Strait Islander children placed in out-of-home care has steadily increased since 2009, from 44.8 to 57.1 per 1,000 children."⁵

Given this over-representation, the IIC's comments are informed by the desire to secure better outcomes for Aboriginal children and families.

The IIC notes that there are children in unsafe situations where their removal is warranted. However, in the IIC's experience, children may be unnecessarily removed from family and kin through a combination of factors that can adversely affect the outcomes for both Aboriginal children and their families when proceedings are brought in the Children's Court. These are explained in more detail below.

1.1. Low levels of trust and engagement between Indigenous people and FACS

In the IIC's view, early intervention and engagement is a strategy that would likely address some of the drivers leading to the removal of Indigenous children. The IIC notes that meaningful and collaborative early intervention and engagement would require measures such as the closer involvement of Aboriginal service providers (and not just services identified as out-of-home care providers); better use of care and safety plans; and the availability of legal representation at earlier stages, such as in relation to parental responsibility contracts.

However, the IIC understands that there is a historical distrust between Indigenous people and the NSW Department of Family and Community Services ("FACS"). In the IIC's experience, this distrust may result in sub-optimal consequences for process and outcome. For example, once FACS has intervened, parents may not nominate other kin or family members who may be suitable carers due to overwhelming issues of shame involved. The IIC notes further that in some instances, the fear of FACS also makes family members reluctant to nominate as carers as there are concerns that FACS might become involved in their own family if something were to happen while a family member's child is in their care.

² AIHW, *Child Protection Australia 2012-13*, at 25 available at:

<http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129548164> (accessed on 22 October 2014)

³ Cited in Judy Cashmore, 'Children in the out-of-home care system', in *Families, policy and the law: Selected essays on contemporary issues for Australia*, Alan Hayes and Daryl Higgins, (eds), AIFS

<http://www.aifs.gov.au/institute/pubs/fpl/fpl15.html>

⁴ Note 2 at 51.

⁵ *Ibid.*

Further, the IIC notes that there is a potential for conflict with FACS being the investigative and removal body, as well as the key (and for some services, the only) referrer to therapeutic services. This is not unique to FACS or NSW but is consistent with the type of child and family welfare systems that have developed in each of the Australian states and territories. Australian child and family welfare systems are identified as child protection systems.⁶ Key characteristics of how child protection systems address child protection can be seen in the table below:

CHARACTERISTIC	CHILD PROTECTION SYSTEM
Framing the problem of child abuse	The need to protect child from harm
Entry to services	Single entry point; report or notification by third party
Basis of government intervention and services provided	Legalistic, investigatory in order to formulate child safety plans
Place of services	Separated from family support services
Coverage	Resources are concentrated on families where risks of (re-)abuse are high and immediate
Service approach	Standardised procedures; rigid timelines
State-parent relationship	Adversarial
Role of the legal system	Adversarial; formal; evidence-based
Out-of-home care	Mainly involuntary

Table 1. Characteristics of the 'child protection' orientation to child protection⁷

Seeing these general features of a child protection system may help to explain the "culture" of the Children's Court and the problems identified by the IIC that are outlined later in the submission. The IIC notes that this arrangement will not address the low levels of engagement with early intervention services.

To provide a further example, the IIC notes that useful and effective early intervention schemes exist. However, access to these programs for Aboriginal families is restricted in a number of ways.

The New Parent and Infant Network⁸ ("Newpin") is one preventative and therapeutic program that works intensively with parents and families facing potential or actual child removal. In the IIC's experience, this has been a very effective program. Previously, other organisations were able to make referrals to Newpin.

However, due to a change in funding arrangements, FACS is now the only referral agency. In the IIC's experience, FACS will generally not make a referral until children have already been removed. The IIC considers that this approach is counter-intuitive on a number of levels. Referrals should be made to therapeutic, early intervention programs before removal in order to prevent removal. Further, given the historical relationship of distrust between Aboriginal people and FACS, the effectiveness of this service is, in the

⁶ Other countries with child protection systems are the UK, US and Canada. These types of child and family welfare systems differ from those identified as 'family service' and 'community caring' systems of child and family welfare (See Nancy Freymond and Gary Cameron, 2006, *Towards Positive Systems of Child and Family Welfare: International Comparisons of Child Protection, Family Service and Community Caring Systems*, University of Toronto Press). These other types of child and family welfare systems apply different approaches to the characteristics outlined in Table one on this page.

⁷ Table adapted from Rhys Price Robertson, Leah Bromfield and Alistar Lamont, 2014, 'International approaches to child protection. What can Australia Learn?', CFCA Paper No. 23, p.4 <https://aifs.gov.au/cfca/sites/default/files/publication-documents/cfca-paper23.pdf>, last accessed 15 May 2015)

⁸ See <http://www.newpin.org.au/>

IIC's view, significantly reduced by removing the ability of Aboriginal-community controlled organisations to make referrals.

1.2. Inadequate access to legal assistance

The IIC notes that there is often inadequate access to legal assistance for Indigenous families in Children's Court proceedings and concerns of procedural fairness may arise. This is particularly true in regional and remote areas where there are not many private practitioners, and many of those practitioners may be conflicted out of acting for families.

In the IIC's view, the availability of proper representation may prevent the unnecessary placement of children into out-of-home-care, and for extended periods of time.

1.3. Different imperatives in the Children's Court and the Family Courts

The IIC notes that there are different imperatives guiding the approach and culture of the Children's Court to those that guide the Family Court and Federal Circuit Court ("Family Courts"). The Children's Court applies care and protection legislation, which provides for state intervention into family life when it is necessary for the safety, welfare and well-being of the child.⁹ The *Family Law Act 1975* by contrast provides a mechanism for families to have their own disputes resolved.

Further, the *Family Law Act* expressly sets out in s 60B(2)(b) that a child has the right to contact, subject to the contact not being contrary to the child's best interest. However, there is no such strongly expressed right to contact in the care and protection jurisdiction.¹⁰

These variations taken together present a particular dynamic in proceedings in the Children's Court, part of which is that parents are often placed in the defensive position of denying that anything has gone awry with the care and therefore safety of children. If they are unsuccessful in that argument, they are not then able to resile from that position, and are therefore in a difficult position to seek meaningful contact. In the IIC's experience it can be very difficult to secure arrangements for meaningful contact and cultural connection through Children's Court processes. Once removal has occurred, there may be inadequate support for kinship placements, and inadequate support for maintaining cultural connection between children and their families and connection to 'country'.

⁹ The *Children and Young Persons (Care and Protection) Act 1998* is structured around State Intervention being triggered by there being existing current concerns about the child being at risk of significant harm (see sections 23,24,25,30) but the State only responding when it determines that it can make an impact on the future care and protection of the child (see sections 34, 71)

¹⁰ The IIC notes that while the *Children and Young Persons (Care and Protection) Act 2008* provides in s 86 that the Court may make contact orders, the IIC notes that Roderick Best argues that in the Children's Court, instead of a right to contact, there is only arguably a rebuttable presumption that contact must exist:

...in NSW it has been said that section 9(2)(f) gives rise to an entitlement to consider that contact should exist unless the safety, welfare and well-being of the child would otherwise be jeopardised. Even when this is not accepted the Children's Court has applied the rebuttable presumption as to the value of contact which was earlier developed in private law proceedings. This effectively imports a rebuttable presumption that contact must exist and so shifts the onus of proof onto whoever is alleging that contact must be restricted in some fashion.

Roderick Best, "Jurisdictional issues in child protection – moving towards a unified system of child protection," A paper presented to the Australasian Institute of Judicial Administration Conference on Child Protection in Australia & New Zealand, 5-7 May 2011, Brisbane at 9.

By way of comparison, the IIC's experience is that in proceedings in the Family Courts, there is less focus on the "wrongness" or culpability of the parents' position which allows more potential for meaningfully addressing risk and structuring appropriate contact.

1.4. Contact and cultural connection

While the IIC's primary focus remains the safety and best interests of children, the IIC submits that maintaining family and cultural connection must be part of the consideration of whether an action is in fact in the best interests of the child.

The Committee notes that a principle underpinning the Wood Inquiry was that:

All Aboriginal children and young people in out-of-home care should be connected to their family and their community, while addressing their social, emotional and cultural needs.¹¹

In the Committee's experience, cultural connection is vital for an Indigenous child's resilience. The Committee holds the strong view that cultural contact plans should be made as part of court-ordered arrangements, and children should have meaningful contact with their families, and families from their own Indigenous nations. The Committee notes that some out-of-home-care providers recruit Indigenous people to run internal "cultural contact programs." In the Committee's view, this arrangement is neither culturally safe nor sufficient as culture is nurtured within culturally appropriate, lived experiences.

Cultural contact must be provided for a significant and substantial time with the purpose of establishing a meaningful relationship with parents, family and community; beyond the establishment of identification. The Committee notes that structured and positive engagement can assist to establish a positive cultural connection, and nurture the understanding in children that culture is a positive aspect of their lives and something they should feel proud of.

Children have a right to enjoy their own culture and to use their own language (Article 27, *International Covenant on Civil and Political Rights*, Article 30, *Convention on the Rights of the Child*).¹²

The IIC notes further that the 1997 *Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*,¹³ (the "Bringing them

¹¹ James Wood, 2009, *Report of the Special Commission of Inquiry into child protection services in NSW*, NSW Department of Premier and Cabinet, at v, available online: <http://apo.org.au/node/2851> (accessed 5 November 2014).

¹² Article 27 of the *International Covenant on Civil and Political Rights* states:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Article 30 of the *Convention on the Rights of the Child* states:

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

See also Articles 11, 12 and 31 of the *UN Declaration of the Rights of Indigenous Peoples*.

¹³ National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (1997). "Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres

Home Report") recommended that there be national standards set in state and territory legislation, which included the factors to be considered in determining the best interests of an Indigenous child. The Bringing them Home Report recommended that national standards legislation provide that the initial presumption is that the best interest of the child is to remain within his or her Indigenous family, community and culture (recommendation 46a). Further, recommendation 46b provided that in determining the best interests of an Indigenous child, the decision maker must also consider:

1. The need of the child to maintain contact with his or her Indigenous family, community and culture,
2. The significance of the child's Indigenous heritage for his or her future well-being,
3. The views of the child and his or her family, and
4. The advice of the appropriate accredited Indigenous organisation.

1.5. The IIC's submissions

The IIC submits that there are innovations in practice and procedure that could be undertaken within the structures that currently exist in respect of the Children's Court, Family Courts and the Local Court ("the Courts") that may result in better outcomes for Aboriginal children and families.

The IIC further submits that there are matters for reform that the Family Law Council might consider that involve the jurisdiction of the Courts, specifically in respect of Aboriginal children and families.

The IIC's views and submissions are set out in more detail below.

2. Innovation within existing structures: practice and procedure

2.1. Better involvement of Aboriginal services in both Children's Court and Family Court proceedings

The IIC notes that s 12 of the *Care and Protection (Children and Young Persons) Act 1988* (NSW) ("*Care Act*") provides:

Aboriginal and Torres Strait Islander families, kinship groups, representative organisations and communities are to be given the opportunity, by means approved by the Minister, to participate in decisions made concerning the placement of their children and young persons and in other significant decisions made under this Act that concern their children and young persons.

Given this, the Committee notes that Aboriginal organisations are entitled to be involved with the FACS decision making process at an early stage. In the Committee's view, there is significant potential for reducing the numbers of Aboriginal children entering the out-of-home-care system if Aboriginal-controlled services were more involved with the FACS decision making process at an early stage. This would contribute to FACS' understanding of how it could meet the needs of Aboriginal families better (for example, by connecting with trauma or mental health services), thereby preventing removal, or providing for meaningful pathways to restoration. In the IIC's experience, most Aboriginal community organisations are unaware of this legislative entitlement, and therefore their involvement has been limited.

Strait Islander Children from their Families" available online:
http://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf
(accessed 24 February 2015)

The IIC notes that this would require building the capacity of Aboriginal organisations through education, to highlight to these organisations the potential significance of their impact, and the scope of their influence. Further, if these organisations were provided with community legal education to understand the difference in the care and family law jurisdictions, they would be better placed to identify matters appropriate for referral to the family law jurisdiction; which can result in better outcomes for Aboriginal families.

Facilitating the greater engagement by FACS with Aboriginal organisations does not necessitate that those organisations be brought under the out-of-home-care umbrella. There may be an advantage in having Aboriginal organisations independent of FACS in the process.

As noted above, there is a historical relationship of distrust between Aboriginal people and FACS, and its associated agencies. This will be difficult to resolve, and in the IIC's view, better outcomes for Aboriginal people will result if they are serviced by agencies outside of FACS. Funding Aboriginal services to operate as out-of-home-care providers may create divisive mistrust in Aboriginal communities.

In the IIC's view, there should be more Aboriginal-specific services available particularly at the early intervention stage, and more pathways to engagement with therapeutic services without the involvement of FACS. Aboriginal parents and families should be connected with Aboriginal-controlled organisations, or organisations that are partnered with Aboriginal-controlled organisations. Aboriginal parents should be supported by an intensive case management approach, and in order to avoid a repeating process, the focus of the services must be focused on trauma and healing.

2.2. More structured contact orders by the Children's Court

While the IIC understands the reasons why the approach taken by the Children's Court to contact is different to that of the Family Courts, the IIC submits that it is still within the power of the Children's Court to make contact orders that provide for contact that is commensurate with risk, and to provide for contact with the purpose of establishing a meaningful relationship with parents and family; beyond the establishment of identification. The IIC notes that structured and positive engagement can assist to establishing positive cultural connection, and nurture the understanding in children that culture is a positive aspect of their lives. As noted above, while safety is the primary consideration, the best interests analysis includes the right to culture and family.

At a minimum, the IIC submits that FACS should prepare written contact plans that provide a high level of specificity. Structured contact plans, reinforced by orders, are necessary for "difficult" parents in high conflict situations. The IIC notes that these contact plans should be regularly communicated and updated.

The IIC's view also is that contact plans for Indigenous children should specifically contemplate and make orders that provide for cultural contact. If cultural contact plans are part of the court orders, FACS will be obliged to implement these orders. The IIC submits that it is open to the Children's Court to create specific policy to ensure that cultural contact plans are part of the care plan. For example, the Children's Court President could instruct Magistrates to require that care plans for Aboriginal children be accompanied by cultural contact plans that are capable of establishing meaningful relationships with the child's parents, family and/or nation.¹⁴ The IIC notes that if cultural

¹⁴ The Committee notes that this issue is tied to the issue of joining grandparents to the application, and the availability of grants of Legal Aid to joinder applications.

contact plans are court-ordered, there will be a positive obligation on FACS to identify family members who can fulfil that cultural role. The IIC also notes that non-Aboriginal parents are often given supervised contact outside of FACS offices.

In this regard, the IIC notes that there is much scope for meaningful cultural contact plans. For example, even though a parent may not have capacity for full parental responsibility, there may still be a range of ways in which they can have meaningful contact.

Further, the IIC proposes for consideration a system of foster care similar to open adoptions. Under this proposed model, contact plans would include acknowledgement of the child's cultural heritage such as the child's family of origin and nation.¹⁵ Further, there would be court-ordered arrangements for cultural contact and parents would be able to secure more meaningful contact with their children in out-of-home-care.

The IIC submits that the level of contact available to parents should be commensurate with the risk. If, for example, the parents' issues leading to the removal of the child are mental health issues and, for example, they have psychotic episodes every three to four years, then a child should be able to see his/her parents when the parents are well.

In the IIC's view, parents are more likely to accept having their children in out-of-home-care if contact is commensurate with the reasons why the removal took place.

Alternatively, out-of-home-care arrangements could be supported with family law-style orders to manage contact with parents in the family law jurisdiction. The advantage of this proposal is that the time constraints that exist in the care and protection jurisdiction do not appear in the family law jurisdiction. This allows time for parents to regain control over their lives through engagement with therapeutic services, and children are kept safe and connected by placing them with kin. The IIC suggests that if FACS has built strong networks with Aboriginal organisations, appropriate matters could be referred through these organisations to the family courts by Aboriginal organisations; and be appropriately resourced to provide support for these families. This point is taken up further in section 2.4 below.

2.3. Partial parental responsibility allocations

The IIC notes that the Court is able to make orders for the partial allocation of parental responsibility. Even if the Court is of the view that parental responsibility should be allocated to the Minister, if there is a suitable adult in that child's kinship structure available, the Court could make an order that parental responsibility for culture be given to that family or kin member. The IIC's view is that the Court should consider making these orders even if that child has been placed with an Aboriginal carer not of his or her own nation. As culture is ontological and there is an enormous diversity between Aboriginal language groups and nations, the IIC considers that children are only able to be meaningfully taught their culture by their own family, language group or nation.

The IIC notes that the allocation of the cultural aspect of parental responsibility to the kinship carer would also provide due process for kinship carers: if FACS sought to end that placement, a court order would be required.

¹⁵ The IIC notes that such information is recorded (meant to be recorded) in a child or young person's "life book" which they develop while they are entering care, or while they are in care. This book is meant to be a record of their life (including family history) that they carry with them during their time in care and once they get out of care. It is useful to distinguish the information recorded in a "life book" from recording that information in the actual contact plans.

2.4. Family law pathways

The IIC considers that, in appropriate matters and for the reasons set out above in relation to contact, better outcomes could be secured for Aboriginal children and families if matters regarding contact were referred to the Family Courts at the early intervention stage (such as when parental responsibility contracts are being drawn up).

For the reasons set out above in relation to better contact arrangements, the IIC suggests that it would assist if FACS was required, at the early intervention stage, to take reasonable steps to advise the kin and family of the child of their entitlement to take family law proceedings. The IIC acknowledges that there are practicalities associated with FACS advising extended family and kin members of access to the family law jurisdiction which may need to be considered more closely. Given the relationship of distrust and fear that can exist between FACS and the Aboriginal community, the IIC suggests consideration will need to be given to processes to assist FACS to meaningfully provide this information. The IIC suggests that FACS would be assisted by developing relationships that would allow genuine engagement with Aboriginal organisations. These relationships would assist FACS with, among other things, identifying relevant family and kin members, particularly in regional areas.

If a Children's Court Magistrate has already made a decision about placing the child, the Magistrate could then make directions that contact be decided by family court pathways.

The IIC notes the view of the Chief Justice of the Family Court and the Chief Federal Magistrate (as he was then), that:

In child protection proceedings where contact between parents arises as an incidental matter it is difficult to see an objection in principle to this being determined in a state child protection court. Once a child protection issue has been determined however, the state court's jurisdiction in what is otherwise a federal family law issue should cease.¹⁶

If parties can agree on contact arrangements, FACS does not need to be further involved unless the child is actually at risk. The IIC considers this arrangement to be useful particularly as children get older (and as parenting capacity may improve), family law pathways provide good potential for reviewing the continued appropriateness of arrangements. As noted previously, the IIC's view is that contact should be commensurate with risk, but in its experience, due to its different perspective, in the Children's Court, the contact orders made are likely to be minimal and only for the purposes of establishing identity. For this reason, Family Courts are more likely to make adequate contact arrangements.

The IIC suggests that if the parties consent, the matter could be transferred to the Family Court for the making of contact orders.

The IIC observes that the Australian Law Reform Commission ("ALRC") recommended that:

Where a child protection agency investigates child abuse, locates a viable and protective carer and refers that carer to a family court to apply for a parenting order, the agency should, in appropriate cases:

¹⁶ D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010 as cited in Australian Law Reform Commission, *Family Violence – A National Response*, October 2010, ALRC Report 114, available online: http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC114_WholeReport.pdf (accessed 10 July 2015). The report is referred to hereafter as "ALRC Family Violence Report".

- (a) Provide written information to a family court about the reasons for the referral;
- (b) Provide reports and other evidence; or
- (c) Intervene in the proceedings.¹⁷

The IIC agrees with parts (a) and (b) of this recommendation, but where a viable and protective carer has been located, the IIC has reservations in relation to part (c) for the reasons set out in more detail in section 3.2 below. However, the IIC notes that in practice, FACS would rarely refer matters to the Family Courts in this way.

2.5. Engage the family law jurisdiction of the Local Courts

In its 2010 Family Violence Report, the ALRC also recommended that when a matter is before a children's court, such court should have the same powers to make decisions under the *Family Law Act* as do Local Courts.¹⁸ The IIC does not disagree in principle with this recommendation. However, the IIC notes also the concerns raised to the ALRC by some stakeholders. These included a concern that adding *Family Law Act* proceedings to the list of matters to which the Children's Court Magistrates must attend, would add significantly to their tasks.¹⁹ The IIC notes also that given the "many significant and fundamental differences"²⁰ between care and protection and family law legislation, an alternative may be to encourage and facilitate the Local Court to exercise the powers it already has to make decisions under the *Family Law Act*.

The IIC understands that, particularly in regional and remote locations, some Magistrates in Local Courts already do exercise their family law jurisdiction in more innovative ways if those courts are not, for example, supported by Family Relationship Centres. Local Court Magistrates could deal with a matter in relation to the protection issues, and when those issues have been resolved could then list the matter in that Magistrates family law list, and make orders properly informed by the matters raised in relation to the protection issues. The IIC submits that this approach could avoid the entrenched dynamic present in the Children's Court, discussed above. It may facilitate parents to accept risk factors, but still be in the position to work towards more fulsome contact orders. Further, the Local Court has the power to close the court in order to provide for the necessary privacy and opportunity for appropriate discussions to be had without public attention.

The IIC suggests that Local Court Magistrates should be encouraged to use their family law jurisdiction. The IIC notes that in the Family Violence Report, the ALRC's view was that Local Courts rarely exercise their family law powers, and that the reluctance of Magistrates to do so may be due to the perception that they lack the requisite expertise.²¹ While the IIC acknowledges these concerns, the IIC understands that some Local Court Magistrates do already exercise their family law jurisdiction. The IIC notes that particular knowledge and expertise is also required in relation to making appropriate cultural contact orders. In this regard, the IIC understands that some Magistrates have worked for significant periods of time in areas with large populations of Indigenous people, and may, for example, run sentencing circles. The IIC suggests also that the Judicial Commission of NSW is in the position to provide for any ongoing educational needs for Magistrates, including in relation to cultural competency.

2.6. Care Alternative Dispute Resolution program

¹⁷ ALRC Family Violence Report, note 16, Recommendation 19-3 at 928

¹⁸ ALRC Family Violence Report, note 16, at [19.139].

¹⁹ Berry Street Inc, *Submission FV 163*, 25 June 2010; N Ross, *Submission FV 129*, 21 June 2010 cited in the ALRC Family Violence Report, note 16, at [19.130].

²⁰ D Bryant and J Pascoe submission, note 16.

²¹ ALRC Family Violence Report, note 16 at [19.131].

The IIC notes that in the Family Violence Report, the ALRC was of the view that more work should be done to explore the current and potential use of dispute resolution models in the context of the intersection of care and protection, and family law. The ALRC's view was that:

flexible dispute resolution processes which can facilitate collaboration across socio-legal service systems, and jurisdictional divides, may offer significant potential for seamless and effective resolution of intersecting child protection and parenting issues relating to the same family. This may be particularly valuable in cases involving family violence.²²

The IIC understands that Legal Aid NSW has established a new Care Alternative Dispute Resolution Program for parties seeking contact after final orders have been made, or seeking to vary a contact order.

The model is non-litigation focused, and invites parties to come to an agreement about arrangements for children. There is a focus on ensuring the voices of the children will be heard in these matters. To this end Legal Aid provides representation for all children who are subject of the contact dispute. Legal assistance will also be available for parties attending subject to means testing and a "significant disadvantage" test.

The IIC considers that this program offers the potential for establishing detailed contact arrangements and cultural contact, which would ideally be expressed as appropriate orders. The benefit of this program may be the flexibility to revisit contact orders as the child gets older and as parents develop greater parenting capacity.

The IIC recommends that the Family Law Council monitors the progress of this program.

3. Matters for reform

3.1. Amend section 69ZK of the Family Law Act

The IIC submits that the improvement of outcomes for Aboriginal children and families would be assisted by amending section 69ZK(1) of the *Family Law Act*. Section 69ZK(1) provides as follows:

Child welfare laws not affected

(1) A court having jurisdiction under this Act must not make an order under this Act (other than an order under Division 7) in relation to a child who is under the care (however described) of a person under a child welfare law unless:

(a) the order is expressed to come into effect when the child ceases to be under that care; or

(b) the order is made in proceedings relating to the child in respect of the institution or continuation of which the written consent of a child welfare officer of the relevant State or Territory has been obtained.

²² ALRC Family Violence Report, note 16, at [23.137]. The IIC notes that the accompanying Recommendation 23-13 made by the ALRC at 1091 is that:

The Australian Government Attorney-General's Department and state and territory governments should collaborate with Family Relationship Services Australia, legal aid commissions and other alternative dispute resolution service providers, to explore the potential of resolving family law parenting and child protection issues relating to the same family in one integrated process.

Currently, consent is required from the Minister (or welfare officer) to allow a matter to proceed where Children's Court orders are in place.

The IIC submits that this provision should be amended to require consent only where parental responsibility has been allocated to the Minister. The IIC's view is that this would facilitate contact, and would avoid a rehearing of a substantial issue (and forum shopping) where parental responsibility is granted to someone other than the Minister, and bring some finality to the process.

The ALRC notes, in its discussion about matters that involve both child protection and family law proceedings and potentially conflicting orders, that section 69ZK(1) recognises that the Commonwealth Parliament does not have legislative competence in child protection matters, and the Family Courts therefore defer to orders under state legislation.²³

3.2. Referring child protection powers to Family Courts

In its Family Violence Report, the ALRC was "disinclined to recommend that federal family courts should have a general power to join a state child protection agency as a party."²⁴

The ALRC was also:

...disinclined to recommend a general reference of child welfare powers to family courts. However, a limited reference of powers to enable the courts to make orders giving parental rights and duties to a child protection agency where there is no other viable and protective carer for a child is supported. A power to join a state child protection agency in this very limited class of cases is also recommended.²⁵

The IIC agrees with these views in relation to Indigenous matters. Given the longstanding distrust with which FACS is regarded by many Aboriginal people, the IIC suggests that Aboriginal families are unlikely to proactively commence proceedings in the Family Courts if they are aware that FACS could generally be joined as a party. The IIC notes that the Federal Circuit Court established an Indigenous Access to Justice Committee in 2012 (now known as the Indigenous Access to Justice RAP Working Group) to explore improvements in access to justice for Indigenous people. One of the actions proposed in the Federal Circuit Court's Reconciliation Action Plan 2014-2016 is a proposal to trial Indigenous circuit courts in Redfern and La Perouse²⁶ with a view to encouraging family law pathways prior to FACS intervention as an alternative to Children's Court proceedings. The IIC understands that there is currently work being undertaken to build community awareness and collaboration to support this initiative, and is concerned that this work may be undermined if Aboriginal families form the impression that FACS can be generally joined to proceedings.

²³ ALRC Family Violence report, note 16, at [10.49]

²⁴ ALRC Family Violence Report, note 16, at [19.99]

²⁵ ALRC Family Violence Report, note 16 at [19.98]

²⁶ Federal Circuit Court of Australia, *Reconciliation Action Plan 2014-2016*, available online: <http://www.federalcircuitcourt.gov.au/pubs/html/reconciliation%20Action%20Plan.html> (accessed 18 May 2015)

3.3. Vesting Children's Court with family law powers

The IIC would not necessarily be opposed to amending the *Family Law Act* to provide the Children's Court the same powers as Local Courts, which is Recommendation 19-4 of the ALRC's Family Violence Report.²⁷

However, the IIC reiterates its concerns that this approach may not in fact result in improved outcomes for Aboriginal children and families (particularly given the existing approach to cultural contact in the Children's Court), without additional resourcing and training of Children's Court Magistrates in relation to issues relating to rights and culture for Aboriginal children and families. The IIC notes that currently, the NSW care and protection legislation only allows for contact orders for 12 months,²⁸ and the orders made are usually bare or minimum orders²⁹. Further, the Children's Court and the parties in the state jurisdiction do not have the benefit of Commonwealth-funded services that support the making and observance of meaningful contact orders.

The IIC suggests that there may be benefit in the Children's Court having limited cross vesting of powers where an order is being transferred to another State. The present transfer arrangements require consent from the receiving State. Usually consent will only be given to a bare order allocating parental responsibility. For example, if a NSW care order is to be transferred because the child will live with an aunty in Queensland.

Often it is clear that a contact order is required and on occasions the Secretary will undertake to make such an application in the Federal Circuit Court. If the Children's Court can make these orders at the same time as the transfer order it will be better for all parties and avoid further delay and expense. The only complication will be the difficulty of the interstate party (aunty in the example above) being properly heard and represented.

3.4. Establishing specialist court for Aboriginal children

The IIC submits that the Family Law Council may wish to consider the possibility of establishing a specialist court for Aboriginal children, particularly in regional areas.

The IIC submits that the key difference between this proposal and the suggestion to amend the *Family Law Act* to provide Children's Courts the same powers as Local Courts is an opportunity to avoid the culture in the Children's Court, which in the IIC's experience may have unnecessarily adverse effects on Aboriginal families. The IIC submits also that creating a specialist court for Aboriginal children would be an opportunity to create a new environment that might reset the dynamic existing in the Children's Court. Parents may not feel compelled to deny the existence of risk, which may provide more meaningful opportunities to tailor appropriate contact arrangements.

The IIC notes that even if there was only just one specialist court established, this court would be in the position to comprehensively consider and produce valuable precedents on matters such as cultural contact.

The IIC acknowledges that close consideration of the details would be required to support this proposal. For example, it may be useful to consider the experiences of tribal courts in the USA (noting salient structural differences). The IIC submits that if this

²⁷ ALRC Family Violence Report, note 16, at 928.

²⁸ Section 86(6), Children and Young Persons (Care and Protection) Act 2008

²⁹ Section 86(1)(a), Children and Young Persons (Care and Protection) Act 2008

recommendation is to be taken up, it would be appropriate to refer this issue to an organisation such as the ALRC or NSW Law Reform Commission.

The IIC thanks you for the opportunity to provide comments. Any questions can be directed to Vicky Kuek, policy lawyer for the Committee, on 9926 0354 or victoria.kuek@lawsociety.com.au.

Yours sincerely,



Michael Tidball
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