



THE LAW SOCIETY
OF NEW SOUTH WALES

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22 November 2019

Mr Jonathan Smithers
Chief Executive Officer
Law Council of Australia
DX 5719 Canberra

By email: natasha.molt@lawcouncil.asn.au

Dear Mr Smithers,

Joint Select Committee Inquiry into Australia's Family Law System

Thank you for the opportunity to contribute to a Law Council submission to the Joint Select Committee Inquiry into Australia's Family Law System. The Law Society's contribution is informed by the views of its Family Law, Children's Legal Issues, Criminal Law, Indigenous Issues and Alternative Dispute Resolution Committees.

Overarching considerations

We agree with the comments of the Attorney-General, the Hon Christian Porter MP, that "the current system is letting Australian families down".¹

The Law Society of NSW has long identified a need for reforms that provide the best outcomes for families who rely on the legal system to help them resolve these complex and emotional disputes, often within the context of family violence.

In its Review of the Family Law System, the Australian Law Reform Commission ("ALRC") posed the discussion question: "What principles should guide any redevelopment of the family law system?" The Law Society agrees with the Law Council of Australia that they should be:

- a) simplicity of use, to enable greater self-help and reduce the need for legal services and costs;
- b) efficiency of process, reducing the number of steps involved, touchpoints, the need for legal services and cost;
- c) transparency and consistency of practice, to provide understanding of the law and confidence in the family law system;
- d) cultural and linguistic sensitivity and inclusiveness, particularly for Aboriginal and Torres Strait Islander and culturally and linguistically diverse (CALD) people;
- e) equality (as to gender and gender roles, children's matters, location, socio-economics, capacity re. the English language); and
- f) proper resourcing.²

¹ As reported in *The Australian*, 23 August 2018.

² Law Council of Australia, response to Australian Law Reform Commission, Review of the Family Law System, Issues Paper, 7 May 2018, [33].

THE LAW SOCIETY OF NEW SOUTH WALES

170 Phillip Street, Sydney NSW 2000, DX 362 Sydney
ACN 000 000 699 ABN 98 696 304 966

T +61 2 9926 0333 F +61 2 9231 5809
www.lawsociety.com.au

In our view, the most urgent consideration is the proper resourcing of the court system. Where the parties cannot resolve matters themselves following relationship breakdown, the Australian family law system must deliver justice in the form of multiple avenues by which a timely, efficient and cost-effective resolution of disputes can occur and which provides protection for vulnerable parties. However, there will always be a need for a properly resourced and functioning court system to provide both a setting in which disputes can be resolved by the parties, or otherwise justly determined.

Our responses to the Terms of Reference to this Inquiry are guided by these principles. Copies of Law Society letters and submissions referenced in this response are enclosed.

Term of Reference A

ongoing issues and further improvements relating to the interaction and information sharing between the family law system and state and territory child protection systems, and family and domestic violence jurisdictions, including:

- i. the process, and evidential and legal standards and onuses of proof, in relation to the granting of domestic violence orders and apprehended violence orders, and
- ii. the visibility of, and consideration given to, domestic violence orders and apprehended violence orders in family law proceedings.

The Law Society is of the view that further improvements can be made relating to the interaction and information sharing between the family law system and state and territory child protection systems. In the experience of our members, the state and territory child welfare agencies and the Family Court of Australia and Federal Circuit Court (“family courts”) are both regularly dealing with the same issues relating to child abuse and neglect, family violence and the safety and welfare of children.

The Law Society considers that the public child protection system and family law system should be better integrated. In our submission to the ALRC Review of the Family Law System Issues Paper we noted that 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.³

We also recommend coordinated reforms to state legislation that enable the Children’s Courts to make orders under the *Family Law Act 1975* (Cth) (“Act”), including parenting orders, recovery orders and Family Law Watch List Orders. This is consistent with the Family Law Council’s recommendation⁴ that ss 69J and 69N be amended to remove any doubt that Children’s Courts, no matter how constituted, have the power to make orders under Part VII. In our view, the Children’s Courts should also have the power to transfer appropriate cases to the family courts.

The Law Society notes that the Council of Attorneys-General is currently working on improving responses to family violence, including:

- increasing the competency of professionals in the family violence and family law systems;
- assessing the merits of expanding the state and territory courts’ exercise of the family law jurisdiction; and
- improving information sharing between the family law, child protection and domestic violence systems.

³ Law Society of NSW, submission to Australian Law Reform Commission, Review of the Family Law System, Issues Paper, 25 May 2018, p 2.

⁴ Family Law Council, Families with Complex Needs and the Intersection of Family Law and Child Protection Systems: Final Report (2016), p 203.

We support initiatives aimed at improving information sharing and achieving better collaboration between the child welfare agencies, the police and the family courts to better protect children and family violence survivors. We note funding has recently been announced to pilot a co-location model, which will embed state and territory family safety officials (such as child protection or policing officials) in family law courts across Australia.⁵

We recommend the continuation of this and other work with state and territory governments to develop and implement a national information sharing framework between the family law, family violence and child protection systems to guide the sharing of information about the safety, welfare and well-being of children and families. This work is consistent with recommendations arising from the ALRC's Review of the Family Law System.⁶

Process, and evidential and legal standards and onuses of proof relating to AVOs and DVOs

The Law Society considers the appropriate evidential and legal standard of proof for domestic violence orders and apprehended violence orders is that which currently applies in Australian jurisdictions: the civil standard of the balance of probabilities. In our view, it is appropriate that the complainant bear the burden of proof of establishing they have reasonable grounds to fear family violence, with certain exceptions: for example children who present with a cognitive impairment or where there has been a history of family violence. We support recommendations arising from the ALRC and NSW Law Reform Commission ("NSWLRC") in their Report on Family Violence — A National Legal Response that the complainant should not bear the onus of proving a likelihood of further family violence.⁷

We agree with recommendations arising from the Royal Commission into Family Violence that not enough effort is focused on the prevention of family violence or early intervention to protect those experiencing violence before it escalates.⁸

Visibility of, and consideration given to, domestic violence orders and apprehended violence orders in family law proceedings

The Law Society supports the recommendations of the ALRC and NSWLRC that there be a national register of family violence orders which is readily accessible by family courts.⁹ We also support improved information sharing between police and the courts in order to better protect those experiencing family violence.

In addition we have previously recommended amendments that enable family violence to be taken into account for the purpose of determining spousal maintenance (s 75) and alteration of property interests (s 79).¹⁰

⁵ Australian Government, Attorney-General's Department, Family Violence (webpage), <https://www.ag.gov.au/FamiliesAndMarriage/Families/FamilyViolence/Pages/default.aspx>.

⁶ Australian Law Reform Commission, Review of the Family Law System, Final Report (March 2019), Recommendation 2.

⁷ See Australian Law Reform Commission and NSW Law Reform Commission, Report 114, Family Violence — A National Legal Response (2010), [7.122]-[7.126].

⁸ Royal Commission into Family Violence, Summary and Recommendations (March 2016), p 6.

⁹ Australian Law Reform Commission and NSW Law Reform Commission, Report 114, Family Violence — A National Legal Response (2010), Recommendations 30-13, 30-18.

¹⁰ Law Society of NSW, letter to Law Council of Australia on Australian Law Reform Commission, Review of the Family Law System, Final Report, 26 August 2019, p 5.

Term of Reference B

the appropriateness of family court powers to ensure parties in family law proceedings provide truthful and complete evidence, and the ability of the court to make orders for non-compliance and the efficacy of the enforcement of such orders.

Truthful and complete evidence

In the experience of our members, instances of deliberate untruthfulness or incomplete evidence are relatively uncommon.

Parties to family law disputes have legal representation in the vast majority of matters. In 2018-2019, 86% of Family Court matters featured legal representation at some point in the proceedings, with both parties legally represented in 71% of matters.¹¹ Where a party is represented, the solicitor is subject to an obligation under the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* not to mislead the court.¹²

Family law litigation occurs at a time of distress and anxiety in the lives of the parties. In the experience of our members, while conflicting evidence is not uncommon, it does not necessarily indicate deliberate untruthfulness. It may be based on unreliable memories, conflicting perceptions of past events or different perceptions as regards the current situation.

Perceptions regarding the prevalence of untruthful evidence may stem in part from the nature of family law proceedings. Given that the majority of proceedings are resolved without the need for judicial determination, evidence is tested in cross-examination in only a small proportion of matters. Perceptions of untruthfulness can persist when an opponent has not been cross-examined and so has not had an opportunity to explain inconsistencies in their evidence.

In matters that do proceed to a hearing, the court will assess and give due weight to the competing evidence. The courts have a range of powers at their disposal if a judge believes that a party is giving evidence which is deliberately inaccurate or misleading. Powers open to the courts include:

- making a costs order against a party;
- a referral to the Attorney-General to consider whether there are grounds to establish perjury;
- referring in the judgment to evidence which has not been accepted; and
- making orders which reflect the finding that a party's evidence was not credible.

The courts have made it clear that a party who has failed to fully disclose their financial situation may face severe consequences.¹³

Orders for non-compliance

In relation to compliance proceedings, it is our members' experience that, due to resourcing constraints, the family law courts cannot always deal with enforcement applications in a timely manner, and there can be long delays before matters are heard. This can encourage non-compliance by fuelling perceptions that the original orders have little force. We recommend judicial resources be directed to enabling contravention matters to be heard within a reasonable time.

¹¹ Family Court of Australia, *Annual Report 2018-19*, p 23.

¹² Rule 19.1.

¹³ *Black v Kellner* (1992) 15 Fam LR 343.

The law on contravention of family law orders is complex and in certain respects, evidence must be proved beyond reasonable doubt. We suggest that simplifying the relevant provisions would assist with enforcement of court orders.

In addition, improving community awareness and understanding of the principles inherent in family law, including encouraging a child focused approach, may also assist in improving rates of compliance with family law orders. We note, for example, the ALRC recommendations that, following a contested hearing, the parties be required to meet with a Family Consultant to assist their understanding of the final parenting orders¹⁴ and/or for the purpose of receiving post-order case management.¹⁵

Consideration could also be given to imposing penalties other than costs for non-compliance in property proceedings. For example, penalties that impose restrictions on overseas travel, as apply under the child support legislation, may be an effective deterrent for parties who engage in obstructionist conduct in financial matters.

Term of Reference C

beyond the proposed merger of the Family Court and the Federal Circuit Court any other reform that may be needed to the family law and the current structure of the Family Court and the Federal Circuit Court.

Structural elements of the family law system

Combining the family law jurisdiction at federal or state level

We note that recommendations arising from the ALRC Review of the Family Law System include consideration of options to establish state and territory courts to exercise concurrently family law, child protection and family violence jurisdiction.¹⁶ In our response to the Final Report we have suggested that a preliminary question is whether there is merit in combining these jurisdictions at one level. We have recommended this issue be further explored through further consultation and/or investigation.¹⁷

Court resourcing

In the meantime, there is an urgent need to address the delays currently experienced by family law litigants caused by underfunding of the courts and associated services. We understand it is not unusual for matters at call-over to be listed for further directions on a date 12 months later, for consideration for listing for hearing. We commend the Chief Justice for initiating measures such as callover days to alleviate the current backlog. Nevertheless, the system is significantly understaffed and in urgent need of the appointment of additional Judges, Registrars and family consultants.

In addition, we recommend measures be taken to ensure judicial vacancies are filled. When Judges in the family courts take extended leave or retire, other Judges are required to take up their caseload. The resulting judicial workloads exacerbate the delays experienced by parties in having their matter determined.

Resources are also required to strengthen the courts' expertise in responding to issues concerning vulnerable parties, including survivors of family violence, people experiencing

¹⁴ Australian Law Reform Commission, Review of the Family Law System, Final Report (March 2019), Recommendation 38.

¹⁵ Ibid, Recommendation 39.

¹⁶ Australian Law Reform Commission, Review of the Family Law System, Final Report (March 2019), Recommendation 1.

¹⁷ Law Society of NSW, letter to Law Council of Australia on Australian Law Reform Commission, Review of the Family Law System, Final Report, 26 August, 2019, p 2.

economic disadvantage, people experiencing disability, and those who identify as Aboriginal and Torres Strait Islander, CALD or LGBTIQ.

In our view, such additional resources will benefit the existing system, and will go a long way to alleviating the current problems experienced across the system, irrespective of any future structural reforms.

Common leadership and entry point and procedures

The Law Society commends the provision of common leadership and management of the family courts, including the appointment of a single head of jurisdiction. We welcome current initiatives for the development of common rules and forms, and common practices and procedures across the family courts, noting the importance that solicitors be consulted on any draft Rules and have ample opportunity to provide input. We note also the ALRC's recommendation that the courts be adequately resourced to carry out their statutory mandate to implement the rules.¹⁸

We also support the introduction of a single point of entry for all family law matters. This will increase efficiencies for parties and the courts, and reduce issues created by parties filing in the wrong forum.

Proposed merger of the Family Court of Australia and Federal Circuit Court

The Law Society supports the Law Council's view that reintroduction of the merger Bill should be postponed pending the findings of this Inquiry. We call on the Government in the meantime to release the current draft Bill to enable proper consultation with users of the family law system.

The merger proposal is premised on a report prepared by PwC which outlines cost-savings projected to result from the merger. We have previously stated that while we appreciate cost-saving measures could free up funds for reinvestment in the system, we do not accept that the report demonstrates a sufficient case for the merger as it does not address the quality of justice that would be delivered. For example, the conclusions in the report are premised on an assumption that the work undertaken by the Family Court and the Federal Circuit Court are predominantly the same; in fact the types of matters and work performed in the two courts are different.¹⁹ We are concerned that merging the two courts as proposed will simply change the structure around the problems they face.

Retaining the specialisation of the family law jurisdiction

Although there are acknowledged problems with the current family courts structure, in our view the specialisation of the family court system should be strengthened, so that those working in the system can better understand and respond to issues experienced by vulnerable parties.

We are concerned that if the merger provides a dual system and the potential for matters to be referred between Divisions 1 and 2, it will not achieve this objective. There is a risk that, together with the family law jurisdiction of the Local Courts, the family law jurisdiction would be spread across three forums overall.

Appeals

Should the merger take place, we would support measures that preserve the specialist appeals expertise currently held in the Family Court by retaining the Appeal Division in the

¹⁸ See Australian Law Reform Commission, Review of the Family Law System, Final Report (March 2019), Recommendation 10.

¹⁹ Law Society of NSW, letter to Law Council of Australia on the *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018*, 6 November 2018, p 2.

new court. The majority of family law appeals involve questions of fact and require either taking fresh evidence or reviewing existing records of evidence.²⁰ We stress the importance of ensuring that judges hearing family law appeals have the appropriate knowledge, skills and experience to do so.

Term of Reference D

the financial costs to families of family law proceedings, and options to reduce the financial impact, with particular focus on those instances where legal fees incurred by parties are disproportionate to the total property pool in dispute or are disproportionate to the objective level of complexity of parenting issues, and with consideration being given amongst other things to banning 'disappointment fees', and:

- i. capping total fees by reference to the total pool of assets in dispute, or any other regulatory option to prevent disproportionate legal fees being charged in family law matters, and
- ii. any mechanisms to improve the timely, efficient and effective resolution of property disputes in family law proceedings.

Options to reduce the financial impact of family law proceedings on parties

The financial impact of family law proceedings on parties will be reduced most effectively by ensuring:

1. adequate resourcing of the family law courts;
2. efficient procedures and case management processes; and
3. effective dispute resolution processes.

1. Resourcing of the family courts

The experience of our members is that the under-resourcing of the family courts, by creating undue delays in proceedings, generates significant costs for litigants. Costs increase when a hearing date is postponed and the parties are required to attend multiple interim court appearances, generating additional legal fees and travel expenses. In addition, parties are often required to incur the cost of updating evidence which has become outdated.

If the courts operated with adequate numbers of Judges and Registrars, matters could be dealt with in a timely manner, generating less legal work and minimising costs while resolving matters more quickly. In particular there is a need for more resources to conduct circuit work in regional areas.

Costs would also be reduced for parties if further resources were provided for family law consultants, thereby reducing the need for parties to engage private consultants.

2. Procedures and case management processes

Adequate court resourcing would enable courts to implement procedures and case management processes so that matters could be handled more simply and efficiently.

We recommend more extensive use of suitably qualified and experienced Registrars and their greater participation in case management in the early stages of matters. This would help to free up judicial resources for substantive interim hearings, complex interlocutory applications, thereby reducing delays and costs.

As discussed above, costs are increased by the need to attend court on multiple occasions. We welcome the increased scope for use of video and audio links²¹ which is likely to create efficiencies and better access for parties in regional and remote areas. We recommend

²⁰ See *Family Law Act 1975* (Cth) s 96(5).

²¹ *Family Law Act 1975* (Cth) ss 168-172.

greater use of measures such as telephone conferences to deal with minor case management, and the development of an online system for divorce matters.

3. Effective dispute resolution processes

In our experience, parties to family law disputes are encouraged by their legal representatives to minimise costs by seeking to resolve the dispute without filing proceedings. This includes, where appropriate, engaging in pre-litigation dispute resolution processes including mediation, collaboration and conciliation.

Increasing the availability of affordable mediation, collaboration and conciliation services will increase the likelihood of parties resolving their disputes without the need to file proceedings.

Capping fees

In our view, capping fees according to the value of the assets in dispute would not be an effective or fair mechanism for reducing costs to the parties. The value of the asset pool does not necessarily reflect the parties' capacity to pay legal fees. An older couple, for example, may have substantial assets but be on a modest income.

Term of Reference E

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

Family law support services

As discussed above, we recommend resources be focused on increasing the availability of court-based family consultants.

Our members report that there are too few court-based family consultants to meet the demand for their services. The delivery of a Family Report can greatly improve the parties' ability to resolve the matter prior to hearing; however the current scarcity of family consultants results in long delays before Family Reports are delivered. We note also that the appropriate use of Child Dispute Conferences and Child Inclusive Conferences can help to minimise the impact of proceedings on the health safety and welfare of children.²²

As discussed above, we recommend greater focus be given to the prevention of family violence or early intervention to protect those experiencing violence before it escalates.²³ Options should be available for courts to refer perpetrators to appropriate interventions including therapy and programs aimed at increasing perpetrators' accountability for their actions, promoting compliance with court orders and changing attitudes and behaviour.

Family dispute resolution services

As discussed above, family law practitioners encourage the use of family dispute resolution as a way of resolving disputes quickly and efficiently. There are many effective family dispute resolution services available including the Law Society's Family Law Settlement Service and the services operated by legal aid commissions, and Family Relationship Centres. Legal practitioners also offer collaborative practice as an alternate dispute resolution process.

While encouraging the use of family dispute resolution in appropriate matters, the Law Society notes that not all matters are suited to that pathway and that some matters will

²² Discussed further in relation to Term of Reference F.

²³ Royal Commission into Family Violence, Summary and Recommendations (March 2016), p 6.

require litigation. To that end, the Law Society suggests it may be appropriate to consider removing the compulsory element of the current provisions in s 60I of the Act.

The Law Society supports the greater use of arbitration as a way of resolving family law disputes. We support the recommendations arising from the ALRC Review of the Family System aimed at expanding the scope of matters which may be arbitrated and removing barriers to arbitration.²⁴

Term of Reference F

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

The Law Society emphasises that any recommendations regarding reform of the family law system should, from the outset, consider the impact of family law proceedings on the health, safety and wellbeing of the children and families involved.

Family law support services

In the experience of our members, the health, safety and wellbeing of children is promoted by the appropriate use of properly resourced family support services. These services are particularly important in more difficult matters involving vulnerable parties, such as those experiencing economic disadvantage and survivors of domestic violence. In these matters Child Dispute Conferences, Child Inclusive Conferences and Family Reports can assist by providing detailed evidence that explains the critical risk factors and issues likely to affect the parties' health, safety and wellbeing. In our view, adequate funding for these processes will ensure they are effected in a timely fashion, without undue delay which risks exposing the parties to harm.

Reducing the adversarial nature of litigation

Our members report that engaging in contested family law litigation can have a polarising effect on parents who are already in dispute, escalating the conflict between them, and this can undermine the safety and wellbeing of the children. We support measures that aim to reduce the adversarial nature of family law litigation.

A number of social science based studies have investigated the impact on children of substantially shared parenting where the parents are in continuing conflict.²⁵ The results suggest the capacity of children, particularly those 10 years and under, to adjust to changes in the family dynamic can be seriously compromised when they are exposed to ongoing parental conflict. An environment of high conflict has been associated with internalising and externalising behaviour problems, self-blame and shame in children.²⁶ It has been found that, in such an environment, children are more likely to exhibit signs of stress and fearfulness, and to display poorer interpersonal skills, insecure attachments and generalised insecurities.²⁷

²⁴ Australian Law Reform Commission, Review of the Family Law System, Final Report (March 2019), Recommendations 26-29.

²⁵ J McIntosh and R Chisholm, "Shared Care and Children's Best Interests in Conflicted Separation - a Cautionary Tale from Current Research", *Australian Family Lawyer* (2007) Vol 20 No 1.

²⁶ M Pruett, T Williams, G Insabella, T Little, "Family and Legal Indicators of Child Adjustment to Divorce among Families with Young Children", *Journal of Family Psychology* (2003), 17-2.

²⁷ C Buehler et al, "Interparental conflict styles and youth problems behaviours; A two-sample replication study", *Journal of Marriage and the Family* (1998), 60, 119-132; K D Pruett, and M K Pruett, "Only God decides: Young children's perceptions of divorce and the legal system", *Journal of the American Academy of Child and Adolescent Psychiatry*, (1999) 38, 1544-1550. See also J Neoh, "Unwitting harm: Dealing with litigating parents", *InPsych*, Australia Psychological Society (2018), 40-1.

These findings have led to the establishment of the Family Court's Less Adversarial Trials process, which allows parents and/or parties to engage with the Bench. The process demonstrates the utility of enabling the court to interact appropriately with the parties as a way of reducing conflict between them. The Federal Circuit Court's Indigenous List is another example of a less adversarial environment which has proven beneficial. Such processes, if properly resourced and appropriately applied, can help to reduce the adversarial nature of hearings.

Another measure which can reduce the adversarial nature of family law litigation is the use of video-conferencing. We support the greater use of technology in circumstances where there are safety issues or concerns about the wellbeing of parties and their children.

The rule in *Rice v Asplund*

We support the ALRC's recommendation regarding incorporating into legislation the rule in *Rice v Asplund*,²⁸ which requires the court, before varying Final Parenting Orders, to be satisfied that the variation reflects significant changes in one or both parents' circumstances.²⁹ In our view, incorporating the rule would help to reduce the risk that children in circumstances of high conflict are exposed to abuse through repeated applications for variations to Parenting Orders over the same issues. We emphasise, however, that the rule should apply subject to consideration of the child's best interests.

Presumption of equal time and presumption of equal share parental responsibility

We have previously indicated our support for the ALRC recommendation of the abolition of the court's requirement under s 65DAA to consider, in certain circumstances, the possibility of the child spending equal time, or substantial and significant time, with each parent.³⁰ The presumption of equal shared parental responsibility is not interchangeable with the presumption of equal time. In our view, the requirement to consider the possibility of a child spending equal time pursuant to the presumption of equal shared parental responsibility shifts the focus of family law proceedings from the best interests of the child to the interests of the parents.

We recommend the court have regard to the likely short, medium and long term effects of a shared care arrangement. It has been suggested the adverse long-term effects of a negative or disrupted early experience can include developmental delay, social and emotional behavioural problems and difficulties in forming and maintaining relationships in adulthood.³¹

We have also expressed support for abolishing the presumption under s 61DA of equal shared parental responsibility.³² Parental responsibility should in most cases be exercised by both parents; however, this again must be subject to the child's best interests. When an order has been made for shared parental responsibility, ss 61DA and 65DAC require decisions relating to the children to be made jointly by the parents – something that makes little sense when the parents are already in conflict.³³ Continual conflict over decision-making may be more harmful than having one party making appropriate decisions subject to consultation with the other.

²⁸ (1979) FLC 30-725.

²⁹ Australian Law Reform Commission, Review of the Family Law System, Final Report (March 2019), Recommendation 41.

³⁰ Law Society of NSW, letter to Law Council of Australia on Australian Law Reform Commission, Review of the Family Law System, Final Report, 26 August 2019, p 3.

³¹ S Goldberg, *Attachment and Development* (2000), Oxford University Press, New York.

³² Law Society of NSW, letter to Law Council of Australia on Australian Law Reform Commission, Review of the Family Law System, Final Report, 26 August 2019, p 3.

³³ J McIntosh and R Chisholm, "Shared Care and Children's Best Interests in Conflicted Separation - a Cautionary Tale from Current Research", *Australian Family Lawyer* (2007) Vol 20 No 1, p 6.

In our view, the court should be required to consider each case individually in light of the paramount duty to consider the best interests of the child. Children enter family law proceedings at different stages of their life and development, each child having differing upbringings, experiences and cultural influences. The court's requirements and processes should incorporate a degree of flexibility for this reason.

Independent Children's Lawyer

In the experience of our members, older children (over 10 years) in family law proceedings can be disenfranchised if not provided with independent representation. Where there is no Independent Children's Lawyer appointed, the views of older children, and their best interests, can be overlooked or assumed by the parents. We support the use of an Independent Children's Lawyer in matters involving older children.

Term of reference G

any issue arising for grandparent carers in family law matters and family law court proceedings.

In the experience of our members, grandparents can play an important role in the lives of their grandchildren through providing care. The importance of their role is reflected in the parenting provisions in the Act. For example:

- Under s 60B(2)(b), grandparents are included as a category of person with whom, as a general principle, children have the right to spend time, and communicate on a regular basis.
- Under s 65C(ba), grandparents have standing to apply for parenting orders, which may allow them to spend time with, or have the majority of care of, their grandchildren and/or have 'parental responsibility'.
- Standing to apply for parenting orders enables grandparents to attend family dispute resolution with the parents and partake in determining living arrangements that are in the best interests of the children.

Determining what is in the child's best interests

Section 60CC requires the court, in determining what is in the child's best interests, to consider the nature of the child's relationship with other persons including grandparents (s 60CC(3)(b)(ii)) and the likely effect of separation from other persons such as grandparents (s 60CC(3)(d)(ii)). The ALRC has recommended simplifying the factors taken into account pursuant to s 60CC so that they refer more generally to the child's "carers" (including grandparents).³⁴ The Law Society supports this recommendation.

The case law applying s 60CC suggests that, when grandparents or any other person concerned with the care, welfare and development of a child applies for parenting orders, the relevant factors are to be considered and weighed by the court and there is no hierarchy of applicants for parenting orders.³⁵

A body of case law has also developed as a result of grandparents bringing court proceedings against parents in an intact relationship, where the grandparents seek orders enabling them to spend time with their grandchildren. In these challenging cases the court must weigh the importance of relationships within the nuclear family against the benefit of relationships with grandparents.

³⁴ Australian Law Reform Commission, Review of the Family Law System, Final Report (March 2019), Recommendation 5.

³⁵ See, for example, *Donnell & Dovey* [2010] FamCAFC 15; *Burton & Churchin and Anor* [2013] FamCAFC 180.

In light of these developments, we recommend amendments to s 60CC that require consideration of the best interests of the child in relation to their “carers”, rather than distinguishing parents and grandparents.

Families and grandparents in Aboriginal and Torres Strait Islander communities

The Law Society recommends consideration be given to incorporating in the Act the concept of family and the involvement of grandparents and other family members within Aboriginal and Torres Strait Islander kinship structures.

Within these kinship structures, it is not unusual for aunties, uncles and/or grandparents to raise children as their own. Section 60CC(2)(a) imports Anglo-Saxon concepts of family relationships and structures which do not necessarily apply in Aboriginal and Torres Strait Islander communities.

Accordingly, we recommend the Act be broadened to recognise the significant parenting and cultural roles played by a child’s clan group and extended kinship system. We support the ALRC’s recommendation of a definition of “member of the family” that includes any Aboriginal or Torres Strait Islander concept of family that is relevant in the particular circumstances of the case.³⁶

Term of Reference H

any further avenues to improve the performance and monitoring of professionals involved in family law proceedings and the resolution of disputes, including agencies, family law practitioners, family law experts and report writers, the staff and judicial officers of the courts, and family dispute resolution practitioners.

Education and training

The Law Society has previously expressed the view that legal practitioners should undertake education and training to develop competencies focused on responding to the physical, psychological and financial abuse of vulnerable people including survivors of family violence, elder abuse, child abuse and discrimination.³⁷

In relation to developing competency to respond to family violence, we recommend all practitioners be required to develop competency in this area. We suggest education be incorporated into the core curricula in Practical Legal Training (“PLT”) courses, rather than into elective units, as not all lawyers who practise in family law form the intention as PLT students to do so. Moreover, in our members’ experience, family violence issues can arise in the context of many other areas of practice.

In our view there should also be a focus on providing practitioners with skills in managing client relationships so as to minimise the risk of physical danger to themselves and vicarious trauma. Also required is an understanding of professional obligations regarding client confidentiality and taking instructions if the mental capacity of the client is in question. We emphasise, however, that practitioners should not be required to assist beyond providing legal information, legal advice and appropriate referrals.

Examples of this type of training include the Law Society’s continuing professional development (CPD) programs which incorporate skills-based training in areas such as family violence and ‘fundamentals’ for family law practitioners. We understand Legal Aid NSW also

³⁶ Australian Law Reform Commission, Review of the Family Law System, Final Report (March 2019), Recommendation 9.

³⁷ Law Society of NSW, letter to the Law Council of Australia on Options for improving family violence competency of legal practitioners, 17 September 2019.

offers comprehensive training for panel solicitors, and that private consultancies offer training on trauma informed practice.

The above recommendations also apply in relation to professionals working in the family law courts. The critical issues continue to be adequate budgetary allocation and adequate staff time for this training to take place.

Performance measures

We support the ALRC's recommendation to expand the role of the Family Law Council to encompass providing ongoing advice and guidance to the Government with respect to the family law system as a whole,³⁸ noting that the effectiveness of such measures would depend on appropriate resources.

It is the Law Society's view that the existing performance measures for legal practitioners and other professionals in the family law system are generally adequate.

We note that legal practitioners are subject to the scrutiny of judicial officers and, in the event of a complaint, regulatory bodies.

Family consultants are also subject to the scrutiny of the court; their work is routinely subjected to cross-examination and overseen by the Family Court's Child Dispute Services to ensure it is of a high standard. The efficacy of these arrangements relies on their being appropriately tasked and adequately resourced. As discussed above, it is our experience that the current lack of family consultants results in delays in the resolution of proceedings.

The performance of family dispute resolution practitioners, including those provided through legal aid commissions, is managed through an accreditation system overseen by the Attorney-General's Department. This system includes continuing professional development requirements and procedures for cancellation or suspension of accreditation on the failure to meet professional standards.³⁹

Options for improving the monitoring and performance of judicial officers in the family courts include the establishment of a Commonwealth Judicial Commission, similar to the Judicial Commission of New South Wales.

Term of Reference I

any improvements to the interaction between the family law system and the child support system.

We note the Family Court and Federal Circuit Court Rules impose an obligation on parties not to use a document that has been disclosed to them for another purpose.⁴⁰ The rules express a broader principle known as the Harman principle or Harman obligation,⁴¹ which is also expressed as an implied undertaking to the court, and which can therefore only be released by leave of the court⁴² or by legislation.

³⁸ Australian Law Reform Commission, Review of the Family Law System, Final Report (March 2019), Recommendation 49.

³⁹ *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth).

⁴⁰ See for example *Family Law Rules 2004* (Cth) r 13.07A and Sch 1 Pt 1 cl 4(8) and 4(9); *Federal Circuit Court Rules 2001* (Cth) r 14.11.

⁴¹ *Harman v Secretary of State for the Home Department* [1983] 1 AC 280; *Hearne v Street* [2008] HCA 36.

⁴² *Liberty Funding Pty Ltd v Phoenix Capital Ltd* (2005) 218 ALR 283 at [31].

In the context of family law, the courts have been willing to release parties from the Harman obligation in very limited circumstances, for example:

- in the case of an admission, by an adult, in respect of child abuse or disclosure by a child in respect of such matters;⁴³ and
- in “special circumstances” involving criminal proceedings in which a party has been charged.⁴⁴

In some matters, however, the resolution of a Part VIII property dispute would be assisted by bringing evidence that has been brought in an application for orders for departure from administrative assessment⁴⁵ (“departure orders”), or vice versa. We recommend consideration be given to reviewing the application of the Harman obligation to cases involving both Part VIII family law proceedings and an application for departure orders.

Term or Reference J

the potential usage of pre-nuptial agreements and their enforceability to minimise future property disputes

The Law Council has previously recommended re-introduction of the relevant amendments proposed by the *Family Law Amendment (Financial Agreements & Other Measures) Bill 2015*.⁴⁶ The Law Society supports this recommendation in principle, subject to the following comments.

The Law Society supports the proposition that parties should be able to contract out of the financial provisions of the Act, if they do so voluntarily and with full understanding of their rights and obligations. In our view, however, there is a need to simplify and clarify the provisions in Part VIIIA, in particular to clarify when financial agreements are binding and when they can be set aside.

We also recommend consideration be given to broadening the court’s powers to vary or set aside an agreement. 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*. We recommend the court’s power be extended to setting aside or varying an agreement where there has been a material change in *circumstances of a party*. Many agreements are entered into at the early stages of the relationship, and as time passes the parties experience material changes in circumstance which are unconnected to the children, such as age-related health conditions. In our view the court should be able to make orders that respond to these changes in circumstances.

Our members report that a proportion of those who enter into a financial agreement pursuant to Part VIIIA agree to an outcome significantly less favourable than the likely outcome of proceedings instigated pursuant to Part VIII, despite having obtained independent legal advice. This can be due to a lack of understanding of the effect of the agreement or, in some cases, an element of undue pressure or influence. In the experience of our members, the issue is more likely to arise in cases involving vulnerable parties, where there is family violence involved, or where the agreement is signed in haste prior to the wedding.

For vulnerable parties, bringing proceedings pursuant to s 90K can be financially onerous. While it is open to a party to make an application pursuant to s 117 for interim property

⁴³ See *Miller & Murphy* [2016] FCCA 974 (2 May 2016).

⁴⁴ See *Zarins & Mylne* (No. 3) [2013] FamCA 737 (26 September 2013).

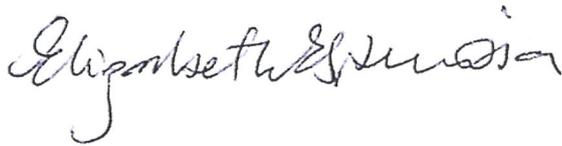
⁴⁵ *Child Support (Assessment) Act 1989* (Cth), Pt 7, Div 4.

⁴⁶ Law Council of Australia, response to Australian Law Reform Commission on its Review of the Family Law System, Issues Paper (May 2018), p 64.

settlement orders in order to fund a s 90K application, recent case law suggests that few such applications are successful.⁴⁷ We recommend additional funding be made available (for example via legal aid) to enable eligible parties to bring an application to set aside their financial agreement.

If you have queries about this letter please contact Sue Hunt, Principal Policy Lawyer, by email to sue.hunt@lawsociety.com.au or by phone on (02) 9926 0218.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Elizabeth Espinosa". The signature is fluid and cursive, with a large initial 'E'.

Elizabeth Espinosa
President

⁴⁷ *Norton & Wilkins* [2017] FamCA 992, *Monaghan & Farrer* [2018] FamCA 178.