



Australian Government  
Family Law Council

# **Access to Justice: A more accessible and equitable family law system**

Family Law Council Report  
TOR3, 2024

ISBN: 978-1-921357-41-1 (on-line)

© Commonwealth of Australia 2024

With the exception of the Coat of Arms and where otherwise stated, all material presented in this publication is provided under a Creative Commons Attribution 4.0 International licence

([www.creativecommons.org/licenses](http://www.creativecommons.org/licenses)).

For the avoidance of doubt, this means this licence only applies to material as set out in this document.



The details of the relevant licence conditions are available on the Creative Commons website as is the full legal code for the CC BY 4.0 licence ([www.creativecommons.org/licenses](http://www.creativecommons.org/licenses)).

#### **Use of the Coat of Arms**

The terms under which the Coat of Arms can be used are detailed on the Department of the Prime Minister and Cabinet website ([www.pmc.gov.au/government/commonwealth-coat-arms](http://www.pmc.gov.au/government/commonwealth-coat-arms)).

## Term of Reference 3

### A more accessible and equitable family law system

Acknowledging that prolonged parental conflict and litigation can adversely impact the wellbeing of children.

The Council will consider options and avenues for making the family law system more accessible and equitable for separating families. Including consideration of:

- a. Ways to enhance the availability and use of family dispute resolution and mediation for both parenting and property matters.
- b. Addressing barriers to the use of family law arbitration including whether, and in what circumstances, arbitration could be used in parenting matters.
- c. Ways to enhance Government-funded family law services and other family law services for matters involving family violence and to better assist families with complex needs.
- d. Ways to enhance Government-funded and other family law services for diverse families including, Aboriginal and Torres Strait Islander families and culturally and linguistically diverse (CALD) families.
- e. Options for improved post-order support so that parents and carers can avoid, where possible, returning to Court for enforcement of parenting orders, unless necessary.
- f. Ways to increase access to plain language information and education about family law so all users of the system, especially unrepresented litigants, can make informed decisions about their matter and effectively navigate the system.



# Contents

<b>ACCESS TO JUSTICE</b>	<b>iii</b>
<b>Term of Reference 3: A more accessible and equitable family law system</b>	<b>iii</b>
<b>Table of Contents</b>	<b>1</b>
<b>ABBREVIATIONS</b>	<b>3</b>
<b>Executive Summary</b>	<b>5</b>
<b>Recommendations</b>	<b>6</b>
<b>1. The family justice system – existing recommendations for reform</b>	<b>11</b>
<b>2. Legislative reform</b>	<b>16</b>
<b>2.1 A stand-alone family law specific dispute resolution Act</b>	<b>16</b>
<b>2.2 Broadening access to arbitration</b>	<b>17</b>
<b>2.3 Addressing the problem of disclosure</b>	<b>25</b>
<b>2.4 Amendments to enhance compliance with orders</b>	<b>26</b>
<b>2.5 Amendments to better support First Nation families</b>	<b>26</b>
<b>3. Creation of a dedicated holistic family relationship internet site with links to related service providers in step-by-step assistance for parties</b>	<b>28</b>
<b>4. Creation of <i>Family Relationship Information Hubs</i> through enhancements of Family Law Pathways Networks (FLPNs)</b>	<b>32</b>
<b>4.1 The benefit of Family Relationship Information Hubs</b>	<b>32</b>
<b>4.2 Enhancement of FLPNs to deliver family relationship information</b>	<b>33</b>
<b>5. Utilisation of technology</b>	<b>35</b>
<b>5.1 amica - Overview</b>	<b>35</b>
<b>5.2 amica - Dispute Resolution tool</b>	<b>36</b>
<b>5.3 Development of interactive smart forms</b>	<b>37</b>

<b>6. Enhancement of frontline FDR, legal and social services</b> .....	<b>40</b>
<b>6.1 Arb Lite (arbitration lite) – developed by Legal Aid Queensland</b> .....	<b>40</b>
<b>6.2 Involvement of social scientists in Family Dispute Resolution delivered by Legal Aid Commissions</b> .....	<b>41</b>
<b>6.3 Flexible funding of CLCs, ATSILS and FVPLS to enable beginning to end service</b> .....	<b>42</b>
<b>6.4. Legally Assisted Family Dispute Resolution</b> .....	<b>42</b>
<b>6.5. Trauma-Informed and DFV-informed FDR</b> .....	<b>45</b>
<b>6.6 Priority Property Pools Program (PPP)</b> .....	<b>47</b>
<b>6.7 Accessible and culturally appropriate service provision</b> .....	<b>47</b>
 <b>BIBLIOGRAPHY</b> .....	 <b>57</b>
<b>A: Articles/Books/Reports</b> .....	<b>57</b>
<b>B: Cases</b> .....	<b>59</b>
<b>C: Legislation</b> .....	<b>59</b>
<b>D: Other</b> .....	<b>59</b>
 <b>Appendix A: Discussion Draft: <i>Family Dispute Resolution Act</i></b> .....	 <b>61</b>
 <b>Appendix B: Functions of the Family Law Council</b> .....	 <b>84</b>
 <b>Appendix C: List of stakeholders consulted</b> .....	 <b>85</b>
.....	

## ABBREVIATIONS

<b>ABS</b>	Australian Bureau of Statistics
<b>ADR</b>	Alternative Dispute Resolution
<b>amica</b>	amica is an online dispute resolution tool
<b>Arb Lite</b>	'Arbitration Lite'
<b>AI</b>	Artificial Intelligence
<b>Attorney-General's Department (Cth)</b>	Australian Government Attorney-General's Department
<b>ALRC</b>	Australian Law Reform Commission
<b>ALRC 2019 Report</b>	<i>Family Law for the Future: An Inquiry into the Family Law System</i> (Final Report 135, ALRC, March 2019)
<b>BFA</b> s	Binding Financial Agreements
<b>CCS</b> s	Children's Contact Services
<b>CLC</b> s	Community Legal Centres
<b>CALD</b>	Culturally and linguistically diverse
<b>DLO</b>	Disability Liaison Officer
<b>DFV</b>	Domestic and Family Violence
<b>Family Law Act</b>	Family Law Act 1975 (Cth)
<b>FCWA</b>	Family Court of Western Australia
<b>FDR</b>	Family Dispute Resolution
<b>FDRPs</b>	Family Dispute Resolution Practitioners
<b>FRC</b> s	Family Relationship Centres
<b>FRSP</b>	Family Relationship Services Program
<b>FLPN</b> s	Family Law Pathways Networks
<b>FSM</b>	Family Safety Model

<b>FVPLS</b>	Family Violence Prevention Legal Services
<b>FCFCOA</b>	Federal Circuit and Family Court of Australia <sup>1</sup>
<b>FNAAVF</b>	First Nations Advocates against Family Violence
<b>IFLOs</b>	Indigenous Family Liaison Officers
<b>LACs</b>	Legal Aid Commissions
<b>LAFDR</b>	Legally Assisted Family Dispute Resolution
<b>LGBTQIA+</b>	Lesbian, gay, bisexual, transgender, queer or questioning, intersex, asexual and more
<b><i>Metcalf Report</i></b>	<i>Support for Separating Families: Review of the FRSP</i> by Andrew Metcalfe AO
<b><i>Mundy Report</i></b>	<i>Independent Review of the National Legal Assistance Partnership Final Report</i> by Dr Warren Mundy
<b>NAJP</b>	National Access to Justice Partnership
<b>NLAP</b>	National Legal Assistance Partnership
<b>PPP</b>	Priority Property Pools Program
<b>RAV</b>	Relationships Australia Victoria
<b>SILs</b>	Specialist Indigenous Lists

<sup>1</sup> For more information on the two separate courts, see Federal Circuit and Family Court of Australia, *About the Courts* (Web Page) <<https://www.fcfcqa.gov.au/about>>.

## Executive Summary

Family law is the most likely way the Australian community will encounter the Australian legal system, and most families make decisions about the care of their children and the division of their property in the shadow of the law. Access to justice is thus imperative to resolve family law disputes and is a fundamental aspect of a fair and equitable legal system. It encompasses various elements such as having access to accurate legal information that is easy to understand, the ability to recognise and resolve relevant legal issues, having access to appropriate assistance from legal and other professionals, and having the ability to navigate the pathway through dispute resolution or adjudication processes.

In addressing this term of reference, the recommendations in this report focus on three areas: legislative reform, in particular, to alternative dispute options, greater utilisation of technology, and program reforms to the legal and allied services sector.

Legislative reform suggestions include enacting a dedicated *Family Dispute Resolution Act*, allowing arbitration of specified children's matters, clarifying courts' powers in terminating arbitration and harmonising what can be arbitrated in court ordered and private arbitration, and a requirement that orders highlight the requirement that parties attempt resolution of future disputes before initiating court proceedings.

Technological reform recommendations propose the development of a national online platform for separating families to access information and services, linking it with a children and young people's online information platform, utilising social media, enhancing Family Law Pathways Networks to become virtual "*Family Relationship Information Hubs*" maintaining the currency of *amica's* dispute resolution database through technological solutions, and creating interactive "smart forms" to be used in both dispute resolution and the litigation process.

Program reform suggestions include expanding the Legal Aid Queensland "*Arb Lite*" program to other legal aid commissions, combining legal and social science skillsets in family dispute resolution processes, preventing fragmentation of legal service delivery by funding frontline providers to provide beginning to end services, expanding legally assisted family dispute resolution through Family Relationship Services Program (FRSP) services and Family Relationship Centres (FRCs), and funding family law services to provide case management and navigation support to clients.

The aim of all of these recommendations is to enhance separated parties' access to relevant information and resources, to obtain required support and to have access to professional services to assist in the effective and timely resolution of their disputes.

# Recommendations

## A more accessible and equitable family law system

### 1. Legislative Reform – Enhancing access to alternative dispute resolution

#### **Recommendation 1:**

That one standalone *Family Dispute Resolution Act* (or however so titled) be enacted, drawing together all alternative dispute resolution processes currently spread through the *Family Law Act 1975* (Cth), the *Family Law Regulations 1984* (Cth), the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth) and the *Family Court Rules 2021* (WA).

#### **Recommendation 2:**

That the *Family Law Act 1975* (Cth) be amended to allow some children’s matters to be arbitrated, consistent with Recommendation 28 of the Australian Law Reform Commission’s 2019 Inquiry into the Family Law System.

#### **Recommendation 3:**

That the *Family Law Act 1975* (Cth) be amended to provide that upon application by an arbitrator, or by a party to an arbitration, a court has power to make directions at any time regarding the further conduct of the arbitration, including power to make a direction terminating the arbitration (whether or not the arbitration was referred from a court).

#### **Recommendation 4:**

(a) That the *Family Law Act 1975* (Cth) be amended so that court ordered arbitration has the same scope of subject matters as private arbitrations.

(b) All alternative dispute resolution processes be included in a standalone *Family Dispute Resolution Act* (see Recommendation 1 above).

(c) The standalone *Family Dispute Resolution Act* (or current provisions if the standalone *Family Dispute Resolution Act* is not taken up) include an Objects provision as follows:

Objects of arbitration and arbitrating

Arbitration:

- (a) is an efficient, impartial, enforceable and timely method by which to resolve disputes;
- (b) is to be encouraged as a method of resolving disputes;
- (c) is to be facilitated by the use of arbitration agreements;
- (d) results in an arbitral award intended to provide certainty and finality (save where the parties have chosen to arbitrate an interim issue).

(d) The current s 10L of the Act (or equivalent provision in a standalone *Family Dispute Resolution Act*) be amended as follows:

**10L** Definition of *arbitration*

- (1) **Arbitration** is a process (other than the judicial process) in which parties to a dispute present arguments and evidence to an arbitrator, who makes a determination to resolve the dispute.
- (2) Arbitration (in both court ordered and private arbitrations) may be of and incidental to:
  - a. Part VIII proceedings, Part VIIIA proceedings, Part VIIIAB proceedings, Part VIIIB proceedings or section 106A proceedings;
  - b. Part VII proceedings but not matters relating to:
    - i. international relocation;
    - ii. medical procedures of a nature requiring court approval;
    - iii. contravention matters;
    - iv. matters in which an Independent Children’s Lawyer has been appointed; and
    - v. family violence which satisfy ss 102NA(1)(b) and (c) of the *Family Law Act 1975* (Cth).
  - c. Proceedings under the *Child Support (Assessment) Act 1989* (Cth) and Child Support (Registration and Collection Act), but not where the Child Support Registrar is participating in the matter;
  - d. Proceedings under ss 79A or 90SN of the *Family Law Act 1975* (Cth) to set aside property orders;
  - e. Proceedings under ss 90K or 90UM of the *Family Law Act 1975* (Cth) to set aside financial agreements;
  - f. Costs;
  - g. Any part of such proceedings;
  - h. Any matter arising in such proceedings;
  - i. A dispute about a matter with respect to which such proceedings could be instituted.

(e) Consequent amendments to s 13E would then be:

**13E** Court may refer proceedings to arbitration

- (1) With the consent of all of the parties to the proceedings, a court exercising jurisdiction under this Act and subject to s 10L, may make an order referring the proceedings, or any part of them, or any matter arising in them, to an arbitrator for arbitration.
- (2) If the court makes an order under subsection (1), it may, if necessary, adjourn the proceedings and may make any additional orders as it thinks appropriate to facilitate the effective conduct of the arbitration.

**Recommendation 5:**

That the *Family Law Act 1975* (Cth) be amended to strengthen disclosure obligations for parties in respect of property matters, as defined in the Family Law Amendment Bill 2024.

### **Recommendation 6:**

That all final parenting orders add two further notations, being that:

- (a) unless a relevant exemption applies, the parties must attend dispute resolution before filing in court again, and
- (b) before reconsidering a final parenting order, the court must consider whether there has been any significant change in circumstances since the order was made, and whether it is in the best interests of the child to do so.

### **Recommendation 7:**

Acknowledging that cultural and kinship systems and associated obligations and practices vary considerably among different First Nations groups around Australia, that the review of the *Family Law Amendment Act 2023* (Cth) include consideration of how family courts around the country have interpreted and applied s 60CC(3) and the extent to which improved outcomes have been achieved.

## **2. Digital Reform – Enhancing online information and access to online service delivery**

### **Recommendation 8:**

That a single authoritative online information platform for separating families be established. The information contained on the platform should aim to provide information to address the needs of all separating families, before, during and after any dispute resolution process including by providing access to instructional videos and linkages to allied service providers. The website content should be presented in an accessible format, with easy-read and plain English language, as well as availability in multiple languages and an easy English format with specific content for Aboriginal and/or Torres Strait Islander families.

### **Recommendation 9:**

That the single authoritative online information platform should be allocated ongoing funding to ensure its currency and to provide linkage to a specific children’s online information platform (see also *Recommendation 4* from the Family Law Council’s *Supporting and Strengthening the Voice of Children* Report, 2024).

### **Recommendation 10:**

That the Family Law Pathways Networks be supported to deliver “*Family Relationship Information Hubs*” which provide current and comprehensive local information about multidisciplinary support and multiagency services for adults and children/young people experiencing relationship breakdown and appropriate referral processes.

### **Recommendation 11:**

The Federal Circuit and Family Court of Australia and the Family Court of Western Australia be provided with initial seed funding to develop technological solutions to facilitate the provision of current court orders that are available to *amica* with the ongoing cost of maintaining currency being met by a modest fee payable by *amica* users.

### **Recommendation 12:**

That corresponding resourcing be provided to *amica* for reviewing *amica* matters and ensuring currency.

### **Recommendation 13:**

That the Attorney-General’s Department (Cth) consider funding a project to develop the use of smart form and easy read technology in the Federal Circuit and Family Court of Australia and consider engaging in discussions with appropriate representatives of the Western Australian Department of Justice with a view to funding a project to develop the use of smart form and easy read technology that can be used in the Family Court of Western Australia.

### **3. Program reform – Enhancing frontline family dispute resolution, arbitration, legal and social services**

#### **Recommendation 14:**

That the Government consider providing funding for the continuation of the *Arb Lite* program, together with seed funding to enable similar programs to be developed by other legal aid commissions on the basis that the recipient Commission commits to developing a fee structure that makes the service self-sustaining.

#### **Recommendation 15:**

That Legal Aid Commissions be resourced to enhance and extend existing programs where family dispute resolution conferences are jointly convened by appropriately qualified lawyers and social scientists.

#### **Recommendation 16:**

That frontline legal service providers be funded to provide beginning to end service delivered by suitably qualified staff including in court proceedings, and allow continued support to clients until matters are concluded, including through appeals, and those providers should be adequately resourced to brief counsel as necessary.

#### **Recommendation 17:**

That the Attorney-General's Department (Cth) consider options to facilitate integrated access to legal advice and assistance and provision of legally-assisted family dispute resolution through Family Relationship Services Program services and Family Relationship Centres for appropriate cases.

#### **Recommendation 18:**

That the Government fund family law services to provide case management support, tailored to clients' needs and capacity, noting the importance of managing safety in cases that involve family violence.

#### **Recommendation 19:**

That funding be provided to the Federal Circuit and Family Court of Australia and Family Court of Western Australia to support the national expansion of Specialist Indigenous Lists.

#### **Recommendation 20:**

That Indigenous Family Liaison Officers be offered permanent positions to cover all cases involving First Nations parties or children in the Federal Circuit and Family Court of Australia and Family Court of Western Australia, with an appropriate management structure to support them.

#### **Recommendation 21:**

That Federal Circuit and Family Court of Australia's Lighthouse Programme be expanded to regional and rural locations on a permanent basis.

#### **Recommendation 22:**

That the Attorney-General's Department (Cth) consider options to increase the availability of cultural reports in parenting proceedings involving an Aboriginal and/or Torres Strait Islander child, including engaging with community members to co-design a suitable process and identify appropriate cultural report writers in each region.

#### **Recommendation 23:**

That the First Nations Hubs (supporting separating or separated First Nations families), as recommended by the *Metcalfe Report*, be implemented and co-designed with First Nations people to ensure that the services are delivered in a culturally appropriate way, which may not involve the same processes as occur in mainstream Family Relationship Services.

**Recommendation 24:**

That the Government provide funding for a pilot to introduce Multicultural Liaison Officers in certain family court registries identified as having significant demand from culturally and linguistically diverse clients, to assist them in navigating the family law system in a culturally appropriate way.

**Recommendation 25:**

That Family Relationship Services Program providers be required to build partnerships with specialist organisations to meet the varied needs of the communities they serve, including those with high numbers of culturally and linguistically diverse clients.

**Recommendation 26:**

That the Government provide funding for a pilot to introduce Disability Liaison Officers to provide guidance and support to court users in the Federal Circuit and Family Court of Australia and Family Court of Western Australia in family law proceedings, particularly in cases involving family violence, and to connect them with crucial legal and social support services within the community.

**Recommendation 27:**

That the Attorney-General's Department consider options to ensure that court services, legal professionals and Family Relationship Services Program reporting captures the frequency of disclosure of disability by clients, where individuals agree to disclose this and seek feedback to support evidence-based decision-making on the effectiveness of the programs in supporting clients experiencing disability.

**Recommendation 28:**

That all Family Relationship Services Program service providers receive appropriate training to support LGBTQIA+ families.

**Recommendation 29:**

That the Attorney-General's Department consider options to ensure that court services, legal professionals and Family Relationship Services Program reporting captures the sexuality and gender identity of clients, where individuals agree to disclose this, to support evidence-based decision-making on the effectiveness of the programs supporting LGBTQIA+ clients.

# 1. The family justice system – existing recommendations for reform

From its re-establishment in 2021, the Family Law Council has resolved to focus upon “the family justice system” rather than simply the family legal system. This is in the context where the overwhelming majority of separating parties are able to resolve their disputes outside of the legal process.

The family justice system includes:

[All of] the mechanisms that exist to determine the legal rights and obligations that individuals possess, and how these may be exercised, by virtue of their family relationships. The system includes the provision of information, advice and assistance before any access to the family courts may be decided upon; such provision while court proceedings may be ongoing (and after they have ended); and alternative or additional methods to the courts to facilitate dispute resolution.<sup>2</sup>

In Australia, the courts and legal service providers are just one part of the family law system – a system that needs to be child-centred and meet the best interests of children and young people in separating families in its delivery of legal and non-legal services. Other significant parts of this system are in the family dispute resolution and family relationship sector which includes various education, therapeutic, capacity building and psycho-social support services funded under the Family Relationship Services Program (‘FRSP’). These include Family Relationship Centres (‘FRCs’), Family Dispute Resolution (‘FDR’), Family Counselling, Children’s Contact Services (‘CCSs’), the Parenting Orders Program/Post Separation Cooperative Parenting Program, and the Supporting Children after Separation Program.

Barriers to achieving a more accessible and equitable family law system, including access to FDR, include:

- ‘postcode injustice’ – there are ‘black holes’ where there is little or no access to in-person government-funded FDR and other family law services that complement FDR; Council acknowledges that the review of the FRSP has examined distribution of services and identified opportunities for additional government-funded services to be established to meet current and projected demand
- poverty and financial precarity – while the FRSP aims to offer universal services, poverty can indirectly affect accessibility through, for example, limiting where people live, access to private or public transport, lack of access to flexible work hours, lack of access to childcare, and unstable housing
- caregiving responsibilities
- disability and longstanding health restrictions (including mental ill-health)

<sup>2</sup> JUSTICE, *Improving Access to Justice for Separated Families* (Report, 2022) 11 [1.5] (*JUSTICE Report*). Note that this is the United Kingdom definition.

- having come from culturally and linguistically diverse backgrounds (including people who have chosen to migrate and people who have sought refuge)<sup>3</sup>
- digital exclusion,<sup>4</sup> and
- LGBTIQ+ people, and in particular, where intersectionality (for example through cultural or linguistic diversity or class) compounds the marginalisation experienced on the basis of gender identity or sexuality.

These barriers arise from the operation of broader systemic and structural factors that are beyond the scope of the family law system to address. However, numerous inquiries conducted over the past decade have explored in detail how those barriers could be mitigated,<sup>5</sup> and access to FDR and complementary services made more accessible and equitable. These inquiries have offered, to Government, a range of viable and evidence-based recommendations and proposals to improve the inclusiveness and fitness for purpose of FDR, as well as other family law services and the family law courts.

The Government has recently received reports from two significant enquiries into separate aspects of the justice system. Those reports are:

- *Independent Review of the National Legal Assistance Partnership Final Report* by Dr Warren Mundy ('Mundy Report'),<sup>6</sup> and
- *Support for Separating Families: Review of the FRSP* by Andrew Metcalfe AO, supported by the Australian Institute of Family Studies ('Metcalfe Report').<sup>7</sup>

Council endorses many of the proposals contained in those reports. We have not sought to duplicate the recommendations for reform set out in those reports, which in our view have considerable merit.

<sup>3</sup> See, eg, Federation of Ethnic Communities' Councils of Australia ('FECCA'), *Multicultural Access and Equity Report* (Report, 2020). See also this report [Family Law Council, *Access to Justice Report* (Report, 2024)] at Section 6.7.

<sup>4</sup> See Julian Thomas et al, *Measuring Australia's Digital Divide: Australian Digital Inclusion Index 2023* (Report, 2023).

<sup>5</sup> Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (Report, Family Law Council, 2012a) ('*Family Law Council Report 2012a*'); Family Law Council, *Improving the Family Law System for Culturally and Linguistically Diverse Clients* (Report, Family Law Council, 2012b); Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems: Interim Report (Terms 1 and 2)* (Report, Family Law Council, 2015); Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems: Final Report (Terms 3, 4 & 5)* (Report, Family Law Council, 2016) ('*Family Law Council Report 2016*'); House of Representatives Social Policy and Legal Affairs Committee, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (Report, House of Representatives Social Policy and Legal Affairs Committee, 2017) ('*SPLA 2017 Report*'); House of Representatives Social Policy and Legal Affairs Committee, *Inquiry into Family, Domestic and Sexual Violence* (Report, House of Representatives Social Policy and Legal Affairs Committee, 2021) ('*SPLA Committee 2021 Report*'); Commonwealth of Australia (Joint Select Committee on Australia's Family Law System), *Improvements in family law proceedings* (Interim Report, December 2020); Commonwealth of Australia (Joint Select Committee on Australia's Family Law System), *Improvements in family law proceedings* (Second Interim Report, March 2021a) ('*JSC Second Interim Report*'); Commonwealth of Australia (Joint Select Committee on Australia's Family Law System), *Improvements in family law proceedings* (Final Report, November, 2021b) ('*JSC Final Report, 2021*').

<sup>6</sup> Warren Mundy, *Independent Review of the National Legal Assistance Partnership* (Final Report, March 2024) ('*Mundy Report*').

<sup>7</sup> Andrew Metcalfe, *Support for Separating Families: Review of the Family Relationships Services Program* (Final Report, June 2024) ('*Metcalfe Report*').

In particular, in respect to the *Mundy Report*, we note the following to be of particular relevance to the family justice system:

- Recognising the steps that are required to address the significant unmet legal needs for Aboriginal and Torres Strait Islander peoples, including appropriate resourcing of Aboriginal and Torres Strait Islander Legal Services ('ATSILS') and Family Violence Prevention Legal Services ('FVPLS').
- The resourcing of the legal assistance sector should be informed by:
  - The *National Agreement on Closing the Gap 2020-2030*.<sup>8</sup>
  - The *National Plan to End Violence Against Women and Children 2022-2032*, which guides actions towards ending violence against women and children.<sup>9</sup>
  - The *National Strategy to Prevent and Respond to Child Sexual Abuse 2021-2030*, which focuses on prevention and improved response to child sexual abuse.<sup>10</sup>
  - The *Safe & Supported: The National Framework for Protecting Australia's Children 2021-2031*, which aims to reduce child abuse and neglect and its intergenerational impacts.<sup>11</sup>
- Adequately remunerating independent children's lawyers appointed by Family Courts and Legal Aid Commissions ('LACs').
- Recognising that legal assistance provided by LACs is usually only granted for the most financially disadvantaged leaving a considerable portion of the population with unmet needs.
- Recognising the consequent need to provide sufficient funding to Community Legal Centres ('CLCs'), FVPLS and First Nations Advocates against Family Violence ('FNAAVF') (formerly the National Family Violence Prevention and Legal Services Forum) to enable them to engage in more significant advocacy work, including engaging counsel for women experiencing FV who fall outside the LAC means test due to assets controlled by the other party.
- Recognising that women face unique legal issues due to social attitudes and norms, including gender inequality, gender-based violence, and systemic gendered discrimination.
- Recognising that pro bono services provided by the larger commercial law firms are rarely focused upon providing assistance to victims of family violence – not because of any unwillingness on the part of partners, but as a result of lack of expertise in family law. This is an additional reason to adequately resource FVPLS to enable them to address complex service delivery issues related to family violence including those affecting Aboriginal and/or Torres Strait Islander women and children.
- Recognising that culturally appropriate service provision is essential for improving legal outcomes for Aboriginal and/or Torres Strait Islander Peoples.

<sup>8</sup> Joint Council on Closing the Gap, *National Agreement on Closing the Gap 2020-2030* (Report, July 2020).

<sup>9</sup> Department of Social Services (Cth), *National Plan to End Violence Against Women and Children 2022-2032* (Report, 2022).

<sup>10</sup> National Office for Child Safety (Cth), *National Strategy to Prevent and Respond to Child Sexual Abuse 2021-2030* (Report, 2021).

<sup>11</sup> Department of Social Services (Cth), *Safe & Supported: The National Framework for Protecting Australia's Children 2021-2031* (Report, 2021).

- Recognising that preventative and early intervention initiatives promote the wellbeing of Aboriginal and/or Torres Strait Islander Peoples and build resilience.
- Recognising that collaborative service planning is crucial for legal assistance providers to maximize outcomes for clients and communities. Such collaboration is vital in regional communities including Aboriginal and/or Torres Strait Islander Communities.
- Ensuring that adequate opportunities for collaboration be provided through sufficient and ongoing funding, reliable and consistent data, and practitioner-led and community-led collaborative practice.
- Recognising that holistic service provision has been shown to improve outcomes for clients across the country, including helping clients better navigate services, communicating complex issues to other professionals, and improving outcomes in non-legal domains.
- Recognising that interdisciplinary practice generates service delivery efficiencies and better outcomes for clients, and that addressing non-legal issues early prevents issues from escalating and reduces costs to the individual.
- Ensuring that legal service professionals are adequately trained and able to consider whether other services, both legal and non-legal, may be relevant to a client's needs and make referrals to these services where appropriate.
- Ensuring that there is sufficient funding for Alternative Dispute Resolution (ADR) services to expand their reach, improve client experience, reduce court system burden, and reduce trauma to families and children.
- Recognising the significant role of technology in shaping legal assistance services over the next five to ten years, particularly with advancements in machine learning and artificial intelligence.
- Considering the establishment of a Justice Technology Innovation Fund to fund the development, trial, and evaluation of technological solutions and digital tools for the legal assistance sector, overseen by an appropriately qualified Board.

The *Metcalfe Report* also included a number of key findings relevant to this term of reference, including:

- the need to provide holistic support to clients in relation to all their separation needs and avoid fragmentation of services
- that the FRSP service delivery has not kept pace with geographic spread or population growth, particularly in urban growth corridors and regional and remote areas
- the importance of case management and wrap-around support for clients, who almost invariably have complex needs
- the need to better support and enhance children and young people's voices and participation in family dispute resolution processes
- the importance of the principle of universal access to services (including ensuring no one is denied service based on their ability to pay)
- that more can be done to ensure family law services meet the needs of First Nations peoples and that these efforts must be First Nations-led to achieve meaningful outcomes
- the value of strong partnerships between family law services and specialist organisations dedicated to providing services to particular client cohorts, based on local need and availability (such as disability services, migrant support services, LGBTIQ+ services or services for current/ ex Defence personnel)
- that more could be done to support and enhance accessibility of online delivery of family law services, and
- the need for a centralised source of clear and consistent information about the family law system and services.

Council also welcomes the recent commitment, through National Cabinet, to invest \$3.9 billion in support for frontline legal assistance services to be delivered through the National Access to Justice Partnership ('NAJP'). Council notes that this investment over five years includes nearly \$800 million in new funding including approximately:

- \$300 million to apply proper indexation in line with wage cost inflation and reduce pay disparity for community lawyers, and
- \$500 million in further additional funding for all parts of the legal assistance sector.

Council note that the NAJP will commence on 1 July 2025, on the expiry of the current National Legal Assistance Partnership ('NLAP'), and will deliver vital support to all parts of the legal assistance sector including LACs, CLCs, Women's Legal Services, Aboriginal and Torres Strait Islander Legal Services and FVPLS. The Commonwealth, states and territories will work together to settle the NAJP through the Standing Council of Attorneys-General, with a view to the agreement being signed by 30 November 2024.

## 2. Legislative reform

### 2.1 A stand-alone family law specific dispute resolution Act

The resolution of disputes other than by judicial determination is a central and essential part of the 'family law landscape' in modern Australia. It is universally recognised that judicial determination is, and should be, an option of last resort in the overwhelming majority of cases.

It is tempting, through the lens of a 2024 perspective, to assume that has been the case throughout living memory. That is not so.

By way of simple example, the introduction in the first iteration of the *Family Law Act 1975* (Cth) (*Family Law Act*) of court-based counselling services, and compulsory conciliation conferences in property cases, broke what was then new ground.

In the nearly fifty years since, over 120 bills amending the *Family Law Act* have been presented to Parliament; many added extra layers to the options and processes associated with alternative dispute resolution. Development has been incremental, and generally by addition rather than by consolidation or simplification.

As a result, any attempt to catalogue those options and processes must traverse a multitude of scattered individual provisions in:

- Parts II, III, IIIA, IIIB, VII, VIII, VIIIA, and VIIIAB of the *Family Law Act*;<sup>12</sup>
- Division 1.2.6, Chapter 4 and Schedule 1 of the *Federal Circuit and Family Court of Australia (Family Law) Rules*;<sup>13</sup>
- Part 2 of the *Federal Circuit and Family Court of Australia (Division 2) (Family Law) Rules*;
- Part V of the *Family Law Regulations 1984*;
- the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth); and
- Practice Directions issued by the Chief Justice of the Federal Circuit and Family Court of Australia.

That in turn has at least two distinct effects.

First, and most obviously, the navigation of scattered provisions in different legislative and other instruments is challenging for even experienced legal practitioners, and significantly more so for the large cohort of separating parties who do not have the benefit of legal advice. That increases time and monetary costs, but also has the potential to operate as a disincentive to access to the options on offer.

Second, and we suggest no less importantly, the scattering of relevant provisions has the clear potential to diminish the perceived importance of those options in the eyes of both practitioners and the public.

<sup>12</sup> And, in Western Australia, equivalent provisions in the *Family Court Act 1997* (WA).

<sup>13</sup> And, in Western Australia, equivalent provisions in the *Family Court Rules 2021* (WA).

Both effects are undesirable. The need for alternative dispute resolution options to be both systemically and practically accessible is well understood. It is vital both for the obvious social reasons, and to enhance the ability of the courts to efficiently deal with the cohort of disputes which require judicial determination.

Council therefore recommends that consideration be given to the consolidation into one Act of all relevant legislative provisions directed towards alternative dispute resolution in family law matters. That Act should stand alone and be appropriately titled, rather than the desired consolidation being attempted by still further expansion of the *Family Law Act*.

Apart from the matters already canvassed, that approach would also present an opportunity for Government, the legal profession and service providers to further promote all forms of alternative dispute resolution. Longer term, it would reduce the legislative steps required to embrace further developments, simplify processes, or enhance existing services.

#### **Recommendation 1:**

***That one standalone Family Dispute Resolution Act (or however so titled) be enacted, drawing together all alternative dispute resolution processes currently spread through the Family Law Act 1975 (Cth), the Family Law Regulations 1984 (Cth), the Federal Circuit and Family Court of Australia (Family Law) Rules 2021 (Cth) and the Family Court Rules 2021 (WA).***

To assist, we attach a concept draft Act for circulation and discussion at **Appendix A**. That discussion draft includes provisions based on models from Singapore and the United States. As such we acknowledge the draft Act contains some concepts foreign to Australian practice and procedure, but we provide it to stimulate discussion and reflection.

## **2.2 Broadening access to arbitration**

Pending the introduction of a *Family Dispute Resolution Act*, we recommend relatively simple reforms to enhance Family Law Arbitration. In doing so, we recognise the valuable work previously done by the Council in its Discussion Paper 'The Answer from an Oracle: Arbitrating Family Law Property and Financial Matters'.<sup>14</sup>

Arbitration offers parties a consensual, private dispute resolution technique, which can be tailored to their needs, the nature of the dispute, conducted at a time that suits them and will see the matter resolved within weeks of being sent to the arbitrator.

<sup>14</sup> Family Law Council, *The Answer from an Oracle: Arbitrating Family Law Property and Financial Matters* (Discussion Paper, May 2007).

Fundamental to arbitration (and what distinguishes it from judicial decision making) is that the consent of the parties is required to convene an arbitration. As the High Court said in *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* [2013] 251 CLR 533 at [75]–[78]:

The exercise of judicial power is an assertion of the sovereign, public authority of a polity. Whilst it is 'both right and important to observe that the determination of rights and liabilities lies at the heart of the judicial function', parties are free to agree to submit their differences or disputes as to their legal rights and liabilities for decision by an ascertained or ascertainable third party, whether a person or a body. As will be explained, where parties do so agree 'the decision maker does not exercise judicial power, but a power of private arbitration'.

An agreement to submit disputes to arbitration does not, apart from statute, take from a party the power to invoke the jurisdiction of the courts to enforce that party's rights by instituting an action to determine a dispute of a kind that the parties have agreed should be arbitrated. The jurisdiction of the courts is not and cannot be ousted by a private agreement.

However, if parties do go to arbitration and the arbitrator makes an award, the making of the award has legal significance in respect of the parties' dispute and their rights and liabilities. As the plurality in *[Dobbs v National Bank of Australasia Ltd]*<sup>15</sup> said: 'if, before the institution of an action, an award was made, it [the award] governed the rights of the parties and precluded them from asserting in the Courts the claims which the award determined'. In such a case, the arbitrator's award governs the rights of the parties because '[b]y submitting the claims to arbitration, the parties confer upon the arbitrator an authority conclusively to determine them'.

This gives rise to the general rule that an award made by an arbitrator pursuant to such authority is final and conclusive. Further, the arbitrator's making of an award in exercise of such authority both extinguishes the original cause of action and imposes new obligations on the parties in substitution for the rights and liabilities which were the subject of the dispute referred to arbitration. The former rights of the parties are discharged by an accord and satisfaction. The accord is the agreement to submit disputes to arbitration; the satisfaction is the making of an award in fulfilment of the agreement to arbitrate.<sup>16</sup>

In 2016, the *Family Law Regulations 1984* (Cth) were amended to facilitate arbitrations. True, the *Family Law Act* provided for arbitrations from 1991, but without Regulations to assist, the process the availability or utility was limited.

On 15 May 2020, the Chief Justice of the Family Court of Australia and the Chief Judge of the Federal Circuit Court of Australia, announced the establishment of an Arbitration List in both courts as they were both then known. On 1 September 2021, the Federal Circuit and Family Court of Australia ('FCFCOA') was established, with new Rules of Court and Practice Directions for the FCFCOA (Division 1) (a continuation of the Family Court) and the FCFCOA (Division 2) (a continuation of the Federal Circuit Court). These are accessible on the FCFCOA website.<sup>17</sup>

<sup>15</sup> *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 653 [emphasis added].

<sup>16</sup> *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* [2013] 251 CLR 533, 566–7 [75]–[78] [emphasis added] [citations omitted].

<sup>17</sup> 'Family Law Practice Direction: Arbitration', *Federal Circuit and Family Court of Australia* (Web Page) < <https://www.fcfcqa.gov.au/tf/pd/fam-arbitration> >.

The courts retain a supervisory role over arbitrations and also facilitate the smooth and efficient operation of arbitrations. For example, the Arbitration List judges ensure subpoenas are issued quickly and efficiently.

Council agrees with and adopts the list of benefits of arbitrating as set out by the Australian Institute of Family Law Arbitrators and Mediators:

- **Control of the process and the degree of formality** - The arbitration can be designed to meet the needs of the individual parties and their issues.
- **Flexibility** - An arbitration does not require the same level of formality as a Court hearing.
- **Convenience** - The arbitration can be held at a time and place, and in accordance with a timetable, agreed between the parties and the arbitrator.
- **Choice of decision maker** - The parties are able to choose an arbitrator in whom they have confidence.
- **Avoidance of delay** - By setting their own timetable, the parties can avoid the delays inherent in the formal Court processes, obtain a prompt resolution of disputed issues, and have certainty that the hearing will take place on the agreed date.
- **Promptness of decision** - The arbitrator agrees to provide his or her award and reasons within a specified period (generally not later than 28 days from the hearing).
- **Confidentiality** - Arbitration takes place in a confidential setting. Arbitrators take an oath not to disclose any communication or information received in their capacity as arbitrator.
- **Binding result** - An arbitral award is a conclusive determination of the dispute subject to rights of review provided in the Act, and is binding and enforceable.
- **Cost** - By designing an arbitration process which meets their individual needs, and avoiding the costs of the Court processes, parties can achieve significant savings. Further, as a result of arbitration taking place at a time of their choosing, valuations remain current and the expense of updating material is avoided.<sup>18</sup>

### 2.2.1 Arbitrating some parenting matters

An impediment to the take up of arbitration is where people are engaged in property and parenting proceedings. In such matters, there is little point in arbitrating the property as the parties remain in the court system to deal with the parenting issues. However, we accept not all parenting matters should be arbitrated.

There is also no sound reason why a range of child support matters could not be the subject of arbitration.

<sup>18</sup> See 'Australian Institute of Family Law Arbitrators and Mediators', *Arbitration* (Web Page) <<https://www.aiflam.org.au/aiflam-members/arbitration>>.

Indeed, Council supports the following recommendations of the Australian Law Reform Commission ('ALRC') and for the reasons articulated by the ALRC, as set out below.

**Recommendation 2:**

***That the Family Law Act 1975 (Cth) be amended to allow some children's matters to be arbitrated, consistent with Recommendation 28 of the Australian Law Reform Commission's 2019 Inquiry into the Family Law System.***

Recommendation 28 of the Australian Law Reform Commission's 2019 Inquiry into the Family Law System was in the following terms:

Recommendation 28: The *Family Law Act 1975* (Cth) should be amended to allow some children's matters to be arbitrated. Appropriate occasions for arbitration in children's matters would not include disputes:

- relating to international relocation;
- relating to medical procedures of a nature requiring court approval;
- relating to contravention matters;
- in which an Independent Children's Lawyer has been appointed; and
- involving family violence which satisfy ss 102NA(1)(b) and (c) of the Family Law Act 1975 (Cth).<sup>19</sup>

We respectfully adopt the procedure and reasoning of the ALRC as follows:

9.37 There is no doubt that arbitration involving children's issues would necessarily be consensual. However, it is also clear for reasons set out below that children's issues would need to be referred by a court for arbitration, and then supervised by the court.

9.38 The ALRC recommends that legislation explicitly provide for arbitration of children's matters in limited circumstances. The method for an arbitral award taking effect as a decree of the court should be different from financial cases. Courts should retain a supervisory role in children's cases so that the award would need to be placed before the court by the parties in terms of a consent order with sufficient supporting material to satisfy the court that such orders are in the children's best interests. For example, supporting material could be contained in documents already on the court file, may include written reasons for the arbitral award, and may include any family report which has been obtained.

<sup>19</sup> Australian Law Reform Commission, *Family Law for the Future: An Inquiry into the Family Law System* (Final Report 135, March 2019) 19 ('ALRC 2019 Report').

9.39 There are a number of sensitivities in relation to arbitration of children's matters. For example, Australia has international obligations under the CRC regarding matters affecting children. The extent to which the state must remain involved in decisions regarding the best interests of children must therefore be considered. Private arbitration of children's matters without sufficient oversight by state institutions such as courts could be seen as incompatible with the state's obligation to ensure that decisions are made in accordance with the Convention. Secondly, the Constitution reserves particular adjudicative roles for federal courts under Chapter III. Any scheme providing for arbitration needs to ensure that it is not bestowing judicial functions on a non-judicial body. Thirdly, courts have traditionally held a *parens patriae* jurisdiction overseeing matters of children's welfare, including additional powers beyond what a child's parent may be entitled to authorise. An arbitration scheme should not undermine the unique authority of courts in this regard.

9.40 Accordingly, the ALRC recommends that arbitration of children's matters should only proceed upon a referral (order) from a court, and not simply of the parties' own volition. A specific judge could maintain some control over the matter, including ultimately making orders to confirm the arrangements. Secondly, a court should only order parties to arbitrate a children's matter where all parties consent to the order. Thirdly, a court should only order parties to arbitrate a children's matter where the court considers that the matter is an appropriate matter for arbitration. Guidance on this issue should be provided in legislation as set out below. Fourthly, an arbitral award in relation to a children's matter should not take effect by way of registration (as occurs in financial cases), but rather should only become an order of the court after a court has reviewed the matter and satisfied itself that the orders should be made.

9.41 Upon determination of an award, the matter should be referred back to the referring court. The court should consider whether the terms of the award are appropriate based on the available supporting material, and satisfy itself that an order in those terms should be made by consent, in accordance with the consent of the parties to have the matter determined by arbitration. ...<sup>20</sup>

### 2.2.2 Directions concerning the conduct of arbitrations

We also adopt the ALRC's recommendation 29 and for the reasons it set out:

Recommendation 29: The *Family Law Act 1975* (Cth) should be amended to provide that upon application by an arbitrator, or by a party to an arbitration, a court has power to make directions at any time regarding the further conduct of the arbitration, including power to make a direction terminating the arbitration (whether or not the arbitration was referred from a court).<sup>21</sup>

<sup>20</sup> Ibid 289–90 [9.37]–[9.41] (citations omitted).

<sup>21</sup> Ibid 292.

### **Recommendation 3:**

***That the Family Law Act 1975 (Cth) be amended to provide that upon application by an arbitrator, or by a party to an arbitration, a court has power to make directions at any time regarding the further conduct of the arbitration, including power to make a direction terminating the arbitration (whether or not the arbitration was referred from a court).***

Council notes that Recommendation 3 would be addressed by amendments in the *Family Law Amendment Bill 2024* (Cth) which was introduced to Parliament on 22 August 2024. The amendments would allow the court to terminate an arbitration if satisfied that a change of circumstances means that arbitration is no longer appropriate.

As the ALRC said:

9.48 Currently, in relation to both court-ordered and private arbitration courts are empowered to make orders ‘appropriate to facilitate the effective conduct of the arbitration’.<sup>22</sup> The legislation does not explicitly provide for such orders to be made on application of an arbitrator, rather than a party. Regulations provide that such an application may be made by a party or jointly by all parties.<sup>23</sup> There may be circumstances in which an arbitrator identifies a need for particular directions about the conduct of an arbitration, although no party is able or intending to make such an application to court. Legislation should be amended to explicitly provide power for directions to be made on application of an arbitrator, and should specify that such directions may be made at any stage of an arbitration process.<sup>24</sup>

### **2.2.3 Including all current provisions in the Family Law Act, Regulations and Rules in one dedicated Family Dispute Resolution Act**

As we have identified in section 2.1, this would also have the advantage of bringing together in one location (being the dedicated Act and rules) the arbitration provisions which are presently spread across the *Family Law Act*, the Regulations and the rules.

### **2.2.4 Setting out the objects of arbitration**

Consideration should be given to including a section setting out the objects of Division 4 of Part VI of the *Family Law Act* which sets out the court’s role in relation to arbitration of disputes. Those objects could include objects similar to those set out in the *International Arbitration Act*, commencing with an acknowledgment that “*arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes*”,<sup>25</sup> and specify objects similar to s 2D(a) and (b), of “encouraging the use of arbitration as a method of resolving disputes” and to “facilitate the use of arbitration agreements”<sup>26</sup> in relation to a method of resolving family law disputes, as well as the fact that arbitral “awards are intended to provide certainty and finality”.<sup>27</sup>

<sup>22</sup> Ibid, citing Relationships Australia, Submission 11 (*Relationships Australia Submission*).

<sup>23</sup> Ibid, citing *Family Law Regulations 1984* (Cth) reg 67E.

<sup>24</sup> Ibid 292 [9.48].

<sup>25</sup> *International Arbitration Act 1974* (Cth) s 39(2)(b)(i).

<sup>26</sup> Ibid ss 2D(a)-(b).

<sup>27</sup> Ibid s 39(2)(b)(ii).

### 2.2.5 Harmonising what can be arbitrated pursuant to s 13E Court ordered arbitrations and private arbitrations

Section 10L of the *Family Law Act* provides for two kinds of arbitrations:

- (1) court-referred arbitration under s 13E.<sup>28</sup>
- (2) party-initiated arbitration. This is arbitration agreed between the parties without court referral. In the Act it is known by the rather bureaucratic term ‘relevant property or financial arbitration matters’.<sup>29</sup> It used to be called ‘private arbitration’ prior to 2006, and that name has now been resurrected in the Arbitration Practice Direction.

However, the two kinds of arbitration have different scopes, and can cover different subject matters. The court ordered arbitration under s 10L(2)(a) covers only Part VIII proceedings, or Part VIIIAB proceedings (other than proceedings relating to a Part VIIIAB financial agreement).<sup>30</sup>

Private arbitrations under s 10L(2)(b) have a broader range of subject matter including the power to make superannuation splitting orders (whereas court ordered arbitrators cannot):

- (1) Part VIII proceedings, Part VIIIA proceedings, Part VIIIAB proceedings, Part VIIIB proceedings or section 106A proceedings; or
- (2) any part of such proceedings; or
- (3) any matter arising in such proceedings; or
- (4) a dispute about a matter with respect to which such proceedings could be instituted.<sup>31</sup>

There is no reason why private arbitrations ought to have greater scope in their subject matter than court ordered arbitrations. We can think of no sound reason which would support the different approaches. We therefore recommend court ordered arbitration have the same scope of subjects as private arbitrations.

### 2.2.6 Expanding the subject matters of Court ordered arbitrations and private arbitrations

We have considered arbitrations in parenting proceedings and accept the force of the position in the *ALRC 2019 Report*, that the court must retain its supervisory role.<sup>32</sup> That means only court ordered arbitration could occur, with parties then taking the Arbitral Award as a proposed Consent Order for presentation to the court.

That said, we are of the view other additions would be useful and recommend the following modifications to *both* court-ordered and private mediations. With respect to child support, we exclude matters where the Child Support Registrar is participating in the proceedings because private arbitration would not be appropriate where a public entity is involved.

<sup>28</sup> *Family Law Act 1975* (Cth) s 10L(2)(a).

<sup>29</sup> *Ibid* s 10L(2)(b).

<sup>30</sup> *Ibid* s 10L(2)(a).

<sup>31</sup> *Ibid* s 10L(2)(b).

<sup>32</sup> *ALRC 2019 Report* (n 19) 289 [9.38].

Accordingly, Council recommends the current sections 10L and 13E of the *Family Law Act* (or equivalent provisions in a standalone *Family Dispute Resolution Act*) be augmented as set out in the recommendations that follow.

**Recommendation 4:**

***That the Family Law Act 1975 (Cth) be amended so that court ordered arbitration has the same scope of subject matters as private arbitrations:***

***(b) All alternative dispute resolution processes be included in a standalone Family Dispute Resolution Act (see Recommendation 1 above).***

***(c) The standalone Family Dispute Resolution Act (or current provisions if the standalone Family Dispute Resolution Act is not taken up) include an Objects provision as follows:***

***Objects of arbitration and arbitrating***

***Arbitration:***

- (a) is an efficient, impartial, enforceable and timely method by which to resolve disputes;***
- (b) is to be encouraged as a method of resolving disputes;***
- (c) is to be facilitated by the use of arbitration agreements;***
- (d) results in an arbitral award intended to provide certainty and finality (save where the parties have chosen to arbitrate an interim issue).***

***(d) The current s 10L of the Act (or equivalent provision in a standalone Family Dispute Resolution Act) be amended as follows:***

***10L Definition of arbitration***

- (3) Arbitration is a process (other than the judicial process) in which parties to a dispute present arguments and evidence to an arbitrator, who makes a determination to resolve the dispute.***
- (4) Arbitration (in both court ordered and private arbitrations) may be of and incidental to:***
  - a. Part VIII proceedings, Part VIIIA proceedings, Part VIIIAB proceedings, Part VIIIB proceedings or section 106A proceedings;***
  - b. Part VII proceedings but not matters relating to:***
    - i. international relocation;***
    - ii. medical procedures of a nature requiring court approval;***
    - iii. contravention matters;***
    - iv. matters in which an Independent Children's Lawyer has been appointed; and***
    - v. family violence which satisfy ss 102NA(1)(b) and (c) of the Family Law Act 1975 (Cth).***
  - c. Proceedings under the Child Support (Assessment) Act 1989 (Cth) and Child Support (Registration and Collection Act), but not where the Child Support Registrar is participating in the matter;***
  - d. Proceedings under ss 79A or 90SN of the Family Law Act 1975 (Cth) to set aside property orders;***

- e. Proceedings under ss 90K or 90UM of the Family Law Act 1975 (Cth) to set aside financial agreements;**
- f. Costs;**
- g. any part of such proceedings;**
- h. any matter arising in such proceedings;**
- i. a dispute about a matter with respect to which such proceedings could be instituted.**

**(e) Consequent amendments to s 13E would then be:**

**13E Court may refer proceedings to arbitration**

**(1) With the consent of all of the parties to the proceedings, a court exercising jurisdiction under this Act and subject to s 10L, may make an order referring the proceedings, or any part of them, or any matter arising in them, to an arbitrator for arbitration.**

**(2) If the court makes an order under subsection (1), it may, if necessary, adjourn the proceedings and may make any additional orders as it thinks appropriate to facilitate the effective conduct of the arbitration.**

Council notes that *Family Law Amendment Bill 2024* (Cth) was introduced to Parliament on 22 August 2024 and includes amendments which would consolidate the list of matters that can be arbitrated either through court referred or privately arranged arbitration.

## 2.3 Addressing the problem of disclosure

A hurdle to separated people accessing FDR processes and mediation in property disputes is an inequity in information. It is not unusual for one party to know the ‘ins and outs’ of the parties’ finances with the other left in an information vacuum. Mediating in such circumstances leaves one party (usually the woman) at a complete disadvantage and vulnerable to accepting a property outcome which is, in reality, far from just and equitable. It is also not unusual for the party disenfranchised from financial information to have no recourse other than to commence court proceedings to obtain orders for disclosure. When the information playing field is levelled, many matters then settle through FDR processes or mediation and the court is able to make just and equitable property orders by consent.

Accordingly, Council supports passage of the provisions included in *Family Law Act* Schedule 1, Part 3 of the *Family Law Amendment Bill 2024*, which implement recommendations from several reports,<sup>33</sup> and are intended to strengthen disclosure obligations in respect of property matters, as defined in that Bill.

**Recommendation 5:**

**That the Family Law Act 1975 (Cth) be amended to strengthen disclosure obligations for parties in respect of property matters, as defined in the Family Law Amendment Bill 2024.**

<sup>33</sup> Explanatory Memorandum of the *Family Law Amendment Bill 2024*, citing *ALRC 2019 Report* [n 19] 18, see Recommendation 25; *JSC Second Interim Report* [n 5] 105, see Recommendation 22.

## 2.4 Amendments to enhance compliance with orders

Parenting orders presently must carry the following notation on all orders:

Pursuant to s 65DA(2) and s 62B of the *Family Law Act*, the particulars of the obligations these orders create, and the particulars of the consequences that may follow if a person contravenes these orders, are set out in Annexure A and those particulars are included in these orders.

The annexure to the Order then sets out, in considerable detail, the obligations under the order, underscoring that parties are required to comply with court orders and the potential consequences of failing to do so.

This is a timely and useful reminder to parties of the obligations that are imposed by court orders.

We also are of the view that it would be most helpful for all parenting orders to include a further notation to the effect that, unless a relevant exemption applies, parties must attend dispute resolution before filing in court again. Lawyers would know that s 60I of the *Family Law Act* requires the parties to attend dispute resolution before applying to the court for a Part VII order, save for some specific exceptions in s 60I(9) – but the same cannot be expected of the parties who no longer have lawyers or are unrepresented. Instead, when the parties obtain final orders, the requirement to attend FDR before filing in court again should be spelt out loud and clear.

### **Recommendation 6:**

***That all final parenting orders add two further notations, being that:***

- a) unless a relevant exemption applies, the parties must attend dispute resolution before filing in court again, and***
- b) before reconsidering a final parenting order, the court must consider whether there has been any significant change in circumstances since the order was made, and whether it is in the best interests of the child to do so.***

## 2.5 Amendments to better support First Nation families

The *ALRC 2019 Report* acknowledged a longstanding recognition that Aboriginal and/or Torres Strait Islander notions of family and kinship encompass a wider range of individuals and obligations than were traditionally recognised in the definition of family member in the *Family Law Act*. In kinship systems, persons other than parents and grandparents often play an important role in raising children. These systems and associated obligations vary considerably among different First Nations groups around Australia. The definition of family in the *Family Law Act* has a range of flow-on impacts, including in the application of parenting orders, the definition of family violence, and provisions in relation to family violence orders. It also potentially impacts financial matters, particularly through the definition of family violence.

Noting the above, **Council welcomes the expanded definition of ‘relative’ and ‘member of the family’** in the *Family Law Amendment Act 2023* (Cth). These changes aim to ensure that the definitions related to the concept of family in the *Family Law Act* are more inclusive of Aboriginal and/or Torres Strait Islander culture and traditions.

Council further welcomes the introduction in subsection 60CC(3) of the *Family Law Amendment Act 2023* (Cth) a standalone best interest factor which needs to be considered for Aboriginal and/or Torres Strait Islander children. This aims to ensure that First Nations children's particular needs and cultural rights are acknowledged and focused on when considering their best interests, by requiring a court to consider a child's connection to their culture in determining parenting orders.

**Recommendation 7:**

***Acknowledging that cultural and kinship systems and associated obligations and practices vary considerably among different First Nations groups around Australia, that the review of the Family Law Amendment Act 2023 (Cth) include consideration of how family courts around the country have interpreted and applied s 60CC(3) and the extent to which improved outcomes have been achieved.***

### 3. Creation of a dedicated holistic family relationship internet site with links to related service providers in step-by-step assistance for parties

Consistent with the recommendations of the *Mundy Report*, Council recognises the benefit of early legal advice and, where appropriate, referral to allied service providers that can assist parties to resolve disputes and, if possible, to resolve underlying issues giving rise to those disputes. Those recommendations are consistent with other research.<sup>34</sup>

In that respect, we are of the view that a website should be created as an enhancement of that which is currently managed by the Attorney-General's Department in respect to the family relationship services, allied legal and family dispute resolution services.

This is particularly important in the context where many people who confront relationship breakdown are economically disadvantaged. That presents a significant challenge for those people to be in a position where they cannot afford to obtain paid, personally delivered, legal information and advice from a legal professional.

As highlighted in the *Mundy Report*, there are many people who fall outside the Legal Aid guidelines. This is particularly concerning in respect to women confronting family violence who may have an entitlement to matrimonial property that takes them over the legal aid means test but who nonetheless lack the resources to obtain immediate advice.

Consistent with the findings of the *Mundy Report*, Council has received submissions from the Community Legal Sector and from First Nations Advocates against Family Violence (formerly National Family Violence Prevention and Legal Services Forum) that they lack resources to meet the demands for their services. This is in the context where those services are required to meet demand across all areas of social welfare law and not just family law.

As against that background, the internet is an important tool to assist separating couples to obtain the information they need to navigate their options. A number of internet resources exist including:

- Family Relationships Online (FRO): This website provides users with information about family relationship issues and links to support services, including in relation to separation, parenting and property arrangements after separation and family violence. FRO includes a 'find local help' function,<sup>35</sup> which enables users to search from a dropdown menu of family law services to find providers in their local area (e.g. organisations delivering FDR, children's contact centres and FRCs). The *Metcalfe Report* recommends significant modernisation of the FRO website.
- Family Dispute Resolution Register: an online register of accredited Family Dispute Resolution Practitioners (FDRPs).<sup>36</sup>

<sup>34</sup> Rachel Carson et al, *Evaluation of the Lawyer-assisted Family Law Property Mediation: Legal Aid Commission Trial* (Australian Institute of Family Studies Final Report, 2022) 6 ('Carson et al, 2022').

<sup>35</sup> 'Find local help', *Family Relationships Online* (Web Page) <<https://www.familyrelationships.gov.au/find-local-help>>.

<sup>36</sup> Attorney-General's Department (Cth), *Family Dispute Resolution Register* (Web Page) <<https://www.fdr.ag.gov.au>>.

- FCFCOA: This website provides comprehensive information about family dispute resolution, including negotiation through lawyers, collaborative practice, conciliation, mediation, and arbitration. It also provides a list of dispute resolution services that can provide an affordable and timely option for resolving disputes.<sup>37</sup>
- *amica*: Launched in June 2020, *amica* is an online dispute resolution tool that helps separating couples to resolve their family law disputes online without going to court and with minimal costs. It supports separating couples to negotiate and reach agreements about their parenting arrangements and division of property.<sup>38</sup> We discuss *amica* in greater detail below.
- Family law mediation services: This webpage provides information on external dispute resolution services including the Family Relationships Advice Line, Attorney-General's Department Family Dispute Resolution Register, Australian Institute of Family Law Arbitrators and Mediators, and legal aid bodies in relevant states and territories.<sup>39</sup>
- Mediations Australia: This website provides information on how to resolve family law dispute online.<sup>40</sup>
- The Family Relationship Advice Line (FRAL): a national telephone and video conferencing service that supports families affected by relationship or separation issues through the provision of information, dispute resolution, and legal advice.<sup>41</sup>
- Family Violence Law Help: a national website developed by National Legal Aid to help people navigate between the family law, family violence and child protection systems.<sup>42</sup>
- State and Territory Legal Aid commissions:
  - Legal Aid ACT: <http://www.legalaidact.org.au/>
  - Legal Aid NSW: <http://www.legalaid.nsw.gov.au/>
  - Legal Aid NT: <https://www.legalaid.nt.gov.au/>
  - Legal Aid Queensland: <http://www.legalaid.qld.gov.au/>
  - Legal Services Commission SA: <http://www.lsc.sa.gov.au/>
  - Tasmania Legal Aid: <https://www.legalaid.tas.gov.au/>
  - Victoria Legal Aid: <https://www.legalaid.vic.gov.au/>
  - Legal Aid WA: <https://www.legalaid.wa.gov.au/>

<sup>37</sup> Federal Circuit and Family Court of Australia, *Family Dispute Resolution* (Web Page) <<https://www.fcfoa.gov.au/fl/family-dispute-resolution>>.

<sup>38</sup> Attorney-General's Department (Cth), *amica – An online Dispute Resolution Tool* (Web Page) <<https://www.ag.gov.au/families-and-marriage/families/family-law-system/amica-online-dispute-resolution-tool>> '*amica*'.

<sup>39</sup> Attorney-General's Department (Cth), *Family Law – information and services* (Web Page) <<https://www.ag.gov.au/families-and-marriage/families/family-law-system>>.

<sup>40</sup> Mediations Australia, *How to Resolve Your Family Law Dispute Online* (Web Page, 20 May 2021) <<https://mediationsaustralia.com.au/how-to-resolve-your-family-law-dispute-online/>>.

<sup>41</sup> Family Relationship Advice Line, *Family Relationships Advice Line* (Web Page) <<https://www.fral.org.au>>.

<sup>42</sup> Family Violence Law Help, *Family Violence Law Help* (Web Page) <<https://familyviolencelaw.gov.au/>>.

However, Council is concerned that the sheer volume of information that exists online, which is of varying quality, makes it difficult for users to know what information is reliable. The internet has also facilitated the growth of online forums by those who cannot afford to obtain personally delivered advice. Regrettably, those who sponsor or participate in those online forums can often be uninformed and, in the worst case, fixated on particular outcomes. That unregulated environment which lacks quality control is a fertile ground for misleading information and advice.<sup>43</sup> For example, when Binding Financial Agreements (BFAs) were introduced, an industry started in generating proforma BFAs online or by post, many of which offended all the requirements for a financial agreement to be binding and little attention was paid to disclosure. This resulted in those agreements (for which the parties had paid) being set aside or not even pursued when the failings of the purported binding agreement were identified by lawyers.

Submissions to the *ALRC 2019 Report* highlighted similar concerns, noting that existing resources can be difficult to navigate, are not effectively tailored for diverse groups, and that public awareness of reliable online information sources about family law is limited.<sup>44</sup> To address this, the ALRC suggested that government consider the development of:

‘a centralised source of clear, consistent, legally sound and nationally endorsed information about the family law system. This would include detailed information about relevant laws and processes, designed for families seeking to reach agreement post-separation’.<sup>45</sup>

The ALRC noted that an option for achieving this may be ‘...further development and promotion of the Family Relationships Online website’.<sup>46</sup>

The *2024 Metcalfe Report* also identified that public awareness of family law services funded through the FRSP is generally low.<sup>47</sup> The report further observed that the FRO website is outdated and not user-friendly, and recommended investment to significantly modernise the website and optimise search results to ensure that FRO would be the first search result for a wide range of searches relating to separating families. The *Metcalfe Report* also suggested that consideration should be given to expanding the online services delivered by the Family Relationships Advice Line, including the potential for integration with an improved FRO website, such as through a webchat information, advice and referral service.

Consistent with these recommendations, research conducted in the United Kingdom has highlighted the value of a single authoritative online platform.<sup>48</sup> Council agrees that such a single authority online information platform would be an important tool to removing barriers to obtaining accurate useful information to assist parties to resolve family law disputes and obtain support from allied service providers.

43 Tatiana Tkacukova, ‘Changing Landscape of Advice Provision: Online Forums and Social Media Run by McKenzie Friends’ [2020] 4 *Child and Family Law Quarterly* 397.

44 *ALRC 2019 Report* [n 19] 449, [15.16]-[15.17].

45 *Ibid* 445 [15.3].

46 *Ibid* 452 [15.26].

47 *Metcalfe Report* [n 7] 9, 93-94 see Key Finding 3.

48 JUSTICE, *Delivering Justice in an Age of Austerity* [Report, 2015]; JUSTICE, *Understanding Courts* [Report, 2019]; JUSTICE, *Solving Housing Disputes* [Report, 2020]; Isabella Pereira et al, *The Varying Paths to Justice: Mapping problem resolution routes for users and non-users of the civil, administrative and family justice systems* [Ministry of Justice Report, 2015]; Anne Barlow et al, *Creating Paths to Family Justice: Briefing Paper and Report on Key Findings* [Report, University of Exeter, 2017] 11-12, referred to in *JUSTICE Report* [n 2] 47.

**Recommendation 8:**

***That a single authoritative online information platform for separating families be established. The information contained on the platform should aim to provide information to address the needs of all separating families, before, during and after any dispute resolution process including by providing access to instructional videos and linkages to allied service providers. The website content should be presented in an accessible format, with easy-read and plain English language, as well as availability in multiple languages and an easy English format with specific content for Aboriginal and/or Torres Strait Islander families.***

The site should include:

- information about relevant legal frameworks and their intersections (family law, family violence, child protection),
- information to guide people seeking to resolve disputes themselves,
- information on the range of processes and forums available for resolving disputes,
- information about what to expect through different processes, including timelines and step-by-step guides,
- links to relevant information and services, including LACs, family court, legal assistance, family relationship and family violence services.

The Council also supports consideration of the potential for integration with FRAL services, such as through the introduction of a webchat information, advice and referral service to provide step-by-step assistance for parties.

In our second 2024 report<sup>49</sup>, Council has recommended the establishment of a specific online platform designed for children to use independently of adults. The central online family dispute resolution platform should provide an appropriate linkage to the children's online platform.

**Recommendation 9:**

***That the single authoritative online information platform should be allocated ongoing funding to ensure its currency and to provide linkage to a specific children's online information platform (Council Recommendation 4 from Term of Reference 2 Report).***

<sup>49</sup> Family Law Council, *Supporting and Strengthening the Voice of Children* (Report, 2024) ('*FLC 2024 Report: Supporting and Strengthening the Voice of Children*').

## 4. Creation of *Family Relationship Information Hubs* through enhancements of Family Law Pathways Networks (FLPNs)

### 4.1 The benefit of Family Relationship Information Hubs

Experience shows the considerable benefit that can be obtained by the creation of family relationships hubs that facilitate not only the provision of timely legal advice but also, where appropriate, the cross referral of people engaged in family law disputes to allied services. This enables a collaborative approach to be taken to interdisciplinary service planning to maximise outcomes for separating couples.

Those services might include, for example;

- a) counselling and child counselling
- b) family group conferencing
- c) couples counselling<sup>50</sup>
- d) financial counselling
- e) legal support, and
- f) capacity building for parents;

as well as online and outreach services<sup>51</sup> in all the areas above.

The concept of Families Hubs, as initially mooted by the ALRC,<sup>52</sup> is to provide a simple pathway to wraparound services and for co-located services, which help build community trust and support effective service delivery. The benefits of a more holistic approach to service provision through the hub model envisaged in the *Metcalfe Report* has also been considered by Council.

Adopting that holistic approach between services to address both legal and nonlegal issues can prevent issues from escalating and absorbing even greater resources than are required if those issues go unaddressed. Such unaddressed issues can impact the individual and also the community in terms of workforce impact, health impact, and even social impact. Further expense is also incurred if court adjudication is required.

50 Jemima Petch et al, 'Couple Counselling Outcomes in an Australian Not For Profit: Evidence for the Effectiveness of Couple Counselling Conducted with Routine Practice' (2014) 35 *Australian and New Zealand Journal of Family Therapy* 445-461; W Kim Halford, Christopher Pepping and Jemima Petch, 'The Gap Between Couple Therapy Research Efficiency and Practice Effectiveness' (2016) 42(1) *Journal of Marital and Family Therapy* 32-44.

51 See also ALRC 2019 Report (n 19) 464, see Recommendations 59-60.

52 ALRC, *Review of the Family Law System* (Discussion Paper 86, October 2018) 83-4, see Proposals 4-1-4-4.

In support of its proposals for Hubs, the ALRC explained that:

4.15 The ALRC proposes that multi-agency Families Hubs be established in local communities to provide separating families and their children with a visible contact point for accessing a range of legal assistance and support services in one place. Families Hubs should advance the safety and wellbeing of separating families and children while supporting them through separation. They should be designed and resourced to identify a person's safety, support and advice needs, and those of their children; assist them to develop a plan to address these needs and connect with relevant services; and coordinate their engagement with services.

4.16 The services to be represented by on-site workers in Families Hubs should respond to the range of service needs of separating families and their children, as identified in research<sup>53</sup> and submissions.<sup>54</sup> These would include specialist family violence services (for men and women); legal assistance services; family dispute resolution services; therapeutic services (such as family counselling and specialised services for children); financial counselling services; housing assistance services; health services (including mental health services and alcohol and other drug services); gambling help services; a children's contact service; and parenting support programs or parenting education services (including a program for fathers). The services represented in each Hub should be selected based on the service needs of the local community.<sup>55</sup>

4.17 As the range of services needed by separating families and their children would include both Commonwealth and state and territory funded agencies, the ALRC proposes that the Australian Government work with state and territory governments to establish Families Hubs.<sup>56</sup>

While recognising their considerable benefit, Council appreciates that the creation of physical family relationships hubs would involve significant expense. We have therefore focussed our recommendation on the creation of virtual family relationships hubs which we describe below.

## 4.2 Enhancement of FLPNs to deliver family relationship information

Council's recommendation therefore focusses on the creation of Family Relationship Information Hubs that build upon the current infrastructure of the Family Law Pathways Networks (FLPNs).

The FLPNs are a national program funded and overseen by the Commonwealth Attorney-General's Department. They consist of 32 networks that cover most urban and rural areas across the country.<sup>57</sup> They are managed by a local steering committee which draws expertise across government, non-government, and legal organisations.

The focus of the FLPNs is to bring together all public, community, and private service providers together including the family law judiciary, FRSP providers, therapists, private legal practitioners, LACs, and CLCs.

The main aim of these networks is to improve collaboration and coordination between organisations and professionals operating within the broader family law system. They provide professional development events, resources, and networking opportunities to family law professionals in their area.

<sup>53</sup> Ibid 84 citing Rae Kaspiew et al, *Evaluation of the 2012 Family Violence Amendments: Synthesis Report* (Research report, Australian Institute of Family Studies, October 2015).

<sup>54</sup> Ibid citing *Relationships Australia Submission* (n 22); *Fitzroy Legal Service and Darebin Community Legal Centre, Submission 7 ('FLS and DCLC Submission')*.

<sup>55</sup> Ibid citing *FLS and DCLC Submission* (n 54).

<sup>56</sup> Ibid 84, [4.15]-[4.17].

<sup>57</sup> Family Law Pathways Network, *About Family Law Pathways Network* (Web Page) <<https://familylawpathways.com.au/about/>>.

This helps to break down silos between organisations and sectors and provides opportunities for professionals to strengthen working relationships, develop appropriate referral mechanisms, and enhance understanding of the services available within the sector.

The networks have been successful in supporting practitioners to work collaboratively, maintain strong working relationships, and develop appropriate referral mechanisms to assist families navigate the family law system.

The *Metcalfe Report* considered the FLPNs as part of the interface between the FRSP and the broader family law system, including in interviews and focus groups with professionals. Participants identified the FLPNs as being highly valuable in supporting connections across the family law sector. Participants particularly highlighted the value of national coordination efforts across the FLPNs. This role is currently undertaken by two Project Officers in an unfunded capacity. The review identified that an enhanced national support and coordination role could assist with building on successful initiatives of individual networks and avoiding duplication of costs across the country.

Council received similar submissions from representatives of FLPNs, including that, with a modest increase in funding they would be in a position to employ a full-time coordinator. Council supports the recommendation of the *Metcalfe Report* that a separate funding stream for the FLPNs should be maintained, and that a full-time National Coordinator position be established and auspiced by an appropriate peak body or service provider, with funding to deliver a range of national activities.

In relation to supporting connections to facilitate effective referrals, the *Metcalfe Report* noted that connections between different parts of the family law system could be strengthened, and that many largely rely on the strength of personal networks in a particular location and word of mouth. To support well-functioning referrals, the review noted that a highly valued activity of some FLPNs is the provision of service wait times and other information to other service providers. This includes the iRefer VIC app and database, developed by the Greater Melbourne Pathways Network and the Family Law Service Directory SA website developed by the South Australia Pathways Network. The *Metcalfe Report* notes that this would be a valuable initiative to have in every region, with a role for a national coordination point to drive its development and leverage shared resources and infrastructure.

It was also submitted to Council by the New South Wales Illawarra Pathway Network that, with relatively little additional expense, the networks could be funded to utilise technology to maintain a central diary of waiting times in the affiliated service provider organisations.

This would facilitate separating couples accessing the first available service within a reasonable proximity to their home and enable services to directly refer individuals requiring assistance to other service organisations that have earlier or more convenient time slots.

Access to each FLPN could be provided by way of links from the single authoritative online information platform for separating families which we have earlier recommended. Information that may be valuable for inclusion on the directories would include: services offered, any fees or eligibility criteria, whether services are government-funded, any information on adherence to relevant standards (e.g. accreditation status, risk and safety standards), disability accommodations available, geographical coverage and availability of remote/virtual service delivery. Council acknowledges that further investigation of any technical barriers to implementation would be necessary.

**Recommendation 10:**

***That the Family Law Pathways Networks be supported to deliver “Family Relationship Information Hubs” which provide current and comprehensive local information about multidisciplinary support and multiagency services for adults and children/young people, experiencing relationship breakdown and appropriate referral processes.***

## 5. Utilisation of technology

Technology has a critical role in shaping how Australians engage with the family law system going forward and can offer significant benefits and opportunities for enhancing access to justice, particularly with rapid expansion in artificial intelligence.

The Council notes a number of promising initiatives utilising technology to support separating families, and considers there are opportunities to build on these. The *Mundy Report* appropriately recommends further exploration of the potential benefits that technologies can provide in the area of legal service delivery including dispute resolution.

In that context Artificial Intelligence (AI) is increasingly being employed in dispute resolution, giving rise to a new form of dispute resolution known as AI-DR.<sup>58</sup> It has been said that:

AI can enhance both efficiency and accuracy. By allowing for prediction of outcomes of certain disputes or claims, use of AI could make negotiations in the shadow of the law swifter and more accurate and bring parties closer together. While parties have always assessed the probable outcome in their case and bargained in its shadow, algorithmic capabilities for studying vast amounts of data present new possibilities in this realm. The prospects of analysing large amounts of data could provide important information that parties may miss and serve as a reality test curbing unfounded expectations.<sup>59</sup>

### 5.1 *amica* - Overview

*amica*<sup>60</sup> is an Australian initiative of National Legal Aid and the Legal Services Commission of South Australia, with funding from the Attorney-General's Department that uses smart technology to guide people facing relationship breakdown and, in many cases, reach agreement in respect to both property and parenting arrangements.

The *amica* website provides a range of family law information to help separating couples. It also enables separating couples to individually step through a series of questions to work out if *amica* is right for them by providing information to inform the understanding of their particular circumstances. *amica* is suitable for separating couples whose relationship is reasonably amicable and whose financial circumstances are not complex.<sup>61</sup> Council acknowledges that the use of *amica* is not suitable in certain circumstances, including where there are family violence concerns, or statutory time limits have expired. In these cases, the *amica* website refers separating couples to legal assistance and other support services in their local state or territory.<sup>62</sup>

*amica* also provides links to existing information resources and referral services in each state and territory, such as family counselling, legal assistance services as well as family violence, social support, family and financial counselling and support for children.

58 Orna Rabinovich-Einy and Ethan Katsh, 'Artificial Intelligence and the Future of Dispute Resolution; The Age of AI-DR' in Mohamed Abdel Wahab, Daniel Rainey and Ethan Katsh (eds) *Online Dispute Resolution: Theory and Practice* (Eleven International Publishing, 2021) (citations omitted).

59 Ibid 8.

60 *amica* (n 38).

61 Ibid.

62 Jessica Moran, 'New online program for couples going through divorce could keep disputes out of court' *ABC News* (online, 8 July 2020) < <https://www.abc.net.au/news/2020-07-09/online-tool-amica-helps-divorcing-couples-divide-assets/12434988>>.

## 5.2 amica - Dispute Resolution tool

The parenting component of *amica*'s dispute resolution tool uses smart technology that prompts separating couples to consider arrangements for handovers, special occasions, education, and healthcare. The information entered into *amica* can be used to create a parenting plan which can be signed electronically by both parties.

For property matters, *amica*'s AI provides separating couples with a suggested division of property based on an analysis of their circumstances; agreements reached by other separating couples in similar situations; and how courts generally handle disputes of the same nature. Once an agreement is reached, users can opt to pay a modest fee for *amica* to produce written documents that record decisions reached. This includes producing a written parenting plan or by producing an application for property consent orders.

The *Mundy Report* notes that *amica* is providing significant social benefit and expanded access to justice to Australians.<sup>63</sup> Nearly 2 million people have accessed information using *amica*, over 4,000 individuals have received a suggested property division using *amica* and 2,528 individuals have finalised their separation through one of the agreements generated by *amica*. The tool continues to develop and improve, with a recently added functionality to allow family law superannuation splitting. For those earning below the national minimum wage, *amica* is free to use. Where users have the capacity to pay, a fee of \$250 is charged if users wish to generate formal consent orders. Noting that the average cost for such matters is more than \$10,000 per person, Australians have saved more than \$30 million by using *amica*.

The *Metcalfe Report* also highlights the valuable contribution that *amica* makes to the dispute resolution landscape, acknowledging that it offers significant benefit to government and users for a relatively low investment.

The efficacy of *amica* is dependent on maintaining the currency of its database which is based on, not only published orders but also consent orders. Council was advised that there is little difficulty in *amica* obtaining currency in respect of published orders as these are published in anonymised form on publicly available websites including, for example, AustLII. Access to consent orders is more complex and involves the allocation of human resources to obtain copies of those orders from within the court files in circumstances where it is necessary for human involvement to anonymise each order. Council understands that child protection agencies are developing technological solutions to the anonymisation of complainant details in externally provided welfare reports. Council recommends that the FCFCOA and Family Court of Western Australia ('FCWA') be funded to explore the potential use of such technological solutions to the anonymisation of Court orders and, in the meantime, to enable the court to allocate sufficient internal resources to assist *amica* in maintaining the currency of its database.

Council also notes that the algorithms underpinning *amica* will be subject to developing case law. Recent family law amendments, including proposed property law amendments contained within the *Family Law Amendment Bill 2024*, also have the clear potential to impact the currency of the *amica* database as case law emerges. This may lead to the requirement for additional resources to review *amica* matters and assist *amica* in maintaining database currency.

### **Recommendation 11:**

***That the Federal Circuit and Family Court of Australia and the Family Court of Western Australia be provided with initial seed funding to develop technological solutions to facilitate the provision of current court orders that are available to amica with the ongoing cost of maintaining currency being met by a modest fee payable by amica users.***

<sup>63</sup> *Mundy Report* (n 6) 192-194.

### **Recommendation 12:**

***That corresponding resourcing should be provided to amica for reviewing amica matters and ensuring currency.***

## **5.3 Development of interactive smart forms**

During the course of our consultations, Council received submissions regarding litigants struggling to complete existing court forms which can be voluminous and complicated, and also the additional expense associated with repeatedly including the same information on forms throughout the litigation process. We have therefore focused on potential technological tools that will reduce that burden and cost and be expressed in plain language.

*amica* collects information from users by way of guided online questions that can be completed using any device that has internet connection including computers, tablets and telephones. The information obtained can subsequently be used to self-populate subsequent forms and proposed court orders. There is potential to use the information collected in formal documentation required for Court proceedings.

The FCFCOA is currently working on a proof of concept trial with Portable - the company that assisted in the technological development of *amica* - to test the efficacy of using smart forms for the submission of consent orders.

In the process of doing so, some of the logic and knowledge from *amica* has been harnessed and progressed into examining the efficacy of the technology to Court forms more broadly. The technology creates automation opportunities in respect to the manner in which information is gathered for various parts of the Court's Case Management and Pathway. The Court has identified that the technology is potentially extremely useful to assist registrars' work, in particular, including in respect to dispute resolution.

Council has been informed<sup>64</sup> that, as a result of this work, the Court has developed:

1. a proof of concept and partially completed prototype that allows for online completion of an Application for Consent Orders (ACO). The application is user friendly, heavily guided and able to adjust calculations for financial matters and draft corresponding orders (or allow for uploading of a practitioner's preferred orders). The application can be completed by one party or jointly and will only be capable of submission once all aspects of the Application are properly completed. The Court expects that this in turn, will significantly reduce the administratively load and time taken for registrars (and support staff) to deal with requisitions.
2. an ACO prototype that is readily able to be adapted for conversion to other documents including an Application, Response, Notice of Child Abuse, Family Violence or Risk ('Notice of Risk') and Financial Statement. These will be extremely valuable for dispute resolution purposes. Crucially, the way the information is gathered will allow any form required later in the proceedings (e.g. amended Applications, future Affidavits, Case Outlines etc) to be completed without repetition of information. Issues in relation to risk and safety plans for family violence victims as well as access issues for physically disabled and the visually impaired can be readily addressed as the development of these forms progresses. These forms will also be readily able to be translated to assist with access to justice issues for parties of CALD and non-English speaking backgrounds.

<sup>64</sup> Council has been informed of this information through a summary document provided by Senior Judicial Registrar Anne-Marie Rice, Executive Director: National Registrar Operations and Practice, Federal Circuit and Family Court of Australia.

3. a prototype of an Affidavit for use in an interim hearing. This interactive 'form' targets the information required in a nuanced, risk focussed way, with a view to ensuring:
  - a. all relevant issues are before the court in a user-friendly way;
  - b. available evidence to support answers to the focus questions is identified and must be uploaded before the form can be filed;
  - c. any orders sought in a corresponding application or response are linked to the issues identified in the affidavit and cannot be filed until all material provided at point of filing is consistent with the other;
  - d. the affidavit and Notice of Risk are consistent and interactive and linked to prompts in relation to safety plans and risk considerations for the court;
  - e. the information provided to complete the initial affidavit can be revisited in the future should any updated information be required to be provided to the Court.
4. an early understanding of where generative AI can be harnessed to assist (e.g. with the drafting of Orders) and potentially with the provision of other information of assistance to parties (e.g. how to navigate the Central Practice Direction and court processes);
5. an understanding of how the technicalities and intellectual property behind the technology can be harnessed by the Courts and an understanding of what future development might be possible within the Court and what might require ongoing consultation with Portable.
6. an early understanding of issues to be addressed including security; confidentiality; hosting capacity; electronic signatures and filing; service and proof of service etc.
7. ideas for consideration about how other high-volume applications such as Applications for Divorces, can be improved, particularly in circumstances where key issues for requisition relate more to service challenges than the form itself.

The Court has advised that it is in the process of working with professionals to further develop an understanding of the timeframes and costs associated with integrating these technological and opportunities into the Courts electronic case management system "CourtPath."

Council has been advised that a significant constraint on the development of the technology is one of cost – with the Court self-funding the work on the Proof of Concept and partially completed Prototype. Council is of the view that projects such as that which early initial concept work have been initiated by the Court require the injection of funding from Government to finalise the work and roll-out broadly through the Justice Technology Innovation Fund, as recommended in the *Mundy Report*.

The provision of initial seed funding for the development of smart form technology has the potential to result in a more user-friendly interface for Court users as well as potential administrative costs savings. Accordingly, Council recommends that the government consider funding a project to develop the use of smart form technology in the FCFCOA and engage in discussion with the Western Australian Government with a view to jointly funding the development of smart form technology that can be utilised by the FCWA.

**Recommendation 13:**

***That the Attorney-General's Department (Cth) consider funding a project to develop the use of smart form and easy read technology in the Federal Circuit and Family Court of Australia; and consider engaging in discussions with appropriate representatives of the Western Australian Department of Justice with a view to funding a project to develop the use of smart form and easy read technology that can be used in the Family Court of Western Australia.***

## 6. Enhancement of frontline FDR, legal and social services

Council has earlier indicated our support for the recommendations of both the *Mundy Report* and the *Metcalfe Report*. We do, however, take the opportunity of highlighting what we regard as initiatives that have considerable merit and warrant consideration of support for their broader utilisation.

### 6.1 Arb Lite (arbitration lite) – developed by Legal Aid Queensland

*Arb Lite* is a lawyer-assisted family law mediation and arbitration service developed by Legal Aid Queensland that aims to resolve less complex property disputes. This service is particularly designed for people who are not usually eligible for legal aid or who cannot afford legal representation.<sup>65</sup>

The pilot service ran from 1 January 2020 until 30 June 2023 and applied to separated, married, and de facto couples. The service was for family law property disputes with a net equity (the total value of assets less debts) of between \$20,000 and \$500,000 excluding superannuation (with no limit on superannuation) or where the legally-aided person's claim is a maximum of \$250,000 of a larger net equity amount.<sup>66</sup>

The program is carried out by experienced and qualified family lawyers who have specialist training in arbitration. Decisions are made “in the shadow of the law” meaning that the outcomes will be similar to decisions made by the family law courts.

The program is more streamlined than their full arbitration program because the people in the dispute are expected to have already resolved any outstanding issues about evidence through a conference or court process. The arbitration is usually conducted on the basis of written submissions or a short electronic hearing where submissions are time limited.

Legal Aid Queensland's Annual Report for 2022-2023 notes that 74% of matters dealt with via *Arb Lite* achieved an early resolution.<sup>67</sup>

Council notes that *Arb Lite* received cross party support from the Joint Select Committee on Australia's Family Law System which tabled its final report on 22 November 2021.<sup>68</sup>

#### **Recommendation 14:**

***That the Government consider providing funding for the continuation of the Arb Lite program, together with seed funding to enable similar programs to be developed by other legal aid commissions on the basis that the recipient Commission commits to developing a fee structure that makes the service self-sustaining. In that respect, while users may have initial reluctance to commit to paying a moderate fee, it should be stressed to them that such a service is considerably cheaper than the expenses they would incur in proceeding to a court adjudicated outcome.***

<sup>65</sup> Legal Aid Queensland, *Family law property mediation program* (Web page, 6 July 2022) < <https://www.legalaid.qld.gov.au/Find-legal-information/Relationships-and-children/Dividing-your-property/Family-law-property-mediation-program> >.

<sup>66</sup> *Ibid.*

<sup>67</sup> Legal Aid Queensland, *Annual Report 2022-2023* (Report, August 2023) 32.

<sup>68</sup> *JSC Final Report 2021* (n 5).

## 6.2 Involvement of social scientists in Family Dispute Resolution delivered by Legal Aid Commissions

Council has had the benefit of presentations from a variety of service providers who offer Family Dispute Resolution where legal practitioners and social scientists work with the family towards a mediated outcome.

While additional expense is necessarily involved in having an additional mediator, Council is of the view that the costs are justified in terms of the longer-term benefits and costs saving that can be achieved if the matter can be diverted from a litigation trajectory. The involvement of social workers or child psychologists can provide additional support in understanding and addressing the emotional needs of all parties involved, especially children.

Those benefits include the following:<sup>69</sup>

- Ensuring a child focussed approach: Social workers and child psychologists can bring a child-centred approach to the mediation process - ensuring that the child's best interests are at the forefront of any decisions made.
- Understanding family dynamics: These professionals are trained to understand family dynamics and can help explore family issues in an objective way that focuses on potential solutions rather than being stuck in the quagmire of conflict. They can assist in exploring various relationships within the family and help resolve interpersonal conflicts.
- Effective communication: qualified social scientists are trained to facilitate effective communication between parties, helping them express their emotions, understand each other's perspectives better, and move forward as amicably as possible.
- More sustainable outcomes: Studies, including successive AIFS evaluations of family law reforms, have shown that where parties participate in an amicable dispute resolution process that outcomes are more sustainable.<sup>70</sup>

### **Recommendation 15:**

**That Legal Aid Commissions be resourced to enhance and extend existing programs where family dispute resolution conferences are jointly convened by appropriately qualified lawyers and social scientists.**

<sup>69</sup> Greg Mantle and Alan Critchley, 'Social Work and Child-centred Family Court Mediation' [2004] 34(8) *The British Journal of Social Work* 1161; Joe Harman, 'Family Law in the Future: The Role of Alternative Dispute Resolution' (Brief Paper, Resolution Institute, March 2020); Laura Robertson and Karen Broadhurst, 'Introducing Social Science Evidence in Family Court Decision-Making and Adjudication: Evidence from England and Wales' [2019] 33(2) *International Journal of Law, Policy and the Family* 181-203.

<sup>70</sup> Ibid; Rae Kaspiew et al, *Evaluation of the 2006 Family Law Reforms* (Research Report, Australian Institute of Family Studies, December 2009); Rae Kaspiew et al, *Experiences of Separated Parents Study* (Research Report, Australian Institute of Family Studies, October 2015) shows at Table 6.1 shows that generally, the patterns in responses establish that pathways that focused on achieving mutually agreed outcomes were associated with a higher proportion of positive assessments as compared to other more formal dispute resolution options, with the FDR/mediation pathway attracting positive endorsements on most measures (after the 'resolving by discussions' pathway). In relation to the sustainability of amicable dispute resolution mechanisms, see Tania Sourdin, *Alternative Dispute Resolution (ADR) Principles: From Negotiation to Mediation* (Paper, January 2014); Tania Sourdin, 'Using Alternative Dispute Resolution to Save Time' [2014] 33(1) *The Arbitrator & the Mediator*; Tania Sourdin, *Alternative Dispute Resolution*. (3rd ed, Law Book Company, 2008)

### 6.3 Flexible funding of CLCs, ATSILS and FVPLS to enable beginning to end service

Council received submissions from CLCs, Aboriginal and Torres Strait Islander Legal Services and FVPLS to the effect that current funding restraints are an impediment to those services providing a holistic beginning-to-end legal service including, where appropriate, the representation of clients in legal proceedings including appeals.

Those submissions were consistent with the submissions made to the *Mundy Report*. Council shares the concerns expressed by Mr Mundy at pages 185 – 186.<sup>71</sup> In particular, we agree that a legal assistance provider's client should reasonably expect the provider to meet their needs or address their matter from start to finish. Where the organisation has staff with appropriate skills there should be no need to refer the client to another organisation, especially in circumstances where substantial advice is given or litigation commenced, save perhaps for the provision of counsel or expert advice.

A significant concern about the lack of continuity of care is that where clients are referred to different providers, forcing them to repeat their stories risks potentially retraumatising them. This can be inefficient and time-consuming for both the clients and the referring solicitors. Insufficient funding may also result in clients not receiving the full extent of the legal assistance they need, such as only receiving legal advice instead of representation. We agree with Mr Mundy that it is important for those frontline legal services that are capable of providing a beginning to end legal service should be funded to do so.<sup>72</sup> This is particularly important in cases involving family violence where the consequence of re-traumatisation can be profound.

#### **Recommendation 16:**

***That frontline legal service providers be funded to provide beginning to end service delivered by suitably qualified staff including in court proceedings, and allow continued support to clients until matters are concluded, including through appeals, and those providers should be adequately resourced to brief counsel as necessary.***

### 6.4. Legally Assisted Family Dispute Resolution

Council considers that legally assisted FDR services (where a lawyer assists parties to participate in a process led by an FDRP) are among those necessary to ensure that the benefits of FDR are accessible to all.

While FDR clients are encouraged to seek legal advice, lawyers do not usually attend FDR sessions to advocate on behalf of their clients. However, some clients are unable to safely participate in traditional FDR due to unequal bargaining power, family violence, or other vulnerabilities. Legally Assisted FDR ('LAFDR') is an option which may address some of these barriers to participation in non-adversarial dispute resolution. Real-time legal advice in-session can also lead to a timelier resolution of matters and can inform realistic client expectations regarding court outcomes.

Several models are available as examples of lawyer-assisted FDR working well in practice, for both property and parenting matters. For example, between 2020-2023, the Government funded the Lawyer-assisted Family Law Property Mediation: Legal Aid Commission ('LAC') Trial.

<sup>71</sup> *Mundy Report* (n 6) 185-6.

<sup>72</sup> *Ibid* 185.

The evaluation of the LAC Trial noted ‘strong uptake’ and, although the AIFS evaluation proposed some adjustments,<sup>73</sup> they reported that:

...in addition to benefits arising from matters reaching final agreement, grants of aid in LAC Trial matters facilitate: the provision of legal advice; safety planning; risk management and case management; safer property settlement negotiations and improved financial disclosure; together with effective referrals and supported engagement with other services, such as family violence services, financial counselling and tenancy assistance services.<sup>74</sup>

Further:

The evaluation indicates that the LAC Trial increased access to post-separation property resolution mechanisms particularly for women.<sup>75</sup> ... These findings suggest that the LAC Trial is important in supporting access to post-separation property settlement for primary caregivers.<sup>76</sup> ... Many professionals also indicated that the LAC Trial provided parties with access to property settlements where they would otherwise not have been able to pursue a property settlement due to the prohibitive costs, delays and stress associated with engaging in litigation.<sup>77</sup> ... More specifically, the vast majority of professionals participating in qualitative interviews indicated that the LAC Trial had provided accessibility to low-cost, agreement-based outcomes for parties with small property pools.<sup>78</sup>

The social return on investment analysis component of the evaluation indicated that for every \$1.00 invested in the LAC Trial, \$4.69 of social value was generated for the LAC Trial stakeholders. These results were identified in the Evaluation as suggesting that the LAC Trial is both a prudent and efficient means of assisting parties to resolve their post-separation property and financial arrangements.<sup>79</sup>

#### **Example: Legally Assisted FDR for parenting matters at Sunshine FRC**

The Sunshine FRC in Melbourne has provided LAFDR for parenting matters alongside its ‘regular’ FDR services for approximately 10 years. The Sunshine FRC partners with two local CLCs to offer this service. The CLCs provide lawyers who understand the mediation process and who support FRC clients through the process, free of charge.

FDRPs refer clients to the LAFDR program if they are particularly vulnerable, in need of legal advice (e.g. may have unrealistic expectations about outcomes) or seem likely to end up in family law courts (i.e. one or both parties wish to pursue court proceedings, or one party is fearful of being “taken to court”).

In 2022, a full or partial agreement was reached in 75% of cases through the LAFDR program. An evaluation of the CLC partnership model is currently underway, using a survey supplemented by interviews with clients and practitioners. So far, in keeping with service data, 75% of early client respondents have reported reaching agreement using the service, despite only 56% reporting any expectation of reaching agreement.

<sup>73</sup> Carson et al 2022 (n 34) 6.

<sup>74</sup> Ibid 2.

<sup>75</sup> Ibid.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid 3.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid 7.

This is a significant achievement given that the clientele includes those with unrealistic expectations of outcomes and those who would otherwise be likely to go to court.

The preliminary survey data also indicates strong rates of satisfaction with the service, and with lawyer involvement in particular.<sup>80</sup> High proportions of survey respondents agree with the following statements:

- 'Having a lawyer present helped me understand my position' (88%);
- 'Having a lawyer helped me respond to proposals' (84%);
- 'I felt more confident participating with lawyer support' (78%);
- 'I felt safer having a lawyer present' (81%);
- 'Having a lawyer helped me understand outcomes from FDR' (88%).<sup>81</sup>

Qualitative data from the study indicates that vulnerable clients value the guidance and perspective that lawyers provide through the program, and feel supported, reassured and empowered by the presence of a lawyer in FDR.<sup>82</sup>

The LAFDR model developed at Sunshine FRC, provided in partnership with CLCs, is highly effective. However, it is currently provided without dedicated funding, and the sustainability of the model is contingent on the resourcing of the partnering CLCs.

Council views LAFDR as an important alternative dispute resolution offering and an area of significant potential growth. Some clients require more guidance than an FDRP may provide under the regular, facilitative model of FDR.<sup>83</sup> There is a need to minimise the cost of legal assistance, particularly in relation to the size of small property pools.

The emphasis by FCFCOA on participation in dispute resolution, both prior to and subsequent to making an application to the Court, is likely to increase the number of mediations being conducted, including for matters that otherwise would not have used mediation as a pathway to resolution. Many of these will involve private lawyers, e.g., where parties turning to mediation have already filed in Court and engaged lawyers, in turn creating demand for options such as LAFDR.

The *Metcalfe Report* also acknowledged that LAFDR offers significant benefit and can help people to safely avoid litigation, particularly in cases involving family violence. These include addressing power imbalances, providing a reality check in negotiations to manage client expectations, and ensuring agreements are put into writing and framed in enforceable terms.<sup>84</sup> The *Metcalfe Report* recommends that '*FRC Hubs and First Nations hubs should seek to put in place formal Memoranda of Understanding with legal assistance providers, to facilitate integrated access to legal advice and assistance, and provision of legally-assisted FDR through the hubs for appropriate cases.*'

Dedicated Government support for legally-assisted FDR would enable the rollout of such services to all FRCs and FRSP centres, or Families Hubs. This would expand the options available to clients and ensure that those needing legal input can nevertheless attempt to resolve their disputes through negotiation rather than going to court.

<sup>80</sup> Council has been provided with this information by Relationships Australia Victoria.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*

<sup>83</sup> Genevieve Heard and Andrew Bickerdike, "Am I on track?" Family dispute resolution and the client need for guidance in post-separation property matters' (2021) 34(3) *Australian Journal of Family Law* 211–230.

<sup>84</sup> *Metcalfe Report* (n 7) 141 citing National Legal Aid's submission to the ALRC, summarising ALRC, Review of the Family Law System (Discussion Paper 86), p 122.

**Recommendation 17:**

**That the Attorney-General's Department (Cth) consider options to facilitate integrated access to legal advice and assistance and provision of legally-assisted family dispute resolution through Family Relationship Services Program services and Family Relationship Centres for appropriate cases.**

### 6.5. Trauma-Informed and DFV-informed FDR

Creating a more accessible family law system requires facilitating the participation of all people including the most vulnerable in the community, in both court and non-court processes. Funding for trauma-informed and domestic and family violence (DFV)-informed services is essential and could reach a greater number of families experiencing DFV or affected by complex co-morbidities through the Family Hubs proposed.

Post-separation services in particular come into contact with vulnerable families at a particularly difficult and high-risk time. Complex and protracted negotiations around post-separation arrangements place women and children, in particular, at risk. In the absence of linked services and support, women and children affected by DFV are at further risk when they attempt to navigate post-FDR steps, including from FDR to Court.

DFV-affected families require more support than the standard FDR model can provide.<sup>85</sup> Comprehensive services to enable families to resolve their disputes safely are required to reduce the heightened risk to women and children during navigation through the FDR environment and in transition to and after Court. FDR services need to be supplemented by tailored support provided by a practitioner who is focused on effectively assessing and responding to presenting DFV issues and/or other complex needs.

**Example: Family Safety Model**

Council's 2016 Report *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems: Final Report (Terms 3, 4 & 5)* observed that:

[The Family Safety] model, which was recently developed by Relationships Australia Victoria (RAV), centres on the employment of Family Safety Practitioners.... [It] was designed to enhance children's safety by ensuring that all family members – men, women and their children – are linked to services through a whole-of-family integrative case management framework. The Family Safety Model adopts an inter-agency approach, which results in a continuum of services being provided to family members over an extended period of time. The aim of the Family Safety Model is to increase the overall responsiveness of the service system to the family's multiple needs. The key elements of the Family Safety Model are:

- A whole-of-family response to the issue of family violence;
- An assertive engagement and joined up approach to working with all family members;
- Actively prioritising the safety of partners/former partners/family members and the children of the men participating in RAV's men's behaviour change programs;
- Offering a range of group work programs that provide preventative and early intervention responses for family members affected by family violence; and
- Delivering an integrative and coordinated practice response when engaged with families that are affected by family and domestic violence.<sup>86</sup>

<sup>85</sup> Relationships Australia Submission (n 22).

<sup>86</sup> Family Law Council Report 2016 (n 5) 85.

The Family Safety Model (FSM) was commended in the Family Law Council's (2016) report to the Attorney-General on *Families with Complex Needs and the Intersection of the Family Law and Child Protection System*,<sup>87</sup> and again in the *ALRC 2019 Report*:

'The role of case managers in FRCs could be modelled on Relationships Australia Victoria's Family Safety Practitioners (FSP). Submissions and previous inquiries identified this model as an innovative approach to supporting FRC clients with complex needs'.<sup>88</sup>

Currently, the RAV FSM is an unfunded service operating at only two of the four FRCs - those with the FSM in place, record the lowest proportions of cases where s60I certificates are issued to enable filing in court.<sup>89</sup> The ability to obtain a greater number of resolutions places less subsequent demand on our Courts and associated service providers.

In an environment of increasing case complexity, the model described above effectively assists people progressing through FDR and through the family law system more broadly. The FSM enhances the existing FDR model and proactively prioritises the safety of partners, children, former partners and family members of clients presenting for FDR. Currently, the FSM may be the safest option for women and children affected by FV who are separating.

Ideally, a similar model would be introduced wherever FDR services are offered. Council expects that this would enable more clients to participate in joint FDR and to result in fewer certificates being issued for progression to court. More importantly, this would see greater numbers of vulnerable clients receiving individual support, continuity of care and enhanced safety, regardless of their dispute resolution pathway.

The *Metcalfe Report* also identified a clear need for case management to support FRSP clients in navigating services, both within the FRSP and in overlapping systems.<sup>90</sup> The report noted this issue had been raised 'almost universally' by stakeholders engaging with the review, as well as in previous family law reviews.<sup>91</sup> A survey of separating families conducted as part of the *Metcalfe Report* showed that most FRSP clients are using multiple FRSP and non-FRSP services.<sup>92</sup> Around three quarters of respondents were using two or more services, including 34% reporting that they were using six or more services. Of survey respondents who reported having safety concerns for themselves and children and their children, 57% reported using six or more services, and some respondents reported using as many as 15 or more services.<sup>93</sup> This demonstrates the complexity of needs of the clients accessing FRSP services, and how critical coordination is to ensure they are receiving the best support possible.

The *Metcalfe Report* noted that the level of assistance provided to FRSP clients 'should be tailored and sequenced to best address clients' strengths and needs',<sup>94</sup> noting that not all FRSP clients will require case management, and of those who do, some will require more intensive support than others.<sup>95</sup> Whilst it may look different in different locations based upon local community needs, Metcalfe identified the core elements of case management should include: 'risk and needs assessment, assistance to access the services required to meet those needs, and continuous monitoring and regular contact with the client'.<sup>96</sup> The *Metcalfe Report* recommends that 'case management should be specifically funded within each FRC Hub. Case management support should be tailored to clients' needs and capacity, and include a focus on safety for matters involving family violence.'

87 Ibid.

88 *ALRC 2019 Report* [n 19] 467 [16.33].

89 Council has been provided with this information by Relationships Australia Victoria.

90 *Metcalfe Report* [n 7] 104 [6.2.2].

91 Ibid.

92 Ibid.

93 Ibid.

94 Ibid 105.

95 Ibid 105.

96 Ibid 105.

Models such as the Family Safety Model cited above are time consuming but the cost of supporting such services is, in the view of Council justified both in terms of the welfare of the separating couple and their children and also from a public interest perspective in avoiding the costs associated with protracted litigation.

**Recommendation 18:**

***That the Government fund family law services to provide case management support, tailored to clients' needs and capacity, noting the importance of managing safety in cases that involve family violence.***

## 6.6 Priority Property Pools Program (PPP)

Council acknowledges the promising results of a case management model introduced in both the FCFCOA and the FCWA. The PPP program provides a streamlined court process for separated couples seeking court orders to resolve their small value (usually less than \$550,000) property dispute. The PPP was initially established as a pilot across four FCFCOA registries under the 2018 Women's Economic Security Package (PPP500 Pilot). The Pilot aimed to improve the responsiveness of the court for vulnerable parties through a simplified way of quickly resolving property disputes which minimises risk and legal costs, and best preserves the parties' scarce assets. In particular, it aimed to assist parties who are vulnerable and may be reluctant to engage with the court system by making the court process easier, cheaper, and quicker to navigate.

In 2022, a positive evaluation of the PPP500 Pilot was completed by the Australian Institute of Family Studies (AIFS), demonstrating that the pilot helped separated couples, including vulnerable women, achieve quick, safe, fair and affordable post-separation property settlements. The evaluation found that the Pilot had a significant social return on investment – for every \$1.00 invested in the program, it generated \$3.88 of social value for litigants and that it empowered disadvantaged parties, (particularly women), by addressing power-imbalances and providing a level of financial security and control, and improved overall wellbeing. From October 2023, the Pilot was expanded nationally into an ongoing program with broader criteria operating across all FCFCOA filing registries and the FCWA. Since then, data from the operation of PPP in the FCFCOA has evidenced that 93% of cases have been finalised by Registrars without the need for any judicial involvement and cases have been dealt with swiftly with an average of 1.7 court events before dispute resolution finalises the matter.<sup>97</sup>

While the expansion is in its early days, initial data shows that the percentage of property-related filings in the Court that can access the special PPP model has significantly increased. This means that many more separating parties have the benefit of the speedy, cost-effective, registrar-led model, which resolves most matters within approximately five months and preserves limited assets. This reduces the chance of economic coercion and its impacts on at-risk parties and children. The model is also successfully freeing up judicial resources given that the vast majority of PPP cases have been resolved without the need to refer matters to a judge.

## 6.7 Accessible and culturally appropriate service provision

Council recognises that culturally appropriate service provision is essential for improving outcomes for Aboriginal and/or Torres Strait Islander Peoples, culturally and linguistically diverse (CALD) peoples, peoples with disabilities and the LGBTQIA+ communities.

<sup>97</sup> Carson et al, *Evaluation of the Small Claims Property Pilot – Priority Property Pools Under \$500,000 (PPP 500)* (Research Report, Australian Institute of Family Studies, November 2022).

This concept is reinforced in both the *Mundy Report* and the *Metcalfe Report*, which also noted a number of barriers to culturally appropriate service provision. Issues include:

- The diversity of needs. First Nations and CALD communities can have different and unique concepts of who makes up a family, what family separation looks like, and what the priorities are when a family does separate. It cannot be assumed that services designed for one group will work for another.
- That engagement needs to be meaningful and long-term to be effective and will require the Commonwealth States and Territories to work together to support Aboriginal and Torres Strait Islander communities to understand and consider family law options to child protection orders for the care arrangements for children when their parents are unable to care for them.
- That current data collection requirements and service targets do not recognise the time required to build and invest in relationships with diverse communities, or the additional time that might be needed for direct service delivery.
- Gendered issues such as family violence, and other intersectional factors, can compound disadvantage and can be deeply embedded in cultural practices and engagement. Unless those are addressed holistically, other solutions can only have limited impact.
- Intake and risk assessment processes can raise issues for First Nations and CALD clients, if a relationship of trust does not already exist. Cultural traditions can mean some clients are deeply uncomfortable answering the types of questions asked, often in an interview format which is not culturally safe. This can lead to risk being hidden or misidentified.
- Collaborative service planning is crucial to maximise outcomes for clients and communities.

### 6.7.1 Aboriginal and/or Torres Strait Islander families

Council note that further consideration of the experiences of Aboriginal and/or Torres Strait Islander families are explored in the adjacent Family Law Council 2024 Reports, including consideration of the specific disincentives to reporting family, domestic and sexual violence for Aboriginal and/or Torres Strait Islander families in the Terms of Reference Report 1ab, 2024,<sup>98</sup> and supporting the participatory rights of Aboriginal and/or Torres Strait Islander children and young people in Terms of Reference Report 2, 2024.<sup>99</sup>

During our consultations Council heard about the positive impacts of the Blurred Borders community legal education kits in working with Aboriginal and/or Torres Strait Islander families. The Blurred Borders resources use visual art, plain language and storytelling to make legal concepts understandable. They were designed for Aboriginal people who do not speak English as a first language. Initially, funded by the Commonwealth Government the Blurred Borders kits were developed in consultation with ACCOs for community and legal service providers working with Aboriginal people in Western Australia and the Northern Territory in relation to bail, criminal processes and family violence. Legal Aid WA has since expanded the resource kits for use in WA in other areas of law including child protection, and tenancy and Legal Aid Queensland has also adapted them for use in their jurisdiction. Utilising and enhancing existing Blurred Borders resources to develop a Family Law kit will facilitate the capacity of stakeholders in the child protection and family law systems, including IFLOs, to work with Aboriginal and Torres Strait Islander families to help them engage with the family law system and consider family law options to child protection orders for the care arrangements for children when their parents are unable to care for them.

<sup>98</sup> Family Law Council, *Family Violence and Systems Abuse* (Report, 2024).

<sup>99</sup> FLC 2024 Report: *Supporting and Strengthening the Voice of Children* (n 49).

Council acknowledges the positive impact of two existing initiatives that support Aboriginal and/or Torres Strait Islander families to navigate family court processes in the FCFCOA: Specialist Indigenous Lists (SILs) and Indigenous Family Liaison Officers (IFLOs).

SILs help Aboriginal and/or Torres Strait Islander children and the people who are seeking Court Orders regarding the care and living arrangements for an Aboriginal and/or Torres Strait Islander child/ren. SILs seek to tackle the issues that can impede Aboriginal and/or Torres Strait Islander Peoples from filing applications and attending court, by providing culturally responsive alternatives developed with local communities, Indigenous support services and the Court. Indigenous Lists are different from other court lists in that they: are less formal, offer specialised support services, and allow the Judge to close the courtroom to the public (if needed). The FCFCOA currently operate SILs or modified case management processes in 11 locations: Adelaide, Alice Springs, Brisbane, Cairns, Darwin, Lismore/Coffs Harbour, Melbourne, Newcastle, Sydney and Townsville. Each SIL operates differently based on the individual and cultural needs of local communities.

Council acknowledges that these tailored processes ensure better outcomes for vulnerable Aboriginal and/or Torres Strait Islander litigants and children, and assist Aboriginal and/or Torres Strait Islander families and State and Territory child protection authorities to use the private family law system to make care and kinship arrangements with children, as an alternative to State/Territory child protection systems and removal of children from their families.

#### **Recommendation 19:**

***That funding be provided to the FCFCOA and FCWA to support the national expansion of Specialist Indigenous Lists.***

### **Indigenous Family Liaison Officers**

Council welcomed the opportunity to meet with an IFLO in the Cairns FCFCOA registry during consultations. IFLOs work for the Courts and are located in many locations across Australia<sup>100</sup>. IFLOs focus on supporting local regions, but also provide broader national support where possible and appropriate, with a focus on matters that are high risk, and those that have access to justice issues and/or cultural complexities that warrant additional supports where possible. IFLOs are there to help and support Aboriginal and/or Torres Strait Islander families to understand and engage with the Court process. They support each stage of the case management process in the FCFCOA. They can also help people who are involved in a family law issue by connecting them to legal and other support services, such as health and social support services, as well as referrals to these services between court attendances so that cases can progress with minimal cost and delay. IFLOs play a critical role in supporting the effective running of SILs. IFLOs are generally present in matters considered by SILs, not just on the day of the hearing, but also to assist in making warm referrals before, after or during Court proceedings. This helps to promote full participation and engagement with Court proceedings.

Prior to 2021, the FCFCOA had only one IFLO undertaking local work. The Government has provided funding to the FCFCOA to currently support 15 IFLOs based in Alice Springs/Darwin, Adelaide, Brisbane, Cairns, Launceston, Lismore, Melbourne, Newcastle, Parramatta/Sydney and Townsville. Under existing funding arrangements, only 4 of the IFLO positions are funded on an ongoing basis. Presently, the existing IFLOs can support approximately 50% of the cases involving First Nations parties or children. This has resulted in the triaging of matters in terms of availability of IFLO support. It also means that IFLOs spend the majority of their time assisting parties at the front end of the case management pathway, with less opportunity for intensive support with family report interviews and dispute resolution processes.

<sup>100</sup> 'Indigenous Family Liaison Officers', *Federal Circuit and Family Court of Australia* (Web Page) <<https://www.fcfcOA.gov.au/fl/pubs/iflo-national>>.

In addition, not all registries have a local IFLO to support families and children in those regions, leading to service gaps, particularly for regional and remote locations.

Taking into account the volume and growth in Aboriginal and/or Torres Strait Islander filings and the high proportion of Aboriginal and/or Torres Strait Islander families in rural and regional locations, together with gender and community-based requirements relating to IFLOs, the current capacity of the IFLOs is insufficient to meet demand.

Ideally, Council considers SILs and other modified case management processes should be supported by an IFLO to cover all family law registries and local regions and to support all cases involving Aboriginal and/or Torres Strait Islander parties or children to be effective. This would involve an almost doubling of the current FTE of IFLOs, together with an appropriate and proportionate management structure for the IFLOs and extension of current funding arrangements beyond the current termination date of 30 June 2026. This would assist in expanding the SILs or specialised case management practices across registry locations.

The temptation to time limit funding for IFLOs should be resisted. Past experience in the FCWA is informative. When short term funding for IFLOs was first made available, the initial appointees did valuable work and achieved very encouraging outcomes. The court was unable to retain them, as they had only short-term job security and understandably took up permanent positions elsewhere. For the same reason, the court could not attract replacement IFLOs and the initial positions sat vacant until the funding period ended.

**Recommendation 20:**

***That Indigenous Family Liaison Officers be offered permanent positions to cover all cases involving First Nations parties or children in the Federal Circuit and Family Court and Family Court of Australia and Family Court of Western Australia, with an appropriate management structure to support the Indigenous Family Liaison Officers.***

## Lighthouse

Lighthouse plays a central role in the FCFCOA's response to cases which may involve risk relating to family violence, mental health, drug and alcohol misuse and child abuse and neglect, by shaping the allocation of resources and urgency given to such cases. It is currently funded to 30 June 2026. At present, Lighthouse is not available to any circuit locations or to some regional registry locations (Albury, Dubbo and Lismore), which disproportionately affects First Nations families. Lighthouse data demonstrates that there are also lower risk-screening rates for First Nations parties.

Ideally, Council considers that Lighthouse should be expanded to regional and remote locations, with embedded IFLO and culturally appropriate supports, which would assist in addressing gaps, as well as creating the ability to conduct some hearings, family report interviews and dispute resolution processes on-country, where appropriate.

**Recommendation 21:**

***That the FCFCOA's Lighthouse Programme be expanded to regional and rural locations on a permanent basis.***

## Cultural Reports

Council also acknowledges previous calls for cultural reports to be prepared for the courts in cases involving Aboriginal and/or Torres Strait Islander children.<sup>101</sup> The ALRC noted that cultural reports could include information about the obligations of various family members in raising children, and a cultural plan setting out how the child's connection with kinship networks and country might be maintained.<sup>102</sup> The ALRC considered that cultural reports should be ordered when sought by either party, or by any Independent Children's Lawyer, or where it would be in the best interests of the child in the opinion of the court.<sup>103</sup> The ALRC further recommended consultation with Aboriginal and/or Torres Strait Islander organisations and community members across the country to identify a number of appropriate cultural report writers in each region. These reports would be separate to other specialist reports prepared during family law matters.<sup>104</sup>

Similar reports were recommended by the 2018 ALRC *Pathways to Justice* Report<sup>105</sup> and the Canadian Inquiry into Missing and Murdered Indigenous Women and Girls<sup>106</sup> for sentencing proceedings to provide a holistic understanding of systemic factors contributing to offending. Cultural Reports are already utilised in the Family Court of New Zealand to support judicial decision-making.

As noted above, in section 2.5 of this Report, the *Family Law Amendment Act 2023* (Cth) reinforced the importance of the best interest factor requiring mandatory consideration of First Nations children's right to enjoy Aboriginal and/or Torres Strait Islander culture. This recent amendment increases the importance of ensuring the Court receives advice directly from community to support their consideration of the cultural needs of First Nations children.

### **Recommendation 22:**

***That the Attorney-General's Department (Cth) consider options to increase the availability of cultural reports in parenting proceedings involving an Aboriginal and/or Torres Strait Islander child, including engaging with community members to co-design a suitable process and identify appropriate cultural report writers in each region.***

The *Metcalfe Report* outlined a range of efforts from the establishment of the program in 2006 to the present day to build capability to more effectively support First Nations families. These included<sup>107</sup>:

- providing additional funding to 13 FRCs in 2006 to employ First Nations advisers,
- funding four rounds of scholarships between 2011 and 2018 for First Nations people to secure relevant qualifications in FDR or other post-separation services,
- a pilot from 2017-20 in which eight existing FRCs adapted their service provision with the aim of better supporting First Nations families, and
- a pilot (ongoing) commencing in 2021, through which nine Aboriginal and Community Controlled Organisations (ACCOs) received funding to train or employ FDRPs to assist First Nations families to resolve post-separation parenting and property disputes in a culturally appropriate way.

<sup>101</sup> *Family Law Council Report 2012a* (n 5); *ALRC 2019 Report* (n 19); *SPLA 2017 Report* (n 5).

<sup>102</sup> *ALRC 2019 Report* (n 19).

<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid.*

<sup>105</sup> Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Final Report, December 2017).

<sup>106</sup> National Inquiry into Missing and Murdered Indigenous Women and Girls (Canada), *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (Final Report, June 2019).

<sup>107</sup> *Metcalfe Report* (n 7).

In 2022, the *Metcalfe Report* noted that 5.4% of FRSP clients identified as Aboriginal or Torres Strait Islander. This suggests high usage of FRSP services relative to the 3.2% of the population that identified as Aboriginal or Torres Strait Islander in the 2021 Census. Two streams were particularly high usage – Regional FDR and Children’s Contact Services.<sup>108</sup> The *Metcalfe Report* acknowledges that high usage does not necessarily reflect the quality or cultural appropriateness of the service.<sup>109</sup> It also suggests that relative to the need indicators, including the percentage of population with dependents living in separated families (single parent, divorced and step families or blended families) for this cohort, usage of these services may not be occurring at the level of need for Aboriginal and Torres Strait families. Interviews with professionals showed that First Nations people were more likely to become involved in the family law system through specific entry pathways, including where they had a non-First Nations partner, are grandparents seeking residence or contact with children, or are seeking assistance for recovery orders.

In looking to build on efforts to date, the *Metcalfe Report* observes that enhancing outcomes for First Nations families in the FRSP must be First Nations-led.<sup>110</sup> A key challenge is that, while an alternative to formal court procedures, the FDR process remains heavily framed within legislation, and within a framework that prioritises a principle, being the best interests of the child, that may does not always neatly translate into Aboriginal and/or Torres Strait Islander families and contexts. Metcalfe further acknowledges the critical importance of allowing an appropriate timeframe for designing and establishing culturally appropriate services, within a funding environment that supports organisational stability.

Council endorses this position and supports the recommendations of the *Metcalfe Report* to create a:

...new, dedicated funding stream...within the restructured program to establish multi-functional service hubs for separating or separated First Nations families, delivered by ACCOs. These hubs should offer the same suite of services as the FRC Hubs, noting that the form those services take may look very different in a First Nations context. The hubs should be designed in partnership with First Nations peak bodies and service delivery organisations, in a way which centres the Priority Reforms and associated outcomes under the National Agreement on Closing the Gap. A shared decision-making process should include issues such as location, infrastructure, branding, service model, delivery organisations, capacity building, data collection and evaluation.<sup>111</sup>

**Recommendation 23:**

***That the First Nations Hubs (supporting separating or separated First Nations families), as recommended by the Metcalfe Report be implemented and co-designed with First Nations people to ensure that the services are delivered in a culturally appropriate way, which may not involve the same processes as occur in mainstream Family Relationship Services.***

108 Ibid.

109 Ibid.

110 Ibid.

111 Ibid 127, see Recommendation 8.

### 6.7.2 Culturally and Linguistically Diverse Australians

The *Mundy Report* identified CALD Australians as a cohort with significant unmet legal need, who often encounter substantial challenges in seeking legal assistance.<sup>112</sup> The *Mundy Report* noted that language gaps are a key challenge, which is compounded by shortages in interpreters, along with cultural differences, as differing values and beliefs may impact how people perceive and engage with the legal system.<sup>113</sup> The *Mundy Report* also notes that numerous submissions to the review highlighted the distinct needs of migrants, refugees and asylum seekers as a sub-category of CALD people requiring priority support, given their often complex and intersecting needs, such as in employment and migration law.<sup>114</sup>

Family violence and other risk factors can play out significantly in CALD Australian communities. Further, some forms of violence are more likely to be influenced by a person's visa status, and/or by religious, cultural or community contexts, such as visa abuse, dowry abuse, female genital mutilation/cutting, reproductive coercion and abuse, and modern slavery (such as forced marriage or human trafficking).<sup>115</sup> Data from Lighthouse in the FCFCOA shows that 30% of parties identify with a cultural background or ethnicity other than Australian and ABS Census data shows that 27.6% of population were born overseas. Significant barriers exist to parties obtaining access to justice due to language. In relation to Lighthouse, the FCFCOA has made recent amendments to the Family DOORS Triage Risk Screen which show that 11% of parties completing the risk screen speak a language other than English at home. Enhanced support for parties where English is their second language, through the introduction of dedicated Multicultural Liaison Officers, would enable support to be provided to those who are unable to access technology or services to assist with engagement with Lighthouse and the broader FCFCOA case management pathway. Multicultural Liaison Officers would be able to provide guidance and support to CALD court users for Lighthouse and family law proceedings more broadly, and connect them with key legal and social support services within the community.

Noting the significant challenges that CALD communities face in engaging with the legal system, and the success of IFLO as a model in providing culturally appropriate support to First Nations people, Council sees merit in piloting the introduction of Multicultural Liaison Officers in certain registries, to work with people from CALD backgrounds in the family law system.

#### **Recommendation 24:**

***That the Government provide funding for a pilot to introduce Multicultural Liaison Officers in certain family court registries identified as having significant demand from culturally and linguistically diverse clients, to assist them in navigating the family law system in a culturally appropriate way.***

Service data provided to the *Metcalfe Report* indicates a significant under-use of FRSP services by people from CALD backgrounds.<sup>116</sup> In 2022-23, 3.2% of FRSP clients identified as CALD, versus 16.21% of the population in the 2021 Census. More specifically, data from the Evaluation of the Children's Contact Service Activity shows that clients using Children's Contact Services ('CCSs') who were from CALD backgrounds (3%–4%), represented a lower proportion of people from CALD backgrounds in the general population (21% according to the 2021 Census).<sup>117</sup> It is acknowledged, however, that this may be an underestimate of CALD people using CCSs given that the data relies on clients reporting their CALD status to the CCS staff.

<sup>112</sup> *Mundy Report* (n 6) 69.

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid* 74.

<sup>115</sup> Alissar El-Murr, 'Intimate Partner Violence in Australia Refugee Communities' (Policy and Practice Paper, AIFS, December 2018); *SPLA Committee 2021 Report* (n 5).

<sup>116</sup> *Metcalfe Report* (n 7) 128-131.

<sup>117</sup> Rachel Carson et al, *Evaluation of the Children's Contact Service Activity: Final report* (Research Report, Australian Institute of Family Studies, 2023).

The report also reviewed efforts to build capability to more effectively support CALD families through the FRSP over time, including:

- the inclusion of positions for a number of CALD participants in the scholarship scheme outlined above (though noting this was not an ongoing funding stream),
- As part of the 2017-20 pilot referenced above, at least six of the eight funded FRCs specifically included CALD communities in their target client groups, and
- In general, the Grant Opportunity Guidelines for the FRSP encourage grantees to consider how they will ensure their services are accessible to people from CALD backgrounds.

Metcalf observed a range of complex, intersecting needs impacting CALD clients of FRSP services. A key message was that partnerships between mainstream and specialist organisations are critical to engaging with and meeting the needs of CALD communities. Such organisations include Migrant Resource Centres, as well as specific ethnic and cultural bodies and services for CALD communities in areas such as family violence, disability, and migration legal assistance. A further message was that, for some CALD clients, a culturally embedded fear of the family law system may mean that, even in cases that would normally make FDR inappropriate, legally assisted FDR with appropriate cultural support may be the safest and best option.<sup>118</sup>

In response to the issues identified, the *Metcalf Report* emphasised the importance of upscaling capacity within the FRSP for providers to deliver case management and legally assisted FDR to support CALD clients, particularly for those who may lose all of their informal community and family support as a result of separation.<sup>119</sup> Council endorses this position.

#### **Recommendation 25:**

***That Family Relationship Services Program providers be required to build partnerships with specialist organisations to meet the varied needs of the communities they serve, including those with high numbers of culturally and linguistically diverse clients.***

#### **6.7.3 People with a disability**

Council acknowledges that family violence and other risk factors play out significantly for people with a disability. The Australian Bureau of Statistics reported that 5.5 million Australians or 21.4% of the population had disability, up from 17.7% in 2018<sup>120</sup>. Women with a disability are at particular risk of experiencing family violence. According to the Australian Bureau of Statistics, women with a disability are almost twice as likely as women without a disability to have experienced physical or sexual violence by a cohabiting partner over a 12-month period.<sup>121</sup> People with a disability also face unique barriers to accessing justice and engaging with Lighthouse, due to particular vulnerabilities they may experience and the resulting need for greater support to deal with family violence and court proceedings.

<sup>118</sup> *Metcalf Report* (n 7) 130.

<sup>119</sup> *Ibid.*

<sup>120</sup> Australian Bureau of Statistics, *Disability, Ageing and Carers, Australia: Summary of Findings* (Web Page) <<https://www.abs.gov.au/statistics/health/disability/disability-ageing-and-carers-australia-summary-findings/latest-release>>.

<sup>121</sup> Australian Bureau of Statistics, *Disability and Violence – In Focus: Crime and Justice Statistics* (Web Page) <<https://www.abs.gov.au/statistics/people/crime-and-justice/focus-crime-and-justice-statistics/disability-and-violence-april-2021>>.

For instance, they may encounter physical barriers to accessing services, insufficient accessible information about ways to report, rights, and available support, and inadequate specialised support services.

Because of the increased risk and unique barriers experienced by people with disability, ideally the FCFCOA and FCWA would be funded for Disability Liaison Officer (DLO) positions for family law matters, with a particular focus on the Lighthouse and the Evatt List. In addition, they would receive additional funding to improve accessibility and WCAG 2.0 compliance of the bespoke online Family DOORS Triage Application and associated documents including the safety and wellbeing plan and copy of their risk screen responses. The introduction of the DLO role would: (1) provide guidance and support to court users with disability in relation to undertaking risk screening, and navigating the Evatt List and more broadly family law proceedings, and (2) connect them with crucial legal and social support services within the community at the local, state, territory, and national levels.

**Recommendation 26:**

***That the Government provide funding for a pilot to introduce Disability Liaison Officers to provide guidance and support to court users in the Federal Circuit and Family Court of Australia and Family Court of Western Australia in family law proceedings, particularly in cases involving family violence, and to connect them with crucial legal and social support services within the community.***

The *Metcalfe Report* identified that one in six, or around 18% of Australians have a disability, however 5.4% of FRSP clients were reported as having a disability.<sup>122</sup> The report concluded that this suggests that people with disability are not accessing FRSP services at a rate that is representative of the general population. Council notes this may also indicate that this information is not routinely collected by service providers or that people are not disclosing a disability in service intake procedures. The report also highlights anecdotal reporting that numbers of children with diagnosed disability, particularly autism spectrum and behavioural disorders, is increasing.

The *2023 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with a Disability* identified a range of challenges for people with disability in accessing the services they need, such as the availability of information and communications, and qualified interpreters.<sup>123</sup> The Royal Commission also noted that intersectional barriers can be particularly challenging for people with disability. For example, people with disability are 2.6 times more likely to have experienced intimate partner violence in the last 12 months. The *Metcalfe Report* notes that this underscores the importance of appropriate responses to family violence in terms of accessibility for this cohort.<sup>124</sup>

The *Metcalfe Report* emphasised the importance of FRCs building partnerships with local disability services in order to understand the needs of their local communities, facilitate warm referrals, and enhance access for people with disability. The report further highlighted the importance of ensuring FRSP services involving clients with disability are provided by staff who are appropriately trained in working with people with disability. Council endorses these positions.

<sup>122</sup> *Metcalfe Report* [n 7] 131 citing 'People with Disability in Australia', *Australian Institute of Health and Welfare* (Web Page) <<https://www.aihw.gov.au/reports/disability/people-with-disability-in-australia/contents/people-with-disability/prevalence-of-disability>>.

<sup>123</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, 'Executive Summary - Our Vision for an Inclusive Australia and Recommendations' (Final Report, 2023) 67.

<sup>124</sup> *Metcalfe Report* [n 7] 131.

**Recommendation 27:**

***That the Attorney-General's Department (Cth) consider options to ensure that court services, legal professionals and Family Relationship Services Program reporting captures the frequency of disclosure of disability by clients, where individuals agree to disclose this and seek feedback to support evidence-based decision-making on the effectiveness of the programs in supporting clients experiencing disability.***

**6.7.4 LGBTIQ+ People**

Limited information is available about LGBTQIA+ people's experiences and needs in relation to family law services when they separate; this became apparent when Council met with various members of these communities. FRSP program reporting does not capture sexuality of clients, making it difficult to assess FRSP service rates comparable with the population for LGBTQIA+ people. A 2019 scoping review identified that 'prevailing heteronormativity in services and, more broadly, in society, creates additional pressures for rainbow families in accessing family law support'.<sup>125</sup> LGBTQIA+ people face significant barriers to help-seeking, including fears of discrimination within service systems, and family violence care often being focused on heterosexual relationships, female victims/survivors and male perpetrators. LGBTQIA+ Australians with other diverse identities, such as being multicultural or multifaith, having a disability, or Aboriginal and/or Torres Strait Islander people, may also be at higher risk of family violence due to cultural sensitivities and marginalisation.

Given the significant challenges and intersecting needs impacting separating LGBTQIA+ families, the *Metcalfe Report* identifies that:

'enhancing accessibility for these families requires conscious and dedicated efforts to ensure that services are seen as welcoming and understanding. These efforts are particularly important for the large group of Christian charitable organisations delivering FRSP services, which may come with a level of stigma for rainbow families. Staff in all service providers should be appropriately trained, to ensure they are confident in working with rainbow families, do not make assumptions, and ask the right questions.'<sup>126</sup>

**Recommendation 28:**

***That all Family Relationship Services Program service providers receive appropriate training to support LGBTQIA+ families.***

**Recommendation 29:**

***That the Attorney-General's Department (Cth) consider options to ensure that court services, legal professionals and Family Relationship Services Program reporting captures the sexuality and gender identity of clients, where individuals agree to disclose this, to support evidence-based decision-making on the effectiveness of the programs supporting LGBTQIA+ clients.***

<sup>125</sup> Emily Armstrong and Paula Fernandez Arias, *Rainbow Family Formation and Dissolution in Australia* [Report, Centre for Better Relationships, 2019].  
<sup>126</sup> *Metcalfe Report* (n 7) 132 citing *ibid*.

# Bibliography

## A: Articles/Books/Reports

Armstrong, Emily and Paula Fernandez Arias, 'Rainbow Family Formation and Dissolution in Australia' (Report, Centre for Better Relationships, 2019)

Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family Law System* (Final Report 135, March 2019)

Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Final Report, ALRC, December 2017)

Australian Law Reform Commission, *Review of the Family Law System* (Discussion Paper 86, October 2018)

Barlow, Anne et al, *Creating Paths to Family Justice: Briefing Paper and Report on Key Findings* (Report, University of Exeter, 2017)

Carson, Rachel et al, *Evaluation of the Children's Contact Service Activity: Final report* (Research Report, Australian Institute of Family Studies, 2023)

Carson, Rachel et al, 'Evaluation of the Lawyer-assisted Family Law Property Mediation: Legal Aid Commission Trial' (Australian Institute of Family Studies Final Report, 2022)

Carson, Rachel et al, *Evaluation of the Small Claims Property Pilot – Priority Property Pools Under \$500,000 (PPP 500)* (Research Report, Australian Institute of Family Studies, November 2022)

Commonwealth of Australia (Joint Select Committee on Australia's Family Law System), *Improvements in family law proceedings* (Interim Report, December 2020)

Commonwealth of Australia (Joint Select Committee on Australia's Family Law System), *Improvements in family law proceedings* (Second Interim Report, March 2021a)

Commonwealth of Australia (Joint Select Committee on Australia's Family Law System), *Improvements in family law proceedings* (Final Report, November, 2021b)

Department of Social Services (Cth), *National Plan to End Violence Against Women and Children 2022-2032* (Report, 2022)

Department of Social Services (Cth), *Safe & Supported: The National Framework for Protecting Australia's Children 2021-2031* (Report, 2021)

El-Murr, Alissar, 'Intimate Partner Violence in Australia Refugee Communities' (Policy and Practice Paper, AIFS, December 2018)

Family Law Council, *The Answer from an Oracle: Arbitrating Family Law Property and Financial Matters* (Discussion Paper, 2007)

Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems: Interim Report (Terms 1 and 2)* (Report, 2015)

Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems (Terms 3, 4 and 5)* (Final Report 2016)

Family Law Council, *Family Violence and Systems Abuse* (Report, 2024)

Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (Report, 2012a)

Family Law Council, *Improving the Family Law System for Culturally and Linguistically Diverse Clients* (Report, 2012b)

- Family Law Council, *Supporting and Strengthening the Voice of Children* (Report, 2024)
- Federation of Ethnic Communities' Councils of Australia, *Multicultural Access and Equity Report* (Report, 2020)
- Halford, W Kim, Christopher Pepping and Jemima Petch, 'The Gap Between Couple Therapy Research Efficiency and Practice Effectiveness' (2016) 42(1) *Journal of Marital and Family Therapy* 32-44
- Heard, Genevieve and Andrew Bickerdike, "'Am I on track?' Family dispute resolution and the client need for guidance in post-separation property matters' (2021) 34(3) *Australian Journal of Family Law* 211-230
- House of Representatives Social Policy and Legal Affairs Committee, *Inquiry into Family, Domestic and Sexual Violence* (Report, 2021)
- House of Representatives Standing Committee on Social Policy and Legal Affairs Committee, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (Report, December 2017)
- Joint Council on Closing the Gap, *National Agreement on Closing the Gap 2020-2030* (Report, July 2020)
- JUSTICE (UK), *Delivering Justice in an Age of Austerity* (Report, 2015)
- JUSTICE (UK), *Improving Access to Justice for Separated Families* (Report, 2022)
- JUSTICE (UK), *Solving Housing Disputes* (Report, 2020)
- JUSTICE (UK), *Understanding Courts* (Report, 2019)
- Kaspiew, Rae et al, *Evaluation of the 2006 Family Law Reforms* (Research Report, Australian Institute of Family Studies, December 2009)
- Kaspiew, Rae et al, *Evaluation of the 2012 Family Violence Amendments: Synthesis Report* (Research report, Australian Institute of Family Studies, October 2015)
- Kaspiew, Rae et al, *Experiences of Separated Parents Study* (Research Report, Australian Institute of Family Studies, October 2015)
- Legal Aid Queensland, *Annual Report 2022-23* (Report, 2023)
- Mantle, Greg and Alan Critchley, 'Social Work and Child-centred Family Court Mediation' (2004) 34(8) *The British Journal of Social Work* 1161
- Metcalfe, Andrew, *Support for Separating Families: Review of the Family Relationships Services Program* (Final Report, June 2024)
- Moran, Jessica, 'New online program for couples going through divorce could keep disputes out of court' *ABC News* (online, 9 July 2020)
- Mundy, Warren, *Independent Review of the National Legal Assistance Partnership* (Final Report, March 2024)
- National Inquiry into Missing and Murdered Indigenous Women and Girls (Canada), *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (Final Report, June 2019)
- National Office for Child Safety (Cth), *National Strategy to Prevent and Respond to Child Sexual Abuse 2021-2030* (Report, 2021)
- Pereira, Isabella et al, *The Varying Paths to Justice: Mapping problem resolution routes for users and non-users of the civil, administrative and family justice systems* (Ministry of Justice Report, 2015)
- Petch, Jemima et al, 'Couple Counselling Outcomes in an Australian Not for Profit: Evidence for the Effectiveness of Couple Counselling Conducted with Routine Practice' (2014) 35 *Australian and New Zealand Journal of Family Therapy* 445-46

Rabinovich-Einy, Orna and Ethan Katsh, 'Artificial Intelligence and the Future of Dispute Resolution; The Age of AI-DR' in Mohamed Abdel Wahab, Daniel Rainey and Ethan Katsh (eds) *Online Dispute Resolution: Theory and Practice* (Eleven International Publishing, 2021)

---

Robertson, Laura and Karen Broadhurst, 'Introducing Social Science Evidence in Family Court Decision-Making and Adjudication: Evidence from England and Wales' (2019) 33(2) *International Journal of Law, Policy and the Family* 181–203

---

Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Executive Summary: Our Vision for an Inclusive Australia and Recommendations* (Final Report, September 2023)

---

Sourdin, Tania, *Alternative Dispute Resolution (ADR) Principles: From Negotiation to Mediation* (Paper, January 2014)

---

Sourdin, Tania, 'Using Alternative Dispute Resolution to Save Time' (2014) 33(1) *The Arbitrator & the Mediator*

---

Sourdin, Tania, *Alternative Dispute Resolution* (3<sup>rd</sup> ed, Law Book Company, 2008)

---

Thomas, Julian et al, 'Measuring Australia's Digital Divide: Australian Digital Inclusion Index 2023' (Report, 2023)

---

Tkacukova, Tatiana, 'Changing Landscape of Advice Provision: Online Forums and Social Media Run by McKenzie Friends' (2020) 4 *Child and Family Law Quarterly* 397

---

## **B: Cases**

*Dobbs v National Bank of Australasia* (1935) 53 CLR 643

---

*TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533

---

## **C: Legislation**

*Family Court Act 1997* (WA)

---

*Family Court Rules 2021* (WA)

---

*Family Law Act 1975* (Cth)

---

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

---

*Federal Circuit and Family Court of Australia (Division 2) (Family Law) Rules* (Cth)

---

*Federal Circuit and Family Court of Australia (Family Law) Rules* (Cth)

---

*International Arbitration Act 1974* (Cth)

---

## **D: Other**

Attorney-General's Department (Cth), *amica - an online Dispute Resolution Tool* (Web Page) <<https://www.ag.gov.au/families-and-marriage/families/family-law-system/amica-online-dispute-resolution-tool>>

---

Attorney-General's Department (Cth), *Family Dispute Resolution Register* (Web Page) <<https://www.fdr.ag.gov.au>>

---

Attorney-General's Department (Cth), 'Family Law – information and services', *Family law system* (Web Page) <<https://www.ag.gov.au/families-and-marriage/families/family-law-system>>

---

Australian Bureau of Statistics, *Disability, Ageing and Carers, Australia: Summary of Findings* (Web Page) <<https://www.abs.gov.au/statistics/health/disability/disability-ageing-and-carers-australia-summary-findings/latest-release>>

---

Australian Bureau of Statistics, *Disability and Violence – In Focus: Crime and Justice Statistics* (Web Page) <<https://www.abs.gov.au/statistics/people/crime-and-justice/focus-crime-and-justice-statistics/disability-and-violence-april-2021>>

---

Australian Government (Cth), *Family Law Pathways Network* (Web Page) <<https://familylawpathways.com.au/>>

---

Australian Institute of Family Law Arbitrators and Mediators, *Arbitration* (Web Page) <<https://www.aiflam.org.au/aiflam-members/arbitration>>

---

Australian Institute of Health and Welfare, *People with Disability in Australia* (Web Page) <<https://www.aihw.gov.au/reports/disability/people-with-disability-in-australia/contents/people-with-disability/prevalence-of-disability>>

---

Family Relationships Online, *Find local help* (Web Page) <<https://www.familyrelationships.gov.au/find-local-help>>

---

Family Violence Law Help, *Family Violence Law Help* (Web Page) <<https://familyviolencelaw.gov.au/>>

---

Federal Circuit and Family Court of Australia, *About the Courts* (Web Page) <<https://www.fccoa.gov.au/about>>

---

Federal Circuit and Family Court of Australia, *Family Dispute Resolution* (Web Page) <<https://www.fccoa.gov.au/fl/family-dispute-resolution>>

---

Federal Circuit and Family Court of Australia, *Family Law Practice Direction: Arbitration* (Web Page) <<https://www.fccoa.gov.au/fl/pd/fam-arbitration>>

---

Federal Circuit and Family Court of Australia, *Indigenous Family Liaison Officers* (Web Page) <<https://www.fccoa.gov.au/fl/pubs/iflo-national>>

---

Fitzroy Legal Service and Darebin Community Legal Centre, Submission No. 7 to Australian Law Reform Commission, *Review of the Family Law System* (2 October 2018)

---

Legal Aid Queensland, *Arb Lite – Family Law property arbitration pilot* (Web Page, 6 July 2022) <<https://www.legalaid.qld.gov.au/Find-legal-information/Publications-and-resources/Factsheets/Arb-Lite-Family-law-property-arbitration-pilot>>

---

Mediations Australia, *How to Resolve Your Family Law Dispute Online* (Web Page, 20 May 2021) <<https://mediationsaustralia.com.au/how-to-resolve-your-family-law-dispute-online/>>

---

Parliament of Australia, Explanatory Memorandum of the Family Law Amendment Bill 2024

---

Relationships Australia, Submission No. 11 to Australian Law Reform Commission, *Review of the Family Law System* (2 October 2018)

---

**Appendix A:  
Discussion Draft:  
*Family Dispute Resolution Act***

Discussion Draft -  
Family Law Dispute  
Resolution Act

# Contents

<b>PART 1—Preliminary</b>	<b>64</b>
1 Name	64
2 Commencement	64
3 Definitions	64
<b>PART 2—Pre-Action Procedures – Financial proceedings</b>	<b>65</b>
4 General	65
5 Where compliance with the preaction procedures in property matters is unnecessary	66
6 Compliance	66
7 Pre-action procedures	67
8 Disclosure and exchange of correspondence	68
9 Lawyers’ obligations	68
<b>PART 3—Pre-Action Procedures – Parenting proceedings</b>	<b>69</b>
10 General	69
11 Where compliance with the pre-action-procedures in parenting matters is unnecessary	70
12 Compliance	70
13 Pre-action procedures	71
14 Disclosures and exchange of correspondence	72
15 Lawyers’ obligations	72
<b>PART 4—Family Dispute Resolution</b>	<b>73</b>
16 General interpretation	73
17 Mediating	73
18 Meaning and form of “mediation agreement”	73
19 Application of Act	74
20 Restrictions on disclosure	74
21 Recording of FDR settlement agreement as order of court	75
22 Rules	75

<b>PART 5—Family Law Arbitration</b>	<b>76</b>
<b>23 Definitions</b>	<b>76</b>
<b>24 Scope</b>	<b>76</b>
<b>25 Applicable law</b>	<b>77</b>
<b>26 Arbitration agreement</b>	<b>77</b>
<b>27 Application for court assistance</b>	<b>77</b>
<b>28 Qualification and selection of arbitrator</b>	<b>78</b>
<b>29 Disclosure by arbitrator; Disqualification</b>	<b>79</b>
<b>30 Party participation</b>	<b>79</b>
<b>31 Interim award</b>	<b>79</b>
<b>32 Protection of party or child</b>	<b>80</b>
<b>33 Powers and duties of arbitrator</b>	<b>80</b>
<b>34 Costs of the arbitrator</b>	<b>80</b>
<b>35 Recording of hearing</b>	<b>81</b>
<b>36 Award</b>	<b>81</b>
<b>37 Confirmation of award</b>	<b>81</b>
<b>38 Correction by arbitrator of unregistered award</b>	<b>81</b>
<b>39 Correction by Court of unregistered award</b>	<b>81</b>
<b>40 Vacation or amendment by court of unregistered award</b>	<b>82</b>
<b>41 Clarification of a registered award</b>	<b>82</b>
<b>42 Enforcement of registered award</b>	<b>82</b>
<b>43 Appeal</b>	<b>82</b>
<b>44 Immunity of arbitrator</b>	<b>83</b>

# PART 1— Preliminary

## 1 Name

This Act is the Discussion Draft - Family Law Dispute Resolution Act.

## 2 Commencement

This Act commences six months after Royal Assent.

## 3 Definitions

(1) In this Act:

**Act** means this Act.

**Family Dispute Resolution (FDR)** means any process aimed at resolving a dispute between parties without court involvement. FDR can be used for disputes concerning your children and/or your financial/property issues. You should consider attending FDR before commencing proceedings in the Family Court. You are required to try to reach agreement using dispute resolution processes before the court will hear your case. It is also faster and cheaper than waiting for the court to make a decision for you. FDR involves an independent impartial person (with specialist training) assisting the parties resolve their issues. You and your children will benefit from an early resolution of your dispute.

**FDR processes** include:

- (a) **Arbitration** – where both parties choose an arbitrator and agree to be bound by their award, which is issued after a hearing at which all parties have the opportunity to be heard. The decision is final and binding and can be enforced by a court;
- (b) **Negotiation** – when parties discuss one or more issues where a conflict exists, which is intended to resolve at least one of these issues;
- (c) **Mediation** – where the mediator facilitates negotiations by identifying issues, exploring settlement options, discussing consequences of not reaching an agreement and encouraging each party to accommodate the other party's interests, and hopefully getting to a voluntary mutually acceptable agreement, which can be made into an order;
- (d) **Conciliation** – is a type of mediation, and focuses on early stages of negotiation, such as opening channels of communication, bringing the parties together and identifying mutually agreed issues;
- (e) **Collaborative Law** – offers parties the support, guidance and protection of their own, specially-trained lawyers. If either party then decides to go to court, they both must hire new lawyers. This motivates everyone involved to continue working toward a mutually agreeable resolution. The parties retain control of the process. It may also involve other professionals.
- (f) **pre-action procedures** means the set of principles and procedures contained within the Act, with which the parties must comply before starting a proceeding.

**Federal Circuit and Family Court of Australia** has the same meaning as defined in section 7 of the *Federal Circuit and Family Court of Australia Act 2021*.

## PART 2— Pre-Action Procedures – Financial proceedings

### 4 General

- (1) Subject to section 5, each prospective party to a proceeding in the Federal Circuit and Family Court of Australia must make a genuine effort to resolve the dispute before filing an application to start proceedings by following the preaction procedures outlined in subsection 3 of this section.
- (2) The objectives of the pre-action procedures are:
  - (a) to encourage early and full disclosure in appropriate proceedings by the exchange of information and documents about the prospective proceeding;
  - (b) to provide parties with a process to avoid legal action by reaching a settlement of the dispute before starting a proceeding;
  - (c) to provide parties with a procedure to resolve the proceeding quickly and limit costs;
  - (d) to ensure the efficient management of proceedings in the court, if proceedings become necessary;
  - (e) to encourage parties, if proceedings become necessary, to seek only those orders that are reasonably achievable on the evidence;
  - (f) to give effect to the overarching purpose of the family law practice and procedure provisions as provided by section 67 of the *Federal Circuit and Family Court of Australia Act 2021* and section 95 of the *Family Law Act 1975*.
- (3) At all stages during the pre-action procedures and, if a proceeding is started, during the conduct of the proceedings, the parties must have regard to the following:
  - (a) the best way of exploring options for settlement, identifying the issues as soon as possible, and seeking resolution of them;
  - (b) the need to avoid protracted, unnecessary, hostile and inflammatory exchanges;
  - (c) the impact of correspondence on the intended reader (in particular, on the parties);
  - (d) the need to seek only orders that are reasonably achievable on the evidence and that are consistent with the current law;
  - (e) the principle of proportionality and the need to control costs because it is unacceptable for the costs of any proceeding to be disproportionate to the financial value of the subject matter of the dispute;
  - (f) the duty to make full and frank disclosure of all material facts, documents and other information relevant to the dispute.

Note: The duty of disclosure extends to the requirement to disclose any significant changes subsequent to the earlier disclosure of any documents.

- (4) Parties must not:
  - (a) use the preaction procedures for an improper purpose (for example, to harass the other party or cause unnecessary cost or delay); or
  - (b) in correspondence, raise irrelevant issues or issues that may cause the other party to adopt an entrenched, polarised or hostile position.

- (5) At the time of filing an application to start a proceeding or a response to that application, a party must file a Genuine Steps Certificate outlining:
  - (a) both:
    - (i) the party's compliance with the pre-action procedures; and
    - (ii) the genuine steps taken by the party to resolve the dispute; or
  - (b) the basis of any claim for an exemption from compliance with either or both the requirements referred to in subparagraphs (a)(i) and (ii).

## 5 Where compliance with the pre-action procedures in property matters is unnecessary

- (1) Compliance with the pre-action procedures is not necessary if:
  - (a) the proceeding is an application for divorce only; or
  - (b) the proceeding is an application relating to nullity or validity of marriage only; or
  - (c) the proceeding is a child support application or appeal; or
  - (d) the court is satisfied that, in the circumstances, it was not appropriate for a party to comply with the pre-action procedures.
- (2) For the purposes of subsection (1)(d), circumstances include the following:
  - (a) the proceeding involves allegations of family violence, or of a risk of family violence;
  - (b) the application is urgent;
  - (c) the applicant would be unduly prejudiced;
  - (d) there has been a previous application in the same cause of action in the 12 months immediately before the start of the proceeding.

## 6 Compliance

- (1) If a proceeding is subsequently started, the court may consider whether these requirements have been met and, if not, any consequences for non-compliance.
- (2) The court may take into account compliance and non-compliance with the pre-action procedures when it is making orders about case management and considering orders for costs.
- (3) In situations of non-compliance, the court may ensure that the complying party is in no worse position than the party would have been in had the pre-action procedures been complied with.

Note: Examples of non-compliance with the pre-action procedures include the following:

- (a) not sending a written notice of proposed application;
- (b) not providing sufficient information or documents to the other party;
- (c) not following a procedure required by the procedures;
- (d) not responding appropriately within the nominated time to the written notice of proposed application;
- (e) not responding appropriately within a reasonable time to any reasonable request for information, documents or other requirement of the procedures.

## 7 Pre-action procedures

- (1) Unless it is unsafe to do so, a person who is considering filing an application to start a proceeding must, before filing the application:
  - (a) give a copy of these pre-action procedures to the other prospective parties to the proceeding; and
  - (b) make inquiries about the dispute resolution services available; and
  - (c) invite the other parties to participate in FDR resolution with an identified person or organisation or other person or organisation to be agreed.
- (2) To the extent that it is safe to do so, each prospective party must:
  - (a) cooperate for the purpose of agreeing on an appropriate dispute resolution service; and
  - (b) make a genuine effort to resolve the dispute by participating in dispute resolution.
- (3) If the prospective parties reach agreement, they may arrange to formalise the agreement by filing an Application for Consent Orders.
- (4) Before filing an application, the proposed applicant must give to the other party (the proposed respondent) written notice (notice of intention to start a proceeding) of the proposed applicant's intention to start a proceeding if:
  - (a) there is no appropriate dispute resolution service available to the parties; or
  - (b) a party fails or refuses to participate in dispute resolution; or
  - (b) the parties are unable to reach agreement by dispute resolution.
- (5) A notice of intention to start a proceeding must set out:
  - (a) the issues in dispute; and
  - (b) the orders to be sought if proceedings are started; and
  - (c) a genuine offer to resolve the issues; and
  - (d) a time (the nominated time) that is at least 14 days after the date of the notice within which the proposed respondent must reply to the notice.
- (6) The proposed respondent must, within the nominated time, reply in writing to the notice under subsection (4), stating whether the offer is accepted and, if not, setting out:
  - (a) the issues in dispute; and
  - (b) the orders to be sought if proceedings are started; and
  - (c) a genuine counter offer to resolve the issues; and
  - (d) a time that is at least 14 days after the date of the proposed respondent's reply within which the proposed applicant must reply.
- (7) It is expected that a person will not start a proceeding by filing an application in a court unless:
  - (a) the proposed respondent does not respond to a notice of intention to start a proceeding; or
  - (b) agreement between the proposed parties is unable to be reached after a reasonable attempt to settle by correspondence under this Part.

## 8 Disclosure and exchange of correspondence

- (1) Parties to a proceeding have a duty to make full and frank disclosure of all information relevant to the issues in dispute in a timely manner.
- (2) As soon as practicable on learning of the dispute and in the course of exchanging correspondence, parties must exchange the following:
  - (a) a schedule of assets, income and liabilities;
  - (b) a list of documents in the party's possession or control that are relevant to the dispute;
  - (c) a copy of any document required by the other party, identified by reference to the list of documents.
- (3) Parties must agree to a reasonable place and time for the documents to be inspected and copied at the cost of the person requesting the copies.
- (4) Parties must not use a document disclosed by another party for a purpose other than the resolution or determination of the dispute to which the disclosure of the document relates.
- (5) Documents produced by a person to another person in compliance with the pre-action procedures are taken to have been produced on the basis of an undertaking from the party receiving the documents that the documents will be used for the purpose of the proceeding only.

## 9 Lawyers' obligations

- (1) Lawyers must, as early as practicable:
  - (a) familiarise themselves with sections 67 and 68 of the *Federal Circuit and Family Court of Australia Act 2021* and section 95 of the *Family Law Act 1975*.
  - (b) advise clients of ways of resolving the dispute without starting legal action; and
  - (c) advise clients of their duty to make full and frank disclosure, and of the possible consequences of breaching that duty; and
  - (d) endeavour to reach a solution by settlement rather than start or continue legal action, subject to this being in the best interests of the client and any child; and
  - (e) notify the client if, in the lawyer's opinion, it is in the client's best interests to accept a compromise or settlement that, in the lawyer's opinion, is a reasonable one; and
  - (f) in cases of unexpected delay, explain the delay and whether or not the client may assist to resolve the delay; and
  - (g) advise clients of the estimated costs of legal action as required by the relevant rules; and
  - (h) advise clients about the factors that may affect the court in considering costs orders; and
  - (i) give clients documents prepared by the court about:
    - (i) the legal aid services and dispute resolution services available to them; and
    - (ii) the legal and social effects and the possible consequences for children of proposed litigation; and
  - (j) actively discourage clients from making ambit claims or seeking orders that the evidence and established principles, including recent case law, indicate is not reasonably achievable.
- (2) A lawyer has an obligation to take the appropriate action in the event of their client failing to comply with their disclosure obligation including, if necessary, ceasing to act for the client.

## PART 3— Pre-Action Procedures – Parenting proceedings

### 10 General

- (1) Subject to section 11, each prospective party to a proceeding in the Federal Circuit and Family Court of Australia is required to make a genuine effort to resolve the dispute before filing an application to start proceedings by following the preaction procedures outlined in this section.
- (2) The objectives of the pre-action procedures are as follows:
  - (a) to encourage early and full disclosure in appropriate proceedings by the exchange of information and documents about the prospective proceeding;
  - (b) to provide parties with a process to avoid legal action by reaching a settlement of the dispute before starting a proceeding;
  - (c) to provide parties with a procedure to resolve the proceeding quickly and limit costs;
  - (d) to ensure the efficient management of proceedings in the court, if proceedings become necessary;
  - (e) to encourage parties, if proceedings become necessary, to seek only those orders that are reasonably achievable on the evidence;
  - (f) to give effect to the overarching purpose of the family law practice and procedure provisions as provided by section 67 of the *Federal Circuit and Family Court of Australia Act 2021* and section 95 of the *Family Law Act 1975*.
- (3) At all stages during the pre-action procedures and, if a proceeding is started, during the conduct of the proceedings, the parties must have regard to the following:
  - (a) the best interests of any child, including the need to protect and safeguard them against risk or harm;
  - (b) the developmental, psychological, emotional and cultural needs of the child, the capacity of each person who is proposed to have parental responsibility for the child to provide for those needs, and the benefit to the child of being able to have a relationship with people who are significant to them, where it is safe to do so;
  - (c) the potential damage to a child involved in a dispute between the parents, particularly if the child is encouraged to take sides or take part in the dispute;
  - (d) the impact of parenting applications that may be motivated by intentions other than the best interests of the child;
  - (e) the best way of exploring options for settlement, identifying the issues as soon as possible, and seeking resolution of them;
  - (f) the need to avoid protracted, unnecessary, hostile and inflammatory exchanges;
  - (g) the impact of correspondence on the intended reader (in particular, on the parties);
  - (h) the need to seek only orders that are reasonably achievable on the evidence and that are consistent with the current law;
  - (i) the duty to make full and frank disclosure of all material facts, documents and other information relevant to the dispute.

Note: The duty of disclosure extends to the requirement to disclose any significant changes

- (4) Parties must not:
  - (a) use the pre-action procedures for an improper purpose (for example, to harass the other party or to cause unnecessary cost or delay); or
  - (b) in correspondence, raise irrelevant issues or issues that may cause the other party to adopt an entrenched, polarised or hostile position.
- (5) The court expects parties to take a sensible and responsible approach to the pre-action procedures.
- (6) At the time an application to start a proceeding is filed:
  - (a) each party must file a Genuine Steps Certificate outlining:
    - (i) the party's compliance with the pre-action procedures and the genuine steps taken by them to resolve the dispute; or
    - (ii) the basis of any claim for an exemption from compliance with either or both the matters referred to in subparagraph (i); and
  - (b) the applicant must file with the court a certificate by a family dispute resolution practitioner.

### **11 Where compliance with the pre-action-procedures in parenting matters is unnecessary**

- (1) Compliance with the pre-action procedures is not necessary if the court is satisfied that, in the circumstances, it was not appropriate for a party to comply with the pre-action procedures.
- (2) For the purposes of subsection (1) circumstances include the following:
  - (a) the proceeding involves allegations of family violence, a risk of family violence or child abuse;
  - (b) the application is urgent;
  - (c) the applicant would be unduly prejudiced;

### **12 Compliance**

- (1) The court may take into account compliance and non-compliance with the pre-action procedures when it is making orders about case management and considering orders for costs.
- (2) Unreasonable non-compliance may result in the court staying the proceeding pending compliance, or ordering the non-complying party to pay all or part of the costs of the other party or parties in the proceeding.
- (3) In situations of non-compliance, the court may ensure that the complying party is in no worse position than the party would have been in had the pre-action procedures been complied with.

Note: Examples of non-compliance with the pre-action procedures include the following:

- (a) not sending a written notice of proposed application;
- (b) not providing sufficient information or documents to the other party;
- (c) not following a procedure required by the procedures;
- (d) not responding appropriately within the nominated time to the written notice of proposed application;
- (e) not responding appropriately within a reasonable time to any reasonable request for information, documents or other requirement of the procedures.

### 13 Pre-action procedures

- (1) A person who is considering filing an application to start a proceeding must, before filing the application, and only if it is safe to do so:
  - (a) give a copy of these pre-action procedures to the other prospective parties to the proceeding; and
  - (b) make inquiries about the family dispute resolution services available; and
  - (c) invite the other parties to participate in family dispute resolution with an identified person or organisation or other person or organisation to be agreed.
- (2) To the extent that it is safe to do so, each prospective party must:
  - (a) cooperate for the purpose of agreeing on an appropriate family dispute resolution service; and
  - (b) make a genuine effort to resolve the dispute by participating in family dispute resolution.
- (3) If the prospective parties reach agreement, they may arrange to formalise the agreement by filing an Application for Consent Orders.
- (4) Before filing an application, the proposed applicant must give to the other party (the proposed respondent) written notice (notice of intention to start a proceeding) of the proposed applicant's intention to start a proceeding if:
  - (a) there is no appropriate family dispute resolution service available to the parties; or
  - (b) a party fails or refuses to participate in family dispute resolution; or
  - (c) the parties are unable to reach agreement by family dispute resolution.
- (5) A notice of intention to start a proceeding must set out:
  - (a) the issues in dispute; and
  - (b) the orders to be sought if a proceeding is started; and
  - (c) a genuine offer to resolve the issues; and
  - (d) a time (the nominated time) that is at least 14 days after the date of the notice within which the proposed respondent is required to reply to the notice.
- (6) The proposed respondent must, within the nominated time, reply in writing to the notice under subsection (4), stating whether the offer is accepted and, if not, setting out the proposed applicant's intention to start a proceeding if:
  - (a) the issues in dispute; and
  - (b) the orders to be sought if a proceeding is started; and
  - (c) a genuine counter offer to resolve the issues; and
  - (d) the time that is at least 14 days after the date of the proposed respondent's reply within which the proposed applicant must reply.
- (7) Other than in the case of urgency or where an issue of personal safety is involved, a party must not start a proceeding by filing an application in a court unless:
  - (a) the proposed respondent does not respond to a notice of intention to start a proceeding; or
  - (b) agreement between the proposed parties is unable to be reached after a reasonable attempt to settle by correspondence under this Part.

## 14 Disclosures and exchange of correspondence

- (1) Parties to a proceeding have a duty to make full and frank disclosure of all information relevant to the issues in dispute in a timely manner.
- (2) As soon as practicable on learning of the dispute under subsection 13(4), parties must exchange copies of documents in their possession or control relevant to an issue in dispute (for example, medical reports and school reports).
- (3) Documents produced by a person to another person in compliance with the pre-action procedures are taken to have been produced on the basis of an undertaking from the party receiving the documents that the documents will be used for the purpose of the proceeding only.
- (4) Documents produced by a person to another person in compliance with the pre-action procedures are taken to have been produced on the basis of an undertaking from the party receiving the documents that the documents will be used for the purpose of the proceeding only.

## 15 Lawyers' obligations

- (1) Lawyers must, as early as practicable:
  - (a) familiarise themselves with sections 67 and 68 of the Federal Circuit and Family Court of Australia Act 2021 and section 95 of the Family Law Act 1975.
  - (b) advise clients of ways of resolving the dispute without starting legal action; and
  - (c) advise clients of their duty to make full and frank disclosure, and of the possible consequences of breaching that duty; and
  - (d) endeavour to reach a solution by settlement rather than start or continue legal action, subject to this being in the best interests of the client and any child; and
  - (e) notify the client if, in the lawyer's opinion, it is in the client's best interests to accept a compromise or settlement that, in the lawyer's opinion, is a reasonable one; and
  - (f) in cases of unexpected delay, explain the delay and whether or not the client may assist to resolve the delay; and
  - (g) advise clients of the estimated costs of legal action under the relevant rules; and
  - (h) advise clients about the factors that may affect the court in considering costs orders; and
  - (i) give clients documents prepared by the court about:
    - (i) the legal aid services and dispute resolution services available to them; and
    - (ii) the legal and social effects and the possible consequences for children of proposed litigation; and
  - (j) actively discourage clients from making ambit claims or seeking orders that the evidence and established principles, including recent case law, indicate is not reasonably achievable.
- (2) A lawyer has an obligation to take the appropriate action in the event of their client failing to comply with their disclosure obligation including, if necessary, ceasing to act for the client.

## PART 4— Family Dispute Resolution

### 16 General interpretation

(1) In this Act, unless the context otherwise requires:

**approved certification scheme** means an accreditation or a certification scheme designated as an approved certification scheme under this Act;

**certified FDR mediator** means a mediator who is certified under an approved certification scheme; where more than one mediator is appointed for an FDR event, a reference to a mediator under this Act is a reference to all the mediators for an FDR event.

**designated FDR service provider** means an FDR service provider designated under this Act;

**FDR communication**, in relation to an FDR event, means:

- (a) anything said or done;
- (b) any document prepared; or
- (c) any information provided,

for the purposes of or in the course of FDR, and includes an FDR agreement or an FDR settlement agreement;

**FDR institution** means a body or an organisation that administers an accreditation or a certification scheme for FDR practitioners;

**FDR settlement agreement**, in relation to an FDR event, means an agreement by some or all of the parties to the FDR Event settling the whole or part of the dispute to which the mediation relates;

**party to a FDR event** means any party to the whole or part of a dispute that is referred for FDR, but does not include any mediator conducting the FDR event;

**third party**, in relation to an FDR event, means a person who is:

- (a) not a party to the FDR event;
- (b) not a mediator for the FDR event; and
- (c) not an FDR event service provider.

### 17 Mediating

(1) Mediation includes a meeting between the mediator, and one or more of the parties to the dispute, and includes any activity undertaken (whether by a mediator, a party to the dispute or some other person):

- (a) to arrange or prepare for such a meeting, whether or not the meeting takes place; and
- (b) to follow up on any matter or issue raised in such a meeting.

(2) For the purposes of subsection (1), a meeting includes a meeting conducted by electronic communication, video conferencing or other electronic means.

### 18 Meaning and form of “mediation agreement”

(1) In this Act, **mediation agreement** means an agreement by 2 or more persons to refer the whole or part of a dispute which has arisen, or which may arise, between them for mediation.

(2) A mediation agreement must be in writing and signed by the parties.

(3) mediation agreement is in writing if its content is recorded in any form, whether or not the mediation agreement has been concluded orally, by conduct or by other means.

## 19 Application of Act

- (1) This Part applies to, or in relation to, any FDR event conducted under a mediation agreement where:
  - (a) the mediation is wholly or partly conducted in Australia; or
  - (b) the agreement provides that this Act or the law of Australia is to apply to the mediation.
- (2) The Attorney-General may, subject to such terms and conditions as the Attorney-General thinks fit to impose may:
  - (a) designate any FDR service provider to be a designated mediation service provider for the purposes of this Act; and
  - (b) designate any accreditation or certification scheme administered by an FDR Service to be an approved certification scheme for the purposes of this Act.
- (3) Notice of every designation must be published in the Commonwealth Government Gazette.

## 20 Restrictions on disclosure

- (1) Subject to subsections (2) and (3), a person must not disclose any mediation communication relating to a mediation to any third party to the mediation.
- (2) A person may disclose an FDR communication to a third party to the mediation if:
  - (a) provided for by the *Evidence Act 1995*;
  - (b) the disclosure is made with the consent of:
    - (i) all the parties to the mediation; and
    - (ii) for an FDR communication that is made by a person other than a party to the mediation, the maker of the FDR communication;
  - (c) the content of an FDR communication is information that has already been made available to the public at the time of its disclosure, other than information that is only in the public domain due to an unlawful disclosure;
  - (d) there are reasonable grounds to believe that the disclosure is necessary to prevent or minimise:
    - (i) the danger of injury to any person; or
    - (ii) the abuse, neglect, abandonment or exploitation of any child or young person;
  - (e) the disclosure is made for research, evaluation or educational purposes without revealing, or being likely to reveal, whether directly or indirectly, the identity of the maker of the FDR communication or any person to whom the mediation communication relates;
  - (f) the disclosure is made for the purpose of seeking legal advice;
  - (g) the disclosure is required by an order of court, or required or authorised by or under any written law;
  - (h) the disclosure is made under compulsion of a law enforcement agency in the investigation of any offence under any written law;
  - (i) the disclosure is in compliance with a request or requirement imposed by a regulatory authority and is necessary to enable the regulatory authority to perform its duties or discharge its functions; or
  - (j) the FDR communication relates to the commission of any offence under any written law or was made in furtherance of any illegal purpose.

- (3) Despite subsection (2), a person may, with permission of a court or an arbitral tribunal, disclose an FDR communication to a third party to the FDR event:
- (a) for the purpose of enforcing or disputing a settlement agreement;
  - (b) for the purpose of establishing or disputing an allegation or a complaint of professional misconduct against a mediator or any other person who participated in the mediation in a professional capacity;
- (4) In this section:
- (a) **disclosure**, in relation to information, includes permitting access to the information;
  - (b) **law enforcement agency** means any authority or person charged with the duty of investigating offences or charging offenders under any written law;
  - (c) **regulatory authority** means any body or organisation in Australia charged with the public function of regulating entities or individuals, whether under any written law or otherwise.

## 21 Recording of FDR settlement agreement as order of court

- (1) Where an FDR settlement agreement has been made in an FDR event in relation to a dispute for which no proceedings have been commenced in a court, any party to the agreement may, with the consent of all the other parties to that agreement, apply to a court for the court to consider making the agreement as an order of court.
- (2) The application must be made within:
- (a) 8 weeks after the FDR settlement agreement is made; or
  - (b) such longer period as the court may allow.
- (3) Subject to subsection (4), a court may record an FDR settlement agreement as an order of court if:
- (a) the FDR is administered by a designated mediation service provider or conducted by a certified mediator;
  - (b) the agreement is in writing and signed by or on behalf of all the parties to the agreement; and
  - (c) the agreement contains such information as may be prescribed.
- (4) The court may refuse to record an FDR settlement agreement as an order of court if:
- (a) the agreement is void or voidable because of incapacity, fraud, misrepresentation, duress, coercion, mistake or any other ground for invalidating a contract;
  - (b) the subject matter of the agreement is not capable of settlement;
  - (c) any term of the agreement is not capable of enforcement as an order of court;
  - (d) where the subject matter of the dispute to which the agreement relates involves a child, one or more of the terms of the agreement is not in the best interest of the child; or
  - (e) where the subject matter of the dispute to which the agreement relates involves property proceedings, the agreement is not just and equitable; or
  - (f) the recording of the agreement as an order of court is contrary to public policy.
- (5) An FDR settlement agreement that is recorded under this section as an order of court may be enforced in the same manner as a judgment given or an order made by a court.

## 22 Rules

- (1) The Court may make Rules of Court regulating the practice and procedure of any matter under this Act.

## Part 5— Family Law Arbitration

### 23 Definitions

(1) In this Act:

**arbitration agreement** means an agreement that subjects a family law dispute to arbitration.

**arbitration organisation** means an association, agency, board, commission, or other entity recognised by the Attorney-General that is neutral and initiates, sponsors, or administers an arbitration or is involved in the training of and selection of an arbitrator.

**arbitrator** means an individual selected, alone or with others, to make an award in a family law dispute that is subject to an arbitration agreement.

**child-related dispute** means the arbitration of child related proceedings as provided for in section 24(2)(b) below.

**court** means the Federal Circuit and Family Court of Australia.

**party** means an individual who signs an arbitration agreement and whose rights will be determined by an award.

### 24 Scope

- (1) This Part governs arbitration of a family law dispute.
- (2) Arbitration is permitted under this Act if the subject matter of the arbitration of or is incidental to;
- (a) Part VIII proceedings, Part VIIIA proceedings, Part VIIIAB proceedings, Part VIIIB proceedings or section 106A proceedings;
  - (b) Part VII proceedings but not matters:
    - (i) relating to international relocation;
    - (ii) relating to medical procedures of a nature requiring court approval;
    - (iii) relating to contravention matters;
    - (iv) in which an Independent Children’s Lawyer has been appointed; and
  - (v) involving family violence which satisfy paragraphs 102NA(1)(b) and 102NA(1)(c) of the Family Law Act 1975.
  - (c) proceedings under the *Child Support (Assessment) Act 1989* and *Child Support (Registration and Collection Act) 1988*, but not where the Child Support Registrar is participating in the matter;
  - (d) proceedings under sections 79A or 90SN of the *Family Law Act 1975* to set aside property orders;
  - (e) proceedings under sections 90K or 90UM of the *Family Law Act 1975* to set aside financial agreements;
  - (f) costs;
  - (g) any part of such proceedings;
  - (h) any matter arising in such proceedings;
  - (i) a dispute about a matter with respect to which such proceedings could be instituted.

- (3) In addition to subsection (2), this Part does not authorise an arbitrator to make an award that:
  - (a) grants a dissolution of marriage, or annulment;
  - (b) is excluded under the subsection (2);
  - (c) grants an adoption or a guardianship of a child or incapacitated individual;
  - (d) determines such other matters as may be prescribed.

## 25 Applicable law

- (1) The law applicable to arbitration is this Act and the Family Law Act 1975.

## 26 Arbitration agreement

- (1) An arbitration agreement must:
  - (a) be in a record signed by the parties;
  - (b) identify the arbitrator; and
  - (c) identify the family law dispute the parties intend to arbitrate.
- (2) Except as otherwise provided in subsection (1)(c), an agreement in a record to arbitrate a family law dispute that arises between the parties before, at the time, or after the agreement is made is valid and enforceable as any other contract and irrevocable except on a ground that exists at law or in equity for the revocation of a contract.
- (3) An agreement to arbitrate a child-related dispute that arises between the parties after the agreement is made is unenforceable unless the court determines the agreement is in the best interests of the child.

## 27 Application for court assistance

- (1) An application for court assistance under this Part must be made to the Division of the Federal Circuit and Family Court of Australia in which a proceeding is listed involving a family law dispute subject to arbitration or, if no proceeding is pending, in the Federal Circuit and Family Court of Australia [Division 2].
- (2) On application of a party, the court may compel arbitration if the parties have entered into an arbitration agreement that complies with the previous section, unless the court determines that the arbitration should not proceed.
- (3) On application of a party, the court shall terminate an arbitration if it determines that:
  - (a) the agreement to arbitrate is unenforceable;
  - (b) the family law dispute is not subject to arbitration; or
  - (c) in the court's discretion, the arbitration should not proceed.
- (4) On application of a party, the court may order consolidation of separate arbitrations involving the same parties and a common issue of law or fact if necessary for the fair and expeditious resolution of the family law dispute.

## 28 Qualification and selection of arbitrator

- (1) Except as otherwise provided in this section, the arbitrator must be qualified as follows.
- (2) During the six year period ending immediately before the time the person applies to be included in the list of arbitrators recognised by the Attorney-General:
  - (a) the person must have, for at least 5 of those years:
    - (i) practised as a legal practitioner; or
    - (ii) held office as a judge or magistrate of one or more of the courts mentioned in subsection (3); or
    - (iii) either practised as a legal practitioner or held such office; and
  - (b) the person must have, for at least 5 of those years, spent at least 25% of the person's time in such practice or office on family law matters; and
  - (c) the person must have gained the necessary experience in family law matters that is sufficient for the person to be an arbitrator; and
  - (d) the person must have successfully completed specialist arbitration training conducted by a tertiary institution or a professional association of arbitrators.
- (3) For the purposes of subsection (2)(a)(iii), the courts are the following:
  - (a) the Federal Circuit and Family Court of Australia (Division 1);
  - (b) the Federal Circuit and Family Court of Australia (Division 2);
  - (c) the Family Court of Western Australia;
  - (d) the Magistrates Court of Western Australia constituted by a magistrate who is not a Family Law Magistrate of Western Australia, sitting at a place outside the metropolitan region (within the meaning of the *Family Court Act 1997* (WA));
  - (e) the Magistrates Court of Western Australia constituted by a Family Law Magistrate of Western Australia, sitting at any place in Western Australia;
  - (f) the former Family Court of Australia;
  - (g) the former Federal Circuit Court of Australia.

Note: For the definition of **Family Law Magistrate of Western Australia**, see subsection 4(1) of the Act.
- (4) The requirements to be met to continue to be an arbitrator are:
  - (a) During the 2 year period beginning on the day from which the arbitrator's name is included in the list of arbitrators recognised by the Attorney-General, and during each subsequent 2 year period:
    - (i) the person must complete at least 10 hours of continuing professional development relevant to family law disputes; and
    - (ii) at least 25% of the person's practice as a legal practitioner must be in relation to family law matters; and
    - (iii) the person must maintain the necessary experience in family law matters that is sufficient for the person to be an arbitrator.
- (5) Within a month of the end of each 2 year period mentioned in subsection (4), the person must give a statutory declaration to the organisation that keeps the list to the effect that the person has met the requirements of that subsection for that period.

## 29 Disclosure by arbitrator; disqualification

- (1) Before agreeing to serve as an arbitrator and after making reasonable inquiry, an arbitrator shall disclose to all parties any known fact a reasonable person would believe is likely to affect:
  - (a) the impartiality of the arbitrator in the arbitration, including bias, a financial or personal interest in the outcome of the arbitration, or an existing or past relationship with a party, lawyer representing a party, or witness; or
  - (b) the arbitrator's ability to make a timely award.
- (2) An arbitrator, the parties, and the lawyers representing the parties have a continuing obligation to disclose to all parties any known fact a reasonable person would believe is likely to affect the impartiality of the arbitrator or the arbitrator's ability to make a timely award;
- (3) If a disclosure required by subsections (1)(a) or (1)(b) is not made, the court may:
  - (a) on the application of a party not later than 30 days after the failure to disclose is known or by the exercise of reasonable care should have been known to the party, suspend the arbitration;
  - (b) on timely application of a party, vacate an award; or
  - (c) if an award has been confirmed, grant other appropriate relief.
- (4) If the parties agree to discharge an arbitrator or the arbitrator is disqualified, the parties by agreement may select a new arbitrator.

## 30 Party participation

- (1) A party may:
  - (a) be represented in an arbitration by a lawyer holding a current practising certificate; and
  - (b) be accompanied by an individual who will not be called as a witness or act as an advocate.
- (2) A party or representative of a party may not communicate ex parte with the arbitrator except to the extent allowed in a family law proceeding for communication with a judge.

## 31 Interim award

- (1) Before an arbitrator is selected and able to act, on the application of a party, the court may make an interim order to facilitate the Arbitration or to protect the interest of the parties or a child pending the Arbitration.
- (2) After an arbitrator is selected and the Arbitration Agreement executed:
  - (a) the arbitrator may make a temporary award; and
  - (c) if the matter is urgent and the arbitrator is not able to act in a timely manner or provide an adequate remedy, on motion of a party, the court may enter a temporary order.
- (3) On the application of a party, before the court confirms a final award, the court may confirm, correct, vacate, or amend a temporary award made under subsection (2)(b).
- (4) On the application of a party, the court may enforce an interim award issued by an arbitrator for the fair and expeditious disposition of the arbitration.

### 32 Protection of party or child

- (1) In this section, **personal protection order** means an order made under section 68B of the *Family Law Act 1975*.
- (2) If a party is subject to a personal protection order or an arbitrator determines there is a reasonable basis to believe a party's safety or ability to participate effectively in arbitration is at risk, the arbitrator shall stay the arbitration and refer the parties to court.
- (3) An arbitrator may make a temporary award to protect a party or child from harm, harassment, or intimidation.
- (4) On the application of a party, the court may stay arbitration and review a determination or temporary award under this section.
- (5) This section supplements remedies available under any law of a state or territory or the Commonwealth for the protection of victims of domestic violence, family violence, stalking, harassment, or similar abuse.

### 33 Powers and duties of arbitrator

- (1) An arbitrator shall conduct an arbitration in a manner the arbitrator considers appropriate for a fair and expeditious disposition of the dispute.
- (2) An arbitrator shall provide each party a right to be heard, to present evidence material to the family law dispute, and to cross-examine witnesses.
- (3) Unless the parties otherwise agree in a record, an arbitrator's powers include the power to:
  - (a) determine the rules for conducting the arbitration;
  - (b) hold conferences with the parties before a hearing;
  - (c) determine the date, time, and place of a hearing;
  - (d) require a party to provide:
  - (e) administer an oath or affirmation to all witnesses giving evidence in the arbitration;
  - (f) compel discovery concerning the family law dispute and determine the date, time, and place of discovery;
  - (g) determine the admissibility and weight of evidence;
  - (h) refer a matter back to the court protect a party or child from risk of harm, harassment, or intimidation;
  - (i) refer a party to court for the court to consider sanctions on a party for bad faith or misconduct during the arbitration according to standards governing imposition of a sanction for litigant misconduct in a family law proceeding.
- (4) An arbitrator may not allow ex parte communication except to the extent allowed in a family law proceeding for communication with a judge.

### 34 Costs of the arbitrator

- (1) The costs of the arbitrator are to be shared equally between the parties to the arbitration unless the parties agree, in writing, otherwise.

### 35 Recording of hearing

- (1) Except as otherwise provided in section (2), an arbitration hearing need not be recorded unless:
  - (a) required by the arbitrator;
  - (b) provided by the arbitration agreement;
  - (c) or requested by a party.
- (2) An arbitrator may request a verbatim recording be made of any part of an arbitration hearing concerning a child-related dispute.

### 36 Award

- (1) An arbitrator shall:
  - (a) make an award in a written record, dated and signed by the arbitrator;
  - (b) give concise reasons for the award.
- (2) An award under this Act concerning a child-related proceeding is not enforceable as a judgment until confirmed by the court.

### 37 Confirmation of award

- (1) After an arbitrator issues an award relating to any dispute which is not a child-related proceeding, a party may apply to the court for registration of the Award as if it were an order of the court.
- (2) If an award determines a child-related dispute, the court shall register the Award if it is in the best interest of the child.
- (3) On registration, an award under this Act is enforceable as a judgment.

### 38 Correction by arbitrator of unregistered award

- (1) On the Application of a party made no later than 30 days after an arbitrator issues the Award, the arbitrator may correct the Award on the arbitrator's own motion or application of a party:
  - (a) if the award has an evident mathematical miscalculation or an evident mistake in the description of a person, thing, or property;
  - (b) if the award is imperfect in a matter of form not affecting the merits of the award; or
  - (c) to clarify the award.

### 39 Correction by Court of unregistered award

- (1) On motion of a party made not later than 90 days after an arbitrator issues an award the court shall correct the award if:
  - (a) the award has an evident mathematical miscalculation or an evident mistake in the description of a person, thing, or property;
  - (b) the award is imperfect in a matter of form not affecting the merits of the award; or
  - (c) the arbitrator made an award on a dispute not submitted to the arbitrator and the award may be corrected without affecting the merits of the issues submitted.

#### 40 Vacation or amendment by court of unregistered award

- (1) On the application of a party, the court shall vacate an unregistered award if the moving party establishes that:
  - (a) the award was procured by corruption, fraud, or other undue means;
  - (b) there was:
    - (i) evident partiality by the arbitrator;
    - (ii) corruption by the arbitrator; or
    - (iii) misconduct by the arbitrator substantially prejudicing the rights of a party;
  - (c) the arbitrator exceeded the arbitrator's powers.
- (2) On the application of a party, the court shall vacate an unregistered award that determines a child-related dispute if the moving party establishes that:
  - (a) the award is contrary to the best interests of the child; or
  - (b) the reasons for the award are inadequate for the court to review the award.
- (3) If an award is subject to vacation under subsection (2) and on hearing from the parties, the court may amend the award if amending rather than vacating is in the best interests of the child.
- (4) The court may determine a review under subsection (3) based on the record of the arbitration hearing and facts occurring after the hearing or may exercise de novo review.

#### 41 Clarification of a registered award

- (1) If the meaning or effect of a registered award is in dispute, the parties may:
  - (a) arbitrate the dispute before the original arbitrator or another arbitrator; or
  - (b) proceed in court under the *Family Law Act 1975* to seek clarification of the award.

#### 42 Enforcement of registered award

- (1) The court shall enforce a registered award, including an interim award, in the manner and to the same extent as any other order or judgment of a court.

#### 43 Appeal

- (1) An appeal may be taken under this Part from:
  - (a) an order confirming or denying registration of an award; or
  - (b) an order correcting an award.
- (2) An appeal under this section may be taken as from an order of the Federal Circuit and Family Court of Australia.

## 44 Immunity of arbitrator

- (1) An arbitrator in a family law dispute is immune from civil liability to the same extent as a judge of the court acting in a judicial capacity.
- (2) The immunity provided by this section supplements any immunity provided under the *Family Law Act 1975* or any act of a State or Territory.
- (3) An arbitrator's failure to make a disclosure required under this Part does not cause the arbitrator to lose immunity under this section.
- (4) An arbitrator is neither competent nor compellable to give evidence about the arbitration, and may not be required to produce records, in a judicial, administrative, or similar proceeding about a statement, conduct, decision, or ruling occurring during an arbitration, to the same extent as a judge of a court of this court acting in a judicial capacity. This subsection does not apply:
  - (a) to the extent disclosure is necessary to determine a claim by the arbitrator against a party to the arbitration; or
  - (b) to a hearing on a motion to vacate an award, if there is prima facie evidence that a ground for vacating the award exists.
- (5) If a person commences a civil action against an arbitrator arising from the services of the arbitrator or seeks to compel the arbitrator to testify or produce records and the court determines that the arbitrator is immune from civil liability or is not competent to testify or required to produce the records, the court shall award the arbitrator reasonable lawyer's fees, costs, and reasonable expenses of litigation.

## Appendix B: Functions of the Family Law Council

The Family Law Council is established by appointments made by the Attorney-General under section 115 of the *Family Law Act 1975* (Cth). Its functions are set out in subsection 115(3) of the Act, as follows:

It is the function of the Council to advise and make recommendations to the Attorney-General, either of its own motion or upon request made to it by the Attorney-General, concerning -

- (a) the working of this Act and other legislation relating to family law;
- (b) the working of legal aid in relation to family law; and
- (c) any other matters relating to family law.

Name	Position	Date of current appointment	Expiry of term
Deputy Chief Justice Robert McClelland AO (Chair)	Federal Circuit and Family Court of Australia	7 December 2021	6 December 2024
Dr Andrew Bickerdike	Relationships Australia Victoria	7 December 2021	6 December 2024
Justice Jacoba Brasch	Federal Circuit and Family Court of Australia	7 December 2021	6 December 2024
Dr Rachel Carson	Australian Institute of Family Studies	7 December 2021	6 December 2024
The Hon John Faulks	Mediator	7 December 2021	6 December 2024
Judge Alexandra Harland	Federal Circuit and Family Court of Australia	7 December 2021	6 December 2024
Ms Michelle Hayward	Women's Legal Service NSW	7 December 2021	6 December 2024
Ms Anne Hollonds	National Children's Commissioner	7 December 2021	6 December 2024
Ms Julie Jackson	Legal Aid Western Australia	7 December 2021	6 December 2024
Dr Rae Kaspiw	Australian Institute of Family Studies	7 December 2021	6 December 2024
Justice Richard O'Brien	Family Court of Western Australia	7 March 2024	6 March 2027
Ms Virginia Wilson	Federal Circuit and Family Court of Australia	7 December 2021	6 December 2024

## Appendix C: List of stakeholders consulted

Participants of roundtables presenting to the Family Law Council in regard to Term of Reference 3 were as follows:

Individual/Organisation	Date	Topic
Children's Court Service	20 June 2022	Update on the work of the Court Child Experts
Representative from the Federal Circuit and Family Court of Australia	20 June 2022	Dispute Resolution in the Family Courts
Representative from the Family Court of Western Australia	20 June 2022	Dispute Resolution in the Family Courts
Representatives from the Federal Circuit and Family Court of Australia	6 October 2022	Overview of the registry and operation of Indigenous list
Relationships Australia Queensland	6 October 2022	Roundtable with Cairns Family Law Service Providers
Centacare Far North Queensland	6 October 2022	Roundtable with Cairns Family Law Service Providers
Legal Aid Queensland	6 October 2022	Roundtable with Cairns Family Law Service Providers
Far North Queensland FLPN Steering Committee	6 October 2022	Far North Queensland FLPN Steering Committee
Queensland Indigenous Family Violence Legal Service	7 October 2022	Roundtable with Indigenous Legal Service Providers
Aboriginal and Torres Strait Islander Legal Service (QLD)	7 October 2022	Roundtable with Indigenous Legal Service Providers
Legal Aid Queensland	7 October 2022	Roundtable with Indigenous Legal Service Providers
Federal Circuit and Family Court of Australia, Cairns registry	7 October 2022	Roundtable with Indigenous Legal Service Providers
National Indigenous Australians Agency	28 November 2022	NIAA briefing: Closing the Gap Framework
Legal Aid ACT	28 November 2022	Roundtable with ACT Legal Professionals and Representative Bodies
ACT Law Society	28 November 2022	Roundtable with ACT Legal Professionals and Representative Bodies
ACT Bar Association	28 November 2022	Roundtable with ACT Legal Professionals and Representative Bodies

Australia's National Research Organisation for Women's Safety (ANROWS)	27 February 2023	Roundtable with systems abuse academics
University of Melbourne	27 February 2023	Roundtable with systems abuse academics
Hague Mothers	27 February 2023	Roundtable with Hague Convention advocacy bodies
Women's Legal Service Tasmania	27 February 2023	Roundtable with Hague Convention advocacy bodies
Victorian Bar	28 February 2023	Roundtable with Victorian Legal Professionals
Victoria Legal Aid	28 February 2023	Roundtable with Victorian Legal Professionals
Women's Legal Service Victoria	28 February 2023	Roundtable with Victorian Legal Professionals
South-East Monash Legal Service	28 February 2023	Roundtable with Victorian Legal Professionals
Djirra	28 February 2023	Roundtable with Victorian Legal Professionals
CatholicCare Victoria	28 February 2023	Roundtable with Family Relationships Service Providers
Relationship Matters Counselling and Mediation	28 February 2023	Roundtable with Family Relationships Service Providers
Better Place Australia	28 February 2023	Roundtable with Family Relationships Service Providers
Legal Aid NSW	29 May 2023	Roundtable with NSW Legal Bodies
NSW Bar Association	29 May 2023	Roundtable with NSW Legal Bodies
NSW Law Society	29 May 2023	Roundtable with NSW Legal Bodies
University of Technology, Sydney	30 May 2023	Roundtable with NSW University and College of Law representatives - ADR and family violence training for students
University of Sydney	30 May 2023	Roundtable with NSW University and College of Law representatives - ADR and family violence training for students
University of New South Wales	30 May 2023	Roundtable with NSW University and College of Law representatives - ADR and family violence training for students
University of Newcastle	30 May 2023	Roundtable with NSW University and College of Law representatives - ADR and family violence training for students
Western Sydney University	30 May 2023	Roundtable with NSW University and College of Law representatives - ADR and family violence training for students

College of Law	30 May 2023	Roundtable with NSW University and College of Law representatives - ADR and family violence training for students
ACON	30 May 2023	Intersections – Family Violence and LGBTQI experience
Bar Association of Queensland	28 August 2023	Roundtable with Queensland Family Law Professionals and Representative Bodies
Family Law Practitioner Association Qld (FLPA)	28 August 2023	Roundtable with Queensland Family Law Professionals and Representative Bodies
Queensland Law Society	28 August 2023	Roundtable with Queensland Family Law Professionals and Representative Bodies
Brisbane Domestic Violence Service - Micah Projects	28 August 2023	Family Violence and Family Law
Family Relationship Advice Line (FRAL)	29 August 2023	Presentation on Family Relationship Advice Line (FRAL)
Relationships Australia Queensland	29 August 2023	Roundtable with Family Law Services and Family Law Pathway Network
Uniting Queensland	29 August 2023	Roundtable with Family Law Services and Family Law Pathway Network
CentaCare Brisbane	29 August 2023	Roundtable with Family Law Services and Family Law Pathway Network
Greater Brisbane Family Law Pathway Network	29 August 2023	Roundtable with Family Law Services and Family Law Pathway Network
Sunshine Coast Family Law Pathway Network	29 August 2023	Roundtable with Family Law Services and Family Law Pathway Network
Legal Aid Queensland	29 August 2023	Legal Aid Queensland Arbitration Model
Legal Aid Queensland	29 August 2023	Roundtable Legal Aid Queensland and Queensland Community Legal Centres
Caxton Legal Centre	29 August 2023	Roundtable Legal Aid Queensland and Queensland Community Legal Centres
Women's Legal Services Queensland	29 August 2023	Roundtable Legal Aid Queensland and Queensland Community Legal Centres
Queensland Family and Child Commission (QFCC)	29 August 2023	Discussion with Queensland Family and Child Commission
Australian Institute of Family Law Arbitrators and Mediators (AIFLAM)	27 November 2023	Discussion with AIFLAM
Anglicare SA	27 November 2023	Roundtable with Family Law Service Providers
Relationships Australia SA	27 November 2023	Roundtable with Family Law Service Providers

Uniting Communities Incorporated	27 November 2023	Roundtable with Family Law Service Providers
Law Society of South Australia	28 November 2023	Roundtable: SA Family Law Professionals and Representative Bodies
South Australian Bar Association	28 November 2023	Roundtable: SA Family Law Professionals and Representative Bodies
Legal Services Commission of South Australia	28 November 2023	Presentation: <i>amica</i>
North Australian Aboriginal Family Legal Service	7 March 2024	Roundtable: Aboriginal Legal and FV Legal Services
Aboriginal Legal Service (NSW/ACT)	7 March 2024	Roundtable: Aboriginal Legal and FV Legal Services
Queensland Aboriginal and Torres Strait Islander Legal Service	7 March 2024	Roundtable: Aboriginal Legal and FV Legal Services
Queensland Indigenous Family Violence Legal Service	7 March 2024	Roundtable: Aboriginal Legal and FV Legal Services
Tasmanian Aboriginal Legal Service	7 March 2024	Roundtable: Aboriginal Legal and FV Legal Services
Victorian Aboriginal Legal Service	7 March 2024	Roundtable: Aboriginal Legal and FV Legal Services
Family Law Practitioners Association Western Australia	7 March 2024	WA Legal Professionals
Law Society of Western Australia	7 March 2024	WA Legal Professionals
Legal Aid WA	7 March 2024	WA Legal Professionals
WA Bar Association	7 March 2024	WA Legal Professionals
Legal Aid WA	8 March 2024	Presentation: Blurred Borders (Legal Aid WA)
Ellia Green OAM	8 March 2024	Presentation
Uniform Law Commission	6 June 2024	Presentation: US Uniform Law Commission, Family Law Arbitration Act
Relationships Australia Victoria	6 June 2024	Presentation: Parenting Coordination
King's College London	6 June 2024	Discussion: 'Improving Access to Justice for Separating Families' Report by JUSTICE



