



Association of Family and Conciliation Courts

Australian Chapter

AFCC Legal Issues Subcommittee

Submission to Senate Enquiry into 'Complaints mechanism administered under the Health Practitioner Regulation National Law'

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About the Association of Family and Conciliation Courts ("AFCC")

AFCC is an interdisciplinary, international association of professionals dedicated to improving the lives of children and families through the resolution of family conflict. AFCC promotes a collaborative approach to serving the needs of children among those who work in and with family law systems, encouraging education, research and innovation and identifying best practices.

Vision

A justice system in which all professionals work collaboratively through education, support, and access to services to achieve the best possible outcome for children and families.

Values

- Collaboration and respect among professions and disciplines
- Learning through inquiry, discussion and debate
- Innovation in addressing the needs of families and children in conflict
- Diversity in family structures and cultures
- Empowering families to resolve conflict and make decisions about their future

Worldwide membership of AFCC stands at approximately 6000.



AFCC - Australian Chapter

The Australian Chapter of AFCC has been formed to bring together Australian Family Law professionals including judicial officers, lawyers, psychologists, social workers, other mental health professionals, mediators, educators, researchers, academics, welfare groups and administrators to share in formal and informal opportunities for education, training, research and professional collaboration.

There are many benefits of having a national interdisciplinary association of family law professionals that is also part of a larger international community as the chapter will be forming various committees to focus on different family law issues and facets of professional practice and hopes to encourage the formation of state and local groups around their particular needs and interests.

The chapter also offers a range of professional development activities, conferences and presentations to enhance family law practice and provide opportunities to expand on current knowledge about how best to serve families and children.

Australia wide membership stands at approximately 200 Family Law Practitioners and organisational members including Not for Profit Welfare organisations.

The Australian Chapter of AFCC is comprised of a number of subcommittees

This submission has been formulated by the AFCC Legal Issues Subcommittee and approved for submission to the Senate by the board of AFCC Australia

Introduction

The AFCC Australia Legal Issues subcommittee welcomes the senate inquiry as to the complaints mechanism administered under the Health Practitioner Regulation National Law.

The terms of reference are:

- (a) the implementation of the current complaints system under the National Law, including the role of the Australian Health Practitioner Regulation Agency (AHPRA) and the National Boards;
- (b) whether the existing regulatory framework, established by the National Law, contains adequate provision for addressing medical complaints;
- (c) the roles of AHPRA, the National Boards and professional organisations, such as the various Colleges, in addressing concerns within the medical profession with the complaints process;
- (d) the adequacy of the relationships between those bodies responsible for handling complaints;
- (e) whether amendments to the National Law, in relation to the complaints handling process, are required; and
- (f) other improvements that could assist in a fairer, quicker and more effective medical complaints process.

Definitions

Family Law Courts - Family Court of Australia and Federal Circuit Court of Australia

Family Law Proceedings - contested proceedings in one of the Family Law Courts

Expert - includes but not limited to psychologist, psychiatrist, medical practitioners.

Private experts - experts appointed and funded privately by parties

Federal experts - experts appointed by and funded by the Family Law Court (usually employees of the Court)

Recommendations of the AFCC Legal Issues Subcommittee

The Health Practitioners National Law may require further amendment to include:

- (a) In recognition of the specialised role of medical professionals (including psychologists) reporting as expert witnesses in family law proceedings, APHRA and the National Boards should adopt a tailored protocol to the management and resolution of complaints made against medical professionals (including psychologists) arising from expert reporting in family law disputes ("the Family Law Protocol").
- (b) According to the Family Law protocol:
 - i. any complaint made by an aggrieved litigant should not be dealt with by APHRA and/or the Boards until APHRA and the Boards are satisfied the family law litigation is fully concluded;
 - ii. all complaints should be made subject to complainants producing all information including a complete set of court documents and orders made by any court in support of their complaint.
 - iii. In the case of complaints pertaining to Medical practitioners including psychiatrists, panels should be comprised of:
 - A. at least one medical practitioner who has current expertise in giving expert Evidence in the Family Law Courts;
 - B. one legal practitioner with experience with the rules of evidence and preferably, family law matters (such as a family law specialist accredited by local state based legal bodies).
 - iv. In the case of complaints pertaining to psychologists
 - A. at least one psychologist or medical practitioner who has current expertise in giving expert Evidence in the Family Law Courts;
 - B. one legal practitioner with experience with the rules of evidence and preferably, family law matters (such as a family law specialist accredited by local state based legal bodies).
- (c) The Senate and/or APHRA and the Boards will need to consider the effect of intersecting legislation about the legality of the dissemination of documents in complaints about arising from family law proceedings.

Family Law Proceedings - Practice and Procedure

There are restrictions on publishing information which identifies the parties and the children in family law proceedings. This includes dissemination of court documents drafted by and on behalf of litigants, expert reports and court orders.

Select family law cases are reported publically with information that could identify the parties removed. (See for example www.austlii.edu.au).

Publically reported cases in the Family Law reports do not identify parties. Parties and experts are identified by pseudonyms only.

Court processes

Generally speaking, to commence proceedings in one of the Family Law Courts each party is required to file:

- (a) An initiating application or a response - setting out the orders they are asking the court to make;
- (b) an affidavit sworn by them setting out their evidence in support of the orders they seek;
- (c) a Notice of Risk - detailing risks of family violence.

The parties proceed to a first court event within on average, 3 months from the date the papers are filed at the Family Law Courts.

At the first Court event (usually a directions hearing), the court usually orders the appointment of experts including possibly:

- (a) a psychiatrist to assess the mental health and capacity of one party or each of them;
- (b) a psychologist or psychiatrist to assess a particular aspect or risk associated with a parties' behaviour - for example a psychosexual assessment to assess risk in a children's dispute, or a specialist assessment pertaining to illness for assessment of legal capacity, or to work in paid employment in the future.
- (c) a social worker, counsellor, psychologist or psychiatrist - to complete a report assessing the needs of the family (often known as a family report).

In Melbourne and Sydney, delays for appointments with experts can be up to months from the date of inquiry.

Following the issue of relevant expert reports, the parties may return to court for a contest about holding or interim orders.

If the matter does not resolve by agreement, the parties may wait for up to another 18 months for a final trial listing. Pending the final trial listing, parties may attend upon existing experts for updated reports, or new experts for reports on new issues.

If a case runs at final trial, each party is entitled to call witnesses, including expert witnesses for examination in the witness box.

Assuming the matter does not resolve, the judge hearing the matter delivers the judgement.

Following receipt of a final judgment, parties may have the right to appeal the judgement on a question of fact or question of law.

Court protocol suggests judgment should be delivered by the trial judge to the parties within 3 months of the final hearing. At the present time in some instances judgments following final hearings may be delivered by the judge up to 12 months following the final court event.

Experts in Family Law Proceedings

Experts should be instructed with regard to the rules of the Court in which the litigation is conducted. This is detailed further below in this submission.

At the time of instruction, all experts are, generally, as a matter of practice instructed in writing.

Private experts do not have access to entire court files as a matter of right during family law proceedings.

Parties usually give private experts a copy of available court documents sworn by each party and/or their witnesses at the time of completing a report.

Those documents may form part of the private experts' working file and records.

Federal experts if employed and working internally at the Court may have access to the court file at the time of writing their report. They do not retain access to the court files following completion of the court process.

In addition, in select matters, orders may be made by the Court permitting experts to examine third party material (including but not limited to medical records, police records and welfare agency records) held at the court following the issue of subpoena.

Private experts are not informed, as a matter of practice and procedure by the Court, as to the outcome of contested hearings in which an expert may have prepared a report. They do not receive copies of orders made by the court or written judgements issued by the judiciary.

Federal experts may receive advice from the Court as to the final orders made in contested proceedings. They do not retain court files or orders once proceedings are concluded.

Only each party to proceedings and the court will hold or be entitled to a full set of documents on the court file arising from the court proceedings.

Experts will not generally have legal standing and rights to seek orders from the court to procure a copy of the court file in full.

Litigants are entitled to examine and copy their own court file during and after litigation unless restrained from doing so by order of the court.

The Australian Family Law Courts (with exception of the Family Court of Western Australia which has its own standing orders addressing the issue) do not have administrative and/or judicial resources available to facilitate assessment and release of court material for the purposes of management of complaints in liaison with APHRA or any other third party bodies after court proceedings have concluded.

The special nature of evidence from reporting Psychologists and Psychiatrists in Family Law Litigation

Pursuant to section 76 and 79 of the Evidence Act 2005 (Commonwealth), opinion evidence is not admissible in Federal Court litigation unless (our emphasis added) that opinion evidence is given by an expert in the area of the opinion given, based on the person's training, study or experience.

76 The opinion rule

- (1) *Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.*
- (2) *Subsection (1) does not apply to evidence of an opinion contained in a certificate or other document given or made under regulations made under an Act other than this Act to the extent to which the regulations provide that the certificate or other document has evidentiary effect.*

Note: Specific exceptions to the opinion rule are as follows:

- ☐ summaries of voluminous or complex documents (subsection 50(3));
- ☐ evidence relevant otherwise than as opinion evidence (section 77);
- ☐ lay opinion (section 78);
- ☐ Aboriginal and Torres Strait Islander traditional laws and customs (section 78A);
- ☐ expert opinion (section 79);
- ☐ admissions (section 81);
- ☐ exceptions to the rule excluding evidence of judgments and convictions (subsection 92(3));
- ☐ character of and expert opinion about accused persons (sections 110 and 111).

Other provisions of this Act, or of other laws, may operate as further exceptions.

Examples:

- (1) *P sues D, her doctor, for the negligent performance of a surgical operation. Unless an exception to the opinion rule applies, P's neighbour, W, who had the same operation, cannot give evidence of his opinion that D had not performed the operation as well as his own.*
- (2) *P considers that electrical work that D, an electrician, has done for her is unsatisfactory. Unless an exception to the opinion rule applies, P cannot give evidence of her opinion that D does not have the necessary skills to do electrical work.*

79 Exception: opinions based on specialised knowledge

- (1) If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.*
- (2) To avoid doubt, and without limiting subsection (1):*
 - (a) a reference in that subsection to specialised knowledge includes a reference to specialised knowledge of child development and child behaviour (including specialised knowledge of the impact of sexual abuse on children and their development and behaviour during and following the abuse); and*
 - (b) a reference in that subsection to an opinion of a person includes, if the person has specialised knowledge of the kind referred to in paragraph (a), a reference to an opinion relating to either or both of the following:*
 - (i) the development and behaviour of children generally;*
 - (ii) the development and behaviour of children who have been victims of sexual offences, or offences similar to sexual offences.*

In February 2015, the senior judicial officers of the Family Court of Australia, the Federal Circuit Court of Australia and the Family Court of Australia jointly developed and released proposed standards for experts conducting Family Reports. These standards inform experts as to standards for best practice in working with families during family law litigation. The Australian Standards of Practice for Family Assessments and Reporting is attached and marked Annexure A.

In the context of the specialised work of experts in family law disputes, bodies managing complaints arising from psychologists and psychiatrists providing opinion evidence in litigation by way of report may benefit from adopting a specialised complaint management protocol.

Issues relating to complaints made to APHRA and boards whilst Family law litigation is ongoing

In many cases, the facts relating to the family law litigation are likely to cross over with facts and events forming the basis of a complaint against made against an expert to APHRA and Boards arising from a report completed by an expert during the litigation..

Disgruntled litigants/complainants can and do rely on complaints made by them against experts to:

- (a) Attempt to have the expert removed from the proceedings; and/or
- (b) Delay family law proceedings which can have deleterious effects on:
 - i. families - emotionally and financially;
 - ii. experts; and/or
 - iii. courts and their resources.

Timing of handling of complaints arising in the context of Family Law Litigation

The AFCC LIC endorses the adoption of similar guidelines to those established by Family Court of Western Australia restraining APHRA (and/or associated regulatory bodies boards and tribunals) progressing dealing with and/or hearing of complaints against family consultants and court appointed experts (psychologists and psychiatrists) pending conclusion of the substantive proceedings before the Family Law Courts for which the report was prepared and conduct reported.

A copy of the standing order is attached in full at Annexure B.

Natural Justice issues to be considered by the Senate related to this submission

Does Australian family law legislation enable to complainants to manage grievances arising from expert reports during the litigation process?

The AFCC LIC asserts that at first instance, complainants are afforded natural justice in the Family Law Courts to deal with complaints.

Complainants can and should pursue complaints about expert opinion evidence provided by psychologist and psychiatrist experts in the ongoing substantive Family Law proceedings.

The Rules of each Court provide opportunity for aggrieved parties to agitate complaints in the legal setting throughout the course of proceedings but particularly at final hearing.

Family Court of Australia

In the case of the Family Court of Australia, family consultants and/or reporting psychologists/psychiatrists are appointed as single experts pursuant to Part 15 of the Family Law Rules (FLR)("the Single Expert Rules"). Part 15 is attached in full at Annexure C.

Upon appointment, according to the FLR, single experts owe extensive duties to the Court prevailing over any obligations to the person instructing or paying the fees. It is in the constraints of those duties that the AFCC LIC contends that it is appropriate that disputation as to expert reports and conduct be at first instance determined by the Court if agitated by a complainant in that forum when there are proceedings on foot. Proceedings may include appeals where the issue of the expert's report is or the expert's role is raised as an appeal point.

15.59 Expert witness's duty to the court

- (1) *An expert witness has a duty to help the court with matters that are within the expert witness's knowledge and capability.*
- (2) *The expert witness's duty to the court prevails over the obligation of the expert witness to the person instructing, or paying the fees and expenses of, the expert witness.*
- (3) *The expert witness has a duty to:*
 - (a) *give an objective and unbiased opinion that is also independent and impartial on matters that are within the expert witness's knowledge and capability;*
 - (b) *conduct the expert witness's functions in a timely way;*
 - (c) *avoid acting on an instruction or request to withhold or avoid agreement when attending a conference of experts;*
 - (d) *consider all material facts, including those that may detract from the expert witness's opinion;*

- (e) *tell the court:*

 - (i) *if a particular question or issue falls outside the expert witness's expertise; and*
 - (ii) *if the expert witness believes that the report prepared by the expert witness:*
 - (A) *is based on incomplete research or inaccurate or incomplete information; or*
 - (B) *is incomplete or may be inaccurate, for any reason; and*

- (f) *produce a written report that complies with rules 15.62 and 15.63.*
- (4) *The expert witness's duty to the court arises when the expert witness:*
 - (a) *receives instructions under rule 15.54; or*
 - (b) *is informed by a party that the expert witness may be called to give evidence in a case.*
- (5) *An expert witness who changes an opinion after the preparation of a report must give written notice to that effect:*
 - (a) *if appointed by a party—to the instructing party; or*
 - (b) *if appointed by the court—to the Registry Manager and each party.*
- (6) *A notice under subrule (5) is taken to be part of the expert's report.*

The Single Expert Rules provide prospective complainants with a range of tools to ask questions or clarify issues taken by complainants about reports prepared by experts during the Family Court litigation.

For example,

Complainants may ask questions of a witness pursuant to Rule 15.65 of the FLR

15.65 Questions to single expert witness

- (1) *A party seeking to clarify the report of a single expert witness may ask questions of the single expert witness under this rule:*
 - (a) *within 7 days after the conference under rule 15.64B; or*
 - (b) *if no conference is held, within 21 days after receipt of the single expert witness's report by the party.*
- (2) *The questions must:*

- (a) be in writing and be put once only;*
 - (b) be only for the purpose of clarifying the single expert witness's report; and*
 - (c) not be vexatious or oppressive, or require the single expert witness to undertake an unreasonable amount of work to answer.*
- (3) The party must give a copy of any questions to each other party.*

Note: A party may cross-examine a single expert witness (see rule 15.50).

15.66 Single expert witness's answers

- (1) A single expert witness must answer a question received under rule 15.65 within 21 days after receiving it.*
- (2) An answer to a question:*
 - (a) must be in writing;*
 - (b) must specifically refer to the question; and*
 - (c) must:*
 - (i) answer the substance of the question; or*
 - (ii) object to answering the question.*
- (3) If the single expert witness objects to answering a question or is unable to answer a question, the single expert witness must state the reason for the objection or inability in the document containing the answers.*
- (4) The single expert witness's answers:*
 - (a) must be:*
 - (i) attached to the affidavit under subrule 15.62(2);*
 - (ii) sent by the single expert witness to all parties at the same time; and*
 - (iii) filed by the party asking the questions; and*
 - (b) are taken to be part of the expert's report.*

Complainants may seek agreement to confer with a witness pursuant to 15.64B of the FLR

15.64B Conference

- (1) *Within 21 days after receipt of the report of a single expert witness, the parties may enter into an agreement about conferring with the expert witness for the purpose of clarifying the report.*
- (2) *The agreement may provide for the parties, or for one or more of them, to confer with the expert witness.*
- (3) *Without limiting the scope of the conference, the parties must agree on arrangements for the conference.*
- (4) *It is intended that the parties should be free to make any arrangements for the conference that are consistent with this Division.*

Note: For example, arrangements for a conference might include the attendance of another expert, or the provision of a supplementary report.

- (5) *Before participating in the conference, the expert witness must be advised of arrangements for the conference.*
- (6) *In seeking to clarify the report of the expert witness, the parties must not interrogate the expert witness.*
- (7) *If the parties do not agree about conferring with a single expert witness, the court, on application by a party, may order that a conference be held in accordance with any conditions the court determines.*

Complainants may seek orders appointing another expert witness (often known as adversarial witnesses) pursuant to 15.49 of the FLR but in doing so must adduce evidence from that expert as to contrary opinion

15.49 Appointing another expert witness

- (1) *If a single expert witness has been appointed to prepare a report or give evidence in relation to an issue, a party must not tender a report or adduce evidence from another expert witness on the same issue without the court's permission.*
- (2) *The court may allow a party to tender a report or adduce evidence from another expert witness on the same issue if it is satisfied that:*
 - (a) *there is a substantial body of opinion contrary to any opinion given by the single expert witness and that the contrary opinion is or may be necessary for determining the issue;*
 - (b) *another expert witness knows of matters, not known to the single expert witness, that may be necessary for determining the issue; or*
 - (c) *there is another special reason for adducing evidence from another expert witness.*

Rights of experts during Family Law proceedings

Experts have a limited voice in the substantive proceedings. They may rights to seek procedural orders in relation to carrying out their function.

15.60 Expert witness's right to seek orders

Before final orders are made, a single expert witness may, by written request to the court, seek a procedural order to assist in carrying out the expert witness's function.

Note:

- (1) The written request may be by letter and may, for example:*
 - (a) ask for clarification of instructions;*
 - (b) relate to the questions mentioned in Division 15.5.6; or*
 - (c) relate to a dispute about fees.*
- (2) The request must:*
 - (a) comply with subrule 24.01(1); and*
 - (b) set out the procedural orders sought and the reason the orders are sought.*
- (3) The expert witness must serve a copy of the request on each party and satisfy the court that the copy has been served.*
- (4) The court may determine the request in chambers unless:*
 - (a) within 7 days of being served with the request, a party makes a written objection to the request being determined in chambers; or*
 - (b) the court decides that an oral hearing is necessary.*

Federal Circuit Court of Australia (formerly Federal Magistrate's Court)

In the case of the Federal Circuit Court of Australia an expert may be retained by the court or by the parties. Division 15.2 of the Federal Circuit Court Rules (FCCR) (which refers to Practice Guideline GPN EXPT 2 of 25 October 2016) determines the responsibilities of parties and experts in proceedings. Practice Guideline GPN EXPT 2 of 25 October 2016 is annexed in full at Annexure D.

The FCCR rules are set out below.

Division 15.2—Expert evidence

15.06A Definition

In this Division:

expert, in relation to a question, means a person (other than a family and child counsellor or a welfare officer) who has specialised knowledge about matters relevant to the question based on that person's training, study or experience.

15.07 Duty to Court and form of expert evidence

For an expert's duty to the Court and for the form of expert evidence, an expert witness should be guided by the Federal Court practice direction guidelines for expert witnesses.

Note: While not intended to address all aspects of an expert's duties, the key points in the guidelines are:

- ☐ *an expert witness has a duty to assist the Court on matters relevant to the expert's area of expertise*
- ☐ *an expert witness is not an advocate for a party*
- ☐ *the overriding duty of an expert witness is to the Court and not to the person retaining the expert*
- ☐ *if expert witnesses confer at the direction of the Court it would be improper for an expert to be given or to accept instructions not to reach agreement.*

15.08 Expert evidence for 2 or more parties

- (1) This rule applies if 2 or more parties to a proceeding call expert witnesses to give opinion evidence about the same, or a similar, question.*
- (2) The Court may give any direction that it thinks fit in relation to:*
 - (a) the preparation by the expert witnesses (in conference or otherwise) of a joint statement of how their opinions on the question agree and differ; or*
 - (b) the giving by an expert witness of an oral or written statement of:*
 - (i) his or her opinion on the question; or*
 - (ii) his or her opinion on the opinion of another expert on the question; or*

- (iii) whether in the light of factual evidence led at trial, he or she adheres to, or wishes to modify, any opinion earlier given; or*
- (c) the order in which the expert witnesses are to be sworn, are to give evidence, are to be cross-examined or are to be re-examined; or*
- (d) the position of witnesses in the courtroom (not necessarily in the witness box).*

Example: The Court may direct that the expert witnesses be sworn one immediately after another, and that they give evidence after all or certain factual evidence has been led, or after each party's case is closed (subject only to hearing the evidence of expert witnesses) in relation to the question.

15.09 Court experts

- (1) The Court may, at the request of a party or of its own motion:
 - (a) appoint an expert as court expert to inquire into and report on a question arising in the proceeding; and*
 - (b) give directions about an experiment or test (other than a testing procedure for section 69W of the Family Law Act) for the purposes of the inquiry or report; and*
 - (c) give further directions, including to extend or supplement the inquiry or report.**
- (2) If possible, the court expert should be a person agreed upon between the parties.*

15.10 Report of court expert

- (1) The court expert must give the report to the Registrar together with the number of copies the Registrar directs.*
- (2) The Registrar must send a copy of the report to each party.*
- (3) The Court may:
 - (a) receive the report in evidence; or*
 - (b) allow the examination of the court expert; or*
 - (c) give other directions as to the use of the report.**
- (4) A party wishing to cross-examine the court expert:
 - (a) must arrange for the attendance of the court expert; and*
 - (b) may issue a subpoena requiring his or her attendance; and*
 - (c) unless the Court otherwise directs, must pay the reasonable expenses of the attendance.**

15.11 Remuneration and expenses of court expert

Unless the Court otherwise directs, the parties are jointly liable to pay the reasonable remuneration and expenses of the court expert for preparing a report.

15.12 Further expert evidence

If a court expert has made a report on a question, a party may adduce evidence of another expert on the question with the leave of the court.

In all courts

Aggrieved parties have general liberty to apply to the court and ask the court to make orders arising from the report which may relate to the conduct of an expert. The judicial officer determining the matter decides these matters on the merits of the case.

At trial each party has the opportunity, through themselves and their legal representatives, to cross examine the reporting expert about their opinion and report. This may give rise to questioning of the conduct of the expert in preparing a report and following the preparation of a report (if relevant).

In most cases, the facts relating to the litigation are likely to cross over with facts and events forming the basis of a complaint. Each party to litigation can put into issue and ask the court to make findings as to the expert report and opinion (including their conduct if a relevant issue in dispute). Judicial officers can and will lead limited questioning of their own during the matter.

Issues relating to procuring information relating to complaints against an expert in Family Law proceedings

Legislative limitation surrounding dissemination of information relating to Family Law proceedings

Pursuant to Section 121 of the FLA, persons, including parties and experts are precluded from publicising or disclosing information which names parties to Family Law litigation to the public or a section of the public. A person may be criminally charged and prosecuted for the sharing of information relating to proceedings.

Section 121 provides

(1) *A person who publishes in a newspaper or periodical publication, by radio broadcast or television or by other electronic means, or otherwise disseminates to the public or to a section of the public by any means, any account of any proceedings, or of any part of any proceedings, under this Act that identifies:*

(a) a party to the proceedings;

(b) a person who is related to, or associated with, a party to the proceedings or is, or is alleged to be, in any other way concerned in the matter to which the proceedings relate; or

(c) a witness in the proceedings;

commits an offence punishable, upon conviction by imprisonment for a period not exceeding one year.

(2) *A person who, except as permitted by the applicable Rules of Court, publishes in a newspaper or periodical publication, by radio broadcast or television or by other electronic means, or otherwise disseminates to the public or to a section of the public by any means (otherwise than by the display of a notice in the premises of the court), a list of proceedings under this Act, identified by reference to the names of the parties to the proceedings, that are to be dealt with by a court commits an offence punishable, upon conviction by imprisonment for a period not exceeding one year.*

(3) *Without limiting the generality of subsection (1), an account of proceedings, or of any part of proceedings, referred to in that subsection shall be taken to identify a person if:*

(a) it contains any particulars of:

(i) the name, title, pseudonym or alias of the person;

(ii) the address of any premises at which the person resides or works, or the locality in which any such premises are situated;

(iii) the physical description or the style of dress of the person;

- (iv) any employment or occupation engaged in, profession practised or calling pursued, by the person or any official or honorary position held by the person;*
- (v) the relationship of the person to identified relatives of the person or the association of the person with identified friends or identified business, official or professional acquaintances of the person;*
- (vi) the recreational interests, or the political, philosophical or religious beliefs or interests, of the person; or*
- (vii) any real or personal property in which the person has an interest or with which the person is otherwise associated;*

being particulars that are sufficient to identify that person to a member of the public, or to a member of the section of the public to which the account is disseminated, as the case requires;

- (b) in the case of a written or televised account or an account by other electronic means—it is accompanied by a picture of the person; or*
 - (c) in the case of a broadcast or televised account or an account by other electronic means—it is spoken in whole or in part by the person and the person's voice is sufficient to identify that person to a member of the public, or to a member of the section of the public to which the account is disseminated, as the case requires.*
- (4) A reference in subsection (1) or (2) to proceedings shall be construed as including a reference to proceedings commenced before the commencement of section 72 of the Family Law Amendment Act 1983.*
- (5) An offence against this section is an indictable offence.*
- (8) Proceedings for an offence against this section shall not be commenced except by, or with the written consent of, the Director of Public Prosecutions.*
- (9) The preceding provisions of this section do not apply to or in relation to:*
- (a) the communication, to persons concerned in proceedings in any court, of any pleading, transcript of evidence or other document for use in connection with those proceedings; or*
 - (aa) the communication of any pleading, transcript of evidence or other document to authorities of States and Territories that have responsibilities relating to the welfare of children and are prescribed by the regulations for the purposes of this paragraph; or*
 - (b) the communication of any pleading, transcript of evidence or other document to:*

- (i) a body that is responsible for disciplining members of the legal profession in a State or Territory; or*
 - (ii) persons concerned in disciplinary proceedings against a member of the legal profession of a State or Territory, being proceedings before a body that is responsible for disciplining members of the legal profession in that State or Territory; or*
- (c) the communication, to a body that grants assistance by way of legal aid, of any pleading, transcript of evidence or other document for the purpose of facilitating the making of a decision as to whether assistance by way of legal aid should be granted, continued or provided in a particular case; or*
- (d) the publishing of a notice or report in pursuance of the direction of a court; or*
- (da) the publication by the court of lists of proceedings under this Act, identified by reference to the names of the parties, that are to be dealt with by the court; or*
- (e) the publishing of any publication bona fide intended primarily for use by the members of any profession, being:*
 - (i) a separate volume or part of a series of law reports; or*
 - (ii) any other publication of a technical character; or*
- (f) the publication or other dissemination of an account of proceedings or of any part of proceedings:*
 - (i) to a person who is a member of a profession, in connection with the practice by that person of that profession or in the course of any form of professional training in which that person is involved; or*
 - (ia) to an individual who is a party to any proceedings under this Act, in connection with the conduct of those proceedings; or*
 - (ii) to a person who is a student, in connection with the studies of that person; or*
- (g) publication of accounts of proceedings, where those accounts have been approved by the court.*
- (10) Applicable Rules of Court made for the purposes of subsection (2) may be of general or specially limited application or may differ according to differences in time, locality, place or circumstance.*

Note: Powers to make Rules of Court are also contained in sections 26B, 37A, 109A and 123.

(11) In this section:

court includes:

- (a) *an officer of a court investigating or dealing with a matter in accordance with this Act, the regulations or the Rules of Court; and*
- (b) *a tribunal established by or under a law of the Commonwealth, of a State or of a Territory.*

electronic means includes:

- (a) *in the form of data, text or images by means of guided and/or unguided electromagnetic energy; or*
- (b) *in the form of speech by means of guided and/or unguided electromagnetic energy, where the speech is processed at its destination by an automated voice recognition system.*

Considerations for the Senate regarding information gathering for complaints against experts arising from Family Law proceedings

The Senate, APHRA and related boards will need to examine:

- (a) if APHRA and members of related assessors, panels and boards meet the definition of "public" set out in section 121 (1) of the FLA;
- (b) if related assessors, panels and boards each meet the definition of "court" set out in section 121(11) for the purposes of qualifying for the exception pursuant to 121(9) (a) or (f) inclusive of the FLA.
- (c) APHRA and related parties may need to approach the Department of Public Prosecutions to ascertain if there is a particular policy surrounding such dissemination of information in relation to such complaints. A request may need to be made of DPP to develop a guideline or memorandum of understanding as to prosecution of experts in such matters.
- (d) APHRA and related parties may need to consider lobbying for legislative amendment to section 121 for an explicit exception relating to publication to protect experts providing information in the court of a complaint for example, at paragraph 121 (9)(b) to include a new (iii) below :

(b) the communication of any pleading, transcript of evidence or other document to:

(i) a body that is responsible for disciplining members of the legal profession in a State or Territory; or

(ii) persons concerned in disciplinary proceedings against a member of the legal profession of a State or Territory, being proceedings before a body that is responsible for disciplining members of the legal profession in that State or Territory; or

(iii) persons concerned in disciplinary proceedings against a member of the experts' profession of a State or Territory, being proceedings before a body that is responsible for disciplining members of that experts' profession in that State or Territory

(NB this will also require an addition/expansion to the definition of expert in the FLA to include single experts and experts in the FLR and experts in the FCCR)

- (e) developing guidelines, administrative processes and discretions relating to intake and consideration of family law complaints, in particular:
 - 1. If a matter is litigated to a contested hearing event in the Family Law Courts, should consideration of any complaint be delayed until judgement from that hearing is handed down and the time for appeal following judgement has passed?

2. Should complainants be required to produce to APHRA of the entire court file as a threshold matter prior APHRA processing and progressing any complaint?

Selection and allocation of experts for assessment and adjudication of complaints

Having regard for the matters raised in this submission and the complexities surrounding such specific Family Law complaints pursuant to the Health Practitioner Regulation National Law Act 2009 ("National Law"):

- (a) In the case of complaints pertaining to Medical practitioners including psychiatrists, panels should be comprised of:
 - i. at least one medical practitioner who has current expertise in giving expert Evidence in the Family Law Courts;
 - ii. one legal practitioner with experience with the rules of evidence and preferably, family law matters
- (b) In the case of complaints pertaining to psychologists
 - iii. at least one psychologist or medical practitioner who has current expertise in giving expert Evidence in the Family Law Courts;
 - iv. one legal practitioner with experience with the rules of evidence and preferably, family law matters.

Annexure A

Australian Standards of Practice for Family Assessments and Reporting – February 2015

Foreword

The conduct of family assessments and the subsequent development of family reports play a critical role in the decision-making process of judicial officers when dealing with family law disputes that are before the courts.

We are very pleased to see the release of the *Australian Standards of Practice for Family Assessments and Reporting*, a publication developed by the Family Court of Australia, the Federal Circuit Court of Australia and the Family Court of Western Australia.

Ensuring good practices in conducting and reporting in family assessments in family law matters is essential in helping to determine the ‘best interests of the child’.

The overarching aim of this publication is to provide information to the decision-makers, agencies and legal professionals involved in the cases, as to what constitutes good practice in family assessments and reporting. This publication attempts to outline a minimum standard of practice when conducting family assessments and preparing reports.

This publication is a result of extensive work and consultation with many people and organisations and we would like to acknowledge Pam Hemphill, Principal Child Dispute Services (Family Court and Federal Circuit Court), and David Hugall, Regional Coordinator, Queensland (Family Court and Federal Circuit Court), for undertaking this task. Our thanks also go to Judge Baumann, family consultants and Regulation 7 family consultants, the Australian Psychological Society, the Australian Association of Social Workers, the Association of Family and Conciliation Courts (Australian Chapter), family report writers at various Legal Aid Commissions, the Family Court of Western Australia (Paul Kerin and Yvonne Patterson), the Family Law Section of the Law Council of Australia, National Legal Aid, Women’s Legal Services Australia and a range of private psychologists for their input and comments.

On behalf of all three courts that deal with family law matters throughout Australia, we hope you find the document a practical and useful guide to responding to family assessments in children’s matters.

Diana Bryant AO, Chief Justice, Family Court of Australia

John Pascoe AO CVO, Chief Judge, Federal Circuit Court of Australia

Stephen Thackray, Chief Judge, Family Court of Western Australia

Introduction

These Standards aim to promote good practice in conducting and reporting in full family assessments by social workers and psychologists in family law matters, such as those completed under s62G of the Family Law Act and family reports commissioned privately.

Their aim is to provide information to the judiciary, agencies, legal professionals and parties who utilise the services of family assessors to increase the understanding in the broader sector as to what constitutes good practice in family assessments and reporting. They attempt to inform what can be expected as a minimum standard of practice when conducting family assessments and preparing reports.

The Standards address some common issues and concerns about family assessments and the processes of assessments and reporting.

The Standards are only intended to apply to full family assessments and not to more brief or preliminary assessments conducted in such events as child inclusive conferences, child inclusive mediation or case assessment conferences.

The Standards should apply to completed assessments where the family assessor offers recommendations concerning the longer term parenting arrangements for children of separated parents or caregivers. They apply to any situation where the family assessor has prior knowledge that decisions about living arrangements, visiting arrangements or parenting decisions are involved in the matter. This can be whether the assessment is ordered by a court, arranged by the parties or their legal representatives, or by the independent children's lawyer.

The principles and practices in these Standards are not intended as a step-by-step guide to practice, nor to limit the discretion of social scientists conducting assessments in individual cases. It is recognised that the processes of each assessment must be tailored to the needs and circumstances of that matter, as well as guided by principles of best and ethical professional practice.

The Standards acknowledge and have drawn on the Association of Family and Conciliation Courts *Model Standards of Practice for Child Custody Evaluations* (2006), the Family Court of Australia and Federal Circuit Court of Australia *Child Dispute Services Professional Directions for Family Consultants*, and the Family Court of Australia and Federal Circuit Court of Australia *Family Violence Best Practice Principles – edition 3.1* (2013).

Definition and purpose of family assessments

A family assessment is a professional forensic assessment undertaken to assist a court and/or the parties decide on parenting arrangements for children of separated parents or caregivers. It is an independent, professional forensic appraisal of the family, done from a social science and non-partisan perspective.

A family assessment provides a comprehensive and impartial social science perspective, and has the functional value of contributing to informed and child-centred decisions.

The assessment provides information about the views and needs of children and their relationships with their parents and other significant adults, and of the attitudes and parental capacities of the adults with regard to the children's needs.

Family assessments should include assessment of any risk factors identified in a matter. Where there are concerns about family violence, a specialised family violence assessment should be included in the assessment and the report.

Principles for family assessors

PRELIMINARY ISSUES AND ARRANGING THE ASSESSMENT

1. Prior to the commencement of the assessment, the role of the family assessor and the purpose and scope of the assessment must be clarified for the family assessor, the parties, the children and the legal representatives.
 - (a) If the family assessment has been ordered by a court then the court order, the Court's policies and professional directions can describe the scope and purpose of the assessment, and should be applied. Private family assessors being briefed for a report should seek and be provided with all necessary information by the parties or their legal representatives, or through the independent children's lawyer where one has been appointed.
 - (b) The parties who are required to participate in the assessment must be advised of the legal basis, or arrangement for, the report to be completed.
 - (c) For any family assessment, the parties need to be informed as to who needs to participate in the assessment, what documents or written information they are required to provide, and what will happen with the assessment when it is completed.
 - (d) Parties should be advised that all documents provided to the assessor must be available to all parties and their legal representatives.
 - (e) If they cannot be advised of things such as the scope and purpose of the report and who needs to participate before the assessment commences, they need to be advised prior to the assessment being completed, with reasonable opportunity being allowed for them to participate and provide information to the family assessor.
 - (f) Assessments arranged by one party or those that include only one side of a dispute should not be undertaken as they are incomplete assessments. If all parties intend to participate in an assessment, but one does not, then the assessment should be noted as limited, and not a full assessment from which opinions or recommendations for children's arrangements can be made.
 - (g) If one party does not attend, but one does with the children, it may still be possible to undertake a limited assessment and comment only on the parental capacity of the parent who attends, the children's views and their relationship with the party who attended.
2. Family assessors must be qualified social science professionals and function as independent and impartial assessors.
 - (a) The qualifications held by the family assessor must be either those accepted by the Family Court of Australia, Federal Circuit Court of Australia or the Family Court of Western Australia, or sufficient to be able to establish their expertise as a forensic assessor of parents, children, family relationships, parental capacity and factors impacting on the welfare and parenting of children.

- (b) As an expert witness, family assessors should have appropriate training, qualifications and experience to assess the impact and effects (both short and long term) of family violence or abuse, or exposure to family violence or abuse, mental health problems and drug or alcohol misuse on the children and any party to the proceedings.
 - (c) Generally family assessors should have qualifications such that they are eligible for membership or are members of the Australian Association of Social Workers or are registered as a psychologist with the Australian Health Practitioners Regulation Authority, meet the mandated or recommended requirements of those bodies in relation to ongoing professional development, and have professional clinical experience working with children and families.
 - (d) Regardless of how the arrangements for their services are made and how the family assessor is to be remunerated, the family assessor should always function as an impartial assessor.
 - (e) Family assessors should provide particulars of their qualifications and experience as a social scientist and family assessor as part of their report.
- 3. Family assessors should avoid multiple relationships with any or all participants in matters, or relationships that create conflicts of interests or the perception of a conflict of interest. They should disclose any and all previous or current professional or social relationships with any parties or family members subject of an assessment. They should also disclose any non-professional or social relationship with legal representatives or judicial officers involved in a matter where there may be a conflict of interest.
 - (a) Where the family assessor has knowledge of prior incompatible relationships, or where there may be a conflict of interest with parties, family members, legal representatives or judicial officers, they should decline to undertake the assessment. If not known prior to commencement of an assessment, pre-existing or previous incompatible relationships must be fully disclosed as soon as they become known.
 - (b) Incompatible relationships include personal, social, therapeutic or financial relationships or connections. Family assessors must also avoid commencing any such relationships in relation to any party or person involved in a matter after commencing their professional forensic involvement in the matter.
- 4. Family assessors should take steps to ensure that the parties, family members who are not party to the legal dispute, and non-family members who are involved in the assessment or who are contacted to obtain information, know and understand the potential uses of the information that they are providing.
 - (a) Individuals, including other professionals from whom information is sought, should be informed of the manner in which information provided by them will be utilised. They should also be informed that information provided by them is not privileged and can be or will be provided to a court.
 - (b) It should be clarified with parties and family members participating in the assessment at the outset that any information obtained during the evaluation can be reported to the Court, and that requests from parties or family members for statements to be kept confidential cannot be honoured.

- (c) It is also important to point out that the purpose of the assessment is not to provide a verbatim record of interviews. Rather, the assessment is an evaluative assessment that is based on, and supported by, what the assessor hears, observes and deduces from interviews, observations and other sources.
- 5. Other than where permission to obtain collateral information is given by court order, by the independent children's lawyer, legal representatives or interagency protocol, the permission of parties must be obtained to receive information from a third party or collateral source.
 - (a) All sources of collateral information should be disclosed by the family assessor, whether the information was obtained by interview or from documents or recordings.
 - (b) Assessors must be aware of the right of parties to challenge the validity of collateral information, and that the views, opinions or determinations of other professionals or agencies should not be interpreted as true, factual or valid, unless determined by a court with appropriate jurisdiction.
- 6. Family assessors must take reasonable steps to ensure that the process of participating in the assessment does not expose any family members, children or other persons to a risk of harm due to family violence.
 - (a) Family assessors should obtain sufficient information about a case from documents and preliminary enquiries with the parties, or their representatives, so as to be aware of possible risks of family violence while the parties are attending interviews or observations, travelling to or from these appointments, or following the release of the assessment.
 - (b) Family assessors must seek information about existing or past family violence intervention orders and any safety concerns that the parties have, prior to making arrangements for the parties and children to attend the assessments.
 - (c) Family assessors should use the information to offer arrangements so that parties can attend without the risk of threats, harassment, intimidation or physical violence. Where necessary, they should negotiate a safety plan with parties who have concerns about family violence.
 - (d) Safety plans for parties' participation should be made without prejudging the parties' expressed concerns about violence. Making arrangements based on parties' expressed concerns is not in itself a presumption about the validity of those concerns. Formulation of any opinions as to the actual risks to parties should only be made after all the necessary information has been gathered.
 - (e) Family assessors must have detailed knowledge and understanding of the nature, dynamics, cycle, impact and relevance of family violence and conduct assessments, as per the Family Court of Australia and Federal Circuit Court of Australia Family Violence Best Practice Principles – edition 3.1 (2013) and the Family Violence Policy of the Family Court of Western Australia.
- 7. Family assessors should ensure that parties are not restricted from full participation in assessments due to financial or educational disadvantage, and/or due to having a disability.

- (a) Arrangements for the assessment process should, as far as is practical, allow low income parties, those living in remote areas or those with a disability to participate in the assessment process in person.
- (b) Parties who have difficulty with literacy should have information provided to them about the appointments and the process by a means other than just in writing.

COMMUNICATION WITH THE PARTIES AND THEIR REPRESENTATIVES

- 8. Family assessors should not have substantive ex-parte communications about a case with the Court or with the solicitors representing the parties.
 - (a) From the time that family assessors accept a brief or agree to undertake an assessment, and including after the evaluations have been completed and their assessments have been submitted, family assessors should take all reasonable steps to minimise ex-parte communication with the Court and with solicitors representing the parties.
 - (b) Where ex-parte communication occurs, all reasonable steps should be taken to limit discussions to administrative or procedural matters such as obtaining dates and times and supplying the assessor with filed documentation only. They should avoid discussing substantive issues, and refrain from accepting or imparting significant information with only one party.
 - (c) Family assessors must respect court Rules, court orders and the courts' Guidelines for Independent Children's Lawyers (2013) with respect to ex-parte communication with independent children's lawyers, and may communicate with the independent children's lawyer in relation to:
 - a preliminary overview of the dynamics of the separated family and the way this is impacting on the child
 - other agencies involved with the family
 - recommendations for case management
 - whether the child should be involved in further counselling and/or whether therapy is indicated
 - whether there are any urgent issues, and
 - details of any child abuse notifications made.
- 9. The assessor must not engage in conversation or communication with parties after a report is completed, other than to communicate with unrepresented parties about basic details with regards to availability for cross examination or further assessment.
 - (a) Any arrangement for the assessor to give verbal feedback to parties and/or to their legal representatives after completion of the assessment should be only by court order or by agreement of all parties, and if done, should be done with all parties. There should be no ex-parte arrangements for feedback or discussion about the assessment with the family assessor.

- (b) Where ex-parte communications with a party or legal representative do happen, they should be disclosed to the other parties.
- (c) After an assessment has been completed and sent to a court or the parties, family assessors should not conduct any further interviews with parties at the request of unrepresented litigants, legal representatives or independent children's lawyers, unless specifically directed to do so by a judicial officer.
- (d) Where further assessment is sought, a new court order needs to be sighted, or new contracting and briefing arrangements agreed to by the parties must be entered into before the assessment commences.
- (e) Prior to being cross-examined in a trial, family assessors should refrain from reading new documents or material provided to them by a party unless ordered or directed by the judicial officer in the matter, or at the request of the independent children's lawyer, or by agreement of all of the parties.

CONDUCTING ASSESSMENTS

- 10. Family assessors should strive to be accurate, objective, fair and independent in gathering their data. They must be able to explain decisions concerning their methodology and treat all participants with respect.
 - (a) In gathering data, family assessors should be committed to accuracy, objectivity, fairness, and independence. They should treat all participants impartially, weigh all data, opinions, and alternative views thoroughly and impartially, and be prepared to articulate the bases for decisions made by them concerning their methodology.
 - (b) They must conduct interviews and spend sufficient time, in the opinion of the assessor, in interviews and observations with the significant people to ensure they have enough information about the parties and their circumstances to formulate valid and unbiased views. If, in the view of the assessor, there is insufficient time to assess one or more parties, this should be identified in the report as a limitation of the assessment.
 - (c) While it can be important for observations of children with each party to be of similar length, it is not always necessary for family assessors to spend exactly equal amounts of time interviewing the different parties or others, or to have identical numbers of interviews with each, as long as sufficient time is taken for adequate assessment of all relevant family members and relationships.
 - (d) Gross discrepancies in the time allocated for assessment of different parties, or differences with the number of interviews or contacts with each party, should only occur where there are clear and stated reasons to do so.
- 11. Family assessors should use evidenced-based methods and methods accepted by the broader professional community for the collection of data, and methods broadly professionally accepted as suitable in forensic assessments.
 - (a) Family assessors should strive to use multiple data gathering methods in order to increase accuracy and objectivity. The means of gathering data should be varied

- to suit the needs of the case, and should be in accordance with accepted and reliable techniques.
- (b) Family assessors should have regard to the needs or circumstances of each case or family, and make decisions concerning the selection of data gathering methods with regards to the circumstances of the case and evaluation required.
 - (c) A valid assessment entails exploration which is broad enough to cover all significant aspects of the child's life in relation to the dispute, including the child as an individual, the child in their family setting, and the child in their broader social environment.
 - (d) The aim is to be both comprehensive enough and achieve economy, by finding a balance between the investment of time required to provide a valid assessment and the over-or under-utilisation of the assessor's time, and unnecessary and possibly harmful over imposition on a family of unnecessary and unwarranted assessment beyond what is needed to assist the Court and/or the parties.
12. Psychometric tools can provide useful data and while test results can be useful indicators, psychometric instruments should only be used for the purposes and populations for which they have published validity and reliability. They should only be used in conjunction with other data collection methods such as interviews, observations and collateral information.
- (a) Psychometric tests should only be used when:
 - the tester has the necessary training and qualifications in the use of that instrument
 - the use of the instrument is justified by the nature of the issues in dispute, and are the reasons for its use articulated in the report, and
 - other means of assessment of the issues, such as interviews and observations, are also used.
 - (b) When interpreting test results, comment must be made as to whether or not, and the extent to which, other forms of assessment support the findings or results of the formal instrument.
13. During the assessment process, the family assessor conducting a family assessment should not offer advice or undertake therapeutic interventions with anyone involved.
- (a) The aim is to complete a forensic assessment, not to intervene, mediate the dispute or provide counselling for any parties or family members.
 - (b) Therapeutic intervention should not be confused with the assessment and reporting process. The assessment process may have an overall therapeutic effect for families and children, but this is a possible consequence rather than the aim of the process. It is recognised that forensic assessment reports can be used later in a mediation or settlement process, but this is not the primary aim or purpose and should only be done after the assessment is completed.

- (c) Counselling or mediation techniques and interventions, such as those based on interpretation, reframing or feedback, should not be used in forensic assessments as to do so will interfere with the process of assessment.
 - (d) The forensic assessment process may also have negative impacts on individuals and on relationships within the family. While the process of the assessments should be arranged to minimise negative impacts, sometimes they are an inevitable consequence of information being sought from family members about contentious or sensitive issues.
 - (e) Although therapeutic interventions and the offering of advice are deemed inappropriate under most circumstances, it is recognised that it may, occasionally, be necessary for a family assessor to intervene or to offer advice when there is credible evidence of substantial risk of imminent and significant physical or emotional harm to a party, a child, or others involved in the evaluative process.
 - (f) Where therapeutic intervention has been employed or advice has been offered, the family assessor should include in their report a description of the intervention or advice and the bases upon which the intervention or advice was deemed necessary.
 - (g) The term 'advice', as used herein, is not intended to include offering information concerning appropriate resources or offering a referral to an appropriate resource in the final written assessment.
14. Family assessors should conduct at least one in-person interview with each parent and other adults who perform a caretaking/parenting role with the children.
- (a) Wherever possible, adults should be interviewed separately, at least once, to ensure they have an opportunity to express their own views.
 - (b) The completeness and validity of the assessments of adults and their relationship with others are reduced if they are only interviewed jointly with other adults. For one party to be interviewed only with their current partner present is not a complete assessment of each individual or of the relationship between the two individuals.
 - (c) A family assessor should provide opinion or evidence about the personality characteristics of a particular individual only when the family assessor has conducted a direct interview or observation of that individual and has obtained sufficient information or data to form an adequate foundation for the information provided and/or opinions offered.
 - (d) Telephone or video interviews can be used as a supplementary means of interview with adults.
 - (e) Where there is no alternative but to interview an adult by telephone, this must be noted as a significant limitation of the assessment, and the reasons for undertaking a phone interview articulated.
 - (f) While interviewing adults jointly with others with whom they have relationships, or with whom they will need to interact for the purposes of being involved with the

children, can enhance the assessment of adult or co-parenting relationships, joint interviews with adults must only be conducted with the permission of the parties and if doing so is not contrary to any existing protection orders and would not place any person at risk of family violence, intimidation or harassment.

15. Family assessors should ensure that any allegation that they are likely to consider in formulating their opinion is brought to the attention of the party against whom the allegation is directed, so that the party is afforded an opportunity to respond.
 - (a) Where circumstances warrant a departure from the foregoing standard, such as the need to protect a child or other family members from potential risk of harm, the reasons thereof should be articulated in the assessment.

CHILDREN IN FAMILY ASSESSMENTS

16. Children must be advised of the purpose of the interviews and informed of what will happen with the information they provide to the assessor.
 - (a) Children can be provided, via their parents or caregivers, with age appropriate brochures or information booklets prior to the day of interviews.
 - (b) Family assessors should meet with children on the day of interviews to explain, in age appropriate language and manner, the purpose and process of the assessment and what will happen with the information they provide.
 - (c) If ordered by the Court, the family assessor can explain the orders made by a court to children and the reasons for the orders or parenting arrangements decided upon.
17. Children must be informed that they do not have to provide information, answer questions or express views about which parent they may wish to live with or spend time with, or about any aspect of their parenting arrangements.
 - (a) Interviews with children should commence by informing children that what they tell the family assessor is not confidential.
 - (b) Children must be made aware that they do not have to express their views about the possible parenting arrangements, and must not be pressured into expressing a view.
18. Family assessors should individually assess each child who is the subject of the evaluation.
 - (a) Family assessors should individually assess each child about whom there are disputes. They must identify and assess issues for each child, taking into account their age and level of understanding, and any special developmental needs.
 - (b) In addition to any joint interviews or observations conducted, individual interviews with children who are old enough must be conducted. These should be done separately to any person who may influence or react to a child's views or their expression of their views, and must be conducted in an environment of privacy and safety.

- (c) Children should be interviewed and/or observed in person. Electronic means do not provide the full range of information about children's reactions and behaviours, nor the means for the assessor to fully engage with children. There are also risks with a lack of control by the assessor over the interview context and the safety and security the child has in the interview unless the assessor is present with the child.
- 19. Family assessors should be trained and skilled in forensic interview strategies with children and should follow generally recognised procedures when conducting interviews and observations with children.
 - (a) Children who are the focus of parenting disputes should be interviewed if they have reasonable receptive and expressive language skills. Younger children can be assessed by observations.
 - (b) When structuring interviews, family assessors should consider a range of approaches and base their interview strategies on published research addressing the effects upon children's responses of various forms of questioning. Family assessors should have knowledge of and should consider the factors that have been found to affect children's capacities as informants.
- 20. Family assessors should seek to ascertain the views of children and assess their maturity, understanding and ability to form and express their own views in relation to the pertinent issues and options.
 - (a) The family assessor should specify the weight given to the child's stated perceptions and/or sentiments and should assess the extent that the child is of sufficient developmental maturity to independently express informed views.
 - (b) In reporting these views to the adults or a court, the family assessor must be cognisant of any risks to the children in doing so, and take steps to minimise these risks by recommending some variation or limiting the process by which parties are informed, and the extent to which they are informed of the children's views.
 - (c) Family assessors should consider the stated views and concerns of each child as these relate to the possible or proposed parenting arrangements. They should describe the manner in which information concerning a child's stated perceptions and/or sentiments was obtained.
 - (d) Family assessors should assess and describe sibling relationships. If a parenting proposal under consideration involves the placement of siblings in different residences, the advantages and disadvantages of such a plan should be clearly articulated.
- 21. Family assessors should assess the relationships between each child and all adults who may perform a caretaking role with the child.
 - (a) Multiple forms of information gathering should be used when assessing relationships, such as interviews, observations, documents, and corroborative information. Adults and children's self-reports about relationships should not be solely relied upon. Where possible and appropriate, joint adult-child interviews,

observations and third party evidence should be included in the assessment of such relationships.

- (b) Each parent/child combination should be assessed by observation of the interactions between the adult/children by the assessor, unless there is a risk to the child's physical or psychological safety or wellbeing in doing so.
 - (c) When observations are conducted, any limitations due to the timing, context or process of the observations must be identified, and the impact on the assessments derived from the data obtained must be acknowledged.
 - (d) Where observation is not possible, it must be reported as a limitation of the assessment, and the reasons for not conducting an observation articulated. The absence of observed parent/child interactions limits the assessment of the nature of the relationship, and of the capacity of the parent to relate to and manage the child. Where there are no such observations, valid recommendations on parenting arrangements may not be possible.
 - (e) Where possible, the observation of adult/child interactions should be conducted after individual interviews with the adults, in order to obtain contextual information about the adult and the child before the observation, and to inform the decision to conduct the observation.
 - (f) Adults observed with children should also be given, in individual interview, the opportunity to comment on or explain any issues arising from the observations.
22. Observations structured or arranged by the assessor must be with the explicit knowledge of the adults involved. Assessors should inform the adults of the purpose for which arranged or structured observation sessions are conducted.
- (a) Parties should be observed by persons other than the family assessor only with their full knowledge and permission.
 - (b) Children should be informed about observations according to their age and ability to understand. Permissions required with regard to children should be obtained from the adult/parent who is to be observed with the children.
 - (c) Unscheduled or unplanned observations, such as incidental interactions between family members in waiting rooms or other public areas, can be used to inform the assessment even though the parties have not been advised before the observation. Assessors should, however, inform the adults of their observations and allow them to comment on what was observed.
 - (d) Assessors must not observe parties or family members covertly and where incidental observation occurs, the assessor must, where practically possible, make it known to the family members that the family assessor is present or can hear/see them.

FORMULATING ASSESSMENTS/OPINIONS AND REPORTING

23. Family assessors should refrain from forming opinions or hypotheses about the parties, the children, relationships or the suitability of any parenting arrangements prior to

assessing the family. It is essential that the assessor remain open and receptive to the parties' perceptions, and to the issues that are important for the parties.

- (a) Preliminary information can be obtained by reading available documents in order to ascertain the composition and characteristics of the family system, the parties' issues, and to make arrangements for the assessment process.
 - (b) Based on the information available prior to the interviews and observations, the assessor can have hypotheses as to what may be the potential issues in a matter and whether there are safety issues for either party in attending the assessment. These hypotheses must be tentative and subject to variation on full assessment.
 - (c) It is important to record what material has been read and when it was read, as this needs to be noted in the completed assessment.
24. Family assessors should refrain from making recommendations or expressing opinions prior to completing their assessment.
- (a) Family assessors should refrain from offering recommendations, expressing any preliminary hypotheses pertaining to parenting arrangements or related issues, and should refrain from negotiating settlements with the parties and/or their solicitors prior to gathering all the necessary information.
 - (b) While it is appropriate and necessary to ask the parents their views about potential or proposed parenting arrangements, the family assessor must not present these options as their own or as favoured options, prior to completing their assessment.
 - (c) While approaches such as reality testing or making a proposal to seek a possible settlement are used in mediation, they are usually not appropriate during a forensic assessment process. To do so could involve the family assessor creating the perception that they favour one proposal, prior to completion of their assessment. Eliciting parties' views about proposals must be done in a neutral way.
 - (d) It is acceptable to make recommendations for further assessment prior to completing a full assessment.
 - (e) It is not appropriate to formulate an initial or early view or opinion on the issues in dispute, or on the parenting arrangements, and then present this to the parties during the process of an incomplete assessment.
25. Family assessors should refrain from reading the evaluations of other similar professionals who have assessed the same family in a family assessment prior to formulating their own evaluation.
- (a) While appropriate to read assessments by different professions, such as psychiatric or medical assessments, reading the evaluations of other family assessors before gathering enough information to formulate their own assessment can lead to the perception of influence by the previous assessment, and may compromise the independence of the assessment.

- (b) As part of the preparation for an assessment, it is important to be aware of what prior assessments have been undertaken. There are circumstances where it is necessary to read another assessor's evaluations prior to meeting the parties, and where so, the reasons for this should be clearly delineated in the report.
 - (c) Once an assessor has gathered enough information and formulated their own view, it is recommended that they read previous relevant assessments by others so as to be more informed and to be able to comment on them, and any similarity or variation between them and the assessor's views, if needed.
- 26. Family assessors must make reasonable efforts to obtain sufficient information from the parties, documents or collateral sources to assess the level and nature of risks to the welfare of the children, and to provide assessments of risk.
 - (a) These risks include, but are not limited to, concerns about or allegations of family violence, child abuse or neglect, mental illness, or drug or alcohol misuse.
 - (b) These risk assessments must be conditional on different possible determinations by a court on any significant disputed or non-agreed facts.
 - (c) When making recommendations, the assessor must consider and recommend according to any assessed risk of future harm. Recommendations must also be conditional upon different possible findings of a court of any significant disputed facts that would impact on future risk.
- 27. Where family violence is identified as an issue in a matter, the assessor must conduct an expert family violence assessment as part of their report. They should use commonly accepted interpretive frameworks for family violence.
 - (a) When assessing risk of harm from family violence, the family assessor must consider the Family Court of Australia and Federal Circuit Court of Australia Family Violence Best Practice Principles – edition 3.1 (2013, or the Family Violence Policy of the Family Court of Western Australia. In doing so they should:
 - address the issue of family violence or abuse or the risk of family violence or abuse
 - assess the harm the children have suffered or are at risk of suffering if the orders sought are or are not made
 - consider whether or not there would be benefits, and if so, the nature of those benefits, if the child spent time with the person against whom the allegations are made
 - assess whether the physical and emotional safety of the child and the person alleging the family violence or abuse can be secured before, during and after any contact the child has with the parent or other person against whom the allegations are made

- ascertain the views of the child or children in light of the allegations of family violence or abuse or the risk of family violence or abuse when it is safe to do so, and
 - be informed whether the whereabouts of the party making the allegations has been suppressed and that those whereabouts not be revealed in the assessment and reporting process.
- (b) Where family violence or abuse is established, the family assessor should report on:
- the impact of the family violence or abuse on the children and a parent/adult who may be a victim
 - any steps taken by a parent or adult to act protectively or protect the children and minimise the risk of further family violence or abuse
 - whether the person acknowledges that family violence or abuse has occurred
 - whether the person accepts some or all responsibility for the family violence or abuse
 - whether, and the extent to which, the person accepts that the family violence or abuse was inappropriate
 - whether the person has participated or is participating in any program, course or other activity to address the factors contributing towards his or her violent or abusive behaviour
 - whether there is a need for the child and the other parent or carer to receive counselling or other form of treatment as a result of the family violence or abuse
 - whether the person has expressed regret and shown some understanding of the impact of their behaviour on the other parent in the past and currently, and
 - whether there are any indications that a person who has behaved violently or abusively and who is seeking to spend time with the child can reliably sustain that arrangement and how it will occur so that the child feels safe.
28. Family assessors should only express opinions in areas where they are competent to do so, based on adequate knowledge, skill, experience and qualifications.
- (a) Opinions of family assessors should be based on the information and data obtained. They should differentiate between information gathered, inferences made and opinions expressed.

- (b) They should not provide raw data, whether empirical, descriptive or quotes, without adequate interpretation of the meaning of that data.
 - (c) They should explain, or make explicit, the relationship between the data and the opinions offered.
 - (d) They should focus on reporting their findings and assessments, and refrain from presenting large volumes of unnecessary raw data in their assessments. Direct quotes and verbatim reporting of interviews should be used only where needed to support or explain the opinions or findings of the assessor.
29. Family assessors must identify the limitations in or of the data obtained and any implications this has for their assessment and opinions. Where the available information is not sufficient to responsibly form opinions on the parenting arrangements for children, they should decline to offer an opinion.
30. Family assessors should avoid offering opinions to a court on matters that do not directly follow from the court order or the brief for the assessment, or are not otherwise relevant to the purpose of the evaluation from a legal or social science perspective.
- (a) Family assessors should recognise that information not bearing directly upon the issues in a matter may cause harm to parties or family members if disclosed, and may have a prejudicial or confounding effect on the decision making process of parties or courts. For this reason, assessors should avoid including information that is not relevant to the issues in dispute, but should be responsive to lawful requests or requirements to disclose all information.
 - (b) Where matters are not included in the brief for the assessment or court order, but are seen by the assessor as relevant to the decision making from a social science perspective, these matters should be included in the assessment and commented on in the assessment.
 - (c) Where an issue has no relevance to the decision making in relation to the children, or the issues in dispute, such non-consequential issues should not be commented on, other than to identify that they are assessed to be non-consequential.
 - (d) Recommendations or advice to parties to change or improve their lives or parenting through treatment, education or personal change, can be made but should also be clearly differentiated from recommendations made to a court about the decision a court can make with regards to parenting arrangements.
31. Family assessors should endeavour to provide assessments that assist the decision making of the parties and/or the Court, based on the family and the situation as they are currently assessed. They should avoid making recommendations that unnecessarily delay or prolong decision making or assessment processes.
- (a) While there may be some circumstances where further information is needed before an assessment can be made, unless specifically requested to do so by the court order or the brief for the assessment, assessors should refrain from limiting recommendations to the short term arrangements with reassessment at a later date.

- (b) Where the parties are seeking resolution or determination of their matter, the family assessments should seek to assist in the early resolution or determination of the matters. Extending the process of assessing or determining a matter adds to the cost and potential distress of families and children. Family assessors should avoid recommending a delay in the determination process based on possible future changes unless requested to do so in the court order, or brief for the report, or if warranted for clearly articulated and valid reasons.
 - (c) While parties or family members may be able to change their individual or family situation by participating in treatment or education programs, assessment should not be unduly delayed or prolonged for them to do so. It is generally not the role of forensic assessors to be a treatment case manager overseeing the outcomes of ongoing treatments or interventions.
- 32. When presenting their findings or assessments in writing or in oral evidence, family assessors should strive to be accurate, objective and professional in their manner and language.
 - (a) They should present information in ways that are concise, easily understood by the Court, legal representatives, and as much as possible, by the parties.
 - (b) Family assessors should, where possible, use plain language and try to ensure that the parties understand the assessments made of them and their children. This can be particularly important where parties are unrepresented.
 - (c) Reports should be framed in terms of the interests of the child being the paramount consideration. To this end, evaluations should clearly identify risk, or potential risk, to the child of all proposals or options, and recommendations should be framed in terms of risk minimisation.
 - (d) Reports should focus on parenting strengths as well as areas of concern. Concerns should be reported in a manner that is neutral and impartial, to enhance the parent's capacity to receive the information with minimal defensiveness.
 - (e) Recommendations for parties to attend any treatment or programs are most helpful when they promote specific strategies for positive change that can be applied pragmatically, and recommendations should clearly articulate the purpose of the recommended service.
- 33. As experts, family assessors are expected to have a broad knowledge of the relevant published peer reviewed research relating to issues for families and children in family law matters. They are also expected to have an understanding of the diversity of this research and the views and findings expressed in it, how it relates to the cases they assess, and the limitations of research in this area.
 - (a) Assessments of families and children must be evidence-based on the broad body of research that underpins social science knowledge about children and families, specifically about separated families. While it is neither possible, nor appropriate, to provide references in every report for all of the research that underpins the knowledge that a family assessor brings to an assessment, where there are specific issues in dispute and recent and relevant peer reviewed and published

research on those issues, the family assessor may choose to provide the full references to cite this research in their report.

- (b) Where research is cited in a report, it is appropriate for the family assessor to be aware of and to cite not only the research that supports their assessment, but also any recent and relevant research that does not support the relied upon research or their assessment. It is not appropriate to select and cite only one or two references that support the assessment and make no reference to research that may not support the assessment.
- (c) Where there are published research papers that provide an overview or meta-analysis of all of the relevant research in relation to an issue, it may be appropriate to cite such published papers.
- (d) Where research is referred to or cited in a report, it is important that the family assessor explain the relevance of this research and how it is to be interpreted and applied to the specific case assessed, and the limitations of doing so.

CULTURAL ISSUES

- 34. Family assessors must ensure that all parties and relevant persons who need to be included in the assessment are able to do so without restriction due to language, culture or disability.
 - (a) Specific provisions may need to be made for Aboriginal or Torres Strait Islander persons to ensure they are able to fully participate in the assessment process.
 - (b) Arrangement should be made to ensure that any party who wishes to or needs to have an interpreter is able to do so and that the interpreter is suitable and appropriately qualified for the purpose.
 - (c) The arrangements for the assessment should be, as far as is practicable, sensitive to the cultural needs of families.
 - (d) Family assessors should make enquires with Indigenous parties as to whether the engagement of an Indigenous consultant or advisor is needed to assist the family members in the process, and to advise the assessor about culturally appropriate interview practices.
 - (e) Consideration should be given to the impact of requiring Indigenous families or parties who were refugees from authoritarian regimes to attend interviews in a court building, and the possible benefits of other locations for interviews, should be considered.
 - (f) The use of any interpreters or cultural advisors, and their role in the assessment process, must be included in the assessor's report.
- 35. As a minimum standard, a family assessment in which one or more party identifies as Aboriginal or Torres Strait Islander should contain the following:

- a description of the Indigenous background of the party (including whether one or both of the party's parents are Indigenous, as well as any tribal affiliations, if known)
 - an indication of whether the child has current and active involvement with any extended Indigenous family
 - a description of the party's connection, if any, to their local Indigenous community e.g. relationships with key local figures, use of Indigenous agencies and services, participation in local cultural events, etc.
 - a description of both parties' views of the significance of the child's Aboriginality and the extent to which this is an issue that the Court needs to consider in determining the matter
 - an assessment of the extent to which the child identifies (or is identified) as an Aboriginal or Torres Strait Islander
 - an assessment of the capacity of both parents to provide the support and opportunity for the child to explore the full extent of their Indigenous heritage, consistent with the child's age, developmental level and wishes
 - an assessment of the capacity of both parents to foster a positive sense of Indigenous cultural identity, and
 - an assessment of the likely impact on the child of being raised in a non-Indigenous family in circumstances where the Court is asked to make an order that the child lives with a non-Indigenous parent.
36. A family assessment in which one or more party identifies significant cultural issues should contain the following:
- a description of the cultural background of the parties
 - an indication of whether the child has current and active involvement with the cultural backgrounds
 - a description of the party's active connection, if any, to that community or extended family
 - a description of both parties' views of the significance of the child's culture and the extent to which this is an issue that the Court needs to consider in determining the matter
 - an assessment of the extent to which the child identifies with the parents' culture
 - an assessment of the capacity of both parents to provide the support and opportunity for the child to explore the full extent of their cultural heritage, consistent with the child's age, developmental level and wishes, and

- an assessment of the capacity of both parents to foster a positive sense of that cultural identity.

HOME VISITS

37. Home visits should only be used as part of an assessment where the home visits are clinically warranted for the purposes of the assessment.

They should also only be considered where there are no risks with regards to the safety of the assessor, where the assessor will have sufficient control over the assessment process, where there is the ability to equally assess the home environments of all parties, and where resources permit.

- (a) Home visits can be used in circumstances where there are specific issues that can only be assessed in the home environment or are necessary to enable a party or significant family member's full participation. Such circumstances include where a party has a disability or illness such that attendance at court or office premises would be difficult, where there are large family groups, or where one or more party is Indigenous.
- (b) Home visits involve a range of risks and limitations and can add significant additional costs of time and resources. While home visits can provide a setting for observations in many homes, it can be difficult for there to be the level of privacy required for individual interviews, with both adults and children. It may not be possible to conduct interviews with sufficient privacy in a home visit.
- (c) In the unusual circumstances that require a home visit to one household or party and not the other, the family assessor must be able to clearly describe and explain the reasons for this, and the implications for assessment.
- (d) Unless the family assessor has particular training and expertise necessary to assess the physical facilities, condition or amenity of homes or premises to which home visits are made, they should refrain from expressing opinions about such matters. Family assessors should be careful to avoid applying their own personal or cultural values to the physical attributes of the homes of the party's.

NOTIFICATION OF RISK OF HARM

38. Where a family assessor has reasonable grounds for suspecting that a child has been, or is at risk of being, ill-treated, abused, seriously neglected or exposed to psychologically harmful behaviour, formal notification to the appropriate child protection authority should be made.

- (a) Family assessors must comply with any legislative requirements for mandatory reporting of abuse of children at risk of abuse or neglect.
- (b) Where the child protection authority has previously been provided with all of the information which the assessor has about alleged abuse or neglect, it is not necessary for the family assessor to provide them with the same information again. The family assessor should, however, notify the child protection agency in relation to any information not included in any prior notification. If it is unclear if the child protection agency has all the information, a further notification is

recommended to ensure the child protection agency has all the necessary information.

- (c) Where a notification is made to a child protection authority, the family assessor should inform the Court and/or parties of this in their report. Where the family assessor considers there is a danger that informing the parties of the notification may jeopardise an investigation by the child protection agency, or place a child or family member at risk of harm, this should be commented on in their report, so that those receiving the report can take this into account when deciding to release it or to give it to the parties.

RECORDING AND STORING INFORMATION

- 39. Interviews, observations or phone calls in family assessments must not be recorded electronically, or any photographs or video recordings made, without the approval of the family assessor and the party involved.
 - (a) The purpose of the recordings, their potential use and the storage and disposal thereof must be explained to parties.
 - (b) Where an assessment is being conducted by court order the Rules and policies of that court with regards to the recording of the assessments process must be observed.
- 40. Family assessors need to make contemporaneous written notes of all interviews and observations, and keep a record of communications with parties and their representatives.
 - (a) While recording events should take place during or shortly after each interview or observation, it is sometimes not good practice to be taking detailed or extensive notes during interviews with children, as they require a more informal interactional style to feel engaged or comfortable in the interview process. Notes of interviews with children will thus sometimes be written immediately after the interview.
- 41. Family assessors must establish a system of keeping all records pertaining to their assessments in a safe and secure place, keep the records private, and retain them at least until the expiry of any appeal period or after the finalisation of any court matter.
 - (a) Family assessors must also be able to produce their records as required or ordered by a court. Where the report was ordered by a court, the notes should only be released by court order.
 - (b) If required to produce notes or records, the assessor should be aware of any information in their notes that may place a party at risk, for example personal contact details of parties or others, and remove these from the records before releasing them. If so, the report writer must inform the Court and the parties they have deleted these details and why this was done.

Annexure B

Family Court of Western Australia now employs Standing Orders as follows:

1. The parties and the Independent Children's Lawyer be restrained and an injunction is hereby granted restraining each of them from providing copies of any Single Expert's report prepared for the purpose of these proceedings, or permitting any other person to do so, to any person or entity other than their solicitor or counsel in these proceedings, without first obtaining leave of the Court.
2. The parties and the Independent Children's Lawyer be restrained and an injunction is hereby granted restraining each of them from making any complaint to a professional body or association concerning the conduct of the Single Expert or concerning the content of the Single Expert's report, or permitting any other person to do so, without first obtaining leave of the Court.
3. The preceding orders shall remain in full force and effect following completion of the proceedings.
4. For the purposes of the preceding orders, leave of the Court may be sought by:
 - (a) the filing of a written request by the Independent Children's Lawyer, copied to both parties to the proceedings;
 - (b) the filing of a Minute of Consent orders signed by the Independent Children's Lawyer and all parties or their legal representatives; or
 - (c) by a formal application with a brief affidavit in support.

Annexure C

Part 15.5—Expert evidence

Division 15.5.1—General

15.41 Application of Part 15.5

(1) This Part (other than rule 15.55) does not apply to any of the following:

(a) evidence from a medical practitioner or other person who has provided, or is providing, treatment for a party or child if the evidence relates only to any or all of the following:

- (i) the results of an examination, investigation or observation made;
- (ii) a description of any treatment carried out or recommended;
- (iii) expressions of opinion limited to the reasons for carrying out or recommending treatment and the consequences of the treatment, including a prognosis;

(b) evidence from an expert who has been retained for a purpose other than the giving of advice or evidence, or the preparation of a report for a case or anticipated case, being evidence:

- (i) about that expert's involvement with a party, child or subject matter of a case; and
- (ii) describing the reasons for the expert's involvement and the results of that involvement;

(c) evidence from an expert who has been associated, involved or had contact with a party, child or subject matter of a case for a purpose other than the giving of advice or evidence, or the preparation of a report for a case or anticipated case, being evidence about that expert's association, involvement or contact with that party, child or subject matter;

(d) evidence from family consultant employed by a Family Court (including evidence from a person appointed under regulation 8 of the Regulations).

Example: An example of evidence excluded from the requirements of this Part (other than rule 15.55) is evidence from a treating doctor or a teacher in relation to the doctor's or teacher's involvement with a party or child.

(2) Nothing in this Part prevents an independent children's lawyer communicating with a single expert witness.

15.42 Purpose of Part 15.5

The purpose of this Part is:

(a) to ensure that parties obtain expert evidence only in relation to a significant issue in dispute;

(b) to restrict expert evidence to that which is necessary to resolve or determine a case;

(c) to ensure that, if practicable and without compromising the interests of justice, expert evidence is given on an issue by a single expert witness;

(d) to avoid unnecessary costs arising from the appointment of more than one expert witness; and

(e) to enable a party to apply for permission to tender a report or adduce evidence from an expert witness appointed by that party, if necessary in the interests of justice.

15.43 Definition

In this Part:

expert's report means a report by an expert witness, including a notice under subrule 15.59(5).

Note: ***expert***, ***expert witness*** and ***single expert witness*** are defined in the Dictionary.

Division 15.5.2—Single expert witness

15.44Appointment of single expert witness by parties

(1) If the parties agree that expert evidence may help to resolve a substantial issue in a case, they may agree to jointly appoint a single expert witness to prepare a report in relation to the issue.

Note: Subrule 15.54(3) sets out the requirements that apply to instructions to a single expert witness appointed by agreement between the parties.

(2) A party does not need the court's permission to tender a report or adduce evidence from a single expert witness appointed under subrule (1).

15.45Order for single expert witness

(1) The court may, on application or on its own initiative, order that expert evidence be given by a single expert witness.

(2) When considering whether to make an order under subrule (1), the court may take into account factors relevant to making the order, including:

(a) the main purpose of these Rules (see rule 1.04) and the purpose of this Part (see rule 15.42);

(b) whether expert evidence on a particular issue is necessary;

(c) the nature of the issue in dispute;

(d) whether the issue falls within a substantially established area of knowledge;
and

(e) whether it is necessary for the court to have a range of opinion.

(3) The court may appoint a person as a single expert witness only if the person consents to the appointment.

(4) A party does not need the court's permission to tender a report or adduce evidence from a single expert witness appointed under subrule (1).

15.46Orders the court may make

The court may, in relation to the appointment of, instruction of, or conduct of a case involving, a single expert witness make an order, including an order:

(a) requiring the parties to confer for the purpose of agreeing on the person to be appointed as a single expert witness;

(b) that, if the parties cannot agree on who should be the single expert witness, the parties give the court a list stating:

- (i) the names of people who are experts on the relevant issue and have consented to being appointed as an expert witness; and
- (ii) the fee each expert will accept for preparing a report and attending court to give evidence;

(c) appointing a single expert witness from the list prepared by the parties or in some other way;

(d) determining any issue in dispute between the parties to ensure that clear instructions are given to the expert;

(e) that the parties:

- (i) confer for the purpose of preparing an agreed letter of instructions to the expert; and
- (ii) submit a draft letter of instructions for settling by the court;

(f) settling the instructions to be given to the expert;

(g) authorising and giving instructions about any inspection, test or experiment to be carried out for the purposes of the report; or

(h) that a report not be released to a person or that access to the report be restricted.

15.47 Single expert witness's fees and expenses

(1) The parties are equally liable to pay a single expert witness's reasonable fees and expenses incurred in preparing a report.

(2) A single expert witness is not required to undertake any work in relation to his or her appointment until the fees and expenses are paid or secured.

Note: This rule applies unless the court orders otherwise (see rule 1.12).

15.48 Single expert witness's report

(1) A single expert witness must prepare a written report.

(2) If the single expert witness was appointed by the parties, the expert witness must give each party a copy of the report at the same time.

(3) If the single expert witness was appointed by the court, the expert witness must give the report to the Registry Manager.

Note: An expert witness may seek procedural orders from the court under rule 15.60 if the expert witness considers that it would not be in the best interests of a child or a party to give a copy of a report to each party.

(4) An applicant who has been given a copy of a report must file the copy but does not need to serve it.

15.49Appointing another expert witness

(1) If a single expert witness has been appointed to prepare a report or give evidence in relation to an issue, a party must not tender a report or adduce evidence from another expert witness on the same issue without the court's permission.

(2) The court may allow a party to tender a report or adduce evidence from another expert witness on the same issue if it is satisfied that:

(a) there is a substantial body of opinion contrary to any opinion given by the single expert witness and that the contrary opinion is or may be necessary for determining the issue;

(b) another expert witness knows of matters, not known to the single expert witness, that may be necessary for determining the issue; or

(c) there is another special reason for adducing evidence from another expert witness.

15.50Cross-examination of single expert witness

(1) A party wanting to cross-examine a single expert witness at a hearing or trial must inform the expert witness, in writing at least 14 days before the date fixed for the hearing or trial, that the expert witness is required to attend.

(2) The court may limit the nature and length of cross-examination of a single expert witness.

Division 15.5.3—Permission for expert's evidence

15.51 Permission for expert's reports and evidence

(1) A party must apply for the court's permission to tender a report or adduce evidence at a hearing or trial from an expert witness, except a single expert witness.

(2) An independent children's lawyer may tender a report or adduce evidence at a hearing or trial from one expert witness on an issue without the court's permission.

15.52 Application for permission for expert witness

(1) A party may seek permission to tender a report or adduce evidence from an expert witness by filing an Application in a Case.

Note 1: A party who files an Application in a Case must, at the same time, file an affidavit stating the facts relied on in support of the orders sought (see subrule 5.02(1)).

Note 2: The court may allow a party to make an oral application (see paragraph (h) in item 3 of Table 11.1 in rule 11.01).

(2) The affidavit filed with the application must state:

(a) whether the party has attempted to agree on the appointment of a single expert witness with the other party and, if not, why not;

(b) the name of the expert witness;

(c) the issue about which the expert witness's evidence is to be given;

(d) the reason the expert evidence is necessary in relation to that issue;

(e) the field in which the expert witness is expert;

(f) the expert witness's training, study or experience that qualifies the expert witness as having specialised knowledge on the issue; and

(g) whether there is any previous connection between the expert witness and the party.

(3) When considering whether to permit a party to tender a report or adduce evidence from an expert witness, the court may take into account:

(a) the purpose of this Part (see rule 15.42);

(b) the impact of the appointment of an expert witness on the costs of the case;

(c) the likelihood of the appointment expediting or delaying the case;

- (d) the complexity of the issues in the case;
 - (e) whether the evidence should be given by a single expert witness rather than an expert witness appointed by one party only; and
 - (f) whether the expert witness has specialised knowledge, based on the person's training, study or experience:
 - (i) relevant to the issue on which evidence is to be given; and
 - (ii) appropriate to the value, complexity and importance of the case.
- (4) If the court grants a party permission to tender a report or adduce evidence from an expert witness, the permission is limited to the expert witness named, and the field of expertise stated, in the order.

Note: Despite an order under this rule, a party is not entitled to adduce evidence from an expert witness if the expert's report has not been disclosed or a copy has not been given to the other party (see rule 15.58).

Division 15.5.4—Instructions and disclosure of expert’s report

15.53 Application of Division 15.5.4

This Division does not apply to a market appraisal or an opinion as to value in relation to property obtained by a party for the purposes of a procedural hearing or conference under paragraph 12.02(g) or subrule 12.05(2).

15.54 Instructions to expert witness

(1) A party who instructs an expert witness to give an opinion for a case or an anticipated case must:

(a) ensure the expert witness has a copy of the most recent version of, and has read, Divisions 15.5.4, 15.5.5 and 15.5.6 of these Rules; and

(b) obtain a written report from the expert witness.

(2) All instructions to an expert witness must be in writing and must include:

(a) a request for a written report;

(b) advice that the report may be used in an anticipated or actual case;

(c) the issues about which the opinion is sought;

(d) a description of any matter to be investigated, or any experiment to be undertaken or issue to be reported on; and

(e) full and frank disclosure of information and documents that will help the expert witness to perform the expert witness’s function.

(3) The parties must give the expert an agreed statement of facts on which to base the report.

(4) However, if the parties do not agree on a statement of facts:

(a) unless the court directs otherwise—each of the parties must give to the expert a statement of facts on which to base the report; and

(b) the court may give directions about the form and content of the statement of facts to be given to the expert.

15.55 Mandatory disclosure of expert’s report

(1) A party who has obtained an expert’s report for a parenting case, whether before or after the start of the case, must give each other party a copy of the report:

(a) if the report is obtained before the case starts—at least 2 days before the first court event; or

(b) if the report is obtained after the case starts—within 7 days after the party receives the report.

(2) The party who discloses an expert's report must disclose any supplementary report and any notice amending the report under subrule 15.59(5).

(3) If an expert's report has been disclosed under this rule, any party may seek to tender the report as evidence.

(4) Legal professional privilege does not apply in relation to an expert's report that must be disclosed under this rule.

15.56 Provision of information about fees

A party who has instructed an expert witness must, if requested by another party, give each other party details of any fee or benefit received, or receivable, by or for the expert witness, for the preparation of the report and for services provided, or to be provided, by or for the expert witness in connection with the expert witness giving evidence for the party in the case.

15.57 Application for provision of information

(1) This rule applies if the court is satisfied that:

(a) a party (the **disclosing party**) has access to information or a document that is not reasonably available to the other party (the **requesting party**); and

(b) the provision of the information or a copy of the document is necessary to allow an expert witness to carry out the expert witness's function properly.

(2) The requesting party may apply for an order that the disclosing party:

(a) file and serve a document specifying the information in enough detail to allow the expert witness to properly assess its value and significance; and

(b) give a copy of the document to the expert witness.

Note: An expert witness may request the court to make an order under this rule (see rule 15.60).

15.58 Failure to disclose report

A party who fails to give a copy of an expert's report to another party or the independent children's lawyer (if any) must not use the report or call the expert witness to give evidence at a hearing or trial, unless the other party and independent children's lawyer

consent to the report being used or the expert witness being called, or the court orders otherwise.

Division 15.5.5—Expert witness's duties and rights

15.59 Expert witness's duty to the court

(1) An expert witness has a duty to help the court with matters that are within the expert witness's knowledge and capability.

(2) The expert witness's duty to the court prevails over the obligation of the expert witness to the person instructing, or paying the fees and expenses of, the expert witness.

(3) The expert witness has a duty to:

(a) give an objective and unbiased opinion that is also independent and impartial on matters that are within the expert witness's knowledge and capability;

(b) conduct the expert witness's functions in a timely way;

(c) avoid acting on an instruction or request to withhold or avoid agreement when attending a conference of experts;

(d) consider all material facts, including those that may detract from the expert witness's opinion;

(e) tell the court:

(i) if a particular question or issue falls outside the expert witness's expertise; and

(ii) if the expert witness believes that the report prepared by the expert witness:

(A) is based on incomplete research or inaccurate or incomplete information; or

(B) is incomplete or may be inaccurate, for any reason; and

(f) produce a written report that complies with rules 15.62 and 15.63.

(4) The expert witness's duty to the court arises when the expert witness:

(a) receives instructions under rule 15.54; or

(b) is informed by a party that the expert witness may be called to give evidence in a case.

(5) An expert witness who changes an opinion after the preparation of a report must give written notice to that effect:

(a) if appointed by a party—to the instructing party; or

- (b) if appointed by the court—to the Registry Manager and each party.
- (6) A notice under subrule (5) is taken to be part of the expert's report.

15.60 Expert witness's right to seek orders

(1) Before final orders are made, a single expert witness may, by written request to the court, seek a procedural order to assist in carrying out the expert witness's function.

Note: The written request may be by letter and may, for example:

- (a) ask for clarification of instructions;
- (b) relate to the questions mentioned in Division 15.5.6; or
- (c) relate to a dispute about fees.

(2) The request must:

- (a) comply with subrule 24.01(1); and
- (b) set out the procedural orders sought and the reason the orders are sought.

(3) The expert witness must serve a copy of the request on each party and satisfy the court that the copy has been served.

(4) The court may determine the request in chambers unless:

- (a) within 7 days of being served with the request, a party makes a written objection to the request being determined in chambers; or
- (b) the court decides that an oral hearing is necessary.

15.61 Expert witness's evidence in chief

(1) An expert witness's evidence in chief comprises the expert's report, any changes to that report in a notice under subrule 15.59(5) and any answers to questions under rule 15.66.

(2) An expert witness has the same protection and immunity in relation to the contents of a report disclosed under these Rules or an order as the expert witness could claim if the contents of the report were given by the expert witness orally at a hearing or trial.

15.62 Form of expert's report

(1) An expert's report must:

- (a) be addressed to the court and the party instructing the expert witness;
- (b) have attached to it a summary of the instructions given to the expert witness and a list of any documents relied on in preparing the report; and

- (c) be verified by an affidavit of the expert witness.
- (2) The affidavit verifying the expert's report must state the following:

'I have made all the inquiries I believe are necessary and appropriate and to my knowledge there have not been any relevant matters omitted from this report, except as otherwise specifically stated in this report.

I believe that the facts within my knowledge that have been stated in this report are true.

The opinions I have expressed in this report are independent and impartial.

I have read and understand Divisions 15.5.4, 15.5.5 and 15.5.6 of the *Family Law Rules 2004* and have used my best endeavours to comply with them.

I have complied with the requirements of the following professional codes of conduct or protocol, being [*state the name of the code or protocol*].

I understand my duty to the court and I have complied with it and will continue to do so.'

15.63 Contents of expert's report

An expert's report must:

- (a) state the reasons for the expert witness's conclusions;
- (b) include a statement about the methodology used in the production of the report; and
- (c) include the following in support of the expert witness's conclusions:
 - (i) the expert witness's qualifications;
 - (ii) the literature or other material used in making the report;
 - (iii) the relevant facts, matters and assumptions on which the opinions in the report are based;
 - (iv) a statement about the facts in the report that are within the expert witness's knowledge;
 - (v) details about any tests, experiments, examinations or investigations relied on by the expert witness and, if they were carried out by another person, details of that person's qualifications and experience;
 - (vi) if there is a range of opinion on the matters dealt with in the report—a summary of the range of opinion and the basis for the expert witness's opinion;
 - (vii) a summary of the conclusions reached;
 - (viii) if necessary, a disclosure that:

- (A) a particular question or issue falls outside the expert witness's expertise;
- (B) the report may be incomplete or inaccurate without some qualification and the details of any qualification; or
- (C) the expert witness's opinion is not a concluded opinion because further research or data is required or because of any other reason.

15.64 Consequences of non-compliance

If an expert witness does not comply with these Rules, the court may:

- (a) order the expert witness to attend court;
- (b) refuse to allow the expert's report or any answers to questions to be relied on;
- (c) allow the report to be relied on but take the non-compliance into account when considering the weight to be given to the expert witness's evidence; and
- (d) take the non-compliance into account when making orders for:
 - (i) an extension or abridgment of a time limit;
 - (ii) a stay of the case;
 - (iii) interest payable on a sum ordered to be paid; or
 - (iv) costs.

Note: For the court's power to order costs, see subsection 117(2) of the Act.

Division 15.5.6—Clarification of single expert witness reports

15.64APurpose

(1) The purpose of this Division is to provide ways of clarifying a report prepared by a single expert witness.

(2) Clarification about a report may be obtained at a conference under rule 15.64B or by means of questions under rule 15.65.

15.64BConference

(1) Within 21 days after receipt of the report of a single expert witness, the parties may enter into an agreement about conferring with the expert witness for the purpose of clarifying the report.

(2) The agreement may provide for the parties, or for one or more of them, to confer with the expert witness.

(3) Without limiting the scope of the conference, the parties must agree on arrangements for the conference.

(4) It is intended that the parties should be free to make any arrangements for the conference that are consistent with this Division.

Note: For example, arrangements for a conference might include the attendance of another expert, or the provision of a supplementary report.

(5) Before participating in the conference, the expert witness must be advised of arrangements for the conference.

(6) In seeking to clarify the report of the expert witness, the parties must not interrogate the expert witness.

(7) If the parties do not agree about conferring with a single expert witness, the court, on application by a party, may order that a conference be held in accordance with any conditions the court determines.

15.65Questions to single expert witness

(1) A party seeking to clarify the report of a single expert witness may ask questions of the single expert witness under this rule:

(a) within 7 days after the conference under rule 15.64B; or

(b) if no conference is held, within 21 days after receipt of the single expert witness's report by the party.

- (2) The questions must:
 - (a) be in writing and be put once only;
 - (b) be only for the purpose of clarifying the single expert witness's report; and
 - (c) not be vexatious or oppressive, or require the single expert witness to undertake an unreasonable amount of work to answer.
- (3) The party must give a copy of any questions to each other party.

Note: A party may cross-examine a single expert witness (see rule 15.50).

15.66 Single expert witness's answers

(1) A single expert witness must answer a question received under rule 15.65 within 21 days after receiving it.

- (2) An answer to a question:
 - (a) must be in writing;
 - (b) must specifically refer to the question; and
 - (c) must:
 - (i) answer the substance of the question; or
 - (ii) object to answering the question.

(3) If the single expert witness objects to answering a question or is unable to answer a question, the single expert witness must state the reason for the objection or inability in the document containing the answers.

- (4) The single expert witness's answers:
 - (a) must be:
 - (i) attached to the affidavit under subrule 15.62(2);
 - (ii) sent by the single expert witness to all parties at the same time; and
 - (iii) filed by the party asking the questions; and
 - (b) are taken to be part of the expert's report.

15.67 Single expert witness's costs

(1) The reasonable fees and expenses of a single expert witness incurred in relation to a conference are to be paid as follows:

- (a) if only one of the parties attends the conference—by that party; or
- (b) if more than one of the parties attends the conference—by those parties jointly.

(2) If a single expert witness answers questions under rule 15.66, his or her reasonable fees and expenses incurred in answering any questions are to be paid by the party asking the questions.

(3) A single expert witness is not required to undertake any work in relation to a conference or answer any questions until the fees and expenses for that work or those answers are paid or secured.

- (4) Subrule (3) is not affected by subrule 15.66(1).

Note: This rule applies unless the court orders otherwise (see rule 1.12).

- (5) In this rule:

attend includes attendance by electronic communication.

15.67A Application for directions

A party may apply to the court for directions relating to a conference with a single expert witness or the asking or answering of questions under this Division.

Division 15.5.7—Evidence from 2 or more expert witnesses

15.68 Application of Division 15.5.7

This Division applies to a case in which 2 or more parties intend to tender an expert's report or adduce evidence from different expert witnesses about the same, or a similar, question.

15.69 Conference of expert witnesses

- (1) In a case to which this Division applies:
 - (a) the parties must arrange for the expert witnesses to confer at least 28 days before the relevant date; and
 - (b) each party must give to the expert witness the party has instructed a copy of the document entitled *Experts' Conferences—Guidelines for expert witnesses and those instructing them in cases in the Family Court of Australia*, the text of which is set out in Schedule 5.
- (2) The court may, in relation to the conference, make an order, including an order about:
 - (a) which expert witnesses are to attend;
 - (b) where and when the conference is to occur;
 - (c) which issues the expert witnesses must discuss;
 - (d) the questions to be answered by the expert witnesses; or
 - (e) the documents to be given to the expert witnesses, including:
 - (i) Divisions 15.5.4, 15.5.5 and 15.5.6 of these Rules;
 - (ii) relevant affidavits;
 - (iii) a joint statement of the assumptions to be relied on by the expert witnesses during the conference, including any competing assumptions; and
 - (iv) all expert's reports already disclosed by the parties.
- (3) At the conference, the expert witnesses must:
 - (a) identify the issues that are agreed and not agreed;
 - (b) if practicable, reach agreement on any outstanding issue;
 - (c) identify the reason for disagreement on any issue;

(d) identify what action (if any) may be taken to resolve any outstanding issues;
and

(e) prepare a joint statement specifying the matters mentioned in paragraphs (a) to (d) and deliver a copy of the statement to each party.

(4) If the expert witnesses reach agreement on an issue, the agreement does not bind the parties unless the parties expressly agree to be bound by it.

(5) The joint statement may be tendered as evidence of matters agreed on and to identify the issues on which evidence will be called.

15.70 Conduct of trial with expert witnesses

At a trial, the court may make an order, including an order that:

(a) an expert witness clarify the expert witness's evidence after cross-examination;

(b) the expert witness give evidence only after all or certain factual evidence relevant to the question has been led;

(c) each party intending to call an expert witness is to close that party's case, subject only to adducing the evidence of the expert witness;

(d) each expert witness is to be sworn and available to give evidence in the presence of each other;

(e) each expert witness give evidence about the opinion given by another expert witness; or

(f) cross-examination, or re-examination, of an expert witness is to be conducted:

(i) by completing the cross-examination or re-examination of the expert witness before another expert witness; or

(ii) by putting to each expert witness, in turn, each question relevant to one subject or issue at a time, until the cross-examination or re-examination of all witnesses is completed.

Part 15.6—Other matters about evidence

15.71 Court may call evidence

- (1) The court may, on its own initiative:
 - (a) call any person as a witness; and
 - (b) make any orders relating to examination and cross-examination of that witness.
- (2) The court may order a party to pay conduct money for the attendance of the witness.

15.72 Order for examination of witness

- (1) A court may, at any stage in a case:
 - (a) request that a person be examined on oath before a court, or an officer of that court, at any place in Australia; or
 - (b) order a commission to be issued to a person in Australia authorising that person to take the evidence of any person on oath.
- (2) The court receiving the request, or the person to whom the commission is issued, may make procedural orders about the time, place and manner of the examination or taking of evidence, including that the evidence be recorded in writing or by electronic communication.
- (3) The court making the request or ordering the commission may receive in evidence the record taken.

15.73 Letters of request

- (1) If, under the *Foreign Evidence Act 1994*, a court orders a letter to be issued to the judicial authorities of a foreign country requesting that the evidence of a person be taken, the party obtaining the order must file:
 - (a) 2 copies of the appropriate letter of request and any questions to accompany the request;
 - (b) if English is not an official language of the country to whose judicial authorities the letter of request is to be sent—2 copies of a translation of each document mentioned in paragraph (a) in a language appropriate to the place where the evidence is to be taken; and
 - (c) an undertaking:

- (i) to be responsible for all expenses incurred by the court, or by the person at the request of the court, in respect of the letter of request; and
- (ii) to pay the amount to the Registry Manager of the filing registry, after being given notice of the amount of the expenses.

(2) A translation filed under paragraph (1)(b) must be accompanied by an affidavit of the person making the translation:

- (a) verifying that it is a correct translation; and
- (b) setting out the translator's full name, address and qualifications for making the translation.

(3) If, after receiving the documents mentioned in subrules (1) and (2) (if applicable), the Registrar is satisfied that the documents are appropriate, the Registry Manager must send them to the Secretary of the Attorney-General's Department for transmission to the judicial authorities of the other country.

Note: Rules 5.06 and 16.05 set out the procedure for arranging for a party or a witness to attend a hearing or trial by electronic communication.

15.74 Hearsay evidence—notice under section 67 of the *Evidence Act 1995*

A Notice of Previous Representation for subsection 67(1) of the *Evidence Act 1995* must be attached to an affidavit that sets out evidence of the previous representation.

15.75 Transcript receivable in evidence

A transcript of a hearing or trial may be received in evidence as a true record of the hearing or trial.

15.76 Notice to produce

(1) A party may, no later than 7 days before a hearing or 28 days before a trial, by written notice, require another party to produce, at the hearing or trial, a specified document that is in the possession or control of the other party.

(2) A party receiving a notice under subrule (1) must produce the document at the hearing or trial.

15.77 Parenting questionnaire

- (1) This rule applies to a parenting case.
- (2) Each party to the case must file a completed questionnaire at least 28 days before the first day before the Judge.

- (3) The questionnaire must be in the form approved by the Principal Registrar.

Note: For the service requirements for a document filed with the court, see rule 7.04.



FEDERAL COURT OF AUSTRALIA



Annexure D

EXPERT EVIDENCE PRACTICE NOTES (GPN-EXPT)

General Practice Note

1. INTRODUCTION

- 1.1 This practice note, including the *Harmonised Expert Witness Code of Conduct* (“**Code**”) (see **Annexure A**) and the *Concurrent Expert Evidence Guidelines* (“**Concurrent Evidence Guidelines**”) (see **Annexure B**), applies to any proceeding involving the use of expert evidence and must be read together with:
- (a) the Central Practice Note (CPN-1), which sets out the fundamental principles concerning the National Court Framework (“**NCF**”) of the Federal Court and key principles of case management procedure;
 - (b) the Federal Court of Australia Act 1976 (Cth) (“**Federal Court Act**”);
 - (c) the Evidence Act 1995 (Cth) (“**Evidence Act**”), including Part 3.3 of the Evidence Act;
 - (d) Part 23 of the Federal Court Rules 2011 (Cth) (“**Federal Court Rules**”); and
 - (e) where applicable, the Survey Evidence Practice Note (GPN-SURV).
- 1.2 This practice note takes effect from the date it is issued and, to the extent practicable, applies to proceedings whether filed before, or after, the date of issuing.

2. APPROACH TO EXPERT EVIDENCE

- 2.1 An expert witness may be retained to give opinion evidence in the proceeding, or, in certain circumstances, to express an opinion that may be relied upon in alternative dispute resolution procedures such as mediation or a conference of experts. In some circumstances an expert may be appointed as an independent adviser to the Court.
- 2.2 The purpose of the use of expert evidence in proceedings, often in relation to complex subject matter, is for the Court to receive the benefit of the objective and impartial assessment of an issue from a witness with specialised knowledge (based on training, study or experience - see generally s 79 of the Evidence Act).
- 2.3 However, the use or admissibility of expert evidence remains subject to the overriding requirements that:
- (a) to be admissible in a proceeding, any such evidence must be relevant (s 56 of the Evidence Act); and
 - (b) even if relevant, any such evidence, may be refused to be admitted by the Court if its probative value is outweighed by other considerations such as the evidence

being unfairly prejudicial, misleading or will result in an undue waste of time (s 135 of the Evidence Act).

- 2.4 An expert witness' opinion evidence may have little or no value unless the assumptions adopted by the expert (ie. the facts or grounds relied upon) and his or her reasoning are expressly stated in any written report or oral evidence given.
- 2.5 The Court will ensure that, in the interests of justice, parties are given a reasonable opportunity to adduce and test relevant expert opinion evidence. However, the Court expects parties and any legal representatives acting on their behalf, when dealing with expert witnesses and expert evidence, to at all times comply with their duties associated with the overarching purpose in the Federal Court Act (see ss 37M and 37N).

3. INTERACTION WITH EXPERT WITNESSES

- 3.1 Parties and their legal representatives should never view an expert witness retained (or partly retained) by them as that party's advocate or "hired gun". Equally, they should never attempt to pressure or influence an expert into conforming his or her views with the party's interests.
- 3.2 A party or legal representative should be cautious not to have inappropriate communications when retaining or instructing an independent expert, or assisting an independent expert in the preparation of his or her evidence. However, it is important to note that there is no principle of law or practice and there is nothing in this practice note that obliges a party to embark on the costly task of engaging a "consulting expert" in order to avoid "contamination" of the expert who will give evidence. Indeed the Court would generally discourage such costly duplication.
- 3.3 Any witness retained by a party for the purpose of preparing a report or giving evidence in a proceeding as to an opinion held by the witness that is wholly or substantially based in the specialised knowledge of the witness¹ should, at the earliest opportunity, be provided with:
 - (a) a copy of this practice note, including the Code (see Annexure A); and
 - (b) all relevant information (whether helpful or harmful to that party's case) so as to enable the expert to prepare a report of a truly independent nature.
- 3.4 Any questions or assumptions provided to an expert should be provided in an unbiased manner and in such a way that the expert is not confined to addressing selective, irrelevant or immaterial issues.

¹ Such a witness includes a "Court expert" as defined in r 23.01 of the Federal Court Rules. For the definition of "expert", "expert evidence" and "expert report" see the Dictionary, in Schedule 1 of the Federal Court Rules.

4. ROLE AND DUTIES OF THE EXPERT WITNESS

- 4.1 The role of the expert witness is to provide relevant and impartial evidence in his or her area of expertise. An expert should never mislead the Court or become an advocate for the cause of the party that has retained the expert.
- 4.2 It should be emphasised that there is nothing inherently wrong with experts disagreeing or failing to reach the same conclusion. The Court will, with the assistance of the evidence of the experts, reach its own conclusion.
- 4.3 However, experts should willingly be prepared to change their opinion or make concessions when it is necessary or appropriate to do so, even if doing so would be contrary to any previously held or expressed view of that expert.

Harmonised Expert Witness Code of Conduct

- 4.4 Every expert witness giving evidence in this Court must read the *Harmonised Expert Witness Code of Conduct* (attached in Annexure A) and agree to be bound by it.
- 4.5 The Code is not intended to address all aspects of an expert witness' duties, but is intended to facilitate the admission of opinion evidence, and to assist experts to understand in general terms what the Court expects of them. Additionally, it is expected that compliance with the Code will assist individual expert witnesses to avoid criticism (rightly or wrongly) that they lack objectivity or are partisan.

5. CONTENTS OF AN EXPERT'S REPORT AND RELATED MATERIAL

- 5.1 The contents of an expert's report must conform with the requirements set out in the Code (including clauses 3 to 5 of the Code).
- 5.2 In addition, the contents of such a report must also comply with r 23.13 of the Federal Court Rules. Given that the requirements of that rule significantly overlap with the requirements in the Code, an expert, unless otherwise directed by the Court, will be taken to have complied with the requirements of r 23.13 if that expert has complied with the requirements in the Code and has complied with the additional following requirements. The expert shall:
 - (a) acknowledge in the report that:
 - (i) the expert has read and complied with this practice note and agrees to be bound by it; and
 - (ii) the expert's opinions are based wholly or substantially on specialised knowledge arising from the expert's training, study or experience;
 - (b) identify in the report the questions that the expert was asked to address;
 - (c) sign the report and attach or exhibit to it copies of:
 - (i) documents that record any instructions given to the expert; and
 - (ii) documents and other materials that the expert has been instructed to consider.
- 5.3 Where an expert's report refers to photographs, plans, calculations, analyses, measurements, survey reports or other extrinsic matter, these must be provided to the other parties at the same time as the expert's report.

6. CASE MANAGEMENT CONSIDERATIONS

- 6.1 Parties intending to rely on expert evidence at trial are expected to consider between them and inform the Court at the earliest opportunity of their views on the following:
- (a) whether a party should adduce evidence from more than one expert in any single discipline;
 - (b) whether a common expert is appropriate for all or any part of the evidence;
 - (c) the nature and extent of expert reports, including any in reply;
 - (d) the identity of each expert witness that a party intends to call, their area(s) of expertise and availability during the proposed hearing;
 - (e) the issues that it is proposed each expert will address;
 - (f) the arrangements for a conference of experts to prepare a joint-report (see Part 7 of this practice note);
 - (g) whether the evidence is to be given concurrently and, if so, how (see Part 8 of this practice note); and
 - (h) whether any of the evidence in chief can be given orally.
- 6.2 It will often be desirable, before any expert is retained, for the parties to attempt to agree on the question or questions proposed to be the subject of expert evidence as well as the relevant facts and assumptions. The Court may make orders to that effect where it considers it appropriate to do so.

7. CONFERENCE OF EXPERTS AND JOINT-REPORT

- 7.1 Parties, their legal representatives and experts should be familiar with aspects of the Code relating to conferences of experts and joint-reports (see clauses 6 and 7 of the Code attached in [Annexure A](#)).
- 7.2 In order to facilitate the proper understanding of issues arising in expert evidence and to manage expert evidence in accordance with the overarching purpose, the Court may require experts who are to give evidence or who have produced reports to meet for the purpose of identifying and addressing the issues not agreed between them with a view to reaching agreement where this is possible ("**conference of experts**"). In an appropriate case, the Court may appoint a registrar of the Court or some other suitably qualified person ("**Conference Facilitator**") to act as a facilitator at the conference of experts.
- 7.3 It is expected that where expert evidence may be relied on in any proceeding, at the earliest opportunity, parties will discuss and then inform the Court whether a conference of experts and/or a joint-report by the experts may be desirable to assist with or simplify the giving of expert evidence in the proceeding. The parties should discuss the necessary arrangements for any conference and/or joint-report. The arrangements discussed between the parties should address:
- (a) who should prepare any joint-report;
 - (b) whether a list of issues is needed to assist the experts in the conference and, if so, whether the Court, the parties or the experts should assist in preparing such a list;
 - (c) the agenda for the conference of experts; and

- (d) arrangements for the provision, to the parties and the Court, of any joint-report or any other report as to the outcomes of the conference ("**conference report**").

Conference of Experts

- 7.4 The purpose of the conference of experts is for the experts to have a comprehensive discussion of issues relating to their field of expertise, with a view to identifying matters and issues in a proceeding about which the experts agree, partly agree or disagree and why. For this reason the conference is attended only by the experts and any Conference Facilitator. Unless the Court orders otherwise, the parties' lawyers will not attend the conference but will be provided with a copy of any conference report.
- 7.5 The Court may order that a conference of experts occur in a variety of circumstances, depending on the views of the judge and the parties and the needs of the case, including:
 - (a) while a case is in mediation. When this occurs the Court may also order that the outcome of the conference or any document disclosing or summarising the experts' opinions be confidential to the parties while the mediation is occurring;
 - (b) before the experts have reached a final opinion on a relevant question or the facts involved in a case. When this occurs the Court may order that the parties exchange draft expert reports and that a conference report be prepared for the use of the experts in finalising their reports;
 - (c) after the experts' reports have been provided to the Court but before the hearing of the experts' evidence. When this occurs the Court may also order that a conference report be prepared (jointly or otherwise) to ensure the efficient hearing of the experts' evidence.
- 7.6 Subject to any other order or direction of the Court, the parties and their lawyers must not involve themselves in the conference of experts process. In particular, they must not seek to encourage an expert not to agree with another expert or otherwise seek to influence the outcome of the conference of experts. The experts should raise any queries they may have in relation to the process with the Conference Facilitator (if one has been appointed) or in accordance with a protocol agreed between the lawyers prior to the conference of experts taking place (if no Conference Facilitator has been appointed).
- 7.7 Any list of issues prepared for the consideration of the experts as part of the conference of experts process should be prepared using non-tendentious language.
- 7.8 The timing and location of the conference of experts will be decided by the judge or a registrar who will take into account the location and availability of the experts and the Court's case management timetable. The conference may take place at the Court and will usually be conducted in-person. However, if not considered a hindrance to the process, the conference may also be conducted with the assistance of visual or audio technology (such as via the internet, video link and/or by telephone).
- 7.9 Experts should prepare for a conference of experts by ensuring that they are familiar with all of the material upon which they base their opinions. Where expert reports in draft or final form have been exchanged prior to the conference, experts should attend the conference familiar with the reports of the other experts. Prior to the conference, experts should also consider where they believe the differences of opinion lie between them and what processes and discussions may assist to identify and refine those areas of difference.

Joint-report

- 7.10 At the conclusion of the conference of experts, unless the Court considers it unnecessary to do so, it is expected that the experts will have narrowed the issues in respect of which they agree, partly agree or disagree in a joint-report. The joint-report should be clear, plain and concise and should summarise the views of the experts on the identified issues, including a succinct explanation for any differences of opinion, and otherwise be structured in the manner requested by the judge or registrar.
- 7.11 In some cases (and most particularly in some native title cases), depending on the nature, volume and complexity of the expert evidence a judge may direct a registrar to draft part, or all, of a conference report. If so, the registrar will usually provide the draft conference report to the relevant experts and seek their confirmation that the conference report accurately reflects the opinions of the experts expressed at the conference. Once that confirmation has been received the registrar will finalise the conference report and provide it to the intended recipient(s).

8. CONCURRENT EXPERT EVIDENCE

- 8.1 The Court may determine that it is appropriate, depending on the nature of the expert evidence and the proceeding generally, for experts to give some or all of their evidence concurrently at the final (or other) hearing.
- 8.2 Parties should familiarise themselves with the *Concurrent Expert Evidence Guidelines* (attached in Annexure B). The Concurrent Evidence Guidelines are not intended to be exhaustive but indicate the circumstances when the Court might consider it appropriate for concurrent expert evidence to take place, outline how that process may be undertaken, and assist experts to understand in general terms what the Court expects of them.
- 8.3 If an order is made for concurrent expert evidence to be given at a hearing, any expert to give such evidence should be provided with the Concurrent Evidence Guidelines well in advance of the hearing and should be familiar with those guidelines before giving evidence.

9. FURTHER PRACTICE INFORMATION AND RESOURCES

- 9.1 Further information regarding Expert Evidence and Expert Witnesses is available on the Court's website.
- 9.2 Further information to assist litigants, including a range of helpful guides, is also available on the Court's website. This information may be particularly helpful for litigants who are representing themselves.

J L B ALLSOP
Chief Justice
25 October 2016

Annexure A

HARMONISED EXPERT WITNESS CODE OF CONDUCT²

APPLICATION OF CODE

1. This Code of Conduct applies to any expert witness engaged or appointed:
 - (a) to provide an expert's report for use as evidence in proceedings or proposed proceedings; or
 - (b) to give opinion evidence in proceedings or proposed proceedings.

GENERAL DUTIES TO THE COURT

2. An expert witness is not an advocate for a party and has a paramount duty, overriding any duty to the party to the proceedings or other person retaining the expert witness, to assist the Court impartially on matters relevant to the area of expertise of the witness.

CONTENT OF REPORT

3. Every report prepared by an expert witness for use in Court shall clearly state the opinion or opinions of the expert and shall state, specify or provide:
 - (a) the name and address of the expert;
 - (b) an acknowledgment that the expert has read this code and agrees to be bound by it;
 - (c) the qualifications of the expert to prepare the report;
 - (d) the assumptions and material facts on which each opinion expressed in the report is based [a letter of instructions may be annexed];
 - (e) the reasons for and any literature or other materials utilised in support of such opinion;
 - (f) (if applicable) that a particular question, issue or matter falls outside the expert's field of expertise;
 - (g) any examinations, tests or other investigations on which the expert has relied, identifying the person who carried them out and that person's qualifications;
 - (h) the extent to which any opinion which the expert has expressed involves the acceptance of another person's opinion, the identification of that other person and the opinion expressed by that other person;
 - (i) a declaration that the expert has made all the inquiries which the expert believes are desirable and appropriate (save for any matters identified explicitly in the report), and that no matters of significance which the expert regards as relevant have, to the knowledge of the expert, been withheld from the Court;
 - (j) any qualifications on an opinion expressed in the report without which the report is or may be incomplete or inaccurate;
 - (k) whether any opinion expressed in the report is not a concluded opinion because of insufficient research or insufficient data or for any other reason; and

² Approved by the Council of Chief Justices' Rules Harmonisation Committee

- (l) where the report is lengthy or complex, a brief summary of the report at the beginning of the report.

SUPPLEMENTARY REPORT FOLLOWING CHANGE OF OPINION

- 4. Where an expert witness has provided to a party (or that party's legal representative) a report for use in Court, and the expert thereafter changes his or her opinion on a material matter, the expert shall forthwith provide to the party (or that party's legal representative) a supplementary report which shall state, specify or provide the information referred to in paragraphs (a), (d), (e), (g), (h), (i), (j), (k) and (l) of clause 3 of this code and, if applicable, paragraph (f) of that clause.
- 5. In any subsequent report (whether prepared in accordance with clause 4 or not) the expert may refer to material contained in the earlier report without repeating it.

DUTY TO COMPLY WITH THE COURT'S DIRECTIONS

- 6. If directed to do so by the Court, an expert witness shall:
 - (a) confer with any other expert witness;
 - (b) provide the Court with a joint-report specifying (as the case requires) matters agreed and matters not agreed and the reasons for the experts not agreeing; and
 - (c) abide in a timely way by any direction of the Court.

CONFERENCE OF EXPERTS

- 7. Each expert witness shall:
 - (a) exercise his or her independent judgment in relation to every conference in which the expert participates pursuant to a direction of the Court and in relation to each report thereafter provided, and shall not act on any instruction or request to withhold or avoid agreement; and
 - (b) endeavour to reach agreement with the other expert witness (or witnesses) on any issue in dispute between them, or failing agreement, endeavour to identify and clarify the basis of disagreement on the issues which are in dispute.

ANNEXURE B

CONCURRENT EXPERT EVIDENCE GUIDELINES

APPLICATION OF THE COURT'S GUIDELINES

1. The Court's Concurrent Expert Evidence Guidelines ("**Concurrent Evidence Guidelines**") are intended to inform parties, practitioners and experts of the Court's general approach to concurrent expert evidence, the circumstances in which the Court might consider expert witnesses giving evidence concurrently and, if so, the procedures by which their evidence may be taken.

OBJECTIVES OF CONCURRENT EXPERT EVIDENCE TECHNIQUE

2. The use of concurrent evidence for the giving of expert evidence at hearings as a case management technique³ will be utilised by the Court in appropriate circumstances (see r 23.15 of the *Federal Court Rules 2011* (Cth)). Not all cases will suit the process. For instance, in some patent cases, where the entire case revolves around conflicts within fields of expertise, concurrent evidence may not assist a judge. However, patent cases should not be excluded from concurrent expert evidence processes.
3. In many cases the use of concurrent expert evidence is a technique that can reduce the partisan or confrontational nature of conventional hearing processes and minimises the risk that experts become "opposing experts" rather than independent experts assisting the Court. It can elicit more precise and accurate expert evidence with greater input and assistance from the experts themselves.
4. When properly and flexibly applied, with efficiency and discipline during the hearing process, the technique may also allow the experts to more effectively focus on the critical points of disagreement between them, identify or resolve those issues more quickly, and narrow the issues in dispute. This can also allow for the key evidence to be given at the same time (rather than being spread across many days of hearing); permit the judge to assess an expert more readily, whilst allowing each party a genuine opportunity to put and test expert evidence. This can reduce the chance of the experts, lawyers and the judge misunderstanding the opinions being expressed by the experts.
5. It is essential that such a process has the full cooperation and support of all of the individuals involved, including the experts and counsel involved in the questioning process. Without that cooperation and support the process may fail in its objectives and even hinder the case management process.

CASE MANAGEMENT

6. Parties should expect that, the Court will give careful consideration to whether concurrent evidence is appropriate in circumstances where there is more than one expert witness having the same expertise who is to give evidence on the same or related topics. Whether experts should give evidence concurrently is a matter for the Court, and will depend on the circumstances of each individual case, including the character of the proceeding, the nature of the expert evidence, and the views of the parties.
7. Although this consideration may take place at any time, including the commencement of the

³ Also known as the "hot tub" or as "expert panels".

hearing, if not raised earlier, parties should raise the issue of concurrent evidence at the first appropriate case management hearing, and no later than any pre-trial case management hearing, so that orders can be made in advance, if necessary. To that end, prior to the hearing at which expert evidence may be given concurrently, parties and their lawyers should confer and give general consideration as to:

- (a) the agenda;
 - (b) the order and manner in which questions will be asked; and
 - (c) whether cross-examination will take place within the context of the concurrent evidence or after its conclusion.
8. At the same time, and before any hearing date is fixed, the identity of all experts proposed to be called and their areas of expertise is to be notified to the Court by all parties.
9. The lack of any concurrent evidence orders does not mean that the Court will not consider using concurrent evidence without prior notice to the parties, if appropriate.

CONFERENCE OF EXPERTS & JOINT-REPORT OR LIST OF ISSUES

10. The process of giving concurrent evidence at hearings may be assisted by the preparation of a joint-report or list of issues prepared as part of a conference of experts.
11. Parties should expect that, where concurrent evidence is appropriate, the Court may make orders requiring a conference of experts to take place or for documents such as a joint-report to be prepared to facilitate the concurrent expert evidence process at a hearing (see Part 7 of the Expert Evidence Practice Note).

PROCEDURE AT HEARING

12. Concurrent expert evidence may be taken at any convenient time during the hearing, although it will often occur at the conclusion of both parties' lay evidence.
13. At the hearing itself, the way in which concurrent expert evidence is taken must be applied flexibly and having regard to the characteristics of the case and the nature of the evidence to be given.
14. Without intending to be prescriptive of the procedure, parties should expect that, when evidence is given by experts in concurrent session:
- (a) the judge will explain to the experts the procedure that will be followed and that the nature of the process may be different to their previous experiences of giving expert evidence;
 - (b) the experts will be grouped and called to give evidence together in their respective fields of expertise;
 - (c) the experts will take the oath or affirmation together, as appropriate;
 - (d) the experts will sit together with convenient access to their materials for their ease of reference, either in the witness box or in some other location in the courtroom, including (if necessary) at the bar table;
 - (e) each expert may be given the opportunity to provide a summary overview of their current opinions and explain what they consider to be the principal issues of

disagreement between the experts, as they see them, in their own words;

- (f) the judge will guide the process by which evidence is given, including, where appropriate:
 - (i) using any joint-report or list of issues as a guide for all the experts to be asked questions by the judge and counsel, about each issue on an issue-by-issue basis;
 - (ii) ensuring that each expert is given an adequate opportunity to deal with each issue and the exposition given by other experts including, where considered appropriate, each expert asking questions of other experts or supplementing the evidence given by other experts;
 - (iii) inviting legal representatives to identify the topics upon which they will cross-examine;
 - (iv) ensuring that legal representatives have an adequate opportunity to ask all experts questions about each issue. Legal representatives may also seek responses or contributions from one or more experts in response to the evidence given by a different expert; and
 - (v) allowing the experts an opportunity to summarise their views at the end of the process where opinions may have been changed or clarifications are needed.
- 15. The fact that the experts may have been provided with a list of issues for consideration does not confine the scope of any cross-examination of any expert. The process of cross-examination remains subject to the overall control of the judge.
- 16. The concurrent session should allow for a sensible and orderly series of exchanges between expert and expert, and between expert and lawyer. Where appropriate, the judge may allow for more traditional cross-examination to be pursued by a legal representative on a particular issue exclusively with one expert. Where that occurs, other experts may be asked to comment on the evidence given.
- 17. Where any issue involves only one expert, the party wishing to ask questions about that issue should let the judge know in advance so that consideration can be given to whether arrangements should be made for that issue to be dealt with after the completion of the concurrent session. Otherwise, as far as practicable, questions (including in the form of cross-examination) will usually be dealt with in the concurrent session.
- 18. Throughout the concurrent evidence process the judge will ensure that the process is fair and effective (for the parties and the experts), balanced (including not permitting one expert to overwhelm or overshadow any other expert), and does not become a protracted or inefficient process.