



# CONCILIATE SA

*Mediation, Family Dispute Resolution & Counselling, Australia  
Incorporating Research & Actioning of Change Initiatives*

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Date: 22<sup>nd</sup> April 2020

## **SUBMISSION TO THE JOINT SELECT COMMITTEE ON AUSTRALIA'S FAMILY LAW SYSTEM**

The Honourable Kevin Andrews MP  
Chair, Joint Select Committee on Australia's Family Law System  
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Dear Chair,

Thank you for the opportunity to make a submission into the Inquiry into Australia's Family Law System.

I am also grateful to have had the opportunity to review a number of submissions already lodged, and acknowledge that many include similar issues to those I wish to raise. The recommended solutions differ however, and while a full transformation of the Family Law System may be seen as the ideal, I don't believe that such full transformation will be achievable in the short term. Rather, meaningful, evidence-based change to aspects of our existing family law system would seem to be the most sensible approach.

*As noted in the submission prepared by the NSW Bar Association 'More Australians will have contact with the system than perhaps any other part of our justice system. The family law system must therefore be recognised - and funded - as an essential specialised service on which so many Australians rely'.*

### **About Conciliate SA**

Conciliate SA is currently operating as an independent entity. This model will change in the near future as partnerships and/or agency assignments are established to meet the objectives of the business. Grant funding is currently being sourced and support being sought from relevant organizations and MP's.

Conciliate SA offers family dispute resolution services to separating families and counselling to both separated and intact families, their children including adolescents, extended family and carers. Mediation is also offered in a broad range of domains where disputes arise, including: civil matters, government departments and agencies, local government, NFP groups, NDIS providers and clients, small to medium business and corporates, sporting clubs (including mediation for boards and committees).

Conciliate SA's broader objectives are to research and develop project initiatives based on identified need; and to provide project management in the piloting and subsequent implementation of these initiatives with the objective of:

- i. Promoting the use and advantages of family dispute resolution (FDR) in resolving disputes among separated families
- ii. Improving accessibility and service delivery of FDR, resulting in better outcomes for families
- iii. streamlining and improving the efficacy of family court processes and procedures that will improve satisfaction levels of users of the system, reduce the current backlog of cases, and manage the current exponential growth of cases if the current system remains unchanged

### **Grant Funding Application AGD**

As the principal business operator, I am currently preparing an application for grant funding through the Attorney General's Department's Family Relationships Services Programme (FRSP), the objectives of which are 'to improve the wellbeing of Australian families, particularly families with children, who are at risk of separating, or who have separated.' The application will fall under the sub-program: Family Law System Projects, that 'build on and support the capacity of the family law system' in particular 'improving the availability of and access to families of family dispute resolution and other related support services'.<sup>1</sup>

### **Background to the Proposal:**

I have undertaken considerable research regarding the Family Law System in recent years. I have been interested in understanding why there is such a demand on the family courts (evidenced by large backlogs of unheard cases) and a high demand for community services for separated families. Yet while there is a legislated solution to resolving a significant number of the issues families face (through family dispute resolution), the percentage of troubled families accessing this service is extremely low.

Since 2019 I have spent substantial time at the Magistrates Court in Adelaide, providing pro bono mediation for a range of civil matters referred through the Mediation Unit (MU) and University of Adelaide Law School's Mediation Information Service (MIS). I believe this is an excellent service and resolves many matters every week that might otherwise proceed to trial (incurring the associated additional costs, stress and time delays in settling the cases). Most of the litigants in these referred cases are self-representing, which poses additional challenges to Magistrates attempting to determine an outcome.

I believe a similar system established within the Family Court and Federal Circuit Court including a number of other initiatives as proposed in this submission would greatly improve the efficiency of the system and relieve much of the backlog of cases.

I trust you will give these recommendations your consideration, and thank you for the opportunity to lodge this submission.

Yours sincerely,

Jane Silbereisen

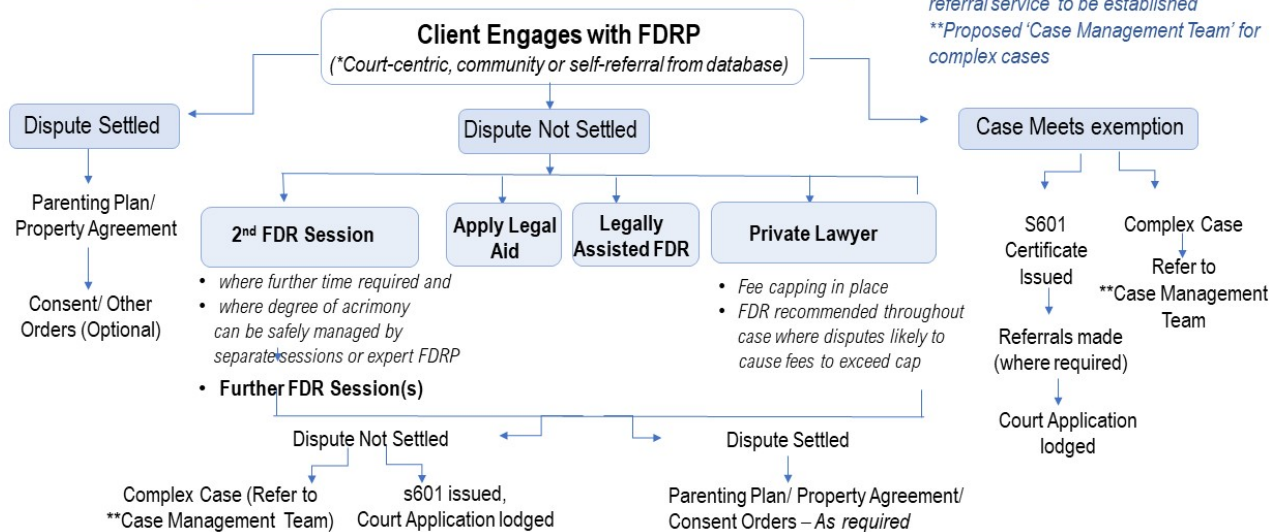
## RESPONSES TO THE TERMS OF REFERENCE

Item No.	Description
d.	<p><i>The financial costs to families of family law proceedings, and options to reduce the financial impact, with particular focus on those instances where legal fees incurred by parties are disproportionate to the total property pool in dispute or are disproportionate to the objective level of complexity of parenting issues, and with consideration being given amongst other things to banning 'disappointment fees', and:</i></p> <ul style="list-style-type: none"> <li><i>i. capping total fees by reference to the total pool of assets in dispute, or any other regulatory option to prevent disproportionate legal fees being charged in family law matters, and</i></li> <li><i>ii. any mechanisms to improve the timely, efficient and effective resolution of property disputes in family law proceedings;</i></li> </ul>
	Response
	<p><b>Recommendations:</b></p> <ul style="list-style-type: none"> <li>i. <i>Capping total fees by reference to the total pool of assets in dispute, or any other regulatory option to prevent disproportionate legal fees being charged in family law matters,</i></li> </ul> <p>At times I have had the opportunity to support clients through their family court journey. I accompanied a client to their initial directions hearing and subsequently to a Conciliation Conference. This conference was conducted with each party in separate rooms, represented by their respective lawyers, and facilitated by a court appointed registrar. The process was clearly adversarial in nature with the Registrar moving between the rooms delivering each party's compromising proposals in the hope of reaching a resolution. A resolution was not reached at this point and it took further weeks of ongoing negotiations between lawyers to reach an agreement on both the property and child custody. The property settlement amount determined for the father, was not large, and reduced substantially by around 65% due to the protracted time in resolving the matter and the legal fees incurred.</p> <ul style="list-style-type: none"> <li>a. In the case described above, the legal fees were clearly disproportionate to the property pool. I believe some form of fee capping (starting with a baseline and capped at a percentage of the property pool) would encourage greater incentive for efficiently resolving the issues for both legal practitioners and the client.</li> <li>b. Where it becomes clear that the complexity of the matter is such that the capped fee is likely to be exceeded, clients should be given the option (as recommended in the legislation), and encouraged to seek FDR/ADR, (including other relevant advice) throughout the trajectory of the case. This will allow the client to reach an agreement with the other party via an affordable channel as opposed to ongoing costly negotiations between lawyers. <i>*(See flow chart below).</i></li> </ul>

## PARENTING & PROPERTY DISPUTES

### FDR FLOW CHART

including **Mandatory Pre-Lodgement -**  
Mandated for all Parenting & Property Matters in both Courts (FCA & FCC)



## ii. Any mechanisms to improve the timely, efficient and effective resolution of property and parenting disputes in family law proceedings;

### Property Disputes

As noted by the AIFS there are currently trials in place of programs to assist low-income families to resolve their property disputes.

*'...There is a need for low-cost family law services to help separating parents with limited financial means to resolve their disputes, so that their assets are not absorbed by legal costs. Potential measures to address this issue may include: The Attorney-General's Department-funded Lawyer-Assisted Property Mediation Trial, to be conducted by state and territory legal aid commissions; and the Small Claims Property Pilot currently underway in the Federal Circuit Court.'*<sup>9</sup>

It is also worth noting that many FDRP's are trained in property dispute resolution. The parties are always advised to seek legal and financial advice around formal entitlements. However, there are always emotional and historical factors around people's attachment to items of property (such as a former family home, heirlooms, gifts etc) that must be unpacked to help the parties understand each other's interests relating to that property and to assist them in decisions around division.

### Mechanisms to improve the timely, efficient and effective resolution of property and parenting disputes in family law proceedings

There are a number of areas where new initiatives can greatly improve the effective resolution of property and parenting disputes in family law proceedings.

Recommended initiatives include establishment of a Court-centric FDR Service, wide promotion of the full range of FDR services available to meet the unmet demand, a web portal that provides a single point of access to all available information, services, education and supports (currently on independent websites) for families experiencing relationship and separation issues; and technology for accessing that information. Such technology should be established within the courts and other centres where appropriate to provide efficient and convenient access to the whole community. It would provide access to a comprehensive registry of FDRP's, and link to the portal.

## Gaps in FDR and Contact Service Availability

There is currently a serious shortage of government funded FDR services that are publicly promoted. Wait lists for FDR and family support services in Adelaide for separated parents are excessive. Families often need to wait months to access the service they desperately need. This means that families in crisis are having to function in that crisis environment until they can access the service. A review of wait times for FDR, Counselling and Contact Centre services in Adelaide for December 2019 and January 2020 are listed in the table below.

\*(Summary list only)

TYPE OF SERVICE	WAIT TIMES
<b>Family Dispute Resolution</b> <i>*waiting times are after intake has been completed and forms received from both parties.</i>	<ul style="list-style-type: none"> <li>- Relationships Australia (Adelaide, Port Adelaide, Salisbury &amp; Elizabeth) have wait lists of 8-10 weeks</li> <li>- Other Centres have wait lists between 4-8 weeks</li> <li>- Legal Services Commission (Adelaide, Noarlunga &amp; Whyalla) Current wait time for a pre-litigation FDR Conference is about 12-16 weeks.</li> </ul>
<b>Family Relationship Counselling</b> <i>(family counselling and mens counselling)</i>	<p>On average 4-10 weeks</p> <ul style="list-style-type: none"> <li>- Anglicare Hindmarsh wait list <u>closed</u> for family counselling and <u>not presently availability</u> for mens counselling.</li> <li>- Relationships Australia (Adelaide) has the longest wait list of 10 weeks</li> <li>- Relationships Australia (Elizabeth and Ridgehaven) - <u>not present availability</u></li> </ul>
<b>Children's Contact Service</b> <i>*waiting times are after intake has been completed and forms received from both parties</i>	<p><b>Changeovers</b> Relationships Australia (Campbelltown, Hindmarsh &amp; Elizabeth) – 4-6 weeks (Anglicare have a 3-4 weeks processing and intake time)</p> <p><b>Supervised Contact</b> Relationships Australia (Campbelltown, Hindmarsh) 12 weeks Northern CCS (Elizabeth) – <u>4-5months</u></p>

While subsidised agencies and organizations offer FDR, there are often extremely long waiting lists. The Family Law Pathways Network collected information from the major family law services in Adelaide, SA regarding their service waiting times for December 2019 and January 2020. It was found that for FDR services, Relationships Australia had the longest wait list at their major centres (Adelaide, Port Adelaide, Salisbury & Elizabeth) of 8-10 weeks. The Legal Services Commission, that provides legally assisted FDR for pre-litigation FDR Conferences, has a wait list of 12-16 weeks (3-4 months).<sup>31</sup>

Of even greater concern is the wait list for Children's Contact Services. For supervised contact, Relationships Australia CCS at Campbelltown and Hindmarsh has a wait time of 12 weeks, and Elizabeth has a wait list of 4-5 months following intake and receipt of forms for both parties. For changeovers, at Campbelltown, Hindmarsh & Elizabeth, there is a 4-6 week wait time on top of the 3-4 week processing and intake time. Family Relationship Counselling has a wait list of up to 10 weeks, with many services currently not able to accept new clients. Relationships Australia -Elizabeth and Ridgehaven has no present availability. Anglicare at Hindmarsh counselling wait list is closed for family counselling and not presently available for mens counselling).<sup>31</sup>

The LSC, that offer lawyer assisted, pre-litigation FDR Conferences, while their success rate is high, they do not have the resources to meet the demand for services (Administration Officer, Personal Communication, February 2020), and as noted in the table above, have a three – four month waiting list.

These waiting times for people in crisis would be perceived by many as highly unacceptable – not to mention the services that are closed, at capacity and no longer accepting clients. When people are actively seeking help, they need available services to access. When families with complex needs don't find the support when they reach out for it, the stresses they are experiencing are likely to worsen which puts vulnerable members of the family at greater risk.

Court-centric FDR and convenient access to a full suite of other support services are urgently needed.

**Recommendation:**

- That all available FDR services (court based, government funded and private) are included in a comprehensive registry that is publicly accessible (via technology such as an information kiosk) through the courts and other appropriate community-based organizations.
- That a marketing and promotional framework is established to promote all services available to support separated families, including the registry and other services included in the proposed parenting portal

### **Court-centric FDR Services**

Court-centric dispute resolution services have functioned successfully in the family court in the past. The Law Council of Australia (LCA) explain that 'services such as the in-house counselling section of the Family Court used to play a pivotal role in assisting parties at very early stages of litigation to resolve their cases. That Court's mediation service led the way globally in alternative dispute resolution in family law. Both services were terminated after withdrawal of government funding'.<sup>33</sup>

The LCA also **note** the need for and broader benefits of early and appropriate access to FDR services. 'It was felt that, if early and appropriate access to family law services such as Family Dispute Resolution (FDR) or the courts were possible, it might obviate child protection involvement; particularly if extended family members were available to intervene and obtain orders for children where protective concerns exist.'<sup>33</sup>

A Mediation Unit currently operates out of the Adelaide Magistrates Court and provides mediation services for civil matters. A separate Mediation Information Service (MIS), established by the University of Adelaide Law School, offers information and 'on the spot' mediations. However, there is currently no in-house FDR /mediation service in the Family Court or Federal Circuit Court.

A Family Dispute Resolution/ Mediation Service, similar to those provided through the Adelaide Magistrates Court noted above, could be established within the Family and Federal Circuit courts, where qualified Family Dispute Resolution Practitioners (FDRP's) are available to provide court supported mediations (on the spot if required) as directed by the Judicial Officers. Availability of this service would also inform and educate the community on the value of mediation in settling their matter before commencing proceedings and using FDR throughout the litigation process prior to a trial or final hearing. [*The objective of FDR noted in the 2006 amendments to the Family Law Act 1975 (Cth)*]. This is also the objective of the MIS for civil matters, and statistics are recorded at every referral or 'on the spot' mediation to evaluate the efficacy of the service. Such evaluative mechanisms would inform the impact of such a service on the reduction of the current backlog of family law cases and into the future.

As noted earlier, since 2019 I have been involved in the provision of pro bono mediation services through these programs operating out of the Adelaide Magistrates Court. I believe this is an excellent system, and resolves many matters every week that might otherwise proceed to trial (incurring the associated additional costs, stress and time delays in settling these cases). Most of the litigants in these referred cases are self-representing, which poses additional challenges to Magistrates attempting to determine an outcome. Mediation is an ideal solution for these self-represented cases. Mediators providing these services are insured and qualified under the NMAS.



## **Marketing and Promotion**

Marketing and promotion activities are key to educate and communicate a product or service in the public domain. Where there is high community need, available services to meet that need require a targeted promotional strategy. While the current government subsidised services have promotional programs in place eg: the Relationship Centres promote their services via requirements under the government funding guidelines; Relationships Australia, NFP organizations including Centacare, Uniting Communities and Anglicare are larger organizations that receive government funding for FDR and other services and also incorporate marketing and promotion as part of their organizational strategic plans. Legal services such as Legal Aid and the Legal Services Commission are both government funded under The National Partnership Agreement on Legal Assistance Services that includes marketing requirements.<sup>34</sup>

An example of a marketing and promotion strategy is the Community Legal Education strategy developed to promote the Legal Aid service in Queensland.<sup>28</sup>

Our CLE Strategy is delivered through:

- web-based legal information and multimedia resources
- written publications, including legal information factsheets and guides
- legal information sessions and webinars for community, health and education workers
- collaborative projects that focus on increasing awareness of the law and our services within hard-to-reach communities
- participation in community events such as Homeless Connect.

Despite the marketing and promotion strategies in place by the funded organization, their resources are inadequate to meet the current demand for services. They do not employ adequate numbers of practitioners to provide efficient services to the community (as demonstrated in the table of 'wait lists' noted above). There are, however, private FDR services that would seem adequate to meet the shortfall, that are competitively priced, and the number of practitioners is growing each year as new FDRP's become registered<sup>5</sup>.

## **The FDR Profession**

There are currently nearly 2000 FDRP's in Australia, registered through the Attorney General's Department, and this number will continue to grow exponentially with around 140 new registrations every year.<sup>5</sup>

Research has shown repeatedly that FDR, where appropriate, is the most successful and preferred method for resolving family disputes. The Australian Institute of Family Studies (AIFS) note that:

*FDR is the most commonly used formal mechanism for resolution of parenting arrangements. AIFS' research indicates that, since the 2006 reforms, FDR has become an increasingly effective mechanism for resolving parenting arrangements. Of the three formal pathways – FDR, lawyers and courts – FDR elicits the most positive evaluations from parents.*<sup>9</sup>

Future reform to the Family Law system should take this into account, being confident that there are and will continue to be more than sufficient FDR resources to meet the current crisis and the demand well into the future.

## **The Range of FDR Services & Service Availability**

Another important factor to consider is that there are many forms of FDR/ ADR that are used in both the private sector (including funded programs), government agencies, community organizations and subsidised NFP organizations. Some of these approaches include facilitation, negotiation, mediation, conciliation, collaborative practice, arbitration and blended methods. There are also differences in fee structures. It's important to be aware of the fact that different approaches may be more suited to different families, and the nature of their case. Consequently, educating the community on the range of available FDR services is also important.

The Legal Services Commission (LSC) offer legally assisted FDR described as Family Law Conferencing. This service is partially funded only where one party has qualified for legal aid. However, if more than one session is required, and the cost of those additional sessions exceeds a cut off fee of around \$2,800,<sup>35</sup> the LSC can enforce repayment of those fees.

*'If a party has a grant of Legal Aid then they will have to pay a contribution towards their legal fees. The amount depends on their financial circumstances.  
If the party has Legal Aid and they own real estate and the legal fees exceed \$2,280.00 then the Commission can register a charge over the property (statutory charge) and require repayment of the amount of legal costs when the property is sold or if the person refinances.  
If a party does not have Legal Aid they will have to pay their own solicitor costs to attend the Conference.'*<sup>35</sup>

This type of service may not suit everyone. Low income-earners, who statistically have the greatest need for FDR services, may not have property against which such fees can be recovered. Low-income earners are also those with the highest complex needs,<sup>25</sup> and as such would be unlikely to resolve their issues in one or two sessions. At the same time, the LSC service is difficult to access with current wait lists between three to four months.

The government funded agencies and NFP groups may offer a range of forms of FDR. Families would need to enquire about the suitability of that process for their needs. These services usually offer a free initial consultation and charge around \$30 per hour thereafter (means tested). If a couple were to have three mediation sessions at three hours each, the cost would be \$270. These funded services are also severely stretched, with waiting times of up to 10 weeks, and some services no longer taking new clients.

Private FDR providers also offer a range of forms of FDR. Once again, families need to research the available providers to make an informed decision about the suitability of the processes offered. Fees differ among private providers. They range anywhere from \$50 per hour to package deals that include a number of sessions and a parenting plan and are often commensurate to the government funded services with concession rates available.

It is critical that the community are aware of the full range of FDR/ADR services available, both funded and private so that they can feel confident that the FDR resources are available when they need them, and they also have access to information regarding processes and fee structures so that an informed choice can be made.

### ***FDR Training***

Training programs for FDRP's are only available to post-graduate students with a background in law or psychology/counselling. It is important to acknowledge the nature of the core training of both disciplines, and the contribution that expertise can make to families undertaking FDR. Many individuals within families are struggling with ineffective communication styles or unresolved trauma. This, compounded by generational patterns of thinking and behaviour, tightly held and unexplored beliefs in addition to cultural factors play a significant role in the degree to which individuals within a relationship are able to effectively communicate with each other and feel heard. FDRP's with psychology as their core training have a background in systems theory and other modalities to be able to identify the drivers underpinning individuals' presenting conflicts and manage this during sessions. Legal Practitioners, on the other hand, have the solid training and experience in family law and knowledge of family law case history crucial in providing legal advice and assisting parties in achieving their legal rights.

Consequently, FDRP's with both legal and psychological core training should be acknowledged for the valuable contribution they bring to the field of dispute resolution.

### **Registry of FDR's accessible via Information Kiosks located within the Courts**

'Information Kiosks' (multiple) placed in the FCA and FCC foyers for housing a registry/database of available FDRP's (including descriptive information such as type of service, fees and waiting times) that is immediately accessible to litigants attending the courts and lawyers, with the opportunity to make appointments online. Immediate and efficient access to a comprehensive registry of all available FDRP's would:

- relieve the current severe shortage of FDR resources and excessive waiting times
- enable FDR to be undertaken pre-lodgement if appropriate and not already arranged
- enable parties to make an informed choice about the practitioner and service that will suit their needs
- when a suitable, accessible and available FDR has been identified, clients will feel empowered



and more likely to consider using them again in the future, whether to resolve disputes during the litigation process or for resolving other disputes arising in their lives.

- As the parties engage in FDR, and experience the positive impact of the process on each party and their relationship (through being heard and understood, being able to express their wishes and concerns, learning new communication skills), they are likely to feel more empowered. (Statistics show that FDR has a higher success and satisfaction rate than either lawyers or the courts)
- The parties are no longer subjected to or experience a reduction in the negative impacts of the adversarial approach
- The resolution or part-resolution of disputes will reduce stress, time and costs to the parties
- When disputes are resolved or the matter is settled more efficiently through the courts, families are able to resume a more normal life more quickly and stress on the children is reduced.
- A decrease in the backlog of cases can be expected and the intended objectives for FDR realised.

Practitioners would need to clearly identify their specialties (ie property; communication; high acrimony; child access disputes; risk planning and management in cases of domestic violence/ harm, child abuse and neglect; mental illness and drug related issues)

Information Kiosks could be made available within the Court foyers for litigants and lawyers to access so that FDR can be sourced and undertaken before further attending court. Where Judges order the parties to a case undertake further mediation, appointments can be made at the Court immediately via the kiosk. Often a single FDR attempt may not resolve all issues, in which case the kiosk can be accessed for arranging further mediation. With such a facility, it is expected that a reduction in the backlog of cases would increase exponentially over time.

The Kiosk could also provide a link to the 'Parenting Portal' providing access to all relevant information families may need. A secure login for professionals/Lawyers could also be made available to access mandatory reporting, surveys and other functionalities as established on the portal.

An app for mandatory reporting and/or other functionalities could also be developed to further enhance such a facility.

The promotion of all available FDR services via a register accessible via Kiosk technology through the courts and other community service centres, would greatly assist in meeting the increasing demand.

#### ***\*Information Kiosk***

*Information Kiosks' (multiple) placed in the FCA and FCC foyers and other suitable locations such as community service centres. Appointments with an FDR could be scheduled immediately online.*

*The Kiosk could also provide a link to the 'Parenting Portal' providing access to all relevant information families may need.*

*A secure login for professionals/Lawyers could also be made available to access mandatory reporting surveys and other functionalities as established on the portal.*

*\*An app for mandatory reporting could also be developed to further enhance such a facility.*



## Web-based Parenting Portal

There are numerous benefits to Web portals which are used as a 'one-stop' point of access to a broad range of information.

*'What is a Web **Portal**? A web **portal** is a customized **website** that immerses information from a wide array of sources in a consistent and uniformed manner.'*

Key features of a web portal include:

- **Central access to** otherwise decentralised, retained information, i.e. integration of internal and external data sources,
- The option to **personalise content** for target user groups (e.g. clients, suppliers and employees), at a specified level of security,
- **Active user interaction**,
- **A single method of user sign-in** and records,
- **A powerful search core**, capable of including all information sources,
- **A strong operating platform** enabling the full use and development of the portal, which provides the tools for simple, decentralised management,
- **Support for various client platforms** (multichannel communication) and the ability to exchange data in a structured format,
- **The right type of information** architecture, which supports the goals of the portal and enables large amounts of information to be presented in a clearly laid out and user-friendly way<sup>36</sup>

Development of an online Portal as a single point of access to FDR and other services for families, (including professionals and service providers) involved in the family law system would provide an efficient and vitally needed source of integrated information. It should encompass a registry of FDR/ADR practitioners (including service specialties, fee structures and availability), education functions and links to supports that cover all identified needs. Much of this information is already available and accessible via the numerous professional bodies, government and NFP provider websites. The portal would be a means of integrating this information into a single platform, and would require creating links to the existing materials (information/services/resources/technologies) and developing any additional materials as needed.

The visual design of the portal is an important aspect to create an impression that separated families can function well and happily within a different family structure. It is also important that it engages all members of the family including mums, dads, teens, children, grandparents, other extended family and carers. Ideally, the portal would include educational functions with video and interactive components.

*'Visual design focuses on the aesthetics of a site and its related materials by strategically implementing images, colors, fonts, and other elements. A successful visual design does not take away from the content on the page or function. Instead, it enhances it by engaging users and helping to build trust and interest in the brand'*<sup>37</sup>

\*An idea of how such a portal could be designed and structured is appended to this document. (Appendix A)

## Recommendations:

### Court-centric FDR Services

Establish a court-centric Family Dispute Resolution / Mediation and Information service within the Family Court and Federal Circuit Court (based on the model of the Mediation Unit and Mediation Information Service established by the University of Adelaide Law School, in the Magistrates Court) to provide immediate pre-lodgement FDR and post lodgement as directed by Judicial Officers.

### Marketing and Promotion

That a marketing and promotional framework is established to promote all services available to support separated families, including the registry and other services included in the proposed parenting portal. Objectives are to inform and educate the public on the availability and benefits of using FDR for resolving family disputes as a preferred and successful option to

court. The service should be particularly targeted at more disadvantaged groups who tend to be higher users of the courts to resolve their disputes.

**Registry of FDR's accessible via Information Kiosks located within the Courts**

Establish Information Kiosks within the courts (Family Court and Federal Circuit Court) to house a registry of local FDRP's with associated service, fee and availability information, to provide immediate access to litigants to enable appointments to be made to undertake FDR prior to attending court or post-lodgement as required.

**Web-based Parenting Portal**

Development of web Portal to serve as an efficient, single point of access to FDR and other services information for families, (including professionals and service providers) involved in the family law system. The portal would also ideally be linked to the proposed Information Kiosks.

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

**Response**

The emergence of the FDR profession came about as a result of amendments to the Family Law Act, 1975 (Cth) - the Family Law Amendment (Shared Parental Responsibility) Act 2006<sup>1</sup>. The objectives for these changes included that parents would be required to attend family dispute resolution (FDR) before filing a court application, unless they met certain exceptions around urgency, family violence and child abuse<sup>2</sup>.

As noted in the Evaluation of the 2006 amendments by the Australian Institute of Family Studies (AIFS), the reforms were underpinned by a recognition that while the focus must always be on the best interests of the child, disputes relating to children after separation are driven by relationship problems rather than legal ones, and that community-based interventions would be more appropriate in understanding and managing these issues, and assisting parents to agree on parenting arrangements that meet the needs of children.<sup>2</sup>

*The aim of the reforms was to bring about "generational change in family law" and a "cultural shift" in the management of separation, "away from litigation and towards co-operative parenting"*<sup>2</sup>.

The policy objectives of the 2006 changes to the family law system were to:

- help to build strong healthy relationships and prevent separation;
- encourage greater involvement by both parents in their children's lives after separation, and also protect children from violence and abuse;
- help separated parents agree on what is best for their children (rather than litigating), through the provision of useful information and advice, and effective dispute resolution services; and
- establish a highly visible entry point that operates as a doorway to other services and helps families to access these other services.<sup>2</sup>

The changes to the family law system included changes to both the legislation and the family relationship services system. The legislative changes comprised four main elements, which:

- require parents to attend family dispute resolution (FDR) before filing a court application, except in certain circumstances, including where there are concerns about family violence and child abuse (SPR Act 2006 s60(1));
- place increased emphasis on the need for both parents to be involved in their children's lives after separation, through a range of provisions, including the introduction of a presumption in favour of equal shared parental responsibility (SPR Act 2006 s61DA; see also s60B(1)(a), s60CC(2)(a));
- place greater emphasis on the need to protect children from exposure to family violence and child abuse (SPR Act 2006 s60B(1)(b), s60CC(2)(b)); and
- introduce legislative support for less adversarial court processes in children's matters (SPR Act 2006 Division 12A of Part VII).<sup>2</sup>

These objectives present as sound, and cover every conceivable requirement to support the needs of families including a focus on preserving existing relationships; of if separating, resolving disputes in the best interest of their children; having a greater involvement in their children's lives; ensuring their children are protected from violence and abuse and avoiding court processes where possible.

However, the actual structures, systems and resources established to meet these objectives are not sufficient, or operating in a way that delivers what was intended. It is reasonable to consider that time and experience will reveal the degree to which such a system is or is not functioning effectively. The observations in this submission outline those insufficiencies and probable solutions to overcome them.

### The Courts

There are inconsistencies within the legislation and rules that apply to the Family Court (FC) and the Federal Circuit Court (FCC). This can impact the capacity of the courts to require compliance with provisions under the Acts applying to each court.

Requirements for pre-filing FDR prior to lodging an application in the courts, were incorporated into the 2006 amendments to the Family Law Act (FLA) [SPR Act 2006 s60(1)]. If FDR was not successful, one of the parties did not attend, or FDR was deemed inappropriate on account of family domestic violence, child abuse or the threat of the risk of such abuses occurring, the Family Dispute Resolution Practitioner (FDRP) would issue a Section 60I Certificate. The certificate is required to be lodged by the applicant with their application. Such pre-filing procedures are clearly mandated for parenting matters under s60I and recommended under the Family Law Rules, 2004, that govern the Family Law Act.

However, the Family Law Rules (FLR) (2004) that govern proceedings in the Family Court under the Family Law Act, do not apply in the Federal Circuit Court (FCC).<sup>5</sup>

Further, a Full Court decision of Thompson & Berg [2014] FamCAFC 73; (2 May 2014) ruled that the FLR pre-action procedures do not apply in the FCC.<sup>5b</sup>

Secondly, FCC Rules that govern FCC proceedings, while they outline provisions for referral to FDR, once the application has been filed in the court, 'do not contain provisions in relation to pre-action procedures or the responsibility of parties and lawyers in achieving the main purpose of the rules'.<sup>5h</sup>

Thirdly, the Civil Dispute Resolution Act 2011 (CDRA), which applies to proceedings in the FCC, includes obligations to take genuine steps to resolve disputes prior to commencing proceedings .. *'.. as far as possible, people take genuine steps to resolve disputes before certain civil proceedings are instituted; promote a move away from an adversarial approach to litigation... and ..improve access to justice by encouraging early dispute resolution'*.<sup>10</sup> However, *'Certain Commonwealth Acts have been excluded, particularly where the Act establishes a very specific dispute resolution regime of its own, such as the Family Law Act 1975.'*<sup>10</sup> The objectives of the CDRA then, have no capacity to mandate FDR for family law matters in the FCC.

While S60I applies to parenting matters in both courts, the Family Court is also subject to pre-action procedures under the Family Law Rules, however the Federal Circuit Court is not subject to the Family Law Rules (they do not apply), the Federal Circuit Court Rules do not contain pre-action procedures and the Civil Dispute Resolution Act that applies in the Federal Circuit Court has deliberately omitted inclusion of the Family Law Act. The implications of these inconsistencies becomes apparent when the question arises of whether obligations exist and under what rules can obligations for the parties or the courts be enforced? (A Rules Harmonisation project is currently underway to resolve the issues around two different sets of rules, forms and case management processes. A Joint Rules Harmonisation Working Group of judges of both courts was established in February 2019 and government funding has been provided for this project.)<sup>5e, 5f</sup>

Such inconsistencies can become problematic when one considers the volume of cases that come before the courts. According to the Annual Reports produced by the FC and FCC, in 2018, there were 19,594 applications to the Family Court<sup>5e</sup> and in 2018-19 there were 85,234 total family law filings in the FCC<sup>5f</sup>. According to information provided by the FCC, around 90% of the court's workload involves family law cases and between 2014 and the present, family law cases filed in the Federal Courts have increased from 40% to 80%<sup>3</sup>. This suggests that the exponential increase in cases being filed in the FCC is likely to continue, and that until rules harmonisation has been achieved, the majority of family law cases heard in the FCC (that have not produced a S60I

certificate) are not subjected to mandatory pre-filing FDR.

Concerns have been raised regarding the low compliance rate of litigants obtaining 'advice from a family counsellor or FDRP (Family Law Act 1975 (Cth) s 60J) in the courts prior to seeking exemption and the failure of the courts to enforce or require compliance with these obligations'<sup>5</sup>

Applicants for parenting matters have the option to seek exemption from S60I pre-filing FDR obligations under certain circumstances. There are various grounds (see 60I(9) of the Act) under which an exemption from attending FDR and filing a certificate can be sought. These grounds include:

- if the matter is urgent
- if the Court is satisfied that there are reasonable grounds to believe that:
  - ~ there has been child abuse and/or family violence by a party
  - ~ there is a risk of family violence by a party, and/or
  - ~ there is a risk of child abuse if there were to be a delay in applying to the Court
- where a party is unable to participate effectively in family dispute resolution (for example, due to an incapacity to do so or physical remoteness from a family dispute resolution provider)
- if your application relates to an alleged contravention of an existing order that was made within the last 12 months, and there are reasonable grounds to believe that the person who has allegedly contravened the order has behaved in a way that shows a serious disregard for his or her obligations under that order.

Applicants are required to file an Affidavit 'Non-Filing of Family Dispute Resolution Certificate' and lodge it with their applications in accordance with the requirements of both the FC and the FCC.<sup>5i</sup>

Harman (2016) conducted a study of families who filed court applications for both parenting and property matters in the Federal Circuit Court in NSW over a three-month period. It was found that only a very small percentage (2.5%) of property cases had undertaken pre-filing FDR or mediation (although there are no mandated Pre-action Procedures for property matters).<sup>5</sup>

Data on parenting cases, showed only 19% of litigants had undertaken pre-filing FDR and eighty-one percent had filed their application to the court without attending or attempting to attend FDR<sup>5</sup>. (Of the eighty one percent of cases, 52% had sought exemption from attending FDR through the Court Registrar and a further 30% had produced the required S601 Certificate issued through the FDRP).<sup>5</sup>

In this study 52% of applications had been granted exemptions. Given that Research has consistently found that allegations of family violence occur in approximately 80% of parenting cases<sup>5g</sup>, it could be safely assumed that of the 52% of applications for exemptions from attending FDR and filing the required S60I certificate, at least 80% of those (42%) related to family violence. Therefore 42% of applications for exemptions related to family violence.

Given the concerns raised about the low compliance rate of litigants seeking advice or FDR prior to seeking exemptions, (only 19% of litigants undertake FDR) and the failure of the courts to enforce or require compliance with pre-filing expectations<sup>5</sup>, is it likely that the relaxed nature of the courts' enforcement capacity could encourage litigants to abuse the exemptions? It is unlikely that these figures will improve without attention to the underlying cause.

Currently, the courts are overcome by a backlog of cases. In a media release dated 10th February 2020, a backlog of up to 2000 cases that were between 18 months and four years old, were identified in the major capital cities, requiring urgent measures to resolve these cases through a 'summer campaign of callovers' over a three month period.<sup>12</sup>

What is required to further mandate parties to take the recommended pre-filing, 'genuine steps' to resolve their disputes? Legislative change is called for, particularly in the FCC. The Family Law Rules (2004) could be applied in the FCC to ensure compliance with the provisions of the FLA. The FCCR could be amended to ensure they 'contain provisions in relation to pre-action procedures and responsibility of parties, (the courts) and lawyers in achieving the main purpose of the rules'<sup>5g</sup>. Measures are required, in addition to rules harmonisation to ensure the courts actively enforce compliance with the pre-action obligations of the FLA to ultimately benefit both families and the

courts.

Consideration of the parties' first port of call in exploring solutions to resolve their parenting disputes is also warranted. Lawyers have been considered 'gatekeepers' to information regarding the option of mediation. According to a study conducted by the AIFS, those with higher asset pools (above \$500,000) were more likely to use lawyers as their main pathway, and for those in the lower asset pool group (less than \$40,000) over one-fifth reported lawyers as their main pathway<sup>9</sup>. However, given that family dispute resolution is a relatively new field, and its conciliatory style is in opposition to the traditional adversarial approach of lawyers, it may not be an integrated service or referral option for all practitioners. In an article by Ardagh<sup>17</sup>, it was noted that 'for many practising lawyers there has been a reluctance to refer their cases out to mediation and an eagerness to adopt more informal methods of dispute resolution themselves, even though this can create a dilemma and a confusion of roles for them.'<sup>17</sup> As Harman<sup>5</sup> points out, 'any step that might generate a "culture change" amongst lawyers and encourage them to more readily embrace mediation might be a desirable reason to mandate pre filing mediation.'<sup>5</sup>

### **Mandatory Mediation**

Numerous studies have been undertaken on the topic of mandatory mediation. Evidence suggests that even where people prefer not to engage in mediation, where they have been required to do so, the results are positive. As Hanks<sup>7</sup> notes:

*'Arguments against mandatory mediation often maintain that parties who are forced to mediate are unlikely to approach the process with a positive attitude<sup>1</sup> ... Further studies demonstrate that where parties are compelled to mediate, there are still comparatively high rates of settlement and the parties benefit from the process<sup>2</sup>... there are high rates of settlement for both voluntary and mandatory mediation when it is engaged in early in the process.'<sup>7</sup>*

*'Authors such as Redfern<sup>3</sup> and Alexander<sup>4</sup> suggest sound public policy bases for mandated mediation including fulfilling roles of judicial, legal profession and community education and eventual acceptance of mediation as a desirable means of dispute resolution'.<sup>5</sup>*

The benefit of pre-filing dispute resolution also reduces costs to the courts. Sourdan (2012) notes 'Many pre-action protocols also play an important role in encouraging parties to pursue ADR. Where ADR is successful, it results in cost savings to both individuals, and to the public in terms of reduced burden on the courts.'<sup>18</sup>

The capacity of the Courts are clearly stretched, and with around 22,000 family law cases listed each year in both the FLC and the FCC<sup>6</sup>, (which are primarily complex cases), seriously considered reforms implemented expediently are required to effectively manage this increasing burden into the future. The recommendations below would be worthy of this consideration.

### **Recommendations**

- that mandated, pre-filing requirements for FDR/ADR for both parenting and property matters related to family law be extended to the CDRA and/or
- that the FLA be removed from the exemption list of Commonwealth Acts.
- that all legislation related to family matters be reviewed and amended for clarity and consistency
- that FDR is promoted widely post filing, where appropriate with the aim of achieving resolution on disputes prior to the final hearing
- that public policy around mandated mediation, in the context of the objectives of the
- legislation, be established and broadly promoted to all stakeholders and the public.



f.	<b><i>The impacts of family law proceedings on the health, safety and wellbeing of children and families involved in those proceedings</i></b>
	<p><b>Response</b></p> <p>The general dissatisfaction with traditional court processes for dealing with family law matters has been the subject of much research in recent years. In particular the negative impact that process has on future parental relationships and their children. Howarth &amp; Caruana<sup>79</sup> note that 'Court processes, both in Australia and abroad, have been characterised as too expensive, slow, unequal, uncertain, incomprehensible, fragmented and adversarial (Sourdin, 2012)', and.. 'the critique of the adversarial nature of litigation is of particular relevance to family disputes over children, where it is asserted that acrimony generated in litigation does little to promote cooperative parenting after separation. It is well-documented that entrenched parental acrimony can be harmful to children (Amato &amp; Keith, 1991).'<sup>19</sup></p> <p>The number of cases raised in the submissions to this inquiry, of families and children who have suffered worrying outcomes as a result of engagement in the current system, certainly demonstrate the inadequacy of the adversarial approach to resolving complex family issues, the questionable nature of expertise of some health workers, professionals and judicial officers working with these families and the negative, compounding effects that often result.</p> <p>The Lone Fathers Association of Australia (LFAA) in their submission, note a number of examples of such incidents:</p> <ul style="list-style-type: none"> <li>- Relationship Counselling Services who simply decide not to provide the service in certain circumstances known only to them</li> <li>- Giving up on mums and dads because of problematic circumstances</li> <li>- Legal aid withdrawing funds because a client disagrees with advice</li> <li>- Inordinate delays in seeing Relationship counsellors</li> <li>- Manipulation of clients who rely on legal aid</li> <li>- Discrimination against fathers relying on legal aid.<sup>24</sup></li> </ul> <p>One example included in the submission by the National Child Protection Alliance<sup>21</sup> demonstrates how futile the impact can be for families.</p> <p style="padding-left: 40px;">The situation is now such that numerous parents inform us that their solicitors and barristers advise them that to raise allegations of Domestic Violence and Child Abuse may mean they will lose their children, and that is very often the outcome when they do so. Such is the pervasive nature of this predictive outcome that some parents are not raising allegations of domestic violence and child abuse either in mediation nor in the Courts, and are merely accepting that the abusive parent will gain a Shared Parenting arrangement and even a sole parenting Order if they were to do so.<sup>21</sup></p> <p>Of critical importance is the fact that most of the negative outcomes that are reported were forecast during the drafting of the legislation, with prevention of such outcomes in mind. For example, in the Family Law Rules (2004) with regard to property and parenting matters.</p> <p>'.. during the conduct of the case itself, the parties must have regard to:</p> <ul style="list-style-type: none"> <li>(a) the best interests of any child;</li> <li>(b) the continuing relationship between a parent and a child and the benefits that cooperation between parents brings a child (that is, helping to maintain as good a continuing relationship between the parties and the child as is possible in the circumstances);</li> <li>(c) the potential damage to a child involved in a dispute between the parents, particularly if the child is encouraged to take sides or take part in the dispute;</li> <li>(d) the principle that people should not seek orders about a child when an application is motivated by intentions other than the best interests of the child;</li> <li>(e) the best way of exploring options for settlement, identifying the issues as soon as possible, and seeking resolution of them;</li> <li>(f) the need to avoid protracted, unnecessary, hostile and inflammatory exchanges;</li> <li>(g) the impact of correspondence on the intended reader (in particular, on the parties);</li> <li>(h) the need to seek only those orders that are reasonably achievable on the evidence and that are consistent with the current law; and...<sup>23</sup></li> </ul>

These rules however, assume that the parents subjected to them have the capacity to consider the impact of their thinking, behaviour and decision-making ability in the midst of often highly acrimonious family dynamics, heightened at a time of family break-down, and often compounded by stressors associated with domestic violence and child abuse/harms, financial difficulties, mental health, drug related and other issues.

The results of a study conducted by the Australian Institute of Family Studies (AIFS), showed that a higher percentage of families with complex issues used the courts to resolve their issues, and many were unrepresented.

*'The use of formal family law pathways (FDR, lawyers and courts) was more common among the parents who reported high levels of pre-separation problems and complexity in their circumstances (Kaspiew et al., 2015c, Table 2.2). Parents who used the courts as their main pathway reported the most problems: 38% of the 2014 post-reform sample had four or more reported issues, compared with 27% of the parents who used lawyers, and 21% who used FDR.'<sup>19</sup> In addition .... 'these complexities are compounded for the significant proportion who use the courts on an unrepresented basis.'*<sup>19</sup>

This evidence supports the need for the courts to have a system in place to manage these high-risk cases appropriately and effectively

The submission to this Inquiry by the AIFS recommends the:

*'...effective risk assessment and management practices in all courts exercising family law jurisdiction. Family law professionals must be trained to deal with multiple, co-occurring and complex risk factors, characterising and responding to them in an effective and trauma-informed way.'*

While training of individuals working with families with complex needs is imperative, individuals working independently with families is often not the most effective approach. Currently one-off and un-coordinated interventions are ordered in the hope of providing sufficient evidence for Judicial Officers to arrive at a determination, including family conferences, conciliation conferences, expert reports and others. Conciliation Conferences are often ordered where families have not been able to reach agreement on their issues. These conferences are adversarial in nature and do not promote open discussion between the parties.

My personal experience of accompanying clients through their family court journey has highlighted these issues. One client, at their initial directions hearing was ordered to attend a Conciliation Conference. This conference was conducted with each party in separate rooms, represented by their respective lawyers, and facilitated by a court appointed Registrar. The process was clearly adversarial in nature with the Registrar moving between the rooms delivering each party's compromising proposals in the hope of reaching a resolution. This initial conference was intended to focus on the property settlement, however, time with the child was raised by the other side as a bargaining tool to encourage this client to agree to the financial offer. The shared care arrangements for the child were therefore agreed to in an environment of 'pressure to settle'. This client was clearly distressed and frustrated throughout the process. The needs of the child were not the focus of discussion. A resolution was not reached at this point and it took further weeks of ongoing negotiations between lawyers to reach an agreement on both the property and child custody.

The parties did not undertake mandatory FDR due to a concern raised by one of one parties. Regardless of the basis for this concern, not undergoing FDR meant that the parties did not have the opportunity to gain an understanding of each other's interests or come to even a partial agreement on other parenting or property matters.

In addition, all court ordered interventions, except FDR are admissible. This places a strain on the parties immediately who withhold vital information for fear of it being presented in the court and used as evidence against them.<sup>24</sup> The value of FDR is that the nature of discussions are confidential, (unless information is revealed that falls under the mandatory reporting rules), and as such the parties are in a position to more freely discuss their circumstances.

Anglicare Australia, in their submission to this Inquiry, support the need for services to be child-focussed, with well-qualified staff and properly funded Family Law Services.<sup>29</sup>

Family intervention is more effective when approached with a whole-of-family focus. As noted by Mayo et al<sup>26</sup>, in their article on Teamwork in Health Care: 'Maximizing Collective Intelligence via Inclusive Collaboration and Open Communication,

*'Teams offer the potential to achieve more than any person could achieve working alone; yet, particularly in teams that span professional boundaries, it is critical to capitalize on the variety of knowledge, skills, and abilities available'*<sup>26</sup>

Working with families with complex needs including child abuse and neglect is challenging, but achievable when teams of professionals work collaboratively together. Bromfield et al<sup>25</sup> state that:

*'A partnership model also involves parents and practitioners engaging and working together, participating in and influencing decision making and valuing each other's knowledge, strengths and expertise. Respect, care, transparency and collaboration should characterise the working relationship. Building partnerships with parents and families in situations of child abuse and neglect is challenging, but skilled child protection practitioners are able to exercise authority and foster cooperation through 'careful, thorough and thoughtful practice' (Turnell & Edwards 1999:32)'*<sup>25</sup>

*These teams meet regularly to share information, knowledge and understanding, and participate in formulating goals, plans and interventions that are important and necessary to ensure the safety and wellbeing of the child and to support parents and families in achieving positive change'*<sup>25</sup>

The benefit of the team approach also extends to other services and agencies. Bromfield et al<sup>25</sup> note that:

*'The Care team process aims to build relationships between and across services and between the parents and key services. This process develops agreed goals and objectives, enables plans to be put into practice, provides support for parents and opportunities to review progress and outcomes.'*<sup>25</sup>

In the family law context, other key services could include mandated access to information from other jurisdictions including the criminal court and child protection agency.

Adapting a similar team approach based on a partnership model, would benefit families with complex risk factors presenting to the courts. Such a co-ordinated approach involving a team of highly trained professionals, would be able to more appropriately and effectively manage the needs of these families, increasing satisfactory outcomes.

In summary, the adversarial system and existing support structures are not adequate to consistently or effectively produce positive outcomes for families with complex needs.

## Recommendations

### Complex Case – Specialised Management Teams

That specialised Case Management Teams are established to manage complex cases.

- Referral to the Case Management Teams would occur as soon as an application to the court is made based on urgency, or an exemption where a s601 certificate has been issued.
- The teams would include at a minimum, FDR practitioner, psychologist/social worker/ case worker and lawyer. If an urgent interim order is required, this would be determined at the first team meeting and placed on an appropriate court list for urgent determination.
- The team would manage the case from the outset to establish a Family Management Plan which includes: identifying issues with parents, making referrals to services, education and other required supports for all members of the family, as agreed to by the parents (and children as appropriate), with follow up until the plan is in place including identified contingency options.
- These '**Specialised Management Teams**' would form part of a new framework and guidelines for processing family law cases through the courts.

	<ul style="list-style-type: none"> <li>- Any costs associated with establishing such a system would be offset by the reduction in multiple court appearances and the increased burden on support systems generally when complex cases are not managed effectively.</li> </ul>
h.	<p><b>Any further avenues to improve the performance and monitoring of professionals involved in family law proceedings and the resolution of disputes, including agencies, family law practitioners, family law experts and report writers, the staff and judicial officers of the courts, and family dispute resolution practitioners</b></p>
	<p><b>Response</b></p> <p>Regarding the performance and monitoring of professionals involved in family law proceedings and the resolution of disputes including agencies, family law practitioners, family law experts and report writers, the staff and judicial officers of the courts, and family dispute resolution practitioners.</p> <p>Currently the various practitioners (family law experts and report writers, agencies and family dispute resolution practitioners) generally operate according to their professional skill-set relevant to the standards and competencies of their respective professional discipline, agency or organization. There is no broad framework that governs how the skill-sets of such professionals should be applied in the context of processing family law cases in line with the objectives set out in the current legislation. Such a framework would outline the deliverables that would be measured in terms of case outcomes, and provide for the monitoring and evaluation of the performance of professionals and agency personnel against the achievement of those deliverables.</p> <p>The performance of family law practitioners, Judicial Officers and court staff, whose principal work is engagement in family law procedures and court processes, should be monitored with regard to meeting the requirements of the legislation for promoting and ensuring compliance with fulfilling pre-lodgement FDR<sup>123</sup>, referral of complex cases to 'Specialised Management Teams', referring cases to post case lodgement FDR<sup>1</sup> as appropriate and/or other defined deliverables.</p> <p>Numerous research has highlighted the under-resourcing of the family law system, including the practice or the lack of, untimely or inappropriate replacement of Judicial Officers working in family law.</p> <p><i>The number of judicial officers is a function of budgetary determinations rather than any assessment of the needs of the various courts and the communities that they serve. The appointment of judicial officers (or replacement of retiring judicial officers) has not kept pace with the number or complexity of cases being issued. In many instances the appointment of judicial officers, however politically expedient,.... who lack the necessary training and experience to efficiently and effectively function in the jurisdiction</i><sup>33</sup></p> <p><b>Recommendation</b></p> <p>Develop a <b>Framework and Operational Guidelines</b> for monitoring the performance of Professionals engaged in Family Law procedures, including:</p> <ul style="list-style-type: none"> <li>- The application of the various professionals' skill-sets to working specifically with family law cases</li> <li>- Mandated training and experience for Judicial Officers and other professionals working in family law</li> <li>- deliverables to be achieved</li> <li>- an evaluation strategy for measuring deliverables against case outcomes and</li> <li>- a strategy for the monitoring and evaluation of the performance of professionals and agency staff against the achievement of those deliverables.</li> <li>- a strategy for the monitoring and evaluation of the performance of family law practitioners, Judicial Officers and court staff against the achievement of the defined deliverables for these professionals including promoting and ensuring the compliance of clients in undertaking pre-lodgement FDR, referring complex cases to 'Specialised Management Teams'.</li> </ul>

**k. Any related matters.**

**Comment on Family Consultations or Child Dispute & Case Conferences**

Family Consultations or Child Dispute Conferences, conducted by a Family Consultant are not confidential. What is stated in the consultation is admissible in court.<sup>3</sup> The objectives of the conference are to gain an understanding of the issues, identify risks and provide a report to assist the court in making a short-term decision about arrangements with the children.

Despite the positive objectives in assisting the decision-making process, the lack of confidentiality can have a significant impact on the parties' preparedness to divulge the issues in their relationship – especially where they involve violence, child abuse or other harms. There are a number of issues here:

- Firstly, if there has been a history of and ongoing risk of family violence or child abuse, these important issues are likely to be withheld, resulting in a court decision that did not take such risks into account and leaving victims vulnerable.
- Secondly, in this setting, the family do not have the opportunity to safely and confidentially discuss their concerns, at which time they could be referred to the help they need. If the parties were offered the option of FDR (either a first session if they had previously received an exemption, or if FDR had already been undertaken – a second or subsequent sessions as needed), the possibility of the family receiving the help they need is substantially increased.
- Thirdly, if the case is complex, the family should be referred to the proposed 'Complex Case - Case Management Team', where the complex issues can be managed professionally and appropriately. The court will then only need to deal with any orders put forward by the legal representative on the team, as discussed and agreed with the family.

**Comment on Family Consultants/ Experts/ Report Writers**

As raised in many of the published submissions to this Inquiry, whether reports written to assess families and their issues including children, are subsidised through the court or funded privately (reports have been quoted as costing between \$8,000 and \$12,000) the recommendations were unchallenged and sometimes considered inappropriate – putting vulnerable parties at further risk, or, not even considered by the court.<sup>24</sup> This problem would be solved through the use of the proposed 'Complex Case - Case Management Team', which would operate under strict guidelines and where any individual professional's opinion is reviewed by the whole team so that a professionally, coordinated response can be made.

*'A partnership model .... involves parents and practitioners engaging and working together, participating in and influencing decision making and valuing each other's knowledge, strengths and expertise. Respect, care, transparency and collaboration should characterise the working relationship'*<sup>25</sup>

Concerns raised by the Lone Fathers Association regarding expert reports are noted below:

*'The terms of reference are often weighted towards a particular view and often we have reports that Independent Children's 'Lawyers write these reports and draft terms of reference. The reports are not challenged in terms of the Uniform Evidence Laws and when reports are ordered by the Court, we do not know what weight will be given to the report. We have been told by a member that one expert report claimed that Autism is a consequence of a child being separated from the child's mother before the age of 5 and therefore the child should not spend overnights with the father. The Court did not give any weight to the fact that the same child spent overnights with the grandparents from time to time.*

*Courts, other than appeal courts give weight, little weight or no weight without explanation. Many key stakeholders in Family law are not accountable, prejudiced by their own views of the law which is extremely subjective in interpretation and not held to each other's decision. We hear often of presumption being the rule rather than evidence. Some of our members have in fact said at times the system is not just broken but blatantly dishonest and prejudiced against a parent and or grandparents.*

*Many of our members would prefer not to use the current Judicial System because it is broken, unreliable, costly and never final. Final Orders are not Final. We hear of cases being reopened repeatedly some going for 15 years according to some members accounts to us.'*<sup>24</sup>



## References

1. Legislation.gov.au. 2020. *Family Law Amendment (Shared Parental Responsibility) Act 2006*. [online] Available at: <<https://www.legislation.gov.au/Details/C2006A00046>> [Accessed 4 May 2020].
2. Kaspiew R, Gray M, Weston R, Moloney L, Hand K, Qu L and the Family Law Evaluation Team, 2009. Evaluation of the 2006 Family Law Reforms: Summary Report.
3. Australia, F., 2020. *About the Federal Circuit Court - Federal Circuit Court of Australia*. [online] Federalcircuitcourt.gov.au. Available at: <<http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/about/about-fcc>> [Accessed 20 April 2020].
4. Australian Government Attorney-General's Department, 'An Evaluation of the Family Advocacy and Support Services' Final Report, 18 October 2018, Prepared by Inside Policy.
5. Harman J, 'Should mediation be the first step in all Family Law Act proceedings?' (2016) 27(1) Australasian Dispute Resolution Journal 17
- 5b. Federal Circuit Court Rules, <https://www.legislation.gov.au/Details/F2018C00534>
- 5c. <https://www.ag.gov.au/legal-system/alternative-dispute-resolution/civil-dispute-resolution-act-2011>
- 5d. THOMPSON & BERG (2014) FLC ¶93-589, Family Court of Australia, Full Court, 02 May 2014, Online at <https://pinpoint.cch.com.au/document/legauUio2366718sl490190885/thompson-berg>
- 5e. [http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/annual-reports/2018-19/2018-19-annual-report-part1\\_fc\\_stats](http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/annual-reports/2018-19/2018-19-annual-report-part1_fc_stats)
- 5f. [http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/reports-and-publications/annual-reports/2018-19/2018-19-annual-report-part1\\_fcc\\_stats](http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/reports-and-publications/annual-reports/2018-19/2018-19-annual-report-part1_fcc_stats)
- 5g. <https://stage.foleys.com.au/resources/Discovery%20and%20Procedure%20in%20the%20Family%20Court%20and%20the%20Federal%20Circuit%20Court%20in%20financial%20matters.pdf>
- 5g. Harman J, The Intersection of Family Violence and Family Dispute Resolution: Implications for Evidence Gathering and Mediation Confidentiality, Australian Journal of Family Law v. 33 no. 1 Jun 2019: 1-28
- 5h. <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/reports-and-publications/publications/family-law/applying-to-the-court-for-orders>
- 5i. <http://www.federalcircuitcourt.gov.au> & <http://www.familycourt.gov.au>
6. Sydney Morning Herald, 1.11.19; ABC, 30.5.18; The Australian, 8.4.19
7. Hanks M, 'Perspectives on Mandatory Mediation' 2012, 35 UNSWLJ 929, 950.
8. Australian Law Reform Commission, Summary Report No 135, Family Law for the Future — An Inquiry into the Family Law System, 2019, <[https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc\\_report\\_135\\_summary\\_report\\_web\\_0.pdf](https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_report_135_summary_report_web_0.pdf)>
9. Australian Institute of Family Studies, Submission to the Joint Select Committee on Australia's Family Law System, January 2020
10. Attorney Generals Department. 2020. *Civil Dispute Resolution Act*. [online] Available at: <<https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/CivilDisputeResolutionAct2011.aspx>> [Accessed 22 April 2020].
11. Australian Dispute Resolution Advisory Council (ADRAC), Conciliation: a discussion paper, October 2019
12. Australia, F., 2020. *Media Release - The Courts Provide Hundreds of Families with Opportunity to Resolve Their Long-Standing Family Law Dispute During Summer Campaign - Federal Circuit Court of Australia*. [online] Federalcircuitcourt.gov.au. Available at: <<http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/about/news/mr100210>> [Accessed 29 April 2020]
13. Australian Law Reform Commission, Review of the Family Law System – Issues Paper 48, 7 May 2018



14. Australian Institute of Family Studies, Submission to the Joint Select Committee on Australia's Family Law System, Jan 2020  
[https://aifs.gov.au/sites/default/files/aifs\\_submission\\_to\\_joint\\_parliamentary\\_inquiry.pdf](https://aifs.gov.au/sites/default/files/aifs_submission_to_joint_parliamentary_inquiry.pdf)
15. Legal Services Commission of South Australia, 41st Annual Report 2018-19 [online] Available at: <[https://lsc.sa.gov.au/resources/41st\\_Annual\\_Report\\_2018\\_to\\_2019\\_Legal\\_Services\\_Commission\\_of\\_SA\\_ACCESSIBLE.pdf](https://lsc.sa.gov.au/resources/41st_Annual_Report_2018_to_2019_Legal_Services_Commission_of_SA_ACCESSIBLE.pdf)>
16. Academyoflaw.org.au. 2020. [online] Available at: <[https://academyoflaw.org.au/resources/Publications/Lucke\\_Legal\\_History\\_in\\_Australia.pdf](https://academyoflaw.org.au/resources/Publications/Lucke_Legal_History_in_Australia.pdf)> [Accessed 20 April 2020].
17. Ardagh A, Repositioning the Legal Profession in ADR Services: The Place of Collaborative Law in the New Family Law System, 2008, QUTLJJ, Vol 8 No 1
18. Sourdin T, Civil Dispute Resolution Obligations: What is Reasonable? UNSW Law Journal, Volume 35(3), 2012
19. Higgs Howarth S, Caruana C, Mandatory mediation in family law – a review of the literature \*, Working Paper No. 2/2017
20. Legislation.gov.au. 2020. *Federal Circuit Court of Australia Act 1999*. [online] Available at: <<https://www.legislation.gov.au/Details/C2018C00370>> [Accessed 20 April 2020].
21. National Child Protection Alliance in association with the National Council for Children post Separation, Submission to the Australian Law Reform Commission Inquiring into the Federal Family Law System, Submission No 818, Jan 2020
22. Attorney-General's Department, Use of Alternative Dispute Resolution (ADR), GUIDANCE NOTE NO 12, [online] Available at: <<https://www.ag.gov.au/LegalSystem/LegalServicesCoordination/Documents/Guidance-note-12-use-of-alternative-dispute-resolution-adr.pdf>>
23. Family Law Rules 2004, Statutory Rules 2003 No. 375 as amended, made under the *Family Law Act 1975*, 2012
24. Lone Fathers Association of Australia Inc: Submission to the Joint Select Committee on Australia's Family Law System, Submission No 112, Dec 2019
25. Bromfield Dr L, Sutherland Dr K, Parker R, Families with multiple and complex needs Best interests case practice model Specialist practice resource, Victorian Government Department of Human Services, Melbourne, Australia, June 2012 [online] Available at: <<https://www.cpmmanual.vic.gov.au/sites/default/files/Families%20with%20multiple%20%26%20complex%20needs%20specialist%20resource%203016%20.pdf>>
26. Mayo, AT, Williams Woolley A, PhD, Wooley MS, Teamwork in Health Care: Maximizing Collective Intelligence via Inclusive Collaboration and Open Communication, AMA Journal of Ethics, Sept 2016
27. Family Relationship Centres, [www.familyrelationships.gov.au](http://www.familyrelationships.gov.au) <https://journalofethics.ama-assn.org/>
28. Legal Aid Queensland, Our performance 2017–18 Annual Report
29. Anglicare Australia, Inquiry on Australia's Family Law System, Submission No 386, Dec 2019.
30. Relationships Australia, Victoria, Joint Select Committee on Australia's Family Law System, Submission from Relationships Australia, Victoria No 119, Dec 2019.
31. Family Law Pathways Network, Major Family Law Services and Waiting Times, 2019, [online] Available at: <<https://ucwb.org.au/wp-content/uploads/2019/01/Waiting-Times-for-CCS-and-FDR-December-2018-and-January-2019.pdf>>
32. An Evaluation of the Family Advocacy and Support Services Final Report 18 October 2018 Prepared by Inside Policy for the Australian Government Attorney-General's Department.
33. Law Council of Australia, Review of the Family Law System – Issues Paper 48, Australian Law Reform Commission, May 2018
34. Attorney General's Department. 2020. *Legal Aid Commissions and Community Legal Centres*. [online] Available at: <<https://www.ag.gov.au/LegalSystem/Legalaidprogrammes/Pages/Legal-aid.aspx>> [Accessed 29 April 2020].
35. Australia, L., 2020. *Family Dispute Resolution - Legal Services Commission Of SA*. [online] Lsc.sa.gov.au. Available at: <[https://lsc.sa.gov.au/cb\\_pages/fdr.php](https://lsc.sa.gov.au/cb_pages/fdr.php)> [Accessed 4 May 2020].
36. web-integration.info. 2020. *Web Portal*. [online] Available at: <<http://www.web-integration.info/en/blog/what-is-a-corporate-web-portal-and-what-are-its-goals>> [Accessed 27 April 2020].
37. Usability.gov, Visual Design Basics, What & Why of Usability, [online] Available at: <<https://www.usability.gov/what-and-why/visual-design.html>>

## APPENDIX A

