AMICABLE RESOLUTION
ALRC REPORT RECOMMENDATIONS

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It's fair to say that for any public service system to work, there are fundamental elements, which are necessary. Foremost, is the need for clear common objectives, simplified functionality and efficiency, transparency of process, skilled professionals across all levels and public confidence in the services delivered and outcomes achieved.

Chapter 13 of the ALRC Final Report focuses on Building Accountability and Transparency in the Family Law System and makes six recommendations in furtherance of these objectives.

Recommendation 49

Section 115 of the *Family Law Act 1975* (Cth) should be amended to expand the Family Law Council's responsibilities to include:

- monitoring and regular reporting on the performance of the family law system;
- conducting inquiries into issues relevant to the performance of any aspect of the family law system, either of its own motion or at the request of government; and
- making recommendations to improve the family law system, including research and law reform proposals.

The ALRC suggests that the noted absence of an independent body tasked with overseeing functionality and performance of the Family Law System, contributed to both a lack of confidence in the system and historical reforms being undertaken as a response to particular interest groups rather than from an overall analysis of best evidence available.

In its Discussion Paper, the ALRC sought stakeholder input on the establishment of a new statutory body, a Family Law Commission, which would have multiple functions including systemic oversight of and reporting in relation to the Family Law System.

Having practised in family law since 2002, initially in South Australia, Kirstie has practised exclusively in this area since moving to Queensland in 2004, gaining Specialist Accreditation with the Queensland Law Society in 2009.

Kirstie joined the Family Law team at Barry.Nilsson. in 2011 and has a particular interest in matters involving complex parenting issues including international and domestic child relocation law and matters arising under the Hague Convention on the Civil Aspects of International Child Abduction. On being appointed a board member of AFCC in early 2018, Kirstie says *"the resolution of family law matters often involves an interdisciplinary and often multi-jurisdictional approach – this role has given me the inestimable benefit of building important relationships with other professionals, outside of the legal profession, working towards improving the area of family law for children and families"*.

Reporting mixed responses to such a proposal, the Final Report notes submissions were, for the most part, supportive of an independent body having responsibility for systemic oversight and reporting. Wary of bureaucratic factors including resource constraints, the ALRC has proposed, as an alternative, the expansion of the responsibilities of the Family Law Council (FLC), which is an independent body, established by the *Family Law Act 1975* (Cth). Members of the FLC are appointed by the Attorney General and while the FLC has been in abeyance since 2016, the ALRC recommends its revival and an expansion of its mandate to oversee the implementation of the recommendations arising from this inquiry in conjunction with the Attorney General's Department and other key stakeholders such as the Family Law Courts and the Department of Human Services. Thereafter the ALRC recommends the FLC continue to monitor, report on and make recommendations in relation to ongoing improvement of system performance.

The establishment of an overarching independent body tasked with monitoring the overall performance of the Family Law System will improve functionality and in turn, public confidence. Avoiding duplication and building on existing systems will help to facilitate overall improved outcomes.

Recommendation 50

The Family Law Council should establish a Children and Young People's Advisory Board, which would provide advice and information about children's experiences of the family law system to inform policy and practice.

The ALRC Reports that several stakeholders have called for the creation of an advisory board comprising children and young people to contribute to the improvement of the Family Law System by making it more child-centred and child-inclusive. The creation of such an advisory board would follow in the footsteps of similar advisory boards established in England and Scotland. The ALRC notes the incorporation of children's voices at a governance level can currently be seen in other sectors and State organisations, particularly in South Australia and Victoria, and suggests the implementation of this recommendation would be a formal method via which the input, ideas and feedback of children and young people could be obtained.

A system whose existence is so integrally dedicated to the protection of children, upholding their rights and ensuring their best interests are met would greatly benefit from having an opportunity to draw on the invaluable knowledge and perspectives of children and young people, particularly those who have first hand experience of the Family Law System. The establishment of this advisory board would provide key stakeholders with highly nuanced and personalised information from which services offered can continue to be tailored and improved.

Recommendation 51

Relevant statutes should be amended to require that future appointments of all federal judicial officers exercising family law jurisdiction include consideration of the person's knowledge, experience, skills, and aptitude relevant to hearing family law cases, including cases involving family violence.

The ALRC identifies that at present, the legislative requirements for the appointment of judicial officers to the Family Law Courts are inconsistent. Appointments to the Family Court of Australia are governed by section 22 of the *Family Law Act 1975* (Cth), which is excerpted below:

a. a person shall not be appointed as a Judge unless:

b. by reason of training, experience and personality, the person is a suitable person to deal with matters of family law.

No similar provision governs appointment of judicial officers to the Federal Circuit Court of Australia, where the vast majority of family law matters are determined.

While the recommendation is currently directed at federal judicial appointments only, the ALRC notes stakeholder submissions that such similar attributes ought also inform the appointment of judicial officers in state courts, particularly with respect to the hearing of cases involving family violence. In response, the ALRC opines that the significance of such suggestions will depend on the extent to which state

courts play a role, if any, in the exercise of family law into the future, particularly in light of Recommendation 1 of the ALRC Report.

Editor: *It is noted that the Commonwealth Attorney General has recently been reported in the Australian Financial Review (21 June 2019) to be intent on pursuing the merger of the Family Court and the Federal Circuit Court and has ruled out a transfer of jurisdiction to the State Courts on the basis that while "there's a theoretical and academic elegance to that proposition… [it] is impractical and unachievable".*

The Report makes clear that there is a need for professional development opportunities for judicial officers in the Family Law System including regular and consistent education and training in the area of family violence. However, the Report goes on to note that the use of professional development to attain minimum competency standards amongst current judicial officers is limited by the principle of judicial independence, as judicial officers cannot be compelled to attend further training following their appointment to the bench irrespective of whether or not such professional development opportunities exist. Thus, the ALRC points to this as further substantiation of the importance for the requirement of key competencies to be met by candidates for all federal judicial appointments at the time of appointment to the bench as enshrined in this recommendation.

The Report notes that judicial appointment processes in Australia are the 'unfettered prerogative of the Executive government', meaning such processes can change with changing governments. The ALRC has previously recommended the establishment of an 'advisory commission' to the Attorney-General on the suitability of candidates for judicial appointment based on various criteria. Whilst this is not included as a specific recommendation in the Final Report, the themes of the submissions endorsed by the ALRC are for greater transparency into the judicial appointment process and an increase in the diversity of judicial appointments so as to be more reflective of the community at large.

> *"If the Family Law System is to function successfully and efficiently with the enjoyment of public confidence, it must meet basic standards, including skilled professionals, judicial officers not excepted. As an accredited specialist practising exclusively in family law, I welcome and endorse the ALRC's recommendation in this regard.*

Recommendation 52

The Law Council of Australia should work with state and territory regulatory bodies for legal practitioners to develop consistent requirements for legal practitioners undertaking family law work to complete annually at least one unit of continuing professional development relating to family violence.

Currently, there is no requirement for family lawyers to undertake training in the area of family violence. Consistent with the comments about Recommendation 51 above, support of and endorsement for the ALRC recommendation to ensure minimum standards of ongoing professional development in the area of family violence for legal practitioners undertaking family law work is likely to find support amongst practitioners. When considering the prevalence of family violence in our society generally and in family law matters specifically, training for legal practitioners practising in family law in family violence including in the recognition of risk factors for clients and the ability to practice in a trauma informed and responsive manner, is vital.

The ALRC questions how legal practitioners undertaking family law work might be identified. Professional development requirements differ for legal practitioners around the country, although the Report notes that there are similarities with most states and territories requiring a minimum of ten units per annum including compulsory elements in ethics and professional

responsibility; practice management and business skills; professional skills; and substantive law. Aside from the additional requirements of practitioners holding specialist accreditation in family law, there is no way to currently identify practitioners practising in family law from those practising in other jurisdictions or to identify uniform gaps in training needs.

The ALRC suggests the wording of this recommendation will allow regulatory bodies to identify how best to implement this recommendation if adopted and goes on to suggest that such training might be rolled out as a compulsory unit to all legal practitioners or linked on a practising certificate to the practise of family law.

The amelioration of the blight of family violence is a collective responsibility on all, to contribute to the shift in attitude that such behaviour is unacceptable. Mandatory family violence training for all legal practitioners working in this area would demonstrate leadership and be beneficial for the community as a whole.

Recommendation 53

The Australian Government Attorney-General's Department should develop a mandatory national accreditation scheme for private family report writers.

Family reports are independent written assessments prepared in the context of parenting matters by experts appointed either by the Court or privately by parties. The content of a family report will be in relation to the care, welfare and development of a subject child and will, typically, include recommendations about what is in the best interests of such child. The conclusions drawn in a family report are based on the observations and expert opinion of the family report writer and are regularly relied on as evidence in the determination of parenting matters.

Family report writers are usually social workers or psychologists and can be court-based, known as Family Consultants, or private practitioners engaged either under Regulation 7 of the *Family Law Regulations 1984*, or Part 15.5 of the *Family Law Rules 2004*, or Division 15.2 of the *Federal Circuit Court Rules 2001*, the latter two being in relation to the appointment of single or jointly appointed expert witnesses.

Stakeholders have expressed concerns during the ALRC Inquiry regarding the qualifications of family report writers, particularly in the areas of understanding of family violence, trauma and its impacts on adults and children, child abuse, cultural competency, and disability, prompting the ALRC to recommend a mandatory accreditation scheme for family report writers.

The Report notes the work being done by the Association of Family and Conciliation Courts in consultation with the Attorney-General's Department in developing a national training course for private experts. The ALRC suggests that if such a program is progressed, the Attorney-General may consider establishing a publically available list of accredited experts including identification of each participant's area of expertise. The Report goes on to suggest that the maintenance of such a list by the Attorney-General's Department might go some way to addressing the concerns regarding the current inconsistency of qualifications and training among private family report writers and suggests a knock-on positive impact on public and professional confidence in the process.

While this recommendation is aimed at private family report writers only, the challenge is to ensure parity in the skills of and quality of forensic assessment produced by all family report writers working in the Family Law System, irrespective of whether they are court-based or in private practice.

Recommendation 54

The *Family Law Act 1975* (Cth) should be amended to:

- require any organisation offering a Children's Contact Service to be accredited; and
- make it an offence to provide a Children's Contact Service without accreditation.

Children's Contact Services (CCS) are regularly used as an option for supervised time between a child and a parent or for supervised changeover of a child between parents in circumstances where risk factors including family violence, child abuse including sexual abuse, substance abuse issues, mental health difficulties or other factors impacting parental capacity are identified in the family. The Report notes that many families who utilise CCS oftentimes have complex or overlapping needs and present with high levels of conflict and safety concerns.

Government funded CCS, subject to regulatory processes and minimum standards of compliance are few in number, leaving a significant gap for such specialised services in the market. While private organisations are stepping in to fill the breach, they are not currently subject to any regulatory oversight.

Stakeholder concerns regarding the safety and quality of services offered by private CCS to some of the most vulnerable families, with highly complex needs, in the Family Law System, are noted by the ALRC. There is a call for accreditation and regulation of these services particularly in relation to the minimum qualifications to be held by CCS staff.

The Report identifies the need for accreditation of CCS and has suggested that this lies within the purview of the Attorney-General's Department. Further, as proposed in the recommendation, the Report proposes that section 10 of the *Family Law Act 1975* (Cth), which provides that regulations may prescribe Accreditation Rules relating to the accreditation of persons, including family counsellors and family dispute resolution practitioners be expanded to include CCS.

The ALRC has gone further in its recommendation to suggest making it an offence to offer services as a CCS without attaining accreditation, given the vital importance of the services provided by CCS in ensuring the safety of some of the most vulnerable and at-risk children in the Family Law System.

The need to ensure key competencies in this service sector, which has such a crucial role at the frontline of managing families with complex and often multi-faceted safety needs, is essential. The challenge may be how private service providers could be incentivised in this regard to encourage growth in this service sector.