THE LAW SOCIETY OF NEW SOUTH WALES
young LAWYERS

Australian Law Reform Commission Review of the Family Law System: Discussion Paper

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Australian Law Reform Commission

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The NSW Young Lawyers Family Law Committee and the Human Rights Committee (the **Committees**) make the following submission in response to the ALRC Review of the Family Law System: Discussion Paper.

NSW Young Lawyers

NSW Young Lawyers ("Young Lawyers") is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 16 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The Family Law Committee

The NSW Young Lawyers Family Law Committee ("the FLC") comprises a group of approximately 1,100 members interested in all aspects of family law. The Committee coordinates family law related Continuing Professional Development (CPD) Programs and keeps family law practitioners informed and connected by running regular committee meeting regarding legislative changes, important judicial decisions and current matters of interest in the area of family law. The Committee also provides a networking platform for students and lawyers working across all aspects of family law.

The Human Rights Committee

The Human Rights Committee ("the HRC") comprises a group of over 1,200 members interested in human rights law, drawn from lawyers working in academia, for government, private and the NGO sectors and other areas of practice that intersect with human rights law, as well as barristers and law students. The objectives of the HRC are to raise awareness about human rights issues and provide education to the legal profession and wider community about human rights and their application under both domestic and international law. Members of the HRC share a commitment to effectively promoting and protecting human rights and to examining legal avenues for doing so. The HRC takes a keen interest in providing comment and feedback on legal and policy issues that relate to human rights law and its development and support.

Scope of Submission and Summary of Recommendations

This submission addresses only the following questions and makes the following recommendations, in summary:

Question 3 – 1

1. Provisions relating to parental responsibility should be contained in one part of the *Family Law Act 1975* (Cth) ("**FLA**").
2. There should be clarification of the decisions which require consultation between parents with parental responsibility.
3. What is currently known as parental responsibility should be renamed to 'decision making responsibility'.

Question 3 – 2

4. There should not be any provision for the early release of superannuation beyond what each party's respective fund may currently offer under hardship provisions.

Question 3 – 16

5. Retail and industry superannuation trustees should be required to develop and publish pro forma orders for superannuation splittable payments with such orders to be available on a central register and each fund's website.
6. If parties develop draft orders in accordance with a fund's pro forma orders, they shall be taken to have afforded the trustee procedural fairness.

Proposal 3 – 18, 3 – 19 and Question 3 – 4

7. Spousal maintenance provisions for de facto and married couples should be merged for simplicity.
8. The considerations in section 75 of the FLA be located in a separate section dedicated to spousal maintenance.
9. The provisions in relation to spousal maintenance should include a rebuttable presumption of a capacity to pay in certain circumstances, such as where a couple has arranged their family life so that one party was the "breadwinner" and the other the "stay at home parent" or "homemaker" and this arrangement was in effect immediately prior to separation.
10. The FLA should be amended to include a requirement that the court consider the impact of any family violence on the ability of the applicant to adequately support themselves.
11. Registrars should have the power to hear and determine applications for spousal maintenance, particularly urgent applications.

Question 5 – 1

12. The limitation periods for married and de facto parties to commence property proceedings should not be increased.

Question 7 – 1

13. The creation of any new parties to family law proceedings will require a significant commitment to increase funding for both the existing and proposed services.

Question 8 – 1 and 8 – 2

14. The definition of family violence should be expansive rather than proscriptive or restrictive.

15. The examples of family violence in section 4AB of the FLA should include references to "repeated derogatory taunts" and "emotional and psychological abuse" and technology facilitated abuse.

Question 8 – 4

16. Section 117 of the FLA should include additional provisions supporting costs against parties who have:

    a. Not complied with rules of court or court directions;

    b. Not been ready to proceed when required; and/or

    c. Improperly or unnecessarily caused another party to incur legal costs.

Question 9 – 1

17. Australia should enact uniform national legislation to prohibit:

    a. The sterilisation of children with disability; and

    b. Medically unnecessary intersex medical procedures;

    subject to a narrow range of limited exceptions.

18. The limited exceptions to the above should be:

    a. Where there is a serious threat to life or health; and

    b. Where the child is competent to provide prior, fully informed and free consent and does provide such consent.

19. Authorisation from the Family Court system should be required for any proposed medical treatment relating to the sterilisation of children with disability or intersex medical procedures for children who:

    a. Do not have the capacity to prior, fully informed and free consent; or

    b. Have not provided such consent.

20. An application for such authorisation by the Family Court system should be accompanied by appropriate safeguards to ensure that any such authorisation is consistent with the best interests of the child, interpreted consistently with international human rights standards.

21. Appropriate safeguards should include the appointment of an independent children's lawyer ("ICL") to advocate for the best interests of the child. The ICL should have successfully completed relevant training, should not be a member of the child's family or the child's carer and should be fully funded by government.[1]

22. National guidelines should be enacted:

    a. In consultation with medical experts, people with disability and their peak bodies to ensure a human rights-based approach is taken in decision-making for any medical treatment relating to sterilisation of children with disability; and

    b. In consultation with medical experts, intersex people and their peak bodies to ensure a human rights-based approach is taken in decision-making for any medical treatment relating to intersex medical procedures.

Questions 10 – 7 and 10 – 3

23. Children's Contact Service workers should be required to have a Working With Children Check and appropriate tertiary qualifications.

Proposal 10 – 8, Questions 10 – 4 and 10 – 5

24. The appointment of judicial officers should require a consideration of their knowledge and aptitude in relation to family violence.

25. Reforms should be made to ensure a more transparent system of appointment, including:

    a. Clearly defined criteria, including consideration of the person's knowledge, experience and aptitude in relation to family violence;

    b. Any merit criteria should be clearly defined;

    c. The process be publicly declared with advertising or calls for expressions of interest;

    d. There be an independent and well-qualified advisory panel to assess the eligibility and appropriateness of candidates; and

    e. Judicial appointment should reflect the diversity of the community.

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[1] See, eg, the recommendations made in the Australian Senate Community Affairs References Committee, *Involuntary or Coerced Sterilisation of People with Disabilities in Australia* (July 2013) xi-xii.

Question 11 – 1

26. State and Territory Police should be required to enquire whether a person applying for or renewing a firearms licence is involved in current family law proceedings.

27. State and Territory Police should be required to inform the family courts if a party to current family law proceedings applies for a firearms licence.

28. The FLA should not be amended to give family law professionals the discretion (and immunity) to notify police if they fear for a person's safety.

Proposal 11 – 7

29. Child protection and family violence support workers should be co-located at each family law court registry.

Question 11 – 2

30. The proposed information sharing framework should not include health records.

Question 12 – 1

31. Section 121 of the FLA should be redrafted in simpler and clearer terms and should include reference to social media and other internet based technologies.

3. Simpler and Clearer Legislation

Question 3 – 1 How should confusion about what matters require consultation between parents be resolved?

The Committees submit that the legislative provisions regarding parental responsibility may be confusing to parties and should be amended to clarify who has parental responsibility, what it is, and which decisions require consultation between parents.

The Committees note the sections relating to parental responsibility are currently spread throughout the FLA, with the provisions about consultation on major long-term issues separate from the provisions establishing the concept of parental responsibility[2]. Parental responsibility is an important concept and one that parties will often need to navigate many years after orders have been made and for that reason it is essential the information is available in a logical and clear manner within the FLA, preferably in one part of the Act.

[2] Ibid, Div 2 and ss 65G and 65P.

The Committees submit Proposal 3-7 in the Discussion Paper is appropriate as it will reduce confusion and the conflation of parental responsibility and care arrangements. The proposed phrase of 'decision-making responsibility' is clear and, in conjunction with the removal of the reference to the 'presumption' of decision-making responsibility, should help minimise confusion in the minds of parents as to the link between decision-making and care arrangements.

Question 3 – 2 Should provision be made for early release of superannuation to assist a party experiencing hardship as a result of separation? If so, what limitations should be placed on the ability to access superannuation in this way? How should this relate to superannuation splitting orders?

The Committees submit the proposal to allow for the early release of superannuation, beyond that which each fund may currently allow under hardship provisions, is not appropriate. There are two possible negative implications of such a change, namely:

a) A financially weaker party may be inclined to agree to a less favourable outcome with a capital payment or transfer of assets on the basis they can simply apply for an early release of superannuation; and
b) Financially weaker parties or those experiencing family violence may be more inclined not to pursue any financial settlement at all on the basis they can apply for an early release of their superannuation.

While the early release of superannuation may be financially beneficial to parties in the short term, it has significant long-term implications, particularly for women, who are much less likely to have sufficient superannuation in retirement.[3]

Whilst it may appear convenient to allow parties to access superannuation after a relationship breakdown and financial settlement, it is submitted that there are real risks that this could further extend the superannuation gap between men and women and cause the parties who get an early release significant financial hardship in retirement.

Question 3 – 16 The *Family Law Act 1975* should require superannuation trustees to develop standard superannuation splitting orders on common scenarios. Procedural fairness should be deemed to be satisfied when parties develop orders

[3] See, eg, Workplace Gender Equality Agency, 'Pay gap leads to 19.3% annual super shortfall for full-time women' (Media Release, 4 December 2015) <https://www.wgea.gov.au/media-releases/pay-gap-leads-193-annual-super-shortfall-full-time-women> and Andrew Robertson, 'Women's superannuation not so super; The $120,000 gender gap', ABC (online), 27 October 2017 <https://www.abc.net.au/news/2017-10-27/it-is-time-for-superannuation-to-be-fairer-to-women/9087556>.

based on these standard templates. The templates should be published on a central register.

The Committees submit the proposal to simplify the process of drafting orders in relation to superannuation splittable payments and providing a superannuation trustee procedural fairness are most appropriate. The publication of standard orders on a central register and superannuation fund websites will minimise delays in both drafting orders and giving them effect. It may also be a useful tool for parties with asset pools comprised only of superannuation, who are often do not have access to liquid funds but find themselves unable to finalise any agreement as to a superannuation split as they are unable to navigate the process without the assistance of lawyers. Although the Committees do not advocate parties signing any final orders without obtaining some legal advice, it is quite possible many parties of modest means simply forego superannuation splittable payments as they are simply unable to navigate the current process without a lawyer.

Proposal 3 – 18, 3 – 19 and Question 3 – 4 Spousal Maintenance

The Committees submit the proposal to redraft and reform the spousal maintenance provisions in the FLA is appropriate. Redrafting is necessary to increase user-accessibility and should:

a) Merge provisions relating to married and de facto spouses;
b) The considerations in section 75 of the FLA be located in a separate section dedicated to spousal maintenance;
c) Introduce a rebuttable presumption of a capacity to pay, in certain circumstances, such as where a couple has arranged their family life so that one party was the “breadwinner” and the other the “stay at home parent” or “homemaker” and this arrangement was in effect immediately prior to separation;
d) Include a requirement that the court consider the impact of any family violence on the ability of the applicant to adequately support themselves.

Enabling Registrars to hear applications for spousal maintenance, particularly urgent applications, should ensure the provisions are more accessible to the parties who need them most.

The Committees cannot comment on the proposal for an administrative assessment in spousal maintenance applications without details as to what the administrative assessment will be based on and the information it would consider. However, the Committees are concerned an administrative assessment would not result in better outcomes for parties as it may not address issues of assets or income tied up in corporate structures and family trusts. Any administrative assessment will presumably also rely on accuracy in reporting expenses, which is an area ripe for parties to inflate their expenses to minimize income available to pay

spousal maintenance. The review and subsequent appeal process, if similar to the current child support review and appeal process, is then likely to lead to further litigation and delays for parties, particularly if their substantive matter is already before the court.

5. Dispute Resolution

Question 5 – 1 Should the requirement in the FLA that proceedings in property and financial matters must be instigated within twelve months of divorce or two years of separation from a de facto relationship be revised?

The Committees submit that the current timeframes in relation to both married and de facto couples are appropriate, and that the timeframes provide parties with an appropriate and sufficient amount of time to attempt to negotiate a resolution, which most parties are able to do, or commence proceedings if necessary.

The current timeframes of a maximum of two years for de facto couples and effectively a minimum of two years for divorced couples (12 months of separation plus 12 months post-divorce, if parties apply without delay) also play a role in assisting the timely resolution of family disputes and providing finality to a financial relationship between separating couples. Extending the time limits may have the unintended consequence of prolonging what is already a personally and financially stressful time for parties. The timeframe is appropriate and necessary to protect financially vulnerable parties or those who have been subjected to financial abuse or control in resolving their financial matter in a timely manner and obtaining financial independence.

Any extension of the time limitations for the commencement of property settlement proceedings should consider that in reality the timeframe for married couples is usually longer than that for de facto couples and unlike de facto couples who have a clear two years from the date of separation, married couples can take steps to prolong the time limitation period, such as not applying for divorce until many years after separation or evading service or opposing an application for divorce, once filed.

7. Children

Question 7 – 1 In what circumstances should a separate legal representative for a child be appointed in addition to a children's advocate?

While the Committees support the better engagement and support of children in the decision-making process, they are concerned about the possibility of further parties being joined to proceedings when there is already a lack of funding and available practitioners for the existing role of Independent Children's Lawyer (ICL).

The Committees are particularly concerned about resources in regional, rural and remote regions across New South Wales and note anecdotal reports from members that there are currently fewer than five ICLs in the regional areas of Dubbo, Orange, Bathurst and Tamworth. When local ICLs are not available they are appointed from Canberra, Paramatta or Sydney, hundreds of kilometres away from the children whose best interests they are charged with representing. In other regional areas, such as Griffith and Armidale, there are currently no ICLs practicing in the region and ICLs must be appointed from Wagga Wagga and Tamworth. In circumstances where the ICL is not local to the parties, the burden of travel to arrange the meeting of the ICL and the children often falls on the parties themselves, a cost and inconvenience that is rarely imposed on parties in metropolitan areas where the ICL is likely to be reasonably proximate to the parties.

The Committees submit the current lack of resourcing unfairly burdens rural and regional areas and that any decision to include another possible party in parenting proceedings will require a corresponding increase in funding and resources.

8. Reducing Harm

Questions 8 – 1 and 8 – 2 What are the strengths and limitations of the present format of the family violence definition and are there issues or behaviours that should be referred to in the definition, in addition to those proposed?

The Committees submit that the broad definition in section 4AB(1) of the FLA which refers to family violence as "violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member), or causes the family member to be fearful" is appropriate and should be retained. This subsection is sufficiently broad to include the most common forms of family violence and is appropriately expansive rather than restrictive.

The main limitation of the current definition is the non-exclusive list in section 4AB(2) of the FLA. The Committees support Proposal 8-1 which seeks to clarify some terms used in the non-exclusive list, and to otherwise extend the list of examples. The Committees support the proposal that the examples of family violence be expanded to include misuse of systems and processes, emotional and psychological abuse and technology facilitated abuse. Further, the proposal to include "emotional or psychological abuse" in the non-exhaustive list at section 4AB of the FLA is appropriate as it is a more expansive and nuanced example of what may constitute family violence. However, the Committees submit that “emotional or psychological abuse” should be included in addition to the current example of "repeated derogatory taunts". The retention of "repeated derogatory taunts" as an example of family violence provides victims with unequivocal certainty that this behaviour falls into the statutory definition of family violence.

The non-exhaustive list should be kept as clear and broad as possible. While it may be clear to family law practitioners that repeated derogatory taunts are likely to be encompassed within the category of emotional or psychological abuse, it is important for the parties, particularly self-represented litigants, that the list of examples of family violence be as expansive as possible. The Committees note anecdotal reports from members that despite the increase in family violence awareness, it is not uncommon for parties to report that there was no family violence because they were not subject to physical abuse or harm, they were "just" called names.

The Committees also submit the additional examples to be included in section 4AB as set out at paragraphs 8.32 and 8.33 of the Discussion Paper add clarity to the present definition and are supported. In relation to the two proposed examples of family violence at paragraph 8.33, the acknowledgment of the use of technology in perpetrating family violence is timely and necessary. The Committees are aware of at least one anecdotal report of an instance in which a perpetrator of family violence (against whom an Apprehended Domestic Violence Order has been issued) used a mobile phone belonging to the protected party's child to contact the protected person. The police did not consider this particular situation to be a breach of the Apprehended Domestic Violence Order ("ADVO"), despite it containing the standard "no contact" orders. While access to technology can be an important resource for victims of family violence to access support and information, it can also be used by perpetrators to subject victims to family violence in ways that were not contemplated when the current examples of family violence were included in the FLA. Clarification around the use of technology facilitated abuse is timely given the prevalence of not only social media but also other forms of technology that can be used to track or monitor users, often without their knowledge. The Committees note the increasing possibility that information gathered by technology (with and without informed consent) may be used by parties to proceedings in ways not originally intended, such as accessing information available on a family cloud, recordings from home assistance devices or school apps to track and locate children or parties.[4]

Question 8 – 4 What, if any, changes should be made to the courts' powers to apportion costs in s 117 of the FLA?

[4] See, eg, Ariel Bogle, 'Family violence perpetrators using schools apps and web portals to harass, stalk and intimidate', ABC (online), 16 October 2018 <https://www.abc.net.au/news/science/2018-10-16/family-violence-perpetrators-using-school-apps-seesaw-to-stalk/10356776> and Mark Burdon and Heather Douglas, The University of Queensland, 'Smart homes can enable domestic abuse – but the technology can also make us safer', ABC (online), 13 September 2017 <https://www.abc.net.au/news/2017-09-12/smart-home-devices-can-help-enable-and-prevent-domestic-violence/8899856>.

The Committees note it is appropriate to review the current provisions relating to unmeritorious proceedings to make it easier for the court to manage proceedings that are frivolous, vexatious or an abuse of process, particularly when proceedings are used primarily as a way of furthering family violence.

While clarification and simplification of the unmeritorious proceedings provisions will go some way in protecting parties and ensuing court time is not abused, the Committees are concerned that the most common forms of abuse of process will not be covered by the unmeritorious proceedings provisions. It is the experience of many of Young Lawyers' members that the most common form of abuse of process is a parties' failure, often repeatedly, to comply with the court's rules and directions. For example, it has become standard practice, at least in the Sydney Registry, for the court to make very detailed orders to prepare the parties to attend a conciliation conference. The standard orders often include an order or notation to the effect that if a party fails to comply then the conciliation conference will be vacated. While the orders are intended to ensure readiness for the conciliation conference, it enables a non-complying party to delay proceedings, negotiations and possibly resolution of the matter for many months. In the experience of those Young Lawyers, parties who fail to comply with common directions for filing of documents and disclosure are rarely subject to any immediate ramifications or penalty and, if the abusing party is in a financially stronger position, there is no immediate disincentive for them to comply with court orders and directions as costs orders are rarely made at the directions hearing stage of a matter, when failure to comply has such a significant impact on the readiness of matters to proceed.

The Committees are of the view there are a number of factors that enable parties to frustrate the court process at a level that is unlikely to be captured by the unmeritorious proceedings provisions but should nonetheless be dealt with in a more efficient manner, namely:

a) In a duty list, there may be anywhere from 20 matters in metropolitan registries to up to 40 or more matters in regional registries listed before a single judge in the Federal Circuit Court and similar numbers before a registrar in the Family Court. As a result, the judge or registrar is forced to triage matters, prioritising matters which may involve risk of harm issues and other urgent matters over applications that are considered more procedural in nature, such as an application to enforce compliance with directions for disclosure or a costs order due to non-compliance with same.
b) In a directions list in metropolitan registries, there may be anywhere from four to ten matters listed at 9.30am before a 10am hearing. In those circumstances, there is simply no way for a judge to hear even brief submissions from parties in relation to costs.
c) If a matter is referred to a conciliation conference and the registrar considers the matter could not proceed or the parties could not negotiate in good faith due a party's non-compliance and the matter is in the Federal Circuit Court (not the Family Court), the registrar has no power to make any costs

orders. The matter will be referred back to the docket judge but due to the matters raised above, there are unlikely to be any repercussions to the non-compliant party.

d) In regional circuits, there are several months between sittings and anecdotal reports from members of the Committees indicate that parties can wait up to five months for a first return date. Parties who do not comply with court rules for filing will cause even further delays, with limited recourse due to the periods between sitting weeks and lack of court time.

e) In addition, parties who reside in regional, remote and rural areas may be required to travel hundreds of kilometres to attend court. A party's failure to comply with court directions or rules may mean the compliant party has travelled a significant distance only to have the matter adjourned due to the other party's non-compliance. These parties incur not just wasted costs in terms of legal fees but also significant expense in travelling to and from court.

The Committees agree that costs orders, on their own, will not always be the most appropriate or effective mechanism to address unmeritorious proceedings. However, the availability and accessibility of costs orders is essential to ensure the proper of administration of particular matters fairly brought before the court. The Committees submit there should be an abridged or simplified costs process to deal with procedural non-compliance as the current considerations set out in section 117 appear to contemplate an application for costs made after final orders. Any abridged process should still involve a consideration of a parties' financial circumstances as there should be a general reluctance to impose costs against parties who are experiencing significant financial hardship or at an extreme economic disadvantage.

The Committees also support the submission from the NSW Bar Association for additional provisions supporting costs against parties who have:

a) Not complied with rules of court or court directions
b) Not been ready to proceed when required; or
c) Improperly or unnecessarily caused another party to incur legal costs.

9. Additional Legislative Issues

Question 9 – 1 Regarding the sterilisation of children with disability and performance of unnecessary intersex medical procedures.

Intersex people "are born with physical or biological sex characteristics (such as sexual anatomy, reproductive organs, hormonal patterns and/or chromosomal patterns) that do not fit the typical definitions for male or female bodies". For the purpose of this submission, "intersex medical procedures" refer to medically

unnecessary procedures performed on intersex children "in an attempt to forcibly change their appearance to be in line with societal expectations about female and male bodies".[5]

Although "there are important overlaps and intersections, intersex people experience separate legal and human rights concerns" from the broader gay, lesbian, bisexual, transgender and queer ("LGBTQ") community.[6] Distinct groups within this community have distinct needs and considerations in relation to medical treatment. In light of this fact, our submission on intersex medical procedures does not address medical treatment that seeks to affirm a person's existing gender identity – that is, "a person's internal conception of their gender" –[7] except to note that there can be serious and potentially life-threatening risks in failing to provide such treatment to a transgender person.[8]

Australia continues to attract criticism at the international level for its failure to nationally prohibit:

- The sterilisation of children – and especially girls – with a disability; and
- The performance of medically unnecessary procedures on intersex children, including procedures for gender assignment.

United Nations monitoring bodies have repeatedly raised concerns that these practices violate human rights. Concerns have been raised in relation to the following rights:

- The right to freedom from torture or cruel, inhuman or degrading treatment or punishment;[9]
- The right to security of person;[10]
- The right to privacy;[11]
- The right to equality before the law and protection against discrimination;[12]
- The right to the enjoyment of the highest attainable standard of physical and mental health;[13]

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[5] United Nations Office of the High Commissioner for Human Rights, "End violence and harmful medical practices on intersex children and adults, UN and regional experts urge" (24 October 2016) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20739&LangID=E?> ("Joint Expert Statement").
[6] See generally Law Council of Australia, *The Justice Project: LGBTI+ People* (August 2018) 6-7.
[7] Out for Australia, "A Word on Language: Gender and Sex Diversity Resource" 2 <http://docs.wixstatic.com/ugd/ab0fca_2b30d0d58d59476281cfc5614ed88316.pdf>.
[8] *Re Kelvin* [2017] FamCAFC 258 (30 November 2017) [17]-[23] ("*Re Kelvin*").
[9] *International Covenant on Civil and Political Rights* art 7 ("ICCPR"); United Nations Human Rights Committee, "Concluding observations on the sixth periodic report of Australia", CCPR/C/AUS/C0/6 (1 December 2017) 4-5 [23]-[26] ("UNHRC Concluding Observations"); Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/22/53 (1 February 2013) 11 [88] ("Report of the Special Rapporteur on torture").
[10] *ICCPR* art 9; UNHRC Concluding Observations 4-5 [25]-[26].
[11] *ICCPR* art 17; UNHRC Concluding Observations 4-5 [23]-[26].
[12] *ICCPR* arts 2 and 26; UNHRC Concluding Observations 4-5 [23]-[26].

- The right of children to be protected from physical and mental violence;[14]
- The right of persons with disabilities to respect for their physical and mental integrity on an equal basis with others;[15] and
- The right of persons with disabilities, including children, to retain their fertility on an equal basis with others.[16]

These rights are recognised by core human rights treaties, by which Australia has agreed to be bound, including:

- *International Covenant on Civil and Political Rights* ("*ICCPR*");
- *International Covenant on Economic, Social and Cultural Rights* ("*ICESCR*");
- *Convention on the Rights of the Child* ("*CROC*");
- *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ("*CAT*");
- *Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW")*;
- *Convention on the Rights of Persons with Disabilities* ("*CRPD*").

The United Nations Committee on the Rights of the Child recognises the sterilisation of women and girls with disabilities as a form of violence against women and girls.[17] The United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment observes that involuntary sterilisation tends to be targeted against vulnerable people "because of discriminatory notions that they are 'unfit' to bear children."[18]

The United Nations Committee on the Elimination of Discrimination against Women has classified medically unnecessary procedures on intersex infants and children as a "harmful practice".[19] A joint statement of

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[13] *International Covenant on Economic, Social and Cultural Rights* art 12(1) ("*ICESCR*"); Committee on Economic, Social and Cultural Rights, "Concluding observations on the fifth periodic report of Australia", E/C.12/AUS/CO/5 (11 July 2017) [45]-[46] and [49]-[50].
[14] *Convention on the Rights of the Child* art 19(1) ("*CROC*"); Committee on the Rights of the Child, "Concluding observations: Australia" CRC/C/AUS/CO/4 (28 August 2012) [46] ("CRC Concluding Observations").
[15] *Convention on the Rights of Persons with Disabilities* art 17 ("*CRPD*"); Committee on the Rights of Persons with Disabilities, "Concluding observations on the initial report of Australia", CRPD/C/AUS/CO/1 (21 October 2013) [39] to [40] ("CRPD Concluding Observations").
[16] *CRPD* art 23(1)(c); CRC Concluding Observations [57]-[58].
[17] CRC Concluding Observations [46].
[18] Report of the Special Rapporteur on torture, 11 [48].
[19] Committee on the Elimination of Discrimination against Women, "Concluding Observations on the eighth periodic report of Australia", CEDAW/C/AUS/CO/8 (20 July 2018)

United Nations and regional experts ("Joint Expert Statement") notes that medically unnecessary procedures are often performed on intersex children due to "social prejudice, stigma associated with intersex bodies and administrative requirements to assign sex at the moment of birth registration".[20]

The Australian Law Reform Commission's *Review of the Family Law System: Discussion Paper* refers to the recommendations made in two reports by the Senate Community Affairs References Committee ("Senate Committee") in 2013.[21] The Senate Committee made 43 recommendations in total. Many of these recommendations would significantly improve protections against the sterilisation of children and the performance of medically unnecessary intersex medical procedures. Nonetheless, the United Nations Committee on the Rights of Persons with Disabilities remains deeply concerned that the recommendations would allow the sterilisation of children to continue.[22] The Senate Committee's recommendations likewise fall short of compliance with the Joint Expert Statement's recommendation that "States must, as a matter of urgency, prohibit medically unnecessary surgery and procedures on intersex children" until "they are old enough or mature enough to make an informed decision for themselves" – in other words, until they are competent to give prior, fully informed and free consent.[23]

The Australian Human Rights Commission has recommended that national "legislation be enacted to criminalise, except where there is a serious threat to life or health, (i) the sterilisation of children (regardless of whether they have a disability), and (ii) the sterilisation of adults with a disability in the absence of their fully informed and free consent".[24] We support this recommendation.

We further recommend, in line with the Joint Expert Statement, that national legislation be enacted to criminalise the performance of medically unnecessary intersex procedures on a person who does not have capacity to give prior, fully informed and free consent to the procedure, except where there is a serious threat to life or health. In relation to a person who does have capacity to give consent, intersex medical procedures should only be performed with such consent.

<https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/AUS/CO/8&Lang=En>.

[20] The signatories to the Joint Expert Statement include the United Nations Committee against Torture, United Nations Committee on the Rights of the Child and United Nations Committee on the Rights of People with Disabilities.

[21] Australian Law Reform Commission, *Review of the Family Law System: Discussion Paper* (October 2018) 233.

[22] CRPD Concluding Observations [39].

[23] Joint Expert Statement.

[24] Australian Human Rights Commission, Submission No 5 to the Australian Senate Community Affairs Reference Committee *Inquiry into the Involuntary or Forced Sterilisation of People with Disabilities in Australia* (20 November 2012) 4, Recommendation 2.

As noted above, intersex people experience separate legal and human rights concerns from the broader LGBT community. For the avoidance of doubt, our recommendation regarding intersex medical procedures is not addressed to circumstances such as those in the recent case of *Re Kelvin* [2017] FamCAFC 258. *Re Kelvin* concerned a 17-year-old transgender boy who wished to commence gender affirming hormone treatment ("the treatment") in circumstances where:

- The child was competent to consent to the treatment;[25]
- The treatment was "necessary for Kelvin's ongoing psychological health and overall wellbeing";[26] and
- There was no dispute between the child, his parents and his medical experts that the treatment should be commenced.[27]

The Full Court of the Family Court decided that the child should be able to access gender affirming hormone treatment without court authorisation.[28]

The Committees' recommendation regarding intersex medical procedures is not addressed to circumstances in which adolescent transgender children who are competent to consent seek gender affirmation treatment that is necessary for their psychological health and wellbeing. It is addressed chiefly to circumstances in which medically unnecessary procedures are performed for the purpose of assigning intersex children a male or female sex either without their prior, fully informed and free consent or before their capacity to give such consent has developed.

10. A Skilled and Supported Workforce

Questions 10 – 7 and 10 – 3 Should people who work at Children's Contact Services ("CCS") be required to have a valid Working with Children Check ("WWCC") and/or hold other qualifications?

The Committees submit reforms to ensure appropriate accreditation and minimum standards for all CCS workers is essential. Many parents and caregivers may be surprised to know that there are currently no minimum standards or accreditation requirements for workers who are supervising some of the most vulnerable children in the family law system. CCS are used by parties and children not just in the family law system but also the care system, often where there are concerns about family violence, child abuse, sexual abuse, alcohol and drug misuse, parental incapacity or mental health concerns. Where CCS workers have

[25] *Re Kelvin* [44].
[26] Ibid [39].
[27] Ibid [41] and [116].
[28] Ibid [164].

direct access to and caring responsibilities for children it is incongruous they are not currently required to have a valid WWCC.

Where CCS workers are working with some of the most vulnerable parties in the family law system, there should be minimum standards, such as a Certificate IV in Community Services, Diploma of Community Services or other similar certificates and diplomas in social work or child care. The imposition of minimum standards is important to ensure consistency of safe and high-quality services across Australia as there are a limited number of government funded (and currently more regulated) CCS services in some rural and regional areas. In those areas, private and currently unregulated CCS are filling the gap and it is important those families are using a service that it not only high-quality but also safe. Greater consistency and minimum standards will also ensure CCS workers have appropriate family violence literacy and are best placed to ensure the safety of the families engaging their services.

Proposal 10 – 8, Questions 10 – 4 and 10 – 5 Judicial Appointments

The Committees submit a more transparent selection and appointment process for judicial appointments is essential to the public's confidence in the judiciary and the wider court system. The Committees' concern about the current process, which lacks transparency, is not a criticism of the judiciary but borne out of concern that despite recent steps at the state level[29] to increase transparency around the appointment of judicial officers, the federal process has in fact regressed.

In 2008, the then Attorney-General Robert McClelland introduced reforms to federal judicial appointments, which applied until 2013. The 2008 reforms were modest by international standards[30] but a significant departure from the process that preceded it and once again continues today. The reforms aimed to increase transparency and public confidence that the selection of judicial officers was not influenced by political considerations. Even though the key features of the 2008 reforms received bipartisan endorsement from the Senate Legal and Constitutional Affairs Committee in 2009, in 2013 the reforms were unexpectedly dismantled. Since then, the system of appointment has again reverted to a process about which the public effectively has limited information.

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[29] See, eg, Judicial Conference of Australia, *Judicial Appointments – A comparative study* (Judicial Conference of Australia, The University of Sydney Faculty of Law, April 2016).
[30] See, eg, the summary of changes to judicial appointments in England as set out in Judicial Conference of Australia, *Judicial Appointments – A comparative study* (Judicial Conference of Australia, The University of Sydney Faculty of Law, April 2016) 60 – 67.

Concerns about the current opaque system, in which the personal preferences of individual Attorneys-Generals play a role[31], have been raised on a number of occasions[32] and in 2015 the Judicial Conference of Australia released a report comparing judicial appointments in all Australian jurisdictions and a handful of international jurisdictions, namely New Zealand, England, Wales, Scotland and Canada. The report concluded with a summary of the two major proposed reforms:

1. A judicial appointments protocol that includes criteria against which candidate can be measured, which is made publicly available, and
2. The establishment of an advisory body, with diverse professional and lay membership, to advise the Executive on the merits of candidates for judicial appointment.[33]

The Committees submit the current opaque system of appointments is inadequate and does not assist in public confidence in a court and court system that is increasingly under public attack.[34] The Committees submit reforms should be made to ensure a more transparent system of appointment, including:

a) Clearly defined criteria, including consideration of the person's knowledge, experience and aptitude in relation to family violence (Proposal 10-8)
b) Any merit criteria should be clearly defined
c) The process be publicly declared with advertising or calls for expressions of interest
d) There be an independent and well-qualified advisory panel to assess the eligibility and appropriateness of candidates
e) Judicial appointment should reflect the diversity of the community.

In relation to the advisory panel, the panel should be, as recommended by the JCA report, independent of the Executive and if the government appoints someone other than the person(s) recommended by the panel, that should be made transparent at the time of appointment.[35]

Changes to the current appointment process which, at a bare minimum, reflect the 2008 model (which was still short of other comparable jurisdictions) is more likely to ensure public confidence and respect of the

[31] Attorney-General's Department (Cth), Judicial Appointments – Procedure and Criteria (1993) 13.
[32] See, eg, Elizabeth Handsley and Andrew Lynch, 'Facing up to Diversity? Transparency and the Reform of Commonwealth Judicial Appointments 2008-2013' (2015) 37(2) *Sydney Law Review* 187.
[33] Judicial Conference of Australia, above n 31, 87.
[34] See, eg, Sherele Moody, 'How Hanson became the queen of men's rights', The Daily Telegraph (online), 31 October 2017 <https://www.dailytelegraph.com.au/rendezview/how-hanson-became-the-queen-of-mens-rights/news-story/8c642857ccbd7560b330c2abe3e53ff5>
[35] Judicial Conference of Australia, above n 31, vi.

quality and independence of the judiciary and, as noted by Professors Handsley and Lynch, help dispel any sense that judicial appointments are determined by establishment networks or partisan allegiances.[36]

11. Information Sharing

Question 11–1 What other information should be shared or sought about persons involved in family law proceedings?

The Committees submit the proposal to amend section 121 of the FLA to clarify it does not restrict information sharing between professional regulators, government agencies, family relationship services, service providers for children and specialist family violence services is appropriate.

The Committees support the proposed changes to information sharing in relation to firearms licences, to the following extent:

a) State and Territory Police should be required to *enquire* whether a person is currently involved in family law proceedings before they issue or renew a gun licence or add a new genuine reason or category of licence. There mere fact a person is involved in *current* family law proceedings may not itself be a barrier to the issuance of a firearms licence but may be appropriately included in Part B of the *P650 Declaration - Person shooting on an Approved Range or undertaking a Firearms Safety Training Course* which would require the Firearms Registry, not the local firearms club, to assess if the applicant is able to proceed to shoot or complete firearms safety training.[37]

b) State and Territory Police should be required to inform family courts if a person makes an application for a gun licence and discloses they are involved in current family law proceedings. The Committees accept there are many legitimate reasons a person may apply for a firearms licence but that particular oversight should be had of persons who are first time applicants while family law proceedings are on foot.

The Committees submit is not appropriate to amend the FLA to give family law professionals (particularly noting this phrase does not appear to be limited to lawyers) the discretion to notify police if they fear for a person's safety and then be provided with immunity, including against defamation, if they make such a

[36] Handsley & Lynch, above n 33, Part V Conclusion.
[37] *Firearms Regulation 2017* (NSW), cl 129.

notification.[38] The proposed amendment is not appropriate and will cause tension in the fiduciary relationship between solicitor and client, particularly the duties to:

- act in a client's best interests;
- avoid any compromise to their integrity and professional independence;
- follow a client's lawful, proper and competent instructions;
- avoid any conflict of interests; and
- maintain client's confidences.

Given the sensitive nature of family law matters, it is imperative legal professional privilege cannot be waived without the client's consent. Further, where a solicitor fears for the safety of their client or another party to the proceedings, there are other suitable mechanisms to address that concern, such as filing a Notice of Risk, requesting a safety plan or advising a client to report the risk to police. Further, there are circumstances in which a solicitor may disclose information which is confidential to a client is already provided for in the Australian Solicitors Conduct Rules ("the Conduct Rules") and include:

> 9.2.4 the solicitor discloses the information for the sole purpose of avoiding the probable commission of a serious criminal offence;
>
> 9.2.5 the solicitor discloses the information for the purpose of preventing imminent serious physical harm to the client or to another person[39]

Parties engaged in the family law system, not just court proceedings, are likely to have contact with many other professionals who are mandatory reporters, such as doctors, teachers and family dispute resolution practitioners, who are required to report any safety concerns. The Committees are concerned well-meaning family lawyers may place themselves in positions of conflict if they are able to make reports with or without the client's consent, for example, a lawyer who makes a report to police (who may then also make a notification to child welfare authorities) on information obtained in the court of taking instructions and that report is then a key part of the evidence before the court at hearing with the solicitor, but not any of the other parties, being aware the report was made by them.

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[38] The Committees note this submission is, of course, not suggesting family law professionals fall foul of sections 316 and 316A of the *Crimes Act 1900* (NSW).
[39] *Australian Solicitor' Conduct Rules* (Cth), cl. 9.2.

The Committees submit it is imperative that obligation to maintain client's confidences (except as already provided in the Conduct Rules) is not disturbed to ensure parties have the peace of mind and security that their instructions will remain confidential. While well-meaning, the proposed amendment may have the unintended consequence of discouraging reports of family violence or child abuse or the risk of same. For example, victims of family violence may see a solicitor for an initial advice before formally separating from their partner in an attempt to prepare for and understand the implications of a family separation. If the client makes a disclosure of family violence and the solicitor then makes a report to the police and that report is then investigated before the client has informed the other party of their intention to separation, could in fact put the client in a more vulnerable position than if the solicitor had maintained confidentiality.

The Committees submit that there is a potential that if legal practitioners are given the discretion to report safety concerns without instructions, they may be open to complaints or negligence claims when they fail to report such concerns and the client then takes the view their solicitor should have made a report, even without their instructions or where otherwise required by law to report a matter.

Proposal 11–7 The Australian Government should work with States and Territory governments to co-locate child protection and family violence support workers at each of the family law court premises.

The Committees submit this proposal is appropriate and particularly important to ensure regional and rural parties are ensured access to the same services as parties located in metro areas, where these services are often already available.

Question 11–2 Should the information sharing framework include health records? If so, what health records should be shared?

The Committees submit health records should not be made available through any information sharing framework for the following reasons:

a) There are already existing avenues available to parties to obtain health records relevant to the legal proceedings, for example, direct requests to treating medical practitioners, GIPA requests and subpoenas;
b) Indiscriminate disclosure of health records without any ability to object to production or redact sensitive information is not only an invasion of privacy but also may disclose information that is irrelevant to the proceedings but also information that may enable a party to continue to further family violence, for example, disclosing sensitive and personal information on social media,

attending the same medical practitioners to intimidate victims or using certain sensitive information to pursue irrelevant lines of questioning in cross-examination (particularly if a party is self-represented) in an attempt to cause embarrassment; and

c) Automatic disclosure of health records may jeopardize supportive therapeutic relationships and discourage people accessing support services or treatment for fear of disclosure.

The current avenues protect the privacy of parties to family law proceedings by affording them procedural fairness and the ability to decline to provide an authority or object to the issuance of subpoenas. The current procedures available to parties to access health records are sufficient and appropriate given the sensitive nature of health records.

12. System Oversight and Reform Evaluation

Question 12‑1: Should privacy provisions in the FLA be amended explicitly to apply to parties who disseminate identifying information about family law proceedings on social media or other inter-based media?

The Committees submit section 121 of the FLA should be amended in its entirety to make it clearer and more accessible to parties, which should help ensure compliance with the restriction on the publication of court proceedings. As part of the re-drafting of section 121, it is appropriate to include specific reference to social media and other internet-based technologies given the prevalence of such technologies and the use and sometimes misuse of them in family law proceedings.[40]

Concluding Comments

The Committees and NSW Young Lawyers thank you for the opportunity to make this submission. If you have any queries or require further submissions please contact the undersigned at your convenience.

[40] See, eg, *Whitehouse & Whitehouse* [2015] FCCA 3621, 50-56.

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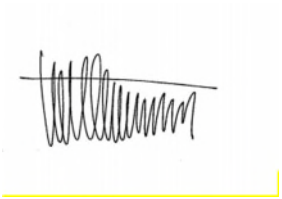

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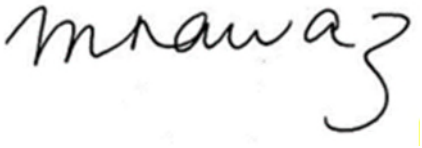

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