

Australian Law Reform Commission
Review of the family law system
Issues Paper 48

Submission

2018

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Summary

NLA considers that the following are key to an accessible and responsive family law system:

- Early and ongoing triage.
- Increased referral to legally assisted models of dispute resolution.
- Pro-active case management.
- Improved competencies, training and professional development.
- Collaborative inter-disciplinary frameworks and practices.

Introduction

About National Legal Aid and Australia's legal aid commissions

National Legal Aid (NLA) represents the directors of the eight state and territory legal aid commissions (LACs) in Australia.

The LACs are independent, statutory bodies established under respective state or territory legislation. They are funded by state or territory and Commonwealth governments to provide legal assistance services to the public, with a particular focus on the needs of people who are economically and/or socially disadvantaged.

LAC services

LACs are the largest providers of family law assistance services in Australia.

LACs provide the full spectrum of family and related law services including:

- legal advice and information;
- legally assisted family dispute resolution (FDR);
- 'at court' duty lawyer and social support services;
- representation in contested proceedings in family law courts for parties and as Independent Children's Lawyers (ICLs);
- referrals to other legal and non-legal service providers where appropriate;
- community legal education;
- training for community service providers; and
- specialist training for legal practitioners.

In the 2016-17 financial year LACs provided in excess of 2.2 million services in all law types.

LAC services are delivered proportionate to the individual's legal need and/or personal circumstances.

LAC services are provided pursuant to the National Partnership Agreement on Legal Assistance Services 2015-2020 (NPA)¹ and respective state and territory enabling legislation. The NPA states that services must be "integrated, efficient and effective" and "focused on improving access to justice for disadvantaged people."² The NPA also requires that:

where appropriate legal assistance service providers should also plan and target their services to people who fall within one or more of the priority client groups:

- (a) children and young people (up to 24 years);*
- (b) Indigenous Australians;*
- (c) older people (over 65 years);*
- (d) people experiencing or at risk of family violence;*
- (e) people experiencing, or at risk of, homelessness;*
- (f) people in custody and prisoners;*
- (g) people residing in rural and remote areas;*
- (h) people who are culturally and linguistically diverse;*
- (i) people with a disability or mental illness;*
- (j) people with low education levels; and*
- (k) single parents.³*

It is common for people whom LACs assist to be within multiple 'priority groups'.

In addition to assisting people within priority groups, LACs provide the general community with the early intervention and prevention strategies of legal advice, information and referral services, and community legal education, with these services being provided online, by video/phone, and face to face.

LAC services are provided across the country from numerous offices and outreach locations including to many regional, rural and remote areas of Australia.

Attachment A to this submission is an NLA publication containing information about NLA and LAC service delivery including a map illustrating the locations of LAC offices from which

¹ Council of Australian Governments *National Partnership Agreement on Legal Assistance Services 2015-2020*.

² Ibid 3.

³ Ibid B-1.

services are delivered, and information about the type and the intensity of services delivered by LACs.

Unique position of NLA to inform law reform and policy in the family law area

NLA/LACs are uniquely placed to help inform the development of family law reform initiatives because:

- LACs have the benefit of the significant expertise and practical experience of thousands of staff and private legal practitioners funded to undertake LAC matters, working in all jurisdictions across the country in a diverse range of family law and related matter types, stages of matter, priority groups, and geographical locations.
- LACs have very high recognition rates in all jurisdictions⁴ with a breadth and depth of expertise and experience in family law, different modes of family law service delivery and responding to the needs of an increasingly complex and diverse community. LACs use targeted and innovative ways to approach family law service delivery to assist our diverse client base.
- LACs have a well developed understanding of the legal and social support information and referrals required by the community from our long experience as a provider of the full suite of legal services, including legally assisted FDR.
- LACs work holistically and cooperatively with other:
 - legal assistance service providers such as Aboriginal and Torres Strait Islander legal services, community legal centres and members of the private legal profession; and
 - social support service providers such as family violence services, Family Relationship Centres, health services, hospitals, women's services, men's services, mental health services, drug and alcohol services, contact centres and youth services.
- LACs are obliged by statute to operate efficiently, effectively and economically. This overlays all services provided.
- NLA has established national working groups and networks. Each working group or network includes a representative from each LAC from their respective specialist area of legal aid practice. These working groups and networks have a long history of working collaboratively together and with others and they can readily identify the differences in laws and practices operating around the country.

LACs are a national resource ready and committed to working with governments and other service providers to best respond to legal and social support needs arising from family breakdown.

⁴ Christine Coumarelos et al, *Legal Australia-Wide Survey: Legal Need in Australia* (Law and Justice Foundation of New South Wales, 2012) xvi.

Victoria Legal Aid (VLA) has also made a separate submission drawing on its state practice experience. NLA and VLA support each other's submissions and to the extent the submissions diverge, rely on respective submissions.

Objectives and principles

Question 1 What should be the role and objectives of the modern family law system?

Context

The changing nature of social and family life in Australia, and the changing nature of the family law system's client base, are described in the Issues Paper (IP), including:

- *changes in social and family life with diversification of family structures, and methods of family formation;*⁵
- *that safety concerns for children are now a common feature of the family law system's workload; and*
- *changes to the culturally and linguistically diverse population.*⁶

As part of the family law system⁷ LACs see these changes reflected in our increasingly diverse client base.

As indicated in the IP "most separating couples are able to work out their arrangements with limited or no recourse to the system".⁸ LACs see many people who, with our assistance, can resolve their issues in a timely manner, i.e. those people who are able to work out their arrangements with limited recourse to the system. LAC legally assisted FDR programs are an excellent example of cost effective timely resolution where parties have ownership of outcomes and court proceedings are avoided.

The IP identifies issues of concern including affordability of legal services and expert reports, self-representation as "an increasingly common feature of family law litigation"⁹ and delays in the system. The IP also questions the appropriateness of adversarial processes and the ethics of adversarial practices.¹⁰

⁵ Australian Law Reform Commission, *Review of the Family Law System Issues Paper 48* [31].

⁶ *Ibid* [67].

⁷ *Ibid*, as defined in [22].

⁸ *Ibid* [33].

⁹ *Ibid* [110].

¹⁰ *Ibid* e.g. [35-36].

In relation to delays it is relevant that when the modern family law system was established in 1975 it was probably envisaged that parties would either be able to afford legal representation or be represented by Legal Aid. This is not today's reality. In 2014 the Australian Government Productivity Commission (PC) inquired into civil law access to justice arrangements in Australia and found that there are more people living in poverty (14%) than are eligible for legal aid (8%).¹¹ This inability of people to access legally assisted dispute resolution and legal representation services leads to the navigation issues described in the IP and contributes significantly to delay.

Attachment B is Appendix H of the Productivity Commission's 2014 report, *Access to Justice Arrangements*, which sets out concerns and the underpinning of recommendations in relation to funding of legal assistance. Please also see the response to Questions 5 and 12, and particularly Question 10 where this issue is addressed in more detail.

In response to the changes described in the IP and constraints identified, LACs have been innovative in finding other ways to assist people to resolve disputes. The Family Advocacy and Support Service (FASS) referred to in the IP¹² is an example of such innovation, as is the scoping of an online dispute resolution system and information and referral platform being undertaken by NLA and described in response to Question 28 of this submission.

Way forward

Suggested role and objectives

Messaging function of the family law system

It is suggested that family, family violence and child protection laws, and the family law system, have an important expressive/messaging function.¹³

This expressive/messaging function should be strengthened in the modern family law system and should:

- reflect and inform societal norms of accepted behaviour and shared community understandings and values, as illustrated in the recent reforms to marriage laws; and
- accurately inform peoples' expectations so as to facilitate appropriate resolution of matters in a timely manner including when arrangements are made in the shadow of the law.

¹¹ Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Appendix H, 2014) 1021-22.

¹² Australian Law Reform Commission, *Review of the Family Law System Issues Paper 48* [56].

¹³ Family Law Council, *Report on Parentage and the Family Law Act* (2013) 7. Rae Kaspiew et al, *Evaluation of the 2006 Family Law Reforms* (Australian Institute of Family Studies, 2009) 11-12; John Dewar refers to the 'expressive function' of family law in terms of being 'designed to influence behaviour in a general rather than detailed way': John Dewar, 'The Normal Chaos of Family Law' (1998) 61(4) *The Modern Law Review* 467, 483.

Consistent with an expressive/messaging function, the role and objectives for the modern family law system should be stated as simply as possible and be in plain language.

Role

To support clear messaging it is suggested that the role of the modern family law system might be stated as simply as:

‘To help people work out safe arrangements for their children and themselves and to divide property fairly upon separation.’

Objectives

The IP identifies the policy objectives underpinning the then new *Family Law Act 1975* (Cth) (the Act) and the opening of the Family Court in 1976.

Notwithstanding the described changes to social and family life, and the family law system client base, NLA suggests that these policy objectives remain largely relevant to a modern family law system, i.e.:

- create a less punitive and more dignified [divorce] process than had existed under the former fault-based divorce system;
- provide [divorcing] couples with a ‘one-stop shop’ of legal and counselling services to help them resolve disputes; and
- establish a specialist national court for family law matters with an informal process.¹⁴

More specifically objectives might include, to:

- ensure children are safe and supported physically, psychologically and financially;
- protect children from abuse, neglect, trauma, violence and family violence;
- support children to keep relationships with their parents and important persons in their lives;
- assist children to participate in decisions that affect them where appropriate;
- support children to connect to and enjoy their culture;
- support responsible parenting/care giving;
- protect the right of adults to physical and psychological safety and to live free from family violence;

¹⁴ Australian Law Reform Commission, *Review of the Family Law System Issues Paper 48* [30]. Parentheses added.

- support separated families who are at risk or vulnerable;
- support fair final arrangements for division of property;
- ensure financial support on a short term basis where there is a need;
- offer timely, cost effective, efficient, affordable, respectful and proportionate processes for resolving post-separation problems; and
- make the family law system easy to understand and use.

Question 2 What principles should guide any redevelopment of the family law system?

Context

NLA supports the principles in relation to the conduct of parenting matters contained in section 69ZN of the Act. These should be expanded to apply to all proceedings under the Act.

NLA also notes the guiding principles identified by Family Law Council (FLC) in its 2015 report *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems*.¹⁵

Way forward

Guiding principles should recognise and respect Australia's First Nations Peoples and their cultures and support the system to be:

- safe and inclusive for all system users;
- child focused;
- resourced with appropriate skills, knowledge and experience;
- responsive to legal and social support needs;
- family violence and trauma Informed;
- culturally safe; and
- evidence based.

¹⁵ Family Law Council, *Interim Report to the Attorney-General in Response to the First Two Terms of Reference on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (2015) 7.

Safe for all system users

The physical and psychological safety of all system users (children, parties and families) is the highest priority. Safety is the paramount consideration in the best interests of the child. Mechanisms for risk screening, risk assessment and safety planning are built into system processes.

Respectful relationships are promoted.

Child focused

Laws and processes are based on and reflect the best interests of the child and are child focused, placing the needs and experience of the child at the forefront. Systems are child inclusive and encourage children's views and participation as appropriate. Children's participation is addressed in more detail in the response to Questions 34 to 40.

Resourced with appropriate skills, knowledge and experience

Decision makers and key professionals including lawyers, family consultants and expert witnesses have specialist knowledge, experience and training and are competent in relevant areas.¹⁶ Please see the response to Question 41.

Interpreters are readily available and appropriately accredited, including as legal interpreters.

In relation to the issue of interpreters, NLA notes the work of Professor Sandra Hale and the Australasian Institute of Judicial Administration and the Judicial Council on Cultural Diversity (JCCD) including the 2017 JCCD [*Recommended National Standards for Working with Interpreters in Courts and Tribunals*](#).

Responsive to legal and social support needs

Responses are problem solving, timely, and proportionate to the needs of the particular case/family, rather than a 'one size fits all' approach.

Responses are multi-disciplinary in nature where required, and service providers work together collaboratively to provide services to people.

Matters are appropriately triaged at all entry points to the system, including an early assessment of risk and exposure to trauma, and the identification of the best pathway for the individual matter. Risk and needs assessments inform the case management process.

¹⁶ See also recommendations 27, 28 & 30 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (2017).

The circumstances of the family and age and needs of the children drive the time frames of the response.

Services are “comprehensible and accessible to families with multiple and complex needs”.¹⁷

Information is shared and duplication of processes including across systems is reduced.

Agreements are future proof as far as possible, contemplating changes as the family ages.

Family violence and trauma informed

Decision makers and key professionals including lawyers, family consultants and expert witnesses, are competent in responding to family violence, understand its impact on parenting and family relationships, and operate in accordance with family violence and trauma informed good practice principles, cognisant of the fact that parties and children may have experienced multiple and/or complex trauma. There is recognition of issues of inter-generational trauma for Aboriginal and Torres Strait Islander peoples.

Processes support those experiencing family violence, and direct those using family violence towards therapeutic and transformative options. Safety of children and parties is central and the needs of all members of the family are assessed and addressed on an ongoing basis.¹⁸

Culturally safe

Aboriginal and Torres Strait Islander peoples and culturally and linguistically diverse people work in the family law system and lead the development of culturally safe and appropriate responses for their peoples.

Information about family laws, systems and processes are readily available in multiple languages.

Evidence based

Data and research are highly valued. They continually inform the family law system response and the development and improvement of the system.

Resources are applied to the family law system and the development and maintenance of the evidence base accordingly.

¹⁷ Ibid.

¹⁸ See recommendations 2 & 3, House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (2017).

Access and engagement

Question 3 In what ways could access to information about family law and family law related services, including family violence services, be improved?

Context

As the IP states “Ensuring the family law system is accessible to all families who require its services is a critical element of ensuring access to justice.”¹⁹

Information about the law and the available services is therefore a key factor in ensuring access to justice.

NLA notes the description in the IP of particular concerns heard in consultations about lack of ready access to information:

- *court websites can be difficult to navigate for both clients and professionals;*
- *readily available information for clients about family law proceedings and the family law system’s processes and services is limited;*
- *information catering to people with language or literacy barriers is limited; and*
- *clients find it difficult to access information that would allow them to identify and connect with relevant legal and non legal services.”*²⁰

and:

*stakeholders also commented that there is limited accessible information available for children, noting that a lack of information can increase the anxiety and trauma children experience in these circumstances.”*²¹

LAC services

The NPA requires LACs to “deliver timely intervention services to resolve clients’ legal problems sooner, or prevent them from arising altogether.”²²

¹⁹ Australian Law Reform Commission, *Review of the Family Law System Issues Paper 48* [46].

²⁰ *Ibid* [48-9].

²¹ *Ibid* [49].

²² Council of Australian Governments *National Partnership Agreement on Legal Assistance Services 2015-2020* clause B8.

LACs have high public recognition rates²³ and deliver large volumes of information services to the public, and to specific groups within the community, in a wide variety of traditional and innovative ways including:

- in person and by video/telephone and online chat (at least 1.25 million information and referral services provided in the 2016-17 financial year);
- through duty lawyer and FASS (including family law, child protection and domestic violence duty lawyers);
- publications, online and hard copy, such as information sheets and self-help kits;
- websites, online guides, videos and infographics;
- social media;
- community legal education; and
- training service providers.

As the IP references, 'Best for Kids' is an initiative of Legal Aid NSW and is an example of legal information designed for children. NLA also notes the positive references in the IP to the community legal education (CLE) resource being developed by NLA and to the FASS navigation function.

Examples of national publications produced by NLA/all LACs include:

1. The CLE resource referred to in the IP is being developed by NLA to complement the FASS. It is funded by the Commonwealth Attorney-General's Department (AGD) and 'in kind' by LACs following an AGD audit of family violence CLE materials which identified that there was a lack of readily accessible information about the aspects of interaction between, and navigation of, the family law, family violence and child protection systems. The resource is due to be completed by 1 October 2018. It aims to ensure legal and referral accuracy for each state and territory, and each of the LACs is contributing to it.
2. *What's the law? Australian law for new arrivals* was produced by NLA for use in the Adult Migrant English Program (AMEP) nationally. It was developed by the eight LACs to ensure accuracy of laws and referral points across a range of legal topics, including family law and family violence, for each of the individual states and territories. It was inspired by the resource *Getting to know the law in my new country* produced by the Footscray Community Legal Centre in Victoria.

The kit includes a DVD with 10 photo stories, information for teachers and activity sheets. A recent research study which focused on one of the *What's the law?* modules

²³ Christine Coumarelos et al, *Legal Australia-Wide Survey: Legal Need in Australia* (Law and Justice Foundation of New South Wales, 2012) xvi.

found that it improved the participants understanding of the law. The study will soon be published in the Canadian [Journal of Law and Social Policy](#).

3. [ICL pamphlets](#)

- *What happens when your parents go to court? (for younger children)*
- *What happens when your parents go to court? (for older children)*
- *What is an independent children's lawyer?*
- *Deciding whether you should help with supervision?*

Individual LACs also produce resources targeted for local use in states and territories.

Benefits of information about family law

Accessible, accurate and timely information about family laws, processes and systems serve a number of important functions. These include:

- assisting families to understand and identify risk issues, such as family violence;
- empowering and facilitating separating families to confidently come to child-focused arrangements for children and just and equitable arrangements for property and financial support;
- managing separated parents' expectations;
- helping children to understand what is happening and managing children's expectations;
- reducing the anxiety of families, parties and children;
- signposting appropriate system entry points and indicating appropriate direction;
- promoting transparency, accessibility, awareness and confidence in the family law system;
- addressing myths and misunderstandings in the community and across agencies and organisations working with the family law system;
- reducing frivolous, vexatious and unreasonable litigation;
- building the knowledge and understanding of agencies and organisations working with the family law system and supporting collaborative service arrangements; and
- achieving costs savings.

Case study 1 – recognising family violence and signposting

Fatima leaves her husband Murad, feeling unhappy because of his constant verbal abuse and threats and goes to live with a sister. Murad continues to threaten and harass Fatima

when he spends time with their children, which occurs at the sister's home 4 or 5 days each week.

Fatima accesses the website 'When Separating' from a link on the Family Court of WA website. Fatima watches the video on family violence and realises that what Murad is doing is a form of family violence and that this may be relevant to arrangements for the children and grounds for a family violence personal protection order. Fatima also realises from the video that contrary to what Murad has told her, despite their family home and other assets being in Murad's sole name, she has a claim to property settlement on the basis of her non-financial contribution as home-maker and parent. Fatima uses the links to services to get advice and assistance from a LAC.

Challenges to improving access to information

Challenges to improving access to information include:

- risk issues can adversely impact on the ability of parties to access information;
- many languages, literacy levels, learning styles, and local conditions;
- complexity of the law and the interactions between Commonwealth and state and territory laws and legal systems including across state and territory borders;
- prevailing myths and misinformation; and
- production and maintenance of community legal education and information tools and materials is resource intensive.

Risk issues can adversely impact on the ability of parties to access information

For people in controlling and violent relationships, accessing information services about family law and family violence can elevate their risk of harm.

Facilities, systems, and processes need to be in place to the extent possible to ensure that information service provision does not elevate risk. Information could be made more widely available including e.g. in public libraries.

Many languages, literacy levels, learning styles, and local conditions

To ensure accessibility to information about the family law system by all potential service users in Australia, community legal education and information (CLEI) resources need to be developed for a very wide range of audiences with vastly different levels of education, English language and/or literacy skills, learning styles, and local conditions, e.g. lack/availability of services in particular geographical locations. Groups of systems users also have particular needs and targeted and or nuanced information are necessary to address those needs.

This diversity means that both top down and bottom up CLEI approaches are necessary.

Complexity of the law and the interaction between Commonwealth and state and territory laws and legal systems

From NLA/LACs' experience of working on national information projects we are aware that the production of a resource containing information about Commonwealth family and related state and territory laws requires considerable expertise to ensure that information about laws, processes and referral points is accurate for people across the country, i.e. within and across the states and territories.

The work of the Council of Attorneys-General in relation to family violence and increased harmonisation of state and territory laws and processes should ultimately support access to information by making it easier to produce information resources accurate for all the states and territories.

Prevailing myths and misinformation

A particular challenge is that the public is exposed to a variety of sources of sometimes misleading and conflicting information. Key sources of information and/or misinformation are often not the family law system but peers, family, friends, lobby groups, men's/women's groups, websites, blogs and social media. The 2012 *Legal Australia-Wide Survey: Legal Need in Australia* (the LAW Survey) confirmed that people often do not consult legal advisers about legal problems but instead seek help from people who are not legally trained.²⁴ People will also interpret information through the lens of their particular perspective on their personal experience.

Significant prevailing myths across the community include:

- separated parents are entitled to 50/50 shared time with their children;
- each parent has a "right" to spend time with children, regardless of safety/risk issues;
- parties who do not make any direct financial contribution towards marital/relationship property are not entitled to any share of property;
- parties are not entitled to remain in family homes where they are in the sole name of the other party; and
- legal aid is not available to more than one party to a matter ('the other party has legal aid, and because of legal conflict therefore I can't get it'), whereas, legal aid is available to more than one party to the same matter assuming eligibility criteria are met re means, merit and guidelines.

The '50/50 myth' was a by-product of the 2006 amendments to the Act, and it persists. It has caused people to reach inappropriate and/or potentially unsafe agreements, and to

²⁴ Christine Coumarelos et al, *Legal Australia-Wide Survey: Legal Need in Australia* (Law and Justice Foundation of New South Wales, 2012) xiv.

bring and maintain applications to family courts based on inappropriate and/or unrealistic expectations.

Case study 2 – 50/50 myth and family violence risk

Family law orders, agreed to by consent, require Alice's 6 year old child to spend unsupervised time with the child's father Friday night to Saturday night each week, despite Alice holding significant concerns about her ex-partner's violence. When queried about why she agreed to the orders, Alice explains "I knew if I went to court, he was entitled to 50/50 time, so at least this was better than 50/50".

Case study 3 - application to court because of misunderstanding of the law

Anna separated from her husband John about 5 years ago, due to his serious family violence and drug use issues. Anna has had the care of their 5 year old son Joe since separation. Joe has had no contact with his father since birth and believes Anna's new partner to be his father. John has made no attempt to spend time with Joe. Anna subsequently commences an application in the family court in 2018, without having had any legal advice, on the misunderstanding that it is necessary for her to obtain orders for sole parental responsibility for Joe.

Production and maintenance of community legal education and information tools and materials is resource intensive

In addition to the resources required to produce CLEI tools and materials for a diverse range of intended users, because laws, processes, referral points and contact details also change from time to time, CLEI resources require ongoing monitoring for accuracy which is resource intensive.

Way forward

NLA suggests that there is a significant number of family law and related systems information services already being appropriately delivered by a range of agencies in different contexts, using a variety of methods, to individuals, community groups, and to other service providers.

Coordination

With ‘fragmentation and duplication’²⁵ having been identified as issues in the past, there is a need to continue in line with the recommendations from the PC’s 2014 *Access to Justice Arrangements Report*.²⁶ Since the PC reported, and pursuant to the NPA,²⁷ collaborative service planning in individual states and territories, including in relation to CLEI resources, has advanced and individual state and territory legal assistance reviews have been undertaken in some jurisdictions with LACs having been identified as main legal assistance access points.

LACs have appropriately resourced websites, a demonstrated capacity to manage large volumes of calls, and offer the benefit of the full suite of legal assistance services beyond information, i.e. legal advice, legal task, legally assisted dispute resolution and legal representation. LACs also work closely with our legal assistance service partners to identify which service is best placed to assist the individual. This produces efficiencies and greatly minimises the need for referral and the associated ‘referral fatigue’ which has been identified as an issue in the past. Victoria Legal Aid has developed a new referral tool to provide clients with improved, more streamlined access to legal assistance. Using the tool, staff can match people with legal problems to relevant services based on the type of legal issue, where they live and eligibility for legal assistance. This enables staff to book clients directly into services at the first point of contact, significantly reducing the time it takes for people to get help. <https://www.legalaid.vic.gov.au/about-us/news/new-online-tool-helps-more-victorians-access-legal-support-services>

Technology

Information should be provided in multiple platforms and formats, e.g. online, interactive, social media, and mobile phone.

In addition to the CLEI resource being developed by NLA, the AGD has provided funding for NLA to scope an online dispute resolution system for separating couples. Further information about this project can be found at the response to Question 28, but as indicated there, research associated with the project identified that people sought a ‘one stop shop for information they can trust to empower and enable them to take action’.²⁸ The platform is intended to include not only DR functionality but relevant legal and referral information and appropriate links. The facility will enable the user to resolve their legal dispute without having to go elsewhere.

²⁵ Productivity Commission, *Access to Justice Arrangements* (Inquiry report No 72, Overview, 2014) 35.

²⁶ Ibid. For example Rec 5.1 ‘Legal Assistance Forums should establish CLE Collaboration Funds to develop high quality education resources’, and 5.2 ‘Legal aid commissions should enhance their existing activities to develop well-recognised entry points for the provision of legal information, advice and referrals’.

²⁷ Council of Australian Governments *National Partnership Agreement on Legal Assistance Services 2015-2020* clause A9.

²⁸ Colmar Brunton Social Research Online Dispute Resolution System Research November 2017 para 1.3.

NLA is also engaged with the Commonwealth Attorney-General's Department in relation to the prospect of the ODRS being further developed to include a specialist module for children of separating parents. Consideration is also being given to the prospect of 'nationalising' the Best for Kids website and/or developing the ICL website.

Other good examples of the provision of information in an accessible and integrated way include:

- The LegalAidSA app for mobile telephones developed by the Legal Services Commission of South Australia. This includes information about the law and services across a range of areas including family law.
- The iRefer Vic app for mobile telephones developed by the Victorian Family Law Pathways. This includes information about family law related services, supports and referrals.
- Legal Aid Queensland legal information website that translates the content into numerous languages, and has a "Browse Aloud" feature which "speaks" the legal information.
- The NT LawInfo website <https://www.lawinfont.org.au/>. This includes plain language, question and answer information across a range of areas including family law and domestic violence.
- Law info NT is a collaborative project by the NT CLE network – an alliance of all NT legal services and other stakeholders delivering CLEI in the NT (Northern Territory Legal Aid Commission provides support through legal information coordination of content and maintains the website).

Enhance the interface and links between legal and social science information and respective disciplinary understandings

One of the objectives under the Act is to assist parties to "consider reconciliation or the improvement of their relationship to each other and to their children."²⁹

Improved linking of information about the law and legal processes with information from the social sciences would play an important role in informing parents and supporting healthy, positive parenting and conflict resolution for both intact and separated families. This includes information about matters such as:

- healthy attachment;
- child development, particularly age appropriate behaviour and milestones;
- respectful and healthy relationships;
- positive ways of resolving conflict;

²⁹ *Family Law Act 1975* (Cth) s 43(1)(d).

- the impacts of separation and associated conflict on children; and
- family violence and the impacts of family violence on children.

Given the research about the prevalence of concurrent risk issues for families in the formal system, such as family violence, mental health and drug and alcohol, it is important that linkages are strong particularly in these areas.

It is suggested that current levels of accessibility could also be improved by greater inter-disciplinary understanding including about the resources available from respective disciplines for the shared client base. LACs and other legal assistance service providers are currently involved in multidisciplinary projects which support clients and also assist to improve respective understandings, e.g. health justice partnerships with health care providers in connection with family law, family violence, and child protection.

Question 4 How might people with family law related needs be assisted to navigate the family law system?

Context

The IP records the difficulty that “client families and individuals” can find in navigating “the family law system, particularly where they have a range of legal and support needs requiring engagement with multiple services.”³⁰

The IP suggests one possible method of addressing the issue would be “to have a case worker or navigator available to assist individuals or families with multiple needs to navigate the family law system from time of first contact to resolution.”³¹

The IP refers to examples of navigation assistance currently in place including FASS, the Family Safety Practitioner (Relationships Australia), and technological solutions such as the Neighborhood Justice Centre Triage Service and mobile app. The IP notes the ALRC’s interest in “how these or other models could be expanded to provide navigation assistance to families with complex needs from time of first contact throughout their engagement with the family law system.”³²

Challenges

Research and LAC experience inform us that the individual journey for each family through the family law system can be as varied as their family characteristics, the nature of their

³⁰ Australian Law Reform Commission, *Review of the Family Law System Issues Paper 48* [51].

³¹ Ibid [52].

³² Ibid [58].

dispute and the number and complexity of their non/legal needs. In this context, NLA suggests that the potential for one individual to have the capacity to navigate all of the members of a family, including the children, through the system from the beginning to the end, is likely to be very limited. It could also be expected to be extremely resource intensive.

Lawyers as navigators

As the family law system is a legal system, lawyers have appropriately played a navigator role for the system. This role is a larger role when family law proceedings intersect with state and territory child protection and family violence laws and proceedings. NLA suggests that as parties have had less access to legal representation in more recent years by reason of legal aid funding constraints and the cost of legal representation, navigation assistance has reduced commensurately.

Attachment B is Appendix H of the Productivity Commission's 2014 report, *Access to Justice Arrangements* as referred to in the response to Question 1. It sets out concerns and the underpinning of recommendations in relation to funding of legal assistance.

Please see the response to Question 10 for further detail re the poverty line and legal aid means tests.

Advice and information services

Improving the information generally available about family law and the family law system and developing new technologies will also assist people to navigate the system. Please see the response to Question 3.

Way forward

As the IP suggests, one approach is to identify what navigation assistance is already in place, what is or is not working, and the gaps that need to be filled with the aim of ensuring that family members are provided with the appropriate navigation assistance at the time it is needed. It will be necessary that the service providing the assistance understands when their role is complete, or needs to be complemented by another service, and can make a warm referral to the service that is best placed to provide the particular navigation assistance that is required.

Such an approach is considered to be an appropriate and more cost-effective approach to navigation. It could be achieved if all service providers work together in a co-operative and collaborative way underpinned by inter-disciplinary understandings and knowledge of the scope of each organisation's service provision.

Timely triage of matters to determine which matters genuinely require the supports of the formal system, including the skills of a judge, experts and/or a forensic determination, and which matters might be better directed away from courts towards dispute resolution (DR) and arbitration will support parties to navigate the system. This issue is addressed in

greater detail under Question 17 in relation to property laws, Questions 20 to 24 resolution and adjudication, and Questions 26 to 28 regarding dispute resolution processes.

Service models

Family Advocacy & Support Services (FASS)

FASS is an innovation that was proposed by NLA to the Commonwealth Attorney-General. The FASS project was proposed in the context of:

- the identification of the prevalence of family violence in family law court proceedings;
- the associated experience of these families;
- the often overlapping involvement of these families in the child protection and family violence jurisdictions; and
- increasing numbers of self represented litigants (SRLs) including because of limited legal assistance funding.

It was considered that FASS could help support this client base to safely navigate the family law system to resolve their legal issues and be provided with the social support they need.

The key drivers for the FASS program were the need:

- for self-represented parties to get legal advice and social support;
- for identification of risk and safety planning to assist safe engagement with court processes and preparation of notices of risk³³ to facilitate the family law court's consideration of the application of Part 12A of Division 7 of the Act to ensure the safety of the parties and the children;
- for the identification and appropriate response and referrals in respect of non-legal issues, particularly where there is the potential for these issues to elevate risk; and
- to strengthen relationships with other legal and non-legal service providers to facilitate integrated case management of families and the required assistance to enable them to navigate the court process and the broader family law system, including between the Commonwealth, and state and territory child protection and family violence systems and court processes.

LACs are uniquely placed to deliver FASS because of their roles in providing legal assistance services and associated social support and referrals in all relevant jurisdictions, including Commonwealth and respective state and territory courts, and in relation to family law, family violence, child protection and criminal law (family violence offences). The FASS is currently being evaluated by independent evaluators.

³³ Client Information Affidavits and Notice of Family Violence and Child Abuse in the Family Court of Western Australia.

The House of Representatives Standing Committee on Social Policy and Legal Affairs (SPLA Committee) 2017 Report, *A Better Family Law System to Support and Protect Those Affected by Family Violence (SPLA Family Violence Report)*, recommended that “the Australian Government considers extending the Family Advocacy and Support Services program, subject to a positive evaluation, to a greater number of locations including in rural and regional Australia.”³⁴

Duty lawyers

The duty lawyer role could be extended to become more FASS-like in terms of work types and social support referrals, funding permitting. Please see the response to Question 10.

The navigation role of the family law courts

NLA suggests that an important navigation function is appropriate diversion from the litigation pathway, even after proceedings have been filed, so that families are not committed to a journey down that pathway.

Legal services play an important role in negotiation and achieving pre filing settlement, and where people cannot access these services it is particularly important that triage occurs at the court.

Triage should occur at the time of intended filing and after filing at key points in proceedings.

Triage at all points should consider the appropriateness of warm referral for LAC legally assisted FDR. LAC legally assisted FDR has been successful not only in resolving matters early, but also after filing and immediately pre-trial, thereby avoiding costs of hearing. The judgement in the matter of *Caine and Caine and Bannerman Solicitors* [2017] FCWA 118 is an example of such an outcome.³⁵ Triage could also identify legally assisted FDR for ICL matters and referrals to reportable therapeutic counselling rather than for family reports or Single Expert Witness (SEW) reports where appropriate.

NLA envisages that triage would be undertaken by court and LAC staff working together with triage being a component of the FASS service.

LACs are in a good position to undertake/further assist with triage as we understand eligibility for legal aid services including legally assisted FDR, and have FASS legal and social support staff including at the courts, and strong referral relationships with other providers. Additional resourcing may be required.

³⁴ House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence (2017)* recommendation 1.

³⁵ See in particular the comments of O’Brien J [11-13].

Co-location of a LAC intake officer at the court

LACs could co-locate a legal aid intake/case management officer at the court if considered appropriate and resourced.

Working with the court, this officer, with a good understanding of legal aid guidelines and programs, would at the earliest stage, be able to identify matters appropriate for referral for dispute resolution services.

This suggestion is informed by the efficiencies and other benefits achieved by the co-location of child protection officers at the family law courts in relation to children's matters where risk is an issue. It is envisaged that analogous efficiencies and benefits will be achieved including appropriate referrals, streamlined processes, and a reduction in the number of matters requiring determination by the court.

Parenting coordinator role

NLA suggests that a new parenting coordinator role could be created and that this role would reduce the need for multiple case management interim hearings and court events occasioned by issues such as mental health, drug and alcohol abuse, family violence and contact refusal. It could potentially divert people from the litigation pathway permanently.

The navigation functions of the parenting coordinator would include ensuring that parties understand any orders made, the implications of those orders, and pro-actively supporting them to comply with those orders. For example, a function would be identification of services/programs which could be accessed to comply with any orders made, and potentially some limited power to determine minor matters, e.g. disputes as to which parenting program or children's contact centre to attend, appointment dates and times.

In circumstances where parties did not comply with orders and issues remain unresolved, evidence from the parenting coordinator about what has occurred would assist the court to understand and assess the attitude of the parties, the dynamics of the relationships, and ability of parties to resolve the issues at stake.

The parenting coordinator would navigate the parties to FDR where appropriate, and would potentially have a role in explaining orders to children in cases where there is no ICL.

The organisation/s or agency/ies undertaking the parenting coordinator role would need to be legally informed and understand options for referrals and potential impacts on a matter, particularly where a party was not legally represented. It is envisaged that there would be a requirement for registration similar to that required under the Act for Family Consultants. The development and implementation of this role could be informed by the arrangements in place in relation to Parenting Coordinators in other jurisdictions such as the USA and South Africa.

If new roles are to be introduced it is proposed that they be trialled, adequately resourced, and evaluated.

Helping children to navigate the system

Guideline 5.1 of the [Guidelines for Independent Children's Lawyers \(2013\)](#), which have been endorsed by the (then) Chief Justice of the Family Court of Australia, and by the Family Court of Western Australia and the Federal Circuit Court of Australia, require *that children are informed about the role of the ICL, the court process and the other agencies that may be involved and the reason for their involvement.*

Please see the responses to Question 3 in relation to information services, and to Questions 34, 35 and 37.

Question 5 How can the accessibility of the family law system be improved for Aboriginal and Torres Strait Islander people?

Context

NLA considers that Aboriginal and Torres Strait Islander peoples are best placed to inform the approaches to be taken in relation to matters affecting them.

Processes for ensuring the family law system is culturally safe should be Aboriginal and Torres Strait Islander developed and led, place based and grounded in local Aboriginal and Torres Strait Islander cultural knowledge.

NLA supports “adequate funding for the Aboriginal and Torres Strait Islander legal services as the ‘specialised legal assistance services for Aboriginal and Torres Strait Islander people’”.³⁶

LAC service delivery

As part of the family law system, LACs work with Aboriginal and Torres Strait Islander legal services to ensure that family law and related services are available and delivered as widely as possible and that issues such as legal professional conflict are addressed.

LACs variously have Aboriginal and Torres Strait Islander staff working in the areas of family law, dispute resolution, family violence, and child protection, with LACs and/or their respective state and territory governments having staff diversity and inclusion policies, e.g. Legal Aid NSW (LANSW) has a number of Aboriginal mediators and family dispute resolution practitioners (FDRPs). There is a general shortage of Aboriginal and Torres Strait Islander FDRPs, however, due in part to the prerequisites for qualification and the expense of training.

³⁶ National Legal Aid Charter June 2017; Productivity Commission 2014, *Access to Justice Arrangements* (Inquiry Report No. 72, Overview, 2014) 767.

In 2016-17 the following services of greater intensity were delivered to Aboriginal and Torres Strait Islander peoples:

Services provided ³⁷	law type	2016-17
Grants of aid approved	Civil	481
	Crime	14,816
	Family	5,375
	total	20,672
Duty lawyer	Civil	41
	Crime	11,607
	Family	399
	total	12,047
Legal advice	Civil	297
	Crime	1,144
	Family	576
	total	2,017
Legal task	Civil	253
	Crime	1,897
	Family	386
	total	2,536
Total		37,272

Source - National Legal Aid statistics

Many more CLEI, minor advice and referral services were also provided to Aboriginal and Torres Strait Islander peoples.

An example of collaborative, innovative CLEI services to Aboriginal and Torres Strait Islander peoples is *Blurred Borders*. This project includes visual art and story-telling to educate on bail and family violence personal protection orders within the cross-border context of the Northern Territory and Western Australia. The next stage of the project, which has just commenced, is to expand these resources to include child protection and the overlap with family law in the context of care arrangement options.

Attachment C contains information about *Blurred Borders*.

³⁷ Family includes state family law child care & protection and apprehended domestic/family violence matters, although matters of this type might also be reflected in civil law data.

FLC and SPLA Committee recommendations

As the IP notes, the

*SPLA Committee recommended that ‘as a matter of urgency’ the Australian Government implement the Family Law Council’s recommendations from its 2012 report, Improving the Family Law System for Aboriginal and Torres Strait Islander Clients, as well as the Council’s additional recommendations in its 2016 report on families with complex needs ‘as they relate to Aboriginal and Torres Strait Islander families’.*³⁸

It also notes “the many submissions that have been made to previous reviews about how access to the family law system for Aboriginal and Torres Strait Islander people can be improved” and that the ALRC “will have regard to these and earlier reports and recommendations in conducting its work on this Inquiry. The ALRC also welcomes additional input from stakeholders”.³⁹

Way forward

As suggested in the response to Question 2, guiding principles for the new family law system should recognise and respect Australia’s First Nations Peoples and their cultures.

Notwithstanding the 2006 amendments to the Act, such as the introduction of section 61F, and the “slow metamorphosis in the case law”⁴⁰ in relation to understanding ‘culture’ and ‘connection to culture’, variations in practice regarding what is considered necessary to meet this requirement remain.

FLC recommendations

NLA supports the implementation of the FLC recommendations.

Improving the cultural appropriateness and accessibility of the family law system for Aboriginal and Torres Strait Islander families could result in reduced interventions in Aboriginal families by the child protection system and the number of children placed in the care of the state as a result. In this regard we note “failure to effectively address civil/family law issues may result in them morphing into or escalating to become criminal law matters”⁴¹ which may perpetuate cycles of disadvantage and family breakdown.

If the *Family Law Amendment (Family Violence and Other Measures) Bill 2017* is enacted, the state and territory child protection courts will be in a position to make family law orders.

³⁸ Australian Law Reform Commission, *Review of the Family Law System Issues Paper 48* [62].

³⁹ Ibid [65].

⁴⁰ Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (2012), 78.

⁴¹ Indigenous Legal Needs Project Submission No 19 to Senate Standing Committee on Finance and Public Administration, Parliament of Australia, *Inquiry into Access to Legal Assistance Services* (2016) 10.

NLA made a submission to the Attorney-General's Department [Exposure Draft - Family Law Amendment \(Family Violence and Other Measures\) Bill 2017](#) and consultation paper.

NLA sees the benefit of state and territory courts exercising child protection jurisdiction being able to exercise family law jurisdiction in circumstances where the welfare authority has indicated they will withdraw child protection proceedings if appropriate family law orders that are in the best interests of the child are in place.⁴²

This would increase the flexibility and options for children in the child protection system in relation to their care arrangements. For example, as indicated in the Legal Aid Western Australia submission to the *Review of the Children and Community Services Act 2004* (2017):

Such options could include shared parental responsibility between the Department of Communities Child Protection and Family Support (CCPFS⁴³) and a parent or extended family member as was ordered at an interim stage in Drake and Drake and Anor [2014] FCCA 2950 and considered at the final hearing of the proceedings. This option might be of benefit to carers with limited financial means where the children require ongoing medical and therapeutic support and/or the spend time with arrangements need to be supervised because of ongoing risk concerns. Regulations that limit the financial support which can be provided to carers in circumstances where CCPFS does not have parental responsibility should also be reviewed to broaden the circumstances in which such assistance can be provided. It is suggested that such financial support would be cost effective when compared to the costs associated with out of home care for children on child protection orders.

Greater use of family court orders could also overcome the problems associated with the care arrangements Aboriginal children in circumstances where family members who would be suitable carers live across the border in the Northern Territory or another Australian jurisdiction.”⁴⁴

In addition to strategies to support the development of an Aboriginal and Torres Strait Islander workforce across the family law system,⁴⁵ NLA suggests that it would also be beneficial to ensure that there is appropriate education and training for child protection workers including in relation to legislative amendments and the options available through the exercise of family law jurisdiction.

⁴² National Legal Aid submission to Family Law Branch AGD *Proposed amendments to the Family Law Act 1975 to respond to family violence* (Feb 2017).

⁴³ The Department of Communities Child Protection and Family Support (CCPFS) is the child protection authority in Western Australia. In the context of this review this would apply generally to child protection authorities in all jurisdictions.

⁴⁴ Legal Aid WA Submission to the Review of the Children and Community Services Act 2004 (2017)).

⁴⁵ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016) Rec 18.

Other initiatives

The Indigenous List in the Federal Circuit Court, Sydney, was established in September 2016 as a pilot. The pilot involves the provision of legal advice, assistance and duty services. Aboriginal parties are supported by Aboriginal community workers who provide culturally appropriate referrals on issues such as housing, substance abuse and mental health.

Building upon the success of the Sydney pilot, more recently a similar Indigenous List has commenced in Adelaide. These Lists use a less formal setting and a more inclusive, problem solving approach to discuss and resolve issues. NLA supports the continuation of culturally appropriate responses as a way of enhancing access to the family law system for Indigenous Australians.

Closing the Gap Refresh

Given the link between family law and child protection, and the potential for the family law system to be better engaged to support the Aboriginal Placement Principle, it would be worth considering sub-targets in connection with use of the family law system as part of Closing the Gap.

Please also refer to NLA's submission to [Closing the Gap Refresh](#).

Question 6 How can the accessibility of the family law system be improved for people from culturally and linguistically diverse communities?

Context

As the IP notes, the SPLA Committee has recommended implementation of the recommendations from the Family Law Council's 2012 Report, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds*.⁴⁶

NLA also notes the consultation feed back to the ALRC that "information catering to people with language or literacy barriers is limited"⁴⁷ and the request for input about initiatives and "other ways that access to family law services for clients from culturally and linguistically diverse communities could be improved".⁴⁸

⁴⁶ Australian Law Reform Commission, *Review of the Family Law System Issues Paper 48* [48].

⁴⁷ Ibid [48].

⁴⁸ Ibid [72].

LAC services

LACs provide some CLE for culturally and linguistically diverse communities and training to service providers involved with culturally and linguistically diverse communities, e.g.:

- What's the Law? Australian Law for New Arrivals – as described in the response to Question 3 <https://www.nationallegalaid.org/resources/whats-the-law/>
- Victoria Legal Aid's Settled and Safe - a collaborative project to prevent family violence in newly emerging culturally and linguistically diverse communities (training developed and delivered state wide) <https://www.legalaid.vic.gov.au/about-us/community-education-and-projects/settled-and-safe>
- Northern Territory Legal Aid Commission's regular training sessions on approaches to family law, family violence and child protection CLE for service providers working with culturally and linguistically diverse communities.

LACs also provide not insignificant numbers of more intensive legal assistance services to culturally and linguistically diverse people. The NPA provides for data to be collected in relation to 'main language spoken is not English' and 'interpreter/translator' required. Whilst the data set is not complete, in 2016-17 it appears that across all law types at least 7% of the grants of aid made for DR or ongoing legal representation were made to people whose main language spoken is not English, and at least 4% required an interpreter.

LACs endeavor, as far as possible given resourcing constraints, to be accessible to culturally and linguistically diverse communities. Examples of culturally and linguistically diverse specific programs include:

- LANSW culturally responsive mediation program.

This program is well established and LANSW has specifically recruited and trained culturally and linguistically diverse lawyers as FDRPs since 2011.

Screening processes ask if parties identify with a particular faith and/or culture and whether they would like a mediator from that faith/culture. LANSW experience has been that:

- Many of the responses identify religion for example Christian, Catholic or Muslim. Religion has an intrinsic relationship with family law but mediations are conducted in accordance with Australian law. However the involvement of Muslim mediators and parties has led to negative and sensationalised publicity of the program which has inaccurately been portrayed as supporting 'Sharia Law'.
- Some people do seek a mediator from their own culture with others expressly not wanting a mediator from their culture due to perceptions, e.g. that the mediator would potentially be patriarchal, or because the community was of a size that there were concerns about privacy.
- Culturally and linguistically diverse mediators work very well in a number of cases as they have a deep cultural understanding found to be helpful in working through issues.

- There is a shortage of culturally and linguistically diverse FDRPs and resourcing is required to assist in training.
- Legal Aid ACT Cultural Liaison Unit - <http://legalaidact.org.au/whatwedo/clu/>

Way forward

NLA is supportive of expanding CLEI, building cultural competency, and enhancing service integration, workforce development, engagement and consultation, and the use of interpreter services, these being the areas for reform identified by the FLC's 2012 Report *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds*,⁴⁹ and the 2016 Report *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems*.⁵⁰

NLA considers however that there would be benefit in reviewing how best to operationalise these areas of reform given both the passage of time and the extensive resourcing that would be required to achieve such reforms. It is suggested that it would be beneficial to prioritise the areas for reform, e.g. a priority area might be building cultural competence for professionals working within the family law system.

Case study 4 – need for cultural competency

Madima is from an African country. She separates from her Australian husband John, who she met when John was working in Africa for a mining company. The issues being litigated in the family law court include who the children are to live with. An expert report is obtained from a psychologist. The report, which is some 20 pages long, has 1 paragraph referencing the mother's culture with no analysis or exploration of the potential importance to the children of maintaining that connection, or how this would be achieved, including proficiency in the mother's native language.

Particular cultural practices

The Legal Services Commission of South Australia made a [submission](#) to the SPLA Committee inquiry into a better family law system which includes case studies and recommendations.

⁴⁹ Family Law Council, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds* (2012).

⁵⁰ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016).

Initiatives and interpreters

Existing LAC initiatives could be expanded with further resourcing. Service provision to diverse communities with different language needs can be resource intensive. E.g. work for culturally and linguistically diverse communities by the Legal Aid Commission ACT (LAACT) escalated following the creation of the LAACT's Cultural Liaison Unit, with costs, particularly in association with the provision of interpreters, rising rapidly with uptake of the services.

Regarding user facilities and prayer rooms please see the response to Question 13.

Question 7 How can the accessibility of the family law system be improved for people with disability?

Context

The IP notes that "A person with a disability may face difficulties in having a (litigation/case) guardian appointed to assist them because of concerns about perceived exposure to liability and the uncertain funding of the litigation."⁵¹

A number of suggestions have been made to address access to justice issues for people with a disability, including:

- *improved awareness of the types of violence experienced by people with disability, as well as cross-sector collaboration with disability specific services;*⁵²
- *training and accreditation for family law system professionals to enhance their competency in working with parents and children with a disability; and*
- *incorporating relevant provisions of the CRPD into the Family Law Act.*⁵³

A parent with disability may sometimes incur the additional expense of securing a specialist report that can address the issue of their disability because of a lack of particular expertise among family consultants.⁵⁴ Specific skills are required to assess disability issues in the context of parenting capacity, with further professional development necessary for this purpose, particularly in the context of intellectual disability. As there is a limited pool of experts prepared and available to undertake assessment reports in the context of family law proceedings, it can be very difficult to find an expert who is well placed to conduct the assessment and the time frame required to obtain a report is often lengthy as a consequence.

⁵¹ Australian Law Reform Commission, *Review of the Family Law System Issues Paper 48* [79].

⁵² COAG Advisory Panel on Reducing Violence against Women and their Children *Final Report* (2016) 11, 37.

⁵³ Australian Law Reform Commission, *Review of the Family Law System Issues Paper 48* [83].

⁵⁴ *Ibid* [81] referencing the Office of the Public Advocate (Vic).

LAC service delivery

LACs provide significant numbers of legal assistance services to people with a disability or mental illness. LAC data reporting pursuant to the NPA indicates that 12.6% of the grants of aid for legal representation services in the 2016-17 financial year were provided to people with a disability or mental illness (up from 9.4% the previous year⁵⁵). This data relies on self-identification and is likely to be an under-count.

LAC staff training

LAC staff, depending on their respective roles, undertake generalist and/or specialist training in relation to engaging effectively with clients with mental illness and cognitive disabilities. E.g. *Overcoming the Barriers* is a half day course for all front line staff at Legal Aid NSW to improve client service delivery to people living with mental illness. The training uses short films to demonstrate some of the barriers. There are practical exercises and further discussion including techniques to assist in overcoming them. A Guide to Best Practice is provided to participants that identifies strategies to engage effectively with clients living with mental illness.

The National ICL Training Program currently being developed by NLA, includes online modules in relation to each of the mental health of children and adults. Please see the response to Questions 34 and 35 for more information about the ICL training program.

Way forward

Case guardians

The role of LACs in case guardian matters to date has been largely to provide a grant of aid for legal representation to a person eligible for legal assistance, and in whose shoes the case guardian stands. The legal representation may be undertaken by either a LAC in-house lawyer or a private legal practitioner. The case guardian role has been largely undertaken by state and territory offices of public guardians/advocates.

LAC experience is as suggested in the IP, i.e. that there have been difficulties over time in finding a case guardian. Disbursements to a lawyer to act as case guardian have been made on rare occasions as a result.

NLA suggests that the issue of availability of case guardians is a matter which would be most appropriately resolved by the Commonwealth and the States and Territories and their respective stakeholders. If considered appropriate, NLA would participate in any meeting and/or work with governments and stakeholders with the aim of identifying all issues clearly

⁵⁵ This increase in data reported may be due to a change in reporting practices pursuant to the National Partnership Agreement on Legal Assistance Services 2015-2020, and not necessarily the nature of the client base.

and possible solutions to those issues, particularly given the likely nature of the matters and the vulnerability of those involved.

In relation to suggestions made from time to time that LACs are well placed to take on the role of administering case guardians, whilst LACs endeavour to assist disadvantaged people wherever possible, issues which would require further investigation or resolution if such a suggestion were to be pursued include:

1. The role of case guardian involves not the provision of legal assistance, but the receipt of it. The role is not a legal role, as it involves the case guardian standing in the shoes of the party, and will necessitate the case guardian engaging in activities which are outside those usually undertaken by a lawyer.
2. Whilst LACs increasingly have social science and social support workers on staff or working as project partners, to the extent that a new group of case guardians might be 'grown' in-house, an issue for LACs is the potential for perception of conflict as it is likely that the in-house practice will already have a role as either the Independent Children's Lawyer or acting for the other party. Whilst the case guardian role is not a legal role, we would expect that this potential for perception would need to be managed.
3. Not all matters involving a case guardian will be matters where the person in whose shoes the case guardian is to stand, will be eligible for legal assistance, i.e. it can be expected that sometimes a person will be outside the LAC's means (and also possibly other eligibility) test, noting that it is the provision of legal assistance which LACs have been established to provide.
4. Assuming that case guardians can be easily found (which is not our experience), case guardians can be expected to want payment for their work, their expenses to be covered, and as is indicated in the IP, to be indemnified not only against costs orders but for any act or omission arising from acting as a case guardian and resulting in loss.
5. In the context of a grant of legal assistance, payment for work and costs could only be by way of disbursement, and the role of case guardian has the potential to encompass many things outside what LACs consider appropriate as disbursements associated with legal assistance, i.e. 'once-off' psychiatric/psychological reports, barristers fees etc. If case guardians can be found and LACs can/are to continue to be involved, then some common understanding must be reached about the extent of disbursements, both in terms of payment to the guardian and associated costs, and what limits might apply/not to activities to be paid for, and in what sort of amounts.
6. It is usually employers who provide indemnities or insurance and, as our understanding is that it is this issue which might have contributed to state/territory offices of the public guardian/advocate being unable to become involved in Commonwealth family law matters, unless there was already a local guardianship order in place in relation to the person for whom the case guardian is sought. Indemnity issues will need further consideration if LACs are to continue to be involved beyond providing a grant of legal assistance (including usual disbursements) to the person in whose shoes the guardian stands.

Suggestions in the IP

NLA supports the suggestions identified in the IP in principle noting the resourcing associated with training and particularly accreditation schemes.

Consideration might also be given to the recommendation of the Victorian Public Advocate to have a rebuttable presumption that disability is not per se a barrier to parenting.⁵⁶ Such a presumption would support the important public expressive/messaging function⁵⁷ of the Act and family law system in relation to disability not equating to incapacity to parent.

NLA notes the Australian Human Rights Commission (AHRC) 2014 Report, *Equal before the Law: Towards Disability Justice Strategies*, and the states and territories Disability Justice Plans. Although the AHRC report was produced in relation to the criminal justice system, it identified a core set of principles and fundamental actions which are applicable to the family law setting and may assist to inform changes to the family law system. The core set of principles and actions address:

- *Appropriate communications - Communication is essential to personal autonomy and decision-making. Securing effective and appropriate communication as a right should be the cornerstone of any Disability Justice Strategy.*
- *Early intervention and diversion - Early intervention and wherever possible diversion into appropriate programs can both enhance the lives of people with disabilities and support the interests of justice.*
- *Increased service capacity - Increased service capacity and support should be appropriately resourced.*
- *Effective training - Effective training should address the rights of people with disabilities and prevention of and appropriate responses to violence and abuse, including gender-based violence.*
- *Enhanced accountability and monitoring - People with disabilities, including children with disabilities, are consulted and actively involved as equal partners in the development, implementation and monitoring of policies, programs and legislation to improve access to justice.*
- *Better policies and frameworks - Specific measures to address the intersection of disability and gender should be adopted in legislation, policies and programs to achieve appropriate understanding and responses by service providers.*⁵⁸

⁵⁶ Office of the Public Advocate (Vic), 'Whatever Happened to the Village, the Removal of Children from Parents with a Disability' (December 2013).

⁵⁷ Family Law Council, *Report on Parentage and the Family Law Act* (2013) 7. Rae Kaspiew et al, *Evaluation of the 2006 Family Law Reforms* (Australian Institute of Family Studies, 2009) 11-12. John Dewar refers to the 'expressive function' of family law in terms of being 'designed to influence behaviour in a general rather than detailed way': John Dewar, 'The Normal Chaos of Family Law' (1998) 61(4) *The Modern Law Review* 467, 483.

⁵⁸ The Australian Human Rights Commission (AHRC), *Equal Before the Law: Towards Disability Justice Strategies* (February 2014, 7.)

A separate but related issue is ensuring accessibility to the family law system and support for carers of people with a disability.

Question 8 How can the accessibility of the family law system be improved for lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) people?

Context

The IP notes the 2013 FLC parentage report and its conclusion that the “present legal framework did not reflect the reality of parenting and family life for many children in Australia.”⁵⁹

The IP also notes that:

*existing evidence and initial consultations for this Inquiry suggest a need for consideration of the extent to which services in the family law system are presently configured to respond to the needs of clients from LGBTIQ groups. The ALRC welcomes further stakeholder input about this issue.*⁶⁰

Since the decision of the Full Court of the Family Court of Australia in November 2017 in *Re Kelvin*, children and adolescents requiring stage 1 or stage 2 hormone treatment for gender dysphoria are no longer required to come to court if the child, their parents and treating medical professionals all consent to the treatment.

Way forward

Legal changes – conceptualisations and definitions of families and parents

Although there has been a major shift in the family law system “from a legal system based on a heterosexual paradigm, to one that to a large extent incorporates and recognises same-sex couples and their children”, the Australian family law system still reflects a two-parent model of legal parentage, “which is a paradigm that does not always represent the diversity of same-sex families.”⁶¹

⁵⁹ Family Law Council, *Report on Parentage and the Family Law Act* (2013) 31 [89].

⁶⁰ Australian Law Reform Commission, *Review of the Family Law System Issues Paper 48* [94].

⁶¹ A Sifris, ‘10. Gay and lesbian parenting: The legislative response’ (Essay 10 in Australian Institute of Family Studies May 2014) <https://aifs.gov.au/publications/families-policy-and-law/10-gay-and-lesbian-parenting-legislative-response>

NLA supports amendments to the Act to ensure that the language, definitions and provisions of the Act are inclusive and reflect and encompass the diverse family formation.

Please see the response to Question 16.

NLA suggests strategies for improving cultural safety and accessibility should be led by LGBTIQ communities and services, and might include the adoption of clear, visible and public LGBTIQ 'Service/Good Practice Guidelines' such as those adopted by the Victorian Department of Health.⁶²

Attachment D is the *Re K* Factors⁶³ being the basis which the court in that case identified as relevant to the appointment of an ICL. It is suggested in the response to Questions 14 and 35 to this submission that legislation might codify the basis for the appointment of an ICL following a review of the *Re K* Factors. It should be clear e.g. that *Re K* Factor (v) is not directed at same sex relationships.

Some ICLs are beginning to experience a small number of parenting order matters where a major issue in the dispute between the parents is the question of whether young children (preschoolers and lower primary school age) are transgender.

In this context, e.g. some relevant professional development from a child development perspective for judicial officers, ICLs and other lawyers, family consultants, counsellors and other social science professionals working with these families would be beneficial.

Question 9 How can the accessibility of the family law system be improved for people living in rural, regional and remote areas of Australia?

Context

The IP describes the barriers to accessing the family law system for people living in rural, regional and remote areas of Australia, and notes:

*Suggestions for improving access for people in rural, regional and remote areas have included making greater use of communication technology to provide services, including for court appearances and conferencing, coupled with efforts to improve availability of such technology, as well as to improve digital literacy.*⁶⁴

NLA also notes and supports the suggestion that:

⁶² Victorian Department of Health, *Service guideline on gender sensitivity and safety*, 2011.

⁶³ *Re K* (1994) FLC 92-461.

⁶⁴ Australian Law Reform Commission, *Review of the Family Law System Issues Paper 48* [101].

*For Aboriginal and Torres Strait Islander clients in rural and remote areas, access to justice may be improved by measures including increasing the availability and family law expertise of interpreters in these locations, improving the cultural competency of mainstream services in these areas, and improved collaboration with Aboriginal and Torres Strait Islander specific services.*⁶⁵

LAC service delivery

As indicated in the introduction to this submission, LAC services are provided across the country from numerous offices and outreach locations including to many regional, rural and remote areas of Australia.

Examples of outreach service delivery and innovative service delivery methods in which LACs are involved include:

- Northern Territory Legal Aid Commission regularly visits 7 remote communities with CLE about family violence and child protection.
- The Legal Aid Commission of Tasmania's video telephones installed in community centres in regional and remote locations. These phones enable people with legal problems in those locations to obtain 'face to face' legal advice through the technology.
- The Queensland Regional Legal Assistance Forum in Bundaberg which partners with Family Law Pathways to deliver CLE to community workers on family law and family violence.
- The Legal Services Commission of South Australia (LSCSA) Law for Community Workers webinars. Registrations regularly include workers from rural and remote locations across South Australia. Topics include helping clients with legal problems, family law and legal responses to family violence.
- 'Blurred Borders'. Please see the response to Question 5.
- Legal Aid Western Australia's When Separating Rural and Regional Families video.

LACs also work co-operatively with the Aboriginal and Torres Strait Islander Legal Service (ATSILS), and regionally located Community Legal Centres to ensure that service reach is extended as far as possible.

Please also refer to NLA's submission to [Closing the Gap Refresh](#), referred to in the response to Question 5.

Challenges

Challenges particular to resolving service delivery issues in rural, regional and remote areas include:

⁶⁵ Australian Law Reform Commission, *Review of the Family Law System Issues Paper 48* [101].

- some people are less comfortable interacting with services that are not in person;
- service providers who do not live or practice in the same location as their clients, may not have good understandings of local and cultural issues, potentially leading to clients not feeling ‘understood’ or properly supported, and not having confidence in services;
- legal professional conflict; and
- cost of fly in/fly out service delivery in constrained funding environments.

Way forward

Practical steps

NLA encourages a range of practical steps to be taken to enhance access to the family law system in regional and rural locations across Australia, such as:

- automatic leave to appear by phone at directions hearings, divorce hearings and interim hearings;
- staggering of times for appearances by phone, for example listing 5 matters per hour, so parties and/or lawyers are not waiting long times on the phone;
- increased use of electronic file management and record keeping mechanisms for example allowing entities producing documents under subpoena to provide electronically, allowing lawyers to scan subpoena material onto USB or disk to avoid having to travel long distances to inspect material, increased use of emailing of court documents, such as family reports;
- co-location/provision of registry services in regional local/magistrates courts where family courts circuit to enable parties access to services they might otherwise be unable to access on-line (either due to connectivity, computer literacy or access difficulties);
- finding better facilities from where to conduct court circuits - including facilities that allow judges to have access to chambers, and parties to use interview rooms and have access to safe rooms;
- introducing more circuits to regional areas;
- reviewing approaches to the management of circuit sittings with the aim of ensuring consistency of process and efficiency for the parties, such as discontinuing practices that necessitate parties and legal practitioners being available for a full week for listings of final hearings that may e.g. be heard on a Tuesday then adjourned to the Friday; and
- more funding for children’s contact centres in regional areas.

Technology

LACs support the increased use of technology to deliver services to help reduce the justice gap for rural, regional and remote people and notes NLA/LAC initiatives such as the ODRS

initiative which includes a legal information and referral platform, being scoped by NLA. Please see the response to Question 3 and particularly Question 28 for further detail.

Conflict

The issue of legal professional conflict is exacerbated for people living in rural and remote communities which may have limited access to lawyers. There is a need to balance the benefits of maximising access to legal advice with a robust conflict policy.

NLA welcomes the consultation by the Law Council of Australia in relation to its Review of the Australian Solicitors' Conduct Rules. NLA will be making a submission to this consultation and will raise the challenges LACs experience in the delivery of legal assistance in the current context. The ALRC's findings may be able to support this issue being addressed.

Question 10 What changes could be made to the family law system, including to the provision of legal services and private reports, to reduce the cost to clients of resolving family disputes?

Context

As the IP records:

The SPLA Family Violence Report noted that the costs associated with seeking negotiated or adjudicated outcomes in the family law system can sometimes impoverish families, particularly in the context of the significant limitations on the availability of publicly subsidised legal services and legal aid.⁶⁶

and that:

Among the factors that contribute to the high costs of litigation are court delays, multiple court hearings, and lack of compliance with court orders.⁶⁷

The IP refers to the 2014 PC Report *Access to Justice Arrangements* and the suggestions for expanding low cost dispute resolution and 'unbundling' legal services as strategies to address cost⁶⁸ and "invites stakeholder comment on these and other means to reduce costs associated with resolving family law matters".⁶⁹

⁶⁶ Australian Law Reform Commission, *Review of the Family Law System Issues Paper 48* [102].

⁶⁷ Ibid [105].

⁶⁸ Ibid [108].

⁶⁹ Ibid [109].

The IP also notes the costs associated with expert reports. LACs' experience is that reports usually cost in the range of \$2,000 to \$6,000, but there have been occasions where substantially more has been sought, e.g. approximately \$12,000 for a report.

Way forward

Legal aid

It is relevant that when the PC undertook its inquiry into civil law access to justice arrangements, it found more people living in poverty (14%) than eligible for legal aid (8%)⁷⁰ and, inter alia, recommended that around \$57m per annum was needed as an interim measure to relax LAC means tests. The PC estimated that this would "increase the number of people eligible for grants of aid from around 1.4m to 1.9m people"⁷¹ and suggested that "The Australian Government should provide the bulk of this funding (given that the money would be used to assist clients in areas of Commonwealth law under existing guidelines)",⁷² i.e. effectively family law.

If the PC recommendation for an additional \$57 million per annum to relax the legal aid means test was implemented,⁷³ NLA has estimated that 41,000 more grants of aid could be made for legally assisted FDR or an additional 7,600 grants of aid could be made for legal representation.

Attachment B is Appendix H of the Productivity Commission's 2014 Report *Access to Justice Arrangements*. Please see the response to Questions 1 and 12.

Expanding DR in family law

"Prompt, affordable and well understood dispute resolution arrangements can help avoid issues escalating into more serious problems that can place burdens on health, child protection and other community welfare services"⁷⁴ and LAC services have been identified as "generating net benefits to the community".⁷⁵

In NLA's view the following particular DR measures would be likely to reduce costs for clients:

- The use of online dispute resolution. Please see the response to Question 28.
- Expanded access to legally assisted DR at all stages of proceedings for property as well as parenting matters. Please see the response to Questions 17, 21, 22 and 24.

⁷⁰ Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Appendix H) 1021-1022.

⁷¹ Ibid 1023.

⁷² Ibid.

⁷³ Ibid 1026.

⁷⁴ Ibid Overview 7.

⁷⁵ Ibid 2.

- A requirement for DR for property with appropriate exemptions and processes to ensure disclosure before DR. Please see the response to Questions 17 and 22.
- Increased access to arbitration for property matters. Please see the response to Question 27.

Improved funding of LAC legally assisted DR would particularly result in many more matters resolving early. It is anticipated that there would be substantial resulting efficiencies to the system, and positive flow on effects to other parties including in relation to cost, as there would be fewer matters entering the litigation pathway and therefore less delay in the hearing of those matters that require a judicial determination.

Unbundling legal services

In relation to the PC suggestion of increased unbundling of legal services, NLA notes the more recent development and implementation of FASS. FASS not only includes a social support component but involves an extension of the work types typically undertaken by general duty lawyer, e.g. by assisting with preparation of documents including notice of risk, applications and affidavits.

NLA suggests that general duty services could potentially be expanded to become more 'FASS-like', i.e. by extending the work types to be undertaken by duty lawyers, but such an expansion of services would require increased funding.

Triage and case management

NLA is of the view that triage of matters by the court into 'streamed' lists, and restrictions on interlocutory applications and the size and number of applications and affidavits, would be beneficial. Please see the response to Question 4.

Reports

Report writers identify issues relevant to determining orders that are in the best interest of children and provide recommendations which may facilitate the timely resolution of proceedings.

However, there are limited numbers of suitably qualified and experienced persons willing to prepare reports and significant delays can be faced in engaging report writers and receiving the report. These delays in turn affect the ability of family law courts to make timely decisions, and can increase legal costs. A limited pool of report writers can also put upward pressure on the cost of reports. Deterrents to practising in this area include the propensity of some parties who perceive that they have not achieved or will not achieve the outcome that they want to make complaints to professional bodies, and the stressful nature of the work and vicarious trauma in a context where other work is available.

Strategies to increase the numbers of report writers, ensure appropriate expertise in the context of a family law dispute, and contain costs might be:

- development of an ‘in-house’ pool of report writers at LACs;
- greater availability of family consultants to write reports;
- greater guidance about the process and content for reports, in consultation with professional bodies, and model this on successful approaches such as the Children’s Court Clinic attached to the Children’s Court of NSW;
- a schedule of prescribed fees for reports;
- greater mentoring by experienced report writers; and
- address how best to respond to complaints by parties to family law proceedings about report writers. This may require a conversation between the courts and relevant professional bodies. NLA notes that organisations like Association of Family and Conciliation Courts have an interest in addressing these concerns, as do LACs.

Question 11 What changes can be made to court procedures to improve their accessibility for litigants who are not legally represented?

Context

The issues created by, and challenges facing, self-represented litigants are set out in a number of reports.⁷⁶

Way forward

One set of rules and procedures

NLA notes the recently announced new Federal Circuit and Family Court of Australia (FCFCA), to be established from 1 January 2019, through the amalgamation of the existing Federal Circuit Court of Australia and the Family Court of Australia:

The FCFCA will have one single point of entry for all federal family law matters to provide a consistent pathway for Australian families needing to have their family law disputes dealt with by court proceedings. Families will have one new court with one set of new rules, procedures and practices designed to ensure that their disputes will be

⁷⁶ E.g. Productivity Commission, *Access to Justice Arrangements*, (Inquiry Report No 72 2014); Family Law Council, *Litigants in Person A Report to the Attorney-General prepared by the Family Law Council* (August 2000); Family Court of Australia, *Self-Represented Litigants - A Challenge: Project Report* (2003).

*dealt with by the FCFCFA in the most timely, informed and cost effective manner possible.*⁷⁷

NLA supports one set of rules, procedures and practices. This will improve accessibility for all court users including litigants who are not legally represented.

The Commonwealth court portal

NLA supports the government's continued investment in the Commonwealth court portal. The future of electronic file management and record storage relies on user adoption. Those not legally represented and who do not have access to computers are unable to file forms electronically. NLA supports measures to encourage greater uptake.

At the same time NLA is concerned that duty lawyers cannot get easy access to the Commonwealth court portal on behalf of self-represented litigants seeking assistance as the only way to obtain access is to file a Notice of Address for Service.

The content of court forms

Forms should be in plain language, as simple as possible, proportionate to the stage of proceedings and provide some guidance as to what is required by decision makers, e.g. Case Information Affidavit used in the Family Court of Western Australia.

Online forms could potentially be self-populating tools to guide parties depending on indicative information entered by them.

LACs are well positioned to assist with the development of appropriate technology, understanding the needs of the client base and with experience in the development of IT responses to legal assistance issues, e.g. please see the response to Question 28 about ODR, and IT supported legal assistance responses such as Legal Chat and Online Referral Booking Information Tool.

Triage and active case management

Please see the response to Question 4.

Efficiencies could be created if triage was undertaken early at the courts and matters were referred into appropriate streams, including increased use of DR processes.

Powers to actively manage cases currently exist, e.g. pursuant to sections 69ZN, 69ZQ, ZR and ZX of the Act, although the exercise of powers can vary.

⁷⁷ The Hon Christian Porter MP, Attorney-General, 'Court Reforms to help families save time and costs in family law disputes', Media Release, 30 May 2018.

Reforms might be considered to operationalise wherever possible the principles in section 69ZN, such as through amendments to the Rules, Practice Notes/Directions and Good Practice Guidelines.

If judicial officers were able to allocate more time to the hearings before them, they could accommodate and address the sometimes slower pace of proceedings and other issues that arise when litigants are in an unfamiliar environment without legal representation.

Question 12 What other changes are needed to support people who do not have legal representation to resolve their family law problems?

Context

The IP states:

Early consultations for this Inquiry revealed a number of suggestions for reform to address these issues, including:

- *developing specialist clinics within the courts or legal aid commissions to provide pro bono training and advice for parties who self-represent, along the lines of Canada's National Self-Represented Litigants Project;*
- *re-drafting court forms and instructions in plain English and re-developing court websites to ensure they are user-friendly and that forms are easily searchable; and*
- *simplifying the legislative framework and drafting provisions in plain English.*⁷⁸

Further, "recent reports have explored the possibility of changes to court procedures to incorporate more inquisitorial features."⁷⁹

LAC services

Unbundled legal services

LACs endeavour to help as many people as possible through innovative service delivery such as FASS and by providing unbundled legal services.

Unbundled legal services include information, legal advice, legal task assistance such as drafting letters and court documents, undertaking negotiations or advocating on behalf of a client, or appearing in court in relation to procedural orders or simple matters. Support is also provided through self-help kits, e.g. Legal Aid New South Wales recovery orders kit and

⁷⁸ Australian Law Reform Commission, *Review of the Family Law System Issues Paper 48* [117].

⁷⁹ *Ibid* [118].

Legal Aid Queensland's guide to preparing consent orders, parenting order and parenting plans.

In 2016-17 more than 2 million unbundled legal services were provided in all law types. Data for more intensive unbundled family law services delivered reflects at least:

- 36,641 duty lawyer,
- 102,736 legal advice,
- 13,284 legal task.

These services were delivered from some family law and state/territory courts and legal aid offices and other service delivery locations.

Duty lawyer services and Family Advocacy and Support Services (FASS)

LAC duty lawyer services provide free legal advice and, in some circumstances, representation for parties at a court event. Duty lawyer services perform an important role in providing triage identifying risk factors, negotiations with other parties, linking clients to appropriate legal and other supports, and making applications for legal aid where appropriate. Duty lawyer services also assist with reality checking and managing party expectations, leading to increases in appropriately settled matters, saved court time and efficiencies.

FASS provides a holistic range of supports, including expanded duty lawyer services, to both parties in matters where people may be experiencing or at risk of family violence. Legal support is integrated with social support and appropriate referrals.

Please also see the response to Questions 3 and 4.

Way forward

Relaxation of means tests

NLA would like to be in a position to relax legal aid means tests so that legal representation can be provided appropriately to financially disadvantaged people.

Attachment B is Appendix H of the Productivity Commission's 2014 report, *Access to Justice Arrangements*. Please see the response to Questions 1 and 10.

Expansion of duty lawyer and FASS

NLA supports the recommendation in the SPLA *Family Violence Report* that "the Australian Government considers extending the Family Advocacy and Support Services program,

subject to a positive evaluation, to a greater number of locations including in rural and regional Australia.”,⁸⁰ noting that in some cases there are limited private practitioners and conflict is an issue.

NLA views the model of FASS as representing family violence good practice and, funding permitting, also supports the expansion of duty lawyer services to become more FASS-like, i.e. additional work types undertaken and a social support component.

Legally assisted DR

As indicated in the response to Questions 21 and 24, NLA considers that enhanced triage at the courts including to DR would facilitate people who do not have legal representation to resolve their family law problems at an earlier point in time.

Subject to funding, one model being considered by LACs at present is the LACs establishing a model which could see matters referred from the family law court but which are yet to have been to DR or which have already been to DR but now appear capable of resolution on the basis of somewhat relaxed eligibility on means requirements. It is envisaged that investment in such a model would produce significant efficiencies, with further filings and procedural and hearing time at the court saved.

Legally assisted DR is addressed in more detail in the response to Questions 21 and 24.

More inquisitorial features

NLA is of the view that there is capacity within the current system for judicial officers to pro-actively case manage matters but consistency of practice could be better supported, e.g. please see the response to Question 15.

Question 13 What improvements could be made to the physical design of the family courts to make them more accessible and responsive to the needs of clients, particularly for clients who have security concerns for their children or themselves?

Context

The IP refers to the recommendations of the Victorian Royal Commission into Family Violence in relation to the safety and accessibility of the Magistrates Court in Victoria, being:

⁸⁰ House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (2017) rec 1.

- *safe waiting areas and rooms for co-located service providers;*
- *accessibility for people with disability;*
- *proper security staffing and equipment;*
- *separate entry and exit points for applicants and respondents;*
- *private interview rooms for use by registrars and service providers;*
- *remote witness facilities to allow witnesses to give evidence off site and from court-based interview rooms;*
- *adequate facilities for children and ‘child-friendly’ courts;*
- *multi-lingual and multi-format signage; and*
- *use of pre-existing local facilities and structures to accommodate proceedings or associated aspects of court business (for example, for use as safe waiting rooms).⁸¹*

The IP notes:

- *Concerns raised by stakeholders and the recommendations from the Victorian Royal Commission into Family Violence regarding safety and accessibility. The concerns are consistent with those held by LACs and NLA supports the recommendations of the Royal Commission.⁸²*
- *ALRC heard support for the roaming or ‘dynamic security’ system used at the Neighbourhood Justice Centre. This system replaces the usual ‘airport style’ security at the court entrance with roaming security guards, who talk and interact with everyone who comes into the building.⁸³*

Court facilities

In establishing FASS, difficulties were encountered in some locations due to a lack of available appropriate space.

The main difficulties related to the need for:

- separate, secure and fixed rooms for each co-located service provider;
- safe rooms of a sufficient size to enable multiple people and their children to access a support service; and
- physical facilities for the effective intake and triage of people located at an appropriate intake point for people accessing the court and its co-located services.

⁸¹ Australian Law Reform Commission, *Review of the Family Law System Issues Paper 48* [120].

⁸² Ibid.

⁸³ Ibid [122].

As highlighted by the below case studies, secure, fit for purpose and safe facilities for co-located service providers such as the FASS are a critical factor in the ability of people to engage in the family law system and participate effectively in proceedings.

Case study 5 – separate, secure and fixed rooms for co-located support services

At the Newcastle registry, there is no separate or fixed room for the FASS support service for men. There is a very small safe room from which the FASS support service for women work out of.

Ben was referred from the duty lawyer to the FASS support worker for men. There were allegations about Ben using family violence.

The support worker for men had to engage with Ben in the hallway of a busy list day. Ben and the support worker were unable to move to a room on a different level as Ben's matter was about to be called into Court on level 4. There were no rooms available.

Each time another lawyer or person walked past, Ben would stop talking. Ben was quite jumpy, frequently looking around to see who was listening to the conversation.

Ben also complained to the support worker that "men's support must not be important as the women have a safe room and the men don't". This also made engagement more difficult.

The support worker later called Ben on the telephone so he could have a more confidential discussion with him. On the telephone, Ben was much more forthcoming in disclosing past abusive behaviours and was open to engaging with supports.

However, there are many men like Ben, where if a rapport is not established face to face on the first occasion, then they will not call the support service back or respond to the support worker's attempts to engage.

In addition, many men find it difficult to locate the FASS support service for men because it is not in a fixed room.

Case study 6 – safety issues in and around court premises

Deb is involved in proceedings regarding her 10 year old son with her ex-partner Rick, who has an extensive criminal record for violence against her and previous partners. Deb has a family violence personal protection order against Rick, which has been breached numerous times.

Deb's lawyer has encouraged safety planning for attending the family court. Deb arrives and leaves at 'staggered times' in the company of a friend. Despite this and the protection order, Rick has waited and confronted her outside court and verbally abused her. Rick has also approached her and thrown papers at her in the waiting area inside the court and threatened to harm her lawyer, eventually assaulting the lawyer.

Way forward

Safety audit

NLA has previously raised particular concerns about the safety of court users at some registries, e.g. Alice Springs and Launceston. The premises at Newcastle and Wollongong are also of concern.

NLA recommends that there should be safety audits conducted at all family court premises, including circuit locations and state magistrates courts, where they are used for family law matters.⁸⁴

Facilities for children

Safe and secure facilities for children are an important enabler for access to the family law system and participation in proceedings. An example of secure childcare facilities are those provided for the use of parties attending court at the Parramatta registry in NSW and the Family Court of Western Australia.

Roaming security

NLA supports additional security measures at and around the courts, including roaming and stationary security posts as well as fixed airport style security.

Safety planning

Physical environments that are designed and built for safety should be supported by processes that pro-actively screen for risk and respond accordingly. Where risk has been identified as an issue the court should pro-actively ensure safety planning for all future court events. E.g. remote attendance could be implemented to address particular safety concerns.

Future planning

NLA supports facilities being built into future planning and replicated in other court locations.

Consideration could also be given to the inclusion of prayer rooms where appropriate as a culturally responsive measure.

⁸⁴ National Legal Aid Submission No 88 to SPLA Committee, Parliament of Australia, Inquiry into *A Better Family Law System* (April 2017) 6.

Legal principles in relation to parenting and property

Question 14 What changes to the provisions in Part VII of the *Family Law Act* could be made to produce the best outcomes for children?

Context

The IP asks about changes to the legislation and notes that the ALRC is also interested in receiving feedback about other sections of the Act and Rules that affect arrangements for children, including:

- *section 68LA, which defines the nature of the role of the Independent Children’s Lawyer;*
- *the principles in Division 12A for conducting child-related proceedings;*
- *the provisions of Division 13A which govern the courts’ powers in relation to non-compliance with orders that affect children; and*
- *the rules governing the making of consent orders.*⁸⁵

Way forward

To support community confidence in, and access to, the family law system, laws in relation to children should be readily comprehensible.

Section 60CC – how a court determines what is in a child’s best interests

NLA considers that the best interests test is right and that the considerations are relevant, however, the way they are currently expressed is overly long and complicated.

NLA is supportive of an approach to amendment along the lines proposed by Professor Chisholm in his article, *Rewriting Part VII of the Family Law Act: A modest proposal*.

In particular, a checklist of best interest considerations to support the principles is considered important.

As Professor Chisholm says:

The draft retains the long-standing principle that the child’s best interests should be the paramount consideration. This principle, essentially unchallenged in Australia, has been retained.

⁸⁵ Australian Law Reform Commission, *Review of the Family Law System Issues Paper 48* [139].

*The draft retains a ‘checklist’ of considerations supplementing the ‘best interests’ principle, and the list includes many of the matters in the existing legislation. Although there is some attraction in leaving the ‘best interests’ principle uncluttered, I believe such a checklist is desirable, to help decision-makers systematically review the relevant matters, and to give an indication to all, especially litigants in person, of the sort of matters that the court is likely to take into account, thereby making the law more transparent.*⁸⁶

Professor Chisholm has suggested that the checklist should focus on “the child’s present and development needs, and on the capacity and willingness of parents and others to meet them.”⁸⁷

Section 61DA and Section 65DAA

Please refer to the response to Question 3 about community misunderstanding of what equal shared parental responsibility means.

Based on our practice experience, LACs agree with Professor Chisholm that sections 61DA and 65DAA appear to connect parental responsibility and care arrangements, and that this is “unhelpful, complex, and confusing”.⁸⁸

There is a need to separate out parental responsibility from provisions in relation to care arrangements.

The promotion of the opportunity for non-resident parents to spend time with their children could be included as a checklist provision.

Independent Children’s Lawyers (ICLs)

The role of ICLs and suggested models to best facilitate decision making that is child focused, and meets the development needs of children and their appropriate participation in parenting proceedings, are addressed in detail under Children’s Experiences and Perspectives in the response to Questions 34, 36 and 37.

NLA believes that ICLs perform a pivotal function in the most complex of parenting order disputes by assisting the court and the parties to make decisions in the best interests of the child.

The role of the ICL is multi-faceted, and research indicates ICLs have a particularly important role to play across three dimensions, as follows:

- *facilitating the participation of the child/young person in the proceedings;*

⁸⁶ Richard Chisholm, ‘Rewriting Part VII of the *Family Law Act*: A Modest Proposal’ (2015) 24(3) *Australian Family Lawyer* 6.

⁸⁷ *Ibid.*

⁸⁸ *Ibid* 7.

- *evidence gathering; and*
- *litigation management - playing an ‘honest broker’ role in case management and settlement negotiations*⁸⁹

The role is enhanced where appropriate by working in partnership with an appropriately qualified social scientist with experience of working with children and their families in the context of family breakdown.

Informed by our experience of ICLs working with social scientists and with social support embedded in FASS, NLA is of the view that there would be benefits in a more structured approach to ICL and social scientist partnerships, with a range of functions that could be performed by social scientists depending on the needs of the particular case.

NLA considers that it is appropriate for ICLs to continue to represent children on a best interests basis, and that section 68LA of the Act sufficiently codifies the role of the ICL. Guidance for the proper discharge of an ICL’s obligations can be found in the [Guidelines for Independent Children’s Lawyers \(2013\)](#).

NLA supports reviewing and codifying the reviewed criteria for the appointment of an ICL, currently found in *Re K* (1994) FLC 92-46.1. Please see the response to Question 8.

Rules governing making of consent orders

In NLA’s view, the encouragement for parents to make their own arrangements for children post-separation and the ability to make consent orders pre and post the commencement of litigation is a strength of the current family law system.

Balanced against this flexibility there is a need for sufficient safeguards to protect parties where there may be family violence or other risk issues.

NLA supports courts taking a greater role in scrutinising parenting consent orders to identify situations of potential risk and to protect children and parties, and to support the best interests of children.

⁸⁹ Rae Kaspiew et al, ‘Independent Children’s Lawyers Study’ (Final Report, Australian Institute of Family Studies, 2013).) xiii.

Question 15 What changes could be made to the definition of family violence, or other provisions regarding family violence, in the *Family Law Act* to better support decision making about the safety of children and their families?

Context

As the IP records:

Recent reports and early consultations for this Inquiry suggested a number of potential reforms to the decision-making framework in Part VII and to the Act's definition of family violence. These include proposals to:

- *include abuse of process as an example in the definition of family violence;*
- *remove the presumption of equal shared parental responsibility and the language of equal shared time from Part VII;*
- *amend the best interests of the child checklist to more clearly prioritise the protection of children from physical or psychological harm;*
- *provide a simplified decision-making framework for determining interim parenting matters;*
- *provide a separate dedicated pathway for decision making in cases involving family violence; and*
- *enact requirements that a risk assessment for family violence be undertaken upon a matter being filed and at each hearing or court event and that findings of fact be made about allegations of family violence as soon as practicable after proceedings are filed.*⁹⁰

NLA made submissions which are relevant to this question, to each of:

Australian Law Reform Commission Inquiry *Family Violence, Improving Legal Frameworks* (July 2010) <https://www.alrc.gov.au/inquiries/family-violence-and-commonwealth-laws/submissions-received-alrc>

House of Representatives Standing Committee on Social Policy and Legal Affairs *Inquiry into a better family law system to support and protect those affected by family violence* (May 2017) https://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/FVlawreform

⁹⁰ Australian Law Reform Commission, *Review of the Family Law System Issues Paper 48* [133].

Attorney-General's Department (Cth), *Exposure Draft - Family Law Amendment (Family Violence and Other Measures) Bill 2017* (Feb 2017) and consultation paper <https://www.ag.gov.au/Consultations/Pages/Proposed-amendments-to-the-Family-Law-Act-1975-to-respond-to-family-violence.aspx>

Attorney-General's Department (Cth), *Exposure Draft - Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017* (Sept 2017) and consultation paper <https://www.ag.gov.au/Consultations/Pages/Family-violence-cross-examination-amendments.aspx>

Senate Standing Committee on Legal and Constitutional Affairs Inquiry *Family Law Amendment (Family Violence and Other Measures) Bill 2017* (Feb 2018) [https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal and Constitutional Affairs/FamilyViolence/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/FamilyViolence/Submissions)

Way forward

Definition of family violence

NLA supports having consistency of definitions which reflect contemporary understandings of family violence across jurisdictions and legislation, in line with the recommendations of a number of Australian reports including the ALRC/NSWLRC Inquiry *Family Violence, Improving Legal Frameworks*.⁹¹ The present definition with its emphasis on “control, coercion or fear” has the advantages of:

- being aligned with definitions of coercive controlling violence in the social sciences literature;
- focusing on the behaviour of the person using abuse;
- identifying the dynamics involved; and
- reflecting a pattern-based, rather than incident-based, approach to family violence.

In NLA's view, although the present definition is adequate, further examples could be included in the non-exhaustive list of examples, e.g. abuse of process and psychological abuse as suggested by some stakeholders, and the range of behaviours contained in the [National Domestic and Family Violence Bench Book](#), produced by the Australasian Institute of Judicial Administration.

In relation to the suggestion in the IP that some concerns have been expressed that the definition “may not adequately reflect the experiences of violence in Aboriginal and Torres

⁹¹ Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010) see particularly 289-91.

Strait Islander communities”,⁹² NLA’s view is that Aboriginal and Torres Strait Islander experts, services and communities are best placed to comment on this issue.

Early hearings to determine family violence

Please refer to NLA’s response to the SPLA Inquiry and to the response to Question 4 ‘Triage’.

Preventing direct cross-examination of victims of family violence

NLA supports preventing the direct cross-examination of victims of family violence by perpetrators. To this end NLA made a fulsome submission to the Attorney-General’s Department [Exposure Draft - Family Law Amendment \(Family Violence and Cross-examination of Parties\) Bill 2017](#) and consultation paper. Please refer to this submission.

NLA confirms that the issue is one relevant to all matter types under the Act.

Improving information sharing

Please refer to NLA’s submission to the Attorney-General’s Department [Exposure Draft - Family Law Amendment \(Family Violence and Other Measures\) Bill 2017](#) and consultation paper.

Good quality, complete information supports good decision making, whilst incomplete information potentially places parties at risk.

NLA supports the creation of the National Domestic Violence Order Scheme (NDVOS). NLA supports the expansion of NDVOS to include other categories of national information which would inform and support decision making in relation to the best interests of children, including:

- family court orders;
- criminal convictions;
- police orders; and
- child protection orders.

Safeguards regarding consent orders

Please see the response to Question 14.

⁹² Australian Law Reform Commission, *Review of the Family Law System Issues Paper 48* [132].

Question 16 What changes could be made to Part VII of the *Family Law Act* to enable it to apply consistently to all children irrespective of their family structure?

Context

NLA refers to the response to Questions 1, 5, 6 and 8 and the discussion and recommendations in the FLC's 2013 report on parentage.⁹³

The language in the Act reflects a nuclear family, e.g. the references in the Act to 'both parents' below:

- ensuring that children have the benefit **of both of their parents** having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; [s60B(1)(a)];
- children have the right to know and be cared for **by both their parents**, regardless of whether their parents are married, separated, have never married or have never lived together; [s60B(2)(a)];
- children have a right to spend time on a regular basis with, and communicate on a regular basis with, **both their parents** and other people significant to their care, welfare and development (such as grandparents and other relatives); [s60B(2)(b)]; and
- the benefit to the child of having a meaningful relationship **with both of the child's parents**; [s60CC(2)(a)].

This does not reflect the experience of all families in Australia.

It is suggested the reference to 'both' should be deleted.

NLA supports reform of the various provisions which affect parentage in order to create certainty about the meaning of 'parent', who has that status and the relationship between the Act and state and territory laws concerning surrogacy under s 60H and parentage in other situations,⁹⁴ such as the artificial conception procedures in s 60HB.

Our experience is that these uncertainties are affecting the parties to proceedings in the family courts, and in some cases producing appeals on highly technical matters rather than freeing up the courts to consider the genuine issues in dispute about the best interests of the child. The reform process will need to be comprehensive and careful to ensure that there are no unintended consequences, given the significance of parentage for the purposes of the Act.

⁹³ Family Law Council, *Report on Parentage and the Family Law Act* (2013).

⁹⁴ See for example, *Mason & Mason* [2013] FamCA 424; *Groth & Banks* [2013] FamCA 430.

Question 17 What changes could be made to the provisions in the *Family Law Act* governing property division to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes?

Context

The ALRC invites comment on whether the following suggestions or any other changes should be made to the provisions in the *Family Law Act* governing property division:

- *proposed changes to the provisions guiding how property should be split including:*
 - *adoption of a community of property regime; and*
 - *a presumption of equal contributions, or other presumptions about how property should be split, such as a presumption of equal sharing;*
- *codification of the Full Court of the Family Court's decision in Kennon & Kennon, or otherwise providing clearer guidance about how family violence will be taken into account in property matters;*
- *amendments to allow greater use of court orders for the split or transfer of unsecured joint debt and liabilities;*
- *suggestions that the requirement to regard the best interests of the child as the paramount consideration should also apply to adjustment of property;*
- *suggestions that the Act's complex superannuation splitting provisions be simplified; and*
- *suggestions that the property provisions for married and unmarried couples be merged and any remaining inconsistencies resolved.*⁹⁵

Current awareness and understanding of relevant law

It can be difficult for parties to ascertain their particular entitlement with any precision without legal advice, which may be expensive and out of reach or otherwise unavailable.

Misunderstanding of the law might prevent people taking action to resolve property issues. Unrealistic expectations can also be a barrier to reaching settlement. In the experience of LACs, myths in relation to property are fairly widespread in the community. These can include beliefs that:

- division is based only on financial contribution;
- if a party leaves the family home, they lose any entitlement to it; and

⁹⁵ Australian Law Reform Commission, *Review of the Family Law System Issues Paper 48* [152].

- parties are entitled to a 50/50 split.

Way forward

The present discretionary property regime under section 79 of the Act, takes into account the particular contribution, financial resources and circumstances of each party to the case.

Despite some of the criticisms of a discretionary system, NLA supports retaining this in preference to a prescriptive system.

Improved community understanding of property law might help to redress myths and provide a platform for an early realistic assessment about division of property.

Preservation of property

Accessible mechanisms to preserve property are necessary to prevent the dissipation of key assets in property settlement disputes.

For many parties, the major asset is the family home and one party may be vulnerable where the other party is the sole proprietor of the property.

Relevant to the intersection of caveat law, the mere application for alteration of property interests under family law legislation does not create a caveatable interest. The fact a spouse may in the future be entitled to an order for alteration of property interests does not give that spouse a caveatable interest in property legally owned by the other spouse, even in circumstances where the property owning spouse has been restrained by order of the Family Court of Western Australia from disposing of relevant property; that is, the Family Court of Western Australia has already ruled that there is a serious question to be tried as to whether the non-legal interest holding spouse will ultimately be found to be entitled to an interest.⁹⁶

Although the scope of caveatable interests lies within the ambit of the states and territories, NLA would support consideration be given to amending state and territory laws to allow for a national approach for caveats to be lodged to preserve real property in the context of family law property settlements.

Small property claims

As indicated in the IP, the process for property settlement is generally the same, no matter the size of the asset pool or degree of complexity involved. Processes should be simplified for smaller asset pools with greater support given to in person litigants to deal with issues of non-disclosure, non-compliance and deliberate delay.

⁹⁶ Law Reform Commission of Western Australia, *The Intersection of the Family Law and Caveat Systems in Western Australia: Project 107 - Discussion Paper*, (2017).

Please see the response to Question 22.

Division of property

As indicated, NLA supports retaining the current discretionary system in relation to calculating entitlement to property, however, some aspects of property law could be the subject of greater clarification and codification. This would assist understanding about the appropriate/likely settlements.

Process of determining property settlement

The process for calculating property entitlements could be explained in the Act.

Following the case of *Stanford*,⁹⁷ the process has commonly been conceived as possessing 5 steps, as follows:

1. Is it just (fair) and equitable (reasonable) to alter the parties' property interests;
2. Determine the net asset pool available for division;
3. Assess contributions (financial and non financial);
4. Consider the future needs factors mentioned in section 75(2);
5. Having gone through steps 1 - 4, consider whether the outcome is fair and reasonable.

NLA supports amending the Act to:

- set out, in plain-language, the 5 step property settlement process; and
- restructure/re-order the provisions concerning matrimonial and de facto property settlement, so that all considerations the court must take into account when altering property interests are located together and in a logical order (rather than the present schema of section 79 being informed by the considerations in section 75(2)).

Consideration could be given to codification of some areas of common law that are well established such as:

- assessment of contributions such as inheritances, gifts or loans from family, lottery wins, redundancy/long-service leave payouts, insurance claims i.e. permanent disability;
- treatment of pre cohabitation assets and debts;
- treatment of assets and debts post separation; and
- farming interests.

⁹⁷ *Stanford v Stanford* [2012] HCA 52.

Consideration could also be given to whether it would be beneficial to amend the Act to codify when the two approaches to property settlement (the ‘global’ approach, and the ‘asset by asset’ approach) might best be applied.

Add family violence as a relevant criteria

NLA supports legislative amendment on the basis of the approach taken in the case of *Kennon*.⁹⁸

Compliance/enforcement

The present processes to enforce compliance with property orders are lengthy and complex.

This enables parties with a vested interest to benefit from potential delays. Strategies to facilitate simpler processes for compliance might include:

- Standard and widespread use of self-executing or springing orders for non-compliance, so that parties can take action to enforce financial orders, without the delay, cost and stress of having to go back to court.
- Regular summary enforcement lists.

Question 18 What changes could be made to the provisions in the *Family Law Act* governing spousal maintenance to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes?

Context

The IP indicates that surveys of court judgments have indicated that orders for maintenance are rare and are generally limited to cases involving high income families and made on an interim basis or for a limited period of time.⁹⁹

The ALRC asks about a suggestion to include family violence “as a relevant factor in determining needs for the purposes of spousal maintenance applications”, and notes that “some stakeholders also proposed the development of a system of administrative determination of maintenance claims, in a similar fashion to child support”.¹⁰⁰

⁹⁸ *Kennon & Kennon* [1997] FamCA 27.

⁹⁹ Australian Law Reform Commission, *Review of the Family Law System Issues Paper 48* [156].

¹⁰⁰ *Ibid* [158].

The need for financial support is often greatest immediately after separation. Spousal maintenance can enable a party to re-establish a new household post-separation, providing safety, security and stability for them and their children. It can also assist a party to acquire skills so that they can adequately support themselves into the future. However, as the IP earlier indicates the court process can be challenging to navigate and process delays can impede matters being dealt with urgently.

Spousal maintenance may be critical to parties on temporary visas, who may have no entitlement to access Centrelink and other social and financial supports.

Way forward

NLA agrees with the suggestion that family violence should be included as a relevant factor in determining needs.

If responsibility for spousal maintenance remains with courts then, as indicated in the response to Question 4, consideration should be given to streaming such matters into appropriate lists.

To ensure timely and adequate disclosure, early intervention disclosure ought to be available to persons making a claim for spousal maintenance, urgent or otherwise. Consideration should be given to:

- The court/registrars, having powers similar to the Child Support Registrar to directly access relevant financial information.
- A rebuttable presumption the respondent has capacity to pay to address the problem of respondents failing to participate in proceedings or failing to file a Financial Statement or give proper disclosure.

Further consideration will need to be given to introducing an administrative process for spousal maintenance.

Question 19 What changes could be made to the provisions in the *Family Law Act* governing binding financial agreements to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes?

Context

The IP notes:

Other issues that have been raised during consultations include concerns about:

- *the use of [binding financial agreements] BFAs to the disadvantage of the member of the couple in the weaker bargaining position;*
- *the extent to which the provisions governing BFAs sit comfortably with a discretionary approach to property adjustment;*
- *whether and how family violence should be taken into account where a couple has entered into a financial agreement, including family violence that commenced after the financial agreement was finalised; and*
- *the effect of the recent High Court decision in *Thorne v Kennedy*, which set aside an agreement on the basis of unconscionable conduct, on enforceability of agreements.*¹⁰¹

LAC services

LACs have limited experience of BFAs, with service provision being legal advice where the issue has arisen.

Role of BFAs

“Of course, the nature of agreements of this type means that their terms will usually be more favourable, and sometimes much more favourable, for one party.”¹⁰²

NLA recognises though that BFAs play a role in:

- providing an alternative approach to settling property settlement disputes without engaging in family court litigation;
- promoting individual liberties and the freedom to contract (with appropriate safeguards),
- enabling parties to reach a property settlement in circumstances where the limitation periods under the Act may have expired; and
- family, estate and business planning.

Way forward

NLA would not support moves to restrict the current grounds to set agreements aside under sections 90K and 90KA of the Act.

¹⁰¹ Australian Law Reform Commission, *Review of the Family Law System Issues Paper 48* [163].

¹⁰² *Thorne v Kennedy* [2017] HCA 49 (8 November 2017) [56].

Although the grounds to set aside under section 90K of the Act are reasonably broad, consideration could be given to reviewing and reframing the grounds in order to insert a specific ground of family violence.

Resolution and adjudication processes

Question 20 What changes to court processes could be made to facilitate the timely and cost-effective resolution of family law disputes?

Context

The IP asks:

...what processes, including alternative dispute resolution models and less adversarial decision making approaches, might be used to assist families with complex needs, as well as how support could be best provided to the parties involved in these matters. The ALRC also asks how misuse of process in family law matters might be prevented.¹⁰³

The IP refers to a number of reform strategies for consideration, namely:

- *the development of a triage approach to court applications, to ensure that urgent cases are identified and dealt with expeditiously and that families are referred to a resolution pathway that is appropriate to their needs;*
- *a more streamlined case management model within the courts, such as the use of a teamed docket system that pairs judicial officers and registrars and possibly family consultants;*
- *increased use of practice directions and notes to support efficiency and safety. Examples provided in initial consultations were Practice Direction No 2 of 2017 (Interim Family Law Proceedings) in the Federal Circuit Court limiting affidavits in interim proceedings to ten pages and annexures to five;*
- *greater leadership from the bench to address delays caused by parties and/or their legal advisers failing to meet court deadlines, including through the setting of budgets for matters;*
- *a greater use of orders diverting litigants to mediation or other dispute resolution services after the commencement of litigation; and*

¹⁰³ Australian Law Reform Commission, *Review of the Family Law System Issues Paper 48* [166].

- *limiting the availability of appeals from interim orders.*¹⁰⁴

Way forward

NLA considers the following are key strategies:

- increased triage;
- increased referral to dispute resolution;
- proactive case management of matters when in court; and
- appropriate resourcing.

Please refer to the response to Question 4 in relation to navigation, and Question 21 in relation to greater opportunity to refer matters to DR.

Triage

Triage needs to occur in court at the commencement of proceedings, and at stages throughout the litigation. Triage should identify and guide responses in relation to:

- risk and safety;
- legal issues;
- urgency;
- social support needs; and
- the most appropriate dispute resolution pathway.

Triage should take account of the circumstances of each family, the issues involved, the stage of proceedings and whether parties are legally represented.

Triage should be underpinned by a multi-disciplinary and collaborative approach where services, professionals and courts share information about risk and urgency, and work in a coordinated fashion, enhancing the safety and well-being of those involved and supporting the efficiency of the court process. Triage will need to be appropriately resourced.

Practices will need to be supported by screening tools which elicit information necessary to make decisions about risk and urgency, e.g. the Case Information Affidavit used in the Family Court of Western Australia which has questions which screen for family violence, child abuse, mental health and drug and alcohol issues.

Forms should be in plain English, easy to complete and leverage technology wherever appropriate.

¹⁰⁴ Australian Law Reform Commission, *Review of the Family Law System Issues Paper 48* [171].

Unrepresented parties would potentially be assisted with forms by FASS and duty lawyer services.

NLA notes the Council of Attorneys-General Family Violence Working Group is addressing a term of reference in relation to risk identification and assessment. The term of reference seeks recommendations about best practice principles and tools for the justice system.

Case management

Case management is the process of proactively guiding and supporting an individual matter through the court process.

Following any initial direction for DR, consideration should be given to placing matters into specialised lists, categorised by matter type, risk and urgency or other relevant features.

Judicial case management

The experience of LACs is that time can be wasted because parties have failed (innocently/deliberately) to present crucial information to the court leading to adjournments which would otherwise not have been needed.

Judicial case management in parenting proceedings could be supported by the parenting coordinator role. Please see the response to Question 4.

NLA also supports the proposed introduction of the new section 45A into the Act as proposed in the *Family Law Amendment (Family Violence and Other Measures) Bill 2017*, which will give the court clearer powers to dismiss applications which have no obvious merit, including those matters where it is apparent that the court is being used as a “tool for perpetrators of family violence to perpetuate the violence”¹⁰⁵ and matters that are vexatious, frivolous or an abuse of process. E.g. the failure by a party to provide full and frank disclosure of their financial circumstances, resulting in adjournments and applications for disclosure orders.

Please refer to the response to Question 17 and the proposals in relation to providing courts with information gathering powers.

Limiting the availability of appeals

NLA is concerned about proposals to limit appeals from interim orders.

Access to an appellate jurisdiction is a fundamental feature of a system based on the rule of law, and great care should be taken in limiting it.

¹⁰⁵ *Family Law Amendment (Family Violence and Other Measures) Bill 2017* General Outline [75]. See the full outline in relation to the proposed section 45A [74-87].

The appeals process provides an important quality assurance and check/balance in litigation and produces cases which clarify and guide the application of the law.

There is a strong public policy rationale for supporting a robust system of appeals. NLA is supportive of measures which clarify or provide additional powers for family courts to summarily dismiss matters, including appeals, that are without merit. This has the potential to address the issue of delays to some extent and consideration of any limitations on appeals needs to be viewed in context with this change.

If further limitations were to be considered, NLA believes that research is needed to examine the evidentiary base for such a change. Research might include exploring the number and percentage of interim orders appealed, the nature of appeals including the proportion of matters which may be frivolous or of limited merit, and the extent to which appeals are actually contributing to delays.

Question 21 Should courts provide greater opportunities for parties involved in litigation to be diverted to other dispute resolution processes or services to facilitate earlier resolution of disputes?

Context

NLA suggests that there is the potential for greater diversion of parties from litigation to DR processes and services, so as to assist people to resolve disputes in a timely manner and minimise costs. Please see the response to Question 4.

NLA supports legally assisted DR. The experience of LACs is that it represents an efficient and effective alternative to litigation. Please also see the response to Question 24.

LACs conduct over 7,300 FDR conferences per year. LAC legally assisted DR programs enjoy high settlement rates in family law matters. The national average settlement rate in 2016-2017 was 79%; rates across the country ranged from 75% to 91%. These settlement rates are considered especially significant as they are achieved in family law matters often involving complex issues and high conflict.

LACs accept appropriate referrals for legally assisted DR whenever it appears that an earlier settlement might be reached. The courts and LACs variously have arrangements for referral for LAC DR, e.g. by direct communication between the court associates and LACs, and placement of LAC DR staff at courts, particularly for callover and busy lists. E.g. Legal Aid NSW has operated a Court Ordered Mediation Program since 2011. This program, available in the Sydney and Parramatta registries of the family court and during some circuits, allows parties at court to be referred for a legally assisted mediation. The program is sensitive to the litigation timetable and can be date fixed at court enabling judicial officers to maintain case management. The FDRPs are specifically recruited for litigation experience enabling

rigorous reality testing of options and likely outcomes. The FDR sessions often occur within the Court Precinct providing additional security to parties.

Considerable success has been achieved in matters where litigation has commenced including in matters set down for hearing.

Way forward

Children's matters

A high proportion of applications for parenting orders in family courts can be expected to be exempted from the requirement to participate in FDR. E.g. Legal Aid Western Australia understands that over half of filings in the Family Court of Western Australia in parenting cases sought an exemption from FDR, and of the applications filed with section 60I¹⁰⁶ certificates, about 48% of certificates were based on a refusal or failure by a party to attend FDR, i.e. it would appear that a large number of litigants in parenting cases have never properly participated in FDR.

Whilst there are good reasons for exempting persons from participating in FDR, legally assisted DR may be a suitable option in some matters once any urgent issues have been addressed by family law courts.

Case study 7 – litigation intervention DR

Sarah separates from her partner John due to family violence. They have a 3 year old child Harley.

Sarah agrees to John spending regular time with Harley notwithstanding some concerns over his family violence, as John is now living with his mother, who does not tolerate abusive behaviour and is protective of Harley.

During a contact visit, John takes Harley and moves with him to a friend's home, and refuses to return him.

Sarah seeks help from a LAC and makes a successful application for a recovery order and interim lives-with orders on the basis of the exemptions of family violence and urgency.

After Harley is returned, John moves back to his mother's home. He expresses regret for his behaviour and a desire to address his family violence.

Sarah tells her LAC lawyer that she would prefer to attempt to get consent orders through FDR if possible, as she believes it will be more constructive and amicable, and less stressful for them both.

¹⁰⁶ Or the equivalent certificate issued under the *Family Court Act 1997* (WA), s 66H.

Refusal or failure to attend FDR may also reflect circumstances existing at a particular point in time. Such circumstances may be subject to change or constructively influenced by legal advice and assistance. E.g. over time heightened emotions may subside, safe living arrangements may be found, and family violence personal protection orders and/or legal advice/representation may be obtained.

In conclusion, NLA suggests that there may be a substantial cohort of children's matters, which presently do not engage in FDR for the reasons outlined, but which would benefit from engaging in DR post-filing where appropriate.

Property matters

NLA refers to the response to Questions 17 and 22 and supports legally assisted DR for property matters with appropriate exemptions, e.g. such as in some matters involving family violence and in circumstances of urgency such as dissipation of assets.

Due to funding restrictions and the priority given to children's matters, LACs conduct limited numbers of legally assisted DR for financial matters (property settlement and spousal maintenance).

LACs are well placed to expand the provision of these services to property matters if further funding were available.

Arrangements which would facilitate referral to and use of DR

NLA believes that there is scope for more structured arrangements for diversion to legally assisted DR and that this could greatly enhance the number of appropriate referrals.

Where not already in place, the following might assist:

- arrangements between the court and LACs in relation to which matters might be referred to LACs for legally assisted DR and in what circumstances;
- consultation between courts and LACs to develop a more coordinated approach for referral;
- placement of LAC intake/case management officers at family court registries, especially during call over days, to assist with identification of matters appropriate for referral to legally assisted DR;
- standardised court orders for referral to DR developed by consultation between the courts and LACs; and
- ensuring that DR is supported by laws and processes compelling disclosure.

Question 22 How can current dispute resolution processes be modified to provide effective low-cost options for resolving small property matters?

Context

NLA agrees with the concerns expressed in the IP that a ‘one pathway’ approach can unnecessarily increase the complexity and potential cost for more simple property matters, and notes the suggestions for change recorded in the IP, namely:

- *a recommendation by the Productivity Commission that the requirement in s 60I of the Family Law Act to attempt FDR prior to lodging an application for children’s orders be extended to financial matters;*
- *recommendations by the SPLA Committee and Women’s Legal Service Victoria that the family courts promote early resolution of small property disputes through a streamlined case management process with simplified procedural and evidentiary requirements;*
- *recommendations by the Victorian Royal Commission into Family Violence, the Family Law Council, and the SPLA Committee, that state and territory magistrates be encouraged to increase the exercise of their Family Law Act powers in relation to property when parties with family law needs are already before the court;*
- *the implementation of a small claims list in the Federal Circuit Court along the lines used by the Federal Circuit Court in claims of up to \$20,000 under the Fair Work Act 2009 (Cth) and claims up to \$40,000 under the National Consumer Credit Protection Act 2009 (Cth); and*
- *the roll out of an arbitration process for small property claims along the lines of Legal Aid Queensland’s arbitration model, which is available to legally aided clients for resolution of property disputes of between \$20,000 and \$400,000.¹⁰⁷*

Way forward

A requirement to attempt DR

NLA supports the introduction of a requirement that DR is attempted for property matters as set out in the response to Questions 17 and 21.

A requirement for DR should be on the basis that there are appropriate exemptions and:

- parties are legally represented in preparation for and during the DR conference;
- agreements reached are drawn in a form that is enforceable;

¹⁰⁷ Australian Law Reform Commission, *Review of the Family Law System Issues Paper 48* [175].

- there is a clear legislative requirement for full disclosure, with clear consequences for non-compliance, such as costs orders, presumptions and the triggering of powers of the court to obtain information directly from third parties; and
- the ability to make a simplified, expedited application to the family law courts for verifiable disclosure to be heard in a streamlined list could be considered.

Arbitration

NLA supports the greatly expanded use of arbitration for small property matters along the lines of Legal Aid Queensland's arbitration model. LACs would be willing to introduce arbitration in other states and territories if appropriately resourced.

The potential expansion of LAC arbitration is addressed in further detail in the response to Question 27.

Question 23 How can parties who have experienced family violence or abuse be better supported at court?

Context

The IP records concerns expressed about the adversarial nature of court processes and its potential impact on parties who have experienced family violence or abuse.

Way forward

Please refer particularly to the response to each of Question 10, where concerns about the availability of legal aid and the cost of legal services are expressed, and to Question 15 where changes to provisions regarding family violence are discussed.

NLA considers that parties at court who have experienced family violence or abuse are best supported by legal representation and social support, and by pro-active case management.

To the extent that full legal representation is not available, NLA suggests that services like FASS and duty lawyer provide good legal support. NLA also made a submission to the Attorney-General's Department [Exposure Draft - Family Law Amendment \(Family Violence and Cross-examination of Parties\) Bill 2017](#) and consultation paper, with that draft Bill proposing bans be placed on the direct cross-examination of alleged/victims of family violence, and NLA making suggestions about the position of representation.

NLA has advocated for a range of measures for parties experiencing family violence to better support them at court. These include:

- clearly enshrine protection from family violence and the need for the family law system to be family violence and trauma informed into the system's objectives and guiding principles. Please see the response to Question 2;
- ensure that laws and procedures provide for the early identification and determination of family violence. Please see the response to Question 15;
- improved triage and case management. Please see the response to Questions 4, 11 and 20;
- expand FASS. Please see the response to Question 4;
- simplify forms and procedures. Please see the response to Question 11;
- Improve the safety of court facilities and safety processes, including the provision of secure children's facilities at courts. Please see the response to Questions 13;
- improve court scrutiny of consent orders for family violence/fairness/agency (see the response to Question 14);
- introduce a small claims property jurisdiction, improve processes for disclosure, and add family violence as a relevant criterion for property matters. Please see the response to Question 17; and
- ongoing training to ensure family violence competence. Please see the response to Questions 41 and 42.

NLA notes the work of the Council of Attorneys-General Family Violence Working Group in relation to family violence competency. The term of reference is focused on improving family violence competency for professionals working in the family law and family violence systems.

Question 24 Should legally-assisted family dispute resolution processes play a greater role in the resolution of disputes involving family violence or abuse?

Context

In NLA's view, legally assisted FDR could potentially play a much greater role in the resolution of matters involving family violence and abuse. Please see the response to Question 21.

LAC legally assisted FDR

Legally assisted FDR is core work for LACs.

All LACs conduct legally assisted FDR programs, which have been developed and refined over many years.

LACs conduct over 7,300 FDR conferences per year. LAC legally assisted DR programs enjoy high settlement rates in family law matters. The national average settlement rate in 2016-2017 was 79%, rates across the country ranged from 75% to 91%. These settlement rates are considered especially significant as they are achieved in family law matters often involving complex issues and high conflict.

Legally assisted FDR represents a legally informed, supported, timely and cost-effective alternative for many matters currently being dealt with in the court system, potentially reducing delays for parties and at the courts. For LAC legally assisted FDR to be available, one party is generally required to qualify for legal aid. All LACs have screening, intake, and referral processes to ensure triaging of matters to appropriate FDR and other services.

The LAC legally assisted FDR model increases access to FDR to a greater range of families by redressing imbalances of power.

The LAC model involves:

- screening for risk and intake processes conducted by appropriately trained staff;
- linkage/referral to social support services where appropriate;
- the use of accredited FDRPs;
- safety planning including 'shuttle' and remote conferencing where appropriate; and
- legal representation.

Legal representation of parties serves a number of important functions, as follows:

- managing parties' expectations, and reality testing, by providing advice about the law and likely outcomes;
- focussing parties on the future and the best interests of their children;
- early resolution and diversion of matters from the family law courts;
- redressing power imbalance, supporting vulnerable parties, and promoting fairness;
- reduction of the risk of breach of orders by ensuring that parties understand the agreement they are entering into;
- identification of related issues and appropriate referrals to support services;
- ensuring that agreements reached are reduced into writing and are enforceable; and
- contribution to the timeliness and efficiency of the justice system.

Notwithstanding a history of family violence, there are victims who express a desire to attempt FDR for a variety of reasons, including:

- to avoid the stress involved in court proceedings;

- to attempt to resolve matters without the lengthy timeframes usually involved in court processes, so providing earlier certainty;
- to have an opportunity to express to the other party in a safe environment, their concerns about the other party's behaviour and its impacts;
- to ensure the children's relationship with the other parent is appropriately maintained; and
- to minimise conflict with the other party.

Participating in FDR for victims of domestic violence can be empowering.

LACs are well placed and willing to play a significant role in any expansion of legally assisted FDR if appropriately resourced.

Question 25 How should the family law system address misuse of process as a form of abuse in family law matters?

Context

LACs commonly see the examples of misuse of process described in the IP¹⁰⁸ in practice, and the serious adverse effects that such behaviours have on victims.

The IP refers to "a number of suggestions for reform have been proposed in this area"¹⁰⁹ including:

- *the SPLA committee recommendation that the definition of family violence in the Act be amended to include abuse of process in the list of examples that come within the definition;*¹¹⁰
- *Strengthening penalties and costs orders for abuse of process;*¹¹¹
- *The SPLA Committee's recommendation that the recent draft of legislative amendments to protect vulnerable witnesses from direct cross-examination by self-representing litigants be introduced into Parliament as a matter of urgency; including the ability to dismiss proceedings if satisfied that they are an abuse of process;*¹¹²

¹⁰⁸ Australian Law Reform Commission, *Review of the Family Law System Issues Paper 48* [190].

¹⁰⁹ *Ibid* [191].

¹¹⁰ *Ibid*.

¹¹¹ *Ibid*.

¹¹² *Ibid* [193].

- *restricting appeals from interim decisions to cases dealing with questions of law or by requiring leave of the court;*¹¹³ and
- *FLC’s suggested trial of a counsel assisting model which was also intended as “this mechanism would limit the opportunities for cross-examination of vulnerable parties by self-representing litigants”*¹¹⁴

*And seeks input about the ways of addressing misuse of process.*¹¹⁵

Way forward

Please refer to the response to Question 15.

NLA considers that the following are appropriate measures to address the described concerns:

Amend non-exhaustive examples in the definition of family violence in the Act

NLA notes the suggestion from the SPLA report to amend the definition of family violence in the Act, to include abuse of process as one of the non-exhaustive examples.¹¹⁶

Introduce legislative protections for vulnerable witnesses and dismiss proceedings

Please refer to the NLA submission to the Attorney-General’s Department [*Exposure Draft - Family Law Amendment \(Family Violence and Other Measures\) Bill 2017*](#) and consultation paper.

Although family courts already have the power to dismiss frivolous or vexatious matters under section 118 of the Act, the threshold for a matter to be found frivolous or vexatious is currently high. Applications based on section 118 are rare in practice.

The Bill was drafted in recognition of the abusive behaviours outlined in the IP, and to put the court in a clear position to deal with the issue in circumstances where applications made are part of the dynamics of controlling and coercive behavior.

Whilst ‘abuse of process’ is a relatively broad concept, it is a term that may not be readily understood by non-lawyers. Consideration might be given to some explanation in the Act including by way of example.¹¹⁷

¹¹³ Australian Law Reform Commission, *Review of the Family Law System Issues Paper 48* [195].

¹¹⁴ *Ibid* [196].

¹¹⁵ *Ibid* [197].

¹¹⁶ *Ibid* [191].

¹¹⁷ For example, sections 17 and 18 of the *Magistrates Court Civil Proceedings Act 2004* (WA).

NLA supports the introduction of the new section 45A into the Act as proposed in the *Family Law Amendment (Family Violence and Other Measures) Bill 2017* which will give the court clearer powers to dismiss applications which clearly have no merit.¹¹⁸

Limitations on/leave for interim appeals

Please refer to the response to Question 21.

There would be benefit in commissioning research in this area before considering the merits of imposing further restrictions on the ability of parties to appeal interim decisions.

Restrictions/controls on ability to issue subpoenas

NLA supports rules which restrict the issue of subpoena if it appears that they are being used as a form of abuse, e.g. for an ulterior purpose such as causing psychological harm and/embarrassment or to obtain sensitive information not directly relevant to the issues in the case.

Question 26 In what ways could non-adjudicative dispute resolution processes, such as family dispute resolution and conciliation, be developed or expanded to better support families to resolve disputes in a timely and cost-effective way?

Context

The IP references LAC FDR processes and particularly the high settlement rates of LAC FDR. In 2016-17 national settlement rates for LAC legally assisted FDR was 79%; rates across the country ranged from 75% to 91%. Please see the response to Question 21 for more detail about LAC legally assisted FDR.

Way forward

NLA confirms support for the expansion of DR identified elsewhere in this submission, including:

- legally assisted FDR for parenting matters – please refer to the response to Questions 21 and 24;
- a requirement for legally assisted DR for property matters – please refer to the response to Questions 17 and 22; and

¹¹⁸ Also referred to under Judicial Case Management heading in the response to Question 10.

- online dispute resolution – please refer to the response to Question 28; and

NLA supports DR processes as being cost-effective and a timely means of resolving family law matters.

NLA also supports appropriate referral for DR at all stages of family law matters, i.e. both before and at various stages after legal proceedings have commenced.

Question 27 Is there scope to increase the use of arbitration in family disputes? How could this be done?

Context

NLA supports increasing the use of arbitration for family law property matters. NLA does not support the expansion of arbitration to parenting matters.

Legal Aid Queensland (LAQ) currently operates a successful model of arbitration for property matters where:

- one of the parties meets LAC means tests;
- both parties agree to property arbitration;
- the value of the net property pool is between \$20,000 and \$400,000; and
- the parties have agreed on arrangements for the children.

Under the program, both parties receive legal advice from a lawyer and assistance with completing the relevant documents detailing their assets, financial situation and other relevant matters.

The arbitration is conducted ‘on the papers’ within a period of 28 days of the arbitrator receiving the relevant documents.

Further information about the LAQ arbitration program can be accessed here:

<http://www.legalaid.qld.gov.au/files/assets/public/publications/relationships-and-children/fs-dividing-property-divorce-july2016.pdf>

Way forward

The LAQ arbitration program provides an existing, evidence based model.

The increased use of arbitration could be promoted by greater referral from the family law courts particularly where there is a small asset pool and/or minor justiciable issues, such as valuation of a relatively low value asset.

Consideration could be given to removing legislative barriers, i.e. the consent requirement in section 13E of the Act. NLA supports the inclusion of full appeal rights to remove the current disincentive that exists in registered awards being reviewable under 13J on a question of law only.

LACs would be willing to develop arbitration programs based on the LAQ model if appropriately resourced for the purpose.

Question 28 Should online dispute resolution processes play a greater role in helping people to resolve family law matters in Australia? If so, how can these processes be best supported, and what safeguards should be incorporated into their development?

NLA supports investigating the introduction of an online dispute resolution system (ODRS) for separating couples.

The Legal Services Commission of South Australia (LSCSA) engaged Colmar Brunton Social Research (CBSR)¹¹⁹ to conduct independent market research into whether there is a need for online dispute resolution (ODR) in family law matters and, if so, what form such a system should take.

The research found that there is a broad appetite to use an online system in family matters.¹²⁰ Income did not appear to be a factor influencing a person's likelihood to use the system. It proved there is a clear need for ODR to play a greater role in dispute resolution within the family law arena; however a 'one size fits all' approach will not be successful.

The research identified that people sought a '*one stop shop for information they can trust to empower and enable them to take action*'.¹²¹ The research also identified that people found it challenging to obtain information that was relevant and felt that they had little control over the process.

*"I remember looking on the internet to find information and I found that a bit of a nightmare and going 'what's relevant to me'... trying to sift through it all and to work out, well this is what I want to do, how do I go about doing it? So I think that was a challenge. Tell me how I go about this, make it clear and simple. That's where you start going here – there on the computer."*¹²²

¹¹⁹ Commonwealth Government has provided \$341,000 in seed funding to facilitate National Legal Aid to investigate the use of online dispute resolution technology in family law matters

¹²⁰ Colmar Brunton Social Research Online Dispute Resolution System Research November 2017 para 1.2.

¹²¹ Colmar Brunton Social Research Online Dispute Resolution System Research November 2017 para 1.3.

¹²² Colmar Brunton Social Research Online Dispute Resolution System Research November 2017 para 5.1.2, response from Female, Medium Income, Regional South Australia.

*"I suppose the other thing is, I spent a lot of the process in the dark... So I would often think what's going on? Is something happening, is nothing happening, why is it taking so long, it's so slow. So I did actually feel like a bit of a mushroom at times. And that was tough."*¹²³

ODR has the potential to address these challenges by informing, empowering and guiding people at all stages of the family dispute resolution process.

Based on the research undertaken by CBSR, people identified a critical need for:

- Up to date, accurate and legally binding information in a user-friendly format with limited jargon;
- Intuitive and user-friendly tool that enables people to work through the steps at their own pace and in an order that works for them. The ability to move forward and back at will is fundamental; and
- Options for further support when the system cannot meet the needs of the user, which would be necessary to complete the 'one stop shop'.

What is online dispute resolution?

ODR may be defined as a digital space where parties can convene to work out an informed resolution to their dispute at their convenience using an automated system.

Technology, such as an ODRS, can empower people to identify their issues, explore needs and consider their options. Furthermore, it allows them to do so from the privacy of their own home, at any time and at their own pace.

*"It would have empowered me with information and laws – you don't know what your rights are. (In terms of Domestic Violence) Empower them with information; we are stronger if we know our rights."*¹²⁴

ODR would allow separating couples to engage in an informed online facilitation of their dispute to systematically work through any areas of dispute.

Appropriate red flags will need to be in place to ensure users with particular needs can be accommodated within the technology or appropriately referred to other services.

NLA envisages that ODR should not replace existing family law services or the provision of legal aid, but would complement existing services and provide expanded reach, allowing courts and legal assistance providers to focus on more complex clients and intractable matters. ODR would potentially reduce the number of disputes requiring resolution

¹²³ Colmar Brunton Social Research Online Dispute Resolution System Research November 2017 para 5.1.4, response from Female, Medium Income, Metropolitan South Australia.

¹²⁴ Colmar Brunton Social Research Online Dispute Resolution System Research November 2017 para 4.1.1, response from Female, Medium Income, Regional South Australia.

through family law courts or face to face FDR as well as potentially narrowing areas of non-agreement.

The ODR tool for family law sits at the very start of the resolution process, prior to traditional mediation, lawyer to lawyer negotiation, FDR or court filing. ODR contemplates resolving matters without ever involving the family courts. It does not seek to improve or evolve the existing court system. It is distinctive from the new online courts and tribunals which can be found in North America and Europe.¹²⁵

The current landscape

The 'DIY' dispute resolution market has seen significant growth in ODR for family matters: Adieu,¹²⁶ Modron,¹²⁷ Relate¹²⁸ and Justice42¹²⁹ (formerly Rechtwijzer) are well-known examples. However, despite all offering pertinent information at the relevant point in the interactive, attractive, intake form and with some offering 'intelligent technology' and 'separation and divorce robots' they all funnel clients towards human assisted resolution be it via mediation, collaborative law or solicitors online.

There are a number of sophisticated programs available to law firms, for purchase, facilitating the collection of raw client data sufficient for a first appointment with a family law professional and offering the client information regarding their exact circumstances.¹³⁰ In effect the initial client intake interview has been reduced to an interactive form completed by the client.

The current 'DIY' market is limited by fees and business hours only availability.

How can we best support?

In the 21st century people are either resolving matters between themselves or cannot/will not pay for legal representation if the matter proceeds through court. The hunger for a 24/7, client controlled, affordable, completely online separation negotiation service is evinced by a combination of the 4.2% increase in applications for consent orders experienced by the family court (they now represent 68% of applications made 2016-17)¹³¹ and the fact that in 41% of trials heard by the family court either neither party or only one party had legal representation in 2016-17.¹³²

¹²⁵ See *Attachment E* to this submission 'The current ODR courts and tribunals landscape'.

¹²⁶ <https://www.adieu.ai/how-to-separate-and-divorce-amicably-in-australia/>

¹²⁷ <https://www.modron.com/>

¹²⁸ <https://www.relate.org.uk/>

¹²⁹ <http://www.si2fund.com/portfolio/justice42/>

¹³⁰ <https://www.settify.com.au/>

¹³¹ Family Court of Australia Annual Report 2016/17

<http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/annual-reports/2016-17/2016-17-annual-report-part3>

¹³² Ibid.

The research undertaken by CBSR identified that it is critical to inform, empower and guide people at all stages of the family dispute resolution process. True ODR should commence with a guided interface which engages the participant, who at this stage may or may not have made the final decision to end the relationship.

“clients have a preference to access information remotely and digitally, yet still enjoy a personalised service experience”¹³³

The NLA ODRS project will facilitate separating couples to complete their property, superannuation and parenting negotiations completely online at a time convenient to them, 24/7 and in an asynchronous manner.

The proposed interface will allow users to answer their queries quickly, providing information in a way that is easy to understand (no large slabs of text or jargon, and written in simple language). This ensures congeniality/human cognisance between computer and human to support the resource as a trusted source of accurate information.

Family law clients are often, anecdotally, frustrated by the lack of a formula for asset and liability division. How do they know their agreed division is fair and equitable if there is no formula or table of how others in their exact situation divided their assets?

The NLA ODRS will help people identify their assets and liabilities and assist them to systematically work through areas of agreement and disagreement. The system will use technology (such as artificial intelligence or machine learning) to analyse risks and opportunities before recommending a course of action and could analyse the data provided and put forward opportunities for agreement, based on previous family law cases. This would offer some certainty that the settlement negotiated between parties is fair and equitable based on ‘what others in the same situation did’.

True ODR should also seamlessly facilitate the filing of completed agreements in the form of consent orders with the family court portal.

Reassuring practising lawyers and mediators that the ODR mechanism will not be in direct competition with them, but rather provide an opportunity to reach clients who may not have availed themselves of their professional services otherwise via the opportunity at each stage of the ODR mechanisms to consult with a professional, will be key.

ODR should provide an opportunity for clients to reach out to lawyers and mediators if they feel the need for professional services at any stage. It is not envisaged the NLA ODR mechanism will be able to issue a mediation certificate;¹³⁴ that work will remain the dominion of registered family dispute resolution practitioners who will be recommended if the ODRS fails to resolve the dispute or clients wish to access their skills immediately.

¹³³ <https://www.ag.gov.au/FamiliesAndMarriage/Families/FamilyRelationshipServices/Documents/AGD-Family-Law-Services-Final-Report.pdf> [27].

¹³⁴ S 60I Family Law Act 1975 (Cth).
http://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/cth/consol_act/fla1975114/s60i.html

Ensuring potential clients are aware of the service, without actively promoting separation, will be a delicate and sensitive marketing task. Rechtwijzer states that without major marketing efforts they easily reached a market share of 2-3% of the separation market with spikes of 5% after media coverage, but admit a lack of active marketing may have played a part in the ultimate failure of the system.¹³⁵

No matter how the family law ODR mechanism is built, it must be trusted: “Justice needs to be timely, effective and affordable with exemplary standards of clarity, fairness and accessibility”.¹³⁶

What safeguards

- Authentication that the person taking part in ODRS is exactly who they say they are, is important. Programs such as InstantID¹³⁷ or Digital Citizen Identity¹³⁸ are available to ensure there is no imposter activity and electronic signatures such as DocuSign¹³⁹ will need to be debated.
- Identification of red flags to indicate instances of domestic violence, power imbalances or simply that the person is not in the right frame of mind to negotiate at this point. In these cases appropriate referrals and support should be provided.
- Children. While going through a separation, the negotiation between the parents may benefit from being informed of how their children are interpreting the situation. Children can benefit from digital resources and access to appropriate information for children would be beneficial. There is anecdotal evidence that parents stay together longer if they themselves are children of divorced parents. They wish to spare their own children the ‘shrapnel’ they felt as young children of divorced parents.¹⁴⁰ It is possible to show a series of pictures or asked to read statements, dependent on age, and ask for a response. Analysis of that text can show the child’s true emotions may enable more successful negotiations between parents whilst simultaneously giving the child an appropriate medium to have a voice in the proceedings.
- CALD, disabled and disadvantaged clients will need to be considered via read speaker, online translation, information at grade 6 or lower reading level, and ensuring all web pages are WCAG 2.0 compliant.¹⁴¹
- Other important safeguards to be built into the ODR include:

¹³⁵ Roger Smith, ‘Digital Delivery of Legal Services to People on Low Incomes’ (2017) *The Legal Education Foundation* 21 <http://www.thelegaleducationfoundation.org/wp-content/uploads/2018/01/Digital-Technology-Winter-2017.pdf>

¹³⁶ Ibid 6.

¹³⁷ <https://risk.lexisnexis.com/products/instantid>

¹³⁸ <https://www.dta.gov.au/blog/digital-identity-early-days-in-the-discovery-process/>

¹³⁹ <https://www.docusign.com.au/#>

¹⁴⁰ The Weekend Australian April 21-22, 2018 Inquirer page 17 ‘More wedded to Staying Together’ Nicola Berkovic.

¹⁴¹ <https://www.australia.gov.au/accessibility>

- assist parties to identify family violence, abuse, coercive control and other risk issues including guilt which result in power imbalances;
- archiving and confidentiality of information and negotiations to avoid breaches of legislation;¹⁴² and
- security of the client's device given that most will access the ODR via a mobile phone or tablet.¹⁴³

It is currently contemplated that all participants in the NLA ODRS will have the opportunity to have their agreement reviewed electronically by a lawyer. The possibility of a small fee for such a review requires further client-based research to ensure this does not bar potential clients from using the service given the filing fee for consent orders is currently \$160.¹⁴⁴

Adequate funding will be a key element to success. Relate (UK) has now paused its ODR platform which was based on Rechtwijzer, citing, "family dispute resolution just cannot be done properly on the cheap, too quickly or without considerable thought".¹⁴⁵

Additional comments

True ODR should be carefully defined as a digital space where appropriate parties can convene to work out a resolution to their dispute at their convenience, completely online, available 24/7, and if necessary, in an asynchronous fashion.

The ability to move forward and back through the ODR mechanism is key as is the trustworthiness and accuracy of the information provided.

Knowledge of what others in the same situation agreed is attractive to clients and will increase compliance.

A successful ODR mechanism is well known, trusted, affordable and avoids the misconception that it is damaging to professionals already at work in the family law field.

The ODR mechanism should be viewed as an integral part of pre-court activity and not sit separate to the family court.

Adequate funding is fundamental to success; the potential to harness digital developments is exciting but will fail if compromised and the program is too slow, difficult to navigate or not comprehensive.

¹⁴² s 121 *Family Law Act 1975* (Cth); s 31A *Legal Services Commission SA Act 1997*, Notifiable Data Breaches Scheme, Part 111 C of the *Privacy Act 1988*.

¹⁴³ Direct clients to <https://www.esafety.gov.au/>

¹⁴⁴ <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/forms-and-fees/fees-and-costs/fees>

¹⁴⁵ Roger Smith, 'Digital Delivery of Legal Services to People on Low Incomes' (2017) *The Legal Education Foundation* 28 <http://www.thelegaleducationfoundation.org/wp-content/uploads/2018/01/Digital-Technology-Winter-2017.pdf>

Children, as well as their parents, need to have the opportunity to not only be heard but feel heard in an appropriate manner.

Any ODR tool needs to be accessible to culturally and linguistically diverse, disabled and disadvantaged clients.

The opportunity to have agreements reviewed electronically by a lawyer with no incentive to continue the matter, for a nominal fee, should be available.

The move towards greater use of ODR is clearly in line with the community's expectations of a modern justice system and enhances access to justice.

*"I could be filling it out, while the kids are watching TV. It would give me an understanding of next steps. i.e. if I needed to get help, it would be right there. Assurance that I was doing everything right, I wasn't missing anything... It would help take away some of the emotion and put it back to facts."*¹⁴⁶

Question 29 Is there scope for problem solving decision-making processes to be developed within the family law system to help manage risk to children in families with complex needs? How could this be done?

Context

"The Terms of Reference ask the ALRC to consider whether the adversarial court system offers the best way to support the safety of families and resolve matters in the best interests of children", and "the need for reforms to address the issues facing families with complex needs".¹⁴⁷

The IP also queries whether a more iterative, problem-solving approach would help manage risk to children in families with complex needs, by addressing "behavioural problems and risk issues that underlie the dispute, with a view to achieving a more sustainable resolution of the conflict."¹⁴⁸

The IP asks for input regarding the opportunities for developing problem solving decision-making processes,¹⁴⁹ noting the "two alternative approaches"¹⁵⁰ suggested by stakeholders being:

¹⁴⁶ Colmar Brunton Social Research Online Dispute Resolution System Research November 2017 para 4.2.3, response from Female, Medium Income, Metropolitan South Australia

¹⁴⁷ Australian Law Reform Commission, *Review of the Family Law System Issues Paper 48* [211].

¹⁴⁸ Ibid [214].

¹⁴⁹ Ibid [221].

- **A hybrid model**, in which the court transfers the role of monitoring the parties' engagement with services to a registrar of the court or to a community-based family relationships agency.
- **An administrative model**, such as a non-judicial tribunal. A version of this approach is embodied in the recently developed Parenting Management Hearing Panel, a consent-based inquisitorial style process to support self-represented parties that will be piloted in Parramatta and one other location.¹⁵¹

Way forward

NLA believes that there are elements of the adversarial system which are essential to fairness and good process. These include "the right to hear...allegations and have those allegations tested."¹⁵²

What is critical is that "lawyers and the judiciary ought to be proactive in employing measures to protect self-representing parties from the trauma of cross-examining or being cross-examined, whilst also protecting the fidelity of the trial process and the evidence it produces."¹⁵³

NLA does not consider that retaining these fundamental elements is incompatible with a problem-solving, therapeutic approach to assist families with complex needs.

In NLA's view, the family law system has already commenced along this pathway, through a number of initiatives, including the provision of social support workers through FASS services. NLA would support greater referral to and use of specialist social support to manage and address non-legal support issues in a collaborative, problem-solving manner including through the expansion of FASS.

The benefits of the lawyer and social support model are also experienced by LACs who have social support workers on staff, e.g. the Northern Territory Legal Aid Commission has a Family Support Caseworker embedded in the in-house family law practice who is referred clients by the family lawyers for their non-legal social and emotional support needs (e.g. housing, financial support, counselling) and includes risk assessment and safety planning; and LAQ is funded to provide court assistance workers in the Brisbane domestic and family violence court, and has employed a social worker in its Violence Prevention and Women's Advocacy team for many years to assist with the social support needs of client's with complex legal and social issues.

¹⁵⁰ Australian Law Reform Commission, *Review of the Family Law System Issues Paper 48* [220].

¹⁵¹ Ibid [220].

¹⁵² J Brasch QC, *Domestic and family violence and self-represented litigants: Can we address the power imbalances?* (Paper delivered August 2016) 4.

¹⁵³ Ibid 5.

NLA also refers to the ‘parenting coordinator’ model referred to in the response to Question 4.

NLA supports the piloting, appropriate resourcing, and evaluation of any new models in relation to their efficacy and cost-effectiveness.

Question 30 Should family inclusive decision-making processes be incorporated into the family law system? How could this be done?

Context

NLA notes the consideration at paragraph 222 of the IP, of family inclusive decision-making processes in the family law system, based on submissions from Aboriginal and Torres Strait Islander organisations to the Family Law Council’s 2016 Complex Needs Final Report:

The Australian Government implement a process, including through amendments to the Family Law Act 1975, to support the convening of family group conferences for Aboriginal and Torres Strait Islander families in appropriate family law matters to assist informed decision-making in the best interests of the child, to allow them to be cared for within their own families and communities wherever possible, based on the Aboriginal and Torres Strait Islander Child Placement Principles.¹⁵⁴

The Australian Government implement a process, including through amendments to the Family Law Act 1975, to support the convening of family group conferences for families from culturally and linguistically diverse backgrounds in appropriate family law matters to assist informed decision-making in the best interests of the child, to allow children to be cared for within their own families and communities wherever possible.¹⁵⁵

Way forward

NLA is generally supportive of pilots of family inclusive decision making processes on the basis that they have the support of respective communities, and are appropriately funded and evaluated.

Pilots should be underpinned by community agreed strategies such as determinants to assess suitability for inclusion in processes, confidentiality boundaries, training of professionals, and guidelines.

Please see the response to Questions 5 and 6.

¹⁵⁴ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016) Rec 16.

¹⁵⁵ Ibid Rec 17.

Integration and collaboration

Question 31 How can integrated services approaches be better used to assist client families with complex needs? How can these approaches be better supported?

Context

The IP refers to the 2012 *Legal Australia-Wide Survey: Legal Need in Australia* report, which confirmed that “individuals with family related legal needs often have a co-occurring range of non-legal support needs.”¹⁵⁶

The IP also refers to “the fragmented character of the wider justice system”¹⁵⁷ and the safety and well-being issues including the potential for:

- *the risk of harm to children or parents to be underestimated or ineffectively responded to, with negative impacts on their safety and wellbeing;*
- *perpetrators of family violence to be able to exploit this jurisdictional fragmentation because ‘the systems are not working as ‘one whole entity’;*
- *a child to ‘fall through the cracks’ between the different systems and services and be left unprotected;*
- *re-traumatisation of a person who is required to recount their experiences of family violence or abuse to multiple service providers; and*
- *a client disengaging from services due to the frustrating and time-consuming process of being referred to multiple services, which may leave people with little faith in the ability of available services to assist or protect them.*¹⁵⁸

The IP also notes that:

*During initial consultations for this Inquiry, some stakeholders suggested other models of integrated services to address safety concerns for children and parents in the family law system, including an expansion of existing health justice partnerships to include greater involvement of family law services.*¹⁵⁹

One suggestion was for the development of Children’s Advocacy Centres (CACs), a model that currently operates in the US” and that “The SPLA Committee in its recent report, recommended that the Attorney-General—through COAG—consider the adoption of

¹⁵⁶ Australian Law Reform Commission, *Review of the Family Law System Issues Paper 48* [228].

¹⁵⁷ *Ibid* [229].

¹⁵⁸ *Ibid* [230].

¹⁵⁹ *Ibid* [236].

*such multidisciplinary approaches to assist the family courts to determine issues of risk to children.*¹⁶⁰

*The ALRC seeks comment about the possibilities for expanding existing integrated services models and/or developing further integrated services programs to support client families with multiple and complex needs. The ALRC is also interested in comment on how these models might be better supported to function effectively.*¹⁶¹

LAC services

As described in the introduction and the response to Question 3, LACs operate across Commonwealth and state jurisdictions and in the family, domestic violence, child protection and criminal law courts.

LACs endeavour to provide and arrange holistic service delivery for our client base including men, women and children, and to be a 'one-stop shop' for as many people as possible in relation to their legal needs, thereby minimising the need for legal referral. LACs also refer clients to non-legal supports, warmly wherever possible. LACs increasingly employ social support/science staff with the aim of holistic service delivery.

ICLs

NLA observes that funding for LACs, and aligned with this payments to panel practitioners on ICL panels administered by LACs, has remained fairly static for many years. It is well documented that over this same period the families using the family court system have become a more complex cohort. The complexity of these families has added significantly to the workload of ICLs.

In the course of litigation an ICL will be expected to perform a range of tasks (or indeed ordered by the court to do so) including:

- working closely with a range of therapeutic services including arranging therapy, counselling, contact services, parenting after separation programs, behaviour change programs, mediation;
- managing a range of parenting issues that arise between parties and require ICL intervention (particularly in times of significant court delays), i.e. variations to changeover locations, children's refusal to attend contact, proposals for travel, schooling and health disputes;
- implementing matters arising under court orders including requesting random drug testing and analysing results, arranging expert reports, providing orders to schools and other agencies;

¹⁶⁰ Australian Law Reform Commission, *Review of the Family Law System Issues Paper 48* [237].

¹⁶¹ *Ibid* [239].

- working with child protection agencies over involvement with family, Notices of Risk, investigations, requests for intervention etc.;
- issuing requests for information and subpoenas to obtain as much information about the child from as many relevant sources as possible;
- court ordered tasks such as preparing chronologies, proposed minutes of orders, trial timetables, producing tender and exhibit bundles;
- arranging and attending roundtable conferences and mediations to broker settlements;
- working with the child including arranging regular meetings and communicating to ensure the child's participation is facilitated; and
- working with the child and family post the making of final orders which provide for the ICL's discharge within a certain time frame.

Some of these activities can take hours of time that is often not allowed for in LAC fee scales. As outlined in the response to Question 35, LACs have invested significant time and funding across a range of activities and projects aimed at ensuring that ICLs understand the expectations of the role and to ensure they are properly equipped to meet these obligations. Realistically however, as the expectations placed on the role by so many different players have increased, (i.e. children, litigants, judges, other legal practitioners, family support workers, family consultants, researchers), ICLs have become increasingly 'stretched' and it is perhaps not surprising that at times this has led to community disappointment with the manner in which the duties are discharged.

With this in mind, NLA supports new thinking around how a range of these duties can be discharged more effectively and efficiently. NLA maintains that the ICL role is a legal one and it will continue to be required to perform a range of legal tasks including, information gathering via legal processes such as subpoenas; obtaining expert reports and ensuring admissibility of all relevant information about the child; cross examination; meeting with children to explain the legal process; trial management; mediation/conciliation/honest broker role. However we also take the view that the totality of tasks now expected to be undertaken by an ICL may be more effectively undertaken if undertaken in a multi-disciplinary environment where, for example, ICLs could work in partnership with a social scientist.

Way forward

NLA supports an integrated, holistic approach to support families with complex needs.

Wherever appropriate, service delivery models should include both legal and social support workers working in collaboration, as occurs in FASS.

FASS

Please see the response to Question 4.

FASS has been successful in identifying legal and social support issues and warmly linking clients to supporting social services.

As noted in the IP:

“The FASS pilot is funded until 2019, at which time an evaluation process will assist the Australian Government to make future service delivery decisions. The SPLA Committee has recommended that, subject to the pilot receiving a positive evaluation, the FASS program be expanded to a greater number of locations, including in rural and regional Australia. The SPLA Committee also recommended the FASS program be extended to include a child safety service attached to the family courts, and that it be broadened to include collaboration and referral pathways to other specialist support services for families with complex needs, including Aboriginal and Torres Strait Islander specific services and services for culturally and linguistically diverse families and parents or children with disability.”¹⁶²

Subject to funding, NLA confirms its support for the expansion of FASS.

LACs are open to the possibility of enhancing the reach and capacity of FASS by the inclusion of other specialist workers to address specific needs. This includes the addition of specialist child safety workers as suggested, although LACs are presently of the view that such workers would be better integrated with the ICL program.

Case study 8 – benefits of support workers in FASS

Lucy

An older woman, Lucy, approached FASS after leaving a marriage of 30 years.

Some gentle questioning by the support worker revealed that she had endured quite severe physical and mental abuse for the whole of the marriage but had never disclosed this to anyone. Lucy had recently engaged a lawyer to act for her in a property settlement but had not told the solicitor about the abuse because she thought the solicitor didn't have time and it was not relevant. The FASS social support worker for women encouraged Lucy to speak with the lawyer about the abuse as it was definitely relevant and her lawyer would want to hear about it.

The support worker referred Lucy to appropriate counselling and also to the Sydney WDVCS for help to get an ADVO as she had received a death threat via text from her ex - partner that morning.

With Lucy's agreement, the support worker then went and spoke with Lucy's lawyer and told them about the history of family violence.

Given the severe family violence, prior to her court date, the support worker called Lucy and assisted her to call the National Enquiry Centre to arrange a safety plan. At court the other party was very angry and waiting outside the courtroom to harass the client when she came

¹⁶² Australian Law Reform Commission, *Review of the Family Law System Issues Paper 48* [235].

out. The support worker was able to ask the security guard to make extra arrangements to take the client out of the building via another exit so she did not have to pass the other party and risk an altercation with him.

Case study 9 – benefits of LAC embedded social workers

Zora

Zora was in a violent relationship with Jimmy. Zora is Macedonian. Jimmy's extended family were also violent to Zora. The violence escalated and Zora tried to leave the relationship. Upon discovering Zora's intentions, Jimmy and his cousin assaulted her; and locked her out of their home without any belongings. Their 3 young children were inside. Police attends and Jimmy and his cousin are charged with assault. Police apply for ADVOs to protect Zora.

Jimmy makes an urgent application in the family law court to recover Zora's children. The Domestic Violence Unit (DVU) lawyer appears at the Hearing. The children are successfully recovered into Zora's care. DVU continue to assist Zora with parenting and property proceedings.

The DVU social worker supports Zora through her legal proceedings. The social worker applies for housing and victims support for Zora, including counselling; as well as urgent financial assistance to arrange new furniture and whitegoods for herself and the children. In consultation with Zora, the social worker undertakes a risk assessment and puts in place a safety plan for Zora and the children. The social worker provides ongoing support to Zora throughout the family law and ADVO proceedings, helping her to prepare for court, support at court and also with de-briefing.

ICLs - multi-disciplinary approach

Please see our comments under the heading 'Context' above.

Some of the identified benefits of using a multi-disciplinary service model have been identified as follows:

- it helps develop a shared ownership of a client's case and provides a more comprehensive service to clients;
- it ensures continuity of representation through to the final case resolution;
- it helps increase the quality and amount of out-of-court time spent on cases because there are people available to take responsibility;
- there is enhanced accountability for children across the team; and

- it is a more efficient and effective means for delivering legal services to children.¹⁶³

Drawing on multi-disciplinary approaches as outlined in the case studies above and international models adopted by child representatives in international jurisdictions, NLA supports the enhancement of the ICL model through the greater availability of social science professionals to work with ICLs to improve children's participation in the family law system, and the assessment of the child's best interests. Social science professionals would work with ICLs throughout the court process, rather than providing a 'snapshot in time' assessment, which is the basis of most family reports produced in family law matters. This is addressed in greater detail in the response to the Questions under children's experiences and perspectives.

Child advocacy centres

NLA does not consider that new standalone entities are required to achieve a multi-disciplinary approach. Rather current processes and services, such as for ICLs, family consultants and report writers and FASS could be developed and enhanced to not only assist with issues of risk to children, but also promote children's participation in the process and to improve the quality of evidence that courts have to consider when making orders about parenting arrangements.

Question 32 What changes should be made to reduce the need for families to engage with more than one court to address safety concerns for children?

Context

The IP records that "data provided to the Family Law Council suggested that thousands of families each year receive legal assistance for multiple court proceedings."¹⁶⁴

The IP notes the impact of:

- *difficulties experienced by families in negotiating the different legal frameworks, terminology and procedural rules across the different jurisdictions;*
- *the need for parents and children to re-tell their story and re-litigate the question of risk in different forums;*

¹⁶³ K Beckhouse, *To investigate legal representation schemes for children in the US, Canada and the UK - administration, delivery and innovation* (2015) Winston Churchill Memorial Trust of Australia https://www.churchilltrust.com.au/media/fellows/Beckhouse_Kylie_2014_Legal_representation_schemes_for_children.pdf p.66

¹⁶⁴ Australian Law Reform Commission, *Review of the Family Law System Issues Paper 48* [241].

- *the limited capacity for federal judicial officers to address a family's multiple legal needs by exercising the protective jurisdictions of state and territory courts as a result of the High Court's decision in Re Wakim; and*
- *barriers inhibiting access to the family courts by family members who are encouraged to seek family law orders by a state or territory child protection department, including barriers associated with the relative cost, pace and formality of family law proceedings by comparison with those of state courts, barriers that can be particularly acute for Aboriginal and Torres Strait Islander families and grandparent carers.*¹⁶⁵

The IP also notes that:

*However, in light of the significant constitutional barriers affecting the ability of federal courts to exercise the powers of state and territory courts, the Family Law Council suggested that the best opportunity for realising a 'one court' model is to support state and territory courts of summary jurisdiction to exercise their family law powers where parties with family law needs are already before the court. The Victorian Royal Commission into Family Violence made a similar recommendation in relation to Victorian magistrates. These recommendations are currently being progressed by the Council of Attorneys-General Family Violence Working Group.*¹⁶⁶

In April 2018, the Senate Standing Committee on Legal and Constitutional Affairs recommended that the *Family Law Amendment (Family Violence and Other Measures) Bill 2017* should be passed.¹⁶⁷

It is understood that the Bill will be introduced shortly and that the increased exercise of family law jurisdiction under the Bill will be piloted in some jurisdictions, and that:

*...the pilots would gather data on the potential resourcing impacts and system needs of increased jurisdiction, over a 12-18 month period. This will inform the implementation of the Bill in all states and territories. Jurisdictions' resourcing and training needs to support the pilots will be determined as part of the negotiations.*¹⁶⁸

NLA notes that the barriers referred to in the IP do not exist in Western Australia because the Family Court of Western Australia (FCWA) is a State Court. The FCWA is beginning to deal with child protection and family violence restraining order matters and the recent *Review of the Children and Community Services Act 2004* has recommended that the child protection jurisdiction become a specialist division of the FCWA.¹⁶⁹

¹⁶⁵ Australian Law Reform Commission, *Review of the Family Law System Issues Paper 48* [242].

¹⁶⁶ Ibid [244].

¹⁶⁷ Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Report on the Family Law Amendment (Family Violence and Other Measures) Bill 2017* Rec 1.

¹⁶⁸ Ibid Rec 7.

¹⁶⁹ Report on the Review of the Children and Community Services Act 2004 (tabled in the WA Parliament on 28 November 2017) Recs 27 to 34

Way forward

Appropriately resourced courts

NLA supports appropriately resourced courts responding to child protection and family violence concerns being able to make parenting orders as appropriate.

For further detail about NLA's views, please see our submissions to:

- Senate Standing Committee on Legal and Constitutional Affairs Inquiry [Family Law Amendment \(Family Violence and Other Measures\) Bill 2017](#) (Feb 2018); and
- Attorney-General's Department [Exposure Draft - Family Law Amendment \(Family Violence and Other Measures\) Bill 2017](#) and consultation paper.

Technology

NLA notes the suggestion in the IP that developing digital hearing processes would reduce the need for families to physically attend court hearings in different locations, and supports the development of such processes for use wherever appropriate, noting that there will be associated resourcing issues. Please refer to the response to Question 28 about ODR.

Co-located child protection workers

NLA is supportive of the co-location of child protection workers in family courts, again noting related resourcing concerns.

Question 33 How can collaboration and information sharing between the family courts and state and territory child protection and family violence systems be improved?

Context

NLA supports collaboration and information sharing as fundamental principles of good systems design. NLA supports the recommendations of the FLC to enhance collaboration and information sharing, as reflected in the IP.¹⁷⁰

In LAC experience, there are a number of things required:

- legislative underpinnings that allow or facilitate information sharing;

¹⁷⁰ Australian Law Reform Commission, *Review of the Family Law System Issues Paper 48* [249].

- commitment to the goals at a high level;
- memorandums of understanding and other appropriate inter-agency agreements;
- good inter-agency relationships;
- clear agreement about what information will be helpful and shared;
- clear, simple, practical processes for achieving information sharing;
- training and awareness of all professionals; and
- professionals across all three systems.

Information sharing

There is a need for harmony around when and how information sharing between systems is allowed, particularly given restrictions relating to identification of parties and children found in relevant Commonwealth and State and Territory legislation.

NLA notes the Council of Attorneys-General Family Violence Working Group terms of reference which include information sharing. NLA also notes the Report of Professor Richard Chisholm *The Sharing of Experts' Reports between the Child protection System and the Family Law System*.¹⁷¹

In Western Australia there are Practice Directions in place in both the Family Court of WA and the Children's Court of WA in relation to the use of court documents filed in proceedings in each Court in the other jurisdiction.¹⁷² In other states and territories Rules allow for courts of one jurisdiction to request documents from courts in the other jurisdiction be provided to it.

The 'Family Violence Portal' trialled in Western Australia is a technological portal to access information from police, child protection and corrections databases to facilitate information sharing, risk assessment and case management matters and may be instructive.

Categories of information to be shared should be developed carefully in consultation with key stakeholders to ensure that information provided:

- is relevant, accurate, tested and useful;
- in a format that is readily useable and effective for decision makers;
- is not overwhelming by reason of volume and extraneous information;

¹⁷¹ Prepared for the Attorney General's Department March 2014.

¹⁷² Practice Direction 1 of 2015 of the FCWA and Practice Direction 1 of 2015 of the Children's Court of WA.

- is limited to documents that have already been prepared to minimise the workload for the agency providing the information wherever possible;¹⁷³ and
- is admissible.¹⁷⁴

Co-location of staff

NLA supports the co-location of child protection staff as presently occurs in Victoria and Western Australia, as referred to in the IP,¹⁷⁵ as a strategy that models and supports collaboration and information exchange.

In Western Australia the role of the Department of Communities staff member is to facilitate information sharing in accordance with the MOU between the FCWA, the Department and Legal Aid WA,¹⁷⁶ coordinate the response of that Authority to requests for information from the FCWA, and where necessary provide urgent oral reports.

The experience of co-location has been transformative. It has enabled improved sharing of information, and a better understanding of perspective and roles which addresses some of the potential barriers to collaboration occurring.

Cross-jurisdictional/interdisciplinary training

Trust and constructive professional relationships which support good collaboration and information sharing are enhanced by regular cross-jurisdictional and interdisciplinary training. This interdisciplinary training models the collaboration sought in practice and provides both formal and informal opportunities for the development and improvement of practices and processes.

Structured key stakeholder groups with regular meetings

Information sharing and collaboration are further supported by convening appropriate user and stakeholder groups at both a policy and operational level to maintain, review and improve processes and provide a mechanism for working through any issues.

The suggestion for an over-arching governance body is also noted.

¹⁷³ For example see Practice Direction 1 of 2014 of the FCWA in relation to information to be obtained from the Department of Communities and associated Information Note Documents sought from the Department for Child Protection and Family Support (now Department of Communities (17 July 2014).

¹⁷⁴ See FCWA Practice Direction No 2 of 2011 Subpoenas to Service Providers (FDR, Family counsellors, employees of Anglicare, Centrecare or Relationships Australia and the Report of Professor Richard Chisholm *The Sharing of Experts' Reports between the Child protection System and the Family Law System* Prepared for the Attorney General's Department March 2014.

¹⁷⁵ Australian Law Reform Commission, *Review of the Family Law System Issues Paper 48* [248].

¹⁷⁶ MOU revised June 2008.

Children's experiences and perspectives

Question 34 How can children's experiences of participation in court processes be improved?

Context

In Australia, the right of children pursuant to the UN Convention on the Rights of the Child (UNCROC), to participate in family law proceedings which affect them and ensure their views are heard, is facilitated mainly through either a report from an expert social scientist and/or through an ICL.

NLA supports the appropriate participation and involvement of children in decisions which affect them.

ICLs

ICLs perform a pivotal function in children's litigation by assisting the Court to make decisions in the best interests of the child.

The data suggest three dimensions of the ICL role that may be relevant to varying extents, depending on the factual issues involved in a case, the age of the children/young people and the representation status of the other parties. These are:

- *facilitating the participation of the child/young person in the proceedings;*
- *evidence gathering; and*
- *litigation management—playing an “honest broker” role in case management and settlement negotiation.”¹⁷⁷*

In the experience of LACs, parties to court proceedings and children and young people may have some awareness of the role that ICLs play in relation to the participation of children, but are often unaware of the other functions performed by ICLs in the litigation process.

Some people believe that ICLs are required to act on instructions rather than in the child's best interests. This lack of understanding can create tensions in terms of managing the expectations of parties and children.

NLA notes the AIFS research referred to in paragraph 259 of the IP, based on data gathered in 2012, which indicated that ICLs were “greatly valued, particularly by judicial officers for their role in evidence gathering and litigation management, through which they were seen to bring a child focus to proceedings that may otherwise be lacking.”

¹⁷⁷ Rae Kaspiw et al, 'Independent Children's Lawyers Study' (Final Report, Australian Institute of Family Studies, 2013) xi.

NLA notes the same research indicated disappointment by children and young people about their level of interaction with ICLs and the extent to which proceedings and outcomes were explained to them.

NLA supports changes which would improve children's experiences of participation in court processes. In the 6 years since the AIFS data was collected, all LACs through NLA have implemented a number of significant initiatives in relation to ICLs to promote good practices with children, improve children's experiences of participation in court processes and support a high quality and consistent standard of representation by ICLs.

These initiatives include:

- Convening a national ICL stakeholder group in 2014 and 2015 to discuss and progress system-wide improvements to child representation. The stakeholder meetings were attended by representatives of the family law courts, the Commonwealth Attorney-General's Department, the Australian Institute of Family Studies and the Family Law Section of the Law Council of Australia.
- Further research to assist LACs and ICLs design responses, resources and training to improve children's understandings and experiences of the court process, including a survey of young people accessing the services of Legal Aid NSW.¹⁷⁸
- The development of a website launched in 2016 to provide support, resources and mentoring to ICLs.¹⁷⁹
- New national resources for children, young people and parents to better explain the role of ICLs.¹⁸⁰
- New national resources for children to better explain the family court process.¹⁸¹
- Development of resources to support ICLs in their work with children including a Good Practice Guide and Aide Memoire for ICLs by Legal Aid NSW and Best Practice Guidelines and Framework for Working with Children and Young People by Legal Aid Queensland. The materials strongly emphasise the importance of clear communication and ongoing contact with children, including explanation of court outcomes. The Guide also clearly prescribes minimum expectations of ICLs, including that all ICLs will meet with children except in exceptional circumstances.¹⁸²
- Participation in the design and delivery of a national ICL and child representation conference held bi-annually since 2014 with the Children's Committee of the family courts.

¹⁷⁸ F Bell, *Discussion Paper: Facilitating the Participation of Children in Family Law Proceedings* (2015) and D Anderson, *Legal Aid NSW ICLs: Survey of Children and Young People: Report of Key Findings* (2016).

¹⁷⁹ <https://icl.gov.au/>

¹⁸⁰ See the range of resources at: <https://icl.gov.au/resources/tools/>

¹⁸¹ For example, see the booklet for young children at: <https://icl.gov.au/wp-content/uploads/2015/09/ICL-childrens-information-under-12s-generic-version-for-website.pdf>

¹⁸² See <https://icl.gov.au/wp-content/uploads/2015/02/ICL-Family-Law-Good-Practice-Guide-Final.pdf>

- Regular training and professional development opportunities.
- Review by LACs of practice standards for ICLs as part of panel and contracting arrangements.
- Revision and development of a new national ICL training program facilitated by Legal Aid NSW, to be completed in the second half of 2018.
- Ensuring the currency of the Guidelines for ICLs that are endorsed by the (former) Chief Justice of the Family Court, the Family Court of Western Australia and the Federal Circuit Court.¹⁸³

Way forward

NLA supports other measures to improve children's experiences of participation in court processes. These include:

Reporting the views of children

NLA refers to the response to Question 20.

Where the child wishes to express a view both the Act and the ICL Guidelines require the children's views to be before the court in an admissible form.

Where children are of an age and maturity to express a view, a short form views report addressing section 60CC(3)(a) of the Act can be prepared by a prescribed reporter, without the need of a full section 62G report.

NLA supports the introduction of governance processes for registration, training, quality assurance and complaint mechanisms about expert report writers. This would address concerns in relation to report writers not adequately or appropriately reporting the views of children.

Children's Charter of Participation

NLA supports mechanisms designed to appropriately consult and obtain feedback from children about their experiences with agencies and services across the family law system.

Representative bodies in family law systems internationally have promulgated charters to support child inclusive and participatory practices in their systems. For example, in the United Kingdom a Family Justice Young Person's Board, comprising 40 young people, developed a National Charter for Child Inclusive Family Justice which contains a range of

¹⁸³ [Guidelines for Independent Children's Lawyers \(2013\)](http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/policies-and-procedures/guidelines-independent-childrens-lawyer)
<http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/policies-and-procedures/guidelines-independent-childrens-lawyer>

obligations such as that every child and young person should have the opportunity to give feedback.

NLA recommends the development and adoption of a set of principles to guide decision-making about the participation of children in legal processes such as developing a 'Charter of Children's Participation' in Australia based on similar charters used in other jurisdictions.

The Charter would assist with explaining processes, raising awareness of children's rights, maintaining the system's focus on children, informing parents and others concerned about a child and guiding ICLs.

Children's family court tours

Some children's experience of the family law system may be improved if they are afforded the opportunity to visit the court. This may provide children with a better understanding of court process and lead to them having greater confidence in the family law system. NLA recommends trialing opportunities for children to attend family courts to have processes and key participants explained to them, based on the successful model of the 'Walk in Her Shoes' tour conducted by magistrates courts in Victoria and Western Australia, and the 'Walk in Their Shoes' tour in the FCWA.

Qualitative feedback from children

Please see the response to Question 40.

Question 35 What changes are needed to ensure children are informed about the outcome of court processes that affect them?

Context

ICL Guideline 6.10, *At the conclusion of proceedings*, sets out the responsibility of the ICL, consistent with their obligation to act in the best interests of the child, to inform the child about the outcome of court processes.

However arguably the legislative framework does not always support the need for children to be informed of the outcome of court proceedings. While section 60CC(3)(a) of the Act places a legislative imperative on family law courts to consider a child's views, there is no requirement to address the reasons why orders might have been made contrary to those views. If a matter is settled by way of consent orders 60CC(5) specifically allows family law courts to not have regard to all of the section 60CC considerations, including the views and wishes of a child. In our experience this can be challenging for an ICL, particularly when courts make orders that conflict with a child's expressed wishes or views.

NLA considers that because of their child-focus, ongoing role in proceedings and professional relationship with the child, the ICL is usually the most appropriate person to

inform children about the outcome of court proceedings both at an early and final resolution stage. Sometimes it can be appropriate for this to be done with the assistance of a family consultant or other social science professional who has had a role with the child in the court proceedings or a therapist or counsellor that has a therapeutic relationship with the child.

In the past practices of ICLs have varied as to whether children were informed about court outcomes and processes, how they were informed, by whom and the amount of information provided.

As outlined in the response to Question 34, NLA and LACs have taken significant steps to ensure that ICLs are aware of their obligation to meet with children and explain court processes and outcomes. In 2014, for example, LANSW increased its fee scale modestly for ICLs to make it clear that ICLs were expected to meet with children throughout the course of legal proceedings. Recently all private practitioner ICLs on that panel were audited to ensure that meeting with children was a part of their practice, and remedial action ensued for those who failed to do so.

LANSW has developed a 'Good Practice Guide for Meeting with Children' for ICLs and this resource is available for use nationally. Developed in conjunction with academics from several universities and following research with children, the guide recommends that a final post order meeting include the following points:

- reading aloud or explaining court orders;
- explaining why certain decisions were made;
- explaining how the child's views were taken into account in the proceedings;
- letting the children know that their parents were able to agree;
- relaying any positive comments the judge made about the child; and
- offering the child the opportunity to ask any final questions they may have.

The new national ICL training package, developed with the support of the Commonwealth Attorney-General's Department, also confirms this obligation and incorporates training for ICLs in conducting meetings at the critical stage. NLA and LACs continue to work to promote the quality of practices of ICLs to improve the experience of children and young people.

Where there is no ICL

In matters where an ICL has not been appointed, consideration might be given to processes such as:

- in person communication from the family consultant;
- in person communication from the 'parenting coordinator' proposed in the response to Question 4;

- judicial practices including meetings with children (see the response to Question 34); and
- other practices such as providing written judgements in plain English or letters to children or introducing a requirement for judges to include reasons for their decisions to the children subject to the orders. See for example Judge Altobelli in *Gaylard & Cain* (2012) FMCAfam 501. Recently, Justice Peter Jackson in the UK Family Court made a decision in the case of *Re A* (A letter to a young person) [2017] EWFC 48. In taking this approach both judges crafted their decisions in age appropriate language, sensitively handling difficult issues, and aimed at allowing the child to understand the decision in the future.

Question 36 What mechanisms are best adapted to ensure children's views are heard in court proceedings?

Context

Please refer to the response to Questions 34 and 35.

“Proposals to the SPLA Committee Inquiry called for the appointment of a children’s advocate, or the development of a model of representation for children that combines legal representation with a therapeutic/clinical approach.”¹⁸⁴

The IP also records:

*Other proposals have included the development of a new agency to ‘oversee the provision of child representation [and] investigatory and expert report writing’, the adoption of a multidisciplinary team approach to child representation, along the lines used by the Children and Family Court Advisory Service (Cafcass) in the UK and the Ontario Office for Children’s Law in Canada, and adoption of a mechanism along the lines of the Scottish F9 Form, which provides an opportunity for children to write directly to the Sheriff (judicial officer) about their views on their future care.*¹⁸⁵

Way forward

As referred to in the response to Question 34, the appointment of an ICL in parenting matters is one way of ensuring Australia meets its obligations for children’s participation under the UNCROC.

¹⁸⁴ Australian Law Reform Commission, *Review of the Family Law System Issues Paper 48* [260].

¹⁸⁵ *Ibid* [261].

In NLA's view, as family court proceedings are a legal process, it is appropriate to have a lawyer in the role of ICL. This is considered particularly important in the context of the prevalence of self-represented litigants. ICLs play an essential role in gathering evidence, managing litigation and testing the evidence.

As indicated in the response to Questions 31, 34, and 35, NLA considers that current processes could be enhanced to help ensure that the parties, legal representatives and judicial officers are child focused and are considering the needs and views of the child through an appropriate developmental lens, utilising the skills of appropriately trained social scientists. This will help to achieve timely outcomes in the best interests of children.

Duty in the Act to meet with the child

In NLA's view, "there is a risk that section 68LA (5)(d) of the Act (which requires the ICL to endeavour to minimise the trauma to the child associated with proceedings) inadvertently acts as a further barrier to participatory practice..."¹⁸⁶

NLA notes that in some international jurisdictions and Australian child protection jurisdictions the requirement that a lawyer meets with a child is legislatively mandated.¹⁸⁷

NLA supports amending section 68LA of the Act, to impose a statutory duty on the ICL to meet with the child, similar to the provisions of section 9B(2) of the *Family Courts Act 1980*, New Zealand or s 110(4) of the *Child Protection Act 1999* (Qld) with the court to have discretion to waive or remove that obligation in limited circumstances.

NLA also supports the development of resources for children that provide information on how they can participate in the decision making process.

Alternative models

NLA notes that the main alternative methods for children's participation used internationally are:

- direct (or express) legal representation of the child;
- mechanisms that allow direct input from the child, for example the Scottish 'Form 9' process; and
- judicial contact/interview.

¹⁸⁶ K Beckhouse, *Laying the guideposts for participatory practice: Children's participation in family law matters*, Family Matters 2016 No 98 32.

¹⁸⁷ See for example section 6 *Care of Children Act 2004* New Zealand; *Colorado Children's Code* (C.R.S Title 19); s 110 *Child Protection Act 1999* (Qld).

Direct representation

Whilst direct representation is possible and occurs from time to time in the current family law system,¹⁸⁸ NLA is of the view that best interests representation has the following benefits:

- ensures the public law principle of best interests is maintained in a private law jurisdiction;
- ensures that children's voices and participation in the process are facilitated where safe and appropriate taking into account their age, stage of development and associated needs their views and the dynamics of their family circumstances;
- provides the flexibility to respond to the particular needs of the particular child in their particular circumstances rather than a 'one size fits all' approach;
- protects children from feeling responsible for case outcomes;
- protects some children in some circumstances from parental pressure and having to manage the "fallout" that may occur as a consequence of one or both parents/the parties being unhappy with their instructions; and
- protects children from systems abuse.

Direct input

From experience we are aware that some children seek direct input into the parenting order decision making process. This can involve requests to send letters to the court or judicial officer, to visit the court or to meet with the judge. NLA considers that mechanisms already exist to facilitate the direct input of children through these methods. Any change to the current options for direct input would require very careful consideration of the safeguards necessary for the children involved.

NLA notes there has been criticism internationally of models of direct input from children, such as the Form 9 used in Scotland, on a number of grounds, including the potential for manipulation of the process by some parents, who may directly or indirectly influence the content:

*There was a strong view that Form F9 (for gaining children's views in private family law proceedings) is not fit for purpose and should no longer be used.*¹⁸⁹

¹⁸⁸ Section 65C *Family Law Act 1975* (Cth).

¹⁸⁹ Scotland Family Justice Modernisation Strategy responses from the summit held on 17 March 2016, <http://www.gov.scot/Topics/Justice/law/17867/fjms/FJMS-summit-responses-2>, 13-14.

Judicial interviews

Some children demand a direct meeting with a judge and some parents/parties and professionals argue that this is potentially an important mechanism to ensure appropriate participation by the child in the decision making process. Whilst NLA does not consider this to be a preferred practice, if a meeting is to occur, there should be clear and transparent guidelines and judicial training, so that the process is child focused, safe, transparent and developmentally appropriate for the child.

In order to manage the expectations of children meeting with judicial officers, an important consideration may be providing a clear explanation of the manner in which these views are to be considered and the role that they will play in the decision-making process. In North America, Canada, the United Kingdom and New Zealand the involvement of children is supported by guidelines promulgated to give some direction on the participation and attendance of children in family courts such as the Ontario *Guidelines for Judicial Interviews and Meetings with Children in Custody and Access Cases*¹⁹⁰ and the UK *Guidelines for Judges Meeting Children who are Subject to Family Proceedings*. These guidelines articulate the purpose of the child's attendance, but they also guide all the participants, reducing judicial discretion and managing the expectations of all involved in relation to the meeting and its outcome.

If judicial interviews were to be encouraged, it should be accompanied by related training for all of the family law professionals involved, as the effectiveness of the meeting and its value from the child's perspective will depend on the skills of the judicial officers and the other professionals involved.

Based on practice experience it is NLA's view that most children represented by ICLs do not seek greater participation than that which is currently available in the family court parenting order proceedings involving their parents. Their views and their interest in participation are influenced by their stage of development and by their life experience and particular circumstances in the context of their family.

Question 37 How can children be supported to participate in family dispute resolution processes?

Context

The ALRC invites stakeholder input about the use and benefits of the child inclusive FDR processes, including culturally appropriate models. The IP references VLA's Kids Talk. This is discussed in detail in VLA's submission to the IP.

¹⁹⁰ *Guidelines for Judicial Interviews and Meetings with Children in Custody and Access Cases in Ontario*, 36 RFL-ART 489 Reports on Family Law, 2014, Thomas Reuters, Canada.

LACs primarily use child focused FDR. Victoria Legal Aid, Legal Aid Commission of Tasmania, Legal Services Commission of South Australia, Northern Territory Legal Aid Commission and Legal Aid Western Australia also use child inclusive FDR.

Child inclusive FDR will not be appropriate in every case and requires a careful consideration and assessment by an expert child consultant of:

- whether the child wishes to express any views;
- whether the child's parents will be receptive to the views;
- the child's needs in relation to their age and stage of development and the family law context;
- whether the child will be at any risk, either physical, emotional or psychological, if the child expresses views; and
- how to communicate the views and voice of the child.

Way forward

NLA agrees with the suggestion in the IP¹⁹¹ that a reason for the restricted use of child-inclusive DR is the greater resources required to appropriately deliver this model.

The expansion of child inclusive FDR would also require the development of standards and strategies including:

- review of the professional standards required to undertake child consultancy, ensuring it is at an adequate level whilst not excluding potentially suitable applicants;
- development of training guidelines and manuals; and
- development of child consultant practice information sessions, and
- evaluation trials of efficacy of current Australian child inclusive practice models.

Funded child inclusive mediation should be available where a child expresses a strong view about wanting to participate in the FDR process, and is of an age and maturity to do so. The engagement of the child could be realised in a number of ways including the use of a letter/questionnaire, or by the child meeting with a family consultant or prescribed social worker or psychologist who could either prepare a written report for the conference or provide verbal feedback at the conference.

¹⁹¹ Australian Law Reform Commission, *Review of the Family Law System Issues Paper 48* [264].

Other ways to support children to participate in FDR

If an ICL is appointed, the ICL should meet with the children prior to the dispute resolution process and be able to inform the parties of any views that the child wishes the ICL to communicate. The ICL can ensure that these views are understood in relation to any proposals that are canvassed. This will enhance the ICL's capacity to be 'the honest broker' in the negotiations between the parties to achieve an outcome in the best interests of the child.

NLA believes that other strategies for participation would need to be developed and overseen by child professionals and experts that acknowledge and address the potential risks to children of participation in the process as set out in the response to Question 38.

Children might be better supported through FDR more generally, if there is a widening of referral pathways through a referral register of supporting services for children. This would help maintain an appropriate focus on the needs of the child during the FDR process. LACs could maintain appropriate referral registries for their jurisdiction that could be made available to family law professionals.

Question 38 Are there risks to children from involving them in decision-making or dispute resolution processes? How should these risks be managed?

Context

As indicated in the response to Question 34 NLA supports the appropriate participation and involvement of children in decisions which affect them.

Risks which need to be carefully managed in order to protect children and promote their welfare, include:

- potential harm to physical and emotional safety;
- being exposed to the conflict between parents;
- repercussions from parents, parties and others;
- manipulation by parents and other persons;
- pressure from parents or parties to 'choose';
- children feeling responsible for the outcome;
- children may not have access to all relevant information, and any information provided and any communication with them should be developmentally appropriate; and

- developmentally some children will not be able to understand the range and priority of the issues involved in determining their best interests.

Way forward

In NLA's view, participation of children in decision making processes should be encouraged in appropriate circumstances. The identified risks would be best managed through careful screening and oversight by appropriately qualified professionals skilled in understanding child development and extensive experience in working with children, preferably in the context of family breakdown.

Question 39 What changes are needed to ensure that all children who wish to do so are able to participate in family law system processes in a way that is culturally safe and responsive to their particular needs?

Context

Please refer to the response to Questions 3, 5, 31 and 34.

Way forward

Culturally safe models of participation for children from particular communities are likely to be best developed by, or in close consultation with, those communities and the children in them.

Ensuring that information is communicated to children using mediums that are most likely to be accessed by them, including social media, will assist.

Question 40 How can efforts to improve children's experiences in the family law system best learn from children and young people who have experience of its processes?

Context

NLA notes the reference in the IP to the Family Justice Young People's Board in the UK.

NLA also notes initiatives such as the *Young People's Family Law Advisory Group* implemented by the South Australian Family Law Pathways Network, whereby young people

who have experienced family breakdown have an opportunity to share their experiences of the family law system, and notes VLA's development of a Young Person's Advisory Forum.

Way forward

NLA considers that children's experiences in the family law system could be improved by adopting a range of system-wide feedback mechanisms including feedback from children.

The approach of using 'consultation peer leaders' to lead and report on consultations with their peers in the report prepared by the office of the Commissioner for Children and Young People in WA to get feedback from children and young people from culturally and linguistically diverse backgrounds¹⁹² could be informative.

Establish advisory body

NLA supports the establishment of a young people's advisory body to provide direct, ongoing feedback and input into family law system issues affecting children.

The advisory body should be as diverse and inclusive as possible with representation from young people referred to in the Access and Engagement section of the IP.

Other qualitative feedback mechanisms

In addition to having a specific young person's advisory body, any redesign of the family law system should promote greater opportunities for children and young people to provide feedback about their experiences at various points in the process.

Feedback can also be obtained from surveys, interviews or other qualitative assessments. In 2016 the Centre for Children and Young People conducted research aimed at gathering the views of children and young people about their meetings with their ICL.¹⁹³ An online survey was completed by 35 children aged 7-11 years and 19 young people aged 12-16 years after meeting with their ICL. The findings, along with insights generated through a comprehensive literature review (Bell, 2015), have together informed the development of a *Family Law: Working with Children Good Practice Guide* (Graham et al, 2016).

We should however, sound a note of caution around the uptake of feedback tools and surveys for young people. Our experience of involving children in survey processes (both

¹⁹² Commissioner for Children and Young People Western Australia, 'Children and Young People from Culturally and Linguistically Diverse Backgrounds Speak Out' (February 2016).

¹⁹³ Facilitating the Participation of Children in Family Law Processes, Survey Report conducted by the Centre for Children and Young People at Southern Cross University in partnership with Legal Aid NSW (2016) <https://www.scu.edu.au/media/scueduau/research-centres/centre-for-children-and-young-people/Legal-Aid-Survey-Report-.pdf>

this study as well as in recent AIFS research) has been challenging. This has been echoed in overseas jurisdictions, for example a Canadian study found that:

*Accessing youth for the evaluation proved to be extremely difficult. Researchers found email was not an effective way of reaching youth; one youth completed the on-line survey. Of the 86 surveys mailed to youth, only 6 were returned completed, 14 were returned to sender as incorrect address. 59 youth were contacted by phone but only 6 youth were reached by phone and participated in the survey.*¹⁹⁴

Technology also provides us with the opportunity to trial new approaches to meetings with children. As an eleven year old who participated in the study suggested, it would be useful to have the lawyer more readily available to them outside of formal meetings:

*That can be like an app for all lawyers so kids can visually call them kinda like Skype (or FaceTime) and it would say when they are busy and free and stuff like that. So if there is any kinda emergency where any child needs to talk to their lawyer they can just use the app.*¹⁹⁵

NLA suggests that in the development of any new systems, consideration could be given to 'building in' feedback mechanisms, so as to facilitate ongoing input from children about experiences of the family law system.

Professional skills and wellbeing

Question 41 What core competencies should be expected of professionals who work in the family law system? What measures are needed to ensure that family law system professionals have and maintain these competencies?

Context

NLA agrees with a number of concerns expressed in the IP¹⁹⁶ and sees this inquiry as an opportunity to identify minimum competencies to ensure the skills and knowledge of professionals who work in the family law system meet a minimum requirement going forward.

¹⁹⁴ A Donnelly Effective & efficient? An evaluation of multidisciplinary law offices in Colorado, paper presented at 15th Bi-Annual ABA National Conference on Children and the Law, Washington DC, 2013, p.14 as quoted in Beckhouse, K Churchill Paper 59.

¹⁹⁵ Donnah Anderson et al, 'Independent Children's Lawyers: Views of Children and Young People' (Survey Report Prepared for Legal Aid NSW December 2016) 22.

¹⁹⁶ Australian Law Reform Commission, *Review of the Family Law System Issues Paper 48* [281-2].

There have been various reports authored in the past 20 years, which have strongly emphasised the need for those working in the family law system to have minimum levels of knowledge and competence in relation to relevant areas, particularly family violence.¹⁹⁷

The IP notes the findings of the 2013 Independent Children’s Lawyers Study about concerns regarding “the skills of some Independent Children’s Lawyers in regard to child inclusive practice”,¹⁹⁸ the suggestion of “improved training for Independent Children’s Lawyers to enhance skills in working with children”,¹⁹⁹ and the reference to “NLA being funded to redevelop the National Training Program for Independent Children’s Lawyers.”²⁰⁰ Please see the response to Questions 34 and 35 in this regard.

NLA notes that LACs have invested considerable resources to improve the knowledge and competency of LAC staff and private lawyers conducting LAC work as part of the family law system.

Way forward

NLA is supportive of proposals for training and accreditation programs, and professional standards to fill gaps which have been appropriately identified.

It could be expected however that there will be concerns about the resourcing for the development of such programs. Many organisations and individuals will also have resourcing concerns related to attendance at programs.

Competencies

Professionals working in the family law system should have competence in a range of matters including:

- family violence;
- child attachment;
- child development;
- neuro-development of children;

¹⁹⁷ House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (2017); COAG Advisory Panel on Reducing Violence against Women and their Children; Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (2012); Family Law Council, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds* (2012); Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010); Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016).

¹⁹⁸ Australian Law Reform Commission, *Review of the Family Law System Issues Paper 48* [282].

¹⁹⁹ *Ibid* [283].

²⁰⁰ *Ibid* [286].

- trauma and the impacts of trauma, including on the neuro-development of children;
- Aboriginal and Torres Strait Islander culture and working with First Nations Peoples;
- culturally and linguistically diverse issues including working with culturally and linguistically diverse communities;
- LGBTIQ issues;
- mental health;
- substance abuse; and
- disability.

NLA notes the work of the Council of Attorneys-General Family Violence Working Group in relation to competencies for family law system professionals (ToR 6), and has provided input to this project.

The degree of competence required in each area will vary according to the role of the professional within the system.

Measures

Training and accreditation programs should be available in a range of formats, e.g. web-based and face to face.

NLA supports that training and accreditation is:

- contextualised to the specific roles of the professionals involved; and
- cross-disciplinary and inter-agency where appropriate, modelling the collaboration sought in family law system practice.

Requirements associated with programs and the specific roles of professionals should not be so onerous as to discourage people from entering the professional field or taking on the particular work.

If a governance body were to be introduced (see Question 47), it could potentially play a key role in relation to training and competency requirements.

ICLs

Please see the response to Questions 31, 34, and 35. NLA notes the current revision of the training program for ICLs. NLA supports greater levels of competency and training for ICLs, including ICLs being required to dedicate a proportion of their continuing professional development to topics instructive to the role of ICLs in family law.

Question 42 What core competencies should be expected of judicial officers who exercise family law jurisdiction? What measures are needed to ensure that judicial officers have and maintain these competencies?

Context

There is a high prevalence of complex risk factors in family law litigation that can threaten the physical, emotional and psychological safety of children and family members.

Way forward

The complexity of risk factors in family law litigation provides a compelling case that family law is a specialist area that requires the appointment of judicial officers who are highly experienced in the area of family law.

All judicial officers should have the qualities noted in s 22(2)(b) of the Act.

Question 43 How should concerns about professional practices that exacerbate conflict be addressed?

Context

LAC family lawyers play an important role in family law matters by providing legal advice and advocating for their clients, as well as by:

- managing clients' expectations;
- 'reality checking';
- helping clients be child-focused;
- assisting clients to maintain a 'future focus';
- maintaining communication and negotiations in a calm, respectful and dignified manner;
- minimising conflict;
- supporting accountability,
- encouraging clients towards reasonable behaviour,
- achieving settlements.

Way forward

Existing legislative provisions in respect of lawyers' ethical and other obligations under the Act are considered appropriate. Greater awareness of these provisions, and how they should inform legal practice, could be better integrated into family lawyers' continuing professional development requirements.

LACs making grants of legal aid to lawyers expect those lawyers to discharge their professional obligations efficiently and effectively.

Question 44 What approaches are needed to promote the wellbeing of family law system professionals and judicial officers?

Context

The IP records the possible negative impacts on the health and well-being of family law system professionals and judicial officers.

NLA and LAC initiatives

LACs provide, and arrange for, training, supervision, mentoring and support programs to assist staff with dealing with issues they face in their day to day work. E.g. Legal Aid Queensland's professional supervision processes incorporate features to assist lawyers to address issues such as the psychological impact of working in family and related law, resiliency, managing stress, managing challenging interactions and understanding complex trauma.

LACs are also connected to relevant State and Territory Governments which operate Employee Assistance Programs which offer some free confidential counselling and support.

Case study 10 - well-being initiatives in the Domestic Violence Unit (DVU) at Legal Aid NSW

Legal Aid NSW has introduced the following measures in its DVU to support staff well-being:

- All DVU social workers undergo external clinical supervision;
- The DVU has a counsellor available specifically to the unit who provides regular face to face counselling to DVU lawyers, social workers and support staff. Regular sessions where the counsellor attends LANSW for the sessions are organised, as well as face to face or telephone counselling sessions according to staff needs;
- The DVU team attends an offline team day once every 2 months. Arrangements are made for other services or panel practitioners to provide the DVU duty FASS, advice,

outreach and litigation services for that day. The team has an opportunity to attend on the DVU counsellor, attend training, spend time together;

- All DVU legal support staff have completed accidental counselling training;
- All DVU staff have completed vicarious trauma education; and
- The DVU is currently considering potential for structured team debriefing sessions facilitated by the DVU counsellor.

Way forward

Professional self-care, resilience, work/life balance and dealing with vicarious trauma should be built into established training for all family law related professionals.

Some professions, like social work, have more successfully incorporated ongoing training and self-reflection into their professional development. Active participation in professional supervision is a core practice obligation for social workers, and psychologists as outlined in professional practice standards. These are ideal opportunities and mechanisms to discuss and address these issues.

There is not a similar requirement or culture of professional supervision for lawyers, other than perhaps in relation to legal issues.

NLA supports the development of appropriately resourced well-being initiatives for those working in the family law system.

Governance and accountability

Question 45 Should s 121 of the *Family Law Act* be amended to allow parties to family law proceedings to publish information about their experiences of the proceedings? If so, what safeguards should be included to protect the privacy of families and children?

Context

The IP notes each of stakeholder concerns that s 121 prevents “victims and survivors of violence from speaking openly of their experiences of the family law system”²⁰¹ and the recent evidence to parliamentary inquiries suggesting that “s 121 has also created uncertainty about the information that regulators of professional bodies, such as bodies

²⁰¹ Australian Law Reform Commission, *Review of the Family Law System Issues Paper 48* [299].

that govern the practices of psychologists and social workers, may access for the purposes of investigating alleged misconduct by their members.”²⁰²

The IP records that:

Initial consultations revealed a number of proposals for responding to these issues, including:

- *relaxation of the s 121 prohibition in relation to proceedings that do not involve children (while maintaining the prohibition on publication of proceedings that would identify a child);*
- *re-enactment of a ‘whistle-blower’ exception to s 121, to allow press reporting on matters of genuine public interest; and*
- *providing exceptions to s 121 to clarify that information may be shared with professional regulators to facilitate their investigatory functions.*²⁰³

Way forward

In NLA’s view, the present system is an appropriate balance which allows publication on the basis that it does not identify parties or children and has exceptions to allow identification where this is justified and/or in the public interest. In particular, this balance protects children from being publicly identified and subjected to scrutiny.

Recent ‘high profile’ family law cases demonstrates the willingness of family courts to consider the provisions of s 121 and make nuanced decisions regarding publication based on balancing the public interest with the best interests of the child and other considerations, in the particular circumstances of the case.

NLA does not believe changes to the law in this area are needed. It may be beneficial, however, to provide some explanation in the Act about what amount to ‘publication’, e.g. posting on social media.

Question 46 What other changes should be made to enhance the transparency of the family law system?

Context

Please refer to the response to Questions 3 and 45.

²⁰² Australian Law Reform Commission, *Review of the Family Law System Issues Paper 48* [301].

²⁰³ *Ibid* [302].

Other changes

One strategy that might assist with transparency and confidence in the system could be reports addressing responses to identified systemic issues in the family law system. This would be the responsibility of the governance body referred to in the response to Question 47.

Question 47 What changes should be made to the family law system's governance and regulatory processes to improve public confidence in the family law system?

Context

The IP records proposals made during early consultations about how the governance of the family law system might be strengthened to improve public confidence, including:

- *The creation of an overarching governance body which performs regulatory functions for the family law system, including supervising the administration of the system, investigating and taking action on complaints, and making recommendations to government about how to improve the system.*
- *The redevelopment of the Family Law Council to vest it with responsibility for taking a more active role in shaping the system along the lines of the role performed by the Independent Advisory Council (IAC) under the National Disability Insurance Scheme Act 2013 (Cth), which provides the NDIS Board with advice about how the National Disability Insurance Agency should perform its functions.*
- *Strengthening institutional leadership within the system to encourage cross-sector collaboration, promote habits of ethical practice, internally monitor and review performance, and translate the findings of review processes into improved service design.*
- *The introduction of a death review process, similar to those used by state and territory child protection systems and coronial processes, to make recommendations for change.*
- *The creation of a Commonwealth Judicial Commission to conduct independent investigations of complaints of judicial misconduct.*²⁰⁴

²⁰⁴ Australian Law Reform Commission, *Review of the Family Law System Issues Paper 48* [313].

Way forward

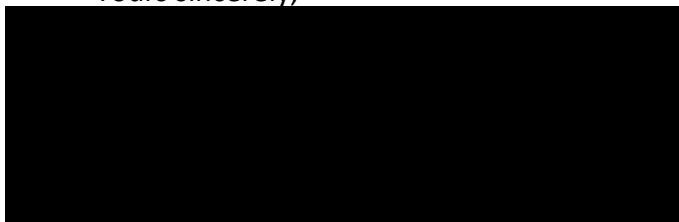
Whilst an over-arching governance body might represent a good way forward, we have some reservations noting particularly the Commonwealth and State and Territory contexts, and the existence of the Council of Attorneys-General and working groups, and the Family Law Council.²⁰⁵

NLA is generally supportive of strengthening the family law system by encouraging cross-sector collaboration, appropriate multi-disciplinary approaches and enhanced training and professional development as key to improving public confidence.

Conclusion

Thank you for the opportunity of making this submission. Please do not hesitate to contact us if you have any questions.

Yours sincerely,



Dr John Boersig PSM
Chair

21 June 2018

²⁰⁵ Noting that there are currently no members appointed to the Family Law Council.