



Law Council
OF AUSTRALIA

Review of the Family Law System – Issues Paper 48

Australian Law Reform Commission

7 May 2018

Telephone +61 2 6246 3788 • *Fax* +61 2 6248 0639
Email mail@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

Table of Contents

About the Law Council of Australia	6
Acknowledgement	7
Objectives and principles.....	8
Question 1: What should be the role and objectives of the modern family law system?.....	8
How do people resolve their family law disputes?	9
The family courts	10
Adversarial vs Inquisitorial court systems.....	11
Question 2: What principles should guide any redevelopment of the family law system?.....	15
Access and Engagement.....	17
Question 3: In what ways could access to information about family law and family law related services, including family violence services, be improved?.....	17
Question 4: How might people with family law related needs be assisted to navigate the family law system?	17
Question 5: How can the accessibility of the family law system be improved for Aboriginal and Torres Strait Islander people?	19
Question 6: How can the accessibility of the family law system be improved for people from culturally and linguistically diverse communities?.....	25
Question 7: How can the accessibility of the family law system be improved for people with disability?	28
Question 8: How can the accessibility of the family law system be improved for lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) people?	30
Question 9: How can the accessibility of the family law system be improved for people living in rural, regional and remote areas of Australia?	32
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?	37
Funding for legal aid	39
Family Reports.....	39
Question 11: What changes can be made to court procedures to improve their accessibility for litigants who are not legally represented?	40
Question 12: What other changes are needed to support people who do not have legal representation to resolve their family law problems?	42
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?	44
Legal principles in relation to parenting and property.....	45
Question 14: What changes to the provisions in Part VII of the <i>Family Law Act</i> could be made to produce the best outcomes for children?	45
Question 15: What changes could be made to the definition of family violence, or other provisions regarding family violence, in the <i>Family Law Act</i> to better support decision making about the safety of children and their families?	47

Question 16: What changes could be made to Part VII of the <i>Family Law Act</i> to enable it to apply consistently to all children irrespective of their family structure?	49
Cultural diversity	49
Same sex couples	50
Question 17: What changes could be made to the provisions in the <i>Family Law Act</i> governing property division to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes?	53
Other systems for alteration of property interests.....	54
Reform.....	55
Section 79(4)(e) / 90SM(4)(e) of the Act	55
Merger of de facto and married person provisions.....	56
Kennon and family violence.....	56
Full and frank disclosure	61
Family dispute resolution.....	61
Case management.....	62
Provisions for the split/transfer of debts.....	62
Best interests	62
Financial consequences.....	62
Question 18: What changes could be made to the provisions in the <i>Family Law Act</i> governing spousal maintenance to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes?	63
Question 19: What changes could be made to the provisions in the <i>Family Law Act</i> governing binding financial agreements to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes?	64
Resolution and adjudication processes.....	65
Question 20: What changes to court processes could be made to facilitate the timely and cost-effective resolution of family law disputes?	65
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?.....	67
Question 22: How can current dispute resolution processes be modified to provide effective low-cost options for resolving small property matters?	68
Question 23: How can parties who have experienced family violence or abuse be better supported at court?	69
Question 24: Should legally-assisted family dispute resolution processes play a greater role in the resolution of disputes involving family violence or abuse?	69
Question 25: How should the family law system address misuse of process as a form of abuse in family law matters?	70
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?	72
Question 27: Is there scope to increase the use of arbitration in family disputes? How could this be done?	72
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?	73
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?	75
Question 30: Should family inclusive decision-making processes be incorporated into the family law system? How could this be done?	76
Integration and collaboration	80
Question 31: How can integrated services approaches be better used to assist client families with complex needs? How can these approaches be better supported?	80
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?	81
Question 33: How can collaboration and information sharing between the family courts and state and territory child protection and family violence systems be improved?	83
Children's experiences and perspectives	84
Question 34: How can children's experiences of participation in court processes be improved?	84
Question 35: What changes are needed to ensure children are informed about the outcome of court processes that affect them?	85
Question 36: What mechanisms are best adapted to ensure children's views are heard in court proceedings?	87
Question 37: How can children be supported to participate in family dispute resolution processes?	89
Question 38: Are there risks to children from involving them in decision-making or dispute resolution processes? How should these risks be managed?	91
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?	92
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?	95
Professional skills and wellbeing	97
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?	97
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?	99
Question 43: How should concerns about professional practices that exacerbate conflict be addressed?	99
Question 44: What approaches are needed to promote the wellbeing of family law system professionals and judicial officers?	100
Governance and accountability	101
Question 45: Should s 121 of the <i>Family Law Act</i> 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?.....	101
Question 46: What other changes should be made to enhance the transparency of the family law system?	102
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?	103

About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2018 Executive as at 1 January 2018 are:

- Mr Morry Bailes, President
- Mr Arthur Moses SC, President-Elect
- Mr Konrad de Kerloy, Treasurer
- Mr Tass Liveris, Executive Member
- Ms Pauline Wright, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council of Australia acknowledges that this submission has been prepared by the Executive of the Family Law Section.

The Family Law Section is the largest of the Law Council of Australia's specialist Sections. Since its inception in 1985, the Family Law Section has developed a strong reputation as a source for innovative, constructive and informed advice in all areas of family law reform and policy development. With a national membership of more than 2600 it is committed to furthering the interests and objectives of family law for the benefit of the community.

The current members of the Family Law Section Executive are:

- Wendy Kayler-Thomson (Chair)
- Paul Doolan (Deputy Chair)
- Michael Kearney SC (Treasurer)
- Dr Jacoba Brasch QC
- Sarah Bastian-Jordan
- Di Simpson
- Minal Vohra SC
- Kate Mooney
- Greg Howe
- Jaquie Palavra
- Nicola Watts

Immediate Past Chair, Geoffrey Sinclair, was not involved in the preparation of this submission.

Law Council Constituent Bodies

The following Law Council Constituent bodies broadly support the general policy positions advanced in this submission:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Queensland Law Society
- South Australian Bar Association
- The Victorian Bar

The Law Council is also grateful to those Constituent bodies for their assistance with the preparation of this submission. The Law Council notes that several of them propose to make supplementary submissions to the Australian Law Reform Commission (**ALRC**) to advance issues relevant in their State or Territory, or issues of particular interest to them.

Objectives and principles

Question 1:

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

1. When the *Family Law Act 1975* (Cth) (**the Act**) commenced in 1975, it was a remarkable piece of modernising law reform, ranging from the introduction of no fault divorce, to introducing recognition of indirect and homemaker contributions, to enshrining the first form of alternative dispute resolution (conciliation conferences) in legislation. Not surprisingly though, as the ALRC's *Review of the Family Law System – Issues Paper* (**the Issues Paper**) identifies at paragraph 17, '*Australian social and family life has changed a great deal since the time of these reforms*'.
2. However, so too has the visibility of and our understanding of phenomena which impact on family functioning. For example, in 1975, many families no doubt experienced family violence, just as they do now; however, the visibility of and focus on family violence has developed from an almost zero base at that time to an issue now of national prominence. Equally, in 1975, many families, had drug and alcohol issues and/or children in need of protection and/or a family member with mental health issues, but these were little recognised at the time, much less understood. All the learnings we now have about the complexities, fragilities and uniqueness of individuals and their relationship interactions, are matters which a modern family law system ought to cater for.
3. The ideal role and objective of the modern family law system remains that which was hoped for in 1975 – '*a 'one-stop shop' of legal and counselling services to help them resolve disputes*'¹. That ideal has turned out to be illusory. The bounds of Commonwealth power delineated in the Constitution, along with the State and national budgetary processes, means, in reality, the one-stop shop is unlikely to ever exist throughout the Commonwealth.
4. As the Issues Paper recognises, these problems present people with many doors through which they may have to enter – the States' child protection courts and family violence courts and allied support services, as well as the Commonwealth's family law courts and allied support services, the Family Court of Western Australia, and sometimes the Federal Court and Administrative Appeals Tribunal (**AAT**), together with other government agencies including those administering the social security and child support schemes and, at a State level, community housing and health services. It comes therefore as both a surprise and concern to the Law Council of Australia (**LCA**) that consideration is currently being given to adding another door to the myriad that currently exists – that is, the Parent Management Hearing panels.
5. Given a truly 'one-stop shop' is an unachievable ideal in any real sense, what then should be the role and objective of the family law system? We have purposefully removed the word 'modern' when reframing this question. Instead, we invite the ALRC to consider roles and objectives which will not suffer from outdatedness through the effluxion of time; today's modernity is tomorrow's old-fashioned.
6. The LCA suggests the ALRC fashion the roles and objectives of the family law system to encompass and reflect:

¹ Issues Paper, paragraph 17

- (a) a family law system understandable and accessible to all;
- (b) the early and easy identification of supports and services which will assist parties upon the breakdown of their relationship (whatever form that relationship takes);
- (c) an integration between those supports and services to seek to ensure that the family's experience of such services is seamless (even if those services are functionally separate), including the sharing of information between those supports and services where appropriate and with proper regard to the rights and privacy of each member of the family;
- (d) collaboration, as opposed to demarcation, between the different courts, agencies and support services to which a family may be exposed;
- (e) a court process within the wider family law system which is properly resourced, accessible and responsive, efficiently doing justice according to law.

How do people resolve their family law disputes?

7. Much of the commentary in the Issues Paper focuses on those people who use the family law system who have what might be summarised as 'complex needs'. Many of these people's experience of the family law system is of being a litigant in a court (or multiple courts). Yet the overwhelming majority of separating couples in Australia are able to resolve their financial and/or parenting arrangements without resort to court. They reach agreement in a range of ways:
 - (a) by discussion between themselves without needing or wanting any assistance from third parties. Some of these couples reach amicable agreements about parenting arrangements or financial arrangements and never document that agreement in any formal way. Some use information available on the internet to document their agreement using, for instance, parenting plan templates and the family courts' Application for Consent Orders process;
 - (b) by discussion between themselves, after one or both have received legal advice and/or advice from a child psychologist or social worker. Some of those couples might use lawyers to formally document their agreement;
 - (c) by participating in mediation via one of the services available to the community via organisations such as Family Relationship Centres or Relationships Australia. Some couples are referred to such services by their lawyer or other agencies. Most of the mediation services of this kind do not involve lawyers directly in the mediation, but many couples seek legal advice before or between mediation sessions. Some couples document their parenting agreements at mediation by signing parenting plans. Other couples use lawyers to document parenting and/or financial agreements reached at mediation or do it themselves using the online court forms; and/or
 - (d) some couples are able to reach agreement using a range of dispute resolution services offered by lawyers. This includes negotiation, mediation, collaboration and arbitration. Family lawyers have specialised in the alternative resolution of family disputes for decades, and for most solicitors, this forms the majority of their day to day work. Barristers working in family law are also significantly involved in dispute resolution work, including where no court proceedings are on foot. Some alternative dispute resolution also

includes the expertise of non-lawyers such as accountants and financial advisers, and child experts. Agreements reached are commonly then documented by lawyers using parenting plans, consent orders, financial agreements and/or child support agreements.

8. Support and funding of services that encourage and assist separating couples to resolve their financial and/or parenting arrangements without the necessity for court proceedings should continue.
9. However, it is important to recognise that there are some couples for whom access to timely court intervention is a necessity. Much has been written about the increasing complexity of the circumstances of the people who use the family courts - for example people who have experienced family violence, families where drug addiction, alcohol abuse and/or mental health issues affects one or both adults or where there are allegations of child abuse. However, it is not the mere existence of those complex personal circumstances that leads to those families becoming involved in litigation – there are many couples with complex needs who, despite those needs, are able to resolve their family law issues. People issue proceedings in the family courts because they haven't been able to resolve those issues between themselves and/or their needs or those issues are so urgent and serious that they cannot delay seeking court intervention. For instance:
 - (a) one parent might unilaterally prevent the other parent from spending time with a child(ren). They might do so based on allegations, which are disputed, about the risk that the other parent presents to the child(ren);
 - (b) one person denies or restricts the other person's access to financial resources sufficient to enable them to support themselves; and
 - (c) one person has dissipated or threatened to dissipate assets of the couple and injunctions are necessary to preserve the asset pool pending a settlement of their respective property settlement claims.
10. In other cases, the issuing of court proceedings by one person comes after genuine but unsuccessful attempts have been made to resolve the family law issues, after using one or a number of the alternative dispute resolution methods outlined above. In some cases, the necessity to commence proceedings in financial cases is caused by the imminent approach of the time limits pursuant to s 44 of the Act.
11. The availability of a properly resourced and functioning court system to the family law system is of central importance, including but not only for the reasons outlined above. Such a system provides the framework within and by reference to which those families who do not access the court system determine the issues arising on the breakdown of their relationship. Such a system provides an answer for those who, despite all attempts, are unable to consensually resolve their issues, and ought to ensure that a person is not forced to enter into a resolution of issues because there is no other alternative available.

The family courts

12. It is often observed, and it is not an exaggeration to say, that our family courts system is in crisis. Chronic underfunding for more than a decade has led to a court system which struggles continually to meet the needs of the community. The funding of the court system has failed to keep pace with the growth in the number of Australians who need access to it and the breadth and complexity of the issues

dealt with by the courts on a daily basis, including as a result of the proper recognition afforded to the prevalence and impact of family violence.

13. Despite recurring statements to the contrary, there is no statutory fixing or limit to the number of judicial officers appointed to any court in the system. The number of judicial officers is a function of budgetary determinations rather than any assessment of the needs of the various courts and the communities that they serve. The appointment of judicial officers (or replacement of retiring judicial officers) has not kept pace with the number or complexity of cases being issued. In many instances the appointment of judicial officers, however politically expedient, has been marked by an insufficient regard to s 22 of the Act – albeit that does not apply to the Federal Circuit Court. That has led to the appointment of some judicial officers who lack the necessary training and experience to efficiently and effectively function in the jurisdiction. There are marked divergences in the process and outcomes of proceedings, particularly in the Federal Circuit Court. In both that Court and the Family Court, there are long delays between the time a case is commenced and a final hearing, in some registries more than three years. Of considerable concern is the delay in obtaining interim hearings. There are not enough family consultants to prepare family reports or s 11F reports, which contributes to further delay in the resolution or finalisation of cases. There are not enough registrars to assist with the procedural management of cases or to conduct court events, such as Conciliation Conferences which assist parties to resolve their cases.
14. The LCA is struck by how many problems identified in the Issues Paper could have been avoided or reduced by the proper funding of the family courts. For instance, services such as the in-house counselling section of the Family Court used to play a pivotal role in assisting parties at very early stages of litigation to resolve their cases. That Court's mediation service led the way globally in alternative dispute resolution in family law. Both services were terminated after withdrawal of government funding.
15. Whilst the LCA commends the ALRC for exploring better ways of meeting the needs of separated families, we note that many of the ideas already raised in the Issues Paper will require a significant injection of funding from government. The LCA is concerned that the desire to embrace new ideas, and to fund them, may lead to continued avoidance by governments of the need to properly fund the family courts and indeed an exacerbation of the difficulties already faced. Substantial legislative change has and will always result in a correspondingly significant increase in the workload of the Courts.

Adversarial vs Inquisitorial court systems

16. We pause to make an observation not directly answering Question 1, but note that the commentary to Question 1 contains an assumption underpinning much of the Issues Paper – essentially, that the adversarial system is flawed, and as assumed later (erroneously) in the Issues Paper, the inquisitorial system is not. We make the equivalent observation about the same assumptions made about courts and tribunals.
17. The Issues Paper uses terms and phrases such as '*adversarial*', '*less adversarial*', '*inquisitorial*' and '*more inquisitorial*' without (a) defining what is meant by those concepts, and (b) understanding the many provisions in the Act and the *Evidence Act 1995* (Cth) (**the Evidence Act**) which allow parties and practitioners to ask for, and judges to implement (on application, or on their own motion) an array of measures to tailor the style of hearing to the needs of the parties.

18. Without understanding what the ALRC means when it uses these terms and phrases, it is difficult to respond to the Issues Paper in those respects. For example, as Sir Anthony Mason has said:

I take the expression 'adversarial justice' to mean a system of adjudication, such as our existing court system, in which the parties have at least the primary responsibility for presenting all aspects of their case. Adversarial justice is an expression often used in opposition to the inquisitorial system which is an imprecise label given to the procedure of the European system, as applied particularly in criminal cases. That opposition has the potential to mislead, as there is a degree of commonality and convergence between the two systems. [emphasis added]

It is a mistake to regard the two systems as static ... Today the European system ... places more emphasis on procedural fairness ... The adversarial system, by moving to case management, begins to resemble the European one in expecting the judge to exercise more control over the litigation. Nevertheless, the defining criterion that distinguishes the two systems is the greater emphasis on procedural fairness which is characteristic of the adversarial system.²

19. With respect to (b), we make the following submission as an overarching observation to the assumptions underpinning much of the Issues Paper.
20. Courts and tribunals, whether they are adversarial, inquisitorial or, in reality, having features of both, make decisions based on evidence.
21. If a party makes an allegation – whatever it may relevantly be - then it is a fundamental cornerstone of all adjudicative processes that the respondent thereto has a right to hear that allegation and to have that allegation tested. An assertion is not evidence; an allegation is just that until and unless the allegation is tested – in other words, saying it is so, does not make it so. The testing often involves asking questions of both parties and any relevant witnesses. Once those questions are asked, it is then, and only then, that an allegation can be found as a fact, or not. If the allegation is not tested, then a finding cannot be made.
22. For example, if an allegation of family violence is made, it would be to the great injustice of each of the victim, perpetrator and any children involved, if that allegation were not properly examined and tested – the consequences of such an allegation have profound consequences for all involved and it is essential in order to properly protect each that the truth is able to be properly determined.
23. The LCA recognises that the trauma which may be caused to an aggrieved person, especially if cross-examined by the 'accused' cannot be underestimated. Equally, it is a high expectation to ask the aggrieved (if self-represented) to cross-examine the accused. Consequently, there is a tension between the rights of the 'accused' to a fair hearing (the critical consideration being the ability to test the evidence against them), and the rights of the aggrieved to also have a fair hearing (the critical consideration being the need to reduce the potential distress and humiliation to the aggrieved caused by personal cross-examination).
24. It may be that the ALRC refers to tribunals and an inquisitorial system as a different mode by which to test the evidence, say, to avoid the accused directly cross-

² Sir Anthony Mason, 'The Future of Adversarial Justice' (Paper presented at the 17th AIJA Annual Conference, Adelaide, 7 August 1999) 5.

examining an aggrieved about family violence allegations. However, an adoption of an inquisitorial system of testing is not the answer. If the ALRC looks at Continental inquisitorial systems, they will see a lengthy process which is burdensome in its expense to the state. The assumed preference for inquisitorial style hearings also overlooks the many provisions already available under the Act to parties, practitioners and judicial officers to tailor hearings to the needs of parties, whilst also acknowledging the fidelity of the currency of courts - namely evidence.

25. Gone are the days our judges in the family law courts sit '*inscrutable like the sphinx*'. Indeed, a lay person unacquainted with modern judicial style would likely be surprised by the active involvement of judicial officers in the cases that come before them. To that end, we invite the ALRC to understand the case management processes already available to the courts – provisions which highlight what Sir Anthony Mason referred to above as a 'degree of commonality and convergence between the two systems', and where it 'is a mistake to regard the two systems as static'.³
26. Lawyers, including duty lawyers assisting a self-representing party and the judiciary ought be proactive in employing measures to protect self-representing parties from the trauma of cross-examining or being cross-examined about family violence, whilst also protecting the fidelity of the evidence questioning process and the evidence it produces; for example:
 - (a) Division 12A, of the Act (some of which we extract below);
 - (b) the positive duty imposed upon judicial officers to disallow improper questions, section 41 of the Evidence Act;
 - (c) sections 135 and 136 of the Evidence Act; and
 - (d) the inherent power of the Court to manage itself.
27. The provisions below, many of which only apply to parenting, but some to all proceedings, highlight what Sir Antony Mason spoke to, as set out in our answer under Question 1, namely that 'it is a mistake to regard the two systems as static ... The adversarial system, by moving to case management, begins to resemble the European one in expecting the judge to exercise more control over the litigation'.⁴
28. Further and insofar as the Issues Paper suggests the need for additional principles including the need to be child centred and trauma informed, as is set out below, such principles are extensively addressed by existing legislation.
29. Sections 69ZQ, ZR and ZX of the Act give the courts considerable power to manage how the parenting proceedings will run and to address issues emerging for persons involved, including those who have suffered family violence. These provisions support the development of appropriate techniques for the protection of persons, and for seeking to reduce the impact of the proceedings on them. We note that the latter is being used with great effect in the Queensland Registry; see for example, *Gallagher & Gomez* where the mother and her lawyers sat in Court in Brisbane and the father, his lawyers, the Independent Children's Lawyer (ICL), her Counsel and the Judge sat in Cairns.⁵

³ Ibid.

⁴ Ibid.

⁵ [2017] FamCA 944 (23 November 2017).

30. The relevant provisions of the Act are:

s 69ZQ General duties

- (1) *In giving effect to the principles in section 69ZN, the court must:*
- (b) decide the order in which the issues are to be decided; and
 - (e) make appropriate use of technology; and
 - (h) deal with the matter, where appropriate, without requiring the parties' physical attendance at court. [Emphasis added]

s 69ZR Power to make determinations, findings and orders at any stage of proceedings

- (1) *If, at any time after the commencement of child-related proceedings and before making final orders, the court considers that it may assist in the determination of the dispute between the parties, the court may do any or all of the following:*
- (a) *make a finding of fact in relation to the proceedings;*
 - (b) *determine a matter arising out of the proceedings;*
 - (c) *make an order in relation to an issue arising out of the proceedings.*

Note: For example, the court may choose to use this power if the court considers that making a finding of fact at a particular point in the proceedings will help to focus the proceedings. .[Emphasis added]

s 69ZX Court's general duties and powers relating to evidence

- (1) *In giving effect to the principles in section 69ZN, the court may:*
- (a) *give directions or make orders about the matters in relation to which the parties are to present evidence; and*
 - (b) *give directions or make orders about who is to give evidence in relation to each remaining issue; and*
 - (c) *give directions or make orders about how particular evidence is to be given; and*
 - (e) *ask questions of and seek evidence or the production of documents or other things from, parties, witnesses and experts on matters relevant to the proceedings.*

- (2) *Without limiting subsection (1) or section 69ZR, the court may give directions or make orders:*

- (a) *about the use of written submissions; or*
- (b) *about the length of written submissions; or*
- (c) *limiting the time for oral argument; or*
- (d) *limiting the time for the giving of evidence; or*
- (e) *that particular evidence is to be given orally; or*
- (f) *that particular evidence is to be given by affidavit; or*
- (g) *that evidence in relation to a particular matter not be presented by a party; or*
- (h) *that evidence of a particular kind not be presented by a party; or*
- (i) *limiting, or not allowing, cross-examination of a particular witness; or*
- (j) *limiting the number of witnesses who are to give evidence in the proceedings.*

- (3) *The court may, in child-related proceedings:*

- (a) *receive into evidence the transcript of evidence in any other proceedings before:*
 - (i) *the court; or*
 - (ii) *another court; or*

(iii) a tribunal;

and draw any conclusions of fact from that transcript that it thinks proper;
and

(b) adopt any recommendation, finding, decision or judgment of any court, person or body of a kind mentioned in any of subparagraphs (a)(i) to (iii).
.[Emphasis added]

31. The provisions above apply, obviously, to child related proceedings, whilst the sections of the *Evidence Act 1995* below apply to all proceedings.

s 26 - Court's control over questioning of witnesses

The court may make such orders as it considers just in relation to:

- (a) the way in which witnesses are to be questioned; and*
- (b) the production and use of documents and things in connection with the questioning of witnesses; and*
- (c) the order in which parties may question a witness; and*
- (d) the presence and behaviour of any person in connection with the questioning of witnesses.*

s 41 - Improper questions (1) The court must disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the court is of the opinion that the question (referred to as a disallowable question):

- (a) is misleading or confusing; or*
- (b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; or*
- (c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate; or*
- (d) has no basis other than a stereotype (for example, a stereotype based on the witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability).*

(5) However, the duty imposed on the court by this section applies whether or not an objection is raised to a particular question.

Question 2:

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

32. This question imports two separate but plainly interrelated considerations: (1) the principles guiding the redevelopment of the family law system,⁶ and (2) the principles to be applied by the family law courts in the exercise of their jurisdiction within that wider system.⁷

⁶ As identified specifically in Question 2 of the Issues Paper.

⁷ As discussed in paragraph 41 of the Issues Paper under the heading of 'Principles to guide the redevelopment of the family law system'.

33. Principles for redevelopment of the system can be extrapolated from the concerns detailed in previous reports and reviews,⁸ that is the design of the system should be guided by the following ideologies:
- (a) simplicity of use;⁹
 - (b) efficiency of process;¹⁰
 - (c) transparency and consistency of practice;¹¹
 - (d) cultural and linguistic sensitivity and inclusiveness;¹²
 - (e) equality;¹³ and
 - (f) proper resourcing.
34. They would be the overarching principles for the family law system. Then within that system are the principles which might guide any redevelopment of the legislation underpinning the family law system.
35. Currently, the Act contains twenty-six different principles cast across six (6) different sections,¹⁴ along with seven additional principles set out in the Rules. There is a further guiding principle to be found in s 81. The number of, and disparate location of these many principles render them practically meaningless. Indeed, the capacity of the family law courts to discharge the obligations created by these principles with the resources made available to them, has long been questioned.¹⁵

⁸ As identified in paragraphs 35 and 36 of the Issues Paper.

⁹ Simplicity of use enables greater self-help and reduces complexity, need for legal service and costs.

¹⁰ Efficiency of process reduces the number of 'steps' required, the number of 'touchpoints' and events, the need for legal services/costs and the frequency of court interactions.

¹¹ Community confidence in the family law system is dependent upon a clear understanding of the law, the process and a transparency of the method of determination. As per the Family Law Council recommendations made March 1999, this requires the law to as '*clearly stated as possible, so that it can be understood not only by legal practitioners but by litigants and members of the public.*' And further '*It is desirable that as far as possible the application of the law to particular cases should yield predictable results. From this point of view, systems that involve a high degree of judicial discretion may provide less certainty of outcome than those that involve the application of a definite rule of law.*' Transparency however should not derogate from the existing privacy protections afforded to families.

¹² Particularly for the First Nation peoples and also for culturally and linguistically diverse peoples.

¹³ Equality as to gender and gender roles, equality as to children's matters (eg: the construct of the family structure, the method in which children were conceived and birthed), equality as to location (eg: urban vs regional, rural, remote) and equality as to socio-economics (eg: financial capacity to meet legal costs and fund court fees, capacity to fund logistical costs such as photocopying, transport, computer/electronic equipment usage) and equality as to capacity (eg: disabilities and proficiency to comprehend and utilize English as the court's working language).

¹⁴ Sections 43 (General principles), 60CA (Paramountcy principle), 60B (Principles to determine the paramountcy principle outcome), 66CC (Principle of parent's primary duty to maintain child), 66D (Principle of step-parent's duty to maintain child), 69ZN (Principles for conducting child related proceedings).

¹⁵ See, eg, *Harris v Caladine* (1991) 172 CLR 84, 112 (Brennan J): '*It seems that the pressures on the Family Court are such that there is no time to pay more than lip service to the lofty rhetoric of s.43 of the Act. That is the section which speaks of the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life (par.(a)) and the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children (par.(b)). It is a matter of public notoriety that the Family Court has frequently been embarrassed by a failure of government to provide the resources needed to perform the vast functions expected of the Court under the Act.*'

36. Further, in addition to the principles in federal family law legislation, there are additional family violence principles and child protection principles in relevant State legislation.
37. Thus in addressing the legislation underpinning the family law system, the legislation ought be comprehensive, seamless, flexible and capable of clear, consistent and just application.

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?

38. The LCA notes that this question traverses a number of other areas in the Issues Paper. The LCA notes the comments of the Queensland Law Society (**QLS**) that access to current and accurate family law information is critical for parties, and that court and government websites with family law information should be well maintained, and provide up to date, clear and comprehensive information, and be monitored regularly and updated as necessary. The LCA otherwise repeats and relies, in responding to this issue about access to information, on the following insofar as relevant:
 - (a) the matters set out in respect of Question 4 below;
 - (b) the matters set out in respect of Question 5 below;
 - (c) the matters set out in respect of Question 6 below;
 - (d) the matters set out in respect of Question 8 below;
 - (e) the matters set out in respect of Question 12 below; and
 - (f) the matters set out in respect of Question 29 below.

Question 4:

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

39. The LCA recognises the enormous range of varied users of the family law system – from those who have (it would appear) sufficient understanding of the process/system to manage the resolution of their family law dispute themselves.¹⁶
40. Anecdotally, family lawyers routinely meet clients who come for advice that gives them understanding of their ‘rights’ and obligations, and clients will share details of

¹⁶ Rae Kaspiew et al, ‘Evaluation of the 2012 Family Violence Amendments’ (Synthesis Report, Australian Institute of Family Studies, October 2015) 70-71.

the offer being made by the other party – one that is not always just and equitable, or is disadvantageous to the client or is not in the best interests of the children.

41. Information availability is an important foundation stone requiring improvement, particularly when we reflect upon the extent to which family law impacts members of our community.
42. The introduction of Family Advocacy and Support Service (**FASS**) at various courts and funded by specific funding allocation to National Legal Aid would appear to have had some success in providing duty lawyer services at certain registries and the ability to triage the family law needs of a person and direct them to additional resources and services.
43. There is a benefit in ensuring that similar support is available in state Magistrates Courts where family violence matters/personal protection matters are dealt with – and having information on hand about the family law system, pathways and referral to services. For example, Darwin has a FASS pilot in the Local Court assisting defendants and will be evaluated. Parties are then getting referrals for family law advice. However, these supports are being accessed by people once they have determined they have a family law problem and may not be available until the time of filing or responding to an application (and hence attending the court precinct). It will not assist those who are not living near a court centre nor those for whom transportation to the court/city/regional centre is difficult (because of distance, other responsibilities, or cost factors).
44. Improved technology will assist in some instances. Reliable internet service is not a given in many parts of Australia. Court websites can be improved to use more direct and simple language. Use of video on websites can be enhanced – that provides the best opportunity for matters to be explained and is especially useful to those with limited understanding of English or challenges to literacy.
45. The Commonwealth Government's advertising campaign last year about family violence is a fine example of the benefits of raising awareness in the community. Funding to National Legal Aid, Community Legal Centres, Women's Legal Services and other victim support groups to continue to provide support to vulnerable women and children is also essential. The education of children about respectful engagement with each other and the right to personal safety and autonomy will also play a significant part in changing attitudes to family violence.
46. The concept of a 'navigator' is not one that the LCA can support at this time – to be effective, it would require an enormous resource allocation given the huge numbers of filings in the Federal Circuit Court alone. Those resources would in the opinion of the LCA be better directed to employment of additional registrars to undertake information sessions, in conjunction with court consultants (video link/live stream to be available) to explain process; key events; time frames and what to expect;
47. The Family Court and Federal Circuit Court websites do not appear to have any information available in languages other than English. They each have a tab about migrants, refugees and language support under the self-represented tab but it has limited information (and is in English). The predominant (after English) language of users of the family law court could be readily identified and a translation page for perhaps the first two or three such languages could be built and linked to the current websites.

Question 5:

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

48. The LCA acknowledges the diversity of Aboriginal and Torres Strait Islander peoples, their culture, family structure and their widely varying lifestyles, values, customs and practices. In addition to their cultural diversity, Aboriginal and Torres Strait Islander people have significant language diversity with approximately 150 different Indigenous languages spoken at home which may be in a metropolitan, urban, regional or remote part of Australia.
49. The lack of access and participation in the family law system by Aboriginal and Torres Strait Islander peoples is greater than that of any other ethnic or cultural group in Australia. A significant body of research and reports highlight the reasons for this, which include a combination of historic and contemporary issues.
50. Long-standing issues - such as past policies of forced removal of children and settlement of communities; intergenerational trauma and the effects of colonisation - still adversely impact communities and individuals today. These same issues manifest themselves in current concerns such as engagement with and over-representation of Aboriginal and Torres Strait Islander peoples in the family violence, criminal justice and child protection legal systems and the continuing and entrenched disadvantage of many Aboriginal and Torres Strait Islander peoples around Australia.
51. Other factors include: a general lack of knowledge of civil and family law systems; resistance, distrust or fear of dominant culture processes; and preference for privacy and family-based dispute resolution. Additional barriers, as noted in the Issues Paper, include 'cost, language, cultural safety and geographic and physical accessibility', together with a legal process that can be drawn out, multi-tiered and balanced against significant and multiple socio-economic pressures (i.e.. health, housing, finance and family violence).
52. In 1995, former Chief Justice Alastair Nicholson stated that:

Historically, Aboriginal people have had little contact with the Court and have been reluctant to seek out Court's services, even in circumstances where their traditional methods of resolving disputes have failed. When contact has occurred, it has usually been in the context of so-called mixed marriages and in such circumstances Aboriginal people often felt disadvantaged in dealing with a 'white institution'.¹⁷
53. Important legislative amendments were made in 1996 and 2006 to the Act, which require a more thorough consideration of the 'need to maintain a connection with the lifestyle, culture and traditions of Aboriginal & Torres Strait Islanders' and the right of each child to enjoy, explore and develop a positive appreciation of these. The Act also now provides specific direction to the Court to have regard to kinship obligations and child-rearing practices.

¹⁷ Alastair Nicholson, 'Ethnicity, Aboriginality and Family Law' (Speech delivered at the 9th Sir Leo Cussen Memorial Lecture, November 1995) 15.

54. The LCA notes the importance placed by the family courts on the relevance of culture and as an important consideration in determining the best interests of child, such as:
- (a) benefits of identification with culture – *Dunstan & Jarrod*;¹⁸
 - (b) broader approaches to family structures as opposed to traditional mainstream constructs and specificity of cultural heritage – *Donnell & Dovey*;¹⁹
 - (c) immersion in culture and avoiding tokenism, including the degree of immersion necessary – *Lawson & Warren*²⁰ and *Bachmeier & Foster*;²¹
 - (d) significance of Aboriginal and Torres Strait Islander culture to the parties and the impact on care of the child – *Sheldon & Weir*;²²
55. As important as the legislative amendments and case law have been in recognising Aboriginal and Torres Strait Islander's culture and unique position in Australian society, the LCA agrees with the comment in the Issues Paper that mainstream family law services are not designed or delivered in a way that recognises the lived experiences of Aboriginal and Torres Strait Islander people and more needs to be done. Access to a family law system which is responsive to the needs of Aboriginal and Torres Strait Islander families, able to effectively engage with them, is flexible, and appropriately addresses cultural issues that may be relevant in determining the best interests of the child, are key in fostering trust and confidence in the system.
56. Family breakdown is often accompanied by related issues such as housing, finance, family violence and child safety. For Aboriginal and Torres Strait Islander families, these are often compounded by existing socio-economic, health and housing difficulties.
57. The prevalence of family violence in Aboriginal and Torres Strait Islander communities usually results in families being required to engage with various overlapping jurisdictions, including criminal justice, victims of crime, child protection, family law and restraining or protection orders. These systems can be complex and overwhelmingly difficult to navigate. As well, factors such as distrust of police and justice agencies, fear of repercussions and retribution (further violence or ostracism from family and community), can impact a person's decision and/or ability to access help. The LCA suggests consideration ought be given to amending the definition of family violence in the Act, referenced in the *National Domestic Violence Benchmark* as, '[t]he extended notion of family and kin in Aboriginal and Torres Strait Islander culture may broaden the scope of relationships affected by or vulnerable to domestic and family violence, which may in turn mean that the abusive behaviours manifest differently in some respects from those in non-Aboriginal and Torres Strait Islander relationships.' This would promote a stronger awareness and consideration of the dynamics of the family violence and relevance to the family law issues for Aboriginal and Torres Strait Islander families.
58. A 2009 study of the legal needs of Aboriginal people in NSW by Cuneen and Schwartz observed that unmet needs in family law often lead to involvement with the criminal justice and child protection systems, because of family violence and the

¹⁸ (2009) FamCA 480.

¹⁹ (2010) FLC 93-428.

²⁰ (2011) FamCA 38.

²¹ (2011) FamCA 86.

²² (2011) FamCAFC 212.

apparent lack of support and assistance to address these issues. It was felt that, if early and appropriate access to family law services such as Family Dispute Resolution (**FDR**) or the courts were possible, it might obviate child protection involvement; particularly if extended family members were available to intervene and obtain orders for children where protective concerns exist.²³

59. The LCA considers that Aboriginal and Torres Strait Islander access to and engagement with a culturally safe and appropriate family law system are fundamental to ensure the safety and well-being and best interests of Aboriginal and Torres Strait Islander children and their families.
60. The LCA is aware of and acknowledges some promising practices around the country designed to overcome these barriers. For example, organisations such as the Family Courts have Reconciliation Action Plans (**RAP**) prepared in collaboration with Reconciliation Australia and designed to implement measures to achieve reconciliation and improve access to justice through tailored services and procedures. As a result of this, an Indigenous Committee was established comprising of Judges from the family law courts around the country.
61. Recently retired Judge Sexton's Indigenous List in the Federal Circuit Court is a noteworthy example of the commitment to the goals of the RAP. This specialised Indigenous list (so named) is a quasi-therapeutic model which is culturally safe, appropriate, private and accessible by Aboriginal and Torres Strait Islander clients. It provides a relatively informal and culturally appropriate court setting whereby parties appear before the court with support persons, service providers and extended family or the relevant child welfare agency to work through issues in dispute to ensure the safety, well-being and best interests of Aboriginal and Torres Strait Islander children. It is understood that this pilot continues following Judge Sexton's retirement and a similar list has commenced in Adelaide run by Judge Kelly. The model encourages engagement and promotes problem solving by the family, often diverting children from the welfare jurisdiction and providing flexibility in parenting arrangements; enabling children to remain connected with their family.
62. Another example in the community sector is Relationships Australia Northern Territory's (**RANT**) Aboriginal Building Connections (**ABC**) program; designed to educate Aboriginal and Torres Strait Islander parents about the impact of conflict on children post separation. It provides practical tools for parents to manage conflict and enhance security for children using culturally inclusive activities. It is implemented by a team of Aboriginal and Islander Cultural Advisors (**AICA**) and is delivered both on-site to individuals who present to RANT for FDR, and off-site to groups in rehabilitation centres, prisons, women's shelters, and on remote Aboriginal communities.
63. A culturally specific model of mediation was also created by RANT in Alice Springs - Model of Practice for Mediation with Aboriginal Families in Central Australia. However, the LCA understands it was discontinued for staffing and funding reasons. Currently, RANT is also one of the eight Family Relationship Centres funded to deliver the Legally-Assisted and Culturally Appropriate Dispute Resolution pilots for Indigenous and Culturally and Linguistically Diverse (**CALD**) families who have experienced family violence and as part of the Commonwealth Attorney-General's Department's (**AGD**) Multicultural Equity and Access Plan 2017-19. This pilot caters for Aboriginal and Torres Strait Islander and CALD families who are affected by family violence. The programme, still in its infancy, will involve travel to the remote

²³ Chris Cuneen and Melanie Schwartz, 'The Family and Civil Law Needs of Aboriginal People in New South Wales' (Final Report, 2008)

Indigenous communities as well as assisting those in regional and metropolitan areas. An evaluation of this programme will be useful in understanding whether it is effective and well received by the communities that it assists.

64. There is also embedding of legal advice services in Aboriginal health organisations or hospitals as part of the Health Justice Partnerships by legal aid commissions and community legal services (e.g. Darwin and Alice Springs).
65. A further example is employment of Indigenous liaison or field officers in Aboriginal and Torres Strait Islander and mainstream legal aid organisations. Some have developed multi-disciplinary services employing cultural and social support caseworkers to work alongside the lawyers and to assist them in meeting their non-legal social support needs or through-care support upon exiting a correctional facility (e.g. National Australia Aboriginal Justice Agency – NAAJA – and Northern Territory Legal Aid Commission).
66. Also of note is the creation of the Judicial Council on Cultural Diversity, an advisory body formed to assist Australian courts, judicial officers and administrators to positively respond to Australia's diverse needs, including the particular issues that arise in Aboriginal and Torres Strait Islander communities.
67. The LCA supports the recommendation of the 2017 House of Representatives Standing Committee on Social Policy and Legal Affairs for the urgent implementation of the Family Law Council's recommendations 1 to 10 of the 2012 Report *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* and recommendation 16 in the 2016 Report on *Families with Complex Needs and the Intersection of Family Law and Child Protection Systems*.²⁴ With the only caveat in recommendation 16.3, that appropriate and careful intake and assessment be undertaken to avoid disadvantaging a family member where a power imbalance or family violence exists and avoid widening the scope of the dispute by polarising both sides of the family. As noted by National Alternative Dispute Resolution Advisory Council (**NADRAC**):

*Relationships between Indigenous people tend to be multi-layered, and dispute issues often overlap. Preparation for the dispute resolution process is therefore vital. Social mapping may be required to identify relevant participants and their relationships, obligations, duties and constraints. Ongoing management of the dispute may also be needed through providing follow up services or linking to other services and processes.*²⁵

68. The LCA recommends more funding to:
 - (a) increase culturally safe legal and embedded non-legal services such as family support caseworkers, liaison officers, field workers or for example, the NAAJA Aboriginal through-care workers, providing casework support for clients exiting correctional facilities to provide practical assistance to Aboriginal and Torres Strait Islander clients and support their ongoing engagement with social/emotional service providers and the legal process more broadly;

²⁴ 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) 255; Family Law Council, 'Improving the Family Law System for Aboriginal and Torres Strait Islander Clients' (2012); Family Law Council, 'Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems – Final Report' (Final Report to the Attorney-General, 30 June 2016).

²⁵ National Alternative Dispute Resolution Advisory Council, 'Indigenous Dispute Resolution and Conflict Management' (Paper, January 2006), p11.

- (b) employ Indigenous Family Consultant/Liaison Officers who can travel to communities to increase the family courts' profile and presence in communities and association of the court with mainstream family law. A greater indigenous workforce in the courts, legal and non-legal community-based services is likely to improve access and build trust;
- (c) develop the capability of and improve accessibility to Aboriginal and Torres Strait Islander interpreters with specialised training in family law, particularly at court and during interviews with family consultants. Training specifically in family law is key to helping Aboriginal and Torres Strait Islander clients understand dominant culture legal concepts which may be foreign to or in tension with their own customary laws, particularly for families living traditional lifestyles in remote communities;
- (d) provide outreach services to regional and remote areas, where there are presently limited or no legal services available;
- (e) provide greater accessibility to culturally competent FDR practitioners, particularly in remote, rural and regional areas, including lawyer assisted mediations and enhancing video-link facilities if on-site mediation is not possible;
- (f) embed culturally competent workers and/or services in all courts dealing with family law and family violence, available to provide support, assist and/or referrals to appropriate services such as the FASS model but culturally specific;
- (g) provide culturally-informed training to family consultants and judicial officers and other report writers so that they more readily accept the notion that mainstream Anglo-Saxon based social sciences may not be reliably applied to Aboriginal and Torres Strait Islander families;
- (h) develop and adopt a more informal and flexible approach to legal service delivery, and allow practitioner's greater time for building trust and rapport with Aboriginal and Torres Strait Islander clients;
- (i) allow further cultural competency training for judges and lawyers to understand the impact of family violence, and culture and traditional beliefs of the family unit within the context of a family law dispute. This should be an ongoing component of continuing professional development and undertaken in a less 'formal' manner where training is practical in focus;
- (j) streamline culturally safe processes where urgent recovery applications are required;
- (k) develop processes for the giving of oral recorded evidence in lieu of documentary evidence (affidavits) for Aboriginal and Torres Strait Islander clients with low literacy levels or other characteristics which create difficulties in complying with the formal evidentiary rules and in keeping with their culture of oral traditions and verbal languages;
- (l) provide legal resources in different Aboriginal languages and in audio/video format;

- (m) adopt a less formal court environment enabling parties to be seated next to their lawyers, on the same level as the judicial officer, preferably in a round table setting and with the use of plain English;
- (n) pilot a Murri or Koori Court type model and consideration of the creation of an Independent Elders Lawyer to assist the family courts and parties with evidence gathering, including expert evidence specific to the culture of the child's community and family/kinship structures, facilitating the participation of the Elders in the proceedings in a manner which reflects the nature of the case; acting as an honest broker between the Elders and the parents; and facilitating settlement negotiations where appropriate. The LCA notes that the New South Wales Law Society (**NSWLS**) does not support the inclusion of Elders in a Koori Court model generally, on the basis that their experience is that it should be utilised only for Elders from the family in question;
- (o) develop a support network such as the model in Victoria, to go some way to assist Aboriginal and Torres Strait Islander clients experiencing high levels of trauma and/or stress, to feel supported and understand the proceedings;²⁶
- (p) allow for collaborative inter-agency approaches to be developed such as the Health Justice models around the country to deliver legal and non-legal advice and assistance to Aboriginal and Torres Strait Islander clients particularly in regional, rural or remote communities with a well-defined warm referral framework;
- (q) further the LCA notes and supports the view of the Law Society of the Northern Territory (**LSNT**), that resources need to be allocated not simply based on population but on other measures such as income, given that indigenous clients in remote communities face different challenges and have different needs to those in urbanised areas;
- (r) further the LCA notes and supports the view of QLS that access to family law advice and representation through Aboriginal and Torres Strait Islander Legal Services (**ATSILS**) is essential to facilitate access to the family law system. From a practical perspective, the capacity for ATSILS to meet the family law needs of Aboriginal and Torres Strait Islander people is often limited by a lack of resources and client conflict issues. For these reasons, culturally competent services outside ATSILS must be available. Legal Assistance Service providers, including Legal Aid, ATSILS, Community Legal Centres and Family Violence Prevention Legal Services must be expanded and appropriately funded, including in remote communities, to provide family law support to clients who cannot receive advice from ATSILS as a result of capacity or conflict issues. QLS further recommends that a system be created, similar to the Legal Aid system, whereby ATSILS develop partnerships with private legal practitioners. These practitioners could undertake legal work for Aboriginal and Torres Strait Islander clients and would be remunerated through government funding, according to a scale of fees. It is important that payment be reasonable and appropriate for the work undertaken. In Queensland, for a private legal practitioner to undertake legal aid work, they are required to meet certain criteria and make certain undertakings. QLS recommend that practitioners who work in partnership with ATSILS similarly be required to meet certain criteria, including demonstrated cultural competency. This would

²⁶ *Volunteer for Court Network*, Court Network
 <<http://www.courtnetwork.com.au/VolunteerforCourtNetwork.aspx>>.

ensure that only practitioners who are competent in undertaking this work are assigned.

Question 6:

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

69. The LCA acknowledges that CALD families are a very diverse community with different cultural practices, languages, needs and vulnerabilities, particularly newly arrived migrants and refugees who may have suffered significant trauma and long periods of displacement prior to resettlement. CALD families also come from varied socio-economic and educational backgrounds and will have vastly different levels of legal literacy and capacity to access the legal system.
70. The Law and Justice Foundation of NSW's check-list for working with CALD communities in a legal context aptly frames the challenges faced by some of these communities:

Checklist for working with CALD communities

This checklist has been developed to provide guidance to legal agencies working collaboratively with CALD communities. It is based on the principle that CALD communities should be active partners, not passive recipients.

What do we already know?

While recognising that there is no 'one size fits all' for CALD communities, research shows that people from non-English speaking countries often:

Have a fear of the law and legal system

Have different understandings of how the law operates e.g. concepts of civil law

Lack knowledge of their rights and responsibilities in Australia

Lack knowledge or are confused about the roles of different legal services

Prefer to use face-to-face services

May have low literacy levels in their own language

Have difficulty communicating in English.

71. Some CALD communities will have a collectivist (as opposed to individualist) culture and approach to their community, family, child-rearing obligations, and family dispute resolution which may differ substantially from western concepts and standards. As with Aboriginal and Torres Strait Islander families, mainstream family law concepts and systems may not adequately respond to their needs which may include family relationship as well as family law needs. The LCA notes the inter-generational and inter-parental pressures and conflicts that may arise from a CALD family's resettlement and desire for family cohesion. This may also lead to under-reporting of family violence and a reluctance or fear of accessing family violence related services which may be perceived as being culturally unsafe.

72. The LCA acknowledges that CALD, as well as Aboriginal and Torres Strait Islanders peoples, experience significant impediments and barriers in accessing the family law system in a way which is culturally safe, inclusive, meaningful and appropriate.
73. Some of these barriers, in addition to those in the above check list, include: perception and suspicion of western family law concepts and differences in parenting practices; the desire to solve family problems privately or with the assistance of community or religious leaders; social isolation; lack of flexibility and integration of services; immigration status uncertainty/ visa dependency, combined with associated family violence complexities and cultural safety when accessing the family law system, as well as mistrust of courts and government authorities.
74. The LCA cannot overstate the importance of CALD communities developing an understanding of and trust in the family law system and processes to promote greater access. The LCA supports the recommendations in the Family Law Council's 2012 *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds Report*:
- (a) engaging with CALD communities through the provision of legal education and service information, including making information about law and processes widely available in different languages and in different formats (written, audio, or video);
 - (b) ensuring availability of adequately trained and culturally compatible interpreters in court, legal services and family relationship-based services and accredited family law translators;
 - (c) building and enhancing cultural competency of family law professionals and the family law system;
 - (d) enhancing and maintaining service integration which the LCA notes is supported through the Family Law Pathways Networks and strongly recommends increased and ongoing funding for the Networks; and
 - (e) developing and strengthening a CALD workforce that CALD clients can identify and feel culturally safe in engaging. The LCA notes and supports the recommendation that Community Liaison Officers be funded to assist family law services and provide cultural advice to family consultants and support to CALD clients in the family law courts. In this vein and acknowledging the importance of culture for CALD communities and children's connection to that culture, the LCA recommends the preparation of cultural reports in contested matters where the child's connection to culture is in consideration and that courts, legal aid commissions and family relationship sector agencies be resourced adequately to provide for these.
75. The LCA recommends consideration be given to legislative reform to improve the interplay between and alignment of the Act and the immigration laws for spouses on temporary spousal visas affected by family violence, facing uncertainty about their ability to remain in Australia legally and needing to access the family law system by reason of parenting or financial issues.
76. The LCA also supports recommendations 17 of the 2016 Report *Families with Complex Needs and the Intersection of Family Law and Child Protection Systems*, with the only caveat in recommendation 17.3 – that appropriate and careful intake and assessment be undertaken to avoid disadvantaging a family member where a

power imbalance, family violence or tensions in cultural protocols exists within the family or community.

77. The LCA cannot over-emphasise the crucial role that interpreters play in the family law system and recommends that more resources be allocated for specific training in family law and increasing availability of interpreters to be available in person at all court events (not just interim or final hearings) for each of the parties, as opposed to the reliance on telephone interpreters, particularly in regional/remote locations. The LCA notes the strong support from the QLS to the implementation and monitoring of the 'Recommended National Standards for Working with Interpreters in Courts and Tribunals' published October 2017 by the Judicial Council on Cultural Diversity and in particular recommendations 5 and 14 thereof.
78. The LCA notes and supports some of the existing beneficial and promising practices in the family law system that have developed to overcome the identified barriers and in response of the 2012 Report. These include:
 - (a) the development and implementation of Multicultural Access and Equity Plans by Commonwealth Government Departments;
 - (b) the establishment of a Multicultural Committee of the Family Courts;
 - (c) the development of the Family Courts Multicultural Plan 2013-15, complying with the courts' obligations under the Government's Multicultural Access and Equity Policy, and in response to the Family Law Council's 2012 Report and the *Access and Equity in Government Services* Report 2010-2012,²⁷ in which CALD communities reported a lack of effective communication about services and rights under Australian family law. The actions set out in the Plan reflect the courts' ongoing commitment to tailoring services, products and communication to meet the needs of CALD clients;
 - (d) the development of a Multicultural Action Plan by Victoria Legal Aid (VLA) to implement an interpreters' policy to bring about consistent and effective practice across VLA, multilingual pamphlets promoting VLA services and cultural awareness training;
 - (e) the funding of eight Family Relationship Centres to deliver the Legally-Assisted and Culturally Appropriate Dispute Resolution pilots for Indigenous and CALD families who have experienced family violence and as part of the Commonwealth AGD's Multicultural Equity and Access Plan 2017-19;
 - (f) development of a CALD workforce including Family Dispute Resolution Practitioner accreditation by Relationships Australia / Family Relationship Centres and legal aid commissions;
 - (g) engagement with CALD communities through the provision of community legal education programmes by legal aid commissions and community and women's legal services. National Legal Aid's 'What's the Law?' is an excellent example of the legal service sector initiative to improve legal literacy and access to the legal system;
 - (h) partnering with migrant resource centres and health services to deliver community legal education and legal advice clinics;

²⁷ Department of Immigration and Citizenship, 2013.

- (i) the creation of the Judicial Council on Cultural Diversity, as referred to in the LCA's response to Question 5; and
- (j) the Commonwealth Government's 2008 initiative to implement new processes for the appointment of judicial officers increasing diversity in judicial appointments in relation to for example gender and cultural background.

Question 7:

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

79. The LCA limits its response to this question to those people who have a disability of a kind which falls within the legal definitions used in the Rules of the family courts, being people who, by virtue of their disability, do not understand the nature and possible consequences of their court proceedings or are not capable of adequately conducting or giving adequate instructions for, the conduct of their proceedings. There will be many people with a disability for whom this definition does not apply, but who would nevertheless benefit from improvements in the accessibility of the family law system. The LCA expects that the ALRC will receive submissions from organisations or groups with special expertise in the needs of such people.
80. The most critical issue which currently adversely affects the ability of people with a disability to exercise their legal rights or to participate in the legal process under the Act, is the increasing unavailability of authorities or persons willing to accept appointment as litigation guardians in family law litigation. The LCA refers to and supports the submission of the then Chief Justice Bryant to the ALRC inquiry into Equality, Capacity and Disability in Commonwealth Laws dated 17 January 2014.²⁸
81. The Rules of both the Family Court and the Federal Circuit Court provide for a relatively straightforward process for the appointment of a litigation representative where an authority or person has already been appointed as administrator or guardian of the disabled person's affairs under State or Territory legislation. However increasingly significant problems arise in family law litigation where the person requiring a litigation representative does not already have a guardian or administrator appointed under State or Territory legislation.
82. In some of those situations a family member can be appointed as the litigation representative. However, the nature of family law litigation means that family members are often not suitable to be appointed as litigation representatives because they have an interest in the case that is adverse to the interests of the person needing the representative (for instance, a financial relationship with the person requiring a litigation representative means they have a potential conflict of interest or may become a witness).
83. It is the experience of the members of the Family Law Section (FLS) of the LCA that in some States and Territories statutory authorities which are regularly appointed as administrators or guardians under State or Territory legislation are willing to take up appointments as litigation representatives in the Family Court and the Federal Circuit Court even though an order has not been made under that relevant State legislation (for instance, in South Australia and in the Australia Capital Territory).

²⁸ The Hon Diana Bryant, Submission 22 to the Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, 17 January 2014.

However, in other States and Territories those statutory authorities are not willing to accept appointments unless an order has been made under State legislation (for instance in Victoria).

84. The Rules of each Court provide that in the event that a litigation representative cannot be found, the Court may request that the Commonwealth Attorney General nominate a person to act as litigation guardian.
85. It is the experience of members of the FLS of the LCA that for the last few years and in the vast majority of cases where the Court has made such a request, the Attorney General has not been in a position to make such a nomination because of the unwillingness of authorities or lay people to act as litigation representatives. As the FLS of the LCA understands matters, there had previously been an agreement between State and Territory Governments and the Commonwealth Government to facilitate the appointment of statutory authorities as litigation representatives in family law litigation where no other litigation representative could be found. The LCA is not aware of the terms of that agreement or the reasons why it no longer operates. However, the LCA is of the view that the reactivation of such an agreement would significantly improve access to justice for disabled persons.
86. The LCA notes that in many circumstances the statutory authority would not be required to fund the legal costs of the person they are asked to represent because either:
 - (a) the disabled person is eligible for a grant of Legal Aid; or
 - (b) the financial resources of the disabled person or the family are sufficient to fund those legal costs.
87. In those cases where there are not sufficient funds available to fund those legal costs, the LCA supports the suggestion made by Chief Justice Bryant (as she was then) to the ALRC in her submission that it would be desirable if funding was made available to State and Territory Legal Aid Agencies to fund those legal costs.
88. The LCA acknowledges that some Government funding may be needed to cover the administrative costs of statutory authorities appointed as litigation representatives in family law litigation. However, those costs are likely to be significantly less than the legal costs.
89. The LCA understands that some statutory authorities have refused to accept an appointment as a litigation representative in family law litigation because of the risk of a costs order being made against the authority in that litigation. Pursuant to s 117(1) of the Act, each party to family law litigation bears his or her own costs although this is admittedly subject to s 117(2). Whilst costs orders are made in family law litigation, they are made far less frequently than in other forms of civil litigation as costs do not 'follow the event'. Thus the exposure to a risk of a costs order being made against the litigation representative in family law litigation is less than in other areas of civil litigation.
90. Nevertheless, the LCA supports the amendment which is proposed in the Civil Law and Justice Legislation Amendment Bill 2017 (currently before Federal Parliament) which would insert a new s 117(6) into the Act to prohibit the court from making an order under s 117(2) against a guardian *ad litem* (the term used in the Bill to cover both case guardians and litigation guardians) unless the court is satisfied that an act or omission of the guardian is unreasonable or has unreasonably delayed the proceedings.

91. Due to the increasing lack of willingness of statutory authorities to act as litigation representatives in family law litigation (where they have not otherwise been appointed as guardian and administrator under State legislation), there is an increased likelihood of lay individuals being appointed as litigation representatives. Family law litigation often raises significant issues about the personal, social, financial and cultural wellbeing of the person being represented which can be challenging for the litigation representative to deal with. There is also, as stated above, a heightened risk of the potential for a conflict of interest to arise between that lay representative and the person they represent, particularly where the litigation representative has a family relationship with the person they represent. The LCA supports Practice Notes being issued by the Courts exercising jurisdiction under the Act that assist a litigation representative to understand their role, duties and responsibilities.
92. The LCA recommends the harmonisation of rules of the family courts in relation to the test to be applied in assessing whether a person needs a litigation representative. The LCA also recommends the harmonisation of terminology in the family courts to describe the litigation representative (as currently, the Family Court uses the terminology '*case guardian*' and the Federal Circuit Court uses the terminology of '*litigation guardian*').
93. The LCA supports the concept of 'supported decision' making for litigants who have a disability – however there would be considerable costs involved in its implementation given the current lack of funding for the system overall.
94. With an ageing population there are likely to be more users of the family law system who lack capacity to make decisions about their finances, including the division of assets upon breakdown of relationships. These cases become even more complex where there are adult children of a former relationship of one or both parties, who have a financial interest (by way of testamentary law) in the outcome of the family law property division. The potential for increased elder abuse in the family law context is likely.
95. The LCA supports more training for professionals in the family law system (lawyers, judges, psychologists) regarding issues of disability, capacity and disability and elder abuse.

Question 8:

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

96. The LCA proposes that consideration be given to the amendment of court forms and the Commonwealth Portal to offer alternatives to binary gender. For example, 'sex' on the current Initiating Application form offers only the options 'male' and 'female'. The suggested alternative in order to encompass transgender and intersex people is: 'unspecified', 'not specified' or 'not stated'.²⁹ The *Sex Discrimination Act 1984* (Cth) was amended in 2013 to introduce new protections from discrimination on the grounds of sexual orientation, gender identity and intersex status in many aspects of

²⁹ See A Gender Agenda Inc., 'Submissions on Behalf of A Gender Agenda Inc. Seeking Leave to Appear as Amicus Curiae', Submission in *NSW Registrar of Births, Deaths and Marriages v Norrie* 250 CLR 490, S273/2013, 23 January 2014.

public life, and these are complemented by the Australian Government Guidelines on the Recognition of Sex and Gender. The LCA notes the views of the Law Society of Tasmania that the current forms and other means of data collection within the family law courts fail to comply with the Guidelines.

97. Although the definition of 'family violence' at s 4AB of the Act is not closed, the addition of examples of conduct associated with LGBTIQ people's experience of domestic violence at s 4AB(2) of the Act may recognise and make visible forms of violence they experience. For example, the threat to disclose information about HIV status is a form of domestic violence experienced by LGBTIQ people and recognised in state criminal law which could be added as an example of 'family violence' at s 4AB(2).
98. Access issues for LGBTIQ people need to be contextualised within an understanding of the history of these communities' past experience of legal systems. It is no exaggeration to say that some LGBTIQ people have gone from criminals as a consequence of sexual expression within their personal relationships, through to legal obligations based on equality following the end of the same relationship. Creating channels of communication with the LGBTIQ communities to explain the family law system in the context of LGBTIQ families is suggested, such as adding to the family courts' digital presence an access point for LGBTIQ people and communicating with leaders in the LGBTIQ communities to dispel or address perceptions about family law.
99. Cultural training for stakeholders inside the family law system (but especially lawyers) is required. The existing system of compulsory units within mandatory legal education would seem the logical place to deliver relatively basic cultural training on issues such as: basic language usage (so as to affirm not unintentionally denigrate LGBTIQ people) and about violence within same sex relationships.
100. While LGBTIQ individuals and families should be treated in the same way as any other family under the law and by family law professionals, this group faces particular challenges within the family law system. Parentage issues disproportionately impact on this group. The Act does not adequately deal with parentage issues for same-sex families. By way of example, the children of transgender men, who are born with reproductive anatomy that allows them to become pregnant and give birth, are not considered within the current scope of the Act and any determinations around parentage for these children are unclear.³⁰ Similarly, same-sex parents of children born overseas via surrogate may not be recognised as parents within the scope of the Act. The consequences of this for LGBTIQ families, who often bear significant cost and overcome enormous challenges to create a family, can be devastating.
101. The issue of who may be considered a parent is dealt with differently across various federal legislation, including the Act, *Child Support Assessment Act 1989* (Cth) and *Passports Act 1938* (Cth). The issue is dealt with differently again throughout various state statutes. These discrepancies require urgent resolution. The LCA refers to the 2013 Family Law Council report on *Parentage and the Family Law Act* and suggests that many of these recommendations warrant consideration as part of this review, including the recommendation for a national Status of Children Act.
102. QLS recommends resources be allocated to community education around parentage, donors and donor agreements. There appears to be a lack of

³⁰ Rosie Charter et al, 'The Transgender Parent: Experiences and Constructions of Pregnancy and Parenthood for Transgender Men in Australia' (2018) *International Journal of Transgenderism*.

understanding around the current non-binding nature of donor agreements. LGBTIQ families may not seek the assistance of a fertility clinic in having a child and therefore may not be provided with information around the ramifications of entering into an agreement, for example, with a friend. The Act provides scope for a person concerned with the welfare of a child to make an application to the court in relation to the parenting arrangements for that child. In these circumstances, a donor may have standing to seek orders in relation to, for example, living arrangements.

Question 9:

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

103. The LCA suggests that inadequate funding of the family law system has created particular challenges for the users of the system in rural, regional and remote Australia.
104. Years of chronic underfunding have resulted in non-purpose built courtrooms located/co-located in less than adequate (or safe) precincts, which heighten risk for parties affected by family violence.
105. Recurrent logistical issues which arise during circuits conducted in regional areas include:
 - (a) typically, the courtrooms and court precincts are small in area, which results in:
 - (i) overcrowding (it not being unusual for there to be between 50 and 70 matters listed on the first day of a circuit, with each matter generally involving two Lawyers, one or two Counsel, two or more parties and support persons accompanying those parties to Court);
 - (ii) opposing parties being in close proximity to each other for potentially long periods, including in matters where there are allegations of mental health issues, family violence and/or child abuse;
 - (iii) a limited number of conference rooms for lawyers to consult with clients privately (which often results in conference occurring within the hearing of others or at locations outside the court precincts);
 - (b) in some locations, access to the court precincts (including by lift) has to be shared by litigants in person, parties and their lawyers and judges;
 - (c) in some of the older courts and court precincts (for example, in Bendigo), lifts sometimes break down (particularly on busy days) which causes significant access issues, particularly for people with disabilities;
 - (d) at some regional locations and particularly on the first day of a busy circuit, security scanning can take a lengthy period, with lawyers from Bendigo for example (where the old Magistrates Court is used for circuits) reporting that it is not uncommon on the first day of a busy circuit for people to have to wait for almost an hour to enter the Court through security scanning; and
 - (e) use of state Courts where many circuits operate is limited and, at times and often at short notice, become unavailable. This results in the circuit having to

move to another location, which may be some distance away and have inadequate facilities. For example, the circuit conducted in Armidale, New South Wales out of the Local/District Court building is sometimes moved to a venue in Gunnedah, some two hours travel time away from Armidale. The LCA understands that on occasion the Judge has had to use her own mobile telephone to facilitate parties appearing by telephone due to a lack of proper facilities at the available Court. The circuit in Armidale has, at times, also been held in the Coroner's Court, which is a particularly small Court with little more than a table in a room with a row of seats behind it. It is not adequate or equipped to deal with circuits where 50 cases or more might be listed each day.

106. Smaller regional registries and circuit sittings, in particular, provide logistical challenges for cross-examination of a vulnerable witness, primarily due to:
 - (a) availability of only one courtroom and the requirement to source an alternate location for the vulnerable witness to give evidence via video-link;
 - (b) scarcity of other locations available to enable a secure video-link with the Court;
 - (c) single entry/exit points at the court precinct or very small court rooms which increase the risk of vulnerable witnesses being in close proximity to the perpetrators; and
 - (d) lack of safe rooms to house vulnerable witnesses during the hearing.
107. Additional funding is needed for courts in regional areas to ensure the safety of all court users (including clients, lawyers and Judges) and to provide the infrastructure necessary for vulnerable witnesses to give evidence in a way only available in larger registries.
108. As a result of the ever-increasing workload of Federal Circuit Court and Family Court of Western Australia Judges in capital cities and the limited number of appointments being made to those Courts, circuits to various regional areas of Australia are limited in number and frequency and, in some areas, have been reduced. In many locations, the number and frequency of circuits for regional areas is constrained by the availability of state Courts at which the circuits are conducted. An example of such difficulties is the inability of the Judge appointed to Rockhampton to sit for more than 16 weeks each year in that location as a result of the unavailability of space at the state Court where that Judge sits.
109. Large numbers of cases are listed during circuits - it not being uncommon for between 50 and 70 matters to be listed on the first day of a circuit. At times the overall caseload of a particular circuit might increase due to increases in the number of cases filed in that circuit, however the length and number of circuits remain the same (or are decreased). For example, the LCA understands that in one circuit in Albury 35 cases were listed for a final hearing over a four day period. Whilst over-listing for trials occurs in city registries, typically this is three-four cases. Clearly a Judge would not have the capacity to deal with 35 cases listed for trials in four days.
110. Large listings have a number of consequences for litigants, lawyers, judicial officers and witnesses, including:
 - (a) overcrowding and safety issues;

- (b) some cases not being reached, which can result in some or all of the costs incurred in preparing for such hearings (including the cost of Counsel) being wasted. Duplication of work (and therefore costs) can also occur when such cases are adjourned to another day in the circuit, to another circuit entirely or transferred to the city registry from where the circuit is conducted;
 - (c) the workload for many rural lawyers can be substantial in preparing for a large number of interim and/or final hearings which may or may not be determined during a particular circuit;
 - (d) commonly, applications for urgent interim orders are not being reached during the circuit in which such applications are initially listed. This results in those applications being adjourned to the next available circuit, (which, at times, can be many months away) or the application being transferred to the main registry from which the circuit is conducted, (which can also result in the application not being determined for a period of some many months);
 - (e) when cases are transferred to the main registry from which a circuit is conducted, parties incur further costs and inconvenience arising from agents being retained to appear and the parties and their lawyers having to personally travel to and appear in those registries;
 - (f) lengthy delays (up to and sometimes exceeding six months) occur when cases are adjourned from one circuit to the next available circuit, (or transferred to the main registry from which the circuit is conducted);
 - (g) there are lengthy delays in cases being determined on a final basis (the time from the date of the filing of an application to a final hearing being up to or exceeding two years in some registries); and
 - (h) difficulties are also created in obtaining grants of legal aid for circuit cases, including where funding applications for trial need to be made on multiple occasions due to the case not being reached; the legal aid cap for funding being reached before a trial due to the case having been listed on previous occasions for trial and not reached; and the late release of family reports delaying determinations of funding applications for trial.
111. Circuits by Registrars of the courts to regional areas have also been reduced or abolished. This results in parties incurring additional costs for those less complex hearings that are conducted by Registrars such as divorce hearings and conciliation conferences as they are required to either pay for town agents or for their lawyers to travel to the main registries for these court events.
112. Additional funding is required for judges and registrars so that the ever-increasing demand in regional areas can be met by more circuits and circuits to more regional areas.
113. Further delays are also created by the lack of timely family reports. It is not uncommon for there to be delays of between six and twelve months from the time a family report is ordered to the time it is prepared and released. Some family consultants do not travel to some regional areas for the purpose of conducting family report interviews and in such circumstances, those interviews either have to be conducted by telephone or the parties (and children) have to travel long distances to participate in such interviews in city registries.

114. Where a Judge orders that a family report be privately-funded by the parties, there is a shortage of private experts available in regional areas to undertake such work.
115. In the Northern Territory, the Federal Circuit Court has, in recent times, arranged for a family consultant from Darwin to travel the lengthy distances to Alice Springs (1500km) and Nhulunbuy (1050km) to prepare reports for families of limited means, which has substantially alleviated access to justice issues for those families and improved the evidentiary value of the family reports prepared in those matters.
116. Additional funding is required to ensure there are sufficient, experienced family consultants available to prepare family reports, with a view to both reducing the waiting time for the preparation of such reports and the general accessibility of such reports in regional areas.
117. One of the recurring issues raised by regional family lawyers in areas where regional registries do not exist is the difficulty in obtaining timely access to documents produced in response to subpoenas. Historically and currently, subpoenaed documents are only brought to regional circuits from main registries at the time circuits are conducted and accordingly, regional lawyers are only able to personally inspect such documents from the first day of the circuit (provided the presiding Judge has no objection to inspections occurring at that time).
118. A number of issues arise as a result of regional family lawyers only being given access to subpoenaed documents during circuits, including the following issues:
 - (a) it limits the amount of time available to lawyers to inspect and consider the subpoenaed documents;
 - (b) it can lead to a delay in the hearing commencing;
 - (c) in the event significant, new information is obtained from the documents inspected, hearings have to be adjourned whilst further investigations are undertaken;
 - (d) it is preferable for subpoenaed documents to be considered prior to affidavits being prepared in cases (noting such affidavits need to be prepared some time prior to the commencement of a circuit);
 - (e) in the event a lawyer considers it necessary to tender a substantial amount of subpoenaed documents during a hearing, it is difficult to logistically prepare for the tendering of such documents at short notice, which can also lead to the hearing being delayed or adjourned; and
 - (f) the inspection of subpoenaed documents can lead to productive settlement discussions, and it would be preferable for such discussions to occur at a much earlier date than the commencement of a circuit.
119. The difficulties encountered by regional lawyers in accessing subpoenaed documents prior to the commencement of a circuit include the following:
 - (a) where circuits in a regional area are conducted in state Courts, (which occurs in many regional locations), the state Courts are not willing to hold, and facilitate access to, subpoenaed documents prior to the commencement of a circuit;

- (b) the inspection of documents held in a main registry prior to a circuit commencing by their lawyers can be expensive for a client, in circumstances where the lawyer has significant distances to travel to and from the main registry;
 - (c) the cost of a town agent inspecting subpoenaed documents and reporting to the regional lawyer can also be a costly exercise and in many cases cannot be undertaken as efficiently and as accurately as the lawyer with the primary conduct of the case; and
 - (d) regional lawyers and their clients are often unable to obtain a grant of legal aid for the cost of a lawyer or a town agent inspecting subpoenaed documents in the main registry.
120. A number of alternative solutions are proposed by regional lawyers to deal with the ongoing issues they face in accessing subpoenaed documents, including the following:
- (a) obtaining the cooperation of the state Courts, where many circuits are held, to hold subpoenaed documents and facilitate regional lawyers obtaining access to such documents (even for a limited period of, say, six to eight weeks prior to the commencement of a circuit);
 - (b) subject to issues of confidentiality being adequately addressed, subpoenaed documents being scanned in the main registry and thereafter emailed/faxed to regional lawyers, (as has occurred, from time to time, in some regional areas, for example, Alice Springs); and
 - (c) subject to issues of confidentiality being adequately addressed, subpoenaed documents being uploaded to the Commonwealth Courts Portal, for access by regional lawyers.
121. Access to the internet and technology may not be readily available in regional areas, in addition to other barriers. Ensuring electronic communication links to the larger registries is crucial to accessing justice. Similarly, audio visual and tele-links are not available in all regional circuits and, if available, cannot always be used due to lack of available or experienced staff in the circuit court and main registries. The lack of such facilities causes difficulties during some hearings, particularly in the case of the cross-examination of vulnerable witnesses and of experts (including family consultants) who are unable to travel to regional circuits to give evidence.
122. Recognition of the role Family Law Pathways Networks play is important in understanding how they link all the family law services in the region and enable services to identify and meet any gaps or barriers faced by users. The LCA supports the ongoing funding of Family Law Pathways Networks, particularly in regional, rural and remote areas.
123. Funding for greater community education in the regional communities is particularly important for those who may not possess legal literacy skills, speak English or have other characteristics or vulnerabilities such that accessing the family law system may be entirely foreign to them.
124. The LCA supports increased funding to the LACS, ATSILS, IFVLS, WLS & CLC's to provide this education and to also increase access to legal services in the more remote locations.

125. The LCA notes and supports the input from the LSNT on this issue, namely that there are a considerable number of clients (and this is anticipated to grow) from smaller and or remote towns and communities that require access to a variety of family law related services including:
- (a) supervised contact centres;
 - (b) supervised handovers;
 - (c) mediations;
 - (d) parenting courses and education post separation;
 - (e) transport and assistance to attend court in person;
 - (f) assistance in attending court by audio-visual means (very important in regional and remote areas);
 - (g) assistance in attending related appointments; and
 - (h) translation of information or legal advice.

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?

126. Users of the family law system can access legal services (advice) a number of ways:
- (a) through engagement of a private lawyer;
 - (b) using a legal aid lawyer – either in house or a private lawyer acting subject to a grant of legal aid (subject to the restrictions and obligations of such a grant);
 - (c) accessing advice from a CLC or WLS (either as one off/unbundled service or ongoing direct retainer);
 - (d) occasional advice and ‘unbundled engagement’ of a private lawyer; or
 - (e) pro-bono advice.
127. While the concept of ‘price’ or ‘value’ is subjective, a range of family law services are offered and available to respond to the needs or interests of the consumer. Not all engagement with family lawyers is ongoing and expensive and consumers are able to access the type of service they want or need with a variety of price offerings. In urban areas, in particular, the consumer benefits from extensive competition and different offerings reflecting the nature of the service, seniority, experience and reputation of the lawyer, firm or community legal service.
128. Many people engage lawyers for preliminary advice and guidance and then continue their own direct negotiations successfully or perhaps will again engage with their advisors to obtain assistance in formalising settlement documents.

129. Most separating couples do not become involved in court proceedings. Lawyers provide valuable assistance to encourage and explore options for settlement and experienced family lawyers discharge this obligation consistently and diligently, thus minimising costs for both parties. The provision of legal advice and the fees paid for that service are usually commensurate with the importance of the subject matter for the client, the complexity of the issues involved and the reassurance provided by receipt of that advice.
130. Sometimes however, litigation is a necessary remedy to protect children's best interests and to secure just and equitable financial outcomes.
131. What are the factors that influence cost when a litigation pathway is necessary? The LCA notes that there are a range of factors which influence the cost of court proceedings:
- (a) the most significant factor that increases the cost of court proceedings is *time* - continuing delay results in increased costs. The longer a case takes to get to trial the more likely that further interim issues requiring judicial determination, will arise. In a parenting case these might include disputes over schooling or increases to the time a child spends with a parent as that child becomes older. In a financial case other circumstances will change including the valuation of property, requiring multiple updates to valuation evidence;
 - (b) not only does delay increase the likelihood of further interim proceedings, it is also increases the likelihood of other issues arising which require negotiation between the parties via their lawyers, thus increasing costs;
 - (c) the availability of a judicial officer to hear and determine interim applications and trials on the dates that they are listed also impacts costs. It is not uncommon, due to the shortage in the number of judicial officers, for interim applications not to be heard on their first return date, and to be adjourned to a later date. Overlisting of trials is common in all courts as a way for the courts to manage their finite judicial resources, but this can lead to cases not being reached on their allocated dates. This leads to parties' incurring costs for multiple court dates, including preparation and appearance fees;
 - (d) the attitude of either or both parties can also lead to an increase in costs. If a person does not take advice about the likely outcome of their claim, or is unwilling or unable to engage successfully in negotiations to compromise their claim, both parties will incur greater legal fees; and
 - (e) the complexity of the facts in issue or the legal arguments involved, will also increase costs. The more complex the case, the more likely it is that there will be multiple witnesses (expert and lay) involved, the more likely it is that there will be multiple interim hearings, the more likely it is that attempts to resolve the case will take more resources and the more likely it is that the case will proceed to a trial.
132. The current family law litigation process imposes the same pathway on each litigated matter, regardless of the complexities of each case. The LCA strongly supports initiatives which will better enable triage and differential case management for cases before the courts (including greater use of registrars and processes to hear and determine small pool property cases that are simpler and quicker).
133. However, the LCA strongly argues that the chronic underfunding of the family courts by successive governments is the most significant cause of the increased cost of

family law litigation in Australia and it must be addressed if the community is to benefit from an affordable family law system.

134. The engagement of private lawyers and the costs they charge are subject to significant regulation by the state and territory law societies and a robust system for complaint and redress operates in each jurisdiction. For instance, the *Uniform Law* which currently applies in Victoria and New South Wales requires regular costs disclosure to clients, including the provision of regular costs estimates.

Funding for legal aid

135. Sustained cuts to legal aid funding over a number of years have impacted the ability of financially disadvantaged and vulnerable parties to obtain access to specialist family law advice.
136. The legal aid system is being supported by private lawyers who undertake work on a grant of aid. The reality for those lawyers and their firms is that the grant of aid received is not sufficient to meet the costs of production incurred by them. A very substantial (and often unheralded) contribution is being made to the support of the national legal aid system by those lawyers and their firms.
137. One of the consequences of the cuts to legal aid funding and the failure of funding of legal aid to keep pace with demand (apart from fewer grants of aid) is the general reduction in costs allowed in particular matters – so the funding allowance to do certain things is reduced. This is also having a serious impact upon the appointment of lawyers to act as ICLs – leading in part, to less experienced private lawyers taking on this work. This may have an adverse impact on the benefit the court might otherwise have expected from the assistance of an ICL and may lead to less than optimal outcomes for some parties and children.

Family Reports

138. When parenting matters are before the Court, reports from court family consultants or private experts are often required, to assist the Court in its best interest considerations, and in some instances, assessment of risk. In most registries, the demand for reports exceeds the ability of the system to provide them – demands upon family consultants are significant and, in some registries, the commencement of final hearings is being imperilled because reports have not been completed.
139. The work of court consultants is important and invaluable. The LCA recommends additional funding for court consultants to better ensure the timely preparation of reports, which aid the court in making sound decisions about children, but also to assist parties in settlement discussions.
140. Where the parties are able to meet the costs of a private report, they ought to be required to do so, easing the burdens on the court's resources and preserving referral to court family consultants for matters where parties are in receipt of a grant of aid or have limited resources. The move to 'user pays' is a necessary consequence of funding reductions but is appropriate, in this instance. In certain registries in property matters, if the asset pool is equal to or more than \$500,000, a private financial mediation is directed or at least strongly encouraged (rather than a court funded conciliation conference where only a relatively small fee is imposed). A similar 'guideline' is being applied, informally at least, in certain registries, with respect to the allocation of family reports.

141. When parties look to private psychologists and psychiatrists for the preparation of reports, there can be challenges in finding those with requisite expertise and/or who are prepared to engage in this forensic work. The limited numbers of psychologists (and even more so, psychiatrists outside of urban centres) that are prepared to undertake this work also impacts cost and delay.
142. Family Report writing is essential work but carries with it significant additional burdens – including being available to be cross-examined at the time of the trial, and the consequential impact of that time demand upon the maintenance of clinical practice. The LCA also notes the considerable professional pressure placed on experts working in this field, including threatening behaviour toward them by litigants and vexatious complaints to professional bodies.³¹
143. The LCA rejects any suggestion that the provision of expert reports by private providers is somehow a ‘closed shop’, inclusion in which is somehow controlled by the providers themselves (as was suggested in one submission and evidence to the Legal and Constitutional Affairs Legislation Committee hearing into the proposed Parenting Management Hearings Bill 2017³²) or that the fees charged by those providers are unreasonable. The preparation of an expert report will usually involve many hours of face to face engagement, reading of court documents, subpoenaed material, and may require contact with relevant third parties before reflection, analysis and drafting of a report, in response to terms of instruction or an order of the court specifying the matters to be addressed. The parties engaging in this process are usually unrestricted in their ability to select or nominate the relevant expert. It is not surprising that those whose expertise comes to be recognised and highly regarded will be in greater demand. Their increased fees, reflecting that expertise, in itself cannot be a ground for criticism. The LCA supports initiatives which would encourage more experts to consider working in this field which might increase competition and put downward pressure on fees charged.

Question 11:

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

144. Whilst simplistic, the ALRC ought not overlook the most obvious of answers to this question – the proper funding of those in need of legal representation who are unable to afford it otherwise. The systemic reduction in the funding of schemes for the representation of indigent Australians is a national disgrace and this issue would not emerge for discussion but for this having occurred.
145. Setting aside that most obvious of answers, the LCA has long advocated for:
 - (a) Simplification of Part VII of the Act;
 - (b) One set of Rules for both the Family Court and Federal Circuit Court;

³¹ Association of Family & Conciliation Courts, Australian Chapter. Submission to the Senate Standing Committee on Community Affairs Inquiry *Complaints mechanisms administered under the Health Practitioner Regulation National Law*, 21 February 2017.

³² Senate Legal and Constitutional Affairs Committee hearing, *Family Law Amendment (Family Violence and Other Measures) Bill 2017 & Family Law Amendment (Parenting Management Hearings Bill) 2017*, public hearing, 23 February 2018, evidence by Ms Paula Piccinini, General Manager, Direct Services, Eastern Domestic Violence Service

- (c) One set of forms for both the Family Court and Federal Circuit Court;
 - (d) Revision and renumbering of the entire Act to make it more user-friendly.
146. These measures will make the court process more accessible for both self-represented parties and legal practitioners (and thus their clients).
147. The LCA refers to its response to Question 1, which suggests that parties, practitioners and judicial officers ought be more aware of and proactive in employing the array of measures already available under the Act and associated legislation and rules including to support a proper fact-based determination in a manner that is sensitive to and protects the needs and interests of all those participating in and affected by the proceedings.
148. Paragraph 118 of the Issues Paper raises the concept of a Counsel Assisting model. This is, with respect, a flawed notion in the view of the LCA which should be rejected as:
- (a) contemplation of such a role is one borne of little more than budgetary constraint and is blind to the difficulties and injustice which would result. The real answer, and the one that ensures appropriate representation and assistance and the appropriate protection of all those involved, is to properly fund the legal representation of those parties in need via the Legal Aid Commissions;
 - (b) the idea of a person ‘parachuting’ in to a family law trial to ask a set of questions, misunderstands the process of proper cross-examination – a carefully crafted cross-examination will move across topics, gathering a piece of evidence here, and a piece there – the suggestion that someone can simply arrive, follow a script (drafted by whom is another unanswered question) and leave, is naïve and of disservice to the client and the court;
 - (c) there are issues as to who would be the client on that approach? Who drafts the questions? Are instructions provided and if so, by and to whom? How much information does the questioner receive? What if the questions are unreasonable or miss the point?
 - (d) this approach may work in criminal trials where violence may be the sole factual and legal issue for determination, and where, often, the alleged victim is but one of the witnesses in the case, with the Director of Public Prosecutions prosecuting. However, in the family law context, the alleged victim is a party to the proceedings and the issue of family violence is just one of the issues to be determined although it will almost always permeate the whole of the factual matrix of the case;
 - (e) the Joint Courts submission to the Victorian Royal Commission 2015 observed: *‘It is difficult to see how such a system would sensibly sequester the cross-examination of an alleged perpetrator as to family violence from the cross examination on other issues in the case’*,³³
 - (f) all Bar Rules prevent legal practitioners from being a client’s ‘mouthpiece’ - it is not appropriate nor possible for a legal practitioner to undertake the role of questioner, limited to asking the complainant only the questions that the accused person requests;

³³ The Family Court of Australia and the Federal Circuit Court of Australia, Submission to the Victorian Royal Commission into Family Violence, 6 August 2015, 13.

- (g) it would not be appropriate, for example, for the ICL (if one exists) to run that part of the case in a partisan way. The adoption of such a role by the ICL would fundamentally remove their independent status and that of representing the interests of the relevant children;
 - (h) ultimately, of what assistance could the questioner be to the Court and to the person involved if they are not briefed with the totality of the evidence and thus do not know that a relevant follow-up question ought to be asked nor the broader context and issues to which the questions (and answers) might relate;
 - (i) finally, would this person ask questions across the full range of family law matters where allegations of violence are made – not only parenting proceedings, but also, say, *Kennon* arguments in property proceedings, arguments about reasonable excuse in contravention proceedings, or the challenge to findings of fact (or not) on Appeals?
149. For all of the reasons above, we urge the ALRC to not recommend a Counsel Assisting model; the funds that would be used would be better employed giving the parties legal aid instead.
150. We set out some specific suggestions as to practice and procedure in answer to the next question.

Question 12:

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

151. The challenges for litigants in navigating the family law system include:
- (a) the existence of multiple courts;
 - (b) the existence of multiple courts which do not share information;
 - (c) the existence of multiple service providers;
 - (d) the existence of multiple service providers which do not share information;
 - (e) the existence of support services that proffer litigation advice without the knowledge or expertise to do so (and sometime harmful to the later presentation of party's case);
 - (f) the need for a high level of general English language literacy;
 - (g) the need for some 'legal language' proficiency;
 - (h) numerous and complex forms;
 - (i) laborious methods of commencing proceedings; and
 - (j) substantive laws and rules which are lengthy, complex and in some instances convoluted.
152. With this in mind, redevelopment of the court system and procedures should include:

- (a) the creation of a single court dedicated to family law issues (albeit one that could comprise different internal divisions);
- (b) the creation of a single set of rules, which are user-friendly, written without multiple parts, written without the requirement to refer back to other sections or rules, concise, and written in plain English;³⁴
- (c) simplification of Part VII of the Act;
- (d) revision and renumbering of the Act;
- (e) the creation of a single interface for the transmission/input of client data. To continue with the use of 'forms' would to maintain an antiquated practice in modern society. Rather than multiple and fixed forms, client data and evidence could be transmitted to the court and other parties via an online system, which is mobile optimized, user-friendly, and intuitively designed. All information which is currently communicated from a client to the court and other parties, is amenable to transmission via an online interface. If required, the data could later be generated into a 'form'. The online interface would be written in plain English (and available in languages other than English and also audio-enabled to meet the needs of the visually impaired and clients with low literacy). An online interface would obviate the current problem of forms becoming superseded and allow additional questions or data requirements to be added by the court instantaneously. The online interface would obviate the problem of clients having to locate resources to print forms, photocopy forms, scan and upload paper forms and post or physically file forms. It would minimize or obviate the need for service and proof of service. It would obviate or significantly decrease the need for clients to interpret the type or form of documents or information required. The interface could allow witnesses in remote locations to input evidence with ease. An electronic interface would enable the oral transmission and recording of information from the client/witness to alleviate difficulties for the linguistically diverse and literacy poor. Documents and exhibits to be put into evidence would be uploaded and would be given an identifier (avoiding the need for photocopying, document bundles, pagination and annexure markings). Provision could easily be made for the swearing or affirmation of this evidence, as, for example, many health insurance providers' on-line refund systems require;
- (f) removal of the mandatory requirement to provide clients with numerous brochures and information documents – simpler and less numerous brochures ought be developed;
- (g) the requirement to use plain English within courts and proceedings;
- (h) a transparent and consistent process within the court. At present, particularly in the Federal Circuit Court, each judicial officer has the discretion to (and does) conduct and manage cases as they see fit. Each judge has a different process. There is no clear, consistent or transparent process. Some may hear interim arguments on the first return date whilst others will not and simply consider it a 'mention' and make directions for further case management. Some may conduct a 'call over' in the morning to order matters whilst others may call matters on whilst litigants wait outside of the court room for what can be up to eight hours. These are just a few examples of the disparate processes utilized.

³⁴ All legal jargon should be excluded – for example, rather than 'serve' = 'give', rather than 'consent' = 'agree'.

Neither litigant (nor lawyer) can currently accurately predict the likely course of the proceedings once filed;

- (i) further education of judicial officers in communicating with litigants;
- (j) further education of judicial officers in the less-adversarial features of the Act; and
- (k) training (or retraining) of legal practitioners in the less-adversarial features of the Act.

153. Further changes to support litigants may include a comprehensive 'one-stop' online guide for families as follows;³⁵

- (a) it must be user-friendly, easy to navigate, clear, written in plain English, available in other languages, and audio-enabled;
- (b) it should clearly explain the law and pathways after separation and pathways for parents that may never have cohabitated. It should explain the family law process, show 'how to' take a particular pathway, and demonstrate typical court procedures and events;
- (c) it should provide open and transparent information about the court – the wait times, the court layout, photographs and 360-degree views of the inside of the court rooms of each registry;³⁶
- (d) written information must be supplemented by short embedded videos;
- (e) it must properly link and integrate information and understanding about the other parts of the family law system (child support, child protection, family and domestic violence, dispute resolution); and
- (f) have a live 'chat' function linked to well-trained staff to assist clients with navigation, referrals and assistance.

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?

154. The reality is that the potential for improvements are limited by the physical environment in which the Commonwealth houses its many courts, or state courts which the Commonwealth is able to use. The LCA also notes its responses provided also to Questions 5 and 9 insofar as they raise the same issue.

155. It is a fair generalisation to note that, by and large, the metropolitan court buildings offer greater amenities in terms of keeping parties apart, safe rooms, courts on

³⁵ At present the information available to the community is dispersed and dense. There is a website for the Family Court, a separate site for the Federal Circuit Court, and separate sites for the State Courts. There are websites for legislation and case law. There is a Family Dispute Resolution website. There is a Child Support website.

³⁶ Until clients arrive at court, many do not know what it looks like, where to go, or where to sit.

different levels (where parties can be separated if required) and the implementation of safety plans. The situation is at times dire in regional courts, particularly smaller and/or older buildings where there are limited rooms available for the parties, only one entrance, and sometimes, only one lift (including for the judge).

156. Ideally, children will never come to court, unless it is for the purposes of a Family Report or s 11F report and then only to attend upon a court counselling area, separate from the courts and the parties milling about outside courts waiting to get on for hearing.
157. The LCA agrees with the deficiencies identified at paragraph 199 of the Issues Paper and the Victorian Royal Commission recommendations summarised at paragraph 120. The LCA also agrees with the observations at paragraph 122 with respect to '*dynamic security*' and notes that such a system is employed in the Brisbane court registry, with the kinds of benefits as set out in that paragraph being achieved.
158. One matter that is not mentioned in the Issues Paper is the safety of lawyers in the family law system. Unfortunately, it sometimes comes to pass that either the ICL or the other party's lawyer becomes the target of a litigant's anger and ire. Save for the provision of security at the courts, no safety assistance is provided to lawyers once they leave the court precinct.

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?

159. The LCA recommends a simplification of Part VII of the Act. The 'legislative pathway' currently mandated under the Act results in the family courts needing to undertake a significant number of steps before reaching a consideration of the subject child's best interests. It is best interests that ought to be the primary focus of any dispute under the Act and the route to determining them should be direct, rather than one that is convoluted, misunderstood by the public, and based on a rebuttable presumption.
160. The principles that ought to inform Part VII should retain a child's best interests as the paramount consideration. The consideration of best interests should take into account each child's age and stage of development. The focus of any legislation must be on the best interests of the child and not on perceptions of what may or may not be 'fair' to parents, or to 'rights' parents consider they may have.
161. Unless indicated on the evidence, separation of parents ought not sever relationships between the child and his/her parents and other family members important to them. If the child has had the benefit of a close relationship with both parents, then substantial involvement of both parents in the life of that child post separation should be seen as a benefit. What constitutes substantial involvement however, need not be the subject of legislative definition. A more intuitive and reactive acknowledgement of what it is to be substantially involved, beyond counting the number of nights a child sleeps at a parent's home and whether this occurs on school days or weekends, ought to be possible.

162. Parenting arrangements post separation for children should not expose a child or parent to harm, abuse or violence or the risk of these occurring. The harm for the child ought to include the harm of being subject to inadequate parenting and/or continuing conflict between parents including the continuation of court proceedings.
163. The Act should continue to respect the rights of children as set out in the United Nations *Convention on the Rights of the Child*.
164. Ultimately the family courts need to have a discretion to consider a child's best interests following these principles unfettered by presumptions or living arrangements that must be considered if orders for a sharing of parental responsibility are made.
165. Currently the Act requires the family courts to consider making orders for equal time or substantial and significant time between parents and children if orders are made for equal shared parental responsibility. This is subject to s 65DAA that requires a consideration of the '*reasonable practicability*' of making such an order. Requiring a consideration of equal time or substantial and significant time, to be determined after a consideration of reasonable practicability, diminishes the consideration of the best interests of the particular child. Best interests ought to be considered as the paramount and first factor, then the configuration of living arrangements with the reasonable practicability of any order made one of the best interests considerations. Only then will orders be made primarily for the benefit of the subject child, rather than the wishes of the parents.
166. A simplified version of Part VII was proposed by the Hon Richard Chisolm in his paper presented at the 2014 National Family Law Conference, *Re-writing Part VII: A Modest Proposal*. The LCA supports the principles underlying his proposed re-draft and commends the form of the redraft and considerations he enunciates.
167. Once best interests are clearly elevated as the paramount consideration, a checklist of factors that may be relevant provides useful guidance to practitioners, parties and the Court. A focus on the child's developmental needs and the capacity of the parties to meet these ought be the main focus, but other than that, various factors in the checklist should not be elevated above other factors in importance.
168. The Act currently refers to 'parents' when determining certain rights and responsibilities. Although most children grow up with parents and most disputes are between parents, the Act currently limits the presumptions which then guide the exercise of the family courts' discretion to parents. Removing this terminology assists in cases where it is not necessarily parents seeking orders for responsibility or care of the child.
169. Consideration may also be given to incorporating into legislation the rule in *Rice v Asplund*,³⁷ subject to a consideration of best interests, to ensure children and/or carers are not exposed to abuse through continued applications to Court over the same issues.
170. Parental responsibility should in most cases be exercised by both parents but again any such order must be subject to the child's best interests. Continual conflict over decision-making regarding the child may be more harmful, than having but one parent/person with the capacity to make appropriate decisions subject to consultation with the other.

³⁷ (1979) FLC 90-725.

171. In summary, the LCA supports a return to discretion, guided by principles and with the child's best interests to be the paramount consideration.
172. Although the proposed draft of Part VII by the Hon Richard Chisholm repeats what is currently in the Act regarding Aboriginal and Torres Strait Islander children, the LCA would add that the considerations ought also to include the right of Aboriginal and Torres Strait Islander children to maintain extended family and community relationships and an active connection to culture and country and to acknowledge the collectivist approach to parenting and concepts of family, attachment and relationships in Aboriginal and Torres Strait Islander culture (as discussed elsewhere in this submission).

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?

173. The family courts already have a very large percentage of cases which include allegations of family violence. Caution needs to be exercised in expanding the definition of family violence, to avoid:
- (a) 'normalising' common (but objectionable) behaviour which is often amplified when parties are locked in litigation or reactionary/triggered behaviour (eg. shouting but not at sustained levels of verbal abuse). There is a difference between poor domestic behaviour and family violence and abuse;
 - (b) 'normalising' family violence to the extent that victims feel powerless to raise it or the Court stops paying attention;
 - (c) unintended consequences such that perpetrators of coercive/controlling violence claiming that their victims are perpetrators of family violence (perhaps of a different kind) on any significant level and using that very claim to exert control.
174. The aim should be to stigmatise the perpetration of family violence, not dilute it and increase opportunity for manipulation.
175. That being said, the definition of 'family violence' has expanded over time to better suit our knowledge of what it encompasses. As social science develops its knowledge of violence, trauma, psychological damage, their causes, symptoms and outcomes, then the definition should be expanded to include behaviours that fit our new knowledge base as it evolves. For example, 'financial abuse' certainly was not a form of violence when the definition first arose, but it is a very present and real phenomenon today. When the internet came about, nobody foresaw cyber-bullying as a significant issue so that victims of 'modern' styles of violence/control can be protected equally with those who fall prey to more 'traditional' methods.
176. A suggested refinement of the definition could be:
- (2) Examples of behaviour that may constitute family violence include (but are not limited to):*

- (a) *an assault (physical including choking); or*
- (b) *a sexual assault or other sexually abusive behaviour; or*
- (c) *stalking (including cyberstalking, hacking or data breaches); or*
- (d) *sustained verbal or psychological abuse such as repeated derogatory taunts or threats to suicide; or*
- (e) *intentionally damaging or destroying property; or*
- (f) *intentionally causing death or injury to an animal; or*
- (g) *other conduct which degrades and embarrasses a person (such as dissemination of intimate images without the knowledge or consent of that person).*

177. The LCA notes the experience of family violence by different sectors in the community may be broader than the examples contained in the definition in s 4AB. For example, specific types of behaviours experienced in Aboriginal and Torres Strait Islander, culturally and linguistically diverse and LGBTIQ communities. The LCA invites consideration of the definition, or inclusion of examples in the definition, to include specific types of behaviour that is experienced by mainly one section or sections of the community as referenced in the *National Domestic Violence Benchbook* to recognise and make these forms of family violence visible.
178. Division 11 of the Act should be expanded to allow the family courts to make family violence protection orders (bearing in mind of course the injunctive powers contained both within Part VII and s 114). It is counterintuitive to have a state/territory court empowered to vary, revoke or discharge or suspend a family law order under s 68R but a family court cannot do the same to a state-made family violence protection order when making parenting orders. This is assumed so because of s 109 of the Constitution, but this may be overridden to the extent of the inconsistency. An injunction under s 68B is, at present, a poor substitute for a state/territory issued family violence protection order in terms of enforcement.
179. Section 68Q would also benefit from amendment. It is currently limited to existing family violence protection orders. As noted above, it ought not be necessary to refer to s 109 of the Constitution to work out what happens when an inconsistent family violence protection order is made after a family law order is made.
180. Increased information sharing between the courts and all levels of government needs improvement (and the LCA acknowledges that a very important project is currently being undertaken by the AGD to address same and the technological issues that it raises). At present, the state court must take into account the terms of any parenting order, but that court will not necessarily have copies of parenting orders, or a Family Report upon which such orders may be based. In private matters, sometimes parties might bring their family law orders along to court, but in police matters often neither party participates. If so, the court and the police cannot access the Act orders (even if they know one exists).
181. Section 60CC(k) is of assistance only where the state/territory court has considered the making of the order following a contested hearing or submissions. A great many orders are made by consent and without admissions, which limit the inferences the family courts can draw from sub-paras (i)-(v).

182. Sections 60CF and 67ZBA are reliant on self-reporting of parties in almost all circumstances and of limited utility. There ought to be a mechanism for the Notice of Risk (whether allegations of family violence made or not), to prompt a report or provision of information in all matters at point of filing such as occurs in some Registries, with information being provided by child welfare agencies directly to the family courts. The family courts can then consider whether to make a s 69ZW Order requesting a report or further information.
183. Section 67ZBB (and see s 3(b)) is difficult to invoke in time and resource pressured courts. It is a rule more honoured in the breach than in the observance and it is rare to have compliance within the required time frame.

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?

Cultural diversity

184. The LCA suggests that consideration be given by ALRC to the following changes to better reflect the complex and multi-tiered family: kinship and community structures of Aboriginal and Torres Strait islander children and, children from culturally and linguistically diverse backgrounds.
185. It remains the opinion of the LCA, that the current structure of the Act which has a starting point of the presumption of equal shared parental responsibility as between parents, ought be altered and a general discretion to make orders in the best interests of the child should instead be the starting position of decisions of the family courts. In the consideration of best interests currently in the Act, s 60CC(2)(a) deals with specific considerations for children of Aboriginal or Torres Strait Islander descent. It is the view of the LCA that such specific consideration for these children ought remain, especially as they are over-represented in state welfare proceedings.
186. Further, the Act can and ought to be appropriately amended to allow for a consideration of people other than legal parents who may appropriately apply for parenting orders. The presumption of equal shared parental responsibility as it is currently worded, applies only to legal parents.
187. However, within Aboriginal and Torres Strait Islander families it is not unusual for aunts, uncles and/or grandparents to raise children as their own. Section 60CC(2)(a) is premised on Anglo-Saxon based family relationships and structures and does not apply to many Aboriginal and Torres Strait Islander families. It should be broadened to recognise the significant parenting and cultural roles played by a child's clan group and extended kinship system.
188. The proposed amendment of s 60CC(2)(a) (or its equivalent in any new legislation) is the benefit of the child of having a meaningful relationship with parents, and in the case of Aboriginal and Torres Strait Islander children or children from culturally and linguistically diverse backgrounds, their family, clan group and extended kinship system).
189. Clearly, the LCA would encourage that any proposed amendment be explored with Aboriginal and Torres Strait Islander representative groups/peak organisations so that they can provide input as to what wording is most likely to be appropriate.

190. Recognition of the importance of 'relationships' beyond parents is particularly important for Indigenous children to maintain these relationships and connection to culture and country for their own emotional and psychological well-being.
191. For all children, but particularly for Aboriginal and Torres Strait Islander children and children from culturally and linguistically diverse backgrounds, the structure of family can be far more fluid than those biologically related to a child. To promote the principles articulated currently in s 60B(2)(e) and ideally avoid children being the subject of state welfare proceedings where parents are not in a position to care for a child, consideration ought be given for the current ss 61DA and 60B, read in conjunction with s 67ZC relating to the welfare of children (or any equivalent provisions in new legislation) to be expanded to include *'a person who could have a significant role in the care, welfare and development of a child if it would be in that child's best interests'*.
192. In the event that a person, who has not already been involved significantly in the care, welfare and development of a child, but is applying to the Court for the child to live with them in order to for example, avoid care and protection proceedings, a report should be prepared by a family consultant (with the requisite cultural expertise) at the commencement of such a matter. The purpose of this report would be to consider the family and cultural dynamic and whether it would be appropriate for orders to be made for that person to obtain parenting orders in relation to the child/ren. If such Orders are deemed appropriate the report should also address what mechanism should be implemented for the child to be placed with that person (for example, gradual introduction of time) as well as other parenting orders for the family members who have played a significant role in the care, welfare and development of the child/ren to ensure they maintain that connection.

Same sex couples

193. Similar concerns that apply to the elevation of legal parents (that exists with the current Act) and the presumption of equal shared parental responsibility as the beginning of any consideration as to the parenting orders that may be made for the child, apply for same sex couples.
194. The married or de facto relationship status between two adults at the time of the conception or adoption of a child is one of the current keys to being a (legal) 'parent'. The allocation of 'parental status' is a role of 'particular importance'³⁸ that mandates certain considerations under the Act. The presumption as to the equal allocation of parental responsibility provided for in s 61DA and the considerations of equal time or substantial and significant time mandated by s 65DAA are not prescribed as part of the reasoning process to the 'best interests' conclusion in proceedings between a parent and a non-parent'.³⁹ The practical result of these legal considerations will have a real impact on how a child's life is arranged following the breakdown of a same sex relationship.
195. A child will be the child of married or de facto partners if the child is born or adopted to people in the relationship.⁴⁰ The relationship status (de facto or otherwise) of the adults at the time of the conception or the adoption of the child is the critical and

³⁸ Wording borrowed from the Full Court in *Aldridge & Keaton* [2009] FamCAFC 229 (22 December 2009), 45.

³⁹ *Blaze & Anor & Grady & Anor* [2015] FamCA 1064 (30 November 2015), 122 (Kent J).

⁴⁰ *Family Law Act 1975* (Cth) s 60HA.

determinative issue as opposed to the relationship status (de facto or otherwise) of the adults when their relationship breaks down.⁴¹

196. Different legislative considerations will arise where the child is born of assisted conception between two women or where the child is born as a result of a surrogacy arrangement. Section 60H of the Act is the key section to be considered in female same sex relationships. State law and s 60HB of the Act are the key considerations when surrogacy has occurred.
197. The female de facto partner who consents to her partner 'carrying out...an artificial conception procedure...' which results in the birth of a child will be the 'other intended parent' of that child.⁴² The status of being the 'other intended parent' of the child born will apply regardless of whether there is a biological link of either woman to the child and the consent of the partner that does not carry the child is 'presumed' at statute unless it is proven, on the balance of probabilities, that the 'other intended parent' did not consent to the 'carrying out' of the '...artificial conception procedure...'.⁴³
198. In *Aldridge v Keaton* the first trial case where a woman submitted her status as the 'other intended parent' was akin to her being a 'parent' of the child in question failed because the trial judge found that the parties were not in a de facto relationship at the time that the child was conceived.⁴⁴ The importance of the de facto status to the status of the woman *vis a vis* the child in question is illustrated by the following finding of Pascoe CFM (as his Honour then was) and the statements made by the Full Court on appeal:

I find their living arrangements in April 2005, combined with all the other circumstances do not constitute 'living together on a genuine domestic basis'. The parties demonstrated a large degree of independence in almost all aspects of their relationship. Accordingly, I find that the parties were not in a de facto relationship at the time of April 2005 [when conception of the child occurred] and consequently that s.60H (1) (a) is not satisfied. [Emphasis added]

...the legislature clearly intended only to apply to parents and also highlighted s 60B (2) (b) which emphasises the child's right to spend time with both parents and other persons. The matters in s 60B (2) (a) to (e) should be read conjunctively. While the emphasis placed on parents by the legislature is of particular importance, the relevance of the principle that a child spending time with people significant to their care, welfare and development must also guide consideration of relevant matters under s 60CC(2) and s 60CC(3).⁴⁵ [Emphasis added]

199. There is no presumption under Australian family law in favour of a natural parent.⁴⁶ However, it has been observed by Professor Millbank that the assertion that there is no presumption in favour of a biological parent may serve to '*mask the true strength*

⁴¹ *Aldridge & Keaton* [2009] FamCAFC 229 (22 December 2009), 3.

⁴² *Family Law Act 1975* (Cth) sub-s 60H(5).

⁴³ *Ibid* sub-s 60H(5).

⁴⁴ *Keaton & Aldridge* [2009] FMCAfam 92 (9 February 2009), 117.

⁴⁵ *Aldridge & Keaton* [2009] FamCAFC 229 (22 December 2009), 45.

⁴⁶ *Rice & Miller* (1993) 16 Fam LR 970, 977.

of the parent factor' in decision making under the Act.⁴⁷ Of course, the Act provides that a 'parenting order' can be made in favour of a person who is not the parent of a child and '...any other person concerned with the care, welfare or development of the child' can apply for a parenting Order.⁴⁸ But that person must show they meet the 'threshold question' and are more than just 'concerned about' the child or have a 'mere interest' in the child.⁴⁹ Further, the presumption of equal shared parental responsibility when making parenting orders (set out in sub-s 61DA(1) of the Act) '...expressly refers to parents not parties'.⁵⁰

200. Differently constituted Full Courts have provided different guidance as to the 'legislative pathway' to be applied by a court when faced with a dispute between a (legal) 'parent' and a person that is not a legal parent but who has been an involved caregiver to a child. In 2009 in the context of a heterosexual man that had cared for a child since birth but who subsequently found out the child in question was not his biological child the Full Court was of the view that it was in the child's best interest to apply what may be best described as the 'usual approach' to the resolution of matters concerning the child. The majority commented:

In our view, his Honour was quite right to consider and make findings in relation to all of the relevant 'additional considerations' in s 60CC (3), even though he acknowledged some had no application to the father because they relate only to a 'parent'. However, for the sake of consistency it seems to us his Honour should have adopted the same approach when discussing s60CC (2) (a). What occurred instead is that the father was treated as a 'parent' for some purposes but not others.

If the father had adopted S, his Honour would have been obliged to consider the benefit to S of having a meaningful relationship with him. If the father had been the biological father, but never lived with S, his Honour would still have been obliged to consider the benefit to S of having a meaningful relationship with him. Why should a different approach be taken because it was discovered that the boy was the product of an extramarital liaison?⁵¹

201. In 2010 a differently constituted Full Court in the context of an indigenous kinship group's care of a child found that the 'primary considerations' under the best interests test at s 60CC(2)(a) of the Act has no application to a person who is not a 'parent'.⁵² However, that conclusion does not, in and of itself, give rise to any difficulty in ensuring all relevant matters are taken into account because as part of the 'additional considerations' at s 60CC(3)(m) of the Act a court can take into account 'any other fact or circumstance that the court thinks is relevant.'⁵³ The Full Court stated that:

In a particular case, the maintenance of a meaningful relationship with a non-parent may be equally important or more important than the maintenance (or establishment) of such a relationship with a parent. As with the additional

⁴⁷ Belinda Fehlberg et al (eds), *Australian Family Law, the Contemporary Context* (Oxford University Press, South Melbourne, 2015) 340.

⁴⁸ *Family Law Act 1975* (Cth) s 64.

⁴⁹ *KAM & MJR & Anor* [1998] FamCA 1896.

⁵⁰ *Blaze & Anor & Grady & Anor* [2015] FamCA 1064 (30 November 2015), 80 (Kent J).

⁵¹ Per majority in *Mulvany & Lane* [2009] FamCAFC 76 (12 May 2009), 78-79.

⁵² *Aldridge & Keaton* [2009] FamCAFC 229 (22 December 2009), 3.

⁵³ *Ibid.*

considerations, it is not necessary to classify a non-parent as a 'parent' to ensure that clearly relevant matters are given appropriate weight

.....the fact that the benefit to the child of the maintenance of a meaningful relationship with a non-parent can, on our analysis, never be a 'primary consideration' does not of itself mean that it will be of any less significance than the benefit to the child of the maintenance of a meaningful relationship with a parent.⁵⁴ [emphasis added]

202. A comparison of the two Full Court cases cannot help but confirm the view expressed that '[t]he decision to treat some social parents as parents but not others may also reveal underlying value judgments about the role of gendered parenting and the hetero nuclear family'.⁵⁵ Ultimately each matter will be assessed on its facts and merits, but the legislation should facilitate this and not privilege some categories of adults over others.

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?

203. Survey evidence demonstrates that a majority of respondents consider that their property arrangements arrived at post separation under the existing property adjustment system of the Act, result in fair outcomes, as noted at paragraph 150 of the Issues Paper.
204. When examining the current property adjustment regime and ways in which it may be improved for the benefit of individual users and the community as a whole, a number of fundamental questions arise:
- (a) Does the current discretionary system, as distinct from a prescriptive or assumptive system, best achieve justice?
 - (b) Does the legislation and case law provide clarity and comprehensibility for users and assist in predictability of outcomes?
 - (c) Does the court structure and internal case management system drive outcomes in a timely and cost efficient manner?
205. The LCA submits that there is no empirical data, research or systemic case examples that would lend support to the view that the discretionary system for the alteration of property interests should be changed. To the contrary, that discretionary system of property adjustment has, through the accumulation of over 40 years of case law, developed a system of precedent cases that guide the exercise of the discretion in ways which are widely understood and followed.
206. The broad policy objective of a property adjustment system ought be to afford the community a fair and known system, which promotes the resolution of issues without the need for an adjudicated determination. The present system provides a

⁵⁴ *Donnell & Dovey* [2010] FamCAFC 15 (10 February 2010), [101]-[102].

⁵⁵ *Aldridge & Keaton* [2009] FamCAFC 229 (22 December 2009), 3.

sufficiently broad discretion to properly address the individual needs of separating couples, whilst affording sufficient certainty to those who negotiate in its shadow so as to avoid the need for a Court determination in the vast majority of cases.

Other systems for alteration of property interests

207. In considering other systems utilised for adjusting property interests it is important to recognise in each instance the social, legal and economic context in which they each operate. It is only possible to properly consider whether a system is one capable of delivering a just outcome when regard is had to the myriad of issues that will determine that question - without being exhaustive, the taxation system, the social security system, the nature and incidence of property and home ownership, familial structures, inheritance laws and the other legal consequences of the breakdown of relationships including parenting and maintenance responsibilities.
208. A move towards an assumptive system of family law financial relief, such as implemented in New Zealand or British Columbia, is not in the view of the LCA real substantive reform and indeed the very nature of an assumptive system is such that it necessarily creates its own problems as to the extent to which exceptions should apply. For example in New Zealand, considerable judicial time is taken up because of the different approach to assets held within trusts, and in determinations of what constitute extraordinary circumstances repugnant to justice that would require the court to depart from the position of equality.
209. If the desire for reform is driven by a need to remove unpredictability of results or to reduce case law conflicts, then it is hard to see how an assumptive system that involves exceptions dealing with issues such as initial contributions, how to treat external contributions such as gifts and inheritances, how to deal with levels of care of children, how to deal with farming cases, and how to deal with family violence, either fulfils the goal of a more simplified and or predictable system or would result in any cost saving to individual users of the system (in terms of legal fees) or to the taxpayer generally (in the cost of maintaining and operating the judiciary).
210. Similarly, a prescriptive system of property alteration may have some superficial attraction, but its benefits, are in the submission of the LCA, more imagined than real. Some foreign systems, as noted in the Issues Paper, have a community of property regime, whereby assets falling within that category are subject to mandatory equal division, whilst separate property is retained by the relevant individual. This approach can lead to significant financial detriment to a party, normally the spouse with care of children, who may have given up a career for the purposes of raising children and entered the relationship with modest assets (sometimes because of age differentials between the parties). It is a system that can cause gender discrimination and perpetuate financial hardship for that spouse post separation.
211. The need in community property regimes to trace and identify separate property, has also in jurisdictions such as California, led to increased complexity and costs, and in particular additional accounting work to identify and value the assets the subject of differential treatment dependent upon whether assets or parts thereof are determined to be community property (subject to an equal division) or separate property (to be retained by one party).
212. The absence of discretion in a prescriptive system to make adjustments for the economic consequences of the marriage (which will generally affect the spouse with care-giving responsibilities for the children), does not enable justice to be tailored to meet the individual needs of the parties.

213. Those who promote either the imposition of a community property regime or the implementation of presumptions of equal contribution (or something similar), also tend to overlook the part played by spouse maintenance/alimony in foreign systems of that nature. Because of the potential for injustice in capital distribution in assumptive and prescriptive systems, spouse maintenance necessarily plays a far more significant role in those jurisdictions. Whilst this is not a factor that can be the subject of comprehensive documentation in what is merely a response to an Issues Paper (because of the complexity of the area and its consequences), consideration must be given to an enormous range of consequences that arise were there to be an increased role for spouse maintenance in an Australian family law system. These include but are not limited to:

- (a) The fact that spouse maintenance in many such foreign jurisdictions is tax deductible to the payer, and also taxable income in the hands of the recipient;
- (b) the cost of housing in Australia compared to many other jurisdictions, which makes the need for a greater share of capital more important than endeavouring to obtain and enforce ongoing spouse maintenance;
- (c) the complexity of the spouse maintenance formulas required in some North American jurisdictions;
- (d) the intention manifested by s 81 of the Act, whereby the Parliament has directed the courts to as far as possible sever the economic relationship between the parties, a proposition to which spouse maintenance on a long-term basis runs counter;
- (e) the costs to the community of additional spouse maintenance hearings, applications to vary spouse maintenance, and applications for lump sum spouse maintenance;
- (f) the difficulties of enforcing spouse maintenance orders, particularly in the case of self-employed individuals and the likely need for a government agency to be introduced with a mandate to oversee any such regime;
- (g) the absence of any empirical data or research studies that would suggest that the Australian community seeks to have spouse maintenance play a larger role, in the majority of cases, for separating parents or parties.

Reform

214. Whilst the LCA supports the retention of the discretionary system for the alteration of property interests, there are a number of areas where consideration should be given by the ALRC to the simplification and/or clarification of certain of the legislative provisions.

Section 79(4)(e) / 90SM(4)(e) of the Act

215. As part of what is sometimes referred to colloquially as a consideration of the 'future needs' factors, the Court is required to direct attention to such parts of s 75(2)/90SF(3) as may be relevant when making an order under s 79/90SM. Not all of the factors in s 75(2)/90SF(3) fall however for consideration when determining the alteration of property interests. It may aid understanding of the legislative process, for s 79 / 90SM to be amended, to incorporate within its provisions, those matters (insofar as relevant) currently contained in s 75(2) and 90SF(3). As part of that

same process, the super splitting provision currently found in s 90MT could be relocated to form part of s 79 / 90SM.

Merger of de facto and married person provisions

216. By way of general observation, the financial relief provisions in the Act are disjointed. The Act as a whole would benefit from a complete redrafting and renumbering, so that relevant areas appeared together (and not in different Parts). In particular:
- (a) Leaving aside the jurisdictional facts as required for the purposes of the exercise of the de facto powers, there appears no reason why the de facto financial provisions and married persons financial provisions could not be merged to avoid duplication.
 - (b) The Act contains numerous provisions in respect of the calculation of superannuation entitlements for the purposes of the super splitting powers. If the aim is to create an Act more readily understandable by users in straightforward cases, then consideration could be given to relocation of many those provisions into associated superannuation legislation, and leaving within the Act only the base powers for the Court in respect of splitting orders and superannuation agreements.

Kennon and family violence

217. Paragraph 152 of the Issues Paper raises the question of the potential codification of the decision in *Kennon & Kennon*, or amendment of the legislation to otherwise provide clearer guidance about how family violence will be taken into account in property matters.
218. The FLS and the LCA have recently made submissions to the Parliamentary Inquiry into a Better Family Law System to Support those Affected by Family Violence, outlining the possible arguments for and against such an approach, and also querying why (if it were to be pursued) inclusion of amendments in respect of family violence would be restricted only to property settlement matters, rather than also being considered in the context of spouse maintenance and child support issues as well. For ease of reference, those submissions are excerpted below:

The case for amendment of the Act to account for family violence in property division orders

- 83 *The case for amendment is not new. It has been canvassed, more than once by the ALRC. It was also made almost a decade and a half ago by the Family Law Council (FLC), a body that now lies dormant,⁵⁶ given the unexplained failure of the Government to appoint constituent members to it since early July 2016.*
- 84 *Going back to 1994, the ALRC made recommended legislative reforms to respond to the prevalence of violence against women in Australia.⁵⁷ They included recommendations to direct the Family Court to take into account*

⁵⁶ The Family Law Council is established under s 115 of the *Family Law Act 1975* (Cth) to advise and make recommendations to the Attorney-General on matters relating to family law.

⁵⁷ Australian Law Reform Commission, *Equality before the Law: Justice for Women* (ALRC Report 69 Part 1) (25 July 1994) <<http://www.alrc.gov.au/report-69-part-1>>.

family violence in property and spousal maintenance proceedings. It should be noted that those 1994 recommendations predated the decision of the Full Court of the Family Court, *In the Marriage of Kennon (Kennon)*.⁵⁸

- 85 *In the ALRC's 1994 report, it was stated that the courts generally had regarded family violence as 'irrelevant' except where it had a direct financial consequence.⁵⁹ It was considered however by the ALRC that violence against a woman by her partner was relevant both to her ability to contribute to the marriage and to her future needs. The ALRC suggested that violence was often 'overlooked' as a relevant factor in proceedings before the Court, despite the provisions of the Act making it possible for the Court to consider that violence.*
- 86 *The ALRC recommended that 'violence should be taken into account in determining the extent to which it diminishes the ability of a woman to make financial and non-financial contributions to the marriage'.⁶⁰ There is some discussion in that report as to whether the violent conduct might be better considered as a negative contribution to the welfare of the family (but that approach had been resisted by the courts as implying fault). The ALRC also recommended that violence be taken into account in the future needs assessment in s 75(2) of the Act (which is already available to the court when considering, for example, the health of a party, the earning capacity of each, and the 'any other fact or circumstance' which justice requires be considered).*
- 87 *The ALRC returned to this issue in a post-Kennon context in 2010. Following Kennon, it is well established that the court may take family violence into account in proceedings for the adjustment of property between parties to a marriage (or de facto relationship):*
- *where a party is able to establish that there has been a violent course of conduct during the marriage/relationship, which had a 'significant adverse impact' upon that party's contributions; or*
 - *which conduct made those contributions 'significantly more arduous'.*
- 88 *In its 2010 report, the ALRC again recommended that the provisions of the Act relating to property adjustment, be amended to refer expressly to the impact of violence on past contributions and on future needs.⁶¹*
- 89 *A detailed analysis of the case for law reform in this area, and the uncertainties arising from the application of Kennon in daily practice, were also expressed in a letter of advice from the Family Law Council to the Attorney General in 2001.⁶² They do not need to be repeated here, it being noted that the recommendations of the Family Law Council for change to*

⁵⁸ (1997) 22 Fam LR 1.

⁵⁹ Australian Law Reform Commission, *Equality before the Law: Justice for Women*, Report No 69 (1994) part 1, [8.2].

⁶⁰ *Ibid* [9.49].

⁶¹ Australian Law Reform Commission, *Family Violence: Improving Legal Frameworks*, Consultation Paper No 32 (2010), 32.

⁶² See letter from the Family Law Council to the Attorney-General, 14 August 2001, <<https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Violence%20and%20Property%20Proceedings.doc>>.

section 79 of the Act were set out in paragraph 28 of the letter, and as to subsection 75(2) in paragraph 29 of the letter.

- 90 *Amendments to the financial provisions of the Act, to incorporate family violence in the manner proposed by the Family Law Council, would convey a powerful social and community message. An amendment to the contributions provisions of subsection 79(4) of the Act (and its de facto relationship equivalent) might take the following form:*

...whether there has been a course, or significant episode, of family violence by one party to the other party to the marriage which has had a significant adverse impact upon the contributions made by the other party or which made those contributions significantly more arduous.

- 91 *An amendment to subsection 75(2) of the Act (and its de facto relationship equivalent), to include a new matter to be considered could take the form proposed by the Family Law Council in 2001:*

...the extent to which the financial circumstances of either party have been affected by family violence perpetrated by a party to the marriage.

- 92 *It is to be anticipated that if the Act is amended in this manner, there will be a significant increase in the number of cases before the courts in which an adjustment in financial cases for family violence is sought. This will result in an increased demand upon the courts' resources given the expansion of evidence about these matters - which are likely to be highly disputed inter partes - and an increase to the number of cases that require judicial determination.*

- 93 *Further resourcing will be required for the courts and their Child Dispute Services sections, and to legal aid and CLCs, coupled with a program of legal education, to support the implementation of any such change and to deal with the added workload the changes will bring.*

The case against amendment of the Act to account for family violence in property division orders

- 94 *The rationale for opposing legislative change in this area, derives from several main factors.*
- 95 *The Kennon decision is oft spoken of as being based on family violence issues, but in fact the Full Court decision was not limited to that area alone. It also looked at circumstances where contributions by a party were made arduous where for example the abuse of alcohol was a factor. Endeavours to codify Kennon into statute may unintentionally restrict the law that has developed, if an amendment to the Act speaks only to circumstances of family violence.*
- 96 *The Family Court has already by Kennon (and leaving to one side arguments about whether what the Full Court said was ratio or obiter) provided for recognition of family violence and other matters within the existing statutory framework. The court should be permitted to continue, on*

a case by case basis, to develop the application of and availability of Kennon style claims.

- 97 *If the motivation for codification is to address the limited reported use of Kennon claims, then it needs to be understood that codification will not circumvent the need for evidence that is particularised and relevant. Many Kennon style claims currently fail not because clients and lawyers are not cognisant of the relevance of family violence, but rather for reason of lack of admissible evidence and the inability to adduce evidence that establishes that there is a causal link between the acts of family violence and the nature and extent of and circumstances in which a party has made their contributions. The mere amendment of subsections 79(4) and/or 75(2) (and their de facto relationship equivalents) in the Act will not address that problem, so the risk then becomes that any amendments to the Act do not resolve the Evidence Act issues.*
- 98 *The Act and Kennon claims do not 'cover the field' in this area, such that litigants can still bring personal injury damages claims in the courts of the states and the territories in addition to claims for property alteration, or can ask that any such tortious claim be dealt with in the family courts together with the Act property claim under the accrued or associated jurisdiction of the courts.*
- 99 *If the Act were to be amended to make family violence a factor required by statute to be considered in property claims, the existence of that additional consideration will likely have the effect of making settlement of cases more difficult and hence increase the number of cases being both filed in the family courts, and which go to final trial and determination in the family courts. This may have a very significant financial impact on both the courts and the legal aid services and cause major revenue implications for the Federal Government.*

Other matters

- 100 *The Law Council raises several other matters for general consideration in the context of any proposed amendment to the Act to address family violence in property division, without expressing any concluded view on those as set out below:*
- *Whether there is any doubt regarding the constitutional power of the Commonwealth under the marriage or divorce heads of power, to make laws that insert 'family violence' as a factor for consideration in the alteration of property interests either under subsections 79(4) or 75(2) and or under the referral of powers in respect of de facto matters.*
 - *If the Act was amended to include family violence as a factor in proceedings for the alteration of property interests, and in circumstances where matrimonial torts have been abolished, it would be necessary to consider whether the Act as a Commonwealth law then 'covers the field', so that litigants can no longer bring damages claims whether in a state court for damages, or using those state based laws under the accrued or associated jurisdiction of the family courts.*

- *Whether Kennon should be codified in subsection 75(2) rather than subsection 79(4) of the Act (and the de facto relationship equivalents) so as to also apply to spouse maintenance claims. If not, the basis for saying it is a factor important and relevant to property division, but not spouse maintenance, needs clarification.*
- *Whether Kennon should be codified in section 117 of the Child Support (Assessment) Act 1989 (Cth) as a ground for a departure application for child support. If not, the basis for saying it is a factor important and relevant to property division, but not the support of children living with a parent who has been the victim of family violence, needs clarification.*
- *Whether Kennon should be codified in Part VII of the Act as a factor for consideration when making orders for child maintenance for children over the age of 18 years.*
- *The appropriate definition of 'family violence' to be applied to any amendment, including whether the broad definition of family violence in the Act which was developed in the context of parenting cases would be adopted.*

101 *In terms of giving notice of family violence as a factor in financial cases:*

- *Whether the Notice of Risk form should become mandatory in all cases – both financial and non-financial – so that particulars of that issue are given at the outset of each case.*
- *Whether the Initiating Application in family law cases requires an amendment, so that litigants in financial cases must inform the court of the presence of family violence factors even if not particularised at that stage.*
- *There are no pleadings in family law cases under Part VIII of the Act. This gives rise to a question as to whether the Rules of the Family Court and the Federal Circuit Court respectively should be amended to require that any financial claim is pleaded at the outset as to the material facts relied upon (which would include family violence particulars).*
- *In circumstances where there was family violence during a relationship, but a litigant who was the victim of family violence did not want to raise it as a factor in a financial case, an issue arises as to whether they should be compelled to raise that matter under the Rules / Act regardless of their wishes.*
- *Whether family violence needs to be a factor set out in the Application for Consent Orders form when applying for financial orders by consent, and the particulars which would need to be given to the court both of the presence of family violence and the respondent's position on that assertion.*
- *Parties can enter into financial agreement pursuant to sections 90C, 90D and 90UD post separation which makes provision for alteration*

of property interests and or spouse maintenance. In doing so, they essentially 'contract out' of the Act. This raises the issue of whether an amendment to the Act is needed which requires that parties to a Financial Agreement take into account family violence before they make the agreement, so as to prevent parties contracting out of the relevance of family violence as a factor in the financial settlement.⁶³

Full and frank disclosure

219. A cornerstone of the *Family Law Rules* and family law matters generally, is the requirement for full and frank disclosure by a party of their financial circumstances and of any matter material to the case.
220. The ability of parties to negotiate and resolve financial matters is dependent, to a significant extent, upon there being timely and accurate disclosure of relevant financial data, such as to enable them to make informed decisions.
221. It is surprising then that the Act itself imposes no such requirement, and it is instead merely contained within the Rules of Court. Given its fundamental importance to the family law system, the LCA suggests that consideration be given to amending the Act such that the requirement for full and frank disclosure is made a statutory provision. Consideration should also be given as to whether failure to make full and frank disclosure can be the subject of penalty if a contravention is established. This would reinforce the importance of the feature, assist parties to obtain disclosure, and expedite resolutions and reduce costs.

Family dispute resolution

222. The Act currently requires, subject to various exceptions, that parties seeking to institute proceedings for parenting orders first undertake family dispute resolution and obtain a certificate pursuant to s 60I before commencing proceedings. The LCA recommends against the inclusion of any similar provision within the financial relief regime.
223. Extending the s 60I regime to financial cases will result in additional cost and delays for parties. It can also be used by the financially stronger party as a tool to essentially 'starve' the financially weaker party out. By way of example, the financially stronger party may substantially reduce or indeed cut off financial support to the weaker spouse. The financially weaker party will not be able to approach a Court for relief for potentially weeks if not months (in terms of even filing an application) until that process of financial disclosure has been undertaken and a certificate granted.
224. Further, the ability of a party to properly consider the resolution of financial issues emerging on breakdown of their relationship is dependent upon both full knowledge of the relevant financial circumstances but also of his/her rights. Unlike in parenting arrangements where each party will usually be uniquely and inherently aware of their children's interests and needs, and hence be in a position to properly consider arrangements for their future care, it is rarely the case that there will exist an equality of information and bargaining power in relation to financial issues. A family

⁶³ Law Council of Australia submission to the 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, 22 May 2017

dispute resolution requirement in relation to financial issues will inevitably disadvantage the less informed and more financially vulnerable spouse.

Case management

225. It would be naïve to suggest that improvements can be made to the property relief provisions merely by dint of legislative changes.
226. The Government has not provided to the ALRC terms of reference that include the structure of the Court system, and case management is a matter for the Court's themselves. The LCA has consistently contended that a single family law court with responsibility for all family law matters is the appropriate vehicle, rather than the current situation that applies (except in Western Australia). Single entry point into the system, with multiple adjudication tiers (being for direct track or simplified cases, ordinary matters and a complex causes list) with case management by Registrars and not Judges, is at the forefront of that one court system. Similarly, some of the current Court rules (such as the requirement in the Federal Circuit Court that parties, even where no interim orders are sought, must file an initiating affidavit) are productive of unnecessary costs and inefficiencies for no good reason.

Provisions for the split/transfer of debts

227. Paragraph 152 of the Issues Paper identifies the possibility of amendments to allow greater use of court orders for the split or transfer of unsecured joint debt and liabilities. The LCA considers that the existing provisions of the Act, including s 80 and Part VIIIAA provide a complete and sufficient set of powers for courts to make any orders necessary to apportion responsibility for liabilities on the breakdown of relationships.

Best interests

228. Paragraph 152 of the Issues Paper also identifies suggestions made for the paramountcy principle to apply to the determination of property entitlements. The LCA considers that such suggestion fundamentally misunderstands the rights being determined in property proceedings and would inappropriately displace those rights in favour of a third party, in the event that there were children of the relationship.

Financial consequences

229. The financial consequences of any change to the current system need to be considered in two primary respects.
230. Firstly, and as history has demonstrated including following the introduction of the Act and following the 2006 parenting reforms, any change will result in a significant increase in litigation as the operation of the new legislation is implemented and tested. The removal of the presently known framework and associated body of knowledge will result in both a changed set of societal expectations and an absence of a basis for the provision of informed advice to separating couples.
231. Secondly, the financial consequences of any change for the broader economy will need to be considered, including the impact upon social security entitlements, child support obligations and entitlements and housing affordability (and public housing).

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?

232. The LCA is of the view that no significant change should be made to the existing spousal maintenance legislative provisions in the Act. If there is substantive change to the property adjustment regime, the maintenance provisions may however require significant revision.
233. The LCA's position in respect of spouse maintenance needs to be understood in the context of the submissions above in Question 17 as to the importance of maintaining the discretionary system of property adjustment. There are very strong philosophical and financial arguments against the introduction of changes to the Australian spouse maintenance provisions.
234. The only matters where the LCA suggests that changes in respect of spouse maintenance should be countenanced, and these are essentially as a consequence of or reflective of the submissions made above dealing with property settlement matters, are as follows:
- (a) The provisions of s 75(2)/90SF(3) would become stand-alone provisions dealing solely with spouse maintenance;
 - (b) There should be a merging of the de facto and married financial relief provisions, so there is not a duplication between those matters going to de facto spouse maintenance and those going to spouse maintenance of married parties;
 - (c) The LCA repeats those submissions made above regarding the 'pros and cons' of inclusion of family violence as a specific factor for consideration, including in spousal maintenance cases;
 - (d) The Family Law Amendment (Financial Agreements & Other Measures) Bill 2015 has currently lapsed. There are a number of clauses within that Bill that should, in the LCA submission, go again before the Parliament. One of those specifically affects maintenance, being the provisions under s 90HA of the Bill as to the point in time at which an award of spouse maintenance would terminate in circumstances where a party had commenced residing in a de facto relationship.
235. As stated above, a single-entry system with Registrar's triaging matters at the point of entry would allow urgent spouse maintenance matters to be listed quickly. There is often urgency and significant impacts on financially weaker spouses, generally women and the children of the family, if financial support is cut off. As the system currently functions, even such urgent matters may wait months for a first return date in court or may be included in a duty list of so many cases there is no possibility of a hearing.

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?

236. The LCA has historically supported the introduction and continued operation of Financial Agreements (**BFAs**) as part of the Australian family law system. That support has been based on the desirability of providing couples with a mechanism to regulate their own financial affairs and relationship, including the ability to agree on different terms to that which might apply under the Act, and the ability to set those terms at a time of their choosing, including before their marriage or de facto relationship.
237. However, the legislation introducing BFAs has now been in operation for about 18 years. It is fair to say that the legislation and the interpretation of it has not been settled over that time, and it remains an area of family law subject to controversy. It is timely to reflect, in particular, on the position regarding s 90B BFAs (pre-nuptial agreements) and s 90UB (before de facto relationship agreements). The question for the community is the balancing, on the one hand, of the desirability of allowing adults to regulate the financial terms of their relationships (and the benefit thereby of reducing the need for those couples to access state-funded services upon the breakdown of their relationships) versus the recognition that most s 90B and s 90UB BFAs favour one party over the other and many produce outcomes that would not be considered 'just and equitable' pursuant to s 79.
238. The decision of the High Court in *Thorne v Kennedy* involved an orthodox application of established principle to the individual facts of the case.⁶⁴ It did not change the understanding of the law in this area, but rather highlighted for practitioners and the public, certain self-evident dangers of BFAs that arise due to the circumstances in which they are entered into. The broader issues around whether a separate jurisprudence might arise for married or de facto couples in the context of s 90K and s 90KA of the Act, which was hinted at during the special leave hearing in *Thorne v Kennedy*, did not emerge from the decision of the High Court because of the manner in which the case was ultimately heard and determined.
239. Some legislative provisions governing BFAs do require amendment, and the *Family Law Amendment (Financial Agreements & Other Measures) Bill 2015* contained provisions directed at remedying certain potential ambiguous provisions within the legislation or arising from the case law. That Bill has lapsed and those amendments have not been brought back before either House of Parliament for consideration. The LCA supports the re-introduction of the relevant amendments proposed by that Bill.
240. Opposition to the passage of the 2015 Bill arose in part because of concerns as noted in footnote 197 of the issues paper. The FLS of the LCA has made submissions, both orally and in writing to the Parliamentary enquiry and to the AGD, to the effect that s 90K and s 90KA of the Act already provide sufficient statutory protections to guard against the matters raised by those concerns. The decision of the High Court in *Thorne v Kennedy* and the remedy there granted under s 90K by the High Court further consolidates that position.

⁶⁴ [2017] HCA 49; (2017) FLC 93-807.

241. If there is a concern that challenges may continue to be made to BFAs as a consequence of the circumstances in which they are made or because of the interpretation by the Courts of the equitable and contractual principles that enable them to be set aside, then one approach that has been mooted, is to require there to be prior Court approval of a Financial Agreement for it to be considered as binding. Presumably, in the case of a s 90B or 90UB Financial Agreement, that hearing and approval would need to take place before the marriage or before the de facto relationship commenced. This is problematic on many levels. Firstly, some Financial Agreements are the subject of challenges that seek to have them set aside, as a consequence of matters that arise after the date the agreement was made, so a process of Court approval at an earlier point in time, could not address those matters. Further, there is the cost that would be involved in any such Court application seeking an order declaring binding a proposed agreement. It would presumably require the parties to file Financial Statements, have asset valuations undertaken, and to file extensive affidavit material detailing their personal and financial circumstances and prognosticating about what events might lie in their respective futures. Further, given the delays in the Court system, there is the practical question of when applications seeking approval of a Financial Agreement would actually be heard and determined. One can readily imagine the situation arising, where it takes a Court 12-24 months to deal with an application to approve a proposed Financial Agreement, being a process that would be so long, expensive and burdensome, as to likely derail any proposed marriage or de facto relationship before it commenced.

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?

242. The LCA has, in numerous submissions to Government and the Courts, advocated a number of changes to the current process which it believes would enhance the aims of 'timely and cost-effective resolution' of disputes.
243. The current system has two separate courts exercising virtually the same jurisdiction.
244. Accordingly, parties who enter the family law system (and their lawyers) are faced with the choice of two courts, two sets of rules, two sets of procedures and processes, a discretionary approach to transfer of matters between the courts and two different appeal processes.
245. This creates unnecessary uncertainty for practitioners and their clients, and unnecessary costs. The delays in the system also create problems with compliance with court orders and directions, and a flow on effect for trying to enforce compliance at later dates (because it can literally take months for enforcement proceedings to be listed when directions and orders have been breached).
246. The LCA has long advocated for one family law court, servicing the needs of family law clients nationally.

247. The current case management system in the Federal Circuit Court requires a case, once filed, to be listed before a Federal Circuit Court judge who then retains conduct of the case until it is finally decided ('the docket system').
248. It is the experience of practitioners that a number of appearances before the Federal Circuit Court judge are largely administrative and result in either an adjournment, an order for standard procedural directions, or a consent order.
249. These are all tasks that could be handled by a Registrar, at significantly lower cost to the system, reserving the valuable time of Federal Circuit Court judges to hear and determine disputed issues. In circumstances where parties have delays of two-three years to obtain a final trial date, and in some registries, twelve months to await an interim hearing, it is a luxury that the system cannot afford to have judges' time being spent on routine matters which often contain substantial administrative detail.
250. The LCA has long advocated a single set of rules to be adopted for use in both courts, a suggestion that has never been embraced by the courts.
251. The use of qualified, experienced Registrars would allow matters to be triaged at an early date. If a judge's determination was required, a daily duty judge or judges could be available possibly even by telephone/video-link to other registries where a Judge is available and to overcome the difficulties with single judge registries.
252. Whilst the Federal Circuit Court has generally embraced the use of telephone attendances, it has usually only been allowed for parties and/or lawyers in regional, rural or remote areas. When many hearings are routine or administrative, there could be greater use made of telephone attendances.
253. The Federal Circuit Court has recently introduced a rule requiring that all affidavits in relation to interim hearings be limited to ten pages and no more than five annexures. The LCA regards this as a sound initiative which has generally been observed by the profession and is likely to lead to reduced costs for parties, and reduced time for hearings. Further changes to, for example, modernise the Financial Statement, would assist. The FLS of the LCA has proposed an updated form for Financial Statements to the Courts, but it is not known whether the Courts will adopt the changes proposed.
254. In Registries where the Federal Circuit Court conducts a Duty List, it is common for one Judge to be expected to deal with thirty or more applications before the court that day. While many of the parties that day may be seeking an interim hearing, there are others who do not require that degree of assistance. Long delays are often experienced, waiting 'to be reached' in the list. Costs increase accordingly.
255. The burdens upon the Judges attempting to manage ballooning lists are real. Not being reached, late in the day is common. Judges are exhausted, parties are put to further cost and in some instances are directed to return on another occasion, to face the same process again. In some Registries, Judges are refusing to list matters for interim hearing and parties face additional uncertainty, in the management of expectations and as they strive for resolution and an outcome.
256. The LCA submits that there is merit in introducing a Small Claims List. Such a list would be conducted by a Registrar and would, for example, be:
- (a) for matters where the total asset pool (net) was less than (say) \$100,000. The LCA accepts (as noted by the NSWLS) that it can be difficult to identify

complexity based on the size of a pool. A small pool may involve significant debts and complicated affairs;

(b) for parenting matters involving limited areas of dispute and where the parties consent.

257. The LCA submits that both parties should (if a Small Claims List were instituted) have the right to a re-hearing de novo before a judge, but with the proviso that if the judge made the same order as the Registrar, then the court would be invited to make a costs order against the unsuccessful party (and so an amendment to s 117(2) would be required).
258. Such a system would be infinitely preferable to the Parenting Management Hearing pilot currently proposed by the Government (and we refer to the submissions made to the Senate Inquiry on this issue by the LCA).

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?

259. Many people who approach the courts have already participated in, and often exhausted, other dispute resolution processes. The Act and associated rules already have provisions directed to ensuring that non-litigious processes and outcomes are explored and facilitated – and such processes are routinely engaged, increasingly on a basis external to the courts as a result of funding constraints, but also with registrars through case assessment conferences and mediations.
260. It needs to be accepted that some parties actually need a judicial decision imposed upon them. Whether it is recalcitrance, stubbornness or some other personality dynamic, some matters cannot be resolved by even the best of dispute resolution options.
261. It also needs to be said that some people approach the courts with a grievance looking for a cause of action. That is, the courts cannot make a party be sensible, reasonable and co-operative, yet that is the bottom line for what some litigants are looking. Like all liberal laws, the Act rests on a basis that its subjects are reasonable and rational. Yet, when a party/s sits outside that dynamic, a court cannot change the fundamental nature of some people.
262. Whilst it is to some extent the role of the courts to continue to encourage, where appropriate, the use of alternative dispute resolution options, it ought not be the situation that parties are forced to utilise such alternatives because there is no viable and functioning court system available.
263. Consideration of alternative dispute resolution (**ADR**) ought not be a function of there being no viable alternative. Without funding for proper participation and representation in ADR, there is a real risk that the rights and interests of litigants and children alike will not properly be protected. Further, without proper representation, there is a real risk of uneven playing fields and unfair outcomes. It goes without saying that in many family law matters there is an 'inequality' in terms of the legal representation of males and females. Generally speaking, males have greater access to cash flows which permit them to retain lawyers and/or larger legal teams

264. It is thus important that any changes to the existing provisions, which are not considered necessary:
- (a) reduce, rather than add further layers of complexity;
 - (b) maintain, rather than reduce opportunities for justice (not limiting the availability of appeals);
 - (c) are transparent and clear (not further orders diverting litigants to ADR during litigation); and
 - (d) are not a forced alternative for those who need and are entitled to a judicial determination.

Question 22:

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

265. The LCA refers to the comments made above, in the context of submissions to the Issues Paper under Question 17, which touched upon case management issues in the family courts' system. The Issues Paper properly identifies in paragraph 173 and 174, the need for effective low-cost options for resolving small property matters and the rationale for same.
266. There already exists within the existing Court structure, the ability for small property disputes to be dealt with in a 'direct track' manner through the utilisation of proper case management processes. This is a matter that has already been the subject of consideration in the Family Court system and is further referenced in the recommendation appearing in footnote 215 of the Issues Paper.
267. As set out in our response to Question 17, the LCA continues to oppose any extension of the s 60I process to financial matters. The clear concern is that any such process would be productive of greater costs and delay, and could be used by the financially stronger party as a tool that would strategically and financially harm the financially weaker spouse. There are already anecdotal examples available, where even the Pre-action Procedures contained within the *Family Law Rules* for financial cases, are utilised by some parties who see delay as working to their benefit, as a means for impeding access to the Court system and denying the other party the opportunity to seek interim financial relief from the Courts.
268. The LCA does not support the recommendation that State and Territory Magistrates be encouraged to increase the exercise of their Act powers in relation to property/spouse maintenance matters when parties with family law needs are already before those Courts. Many State and Territory Magistrates do not, with respect, have the education, training or experience in financial family law cases that make them suitable to carry out that role. It is also a matter of notoriety that the State and Territory Magistrates Courts are already overloaded in exercising their own jurisdiction, and absent significant additional funding, resourcing and training, it would be a false economy to suggest that this process would provide any relief to litigants in small property pool cases.

269. Small property pool cases are, in many instances, ideally suited to resolution through private arbitration. There have been mixed signals from members of the family law courts judiciary as to whether they are willing to encourage parties to engage in arbitration. The LCA would support the rollout of an arbitration process for small property claims for legally aided clients for resolution of property disputes in the monetary band as described in paragraph 175 of the Issues Paper, although the LCA queries the availability of Legal Aid for those persons and this is no doubt a funding issue that the Commonwealth would need to address.

Question 23:

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

270. The LCA notes that this question traverses a number of other areas in the Issues Paper. The LCA repeats and relies, in responding to this issue, on the following insofar as relevant and also the various other reports and submissions referenced on this issue that are canvassed in our responses being:
- (a) the matters set out in respect of Question 5;
 - (b) the matters set out in respect of Question 8;
 - (c) the matters set out in respect of Question 13;
 - (d) the matters set out in respect of Question 15; and
 - (e) the matters set out in respect of Question 17 dealing with treatment of family violence in financial relief proceedings.

Question 24:

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

271. In responding to Question 1, we have addressed the concerns of the LCA about (a) the assumption in the Issues Paper that the adversarial model is, in and of itself flawed, and (b) the lack of engagement by the Issues Paper with the raft of provisions already available for a judicial officer to meet the needs of parties, whilst also protecting the fidelity of the evidence gathering process, under the Act.
272. We have also, in responding to Question 1, addressed the ideal of a 'one-stop shop', along with the more realistic aims of collaboration, information sharing and seamless service provision and support for families who need to access more than one court and/or more than one support service.
273. A clear aim of any system of dispute resolution is to ensure that people are not adversely affected in their participation as a result of family violence and that issues of family violence are appropriately dealt with in the relevant context.

274. As to the first matter, any form of dispute resolution must ensure that victims of family violence are properly protected – not only in the immediate physical sense, but in their ability to properly understand and protect their own interests and, where applicable, those of children. Family dispute resolution processes typically occur, and are intended to occur, shortly following the breakdown of relationships and prior to the commencement of any proceedings. They occur at a time when most people are at their most vulnerable and power and information imbalances between them the most acute. Legal assistance, assuming that it is available, is an essential part of protecting people at this time but it cannot be viewed as a complete protection.
275. As to the second matter, issues of family violence will not always be relevant to the determination of family law issues. For example, in financial proceedings a court may find that family violence did occur but that it ultimately has no relevance in determining the property entitlements of each party pursuant to s 79. By way of further example, the occurrence of family violence in a relationship may have no ultimate relevance to questions of how often a child ought spend time with one of their parents, the school which they are to attend or a course of medical treatment that they are to undertake.
276. Considerable care must be taken before the extension of family dispute resolution processes to cases involving family violence, particularly if it is contemplated that participation in such a process is to be required before the commencement of any proceedings. Such a requirement carries with it a substantial risk of exposing vulnerable people to unjust and exploitative outcomes.

Question 25:

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

277. The view of LCA is that the present legislative framework properly and adequately addresses these issues. In so far as the Paper refers to a Counsel Assisting model (paragraph 196), we repeat our submissions as set out in the response to Question 11.
278. There is no issue that litigation can itself become a form of abuse. We provide the ALRC with the following cases by way of example: *Hopkins & Walker & Anor* (and all related cases for these parties) where by 2004, the mother was diagnosed with PTSD arising out of her interactions with the father, much of which was his institution of proceedings against her and those providing services to the children, along with further threat to do so.⁶⁵
279. It is, however, to be recognised that the family law system is no different to other jurisdictions, particularly where personal rights and litigants are involved. In each instance there is a need to balance the rights (and needs) of people to be able to access the court system, against abuse of both other litigants and the system itself by misuse.
280. The right to issue proceedings in a court is an inalienable right of all adults unless fettered by a court. As Kirby J said in *Re Attorney-General (Cth); Ex parte Skyring*:

⁶⁵ 2013] FamCA 616 (1 May 2013).

*...it is regarded as a serious thing in this country to keep a person out of the courts. The rule of law requires that, ordinarily, a person should have access to the courts in order to invoke their jurisdiction.*⁶⁶

281. Similarly, Kirby J said in *Batistatos v Roads and Traffic Authority of NSW* :

*The common law has long been defensive of the right that all persons enjoy to have access to the courts and not to be denied such access save in the most exceptional of circumstances. So much is inherent in the rule of law which is a foundation of Australia's legal system, implied in the Constitution.*⁶⁷

282. That said, ss 118 and 102Q of the Act provide:

s 102Q

- (a) proceedings that are an abuse of the process of a court or tribunal; and*
- (b) proceedings instituted in a court or tribunal to harass or annoy, to cause delay or detriment, or for another wrongful purpose; and*
- (c) proceedings instituted or pursued in a court or tribunal without reasonable ground; and*
- (d) proceedings conducted in a court or tribunal in a way so as to harass or annoy, cause delay or detriment, or achieve another wrongful purpose.*

s 118 Frivolous or vexatious proceedings

The court may, at any stage of proceedings under this Act, if it is satisfied that the proceedings are frivolous or vexatious:

- (a) dismiss the proceedings; and*
- (b) make such order as to costs as the court considers just.*

283. As noted above, the bar is set high: for instance, in *Marsden & Winch*:

The Full Court in Bennett at [33] enunciated two important principles to be considered when abrogating from this right [the right to access courts]. First, if a fundamental common law right or privilege is to be modified by statute, then the statute should make that intention unambiguously clear; and, secondly the right of a citizen to unimpeded access to the courts is a fundamental common law right...

*It is a course that should be reserved for the clearest of cases (see *Vlug and Poulos* (1997) FLC 92-778). ...*

*As we will explain, an order pursuant to s 118 is a step not to be undertaken lightly and deprives a person subject to such an order of the same level of access to the Court as enjoyed by others.*⁶⁸

⁶⁶ (1996) 135 ALR 29, 323.

⁶⁷ (2006) 226 CLR 256, 159.

⁶⁸ [2013] FamCAFC 177 (12 November 2013), 131-134.

284. The LCA is of the view that the present legislative framework is sufficient to address the issue identified. The LCA Professional Ethics Committee is currently reviewing the Australian Solicitor Conduct Rules, and the commentary that accompanies those Rules. Consideration could be given to clarifying in that commentary the following:
- (a) a solicitor must not engage in conflicting out for the dominant purpose of denying the other party access to legal representation on the basis of conflict of interest (a breach of Rules 3, 4.1.4 and 5);
 - (b) a solicitor must not engage in burning off by engaging in litigation in a manner which has the dominant purpose of depleting the other party of financial resources (a breach of Rules 3, 4.1.4, 5 and 34.1.3); and
 - (c) a solicitor must not send correspondence or otherwise make a threat of indemnity costs against the other party unless the solicitor believes on reasonable grounds that the material already available provides a proper basis, at law, to do so (rule 22).

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?

285. The LCA notes that this question traverses a number of other areas in the Issues Paper. The LCA repeats and relies, in responding to this issue, on the following insofar as relevant that are canvassed in our responses being:
- (a) the matters set out in respect of Question 2;
 - (b) the matters set out in respect of Question 4;
 - (c) the matters set out in respect of Question 6;
 - (d) the matters set out in respect of Question 12;
 - (e) the matters set out in respect of Question 17 insofar as they go to the opposed extension of FDR/s 60I to financial matters;
 - (f) the matters set out in respect of Question 21;
 - (g) the matters set out in respect of Question 22; and
 - (h) the matters set out in respect of Question 28.

Question 27:

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

286. Within the context of the concerns expressed above at question 24 as to parties effectively being 'forced' to private dispute resolution forums, there is scope for

amendments to the Act to encourage and facilitate the use of arbitration in financial proceedings.

287. Firstly, there ought be no distinction between the appeal rights arising from an arbitral award and those of a trial judge. Presently the former are confined to issues of law.
288. Secondly, the uncertainty that attends the effect of an arbitral award for various state and federal purposes ought be removed. It ought be that once an award is registered in the court, it has the effect of an Order; the legislation says this is so. There is ongoing uncertainty as to whether Offices of State Revenue (State and Territory) and Trustees of various Superannuation Funds will recognise such registered arbitral awards.
289. Thirdly, the broader issues of resourcing and delay which attend financial proceedings before the courts need to be addressed – too often delay is to the distinct advantage of one party, whether because of the benefit of interim orders, of the occupation of a home, of rising property markets, and in those circumstances there is no incentive to participate in arbitration so as to achieve an earlier resolution
290. Fourthly, the courts need the ability to support arbitration on a timely basis – whether through facilitative processes, including the issue of subpoena, or in the registration of arbitral awards and the determination of related disputes. That the determination of such disputes will take years serves only to defeat any attraction a party may have to participation in arbitration.

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?

291. This review provides an opportunity to modernise the family law system by the incorporation of technology-supported justice and online dispute resolution.⁶⁹ This opportunity should be embraced.

⁶⁹ *'Every generation has updated or reformed the justice system to adapt to changing times. From the sealing of Magna Carta, to the protection of judicial independence in the 1701 Act of Settlement, to the creation of the Crown Court in the 1970s – there has never been a moment of stagnation or complacency. We have not inherited this remarkable justice system by accident but thanks to the foresight and the hard work of all those who came before us. Our times – with the advent of the internet and an explosion in new technology – provide the opportunity for radical change. Traditional ways of working are being upended, not just in justice but across the board. To secure and enhance the global reputation of our justice system, therefore, we must respond to those changes radically and quickly – and the rapidly evolving needs and expectations of everyone who uses our courts and tribunals. At their heart, these reforms are about meeting the needs of all those people – judges, magistrates, the legal professions, witnesses, victims, defendants, individual citizens and businesses of all sizes. In delivering a proportionate and effective justice system to them, we should be competing not just with the best jurisdictions around the world, but with every modern consumer experience they have in their lives, from skyping their family and friends, to online banking, to entering into contracts with businesses on the other side of the planet. In delivering a system that is just and accessible to everyone who needs it, we will be competing not just with modern practices around the world but respecting the practices of our own history. From experience, we know that first and foremost our courts and tribunals uphold the rule of law – maintaining the order and individual liberty that all of us enjoy. The rule of law is fundamental to every*

292. It is an opportunity to refocus the family law system from being court-centered to *'being seen more as a service rather than a physical venue'*, to widen access to justice, and to have *'its primary focus on informing and assisting the public in containing and resolving...disputes...with less intervention by a judge'*.⁷⁰
293. Online dispute resolution (**ODR**) is not a new concept. British Columbia, Canada, paved the way with the creation of its Civil Administrative Tribunal (**CRT**) in 2016 with an ODR component mandated for disputes under \$5000.⁷¹ The CRT uses the Modria platform.⁷²
294. The Rechtwijzer ODR platform is utilized in family law in both the Netherlands and in British Columbia, Canada.⁷³ This ODR system provides diagnosis, advice, intake, negotiation, review and optional stages of mediation and arbitration.
295. England and Wales has undertaken extensive reviews and is now advancing even more ambitious plans to incorporate technology-supported justice and ODR into courts and tribunals.⁷⁴
296. Significant guidance can be obtained from the comprehensive analysis and considerations of Lord Justice Briggs in his final report in Chapter 6 'Online Court' in which he addresses the criticisms of ODR, provides recommendations to take those into account and outlines the proposed ODR system for the UK in three stages:
- (1) an automated online triage stage designed to help litigants without lawyers articulate their claim in a form which the court can resolve, and to upload their key documents and evidence; (2) a conciliation stage, handled by a Case Officer; and (3) a determination stage, where those disputed cases which cannot be settled are determined by a Judge, by whichever of a face to face trial, video or telephone hearing or determination on the documents is the most appropriate.*⁷⁵

civilised society. Above all, these reforms will help to protect it.' – The Lord Chancellor, the Lord Chief Justice of England and Wales, and the Senior President of Tribunals, 'Transforming our justice system' (Joint Paper, the Ministry of Justice, September 2016), 16.

⁷⁰ Graham Ross, 'The Online Court – Misunderstandings and Misconceptions when Delivering a Vision for the Future of Justice' (2015) 1 *International Journal of Online Dispute Resolution*.

⁷¹ See *Online Help Guide*, Small Claims BC <<http://www.smallclaimsbcc.ca>>; Darin Thompson, 'The Online Justice Experience in British Columbia' on *The Society for Computers and Law*, (22 November 2016) <https://www.scl.org/articles/3784-the-online-justice-experience-in-british-columbia>.

⁷² *Expanding Access to Justice with Online Dispute Resolution*, Tyler Technologies <https://www.tylertech.com/solutions-products/modria>.

⁷³ HiiL <www.hiil.org>; My Law BC <<http://mylawbc.com>>.

⁷⁴ The Civil Justice Council established an ODR Advisory Group in 2014, led by Professor Richard Susskind. The Advisory Group released its Report in 2015: Civil Justice Council, 'ODR in Low Value Civil Claims' (Report, Online Dispute Resolution Advisory Group, February 2015), and Lord Justice Briggs published his final report in July 2016: Lord Justice Briggs, 'Civil Courts Structure Review' (Final Report, Judiciary of England and Wales, July 2016).

⁷⁵ Ibid 31, listed as:

- (a) That the Online Court will provide second-tier, second class justice to those wrongly viewed as having less important claims, by comparison with the current traditional civil court structure.
- (b) That a large majority of the court users needing to use the Online Court will be denied access to justice by the requirement to go online, due to difficulties of various kinds with computers, unless a parallel paper path to court is preserved long term, or the Online Court itself made voluntary.
- (c) That the exclusion of lawyers (whether by design or by the economic consequences of the chosen costs regime) will be a cause of injustice in the many cases where there will not be a level playing field, and will encourage the growth of paid McKenzie friends and others with an undesirable influence upon vulnerable litigants.
- (d) That the bringing into operation of the Online Court is a rash step in the dark, for which there is no

297. There is established international discourse on the ethical issues surrounding the development and implementation of ODR systems from which the ALRC can take guidance.⁷⁶
298. The concept of service provision 'on-line' offers many brave new possibilities, but also creates the space for opportunism, where services are provided for a fee by people who know little or anything about family law. From time to time, members inform the FLS of the existence of websites where parties can, for example, have their BFA jointly done by on-line pro forma, or if they input set data, they will be told the property division answer.
299. These are dangerous practices which ultimately do the parties a great disservice. Whilst the LCA supports expanding dispute resolution processes to on-line means, there would need to be some kind of quality assurance, so people do not ultimately find themselves with a meaningless [non-B]FA, or an unjust and inequitable property division. Caution clearly needs to be exercised in promoting readily accessible, online services, if the real cost is to increase risk and disadvantage. The benefits and protections of independent legal advice cannot be underestimated and fast, cheap and readily accessible alternatives to traditional pathways may be poorly regulated and create greater injustice than the 'ill' they were intended to remedy.

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?

300. The Family Court of Australia has a well-established method of dealing with such issues known as the 'Magellan program'. The difficulty with this program, and any that the ALRC might ultimately recommend, is that there is insufficient funding for it to be administered in the manner intended and of which it is capable.
301. Subject to funding constraints, there is of course always more that can be done, and within that reality:
- (a) the value of therapeutic jurisprudence, particularly for families with complex needs, has been discussed extensively;

comparable precedent to provide the requisite minimum level of confidence that it will work.

- (e) That £25,000 is a wrong and unnecessarily high level at which to set the ceiling of the court's jurisdiction.
- (f) That the Online Court will be blighted by government incompetence in IT, or by under-funding during both design and operation.
- (g) That the creation of an interactive automated process of triage at stage 1, across the whole range of case types planned to fall within the Online Court's jurisdiction, is beyond the capacity of current IT, and will never replace bespoke advice on the merits from a lawyer.
- (h) That culturally normal conciliation at stage 2 will deter litigants from ADR pre-issue, and that the Small Claims Mediation model is inadequate for a jurisdiction up to £25,000.
- (i) That determination of disputes about substantive rights other than at a face to face hearing will deprive the loser of that basic feature of English justice, namely a day in court.
- (j) That online justice threatens a loss of open justice and transparency. '

⁷⁶ See, eg, Leah Wing, 'Ethical principles for Online Dispute Resolution – a GPS Device for the Field' (2016) 3(1) *International Journal of Online Dispute Resolution*, 12.

- (b) bearing in mind the boundaries of the work that can be undertaken by federal judicial officers,⁷⁷ the substantive 'therapeutic' function would need to be conducted by other persons within the system;
- (c) preference should be given to a model which maintained the participants within the one court structure, rather than have them transferred out to some external agency or group;
- (d) a hybrid model or dual-level model, where Registrars or other court officers,⁷⁸ conducted therapeutic intervention, management and monitoring, would allow the participants access to therapeutic intervention whilst remaining within the court system;
- (e) upon commencing proceedings, the case would be triaged by the court to determine whether it was appropriate to enter at a therapeutic level or immediately advance to the judicial level. Indicators for entering at the therapeutic level may include multiple prior family law proceedings, family law proceedings held within the prior 2 years, contravention applications, and families with pending proceedings in more than one court;
- (f) registrars or the delegated court officer would manage the therapeutic process. Delegates from external agencies would be in attendance or otherwise immediately available/accessible to assist with 'warm' referrals for support services, therapy and or treatments. The parties' compliance and progress would be recorded by the court officer and a summary of that record may then form part of the evidence available to the judicial officer who will ultimately determine the substantive proceedings; and
- (g) federal judicial officers would have a role in making interim orders during the therapeutic stage of the matter and would ultimately make a 'final' order once the therapeutic level was completed or the case had been provided with a certain duration of therapeutic assistance.

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

- 302. The LCA is aware of the use of family-inclusive conferencing in child protection matters, and also child-inclusive conferencing and mediations in some family law matters.
- 303. The LCA is of the view that any extra models of FDR may assist some families. Every family is different, and every set of facts are different, which is why the family courts have such a wide discretion.

⁷⁷ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254. The LCA notes that the NSWLS has the view that if interim orders are drafted such that therapeutic intervention was linked to or required as a condition of time with or residency of a child, (that is to say, therapeutic jurisprudence) this practice may not be repugnant to the principle in *R v Kirby; Ex parte Boilermakers Society of Australia*.

⁷⁸ Court officers conducting the therapeutic level of jurisprudence would require specialist training and support to conduct these roles.

304. In summary, a family-inclusive model of FDR ought be one of the many options of settlement of disputes available to families. However, the LCA wishes to warn the ALRC of some of the problems inherent in making 'whole-of family' conferencing some sort of mandatory or 'usual' model of alternative dispute resolution, especially for identified cultural groups.
305. The LCA refutes any contention that 'whole-of-family' or 'community inclusive' dispute resolution ought be mandatory or imposed on litigating parties absent their consent.
306. The concept of Family Group Conferencing (FGC) and Family Decision Making is best described by Ban and Swain:

*Family Decision Making (FDM) is a technique developed in New Zealand and applied through the medium of a Family Group Conference (FGC). It allows key decisions to be made by the family and friendship network regarding the welfare of one of their members. The role of professionals is to provide information regarding assessments, supports and resources.*⁷⁹

307. In the Child Protection context, it is appropriate that families and community support workers are involved. These are families in crisis who need to link into community supports. There are also statutory imperative in those jurisdictions of discerning any appropriate kinship placements which usually involve aunts and grandmothers.
308. In Child Protection FDRs, the participants usually have a common goal, even if families are hostile and parents are estranged – that is, to facilitate the early return of children out of foster care and back to family (or prevent them going into care). This is not so in family law proceedings – a totally different inter-family dynamic of conflict exists. It should be remembered that in Child Protection matters, the participants are all making decisions, and may come to a consensus, but the power in the room remains with the Child Protection Authority, who will take the group's ideas and decisions into account but not necessarily implement them.
309. Relatives are usually, by definition, older and better off financially, and more articulate in legal matters, leading to an unbalanced power dynamic. They are also inevitable witnesses in any future court case. There are, in some cases, a risk that young parents may be at the behest - culturally, emotionally, or financially - of relatives who may have different agendas.
310. Parties are the ones paying the court costs, and responsible for running the case, and responsible for costs consequences, yet the power and agency granted to non-parties at Family Group Conferences undermines the parties' power and agency.
311. Parents – or perhaps more accurately, those who have been intimately involved in the upbringing of children – need to be the ones who are primarily responsible for the future of their children. Overwhelmingly, that will be the two parents, in which case their responsibility and their agency ought not be undermined. Otherwise, their willingness to invoke the jurisdiction may be impeded.
312. One of the common tragedies of conflict after separation is the loss of an entire side of a family, maternal or paternal, to a child or sibling group. This can be traumatic for them, undermine their sense of belonging and being loved and wanted, and reduce their pool of confidants and role models.

⁷⁹ Paul Ban and Phillip Swain, 'Family Group Conferences: Part one. Australia's First Project Within Child Protection' (1994) 19(3) *Children Australia*, 19, 19.

313. The extended family may not have the resources or the courage, or may consider it counterproductive, to engage in litigation. FDR may offer an option in some family disputes to be involved.
314. Family-inclusive conferencing should be made available, via private mediations or Legal aid conferencing, but only if the parties to proceedings consent.
315. Care should be taken with any assumptions that this type of conferencing suits particular ethnic groups.
316. However, a particular set of *facts* in a case may make the case inherently more suited to such conferencing. Those facts will inevitably be:
 - (a) Where the case has a 'child protection' aspect to it – i.e.: the family environment is dysfunctional resulting in neglect or abuse of children;
 - (b) Where children have a history of being cared for by the extended family or one of them;
 - (c) Where one or other party is suffering from a health issue such as drug or alcohol abuse or mental illness.
317. Family violence matters are not intrinsically suited to family inclusive conferencing, if the above indicia are not also present. Families may only be finding out about the violence for the first time and may be shell-shocked and very angry. Often, they are very unbelieving. To have to sit through the expression of one's ex-in-law's emotions when one is the victim of family violence from their son (or daughter) is not in the best interests of vulnerable litigants. Not all mediators are as skilled as others in the dynamics of family violence. Mediators may have varying abilities to manage such counselling.

The following is noted in particular reference to Aboriginal and Torres Strait Islander and CALD families:

318. Family Lead Decision Making (**FLDM**) & FGC for Aboriginal and Torres Strait Islander families, whilst more akin to traditional Indigenous dispute resolution processes, will need to be carefully designed and undertaken because of the potential to widen the scope of the dispute and polarise the family by involving more family members potentially both paternal and maternal sides. As noted by NADRAC:

*Relationships between Indigenous people tend to be multi-layered, and dispute issues often overlap. Preparation for the dispute resolution process is therefore vital. Social mapping may be required to identify relevant participants and their relationships, obligations, duties and constraints. Ongoing management of the dispute may also be needed through providing follow up services or linking to other services and processes.*⁸⁰

The LCA notes the views of the NSWLS that FLDM and FGC processes are generally effective in Indigenous matters only after an interim order has been made to set the rules of engagement for parties.

319. It may also result in a caregiver or parent having undue pressure placed on them due to cultural protocols and/or the particular nature of family violence they may

⁸⁰ National Alternative Dispute Resolution Advisory Council, Indigenous Dispute Resolution and Conflict Management, January 2006, 11.

have been subjected to thereby preventing a level playing field and agreeing to decisions regarding their children under duress. These dynamics can also be complicated by financial considerations relating to the children's care arrangements.

320. For families from culturally and linguistically diverse backgrounds, similar factors may arise. In various migrant communities, family law is viewed as a private matter and a high priority is given to family cohesion. Resolution of disputes by way of mediation, conciliation or arbitration by community members or religious leaders may be preferred to those of mainstream Anglo-European services such as FRC's or legal aid commissions (possibly viewed as government agencies which some cultures may have had negative experiences of and therefore a level of fear and distrust). Some cultures may be highly patriarchal/matriarchal and involving wider family in decisions about arrangements for children upon breakdown of the family unit, may result in unfair outcomes, particularly where there may be a power imbalance, family violence or tensions in cultural protocols. The 2012 Family Law Council Report, *Improving the Family Law System for clients from Culturally and Linguistically Diverse Backgrounds*, noted concerns by:

*'A number of migrant and legal service providers [who] emphasised the potentially oppressive effects of cultural frames around family and community privacy, especially for women. The Footscray Legal Service's Out of Africa report indicates that clients of its African Legal Service were often reluctant to report family violence to police as they believed domestic arguments were private matters that should be resolved by extended family members and community elders.'*⁸¹

321. Culturally responsive mediation processes can facilitate FLDM, though will require time and resources to establish, organise and maintain to enlist the confidence of and up-take by the communities. RANT in Alice Springs trialled such a process (Model of Practice for Mediation with Aboriginal Families in Central Australia). However, it was discontinued after the creators of the process ceased employment with RANT. The LCA notes RANT are one of 8 organisations who have received Commonwealth funding to establish FDR for CALD or Indigenous families affected by family violence. It is understood that the programme will involve travel to the remote Indigenous communities as well as assisting those in regional and metropolitan areas. An evaluation of this programme will be useful in understanding whether it is effective and well received by the communities.
322. Factors which would need to be addressed in designing suitable models might include:
- (a) engagement and consultation with communities at the local level;
 - (b) cultural safety and cultural competency training for those designing and delivering FLDM services for Aboriginal and Torres Strait Islander peoples and those from culturally and linguistically diverse communities, and particularly in relation to the needs of those communities and their experience of family violence;
 - (c) development of Indigenous and CALD workforce to run and support FLDM services and providing encouragement and support for the development of specific FLDM services;

⁸¹ Family Law Council, 'Improving the Family Law System for clients from Culturally and Linguistically Diverse Backgrounds' (Report, February 2012), 36.

- (d) family law/legal literacy by the communities;
- (e) developing and enhancing interpreter capabilities;
- (f) recognition of Indigenous or CALD communities' perspectives on disputes and their resolution;
- (g) flexibility and adaptability of services to cater for the needs of divergent communities and their needs;
- (h) long term and sustainable outcomes; and
- (i) integrated approaches across programme, process and jurisdictional boundaries, particularly for families with complex needs who require social as well as legal support.

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?

- 323. Proposals for the integration of services have already been comprehensively considered by the Family Law Council in its still contemporary 2016 final report.⁸²
- 324. That report notes the increasingly narrow boundary between private and public family law and the prevalence of families with complex needs in the family law system.⁸³
- 325. Chapter 5 of that report discusses 'Collaboration, case management and integrated services'. Ultimately the Family Law Council made the following recommendations in the context of an integrated services approach and these are supported by the LCA:

Recommendation 6: A court-based integrated services model

1) To provide evidence and a better structured system in a more child-focused way, the Australian Government should consider establishing a client-centred integrated service model to trial collaborative case management approaches to families with complex needs, to be piloted initially in one court registry and evaluated pending further roll out. Part of

⁸² Family Law Council, 'Final Report'. The report concentrates on opportunities to enhance collaboration and information sharing within the family law system as well as other support services such as child protection, mental health, family violence, drug and alcohol, Aboriginal and Torres Strait Islander and migrant services.

⁸³ At 96: AIFS research shows that family law judicial officers regularly adjudicate parenting matters with multiple risk factors, involving a combination of family violence, child (sexual) abuse, drug and alcohol dependency and/or serious mental illness. The Family Law Council notes in particular the 2014 survey of family reports described in Chapter 1, which revealed that 31% of the surveyed cases involved three of these risk factors, while 26% involved four risk factors. Family violence was present in 81% of the surveyed cases.

that trial should include the development of effective information sharing protocols.

2) In order to support the development of effective information sharing protocols, Council recommends the government clarify the confidentiality status of family dispute resolution intake assessments.

Recommendation 7: Case managed integrated services in the family relationships sector

To better address the complex nature of children's disputes, the Australian Government consult with Family & Relationship Services Australia with a view to further developing a case managed integrated services approach attached to family dispute resolution and men's behaviour change programs across the whole family relationship services sector.

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?

326. If the State and Commonwealth governments sought to seriously address the issue of the protection of children on a comprehensive basis, with all of the attendant difficulties, it would require a concerted and co-ordinated referral of the relevant legislative powers, a comprehensive legislative framework and a commitment to proper funding on an ongoing and sustainable basis.
327. Instead, we note that over the course of two years, the Family Law Council considered opportunities for change to reduce the need for families to engage with more than one court.⁸⁴
328. Following comprehensive forums, consultations, research, discussion, feedback and engagement with stakeholders, an interim report was issued in 2015,⁸⁵ followed by a final report in 2016.⁸⁶
329. We commend that report for consideration by the ALRC noting that some of the recommendations made have already been implemented.
330. Ultimately the Family Law Council made the following recommendations in the context of enhancing inter-jurisdictional cooperation:

⁸⁴ Family Law Council, 'Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems – Interim Report' (Interim Report to the Attorney-General, June 2015); Family Law Council, 'Final Report'.

⁸⁵ Family Law Council, 'Interim Report'.

⁸⁶ Family Law Council, 'Final Report'.

Recommendation 5

The Attorney-General raise the following matters at the COAG level:

- a) The development of a national database of court orders to include orders from the Family Court of Australia, the Family Court of Western Australia, the Federal Circuit Court of Australia, state and territory children's courts, state and territory magistrates courts and state and territory mental health tribunals, so that each of these jurisdictions has access to the other's orders.*
- b) The convening of regular meetings of relevant stakeholder organisations, including representatives from the children's courts, child protection departments, magistrates courts, family courts, legal aid commissions and Attorney-General's Departments, to explore ways of developing an integrated approach to the management of cases involving families with multiple and complex needs.*
- c) Amending the prohibition of publication provisions in state and territory child protection legislation to make it clear that these provisions do not prevent the production of reports prepared for children's court proceedings in family law proceedings.*
- d) The entry into Memoranda of Understanding by state and territory child protection agencies and the federal family courts to address the recommendations of Professor Chisholm's reports.*
- e) The co-location of state and territory child protection department practitioners in federal family court registries.*
- f) The development of dual competencies for Independent Children's Lawyers to achieve continuity of representation for children where appropriate.*

Recommendation 6

The Family Law Council has previously made recommendations in relation to a number of issues that are covered by the present terms of reference in its 2009 report, Improving Responses to Family Violence in the Family Law System. These include:

- *Recommendation 7.3.1:
The adoption of consistent terminology in orders relating to children across relevant State and Commonwealth legislation so that orders are more readily understood by parents and carers of children and those working in family law and child protection, including law enforcement.*
- *Recommendation 9.3:
The Attorney-General facilitate the development of protocols for the collaborative exchange of information between the family courts and child protection departments, police, and mental health services.*

Recommendation 10: Collaboration between family law and state and territory courts

The Australian Government explore through COAG or LCCSC the possibilities for increasing circuiting of Federal Circuit Court judicial officers and registry staff in state and territory magistrates courts, including specialist family violence courts and community justice centres.

Recommendation 15: State and territory courts exercising family law jurisdiction

- 1) The National Judicial College of Australia develop a continuing joint professional development program in family law for judicial officers from the family courts and state and territory children's courts and magistrates courts.*
- 2) If the Australian Government accepts Rec 15.1, then Council recommends amendment of the Family Law Act 1975 to increase the monetary limit for property division by courts of summary jurisdiction.*
- 3) Council recommends an increase in Commonwealth funding to state and territory courts of summary jurisdiction to enable them to take on more family law work.*

Question 33:

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

331. There needs to be an identification of the information sought to be shared – as different processes and requirements will attend different forms of information.
332. The sharing of information as to convictions, and of the entry of protection orders, is one that ought to occur and there ought to be a ready commitment to a process by which this can be effected.
333. The sharing of information as to complaints, and child protection processes, is one that should also occur but there needs to be a greater awareness of the context in which such information is gathered and a greater scrutiny of and safeguards applied to its use once shared.
334. In that context, guidance can be obtained from the model adopted by the Family Court of Western Australia which is not beset by the challenges otherwise posed by the federal system and the unavailability of a 'one-family, one-court' system throughout Australia.
335. The LCA also supports the recommendations of the Family Law Council and Victorian Royal Commission as set out at paragraphs 249 and 250 of the Issues Paper. It is to be noted, however, that the LCA endorses the concerns set out at paragraph 252. To the two matters listed at paragraph 252 we add a third, namely the challenges created when intending to forge a new system where reports and processes in one forum (which do not apply the rules of evidence) are to be

transposed to a forum where there is greater adherence to those rules – that which is an acceptable foundation for action in one place may be found wanting in another. By way of example, in the family law courts the bare opinion and summaries of a child protection case worker is not of itself evidence of that expressed and to decline an interview with the department is not an admission of culpability.

Children’s experiences and perspectives

Question 34:

How can children’s experiences of participation in court processes be improved?

- 336. The LCA acknowledges the rights that children have to make their views known and participate in processes relevant to their care (*Articles 9 and 12 under the Convention on the Rights of Child*) and that the family courts are bound to have regard to the views of the child when deciding their best interests pursuant to s60CC(3) (a) of the Act.
- 337. The UN Committee on the Rights of the Child stated in General Comment 12 that while a right to be heard means that a child’s *views must be taken into account, it does not necessarily extend* to making decisions consistent with those views. This reflects the interdependent and complementary relationship between the right to be heard *and consideration* of the child’s best interests.⁸⁷
- 338. The family courts have developed a range of processes to ensure that parenting orders are made based on evidence as to the best interests of the child – these include the preparation of family reports, child inclusive interviews, and parties-only child dispute interviews; the appointment of ICLs, admission into evidence of evidence from a family therapist, school social worker, or the like and the development of the child responsive program. A Judge can also interview a child, however, this is uncommon.
- 339. The LCA is of the view that in general involving children in adversarial proceedings can be harmful to children if not done properly and with a view to the child’s age and stage of development.
- 340. Practitioners are concerned about protecting children from exposure to the conflict between their parents, from pressure (real or perceived) from one or both of their parents (or other siblings) as to what their views ‘should be’ and from the repeated engagement with multiple agencies, courts and family law professionals.
- 341. To improve children’s experiences in the family courts we must create an environment where children understand the process and feel comfortable. An environment where children know they can express their views without retribution, and where they also know and understand that although their views are known and taken into account, they are not under pressure to make the ultimate decision about what Orders are made.
- 342. It is in the best interests of children that we:

⁸⁷ Megan Mitchell, ‘Ever Seen or Heard? The Voice of Children in Family Law’ (Speech delivered at the 16th National Family Law Conference, Sydney, 8 October 2014).

- (a) reduce court delays so that decisions can be made about children as quickly as possible;
- (b) facilitate whatever legislation or information sharing processes are necessary so that family courts can gather information from other agencies like child welfare authorities, the police and other courts with jurisdiction with respect to children and/or domestic violence so that children and their parents do not have to tell their history and circumstances over and over again;
- (c) appropriately fund family consultants so that they are able to be the family's first point of contact with the court (unless urgent or a *Rice & Asplund* threshold presented) and that they are actively involved in the matter until it concludes so that children and ICLs have a consistent person with whom to liaise;
- (d) expand the Family Consultant's role– so they are not just participating in court ordered events but checking in with children independently throughout the duration of proceedings, and possibly for some time after proceedings end. This is consistent with the intent of s 65L of the Act, although this ongoing role would raise significant funding issues;
- (e) appropriately fund ICLs so that experienced practitioners in private practice are willing to do more of this work. Increased funding will also allow ICLs to do more for children and to spend more time on each case. It will also allow ICLs to meet with children more often in environments which are convenient to the child and not just the ICL;
- (f) develop a formal team model where a Family Consultant and ICL are allocated to a particular case to work together with respect to the child or children concerned so the children have the benefit of someone who can properly interview them and provide feedback to the ICL as to how to treat their views and needs given their presentation and state of development; and
- (g) prepare family reports early in the process and not near the end, preferably before any interim orders are made so the court has as much information as possible about the family dynamics of each particular child.

Question 35:

What changes are needed to ensure children are informed about the outcome of court processes that affect them?

- 343. The LCA notes that there is no legislative framework in place setting out who is responsible for informing children of the outcome of court processes that affect them and thus it can be assumed in most cases it is one of their parents or a carer who tells them of the decision that has been made. In some instances, at the conclusion of a hearing, the Judge may make a specific direction to the ICL to meet with the child for the purpose of explaining the outcome of the hearing and the orders made.
- 344. The UN Committee on the Rights of the Child stated in Note 15 that children should be given feedback about how their views have been considered in the decisions made.⁸⁸

⁸⁸ Ibid.

345. *The Guidelines for Independent Children's Lawyers (2013) provide 'In appropriate circumstances the ICL has a responsibility to explain to the child, or to facilitate an explanation by a Family Consultant or other appropriate expert who has provided a report in the case:*

- *the orders made by the court; the effect of those orders;*
- *if submissions were made by the ICL that were contrary to the child's views, the reasons for so doing; and*
- *whether leave has been sought to provide copies of the orders, reasons for judgment of the court and for any other material, including expert reports, to any relevant professional involved with the family and to whom the ICL intends to forward such material.*

In consultation with a Family Consultant or an appropriate expert in the case, the ICL should determine who is the most appropriate person to explain the orders, taking into account their current respective relationships with the child.'

346. The LCA submits the process of keeping children informed of decisions is presently haphazard in many cases and is thus not in their best interests.

347. As noted, at the end of a trial the judicial officer can make directions about who will inform the child, or indeed, he or she can meet with the child and explain the decision, however if Orders are made by Consent no such directions are made.

348. The Family Law Council in its 2016 report *'Families with Complex Needs and the Intersection of Family Law and Child Protection Systems'* recommended:

1. *'The Australian Government establish a young person advisory panel to assist in the design of child-focused family law services that build on an understanding of children's and young people's views and experiences of the family law system's services.*
2. *The Australian Government consult with children and young people and stakeholders in developing guidelines for judge who may choose to meet with children in family law proceedings.'*

349. The LCA supports such a panel so that young adults who have experienced family law processes can give some input into how children are informed of the outcome to family law proceedings and how the decisions made will affect them.

350. When an ICL is not appointed, or when it is consent orders being made, a family consultant is likely to be the best person in the current structure of the family courts to explain outcomes to children, but community based legal centres or social workers may be an alternative.

351. In cases in which children have already met with a family consultant, report writer or have an ICL, one of those people should be required to explain orders and answer questions and, in most cases, the most appropriate person will be the ICL.

352. ICL's should be properly funded to meet with children in an environment that children are comfortable in, to explain the Orders made and answer questions. Ideally the ICL will liaise with the family consultant prior to any such meeting to

obtain advice about how to explain these matters in a way that is understandable and appropriate given the age and stage of development of the child.

353. When explaining outcomes after a contested matter, it is important that children are reassured that the court knew and understood their views, and if orders were made contrary to those views that the reason those alternative orders were made are explained.

Question 36:

What mechanisms are best adapted to ensure children's views are heard in court proceedings?

354. The LCA is strongly opposed to any alteration to the 'best interests' paramountcy principle in matters dealing with the welfare of children.
355. In the Family Law Council's Interim report '*Families with Complex Needs and the Intersection of Family Law and Child Protection Systems*' in June 2015, they pointed out a weakness of the current system:

'...the family law system has no independent investigative body akin to a child protection department to provide the courts with a forensic assessment of child risk issues, and the family courts have no capacity to compel a child protection department to intervene in a family law case or to investigate the courts concerns'.⁸⁹

356. The same report also referred to the fact that s 121 of the Act and state legislation are a barrier to releasing relevant reports about children from one court to another. The fact that Magistrates Courts and the police usually deal with restraining orders, Children's Courts and child welfare authorities usually with care and protection matters and the family courts with parenting matters, means that parents and their children must often repeat their story. It is important to ensure that children's views do not get lost or altered within the system, simply because they are confused or because they feel they are not being heard due to inevitable delays of moving within the different systems.
357. The family courts would be assisted by having any relevant information from police and child welfare agencies before them on the first return date as happens in the Family Court of Western Australia, which is a state court and where there are protocols in place to ensure family consultants can gather this information and provide same to the judicial officer.
358. Another potential source of information about children for the courts is FDR. In most cases before a matter comes before the court, parties are required to attend FDR. Prior to the requirement for FDR, parties attended confidential counselling at the court before the first return date and the counsellor would then provide the judicial officer with a Form 69 summary and recommendation. The Form 69 did not breach any confidences given in counselling but made recommendations for case management.
359. Notwithstanding an FDR practitioner cannot disclose any communication pursuant to s 10H(1) of the Act, more could potentially be done to assist parties, as the

⁸⁹ Family Law Council, 'Interim Report', 96.

current s 60I certificate has no substantive value to the Court. As pointed out in its *2016 Submission to the Family Law Council on the Issue of Families with Complex Needs*, the LCA is of the view that the court would be assisted with recommendations from FDR. Improvements to the s 60I certificate, which contained the FDR practitioner recommendations and providing information (after consent is provided) would significantly improve information sharing, and would of course assist the courts by giving them information for case management that may improve outcomes and reduce delays for parties and their children.

360. Another alternative source of information is the creation of a body like The Children and Family Court Advisory and Support Service (**Cafcass**) in the UK.
361. Cafcass is a non-departmental public body accountable for safeguarding the welfare of children and providing advice to the family courts in England and Wales. When an application for parenting orders is filed it is sent for specialist screening within Cafcass, which then undertakes an initial check of police and child welfare authorities, including records of domestic violence and criminal convictions to see if the family is known to those agencies. A Cafcass officer will also conduct a risk assessment with the parties and prepare a short report for the court.⁹⁰ The LCA also supports family reports being prepared earlier in proceedings so that children's views, and their maturity to express same, are known to the court as soon as possible, and preferably before any interim hearing.
362. The LCA submits that committing more resources such as family reports and the appointment of ICL's early in proceedings, is one of the best ways of ensuring that children's views are heard and understood. If children can report their views when proceedings are commenced, and thus usually very close to separation it is arguable that there is less opportunity for coaching by one or both parents.
363. The LCA is of the view that a system whereby the court is informed of, not only the child's views; what constitutes their best interests as formulated by an ICL; meetings with family consultants; family report writers; and, very occasionally through meetings with judicial officers, is the most reliable and effective way of ensuring cogent and reliable evidence is before the court with respect to the best interests of the child.
364. It is not enough that the court knows what a child has said he or she wants, the court must know, if possible, the motivation for what has been said and if the particular child has the developmental capacity to understand the long-term impact on the child of those views.
365. We note that in child protection matters, Child Representatives often act on instructions from a child when the child is deemed mature enough to give instructions.
366. However, the LCA is strongly opposed to any suggestion of direct representation of a child in family law court proceedings and repeats the comments put by the LCA to the 1997 ALRC Report *'Seen and heard: priority for children in the legal process'* when it argued:

⁹⁰ Family Law Council, 'Final Report, above n 82, 37; Kylie Beckhouse, 'To Investigate Legal Representation Schemes for Children in the US, Canada and the UK—Administration, Delivery and Innovation' (Churchill Foundation, 2014) 20.

'that any other form of representation by children in proceedings between disputing parents...

*...would only add to the stresses and emotions experienced by the children at that time in their lives. Children's rights include the opportunity to have an ongoing relationship with each of their parents after the litigation has concluded and to be protected from the effects of parental disputation as far as possible.'*⁹¹

367. Best interests representation allows children to express an opinion without feeling responsible for the ultimate decision as referred to in the Guidelines for Independent Children's Lawyers (2013):

'The ICL should seek to provide the child with the opportunity to express his or her views in circumstances that are free from the influence of others.

A child who is unwilling to express a view must not be pressured to do so and must be reassured that it is his or her right not to express a view even where another member of the sibling group does want to express a view.

The ICL should ensure that there are opportunities for the child to be advised about significant developments in his or her matter if the child so wishes, and should ensure that the child has the opportunity to express any further view or any refinement or change to previously expressed views'.

368. A major criticism of the 'best interests' model is that it denies 'competent children' the right to instruct their advocates. The LCA opposes the presumption of competency in the family courts, being of the view that it is adverse to children to be witnesses in parental disputes, when children's wishes and needs are able to be conveyed to the court in better ways, which do not place the children as partisan litigators supporting one parent over another, or feeling torn between both.
369. Furthermore the family courts and ICLs are obligated under s 60CC(3)(a) to take into account *'any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views'* which in turn means that the views of 'competent children' must be given greater weight whereas the views of younger children (more vulnerable to be influenced) will be given less weight.
370. The LCA is of the view that the present guidelines for participation of children in proceedings are adequate and should not be changed, save that it supports the early intervention and increased funding of ICLs, family consultants and family reports to ensure that children are heard as soon as possible.

Question 37:

How can children be supported to participate in family dispute resolution processes?

371. The LCA refers to and repeats the concerns set out at question 30 above with respect to Family Inclusive FDR.

⁹¹ Australian Law Reform Commission, *Seen and heard: priority for children in the legal process*, Report No 84 (1997) [13.51].

372. The 1997 ALRC Report '*Seen and heard: priority for children in the legal process*' confirmed that there is little research available to suggest that children may benefit from being involved in FDR.⁹²
373. The ALRC report found: '*Children should not be required to become involved in alternative dispute resolution processes. Rather, the degree of children's involvement should be determined in each case on the best wishes and needs of the child involved*'.
374. The LCA agrees with this finding that children should not be automatically involved in FDR.
375. The FDR process is of its very nature confidential and there is a significant difference between giving information confidentially to help negotiations, and, preparing evidence so that a judicial decision can be made.
376. If a child participates in FDR and the matter does not resolve, the child will have to express his or her views again to a family report writer or ICL. If the latter view differs to the former view then one or both parties will want there to be evidence given about what was said in FDR, issues of confidentiality and admissibility will then need to be addressed, and consideration given to exceptions under the *Evidence Act* to statements made at FDR by children.
377. If a child does not participate directly in FDR but a social worker obtains his or her views and brings them to the FDR, the social worker may also have to give evidence if there is later a change in views, and allegations that the child has been 'coached' by one of the parents in-between FDR and Court.
378. If a child is to be involved in FDR (contrary to our submissions), it is the view of the LCA that same should be supported by a social worker trained in legal issues for children, child development and communication with children so that the child fully understands the impact of what he or she may say at FDR, either in person or through the social worker. If child inclusive FDR is to be used, then there will need to be additional funding to ensure that each child has a dedicated social worker to assist them through the process.
379. The resolution of the dispute between a child's parents can only benefit the child, but the LCA cautions that the degree of a child's involvement in FDR must be determined on a case by case basis, and before a child is exposed to FDR the following should occur:
- (a) parents must be screened and found to be willing to take their child's perspective into account and be assessed as to how they will react if the child does not say something that they want to hear, to ensure that there will be no retribution (even inadvertent) against the child who expresses a view.
 - (b) children must be screened and found not only to be willing to participate, but also to be assessed as understanding the effect participating may have on their long term interests if the matter does not resolve.
380. Caution needs to be exercised that children are only involved in the FDR process if it is absolutely appropriate for them to be so involved and it is likely to be in cases which are the exception rather than the norm.

⁹² Ibid [16.18].

Question 38:

Are there risks to children from involving them in decision-making or dispute resolution processes? How should these risks be managed?

381. The risks of involving children in decision-making are well known, and as the ALRC Issues Paper correctly identifies, this creates a difficult balancing act for the Courts and practitioners in shielding children from those risks; but, also enabling them to be heard.
382. Courts regularly hear evidence from Family Consultants and others about the effect of intra-family conflict upon children. Children need to get on with the task of being children, learning whatever is age-appropriate for them – be it how to use a toilet or cutlery, how to regulate emotions, how to get on with peers, manage their physicality, cope with adversity, negotiate the wider world, become independent of their parents, and absorb their school work. However, it is well known that exposure to conflict will inhibit children's ability to focus on developmentally-appropriate learning. Difficulty focusing at school; trusting others; forming relationships with peers; difficulty sleeping; constant anxiety or hyper-arousal; are all factors which the Courts are told are experienced by such children. If children are involved in inappropriate or insensitive ways in decision-making, these pre-existing issues can be exacerbated, to a child's great detriment.
383. Courts regularly also hear evidence about how children present differently, in general terms, at different developmental ages. Teenagers may be more moralistic and perceive issues in 'black and white'. Eight to 10 year olds may be more placatory of their primary carer or seek to show each parent that they love them by talking about equal time. Small children's worlds revolve around whoever is providing them with their primary care. All children may be inhibited from criticising their primary carer, or be influenced by that person (deliberately or just innately) to criticise the absent parent. Others are very protective of whomever they perceive to be the more vulnerable parent. Some children may lack the skills to convey their memories or their current fears about family violence and past scary events.
384. Feedback from young people who have given their views in court proceedings is *ad hoc*, in that there is no formal process in place to collect that information after the event. That is properly so given the need to minimise the impact of proceedings on children.
385. In summary, the task of involving children in decision-making processes is fraught with risk if undertaken by someone without a good comprehension of the dangers, some of which are touched on above. Happily, the court has available to it practitioners who are skilled to do precisely that, in the form of family consultants.
386. There is no better alternative for families than having family consultants interview parties and children in each and every case at an early stage (unless a matter of urgency or there is a *Rice & Asplund* issue to be addressed); prior to the first return date is ideal. It will ensure that children are heard early on by the court, via a person skilled in interviewing children and contextualising that material for the court. Anecdotal evidence from legal practitioners suggests that such a practice gives the case a far higher chance of settlement and settlement at an early stage. Practitioners have more information upon which to base their advice to their clients. Ideas from the consultant on how to case manage the matter (for example linking the family in to various services or courses) will reduce risk of exposure to family

violence and improve parents' functioning at an early stage. It is still common, for example, for a case involving family violence to run for months or years before anyone undertakes an anger management program.

387. The LCA cannot emphasise strongly enough the view that it is family consultants and not others who ought be tasked with ensuring children's views are heard. It maximises the chances of all Australian children encountering a consistent, well-trained, approach by practitioners who are well positioned to minimise the known risks inherent in involving children in decision-making.

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?

388. Children who wish to participate in family law processes should be assisted in doing so and in a way which is empowering, enables them to be heard and causes no harm. This is especially true for vulnerable children, children with disabilities, Aboriginal and Torres Strait Islander and culturally diverse children.
389. That said, the LCA recognises that all children, no matter their background or characteristics will have individual needs. Many will have experienced some form of trauma (intergenerational or contemporary), abuse or exposure to family violence, have a disability or special needs, low educational outcomes and possibly significant language barriers. The most disadvantaged children live in families with entrenched and complex problems, which are the very factors that make them all the more vulnerable.
390. Some may also have experienced multiple legal systems (youth justice and/or child protection, particularly Aboriginal children who are over-represented in both), trauma and grief arising from abuse, neglect, removal or a disconnect with their family, culture or country and disruption to their education.
391. As noted in the ALRC report '*Seen and Heard: Priority for Children in the Legal Process*':
- In addition, the difficulties that commonly arise in all children's involvement in legal processes, including barriers to access, lack of understanding, marginalisation and agency complexities, affect Indigenous children on a greater scale. Indigenous children are vastly over-represented in those legal processes that have links with adverse outcomes and other legal processes.*⁹³
392. Children with disabilities (which term includes behavioural problems, learning disabilities, physical or intellectual impairments and psychological and psychiatric conditions) may be over-represented in educational discipline processes, in addition to other legal systems. Children with intellectual disabilities are over-represented as victims of crime.⁹⁴

⁹³ Ibid [4.59].

⁹⁴ Ibid [4.63]

393. Those working in the family law system ought to be sensitive and responsive to the individual needs of children, particularly vulnerable children and those from disadvantaged backgrounds, and factor in their age, stage of development, level of understanding and their cultural, familial and social backgrounds.
394. The LCA recommends that a tailored approach to children's participation be adopted by appropriately skilled professionals in the family law system recognising that all children are different, have different needs and are affected in different ways by family breakdown or disputes about their living arrangements.
395. Family breakdown or disputes about their care arrangements may increase children's vulnerability or add to their trauma. Many of the children mentioned above may not have the language, literacy or developmental capacity to understand and participate in a western concept of family dispute resolution /adjudication processes even if they wished to do so.
396. Building and developing a specialised workforce to work with and interview children is essential to maximise opportunities for children's participation, should they wish to do so, or should it be appropriate to do so without causing trauma or subjecting them to system's abuse. Identifying and respecting the child's right not to participate is as equally important as the right to participate itself.
397. Training in cultural competency, trauma informed practice and child development should be core competencies for those working with children.
398. The LCA notes that not all family law professionals working with children or involved in decision making about them are required to undertake specific training in these areas, though it is often done voluntarily.
399. Training particularly in core competencies has been identified for ICLs in the AIFS *Independent Children's Lawyer Study*. Some judicial officer survey participants, made specific reference to training in child development and in issues affecting Aboriginal and culturally diverse families:

More training in social sciences interaction with children, brain development of children, basic psychology. There needs to be a re-accreditation process on regular occasions.

...

More ongoing training would be good, not just a one-off course. Greater training in issues affecting Aboriginal and culturally diverse clients would be useful—for us all.⁹⁵

400. The LCA understands that National Legal Aid is currently re-designing the ICL training program to enhance training in these areas and requirements for continuing legal education in core competencies which the LCA supports and suggests could extend to all family lawyers involved in children's matters.
401. The LCA also supports Recommendation 133 of the 1997 ALRC Report:

Recommendation 133 *Judicial officers, including State and Territory magistrates, exercising federal family jurisdiction should receive training in children's matters. Training for State and Territory magistrates could be provided by members and*

⁹⁵ Ibid p.95

staff of the Family Court during annual training conferences. Training should include material on:

- *child development*
- *communication skills and appropriate language for communicating with children*
- *family dynamics*
- *issues surrounding disclosure of and family dynamics concerning child abuse*
- *cross-cultural awareness.*

Implementation. *In conjunction with other judicial education bodies, AIJA should develop a national core syllabus for this training.*

402. The LCA also supports increasing funding for:

- (a) the recruitment of more family consultants and to expand their role to allow for greater contact with children both during the proceedings and for a period post final orders. Circumstances may arise where a family consultant may need to sight or speak with the child and provide important evidence to the court, however, resources are now so constrained that contact beyond the family report interview process is not feasible; and
- (b) the appointment of more relevantly skilled, ICL's in matters involving cultural, developmental or other special characteristics of the child.

403. The LCA recommends the building of culturally and developmentally safe and appropriate child-centric services which could assess children and provide them with ongoing support (such as the *Supporting Children After Separation* Programme) and create opportunities for participation. Such services could also provide assisted referrals should children require additional supports (eg. grief, trauma/family violence counselling/education around a parents' mental illness or disability) and would need to be accessible to all children including those in regional/remote regions.

404. The LCA recommends enhancing opportunities for children's participation in family dispute resolution processes with the creation of specially trained Indigenous and CALD child consultants embedded at Family Relationship Centres and legal aid commissions to facilitate child informed/focused mediations. This should only occur upon assessment by the child consultant that it is appropriate and safe for the child to participate in this way. The LCA notes that various models of child informed/focused family dispute resolution processes exist around the country both at Family Relationship Centres and legal aid commissions.

405. The LCA notes that children's matters requiring judicial determination are significantly assisted by the preparation of family reports. This assists not only the judicial officer but the parties and their lawyers (including the Independent Children's Lawyer) understand the key non-legal issues in the matter, including the views of the children, if expressed. An important adjunct to the family report where cultural issues are identified would be the preparation of a cultural report that is relevant to the family. To the LCA's knowledge, such reports are rarely used but would be of immeasurable assistance especially in circumstances involving caregivers from mixed cultural backgrounds. Cultural reports may identify the cultural needs and

characteristics of the child and may provide guidance about the child's participation. The LCA recommends that additional funding be provided to the Courts for the preparation of such reports.

406. The LCA recommends the development and use of technology such as APPs to increase children's awareness and understanding of the family law system and where they might obtain support (eg. Kids Helpline, Headspace). The LCA notes the development of resources for children by the Family Court (*Why am I going to see a Family Consultant*), the Legal Aid NSW *BestForKids* web-site and the role of ICL's on the ICL website.

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?

407. As indicated in Question 35, the LCA supports the consideration of the establishment of a young person advisory panel to assist in the design of child-focused family law process that build on an understanding of children's and young people's views and experiences of the family law system and a platform for government consultation with children and young people and notes the Cafcass FJYPB UK model.
408. Consideration could also be given to funding a national peak consumer body such as Create Foundation designed for children in out-of-home care for children involved in the family law system. The LCA notes Create's policy and advocacy functions as:

CREATE Policy and Advocacy aims to influence change so that all children and young people with a care experience have the opportunity to reach their full potential.

The views and wishes of children and young people in out-of-home care are regularly sought by CREATE through formal and informal consultations.

Those views provide a basis for all of the policy and advocacy work that CREATE does, informs the way we operate and supports our media responsiveness.

CREATE Policy and Advocacy includes:

- *Consultations, focus groups, surveys, think tanks & interviews*
- *Reports, submissions and research articles*
- *Interagency networking*
- *Government lobbying*
- *Media*
- *Policy and practice development*

With CREATE offices in each state and territory, CREATE is able to provide local support to address local issues as they arise. When a national response is required; this is when the CREATE team is able to pool local information and

feedback from children and young people in care in each state and territory to provide a national overview, such as that in the CREATE Report Cards.

CREATE's Report Cards are major research projects that promote opportunities for children and young people in care by informing the community and Governments about their views on their care experience.

CREATE is an active member of the Implementation Working Group for the National Framework for Protecting Australia's Children 2009-2020 and helped develop the National Standards for out-of-home Care.

409. Create's Youth Advisory Groups hold forums for children and young people aged 10 to 25 where they can provide *'input into resource development, programs and general government or organisational policy.'*
410. The LCA submits a similar organisation could be established as a conduit for children and young persons to provide their views, experiences and recommendations to improve family law processes. These could be channelled into the Family Law Council, AIFS, the Children's Committee of the family courts, National Legal Aid's ICL programme and the Children's Commissioner.
411. The LCA does note however interesting existing initiatives in the family law system aimed at receiving and learning from children's experiences:
 - (a) Relationships Australia S.A. *Young People's Family Law Advisory Group* pilot funded by the South Australian Family Law Pathways Network (SAFLPN) supported and endorsed by the family law courts Children's Committee. While it aims to assist young persons to build life skills, two of its 3 main objectives are to:
 1. *Obtain a comprehensive array of information from participants about a variety of issues concerning their experiences of all facets of the family law system;*
 2. *Prepare an evaluation of these findings;*
412. This pilot was due to be evaluated in February 2018. The LCA recommends consideration be given to this evaluation and funding similar pilots nationally to obtain information from all parts of Australia.
413. AIFS current research into children and young people's experiences of family law system services in Australia where active recruitment of children and young people to take part in the research has been undertaken. The research will no doubt provide invaluable data to inform policy and improve processes.

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?

414. Education and core competencies for family lawyers need to be addressed on several levels:
- (a) undergraduate education for law students;
 - (b) mandatory CLE for admitted lawyers; and
 - (c) specialist accreditation in family law.
415. The FLS of the LCA has recommended that family law should be a compulsory subject for law students.⁹⁶ This reflects the importance of this area of law, its increasing complexity and impact upon society (especially children). Ensuring all graduating lawyers have some competency in family law will build a better foundation for continuing engagement and legal training in post-admission practice and will ensure those practitioners who choose to practice in family law, do so from a considered position based on actual experience.
416. The LCA recommends mandatory family violence education for all legal practitioners as part of their continuing legal education requirements, if not on an annual basis then at least on the basis of one hour/unit every 2 years. Core competencies could be developed for legal practitioners, in consultation with the FLS, FLC, AIFS, Attorney-General's Department, NLA, ATSILS, NACLAC and the Courts. Each state and territory law society has a scheme of continuing legal education and it is contemplated that the inclusion of a family violence component (particularly focussing upon how to discuss such matters with clients and how to look for indicators or flags of risk) could readily be adopted.
417. Family violence is already a matter which informs the assessment requirements of the successful completion of Specialist Accreditation in Family Law.
418. However, not all practitioners who work in family law are cognisant of the complex dynamics relating to family violence such as to enable them to properly identify risk flags relating to family violence or to properly advise someone in those circumstances. It is vital that lawyers practising in family law be in a position to identify the risk and or existence of family violence in order to enliven assessment, safety planning processes and referrals.
419. Regrettably, there are still occasions when a legal practitioner's engagement is clearly inadequate and while this is of concern, the majority of lawyers who regularly practice in family law are committed to learning more about family violence and how to better assist their clients.

⁹⁶ Family Law Section of the Law Council of Australia, Submission No 26 to Law Admissions Consultative Committee, *Review of Academic Requirements for Admission to the Legal Profession*, 31 March 2015.

420. The LCA notes that in the AIFS research published in 2016 into the 2012 amendments to the Act of people who used FDR, lawyers or courts in 2014, 29% said they were *not* asked about family violence.⁹⁷
421. The LCA recognises that there would be benefit in offering lawyers particular training in the use of risk assessment modules, such as DOORS or the Common Risk Assessment Framework (CRAF).
422. The Act requires lawyers to provide advice to clients about dispute resolution services (among other matters) and family lawyers consistently support and engage in alternate dispute resolution. Most matters do not end up at court. Legal practitioners already play a very significant role in assisting parties to reach agreement about matters and to document the settlement. Offering continuing legal education about dispute resolution and negotiation training is supported by the LCA and the work of AIFLAM is one example of the mediation skills training on offer.
423. Clients are not static beings operating at all times from a uniform and predictable position – they experience a range of pressures, emotions, fears and anxieties – and how one might experience a client at one point, may be very different to how they engage at another.
424. In complex matters (and they are the ones that generally tend to require more formal pathways) – the client may have experienced family violence, be fearful for their safety or fearful for the safety of their children; there may be issues relating to allegations of sexual abuse; the client or other party (or both) may have mental health challenges (in some instances not diagnosed or perhaps not even admitted) or there may be alcohol dependence or substance abuse issues and other complexities such as socio-economic pressures, cultural factors and intersection with other legal systems.
425. The degree of unresolved anger and enmity between parties can be significant and there may be real psychological and emotional impediments to parties acting as rational decision makers in these complex dynamics. There may be cultural dynamics and mores which inform preferred outcomes, contrary to advice and urgings to a different course. For those of Aboriginal and Torres Strait Islander and CALD backgrounds, the challenge of communicating well with their advisor may be compounded.
426. It is important that the ALRC takes care not to assume there is such a thing as a ‘typical’ family law client coming from a homogenous culture and lived experiences. The enormous challenge (and reward) of acting in this area is the very real continuum of human experience in which we operate – and the reality that assumptions about our client’s experiences cannot safely be made.
427. The FLS notes public and academic commentary that has been critical of the standard of family reports. The LCA considers that there are a range of options available to raise the standard of practice of private family report writers, including accreditation and adoption of the National Standards on Family Report writing published by the family courts.

⁹⁷ Rae Kaspiew et al, ‘Experiences of Separated Parents Study’ (Study, Australian Institute of Family Studies, October 2015) 91.

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?

- 428. Family law is an area of increasing complexity. The Australian community is entitled to expect that Judges appointed to preside in this area, are suitably qualified to discharge their duties.
- 429. The LCA is of the view that s 22 of the Act should be amended to extend its application to the appointment of Judges to the Federal Circuit Court who are likely to hear family law cases.
- 430. Any proposal to change the structure of the family courts should take into account the significant community benefit in having judicial officers with specialist family law backgrounds hearing and determining family law disputes. The LCA notes and supports the views of the NSWLS that it is critical that judicial officers are supported in terms of their own mental health, including and beyond access to counselling and active preventative measures, adequate judgment writing time and leave arrangements. These observations are also applicable to Question 44.
- 431. There should be a bi-partisan approach to the appointment of judicial officers to the family courts that includes interview and assessment of candidates by a panel made up of suitably qualified and experienced panel members. Part of that assessment of suitability for appointment should be an assessment of the candidates willingness and enthusiasm to participate in training throughout their judicial careers.
- 432. Encouragement should be given to judges to participate in continuing legal education events in Australia and with Australian family lawyers and other professionals in the family law system – this would encourage the sharing of knowledge between judicial officers and other professionals and assist in identifying differences in approach or gaps in knowledge.
- 433. The LCA has concerns as expressed elsewhere in these responses to the Issues Paper, about increasing the family law jurisdiction of state local and magistrates courts in circumstances where there is limited funding and availability of ongoing training for those judicial officers in family law.

Question 43:

How should concerns about professional practices that exacerbate conflict be addressed?

- 434. The vast majority of lawyers working in family law strive to advance the best interests of their clients, conduct matters respectfully and with a view to assisting their clients to an acceptable resolution of matters in dispute, and to guide their clients in parenting cases to ensure that their decision making is framed by the paramount principle of the best interests of the child. The *Best Practice Guidelines for Lawyers Doing Family Work*, a joint publication of the FLS and the Family Law

Council provides guidance for family lawyers about conduct and communication which minimises, or at least does not exacerbate, conflict.⁹⁸

- 435. Lawyers have an over-riding duty to the Court, and operate under an extensive range of professional obligations which inform our conduct with our clients, the court, our fellow practitioners and the wider community. Lawyers take those obligations very seriously and are rightly proud of the work they do for their clients.
- 436. CPD obligations on lawyers each year include a component relating to ethics.
- 437. Each state and territory have a disciplinary process to respond to allegations about unprofessional conduct or professional misconduct by lawyers. The LCA notes that lawyers in practice are subject to an exhaustive range of rules, ethical guidelines and obligations, and duties to the court. There are extensive independent complaint mechanisms available to the public (and to judicial officers) in relation to the conduct of legal professionals.
- 438. Family lawyers deal, day in and day out, with clients who are often going through one of the most stressful periods of their life. They deal with clients who have been subjected to or are themselves perpetrators of family violence, with clients whose children are at risk or been subject to abuse, with families afflicted by alcohol and substance abuse. These are challenges that family lawyers embrace as part of working in the profession and endeavour to guide clients safely through the situation and to secure the best outcome. The LCA notes and supports the views of the NSWLS that conflictive behaviour between parties is exacerbated by system delays. As parties become increasingly distressed the potential for lawyers to be drawn into disputes and to lose objectivity also increases. Poor professional practices cannot be viewed in isolation from a system that is stretched and with practitioners that are under high levels of pressure.
- 439. Whilst one recent decision of a Judge of the Family Court in *Simic & Norton* raised concerns about conduct of 1 or more lawyers, the LCA notes that the matters in question remain to be determined by the relevant State body.⁹⁹ To the extent that the judgment suggested more widespread problems, there was on the face of the judgment, no evidence cited to support any broader observation.

Question 44:

What approaches are needed to promote the wellbeing of family law system professionals and judicial officers?

- 440. Whilst there is significant body of research into the wellbeing of lawyers in Australia, much of that research focuses on the stressors associated with legal practice more generally and tends to highlight workplace issues such as long hours, lack of autonomy, time sheets, and cultural issues within firms.
- 441. There is little empirical research on the impact of the subject matter of lawyers' work upon their wellbeing – in the case of family lawyers, the impact of long term exposure to client's experiencing family breakdown and the many different types of

⁹⁸ Family Law Council and Family Law Section of the Law Council of Australia, *Best Practice Guidelines for Lawyers Doing Family Law Work* (4th ed, 2017).

⁹⁹ *Simic & Norton* [2017] FamCA 1007.

behaviour that exposes them to, including child abuse, family violence and direct threats made the safety of lawyers and their families.

- 442. The LCA supports targeted research into the impact of vicarious trauma on family lawyers, and the development of training and support specifically for family lawyers and judicial officers alike. We also note our comments in response to Questions 43 and 44, and the need to recognise and support the well-being of judges and the enormous case burden they carry, and often insufficient judgment writing time and or ability to take annual leave.
- 443. The LCA notes and supports the view of the QLS that resilience training be provided to family law professionals and judicial officers, and that counselling services be made available, given the psychological and emotional impact that the impact of the long term exposure to client's experiencing family breakdown, family violence, child abuse and other complex and difficult issues, can have.

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?

- 444. The maintenance of a no-fault divorce system and the ability of parties to obtain justice and retain their personal dignity, would be grievously eroded were substantial changes made to s 121 of the Act.
- 445. The LCA notes that the question as framed in the Issue Paper, does not seem to suggest any amendment so as to allow the media to report upon proceedings by naming the parties to litigation. If there was to be any such suggestion, it should in the view of LCA be firmly rejected.
- 446. The LCA is of the view that if anonymisation of family law matters was removed, the media would understandably publish the names and details of cases involving prominent or 'celebrity' litigants and would undoubtedly focus on the more sensational and salacious matters. Regard can be had to what occurs when 'public figures' have proceedings in the Local or Magistrates Courts about family violence – and the extensive media coverage that has followed.
- 447. The media (and therefore parties) already have adequate opportunity to relate 'their experience of the proceedings'. The media will often publish details of particular judgments, with names anonymised, which allows the public to be informed about the way in which certain cases are decided.
- 448. A disaffected party should not be allowed to vent his/her disenchantment or unhappiness with the process of, or decision in, their matter by including the names and other identifying details of themselves, their former partners(s) and/or children. To do so is likely to cause severe prejudice and distress to the other party and/or children and potentially arm perpetrators of family violence with a powerful arsenal to continue the abuse.

449. A good example of where parties have been able to tell their stories under the cloak of anonymity is the Royal Commission into Institutional Child Abuse. It could not be contended that the stories of the victims were any less powerful because they were anonymised.
450. The proliferation of social media is another compelling reason why s 121 should not be amended. The vast majority of family lawyers will be aware of repeated and flagrant breaches of s 121 by parties via Facebook, Twitter and text messages (predominantly). Outrageous, defamatory, prejudicial and false assertions are made almost every minute. It is conceded that few, if any, prosecutions under s 121 have resulted but that is no reason to remove or amend the section. The failure to prosecute may be an under-resourcing issue for the Federal Police and Commonwealth DPP.
451. The LCA understands that there is an opposing view that, particularly for people who have experienced family violence, being able to tell their story (including on social media) is important and powerful. Speaking out about family violence and offering support to those in the midst of the experience, is a recognised and important part of working towards its elimination.
452. While not meaning to diminish the importance of this process for many, the adverse consequences which may flow, particularly for children, with respect, outweigh any possible benefits. There is also the very real risk that serious reputational damage may occur in circumstances where allegations are denied and an opportunity to test the evidence in court has not been provided. Telling the stories of family violence survivors can occur, respectfully, in an anonymised fashion.
453. If the section was amended, there would be no curb on the behaviour of many litigants in publishing material.
454. It is suggested in the Issues Paper that there should be consideration of a 'whistle-blower' exemption 'to allow press reporting on matters of genuine public interest'. It is submitted (as detailed above) that a 'whistle-blowing' article can readily be published without needing to identify the parties.
455. The only other suggested amendment in the Issues Paper is to provide a further exception 'to clarify that information may be shared with professional regulators to facilitate their investigatory functions essentially expanding s 121(9)(b) to other disciplines such as valuers, psychologists, psychiatrists and accountants. The LCA has no objection to such an amendment being considered, and believes it would be helpful for such bodies to remove any current ambiguity.

Question 46:

What other changes should be made to enhance the transparency of the family law system?

456. The Issues Paper does not explore this question in any level of detail.
457. There is clearly a degree of confusion, misunderstanding and uncertainty in the general public about the family law system, how it operates, and how decisions are made. So much is evident from media reports, talk-back radio and social media 'posts'.

458. As noted in the response to Question 45, it is essential that the privacy of parties be maintained by s 121 remaining intact and, further, that privacy be enhanced by the Federal Police and the Commonwealth DPP being provided with better resources to prosecute breaches of s 121. It is submitted that a few successful prosecutions, appropriately published, would likely prove a strong deterrent to the unacceptable behaviour so much in evidence.
459. Much of the misinformation arises in the LCA view, from the complexity of the parenting provisions in Part VII of the Act. It is submitted that the substantial rewriting of Part VII (as advocated for some time by the LCA) would substantially assist in making the family law system more accessible and transparent.
460. A better understanding of the system may also be achieved by public education campaigns.

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?

461. The LCA supports the establishment of a Federal Judicial Commission, noting that this reform is part of the more general current debate about the need for Federal anti-corruption bodies.
462. Notwithstanding that support, the LCA suggests that particular regard needs to be had in any such new regulatory system to the needs and issues that are common to family law cases and litigants as identified in the Issues Paper. For instance, sensitivity to the needs of people that have experienced family violence. Recognition that such a system needs to ensure against vexatious complaint is also important.
463. The LCA notes, in relation to family report writers, the submission made to the House of Representatives by the AFCC regarding complaint procedures. The LCA does not oppose the proper regulation of all professionals working in the family law system, but the use of complaints by some vexatious litigants in order to frustrate the timely administration of justice should also be taken into account. The LCA supports, for instance, the making of orders by courts to require litigants to obtain leave of the court before making a complaint against a family report writer during the course of the litigation.
464. The LCA strongly supports the Government appointing members to Family Law Council to allow it to be reconvened and to make recommendations to government for future reforms.
465. The LCA considers that the Federal Government should consider convening a formal body, made up of the major stakeholders in the family law sector, to share ideas and to negotiate reforms. Those stakeholders should include, for instance, the federal and state courts, government agencies at state and federal levels, the family law profession, the mediation sector, the family violence sector and the social science sector. A similar body had been convened by the former Chief Justice of the Family Court, Diana Bryant (the Family Law Forum) and it was a valuable forum in which to develop relationships between leaders in the various sectors and to collaborate.

466. The LCA considers that the Federal Government should review the current allocation of responsibility for various parts of the family law sector amongst various government departments/ministers, and branches within departments. The LCA considers that the current fragmentation of responsibility reduces the effectiveness of the Government's capacity to appropriately manage and fund the family law system.