
Review of the Family Law System Issue Paper 48

Australian Law Reform Commission

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About Caxton Legal Centre

Caxton Legal Centre is Queensland's largest community legal centre. Caxton Legal Centre's objects are to provide legal and social welfare services to low income and disadvantaged persons in need of relief from poverty, distress, misfortune, destitution and helplessness, and to educate such people in legal, social welfare and related matters.

We are an independent, non-profit community organisation providing free legal advice, social work services, information and referrals.

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Introduction

Caxton Legal Centre is pleased to provide this Submission in response to the Review of the Family Law System IP 48.

Established in 1976, Caxton Legal Centre is Queensland's oldest community legal centre. We are an independent non-profit organisation providing free legal advice and social work support to low-income and disadvantaged clients including those experiencing domestic and family violence and family law issues. Our goals are to promote access to justice, provide free legal advice and information, empower people to address their legal problems, increase community awareness of the law, produce plain-English publications and work to change unfair laws.

Our submissions need to be read in that context of our goals. We appreciate the many competing considerations that necessarily will be brought to the table by all concerned individuals and organisations who provide a submission to this Issues Paper. We acknowledge local and overseas research about family law issues and processes, and the academic rigour concerning an ideal family law system. In line with our goals, we include in our submissions our preference for practical options that overcome the barriers low-income and disadvantaged people have in accessing the family law system. We promote options that empower self-represented parties to address their family law issues in a cost-effective, supported and fair manner.

Caxton has extensive practice experience in family law with some practitioners having practised in private practice, held specialist family law accreditation, worked in the Family Law Courts, engaged in previous family law reform and provided a range of family law services for over 20 years. We also draw experience from the wide variety of family law programs our lawyers and social workers are engaged in including:

- Family Law Duty Lawyer Service – court-based legal advice five days per week at the Brisbane Registry of the Federal Circuit Court of Australia and the Family Court of Australia
- Family and Advocacy Support Service (FASS) – court-based legal advice and social work support five days per week at the Brisbane Registry of the Federal Circuit Court of Australia and Family Court of Australia
- legally assisted Family Law Mediations for culturally and linguistically diverse (CALD) clients – in partnership with Family Relationships Australia, Mt Gravatt
- Family Law advice and Casework program – day-time and evening advices and casework. Our evening advices are delivered by volunteer family lawyers
- Domestic and Family Violence Duty Lawyer Service – court-based legal advice for respondents in the Domestic Violence Court, Brisbane Magistrates Court including the provision of family law advice
- Child Protection program – this advice and casework program was recently defunded.

Clients who usually access our services are either court users or people who do not qualify for legal aid and cannot afford private legal services. We are a service of last resort for people who are resolving their family law issues informally or who are self-representing in family law proceedings. For property settlements, our clients usually support a high level of debt and small property pool and/or are the 'working poor' and cannot afford ongoing private representation. For parenting issues, our clients usually have complex family law issues, have been denied (or would not qualify for) legal aid and/or again are the working poor, who want assistance negotiating parenting arrangements or navigating the family law system but cannot afford ongoing private representation throughout those negotiations.

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

- 1 Australian society has changed considerably since the commencement of the *Family Law Act 1975 (Cth)* (Family Law Act). Families that most need to use family law system services are usually those affected by multiple issues such as family violence, child safety, substance abuse, financial stress, family dysfunction and poor mental health. What is required is a system response that recognises the different family law issues of the clients and provides a range of services appropriately matched to resolve those issues. For complex matters, the response needs to be holistic and multidisciplinary—one that addresses both legal and psychosocial issues.
- 2 Taking into account the modern structure of Australian families, research into the developmental needs of children, the steps being taken in the community to tackle domestic and family violence, the realities of substance abuse, the higher rates of families separating and blended families, the change in ways people access information, the increase in population, the need to integrate legal systems with support services and the rising cost of legal fees, we consider that the objectives that could best express the appropriate role and functions of a contemporary Australian family law system could include:
 - the provision of a range of integrated family law services that are appropriate for diverse family structures and needs
 - the availability of and access to relevant information, early intervention supports, legal advice and dispute resolution processes for separating families
 - the upholding of the United Nations Convention on the Rights of the Child in the provision of all family law services
 - the management of complex family law matters holistically and in collaboration with domestic violence and child safety services
 - the delivery of fair, affordable, consistent and expeditious services to resolve family law parenting and property settlement disputes.

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

- 3 An overarching set of principles or values should be identified to guide the redevelopment of the family law system and support the achievement of its objectives. The principles should be inclusive, succinct and relevant to the objectives. Having regard to what we have recommended as the objectives, we consider that the principles that could support these include the:
- importance of recognising and responding appropriately to diverse family structures and need
 - paramount importance of providing information, supports and early interventions which promote the developmental needs and safety of children within the family structure
 - need to effectively address complex family issues including family violence, substance abuse and mental illness
 - desirability for family law disputes to be resolved at the earliest opportunity, fairly and cost effectively.

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

- 4 Before addressing accessibility, the type of information provided to families needs to be reviewed. With the increase in number of self-represented parties and increase in those accessing information using technology, more useful information about a range of parenting issues and property settlement issues should be readily available online in easy-to-understand language and in a variety of languages.
- 5 In parenting matters, disputes (including contravention applications) often arise because of lack of information about child development stages, child behaviour and parenting arrangements that may benefit the child and promote the child-parent relationship. There is also a lack of publicly available, accessible and easy-to-understand information about issues such as the impact of family violence and substance abuse on children.
- 6 It would be beneficial for research findings and best-practice understandings to be distilled into easy-to-understand information about a range of parenting issues. It would be extremely useful to draw correlations between this information and the types of parenting orders that the court makes for children. Self-represented parties would also benefit from being able to have access to a bank of precedent clauses and explanations for the use of these clauses, in order to incorporate this information into their own parenting agreements or orders. Information about the type of parenting arrangements that could work when parents live at a distance (relocation) and the type of supervision arrangements that could enhance the safety of children and their parents (where there

are domestic and family violence orders) would also assist parents positively to come to an agreement on some more complex matters.

Case Study 1: At the Family Law Duty Lawyer Service, the respondent father sought advice in relation to an application by the mother to vary eight-year-old orders specifying the time the teenage children spent with the father. The mother cited the children's wishes, school and extra-curricular commitments and the children's strained relationship with the father as grounds for reducing time. The father was adamant the mother was negatively influencing the children against him, that the children had always spent three out of four weekends and every Wednesday night with him and wanted that to continue, that he was hurt and angry with what the mother had written in her affidavit about his relationship with the children whom he paid a significant amount of child support for and wanted to know what his prospects were of having the application dismissed. He also wanted the children to come to court and have their say. Prior to providing legal advice, a significant amount of time was spent by the duty lawyer providing information about the children's developmental needs as they individuate as teenagers, addressing the delicate balance of not overly involving children in the dispute but providing some mechanism for the children's wishes to be sought and taken into account, providing information about services and programs that can assist in understanding and strengthening a relationship with teenage children who prioritise peer relationships and who are balancing many commitments, exploring options for having a more meaningful relationship with teenage children, reciting the impact on the children of inappropriately drawing them into the debate and refocussing him on how to be child-focussed in making future parenting decisions. Afterwards, the father was amenable to negotiating parenting orders that were more appropriate for and in the best interests of the children.

Case Study 2: At the Family Law Duty Lawyer Service, the de-facto respondent wife sought advice about how to effect a property settlement between the parties, which was essentially debt. Both the parties were under financial stress. The application was for orders allocating half of the debt to each party. The wife had the care of two children and was employed part time. The husband was employed full time in manual labour and was assessed to pay child support, and he was in arrears. The duty lawyers for both parties referred each client to a financial counsellor to make financial hardship arrangements and renegotiate some debts. It was agreed to adjourn the matter until after the financial counsellor had reduced/managed the debts as much as possible and prepared budgets for the clients. The matter was resolved on the next return date.

Case Study 3: At the Family Law Duty Lawyer Service, the respondent husband sought advice about the wife's application for property settlement orders for 70% of the pool of assets. Negotiations had failed when he had offered 60%. He had not received legal advice. The parties had been married for 10 years, the children lived with the wife except for each alternate weekend when they spent time with the father, the wife earned \$40 000 pa and had superannuation of \$35 000, the husband earned \$80 000 pa and had superannuation of \$110 000, the parties had no assets at the commencement of the relationship and now owned a house with equity of \$250 000, they were both in their early 40s and had no health issues, there had been no extraordinary contributions during the relationship. The husband was provided with legal advice by the duty lawyer, and the parties were able to negotiate a settlement of 70% of the non-super assets to the wife and 60% of the total superannuation to the wife

- 7 In property settlement matters, whilst the legal framework is a discretionary one based on assessments of contributions and future needs, the type of information parties are provided should be to either assist them to understand the likely range of their entitlements or to assist them to address particular issues such as debt, bankruptcy and superannuation. Information drawn from pivotal cases with a basic explanation, including examples of how the courts assess property settlement ranges, would assist parties with 'house-and-garden variety' property settlements. 'Joined up' information about debt would greatly benefit parties and sometimes prevent applications being brought to manage small-pool/high-debt cases. Information about terms such as 'just and equitable' and how that translates into making decisions about cases would also be of benefit to family law system users.
- 8 There is a growing category of family law system users who seek to educate themselves from online material and represent themselves to avoid the cost of ongoing private representation. These clients require greater access to legal information about family law issues. Clients of the Family Law Duty Lawyer Service often want assistance with understanding what parenting arrangements are suited to children of various ages, how to word clauses and how to draft affidavits and fill in forms. Whilst not detracting from the importance of parties obtaining legal advice, parties need to also have greater online access to a suite of information that assists in negotiating and documenting agreements and completing forms and affidavits.
- 9 Clients of the Family Law Duty Lawyer Service often present with a misunderstanding of the Family Law Court process including what can reasonably be achieved at the first return date and at an interim hearing, as well as the length of time that it may take to resolve their family law issue on a final basis. Whatever future processes (and there ought to be a range of processes for different family law issues) are implemented, there should be information that clearly explains each stage of the process. Previously, clients

were required to attend an information session. The intent of those sessions is still commendable however, the mode is outdated. Responsibility for providing this information should be spread across all points of contact with the family law system including the legal profession, dispute resolution practitioners, related services (child protection and family violence services) and online support.

- 10 We recommend establishing a central information hub administered by an appropriate organisation who would manage, update and distribute that information.

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

- 11 People with family law needs usually have social support needs and other legal needs. Family law needs arise well before entry into the family court system. Consequently, it needs to be recognised that the family law system necessarily incorporates other service interactions. These services include education, law enforcement, mental health, drug and alcohol, domestic violence, child protection, financial, family supports, counselling and other legal services.
- 12 Some family law system users will be able to self-navigate, provided there is sufficient and accessible information about service options, easy-to-use forms, a range of appropriate services and improved referral pathways between services.
- 13 Other family law system users, such as those from CALD or Indigenous communities or those who have complex family law needs, may require more one-on-one assistance to navigate the family law system. In Queensland, the Family and Child Connect program assists with a range of family and parenting issues, however, there is a disconnect between professionals making referrals to this organisation. This service could provide one of the platforms to build the role of appropriately trained caseworkers, who could assist individuals and families to access support services and navigate their way through the family law system from an early intervention stage, to dispute resolution process and court attendances through to resolution.

Question 5: How can the accessibility of the family law system be improved for people from culturally and linguistically diverse communities?

- 14 In addition to the recommendations made by the Family Law Council in 2012 and from our work with clients from CALD communities (legally assisted family law mediations for CALD clients conducted in partnership with the Family Relationships Centre at Mt Gravatt, and our collaborative work with Multicultural Development Australia (MDA)), we consider that accessibility of the family law system can be improved for people from CALD communities by:

- improved training of and engagement with caseworkers of newly arrived or refugee communities on family law and related issues. The caseworkers are the critical contact point, noticers of family law issues and referrers to services given the newly arrived person or refugee has limited understanding of the Australian family law system and is highly dependent on the caseworker to make connections to services. Specially trained caseworkers in family law, domestic violence and child protection issues could be embedded into existing services, or all caseworkers could be provided with additional training. Family law processes and court attendances could be inclusive of caseworkers
- improved engagement with community leaders. In most CALD communities there is an emphasis on parties reconciling and keeping the family together, even when issues such as domestic violence remain unaddressed.
- Opportunities to engage with community leaders on family law and related issues, such as through a series of community-led forums and community consultations, should be prioritised and facilitated
- an increased number of family dispute resolution practitioners (FDRP) and lawyers both trained in cultural competency to conduct lawyer-assisted mediations. Our experience is that specifically trained FDRPs and lawyers recognise and address the cultural issues impacting on the ability of parties to participate in a dispute resolution process. The mediation model can be adjusted to be culturally appropriate and include as many participants as may be required to achieve a resolution of the issues. The issues canvassed can be broadened to address underlying culturally relevant concerns in addition to more common family law issues. Interpreters are present for both parties. Sufficient time is granted (up to four hours for one session with the opportunity to return for an extra two hours) to allow for the parties to understand the Australian family law system and devise an arrangement that is both culturally appropriate and recognises Australian family law requirements.

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

- 15 Our submission on this question is confined to the issue of appointment of a case guardian. In our experience in Queensland, the process for appointment of a case guardian in the family law system has failed. The case study that follows is one example of many where family law system users with impaired capacity are left with no legal assistance throughout the proceedings.

Case Study 4: At the Family Law Duty Lawyer Service, a young woman with an acquired brain injury (ABI) resulting from a motor vehicle accident three years prior was referred by the trial judge for legal assistance. The client had not filed any material, an independent children's lawyer (ICL) had been appointed and she had participated in a family report that recommended a neuropsychological assessment of the effects of her ABI on her capacity to parent two children aged eight and ten. The children had been spending time with their mother pursuant to interim orders made over the course of two years, providing for time supervised by the paternal aunt and then unsupervised day visits. The mother now wanted the children to spend overnight time with her on weekends. The evidence was that the children had a very close bond with the mother who had been their primary carer up until the accident and wanted to spend more time with her. The mother suffered from seizures, depression and short-term memory loss. The father had adopted an overly protective position towards the children spending time with the mother and had not taken up suggestions made in the family report for the children to be provided with counselling and skills to understand and manage the effects of the mother's ABI. The mother had not received legal advice before or during the proceedings. The father and the ICL were legally aided. The client had become very anxious and upset at the commencement of the trial. The duty lawyer read the reports and attended upon the client. She assessed the mother as not being able to adequately conduct her case or give instructions for the conduct of her case due to her disability. An adjournment of the trial was sought, and the trial judge made the usual directions regarding appointment of a case guardian. No private person or service provider would act as the mother's case guardian. The matter returned to court and was heard with no case guardian appointed.

16 There are numerous failures in the system for appointment of a case guardian in Queensland:

- The need for a person with impaired capacity to have a case guardian is usually identified too late in the family law system.
- If there is no available and willing private case guardian, it is almost impossible to identify an alternative case guardian.
- The Public Trustee Qld conducts family law litigations as case guardians only in cases where the projected property settlement outcome warrants the costs being deducted from the settlement.
- The Office of the Public Guardian will rarely agree to litigate as case guardians in parenting matters.
- A highly vulnerable person is left without assistance to participate in complex proceedings.
- The ICL (where appointed) often and inappropriately fulfils a proxy case guardian role for the vulnerable party.

- The person with impaired capacity has not ever obtained independent legal advice or representation.
 - The fact that the person with impaired capacity cannot adequately participate in the proceedings has not been addressed.
 - The proceedings are usually delayed, sometimes indefinitely.
 - A trial may proceed, but without the judge or lawyers representing the other party/ies being able to discharge their professional and legal obligations or make orders that are enforceable.
- 17 All people with family law issues who have impaired capacity should be able to access and have appointed for them a case guardian. The case guardian should be able to obtain legal advice, either paid for by the person with impaired capacity, if they can afford it, or should be able to obtain legally aided advice. The case guardian should have exemption from legal costs.
- 18 It is essential that a person with impaired capacity be able to access assistance from someone such as a case guardian before proceeding to court. For this to occur, the role of case guardian should be expanded to include the notion of a family law advocate. When the person first makes contact with the family law system and it is determined they have impaired capacity for their family law matters, they should be able to access a family law advocate. The family law advocate could help them to access legal advice and conduct negotiations on their behalf. The family law advocate would require specific training in areas of disability, domestic violence, components of the FDRP course and advocacy. In the event the matter could not be resolved, the family law advocate could be appointed the person's case guardian.
- 19 This role could be performed by advocacy organisations such as Aged and Disability Advocacy (ADA) Australia. Additionally, via consultation with Legal Aid, an arrangement could be negotiated with the Office of the Public Guardian and Public Trustee regarding the appointment of case guardians (legally aided where required) for family law issues.

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?

- 20 Family law disputes for the most part do not require a full legal representation model and are more suited to the more affordable unbundled legal-services model. The development of unbundled legal services has grown largely out of the family law jurisdiction, which lends itself particularly well to this more cost-effective way of receiving legal advice and assistance. Practitioners who do not have a limited scope retainer consider themselves obliged to manage all communications between their client and the other party, including negotiating minor parenting issues and routine disclosure. These practitioners are also not willing to perform discrete legal tasks.

- 21 The reality is that unbundled family law services are the bread and butter of legal aid lawyers and community legal centre lawyers who add legal ghost-writing to the list of unbundled services. More recently, some private practitioners have decided to offer discrete legal services on a limited retainer agreement with the client and will perform tasks such as drafting documents at a fixed price or review documents already prepared by the client. We consider that changes are required to the Australian Solicitors Conduct Rules and the Barristers' Conduct Rules to recognise, legitimise and provide a supportive framework for legal practitioners to provide unbundled legal services. Furthermore, legal training ought to include the teaching of unbundled legal services to students in a practical setting to encourage future lawyers to use the practice.
- 22 Family law disputes currently progress along a predictable continuum where single events are dotted along a timeline from the commencement of proceedings to a judgement being rendered. Some of these points along the continuum are more amenable to the intervention of dispute resolution mechanisms to resolve the issues than others. Affordable, subsidised or free legal services and dispute resolution mechanisms to resolve family law issues at critical points along the family law continuum should be embedded in the family law system and made accessible to more people.
- 23 Once proceedings have been commenced, parenting issues have the greatest chance of resolving after the intervention of a family consultant and/or after a family report has been provided. Lawyers at our Family Law Duty Lawyer Service report that clients are better placed to receive advice and give instructions to negotiate parenting orders after the parties have been ordered (pursuant to s 11F (Family Law Act)) to attend upon a family consultant (child inclusive where appropriate) and/or have received a copy of the s 62G (Family Law Act) family report. It is the combination of input from a family consultant or expert and legal advice that is critical to resolving parenting issues at these opportune moments.
- 24 This indicates that access to a family consultant and access to legal advice prior to proceedings being commenced should be a critical focus point for this family law system review. Ensuring the availability and affordability of these early interventions for every family law system user is critical. To achieve this, we consider the following changes should be made to the family law system:
 - Pre-action procedures should be amended to mandate that parties with parenting issues attend upon a family consultant operating in the first instance in a similar way to that of the consultants upon whom parties are ordered to attend pursuant to s 11F of the Family Law Act.
 - The family consultant could be engaged privately (and jointly) for those with means, be subsidised for those with limited means and be fully funded for those with no means.
 - The attendance could be jointly or separately and may or may not be child inclusive (see discussion below regarding the participation of children).
 - The consultant's role would be, inter alia, to identify the issues that can be resolved, the issues that cannot be resolved, to assess and address safety issues, identify complex

- matters or other matters (e.g. CALD, Indigenous, mental health) requiring case management, to indicate the wishes of children to be included in the consultation, make preliminary recommendations to resolve parenting issues, make recommendations for family dispute resolution (legal aid mediations, private mediations, family dispute resolutions (FDR)), make referrals to support services, make recommendations for a family report and to provide a brief written summary of these matters.
- Pre-action procedures should be further amended to include a certificate signed by a lawyer that in addition to their current requirements to advise clients about certain matters, they have provided advice about the family consultant's report and identified options for resolving the parenting issues.
 - A lawyer could be retained privately by those with means. Legal aid bodies and community legal centres could receive specific funding to provide legal advice to parties about the family consultant's report and to explore options for resolving the parenting issues.
 - The family consultant's report would form part of the evidence at the first hearing date once proceedings commenced, thus eliminating the need for adjournments (and costs thrown away).
 - The category of urgent matters that can bypass the pre-action procedures should be reviewed and tightened. Duty lawyers from our Family Law Duty Lawyer Service report that many parenting matters that have been commenced without an s 60I certificate are not necessarily urgent. Certainly, not all recovery applications are urgent. FDR can be appropriate for families affected by domestic and family violence. Urgent child safety issues should be diverted to child safety services. Ideally, save for a few categories where an urgent parenting order may be required (e.g. flight risk), strict compliance with these pre-action procedures would ensure they are not a means to an end but an end of themselves, to resolve parenting disputes.
 - Family reports, psychiatric reports or other expert reports should be limited to more complex matters that involve ongoing family law system interventions. To reduce the costs of obtaining these reports, a fee schedule to regulate these costs could be developed. Parties could be assessed as to their means to contribute towards these costs or, in the case of financial hardship, the family law system could draw on public funding to pay for the cost of obtaining these reports. Alternatively, if adjudication procedures were relaxed, professionals could provide information and make recommendations orally at a considerably reduced expense.
- 25 The goal would be to ensure that every family law system user is able to afford the services of a family consultant and legal advice prior to commencing court proceedings to assist them to resolve parenting issues. Court proceedings should be reserved for more complex matters that are case managed through whatever new system is implemented. The expected outcome would be a reduction in the number of applications filed. An overall reduction in costs will inevitably be achieved via a reduction in the number of parenting applications filed and the amount of time spent engaged in court proceedings.

- 26 Alongside the changes made to pre-action procedures, there would need to be changes to the way in which parenting agreements are formalised where parties wish to do so. A move towards unbundled legal services would assist some parties with limited means to obtain discrete task assistance to draft their agreement. Parties with no means to afford private legal advice will need to access lawyers funded by legal aid or community legal centres who could be provided with specific funding to provide one-off legal advice and assistance to draft parenting agreements. In addition to this, online forms could be completed with the assistance of apps that generate appropriately worded parenting agreements based on answers to a range of guided questions. Not all family law system users will have the ability to use online forms, so it is important that access to affordable legal advice remains an option.
- 27 Property settlement issues have the greatest chance of resolving after basic disclosure has been made. Parties also need to have received legal advice about the likely range of their entitlement and options to adjust the ownership of property, including superannuation, to achieve a fair settlement.
- 28 Family law system users who can afford one-off legal advice still access free legal services for several reasons. Lawyers from our day-time and evening advice program report that these clients seek free legal advice because they have either already spent a significant sum of money on legal fees in the basic stages of disclosure and preliminary negotiations, and do not qualify for legal aid arbitration. Alternatively, these clients have in some instances not sought private legal advice because they perceive they will be locked into an ongoing retainer with a lawyer that does not reflect good value for money (especially when both parties will be spending money on a lawyer). Fixed fee services and unbundled services may go some way towards addressing these concerns.
- 29 However, many clients cannot realise their assets to pay a private lawyer, have debt only, or have insufficient income to obtain private legal advice. Legal aid arbitrations are filling a small gap, but the means test, merits assessment, asset range and exclusion categories leave many clients unable to access an affordable dispute resolution mechanism. Clients with a high level of debt compared to the value of their assets fall outside the legal aid arbitration requirements (there must be equity of \$20 000).
- 30 Many people do not access the family law system to obtain assistance until they have themselves negotiated the terms of the agreement, and now want assistance to document the agreement. The do-it-yourself kit *Application for Consent Orders* has gone some way to making it possible for clients to complete all necessary paperwork for a property settlement without seeking assistance. However, clients report that this kit includes an overwhelming amount of explanatory material but no helpful examples of the likely range of their entitlement or precedent clauses to assist with the drafting of the orders.
- 31 Because of the lack of precedent clauses available on the court website, even for the simplest of property settlements, a smattering of precedents has been developed in community legal centres and legal aid bodies to provide to clients to use to draft their

own orders. The quality and wording of these orders is ad-hoc, and not every family law system user can access community legal centres for advice (especially people in regional and remote areas). Clients also seek the assistance of community legal centres when their application for consent orders has been requisitioned, often because of the poor wording of the orders.

- 32 We consider that the family law system review should acknowledge the reality that family law systems users need to have access to precedent clauses or a tool that generates precedent clauses. We suggest that the cost to users could be reduced by including in these reforms the development of an online tool where clients can answer guided questions about their property settlement and where precedent clauses can be generated in simple cases. In more complex cases, the tool may refer the client for legal advice along the path of assisting the client to prepare the property settlement orders. Draft orders generated by the online tool could then be reviewed by a lawyer in person or via e-lawyering.
- 33 From our experience, clients seeking assistance with their property settlement negotiations at our Family Law Duty Lawyer Service or at our daytime and evening family law advice sessions, want someone to tell them what a fair settlement is. These clients do not have sufficient resources to pay for private mediation that does not necessarily result in an outcome. Conciliation conferences are an effective means by which property settlements are resolved when those who are experienced at conducting the conferences offer an opinion about the likely outcome.
- 34 To reduce the costs to parties of resolving property settlement disputes, something akin to a conciliation conference could be embedded in pre-action procedures. Ideally, the full suite of alternative dispute resolution options should be revisited and selected methods appropriate to resolving various categories of property settlements made available at affordable rates. Arbitration has seen a slow uptake. Other options such as case appraisal or early neutral evaluation could be embedded into compulsory pre-action procedures. This would offer family law system users with property settlement issues a similar intervention or input as the family consultant would offer for parenting issues.
- 35 For this to be successful, the alternative dispute resolution (ADR) process would have to be made available at a subsidised rate or be fully funded for some users. The requirement for disclosure would need to be made clear. Also, for the process to be completely successful, parties would need to obtain legal assistance to support their involvement in this process. There could be funding allocated to legal aid bodies or community legal centres for a specific category of legal assistance, namely to provide one-off ADR advice. This concept is not novel as grants of legal aid for a legal aid mediation, a type of one-off ADR advice, are already available.

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

AND

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

Case Study 5: At our Family Law Duty Lawyer Service, the paternal grandmother, whose trial was proceeding that day, was referred by the trial judge for advice about cross-examination of witnesses and trial procedure. The grandmother had lived with the grandchildren for six years until the parents separated two years ago. The parents both had substance abuse issues. The father was recently incarcerated and was due for release in three months. The mother had re-partnered, and police had recently applied for a Protection Order (mandatory conditions only) naming the mother as the aggrieved after an incident of domestic violence perpetrated by her new partner, which the children had witnessed. The mother was represented by a legal aid. There was no ICL appointed. The grandmother had been spending time with the children every third weekend but, after recommendations made in the family report, had applied for the children to live with her. The mother alleged the grandmother was an alcoholic, did not acknowledge the amount of care the grandmother had provided, continued to live with her new partner (denying any DV between them) and did not admit to having substance abuse issues. The mother's lawyer had subpoenaed the father's police records. The grandmother had not subpoenaed the mother's hospital, rehab and police records. The duty lawyer assisted the grandmother to prepare limited cross-examination questions for the family report writer, the mother and the father as well as explain basic court procedures. The duty lawyer observed that the mother's and father's court material contained objectionable evidence, but there was no time to assist the grandmother with this issue. The grandmother was very upset and fearful of the trial process she was required to embark upon. The grandmother returned to our service six months later, after a judgement had still not been rendered, seeking assistance because the mother was not complying with interim orders still in place for the grandmother to spend time with the grandchildren, and she suspected the mother was avoiding contact with her due to her ongoing substance abuse issues and volatile relationship with her partner.

36 Based on our experience of providing a family law duty lawyer services for nine years, we consider that the following changes could be made to court procedures to improve the accessibility for litigants who are not legally represented:

- The Family Law Duty Lawyer Service should continue to be embedded in the family law system irrespective of what form those proceedings may take arising out of this review. Many family law system users have not received legal advice prior to consulting with a

family law duty lawyer. Clients of the Family Law Duty Lawyer Service usually experience one or more disadvantages namely illiteracy, poor mental health, financial stress, affected by domestic and family violence, substance abuse issues, homelessness, which has impacted their ability to obtain legal advice until their attendance at court. This is similar to our experience of clients at the Domestic and Family Violence Duty Lawyer Service.

- The family law court system needs to include a less formal entry process including easier-to-complete forms. Family law system users are at a significant disadvantage if they do not have completed paperwork, thus the Family Law Duty Lawyer Service spends a considerable amount of time assisting clients to prepare basic documents. The only way this issue is going to be addressed meaningfully at the front end of the family law system is if the system is completely overhauled and the forms are substantially altered.
- The whole family law system needs to move towards more informal proceedings (at least for less complex matters) such as those conducted at a Queensland Civil and Administrative Tribunal (QCAT) hearing. In such a setting, for certain family law issues, there could be less strict reliance on the completion of paperwork and more emphasis on a conversation with a family consultant (see above recommendations for pre-action procedures), who could garnish the issues and record them, and on a conversation with the tribunal member.
- Even if there is not a complete shift towards less formal proceedings, forms could be amended to include simple tick-a-box types of orders sought, acknowledging that there is no need to require users to generate the wording of many of the basic parenting and property settlement orders. There could always be an open-ended section of the form to add tailor-made orders sought to suit circumstances.
- Affidavits could be more easily prepared if the communication of facts could be in the form of answering specific questions rather than telling a free-form story that is usually replete with irrelevant details. The Notice of Risk is a better example of a form (whilst still being too repetitive) that guides users to answer specific questions and gives examples of what users should say are the facts to support their answers.
- There should be consultation with communication specialists about the design of forms best suited to obtain information from a wide range of users (e.g. Indigenous, CALD, illiterate, low-education, regional, remote, trauma-informed users).
- The family law trial process needs to include a more informal process for appropriate matters whereby self-representation is the norm and a more level playing field is created, as with QCAT hearings. The trial process is an impossible obstacle for self-represented family court users. Our family law duty lawyers are sometimes required to assist parties on the morning of their trial to formulate cross-examination questions, explain the trial process, set out the grounds for objections to evidence, explain how to tender evidence, demystify legal jargon, pinpoint the issues in dispute and how to test disputed facts, explain what a submission is and how that relates to the evidence and the relevant sections of the Family Law Act. A self-represented party cannot make much sense of all of this advice and translate it into decent self-advocacy in the context of an emotionally draining confrontational process.

- The current trial process is also problematic for judges to maintain the integrity of court procedures and rules with the presence of self-represented parties, including the need to follow well-intended but sometimes overly burdensome guidelines given by higher courts about how to safeguard procedural fairness for self-represented litigants. The family law trial process in its current form is designed for lawyers. It is not designed for self-represented parties.
- With nearly half of all family law trials being conducted by self-represented litigants, an informal tribunal process like a QCAT hearing is more desirable. Such a non-judicial process could be more inclusive of relevant parties, be more tailored to be more culturally appropriate, receive evidence both in written form and orally, dispense with cross-examination and be more inquisitorial in nature, include support persons for vulnerable persons or those experiencing domestic violence and minimise rules and procedures that complicate the traditional trial process.
- We consider that it would be insufficient to leave the family court system as is and prop up self-represented litigants with programs such as pre-trial clinics and plain-English drafted forms and legislation as suggested in the Issues Paper. It is noted that the government did not accept Recommendation 12 of the House of Representatives Standing Committee on Family and Community Affairs inquiry into child-custody arrangements in the event of family separation *Every Picture Tells a Story* (June 2005). The committee recommended the establishment of a national, statute-based Families Tribunal with features similar to the QCAT process and composition similar to the Mental Health Review Tribunal Qld (which are found in tribunals in other states). The government at the time considered the committee's objectives could be better met through its new network of Family Relationships centres (FRCs) and through changes to court processes. However, the FRCs have not become the 'shop-front single-entry point into the broader family law system' as intended, nor have changes to the court procedures made in 2006 resulted in a less acrimonious, less costly, more accessible and more timely process for family law system users who require a decision to be made for them. It is time to revisit this recommendation and consider that the benefits of an informal tribunal process outweigh perceived disadvantages of making such a significant change to the family law system.

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?

37 It is the experience of our family law duty lawyers in the Brisbane Registry that incidents within the court precinct involving security concerns rarely occur. Rather it is the perception of safety and sense of wellbeing of court attendees that should be addressed. The following recommendations are additional to those contained in the Issues Paper:

- Improvements are necessary to the family law system to better identify clients who have domestic and family violence concerns and refer them to a domestic violence service to create a safety plan for court attendance.
- Outdoor or indoor play spaces should be made available for children required to be in attendance at court.
- The role of volunteers with the Court Network at the family court precinct should be reintroduced.

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?

- 38 A great deal of research has already been undertaken about Australian families, the effects of family violence on children, child development and successful milestones, youth mental health issues, education, the effects of family breakdowns, the experience of blended families, the impact of substance abuse on the capacity of parents to meet children's needs and other relevant topics that can be drawn upon to make changes to Part VII of the Family Law Act. We consider that, whilst the best interests of the child should remain the family law system's paramount consideration, Part VII could make more sense to care givers and to courts, making decisions about what produces the best outcomes for children if evidence-based factors that have been demonstrated to contribute to or are indicators of best outcomes for children, were articulated as the factors that a court must consider (e.g. the capacity to provide a stable and supportive education environment; the capacity to provide a home environment that is not impacted by domestic violence or substance abuse). Having this evidenced-base list of factors could also direct family consultants and family report writers to the issues that they ought to consider.
- 39 The child's rights pursuant to the United Nations Convention on the Rights of the Child could be included alongside the requirement to take into account the need to protect the child from harm.
- 40 The term 'both parents' in the requirement to take into account the benefit to the child of having a meaningful relationship with both parents, could be exchanged with 'child's carer' to take into account that the notion of who is the child's carer is not as rigid in some cultures and family arrangements (e.g. in Indigenous cultures, extended family arrangements, blended families and LGBTIQ families). This would require the court to consider the benefit to the child of having meaningful family connections. The phrase '... with whom the child has family connections ...' could then be defined to be inclusive of relationships that are in the child's best interests.
- 41 The decision-making framework in Part VII that includes a presumption of equal shared parental responsibility and, where that order is made, a requirement to consider whether an equal care-time arrangement is in the child's best interests, has not, in our

experience, made any real difference (since 2006) to family court system users' attitude and behaviour towards those responsibilities nor to the way judges determine decision-making, living and time arrangements for children. This review could canvass whether the presumption of equal shared decision-making responsibility adds anything to the legal status of parents, carers or guardians to make decisions. If not, the presumption could be removed as well as the need to consider an equal time-care arrangement, as neither change the way in which parenting matters are decided in the best interests of children.

- 42 Slight tweaking of the legislation to create a different emphasis could include that decision-making responsibility be called exactly that (instead of the misunderstood phrase 'parental responsibility'), and that the common categories, where decisions need to be made, are more clearly articulated. The court could then be required to decide who has various levels of authority, permission and responsibility for the decision-making categories in dispute. For example, this could result in the following orders: The mother has authority to decide which school the child will attend. The father has authority to request and permission to receive information from the mother and the school about the child's education. The mother has responsibility for keeping the father informed of the child's inclusion in school extra-curricular activities.
- 43 Protagonists pre-2006 for equal care-time arrangements are still dissatisfied with the lack of actual equal time orders being made by the court. It is the overwhelming experience of court users who attend our Family Law Duty Lawyer Service that judges are not focussed on this type of arrangement (nor are the clients themselves, who usually prefer there to be one primary household in which the child lives because of concerns about the other parent's capacity to care for the child). We believe that it will make little difference whether the requirement to consider equal care-time is removed or remains.
- 44 Division 13A contravention proceedings for non-compliance with parenting orders requires substantial change. This procedure, quasi-criminal in nature, is technical, can delay the substantive proceedings, is not heard in a timely fashion, is poorly understood by self-represented parties, is reported to be a 'toothless tiger' and, by the time it is heard, the parenting issues have moved on. We consider that where one party alleges non-compliance of a parenting order, there ought to be a wholly different procedure for dealing with non-compliance. Additionally, a different process needs to be in place to deal with one-off or simple non-compliance and more systemic and serious non-compliance, typically present in more complex parenting matters.
- 45 Irrespective of whether there are proceedings already on foot, unless a matter is already being managed as a complex matter (see further below), a party should have to first go through pre-action procedures with a family consultant (see above and below). If the issues cannot be resolved, a party could have the right to file an application for a compliance review, which comes before the tribunal. This compliance review could include considering whether there ought to be a variation to the existing orders including make-up provisions.

- 46 If family court proceedings were to move towards a less formal process (e.g. tribunal or other system with less procedural requirements), the tribunal member hearing the compliance review could, without going through the current quasi-criminal process, act in a more inquisitorial way to ascertain what issues are at the heart of the non-compliance. The tribunal member could then vary the order, make provision for make-up time, make referrals to support services, order mandatory compliance with parenting programs or order a fine to be paid. It is unknown if other punishments serve any purpose to promote compliance with parenting orders.
- 47 For serious non-compliance, where the overall effect of the orders has broken down (e.g. time has been suspended substantially or wholly), it is likely that during pre-action procedures with a family consultant, the parties would be allocated a caseworker and be referred to the adjudication process allocated for more complex parenting matters.

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?

- 48 The definition of family violence in s 4AB of the Family Law Act should aim to be as consistent as possible with state and territory family violence legislation and should acknowledge that family violence:
- can present in many forms
 - is a pattern of behaviour
 - often involves exercise of control over the victim
 - is distinguishable from relationship conflict
 - has a negative impact on children who experience or witness the violence
 - affects the victim, the perpetrator, other family members, friends and broader aspects of life (e.g. work, education)
 - can be actual or threatened
 - can include physical, sexual, economic, emotional and psychological, cultural, spiritual, social (including restricting contact with children), property, animal, social media, privacy (following, harassing, monitoring) and systems abuse aspects
 - is significantly more likely to be experienced by women than men
 - may be exacerbated at times of heightened risk (e.g. pregnancy, separation and during family law processes).
- 49 The government is currently engaged in rolling out the *Third Action Plan 2016–2019 of the National Plan to Reduce Violence against Women and their Children 2010-2022*. The focus of this action stage is to pull together an integrated service response to family violence, which, in Queensland, has seen the successful establishment of a state-wide domestic violence duty lawyer service and pilot specialist domestic violence courts, the introduction of high-risk teams, the appointment of domestic and family violence

integration managers to join the dots in service provision and training in the Common Risk Assessment framework.

- 50 In Queensland, domestic violence duty lawyers provide family law advice to both the aggrieved and respondent, complete legal aid application forms for a legal aid mediation, make referrals to family dispute resolution, negotiate and make submissions about exceptions to the conditions in a protection order to allow for family law orders to govern the manner in which children live with and spend time with the parties and make submissions to magistrates pursuant to s 68R of the Family Law Act for variations to be made to family law orders. It is noted that since the introduction of the Federal Circuit Court, state magistrates in Queensland, outside of specialist domestic violence courts, rarely exercise that jurisdiction and express a reluctance to deal with family law matters as part of the domestic violence proceedings.
- 51 The family law system needs to be well integrated with domestic violence systems and responses. In Brisbane, domestic violence duty lawyers can refer urgent family law matters to the Family Advocacy and Support Service in the Brisbane Federal Circuit Court registry (it is only a short walk between courts, and our duty lawyers are rostered in both courts), who can assist clients with commencing family law proceedings and provide continuing support services throughout that process.
- 52 The time delay between when protection orders are made in a state Magistrates Court, which may include ouster orders and no contact conditions, and when parties can attend family dispute resolution and make parenting arrangements poses a considerable issue. Because it is considered inappropriate and outside of the scope of domestic violence duty lawyers to negotiate family law issues, this time delay can mean that children are unable to spend time with a parent or even make phone contact with a parent for at least three months. It can mean that one parent can make unilateral decisions about the child's schooling and residence location.
- 53 Temporary protection applications containing a full suite of conditions are rarely refused on a police application. For private applications, temporary orders are usually granted where, on the face of the application, allegations of recent incidents of domestic violence are contained. Those allegations, however, may not bear any relevance to conditions sought such as preventing the respondent from attending at a child's school.
- 54 Usually any family law exceptions provided for in the protection orders require any parenting arrangements to be in writing or to be an order of the court. Without a timely mechanism to address parenting issues, the exceptions are worthless. Therefore, respondents often do not want to consent to temporary or final protection orders naming the children and restricting contact with the children when there is no pathway for timely assistance with formalising parenting arrangements.
- 55 The family law system needs to change to include a clear, distinct and direct entry point for families experiencing domestic and family violence. This could be in the form of a referral of the parties to a family consultant who can conduct a risk assessment, make

recommendations about what interim parenting orders would be congruent with maintaining the safety of the aggrieved and children, and record in writing any parenting arrangements agreed to between the parties so that these can form part of the exceptions to the protection orders.

- 56 The effect of this time lag is not only experienced by clients with parenting issues but also with property settlement issues. It can mean that interim financial arrangements cannot be sorted out (payment of bills, ending tenancy agreements, use of cars, payment of school fees). The family law system must recognise the need for a process to deal with urgent financial issues. This process could involve a direct referral to a family consultant who is experienced in financial matters as well as parenting issues.

Question 16: 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?

- 57 We consider that if the discretionary approach towards the division of property remains essentially unchanged, then there should be changes made to the family law system (discussed in more detail above) including:
- a simplification of the forms to be completed
 - a change to pre-action procedures to include an early case assessment of the likely range of entitlements (after basic discovery)
 - the broadening of affordable and timely alternative dispute resolution mechanisms provided
 - early access to affordable legal advice and including the legitimising of unbundled legal services to reduce costs
 - clear examples of how certain facts are relevant to the types of property settlement adjustments that have historically been made (so self-representing parties can get an idea of what the likely range of their entitlement is).
- 58 If the discretionary approach towards division of property is to involve presumptions about equal division, equal contribution or a community of property regime, then changes to the legislation should largely reflect the type of regular decisions being made by judges to adjust property interests and should not stray too far from current community views. Making changes to the legislation to remove discretion will simplify the issues for parties, lawyers and judges. However, exploring the options is like walking a minefield with each point likely to explode with examples of exemptions that should exist. However, if the current discretionary regime is deemed to be no longer fit for providing swift, fair outcomes for family law system users, then possible changes to the legislation could include:

- no adjustments to be made for routine direct and indirect financial and non-financial contributions to the property pool (i.e. working, home duties, care of children), which should bear the same weight
- assets purchased in joint names where the common intention was that parties would hold a joint and equal share in the assets to be split equally
- assets kept separate from the community of assets jointly owned (e.g. inheritances, gifts from a family member to one party, assets owned prior to the relationship) to be treated as an asset of that party that they solely retain (with certain exceptions)
- all superannuation accumulated during the relationship to be split equally, and superannuation splitting provisions to be simplified
- if there are two vehicles, each party to become the registered owner of the vehicle they usually drove, and if there is only one vehicle then the person who has the greatest need for the vehicle to retain the vehicle (need to be defined by matters such as care of children and work etc.)
- all household furniture to be divided equally
- all debts incurred for the benefit of both parties to be equally shared or if they benefited one party solely then that person to bear the responsibility for that debt
- personal injury payouts not already assumed into the jointly owned assets to be retained by the person who received the payout (with certain exceptions)
- exceptions to the above to be in place when a victim of domestic violence has experienced financial abuse (e.g. forced to place assets in the sole name of their partner, granted no access to the assets of the parties)
- assets purchased during the relationship and placed in one person's sole name to be equally split between the parties except where it can be shown that the parties intended that it should be treated as an asset of that party solely (e.g. in a second marriage, both parties acquire assets in their own names from their individual property settlements and intend to bequeath those assets to children of their first marriage under their will)
- taking into account future factors pursuant to s 75(2) (Family Law Act), these adjustments preferably to be made via the child support system or via a spousal maintenance payment rather than via a further adjustment to the pool of assets.

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?

59 In our experience, spousal maintenance applications are rare. Most family law system users who access a community legal centre may have a need for spousal maintenance, but their ex-partner does not have the capacity to pay it. Where need and capacity co-exist and where there is no tricky aspect to the way the capacity exists (layered behind a business or trust structure), the exercise is a relatively simple mathematical one of assessing the reasonable needs of both parties and redistributing some of the income and assets of one party to support the other for a nominated period. As to the latter, an

expectation seems to have been developed in the Family Law Courts that whatever support is assessed to be paid, it ought only to continue for a limited period. This is based on the expectation that parties may re-partner or decrease their need for support by increasing their own asset pool pursuant to an adjustment of the property pool or via improved capacity to earn an income.

- 60 Clients with some wealth may only be arguing about the level of spousal support not the capacity to pay. Where the capacity to pay spousal maintenance is obscured within business, or company or trust structures and there is a need for support, the issue is not only capacity but enforcement.
- 61 Our concern is for the client who experiences disadvantage whilst their ex-partner has capacity to pay support. This scenario usually arises when there is family and domestic violence including in the form of financial abuse. The person who is the victim of family violence is usually self-represented due to their lack of access to finances. Usually their need for financial support is both urgent and ongoing.
- 62 There is a strong case for a simple procedure to process spousal maintenance claims in this context. The child support regime is complicated but already set up to process formulas, conduct reviews where there are higher support needs and complex income-earning structures in place, and carry out enforcement processes. It is also largely a process set up online, making it a safe user option and a person can self-represent through most of the process. Spousal support could be formularised and could have a pre-determined commencement and conclusion date with the ability to apply for a lengthy period in extenuating circumstances.

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

- 63 The negative effects of participation in lengthy family law processes, including delayed outcomes, is experienced by all family law system users whether they are represented, self-represented, experiencing disadvantage or have complex family issues, and whether the matter involves parenting, financial or both matters.
- 64 Our perspective on what changes to court processes could be made to facilitate the timely and cost-effective resolution of family law disputes is through the lens of those who self-represent, who do not have legal aid funding, who experience disadvantage and complex family law issues. There should be different family law systems that respond to different family law issues that do not disadvantage those who cannot afford legal representation. There are many options that could be considered to improve the family law system. Complex family law needs will not be resolved quickly but can be resolved better.
- 65 The following options are recommended as pathways for resolving different family law issues.

Parenting Issues—Stage 1 Family Consultant

- 66 The single-entry point to the family law system is a family consultant for parenting issues (see our discussion of this above).
- 67 The family consultant is the pivotal link between families and varying family law systems addressing different family law needs and issues.
- 68 The approach is accessible, inclusive, protective, diagnostic, facilitative and triaging.
- 69 The family consultant achieves accessibility by being readily available across a number of settings including centralised settings (e.g. FRCs, neighbourhood justice centres where other services could be joined into the central service), and also integrated or embedded into other settings including health, child safety and domestic violence services, and Indigenous services, with adequate representation in regional, rural and remote communities.
- 70 The family consultant also achieves accessibility by being affordable, namely on a sliding scale for those with means and free for those with limited means.
- 71 Accessibility is further achieved by ensuring cultural competency through appropriate background and training of the consultants.
- 72 Finally, accessibility is achieved using technology to connect parties to one family consultant where there is distance between them.
- 73 Inclusivity is achieved by meeting with family members (widely defined) and assessing how children can also participate in the process.
- 74 To respond protectively, the family consultant assesses for, responds to and makes appropriate referrals to domestic and family violence services and child safety.
- 75 The family consultant diagnoses the family needs and issues, including whether the family presents with complex needs and require the assistance of a family caseworker.
- 76 The family consultant facilitates families to have initial discussions to identify issues they can agree on and those they cannot agree on and makes recommendations (which can inform family caseworkers and decision makers).
- 77 The final role is to triage families by making referrals to support services (including legal services), allocating a family caseworker for parenting disputes involving complex family needs and making referrals to appropriate family dispute resolution services.
- 78 Families who identify as having urgent family law needs can access family consultants, who may be best placed at the courts or tribunal (see below), almost immediately. However, the categories of what is an urgent family law issue requires clear articulation (e.g. immediate flight risk). Users of the family law system will want to say their parenting issues are urgent when, relative to other family law issues, they are not.
- 79 Note: At the Family Law Duty Lawyer Service, clients who are distressed often cite child safety concerns and unilateral removal of a child as the main issues of urgency. If there

are legitimate child safety concerns, the appropriate service is child safety. If a child has been unilaterally removed, the issue of urgency again is whether there are child safety concerns associated with the removal including domestic and family violence concerns, which initially ought to be placed with child safety services for investigation not the family law system.

Parenting Issues—Stage 2 Family Support Services and Family Dispute Resolution

- 80 Families who cannot agree on parenting issues attend family dispute resolution, which can include private mediations, FDRPs, legal aid mediations and legally assisted mediations for families with complex needs, including ensuring there are culturally appropriate FDR mechanisms available.
- 81 Families also engage with support services they are referred to.
- 82 Families with complex needs are case managed by a family caseworker.
- 83 The family caseworker connects each family member with appropriate support services, including legal advice, and continues to work with the family to resolve parenting disputes.
- 84 Clients who cannot afford legal representation will have access to free legal advice at the point of preparation for stage 2, and community legal centres can be discretely funded to provide this FDR preparation service or to provide legally assisted FDR services (outside of legally aided mediations).
- 85 The family caseworker attends the FDR process.
- 86 Families can select to remain in this stage for as long as required and appropriate.
- 87 If the FDR process does not resolve all parenting issues, the parties may proceed to the family law adjudication process and carry with them into that next stage their caseworker where appointed.

Parenting Issues—Stage 3 Adjudication Process

- 88 If families cannot resolve their parenting issues, they can seek to have the issues determined by adjudication.
- 89 Completion of forms and availability of information has already been addressed previously save to note that the jump from stage 2 to stage 3 should not represent an awkward leap from a facilitative and supported process to an adversarial, positional, unsupported and highly technical process.
- 90 Caseworkers assist parties with complex family law needs with the completion of (the newly developed and accessible) forms to commence proceedings.
- 91 Clients who cannot afford legal representation will have access to free legal advice at the point of entry into stage 3, and community legal centres can be discretely funded to provide this pre-filing service.

- 92 The adjudication process is informal. Ideally, a non-adversarial tribunal, which can be called the Families Tribunal or other apt name.
- 93 The composition of the tribunal is variable depending on the complexities and family support needs for intervention and could include a tribunal member and other qualified professional (psychologist or social worker preferably from a culturally relevant background).
- 94 The tribunal's decision would be binding.
- 95 Complex parenting matters that do not respond successfully to the tribunal's intervention, and other matters that fall outside the tribunal's jurisdiction will have a federal judge as the decision maker with as many procedural formalities stripped from the process that may be constitutionally allowed.
- 96 The tribunal's decision would be reviewable by a federal judge.
- 97 There will need to be some striving with constitutional issues, and state and federal jurisdiction to bring about a Families Tribunal. The major constraint of the Constitution is that the judicial power of the Commonwealth must be exercised by a court and judges (and any delegated officers), who must act judicially. There does not appear to be an immediate solution to this problem without some creative analysis. Expert constitutional advice would need to be sought to determine if and how such a tribunal could be constitutionally valid, and what could be the outer limits of its jurisdiction. Alternatively, there would need to be an equal amount of thought put into how much the rules and procedures of a tribunal chaired by a federal judge (or the courts as they are currently constituted) might be relaxed and still qualify as acting judicially.
- 98 The fact that there is a workforce already in place, including tenured judicial positions within the Federal Circuit Court of Australia and Family Courts, cannot define the response to a need for radical change to the current adversarial system. This system is untenable and the role of a judge and court in resolving parenting issues is questionable. Parenting issues that are not complex do not require a judicial process. That may be reserved for more complex matters including complex legal issues. Even so, it is arguable that complexity usually arises due to a variety of social support needs and disadvantages, not complex legal issues. These matters are then suited to more intensive case management by a caseworker and suited to a less adversarial approach. It is difficult to accept a position that argues for the retention of an adversarial process just because the support needs of a family are more complex. In other words, complexity does not necessarily equate to the need for judicial intervention with the adversarial process currently in place.
- 99 It is true that the greater the complexity, the more factors need to be considered and weighed up in establishing what is in the best interests of a child. Also, complexity may mean the need for more regular (and micro-managed) intervention along the way to assess safety and risk, respond to turbulent family dynamics, address non-compliance with interim decisions, monitor the progress of engagement with supports and decide

when a final determination should be made. It seems that some of this process, especially enforcement, may require judicial intervention.

100 At the moment, families travel along a trajectory of family law court dates, which are not at all aligned to the family situation and changing circumstances. It could never be said that it is in the best interests of a child to make an interim decision that remains in place for two years while getting to a final hearing about what is in their best interests, nor to wait more than 12 months for a decision to be rendered on evidence about the family which has shifted. To genuinely make decisions that are in the best interests of children, there needs to be more than just timely resolution of family law disputes. The resolution needs to be family focussed and place the family at the centre of what and when adjudications are required. It is difficult to see that anything other than a non-judicial tribunal, constituted by members who bring different qualifications and skills, and which is responsive to family needs for intervention, is going to affect real and positive change. Inserting various pilot programs into what is essentially a formal and adversarial process is not going to bring about sufficient change.

Property Settlement Issues

101 Property settlement issues lend themselves more to a more formal adjudication process. However, ideally family law system users who have property settlement disputes could:

- operate within a clearer framework of how property settlement disputes are determined, which could include amending the legislative framework to provide less discretion and more certainty around assessing entitlements
- have a single-entry point to a financial case appraiser or early neutral evaluator for property settlement issues, something like the family consultant for parenting matters except relevant for financial disputes
- appoint a financial case appraiser to initially assist parties to identify the financial issues, identify what disclosure would need to be made, make referrals to free financial counselling services to address debt distress
- appoint a case appraiser to facilitate the parties to resolve their financial dispute, provided parties complied with the discovery process for simple property settlement cases and small pool property matters. If the matter was unable to be fully resolved, the case appraiser offers an appraisal of how the property settlement dispute may be decided if adjudicated (similar to the conciliation conference)
- appoint a case appraiser to triage more complex property disputes to either mediation, arbitration or adjudication by a judge.

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?

102 In addition to the opportunities for ADR discussed above, it is clear to our family law duty lawyers that parties who are in receipt of a family report are far more likely to be in position to resolve their parenting dispute. If nothing else changes in the family law system, there should be introduced a mandatory dispute resolution process within a defined period (say one month) after the release of a family report. Self-represented parties who cannot afford private legal advice should have access to free legal advice. Community legal centres could be provided with specific funding to provide post-family-report ADR advice.

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

103 The Legal Aid Queensland arbitration model, which is available to legally aided clients for resolution of property disputes between \$20 000 and \$400 000, should be adopted and expanded. Parties in a debt situation require referrals to financial resilience workers and financial counsellors who can assist them to negotiate debt reduction and prepare budgets to determine what debt they can support before an adjudication of debt redistribution. The Family Law Act could be amended to provide for certain principles relating to determining how to adjust debt between parties. These principles could include that:

- neither party shall be able to file an application for debt adjustment without first attending upon a financial counsellor
- debt allocation shall be determined by principles such as, unless there are exceptional circumstances, debt follows the asset, debt remains with the debt owner and finally that debt repayment is the responsibility of the person who can afford to support the debt.

104 Small property pools could be defined in the Family Law Act as:

- the value of property where the net value of total real property owned is less than \$500 000
- the value of other assets where the total value is less than \$20 000.

105 When calculating the value of other assets, the value of superannuation, furniture and chattels and one car per party worth less than \$20 000 should be excluded.

106 In such cases, parties could be referred by the financial case appraiser to free and binding arbitration.

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

107 From our experience working with victims and perpetrators of family violence, the best way to ensure that parties can participate in making decisions about parenting and financial matters is to ensure that:

- parties can participate in dispute resolution processes as quickly as possible after intervention by state courts making protection orders. This allows for contact between the parties with and about the children to be arranged as exceptions to the protection order conditions, and for a mechanism to sort out pressing financial issues
- services providing dispute resolution processes are upskilled to change their screening processes how to support families who are affected by family violence in the dispute resolution process
- section 60I certificates are only granted on the basis that, due to the specific circumstances of family violence, it would not be possible for the service to provide sufficient support for the family to participate safely and effectively in any dispute resolution process
- the dispute resolution process is legally assisted and that, where legal aid funding is not available for parties who are self-represented and cannot afford legal representation, community legal centres are funded to provide legal assistance for the dispute resolution process.
- Note: We collaborate with FRC Mt Gravatt to provide legally assisted mediations to CALD and Indigenous clients who may have been affected by family violence; however, this funding is extremely limited to provide one service per month. There needs to be ongoing and increased funding for this service.

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

108 The experience of our domestic and family violence duty lawyers appearing for the respondent in the Brisbane Domestic Violence Court is that in some cases the aggrieved achieves a false status quo and circumvents the usual family law system to resolve parenting issues by making an application for a protection order. This raises issues solely concerned with disputes over parenting issues and naming the child as a person who requires protection. Temporary orders are usually made that restrict contact between the respondent and the child for a period of approximately three to four months until the application can be heard. Magistrates acting cautiously are not inclined to summarily dismiss the application.

109 The use of the state domestic violence jurisdiction to achieve parenting outcomes without there being domestic violence between the parties is another category of abuse of process not highlighted in the Issues Paper. In *SGLB v PAB* [2015] QMC 8 the

court found that the predominant purpose of the application for a protection order was to effect a change in the current living arrangements of the children of the marriage, and an order was made permanently staying the application.

- 110 At the Family Law Duty Lawyer Service, parties who have been accused (usually on multiple occasions) of abusing their child (and later found to not have) lament that this is an abuse of process because of the ongoing notifications being made to child safety, the multiple breaches of court orders, which delay an ultimate hearing, and the multiple occasions the child is exposed to being examined by health professionals and interviewed by psychologists and counsellors. Similarly, parties who are the respondent to trivial applications to vary orders to reduce time or micro-manage time experience this as an abuse of process.
- 111 It is our experience that a person who engages in abuse of process can sometimes be a type of personality that has little insight into the effects on the child, is focussed on their own rights and, if a psychiatric report is obtained, may be diagnosed with a personality disorder such as narcissistic, histrionic or borderline personality disorder. The abuse of process may be conscious but is part of the behaviour of parents in high conflict (which can look like abuse of process). It can also be a deliberate attempt to manipulate the system to their own end including controlling the other party.
- 112 Abuse of process therefore occurs both inside and outside the context of domestic violence and is not necessarily an example of it. The possible categories of abuse of process are not closed and are limited by how much energy the person abusing the court's process has to continue their pursuit. We do not support the Family Law Act being amended to include in the definition of domestic violence 'abuse of process' in the list of examples of behaviour that might come within the definition. The inherent power a superior court has to manage an abuse of its processes should remain a broad power that is exercised in appropriate circumstances to prevent actual abuse of process where the court's process is either being invoked for an illegitimate or collateral purpose or used to be unjustifiably oppressive to a party.
- 113 Strengthening penalties, including costs orders, would not address this situation, as self-represented parties will often not have the means to satisfy a costs order. Other issues raised in the Issues Paper, such as protecting vulnerable witnesses from direct cross-examination by self-represented litigants and subpoenas addressed to family counsellors, are wholly different issues of abuse of process and should be treated as such.

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?

- 114 We recommend that:

- pre-action procedures for both parenting disputes and property disputes include compulsory participation in a dispute resolution process
- there could be a range of dispute resolution processes available
- the process is appropriate to the nature of the dispute including the complexity of the family issues
- there is a clear dispute resolution pathway for different types of disputes including diagnosis by a family consultant of the type of process best suited to complex family issues
- the process be costed on a sliding scale including no cost for those who cannot afford to contribute
- all parties have access to legal advice to prepare for the dispute resolution process including specific funding of legal aid bodies and community legal centres to provide FDR advice for those who cannot afford private legal advice
- ADR is legally assisted where there are complex family issues, family violence, CALD or Aboriginal and Torres Strait Islander parties; and that there is specific funding of legal aid bodies and community legal centres to provide legal assistance for those who cannot afford private representation
- for parenting issues, there be up-front exploratory dispute resolution that includes recommendations (family consultant) followed by more intensive dispute resolution for more complex and/or intractable disputes
- for property disputes, there be up-front exploratory dispute resolution and case appraisal followed by more intensive dispute resolution and adjudication for more complex and/or intractable disputes
- access to the first layer of dispute resolution be readily accessible, appropriately embedded in other services (health, child safety, domestic violence) and available regionally, rurally and remotely
- access to the first layer of dispute resolution occur in a timely manner.

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?

- 115 Some clients of our family law advice sessions, usually the 'working poor' who do not qualify for legal aid and cannot afford private legal representation, would greatly benefit from being able to access an affordable online dispute resolution process. It is not the answer for every family law system user. However, as previously stated, there needs to be a suite of available dispute resolution mechanisms available to parties.
- 116 The Dutch-based Justice 42 dispute resolution platform offers an interesting example. The built-in safety mechanism of an initial face-to-face intake process could be done by the family consultants and case appraisers referred to above. It may be too limiting to say that people who are affected by family violence or other safety concerns should

be screened out of using an online tool. The better approach may be to ask what supports can be put in place for parties with complex family law needs, including family violence, to ensure they can access and benefit from using an online dispute resolution process.

- 117 An online tool can be seen to enhance safety by putting physical distance between the parties. It can also be accessed by parties with a support person (e.g. caseworkers working with the family) whenever those supports are available, so that instead of needing to bring the support person to the process, the process comes to where the party receives support (e.g. at the domestic violence support service). It can be accessed by the parties quickly. It can be accessed when the parties need it and want it rather than waiting for appointments. It has obvious benefits for rural and remote communities so long as it does not replace face-to-face dispute resolution options and family support services. Prior to its development, new family law system users could be surveyed about the value of having access to such a tool.

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?

AND

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

- 118 Both questions strike at the obvious pitfalls of an adversarial process and the benefits of separated families using a system that supports families to the extent they require support to address their family law needs. If a family law system was to be designed afresh, it is unlikely its designers would arrive at the current system. The introduction of a non-adversarial/non-judicial system (i.e. a tribunal) should be explored and exhausted first. Other approaches such as those being run in various registries are commendable but are greatly restricted within the current framework.

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

- 119 There will be an overwhelming number of submissions made in respect of how to integrate family law, child protection and domestic violence services. We propose to address two issues only, namely integration of the family law system and other support services (e.g. mental health, drug and alcohol, counselling) and the FASS pilot.
- 120 There is a considerable disconnect between different types of services and the family law system. It is not just a lack of integration of family law, child safety and domestic

violence services that poses a problem. It is a lack of integration of *all* the services that exist to support families, especially families who have complex needs.

- 121 In the first instance, there is no collaboration with the support services that are already in place and being provided to families with complex needs. In our experience, because of the adversarial nature of Australia's family law system and stigma attached to issues such as mental health, there has been an evidentiary advantage for clients who come to the family law system with a clean slate versus those who disclose that they are connected with support services. The legal profession has traditionally viewed connections with support services as information to be subpoenaed and used against the other party. The trial process reinforces this.
- 122 As a result, clients who seek assistance from our Family Law Duty Lawyer Service or who access our family law advice sessions, can be cagey about their connections with support services or say that they do not want to disclose some of the issues that contribute to their families having complex needs. Understandably, some want to keep their support services (e.g. private counselling for a mental health issue or gambling counselling) separate from their family law issues, because the scrutiny of their connection to services can undermine genuine and open engagement with those services.
- 123 In the Family Law Courts, there has been a desirable change in approach and growing shift towards affirming clients' connections with support services including the realisation that being well connected to services is more likely to be synonymous with better parenting outcomes. Still, there is no dialogue between the family law system and the service providers apart from how evidence about a user's engagement with services or lack thereof is presented to the court in an affidavit or by subpoena. It can often be a wait-and-see approach, namely, the court orders a party to attend upon a support service, it then waits to see if the party engages and gains some reported benefit from it, then it draws conclusions. There may not be any evidence of this where there is no ICL appointed and the parties self-represent. It is in this context that families with complex needs, who may already experience various types of disadvantage in participating in the family law system, have experienced a disconnect between their support services and the family law system.
- 124 At the Family Law Duty Lawyer Service, we note that despite many families having complex needs and already travelled part of the way through the family law system to arrive at court, they are poorly or not at all connected with services that address those needs. Therefore, it can be said that there is a further disconnect in making early and appropriate referrals to support services for families with complex needs and keeping up a conversation with those services as the family law issues are addressed in the court system. The adversarial process has contributed to this. Instead of seeing family law issues as primarily social issues, they have been primarily viewed as legal issues that require argument as opposed to an ongoing conversation about the issues.

125 We consider that some of the following changes could assist to integrate support services and the family law system:

- A less adversarial process would facilitate the integration of support services and the family law system.
- A change of the emphasis on why information is being sought about support services would be beneficial. The emphasis needs to be on incorporating information about how the support services are enhancing a person's parenting capacities rather than 'digging up dirt' on them. There may be greater willingness for clients to join the dots between their support services and the family law system.
- A change how information is obtained from the support services would also be beneficial. If the support services could participate in a more informal process, giving information orally (recorded) with the client present, it may enhance the client's understanding of how this information is relevant to decisions being made about parenting issues, reduce the costs of issuing subpoenas, reduce the costs of obtaining written reports, enable the client to access this information more readily and reduce the client's antagonism about the veracity and fairness of that information.
- The incorporation of a mechanism to provide the support service with feedback about what further supports are required for the client's complex parenting issues to progress would be of assistance.
- The inclusion of caseworkers and support workers from support services into the family law system at the earliest possible opportunity would be desirable.
- The provision of a diagnostic approach for parenting issues at the entry point into the family law system would be beneficial. If the point of entry were a family consultant, as alluded to previously, this role would include making early referrals to appropriate support services who may later be involved in providing information to decision makers.

126 We are one of the providers in the Brisbane Registry of the FASS pilot. Our lawyers are rostered on as duty lawyers for the Family Law Duty Lawyer Service, the FASS pilot and the Domestic and Family Violence Duty Lawyer Service. We have a dedicated social worker for the FASS pilot and other social workers who roster into this position when required. Because our lawyers work across all three services and because we can refer clients back and forth between those services and our centre for ongoing family law advice and social work supports, clients are receiving a multidisciplinary service that assists them to make connections between disconnected systems.

Note: Our funding for child protection services was discontinued, so clients can no longer receive from us more than initial child protection advice and referrals. Ensuring service providers can provide multidisciplinary services is integral to the success of individual programs.

127 Families with complex needs are usually self-represented, access legal aid or community legal services for assistance and utilise the duty lawyer services. We recommend that:

- Commonwealth and state government funding contracts to community services, FDR programs, legal aid bodies and community legal centres be better coordinated so that the right mix of funding is allocated (funding usually comes in uncoordinated dribs and drabs that hinders all service providers in delivering seamless, well-connected services, especially to families with complex needs)
- community legal centres and legal aid bodies to receive adequate and ongoing funding to provide legal and social support services to disadvantaged clients
- funding to reach across all three related areas of family law, domestic violence and child protection
- funding to include the three categories of court-based services, targeted dispute resolution services (FDR and ADR advices and legally assisted FDR) and ongoing assistance for families with complex needs, families who experience family violence and families who are from CALD and Indigenous communities.

Questions 34–40: Children’s experiences and perspectives

- 128 A child’s involvement in or exposure to the family law system may cause harm to the child. However, it is naive to suggest that a child’s first exposure to and participation in the dispute (and ensuing harm) is experienced in the family law system. By virtue of the conflict, a child may already be participating to varying degrees in decisions being made about who they live with, schooling and other parenting decisions. In addition, it is usual for parents who are not in conflict to involve children in part of the decision-making process relating to a range of issues that relate to the child’s welfare. The issue is whether and how, in situations of conflict and in a system that manages that conflict, children can continue to participate in decisions that affect their welfare in a safe manner.
- 129 The adversarial process has made the participation unsafe. However, processes that are child focussed and not adversarial may provide the safe environment necessary to facilitate their ongoing participation.
- 130 Our experience is not in working with children. Our experience is with parents who over-expose and involve children in family law conflict, who emphasise their children’s wishes to justify parental conflict, who do not understand how their children can safely participate in family law decision-making processes and who grapple with what relationship the ICL will have with their child. How a child participates in the family law system and what principles govern that are not clear in the Family Law Act.
- 131 We propose that what is required before moving onto deciding what systems ought to be in place to enable children to participate in the family law system, is a clear articulation of the principles that should underpin their participation. These principles could be called the ‘child inclusion principles’ and include:

- parents, not children, to bear the responsibility for making decisions about parenting issues
- parents to refrain from discussing with and involving children in making decisions about parenting issues
- a child's genuinely held wishes to be relevant to making decisions about what is in the child's best interests
- whether or not and how a parent has directly or indirectly influenced the wishes of a child to be relevant to making decisions about what is in the child's best interests
- the wishes of a child, the age at which they are expressed and the veracity with which they are held to be determinative of what is in the child's best interests
- whether or not and how a child participates in family dispute resolution and the court process to be determined in each case in the best interests of the child;
- unless in exceptional circumstances, children not to directly participate in family court hearings
- information about the nature of a child's relationship with their parents and others to be relevant to whether or not and how their wishes are to be taken into account
- whether or not and how independent information about a child's wishes is to be obtained to be determined in each case in the best interests of the child
- a person who conducts child inclusive family dispute resolution, mandated therapeutic counselling, observations of supervised contact, family report interviews to have the responsibility to explain to the child where appropriate how the information will be used
- children not to be exposed to conflict that results in their emotional, psychological or physical harm.
- This is not an exhaustive list. Children who have been exposed to the family law system should be consulted, and their experiences should inform the 'child inclusion principles'.

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?

132 We do not support a relaxation of s 121 (Family Law Act) save for in the limited circumstances specified in the Issues Paper.