

# Review of the Family Law System: Discussion Paper

Australian Law Reform Commission

16 November 2018

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# About the Law Council of Australia

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

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

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

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

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

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

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

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

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

# Acknowledgement

The Law Council of Australia (**LCA**) acknowledges that this submission has been prepared by the Executive of the Family Law Section (**FLS**).

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

The current members of the Family Law Section Executive are:

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

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

## Law Council Constituent Bodies

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

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

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

## Introduction

1. The LCA is grateful for the opportunity to provide a submission to the ALRC's *Review of the Family Law System: Discussion Paper* (**Discussion Paper**). This submission follows the LCA's earlier submission of 7 May 2018 to the ALRC's *Review of the Family Law System—Issues Paper (IP 48)* (**Issues Paper**).
2. The LCA has set out in the table format that follows, its specific response to more than 130 proposals and 30 questions contained within the Discussion Paper. By way of overview and general comment, the LCA notes the following:
  - The ALRC Discussion Paper is ambitious in its breadth of its scope, however it does not address:
    - the failure by successive governments to properly resource the existing Australian family law system; and
    - whether the existing family law system – properly resourced – would represent the best practice model for family law in the Australian context.
  - Rather than addressing those issues, the Discussion Paper proposes the establishment of a series of satellite services and further bodies. The Discussion Paper does not address the anticipated cost or funding of these initiatives, nor how funding might be allocated as between existing services and the courts, and new initiatives.
3. From a Family Law Commission to a Children and Young Persons advisory body and a Children's Advocate, a host of well-intentioned ideas are put forward – yet at no time does the Discussion Paper address whether given proper funding to the courts, Independent Children's Lawyers, Legal Aid, appointments to the Family Law Council, funding and training of family dispute resolution services and family consultants, funding of state-based welfare authorities and initiatives and the timely replacement of judges, the *existing* system could achieve the same goals without reinventing many of the same services under different nomenclatures.
4. Without a consideration of both that question and, further, the question of the funding of the myriad of recast initiatives, little can be expected to change for users of the family law system, save that families and children will be faced with a new and potentially underfunded landscape to negotiate.
5. The Discussion Paper does not address the extent to which certain case management failings, such as the inefficiencies of a docket system in the Federal Circuit Court of Australia (particularly since the expansion of its family law jurisdiction and increase in its workload), have contributed to delays and other problems in the family law system.
6. The Discussion Paper makes a number of recommendations for changes, some of which appear to be targeted to improve the services of the system to specific users of the system (such as victims of family violence), and some which appear to have broader application to 'families' and 'children'. However, the characteristics of the different users of the system (even with the specific user groups identified), their needs and vulnerabilities, or the approximate number of them are not defined. Nor does the Discussion Paper adequately consider or contemplate likely future pressures on the family law system, such as population growth, increased cultural diversity of family law system users, and the ageing of the Australian society. Coupled with the absence of assessing the funding needs for each of the Discussion Paper's proposals, the Discussion Paper has missed the opportunity to develop a framework which would assist governments to prioritise scarce resources to the most needy and to develop a longer term funding model for existing and new services.

7. A significant component of the Discussion Paper involves looking at further or other ways to assess and maintain standards amongst those practising in the family law arena. While improving professional standards is vital, there are already comprehensive and ongoing processes in place, through for example the annual 20 hours of Continuing Legal Education (**CLE**) required of solicitors who hold a practicing certificate and maintain specialist accreditation in family law.
8. Legal practitioners are already the subject of extensive regulation by state and territory law societies, bar associations, by specialist accreditation schemes throughout Australia, and are also supported by professional bodies such as the Australian Institute of Family Law Arbitrators and Mediators (**AIFLAM**), the Family Law Section of the LCA, and state and territory family law associations. While the Discussion Paper notes that the ALRC seeks to supplement, rather than duplicate, existing services, the opposite seems to be the effect of the proposed Family Law Commission.
9. Little attention is turned in the Discussion Paper to a fundamental problem affecting the family law sector, being the shortages of social science experts in report writing areas and looking at ways in which they could be further encouraged to participate in this field and therefore address the delays and backlogs in obtaining specialist reports for parenting cases. The high cost of the services, is undoubtedly due in no small part at present time, to the shortage of supply of qualified experts willing to provide these services in the context of the family law courts.
10. The LCA is concerned that there are a series of measures proposed in the Discussion Paper, that represent clear duplication of provisions that already exist under the *Family Law Act 1975* (Cth) (**Family Law Act**) or are otherwise identifiable as remedies contained in existing court rules. The laudable proposal is made at the commencement of the Discussion Paper, for the introduction of clearer and simpler legislation. However, any number of the proposals put forward by the ALRC appear to involve the introduction of unnecessary provisions into the legislation or the court rules. This is likely to have the effect of making more lengthy and complex the very legislative scheme which the ALRC is otherwise committed to simplifying.

# Responses to Proposals

## 2. EDUCATION, AWARENESS AND INFORMATION

### Proposal 2–1

The Australian Government should develop a national education and awareness campaign to enhance community understanding of the family law system. This should include information about:

- the benefits of seeking information, advice and support when contemplating or experiencing separation;
- the duties and responsibilities of parents and the importance of taking a child-centred approach to post-separation parenting that prioritises children's safety and best interests;
- the existence and location of the proposed Families Hubs (Proposals 4–1 to 4–4) as a place where people experiencing separation can access advice and support services;
- the availability of the proposed family law system information package (Proposals 2–5 to 2–8) that provides practical information to assist people, including children and young people, to understand and navigate the family law system, including how to access the package; and
- the availability of alternative dispute resolution processes to assist and empower people experiencing separation to reach agreement about arrangements for their children and property outside of court proceedings.

### Response:

Agree.

### Comment:

'Advice' needs to be both social science advice (e.g. impact of conflict on children) and legal advice. Ongoing funding would be required to ensure that the information remains up to date.

## 2. EDUCATION, AWARENESS AND INFORMATION

### Proposal 2–2

The national education and awareness campaign should be developed in consultation with Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTIQ and disability organisations and be available in a range of languages and formats.

### Response:

Agree.

### Comment:

The LCA notes the following comments that have been received from the Law Society of NSW:

*The Law Society agrees that Indigenous communities should receive targeted education about the family law system, and how it can assist Indigenous families. However, such education must be done by Indigenous people in safe Indigenous spaces, by indigenous people who understand the system and are respected by community. At the moment, those people are fairly rare, so we need to educate the potential educators by addressing the right support agencies who can then identify the families who need help, and explain the potential benefits of the family law system in an effective way that indigenous people trust. Indigenous people are accustomed to being taken to court by the police or by FACS. They are used to bad things happening at courts so their attitude is that it's best to stay well away. And it's*

	<i>therefore one thing to be handed an information package or consulted by well meaning people, and quite another to have a trusted elder or Indigenous community health worker who knows your family, to explain how an approach to the family law system, whether to an FRC or Families Hub or a court, might really help.</i>
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2. EDUCATION, AWARENESS AND INFORMATION	
<b>Proposal 2–3</b>	The Australian Government should work with state and territory governments to facilitate the promotion of the national education and awareness campaign through the health and education systems and any other relevant agencies or bodies.
<b>Response:</b>	Agree.
<b>Comment:</b>	<p>Information will need to incorporate the family violence laws/systems applicable in each state and territory.</p> <p>The LCA notes the following additional comments that have been received from the Law Society of NSW:</p> <p><i>In respect of any campaign to educate Indigenous communities, and in addition to the Law Society's comments at Proposal 2-2, we note the valuable work that has already been carried out in NSW by the Aboriginal Family Law Pathways Network. Indigenous family law pathways networks in each state and regional area and they should set up and fund roadshows in all those areas, just as the Greater Sydney Family Law Pathways Network did all over Sydney a number of years ago. Any Indigenous family law pathways network should be minimum 50% indigenous membership.</i></p>

2. EDUCATION, AWARENESS AND INFORMATION	
<b>Proposal 2–4</b>	<p>The Australian Government should work with state and territory governments to support the development of referral relationships to family law services, including the proposed Families Hubs (Proposals 4–1 to 4–4), from:</p> <ul style="list-style-type: none"> <li>• universal services that work with children and families, such as schools, childcare facilities and health services; and</li> <li>• first point of contact services for people who have experienced family violence, including state and territory specialist family violence services and state and territory police and child protection agencies.</li> </ul>
<b>Response:</b>	Agree.
<b>Comment:</b>	<p>The LCA notes the following comments that have been received from the Law Society of NSW:</p> <p><i>The Law Society's view is that for Indigenous families, it is critical to appoint indigenous liaison officers to each court registry, preferably located in community health or other agencies relied on and used by indigenous people, to build the link between the court and community. The system used to have indigenous liaison officers, but their funding stopped when the FRC's were set up. In our view this was a retrograde step.</i></p>



	<p><i>In the Sydney list, the Federal Circuit Court relied on the 6 or so Indigenous support people who attended court each list day to support the litigants, to connect with community and explain the proceedings. The Federal Circuit Court's Indigenous policy officer at the Sydney registry has been actively promoting the Indigenous list. But even so, the majority of the cases were identified in the community by an Indigenous community worker, referred to a known and trusted solicitor at the Family Law Early Intervention Unit of Legal Aid who would file or arrange the filing of the application. The usual practice when Indigenous families break down and risk issues arise, is put your head down, and hope FACS don't take any action. The practice of recognising the problems early, initiating action in the family law system to ensure children are safe and properly cared for, <u>is a practice that must be encouraged and promoted</u>. It is going to take a long time for the Indigenous community to build trust in the system, but it won't happen without a strong Indigenous presence at the education stage, the support agencies stage and the Court stage.</i></p> <p><i>The Law Society note that in Cairns, the only FCC indigenous liaison officer employed in either court works with the court and community and provides the link. With his help, a programme called Law Yarn was launched a few months ago initiated by community. It is led by LawRight, a community legal service and delivered in collaboration with Wuchopperen Health Service and Queensland Indigenous Family Violence Legal Service (QIFVLS). Law Yarn helps health workers to yarn with members of remote and urban communities about their legal problems and connect them to legal help. This is a positive example of a health/justice partnership, the holistic approach that the ALRC appears to envisage, but it is an Indigenous community initiative, within an Indigenous framework using Indigenous services.</i></p>
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2. EDUCATION, AWARENESS AND INFORMATION	
<b>Proposal 2–5</b>	<p>The Australian Government should convene a standing working group with representatives from government and non-government organisations from each state and territory to:</p> <ul style="list-style-type: none"> <li>advise on the development of a family law system information package to facilitate easy access for people to clear, consistent, legally sound and nationally endorsed information and the family law system; and</li> <li>review the information package on a regular basis to ensure that it remains up-to-date.</li> </ul>
<b>Response:</b>	Agree.
<b>Comment:</b>	<p>The LCA agrees with this recommendation, however notes that it will require significant initial and ongoing funding, including for the organisations that are asked to be involved, as many of them will have limited funds available to support their involvement in such a significant project.</p> <p>The Discussion Paper refers (paragraph 2.25) to the family law information package providing separating people with 'a practical guide to the family law system' including 'clear information on the legal frameworks governing these</p>

	<p><i>matters</i>'. The LCA urges caution in attempts to develop 'guides' to the resolution of parenting and property/financial matters within a discretionary legal system, with the attendant risks that some users may be vulnerable to adapting the 'guide' or illustrations as representing 'expected' or standard outcomes (and unknowingly, accepting less or a sub-optimal outcome).</p> <p>In these circumstances, early identification of the need for and referral to legal advice is an essential safeguard for users of the family law system.</p>
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2. EDUCATION, AWARENESS AND INFORMATION	
<b>Proposal 2–6</b>	<p>The family law system information package should be tailored to take into account jurisdictional differences and should include information about:</p> <ul style="list-style-type: none"> <li>• the legal framework for resolving parenting and property matters;</li> <li>• the range of legal and support services available to help separating families and their children and how to access these services; and</li> <li>• the different forums and processes for resolving disputes.</li> </ul>
<b>Response:</b>	Agree.
<b>Comment:</b>	<p>It is not clear who would be invited to participate in the development of the family law system information package, noting at paragraphs 2.29 and 2.30 and 2.33 of the Discussion Paper the focus is also upon consolidating the various information sources presently available and ensuring they remain accurate and up to date.</p> <p>The scale of this project is significant, given regular engagement between existing government and non-government agencies and services is recommended (paragraph 2.34) initially to undertake a stocktake and for future development and maintenance of the product. Information about the legal framework for separating families will be an integral part of the information package and the LCA notes that it is essential that lawyers are part of the design, build and delivery of this part of the information package.</p> <p>If it is to be recommended that Legal Aid Commissions and Community Legal Centres should provide their expertise in building the legal advice aspects of the information package, then the LCA again notes that additional funding must be made available to these important agencies to assist in meeting the resource allocation that will be required.</p>

2. EDUCATION, AWARENESS AND INFORMATION	
<b>Proposal 2–7</b>	<p>The family law system information package should be accessible in a range of languages and formats, including:</p> <ul style="list-style-type: none"> <li>• electronically via a central website;</li> <li>• as printed material available at key entry points to the family law system and universal services; and</li> <li>• through interactive means, including a national telephone helpline and a national web-chat service.</li> </ul>
<b>Response:</b>	Agree.

<b>Comment:</b>	None.
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## 2. EDUCATION, AWARENESS AND INFORMATION

<b>Proposal 2–8</b>	<p>The family law system information package should be:</p> <ul style="list-style-type: none"> <li>• developed with reference to existing government and non-government information resources and services;</li> <li>• developed in consultation with Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTIQ and disability organisations; and</li> <li>• user-tested for accessibility by community groups including children and young people, Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse communities, LGBTIQ people and people with disability.</li> </ul>
<b>Response:</b>	Agree.
<b>Comment:</b>	None.

## 3. SIMPLER AND CLEARER LEGISLATION

<b>Proposal 3–1</b>	<p>The <i>Family Law Act 1975</i> (Cth) and its subordinate legislation should be comprehensively redrafted with the aim of simplification and assisting readability, by:</p> <ul style="list-style-type: none"> <li>• simplifying provisions to the greatest extent possible;</li> <li>• restructuring legislation to assist readability, for example by placing the most important substantive provisions as early as possible;</li> <li>• redrafting the Act, Regulations and Rules in ordinary English, by modernising language, and as far as possible removing terms that are unlikely to be understood by general readers, such as legal Latin, archaisms, and unnecessarily technical terms;</li> <li>• user testing key provisions for reader comprehension during the drafting process, for example, through focus groups, to ensure that the legislation is understood as intended;</li> <li>• removing or rationalising overlapping or duplicative provisions as far as possible;</li> <li>• removing provisions establishing the Family Court of Australia and the Australian Institute of Family Studies to separate legislation;</li> <li>• removing provisions defining parentage for the purposes of Commonwealth law to separate legislation; and</li> <li>• considering what provisions should be contained in subordinate legislation rather than the Act.</li> </ul>
<b>Response:</b>	Agree generally.
<b>Comment:</b>	<p>The LCA supports the proposition that the Family Law Act and subordinate legislation ought to be recast to make it a more approachable and accessible piece of legislation in accordance with current drafting practices. Care, however, needs to be taken to preserve the important provisions contained within the legislation which are the subject of a body of jurisprudence that has been developed over more than the last 42 years. Any review needs to ensure</p>

	<p>that there is no unnecessary uncertainty nor inadvertent change to the law created by the changes to be made.</p> <p>Further, the Family Court and Federal Circuit Court have expressed an intention to engage in a review, simplification and unification of their respective Rules. It is not understood whether this proposal is separate from or bears any relationship to that review.</p> <p>In that context, and whilst the LCA agrees with a number of the particular aspirations identified in the proposal, it is submitted (by reference to those identified) that:</p> <ul style="list-style-type: none"> <li>• it is not always possible nor appropriate as a matter of proper drafting and construction to simply reorganise the ‘most important substantive provisions’ in a piece of legislation, even if such provisions can properly be identified;</li> <li>• the Family Law Act is a relatively modern piece of legislation which is not laden with terms of the nature described;</li> <li>• as already observed, whilst ‘readability’ is important, if the proposal is understood correctly, the views of ‘focus groups’ as to the manner in which legislation is to be expressed runs a significant risk of altering the legal meaning and consequence;</li> <li>• the ‘merger’ legislation already proposes the repeal of all provisions establishing and maintaining the Family Court of Australia; and</li> <li>• a comprehensive approach is required to the provisions dealing with parentage issues by the Commonwealth wherever it is included, noting that at date of writing there is a pending special leave application to the High Court of Australia which relates to this area of the legislation.</li> </ul>
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3. SIMPLER AND CLEARER LEGISLATION	
<p><b>Proposal 3–2</b></p>	<p>Family law court forms should be comprehensively reviewed to improve usability, including through:</p> <ul style="list-style-type: none"> <li>• only gathering information that is absolutely required, and simplifying how information is gathered (e.g. through use of check-boxes);</li> <li>• using smart forms, to pre-populate information from previously completed forms (such as name and address), ask contextual questions based on previous answers, and provide contextual help within the form;</li> <li>• using real-time help functions, such as a live-chat functionality, and links to audio-visual help;</li> <li>• providing collaborative functions in circumstances where forms require information from both parties to allow them both to easily enter information;</li> <li>• ensuring that all forms are drafted in ordinary English and where possible providing alternative forms in Easy English to assist litigants with limited literacy or English skills;</li> <li>• providing a paper form for use by individuals without access to technology; and</li> <li>• providing a single set of forms for all courts exercising jurisdiction under the <i>Family Law Act 1975</i> (Cth).</li> </ul>
<p><b>Response:</b></p>	<p>Agree generally.</p>

**Comment:**

The LCA supports the adoption of common forms for all family law proceedings, which the Family Court and Federal Circuit Court have each announced an intention to implement. Again, it is not understood whether this proposal is separate from or bears any relationship to that aspiration.

In designing forms, it is important to ensure that the benchmark used for the information to be gathered is appropriate and that the means by which the information is elicited is fit for that purpose.

The information to be gathered on the commencement of proceedings is that necessary to enable the proper identification of issues, the necessary people/entities to be involved and the most appropriate means of disposition – including, if appropriate, the most suitable form of ADR. That necessary information is unable to be gathered by the use (wholly or even primarily) of check boxes or similar formulaic methods and involves the gathering of information particular to each person, child and family. Much of it is not information which can nor ought to be gathered following the commencement of proceedings. To do so is to deny the ability of the Courts to properly assess and direct matters at the earliest opportunity.

These realities cannot be overlooked without exposing people involved in the family law system to considerable risks in the important and early stages of proceedings – including that issues as to violence and safety are unable to be properly assessed and addressed.

The LCA notes the following additional comments that have been received from the Law Society of South Australia:

*The Society notes and supports the LCA Response to Proposal 3-2. While simplification is desirable to a certain degree, a careful balance needs to be struck between simplifying documents and ensuring that enough information is captured. The Society notes that the purpose of court forms is to provide a basis for the understanding and assessment of the issues. There is a risk if documents are oversimplified, important information relating to a matter may be missed or overlooked.*

### 3. SIMPLER AND CLEARER LEGISLATION

**Proposal 3–3**

The principle (currently set out in s 60CA of the *Family Law Act 1975* (Cth)) that the child's best interests must be the paramount consideration in making decisions about children should be retained but amended to refer to 'safety and best interests'.

**Response:**

Agree that the child's best interests should remain the paramount consideration, however note the following issues about adding the word 'safety' to that consideration.

**Comment:**

Including safety as a consideration does elevate the issue of potential harm to the child in any order made and this is considered positive. However, it is difficult to see how an order could be made in a child's best interests that also compromised that child's safety. The intent to ensure safety is not forgotten when determining best interests is generally agreed.

However, the LCA suggests that amending or tinkering with the paramountcy principle itself in section 60CA could have undesirable consequences, and that a better place to emphasise safety would be within section 60B which seeks to provide guidance about the range of matters that should be taken into account when assessing 'best interests'.

The proposed amendment to section 60CA has the potential to cause an increase in litigation and complexity and as stated maybe unnecessarily so. Best interests must already encompass safety. Adding the words, 'safety and' to best interests also adds another potential issue between parents potentially requiring forensic determination through litigation.

The LCA notes the following additional comments that have been received from the ACT Law Society's Family Law Section in respect of Proposals 3-3, 3-4 and 3-5:

*Firstly, a definition of safety must be contained in the legislation, and will be presumably defined differently to "family violence". Without an understanding of what is meant legislatively by the concept "safety", a change to the terminology is meaningless, potentially confusing and likely not to promote best interest.*

*It appears that this will become a mandatory consideration – it "must" be considered.*

*Amendments to section 60B to simply the objects and principles are only supported when such a change enhances the interpretation of the Act, not diminishes it. Again the use of the word "safety" is suggested to assist in interpreting the principles of the parenting sections of the Act. This is only going to be of practical assistance where the concept of safety is separately defined in the Act (s4)*

Similarly, the Victorian Bar, in relation to Proposals 3.3, 3.4 and 3.5 comments:

*...we [have] concerns about the use of the word "safety" which, in the absence of a statutory definition, is open to subjective interpretation and is likely to lead to disputes about what constitutes "safety". Whilst it is arguably a more negative term, the phrase "harm or risk of harm" is likely to be more clearly understood.*

### 3. SIMPLER AND CLEARER LEGISLATION

#### Proposal 3–4

The objects and principles underlying pt VII of the *Family Law Act 1975* (Cth) set out in s 60B should be amended to assist the interpretation of the provisions governing parenting arrangements as follows:

- arrangements for children should be designed to advance the child's safety and best interests;
- arrangements for children should not expose children or their carers to abuse or family violence or otherwise impair their safety;
- children should be supported to maintain relationships with parents and other people who are significant in their lives where maintaining a



	<p>relationship does not expose them to abuse, family violence or harmful levels of ongoing conflict;</p> <ul style="list-style-type: none"> <li>• decisions about children should support their human rights as set out in the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities; and</li> <li>• decisions about the care of an Aboriginal or Torres Strait Islander child should support the child's right to maintain and develop the child's cultural identity, including the right to: <ul style="list-style-type: none"> <li>(a) maintain a connection with family, community, culture and country; and</li> <li>(b) have the support, opportunity and encouragement necessary to participate in that culture, consistent with the child's age and developmental level and the child's views, and to develop a positive appreciation of that culture.</li> </ul> </li> </ul>
<b>Response:</b>	Agree generally.
<b>Comment:</b>	See above as to the concerns about the words 'safety and' being added to best interests.

### 3. SIMPLER AND CLEARER LEGISLATION

<b>Proposal 3–5</b>	<p>The guidance in the <i>Family Law Act 1975</i> (Cth) for determining the arrangements that best promote the child's safety and best interests (currently set out mainly in s 60CC), should be simplified to provide that the following matters must be considered:</p> <ul style="list-style-type: none"> <li>• any relevant views expressed by the child;</li> <li>• whether particular arrangements are safe for the child and the child's carers, including safety from family violence or abuse;</li> <li>• the developmental, psychological and emotional needs of the child;</li> <li>• the capacity of each proposed carer of the child to provide for the developmental, psychological and emotional needs of the child;</li> <li>• the benefit to a child of being able to maintain relationships that are significant to them, including relationships with their parents, where it is safe to do so; and</li> <li>• anything else that is relevant to the particular circumstances of the child.</li> </ul>
<b>Response:</b>	Agree.
<b>Comment:</b>	None.

### 3. SIMPLER AND CLEARER LEGISLATION

<b>Proposal 3–6</b>	<p>The <i>Family Law Act 1975</i> (Cth) should provide that, in determining what arrangements best promote the safety and best interests of an Aboriginal or Torres Strait Islander child, the maintenance of the child's connection to their family, community, culture and country must be considered.</p>
<b>Response:</b>	Agree.
<b>Comment:</b>	None.

### 3. SIMPLER AND CLEARER LEGISLATION

#### Proposal 3–7

The decision making framework for parenting arrangements in pt VII of the *Family Law Act 1975* (Cth) should be further clarified by:

- replacing the term ‘parental responsibility’ with a more easily understood term, such as ‘decision making responsibility’; and
- making it clear that in determining what arrangements best promote the child’s safety and best interests, decision makers must consider what arrangements would be best for each child in their particular circumstances.

#### Response:

Agree, generally.

#### Comment:

‘Decision making responsibility’ is clunky language.

‘Parental responsibility’ reflects the terms of the UN *Convention on the Rights of the Child* and is used in Hague legislation so there may be some issues for consideration given the international use of the phrase. However, the LCA appreciates that an order that says the parties retain ‘decision making responsibility’ may be easier for parties to understand.

It would have to also be clear this relates to long term decisions and not all decisions.

The LCA notes the following additional comments that have been received from the Law Society of South Australia:

*The Society notes that the LCA consider the change in terminology “clunky”. However, the Society considers that the proposal to change the term “parental responsibility” to “decision making responsibility” leads to the question, as to exactly what type of decision making the responsibility entails. If this proposal is adopted, the Society suggests that it must be clarified by expanding the term to “decision making responsibility as to long term decisions”. The Society understands such a term is also “clunky”, however, there is little point in changing the terminology if it does not provide the appropriate level of guidance to parents.*

The LCA notes the following additional comments that have been received from the Bar Association of Queensland:

*The Association agrees with the LCA comments on the ALRC’s proposal that the decision-making framework for parenting arrangements in Part VII of the Act should be further clarified (proposal 3-7).*

*The Association is of the view that educating users of the family law system on the decision-making framework for parenting arrangements is of crucial importance. In the experience of the Association’s members who practise in family law, parents and family members tend to conflate care-time arrangements with decision making for children in parenting matters. This has been caused, at least in part, by a misconception that the presumption of equal shared parental responsibility in section 61DA of the Family Law Act ... is a presumption of equal time.*



	<i>In the experience of the Association's members, it is important that these two issues be clearly separated in the public arena. The Association is of the view that education is central in assisting users of the family law system to better understand both concepts of major long-term issues and day to day decision making.</i>
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3. SIMPLER AND CLEARER LEGISLATION	
<b>Question 3–1</b>	How should confusion about what matters require consultation between parents be resolved?
<b>Response:</b>	See below comments.
<b>Comment:</b>	The Family Law Act currently sets out what is a long-term decision, so it is not certain from the LCA perspective as to what 'confusion' the ALRC is referring to.

3. SIMPLER AND CLEARER LEGISLATION	
<b>Proposal 3–8</b>	<p>The <i>Family Law Act 1975</i> (Cth) should be amended to explicitly state that, where there is already a final parenting order in force, parties must seek leave to apply for a new parenting order, and that in considering whether to allow a new application, consideration should be given to whether:</p> <ul style="list-style-type: none"> <li>there has been a change of circumstances that, in the opinion of the court, is significant; and</li> <li>it is safe and in the best interests of the child for the order to be reconsidered.</li> </ul>
<b>Response:</b>	Agree.
<b>Comment:</b>	None.

3. SIMPLER AND CLEARER LEGISLATION	
<b>Proposal 3–9</b>	The Commonwealth Attorney-General's Department should commission a body with relevant expertise, including in psychology, social science and family violence, to develop, in consultation with key stakeholders, evidence-based information resources to assist families in formulating care arrangements for children after separation that support children's wellbeing. This resource should be publicly available and easily accessible, and regularly updated.
<b>Response:</b>	Agree generally.
<b>Comment:</b>	This however would be subject to funding, clarity that it is for guidance only, and not used to determine matters.

3. SIMPLER AND CLEARER LEGISLATION	
<b>Proposal 3–10</b>	The provisions for property division in the <i>Family Law Act 1975</i> (Cth) should be amended to more clearly articulate the process used by the courts for determining the division of property.

<b>Response:</b>	Agree.
<b>Comment:</b>	<p>The proposal to clarify the pathway for the making of decisions in the alteration of property interests is supported, however it is clearly subject to the drafting of the legislative provisions.</p> <p>For example, if the proposal is intended to signify an intent to codify the provisions in <i>Stanford</i>, what precisely are the 'steps' that will be statutorily prescribed by the legislature? The decision of the High Court in <i>Stanford</i> has been the subject of much academic debate and differing interpretations as to the pathway it illuminates. It is with respect not clear from the proposal or the accompanying text in the Discussion Paper, as to how such a proposal would be implemented or what exactly it would do.</p>

### 3. SIMPLER AND CLEARER LEGISLATION

<b>Proposal 3–11</b>	<p>The provisions for property division in the <i>Family Law Act 1975</i> (Cth) should be amended to provide that courts must:</p> <ul style="list-style-type: none"> <li>• in determining the contributions of the parties, take into account the effect of family violence on a party's contributions; and</li> <li>• in determining the future needs of the parties, take into account the effect of any family violence on the future needs of a party.</li> </ul>
<b>Response:</b>	<p>The LCA recognises the powerful goals that may be achieved, in both a preventative and compensatory sense, from a legislative recognition of the past and future effects of family violence in the context of financial matters under the Family Law Act. Whether the proposal is ultimately supported, will however be dependent on the text of any proposed statutory amendments, both as to the Family Law Act and as to the evidentiary rules that should apply.</p>
<b>Comment:</b>	<p>The LCA response to the Issues Paper addressed the arguments for and against this proposal and potential issues with a codification of <i>Kennon</i> (see paragraphs [217] to [218] on pages 56 to 61), and noted that it also drew extensively on the FLS / LCA submissions to the Parliamentary Inquiry into a Better Family Law System to Support those Affected by Family Violence.</p> <p>The LCA recognises the potential importance of change in this area and the preventative purpose which statutory inclusion of family violence may achieve. For example, there may over time be behavioural changes if parties are aware that they may have substantial and adverse financial consequences for them under the Family Law Act, leaving aside the existing criminal law ramifications of such actions.</p> <p>The LCA remains concerned however by the absence in the Discussion Paper of an attempt to grapple with the evidentiary challenges in family violence cases; to recognise that there are many other forms of behaviour (e.g. drug and alcohol abuse) that can have devastating consequences as well; and the floodgates risk for litigation.</p> <p>Whilst some of these are already highlighted in the Issues Paper submission by the LCA, a number of problematic issues need to be addressed as part of any drafting exercise to achieve a statutory amendment:</p>

- a. Will the existing definition of 'family violence' in the Family Law Act apply to financial matters?
- b. Will one incident of 'family violence' suffice or will a course of conduct be required?
- c. What is the intent of the amendment in respect of the contributions factor? Is it intended to be punitive/compensatory in nature and will a link to making contributions more arduous be required? In respect of the future needs factors, is it intended to be relevant only if there is a causal link to a diminution of income earning capacity or having an effect for example on health?
- d. Is there a risk of a 'double dip' if it is included both as a factor affecting contributions weighting and a factor going to future needs, if it arises from the same factual incident or incidents? The LCA considers that the effect of family violence, if it is to be included and is not already covered by (in the married persons context) section 75(2)(o), is more readily identifiable as a factor relevant to the future needs of a party rather than as a factor in the assessment of contributions.
- e. If it is included simply as a factor for consideration, it must in the vast majority of cases then be reflected by the percentage awarded to a party of the 'property' available for division. It will not usually be a specific percentage as the case law eschews any approach that breaks down the overall percentage into component parts, rather it is (generally, but not always) a holistic exercise in arriving at the overall outcome (for example, a court may assess contributions to be equal and then award 12% for future needs, but will not generally say that the 12% is made up of 3% for income disparity; 5% for care of children and 4% for family violence, or break them up into specific dollar amounts although this can be done). This will normally therefore mean no correlation is available for example between what an award in a civil case for an assault may have been and the award given because of family violence in arriving at an alteration of property interests. As it is embodied in a percentage, it may also mean that family violence in a case involving wealthy parties with larger property pools, has a greater effect than more serious family violence in a case involving a smaller property pool (e.g. 3% adjustment for family violence in a pool of \$10million for couple A is greater than 10% for more serious and sustained episodes of family violence for couple B who have a pool of only \$500,000). This raises social justice and comparative justice issues and goes back to the question of the intent of the legislative reform i.e. is to be punitive or compensatory or preventative or giving recognition to the contributions made?
- f. Will it be mandatory to disclose family violence in financial cases, even if a party does not want to pursue a finding or seek a contributions weighting or future needs adjustment on that issue?
- g. Will it be necessary to give particulars of the incidents or actions that amount to family violence, to enable a respondent to address them?
- h. Evidence at trials is generally filed simultaneously by way of exchange. If there are not pleadings that identify the issues, will the rules need to be amended to require a party raising such matters to file evidence first, with the other party then responding, or otherwise permitting a case in reply?

	<ul style="list-style-type: none"> <li>i. Will the usual rules of evidence in the <i>Evidence Act 1995</i> (Cth) (<b>Evidence Act</b>) apply to family violence cases?</li> <li>j. Will a party still be entitled to bring a common law claim for damages in respect of for example an assault (either separately in a civil court or in the FCA or FCCA under accrued jurisdiction) as well as seeking findings about the same incidents and contributions weightings/ future needs adjustments under the Family Law Act? How would the state laws and commonwealth laws interact?</li> <li>k. What effect, from the point of view of case load, length of trials, number of witnesses, and judicial workload and funding and resources of the courts, would an amendment of this nature have?</li> </ul>
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3. SIMPLER AND CLEARER LEGISLATION	
<b>Proposal 3–12</b>	The Attorney-General's Department (Cth) should commission further research on property and financial matters after separation, including property adjustment after separation, spousal maintenance, and the economic wellbeing of former partners and their children after separation.
<b>Response:</b>	No view expressed.
<b>Comment:</b>	It is not clear to the LCA from the Discussion Paper, the purpose that the research would be applied to, whether in terms of family law reform or social welfare change.

3. SIMPLER AND CLEARER LEGISLATION	
<b>Proposal 3–13</b>	The Australian Government should work with the financial sector to establish protocols for dividing debt on relationship breakdown to avoid hardship for vulnerable parties, including for victims of family violence.
<b>Response:</b>	No view expressed.
<b>Comment:</b>	It is not clear to the LCA that this is a matter that goes to amendment of the Family Law Act, how determinations of that nature would be made, or what is the 'financial sector' (i.e. is it any third party who is a creditor regardless of whether they are a supplier of services the parties had the benefit of, or a bank/credit union etc.), or how the rights of third party creditors would be addressed.

3. SIMPLER AND CLEARER LEGISLATION	
<b>Proposal 3–14</b>	If evaluation of action flowing from this Inquiry finds that voluntary industry action has not adequately assisted vulnerable parties, the Australian Government should consider relaxing the requirement that it not be foreseeable, at the time the order is made, that to make the order would result in the debt not being paid in full.
<b>Response:</b>	No view expressed.
<b>Comment:</b>	See comments at Proposal 3-13 above.

3. SIMPLER AND CLEARER LEGISLATION	
<b>Proposal 3–15</b>	The Australian Government should develop information resources for separating couples to assist them to understand superannuation, and how and why superannuation splitting might occur.
<b>Response:</b>	Agree.
<b>Comment:</b>	The LCA agrees that the Government should resource and develop an educational awareness program.

3. SIMPLER AND CLEARER LEGISLATION	
<b>Proposal 3–16</b>	The <i>Family Law Act 1975</i> (Cth) should require superannuation trustees to develop standard superannuation splitting orders on common scenarios. Procedural fairness should be deemed to be satisfied where parties develop orders based on these standard templates. The templates should be published on a central register.
<b>Response:</b>	Agree.
<b>Comment:</b>	This Proposal is supported by the LCA, and its implementation would be subject to how any such proposed laws (may) adversely impact the right of the third party trustee(s) of superannuation funds.

3. SIMPLER AND CLEARER LEGISLATION	
<b>Proposal 3–17</b>	<p>The Australian Government should develop tools to assist parties to create superannuation splitting orders. These could include:</p> <ul style="list-style-type: none"> <li>• a tool to look up the legal name and contact details of superannuation funds;</li> <li>• a tool, with appropriate safeguards, to identify the superannuation accounts held by a former partner from Australian Tax Office records, with necessary amendments to the taxation law to support this;</li> <li>• tools to assist parties with process requirements, such as making superannuation information requests, providing draft orders to superannuation trustees for comment where standard orders are not used, and providing final orders to trustees; and</li> <li>• allowing auto-generation of standard form orders based on the standard orders provided by the superannuation trustee and user-entered data.</li> </ul>
<b>Response:</b>	Agree.
<b>Comment:</b>	None.

3. SIMPLER AND CLEARER LEGISLATION	
<b>Question 3–2</b>	Should provision be made for early release of superannuation to assist a party experiencing hardship as a result of separation? If so, what limitations should be placed on the ability to access superannuation in this way? How should this relate to superannuation splitting provisions?

<b>Response:</b>	No view expressed.
<b>Comment:</b>	The LCA notes that this is not readily identifiable as a matter for an ALRC review into family law and raises instead questions of social policy, revenue protection, social security implications for the future and potential impact on taxpayers, and how would limitations on the use of any funds so released be monitored.

### 3. SIMPLER AND CLEARER LEGISLATION

<b>Question 3–3</b>	<p>Which, if any, of the following approaches should be adopted to reform provisions about financial agreements in the <i>Family Law Act 1975</i> (Cth):</p> <ul style="list-style-type: none"> <li>(a) amendments to increase certainty about when financial agreements are binding;</li> <li>(b) amendments to broaden the scope for setting aside an agreement where it is unjust to enforce the agreement, for example, because there has been family violence, or a change of circumstances that was unforeseen when the agreement was entered into;</li> <li>(c) replacing existing provisions about financial agreements with an ability to make court-approved agreements; or</li> <li>(d) removing the ability to make binding pre-nuptial financial agreements from family law legislation, and preserving the operation of any existing valid agreements?</li> </ul>
<b>Response:</b>	The LCA supports further consideration of items (a) and (b), and opposes (c) and (d).
<b>Comment:</b>	<p>In relation to each proposal listed, the LCA makes the following comments:</p> <ul style="list-style-type: none"> <li>(a) The Federal Government should re-introduce to the Parliament the relevant amending provisions to the legislation about financial agreements, as were contained in the now lapsed Family Law Amendment (Financial Agreements and Other Measures) Bill 2015. The LCA has, through its Family Law Section, previously made submissions to Government about the contents of that Bill and appeared before the Senate Legal and Constitutional Affairs Committee reporting on that Bill. The Government should additionally introduce amendments that provide that giving of independent legal advice in the terms required by section 90G, is deemed to have occurred where there is a signed statement of independent legal advice from an Australian legal practitioner stating that it has occurred (i.e. a party should not be able to go 'behind' the statement of legal advice).</li> <li>(b) In relation to the introduction of a specific legislative provision for setting aside financial agreements in circumstances of family violence, this proposed amendment (as mooted in submissions by the QLD Women's Legal Service to the Senate Committee) has previously been opposed by the FLS as unnecessary on the basis that sections 90K and 90KA provide sufficient legislative protection (see paragraph [240] of the LCA submission to Issues Paper). However, the FLS considers that the debate should be expanded to include the question of whether there should be broader set aside grounds in section 90K/KA (e.g. the justice and equity, or the provisions on breakdown of the relationship judged against the statutory discretion in respect of the making of an order for maintenance and or an</li> </ul>



order for the alteration of interests in property). The LCA recognises that the scope of potential debate about such changes is extremely broad and may require a detailed examination of examples of legislative regimes in foreign jurisdictions (for example, some of the states of the USA) that have a longer history of recognition of pre-nuptial and cohabitation agreements and a greater depth of case law surrounding them.

- (c) Opposed. The notion of requiring that pre-cohabitation/marriage or pre-separation financial agreements be the subject of court approval to be binding, is fraught with legal and practical and logistical difficulties (see paragraph [241] of the LCA submission to the Issues Paper).
- (d) Opposed. The better approach rather than 'grandfathering' out the financial agreement legislation, is to improve its clarity and the enforceability of such agreements.

The LCA would welcome further consultation on this topic when the ALRC formulates any specific proposals it may be considering.

The LCA notes the following additional comments that have been received from the Law Society of South Australia:

*The Society submits that the legislation relating to binding financial agreements (BFAs) as a whole should be clarified ....While there have been previous attempts at reform with respect to BFAs, there is still much uncertainty around their validity.*

*When prepared and executed correctly, BFAs can serve as a useful tool to provide certainty to parties that enter into a relationship upon its subsequent breakdown (with respect to those parties entering into such agreements in contemplation of marriage or de facto relationship). Without such mechanisms available, it is likely that these couples, upon separation, would then likely be users of the Court system.*

*The Society considers that clarification and reform of the Act with respect to BFAs is necessary, and will in turn reduce the load on the court system and provide greater certainty to parties.*

### 3. SIMPLER AND CLEARER LEGISLATION

<b>Proposal 3–18</b>	The considerations that are applicable to spousal maintenance (presently located in s 75 of the <i>Family Law Act 1975</i> (Cth)) should be located in a separate section of family law legislation that is dedicated to spousal maintenance applications ('dedicated spousal maintenance considerations').
<b>Response:</b>	Agree.
<b>Comment:</b>	See paragraph [234] of the LCA submission to the Issues Paper for details.

3. SIMPLER AND CLEARER LEGISLATION	
<b>Proposal 3–19</b>	The dedicated spousal maintenance considerations should include a requirement that the court consider the impact of any family violence on the ability of the applicant to adequately support themselves.
<b>Response:</b>	The LCA recognises the powerful goals that may be achieved, in both a preventative and compensatory sense, from a legislative recognition of the past and future effects of family violence in the context of financial matters under the Family Law Act. Whether the proposal is ultimately supported, will however be dependent on the text of any proposed statutory amendments, both as to the Family Law Act and as to the evidentiary rules that should apply.
<b>Comment:</b>	<p>See response to Proposal 3-11 above. The LCA repeats and relies upon the same matters.</p> <p>The LCA response to the Issues Paper addressed both sides of this proposal, and potential issues with a codification of <i>Kennon</i>.</p> <p>Further, see paragraphs [217] and [218] on pages 56 to 61 of the LCA submission to the Issues Paper, which drew extensively on the FLS / LCA submissions to the Parliamentary Inquiry into a Better Family Law System to Support those Affected by Family Violence.</p> <p>See also subparagraph [234(c)] of the LCA submission to the Issues Paper, in the maintenance context, as to the pros and cons of a specific inclusion of family violence as a factor.</p>

3. SIMPLER AND CLEARER LEGISLATION	
<b>Question 3–4</b>	<p>What options should be pursued to improve the accessibility of spousal maintenance to individuals in need of income support? Should consideration be given to:</p> <ul style="list-style-type: none"> <li>• greater use of registrars to consider urgent applications for interim spousal maintenance;</li> <li>• administrative assessment of spousal maintenance; or</li> <li>• another option?</li> </ul>
<b>Response:</b>	Agree, in part
<b>Comment:</b>	<p>The FLS of the LCA has long advocated the greater use of Registrars in the family law system, as a means of relieving Judges from case management duties and assisting in the timely delivery of justice in certain interlocutory decisions under the Family Law Act, such as spouse maintenance. The LCA supports the giving of greater power to Registrars to deal with urgent and interim spouse maintenance applications. This would require funding support. See paragraphs [232] to [235] of the LCA submission to the Issues Paper.</p> <p>The LCA opposes the establishment of any administrative assessment of spouse maintenance scheme, as it could not co-exist with a discretionary property regime and would add a substantial layer of bureaucratic cost and complexity.</p>



#### 4. GETTING ADVICE AND SUPPORT

<b>Proposal 4–1</b>	<p>The Australian Government should work with state and territory governments to establish community-based Families Hubs that will provide separating families and their children with a visible entry point for accessing a range of legal and support services. These Hubs should be designed to:</p> <ul style="list-style-type: none"> <li>• identify the person’s safety, support and advice needs and those of their children;</li> <li>• assist clients to develop plans to address their safety, support and advice needs and those of their children;</li> <li>• connect clients with relevant services; and</li> <li>• coordinate the client’s engagement with multiple services.</li> </ul>
<b>Response:</b>	<p>Agree, subject to comments below.</p>
<b>Comment:</b>	<p>The Discussion Paper proposes the creation of Families Hubs to remedy an observed ‘service fragmentation’ and to improve service delivery. While the LCA supports this proposal, it is noted that the scale and nature of the remedy being proposed will again require significant additional government funding at a time when governments have consistently underfunded other existing, critical parts of the family law system. The LCA expresses concern that funding for ‘new’ initiatives should not take priority over increased and guaranteed future funding for <i>existing</i> services and supports within the family law system, including courts and associated court services.</p> <p>It is proposed (Discussion Paper paragraph 4.3) that ‘<i>embedded onsite workers from a range of local services, including legal assistance services, specialist family violence services...family dispute resolution services, therapeutic services, financial counselling services, housing assistance services, health services, children’s contact services and parenting support or education services</i>’ will come together in locations to provide one-stop support and triage. The LCA observes there is some risk that there will be duplication of certain services offered by Family Relationship Centres and other providers, with attendant risks to the allocation of scarce government resources.</p> <p>The proposal also assumes staff from a range of relevant and important referral services are available – the expertise suggested above is diverse and significant. If other agencies, offering those services are to provide their staff to the Families Hubs, they must receive additional funding for this purpose. No net benefit will be achieved, if a support service becomes under strain in the provision of its primary service because of additional, unfunded, service expectations of the Families Hubs.</p> <p>The establishment of Families Hubs in urban areas (particularly capital cities) is likely to be more readily achieved given the greater availability of essential infrastructure, however the LCA recognises that rural and remote communities will more likely experience greater advantage, immediately, if they were to be the priority focus of the establishment of Families Hubs. However, the LCA notes providers of the range of services expected to operate within Families Hubs, are harder to secure in non-urban locations.</p> <p>By inference, it would appear that the Families Hubs will be heavily reliant upon resourcing from agencies who receive funding from State and Territory</p>

	<p>governments. There may be some suggestion that this new service will result in cost shifting from Commonwealth reserves to State and Territory reserves.</p> <p>The LCA notes the following additional comments that have been received from the Bar Association of Queensland:</p> <p><i>With respect to the ALRC's proposed community-based Families Hubs (proposals 4-1 to 4-4), the Association agrees with the LCA that this would require significant additional Government funding at a time when Governments have underfunded other existing, critical parts of the family law system.</i></p> <p><i>If the proposed Families Hubs are to be implemented, the Association is of the view that Legal Aid Centres, the Courts and other family law professional bodies should also be included in the information providers for input. It is important to understand the input of these bodies when delivering services to families in the proposed Families Hubs.</i></p> <p>The following comments have been received by the Law Society of NSW:</p> <p><i>The Law Society supports the concept of Families Hubs, but Indigenous family hubs need to be staffed by Indigenous people respected and trusted by their communities. Those hubs should be located in existing Indigenous agencies (perhaps AMS's or Aboriginal drug and alcohol service, or The Men's Shed at Mt Druitt, staffed by Indigenous people). We strongly propose using existing infrastructure and establish hubs in those familiar places. Indigenous people will listen to those people. Very few will use white-run services. A mediation pathway designed by Indigenous people with an Indigenous support presence at every mediation would be ideal.</i></p>
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#### 4. GETTING ADVICE AND SUPPORT

<b>Proposal 4-2</b>	The Australian Government should work with state and territory governments to explore the use of digital technologies to support the assessment of client needs, including their safety, support and advice needs, within the Families Hubs.
<b>Response:</b>	Agree.
<b>Comment:</b>	<p>The LCA notes that digital technologies should not be seen as a replacement for the availability of face to face and telephone support (the LCA refers to its recently completed Justice Project in this regard).</p> <p>The proposal also assumes reliable access to digital technologies – in many rural and remote areas - this simply cannot be guaranteed.</p>

#### 4. GETTING ADVICE AND SUPPORT

<b>Proposal 4-3</b>	Families Hubs should advance the safety and wellbeing of separating families and their children while supporting them through separation. They should include on-site out-posted workers from a range of relevant services, including:
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	<ul style="list-style-type: none"> <li>• specialist family violence services;</li> <li>• legal assistance services (such as community legal centres);</li> <li>• family dispute resolution services;</li> <li>• therapeutic services (such as family counselling and specialised services for children);</li> <li>• financial counselling services;</li> <li>• housing assistance services;</li> <li>• health services (such as mental health services and alcohol and other drug services);</li> <li>• gambling help services;</li> <li>• children's contact services; and</li> <li>• parenting support programs or parenting education services (including a program for fathers).</li> </ul>
<b>Response:</b>	Agree.
<b>Comment:</b>	<p>The LCA refers to the observations made in response to Proposal 4.1, above. The suggestion that the staff at the Families Hubs may provide ongoing case management support (paragraphs 2.4 and 4.39 to 4.43 of the Discussion Paper) indicates an ambitious scale of service delivery that will require a significant initial and ongoing resourcing commitment.</p> <p>The LCA notes the following additional comments that have been received from the Law Society of South Australia:</p> <p><i>The Society questions how this system would be managed and integrated within the existing framework. The Society considers there is potential for the doubling up of service provisions, and equally, at the other end, certain services may slip through the cracks, particularly in the context of the existing Family Relationships Centres, which the Society understands will not be replaced but will work in conjunction with or alongside this proposal.</i></p>

#### 4. GETTING ADVICE AND SUPPORT

<b>Proposal 4–4</b>	Local service providers, including Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTIQ and disability organisations, specialist family violence services and legal assistance services, including community legal services, should play a central role in the design of Families Hubs, to ensure that each hub is culturally safe and accessible, responsive to local needs, and builds on existing networks and relationships between local services.
<b>Response:</b>	Agree.
<b>Comment:</b>	<p>The LCA refers to the observations expressed previously with respect to the necessary resourcing to create and continue this ambitious program. Protection of funding for existing essential services supporting more vulnerable or disadvantaged users of the family law system (including Aboriginal and Torres Strait Islanders, those from CALD backgrounds, those with disabilities and LGBTIQ users of family law services) is also essential.</p>

4. GETTING ADVICE AND SUPPORT	
<b>Proposal 4–5</b>	<p>The Australian Government should, subject to positive evaluation, expand the Family Advocacy and Support Service (<b>FASS</b>) in each state and territory to include:</p> <ul style="list-style-type: none"> <li>• an information and referral officer to conduct intake, risk and needs screening and triage, as well as providing information and resources;</li> <li>• a family violence specialist legal service and a family violence specialist support service to assist clients who have experienced or are experiencing family violence; and</li> <li>• an additional legal service and support service, to assist clients who are alleged to have used family violence and clients who are not affected by family violence but have other complex needs.</li> </ul>
<b>Response:</b>	Agree.
<b>Comment:</b>	Provided the government commits recurrent funding to the continuation and expansion of the pilot/model. The LCA notes FASS currently provides more extensive duty lawyer and added social support services to litigants in person affected by or engaging in family violence. This is also consistent with observations made in the LCA submission to the Issues Paper (see paragraph [42]).

4. GETTING ADVICE AND SUPPORT	
<b>Proposal 4–6</b>	The FASS support services should be expanded to provide case management where a client has complex needs and cannot be linked with an appropriate support service providing ongoing case management.
<b>Response:</b>	Agree.
<b>Comment:</b>	Provided the government commits the funding / resources on a recurring basis.

4. GETTING ADVICE AND SUPPORT	
<b>Proposal 4–7</b>	The level and duration of support provided by the FASS should be flexible depending on client need and vulnerability, as well as legal aid eligibility for ongoing legal services.
<b>Response:</b>	Agree.
<b>Comment:</b>	As per Proposal 4-6 above.

4. GETTING ADVICE AND SUPPORT	
<b>Proposal 4–8</b>	The Australian Government should, subject to positive evaluation, roll out the expanded FASS to a greater number of family court locations, including in rural, regional and remote locations.
<b>Response:</b>	Agree.
<b>Comment:</b>	As per Proposal 4-8 above.



5. DISPUTE RESOLUTION	
<b>Proposal 5–1</b>	The guidance as to assessment of suitability for family dispute resolution that is presently contained in reg 25 of the <i>Family Law (Family Dispute Resolution Practitioners) Regulations 2008</i> (Cth) should be relocated to the <i>Family Law Act 1975</i> (Cth).
<b>Response:</b>	Agree.
<b>Comment:</b>	None.

5. DISPUTE RESOLUTION	
<b>Proposal 5–2</b>	The new legislative provision proposed in Proposal 5–1 should provide that, in addition to the existing matters that a family dispute resolution provider must consider when determining whether family dispute resolution is appropriate, the family dispute resolution provider should consider the parties' respective levels of knowledge of the matters in dispute, including an imbalance in knowledge of relevant financial arrangements.
<b>Response:</b>	Agree.
<b>Comment:</b>	None.

5. DISPUTE RESOLUTION	
<b>Proposal 5–3</b>	<p>The <i>Family Law Act 1975</i> (Cth) should be amended to require parties to attempt family dispute resolution prior to lodging a court application for property and financial matters. There should be a limited range of exceptions to this requirement, including:</p> <ul style="list-style-type: none"> <li>• urgency, including where orders in relation to the ownership or disposal of assets are required or a party needs access to financial resources for day to day needs;</li> <li>• the complexity of the asset pool, including circumstances involving third party interests (apart from superannuation trustees);</li> <li>• where there is an imbalance of power, including as a result of family violence;</li> <li>• where there are reasonable grounds to believe non-disclosure may be occurring;</li> <li>• where one party has attempted to delay or frustrate the resolution of the matter; and</li> <li>• where there are allegations of fraud.</li> </ul>
<b>Response:</b>	Not agreed.
<b>Comment:</b>	The LCA submission to the Issues Paper opposed (at paragraphs [222] to [224]) the introduction of family dispute resolution ( <b>FDR</b> ) as a pre-condition to the institution of proceedings for financial relief. That position remains unchanged.

The opposition to the proposal is based on concerns about the potential use of FDR as a tool for delay, cost and oppression to the detriment of vulnerable persons, and the existence already (if not the consistent enforcement by the Courts) of the pre-action procedures in financial cases in the Family Law Rules.

The LCA notes the ALRC comments in paragraphs 5.15 to 5.19 of the Discussion Paper and supports increased availability of legally-assisted mediation services in financial cases, particularly to cater for the needs of couples/parties who may not currently be able to afford existing services and/or where the property pool is relatively modest or the identification and valuation of the assets in the pool is relatively simple.

However, the LCA suggests that making FDR compulsory in all financial disputes is likely to have unintended consequences which are contrary to any overarching goal of reducing costs and minimising conflict. The LCA notes the comparison made between the use of mediation in parenting and financial cases in paragraphs 5.13 and 5.14. The LCA suggests that such comparisons are misleading and do not take account of the significant differences in the nature of dispute resolution for parenting versus financial disputes. They include:

- in most parenting disputes, both parents have relatively good knowledge of the facts relevant to the dispute – they both know their children’s day to day needs and arrangements;
- in most financial disputes, one party, and sometimes both, do not have good knowledge of the other party’s or their joint financial circumstances;
- in most parenting disputes, the legal complexities relate solely to the application of the principles in the Family Law Act;
- in many financial disputes, the legal complexities can include the application of the principles in the Family Law Act, but also matters such as valuation methodologies, taxation laws, interpretation of financial statements and trust deeds, tracing of funds, and stamp duty laws;
- in most mediations in parenting disputes, parties do not need significant assistance of lawyers before, at, or during the process; and
- in most mediations in financial disputes where both parties have engaged lawyers, the mediation will occur after the parties have exchanged disclosure, have identified the asset pool and usually will have identified what values they agree or disagree about. That is so because that is the most cost-effective way, in most cases, of preparing a financial dispute for mediation. If that preparatory work was undertaken in the mediation process itself, the mediation would be protracted and expensive. In many cases, having done the preparatory work, the parties do not need to incur the costs of a mediation as the issues in dispute have been identified and negotiation via lawyers is more cost-effective.

There is available evidence, not referenced by the ALRC, that a significant number of separated couples are already able to resolve their financial dispute (see the Annual Report of the Family Court of Australia which notes that 14,295 Applications for Consent Orders were filed in 2017/18, most of which the LCA suggests would be in relation to financial matters).



If the Government were to decide that financial FDR should be introduced, then the LCA is of the view that the exceptions must be clearly spelled out and accepted, to provide safeguards for vulnerable litigants and avoid the scenarios spelled out above.

The LCA notes that many aspects of such a proposal would require additional consideration, including questions such as:

- Many separated couples currently resolve their financial dispute without recourse to the courts, using a range of services already available in the community including mediation and negotiation – will those services qualify as FDR or as exemptions to compulsory FDR?
- What would be the relationship between compulsory FDR and the 'genuine steps statement' in proposal 5-4?
- What would be the cost to the general community of expanded FDR services? Would the Government subsidise FDR in financial cases, as it currently does with some FDR in parenting cases?
- Will the introduction of compulsory FDR in financial disputes increase costs for some parties? For those couples who seek the advice of lawyers to resolve financial disputes, an additional layer of 'compliance' by requiring attendance at FDR will inevitably increase their costs. The strategic abuse of compulsory FDR by the stronger party may increase costs for the vulnerable party, thereby reducing their capacity to fund legal proceedings to pursue their legitimate entitlements.
- Will the introduction of compulsory FDR in financial disputes lead to the unintended consequence of more litigation, rather than less? For example, will behaviour of some parties become focused on 'gaining the certificate' or gaining the 'right' to issue proceedings, rather than genuine dispute resolution?
- What confidentiality will apply to such FDR? For instance, will information or documents disclosed during FDR, or the non-disclosure of relevant financial material by one party during FDR, be able to be used in evidence if the dispute is not resolved and proceedings are issued?
- What will happen if the parties are already in court in relation to parenting proceedings? Will they be exempted from attending FDR in relation to financial issues so that the parenting and financial dispute can be heard at the same time? Or will the parties need to be involved in two separate sets of proceedings if they can't resolve the financial dispute at FDR?

The LCA notes the following additional comments that have been received from the Law Society of South Australia:

*The Society is concerned that compulsory family dispute resolution with respect to property settlement matters, may impact on vulnerable parties, in particular, in the context of a relationship where there is family violence, and a history of control or a power imbalance.*

*For example, the proposal would be problematic in situations where one party controls the finances, and the other party has no access to or no knowledge of the workings. This may in some cases, create further power imbalances and could possibly extend insofar as to dissuade the disadvantaged party from leaving an abusive or controlling relationship.*



The LCA notes the following additional comments that have been received from the Bar Association of Queensland:

*The ALRC has proposed that the Act be amended to require parties to attempt family dispute resolution prior to lodging a court application for property and financial matters (proposal 5-3). The Association notes the LCA opposition to this proposal, this opposition being based on concerns about the strategic use of family dispute resolution as a tool for delay, cost and oppression.*

*The Association considers that the concerns raised by the LCA, particularly with respect to proper exceptions to protect vulnerable litigants in parenting matters, are valid.*

*However, the Association considers there would be significant benefit in family dispute resolution being required for property matters, and this view is outlined at pages 14 to 17 of the Association's submission to the ALRC on the Issues Paper.*

The LCA notes the concerns of the Victorian Bar that there is an additional risk of increased litigation about whether the exceptions to compulsory FDR do apply or should apply in particular cases, similar to arguments in parenting cases about whether the exemptions to s60I have been made out. This leads to increased costs and delay.

## 5. DISPUTE RESOLUTION

### Proposal 5–4

The *Family Law Act 1975* (Cth) should be amended to specify that a court must not hear an application for orders in relation to property and financial matters unless the parties have lodged a genuine steps statement at the time of filing the application. The relevant provision should indicate that if a court finds that a party has not made a genuine effort to resolve a matter in good faith, they may take this into account in determining how the costs of litigation should be apportioned.

### Response:

Agreed.

### Comment:

Provided the form of safeguards as referred to under Proposal 5-3 are in place, then a genuine steps statement is supported by the LCA. The LCA suggests that if compulsory FDR is introduced by government, consideration should be given to the filing of a genuine steps statement being an exemption to compulsory FDR. That is, if parties have made attempts to settle their financial dispute through mechanisms other than mediation (such as negotiation between lawyers), they should not be required to bear the cost of attending compulsory FDR.

The LCA queries whether any amendment is required to the terms of section 117, given the breadth of paragraphs 117(2A)(c) and (g). The LCA is of the view that changes to section 117, in this context, would be superfluous.

## 5. DISPUTE RESOLUTION

<b>Proposal 5–5</b>	<p>The <i>Family Law Act 1975</i> (Cth) should include a requirement that family dispute resolution providers in property and financial matters should be required to provide a certificate to the parties where the issues in dispute have not been resolved. The certificate should indicate that:</p> <ul style="list-style-type: none"> <li>the matter was assessed as not suitable for family dispute resolution;</li> <li>the person to whom the certificate was issued had attempted to initiate a family dispute resolution process but the other party has not responded;</li> <li>the parties had commenced family dispute resolution and the process had been terminated; or</li> <li>the matter had commenced and concluded with partial resolution of the issues in dispute.</li> </ul>
<b>Response:</b>	If FDR were to be introduced for financial matters, then this is agreed.
<b>Comment:</b>	See responses to Proposals 5-3 and 5-4 above.

<b>5. DISPUTE RESOLUTION</b>	
<b>Question 5–1</b>	Should the requirement in the <i>Family Law Act 1975</i> (Cth) that proceedings in property and financial matters must be instigated within twelve months of divorce or two years of separation from a de facto relationship be revised?
<b>Response:</b>	Disagree.
<b>Comment:</b>	The LCA is of the view that the time limitations in the Family Law Act are appropriate, strike a proper balance, and encourage severance of financial relations following the end of a marriage or relationship.

<b>5. DISPUTE RESOLUTION</b>	
<b>Proposal 5–6</b>	<p>The <i>Family Law Act 1975</i> (Cth) should set out the duties of parties involved in family dispute resolution or court proceedings for property and financial matters to provide early, full and continuing disclosure of all information relevant to the case. For parties involved in family dispute resolution or court proceedings, disclosure duties should apply to:</p> <ul style="list-style-type: none"> <li>earnings, including those paid or assigned to another party;</li> <li>vested or contingent interests in property, including that which is owned by a legal entity that is fully or partially owned or partially controlled by a party;</li> <li>income earned by a legal entity fully or partially owned or controlled by a party, including income that is paid or assigned to any other party, person or legal entity;</li> <li>superannuation interests; and</li> <li>liabilities and contingent liabilities.</li> </ul>
<b>Response:</b>	Agree.
<b>Comment:</b>	The LCA supported these matters in its submission to the Issues Paper (see paragraphs [219] to [221]).

5. DISPUTE RESOLUTION	
<b>Proposal 5–7</b>	<p>The provisions in the <i>Family Law Act 1975</i> (Cth) setting out disclosure duties should also specify that if a court finds that a party has intentionally failed to provide full, frank and timely disclosure it may:</p> <ul style="list-style-type: none"> <li>• impose a consequence, including punishment for contempt of court;</li> <li>• take the party's non-disclosure into account when determining how costs are to be apportioned;</li> <li>• stay or dismiss all or part of the party's case; or</li> <li>• take the party's non-disclosure into account when determining how the financial pool is to be divided.</li> </ul>
<b>Response:</b>	May not be required.
<b>Comment:</b>	<p>While LCA does not oppose this Proposal in principle, the provisions of subsection 117(2A) are already sufficiently broad to cover these matters and LCA is concerned that any amendment would be superfluous.</p> <p>The LCA is concerned that proposals of this nature lengthen by unnecessary duplication the Family Law Act, and are irreconcilable with Proposal 3-1 for simpler and clearer legislation.</p> <p>The LCA notes the following additional comments that have been received from the ACT Law Society's Family Law Section, who disagree with the LCA position:</p> <p><i>We are of the view that additional provisions (outside of s117) in relation to consequences of non-disclosure would ideally result in greater compliance, less court-time and more streamlined processes of individual matters.</i></p> <p><i>The rationale being that if parties were aware that there were very specific provisions pertaining to non-disclosure, they would be more inclined to comply in a timely way.</i></p> <p><i>Disclosure encourages early settlement which ideally would result in a lessening of the burden on the Courts.</i></p>

5. DISPUTE RESOLUTION	
<b>Question 5–2</b>	Should the provisions in the <i>Family Law Act 1975</i> (Cth) setting out disclosure duties be supported by civil or criminal penalties for non-disclosure?
<b>Response:</b>	Disagree.
<b>Comment:</b>	<p>The LCA opposes any such change as there is already sufficient mechanisms in the existing provisions of the Family Law Act and the relevant court rules.</p> <p>Section 117(2A) of the Family Law Act gives a very broad power to depart from the general rule as to costs in an appropriate case including the power to make orders for costs on a party/party basis, on the indemnity basis, and against legal practitioners.</p> <p>There is further existing power to order a stay of an application an appropriate case, or to make an order that a case proceed on an undefended basis where</p>

	<p>there has been a fundamental failure to comply with court directions or rules including as to disclosure.</p> <p>The LCA is concerned that Proposals of this nature lengthen by unnecessary duplication the Family Law Act, and are irreconcilable with Proposal 3-1 for simpler and clearer legislation.</p> <p>The LCA notes the following additional comments that have been received from the South Australian Bar Association:</p> <p><i>It is the view of SABAR that a more rigorous approach be taken by Judicial Officers in ordering cost based orders for parties who fail to disclose or comply with Court Orders.</i></p>
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5. DISPUTE RESOLUTION	
<b>Proposal 5–8</b>	<p>The <i>Family Law Act 1975</i> (Cth) should set out advisers' obligations in relation to providing advice to parties contemplating or undertaking family dispute resolution, negotiation or court proceedings about property and financial matters. Advisers (defined as a legal practitioner or a family dispute resolution practitioner) must advise parties that:</p> <ul style="list-style-type: none"> <li>• they have a duty of full, frank and continuing disclosure, and, in the case of family dispute resolution, that compliance with this duty is essential to the family dispute resolution process; and</li> <li>• if the matter proceeds to court and a party fails to observe this duty, courts have the power to: <ul style="list-style-type: none"> <li>(a) impose a consequence, including punishment for contempt of court;</li> <li>(b) take the party's non-disclosure into account when determining how costs are to be apportioned;</li> <li>(c) stay or dismiss all or part of the party's case; and</li> <li>(d) take the party's non-disclosure into account when determining how the financial pool is to be divided.</li> </ul> </li> </ul>
<b>Response:</b>	Generally agreed.
<b>Comment:</b>	<p>Assuming that the first dot point in Proposal 5-8 signals the intention to largely transpose the pre-action procedures (including obligations upon legal advisers) from the Family Law Rules into the Family Law Act, then this is supported by the LCA and consistent with the response by the LCA to the Issues Paper.</p> <p>In respect of the second dot point in Proposal 5-8, the LCA submits that there are already existing legislative provisions in the Family Law Act that cover each of those matters and case law supportive of same, so it is unclear why they would be duplicated. The LCA is concerned that proposals of this nature lengthen by unnecessary duplication the Family Law Act, and are irreconcilable with Proposal 3-1 for simpler and clearer legislation.</p>

5. DISPUTE RESOLUTION	
<b>Question 5–3</b>	Is there a need to review the process for showing that the legal requirement to attempt family dispute resolution prior to lodging a court application for parenting orders has been satisfied? Should this process be aligned with the process proposed for property and financial matters?
<b>Response:</b>	Agree.
<b>Comment:</b>	The LCA would support a review of the process in parenting matters and suggests that the utility of section 60I certificates could be improved (see the LCA submission to the Issues Paper, at paragraph [359]).

5. DISPUTE RESOLUTION	
<b>Proposal 5–9</b>	<p>The Australian Government should work with providers of family dispute resolution services, legal assistance services, specialist family violence services and Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTIQ and disability organisations to support the further development of culturally appropriate and safe models of family dispute resolution for parenting and financial matters. This should include:</p> <ul style="list-style-type: none"> <li>examining the feasibility of means-tested fee for service and cost recovery models to be provided by legal aid commissions and community organisations such as Family Relationship Centres;</li> <li>the further development of dispute resolution models for property and financial matters involving, where necessary, support by financial counsellors and the provision of legal advice by private practitioners and legal assistance services, such as legal aid commissions, community legal centres and the Legal Advice Line that is part of Family Relationships Advice Line; and</li> <li>amendments to existing funding agreements and practice agreements to support this work.</li> </ul>
<b>Response:</b>	Agreed.
<b>Comment:</b>	LCA supports the proposal, however notes that it raises substantial issues as to resources and funding.

5. DISPUTE RESOLUTION	
<b>Proposal 5–10</b>	<p>The Australian Government should work with providers of family dispute resolution services, private legal services, financial services, legal assistance services, specialist family violence services and Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTIQ and disability organisations to develop effective practice guidelines for the delivery of legally assisted dispute resolution (<b>LADR</b>) for parenting and property matters.</p> <p>These Guidelines should include:</p> <ul style="list-style-type: none"> <li>guidance as to when LADR should not be applied in matters involving family violence and other risk related issues;</li> </ul>

	<ul style="list-style-type: none"> <li>• effective practice in screening, assessing and responding to risk arising from family violence, child safety concerns, mental ill-health, substance misuse and other issues that raise questions of risk;</li> <li>• the respective roles and responsibilities of the professionals involved;</li> <li>• the application of child-inclusive practice;</li> <li>• the application of approaches to support cultural safety for Aboriginal and Torres Strait Islander people;</li> <li>• the application of approaches to support cultural safety for families from culturally and linguistically diverse communities;</li> <li>• the application of approaches to support effective participation for LGBTIQ families;</li> <li>• the application of approaches that support effective participation for families where parents or children have disability;</li> <li>• practices relating to referral to other services, including health services, specialist family violence services and men's behaviour change programs;</li> <li>• practices relating to referrals from and to the family courts; and</li> <li>• information sharing and collaboration with other services involved with the family.</li> </ul>
<b>Response:</b>	Agree.
<b>Comment:</b>	The LCA supports the proposal, however notes that it raises substantial issues as to resources and funding.

## 5. DISPUTE RESOLUTION

<b>Proposal 5–11</b>	These Guidelines should be regularly reviewed to support evidence-informed policy and practice in this area.
<b>Response:</b>	Agree.
<b>Comment:</b>	LCA supports the proposal, however notes that it raises substantial issues as to resources and funding.

## 6. RESHAPING THE ADJUDICATION LANDSCAPE

<b>Proposal 6–1</b>	The family courts should establish a triage process to ensure that matters are directed to appropriate alternative dispute resolution processes and specialist pathways within the court as needed.
<b>Response:</b>	Agreed as a general proposition but see below for qualifications.
<b>Comment:</b>	The LCA supports the reinstatement of a proper, appropriate and resourced triage system for the assessment of proceedings. The Family Court established and successfully conducted such a system in the late 1990s and early 2000s, involving registrars and family consultants before both changing management practices and reducing resources resulted in the system being unable to function effectively. In conjunction with a case management system planned and implemented after extensive consultation, research and study of comparative case management system, the Family Court then provided an effective system for the proper disposition of proceedings on a timely basis.

	<p>The LCA is opposed to the use of judicial resources for the primary conduct of such a system. One of the most valuable resources that the system has, and the most costly, is judge time and it ought be allocated to the determination of proceedings that require allocation of this resource. The case management of proceedings ought to otherwise be undertaken by properly qualified and experienced Registrars, supported in parenting proceedings by Family Consultants.</p> <p>The broader system ought to ensure that by the time proceedings are commenced, and absent other good reason, ADR processes have been exhausted. It ought not be the role of the Courts to divert parties to ADR processes where they have already engaged in such process, often at considerable cost and delay, prior to commencing proceedings. The current practice of the Federal Circuit Court in forcing parties to undertake further ADR where they have already participated fully in such processes increases delay, costs and often forces parties to enter into disadvantageous resolutions because of those imposts.</p> <p>The purpose should be proper case management and not simply diversion.</p> <p>If the other reform proposals are implemented (and as current practice demonstrates in many instances) filing proceedings is a last resort after ADR has been exhausted and/or the matter is unsuitable.</p> <p>Any triage process should not add to cost and delay; nor should it soak up scarce judicial resources which would be better applied to determination of cases— any triage to be at Registrar level, where the Registrar can send the matter to the next step or event which is actually appropriate for the specific case.</p>
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6. RESHAPING THE ADJUDICATION LANDSCAPE	
<b>Proposal 6–2</b>	The triage process should involve a team-based approach combining the expertise of the court's registrars and family consultants to ensure initial and ongoing risk and needs assessment and case management of the matter, continuing, if required, until final decision.
<b>Response:</b>	See above.
<b>Comment:</b>	See comments on Proposal 6-1.

6. RESHAPING THE ADJUDICATION LANDSCAPE	
<b>Proposal 6–3</b>	<p>Specialist court pathways should include:</p> <ul style="list-style-type: none"> <li>• a simplified small property claims process;</li> <li>• a specialist family violence list; and</li> <li>• the Indigenous List.</li> </ul>
<b>Response:</b>	Agreed in part.
<b>Comment:</b>	The LCA submits that the establishment of 'specialist court pathways' ought not be understood as a case management tool or approach as opposed to a means of ensuring that proceedings involving particular issues are allocated



	<p>appropriate attention and resources within the Court system. Such issues can and ought to be the subject of particular attention in that context.</p> <p>The LCA submits that any case management system ought to seek to identify a matter by the level of resources that the Court will be required to allocate to determine that matter – for example, short or contained matters (which would encompass most small property claims), complex matters (encompassing those requiring the intense allocation of judicial resources to determine the most demanding parenting and financial matters) and the balance or ‘standard’ matters. This approach permits a differential approach to the management of each matter within broad and objectively discernible parameters.</p> <p>Such approach also permits the identification within such a system of matters which raise particular issues requiring more nuanced attention – for example, the Magellan program and the Indigenous List. Further, matters raising issues of family violence which require a particular approach or attention can also be identified.</p> <p>There are a series of difficulties in constructing a case management system or pathways by reference to particular issues such as the three raised for consideration. As commented upon below, ‘small’ in the context of property claims has a meaning that is likely to diverge substantially across the country and from region to region and says nothing about the nature of the issues involved nor the significance of those issues to the parties. Further, the current definition of ‘family violence’ in the Family Law Act is of such breadth that a substantial majority of proceedings could be characterised as raising such a potential issue, whether ultimately relevant to the proceedings or not.</p>
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6. RESHAPING THE ADJUDICATION LANDSCAPE	
<b>Proposal 6–4</b>	<p>The <i>Family Law Act 1975</i> (Cth) should provide for a simplified court process for matters involving smaller property pools. The provisions should allow for:</p> <ul style="list-style-type: none"> <li>the court to have discretion, subject to the requirements of procedural fairness, not to apply formal rules of evidence and procedure in a given case;</li> <li>the proceedings to be conducted without legal technicality; and</li> <li>the simplified court procedure to be applied by the court on its own motion or on application by a party.</li> </ul>
<b>Response:</b>	See below comments.
<b>Comment:</b>	<p>The LCA submits that it is difficult to have a common definition of what is to constitute a ‘small’ property pool across the Commonwealth. There are obvious vast differences in property values between various states and regions.</p> <p>Further, it is in the ‘small’ property cases that the consequences of a determination of the issues will be of far greater and lasting significance for parties and children and their futures than in ‘large’ cases.</p> <p>It is thus to be recognised that any differing approach to the determination of ‘small’ property cases need to appropriately balance the perceived aim of quicker and cheaper justice with the overriding mandate that a just and</p>



	<p>equitable outcome be achieved. The adoption of a ‘simplified court procedure’ is likely to be one that provides a second (and lesser) tier of justice to those for whom the financial consequences of a determination are the most significant. The LCA is fundamentally opposed to any notion predicated upon a process that would see the level of justice able to be accessed by a family law litigant being determined by their financial means.</p> <p>The primary difficulty in determining ‘small’ property matters presently is the absence of available judicial resources to do so on a timely basis. Such matters are dealt with in the same way as every other matter before the Courts. Delay increases costs and uncertainty and, whilst not universally so, the delay is greatest in the more economically disadvantaged regions – such as clients at the Parramatta registry in NSW.</p> <p>The most appropriate way in which to deal with ‘small’ property matters is to ensure that such matters are appropriately identified early in the case management process; that there are Registrars available to refine and define the issues on a timely basis; and that there is, where necessary, a Judge available to determine the matter on a timely basis.</p> <p>The LCA notes the following additional comments that have been received from the South Australian Bar Association:</p> <p><i>SABAR would support a process whereby small property pools are expedited for a final hearing taking 1 day or less. It is important for these smaller cases that they be dealt with before the cost of legal fees impacts on the capacity of the parties to resolve the matter and/or one of the parties is so financially disadvantaged that they remain in a precarious financial position pending Trial. Very often the financially disadvantaged party is the wife who has the care of children.</i></p>
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6. RESHAPING THE ADJUDICATION LANDSCAPE	
<b>Proposal 6–5</b>	<p>In considering whether the simplified court procedure should be applied in a particular matter, the court should have regard to:</p> <ul style="list-style-type: none"> <li>• the relative financial circumstances of the parties;</li> <li>• the parties’ relative levels of knowledge of their financial circumstances;</li> <li>• whether either party is in need of urgent access to financial resources to meet the day to day needs of themselves and their children;</li> <li>• the size and complexity of the asset pool; and</li> <li>• whether there are reasonable grounds to believe there is history of family violence involving the parties, or risk of family violence.</li> </ul> <p>The court should give weight to each of these factors as it sees fit.</p>
<b>Response:</b>	Disagree.
<b>Comment:</b>	<p>LCA refers to the earlier comments made in relation to case management processes.</p> <p>In addition to the matters set out above, there are a series of issues emerging from the identified matters which require consideration:</p>

	<ul style="list-style-type: none"> <li>the matters identified rarely remain static during a proceeding – financial circumstances change, needs change, family violence emerges or occurs and the relative levels of knowledge change (both for better or worse and consequent upon changes in or losses of legal representation and advice). One consequence of change relevant here is the change in the suitability of a matter for the application of any varied or differing procedure together with the cost and delay entailed with changes to the procedures applied to the determination;</li> <li>identification of each matter on an informed and proper basis will, of itself, add a layer of cost and complexity to the management of the case – for the reasons set out above, that a matter at face value may involve a ‘small’ amount of money does not inform nor convey any information as to the issues involved, that which is required to determine those issues and the consequences of such a determination. Further, in order to properly consider the consequences of such a characterisation on their rights and entitlements, a party will need to have the opportunity for and benefit of proper and informed legal advice; and</li> <li>if family violence is to be a relevant consideration, for the reasons already set out, it is likely to preclude the application of any proposed procedure in many cases if the simple existence of such an allegation within the meaning of section 4AA of the Family Law Act is to be sufficient. If it is not, there are considerable difficulties in determining that family violence which would be sufficient and that which would not and how the occurrence of such violence is to be determined or not – for example, will the existence of an allegation be sufficient?</li> </ul>
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6. RESHAPING THE ADJUDICATION LANDSCAPE	
<b>Proposal 6–6</b>	<p>The family courts should consider developing case management protocols to support implementation of the simplified process for matters with smaller property pools, including provision for:</p> <ul style="list-style-type: none"> <li>case management by court registrars to establish, monitor and enforce timelines for procedural steps, including disclosure;</li> <li>conducting a conciliation conference once the asset pool has been identified; and</li> <li>establishing a standard timetable for processing claims with expected timeframes for case management of events (mentions, conciliation conferences and trial).</li> </ul>
<b>Response:</b>	See above response to Proposal 6-5.
<b>Comment:</b>	<p>The LCA repeats the prior submissions advanced in relation to the proper approach to case management, including the role that Registrar’s should have. Registrars should be used for case management as identified together with the conduct of conciliation conferences, the latter of which continues to occur in the Family Court where resources permit.</p> <p>Small property pool cases do not make those matters necessarily easier to determine as every percentage point and every dollar counts. They need special care and attention not a formulaic approach.</p>

6. RESHAPING THE ADJUDICATION LANDSCAPE	
<b>Proposal 6–7</b>	<p>The family courts should consider establishing a specialist list for the hearing of high risk family violence matters in each registry. The list should have the following features:</p> <ul style="list-style-type: none"> <li>• a lead judge with oversight of the list;</li> <li>• a registrar with responsibility for triaging matters into the list and ongoing case management;</li> <li>• family consultants to prepare short and long reports on families whose matters are heard in the list; and</li> <li>• a cap on the number of matters listed in each daily hearing list.</li> </ul> <p>All of the professionals in these roles should have specialist family violence knowledge and experience.</p>
<b>Response:</b>	If family violence was the only critical issue in family law matters, then this proposal would be agreed to, but it is not.
<b>Comment:</b>	<p>At first blush, this proposal appears positive. However, deeper consideration reveals an idea which is fraught with tensions and difficulties. For example:</p> <ul style="list-style-type: none"> <li>• What is 'high risk'; from whose perspective (parent and/or child), and at what time?</li> <li>• Will this list include property matters, as well as children's cases?</li> <li>• Who will decide if the matter ought to be on the list or not – that is, some form of prima facie determination will be required on an interim basis? How is the respondent to such claims to properly participate in this preliminary determination phase?</li> <li>• If there is to be some kind of discrete trial, then the alleged victim may be cross-examined twice, being at this preliminary phase and then again at the trial-proper;</li> <li>• What is the purpose of the separate listing - i.e. does allegation or meeting this criterion mean the case gets quasi-expedition?</li> </ul> <p>As a matter of general practice, by the time what might be termed 'high risk' cases come to the family courts, they normally (or should) have their AVO/DVO in place from the State/Territory court.</p> <p>There is perhaps an assumption in the Discussion Paper that does require challenging - family violence is a critical issue, but it is not the only issue of complexity in family law disputes. What about cases, and there are a huge number of them in the system, that do not fall within the family violence criteria but throw up similar risk factors for children and spouses due to drugs, alcohol, personality disorders, psychiatric issues or where no party is a responsible parent (for any of many reasons) and the state or territory child protection department will not intervene?</p>

6. RESHAPING THE ADJUDICATION LANDSCAPE	
<b>Question 6–1</b>	What criteria should be used to establish eligibility for the family violence list?
<b>Response:</b>	See above.
<b>Comment:</b>	See response to Proposal 6-7 above. If the existing definition of family violence were the criteria and it were applied to any incident of family violence

	that may have occurred at any point in the relationship and regardless of the age of the children, then experience suggests that the majority of property and parenting matters would be on the family violence list.
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6. RESHAPING THE ADJUDICATION LANDSCAPE	
<b>Question 6–2</b>	What are the risks and benefits of early fact finding hearings? How could an early fact finding process be designed to limit risks?
<b>Response:</b>	See comments below.
<b>Comment:</b>	<p>See above responses to Proposals 6-1 and 6-7. In the Brisbane Registry, FM Wilson (as he was then) trialled early discrete issues hearings (especially where allegations of sexual abuse were made) and despite good intentions, it did not with the greatest of respect, work in the view of the LCA. Instead, it added an extra layer of litigation and thus cost to the parties.</p> <p>It also needs to be understood that even where a court makes a finding that family violence did or did not happen, that does not dispose of the wider dispute. For example, notwithstanding a finding of no family violence at an early, discrete hearing, the accuser may still run a case that their belief system about the other party is such that it would compromise their parenting if time between the children and the now innocent party were allowed (see the <i>Russell &amp; Close</i> style cases).</p> <p>As for property proceedings, <i>Kennon</i> requires two steps: the finding of family violence (or other such discrediting conduct) and that that made the party's contributions more onerous. It would be artificial to deal with only the first limb at a discrete hearing, without the second. But then it would be equally artificial to deal with the two limbs at a discrete hearing, without regard to the many forms of contributions which are relevant in property proceedings.</p>

6. RESHAPING THE ADJUDICATION LANDSCAPE	
<b>Proposal 6–8</b>	The Australian Government should work with state and territory governments to develop and implement models for co-location of family law registries and judicial officers in local court registries. This should include local courts in rural, regional and remote locations.
<b>Response:</b>	Agreed, provided funding and resources exist now and are committed to by the government for the future
<b>Comment:</b>	<p>Resourcing and funding will inevitably be a major issue to be addressed.</p> <p>Rockhampton and Mackay, QLD are examples of a FCCA judge not getting chambers, let alone court rooms, in the local courts.</p> <p>The LCA notes the following additional comments that have been received from the ACT Law Society's Family Law Section:</p> <p><i>Local courts especially in rural areas have limited space and the facilities may not be ideal. By way of example, currently the FCCA at Port Macquarie sits in the old Local Court at Wauchope. Not having a Family Law registry also means that subpoena documents cannot be sent</i></p>

*between registries as State Courts will not accept Federal Court documents. This necessitates a 6 hour round trip to Newcastle from Port Macquarie to view subpoenas.*

## 6. RESHAPING THE ADJUDICATION LANDSCAPE

<b>Question 6–3</b>	What changes to the design of the Parenting Management Hearings process are needed to strengthen its capacity to apply a problem-solving approach in children's matters? Are other changes needed to this model?
<b>Response:</b>	The LCA does not support Parenting Management Hearings ( <b>PMH</b> )
<b>Comment:</b>	<p>The LCA is opposed to the establishment of PMH, and repeats and relies upon its earlier submissions on this deeply flawed proposal.</p> <p>Suffice to say, the PMH will only serve to further disempower the already disempowered, and further disenfranchise the already disenfranchised.</p>

## 6. RESHAPING THE ADJUDICATION LANDSCAPE

<b>Question 6–4</b>	What other ways of developing a less adversarial decision making process for children's matters should be considered?
<b>Response:</b>	The LCA respectfully disagrees with the underlying foundation of the question.
<b>Comment:</b>	<p>This question operates on the assumption that the adversarial system is, of itself, bad. We refer to the LCA's submission earlier this year to the Issues Paper which extensively canvassed this issue and will not be repeated here.</p> <p>Division 12A of the Family Law Act provides an existing gateway which can be better utilised.</p> <p>Proper resourcing of family consultants and sufficient judicial officers to provide timely determinations is the essential missing factor.</p> <p>Fact finding is a critical process and cannot with respect be dumbed-down. Equally, it is a myth that an inquisitorial process is a cure-all.</p>

## 6. RESHAPING THE ADJUDICATION LANDSCAPE

<b>Proposal 6–9</b>	<p>The Australian Government should develop a post-order parenting support service to assist parties to parenting orders to implement the orders and manage their co-parenting relationship by providing services including:</p> <ul style="list-style-type: none"> <li>• education about child development and conflict management;</li> <li>• dispute resolution; and</li> <li>• decision making in relation to implementation of parenting orders.</li> </ul>
<b>Response:</b>	Disagree.
<b>Comment:</b>	The LCA considers it important for parents to receive support and if necessary, guidance, post the making of final parenting orders where implementation causes ongoing parental conflict. The LCA notes family consultants can be required to supervise or assist compliance with parenting orders pursuant to

section 65L, although these orders are infrequently made due to funding constraints. The LCA recommends increased resourcing of Child Dispute Services to enable Family Consultants to perform this function and more orders made under section 65L. The LCA would also support more funding for Independent Children's Lawyers to remain involved in matters post final orders for a period of time to assist the parties in the implementation of those orders.

The LCA also notes services currently exist which provide education about child development and conflict management (parenting courses and parenting after separation /parenting order programmes). Consideration ought to be given to increasing the funding for the parenting order programme to make it more accessible and a strengthened problem solving focus. Additionally, the LCA notes dispute resolution is offered through private family dispute resolution practitioners, family relationship centres (**FRCs**) and legal aid commissions. The LCA is concerned the proposal may divert funding from these existing services.

The LCA has serious reservations about the proposed decision making function suggested in the proposal. It would require someone other than a judicial officer (envisaged to be from a social science background) to interpret the intent and effect of parenting orders including decisions about their implementation (in the event mediation has failed).

The proposal suggests the parenting order coordinator 'arbitrate' the dispute to which the parties agree to be bound. The LCA notes the existing arbitration provisions contained in Part II Division 4 and Part IIIB Div 4 of the Family Law Act and Part V of the Regulations, enable arbitration in financial matters. Despite these broad provisions, arbitration is not a common feature of non-court based dispute resolution processes. The LCA is concerned about the lack of the necessary legislative underpinnings to support the proposed model, and how this intersects with the contravention/enforcement powers contained in Division 13A in the event of non-compliance despite the 'arbitral decision' particularly where coordinators cannot make binding changes to the existing orders.

The LCA questions the utility of such a role where the stated intended clients for the service are those '*highly conflicted parents...whose relationship is characterised by poor communication, low cooperation and high levels of conflict, but not family violence...not intended or appropriate for cases where there has been a history of coercive controlling violence, an issue that is often present in contravention proceedings*' (Discussion Paper, at 6.93). In the LCA's experience it is precisely these client cohorts that have had to resort to litigation in the first place where education and mediation has failed or deemed unsuitable.

The LCA submits that it is incumbent on the parties and the profession that parenting orders be drafted in a manner which are understandable, practicable and enforceable as intended by the legislation.

The LCA notes the following additional comments that have been received from the South Australian Bar Association:

*It is the view of SABAR that there is already a plethora of such services within the community. For example Centacare, Relationships Australia, Anglicare and community based legal service centres who are able to*



	<i>assist parties. SABAR does not see the need for any further support services to be added to the list of service providers already available to litigants.</i>
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6. RESHAPING THE ADJUDICATION LANDSCAPE	
<b>Proposal 6–10</b>	The Australian Government should work with relevant stakeholders, including the Community Services and Health Industry Skills Council, the Australian Psychological Society, the Australian Association of Social Workers, the Mediator Standards Board, Family & Relationship Services Australia and specialist family violence services peak bodies, to develop intake assessment processes for the post-order parenting support service.
<b>Response:</b>	Disagree.
<b>Comment:</b>	See above comments in relation to Proposal 6-9.

6. RESHAPING THE ADJUDICATION LANDSCAPE	
<b>Proposal 6–11</b>	The proposed Family Law Commission (Proposal 12–1) should develop accreditation and training requirements for professionals working in the post-order parenting support service.
<b>Response:</b>	Disagree.
<b>Comment:</b>	The LCA does not support establishment of the Family Law Commission.

6. RESHAPING THE ADJUDICATION LANDSCAPE	
<b>Proposal 6–12</b>	<p>The Australian Government should ensure that all family court premises, including circuit locations and state and territory court buildings that are used for family law matters, are safe for attendees, including ensuring the availability and suitability of:</p> <ul style="list-style-type: none"> <li>• waiting areas and rooms for co-located service providers, including the extent to which waiting areas can accommodate large family groups;</li> <li>• safe waiting areas and rooms for court attendees who have concerns for their safety while they are at court;</li> <li>• private interview rooms;</li> <li>• multiple entrances and exits;</li> <li>• child-friendly spaces and waiting rooms;</li> <li>• security staffing and equipment;</li> <li>• multi-lingual and multi-format signage;</li> <li>• remote witness facilities for witnesses to give evidence off site and from court-based interview rooms; and</li> <li>• facilities accessible for people with disability.</li> </ul>
<b>Response:</b>	Agree.
<b>Comment:</b>	The LCA recognises the importance of ensuring the provision of safe and accessible court facilities and agrees with Proposal 6-12. The proposal is made at a time when in many Family Law Courts around Australia, the



	<p>minimum standards that ought to be expected, are not met. The challenge of securing suitable buildings to house courts (if it is accepted that certain existing court buildings are not fit for purpose) will be particularly difficult in rural and remote areas.</p> <p>The LCA observes that the cost of ensuring that all Family Law Courts are safe for attendees (beyond security services at the entrance) and meet the criteria listed in the Discussion Paper will be significant – however, the LCA supports the proposal and considers the allocation of that funding to improve these resources, as essential.</p>
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7. CHILDREN IN THE FAMILY LAW SYSTEM	
<b>Proposal 7–1</b>	Information about family law processes and legal and support services should be available to children in a range of age-appropriate and culturally appropriate forms.
<b>Response:</b>	Agree.
<b>Comment:</b>	The LCA notes that information about the family law process has also been developed by the Family Law Court’s Children’s Committee, National Legal Aid (ICL web-site) and Legal Aid NSW ‘Best for Kids’ in various formats (booklet and digital) and various age ranges.

7. CHILDREN IN THE FAMILY LAW SYSTEM	
<b>Proposal 7–2</b>	The proposed Families Hubs (Proposals 4–1 to 4–4) should include out-posted workers from specialised services for children and young people, such as counselling services and peer support programs.
<b>Response:</b>	Agree, if the Families Hubs were established and funded.
<b>Comment:</b>	<p>Provided Families Hubs are established and funded. The LCA supports children and young people accessing and receiving support and counselling. The LCA notes that NGOs currently receive funding for a suite of family relationship services including Supporting Children after Separation programme which has been designed to provide counselling for children experiencing family law disputes.</p> <p>The LCA notes the following additional comments that have been received from the ACT Law Society’s Family Law Section:</p> <p><i>In relation to proposal 7-2, our Society makes the additional comment that the Hubs are unlikely to equally benefit children and young people in metropolitan areas as they do in rural, regional and remote areas (“RRR areas”). Care will need to be taken in relation to the posting of out-posted workers and the distribution of those resources across large geographical distances.</i></p>

7. CHILDREN IN THE FAMILY LAW SYSTEM
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<b>Proposal 7–3</b>	The <i>Family Law Act 1975</i> (Cth) should provide that, in proceedings concerning a child, an affected child must be given an opportunity (so far as practicable) to express their views.
<b>Response:</b>	Agree generally.
<b>Comment:</b>	<p>In contested matters, children are often provided with an opportunity to do so through reports prepared by family consultants or single experts. However, the LCA is of the view that a qualification is required for the requirement, in that it not only be '<i>so far as practicable</i>' but also in their best interest to express their views. The LCA notes many contested proceedings are highly acrimonious and emotionally charged relating to the care of and arrangements for children and often involve allegations of risk. The LCA refers to and repeats its submission to the Issues Paper at paragraphs [338] to [341].</p> <p>The LCA notes the following additional comments that have been received from the South Australian Bar Association:</p> <p><i>It is the view of SABAR that these provisions are already in place. For example, it is common for the Court to appoint Independent Children's Lawyer's in cases where the relevant criteria is met or the children are of an age where their wishes are brought to account. It is not uncommon for the Court to direct that an Independent Children's Lawyer is to meet with the children so that their wishes can be put before the Court. In addition it is common for the wishes of the children to be clarified through the use of Family Assessment Reports.</i></p>

## 7. CHILDREN IN THE FAMILY LAW SYSTEM

<b>Proposal 7–4</b>	The <i>Family Law Act 1975</i> (Cth) should provide that, in any family dispute resolution process concerning arrangements for a child, the affected child must be given an opportunity (so far as practicable) to express any views about those arrangements.
<b>Response:</b>	Agree generally.
<b>Comment:</b>	<p>The LCA refers to and repeats the concerns set out in Proposal 7-3 and to others articulated in the response to the Issues Paper at paragraphs [374] to [377].</p> <p>The LCA also notes current models for child-inclusive FDR and LADR exist nationally.</p> <p>The LCA agrees with ALRC's recommendation for the design of best practice guidelines. Children should be assessed by a skilled professional with the relevant expertise and experience in family law processes, who can and should support the child through the process. There ought to also be an assessment of parents' ability and preparedness to receive the views of their children through this process.</p> <p>The LCA agrees there will need to be an expansion of the availability of child-inclusive FDR with attendant increase in resourcing to support all this.</p>

7. CHILDREN IN THE FAMILY LAW SYSTEM	
<b>Proposal 7–5</b>	The Attorney-General's Department (Cth) should work with the family relationship services sector to develop best practice guidance on child-inclusive family dispute resolution, including in relation to participation support where child-inclusive family dispute resolution is not appropriate.
<b>Response:</b>	Agree.
<b>Comment:</b>	It is recommended the government also work with legal aid commissions who also offer child-inclusive LADR.

7. CHILDREN IN THE FAMILY LAW SYSTEM	
<b>Proposal 7–6</b>	There should be an initial and ongoing assessment of risk to the child of participating in family law proceedings or family dispute resolution, and processes put in place to manage any identified risk.
<b>Response:</b>	Agree in principle.
<b>Comment:</b>	<p>Provided sufficient and recurring funding is committed to such ongoing assessments to ensure participation is in the child's best interests; enabling a child wishing to express those views, to parents who are receptive to those views and account for the child's needs based on their age, stage of development and degree of involvement in the parental dispute.</p> <p>It is imperative that such assessments be undertaken by appropriately skilled and qualified professionals such as family consultants who already undertake a level of risk assessment in parenting matters</p>

7. CHILDREN IN THE FAMILY LAW SYSTEM	
<b>Proposal 7–7</b>	Children should not be required to express any views in family law proceedings or family dispute resolution.
<b>Response:</b>	Agree.
<b>Comment:</b>	None.

7. CHILDREN IN THE FAMILY LAW SYSTEM	
<b>Proposal 7–8</b>	<p>Children involved in family law proceedings should be supported by a 'children's advocate': a social science professional with training and expertise in child development and working with children. The role of the children's advocate should be to:</p> <ul style="list-style-type: none"> <li>• explain to the child their options for making their views heard;</li> <li>• support the child to understand their options and express their views;</li> <li>• ensure that the child's views are communicated to the decision maker; and</li> <li>• keep the child informed of the progress of a matter, and to explain any outcomes and decisions made in a developmentally appropriate way.</li> </ul>

<b>Response:</b>	Disagree.
<b>Comment:</b>	<p>The LCA considers the well-being and protection from harm of children at the centre of family law dispute as paramount. The LCA supports, in principle, children's views being heard in proceedings.</p> <p>The proposal contemplates appointment in proceedings in every parenting matter. It is unclear whether it is intended to also have a child advocate in FDR.</p> <p>It is also not clear how the role and the framework to support it will be funded in a resource constrained environment affecting both courts. If a new national body of child advocates is to be established, there will be very significant resource implications.</p> <p>Many parenting matters often involve litigants in person, complexity and high conflict often warranting an Independent Children's Lawyer (<b>ICL</b>) appointment. The net effect may very well involve the appointment of both the child advocate and the 'separate legal representative'. This would increase costs associated with litigating these matters. It is unclear what role the family consultant or single expert may have in making assessments and recommendations in proceedings.</p> <p>The LCA notes reference to the UK Cafcass and Ontario's Office of the Children's Lawyer models, which both have social scientists and lawyers embedded in the organisation. It is notable that both these models have extensive information gathering and investigative powers with a significant focus on and core work in child protection matters, which are not matters heard by the federal family courts in Australia.</p> <p>The role appears to be multifaceted ranging from:</p> <ul style="list-style-type: none"> <li>• supporting children through the litigation process;</li> <li>• communicating their views; and</li> <li>• assessing and advocating for their best interests in the event children are unable to express a view.</li> </ul> <p>The duties, responsibilities and nature of relationship the child advocate is to have with the child, the parties and the court whilst performing each of these functions, is also unclear and whether they themselves might require legal representation if advocating for the child's best interests.</p> <p>With the exception of views expressed by the child, it is not clear what the child advocate is to do with any disclosures made to them by the child and what involvement the child advocate will have in the legal proceedings if a separate legal representative has not been appointed.</p> <p>The LCA agrees that appropriately qualified and skilled professionals are required to ascertain the views of children. Family consultants and single experts arguably already have the necessary skills.</p> <p>The LCA reiterates its earlier submission to the Issues Paper (see paragraphs [336]-[342] and [354]-[370]). The current model and guidelines for child participation should be retained. These are adequate save for earlier involvement of and increasing funding for ICLs, family consultants with expanded roles and preparation of family reports; coupled with a teamed based</p>

	<p>approach by ICLs and family consultants/appropriately qualified single experts (e.g. Legal Aid Queensland model of embedded social scientists preparing family reports).</p> <p>This would address the ‘forensic issues’ of how a child’s views (and the context in which they are expressed) are placed before the court and to some extent ease pressure on the ICL to ensure a child’s participation.</p> <p>The ALRC’s reference to the Children and Young Person’s 2018 Study suggested the need for children feeling ‘supported’ throughout the process rather than merely expressing their views. A child and youth support worker model could be explored (e.g. embedded in and part of the legal aid commissions’ ICL programme).</p> <p>The respective roles of the ICL, child and youth support worker and family consultant/single expert should form part of the information resources made available to children at schools, children’s contact centres, children’s health services etc.</p>
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## 7. CHILDREN IN THE FAMILY LAW SYSTEM

<b>Proposal 7–9</b>	<p>Where a child is not able to be supported to express a view, the children’s advocate should:</p> <ul style="list-style-type: none"> <li>• support the child’s participation to the greatest extent possible; and</li> <li>• advocate for the child’s interests based on an assessment of what would best promote the child’s safety and developmental needs.</li> </ul>
<b>Response:</b>	Disagree.
<b>Comment:</b>	See response to Proposal 7-8 above. The LCA maintains this should continue to be the role of the Independent Children’s Lawyer. It is unclear what these circumstances might be and how the child advocate would assess and determine what would best promote the child’s safety and developmental needs, without themselves being privy to the issues in dispute, the evidence, if the matter is before the court and participating in the proceedings in some form. It would increase costs in the matter and conflict with the roles of Separate Legal Representative and the Family Report writer/single expert witness.

## 7. CHILDREN IN THE FAMILY LAW SYSTEM

<b>Proposal 7–10</b>	<p>The <i>Family Law Act 1975</i> (Cth) should make provision for the appointment of a legal representative for children involved in family law proceedings (a ‘separate legal representative’) in appropriate circumstances, whose role is to:</p> <ul style="list-style-type: none"> <li>• gather evidence that is relevant to an assessment of a child’s safety and best interests; and</li> <li>• assist in managing litigation, including acting as an ‘honest broker’ in litigation.</li> </ul>
<b>Response:</b>	Disagree.
<b>Comment:</b>	See response to Proposal 7-8 above as to the preferred model.

7. CHILDREN IN THE FAMILY LAW SYSTEM	
<b>Question 7–1</b>	In what circumstances should a separate legal representative for a child be appointed in addition to a children's advocate?
<b>Response:</b>	See comments below.
<b>Comment:</b>	The LCA maintains the separate or independent legal representative for the child should advocate for the child's best interests. The circumstances in which appointments are made may require a revisit of the <i>Re: K</i> factors and consideration of the discretion when making such appointments by legal aid commissions (e.g. only in cases involving allegations of or risk of abuse, family violence, mental health or drug and alcohol issues increasing a child's vulnerability).

7. CHILDREN IN THE FAMILY LAW SYSTEM	
<b>Question 7–2</b>	How should the appointment, management and coordination of children's advocates and separate legal representatives be overseen? For example, should a new body be created to undertake this task?
<b>Response:</b>	See comment below.
<b>Comment:</b>	In relation to lawyers representing the best interests of children, the LCA considers the current appointment, management and coordination of ICLs by legal aid commissions should remain. However, there is an urgent need to increase funding to legal aid commissions to enable them to improve the availability and quality of ICLs, including to fund the return of senior, experienced private practitioners to ICL work.

7. CHILDREN IN THE FAMILY LAW SYSTEM	
<b>Question 7–3</b>	What approach should be taken to forensic issues relating to the role of the children's advocate, including: <ul style="list-style-type: none"> <li>• admissibility of communications between the children's advocate and a child; and</li> <li>• whether the children's advocate may become a witness in a matter?</li> </ul>
<b>Response:</b>	See comment below.
<b>Comment:</b>	<p>The LCA considers this model to be fraught with complications and possible tensions between the purpose and scope of the role and the forensic issues arising from the relationship and engagement with the child.</p> <p>The role is described as supporting participation along a '<i>spectrum</i>' from providing information and support, to advocating for the child's interests based on '<i>an assessment of what would best promote safety and developmental needs</i>'.</p> <p>Views expressed to a child advocate (or refusal to do so), from a procedural fairness perspective, should be admissible and arguably the circumstances underpinning those views tested. It is likely a child advocate would become a witness in the matter, particularly if they have assessed what would best promote safety and developmental needs of the child.</p>



	Admissibility of communications and compellability as a witness, may affect the rapport building and relationship the child advocate develops with the child and in turn the child's ability or willingness to confide in and express their views. This may become problematic if the relationship is a long one and the child requires significant support with the risk of the relationship developing into a therapeutic one. The possible tensions that might arise between the support and forensic role of the child advocate are recognised in 7.91 of the Discussion Paper.
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7. CHILDREN IN THE FAMILY LAW SYSTEM	
<b>Proposal 7–11</b>	Children should be able to express their views in court proceedings and family dispute resolution processes in a range of ways, including through: <ul style="list-style-type: none"> <li>• a report prepared by the children's advocate;</li> <li>• meeting with a decision maker, supported by a children's advocate; or</li> <li>• directly appearing, supported by a children's advocate.</li> </ul>
<b>Response:</b>	Agree in part.
<b>Comment:</b>	The LCA does not agree to the child advocate model as proposed and: <ul style="list-style-type: none"> <li>• maintains its position that a report evidencing a child's views is consistent with Australia's obligations under article 12 of UN <i>Convention on the Rights of the Child</i>, and the Family Law Act is of assistance to the court. However, as submitted by the LCA in its response to the Issues Paper (at [364]), it is not enough that the court knows what a child has said he or she wants, the court must know, if possible, the motivation for what has been said and if the particular child has the developmental capacity to understand the long-term impact on the child of those views. Reports are currently prepared by Family Consultants and single expert witnesses which may contain the child's views and are contextualised from the material before the court and from family interviews;</li> <li>• notes it is already possible for children to meet with judicial officers, though rare but supports the development of guidelines to better support this process on the rare occasion that it does occur; and</li> <li>• strongly opposes direct representation of children in family law proceedings and appearing directly in proceedings (see the LCA submission to the Issues Paper, at [366]).</li> </ul>

7. CHILDREN IN THE FAMILY LAW SYSTEM	
<b>Proposal 7–12</b>	Guidance should be developed to assist judicial officers where children seek to meet with them or otherwise participate in proceedings. This guidance should cover matters including how views expressed by children in any such meeting should be communicated to other parties to the proceeding.
<b>Response:</b>	Agree.
<b>Comment:</b>	The LCA agrees with this proposal, provided courts and processes are adequately funded to facilitate such a meeting, support the children and enable due process. The LCA is of the view however that meetings between children and judicial officers should remain the exception, rather than the norm.



7. CHILDREN IN THE FAMILY LAW SYSTEM	
<b>Proposal 7–13</b>	There should be a Children and Young People’s Advisory Board for the family law system. The Advisory Board should provide advice about children’s experiences of the family law system to inform policy and practice development in the system.
<b>Response:</b>	Agree.
<b>Comment:</b>	None.

8. REDUCING HARM	
<b>Proposal 8–1</b>	<p>The definition of family violence in the <i>Family Law Act 1975</i> (Cth) should be amended to:</p> <ul style="list-style-type: none"> <li>clarify some terms used in the list of examples of family violence and to include other behaviours (in addition to misuse of systems and processes (Proposal 8– 3)) including emotional and psychological abuse and technology facilitated abuse; and</li> <li>include an explicit cross-reference between the definitions of family violence and abuse to ensure it is clear that the definition of abuse encompasses direct or indirect exposure to family violence.</li> </ul>
<b>Response:</b>	Agree.
<b>Comment:</b>	This makes it consistent with state legislation, is supported by the LCA in its submission to the Issues Paper, and will bring the Family Law Act into line with technology as a means of causing harm.

8. REDUCING HARM	
<b>Question 8–1</b>	What are the strengths and limitations of the present format of the family violence definition?
<b>Response:</b>	See comment below.
<b>Comment:</b>	<p>The LCA refers to its response to Proposal 8-1.</p> <p>The LCA notes that if amendments were to be made to the Family Law Act to include family violence as a prescribed factor for consideration in property settlement matters, spouse maintenance matters, and potentially as a ground for setting aside financial agreements, then consideration must be given as to whether it is appropriate for the same definition of ‘family violence’ in section 4AA that applies to matters under Part VII of the legislation, applies to financial cases as well. The LCA refers to its submissions above in respect of Proposals 3-11 and 3-19 and Question 3-3.</p>

8. REDUCING HARM	
<b>Question 8–2</b>	Are there issues or behaviours that should be referred to in the definition, in addition to those proposed?

<b>Response:</b>	See response to Question 8-1 above, and responses to Proposals 8-2 and 8-3.
<b>Comment:</b>	None.

8. REDUCING HARM	
<b>Proposal 8–2</b>	<p>The Australian Government should commission research projects to examine the strengths and limitations of the definition of family violence in the <i>Family Law Act 1975</i> (Cth) in relation to the experiences of:</p> <ul style="list-style-type: none"> <li>• Aboriginal and Torres Strait Islander people;</li> <li>• people from culturally and linguistically diverse backgrounds; and</li> <li>• LGBTIQ people.</li> </ul>
<b>Response:</b>	Agree.
<b>Comment:</b>	None.

8. REDUCING HARM	
<b>Proposal 8–3</b>	<p>The definition of family violence in the <i>Family Law Act 1975</i> (Cth) should be amended to include misuse of legal and other systems and processes in the list of examples of acts that can constitute family violence in s 4AB(2) by inserting a new subsection referring to the ‘use of systems or processes to cause harm, distress or financial loss’.</p>
<b>Response:</b>	Agree.
<b>Comment:</b>	None.

8. REDUCING HARM	
<b>Proposal 8–4</b>	<p>The existing provisions in the <i>Family Law Act 1975</i> (Cth) concerning dismissal of proceedings that are frivolous, vexatious, an abuse of process or have no reasonable prospect of success (‘unmeritorious proceedings’) should be rationalised.</p>
<b>Response:</b>	Disagree.
<b>Comment:</b>	The legislative provisions are sufficient and do not require rationalisation or tinkering with.

8. REDUCING HARM	
<b>Proposal 8–5</b>	<p>The <i>Family Law Act 1975</i> (Cth) should provide that, in considering whether to deem proceedings as unmeritorious, a court may have regard to evidence of a history of family violence and in children’s cases must consider the safety and best interests of the child and the impact of the proceedings on the other party when they are the main caregiver for the child.</p>
<b>Response:</b>	Disagree.

<b>Comment:</b>	This is a factor that can already be taken into account if needed. See comments in relation to Proposal 6-7 about the need not to allow the focus on family violence to result in the failure to acknowledge the relevance and prevalence of issues such as drug and alcohol abuse.
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8. REDUCING HARM	
<b>Question 8–3</b>	Should the requirement for proceedings to have been instituted ‘frequently’ be removed from provisions in the <i>Family Law Act 1975</i> (Cth) setting out courts powers to address vexatious litigation? Should another term, such as ‘repeated’ be substituted?
<b>Response:</b>	No.
<b>Comment:</b>	The LCA is of the view that change for the sake of change, is likely to make for bad law and further litigation over terminology and its interpretation.

8. REDUCING HARM	
<b>Question 8–4</b>	What, if any, changes should be made to the courts’ powers to apportion costs in s 117 of the <i>Family Law Act 1975</i> (Cth)?
<b>Response:</b>	None should be made.
<b>Comment:</b>	<p>Section 117 of the Family Law Act as drafted strikes an appropriate present balance – any issue that may exists, lies instead with the exercise of the discretion to make or not make cost orders and case management issues.</p> <p>If amended, there is a risk that section 117 will otherwise be used as a weapon against the financially vulnerable.</p> <p>The LCA does support making clearer the already existing power of the court to order costs against solicitors where they aid and abet the use of litigation as a form of family violence (see earlier submission by the LCA to the Issues Paper).</p>

8. REDUCING HARM	
<b>Proposal 8–6</b>	<p>The <i>Family Law Act 1975</i> (Cth) should provide that courts have the power to exclude evidence of ‘protected confidences’: that is, communications made by a person in confidence to another person acting in a professional capacity who has an express or implied duty of confidence. The Act should provide that:</p> <ul style="list-style-type: none"> <li>• Subpoenas in relation to evidence of protected confidences should not be issued without leave of the court.</li> <li>• The court should exclude evidence of protected confidences where it is satisfied that it is likely that harm would or might be caused, directly or indirectly, to a protected confider, and the nature and extent of the harm outweighs the desirability of the evidence being given. Harm should be defined to include actual physical bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm (such as shame, humiliation and fear).</li> <li>• In exercising this power, the court should consider the probative value</li> </ul>

	<p>and importance of the evidence to the proceedings and the effect that allowing the evidence would have on the protected confider.</p> <ul style="list-style-type: none"> <li>• In family law proceedings concerning children, the safety and best interests of the child should be the paramount consideration when deciding whether to exclude evidence of protected confidences. Such evidence should be excluded where a court is satisfied that admitting it would not promote the safety and best interests of the child.</li> <li>• The protected confider may consent to the evidence being admitted.</li> <li>• The court should have the power to disallow such evidence on its own motion or by application of the protected confider or the confidant. Where a child is the protected confider, a representative of the child may make the claim for protection on behalf of the child.</li> <li>• The court is obliged to give reasons for its decision.</li> </ul>
<b>Response:</b>	Not necessary.
<b>Comment:</b>	<p>As the proposals read, there is no real need, just a need for a greater awareness of the Evidence Act provisions.</p> <p>The LCA is of the view that the proposals would not address the perceived problem, as to determine the issue the legal representatives and Court would need to read the material in order to argue/determine probative value or other matters.</p>

<b>8. REDUCING HARM</b>	
<b>Proposal 8–7</b>	<p>The Attorney-General's Department (Cth) should convene a working group comprised of the family courts, the Family Law Section of the Law Council of Australia, the Royal Australian and New Zealand College of Psychiatrists, the Australian Psychological Society, the Royal Australian College of General Practitioners, Family &amp; Relationship Services Australia, National Legal Aid, Women's Legal Services Australia and specialist family violence services peak bodies and providers to develop guidelines in relation to the use of sensitive records in family law proceedings. These guidelines should identify:</p> <ul style="list-style-type: none"> <li>• principles to consider when a subpoena of sensitive records is in contemplation;</li> <li>• obligations of professionals who are custodians of sensitive records in relation to the provision of those records;</li> <li>• processes for objecting to a subpoena of sensitive records; and</li> <li>• how services and professionals need to manage implications for their clients regarding the possibility that material may be subpoenaed and any potential consequences for their clients if a subpoena is issued.</li> </ul>
<b>Response:</b>	See response to Proposal 8-6 above.
<b>Comment:</b>	<p>Access to sensitive records can be critical to the identification of a child's best interests, including protection from harm, and that ought to prevail. As stated above, the Evidence Act already allows courts to exclude evidence where the probative value is substantially outweighed by the danger that the evidence might: (a) be unfairly prejudicial to a party; or (b) be misleading or confusing; or (c) cause or result in undue waste of time.</p>

9. ADDITIONAL LEGISLATIVE ISSUES	
<b>Proposal 9–1</b>	<p>The <i>Family Law Act 1975</i> (Cth) should include a supported decision making framework for people with disability to recognise they have the right to make choices for themselves. The provisions should be in a form consistent with the following recommendations of the ALRC Report 124, <i>Equality, Capacity and Disability in Commonwealth Laws</i>:</p> <ul style="list-style-type: none"> <li>• Recommendations 3–1 to 3–4 on National Decision Making Principles and Guidelines; and</li> <li>• Recommendations 4–3 to 4–5 on the appointment, recognition, functions and duties of a ‘supporter’.</li> </ul>
<b>Response:</b>	Agree.
<b>Comment:</b>	None.

9. ADDITIONAL LEGISLATIVE ISSUES	
<b>Proposal 9–2</b>	<p>The Australian Government should ensure that people who require decision making support in family law matters, and their supporters, are provided with information and guidance to enable them to understand their functions and duties.</p>
<b>Response:</b>	Agree.
<b>Comment:</b>	None.

9. ADDITIONAL LEGISLATIVE ISSUES	
<b>Proposal 9–3</b>	<p>The <i>Family Law Act 1975</i> (Cth) should include provisions for the appointment of a litigation representative where a person with disability, who is involved in family law proceedings, is unable to be supported to make their own decisions. The Act should set out the circumstances for a person to have a litigation representative and the functions of the litigation representative. These provisions should be in a form consistent with recommendations 7–3 to 7–4 recommendations of ALRC Report 124, <i>Equality, Capacity and Disability in Commonwealth Laws</i>.</p>
<b>Response:</b>	Agree.
<b>Comment:</b>	<p>The LCA notes that resourcing will be an issue. South Australia seems to be the only jurisdiction where the Public Trustee will act as litigation guardian in family law proceedings. It is also the case that the current arrangement, where a Family Law Court can ask the Commonwealth Attorney-General to appoint an appropriate person to act as litigation guardian, is a request rarely worth making, as in most cases (in the experience of members of the Family Law Section of the LCA) the Attorney General is unable to identify a person willing to act.</p>

9. ADDITIONAL LEGISLATIVE ISSUES	
<b>Proposal 9–4</b>	Family courts should develop practice notes explaining the duties that litigation representatives have to the person they represent and to the court.
<b>Response:</b>	Agree.
<b>Comment:</b>	None.

9. ADDITIONAL LEGISLATIVE ISSUES	
<b>Proposal 9–5</b>	The Australian Government should work with state and territory governments to facilitate the appointment of statutory authorities as litigation representatives in family law proceedings.
<b>Response:</b>	Agree.
<b>Comment:</b>	Subject to funding and resourcing.

9. ADDITIONAL LEGISLATIVE ISSUES	
<b>Proposal 9–6</b>	<p>The Australian Government should work with the National Disability Insurance Agency (NDIA) to consider how referrals can be made to the NDIA by family law professionals, and how the National Disability Insurance Scheme (<b>NDIS</b>) could be used to fund appropriate supports for eligible people with disability to:</p> <ul style="list-style-type: none"> <li>• build parenting abilities;</li> <li>• access early intervention parenting supports;</li> <li>• carry out their parenting responsibilities;</li> <li>• access family support services and alternative dispute resolution processes; and</li> <li>• navigate the family law system.</li> </ul>
<b>Response:</b>	Agree.
<b>Comment:</b>	Funding and resourcing will be an issue. The suggestion that the National Disability Insurance Agency will accept referrals for funding from the NDIS is interesting but even if approved, the process of accessing supports from the NDIS has proven to be complex and time consuming and may be a significant barrier unless a streamlined and particular process for family law support, can be developed.

9. ADDITIONAL LEGISLATIVE ISSUES	
<b>Proposal 9–7</b>	The Australian Government should ensure that the family law system has specialist professionals and services to support people with disability to engage with the family law system.
<b>Response:</b>	Agree.
<b>Comment:</b>	While the LCA supports this initiative, it is presently unclear as to the supports

	or services which would be the subject of additional funding (whether through the NDIS or other sources). While a need for ' <i>disability competent and accessible services in the family law system</i> ' is identified (paragraph 9.82 of the Discussion Paper) the Discussion Paper suggests that these services may not be presently available, particularly in rural and remote parts of Australia.
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9. ADDITIONAL LEGISLATIVE ISSUES	
<b>Question 9–1</b>	<p>In relation to the welfare jurisdiction:</p> <ul style="list-style-type: none"> <li>• Should authorisation by a court, tribunal, or other regulatory body be required for procedures such as sterilisation of children with disability or intersex medical procedures? What body would be most appropriate to undertake this function?</li> <li>• In what circumstances should it be possible for this body to authorise sterilisation procedures or intersex medical procedures before a child is legally able to personally make these decisions?</li> <li>• What additional legislative, procedural or other safeguards, if any, should be put in place to ensure that the human rights of children are protected in these cases?</li> </ul>
<b>Response:</b>	Agree.
<b>Comment:</b>	<p>Matters related to the welfare jurisdiction, including the making of decisions as to sterilisation and other special medical treatments, should remain the preserve of superior courts. Questions of this nature, apart from their obvious seriousness warranting the attention of the most experienced of judicial officers, are intertwined with assessments of 'best interests of children'. The Family Court of Australia is the most appropriate superior court to continue to hear these cases.</p> <p>The jurisprudence on the exercise of the welfare jurisdiction, and in particular in relation to special medical procedures, has been guided by the High Court (in <i>Re: Marion</i>) and developed over time as medical knowledge has changed. The test for <i>Gillick</i> competence has been approved and adopted in such cases. Consideration could be given to the codification of a '<i>Gillick</i>' test, however that would require significant consultation and careful drafting to ensure that the test evolves over time.</p>

9. ADDITIONAL LEGISLATIVE ISSUES	
<b>Proposal 9–8</b>	The definition of family member in s 4(1AB) of the <i>Family Law Act 1975</i> (Cth) should be amended to be inclusive of Aboriginal and Torres Strait Islander concepts of family.
<b>Response:</b>	Agree.
<b>Comment:</b>	This is consistent with the LCA's submissions to the Issues Paper (at paragraphs [187] to [188]).



9. ADDITIONAL LEGISLATIVE ISSUES	
<b>Question 9–2</b>	How should a provision be worded to ensure the definition of family member covers Aboriginal and Torres Strait Islander concepts of family?
<b>Response:</b>	See comment below.
<b>Comment:</b>	The LCA recommends consultation with Aboriginal and Torres Strait Islander peak representative bodies to propose wording for the definition.

10. A SKILLED AND SUPPORTED WORKFORCE	
<b>Proposal 10–1</b>	The Australian Government should work with relevant non- government organisations and key professional bodies to develop a workforce capability plan for the family law system.
<b>Response:</b>	The LCA queries the foundation for the proposal.
<b>Comment:</b>	<p>The LCA queries whether the intent is that government funded organisations be treated differently to private organisations. If the goal is to improve the 'capability' of all working within the family law system, then exclusion of government agencies is inconsistent.</p> <p>The LCA also queries whether such a plan can be appropriately developed without their first having been a comprehensive assessment of the differing needs of users of the family law system.</p>

10. A SKILLED AND SUPPORTED WORKFORCE	
<b>Proposal 10–2</b>	<p>The workforce capability plan for the family law system should identify:</p> <ul style="list-style-type: none"> <li>the different professional groups working in the family law system;</li> <li>the core competencies that particular professional groups need; and</li> <li>the training and accreditation needed for different professional groups.</li> </ul>
<b>Response:</b>	See comments below.
<b>Comment:</b>	<p>There are already various regulatory regimes in place for some of the professionals in the family law system, and an alternative to the development of second compliance (accreditation) scheme, would be for the government to work with those existing regulatory bodies.</p> <p>The LCA makes the following observations:</p> <ul style="list-style-type: none"> <li>(a) how could such a scheme can apply to private professionals – e.g. lawyers and psychologists;</li> <li>(b) if the relevant schools and colleges and professional organisation already assess the competencies of participants, there may be significant opposition to the imposition of a further 'assessment' process undertaken by generalists;</li> <li>(c) what would be the impact on costs of services by the implementation of a new accreditation system - presumably costs of family law services would increase;</li> </ul>

	<p>(d) the impact on the availability of family law services if a new accreditation system was implemented – if costs of compliance increase, some practitioners may cease to work in the system. Some key areas of specialist services already have a shortage of staff eg. skilled family consultants, skilled forensic psychiatrists;</p> <p>(e) the potential for the cost of this plan and development and implementation of such a scheme could be enormous.</p> <p>It would appear that analysis has not yet been undertaken to identify the areas where there is a shortage of expertise and to ensure that appropriate training and resourcing is directed to that sector. The generalised approach adopted in the Discussion Paper means that opportunities for focused discussions about desirable skills and competencies improvement is being missed.</p>
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10. A SKILLED AND SUPPORTED WORKFORCE	
<b>Proposal 10–3</b>	<p>The identification of core competencies for the family law system workforce should include consideration of the need for family law system professionals to have:</p> <ul style="list-style-type: none"> <li>• an understanding of family violence;</li> <li>• an understanding of child abuse, including child sexual abuse and neglect;</li> <li>• an understanding of trauma-informed practice, including an understanding of the impacts of trauma on adults and children;</li> <li>• an ability to identify and respond to risk, including the risk of suicide;</li> <li>• an understanding of the impact on children of exposure to ongoing conflict;</li> <li>• cultural competency, in relation to Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse communities and LGBTIQ people;</li> <li>• disability awareness; and</li> <li>• an understanding of the family violence and child protection systems and their intersections with the family law system.</li> </ul>
<b>Response:</b>	Agree.
<b>Comment:</b>	<p>The LCA notes the following comments received from the Law Society of NSW:</p> <p><i>The Law Society supports the list of core competencies for the family law system workforce, including "cultural competency, in relation to Aboriginal and Torres Strait Islander people" but suggest that one hour of training by watching a video is not enough. There should be minimum and meaningful requirements such that the family law system workforce can provide effective services to Indigenous peoples.</i></p>

10. A SKILLED AND SUPPORTED WORKFORCE	
<b>Question 10–1</b>	Are there any additional core competencies that should be considered in the workforce capability plan for the family law system?

<b>Response:</b>	See comment below.
<b>Comment:</b>	<p>LCA notes the following:</p> <ul style="list-style-type: none"> <li>(a) Understanding boundaries of professional competence e.g. non-lawyers should not give legal advice.</li> <li>(b) For non-lawyers, a general understanding of the legal system and basic understanding of family law.</li> </ul>

## 10. A SKILLED AND SUPPORTED WORKFORCE

<b>Proposal 10–4</b>	The Family Law Commission proposed in Proposal 12–1 should oversee the implementation of the workforce capability plan through training— including cross-disciplinary training—and accreditation of family law system professionals.
<b>Response:</b>	Disagree.
<b>Comment:</b>	<p>The LCA opposes the establishment of the Family Law Commission.</p> <p>Cross-disciplinary training could be encouraged by government by less formal and expensive means. For example, the Chief Justice Family Law Forum was a valuable meeting of the stakeholders in the family law system, and a similar forum could be regularly hosted by the Department of the Attorney-General to foster development of working relationships between stakeholder groups. Government could assist with funding of cross-disciplinary and individual profession training, without the need for a Family Law Commission.</p> <p>Existing government funded organisations could receive more funding for training, rather than to spend money on creating (yet another) peak body. For example, FRCs could receive more money for training; Courts could receive more money for training; as could Legal Aid bodies</p> <p>Noting that the creation of the Family Law Commission is opposed by the LCA, the creation of any new body to oversee the review and accreditation of disparate professional groups working in the family law field is an enormous project that would be:</p> <ul style="list-style-type: none"> <li>• expensive (staffing and structural support alone would be significant);</li> <li>• the task of building this regulatory process would be substantial and would take time;</li> <li>• unwieldy given the many participating groups being scrutinised;</li> <li>• the basis of regulatory power is not clear; and</li> <li>• its interaction with the laws of the States is not clear.</li> </ul> <p>The desired outcomes (improved standards of those operating within the family law system) would be better and more cost effectively achieved by encouraging further engagement in training through existing services, rather than the creation of a further bureaucratic mechanism.</p>

## 10. A SKILLED AND SUPPORTED WORKFORCE

<b>Proposal 10–5</b>	In developing the workforce capability plan, the capacity for family dispute resolution practitioners to conduct family dispute resolution in property and financial matters should be considered. This should include consideration of existing training and accreditation requirements.
<b>Response:</b>	Disagree.
<b>Comment:</b>	See response to Question 10-2, below.

<b>10. A SKILLED AND SUPPORTED WORKFORCE</b>	
<b>Question 10–2</b>	What qualifications and training should be required for family dispute resolution practitioners in relation to family law disputes involving property and financial issues?
<b>Response:</b>	See comment below.
<b>Comment:</b>	<p>The LCA opposes property and financial matters becoming the subject of compulsory pre-filing family dispute resolution (<b>FDR</b>). The risks of delay, cost and injustice being wrought upon vulnerable participants are significant given the complexity of the discretionary property adjustment and financial support framework under the Family Law Act. The concerns of the LCA are expanded upon elsewhere in this response.</p> <p>If compulsory financial FDR were to be implemented, the persons conducting the FDR should be legally qualified with significant experience in family law practice (and in particular, in financial cases) and with dispute resolution training and experience. In the alternative, a lawyer assisted model of FDR would also provide protections to users of the service.</p> <p>Either of these two scenarios are more readily achieved than attempting to train non-lawyer FDR practitioners to have base line competencies in financial matters.</p> <p>In a discretionary system for resolution of financial matters between parties, it is essential that persons conducting this type of dispute resolution are (at the bare minimum) legally qualified and have relevant experience in family law. The provision of legal advice and representation is also essential to ensure protections for vulnerable participants. In circumstances where a significant part of the focus of the ALRC review (quite appropriately) is protecting people from family violence, the system should increase and enhance the protections afforded by legal representation and advocacy – not create further opportunities for injustice to occur.</p> <p>The safeguards contemplated elsewhere in the Discussion Paper (and see for example Proposal 5.3) may be insufficient to properly protect the vulnerable.</p> <p>Rigorous consideration and discussion around the core competencies of those engaging in financial ADR would need to occur to minimise the undesirable impacts of such a policy change.</p>

<b>10. A SKILLED AND SUPPORTED WORKFORCE</b>
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<b>Proposal 10–6</b>	State and territory law societies should amend their continuing professional development requirements to require all legal practitioners undertaking family law work to complete at least one unit of family violence training annually. This training should be in addition to any other core competencies required for legal practitioners under the workforce capability plan.
<b>Response:</b>	Disagree.
<b>Comment:</b>	<p>The LCA in its response to the Issues Paper submitted that <i>all</i> legal practitioners should undertake compulsory family violence CPD. This would benefit the whole community, not just the legal profession and people seeking family law advice. For the reasons identified below, this approach has the advantage that it would also be easier to monitor via existing CPD compliance schemes in each state and territory.</p> <p>The LCA recognises this as an important opportunity for national advocacy around the benefits to our society as a whole about improving knowledge of and awareness with respect to family violence</p> <p>If the focus was to remain upon the provision of training only to those who practise in family law, how would regulatory bodies ensure compliance? How would legal practitioners doing family law work be identified (beyond self-report)? How would such a scheme be regulated in a practical sense – would the existing regulator be asked to monitor compliance as part of the existing schemes that regulate compulsory CPD for legal practitioners around the court, and what would be the consequences of non-compliance?</p>

## 10. A SKILLED AND SUPPORTED WORKFORCE

<b>Proposal 10–7</b>	The <i>Family Law Act 1975</i> (Cth) should provide for the accreditation of Children’s Contact Service workers and impose a requirement that these workers hold a valid Working with Children Check ( <b>WWCC</b> ).
<b>Response:</b>	Agree with respect to WWCC; unable to comment on minimum qualifications required.
<b>Comment:</b>	<p>The LCA does not profess to hold sufficient expertise to comment on the minimum qualifications workers in contact centres should have, however suggests that the fact that WWCC are not necessarily mandatory for all staff working in contact centres to be a matter of significant concern.</p> <p>The LCA notes however, the significant demands upon the existing contact centres in Australia, with continuing challenges with respect to adequate funding; long delays for families to access their services and cost barriers for users (in the private/user pays services). The LCA recognises there would be better outcomes for families if there were more contact centres available and urges focus upon that fundamental need. While a basic framework as to core competencies for staff at these centres is desirable, the key issue remains ensuring the provision of adequate resources to families in need. There are delays for most families being able to access contact centres, with huge waiting lists in some areas.</p>

## 10. A SKILLED AND SUPPORTED WORKFORCE

<b>Question 10–3</b>	Should people who work at Children’s Contact Services be required to hold
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	other qualifications, such as a Certificate IV in Community Services or a Diploma of Community Services?
<b>Response:</b>	See response to Proposal 10-7 above
<b>Comment:</b>	See response to Proposal 10-7 above.

#### 10. A SKILLED AND SUPPORTED WORKFORCE

<b>Proposal 10–8</b>	All future appointments of federal judicial officers exercising family law jurisdiction should include consideration of the person’s knowledge, experience and aptitude in relation to family violence.
<b>Response:</b>	Agree.
<b>Comment:</b>	None.

#### 10. A SKILLED AND SUPPORTED WORKFORCE

<b>Question 10–4</b>	What, if any, other changes should be made to the criteria for appointment of federal judicial officers exercising family law jurisdiction?
<b>Response:</b>	See comment below.
<b>Comment:</b>	<p>All judicial officers should have knowledge, experience and aptitude in family law – meaning that they should, at the time of their appointment, be practising as a family lawyer (or be a judicial officer in the family law jurisdiction in a lower court) or have substantial experience in the area by virtue for example of academic positions held in the family law area.</p> <p>In the same way that the ALRC has recognised that judicial officers need particular capacities in relation to family violence, the LCA suggests that knowledge, experience and aptitude more generally in family law should be a prerequisite for appointment to courts exercising family law jurisdiction. Adjudicating family law disputes requires the same capacities as judges in other jurisdictions – the ability to interpret and apply the law and the ability to assess and weigh evidence – but in addition, it requires the knowledge, experience and aptitude to expertly manage the nuances of family law disputes, separated couples and their children.</p>

#### 10. A SKILLED AND SUPPORTED WORKFORCE

<b>Question 10–5</b>	What, if any, changes should be made to the process for appointment of federal judicial officers exercising family law jurisdiction?
<b>Response:</b>	See below.
<b>Comment:</b>	There have been calls for decades to changes to the way that the Commonwealth (and States and Territories) appoints Judges. Those calls have largely focused on the need for greater transparency and greater independence from the Executive in the appointment process. The options canvassed include the application, interview and panel process highlighted by the ALRC through to the establishment of an independent body such as that which operates in the UK (the Judicial Appointments Commission). The LCA advocates for a process that is less open to political interference and which



	focuses on the proper assessment of a candidate's knowledge, skill and aptitude for appointment, in this case, to the family law jurisdiction.
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10. A SKILLED AND SUPPORTED WORKFORCE	
<b>Proposal 10–9</b>	The Australian Government should task the Family Law Commission (Proposal 12–1) with the development a national accreditation system with minimum standards for private family report writers as part of the newly developed Accreditation Rules.
<b>Response:</b>	Disagree.
<b>Comment:</b>	<p>The LCA opposes the establishment of the Family Law Commission.</p> <p>The LCA considers that appropriately skilled family report writers are essential elements of a properly functioning family law system. However, the LCA is concerned that the ALRC has not fully appreciated the reasons why there might be problems with the quality of some reports, and the adverse implications of their proposal for the development of a national accreditation scheme.</p> <p>The LCA considers that problems with the quality of some family reports are caused by:</p> <ul style="list-style-type: none"> <li>• a significant shortage in the number of psychologists, psychiatrists and other qualified social scientists who are prepared to do this work;</li> <li>• a diminution in funding, over time, of the family courts' in-house family consultants service; and</li> <li>• a diminution in funding, over time, for Regulation 7 family consultants.</li> </ul> <p>The effect has been that there is a significant shortage of private family report writers in Australia, and as a result, some social scientists with less than the desired level of skill and experience, are engaged to do the work.</p> <p>In addition, the LCA is aware that many experienced family report writers will no longer do the work – a result of many factors, but including, the poor rate of remuneration offered to Regulation 7 family consultants compared to the remuneration in other areas of psychiatry and psychological practice, vexatious complaints made against them by litigants (and the APS and APHRA's relative lack of knowledge and skill to deal with complaints against single expert witnesses) and personal threats made by litigants.</p> <p>The LCA is concerned that the risk of an accreditation scheme is that the numbers of qualified social scientists willing to do this difficult work will reduce, placing even more pressure on the system. Any new system which increases the costs of compliance for social scientists and which opens them up to yet another complaint mechanism, is likely to cause many to choose not to do this work.</p> <p>The LCA favours a system which encourages highly skilled social scientists working in other similar fields to do this work. The LCA is aware that the Australian Chapter of the Association of Family and of Conciliation Courts (AFCC) is currently developing an 'endorsement' scheme and has developed a training course for psychologists considering entering the field.</p>



	<p>The LCA also suggests an expanded use of the Best Practice Guidelines for Family Reports that governs family consultants (those employed by the courts and Regulation 7 family consultants). Those Best Practice Guidelines are generally accepted to be the 'minimum standard' for the proper preparation of family reports. The courts could be encouraged to change their Rules requiring all private family report writers to be given the Guidelines at the time of their appointment in each case and that they be ordered to follow them.</p> <p>The LCA also suggests that psychologists, psychiatrists and other qualified social scientists collaborate with other stakeholders to improve those Guidelines.</p> <p>Industry practice could encourage compliance, thus encouraging the use of private family report writers who adopt the Guidelines.</p> <p>In addition, there is an urgent need to increase the funding available to the family courts to increase its number of in-house family consultants and to increase the fees paid to Regulation 7 family consultants.</p>
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10. A SKILLED AND SUPPORTED WORKFORCE	
<b>Proposal 10–10</b>	The Family Law Commission (Proposal 12–1) should maintain a publicly available list of accredited private family report writers with information about their qualifications and experience as part of the Accreditation Register.
<b>Response:</b>	Disagree, see response to Proposal 10-9.
<b>Comment:</b>	A list of practitioners that have agreed to abide by best practice guidelines could be maintained, whether on professional body websites or another suitable and publicly accessible site.

10. A SKILLED AND SUPPORTED WORKFORCE	
<b>Proposal 10–11</b>	When requesting the preparation of a report under s 62G of the <i>Family Law Act 1975</i> (Cth), the family courts should provide clear instructions about why the report is being sought and the particular issues that should be reported on.
<b>Response:</b>	Agree generally.
<b>Comment:</b>	Clearly some guidance as to relevant or contested issues – such as family violence, insight, communication between parties etc - is useful, however sometimes new facts or issues arise in the preparation of Family Reports which are relevant to the assessment of the best interests of the child and the Report writer should not be overly restricted in the matters that they can report on so that such new issues would be omitted or further costs being incurred of a hearing before a Judge to amend the terms of the instruction. A general catch all being ' <i>and any other matters the Family Report writer considers relevant to the assessment of the best interests of the child</i> ' should be included.

10. A SKILLED AND SUPPORTED WORKFORCE
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<b>Proposal 10–12</b>	In appropriate matters involving the care, welfare and development of a child, judges should consider appointing an assessor with expert knowledge in relation to the child’s particular needs to assist in the hearing and determination of the matter.
<b>Response:</b>	Agree generally.
<b>Comment:</b>	This recommendation is, the LCA understands, made with respect to Aboriginal and Torres Strait Islander matters. It is a very generally worded recommendation. The LCA would not want to encourage different children being treated differently under the Family Law Act.

## 10. A SKILLED AND SUPPORTED WORKFORCE

<b>Proposal 10–13</b>	<p>The <i>Family Law Act 1975</i> (Cth) should provide that, where concerns are raised about the parenting ability of a person with disability in proceedings for parenting orders, a report writer with requisite skills should:</p> <ul style="list-style-type: none"> <li>• prepare a report for the court about the person’s parenting ability, including what supports could be provided to improve their parenting; and</li> <li>• make recommendations about how that person’s disability may, or may not, affect their parenting.</li> </ul>
<b>Response:</b>	Agree.
<b>Comment:</b>	None.

## 10. A SKILLED AND SUPPORTED WORKFORCE

<b>Proposal 10–14</b>	The <i>Family Law Act 1975</i> (Cth) should be amended to provide that in parenting proceedings involving an Aboriginal or Torres Strait Islander child, a cultural report should be prepared, including a cultural plan that sets out how the child’s ongoing connection with kinship networks and country may be maintained.
<b>Response:</b>	Agree.
<b>Comment:</b>	None.

## 10. A SKILLED AND SUPPORTED WORKFORCE

<b>Question 10–6</b>	Should cultural reports be mandatory in all parenting proceedings involving an Aboriginal or Torres Strait Islander child?
<b>Response:</b>	Disagree.
<b>Comment:</b>	<p>As with family reports, it may not be feasible within the current funding constraints of the family law courts for cultural reports to be obtained in every matter involving Aboriginal or Torres Strait Islander children. It may also not be necessary where there is no live issue regarding the child’s culture.</p> <p>The LCA however restates its submissions on the Issues Paper (see paragraphs [68(g)] and [397]–[398]) regarding the importance of family law professionals such as family consultants, undertaking culturally informed</p>

	training to develop cultural competency when working with Aboriginal and Torres Strait Islander Families.
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## 10. A SKILLED AND SUPPORTED WORKFORCE

<b>Proposal 10–15</b>	The Australian Government should, as a condition of its funding agreements, require that all government funded family relationships services and family law legal assistance services develop and implement wellbeing programs for their staff.
<b>Response:</b>	Agree.
<b>Comment:</b>	None.

## 11. INFORMATION SHARING

<b>Proposal 11–1</b>	<p>State and territory child protection, family violence and other relevant legislation should be amended to:</p> <ul style="list-style-type: none"> <li>remove any provisions that prevent state and territory agencies from disclosing relevant information, including experts' reports, to courts, bodies and agencies in the family law system in appropriate circumstances; and</li> <li>include provisions that explicitly authorise state and territory agencies to disclose relevant information to courts, bodies and agencies in the family law system in appropriate circumstances.</li> </ul> <p>The relevant agencies can be identified through the proposed information sharing framework (Proposals 11–2 and 11–3).</p>
<b>Response:</b>	Agree.
<b>Comment:</b>	None.

## 11. INFORMATION SHARING

<b>Question 11–1</b>	<p>What other information should be shared or sought about persons involved in family law proceedings? For example, should:</p> <ul style="list-style-type: none"> <li>State and territory police be required to enquire about whether a person is currently involved in family law proceedings before they issue or renew a gun licence?</li> <li>State and territory legislation require police to inform family courts if a person makes an application for a gun licence and they have disclosed they are involved in family law proceedings?</li> <li>The <i>Family Law Act 1975</i> (Cth) require family courts to notify police if a party to proceedings makes an allegation of current family violence?</li> <li>The <i>Family Law Act 1975</i> (Cth) give family law professionals discretion to</li> </ul>
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	notify police if they fear for a person's safety and should such professionals be provided with immunity against actions against them, including defamation, if they make such a notification?
<b>Response:</b>	Generally agree, subject to below.
<b>Comment:</b>	<p>The LCA generally endorses the policy intent of these recommendations, but suggests that in relation to first three of these questions, significant legal, institutional and resource barriers exist such to make the adoption of such policies to be almost impossible without a great deal of cooperation between all levels of government, the courts and the various police agencies.</p> <p>In relation to the last question, the LCA suggests that family law professionals probably already have the discretion to breach their obligation of maintaining legal professional privilege if they reasonably believe that their client is about to commit a criminal offence (such as harming the other party). The ethical considerations may be more vexed when the lawyer believes their client might harm themselves. Any proposed legislative amendment would need to also provide immunity in the case that a family law professional does not make such a notification.</p>

## 11. INFORMATION SHARING

<b>Proposal 11–2</b>	<p>The Australian Government should work with state and territory governments to develop and implement a national information sharing framework to guide the sharing of information about the safety, welfare and wellbeing of families and children between the family law, family violence and child protection systems.</p> <p>The framework should include:</p> <ul style="list-style-type: none"> <li>• relevant federal, state and territory court documents;</li> <li>• child protection records;</li> <li>• police records;</li> <li>• experts' reports; and</li> <li>• other relevant information.</li> </ul>
<b>Response:</b>	Agree.
<b>Comment:</b>	None.

## 11. INFORMATION SHARING

<b>Proposal 11–3</b>	<p>The information sharing framework should include the legal framework for sharing information and information sharing principles, as well as guidance about:</p> <ul style="list-style-type: none"> <li>• why information needs to be shared;</li> <li>• what information should be shared;</li> <li>• circumstances when information should be shared;</li> <li>• mechanisms for information sharing, including technological solutions;</li> <li>• how information that is shared can be used;</li> <li>• who is able to share information;</li> </ul>
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	<ul style="list-style-type: none"> <li>roles and responsibilities of professionals in the system in relation to information sharing;</li> <li>interagency education and training;</li> <li>interagency collaboration; and</li> <li>monitoring and evaluation of information sharing initiatives.</li> </ul>
<b>Response:</b>	Agree.
<b>Comment:</b>	None.

## 11. INFORMATION SHARING

<b>Question 11–2</b>	Should the information sharing framework include health records? If so, what health records should be shared?
<b>Response:</b>	No.
<b>Comment:</b>	The LCA notes that as a general proposition, it cannot be said that health records will always be relevant and, in many cases, may result in a gross breach of privacy.

## 11. INFORMATION SHARING

<b>Question 11–3</b>	Should records be shared with family relationships services such as family dispute resolution services, Children’s Contact Services, and parenting order program services?
<b>Response:</b>	No.
<b>Comment:</b>	The LCA suggests that the benefits to be gained by information sharing must also be balanced by the risk that access to such information is misused. The LCA suggests that a lower level of access to records for these organisations is appropriate. For instance, it is not necessary that they have access to the records of state agencies, but they might have access to the current orders that have been made in state courts and in the family courts.

## 11. INFORMATION SHARING

<b>Proposal 11–4</b>	The Australian Government and state and territory governments should consider expanding the information sharing platform as part of the National Domestic Violence Order Scheme to include family court orders and orders issued under state and territory child protection legislation.
<b>Response:</b>	Agree.
<b>Comment:</b>	None.

## 11. INFORMATION SHARING

<b>Proposal 11–5</b>	State and territory governments should consider providing access for family courts and appropriate bodies and agencies in the family law system to
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	relevant inter-jurisdictional and intra-jurisdictional child protection and family violence information sharing platforms.
<b>Response:</b>	Agree.
<b>Comment:</b>	None.

11. INFORMATION SHARING	
<b>Proposal 11–6</b>	The family courts should provide relevant professionals in the family violence and child protection systems with access to the Commonwealth Courts Portal to enable them to have reliable and timely access to relevant information about existing family court orders and pending proceedings.
<b>Response:</b>	Agree mostly.
<b>Comment:</b>	The LCA submits that this should be limited to Court orders. There may be substantial parts of evidence in affidavit material that is not relevant, and which could breach the privacy of third parties and parties generally.

11. INFORMATION SHARING	
<b>Proposal 11–7</b>	The Australian Government should work with states and territory governments to co-locate child protection and family violence support workers at each of the family law court premises.
<b>Response:</b>	Agree.
<b>Comment:</b>	None.

11. INFORMATION SHARING	
<b>Proposal 11–8</b>	The Australian Government and state and territory governments should work together to facilitate relevant entities, including courts and agencies in the family law, family violence and child protection systems, entering into information sharing agreements for the sharing of relevant information about families and children.
<b>Response:</b>	Agree.
<b>Comment:</b>	None.

11. INFORMATION SHARING	
<b>Proposal 11–9</b>	The Australian Government and state and territory governments should work together to develop a template document to support the provision of a brief summary of child protection department or police involvement with a child and family to family courts.
<b>Response:</b>	Agree.
<b>Comment:</b>	None.

11. INFORMATION SHARING	
<b>Question 11–4</b>	If a child protection agency has referred a parent to the family courts to obtain parenting orders, what, if any, evidence should they provide the courts? For example, should they provide the courts with any recommendations they may have in relation to the care arrangements of the children?
<b>Response:</b>	Not agreed.
<b>Comment:</b>	Whilst a copy of reports could be provided, it is not for a child protection agency recommendation to usurp the role of judicial decision making in parenting cases.

11. INFORMATION SHARING	
<b>Proposal 11–10</b>	The Australian Government should develop and implement an information sharing scheme to guide the sharing of relevant information about families and children between courts, bodies, agencies and services within the family law system.
<b>Response:</b>	Agree.
<b>Comment:</b>	None.

11. INFORMATION SHARING	
<b>Proposal 11–11</b>	<p>The <i>Family Law Act 1975</i> (Cth) should support the sharing of relevant information between entities within the family law system. The information sharing scheme should include such matters as:</p> <ul style="list-style-type: none"> <li>• what information should be shared;</li> <li>• why information should be shared;</li> <li>• circumstances when information should be shared;</li> <li>• mechanisms for information sharing;</li> <li>• how information that is shared can be used;</li> <li>• who is able to share information; and</li> <li>• roles and responsibilities of professionals in the system in relation to information sharing.</li> </ul>
<b>Response:</b>	Agree.
<b>Comment:</b>	None.

11. INFORMATION SHARING	
<b>Proposal 11–12</b>	The Australian Government should work with states and territories to ensure that the family relationships services they fund are captured by, and comply with, the information sharing scheme.
<b>Response:</b>	Agree.
<b>Comment:</b>	None.



## 11. INFORMATION SHARING

<b>Question 11–5</b>	<p>What information should be shared between the Families Hubs (Proposals 4–1 to 4–4) and the family courts, and what safeguards should be put in place to protect privacy? For example:</p> <ul style="list-style-type: none"> <li>• Should all the information about services within the Families Hubs that were accessed by parties be able to be shared freely with the family courts?</li> <li>• What information should the family courts receive (i.e. services accessed, number of times accessed, or more detailed information about treatment plans etc)?</li> <li>• Should client consent be needed to share this information?</li> <li>• Who would have access to the information at the family courts?</li> <li>• Would the other party get access to any information provided by the Families Hubs services to the family courts?</li> <li>• Should there be capacity for services provided through the Families Hubs to provide written or verbal evidence to the family courts?</li> </ul>
<b>Response:</b>	See comment below.
<b>Comment:</b>	The LCA notes that the services that Families Hubs may provide in future is dependent on the funding they receive. In not knowing how or to what extent they may be funded, what they will do, who will provide the services, and what their qualifications will be, the LCA cannot comment on this question.

## 12. SYSTEM OVERSIGHT AND REFORM EVALUATION

<b>Proposal 12–1</b>	<p>The Australian Government should establish a new independent statutory body, the Family Law Commission, to oversee the family law system. The aims of the Family Law Commission should be to ensure that the family law system operates effectively in accordance with the objectives of the <i>Family Law Act 1975</i> (Cth) and to promote public confidence in the family law system. The responsibilities of the Family Law Commission should be to:</p> <ul style="list-style-type: none"> <li>• monitor the performance of the system;</li> <li>• manage accreditation of professionals and agencies across the system, including oversight of training requirements;</li> <li>• issue guidelines to family law professionals and service providers to assist them to understand their legislative duties;</li> <li>• resolve complaints about professionals and services within the family law system, including through the use of enforcement powers;</li> <li>• improve the functioning of the family law system through inquiries, either of its own motion or at the request of government;</li> <li>• be informed by the work of the Children and Young People’s Advisory Board (Proposal 7–13);</li> <li>• raise public awareness about the roles and responsibilities of professionals and service providers within the family law system; and</li> <li>• make recommendations about research and law reform proposals to improve the system.</li> </ul>
<b>Response:</b>	Disagree.

**Comment:**

The LCA considers that a Family Law Commission would duplicate many of the responsibilities of existing bodies including:

- the responsibility of Government to appropriately manage and resource matters over which it has constitutional responsibility;
- the responsibility and powers of the regulatory bodies for a number of professional groups within the family law system, including the various the state and territory legal profession regulation bodies and associations, the Australian Health Practitioner Regulation Agency, state and territory medical practitioner boards, the Australian Psychological Society;
- the existing statutory body established under the Family Law Act to provide advice and make recommendations to the Attorney General about the family law system, the Family Law Council; and
- the existing statutory body established under the Family Law Act to provide research about issues affecting Australian families, including family law related issues.

The LCA considers that at a time when the resources for the essential services within the family law system are stretched beyond capacity, it cannot be justified as a matter of public policy for a new statutory body to be established and funded. The LCA considers that such a body would require significant initial and ongoing funding, and that such funds, even if they were available, would be better directed to providing front line services.

Nevertheless, the LCA has advocated publicly for some time for the reappointment of members to the Family Law Council. The LCA considers the Government's failure to appoint members to the Family Law Council, at the time of the 'merger bill' and the largest family law review in 40 years, inexplicable.

The LCA suggests that consideration be given to an expanded role for the Family Law Council, such that it has an ongoing reporting and investigatory role, rather than relying on terms of reference from government for specific projects. It could, for instance, report of the "health" of the family law system each year and make recommendations for improvements. It could also be the body that hosts collaborative meetings of all stakeholders in the family law system (see the LCA's previous comment about the utility of the Family Law Forum).

The LCA notes the following additional comments that have been received from the Law Society of South Australia:

*The Society considers that the Family Law Council and the Australian Institute of Family Studies are already well placed to undertake the tasks proposed to be carried out by the Family Law Commission.*

*Consideration should be given to existing systems and bodies and how they can be better utilised and funded. Given the family law system is already chronically underfunded, the Society questions this proposal, as well as similar proposals contained in the Discussion Paper that would in effect duplicate the functions and responsibilities of existing bodies/arrangements within the Family Law System.*

	<p>The LCA notes the following additional comments that have been received from the Queensland Law Society:</p> <p><i>In our view, dual regulation, as demonstrated in the dual migration of migration lawyers, would adversely impact legal practitioners for the following reasons:</i></p> <ul style="list-style-type: none"> <li><i>the uncertainty and compliance burdens of two separate legislative regimes and the associated differences in law, regulatory policies, practices and procedures of multiple regulatory bodies applying to the same area of legal practice;</i></li> <li><i>the annual cost of two regulation fees; and the</i></li> <li><i>burden of being subject of two practice and conduct regimes.</i></li> </ul> <p>The LCA also notes that part of the fragmentation of the family law system is that no single government department has complete oversight over the operation of the many aspects of the system. For instance, even though the effectiveness and operation of the child support scheme and family relationship centres intersect and impact upon the effectiveness and operation of the family courts, they are not administered by the same government department or minister.</p>
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12. SYSTEM OVERSIGHT AND REFORM EVALUATION	
<b>Proposal 12–2</b>	<p>The Family Law Commission should have responsibility for accreditation and oversight of professionals working across the system. In discharging its function to accredit and oversee family law system professionals, the Family Law Commission should:</p> <ul style="list-style-type: none"> <li>develop Accreditation Rules;</li> <li>administer the Accreditation Rules including the establishment and maintenance of an Accreditation Register;</li> <li>establish standards and other obligations that accredited persons must continue to meet to remain accredited, including oversight of training requirements;</li> <li>establish and administer processes for the suspension or cancellation of accreditation; and</li> <li>establish and administer a process for receiving and resolving complaints against practitioners accredited under the Accreditation Rules.</li> </ul>
<b>Response:</b>	Disagree.
<b>Comment:</b>	<p>The LCA is opposed to the establishment of the Family Law Commission. In relation to this aspect of its proposed functions – the accreditation and oversight of professionals, the LCA contends this would duplicate and overlap with so much of the responsibilities and powers of the existing professional regulatory bodies as to be entirely unworkable. Regulation, accreditation and other quality assurance schemes already apply to many professionals in the system.</p> <p>In so far as the legal profession and family lawyers are concerned, they must adhere to rigorous regulatory requirements to maintain their certificate to practise each year, and for those family lawyers that are accredited specialists, they must adhere to further regulatory requirements including additional continuing legal education in family law each year and submit to re-</p>

	accreditation every three years. Those regulatory requirement for lawyers are expensive to maintain. The LCA suggests that adding yet another regulatory scheme for family lawyers would inevitably increase costs for the users of the system. It may also discourage professionals from working in the system.
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12. SYSTEM OVERSIGHT AND REFORM EVALUATION	
<b>Proposal 12–3</b>	<p>The Family Law Commission should have power to:</p> <ul style="list-style-type: none"> <li>conduct own motion inquiries into issues relevant to the performance of any aspect of the family law system;</li> <li>conduct inquiries into issues referred by government relevant to the performance of any aspect of the family law system; and</li> <li>make recommendations to improve the performance of an aspect of the family law system as a result of an inquiry.</li> </ul>
<b>Response:</b>	Disagree.
<b>Comment:</b>	The LCA suggests that these are all powers which could be given to the existing Family Law Council.

12. SYSTEM OVERSIGHT AND REFORM EVALUATION	
<b>Proposal 12–4</b>	The Family Law Commission should have responsibility for raising public awareness about the family law system and the roles and responsibilities of professionals and services within the system.
<b>Response:</b>	Disagree.
<b>Comment:</b>	The LCA notes that this could be done directly by Government and by Government providing additional funding to existing bodies (Family Law Council; Family Law Section of the LCA; FRCs; Legal Aid bodies; state and territory law societies).

12. SYSTEM OVERSIGHT AND REFORM EVALUATION	
<b>Proposal 12–5</b>	The Family Law Commission should have responsibility for providing information and education to family law professionals and service providers about their legislative duties and functions.
<b>Response:</b>	Disagree.
<b>Comment:</b>	See above. Stakeholder groups already provide such information and education and could be encouraged to do more. Whilst that may require some funding from Government, the LCA suggests that this would be substantially less expensive for the taxpayer, would be more efficient, and would result in a higher quality of targeted information and education relevant to each sector.

12. SYSTEM OVERSIGHT AND REFORM EVALUATION	
<b>Proposal 12–6</b>	The Family Law Commission should identify research priorities that will help inform whether the family law system is meeting both its legislative

	requirements and its public health goals.
<b>Response:</b>	Disagree.
<b>Comment:</b>	The LCA is of the view that the Australian Institute of Family Studies is already established and well qualified to undertake this task.

## 12. SYSTEM OVERSIGHT AND REFORM EVALUATION

<b>Proposal 12-7</b>	The Australian Government should build into its reform implementation plan a rigorous evaluation program to be conducted by an appropriate organisation.
<b>Response:</b>	See response to Proposal 12-1 above.
<b>Comment:</b>	See comments on Proposal 12-1 above.

## 12. SYSTEM OVERSIGHT AND REFORM EVALUATION

<b>Proposal 12-8</b>	The Australian Government should develop a cultural safety framework to guide the development, implementation and monitoring of reforms to the family law system arising from this review to ensure they support the cultural safety and responsiveness of the family law system for client families and their children. The framework should be developed in consultation with relevant organisations, including Aboriginal and Torres Strait Islander, culturally and linguistically diverse, and LGBTIQ organisations.
<b>Response:</b>	Agree.
<b>Comment:</b>	None.

## 12. SYSTEM OVERSIGHT AND REFORM EVALUATION

<b>Proposal 12-9</b>	<p>The cultural safety framework should address:</p> <ul style="list-style-type: none"> <li>the provision of community education about the family law system;</li> <li>the development of a culturally diverse and culturally competent workforce;</li> <li>the provision of, and access to, culturally safe and responsive legal and support services; and</li> <li>the provision of, and access to, culturally safe and responsive dispute resolution and adjudication processes.</li> </ul>
<b>Response:</b>	Agree.
<b>Comment:</b>	None.

## 12. SYSTEM OVERSIGHT AND REFORM EVALUATION

<b>Proposal 12-10</b>	Family law service providers should be required to provide services that are compliant with relevant parts of the cultural safety framework.
<b>Response:</b>	Agree.
<b>Comment:</b>	None.

12. SYSTEM OVERSIGHT AND REFORM EVALUATION	
<b>Proposal 12–11</b>	<p>Privacy provisions that restrict publication of family law proceedings to the public, currently contained in s 121 of the <i>Family Law Act 1975</i> (Cth) should be maintained, with the following amendments:</p> <ul style="list-style-type: none"> <li>• s 121 should be redrafted to make the obligations it imposes easier to understand;</li> <li>• an explicit exemption to the restriction on publication or dissemination of accounts of proceedings should be provided for providing accounts of family law proceedings to professional regulators, and for use of accounts by professional regulators in connection with their regulatory functions;</li> <li>• an avoidance of doubt provision should be inserted to clarify that government agencies, family law services, service providers for children, and family violence service providers are not parts of the ‘public’ for the purposes of the provision;</li> <li>• the offence of publication or dissemination of accounts of proceedings should only apply to public communications, and legislative provisions should clarify that the offence does not apply to private communications; and</li> <li>• to ensure public confidence in family law decision making, an obligation should be placed on any courts exercising family law jurisdiction, other than courts of summary jurisdiction, to publish anonymised reports of reasons for decision for final orders.</li> </ul>
<b>Response:</b>	Agree.
<b>Comment:</b>	The LCA is particularly concerned that a requirement upon family courts to publicly publish all (anonymised) reasons for judgment be enshrined in legislation. The former Chief Justice of the Family Court, the Hon Diana Bryant instigated such a policy when she became Chief Justice. Such a policy has not, and does not, exist in the Federal Circuit Court (whether by reasons of lack of resources or a different approach). The LCA considers it vital to enhance public confidence and so as to enable proper consideration of the work of the family courts, for all judgments to be published publicly in a timely manner.

12. SYSTEM OVERSIGHT AND REFORM EVALUATION	
<b>Question 12–1</b>	Should privacy provisions in the <i>Family Law Act 1975</i> (Cth) be amended explicitly to apply to parties who disseminate identifying information about family law proceedings on social media or other internet-based media?
<b>Response:</b>	Yes.
<b>Comment:</b>	If the section is to be redrafted to make it easier to understand, examples of what is ‘public dissemination’ could be included.

12. SYSTEM OVERSIGHT AND REFORM EVALUATION	
<b>Question 12–2</b>	Should a Judicial Commission be established to cover at least Commonwealth judicial officers exercising jurisdiction under the <i>Family Law Act 1975</i> (Cth)? If

	so, what should the functions of the Commission be?
<b>Response:</b>	Yes.
<b>Comment:</b>	<p>The LCA supports the creation of a Judicial Commission to which family law judicial officers could be referred, in certain limited circumstances. The number of judicial officers exercising family law jurisdiction is significant. While there is a complaint processes (within the courts), that process may suffer from the (unfair or otherwise) perception by the public that it is not independent. The creation of an independent body will increase public confidence in our judicial system. The LCA generally supports the creation of a Judicial Commission with functions similar to the complaints function of the NSW Commission.</p> <p>The LCA does not consider that there are any special provisions required within such a Commission related only to judges exercising family law jurisdiction. However, the LCA suggests that further consideration be given more generally to the question of when public hearings are appropriate. The LCA considers that there is merit in the hearings to test allegations being held privately, with the outcome and transcript of such hearings only being made public if the allegations are proven.</p>