



National Legal Aid

Australian Law Reform Commission
Review of the family law system
Discussion Paper 86

Submission

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Contents

Contents.....	2
About National Legal Aid and Australia’s legal aid commissions	3
2. Education, Awareness and Information	5
3. Simpler and Clearer Legislation	12
4. Getting Advice and Support.....	21
5. Dispute Resolution.....	25
Other matters	31
6. Reshaping the Adjudication Landscape	34
7. Children in the Family Law System	41
8. Reducing Harm.....	62
9. Additional Legislative Issues	66
10. A Skilled and Supported Workforce.....	69
11. Information Sharing	76
12. System Oversight and Reform Evaluation	84

About National Legal Aid and Australia's legal aid commissions

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

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

LAC services

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

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

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

In the 2017-18 financial year LACs provided in excess of 2.25 million services in all law types.

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

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

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

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

² *Ibid* 3.

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

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

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

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

Attachment A to this submission is an NLA publication containing information about NLA and LAC service delivery including a map illustrating the locations of LAC offices from which services are delivered, and information about the type and the intensity of services delivered by LACs.

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

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

- LACs have the benefit of the significant expertise and practical experience of thousands of staff and private legal practitioners funded to undertake LAC matters, working in all jurisdictions across the country in a diverse range of family law and related matter types, stages of matter, priority groups, and geographical locations.

³ Ibid B-1.

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

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

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

2. Education, Awareness and Information

NLA’s experience in developing national resources, which deal with multiple areas of law across all state and territory jurisdictions, has informed the NLA response to this chapter.

It is important to distinguish between:

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

- general legal and other education for the community at large, such as would be presented in a public education campaign;
- CLE and information resources targeted at particular needs or to particular sections of the community, including workers who have contact with separated families;
- information and referral provided directly to individuals on a one-on-one basis, whether in person, by tele/videophone or online chat.

In the 2016-17 financial year LACs:

- provided 3,866 CLE activities to over 83,000 individuals;
- produced 1,566 CLE resources;
- provided 1.25 million information and referral services.

LACs provide information to the community “in a wide variety of traditional and innovative ways”.⁵

NLA has a national CLE Network (CLEN)⁶ that includes representation from all LACs and the National Association of Community Legal Centres. NLA, through the CLEN, and NLA’s Family Law Working Group (FLWG), has produced national resources tailored for each of the states and territories in the areas of family and related laws, including for example:

- *Family Violence Law Help* - Family Advocacy and Support Service CLE Resource (2018). This web-based resource contains legal, safety and other information in relation to family violence, across the different legal systems, and for all states and territories.
- Independent Children’s Lawyers brochures (2014) - *What is an independent children’s lawyer?*; *What happens when your parents go to court?* (older children); *What happens when your parents go to court?* (younger children); *Deciding whether you should help with supervision*.
- *What’s the law? Australian law for new arrivals* (2012) - including modules on family law, family violence and child protection.
- Fact sheets for the Commonwealth Attorney-General’s Department website Family Relationships Online (e. 2006).

Maintenance of publications to ensure that they remain current requires ongoing resourcing.

⁵ National Legal Aid *submission 163*, Australian Law Reform Commission, Review of the Family Law System, Issues Paper 48 (2018), 13.

⁶ Formerly known as the NLA Community Legal Education Working Group.

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.

NLA generally supports this proposal in the context of the response to Proposals 4-1 to 4-4 in relation to Families Hubs.

The benefits of enhanced community awareness and understanding of the family law system are set out in detail in NLA’s response to the Australian Law Reform Commission Issues Paper 48 (IP).⁷

NLA suggests that consideration be given to the campaign addressing myths and misconceptions prevalent in the community about family law and the family law system. In this regard please refer to the NLA response to the IP.⁸

NLA notes the available evidence about effective public legal education, in particular the idea of using multiple channels to effectively reach target audiences.⁹

NLA also suggests that in developing and promoting the national education and awareness campaign and the information package, relevant stakeholders should be engaged, including those with expertise in the development and delivery of effective national CLE information (CLEI) resources in family and related law, such as representatives of the NLA CLEN and FLWG.

⁷ National Legal Aid *submission 163*, Australian Law Reform Commission, Review of the Family Law System, Issues Paper 48 (2018) 14.

⁸ *Ibid* 16.

⁹ Community Legal Education Ontario, *Public Legal Education and Information in Ontario Communities: Formats and Delivery Channels* (2013).

The Discussion Paper 86 (DP) makes the comment at paragraph 2.9 that stakeholder submissions suggested “the current information access points are not well-known or visible to families”. NLA refers to research which indicates LACs have the highest public recognition rates of any legal service¹⁰ and consequently are one of the main entry points to the family law system for separating families. It is also relevant for people who need to access legal assistance services that LACs provide the full suite of services, i.e. not only information and CLE materials, but also legal advice, duty lawyer, Family Advocacy and Support Services (FASS), legally assisted FDR and legal representation.

NLA has some concerns about the extent of the resources necessary to support both the campaign and the response to increased demand for service delivery as a result of the campaign.

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.

Supported.

Proposal 2–3 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.

Supported.

Proposal 2–4 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:

- **universal services that work with children and families, such as schools, childcare facilities and health services; and**
- **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.**

Supported, in the context of the NLA response to Proposals 4-1 to 4-4 in relation to Families Hubs.

¹⁰ Christine Coumarelos et al, *Legal Australia-Wide Survey: Legal Need in Australia* (Law and Justice Foundation of NSW 2012) xvi.

Development of referral relationships should take account of established arrangements.¹¹ Family Pathways Networks are also instructive in this regard.

Proposal 2–5 The Australian Government should convene a standing working group with representatives from government and non-government organisations from each state and territory to:

- **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 about the family law system; and**
- **review the information package on a regular basis to ensure that it remains up-to-date.**

Supported, however, NLA perceives considerable challenges to producing a single national comprehensive package. NLA also has some reservations about the efficacy of a large standing working group. It is suggested that the group would require significant resourcing noting both the proposed development and review functions of the group.

The avoidance of duplication should be the starting point for the creation of any new CLEI resource. As indicated in the NLA response to the IP, “a significant number of family law and related systems information services [are] already being appropriately delivered by a range of agencies in different contexts, using a variety of methods, to individuals, community groups, and to other service providers.”¹² The information package should leverage off and build on existing resources.

Likely challenges to producing the information package include:

- the complexity involved in developing a national resource which accurately reflects for each state and territory the inter-relationship between Commonwealth family law and the respective state and territory based family violence and child protection laws, and provides information about respective service delivery/referral points;
- the lack of suitability of one generic information package for multiple audiences/groups/needs;
- the time, resources and associated cost that would be required to continually review and update the package.

It is suggested that the question of how to proceed with a new large-scale CLEI package for the family law system might initially be subject to further discussions with existing national networks with experience in the area, such as the NLA CLEN and the NLA FLWG (see above) to ensure that all learnings are taken into account prior to embarking on a wider process.

¹¹ E.g. LACs have collaborative arrangements pursuant to the *National Partnership Agreement on Legal Assistance Services 2015-2020*, B10.

¹² National Legal Aid *submission 163*, Australian Law Reform Commission, Review of the Family Law System, Issues Paper 48 (2018) 17.

Proposal 2–6 The family law system information package should be tailored to take into account jurisdictional differences and should include information about:

- the legal framework for resolving parenting and property matters;
- the range of legal and support services available to help separating families and their children and how to access these services; and
- the different forums and processes for resolving disputes.

Supported.

The proposed package is a significant undertaking. To ensure it is accurate for all states and territories will require national networks which are capable of identifying and resolving cross-border differences and issues. Please refer to the response to Proposal 2-5.

Proposal 2–7 The family law system information package should be accessible in a range of languages and formats, including:

- electronically via a central website;
- as printed material available at key entry points to the family law system and universal services; and
- through interactive means, including a national telephone helpline and a national web-chat service.

Supported.

The development of CLEI resources should take into account current and future trends and any available research regarding information access and the use of technologies.

NLA's experience is that a single print version of the totality of family law and related information would make for an extraordinarily large document, even if the information was pitched at a fundamental level. Accordingly, the central website should enable 'page only' printing.

Regular changes to laws, processes and services would also make very challenging the prospect of a single, up-to-date, reliable, printed resource. The *Family Violence Law Help* (FASS CLE resource) produced by NLA¹³ is instructive in this regard. Overall information was divided into approximately 80 separate, one-page information sheets capable of being individually printed.

Proposal 2–8 The family law system information package should be:

- developed with reference to existing government and non-government information resources and services;

¹³ Legal Aid NSW was the lead LAC for this project.

- **developed in consultation with Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTIQ and disability organisations; and**
- **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.**

Supported. See the NLA response to Proposal 2-5.

The campaign should also be guided by and compliant with CLE good practice objectives and principles, e.g.:

- *CLE should be informed by community development practice*
- *CLE should be relevant to the community and respond to a need*
- *CLE should be targeted to specific audiences*
- *CLE should be accessible to those who need it*
- *CLE should be appropriate to the targeted community*
- *CLE should be based on consultation and participation with the targeted community*
- *CLE should consider initiatives currently available*
- *CLE should be coordinated*
- *CLE initiatives should be trialled and tested*
- *CLE should be documented*
- *CLE should be evaluated*
- *CLE should be conducted by those with appropriate skills*
- *CLE should be informed by other disciplines when considering service delivery.*¹⁴

In reviewing/creating any CLEI content, it is suggested that it is important to consider:

- the problem/s and the audience/s – who needs the information, why?
- the primary sources of family law content, which audiences this content currently reaches and how effective this content is?
- how to involve the community in a process of content review and creation, as opposed to testing content at the end of a process?
- the pros and cons of various approaches – centralised information vs generic information that is localised

¹⁴ National CLE Advisory Group, *Guidelines for the Management of Community Legal Education*, 2005. The National CLE Advisory Group comprised representatives of NLA and NALCL. Its function is now undertaken by the NLA CLEN and NALCL CLECD representatives.

- what current research says about information services - there are precedents and evidence around best practice that should be applied.

Any information package should also include relevant information from the social sciences to “enhance the interface and links between legal and social science information” and to inform parents and support healthy, positive parenting and conflict resolution for both intact and separated families”.¹⁵ It is suggested that the following could be included in the package:

- healthy attachment;
- child development;
- respectful and healthy relationships;
- positive ways of resolving conflict;
- the needs of children and positive parenting post-separation;
- family violence and its impacts on children.

Proposal 3-9 of the DP is relevant, i.e. that the Attorney-General’s Department (Cth) 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 well-being. This resource should be publicly available and easily accessible, and regularly updated.

3. Simpler and Clearer Legislation

Proposal 3–1 The Family Law Act 1975 (Cth) and its subordinate legislation should be comprehensively redrafted with the aim of simplification and assisting readability, by:

- **simplifying provisions to the greatest extent possible;**
- **restructuring legislation to assist readability, for example by placing the most important substantive provisions as early as possible;**
- **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;**
- **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;**
- **removing or rationalising overlapping or duplicative provisions as far as possible;**

¹⁵ National Legal Aid *submission 163*, Australian Law Reform Commission, Review of the Family Law System, Issues Paper 48 (2018) 19.

- **removing provisions establishing the Family Court of Australia and the Australian Institute of Family Studies to separate legislation;**
- **removing provisions defining parentage for the purposes of Commonwealth law to separate legislation; and**
- **considering what provisions should be contained in subordinate legislation rather than the Act.**

NLA supports revision and appropriate redrafting of the legislation to ensure that it is as comprehensible to as many people as possible.

NLA would welcome the opportunity to participate in user testing. NLA suggests that advisors pursuant to the current s 60D of the *Family Law Act 1975* (Cth) (the Act) should also be included in user testing.

Much of the subject matter of the legislation is, however, necessarily complex in nature, and as indicated by the proposal there will be limits to the extent to which it can be simplified. Ensuring clarity in the legislation should take precedence over its simplification. It is ultimately judicial officers who have to apply the legislation, and it is important that the legislation is of such precision that it is capable of consistent application. There is a settled body of case law in relation to the existing legislation. If re-drafted legislation is imprecise it is expected that there would be a period of uncertainty and inconsistency in the application of that legislation until the law is settled through appellate processes.

The use of terms that have precise meaning will aid the consistent application of the law. To this end, NLA has reservations about the replacement of defined technical terms like “subpoena” and “affidavit” with terms such as “order to produce documents” and “witness statement” as suggested in the DP.

Whilst NLA supports the use of plain English in legislation, any substitution of technical legal terms with plain English equivalents will need to be undertaken with great care to ensure that the substitutes do not lose meaning, or spur litigation to establish their meaning.

The terminology across family law legislation must be consistent with a glossary of terms to be included in the legislation.

There are significant CLEI resourcing implications associated with comprehensive redrafting. Unless the proposed information package is capable of replacing all existing CLEI materials, which is considered unlikely, the many valuable CLEI resources currently available to the public will need to be reviewed and amended or replaced. This will be costly for service providers.

NLA would support the removal, from the Act, of provisions about establishing each of the Family Court, the Australian Institute of Family Studies, and defining parentage if there was a demonstrable advantage to do so.

NLA sees some logic in family law legislation first establishing the authority of the court to make decisions where parties cannot agree about the arrangements to be made.

NLA appreciates that parentage is intrinsically relevant to the decisions that the court could make, and notes that the concept of parentage is also relevant to a range of other issues, e.g. passports, citizenship, and wills and intestacy. Given the cross-jurisdictional implications of parentage, provisions defining parentage should be the subject of cross-jurisdictional agreement.

Whilst the legislation is currently large, there is a benefit in related laws being collated in one place, rather than users having to source/access/carry multiple Acts.

Proposal 3–2 Family law court forms should be comprehensively reviewed to improve usability, including through:

- **only gathering information that is absolutely required, and simplifying how information is gathered (eg through use of check-boxes);**
- **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;**
- **using real-time help functions, such as a live-chat functionality, and links to audio-visual help;**
- **providing collaborative functions in circumstances where forms require information from both parties to allow them both to easily enter information;**
- **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;**
- **providing a paper form for use by individuals without access to technology; and**
- **providing a single set of forms for all courts exercising jurisdiction under the Family Law Act 1975 (Cth).**

Supported, in the context of NLA’s response to Proposal 3-1 above.

NLA views the use of technology as fundamental in breaking down barriers to accessing justice, including by the use of court smart forms.

By way of example, the Form 13 Financial Statement that parties are required to file in family law proceedings is a complex document that assumes a relatively sophisticated level of knowledge as to financial affairs and structures.

A smart version of the Financial Statement that leads a user by asking contextual questions and provides examples would be of significant assistance to self-represented persons.

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’.

NLA supports retention of the child’s best interests as the paramount consideration but does not support amendment of the principle to refer to ‘safety’.

Best interests encompasses safety and to separate it out may imply it is not a component of best interests. This has the potential to raise a range of issues, including the role of child protection authorities and appropriate benchmarks for intervention, and the question of what else might not be encompassed by best interests.

NLA is concerned that this proposed amendment has the capacity to complicate interpretation of the legislation rather than to simplify it which is the aim suggested in Proposal 3-1.

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;
- where maintaining a relationship does not expose them to abuse, family violence or harmful levels of ongoing conflict;
- 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
- 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:
 - (a) maintain a connection with family, community, culture and country; and
 - (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.

Supported in the context of the response to Proposal 3-3.

The ‘maintaining relationship provision’ is very broad and consequently unlikely to make interpretation of the provisions less complex.

The under-resourcing of child welfare and child protection systems, and the high benchmarks for protective intervention, are widely acknowledged and are suggested as relevant to consideration of this issue.

NLA agrees with the DP at paragraph 3.44, that the current s 60B of the Act “substantially overlaps with s 60CC (the best interests factors), but is inconsistent in a number of respects. ...confuses rather than clarifies interpretation, and has had little practical effect.”

However, the proposed s 60B appears to involve a degree of repetition and a similar overlap with the new s 60CC.

Proposal 3–5 The guidance in the *Family Law Act 1975* (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:

- any relevant views expressed by the child;
- whether particular arrangements are safe for the child and the child’s carers, including safety from family violence or abuse;
- the developmental, psychological and emotional needs of the child;
- the capacity of each proposed carer of the child to provide for the developmental, psychological and emotional needs of the child;
- 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
- anything else that is relevant to the particular circumstances of the child.

Supported in the context of the response to Proposal 3-3.

If a hierarchy is intended, we have some concerns that hierarchy will lend itself to debate and has the potential to complicate considerations in individual matters, e.g. where a child’s views are not supported by the evidence of what is in their best interests.

Proposal 3–6 The *Family Law Act 1975* (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.

Supported.

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.

Supported in the context of the response to Proposal 3-3.

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

The change in language from *parental responsibility* to *decision making responsibility*, and the abolition of equal shared parental responsibility and reference to specific time arrangements will greatly reduce confusion.

The education and awareness campaign and family law information package also present opportunities to proactively address common myths and misconceptions and promote better understandings of the law.

Consideration could be given to including in the legislation examples of the sorts of matters which would require consultation in the absence of any specific court orders, although such consideration should take into account the over-arching aim to simplify/streamline the legislation.

Proposal 3–8 The *Family Law Act 1975* (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:

- there has been a change of circumstances that, in the opinion of the court, is significant; and
- it is safe and in the best interests of the child for the order to be reconsidered.

Supported as a codification of the principle in *Rice & Asplund*. However, consideration should be given to re-expressing the test as a plain English version of the three criteria in *Marsden & Winch*¹⁶ referred to in the DP at paragraph 3.77.

In relation to the second dot point, NLA refers to our comments in response to Proposal 3-3.

Proposal 3–9 The Attorney-General’s Department (Cth) 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.

Supported, with the inclusion of law as an area of relevant expertise.

NLA supports “improved linking of information about the law and legal processes with information from the social sciences”.¹⁷

NLA would seek to be included as a key stakeholder in such consultations.

¹⁶ *Marsden & Winch* [2009] FamCAFC 152 [50]. This formulation was cited by the Full Court of the Family Court with approval in *O’Brien & O’Brien* (2017) [2017] FamCAFC 219 [21].

¹⁷ National Legal Aid *submission 163*, Australian Law Reform Commission, Review of the Family Law System, Issues Paper 48 (2018), 19.

The proposed resources would provide significant support to separating parents and could be integrated with the family law system information package and education and awareness campaign.

It is suggested that the resource would benefit from consultation from those with expertise in the development and delivery of CLEI resources.

As with any written information resource, there will need to be an agency with ultimate responsibility for its currency. The maintenance and updating of information resources can require considerable time and resources and this role would need to be supported.

Proposal 3–10 The provisions for property division in the *Family Law Act 1975 (Cth)* should be amended to more clearly articulate the process used by the courts for determining the division of property.

Supported.

Proposal 3–11 The provisions for property division in the *Family Law Act 1975 (Cth)* should be amended to provide that courts must:

- in determining the contributions of the parties, take into account the effect of family violence on a party's contributions; and
- in determining the future needs of the parties, take into account the effect of any family violence on the future needs of a party.

Supported.

Proposal 3–12 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.

Supported.

NLA is of the view that any substantial change to the current law in relation to property and financial matters after separation should be informed by an appropriate evidence base.

Proposal 3–13 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.

Supported.

Proposal 3–14 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.

Supported.

Proposal 3–15 The Australian Government should develop information resources for separating couples to assist them to understand superannuation, and how and why superannuation splitting might occur.

Supported.

Proposal 3–16 The *Family Law Act 1975* (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.

Supported.

Proposal 3–17 The Australian Government should develop tools to assist parties to create superannuation splitting orders. These could include:

- a tool to look up the legal name and contact details of superannuation funds;
- 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;
- 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
- allowing auto-generation of standard form orders based on the standard orders provided by the superannuation trustee and user-entered data.

Supported.

NLA believes there is considerable scope for technology to be used to simplify the process of obtaining information in relation to superannuation interests, and then producing appropriate orders based on those interests.

NLA supports any efforts to standardise and regulate the fees charged by superannuation trustees in respect of family law matters, including in relation to actioning information requests and giving effect to a splitting order.

Superannuation trustees should waive fees by applying similar criteria to that used by courts in respect of court fees.

Question 3–2 Should provision be made for early release of superannuation to assist a party experiencing hardship as a result of separation? If so, what limitations should be

placed on the ability to access superannuation in this way? How should this relate to superannuation splitting provisions?

In LACs' practice experience there are cases where an ability to split and release superannuation on an interim basis would ameliorate hardship to clients in circumstances of vulnerability, e.g. victims of family violence where superannuation is the only identifiable asset. An interim split with an early release on the grounds of hardship would enable parties in this situation to deal with immediate financial issues, such as the need to access alternative housing.

NLA notes that there appears to be nothing currently preventing a court making an interim superannuation splitting order. Section 90MS makes clear that a superannuation splitting order is made "under either section 79 or 90MS".

Sections 80(1)(h) and 90SS(1)(h) provides that a court, in exercising its jurisdiction to alter property interests, may "make a permanent order, **an order pending the disposal of proceedings** or an order for a fixed term or for a life or during joint lives **or until further order.**"

However, a person seeking an interim superannuation splitting order would have to satisfy the court of the usual grounds for an interim property settlement order including that:

1. it is appropriate to exercise the power having regard to the fact that the usual order is a "once and for all" order made after a final hearing; and
2. the power must be exercised conservatively, with the judicial officer satisfied that the remaining property will be sufficient to meet the legitimate expectations of both parties at the final hearing, or that the order that is contemplated is capable of being reversed or adjusted if necessary.

Whether an interim superannuation split is 'appropriate' will likely be informed by any changes made to early release conditions for superannuation. The court is unlikely to make an interim superannuation splitting order unless there is evidence that an early release condition applies and that the applicant will be able to access the funds in the circumstances.

NLA welcomes the Australian Government's 2018 Women's Economic Security Statement, that the "Government will extend the ability to access early release of superannuation to victims of family violence and domestic violence" and further consideration being given to permitting the early release of superannuation to assist a party experiencing hardship as a result of separation, subject to a careful assessment of whether the immediate benefits outweigh the benefits of maintaining those savings until retirement.

Question 3–3 Which, if any, of the following approaches should be adopted to reform provisions about financial agreements in the *Family Law Act 1975* (Cth):

- **amendments to increase certainty about when financial agreements are binding;**

- 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;
- replacing existing provisions about financial agreements with an ability to make court-approved agreements; or
- removing the ability to make binding pre-nuptial financial agreements from family law legislation, and preserving the operation of any existing valid agreements?

NLA would support an amendment for setting aside an agreement where it would be unjust to enforce the agreement by reason of family violence.

Proposal 3–18 The considerations that are applicable to spousal maintenance (presently located in s 75 of the *Family Law Act 1975* (Cth)) should be located in a separate section of family law legislation that is dedicated to spousal maintenance applications ('dedicated spousal maintenance considerations').

Supported.

Proposal 3–19 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.

Supported.

Question 3–4 What options should be pursued to improve the accessibility of spousal maintenance to individuals in need of income support? Should consideration be given to:

- greater use of registrars to consider urgent applications for interim spousal maintenance;
- administrative assessment of spousal maintenance; or
- another option?

NLA supports consideration being given to greater use of registrars as proposed above.

Please also see the NLA response to Question 18 of the IP.

4. Getting Advice and Support

Proposal 4–1 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:

- identify the person's safety, support and advice needs and those of their children;

- **assist clients to develop plans to address their safety, support and advice needs and those of their children;**
- **connect clients with relevant services; and**
- **coordinate the client’s engagement with multiple services.**

NLA supports the aim of having visible entry points for accessing a range of legal and support services, such as those identified above, but does not support the creation of Families Hubs as proposed at this point in time.

The proposed Families Hubs would require a significant level of new funding. The model appears similar to the Victorian Safety and Support (Orange Door) Hubs, which commenced at five launch sites in 2018, and are in the process of being evaluated.¹⁸

Some potential issues in relation to the Families Hubs, which would require careful consideration, include:

- whether the on-site co-location of the services in Proposal 4-3 would be feasible;
- the challenge in providing Families Hubs across regional, rural and remote areas, particularly given that many of the services identified in Proposal 4-3 may not exist in many of these areas;
- whether a ‘bricks and mortar’ service centre represents the best model for the future, given the growing trend of the community, particularly young people, to access information via technology;
- possible duplication of some of the function and services of existing service providers; and
- the large cost involved and the comparative cost of other models.

Given an environment of limited resources and the need to carefully prioritise funding, in NLA’s view, any recommendations regarding Families Hubs should be deferred pending the evaluation of the Victorian Hubs, which it is understood is due to be completed in 2019.

Alternative approaches might include leveraging off existing effective Pathways Networks and branding existing entry points such as the LACs including FASS locations, Family Relationship Centres, Domestic Violence Units and Health Justice Partnerships, as approved ‘Families Hubs’. The high recognition rates of LACs referred to in the response to Proposal 2-1, supports LACs as a logical entry point for services. LACs have been recommended as entry points for services in a number of recent reports.¹⁹

¹⁸ Victorian Government, *The Orange Door Support and Safety Hub: Support and Safety Hubs Service Model* (2018) 3-5.

¹⁹ Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, 2014) recommendation 5.2; Victorian Government, *Access to Justice Review* (2016) recommendation 2.1; Ernst & Young, ‘SA Community Legal Centres Service Review Project Final Report’ (2016) 5.

Branding should involve the meeting of minimum requirements, such as:

- ability to assess and triage for both legal and social support needs;
- ability to case manage complex needs clients;
- demonstrated referral pathways and the ability to appropriately refer to other services, including by warm referral where possible; and
- demonstrated collaborative arrangements with other service providers.

It is suggested that a model that allows a number of existing agencies to be branded as 'Families Hubs' would provide flexibility, address issues in more rural and regional areas, and be cost effective.

The critical service delivery component is suggested to be integrated and supported case-management rather than physical co-location.

Proposal 4–2 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.

Supported, in the context of the response to Proposal 4-1.

Please also refer to the response to Chapter 11 Information Sharing.

Proposal 4–3 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:

- specialist family violence services;
- legal assistance services (such as community legal centres);
- family dispute resolution services;
- therapeutic services (such as family counselling and specialised services for children);
- financial counselling services;
- housing assistance services;
- health services (such as mental health services and alcohol and other drug services);
- gambling help services;
- children's contact services; and
- parenting support programs or parenting education services (including a program for fathers).

NLA supports coordinated service delivery to advance the safety and wellbeing of separated families and their children. As previously identified, the critical service delivery component is suggested to be integrated and supported case-management rather than physical co-location.

As indicated in the response to Proposal 4-1, NLA has some reservations about the establishment of new 'bricks and mortar' hubs. Noting all those services identified above in

relation to the suggestion of out-posted workers, challenges would include effective use of personnel time and associated cost, and housing all services in one location. The availability of some service types in less populated areas will also be an issue.

As suggested in the response to Proposal 4-1, it would be more cost-effective and more readily achievable to resource existing agency entry points as 'Families Hubs'. There are many examples of successfully integrated legal and social support services, including FASS and the Domestic Violence Units and Health Justice Partnerships operated by LACs and CLCs.

Proposal 4–4 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.

Supported, in the context of the NLA response to Proposals 4-1 to 4-3.

Proposal 4–5 The Australian Government should, subject to positive evaluation, expand the Family Advocacy and Support Service (FASS) in each state and territory to include:

- an information and referral officer to conduct intake, risk and needs screening and triage, as well as providing information and resources;
- 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
- 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.

Supported, on the basis that appropriate resourcing is provided.

FASS should not, however, become a substitute for a grant of legal aid for on-going legal representation to clients who would otherwise meet the eligibility criteria for a grant of legal aid.

Proposal 4–6 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.

NLA would support FASS support service workers providing case management on the above basis if appropriately resourced to provide the service.

Proposal 4–7 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.

Supported. This is the current basis for existing FASS and duty lawyer services.

Proposal 4–8 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.

Supported.

5. Dispute Resolution

Proposal 5–1 The guidance as to assessment of suitability for family dispute resolution that is presently contained in reg 25 of the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) should be relocated to the *Family Law Act 1975* (Cth).

Supported. This proposal is consistent with the aims of accessibility and clear messaging in the legislation.

Proposal 5–2 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.

Supported.

The FDR provider should also take into account other matters including:

- *The model of FDR to be used;*

Issues arising out of an imbalance in knowledge of the matters in dispute will often be addressed by legally assisted models of FDR.

- *The exceptions identified in Proposal 5-3.*

Proposal 5–3 The *Family Law Act 1975* (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:

- 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;
- the complexity of the asset pool, including circumstances involving third party interests (apart from superannuation trustees);
- where there is an imbalance of power, including as a result of family violence;
- where there are reasonable grounds to believe non-disclosure may be occurring;
- where one party has attempted to delay or frustrate the resolution of the matter; and
- where there are allegations of fraud.

Supported, subject to noting that there will be some matters where the imbalance of power can be addressed by legally assisted FDR.

NLA supports the exceptions being drafted in a manner which does not necessarily preclude family violence victims from participating in FDR, but provides them with a choice to elect not to participate, should they wish to rely on the exception.

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.

NLA supports the intent behind this proposal, which is to ensure that parties take genuine steps to resolve property matters and that attaching costs consequences to a failure to do so “will mitigate the possibility that these proposals might have the unintended consequence of creating further opportunities to misuse processes”.²⁰

NLA understands from paragraphs 5.33 to 5.37 of the DP that it is the applicant (rather than both parties) who is required to provide evidence of the steps taken to resolve the issues in dispute, but that once proceedings are before the court, the court is able to consider whether either/both parties have made a genuine effort to resolve the matter in good faith.

Proposal 5–5 The *Family Law Act 1975 (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:

- the matter was assessed as not suitable for family dispute resolution;
- the person to whom the certificate was issued had attempted to initiate a family dispute resolution process but the other party has not responded;

²⁰ Australian Law Reform Commission, *Review of the Family Law System*, Discussion Paper 86 (2018) [5.36].

- **the parties had commenced family dispute resolution and the process had been terminated; or**
- **the matter had commenced and concluded with partial resolution of the issues in dispute.**

Supported, with suggestions for additional reasons for a certificate to issue:

- the person to whom the certificate was issued had attempted to initiate a FDR process but the other party has not responded or has responded but not *participated*;
- FDR *not reasonably able to be completed prior to the expiry of the alleged time limit to file property proceedings* (see the response to Question 5-1).
- FDR *is not able to proceed due to the FDR provider having concerns about incomplete/inadequate disclosure* (see the response to Proposal 5-8).

Question 5–1 Should the requirement in the *Family Law Act 1975 (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?

NLA does not support the time limits for property matters being revised. In NLA’s view the existing time limits are appropriate, and compelling practical and policy reasons remain to end the financial relationship of the parties as currently provided for by s 81 of the Act.

NLA notes, however, that a mandatory requirement for pre-filing FDR in property matters will be likely to place greater demand on existing FDR service providers, potentially increasing the time taken to complete FDR, particularly whilst workforces are being increased to meet demand.

The issue of a party possibly being unable to attempt or complete FDR prior to the expiry of the relevant time limit might be addressed by:

- Adding *FDR not reasonably able to be completed prior to the expiry of the alleged time limit to file property proceedings*, to the categories of exceptions.
- Having a simplified process for filing a property application within time, allowing adjournment of proceedings pending the attempt or completion of FDR.
- Where leave is sought to file out of time, court processes should also allow for referral to FDR where FDR has not already been attempted.

Proposal 5–6 The *Family Law Act 1975 (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:

- **earnings, including those paid or assigned to another party;**
- **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;**

- **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;**
- **superannuation interests; and**
- **liabilities and contingent liabilities.**

Supported.

NLA suggests that for clarity, the legislation should provide that the disclosure obligation arises upon separation.

Compliance with the disclosure obligation is likely to be facilitated by having online self-populating smart forms which:

- provide prompts and plain English explanations;
- assist self-represented parties to complete them; and
- automatically generate any documentation required to be provided to the other party.

The prompts and explanations, would assist parties to understand what must be disclosed, including assets and property which may have already been divested or are no longer in the possession or control of the parties.

Proposal 5–7 The provisions in the *Family Law Act 1975 (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:

- **impose a consequence, including punishment for contempt of court;**
- **take the party’s non-disclosure into account when determining how costs are to be apportioned;**
- **stay or dismiss all or part of the party’s case; or**
- **take the party’s non-disclosure into account when determining how the financial pool is to be divided.**

Supported.

Question 5–2 Should the provisions in the *Family Law Act 1975 (Cth)* setting out disclosure duties be supported by civil or criminal penalties for non-disclosure?

NLA considers current penalties are sufficient, but that these might be better publicised as part of the information package.

Proposal 5–8 The *Family Law Act 1975 (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:

- 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
- if the matter proceeds to court and a party fails to observe this duty, courts have the power to:
 - (a) impose a consequence, including punishment for contempt of court;
 - (b) take the party's non-disclosure into account when determining how costs are to be apportioned;
 - (c) stay or dismiss all or part of the party's case; and
 - (d) take the party's non-disclosure into account when determining how the financial pool is to be divided.

Supported.

NLA suggests that it is emphasised to parties that continuing disclosure includes disclosing changing circumstances throughout the process, e.g. the acquisition of a new job or anything that might be relevant to their future needs.

Question 5–3 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?

NLA supports the existing process which alerts the courts to the possibility of risk issues whilst also minimising risk to vulnerable parties and their children.

Proposal 5–9 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:

- 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;
- 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
- amendments to existing funding agreements and practice agreements to support this work.

Supported.

NLA considers legally assisted FDR is the most appropriate model for FDR in property and financial matters, and particularly in parenting matters where there is a power imbalance created by issues such as family violence. In NLA's view it is always appropriate to have legal advice when entering into a process which has the capacity to affect rights and entitlements.

LACs are one of the largest providers of legally assisted FDR nationally, including to members of the groups identified; 7,543 conferences were held in 2017-18 with a national settlement rate of 81%. NLA would welcome the capacity to extend these legally assisted dispute resolution services to more people.

For LAC legally assisted FDR, one party must usually be eligible for a grant of legal aid which involves means and merit testing. Sometimes costs are recovered where parties can afford it. Presently LACs are limited by funding constraints from providing more of these services, with the means tests being very stringent, and the Productivity Commission recommending that \$57 million per annum was required to relax the LACs' means tests,²¹ with more people living in poverty (14%) than eligible for legal aid (8%).²²

Please refer to NLA's response to the IP for a description of LAC legally assisted FDR.²³

If settlement cannot be reached at legally assisted FDR, clients of LACs with merit, and who continue to be eligible on means, are then able to be seamlessly represented in court proceedings, as well as being provided with, or referred to, appropriate social supports.

Proposal 5–10 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 (LADR) for parenting and property matters.

These Guidelines should include:

- **guidance as to when LADR should not be applied in matters involving family violence and other risk related issues;**
- **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;**
- **the respective roles and responsibilities of the professionals involved;**
- **the application of child inclusive practice;**

²¹ Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Appendix H, 2014) 1023.

²² *Ibid.*

²³ National Legal Aid *submission 163*, Australian Law Reform Commission, *Review of the Family Law System*, Issues Paper 48 (2018) 67.

- the application of approaches to support cultural safety for Aboriginal and Torres Strait Islander people;
- the application of approaches to support cultural safety for families from culturally and linguistically diverse communities;
- the application of approaches to support effective participation for LGBTIQ families;
- the application of approaches that support effective participation for families where parents or children have disability;
- practices relating to referral to other services, including health services, specialist family violence services and men’s behaviour change programs;
- practices relating to referrals from and to the family courts; and
- Information sharing and collaboration with other services involved with the family.

Supported.

LACs have led the development of legally assisted DR in Australia, and the LAC model represents good practice. LACs are therefore well-placed to have a leadership role in the development of effective practice guidelines for legally assisted DR.

Any new guidelines should be informed by and consistent with existing good practices, resources, and processes which are tried and tested.

Proposal 5–11 These Guidelines should be regularly reviewed to support evidence informed policy and practice in this area.

NLA supports the regular review of Guidelines for legally assisted DR:

- informed by relevant research and evaluations;
- in consultation with NLA and other key stakeholders; and
- having regard to the experiences of users of legally assisted DR services.

Other matters

Online Dispute Resolution System

In its response to the IP, and in particular Question 28, NLA indicated its support for investigating the introduction of an online dispute resolution system (ODRS) for separating couples.

Although the ODRS was not mentioned specifically in the DP, a number of proposals acknowledge the benefit of alternative dispute resolution processes being available to assist and empower people to reach agreements about their family law issues outside the court system, e.g. Proposal 2-1.

The DP also recommends publicly available and easily accessible tools, e.g. in superannuation matters Proposal 3-17, and information resources to assist families

formulate care arrangements for children Proposal 3-9. These information resources to which people can be referred and tools which can be utilised during the process are integral parts of the ODR process.

NLA's submission to the IP set out in some detail the background to the program that NLA has been formulating. Since the date of that submission, however, there have been further extensions and the program is now at an advanced stage to make recommendations to government about the best format of an ODRS.

The Commonwealth Government provided seed funding to NLA to investigate the introduction of an ODRS for couples that are separating or divorcing in Australia to assist them to resolve their family law disputes with less reliance on formal pathways.

On 27 June 2018 the Commonwealth Attorney-General's Department approved an extension of the seed funding for the ODRS development. This agreement extended the project until 30 June 2019 and varied reporting obligations with the final report and funding acquittal now due on that date.

A design and development partner for the ODRS project was appointed. The project team defined a Minimum Viable Product (MVP) for the initial prototype functionality. The initial MVP was defined as:

'A tool to prove that ODR can help couples with a "simple" (constrained) separation to generate a fair and satisfactory resolution using AI'

Consistent with market research findings, the project team determined that:

'The tool must be simple and intuitive to use, trustworthy and flexible. It must educate users about their rights and obligations in relation to the settlement process, while remaining accessible and engaging'

The ODRS will suggest a settlement offer for the parties based on a machine learning model trained on authoritative Australian Family Law Court cases and Consent Order data. The use of artificial intelligence and sentiment analysis is unique to this ODRS and distinguishes the product from other ODR platforms in the commercial market.

The scope of the funding provided to date allows for the development of an ODRS prototype with the following functionality:

- Property Settlement, including:
 - Superannuation: simple superannuation splitting
 - Assets: e.g. real estate, motor vehicles, money, shares, household items, pets
 - Liabilities: e.g. credit card debt, personal loans, mortgages
- Legal Information and referral
- Simple parenting plans
- Links to existing online divorce process

- Dispute avoidance and empowerment via education.

Further functionality will be developed prior to the launch of ODRS covering areas such as:

- More complex parenting plans
- Superannuation: more complex superannuation splitting
- Consent Orders: Online filing and integration with courts.

As required by the grant agreement, a final report is to be provided by 30 June 2019 that will include recommendations for future steps of the project, including indicative costs and future governance options.

It is anticipated that the ODRS program when finalised will satisfy the desirability of providing an accessible tool to people to resolve their family law disputes in an innovative and inexpensive way.

Arbitration

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

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

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

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

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

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

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

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

Further information about the LAQ arbitration program can be accessed here:
<http://www.legalaid.qld.gov.au/files/assets/public/publications/relationships-and-children/fs-dividing-property-divorce-july2016.pdf>

6. Reshaping the Adjudication Landscape

Proposal 6–1 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.

Supported.

“Early and ongoing triage” is “key to an accessible and responsive family law system.”²⁴

NLA supports the use of triage processes at the commencement of court proceedings and at key stages throughout the litigation process. Triage processes should identify, assess and guide responses to:

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

Determining the most appropriate pathway includes assessing which matters require the skills of a judge and a forensic determination, which might be suitable for specialist lists, such as the proposed small property list and Indigenous list, and which might be better directed away from courts to community based FDR, legally assisted FDR, property mediation and arbitration.

Proposal 6–2 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.

Supported.

²⁴ National Legal Aid *submission 163*, Australian Law Reform Commission, Review of the Family Law System, Issues Paper 48 (2018), 3.

Triage “should be underpinned by a multi-disciplinary and collaborative approach where services, professionals and courts share information about risk and urgency and work in a coordinated fashion, enhancing safety ... and supporting efficiency.”²⁵

Triage practices “need to be supported by the use of screening tools to be completed by the parties which elicit information necessary to make decisions about risk and urgency, such as the Case Information Affidavit used in the Family Court of Western Australia”,²⁶ which screens for family violence, child abuse, mental health and drug and alcohol issues.

NLA envisages that FASS and duty lawyer services would play an integral role in supporting the triage process.

It is noted that Australia’s National Research Organisation for Women’s Safety has completed its *National Risk Assessment Principles* for domestic and family violence and it is understood that the Council of Attorneys-General has “agreed for jurisdictions to aspire to achieve alignment with the National Risk Assessment Principles, with assistance of guidance developed by the Family Violence Working Group, when developing, updating or evaluating family violence risk identification or assessment tools and processes applicable to the justice system”.²⁷

Proposal 6–3 Specialist court pathways should include:

- **a simplified small property claims process;**
- **a specialist family violence list; and**
- **the Indigenous List.**

NLA supports specialist court pathways for a simplified small property claims process and an Indigenous List.

A contravention/enforcement list would assist a timely response to issues that arise in respect of implementation of court orders, including those referred back to the court from the post order parenting service referred to in Proposal 6-9 below.

As the DP states, “it is clear that matters involving family violence form a substantial proportion of the case load of the family courts”.²⁸ The level of risk to safety can also vary over time with mental health and substance abuse being relevant factors in many cases. In the view of NLA, the focus should be on ensuring that there are appropriate processes utilising skilled workforces in place to screen, identify, triage and respond to family violence for all family law matters. All decision makers presiding over family law matters should be

²⁵ Ibid 65.

²⁶ Ibid.

²⁷ Commonwealth Attorney-General’s Department, *Council of Attorneys-General, Communique November 2018* <https://www.ag.gov.au/About/CommitteesandCouncils/Council-of-Attorneys-General/Pages/default.aspx>

²⁸ Australian Law Reform Commission, *Review of the Family Law System*, Discussion Paper 86 (2018) [6.22].

skilled to a high degree to identify, understand and appropriately respond to family violence. There should be capacity in the family law courts to respond to any matter of an urgent nature.

Triage processes should be underpinned by a collaborative, coordinated approach and appropriate proactive information sharing protocols between the family law courts, state and federal police and child protection authorities.

Proposal 6–4 The *Family Law Act 1975* (Cth) should provide for a simplified court process for matters involving smaller property pools. The provisions should allow for:

- 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;
- the proceedings to be conducted without legal technicality; and
- the simplified court procedure to be applied by the court on its own motion or on application by a party.

Supported.

NLA notes the Women’s Economic Security Statement, announced by the Minister for Women, the Hon Kelly O’Dwyer MP on 20 November 2018, which includes funding for the courts to pilot a simpler and faster court process for resolving small value (up to \$500,000) family law property cases quickly and more cost effectively. LACs have also been funded to pilot legally assisted FDR within similar parameters on the basis of a relaxed means test.

Proposal 6–5 In considering whether the simplified court procedure should be applied in a particular matter, the court should have regard to:

- the relative financial circumstances of the parties;
- the parties’ relative levels of knowledge of their financial circumstances;
- whether either party is in need of urgent access to financial resources to meet the day to day needs of themselves and their children;
- the size and complexity of the asset pool; and
- whether there are reasonable grounds to believe there is history of family violence involving the parties, or risk of family violence.

Supported.

Proposal 6–6 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:

- case management by court registrars to establish, monitor and enforce timelines for procedural steps, including disclosure;
- conducting a conciliation conference once the asset pool has been identified; and
- establishing a standard timetable for processing claims with expected timeframes for case management of events (mentions, conciliation conferences and trial).

Supported.

Proposal 6–7 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:

- a lead judge with oversight of the list;
- a registrar with responsibility for triaging matters into the list and ongoing case management;
- family consultants to prepare short and long reports on families whose matters are heard in the list; and
- a cap on the number of matters listed in each daily hearing list.

All of the professionals in these roles should have specialist family violence knowledge and experience.

Please refer to NLA’s response to Proposal 6-3. There should be capacity in the family law courts to respond to any matter of a high risk and/or urgent nature. All decision makers should be appropriately skilled and equipped to deal with family violence.

As indicated in the response to Proposal 6-2, screening for risk and triage processes will assist the prioritisation of high risk family violence matters and the formulation of appropriate safety plans.

Question 6–1 What criteria should be used to establish eligibility for the family violence list?

Please refer to NLA’s response to Proposals 6-3 and 6-7.

Question 6–2 What are the risks and benefits of early fact finding hearings? How could an early fact finding process be designed to limit risks?

NLA supports timely resolution of matters in the best interests of children and the earlier disposition of the totality of each family law matter including those involving family violence. A number of the ALRC’s proposals should help achieve this aim. All LACs agree that more resourcing to achieve final orders earlier in family law matters would improve outcomes for children and families.

With the exception of VLA, LACs do not support discrete hearings as contemplated and consider that there are better strategies for addressing family violence.

Whilst individual circumstances vary, potential risks and benefits of early fact finding on the discrete issue of family violence include:

Risks

- Duplication or deferral of proceedings due to concurrent criminal and/or domestic violence order proceedings in relation to the same alleged matters. Potential prejudice

to associated criminal law proceedings, noting deprivation of liberty, which may be a real risk for some alleged perpetrators, is a serious issue.

- Aggravating or inflaming the relationship between the parties to their detriment and that of their children.
- Adding a litigation event and increasing the time taken to finalise cases where there are additional matters that the court needs to determine in the dispute between the parties.
- Further contested allegations may occur during proceedings, undermining or casting doubt on earlier findings or leading to the requirement for a further finding of fact hearing/s.
- The difficulty in dealing with specific issues in isolation from others, some of which may not be able to be determined by an early finding of fact process. For example a family violence finding may not, of itself, resolve the matters in issue in the context of a particular family when there may be other issues such a mental health and/or drug and alcohol abuse, which may require the input of an expert.
- Early fact hearings may promote an incident-based rather than a pattern-based approach to family violence.
- Risk is not static and can vary over time in response to events and changes in the behaviour of the parties.
- Costs to the parties, the justice system, government and the community associated with an extra litigation event.

Benefits

- Would emphasise that family violence is a key issue relevant to resolution of family law matters.
- If publicly promoted, could provide an important preventative messaging function in relation to family violence.
- If the only forensic issue is family violence, then the determination of this may lead to an early resolution of the overall matter.
- Could lead to a reduction in the number of matters that reach final hearing.
- Might assist with case management in some cases.
- Might help inform the interim orders made by the court in some cases.

Proposal 6–8 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.

NLA supports this proposal conditional upon the development and implementation of appropriate minimum facilities and standards to ensure local courts are safe and suitable for parties, children and service providers involved in family law matters.

Co-location has the potential advantages of:

- improving accessibility;
- reducing costs;
- improving information sharing; and
- facilitating a holistic approach to issues affecting parties.

NLA understands that co-location is already being implemented in some areas, including in Alice Springs in the Northern Territory, and Rockhampton in Queensland.

Some local court facilities may render them unsuitable to be used for family court matters, e.g. at one local court premises in NSW:

- there is only one entry and exit and no safe room;
- there are 4 benches on the verandah of the court for clients to sit or for solicitors to meet with clients. Anything said on the verandah can be heard in the courtroom and vice versa;
- no child friendly spaces for clients and children;
- no confidential spaces for conversations;
- only one practitioner's room, which is inevitably taken by counsel and is rarely available for the use of practitioners;
- there is no photocopier or printer.

Appropriate minimum facilities would include:

- addressing the matters identified in Proposal 6-12;
- a telephone and computer for self-represented litigants; and
- adequate offices and interview rooms for supporting services such as FASS.

If co-location is not possible, then close proximity at least would make it easier for parties to go between courts.

The other practical issue is the need for the family law court registry to send subpoenaed material to the local court registry where the courts circuit so that the material is readily accessible to solicitors and parties for inspection/copying purposes.

Question 6–3 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?

If the Parenting Management Hearings Bill 2017 is enacted, then evaluation of the intended pilot of the Parenting Management Hearings should be informative.

Question 6–4 What other ways of developing a less adversarial decision making process for children’s matters should be considered?

In addition to established less adversarial processes which facilitate decision making, such as referral for FDR and Independent Children’s Lawyer conferences, suggested innovations such as lawyer assisted FDR on duty days, with assessment and intake through expanded FASS services, should also be funded, including for matters which do not involve allegations of family violence.

Proposal 6–9 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:

- education about child development and conflict management;
- dispute resolution; and
- decision making in relation to implementation of parenting orders.

Supported. NLA envisages that the service would:

- identify available services and programs to assist parties to comply with orders;
- pro-actively support parties to otherwise comply with the orders;
- assist with resolving disputes related to implementation of orders, e.g. which program or contact centre to attend;
- have some educative role to support parties to understand children’s needs and focus on their children’s best interests post-separation; and
- refer back to the family law courts when matters can’t be resolved.

Proposal 6–10 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.

Supported. As many of these matters are going to be referred from the family law courts and will involve matters in which ICLs have been appointed, NLA considers that it would be appropriate for the family law courts and NLA to be involved in the work to develop intake assessment processes. The role of FASS and compliance and enforcement processes are also relevant.

Proposal 6–11 The proposed Family Law Commission (Proposal 12–1) should develop accreditation and training requirements for professionals working in the post-order parenting support service.

NLA refers to the response to Proposal 6-10 and to Chapter 12.

NLA suggests the work pursuant to Proposal 6-10 should include consideration of which professionals and associated organisations are best qualified to provide the service. This would help to inform the required arrangements in relation to accreditation and training.

Proposal 6–12 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:

- waiting areas and rooms for co-located service providers, including the extent to which waiting areas can accommodate large family groups;
- safe waiting areas and rooms for court attendees who have concerns for their safety while they are at court;
- private interview rooms;
- multiple entrances and exits;
- child-friendly spaces and waiting rooms;
- security staffing and equipment;
- multi-lingual and multi-format signage;
- remote witness facilities for witnesses to give evidence off site and from court-based interview rooms; and
- facilities accessible for people with disability.

Supported.

7. Children in the Family Law System

Children should be supported during family breakdown, be provided with related age appropriate information, kept informed about the decision making processes being used to determine the arrangements for their care, and be able to express their views about those arrangements.

The inclusion of an additional social science professional role as described in Proposal 7-8 could facilitate this aim, its focus being the provision of support and information and facilitating children to express their views in the decision making process. This could complement the role of the ICL where one is appointed. Consideration will need to be given to potential overlapping of roles with family consultants, Single/Court Expert Witnesses and ICLs.

The ICL would continue to act in the best interests of children with their responsibilities as set out in s 68LA of the Act and the *National ICL Guidelines 2013* continuing to operate.

Proposal 7–1 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.

Supported. Please refer to the response to Proposals 2-1, 2-2, 2-6 and 2-8.

LACs have considerable experience in providing general and targeted CLEI activities and published information resources including to young people and children. E.g. Legal Aid NSW's website *Best for Kids*²⁹ and the National Legal Aid ICL brochures *What happens when your parents go to court?* (younger children) and *What happens when your parents go to court?* (older children).

In NLA's view awareness of resources is also an issue. This might be addressed through a range of strategies including, e.g. the proposed education campaign and the social science professional (children's advocate) role proposed by Proposal 7-8.

Proposal 7–2 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.

NLA refers to the response to Proposals 4-1 to 4-4 in relation to Families Hubs.

The evaluation of the Victorian Safety and Support (The Orange Door) Hubs will be informative in respect of the proposed role of Families Hubs in the family law system including the appropriateness of locating out posted workers from specialised services for children in their structure.

NLA supports children and young people having access to specialised services, such as counselling and peer support programs. These services were identified by young people in the 2018 Australian Institute of Family Studies (AIFS) *Children and Young People in Separated Families Final Report 2018*³⁰ and the 2018 Kids Helpline Survey³¹ as being some of the most beneficial supports for them post-separation.³²

Electronic methods of service delivery to children are important, e.g. online chat and telephone services provided by Head Space³³ and Kids Helpline.³⁴ The recent Kids Helpline

²⁹ <http://www.bestforkids.org.au/>

³⁰ Rachel Carson et al, 'Children and Young People in Separated Families: Family Law System Experiences and Needs' (Australian Institute of Family Studies, 2018).

³¹ Kids Helpline and the University of Sydney, A National Online Survey about Children's Experiences of Parental Separation (March to November 2017) for Family Law Society (Qld and WA) 2018.

³² Rachel Carson et al, 'Children and Young People in Separated Families: Family Law System Experiences and Needs' (Australian Institute of Family Studies, 2018) viii, 75-8, 93.

³³ <https://headspace.org.au/>

³⁴ <https://kidshelpline.com.au/>

Survey³⁵ demonstrates the preparedness of young people to access on line services and to communicate using technology.³⁶

Consideration could be given to supporting and enhancing existing services and others including the *Supporting Children After Separation* programs.

Proposal 7–3 The *Family Law Act 1975* (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.

NLA supports this proposal on the basis that “so far as practicable” includes consideration of risk issues for the particular child in their particular circumstances. This is an important aspect of the role of the ICL when one is appointed.

The Act does provide that the court must consider “any views expressed by the child and any factors (such as the child’s maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child’s views” in s 60CC(3).

Parenting matters can involve issues of family violence, mental health, child sex abuse, neglect, drug and alcohol misuse and other complex needs issues. Some parties also do not have sufficient insight or capacity to hear and be responsive to the views of the child.

In light of this reality, all parenting matters require a careful assessment by a qualified and experienced professional of the capacity of the parents/parties to hear the views of the child and the risks to the parties and the child, and whether and how those risks can be addressed, so that the child is not placed at direct risk of harm. Risks may be able to be adequately managed in some cases so that the child’s views are able to be expressed with appropriate safeguards.

Potential risks to children include:

- direct harm to the children’s physical and emotional safety;
- being exposed to the conflict between parents;
- repercussions from parents, parties and others;
- manipulation by parents and other persons;
- pressure from parents or parties to ‘choose’;
- children feeling responsible for the outcome; and

³⁵ A National Online Survey about Children’s Experiences of Parental Separation (March to November 2017) by Kids Helpline and the University of Sydney, for Family Law Society (Qld and WA).

³⁶ Ibid.

- children may not have access to all relevant information, and any information provided and any communication with them should be developmentally appropriate.

The case studies below illustrate examples from LACs' experience where conveying the child's views directly to the parents would have put the child at risk:

Case study 1

The parties separated when their son, Ben was 11, due to alleged physical, verbal and emotional family violence by the father to the mother. An ICL was appointed, due to the allegations of family violence. The ICL met with Ben, who told the ICL that he didn't want to see his father as he was often angry and aggressive and that he was afraid of him. Ben said he didn't want the ICL to disclose what he had said to anyone as he was afraid of his father's reaction. There was other independent evidence of significant family violence by the father. The ICL kept Ben's wishes in confidence, but was able to successfully advocate for no contact, consistent with Ben's wishes, on the basis of the risks to Ben from family violence. The court subsequently made a no contact order.

Case study 2

The parties had a child Maria, who was 12 when they separated. The mother was the main carer during the relationship and Maria lived with her mother post-separation. The mother stopped the father's contact, alleging that he had sexually abused Maria. The father commenced proceedings for spends time with Maria. Because of the mother's allegations an ICL was appointed, who obtained an expert report. The expert diagnosed the mother as having serious mental health issues, and believed there was no basis to the allegations of sexual abuse. Maria told the expert she was frightened of her mother and didn't want to live with her. The expert and ICL supported a change to the living arrangements, so that Maria would live with her father. The expert report and Maria's views had to be carefully managed, as the expert considered there was a real risk that the mother would harm Maria if she was aware that Maria might be ordered to live with her father.

Proposal 7-4 The *Family Law Act 1975 (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.

Please see the response to Proposal 7-3.

NLA supports children being able to express their views in FDR processes through child inclusive mediation, where:

- the child wishes to participate in the FDR process;
- the child is of an age and maturity to do so; and
- the parents have the capacity to hear and be responsive to the child's views, so that it is safe for the child to participate.

VLA, the Legal Aid Commission of Tasmania, the Legal Services Commission of South Australia, the Northern Territory Legal Aid Commission and Legal Aid Western Australia are providers of child-inclusive FDR. All LAC FDR is child focused and legally assisted.

Assessment

As indicated in the response to Proposal 7-3, child-inclusive FDR processes require a careful assessment of the risks to the parties and child/ren, and the capacity of the parties to be responsive to the child/ren's views. At LACs, the assessment for suitability for child inclusive mediation is undertaken by a professionally qualified, skilled and experienced child consultant.

Child-inclusive mediation is conducted in about 6% of all matters assessed due to prevalence of identified risk issues. NLA notes that rates of suitability may be higher in other FDR services in the community, where risk related issues are expected to be less prevalent in the cohort seeking assistance from those services.

Resourcing

NLA agrees with the ALRC that a reason for the restricted use of child-inclusive DR is the greater resources and skills required to appropriately deliver this model.³⁷ An expansion of child-inclusive FDR would therefore require a commensurate increase in funding/resources to ensure that appropriately trained professionals are available to perform this role and the development of appropriate guidelines/standards for this work. We would welcome such investment and expansion of child inclusive legally assisted FDR and would propose LACs to be the most suitable body to expand this service.

Consideration should also be given to the challenges of conducting child-inclusive FDR in regional and remote areas, where there is likely to be difficulty in accessing child consultants to conduct the required assessment. There may also be challenges for private FDR providers, who may not be able to locate or partner child consultants in their services as readily as LACs or Family and Children's Relationship Services.

Staffing

The expansion of child inclusive FDR would also require the development of a much larger pool of suitably qualified and trained child consultants. NLA agrees with the comments cited in the DP that the role "requires high levels of expertise and experience in dealing with both parents and children in distress, underpinned by a strong foundation in child development and experience working with complex issues for children. A high level of expertise in dealing with complex clinical and family issues and dynamics is also necessary."³⁸

³⁷ Australian Law Reform Commission, *Review of the Family Law System*, Discussion Paper 86 (2018) [7.44-5].

³⁸ Australian Law Reform Commission, *Review of the Family Law System*, Discussion Paper 86 (2018) [7.44].

Proposal 7–5 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.

Supported.

LACs are an integral part of the family relationships sector, and providers of child-inclusive FDR. As such NLA, as a key stakeholder, should be involved in any consultation about the development of best practice guidelines on child-inclusive mediation.

Proposal 7–6 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.

NLA supports this proposal.

In relation to FDR, please refer to the response to Proposals 7-3 and 7-4.

In proceedings before the family law courts, the ICLs, family consultants and Single/Court Expert Witnesses working with children have this responsibility.

Proposal 7–7 Children should not be required to express any views in family law proceedings or family dispute resolution.

NLA supports this proposal which confirms the current legal position as set out in s 60CE of the Act.

Proposal 7–8 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:

- explain to the child their options for making their views heard;
- support the child to understand their options and express their views;
- ensure that the child’s views are communicated to the decision maker; and
- keep the child informed of the progress of a matter, and to explain any outcomes and decisions made in a developmentally appropriate way.

NLA supports consideration being given to the creation of a role for a social science professional (children’s advocate) to discharge the above functions taking into account the potential for overlap of the new role with family consultants, Single/Court Expert Witnesses and ICLs.

It is recommended that further consideration should be given to the name of the role. NLA has some concern that the name ‘children’s advocate’ has the potential to cause confusion with the role of the ICL. In our experience, the term advocate has a particular meaning in

law and legal proceedings, and to the parties themselves. This confusion would not be resolved by replacing ICL with ‘separate legal representative’.

A social science professional role focused on the provision of support and information and facilitating children to express their views in the decision making process may facilitate ensuring that children are supported during family breakdown, are provided with related age appropriate information, are kept informed about the progress of the proceedings, and are able to express their views about the arrangements for their care.

NLA envisages the role would be complementary to that of the ICL. The professional in the role would provide evidence of the child’s views and/or support the child to provide that evidence. The function of providing the court with an assessment based on the available evidence of what is in the best interests of the child would remain the role of the ICL informed by all the evidence in the case including the reports of the family consultant and/or the Single/Court Expert Witness.

In the event that the social science professional (children’s advocate) role is envisaged to also operate on best interests, then it is anticipated that it would be subject to the same sorts of criticisms that are currently made of family consultants, ICLs and Single/Court Expert Witnesses.

Currently, evidence of the children’s views is provided to the family law courts through a report from a family consultant or Single/Court Expert Witness. Sometimes judicial officers will also ask the ICL to provide the court with information about the views of children in relation to particular issues. NLA suggests that a social science professional (children’s advocate) with the role of providing evidence of the child’s views and/or to support the child to provide that evidence, would require a similar level of skill, qualifications and experience to that of family consultants or Single/Court Expert Witnesses, including experience of preparation of assessments in the context of family law court parenting proceedings.

This is supported by the evaluation of the pilot of *Views of the Child Reports* in Ontario, Canada.³⁹ In this pilot the reports were prepared by mental health professionals who had experience in undertaking clinical investigations for the Office of the Children’s Lawyer. The evaluation reported that “The Reports were not evaluative and clinicians were not to provide any recommendations, though they were asked to include observations about the child’s non-verbal communication, affect during the interview, cognitive functioning, and any significant characteristics or behavior.”⁴⁰ It is also noted that 4 of the 34 children interviewed did raise some concern about what they remembered saying compared to what was in the report.⁴¹ This is an issue that can sometimes arise in relation to the reports

³⁹ Rachel Birnbaum and Nicholas Bala, ‘Views of the Child Reports: The Ontario Pilot Project— Research Findings and Recommendations’ (Queen’s Law Research Paper Series No 2017–092, Queen’s University, 2017).

⁴⁰ Ibid 11.

⁴¹ Ibid 19.

prepared by family consultants and Single/Court Expert Witnesses and in relation to the communications of the ICL. It could also arise in relation to the work of the social science professional (children's advocate).

Importantly, the evaluation also identified that "while the majority of participants (*in the evaluation*) (e.g. children, parent/guardians, clinicians, parents' lawyers and judges) expressed positive views of the utility of these reports, there were important cautionary issues that were raised. For example, whether, and if so, how these reports should be used in cases: (1) where a child refuses to visit the other parent; (2) where children have special needs that affect communication, such as learning problems or developmental delays; and (3) where one parent has not had any contact for a long period of time and the child is unfamiliar with that parent."⁴² Many of the report writers in the study also reported that whilst the focus of the report was on the children they would have appreciated more contextual information before interviewing the child.^{43 44}

Challenges in developing the role are envisaged to include:

- The availability of a pool of appropriately trained professionals including in rural, regional and remote areas.
- Management of the safety of the child in relation to their interaction with the social science professional, including disclosures of abuse and or risk made by the child.
- How the views of the child will become evidence and the potential for the social science professional (children's advocate) to become a witness.
- The interface of the role with the role of the ICL, family consultant and/or Single/Court Expert Witness, including in circumstances where an ICL and/or a family consultant or Single/Court Expert Witness are also going to be meeting with the child and, in the case of the latter, preparing reports.

NLA would welcome being involved in the further development of this new role and determining how the new role would work in conjunction with existing roles in the family law system.

Proposal 7–9 Where a child is not able to be supported to express a view, the children's advocate should:

- **support the child's participation to the greatest extent possible; and**
- **advocate for the child's interests based on an assessment of what would best promote the child's safety and developmental needs.**

⁴² Ibid 25.

⁴³ Ibid 33.

⁴⁴ Ibid 11.

NLA supports the child's participation to the greatest extent possible. Please see the response to Proposal 7-8.

The circumstances where a child cannot be supported to express a view are most likely to be:

- where the child is not of sufficient age or maturity;
- where expressing a view would put the child at risk (see response to Proposals 7-3 and 7-4);
- where although the child wants to be kept informed they do not wish to express a view about the arrangements for their care.

It is the view of NLA that where an ICL has been appointed in family law court proceedings, that both in those proceedings and any associated FDR process, it is appropriate that advocacy be conducted by the ICL who has had an opportunity to consider all of the admissible evidence, including any assessment that has been prepared by the family consultant or other expert in the proceedings and, as a consequence, is best placed to advocate for the outcome that would promote the child's best interest.

Consideration could be given to whether a family consultant from the Child Dispute Service, or in Western Australia (WA), the Family Court of WA Counselling and Consultancy Service, might be able to perform some aspects of this role in circumstances where an ICL is not appointed.

In relation to this role and in the context of FDR, please see the response to Proposals 7-3 to 7-6.

Proposal 7–10 The *Family Law Act 1975 (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:

- gather evidence that is relevant to an assessment of a child's safety and best interests; and
- assist in managing litigation, including acting as an 'honest broker' in litigation.

The DP recognises in Proposal 7-10 that the role of the ICL includes responsibility for gathering evidence that is relevant to the assessment of a child's best interests and assistance in managing litigation, including acting as an honest broker.

We refer to the response to Proposals 7-8 and 7-9 in respect of the role of the ICL in family law proceedings and confirm that it is our view that the division of the current role of the ICL into the roles of 'children's advocate' (Proposals 7-8 and 7-9) and 'separate legal representative', as contemplated in Proposal 7-10, does not reflect the complexity of the current work of ICLs and could potentially add complication to the participation of children in the decision making process and the achievement of timely outcomes in their best interests.

NLA supports the role for a social science professional to provide support for children during family law court proceedings, including equipping them with related age appropriate information, informing them about the progress of the proceedings and supporting them to express their views about the arrangements for their care. This role would complement that of the ICL as set out in ss 68L and 68LA of the Act.

NLA also considers that the title of ICL should be retained. The term 'separate legal representative' does not fit with the ALRC's aim of simplification to facilitate community understanding of family law legislation and proceedings. The term was changed from separate legal representative in 2006 in an effort to assist parents and children to understand its meaning and the role, i.e. to remove confusion that the role was to act on *behalf* of the child. It is considered that confusion in community understanding would be further exacerbated if the role of the social science professional described in Proposal 7-8 continued to be titled the 'children's advocate'.

Following the release of the AIFS *Independent Children's Lawyer Study* (2014), the inaugural ICL Stakeholder meeting, held in July 2014,⁴⁵ considered whether it would be beneficial for the ICL role to be renamed. Considerable attention was given to the issues involved and returning to the title of 'Separate Legal Representative' was discussed. It was concluded that the word 'children' needed to be included and that the title Independent Children's Lawyer most accurately reflected the nature of the role.

NLA also refers to the response to Proposals 3-3 to 3-7 and confirms that in our view the paramount consideration in child related proceedings should continue to be the child's best interests.

The value of maintaining the ICL's role of acting in the best interests of the child is illustrated by the following case studies where, from the available evidence, the outcome that had been identified to be in the child's best interests has been contrary to the clear and unequivocal expressed views of the child.

Case Study 3

The father of an 8 year old girl commenced proceedings in the family court against the mother, for the shared care of his daughter, Alice. An ICL was appointed, due to the mother alleging that the father had been physically, psychologically and emotionally abusive to her and Alice during the relationship and after separation. Alice told the ICL that she loved both her parents and wanted to live with her mother and spend time with her father. A report was prepared by an expert witness/psychologist who found that the father had an anti-social personality disorder and it would be unsafe for Alice to spend time with her father, due to the risk of physical violence and the father's constant denigration of the mother to

⁴⁵ Participants at the meeting included the then Chief Justice of the Family Court of Australia, representatives of the then Federal Magistrates Court, FCWA, the Child Dispute Service, Family Law Section of the Law Council of Australia, the Australian Institute of Family Studies and the National Legal Aid Family Law Working Group.

Alice. This included trying to persuade Alice that her mother is a liar. The ICL clearly communicated Alice's wishes to the judge, but also expressed concerns about in person contact as not being in Alice's best interests. Orders were made for no in person contact and for contact through letters, presents and cards, which would be vetted. The ICL met with Alice to explain that her wishes had been made clear to the judge, but that the judge had concerns about her seeing her father because of his anger. Alice was disappointed, but glad to be able to stay in touch with her father through the written communication.

Case Study 4

The Australian mother and Italian father met when the mother was an exchange student in Italy, subsequently marrying and having 4 daughters whom they raised in Italy. The parties subsequently separated and shared care of the girls. The mother travelled with the girls to Australia for a holiday when the eldest daughter was 14. The mother alleged family violence by the father and the girls remained in Australia, until the father brought a Hague application for the girls' return. The girls expressed strong wishes to remain in Australia and the mother argued against the Hague application on the basis that the girls would be at risk if they were returned. The Hague application was successful and the children were returned to Italy. An order was obtained in Italy for the girls to remain living there with the father. The girls later revealed that the claims of family violence by the mother were completely false.

Case Study 5

The parents of Rod separated when Rod was 13. The father alleged that the mother's new partner posed a risk to Rod due to him having a criminal record for child sexual abuse offences against boys. The mother was aware of her new partner's criminal history but did not believe he posed any risk. The mother insisted that her partner should continue to live with her and be present during any time that Rod spent at their home. An ICL was appointed, and an expert report was prepared. Rod told the ICL and expert very clearly that he liked his mother's new partner and wanted to spend time with his mother and her partner. The expert formed the view that the mother's new partner was at high risk of reoffending and that Rod would be at significant risk should he spend unsupervised time at his mother's. The ICL made Rod's views very clear to the presiding judge but indicated that she thought the new partner posed an unacceptable risk to Rod, which could not be adequately addressed, should Rod spend unsupervised time at the mother's home. Orders were made for Rod to have supervised time with the mother only.

Case Study 6

This case involved children with high special needs and a parent with an intellectual disability who required a litigation guardian. As the case progressed the youngest child's mental health and behaviour deteriorated due in large part to continued exposure to

parental conflict and litigation. The ICL appointed in the case arranged a number of expert reports and involved relevant support services. Throughout the proceedings the ICL also worked collaboratively with a Family Consultant based at the family law court. The Family Consultant prepared two Family Reports and was on hand throughout the proceedings (i.e. not just around the time of the reports) to work with the ICL before decisions were made as to how to best progress the case and support the family. After the matter finalised with detailed Final Orders made by consent between the parties during a mediation one week before trial (the 3rd mediation in almost three years of litigation), the ICL received an email from the Family Consultant indicating how the case had highlighted how collaboration helped achieve positive outcomes for the family in complex and trying circumstances. Getting the children's parents out of court as quickly as possible was a significant priority for the ICL, and reaching consent and avoiding a protracted trial process was a significant achievement of benefit to this family.

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

The role of the 'children's advocate' as proposed in 7-8 overlaps with the roles of other professionals in family law proceedings including the ICL and other social science professionals such as the family consultant and Single/Court Expert Witness. This overlap has not been explored in the DP and requires careful consideration in the context of the priority that should be given to the creation of the new role or the option of providing resources to enhance existing roles to achieve what is required.

NLA refers to the table at the end of the response to Chapter 7.

NLA's view is that ideally an ICL should be appointed in all disputed parenting order matters. In an environment of limited resources ICL appointments should be prioritised for matters involving high conflict, allegations of physical, sexual, emotional or psychological abuse of children and serious family violence, drug and alcohol abuse and mental health issues adversely impacting on the welfare of the child, noting that the identified issues rarely occur in isolation from each other. The appointment of an ICL should also be considered where it is alleged that a child is refusing to spend time or have other contact with a parent. Consideration could also be given to the appropriateness of the appointment of an ICL in Hague convention matters and the appropriateness of the "if there are exceptional circumstances" requirement in s 68L(3)(a) in respect of these matters.

It is the view of NLA that, in an environment of limited resources, the priority for the appointment of a social science professional (children's advocate) to support the child's participation should be the matters in which an ICL has not been appointed. In parenting proceedings and any associated FDR process it is appropriate that, where an ICL has been appointed, that the advocacy for the child be conducted by the ICL who has had an opportunity to consider all of the admissible evidence including any assessment that has been prepared by the family consultant or other expert in the proceedings and, as a consequence, is best placed to advocate for the outcome that would best promote the child's best interests.

As indicated in the response to Proposal 7-9, consideration could be given to whether the role of the social science professional (children’s advocate) in family court proceedings could be best filled by a family consultant with the Child Dispute Service, or in WA, the Family Court of WA Counselling and Consultancy Service.

Question 7–2 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?

NLA suggests that the responsibilities of these roles and their interface with each other require careful consideration. The appropriate arrangements for the oversight of the appointment, management and coordination of the social science professional (children’s advocate) role can be considered as part of this process. Oversight of the social science professional role might sit with a range of organisations including the Child Dispute Services of the Family Court and Federal Circuit Court, or in WA the Family Court Consultancy Service, or LACs (particularly in the context of family court proceedings), or possibly in the Family Relationship Centres when litigation has not commenced. The oversight of appointment, management, and co-ordination of ICLs should remain with LACs as they are responsible for the appointment, funding and training of ICLs.

NLA can also see that there may be advantages to a model where the role could “travel” with the child throughout their family’s involvement in the family law system when that includes both FDR and litigation. As identified in the response to Proposal 7-8 it would be important that the social science professional (children’s advocate) be someone who has experience in and understanding of family law parenting proceedings.

Question 7–3 What approach should be taken to forensic issues relating to the role of the children’s advocate, including:

- **admissibility of communications between the children’s advocate and a child; and**
- **whether the children’s advocate may become a witness in a matter?**

NLA refers to the response to Proposals 7-8 and 7-9.

The question is how are the views of the child to become evidence? In circumstances where the views are to be expressed through the ‘children’s advocate’, whether by way of report or affidavit, there is the potential for the ‘children’s advocate’ to be called to give evidence and be cross-examined in the proceedings.

Proposal 7–11 Children should be able to express their views in court proceedings and family dispute resolution processes in a range of ways, including through:

- **a report prepared by the children’s advocate;**
- **meeting with a decision maker, supported by a children’s advocate; or**
- **directly appearing, supported by a children’s advocate.**

NLA refers to the response to Proposals 7-8 to 7-10 and to the response to Question 36 of the IP.⁴⁶

Report

Children are currently able to express their views in family law court proceedings through a report prepared by a family consultant or Single/Court Expert Witness. NLA supports the continuation of this option.

Meeting a decision maker

Research suggests that “children may feel that they have had their views acknowledged if they are afforded the opportunity to visit the court and/or meet the judge.”⁴⁷

The child needs to be supported to understand that meeting the decision maker will not necessarily mean that the views that they are expressing will be realised.

Direct appearance

The ALRC has confirmed its view that direct participation in proceedings should not be the primary method of participation.⁴⁸

NLA has serious reservations about the prospect of children appearing directly in family law court proceedings, which potentially enmeshes them in adult conflict. Direct representation entails the prospect of cross-examination.

From the experience of ICLs it is important that children who express a wish to directly appear be given a clear explanation of what is involved, including who will be present, the potential consequences for outcomes affecting them, and that directly appearing will not necessarily mean the views that they are expressing will be realised.

Proposal 7–12 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.

Supported.

The *Guidelines for Judicial Interviews and Meetings with Children in Custody and Access Cases in Ontario* (2013) might be informative in this regard.

⁴⁶ National Legal Aid *submission 163*, Australian Law Reform Commission, *Review of the Family Law System*, Issues Paper 48 (2018) 103-105.

⁴⁷ Kylie Beckhouse, ‘Laying the guideposts for participatory practice: Children’s participation in family law matters’ (2016) 98 *Family Matters* 31.

⁴⁸ Australian Law Reform Commission, *Review of the Family Law System*, Discussion Paper 86 (2018) [7.100] citing *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) rec 151.

Proposal 7–13 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.

Supported.

Role of the Independent Children’s Lawyer	Social Science Professional (‘Children’s Advocate’)	Role of the Family Consultant/Single Expert Witness
<p>Upon appointment, forensic consideration of the parties’ court documents, subpoenaed documents and other independent evidence before the Family Court.</p> <p>Make submissions to the Family Court as to the procedural and other orders required to case manage the dispute and the identified risk issues in the best interests of the child to progress the resolution of the proceedings.</p> <p>Plan to meet with the child, depending on the time frame between appointment and the next court date and the nature of the next court hearing. Meeting with the child might occur before the next court event in some circumstances.</p>	<p>Meet with the child to provide them with information about the proceedings, identify the non-legal support they may require. Where possible, ascertain the child’s views about the matters in issue, whether they want to express their views and their options in relation to how this can be done. Explain that they have an ICL, the role of the ICL and that they will be meeting with the ICL.</p>	<p>Child Dispute Service (FCS or CC) or Family Court Counselling and Consultancy Service (FCWA) s 11 F Conference or Case Assessment Conference with the parties and the ICL (sometimes occurs before the appointment of the ICL) to identify and assess risk ,clarify the matters in issue and make recommendations in relation to case management. Can sometimes be child inclusive or include interviews of the child.</p> <p>Take steps to obtain relevant information about the child(ren) and family, where ordered/ directed (s 69ZW Orders WA) liaise with police and child protection authorities, possibly on site at the Family Court.</p>
<p>Gathers evidence in relation to the child(ren), their family and the issues in dispute from independent sources, including from schools, medical and allied health professionals, police, child protection authorities etc.</p>		
<p>Refer the child and the parties to programs to address identified issues.</p> <p>For example, seeking orders associated with requesting and monitoring for urinalysis or hair analysis testing, organising referrals to drug and alcohol counselling, behaviour change programs, family</p>	<p>Meets with child(ren) as necessary. Could refer the children to programs to get support/address issues.</p> <p>Update child(ren) on the progress of the proceedings and the next steps at appropriate stages and discuss relevant issues, including any interim</p>	<p>Identifying issues relevant to the best interests of the child(ren) and taking steps to address those issues.</p>

Role of the Independent Children’s Lawyer	Social Science Professional (‘Children’s Advocate’)	Role of the Family Consultant/Single Expert Witness
<p>violence counselling, post separation counselling, liaising with schools, medical and allied health professionals.</p>	<p>decisions made about the children.</p>	
<p>Considers, having regard to the information and issues before the court, how much involvement the child(ren) should have in the proceedings, including but not limited to, whether it is appropriate to meet with the child(ren) about the proceedings and to obtain their views. Generally the expectation is that the ICL will meet with the child(ren). Sometimes they might organise another appropriate professional (including another ICL) to meet with the child(ren) if evidence is required for a hearing of the proceedings to avoid becoming a witness.</p> <p>When the ICL meets with the child(ren) they explain the role of the ICL, the rules in relation to confidentiality, what is happening in the proceedings, the next steps, the child’s perspective on their care arrangements, whether they want to share their views with their parents/family and the court and their options in relation to how this can be done. Sometimes communications with the child(ren) can be on the telephone and/or on line eg Skype.</p> <p>Depending on the nature of the allegations, it may not be forensically appropriate to meet with the child(ren) until after a Single Expert Witness or family consultant has completed their assessment and/or the Family Court has made findings about specific allegations, e.g. allegations of sexual abuse.</p>	<p>Meets with the child(ren) to update them with information about the proceedings, identify the non-legal support they may require. Where possible ascertain the child(ren)’s views about the matters in issue, whether they want to express their views and their options in relation to how this can be done.</p> <p>Writes a report setting out the child’s views or otherwise supports the child to express their views where possible, liaising with the ICL where one is appointed.</p>	<p>Meets with the parents, other significant persons and the child(ren) to prepare a family report (family consultant) or a Single Expert Witness report or wishes/views report.</p>

Role of the Independent Children’s Lawyer	Social Science Professional (‘Children’s Advocate’)	Role of the Family Consultant/Single Expert Witness
<p>Organises the appointment of a family consultant or Single Expert Witness to conduct an assessment of the family and/or family therapist (reportable or unreportable family therapy), which involves careful consideration as to what is required and the most appropriate professional to undertake what is required.</p> <p>Child(ren) might make a disclosure to the ICL of physical, sexual, psychological or emotional abuse and/or family violence that might indicate that a child is at risk.</p> <p>The ICL will be aware of whether the disclosure is new or historic from the available evidence.</p> <p>The ICL has to work out what it is appropriate for them to do in respect of the disclosure, that is:</p> <p>What to communicate to the child(ren);</p> <p>Whether to encourage the child(ren) to provide more details;</p> <p>Whether any urgent action is required in relation to safety planning for the child(ren) and their care arrangements;</p> <p>Whether a mandatory report to police, child protection authorities is required;</p> <p>Whether the ICL has become a witness in the proceedings.</p> <p>The ICL has to determine what might be required in relation to evidence in the proceedings, what should be communicated to the parties, to the family consultant or Single Expert Witness if appointed, the social support professional (children’s advocate) if one is appointed in the matter, and whether orders need to</p>	<p>Child(ren) might make a disclosure to the social support professional (children’s advocate) of physical, sexual, psychological or emotional abuse and/or family violence that might indicate that a child is at risk.</p> <p>The professional will need to work out what it is appropriate for them to do in respect of the disclosure, that is:</p> <p>What to communicate to the child;</p> <p>Whether to encourage the child to provide more details;</p> <p>Whether any urgent action is required in relation to safety planning for the child and their care arrangements;</p> <p>Whether a mandatory report to police, child protection authorities is required.</p> <p>Communicate with the ICL as to what might be required in relation to evidence in the proceedings , what should be communicated to the parties, to the family consultant or Single Expert Witness if appointed, the Family Court and whether orders need to be sought, (including to ensure the safety of the child(ren)).</p>	<p>Where a disclosure is made to the ICL or social science professional, make assessment as to the steps to take in their role including in relation to their report/therapy.</p> <p>This could include a further interview/meeting with the child.</p> <p>Family consultant or Single Expert Witness conducts an assessment of the family and any risk allegations, ascertains the views of the child(ren) and writes a report for the court making recommendations in relation to their care arrangements.</p> <p>Child(ren) might make a disclosure to the family consultant/Single Expert Witness of physical, sexual, psychological or emotional abuse and/or family violence that might indicate that a child is at risk.</p> <p>The family consultant/Single Expert Witness will be aware of whether the disclosure is new or historic from the available evidence.</p> <p>The family consultant/Single Expert Witness (in consultation with the ICL if one is appointed) has to work out what it is appropriate for them to do in respect of the disclosure, that is:</p> <p>What to communicate to the child(ren);</p> <p>Whether to encourage the child(ren) to provide more details;</p> <p>Whether any urgent action is</p>

Role of the Independent Children's Lawyer	Social Science Professional ('Children's Advocate')	Role of the Family Consultant/Single Expert Witness
be sought (including to ensure the safety of the child).		<p>required in relation to safety planning for the child(ren) and their care arrangements;</p> <p>Whether a mandatory report to police, child protection authorities is required.</p> <p>Family therapist works with the parties and the child(ren) to explore the potential for them to work together to achieve care arrangements which meet the developmental needs of the child(ren) and are in their best interests.</p>
Organises an independent medical review of the child in those matters where the parents are in conflict about the child(ren)'s health (eg autism, ADHD, depression, anxiety, asthma assessment).	<p>Provides support for the child(ren) throughout the proceedings and refers child(ren) for specific/additional psycho-social support and other support (could include liaison with the medical professional if an independent review was required (eg autism, ADHD, depression, anxiety, asthma assessment) if necessary.</p> <p>Obtain updates on the views of the child(ren) and determines what should be communicated to the parties (liaising with the ICL where one is appointed).</p>	
Works with police, children's hospital child protection units and child protection authorities in respect of investigating, assessing and responding to child protection/welfare concerns.	<p>Could include liaising with police, children's hospital child protection units and child protection authorities in relation to the arrangements for medical examinations and child witness interviews, provision of relevant documents (as identified in consultation with the ICL).</p>	
Forensic consideration of the evidence including child(ren) witness interviews, family reports and Single	<p>Meets with the child(ren) to update them with information about the proceedings, identify</p>	

Role of the Independent Children's Lawyer	Social Science Professional ('Children's Advocate')	Role of the Family Consultant/Single Expert Witness
<p>Expert Witness reports and apply relevant psycho-social research, case law and legal principles.</p>	<p>the non-legal support they may require. Where possible ascertain the child(ren)'s views about the matters in issue, whether they want to express their views to the court and their options in relation to how this can be done.</p> <p>Writes a report setting out the child(ren)'s views or otherwise supports the child(ren) to express their views where possible, liaising with the ICL where one is appointed.</p> <p>Consider UNCROC and the relevant provisions for child inclusion in decision making in their role.</p>	
<p>Refer the child(ren) and/or the parties for psycho-social support or psychological/psychiatric assessment.</p>		
<p>Facilitates negotiations between the parties and, if appropriate, organising and participating in informal settlement conferences or a FDR conference (including child inclusive dispute resolution).</p> <p>The ICL considers the appropriateness of FDR at all stages of proceedings, including early and late intervention conferences, and if DR is not considered appropriate, actively programs the proceedings to a judicial determination (noting extended litigation is not in a child's best interests).</p>	<p>Obtains updates on the views of the child(ren) and determines what should be communicated to the parties in liaison with the ICL (where one is appointed).</p>	<p>Conducts Child Dispute Conference between the parties where ordered.</p>
<p>Participates in all court events, including programming and directions hearings, interim hearings and trials acting in the best interests of the child(ren) as to the case management of the matter to</p>	<p>Attends court hearings at which the views of the child(ren) are relevant to the matters in issue (eg interim hearings and at trial) to convey to the court and the</p>	<p>Provides reports to the court and attends trial for the purpose of cross-examination.</p>

Role of the Independent Children’s Lawyer	Social Science Professional (‘Children’s Advocate’)	Role of the Family Consultant/Single Expert Witness
<p>achieve a timely and appropriate outcome.</p> <p>Act as an honest broker based on the best interests of the child(ren), which is sometimes inconsistent with child(ren)’s expressed wishes. In situations such as these, the ICL may meet with the child(ren) to explain why they adopted a view inconsistent with the child(ren)’s wishes and the outcome.</p> <p>Incorporate UNCROC and the relevant provisions for child inclusion in decision making and consider the Convention as part of the case planning and submissions to the court.</p>	<p>parties the child(ren)’s wishes.</p> <p>Liaises with the ICL in order to accurately communicate to the child what happened at the court hearings and the hearing outcome.</p>	
<p>Trial preparation includes the preparation of chronologies, obtaining written transcripts of police and child witness interviews, preparing bundles of exhibits to be tendered into evidence, drafting Minutes of Proposed Orders, facilitating the family consultant/ Single/Court Expert Witness and other professional witnesses attending to give evidence, drafting affidavits and, if ordered, drafting written submissions.</p>		
<p>At trial puts evidence before the court and cross-examines witnesses. Makes submissions based on the evidence as to the child(ren)’s best interests. Irrespective of the view of the ICL in relation to the child(ren)’s best interests, ensure that the court is provided with evidence of the child(ren)’s views in relation to the arrangements for their care.</p>	<p>Present the child(ren)’s views to the court, and in some circumstances, give evidence at trial as to the child(ren)’s views.</p>	<p>Give evidence at trial in relation to the assessment in their report and recommendations.</p>

Role of the Independent Children’s Lawyer	Social Science Professional (‘Children’s Advocate’)	Role of the Family Consultant/Single Expert Witness
Works to implement and monitor court orders, which can include liaising with third parties in circumstances where the court has ordered a change in care arrangements.	Facilitates the practical arrangements in relation to the implementation of court orders, which can include liaising with third parties in circumstances where the court has ordered a change in care arrangements.	
Meet with child(ren) to discuss and explain the outcome of any important decisions made by the court, on both an interim and final basis.	Meet with child(ren) to discuss and explain the outcome of any important decisions made by the court, on both an interim and final basis.	
Facilitates the return of the child’s personal items where one of the parents is refusing to return them - this can include negotiation or drafting an application to be heard by the court (if the return is not being facilitated).	Facilitates the practical arrangements for the child, eg the return of the child’s personal items where one of the parents is refusing to return them for the benefit of the children with the assistance of the ICL (where appointed).	
Manages conflict, assists parties in child and future focused discussions, reality testing the parties, and to the extent possible, works with the parties to maintain respectful and constructive communication during the proceedings and until the ICL is discharged.		
Where appeals are lodged, participates, including but not limited to, drafting a Response to the Appeal Notice, agreeing the Appeal Index, where relevant filing applications to adduce further evidence (or filing a response to such applications), preparing written submissions and attending and participating in the appeal.		

8. Reducing Harm

Proposal 8–1 The definition of family violence in the *Family Law Act 1975 (Cth)* should be amended to:

- 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
- 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.

Supported.

Please refer to the NLA response to Question 15 of the IP for further detail.⁴⁹

Question 8–1 What are the strengths and limitations of the present format of the family violence definition?

Strengths of the present format of the family violence definition are that it:

- emphasises a broad pattern-based, as well as incident-based, understanding of family violence;
- is consistent with the definition of family violence in related legislation in a number of other jurisdictions; and
- is supported by non-exhaustive examples, which perform a crucial educative role.

Limitations of the present format of the definition are:

- It may not sufficiently capture the experience of family violence for Aboriginal and Torres Strait Islander and culturally and linguistically diverse people.

Question 8–2 Are there issues or behaviours that should be referred to in the definition, in addition to those proposed?

Please see the response to Proposal and Question 8-1.

⁴⁹ National Legal Aid *submission 163*, Australian Law Reform Commission, Review of the Family Law System, Issues Paper 48 (2018) 55.

The inclusion of a non-exhaustive list of examples aids understandings of family violence. The list can be updated to reflect contemporary understandings of family violence, and aid interpretation of the legislation.

Proposal 8–2 The Australian Government should commission research projects to examine the strengths and limitations of the definition of family violence in the *Family Law Act 1975 (Cth)* in relation to the experiences of:

- Aboriginal and Torres Strait Islander people;
- people from culturally and linguistically diverse backgrounds; and
- LGBTIQ people.

Supported, taking account of existing research.

Proposal 8–3 The definition of family violence in the *Family Law Act 1975 (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’.

Supported.

In relation to the reference in the DP at paragraph 8.46 about “legal aid commission processes” being engaged as part of systems misuse, NLA understands this to refer to instances where perpetrators of family violence make complaints about their ex-partner receiving legal aid, suggesting that they are not so entitled. This is a common experience for LACs. LACs are also aware of situations where alleged perpetrators attempt to prevent the victim from obtaining legal advice by approaching all the local legal aid panel lawyers for advice themselves.

An understanding of the dynamics of coercion and control are fundamental to an understanding of systems abuse and misuse of legal process. NLA notes the nuanced understanding of this issue demonstrated in the appeal case of *Baron v Walsh* [2014] WASCA 124, and the helpful description of “systems abuse” contained in the *National Domestic and Family Violence Bench Book*.⁵⁰

Inclusion of systems misuse in the examples will support the prevention of such abuse and an appropriate response to it when it does occur.

⁵⁰ <http://dfvbenchbook.aija.org.au/understanding-domestic-and-family-violence/systems-abuse/>

Proposal 8–4 The existing provisions in the *Family Law Act 1975 (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.

NLA supports bringing together the existing provisions under Part XIB of the Act with the new s 45A of the Act.

Proposal 8–5 The *Family Law Act 1975 (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.

Supported, in the context of NLA’s response to Proposal 3-3.

Question 8–3 Should the requirement for proceedings to have been instituted ‘frequently’ be removed from provisions in the *Family Law Act 1975 (Cth)* setting out courts powers to address vexatious litigation? Should another term, such as ‘repeated’ be substituted?

NLA considers that the requirement for proceedings to have been instituted ‘frequently’ under s 102QB(1) is a barrier. Courts are well placed to assess whether proceedings are vexatious and/or amount to part of a serial form of conduct, and should have discretion to exercise the powers in s 102QB(2) taking into account all relevant circumstances.

In relation to the suggestion that ‘repeated’ be substituted for ‘frequent’, NLA supports the intent of the proposal, however, has concerns that ‘repeated’ not be interpreted to mean only proceedings brought under the same head of power.

Question 8–4 What, if any, changes should be made to the courts’ powers to apportion costs in s 117 of the *Family Law Act 1975 (Cth)*?

S 117(4)(b) of the Act has on occasion been interpreted to mean that costs can never be made against a person who had been in receipt of legal aid for the proceedings at some point, regardless of the party’s present capacity to pay or behaviour.

The provision should be amended so that it is clear that a costs order can be made where a party is not presently in receipt of legal aid, and the party has the capacity to pay and the circumstances of the case otherwise warrant it.

Proposal 8–6 The *Family Law Act 1975 (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:

- Subpoenas in relation to evidence of protected confidences should not be issued without leave of the court.
- 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).
- In exercising this power, the court should consider the probative value and importance of the evidence to the proceedings and the effect that allowing the evidence would have on the protected confider.
- 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.
- The protected confider may consent to the evidence being admitted.
- 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.
- The court is obliged to give reasons for its decision.

Supported in the context of the response to Proposal 3-3. Please also refer to the response to Chapter 11 Information Sharing.

The safety of all those involved in proceedings and the confider needs to be appropriately protected.

Proposal 8–7 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 & 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:

- principles to consider when a subpoena of sensitive records is in contemplation;
- obligations of professionals who are custodians of sensitive records in relation to the provision of those records;
- processes for objecting to a subpoena of sensitive records; and
- 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.

Supported.

Consideration should be given to expanding the membership of the working group to include other key stakeholders concerned with the interests and protection of children, such as Departments of Child Protection and Children’s Commissioners.

It is suggested that the inclusion of representatives from child protection authorities would be valuable, as they have much experience in relation to protection of confidence in the context of the protection of children.

9. Additional Legislative Issues

Proposal 9–1 The *Family Law Act 1975* (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, *Equality, Capacity and Disability in Commonwealth Laws*:

- Recommendations 3–1 to 3–4 on National Decision Making Principles and Guidelines; and
- Recommendations 4–3 to 4–5 on the appointment, recognition, functions and duties of a ‘supporter’.

Supported.

Proposal 9–2 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.

Supported.

Proposal 9–3 The *Family Law Act 1975* (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, *Equality, Capacity and Disability in Commonwealth Laws*.

Supported.

Proposal 9–4 Family courts should develop practice notes explaining the duties that litigation representatives have to the person they represent and to the court.

Supported.

Proposal 9–5 The Australian Government should work with state and territory governments to facilitate the appointment of statutory authorities as litigation representatives in family law proceedings.

Supported.

Proposal 9–6 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 (NDIS) could be used to fund appropriate supports for eligible people with disability to:

- build parenting abilities;
- access early intervention parenting supports;
- carry out their parenting responsibilities;
- access family support services and alternative dispute resolution processes; and
- navigate the family law system.

Supported.

Although the *National Disability Insurance Scheme (Children) Rules 2013* and the *National Disability Insurance Scheme (Supports for Participants) Rules 2013*, enable NDIS funding to be used for these purposes, additional strategies would support this occurring to a greater extent in practice. This includes the development of stronger referral relationships and pathways by family law professionals with the NDIA.

The provision of coordinators of support funded through NDIS, to assist people with disability who are engaged in family law proceedings, would also improve referral. The role of a coordinator of support is to help an NDIS participant implement their NDIS plan, identify support services, help the person choose and enter into agreements with service providers. This is particularly important where an NDIS participant is involved in family law proceedings and receiving appropriate supports has the potential to positively impact on their parenting capacity and the participants' child/ren. In the experience of LACs, many NDIS participants have been provided NDIS funding to access support services, but without funding for a coordinator of support, participants are often unable to locate support services to assist them.

The coordinators of support would require knowledge of both the NDIS and family law systems, to assist people with disability to navigate the interface between these systems.

Given that some people with a disability may not be eligible for NDIS, it is critical that mainstream services are disability accessible.

Proposal 9–7 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.

Supported.

Funding of coordinators of support, as described in the response to Proposal 9-6, is one of the most important ways in which people with disability can be assisted to engage with the family law system.

Question 9–1 In relation to the welfare jurisdiction:

- **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?**
- **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?**
- **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?**

As welfare jurisdiction matters involve decisions which may permanently affect a child, and may also involve complex legal and evidential issues, in NLA's view the family law courts are the appropriate authorising body. Family law courts should be supported by expert witnesses with a very high level of knowledge and experience of the relevant issues.

NLA supports the right of children to make decisions regarding their own body, provided they are 'Gillick-competent'.

LACs have had no recent practice experience of family law courts being prepared to consider making orders for the sterilisation of children with disabilities, given the other non-permanent and less invasive options available.

Proposal 9–8 The definition of family member in s 4(1AB) of the *Family Law Act 1975* (Cth) should be amended to be inclusive of Aboriginal and Torres Strait Islander concepts of family.

NLA considers that Aboriginal and Torres Strait Islander peoples and the community controlled organisations that provide them with family law and related services are best placed to respond to how the definition of family member in the Act might best be amended to be more inclusive of Aboriginal and Torres Strait Islander concepts of family.

Question 9–2 How should a provision be worded to ensure the definition of family member covers Aboriginal and Torres Strait Islander concepts of family?

Please refer to the response to Proposal 9-8 above.

10. A Skilled and Supported Workforce

Proposal 10–1 The Australian Government should work with relevant nongovernment organisations and key professional bodies to develop a workforce capability plan for the family law system.

Supported.

NLA notes the work of the Council of Attorneys-General (CAG) Family Violence Working Group in relation to “measures to improve family violence competency of professionals across family violence and family law systems”⁵¹ and understands will be consulting with relevant sector bodies about implementing recommendations contained in a report it has prepared.

NLA would seek to be one of the organisations involved in the development of a workforce capability plan.

Proposal 10–2 The workforce capability plan for the family law system should identify:

- the different professional groups working in the family law system;
- the core competencies that particular professional groups need; and
- the training and accreditation needed for different professional groups.

Supported.

“NLA is supportive of proposals for training and accreditation programs and professional standards to fill gaps which have been appropriately identified.

It could be expected, however, that there will be concerns about the resourcing for the development of such programs. Many organisations and individuals will also have resourcing concerns related to attendances at programs.”⁵²

Risks in developing resource intensive training and accreditation schemes, which may also be costly, include the potential for some practitioners to withdraw from the workforce and/or costs being passed on to consumers. There are particular concerns in relation to the potential withdrawal of sole practitioners in regional, rural and remote locations and on-going supply of services.

⁵¹ Commonwealth Attorney-General’s Department, *Council of Attorneys-General, Communique November 2018* <https://www.ag.gov.au/About/CommitteesandCouncils/Council-of-Attorneys-General/Pages/default.aspx>

⁵² National Legal Aid *submission 163*, Australian Law Reform Commission, *Review of the Family Law System*, Issues Paper 48 (2018) 111.

Proposal 10–3 The identification of core competencies for the family law system workforce should include consideration of the need for family law system professionals to have:

- an understanding of family violence;
- an understanding of child abuse, including child sexual abuse and neglect;
- an understanding of trauma-informed practice, including an understanding of the impacts of trauma on adults and children;
- an ability to identify and respond to risk, including the risk of suicide;
- an understanding of the impact on children of exposure to ongoing conflict;
- cultural competency, in relation to Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse communities and LGBTIQ people;
- disability awareness; and
- an understanding of the family violence and child protection systems and their intersections with the family law system.

Supported.

“The degree of competence required in each area will vary according to the role of the professional within the system”.⁵³

Please also refer to NLA’s response to Proposal 10-2 for training and accreditation in relation to resourcing concerns. There will be a need for appropriate funding support to ensure adequate workforces.

Question 10–1 Are there any additional core competencies that should be considered in the workforce capability plan for the family law system?

Please see the response to Proposals 10-2 and 10-3 above.

Appropriate boundaries for respective professional roles, collaborative practice and respectful relationships could be included as an area of competence. E.g. whilst non-lawyers should have a basic understanding of family and related laws and legal systems (as suggested by Proposal 10-3, last dot point) there should also be knowledge about the need to refer for legal advice.

Proposal 10–4 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.

⁵³ National Legal Aid *submission 163*, Australian Law Reform Commission, Review of the Family Law System, Issues Paper 48 (2018) 112.

Please refer to the NLA response to Chapter 12 about the establishment of the Family Law Commission and its proposed roles.

To avoid duplication and unnecessary cost, implementation of the workforce capability plan, including training and accreditation, should integrate with existing professional/development requirements wherever possible.

Proposal 10–5 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.

Supported. Please see our response to Proposals 10-2 and 10-3 and to Question 10-1.

The development of the workforce capability plan needs to be considered in the context of other proposed changes to the family law system. In light of the proposed requirement for mandatory pre-filing FDR for property and financial matters, the availability of a suitably qualified, trained and experienced pool of mediators to conduct FDR will be a critical issue.

NLA's view is that FDR practitioners conducting property and financial matters should be lawyers, and that they should have family law property law competence. It is also considered that legally assisted FDR should be engaged in property and financial matters. NLA is of the view that these measures will best protect the financial security of those engaging in FDR and particularly where there has been family violence or other power imbalance.

In any event, FDR in relation to property and financial matters should not be occurring without each of the parties having first obtained legal advice.

In circumstances where a party does not wish to obtain legal advice there should be formal documented acknowledgement that they have had the right to obtain legal advice explained to them, and have declined to exercise that right. This will help to limit the potential for parties to seek to re-open matters on the basis that that they did not have the opportunity to have legal advice.

LACs are well placed to expand FDR for property matters, if appropriately funded, and notes the recent announcement of the Women's Economic Security Statement which includes funding for LACs to pilot legally assisted FDR on the basis of a relaxed means test.

Question 10–2 What qualifications and training should be required for family dispute resolution practitioners in relation to family law disputes involving property and financial issues?

Please see our response to Proposal 10-5 above.

Lawyers conducting FDR involving property and financial issues should be the preferred position. Having lawyers conduct property FDR has numerous advantages including:

- the provision of a qualified, ready workforce;
- legal literacy;
- financial literacy;
- ability to assess fairness in the context of the law;
- ability to reality check parties in the context of the law; and
- an understanding of how consent orders should be structured to ensure that orders are capable of being implemented and are enforceable.

If any new system requirements are to be introduced, then there should be a simple, no cost process for recognition of prior learning.

Proposal 10–6 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.

NLA supports competence and continuing professional development in relation to responding to family violence. Ultimately this proposal, which imports potential issues/questions in relation to regulation is a matter for legal professional bodies.

NLA also supports education about family violence being embedded into the undergraduate law degree for all law students.

Proposal 10–7 The *Family Law Act 1975* (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.

Supported.

Question 10–3 Should people who work at Children’s Contact Services be required to hold other qualifications, such as a Certificate IV in Community Services or a Diploma of Community Services?

The minimum qualification for people who work at Children’s Contact Services should be consistent with those required by the organisations funded under the Families Relationships Services Program to deliver Children’s Contact Services.

Proposal 10–8 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.

Supported.

Question 10–4 What, if any, other changes should be made to the criteria for appointment of federal judicial officers exercising family law jurisdiction?

“There is a high prevalence of complex risk factors in family law litigation that can threaten the physical, emotional and psychological safety of children and family members.

The complexity of risk factors in family law litigation provides a compelling case that family law is a specialist area that requires the appointment of judicial officers who are highly experienced in the area of family law.

All judicial officers should have the qualities noted in s 22(2)(b) of the Act.”⁵⁴

Question 10–5 What, if any, changes should be made to the process for appointment of federal judicial officers exercising family law jurisdiction?

NLA does not advocate any specific processes for the appointment of federal judicial officers exercising family law jurisdiction.

NLA generally supports diversity in judicial appointments across all jurisdictions, reflective of the diversity of the Australian community.

Proposal 10–9 The Australian Government should task the Family Law Commission (Proposal 12–1) with the development of a national accreditation system with minimum standards for private family report writers as part of the newly developed Accreditation Rules.

Please refer to the response to Proposals 10-2 to 10-5 and to Chapter 12 about establishment of the Family Law Commission and its proposed roles. NLA supports strategies which will improve the skills, competence and available pool of private family report writers, including the introduction of an accreditation process. There will need to be some consideration given as to how previous experience as a family report writer and Single/Court Expert Witness should be taken into account in this context.

NLA supports family reports as an invaluable tool in assisting parties and the courts in family law matters, however, agrees that there are currently some issues with variation in the skills and experience of report writers and the quality of reports.

There are numerous underlying issues contributing to the variation in the quality of reports. These include:

⁵⁴ National Legal Aid *submission 163*, Australian Law Reform Commission, Review of the Family Law System, Issues Paper 48 (2018) 113.

- Inadequate funding such that report writers are not funded for an amount of time sufficient to conduct a thorough assessment.
- Barriers to experts being prepared and available to write reports including the stressful nature of the work, and being subject to frivolous and vexatious complaints from parties displeased with the court outcomes.
- Shortage of experts and long waiting periods for reports resulting in decisions being driven by availability rather than suitability.

Accreditation, whilst supported, will not address the above underlying issues and other strategies need to be put in place to support the long term development and retention of a suitably qualified and experienced pool of report writers. NLA notes the work being undertaken by the Australian Chapter of the Association of Family and Conciliation Courts in this context.

Consideration might also be given to additional funding to enlarge the pool of in-house experts employed at either or both of the family law courts and the LACs.

Any process of accreditation would have to be carefully managed, so as not to be so expensive, time consuming or difficult that it would create a further barrier for potential report writers, thereby limiting the potential size of the workforce.

Proposal 10–10 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.

Supported in the context of the response to Chapter 12 and in the event that an accreditation process is developed and implemented.

The appropriate location for any list would likely arise out of the work done in furthering Proposal 10-9. The Commonwealth Attorney-General’s Department might be one option.

Proposal 10–11 When requesting the preparation of a report under s 62G of the *Family Law Act 1975 (Cth)*, the family courts should provide clear instructions about why the report is being sought and the particular issues that should be reported on.

Supported.

NLA agrees with the DP at paragraph 10.81 that some reports requested under s 62G “may reflect a lack of focus on specific issues that have been raised in the proceedings.” This concern would likely be addressed by greater clarity as to why the report is sought and the issues to be reported on.

Proposal 10–12 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.

Supported.

NLA agrees that there are proceedings where specialist advice would be helpful, and supports the call in the DP at paragraph 10.82 “for specialist advice to be available to decision makers in cases involving children with particular cultural or other needs, such as Aboriginal and Torres Strait Islander children.”

However, in LACs’ practice experience, the underlying issues resulting in any lack of specialist advice being appointed in proceedings are likely to be:

- the lack of funding to appoint a specialist/assessor;
- the lack of available specialists/assessors; and
- the lack of well-developed relationships between cultural experts and family law professionals.

Proposal 10–13 The *Family Law Act 1975* (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:

- **prepare a report for the court about the person’s parenting ability, including what supports could be provided to improve their parenting; and**
- **make recommendations about how that person’s disability may, or may not, affect their parenting.**

Supported.

NLA supports that the focus in parenting order proceedings should be on the person’s parenting capacity, and how that capacity might be supported, rather than on the person’s disability.

NLA refers to its comments in the response to the IP that consideration might be given to a rebuttable presumption that disability is not per se a barrier to parenting, as suggested by the Victorian Public Advocate.⁵⁵

NLA notes present difficulties in finding experts prepared and able to conduct assessments of parenting capacity in these circumstances. Steps may need to be taken to develop the skills, and increase the size, of the existing pool of family consultants and experts as “specific skills are required to assess disability issues in the context of parenting capacity,

⁵⁵ National Legal Aid *submission 163*, Australian Law Reform Commission, Review of the Family Law System, Issues Paper 48 (2018) 35, citing Office of the Public Advocate (Vic), *Whatever Happened to the Village, the Removal of Children from Parents with a Disability* (2013).

with further professional development necessary for this purpose, particularly in the context of intellectual disability.”⁵⁶

Proposal 10–14 The *Family Law Act 1975* (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.

Supported in principle noting that NLA considers that “Aboriginal and Torres Strait Islander peoples are best placed to inform the approaches to be taken in relation to matters affecting them.”⁵⁷

NLA has some concerns that notwithstanding the provisions of s 60CC(3)(h), 60CC(6) and 61F, cultural issues and connection to culture, kinship and country, can be minimised or not addressed. Cultural reports would need to be resourced and would require the development of a pool of Aboriginal and Torres Strait Islander report writers.

Question 10–6 Should cultural reports be mandatory in all parenting proceedings involving an Aboriginal or Torres Strait Islander child?

Please see the response to Proposal 10-14.

Proposal 10–15 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.

Supported, subject to appropriate funding/resourcing being provided to meet this condition.

NLA notes that LACs have relationships with local state and territory Departments of Justice/Attorneys-General and that employee assistance programs are available through respective departments.

11. Information Sharing

Proposal 11–1 State and territory child protection, family violence and other relevant legislation should be amended to:

⁵⁶ National Legal Aid *submission 163*, Australian Law Reform Commission, Review of the Family Law System, Issues Paper 48 (2018) 32.

⁵⁷ *Ibid* 25.

- 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
- 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. The relevant agencies can be identified through the proposed information sharing framework (Proposals 11–2 and 11–3).

Supported, subject to an improved understanding of, and depending on, “which bodies and agencies in the family law system” would be involved.

NLA notes the work of the CAG Family Violence Working Group in developing “a proposed framework for the appropriate sharing of court orders, judgements, transcripts and other documents between the family law, family violence, and children protection systems.”⁵⁸ It is understood that work on this framework is continuing and a further report will be provided to CAG in the second half of 2019.

The CAG Family Violence Working Group is also understood to be working on technological options to support information sharing.

Legislative amendment needs to be supported in the relevant agencies by:

- commitment at a high level to the goals of information sharing and collaboration and clear endorsement communicated through to the front line through relevant agency policy, professional development and practice manuals;
- memorandums of understanding and other appropriate inter-agency agreements;
- good inter-agency relationships;
- clear agreement about what information will be helpful and shared;
- clear, simple, practical processes for achieving information sharing;
- training and awareness of all professionals; and
- professionals across all three systems.⁵⁹

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

⁵⁸ Commonwealth Attorney-General's Department, *Council of Attorneys-General, Communique November 2018* <https://www.ag.gov.au/About/CommitteesandCouncils/Council-of-Attorneys-General/Pages/default.aspx>

⁵⁹ National Legal Aid *submission 163*, Australian Law Reform Commission, Review of the Family Law System, Issues Paper 48 (2018) 94-5.

- **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?**
- **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?**
- **The *Family Law Act 1975* (Cth) require family courts to notify police if a party to proceedings makes an allegation of current family violence?**
- **The *Family Law Act 1975* (Cth) give family law professionals discretion to 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?**

The consideration of this question will be informed by the development of the information sharing principles and guidance as part of the framework referred to at Proposal 11-3.

In an environment where risk is an issue and there are limited resources, it is suggested that the focus for information sharing be information relevant to the risk that is already collected by the agency and can readily be shared utilising a simple, streamlined and cost-effective process. It is also necessary to ensure that both the officers of the agency providing the information and those of the agency receiving it understand the relevance of the information, its impact on the actions to follow and, as a consequence, the reason why it should be shared as a priority.

The experiences in some jurisdictions of child protection authorities being overwhelmed by the introduction of mandatory reporting, illustrate the need to carefully consider and balance the form and categories of information, relevance and resource impacts on the agencies involved.

Proposal 11–2 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. The framework should include:

- **relevant federal, state and territory court documents;**
- **child protection records;**
- **police records;**
- **experts’ reports; and**
- **other relevant information.**

Supported.

Please see the response to Proposal and Question 11-1.

The Report of Professor Richard Chisholm *The Sharing of Experts' Reports between the Child Protection System and the Family Law System*⁶⁰ should also inform the work of CAG and Proposal 11-2.

As NLA recommended in our submission to the IP,⁶¹ “categories of information to be shared should be developed carefully in consultation with key stakeholders to ensure that information provided:

- is relevant, accurate, tested and useful;
- in a format that is readily useable and effective for decision makers;
- is not overwhelming by reason of volume and extraneous information;
- is limited to documents that have already been prepared to minimise the workload for the agency providing the information wherever possible;⁶² and
- is admissible.”⁶³

In this context, the sharing of court orders, judgements and transcripts (where available) between federal and state and territory jurisdictions would, at first glance, appear to be quite straight forward. This should be the case when the information is being shared locally (e.g. between the family court and the child protection authority and/or family violence agencies within a particular jurisdiction) but might become more complicated when the information is being shared between different jurisdictions which use different terminology and have different types of orders, e.g. in relation to child protection. The benefits of access to information such as judgements and transcripts will also vary depending on the role and responsibilities of the officer accessing the information. For example, access to a family court order that prevails to the extent of any inconsistency with a family violence order might assist a police officer attending a location in response to a police report, but access to judgements and transcripts in relation to the same parties would be of limited benefit to the officer in that context.

Proposal 11–3 The information sharing framework should include the legal framework for sharing information and information sharing principles, as well as guidance about:

- **why information needs to be shared;**

⁶⁰ Prepared for the Attorney-General’s Department, March 2014.

⁶¹ National Legal Aid *submission 163*, Australian Law Reform Commission, Review of the Family Law System, Issues Paper 48 (2018) Question 33, 96.

⁶² For example see Practice Direction 1 of 2014 of the FCWA in relation to information to be obtained from the Department of Communities and associated Information Note Documents sought from the Department for Child Protection and Family Support (now Department of Communities (17 July 2014).

⁶³ See FCWA Practice Direction No 2 of 2011 Subpoenas to Service Providers (FDR, family counsellors, employees of Anglicare, Centrecare or Relationships Australia) and the Report of Professor Richard Chisholm *The Sharing of Experts' Reports between the Child Protection System and the Family Law System* prepared for the Attorney General’s Department March 2014.

- **what information should be shared;**
- **circumstances when information should be shared;**
- **mechanisms for information sharing, including technological solutions;**
- **how information that is shared can be used;**
- **who is able to share information;**
- **roles and responsibilities of professionals in the system in relation to information sharing;**
- **interagency education and training;**
- **interagency collaboration; and**
- **monitoring and evaluation of information sharing initiatives.**

Supported.

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

The identification of health records that might be appropriate to share, and the associated arrangements for sharing, should be considered in the context of the implementation of Proposals 11-2 and 11-3. There is a need to ensure an appropriate balance between confidentiality and the right to privacy, and risk identification and assessment. See also the response to Proposals 8-6 and 8-7 regarding sensitive records. NLA would be particularly concerned if the prospect of health records being shared deterred people from seeking the assistance that they might need.

Consideration should be given to including Department of Education records in the information sharing framework. Education records are often a highly relevant and probative source of information. Their inclusion as part of the information sharing network could facilitate records being provided and shared in a more planned, targeted, expedited, and consistent manner, with potential benefits for courts, parties and departments. This might include reducing the burden on departments from having to respond to ad hoc subpoenas for large amounts of material which may be of questionable relevance or assistance.

Question 11–3 Should records be shared with family relationships services such as family dispute resolution services, Children’s Contact Services, and parenting order program services?

NLA refers to the response to Proposals 11-2 and 11-3.

The question of the information that it is appropriate to be shared with family relationships services such as FDR services, Children’s Contact Services, and parenting order program services will depend on the particular circumstances of the particular case. Some records can currently be shared with the consent of the person about whom the record was made. When family court proceedings have commenced this is an issue that can be determined by the court and be the subject of a court order.

Proposal 11–4 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.

Supported in the context of the response to Proposals 11-1 to 11-4.

The CAG Family Violence Working Group terms of reference include a reference on the technology associated with information sharing. The recommendation of the ALRC should be informed by the recommendations developed in relation to that term of reference.

Proposal 11–5 State and territory governments should consider providing access for family courts and appropriate bodies and agencies in the family law system to relevant inter-jurisdictional and intra-jurisdictional child protection and family violence information sharing platforms.

Supported, on the basis that the implementation of Proposals 11-2 and 11-3 will determine the “appropriate bodies and agencies in the family law system” and the nature and limits of the information to be shared.

Proposal 11–6 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.

Supported, subject to an improved understanding of, and depending on, who would be a “relevant professional in the family violence and child protection system”.

Please refer to the response to Proposals 11-2 and 11-3.

Access might be initially prioritised for, and limited to, police and child protection authorities.

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

NLA supports the co-location of child protection staff as presently occurs in Victoria and Western Australia, as referred to in the IP,⁶⁴ as a strategy that models and supports collaboration and information exchange. In small regional locations there may be challenges in relation to staffing and space.

⁶⁴ Australian Law Reform Commission, *Review of the Family Law System Issues Paper 48* [248].

NLA also supports the expansion of the FASS operated by LACs which provides for court based family violence social support workers teamed with lawyers (please see the response to Proposal 4-5).

Proposal 11–8 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.

Supported, on the basis that the implementation of Proposals 11-2 and 11-3 will identify the relevant entities, including courts and agencies in the family law, family violence and child protection systems to be included in the information sharing agreements.

Proposal 11–9 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.

NLA suggests that it would be appropriate for the Australian Government and state and territory governments to endorse and support the family law courts, child protection authorities and police in each state and territory jurisdiction to work together to determine the information to be communicated and the format for that communication which will best meet the requirements of their jurisdiction.

Question 11–4 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?

NLA suggests that family courts and child protection authorities in each jurisdiction should be supported to work together to determine the information to be communicated, the format and method for that communication which will best meet the requirements of both agencies in their jurisdiction.

Proposal 11–10 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.

Some jurisdictions (e.g. Western Australia) already have long standing memorandums of understanding and information sharing arrangements/procedures in place that are working well. NLA suggests that the development of best practice principles in this context is appropriate rather than the imposition of a new uniform national information sharing scheme.

Proposal 11–11 The *Family Law Act 1975* (Cth) should support the sharing of relevant information between entities within the family law system. The information sharing scheme should include such matters as:

- what information should be shared;
- why information should be shared;
- circumstances when information should be shared;
- mechanisms for information sharing;
- how information that is shared can be used;
- who is able to share information; and
- roles and responsibilities of professionals in the system in relation to information sharing.

Supported.

NLA also refers to our submission to the IP⁶⁵ and confirms that trust and constructive professional relationships which support good collaboration and information sharing are enhanced by regular cross-jurisdictional and interdisciplinary training. Interdisciplinary training models the collaboration sought in practice and provides both formal and informal opportunities for the development and improvement of practices and processes.

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

Proposal 11–12 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.

Supported, subject to the development and implementation of the national information sharing framework and principles in Proposals 11-2 and 11-3. These should guide the extent of, and processes for, the involvement of family relationship services in the information sharing scheme.

Question 11–5 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:

- 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?
- What information should the family courts receive (ie services accessed, number of times accessed, or more detailed information about treatment plans etc)?

⁶⁵ National Legal Aid *submission 163*, Australian Law Reform Commission, Review of the Family Law System, Issues Paper 48 (2018) Question 33, 96.

- **Should client consent be needed to share this information?**
- **Who would have access to the information at the family courts?**
- **Would the other party get access to any information provided by the Families Hubs services to the family courts?**
- **Should there be capacity for services provided through the Families Hubs to provide written or verbal evidence to the family courts?**

NLA refers to the response to Proposals 4-1 to 4-4 regarding Families Hubs, and to the balance of the response to Chapter 11.

12. System Oversight and Reform Evaluation

Proposal 12–1 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 *Family Law Act 1975 (Cth)* and to promote public confidence in the family law system. The responsibilities of the Family Law Commission should be to:

- **monitor the performance of the system;**
- **manage accreditation of professionals and agencies across the system, including oversight of training requirements;**
- **issue guidelines to family law professionals and service providers to assist them to understand their legislative duties;**
- **resolve complaints about professionals and services within the family law system, including through the use of enforcement powers;**
- **improve the functioning of the family law system through inquiries, either of its own motion or at the request of government;**
- **be informed by the work of the Children and Young People’s Advisory Board (Proposal 7–13);**
- **raise public awareness about the roles and responsibilities of professionals and service providers within the family law system; and**
- **make recommendations about research and law reform proposals to improve the system.**

NLA has reservations about the establishment of the Family Law Commission.

If the Family Law Commission is to be established, NLA considers that it will be important that its officers/members have a shared understanding of the roles of the professions and services operating in the family law system, and that its board membership/leadership/staffing is representative of the professionals working in the relevant roles. The Family Law Commission will need to work closely with funders.

The resources required to establish the Family Law Commission with the responsibilities identified in the proposal are likely to be substantial, and the challenges associated with their implementation significant. NLA is concerned that in an environment of limited funding that improvements in frontline service delivery be a first priority, e.g. ensuring safe

court and service delivery premises, improved screening for risk and appropriate information sharing, expanding legally assisted FDR, ensuring legal representation for parties in matters requiring a judicial determination, and appropriate training to support quality service provision.

NLA confirms the view expressed in the NLA submission to the IP that the context of state and territory based family related laws, practices, and procedures is also relevant when considering the establishment of, and roles/functions for, the Family Law Commission.

In the above contexts, NLA supports in principle the following responsibilities, which are suggested to be of a more systemic nature, for the Family Law Commission:

- **monitor the performance of the system;**
- **improve the functioning of the family law system through inquiries, either of its own motion or at the request of government;**
- **be informed by the work of the Children and Young People’s Advisory Board;**
- **make recommendations about research and law reform proposals to improve the system;**
- **raise public awareness about the roles and responsibilities of professionals and service providers within the family law system;**

It will be essential for the appropriate discharge of this responsibility that there are close relationships with respective professional bodies and that any public awareness raising is undertaken in consultation with those bodies.

NLA does not support the Family Law Commission having the following proposed responsibilities:

- **manage accreditation of professionals and agencies across the system, including oversight and training requirements;**

In NLA’s view, the accreditation of professionals including oversight and training requirements is appropriately a matter for respective professional bodies. NLA notes the work of the CAG Family Violence Working Group in relation to “measures to improve the family violence competency of professionals across the family violence and family law systems” and understands will be consulting with relevant sector bodies about implementing recommendations contained in a report it has prepared.⁶⁶

- Training and accreditation programs should be available in a range of formats.

⁶⁶ Commonwealth Attorney-General’s Department, *Council of Attorneys-General, Communique November 2018* <https://www.ag.gov.au/About/CommitteesandCouncils/Council-of-Attorneys-General/Pages/default.aspx>

- Contextualised to specific roles of the professionals involved, cross-disciplinary and inter-agency where appropriate, modelling the collaboration sought in family law system practice.
- That requirements, including costs and time required for completion, not be so onerous as to discourage people from the entering the field or taking on particular work.

- **issue guidelines to family law professionals and service providers to assist them to understand their legislative duties;**

Guidelines and professional responsibilities legislative or otherwise, should ultimately remain the responsibility of respective family law professionals and service providers.

- **resolve complaints against professionals and services within the family law system, including through the use of enforcement powers.**

Complaints should be investigated and resolved by relevant professional bodies. Complaints can be used to inform required areas for professional development to improve practice. As an associated measure it could be incumbent on professional bodies and service providers to raise any systemic issues identified by them with the Family Law Commission to inform future research. The Family Law Commission website should identify the professional bodies to which complaints by the public should be directed.

NLA also notes that some complaints could be expected to have state/territory aspects, and that a national complaints resolution system would involve considerable time and cost to set up and there would be substantial overlap with the current functions of professional regulators.

Proposal 12–2 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:

- **develop Accreditation Rules;**
- **administer the Accreditation Rules including the establishment and maintenance of an Accreditation Register;**
- **establish standards and other obligations that accredited persons must continue to meet to remain accredited, including oversight of training requirements;**
- **establish and administer processes for the suspension or cancellation of accreditation; and**
- **establish and administer a process for receiving and resolving complaints against practitioners accredited under the Accreditation Rules.**

Not supported.

Please refer to the response to Proposals 10-4 and 12-1.

In relation to complaints, the systems focus of the Commission would better align with a role in responding to systemic issues raised by complaints, rather than having responsibility for dealing with individual complaints.

Proposal 12–3 The Family Law Commission should have power to:

- **conduct own motion inquiries into issues relevant to the performance of any aspect of the family law system;**
- **conduct inquiries into issues referred by government relevant to the performance of any aspect of the family law system; and**
- **make recommendations to improve the performance of an aspect of the family law system as a result of an inquiry.**

Supported.

Please see the response to Proposal 12-1.

Proposal 12–4 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.

Supported in the context of the response to Proposal 12-1.

It would be essential for the appropriate discharge of this responsibility that there are close relationships with respective professional bodies/service organisations and that any public awareness raising is undertaken in consultation with those bodies.

Proposal 12–5 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.

Not supported.

Please refer to the response to Proposal 12-1.

Proposal 12–6 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.

Supported in the context of the response to Proposal 12-1.

NLA would be interested to understand how this proposed function of the Family Law Commission would sit with the present role of AIFS and the work of Australia's National Research Organisation for Women's Safety?

Proposal 12–7 The Australian Government should build into its reform implementation plan a rigorous evaluation program to be conducted by an appropriate organisation.

Supported.

Proposal 12–8 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.

Supported.

As indicated in the DP, frameworks to guide culturally appropriate services already exist in some sectors. State and territory governments and respective departments may have their own frameworks. Existing frameworks should be considered so as to reduce duplication of effort and ensure consistency as far as possible.

Relevant organisations to be consulted should include peak bodies of the main family law legal assistance service providers, including LACs (or their nominees).

Proposal 12–9 The cultural safety framework should address:

- the provision of community education about the family law system;
- the development of a culturally diverse and culturally competent workforce;
- the provision of, and access to, culturally safe and responsive legal and support services; and
- the provision of, and access to, culturally safe and responsive dispute resolution and adjudication processes.

Supported.

As previously identified, the implementation of such a cultural safety framework is likely to require additional resources for many organisations to enable relevant education and training and recruitment and employment of appropriate staff.

As indicated in the NLA response to the IP, LACs endeavor, as far as possible given resourcing constraints, to be accessible to diverse communities, and provide some CLE for culturally and linguistically diverse peoples and Aboriginal and Torres Strait Islander peoples, large numbers of legal assistance services to individuals from these groups, and some LACs have specialist culturally responsive programs.

Proposal 12–10 Family law service providers should be required to provide services that are compliant with relevant parts of the cultural safety framework.

Supported, in principle. Please see the response to Proposal 12-9.

The development and implementation of cultural safety frameworks could be expected to have significant resource implications, and organisations will need to be appropriately funded to ensure appropriate development and implementation.

Proposal 12–11 Privacy provisions that restrict publication of family law proceedings to the public, currently contained in s 121 of the *Family Law Act 1975* (Cth) should be maintained, with the following amendments:

- **s121 should be redrafted to make the obligations it imposes easier to understand;**

Supported.

- **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;**

Supported.

This is an appropriate exception. It should be accompanied by an appropriate understanding of family law proceedings and in this context the dynamics that might result in complaints.

- **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;**

Supported in principle.

NLA considers that the avoidance of doubt provision will need to be very carefully drafted to identify the services that should be the subject of the provision and accompanied by associated professional development for the agencies the subject of the “avoidance of doubt” provisions.

The list of agencies and providers described in the dot point above is considered to be too broad for final definitional purposes.

- **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;**

Supported, in principle.

NLA notes that careful consideration will need to be given to the definition of “private communication”, so that the application of the provision is limited in scope, e.g. a “private face-book group” could have any number of members.

- 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.

NLA generally supports the publication of anonymised family law decisions.

Question 12–1 Should privacy provisions in the *Family Law Act 1975 (Cth)* be amended explicitly to apply to parties who disseminate identifying information about family law proceedings on social media or other internet-based media?

Yes.

Question 12–2 Should a Judicial Commission be established to cover at least Commonwealth judicial officers exercising jurisdiction under the *Family Law Act 1975 (Cth)*? If so, what should the functions of the Commission be?

As a general principle, NLA supports appropriate accessible and transparent complaints and feedback mechanisms.

Conclusion

Thank you for the opportunity of making this submission. Please do not hesitate to contact us if you have any questions.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'John Boersig', followed by a large, stylized flourish that extends to the right.

Dr John Boersig PSM
Chair



National Legal Aid

2018



Contents

Legal aid commissions	3
Our services – numbers	4
Our reach	5
Our services – description	6
Our national achievements	8
What we are working on	9
Charter of National Legal Aid	10
National Legal Aid directors	12

Legal aid commissions

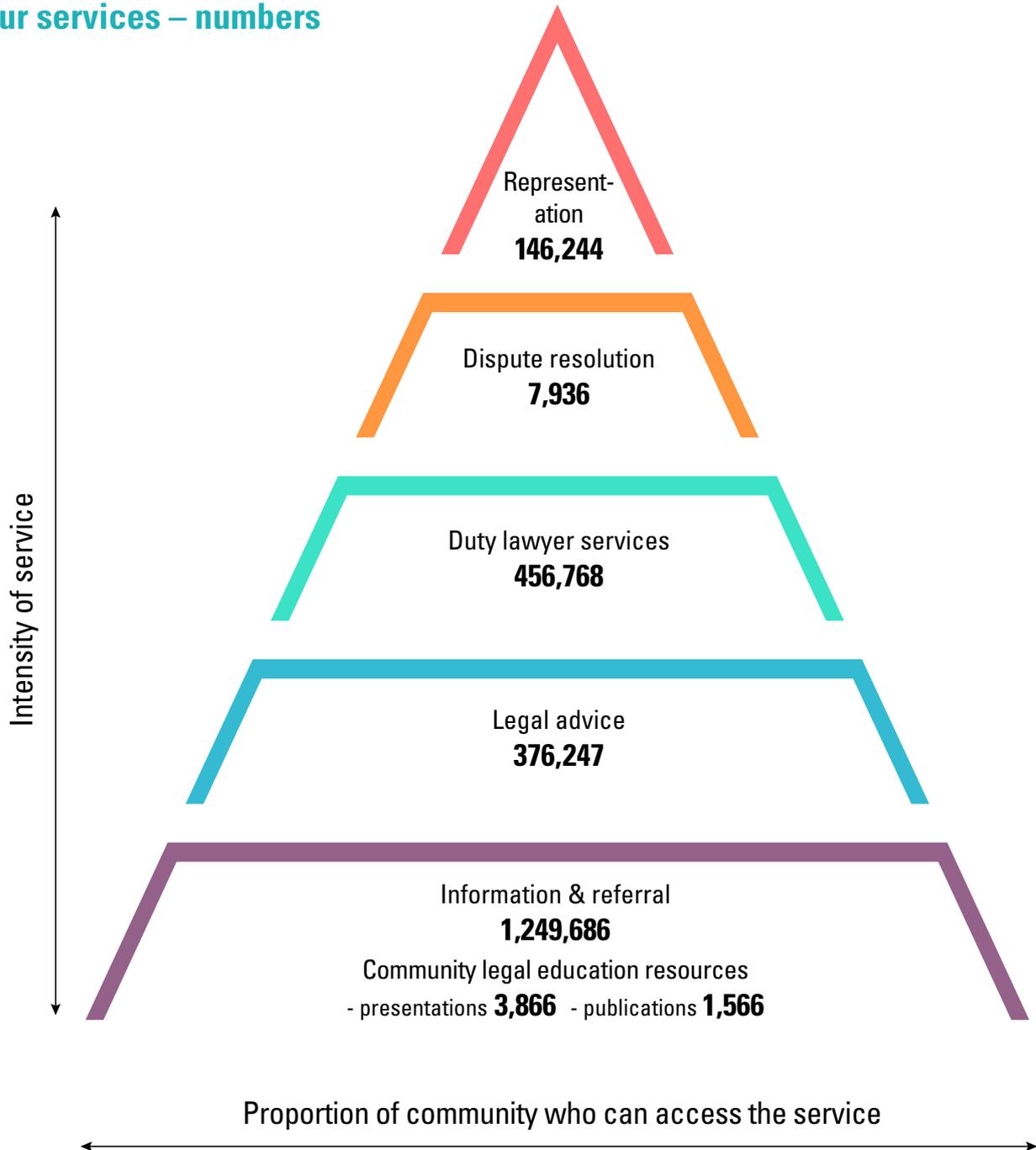
8 legal aid
commissions 

in excess of **2.2** million services
per year

2016-17
funding **\$729.6** M

80 offices around
the country

Our services – numbers



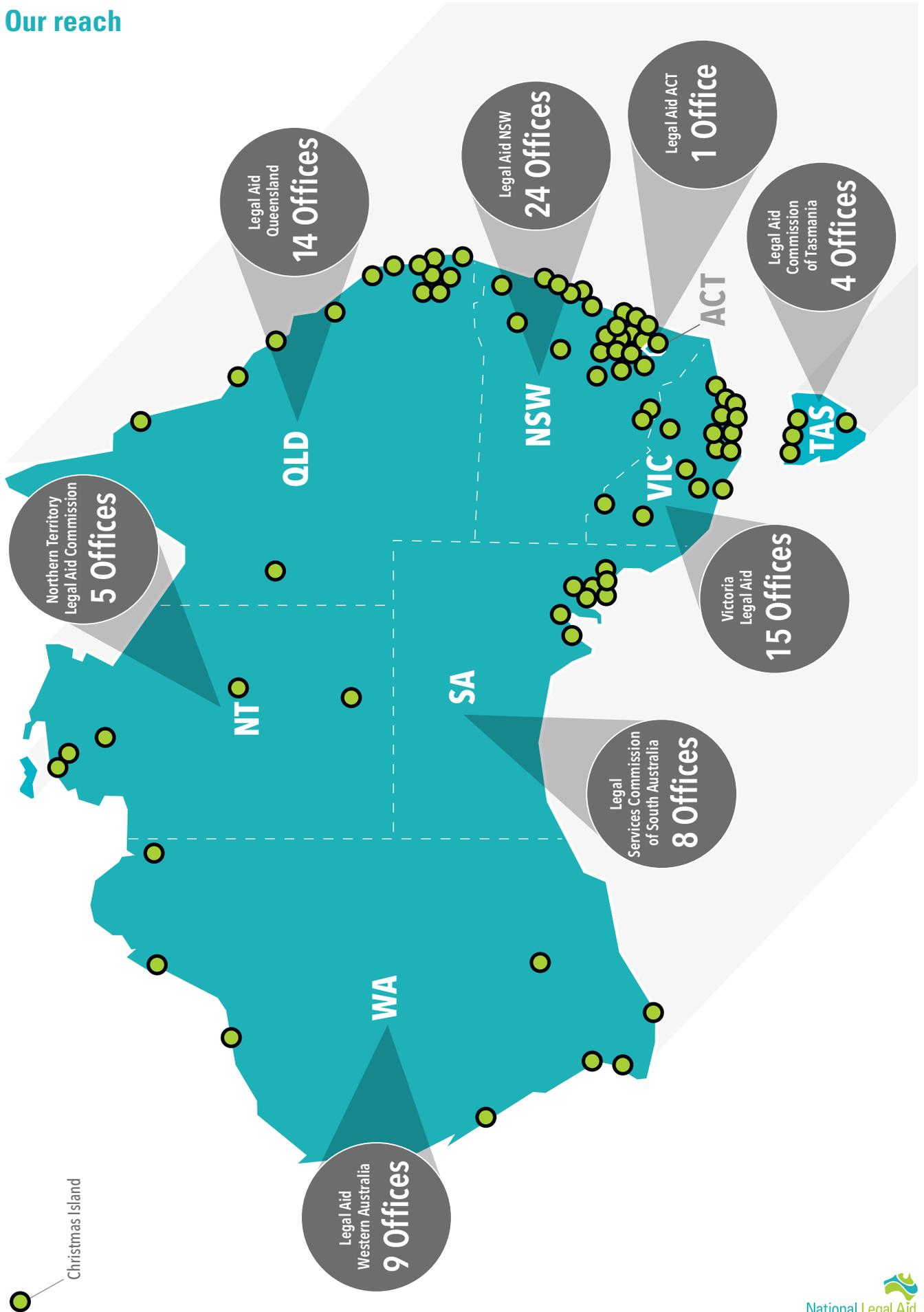
Sources: National Partnership Agreement on Legal Assistance Services 2015-20;
National Legal Aid Statistics

<https://nla.legalaid.nsw.gov.au/nlareports/>

Notes:

- i) Duty lawyer services include Family Advocacy and Support Services.
- ii) Legal advice includes work accompanying the advice e.g. drafting of legal letters, telephone advocacy on someone's behalf etc.
- iii) Community legal education resources reported here are Commonwealth law related only. More services were provided for state/territory law matters.

Our reach



Our services – description

Legal aid commissions services

Legal aid commissions (LACs) are the main providers of legal assistance services in Australia,¹ and provide nearly all the legal assistance representation services at courts and tribunals. Many also co-ordinate funding to community legal centres.

In 2016-2017 LACs provided in excess of 2.2 million services (in all law types) to people across the country. These services were delivered from LAC offices and by way of outreach including through health justice partnerships.

Background

LAC services are provided consistently with the priorities specified by the inter-governmental National Partnership Agreement on Legal Assistance Services 2015-2020 (NPA), and with the state and territory enabling legislation of the respective LAC.

Litigation is a response of last resort for LACs and the NPA also specifies that “Family or civil law disputes should be resolved through alternative dispute resolution processes rather than through litigation, where appropriate.”²

Legal representation services

Legal representation services include legal representation in fully contested matters including the provision of independent children’s lawyers and child representatives as requested by the family law courts and child protection courts respectively, as well as full legal representation services for parties with matters predominantly in the family law, family violence, child protection, and criminal law courts.

Duty lawyer services and family advocacy support services

Duty lawyer services are provided in civil law courts and tribunals including the family law courts, the Administrative Appeals Tribunal, and as many local courts as possible including state/territory family violence courts. “The presence of duty lawyer services on the day at court has been proven to contribute to the effectiveness and efficiency of the court process for both the client and the court or tribunal”.³

Family advocacy and support services are provided at some registries of the family law courts⁴ to assist families experiencing domestic violence as they move through the family law system. The service integrates duty lawyers with specialist family violence workers to help families navigate between the federal and state court systems and connect people with trauma-informed help such as risk assessments and safety planning.⁵

Our services – description (continued)

Dispute resolution services

Dispute resolution services are provided as a necessary first step in all matters which are appropriate for such service delivery. All LACs operate programs which provide legally assisted models of dispute resolution conferences, and which achieve very high settlement rates, e.g. in 2016-2017 the national average settlement rate was 78%. The LACs organise conferences, including providing the Chairperson for these conferences, and ensure parties who qualify for a grant of legal aid are legally represented.

Whenever settlement is achieved these services avoid the cost of resources associated with court proceedings, including the cost of court administration and hearing time.

Legal advice, information and referral services

The legal advice, information and referral services, and community legal education, are non-means tested services designed as prevention and early intervention strategies. These services are provided on-line, by phone, and face to face.

LACs produce information and self-help resources and provide community legal education services to further support self-representing parties with various problem types.

¹ Productivity Commission 2014, *Access to Justice Arrangements*, Inquiry Report No. 72, Canberra vol 2 667.

² National Partnership Agreement on Legal Assistance Services 2015-2020, Clause B9.

³ An evaluation of Legal Aid NSW's Early Intervention Unit Duty Service at Parramatta Family Law Courts, Law and Justice Foundation, 2012 www.legalaid.nsw.gov.au/_data/assets/pdf_file/0003/15969/Evaluation-of-Family-Law-Early-Intervention-Duty-Service.pdf found that the duty service contributed to the efficiency and effectiveness of the court process by: diverting matters that should not have been in court and advising and assisting clients to take the most appropriate course of action; and contributing to the resolution of matters on the day through the drafting of documents, including providing a 'reality check' with clients – while explaining the processes and implications and negotiating with other parties for clients.

⁴ The services in the Northern Territory are primarily delivered from the Darwin Local Court and the Katherine Local Court due to demand for services at these locations.

⁵ Senator George Brandis (then Attorney-General) *'Improving family violence support in family law courts'* (media release, 17 May 2017).

Our national achievements

- 2.2 million services to the public
- Family dispute resolution – 78% national settlement rate
- Family Advocacy and Support Services

Implementation in March 2017 of the Family Advocacy and Support Service at the main registries of the family law courts following the announcement in late October 2016 by Government that the services would be established.

- Independent children's lawyers

Dedicated website (<https://icl.gov.au>) and suite of publications to provide information, news and resources to the public about the role of the independent children's lawyers in family law proceedings and also the professional development and mentoring for those undertaking the role.⁶

- *What's the law? Australian law for new arrivals*

What's the law? was produced for national use in the Adult Migrant English Program (AMEP) and addresses 10 commonly experienced legal issues. The kit includes a DVD with 10 photo stories, information for teachers and activity sheets. A recent research study which focused on one of the *What's the law?* modules found that it improved the participants understanding of the law. The study will soon be published in the *Journal of Law and Social Policy*.

This resource was developed by the eight Australian state and territory legal aid commissions, and inspired by the resource *Getting to know the law in my new country*, produced by the Footscray Community Legal Centre in Victoria.

- National consultations and submissions, including in response to parliamentary inquiries and reviews by the Australian Law Reform Commission, ensuring an experience informed national response.
For example:

Family Law

- Family Law Amendment (Parenting Management Hearings) Bill 2017, Senate Legal and Constitutional Affairs Committee Inquiry
- Family Law Amendment (Family Violence and Other Measures) Bill 2017 Exposure draft and public consultation paper and the Senate Legal and Constitutional Affairs Committee Inquiry
- Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017 Exposure draft and public consultation paper, Commonwealth Attorney-General's Department
- Parliamentary inquiry into a better family law system, House of Representatives Standing Committee on Social Policy and Legal Affairs

Elder Abuse

- Australian Law Reform Commission Elder Abuse Inquiry, Issues Paper and Discussion Paper.

⁶ In response to the release of the Australian Institute of Family Studies *Independent Children's Lawyers Study* Final Report 2nd edition June 2014, and with NLA taking on sole responsibility for independent children's lawyer training as from May 2017.

What we are working on

- Review of the National Partnership Agreement on Legal Assistance Services 2015-2020
- Responding to elder abuse
- Review of the family law system by the Australian Law Reform Commission

- Online Dispute Resolution System project

This project is investigating the introduction of an Online Dispute Resolution System for couples that are separating or divorcing in Australia to assist them to resolve their family law disputes with less reliance on formal pathways.

National Legal Aid gratefully acknowledges the sponsorship of the Commonwealth Attorney-General's Department.

- ICL training program

This program comprises online and face to face training modules and tested learnings. National Legal Aid gratefully acknowledges the support of the Commonwealth Attorney-General's Department for developing this training.

- Family Violence and Family Law Community Legal Education Resource to complement the Family Advocacy and Support Services

This resource comprises a national website housing family violence resources and information about the Family Advocacy and Support Services in each state and territory. National Legal Aid gratefully acknowledges the support of the Commonwealth Attorney-General's Department for developing this resource.

- Hosting the International Legal Aid Group Conference 2021

"The International Legal Aid Group (ILAG) is a network of legal aid specialists including Chief Executives and Managers from Legal Aid Commissions, high ranking Civil Servants and leading Academics from over two dozen countries. ILAG's mission is to improve evidence-based policy-making in the field of poverty legal services through discussion and dialogue relating to international developments in policy and research. ILAG focuses primarily on the particular issues raised in jurisdictions which have established highly developed systems of legal aid. However, ILAG is expanding its brief to include jurisdictions with less developed systems and has in an real interest in how technology can be used to improve access to justice."⁷

⁷ International Legal Aid Group website <http://www.internationallegalaidgroup.org/index.php>

Charter of National Legal Aid

Membership

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

The LACs are independent statutory bodies that provide legal assistance services to the public, with a particular focus on the needs of people who are economically and/or socially disadvantaged. LACs provide in excess of 2.2 million legal services each year.

One of the NLA directors, on a rotation basis, is the Chair and primary spokesperson for NLA.

Purpose

NLA's purpose is to:

- lead and encourage a national system of legal aid which allows economically disadvantaged people to obtain access to justice, and
- provide a forum for engagement at a national level with government/s, stakeholders, community; and for the individual LACs to engage with each other about best practice of legal aid and related issues.

Beliefs

NLA is guided by belief in the rule of law and the importance of an effective, efficient, independent justice system which is accessible to everyone. These are the cornerstones of a civil and democratic society.

Priorities

In 2017-18 key priorities for NLA include:

- prevention of and responding to elder abuse;
- prevention of and responding to domestic violence, and
- inclusion of justice targets in the Closing the Gap strategy and support for adequate funding for the Aboriginal and Torres Strait Islander legal services as the 'specialised legal assistance services for Aboriginal and Torres Strait Islander people'.⁸

⁸ Productivity Commission 2014, *Access to Justice Arrangements Inquiry Report No. 72*, Canberra, 767.

Charter of National Legal Aid (continued)

Strategies

NLA:

- maintains a set of policies which provide the basis for our work in advocating for equitable access to justice;
- is supported by a secretariat and by a number of working groups and networks including a representative of each of the LACs with expertise in the respective area of legal aid business, and
- meets regularly for strategic planning purposes.

Co-operation

There are four main government funded legal assistance service providers in Australia, including the LACs, community legal centres, Aboriginal and Torres Strait Islander legal services and Family Violence Prevention Legal Services.

NLA is a member of the Australian Legal Assistance Forum (ALAF), comprised by representatives of the above legal assistance service providers and the Law Council of Australia representing Australian lawyers and their state and territory representative bodies, a signatory to the ALAF Statement of Co-operation, and provides the ALAF Secretariat.

New Zealand

There is a strong alliance between NLA and Legal Aid Services New Zealand. The legal aid alliance facilitates the sharing of information, the showcasing of initiatives, and contributes to the development of best practice.

A representative of Legal Aid Services NZ attends NLA meetings to discuss matters of mutual interest.

Further information

Further information about NLA and the work that we do, can be found at



<http://www.nationallegalaid.org/>

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