Australian Law Reform Commission

Review of the Family Law System

Issues Paper

Submission

May 2018

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Contents

About Victoria Legal Aid 1

Executive Summary 3

Objectives and principles 7

Access and engagement 12

Legal principles in relation to parenting and property 34

Resolution and adjudication processes 52

Integration and collaboration 69

Children’s experiences and perspectives 79

Professional skills and wellbeing 92

Governance and accountability 98

# About Victoria Legal Aid

Victoria Legal Aid (VLA) is an independent statutory authority set up to provide legal aid in the most effective, economic and efficient manner.

VLA is the biggest legal service in Victoria, providing legal information, education and advice for all Victorians. We fund legal representation for people who meet eligibility criteria based on their financial situation, the nature and seriousness of their problem and their individual circumstances. We provide lawyers on duty in most courts and tribunals in Victoria.

Our clients are often people who are socially and economically isolated from society; people with a disability or mental illness, children, the elderly, people from culturally and linguistically diverse backgrounds and those who live in remote areas. VLA can help people with legal problems about criminal matters, family separation, child protection, family violence, immigration, social security, mental health, discrimination, guardianship and administration, tenancy and debt.

We provide:

* Free legal information through our website, our Legal Help line, community legal education, publications and other resources
* Legal advice through our Legal Help telephone line and free clinics on specific legal issues
* Minor assistance to help clients negotiate, write letters, draft documents or prepare to represent themselves in court
* Grants of legal aid to pay for legal representation by a lawyer in private practice, a community legal centre or a VLA staff lawyer
* A family mediation service for disadvantaged separated families
* Funding to 40 community legal centres and support for the operation of the community legal sector.

## About VLA’s family law work

VLA’s Family, Youth and Children’s Law Program plays a leading role in the coordination of family law and family violence legal services in Victoria. We provide:

* Duty lawyer, legal advice, representation and information services including in child support, parenting disputes, child protection and family violence matters across the state, to children and to parents;
* Lawyer-assisted and child-inclusive family dispute resolution to help settle disputes without going to court (through our Family Dispute Resolution Service);
* Independent children’s lawyers who promote the interests of children at risk;
* The new Family Advocacy and Support Services (FASS) in Melbourne and Dandenong family law registries – providing specialist duty lawyers alongside specialist family violence support workers;
* Family Violence to Family Law Continuity of Service Delivery pilots with two community legal centres, offering a continuing legal service from when parents first appear at the Magistrates’ Court for family violence intervention orders, through to addressing family law needs; and
* Legal advice and education in the community.

In the 2016–17 year, the Family, Youth and Children’s Law program provided:

* services to almost 33,000 clients (including 1,659 Aboriginal or Torres Strait Islander clients)
* over 17,000 duty lawyer services and over 15,000 grants for ongoing representation.

Informed by this broad experience and access to data, VLA has, over many years, worked with governments, family law courts and family law professionals to improve the family law system and the outcomes for our clients and most importantly for children. We also have ongoing engagement with the Victorian government, state agencies and other partners in the implementation of the recommendations of the state’s Royal Commission into Family Violence.

# Executive Summary

Victoria Legal Aid (VLA) welcomes the opportunity to make a submission to the Australian Law Reform Commission’s (the Commission) review of the family law system (the review) Issues Paper.

VLA has contributed to family law reform for several years, drawing on our role as the arranger of family law legal assistance across the state and our own extensive family law practice. We welcome the broad-ranging Terms of Reference of this review, noting that since the inception of the *Family Law Act 1975* (Cth), reform of the family law system has been piecemeal and fragmented. We look forward to the subsequent phases of consultation.

As a member of National Legal Aid (NLA), VLA has contributed to and supports the NLA submission on the Issues Paper. The NLA submission represents the joint practice experience of the eight Legal Aid Commissions (LACs) in Australia and provides a comprehensive analysis of the national issues.

Our own submission is based on the unique experience of Victoria. Our state family violence and child protection systems have undergone significant structural change and service reform in recent years, notably thanks to the Royal Commission into Family Violence. Our analysis of the issues in the family law system is informed by our engagement with and experience of these reforms, particularly given the overlap between the three jurisdictions (family law, family violence and child protection) as well as the lessons learnt from these reforms in state jurisdictions where there is relevance to the family law jurisdiction.

Our submission also draws extensively on VLA data and practice experience in family, youth and children’s law (including family violence legal matters). VLA acknowledges and values the generous input of our lawyers and key stakeholders who contributed content to this submission.

Our submission is structured according to the questions provided in the Issues Paper for ease of reference and reading. However, we would like to draw the Commission’s attention to the overarching themes of our submission, which underpin our reconceptualisation of the family law system. Central to these themes is the need for the family law system to be child-centred at every stage of the process, prioritising the needs and interests of children.

We are particularly focused on reforms to:

* Create an accessible system;
* Support parents to resolve disputes without recourse to the courts;
* Respond to the needs of the child and family;
* Protect all individuals’ right to safety; and
* Enable good decision-making based on the best available evidence.

**Creating an accessible system**

Ensuring access to justice, including the family law system, is a key concern of VLA. LACs aim to promote access to justice for those who would not otherwise have the means to protect their legal rights or respond to claims about their legal responsibilities.

Systemic lack of access to justice includes challenges accessing legal information, inability to access support services to prevent exacerbation of problems, inability to resolve legal problems in a timely way, the particular impact that laws, practices and decision-making can have on vulnerable groups within the community, and the inability to afford private legal advice or assistance to navigate the formal justice system. Legal assistance is crucial in this regard, but legal aid representation is only available for eight percent of Australians, despite fourteen percent of the population living under the poverty line.

Our response to Questions 3 to 13 recommend a range of reforms to improve accessibility of and strengthen engagement with the family law system, particularly for the most vulnerable and disadvantaged in our community.

Some of these recommendations are focused on increasing the availability of legal assistance for those most in need – groups that may experience greater levels of vulnerability or lack of access to justice – while others focus on the design of the family law system and ensuring that a person’s experience in the family law system is not contingent on the ability of an individual to access a lawyer, whether privately funded or legally-aided, and supports individuals to engage with and navigate the family law system effectively.

In VLA’s view, an accessible family law system would promote its services and disseminate tailored information to communities to improve understanding of the family law system and related services. It would provide an equivalent service (pre-court, at court and post-court) regardless of where people live, ensure cost is not a barrier to access and include streamlined procedures that reduce cost, respond to the needs of a family at the point in time that they come into contact with the system and as they travel through the system, and improve the timeliness of resolution.

Critically, the family law system would be inclusive, equitable and culturallysafe forall individuals**,** including Aboriginal and Torres Strait Islander peoples, thosewith disability, individualsfrom culturally and linguistically diverse backgrounds, and families in the LGBTIQ+ community.

**Supporting parents to resolve disputes without recourse to the courts**

VLA encourages a redesigned family law system to focus on supporting families to resolve disputes early and without recourse to the family law courts. This is an important aspect of reducing the workload of the family law courts, reducing cost to litigants that they are often unable to afford, and supporting parties to resolve their own disputes without recourse to court (where safe to do so). It also focuses the work of the family law courts on the families presenting with the most complex needs and requiring judicial determination of disputes.

In our view, there are several ways to do this, including through community education initiatives that support family strengthening and encourage families to identify and address their own problems and achieve safe caring arrangements for their children. Critical to this also is working with and resourcing community organisations to ‘issue spot’ family law needs early and refer appropriately.

Increased access to free and improved legal information and advice would assist more people to make informed decisions about their legal issue. Additionally, access to early resolution processes that are already working effectively to help individuals resolve their disputes prior to attending court, including legally-assisted family dispute resolution (FDR), should be expanded.

A legally assisted model of FDR, supported by case management for clients and mediation by experienced chairpersons, can expand eligibility of FDR to parents screened out of non-legally assisted models of FDR and support parents to resolve family law matters without recourse to court. Further, compulsory legally-assisted FDR for property matters, if the full and frank financial disclosure requirements can be met, would support parties to resolve their own disputes while significantly reducing the workload of the family law courts and cost to litigants.

**Responding to the needs of the child and family**

Most separating parents resolve their disputes without recourse to the formal processes of the family law system. Therefore, the cases that enter the formal system are the most complex and difficult to resolve. Family violence is notably prevalent, identified as a risk factor in 81 percent of family law cases with a family report conducted.

Responding effectively to the increasing complexity of cases in the family law system requires a more trauma-informed, culturally safe approach that can identify and address non-legal needs, and a range of legislative and procedural changes.

Primarily, VLA envisions systems and processes at the family law courts that support triaging at the point of intake, with a single point of entry so that all applications to the family law courts are appropriately case-managed according to their complexity and level of risk. This process would facilitate early ‘issue spotting’ to identify legal and non-legal need and refer appropriately, make or organise risk assessments, implement safety planning, triage families depending on the level of need and vulnerability, and identify the information required to assist with judicial decision-making in the best interests of the child (in parenting matters, for example).

A range of court processes should be available with the intensity of the process responding to the needs of the family. For example, a simplified small property stream should be available at court for determination of small property pool matters quickly and cost-effectively.

Where appropriate, strengthening the integration between FDR and the family law courts could assist families to resolve their disputes in a timelier manner and would be more responsive to the needs of the family at each stage of the family law process and reduce the need for judicial determination at final hearing. For example, in our view a referral from the family law courts back to an FDR service and the convening of a further mediation could assist with timely resolution of family law disputes.

If the court supports parents to address both legal and non-legal issues in an ongoing way, in our experience a family is more likely to resolve their issues, address safety concerns for children, and create lasting and meaningful change in the lives of the children.

**Protecting all individuals’ right to safety**

VLA envisions a modern family law system that operates from a family violence-informed perspective that holds users of family violence to account and prioritises the safety of the victim survivor. In this environment, children are recognised as victims of family violence who require specialised responses and supports.

Clear risk assessment and management processes would be embedded within the family law system to ensure that safety is prioritised for all individuals.

In situations where family violence risk is identified, VLA supports the adoption of processes in the family law courts that are responsive to family violence; in particular, early determinations about family violence and a legislative ban on direct cross-examination in family violence situations (our holistic response to family violence is outlined in our response to Question 23).

**Enabling sound decision-making based on the best available evidence**

The family law system is child-centred and aims to support decision-making in the best interests of the child. There are processes in place that support decision-making that is consistent with this public law principle in a private law jurisdiction that resolves disputes between two private parties. However, at present the system can struggle to address this tension and make decisions based on the best available evidence and in the best interests of the child where a child is at risk of harm due to the conduct of one or both parents.

An effective and efficient family law system would draw on the most appropriate and relevant information to make decisions that are in the best interests of children.

Importantly, it would improve children’s participation in decision-making where safe and appropriate to do so and give a greater focus to the voice of the child. Such an approach would see experts informed by the relevant social science and with skills in meeting with children, facilitating the inclusion of the child’s voice in the process.

Additional expert information that can assist with decision-making on the best available evidence would also be identified early and sought. For family law property disputes, additional measures that strengthen mandatory financial disclosure would be implemented to support the timely and fair resolution of property disputes.

The system would also appropriately share information between jurisdictions and support families to resolve their matters in one court to enable sound and informed decision-making in the best interests of the child.

To ensure the best available evidence was sought and understood, all family law professionals would also be trained and skilled in core competencies, as well as undertaking compulsory and regular professional development, regarding common issues in family law cases, including for example child development, the impact of separation on children, the nature and dynamics of family violence, the effects of trauma and the provision of culturally safe and inclusive services. This is necessary to ensure all professionals, including judicial officers in the jurisdiction, can effectively fulfil the functions of their role in a modern family law system.

These themes are further explored through our responses to the questions in the Issues Paper. VLA is available to meet with the Commission to provide further detail on any of the recommendations made in our submission.

The client stories and case studies used throughout this submission are real cases but have been de-identified and names and other details have been changed to protect privacy and confidentiality. Client consent has been obtained to include each client story.

# Objectives and principles

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

VLA perceives the functions of the family law system as twofold: operational and symbolic. Operationally, the system assists people to resolve parenting and property disputes in a fair and just manner. Symbolically, the system ‘plays an important role in informing people’s expectations about appropriate parenting arrangements for children’,[[1]](#footnote-1) including for those families that do not require the formal system to resolve post-separation disputes and the community more broadly. The family law system should both reflect and inform Australia’s cultural norms.

However, as indicated in the Issues Paper, Australian cultural parenting norms and ‘social and family life has changed a great deal’ since the time of the reforms encapsulated in the *Family Law Act 1975* (the Act) and the commencement of operations of modern family law courts in 1976.[[2]](#footnote-2)

There are now more:

* Cohabiting and one-parent families;
* Combinations of step-families, blended families, and same-sex families;
* Formal and informal kinship care arrangements;
* Families with different cultural practices relating to child care and parentage;
* Families with multiple caregivers drawn from broader family or community members; and/or
* Families from many different countries of birth, religious faiths and spoken languages.[[3]](#footnote-3)

The family law system is also under increasing pressure in response to other social and demographic changes.[[4]](#footnote-4) These include significant changes in relation to:

* The nature, structure and workload of the family law system;[[5]](#footnote-5)
* Complexity of the issues and needs of families utilising the family law system;[[6]](#footnote-6)
* Prevalence of family violence and other risk issues affecting children and families;[[7]](#footnote-7)
* Shifting boundaries between child protection, family violence and family law matters and jurisdictions;[[8]](#footnote-8)
* Affordability of legal representation;
* Funding for, and availability, of legal aid; and
* Increases in self-represented litigants.[[9]](#footnote-9)

These changes require clarification of the role and objectives of the family law system so that it reflects and aligns with the reality and experience of the diversity of contemporary Australian families and the values of modern Australian society.

### Role

VLA sees the overarching role of the family law system as *to* *provide a process to assist people to resolve both parenting and property disputes*, which:

* Is clear and transparent;
* Is safe;
* Facilitates timely resolution of disputes to avoid problems escalating or becoming exacerbated;
* Supports parties to make and commit to decisions;
* Provides certainty; and
* Is cost-effective, with costs set at an amount proportionate to the issues in dispute and resolution without recourse to court where possible.

### Objectives

To fulfil this role, be responsive to all families, and address some of the key challenges of the current system, the objectives of the family law system and decision-making should be to:

* Protect and promote the best interests of children as the paramount consideration, including safety, cultural connection, and healthy development;
* Achieve safe, child-centred and workable parenting arrangements for the care of children;
* Achieve fair and just outcomes for parties, including equitable distribution of assets;
* Protect all individuals’ right to safety; and
* Respond to both legal and non-legal issues facing families.

The detail of each of these objectives will be explored more thoroughly throughout this submission.

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

VLA agrees that a set of principles should guide and underpin the redevelopment of the family law system. Implementation of the principles would assist in ensuring the family law system meets its role and objectives.

Principles would need to accommodate the increasing complexity of issues facing families in the family law system as well as reflect the experience of the majority of separating parents that resolve their own post-separation arrangements without recourse to the formal processes of the family law system.[[10]](#footnote-10) This means that the relatively few cases that proceed to the family law courts are the most complex, often involving multiple risk factors including family violence, child abuse, mental illness, substance abuse and/or cognitive impairment issues, and are less likely to resolve without judicial determination.

The complexity of cases in the family law system has been steadily increasing since its inception in 1975. For example, a 2014 survey of family reports showed that 31 percent of the surveyed cases involved three risk factors, while 26 percent involved four risk factors; family violence was present in 81 percent of the surveyed cases.[[11]](#footnote-11)

The Issues Paper recognises this increasing complexity and notes additional changes to the family law system’s workload since its inception including the increasing numbers of self-represented litigants, a growing emphasis on pre-filing and alternative dispute resolution processes, as well as more active judicial case management of matters in the family law courts.[[12]](#footnote-12) These changes have created challenges for the family law system to meet the needs of families within it, including long court delays, high costs, lack of cultural safety and responsiveness, inaccessibility in rural areas, lack of a child-centred practice, and difficulties ensuring safety for victim survivors of family violence.[[13]](#footnote-13) VLA’s practice experience supports these findings.

Our experience suggests that the increased complexity and the change in the formal family law system workload requires a more specialised, coordinated and efficient family law system; and a strategic, measured approach to reform. Since its inception, reform to the family law system has been piecemeal. Processes have been added to the system in a fragmented way rather than taking a strategic approach to reform that holistically considers how to meet the needs of families with multiple and complex problems or support them to resolve their issues.

Foundational principles would inform strategic system design, practice guidance, and the key considerations when making decisions about parenting arrangements and property divisions. Principles would also inform how the system encourages good decision-making prior to families engaging with the family law courts, helping parents making decisions in the shadow of the law to understand the considerations involved in decision-making if recourse to formal family law dispute processes is required.

### Principles

The family law system should be:

* Child-centred: The family law system embeds a child-centred approach that prioritises the needs and interests of children. This means promoting the safety and cultural connection of children, recognising the impact of trauma on children in the system, considering the developmental needs of children and timeframes in childhood and adolescence, and supporting the involvement of children and young people in decisions that affect them;[[14]](#footnote-14)
* Culturally safe and inclusive: The family law system is culturally safe and respects diversity.[[15]](#footnote-15) This means recognising the individual experiences of people from different backgrounds, including Aboriginal and Torres Strait Islander peoples, people from culturally and linguistically diverse communities, and rainbow families. It also means providing culturally safe spaces and environments, ensuring cultural competency of those who work in the system (including judicial officers, lawyers, court staff, report writers etc.), and respecting and valuing cultural identity and difference;[[16]](#footnote-16)

The family law system is inclusive. It uses language that recognises and values the diverse make up of families within Australia, including the range of people who may take on parenting and caring roles for children. This includes parents in blended families and step families, same-sex parents, and families with multiple caregivers or kinship caring arrangements;

* Physically, psychologically and emotionally safe: The family law system prioritises the safety of all individuals. It makes sure that individuals, including victim survivors of family violence, are and remain safe throughout the family law process and can access safe pathways to participate in family law processes where required. It incorporates consistent and ongoing risk assessment and management processes to promote safety;
* Fair and equitable: The family law system prioritises the attainment of fair, just and equitable outcomes for parties. This means that procedures and decision-making in the system are fair and equitable *and* seen to be fair and equitable;
* Coordinated: The family law system employs a collaborative and coordinated approach to create a seamless experience for its clients, where relevant services and professionals work together to identify and address issues and support families. It integrates legal services with other non-legal social support services and coordinates responses with other legal systems, including state and territory courts.

The system also coordinates with other non-legal systems, such as education and primary prevention systems, to support family strengthening and keep families out of the family law system;

* Accessible: The family law system is accessible to all individuals, regardless of location or financial or social background. The system promotes knowledge of its services, is easy to navigate and has no cost barriers for people experiencing disadvantage or complex needs;
* Responsive: The family law system accommodates and responds appropriately to the simpler disputes as well as families presenting with the most complex needs. This includes identifying the multiple, interconnected needs of families at times of separation and addressing them holistically and therapeutically, including by referral to appropriate support services and agencies such as family violence support services, drug and alcohol programs, and mental health services. The system responds and provides support in a timely manner;
* Trauma and family violence-informed: Systems and professionals in the family law system operate from a trauma- and family violence-informed perspective, cognisant of the reality that many parties and children in the system may have experienced multiple and/or complex trauma. Any trauma-informed response incorporates an understanding of the specific experiences of trauma for Aboriginal and Torres Strait Islander peoples, including intergenerational trauma.[[17]](#footnote-17)

Processes and professionals do not collude with perpetrators of family violence. They support family violence victims, hold those using family violence accountable for their behaviour and encourage them towards therapeutic and transformative options. Safety of children and parties is central and the needs of all members of the family are assessed and addressed on an ongoing basis.[[18]](#footnote-18) Children are recognised as victims in their own right who require tailored responses and supports; and

* Up-to-date: The family law system is informed by the social science research and updated in an ongoing way.

# Access and engagement

Ensuring access to justice, including in the family law system, is a key concern of VLA. Legal Aid Commissions (LACs) aim to promote access to justice for those who would not otherwise have the means to protect their legal rights or respond to claims about their legal responsibilities. Legal assistance is crucial in this regard, and outlined comprehensively in the NLA submission, but legal aid representation is only available for eight percent of Australians, despite fourteen percent of the population living under the poverty line.[[19]](#footnote-19)

Systemic lack of access to justice includes challenges accessing legal information, inability to access support services to prevent exacerbation of problems, inability to resolve legal problems in a timely way, the particular impact that laws, practices and decision-making can have on vulnerable groups within the community, and the inability to afford private legal advice or assistance to navigate the formal justice system.

Our response to the questions in this section recommends a range of reforms to improve accessibility of and strengthen engagement with the family law system, particularly for the most vulnerable and disadvantaged in our community. Some of these involve increasing the availability of legal assistance for those most in need – groups that may experience greater levels of vulnerability or lack of access to justice – while others involve designing a system that supports individuals to engage with and navigate the family law system effectively.

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

VLA strongly supports measures to improve access to information about and understanding of the family law system and related services.

VLA’s practice experience aligns with the challenges that individuals face in accessing information about the family law system, as identified in the Issues Paper. When VLA clients first interact with our legal services, they often have limited understanding of the family law system, the different processes in the system and the possible outcomes. They also sometimes hold concerning misconceptions about specific sections of and concepts in the Act, such as equal shared parental responsibility (this will be discussed in more detail in our response to Question 14), which possibly indicates a broader community misunderstanding about these concepts. More and better information about the family law system would assist in managing parties’ expectations and reducing unnecessary or ill-informed litigation.

**Case study**

A VLA Family Dispute Resolution Service (FDRS) case manager first spoke with a mother following troubles she was having establishing the care arrangements for the children from her previous relationship. The father often ignored the care arrangements that she was seeking to establish for the children.

Throughout the relationship the father had been verbally abusive and demonstrated controlling behaviours. He had also experienced poor mental health.

The father believed that he was entitled to 50/50 time with the child post-separation and he had been visiting the mother’s home every day prior to participating in family dispute resolution.

The father did not have legal representation. FDRS referred him to the Family Law Legal Service for legal advice that would help inform his expectations by informing him about the difference between equal shared parental responsibility and equal time and that a decision by a court on parental responsibility would be separate to a decision about the time each parent might spend caring for the child.

Before reflecting on how information about the family law system can be improved, VLA suggests the Commission consider initiatives that support family strengthening to keep families out of the formal processes of the family law system. Community prevention education programs, such as VLA’s program *Settled and Safe* in new and emerging communities (see our response to Question 6), are important elements of a broader system that supports families to identify and address their own problems and achieve safe care arrangements for their children.

Any reform needs to consider how to create a system that is more responsive to the diverse needs of the broad range of families with family law issues. This requires broader consideration of how the family law system interacts and coordinates with other systems established to support children and families experiencing vulnerability, such as state-based community service organisations.

Currently the family law courts do little outreach into communities to improve awareness of and engagement in the system. In considering the diverse needs of the community, VLA also suggests the Commission map the information requirements of a broad range of communities and organisations, identifying existing information gaps and opportunities to improve knowledge or awareness. This will enable decision-making about who is best placed to provide the information depending on the point in time and the party or community.

To improve community (and individual) understanding of the family law system, VLA’s practice experience shows that more information is required about:

* The family law process for parents who cannot agree to the care arrangements of their child or their property settlement, including the difference between the processes once a family enters the formal family law system including family dispute resolution (FDR) and court, so that individuals know what to expect at each point of their journey;
* The outcomes parties can expect at each stage of the process, including what can be achieved through FDR. VLA lawyers have highlighted that more information about the possible outcomes of each process can help manage parties’ expectations and encourage resolution pre-court;
* Commonly misunderstood concepts in the legislation, to dispel myths before they become entrenched. For example, VLA clients often misunderstand the concept of equal shared parental responsibility and believe it means that separated parents are also *entitled* to equal time caring for their children. Another common myth includes each parent having a ‘right’ to spend time with children, regardless of safety/risk issues;
* The social science research on child development and how children may respond to separation. The experience of VLA’s Family Dispute Resolution Service (FDRS) case managers and chairpersons is that this knowledge can assist parents to adopt a more child-centred approach to negotiations and discussions about the care arrangements for the child (For further information see our response to Questions 37 and 38);
* Non-legal problems that families may be experiencing and may be impacting on the parenting dispute. For example, many people may not be aware that they are experiencing family violence, so they may not recognise the references to family violence in various publications as relevant to them;
* Relevant court services that can assist in meeting individuals’ needs in the court process, such as the Family Advocacy and Support Services (FASS) model; and
* Related support services that can assist individuals to meet their varied and complex needs.

We also note the comprehensive analysis in the NLA submission of the importance of accessible information about family law early, the current gaps, and recommendations to improve access to information.

Based on our experience, the family law system could improve access to information about family law and family law related services by:

* Improving the information on, and ease of navigation of, the family court websites;
* Providing clear, accurate information on family law to families at the earliest possible time, including before FDR. VLA assists at least 30 percent of our family law clients in the first instance at the Magistrates’ Court of Victoria for a family violence intervention order matter, after matters have already reached a point of crisis. Family law information needs to be available at this point in time for those who need it;
* Presenting information in plain language and different formats for different audiences (including video, audio, pamphlets, website explainers). VLA’s Family Law Legal Aid Services Review, for example, identified the need to review existing resources to identify and address quality and accessibility, gaps and duplication, and develop or diversify information and other resources as required;
* Improving use of technology and online-based applications to share information;
* Collaborating with communities to develop culturally appropriate and tailored education programs and materials about family law (as well as the family violence and child protection systems), including Aboriginal and Torres Strait Islander communities and culturally and linguistically diverse communities,
* Improving education programs and materials about family law for people with disability including cognitive impairment and/or mental illness;[[20]](#footnote-20)
* Providing outreach to communities, based on collaborative engagement with community to determine need and approach; and
* Building the ability of community service organisations to identify family law issues when engaging with clients and refer appropriately. This would help improve engagement of vulnerable clients in appropriate services. VLA is considering how online tools could assist community service organisations to refer clients to family law services at the earliest possible opportunity to improve timeliness as well as early identification of legal and non-legal issues.

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

VLA assists some of the most vulnerable people in the family law system, and clients often present with multiple and complex legal and non-legal needs. Navigation assistance is currently fragmented and piecemeal. Our lawyers report that when clients enter the system, they experience high levels of anxiety, confusion, frustration and stress. Often, their expectations do not correlate with the reality of what they experience in the system and they feel unsupported.

Our practice experience supports the Commission’s initial finding that ‘client families and individuals can find it difficult to navigate the family law system, particularly where they have a range of legal and support needs requiring engagement with multiple services’[[21]](#footnote-21) and the need to consider measures to assist clients to navigate the system and connect with appropriate services. This can be particularly important for minimising the negative impact of separation and family law proceedings.

Our response to this question focuses on improving:

* Early navigation to supports and services to avoid entry to the family law courts;
* Access to legal assistance; and
* Navigation once at the family law courts.

### Improving navigation of supports and services early to avoid entry to the courts

Improving navigation of and access to the family law system at the earlier stages of disputes is critical to resolving disputes without recourse to court (which aligns with our articulation of the role of the family law system in response to Question 1). Based on our experience, there are several ways to do this, including:

* Improving the ability of community service organisations to ‘issue spot’ family law needs early and refer appropriately (see our response to Questions 3 and 31);
* Increasing use of technology to disseminate family law information and promote services;
* Increasing the availability of free legal information and advice (see the box below for more information about VLA’s legal information and advice line);
* Providing an equivalent service regardless of where people live (see our response to Question 9); and
* Expanding access to legally-assisted FDR to support more people to resolve their legal problems without recourse to court (for more detail see our responses to Questions 21 and 24).

**VLA Legal Help service**

VLA provides a free legal information and advice service – Legal Help – which currently provides crucial navigation assistance in the family law system. Legal Help is the main telephone entry point for legal triage for the broader Victorian legal assistance sector and is therefore often the first touch point for people with a legal problem.

In 2016-17, VLA’s Legal Help telephone service received 191,030 calls. Two of the top five matters dealt with by the Legal Help telephone service were family law legal issues: time spent with children and family law property settlements.

To determine how to triage a call, Legal Help undertakes a preliminary assessment – determining the primary legal issue, whether the caller is already receiving the assistance of a lawyer, and any immediate access issues which need to be addressed (such as the need for an interpreter).

Legal Help may refer matters to a more appropriate legal service or private practitioner, provide one-off information or advice, assess the calls as out of scope of Legal Help, or undertake further assessment to determine whether the individual meets the criteria to receive legal aid.

In this initial assessment, Legal Help lawyers also consider whether there are any non-legal issues that may be impacting on or interacting with the individual’s legal issues. Legal Help provides referrals to relevant non-legal support services to assist people to access this support.

Legal Help often provides information about where an individual can go for more information about the family law process or for further legal assistance or services. It provides crucial navigation assistance at the early stage of the family law system.

VLA is wanting to continue to grow Legal Help as the main entry point to the legal assistance sector in Victoria including by providing extended hours and considering various ways to expand access to and the effectiveness of Legal Help through the use of online tools and technology-enabled services such as web-chat and greater integration with our website.[[22]](#footnote-22)

### Improving access to legal assistance

Access to publicly funded legal assistance is critical for the most vulnerable people in our society who often have complex needs. It is an essential element of a fair and accessible justice system.

Eligibility for legal assistance in Victoria is based on a combination of factors, one of which is a means test. VLA uses the means test to assess the financial situation of most people who apply for a grant of legal assistance and decide whether a person can afford the full costs of the legal services from a private lawyer.

VLA recently reviewed our means test, including the assessment of financial eligibility, to assess whether the test continues to reflect the way people live today and whether the factors considered under the test reflect the financial circumstances and experience of people who need legal help.

There is an increasing gap between those who qualify for legal assistance and those who are able to pay for a private lawyer.[[23]](#footnote-23) The means test review identified that many people who should be eligible for legal assistance under our means test, due to their fragile financial situation or additional vulnerability, have missed out and are unable to secure legal assistance as a result. This often means they need to take on additional debt or self-represent in their legal proceedings. The latter is particularly common in family law matters. Or a person may decide not to pursue their legal issues as they find it too difficult to do so unassisted.

**Client story**

VLA first met Aesha when she sought the assistance of the duty lawyer at the Federal Circuit Court. She was seeking to regain the residence of her daughter who was living with the paternal grandparents as her husband’s job required a lot of work. She was ineligible for legal assistance as she did not meet the requirements of the means test.

About 12 months later she presented for duty lawyer assistance again.

In this period, she had not been able to progress her case as she had not been eligible for legal assistance, didn’t have the finances to pay for a private lawyer and was not able to self-represent herself effectively in the legal proceedings.

It seemed that Aesha’s circumstances had changed, and she had begun to address many of the concerns that the court would have considered when determining where would be best for the child to live, but the court was unaware of any of this as she had not filed any material. She potentially could have had a strong case to argue, had she had that evidence before the court.

VLA’s mean test review identified several ways to increase access to justice by improving the fairness of our means test and increasing the availability of legal assistance for those most in need. Some recommendations involve changes that cannot be implemented without further financial investment to bolster increased capacity within VLA to progress them.

In particular, with additional funding we could waive our means test for priority clients including applicants who identify as Aboriginal or Torres Strait Islander, are experiencing homelessness, or who are experiencing or fleeing from family violence. VLA could also increase the disposable income threshold for ‘priority’ matters, including applicants with family violence intervention order matters and child protection matters. This would mean these clients would be eligible for grants of legal assistance for related family law matters, as well as given greater access to legal advice and duty lawyer services. Given the small but significant number of VLA clients with legal problems that cross over the family law, child protection and family law jurisdictions, VLA suggests the Commission consider the need to increase funding for legal assistance for priority client groups.

More generally, VLA recommends the Commission consider the important role of legal assistance in the family law system and the resourcing implications of giving effect to the Productivity Commission’s recommendation that financial limits for grants of legal aid for civil (including family) law matters provided by LACs be increased.[[24]](#footnote-24)

We are strongly of the view, though, that improving access to and engagement in the family law system is not only about increasing legal assistance. It also requires system design that is not contingent on the ability of an individual to access a lawyer, whether privately funded or legally-aided.

As noted in the Issues Paper, self-represented litigants are a feature of about half of all family law trials in the Federal Circuit Court of Australia. The provision of legal assistance to all individuals who cannot afford a private lawyer in the family law system would have significant cost implications. As such, it is important both that legal assistance is available to the most vulnerable parties with complex needs and that processes to effectively support self-represented litigants to navigate the family law system (such as case management functions and simpler procedures) are embedded within the family law courts.

**Improving navigation at court through case management support**

VLA’s experience suggests that comprehensively addressing the needs of a family in the family law system requires more than navigation assistance. VLA proposes a court-based case management model to assist families to achieve timely resolution of matters and support sound decision-making in the best interests of children.

This model would support families to move promptly through the system, identify and collect the relevant information for their matter, and link children and families into appropriate services to enable them to address non-legal needs impacting on the resolution of their family law matter.

The intensity of the service offering in such a model would need to be proportionate to the level of need and vulnerability. The model would therefore also need to include a triage response so that parties with the most complex issues receive the most intense level of service. This recommendation is central to VLA’s conceptualisation of a more efficient and effective family law system and is explored in greater detail in our response to Question 31.

VLA envisages this approach complementing the existing FASS model. FASS identifies and assists parties with legal and non-legal need and provides referrals for clients to non-legal support services but does not aim to deliver ongoing support or case management throughout the duration of a matter. Additional support through a case management service would complement FASS and provide a function within the court to enable the system to comprehensively respond to families with complex needs.

VLA would also support additional measures being implemented throughout the family law system, such as training for community service organisations to be able to ‘issue spot’ family law issues at the early stages and provide warm referrals to legal services appropriately (as discussed in our response to Question 31). Our Family Law Legal Aid Services Review also identified the need for all professionals in the family law system to be aware of and able to spot non-legal issues that a client may be experiencing (including family violence, mental health or drug and alcohol problems) and refer appropriately, so lawyers are playing a constructive role in a family law system that is comprehensively responding to families with complex needs. VLA is considering how online tools could also assist professionals to spot family law issues.

## Questions 5, 6 and 8: How can the accessibility of the family law system be improved for Aboriginal and Torres Strait Islander people?

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

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

VLA agrees that the current family law system is not designed or delivered in a way that recognises the lived experiences of different groups that may experience greater disadvantage or barriers to access, as indicated in the Issues Paper. The family law system is not currently accessible, equitable, or responsive to culturally and linguistically diverse families, rainbow families, or Aboriginal and Torres Strait Islander families.

For many groups facing structural disadvantage there are a number of common challenges in accessing and engaging with the family law system.

Common barriers include:

* The actual or perceived connection of family law and child protection services;[[25]](#footnote-25)
* A lack of understanding about the family law system and the entry points into the system;
* Families not recognising that what they are experiencing may be a legal problem and so do not seek legal advice;
* Little community outreach by the family law courts;
* Families feeling isolated from the broader community and the family law system due to cultural difference, language, and distance to services;
* Family law can be seen as a taboo topic, particularly in culturally or linguistically diverse communities, because communities may not want to acknowledge dissolution of marriage; and
* Communities often have their own frameworks for deciding parenting arrangements post-separation including who in the family (beyond the parents) has a say in parenting decisions.

Common possible solutions include:

* Ensure the family law system is culturally safe for all groups of people, including those that face additional structural barriers and acknowledging the unique experiences of communities in Australia. This includes providing culturally safe FDR;
* Develop culturally appropriate and accessible information about the family law system that is tailored to the needs of communities;
* Fund culturally safe and appropriate legal services to provide legal assistance;
* Improve the cultural competency of all practitioners in the family law system, including all judicial officers, lawyers and legal services staff, FDR chairpersons/mediators/case managers, and court staff; and provide opportunities to further develop competency. This could occur, for example, through regular cultural awareness and cultural safety training, and should include a focus on gender diversity, the LGBTIQ+ community and changing family structures in Australia;
* Provide advanced cultural awareness training to Independent Children’s Lawyers (ICLs) to specialise in providing best interests legal representation to children from diverse backgrounds;
* Fund specialist support services while ensuring all aspects of the family law system, including mainstream services, are providing a culturally safe service so that clients from diverse groups can make a choice about the service they access. It is important that there is a wide availability of a range of culturally safe services, including mainstream and community-led services. This is also due to the limited availability of specialist legal services, where for example, there is a likelihood of legal conflicts arising when Aboriginal and Torres Strait Islander clients seek to use specialist Aboriginal services;
* Embed greater flexibility in the FDR model so that family members with broader decision-making responsibility (other than direct parents) can participate;
* Make a shift away from the complex paper-based system to a more flexible system that is not reliant on written evidence;
* Build and embed collaboration and coordination between the family law system and community-controlled services, including legal services. This could include embedding family lawyers in culturally specific organisations to improve engagement and trust in the system;
* Improve the cultural safety of contact centres, including improving the cultural awareness of staff;
* Improve access, more generally, to the family law system and related services in rural, regional and remote areas of Australia; and
* Implement the one court principle to enable families to have their matters resolved in the one court and reduce their need to engage in multiple systems (see our response to Question 32 for more information).

### Supporting Aboriginal and Torres Strait Islander peoples

In 2016-17, VLA’s Commonwealth family law services[[26]](#footnote-26) assisted 403 clients who identified as Aboriginal and Torres Strait Islander, or 3 percent of our Commonwealth family law clients.

In consultations with key Aboriginal and Torres Strait Islander stakeholders we heard about the underlying mistrust of the family law system by Aboriginal and Torres Strait Islander families due to the continuing impact of historical government policies of child removal and intervention in Aboriginal and Torres Strait Islander families’ and communities’ lives and the ongoing link between the family law and child protection systems in Australia.[[27]](#footnote-27) This connection of family law and child protection services can impact on the likelihood of Aboriginal and Torres Strait Islander families to access or engage with family law services or related services.

Furthermore, many of the difficulties that affect family members who are advised to seek family law parenting orders by a State child protection agency are likely to be exacerbated for Aboriginal families. For example, clients ‘involved in the child protection system ‘are commonly affected by chronic disadvantage’, with little capacity to afford legal representation, and many also have low levels of literacy, impeding their ability to engage with the legal process as a self-represented litigant’.[[28]](#footnote-28) Addressing this link and mistrust will be critical if the system is to improve engagement of Aboriginal and Torres Strait Islander peoples.

A critical first step for the family law system is to ensure that it is culturally safe for all Aboriginal and Torres Strait Islander people, acknowledging the vast diversity among Aboriginal and Torres Strait Islander communities in Australia.

The system should support specialist Aboriginal and Torres Strait Islander services while ensuring all aspects of the family law system, including mainstream services, are providing a culturally safe service so that Aboriginal and Torres Strait Islander clients can make a choice about the service they access. Due to the limited availability of specialist legal services, there is also a likelihood of legal conflicts arising when Aboriginal and Torres Strait Islander clients seek to use specialist Aboriginal services. It is therefore important that there is a wide availability of a range of culturally safe services, including mainstream and community-led services.

The NLA submission outlines research commissioned by NLA in relation to the family and civil law needs of Aboriginal and Torres Strait Islander peoples. We draw the Commission’s attention to the findings of this research project, which identified additional issues to that identified by the Family Law Council in 2012.

VLA supports the need for any system and legislative redesign and reform to recognise the experiences of Aboriginal and Torres Strait Islander peoples and communities. Creating a culturally safe and appropriate family law system requires redesign and reform to be developed in close collaboration with Aboriginal and Torres Strait Islander peoples.[[29]](#footnote-29)

We also ask the Commission to consider:

* Re-introduction of Indigenous Liaison Officers that provide culturally appropriate support persons within the court system as one important way of enhancing accessibility of the family law courts for Aboriginal and Torres Strait Islander families;
* Re-introduction of Indigenous Family Consultants. This would also provide a culturally safe person to hear the stories of Aboriginal and Torres Strait Islander children and families and prepare culturally appropriate and relevant family reports informed by a sound understanding of the systemic challenges facing Aboriginal and Torres Strait Islander peoples and the reasons why they a family may be reluctant to interact with family law services and justice systems arising from the history of forced removal of Aboriginal and Torres Strait Islander children and contemporary experience with the criminal justice system; and
* Introduction of a special list at court for matters involving Aboriginal and Torres Strait Islander people, as currently happens in some locations in Victoria.

### Supporting people from culturally and linguistically diverse backgrounds

In 2016-17, VLA’s Commonwealth family law services assisted 2,222 clients who identified as not being born in Australia, or 18 percent of Commonwealth family law clients. Of these clients, 1,143 (or 51 percent) spoke a language other than English at home. VLA provided family law services with the assistance of an interpreter to 410 clients (3 percent). In the same year, 1,085 people (3 percent) who received legal information for a family law issue from VLA (mainly through our Legal Help service) required the assistance of an interpreter.

VLA’s practice experience demonstrates that many families from culturally and linguistically diverse backgrounds lack knowledge and understanding of the family law system and different cultural dynamics affect how willing people are to engage in the family law system.

**Settled and Safe: A Community Prevention and Education Program**

VLA delivers a family violence and family law education program in new and emerging communities called *Settled and Safe*. It is designed to increase awareness of family law, family violence and child protection legal issues in new and emerging communities by:

* Increasing settlement service providers’ knowledge of family violence, Victorian legal responses to family violence, and VLA services;
* Collaborating with settlement service providers to deliver legal information sharing programs to new and emerging communities; and
* Increasing our organisational responsiveness to new and emerging communities, with a particular focus on the prevention of family violence.

*Settled and Safe* recognises that many people starting new lives in Victoria arrive from countries with very different laws and systems governing family relationships and family violence. While adjusting to the challenges of a new life in Australia, family relationships can come under pressure. This pressure can be heightened where families have experienced trauma and dislocation. *Settled and Safe* aims to help people from emerging communities become more confident about their legal rights and responsibilities in family relationships. The program has developed to include information about Commonwealth family law and Victorian laws regarding child protection, in addition to family violence. Importantly, *Settled and Safe* provides the opportunity for families to understand the services and the legal pathways available to them that can assist with problems before they escalate or become exacerbated.

**Case study**

Amir is a refugee to Australia. Amir does not speak English, does not understand the Australian legal system and holds a deep distrust of the court system. He is socially isolated and lacks support from within his community. He is experiencing financial hardship.

Amir and his wife separated after arriving in Australia. His wife alleged family violence and sought a family violence intervention order for her safety and the safety of the children.

She later filed an application for family law orders seeking sole parental responsibility of the children and for the children to live with her.

Due to the nature of the mother’s allegations in her application and the court’s obligation to prioritise protecting the children from physical or psychological harm from being subjected to, or exposed to abuse, neglect or family violence, interim orders were made for Amir to spend supervised time with the children.

After two years of proceedings and delays due to the lack of interpreters being available, an Independent Children’s Lawyer was appointed. During that time Amir had struggled to organise supervised time due to his inability to afford interpreters, who were required to be present. Amir has limited access to contact centre services due to the language barrier.

After 14 months of not seeing his children, interim orders were made allowing the children to spend unsupervised time with Amir at a contact centre, provided he remained in the Children’s Room at all times. The mother consented to these orders as the location was still in a public place.

The children are currently spending time with Amir in accordance with the orders, however the time is still limited to availability of the contact centre. A matter with similar issues and no language barriers would usually only take six to eight months to reach the same stage.

In addition, women from culturally, linguistically and religiously diverse communities face specific challenges, such as specific forms of violence related to cultural practices and complex family structures, including forced marriage; cultural expectations about marriage and divorce with respect to caring for children as well as economic decision-making; and migration visa status requirements.

**Client story**

A couple of years ago Bella was taken overseas by her parents and forced to marry an extended family member. She was not told of the marriage until several days after arriving in her family’s home country. Her parents withheld her passport and return plane ticket when Bella indicated her refusal to marry. Bella’s parents prevented her from talking to other family members so that she couldn’t inform them that she did not agree to the marriage. As a result, Bella had no access to supports, including no access to money.

Bella’s mother went on a hunger strike until Bella acquiesced. Her father threatened to disown her if she did not agree to the marriage. Bella was fearful of this threat for several reasons, including because of the cultural shame associated with being disowned. Bella was also heavily reliant on her parents on a day-to-day basis due to a mild-to-moderate intellectual disability.

After contemplating suicide, Bella agreed to the marriage taking place so her father would not disown her and her mother would eat again.

Bella’s VLA lawyer first met her as a duty lawyer at the family law courts. While Bella presented with a mild-to-moderate intellectual disability, she was assessed by the lawyer to have capacity to provide instructions. Importantly Bella understood the difference between an annulment and a divorce.

Bella explained to her lawyer that it was very important, culturally, for her to obtain an annulment. As a result, her lawyer was particularly mindful of the fact that there were negative cultural implications if she was to obtain a divorce instead.

Bella’s lawyer prepared detailed affidavit material documenting the circumstances which led to the marriage taking place.[[30]](#footnote-30) Counsel for Bella made oral submissions about the duress Bella was put under to agree to the marriage. Bella gave evidence as did her mother. A neuropsychological report, obtained by Bella’s lawyer to corroborate childhood assessments of her functioning, confirmed Bella’s heavy reliance on her parents on a day-to-day basis, particularly her mother, as a result of her intellectual disability.

Based on the evidence and the arguments made on Bella’s behalf, the judge found that the situation in its totality amounted to duress. The marriage was declared null and void.

The impact for Bella in obtaining an annulment has been profound. As the marriage is deemed to have been invalid and therefore never occurred, there are none of the negative cultural implications attached had she been required to apply for a divorce. She is therefore able to marry without the cultural shame of it being her second marriage. This also increases her prospects of actually being able to marry, which is very important to Bella and her family. She and her parents are also no longer facing pressure from their extended family members overseas to have the marriage annulled so the respondent can marry.

We also ask the Commission to consider:

* Providing training for law professionals and the Department of Immigration and Border Protection staff on the intersection between family law and family violence with migration laws and improving access to migration agents for women experiencing family violence who require support to attain the appropriate visas;
* Improving the availability and access to qualified interpreter services for all clients, including female victim survivors of family violence who may prefer a female interpreter; and
* Improving support and safety for women engaging with the family law system, including multilingual signage and provision of child care facilities at court.[[31]](#footnote-31)

### Supporting people from LGBTIQ+ communities

Any reform to the family law system with respect to rainbow families should begin from a perspective that understands the experiences of the LGBTIQ+ community. We have already noted the need for the family law system to be inclusive and respectful of the diversity of contemporary Australian families, including families from a range of different cultural backgrounds, same sex families, blended families, and families with multiple caregivers. It is also critical that the system recognises and is inclusive of all people, including children and young people, who are gender diverse or do not identify with the gender they were assigned at birth.

In VLA’s experience, there is a clear need for the family law system to be safe and inclusive for LGBTIQ+ children and rainbow families.[[32]](#footnote-32) We also ask the Commission to consider:

* Funding LGBTIQ+ friendly and culturally safe support services in the family law system that recognise and understand the needs and experiences of rainbow families, including family therapy and counselling;
* Providing training about gender diversity, the LGBTIQ+ community and changing family structures in Australia to all professionals in the court system. This includes building understanding of the lived experience of rainbow families and their experience of homophobia/transphobia and recognising that, although children and young people in rainbow families may not identify as LGBQTI, they can have negative experiences arising from the discrimination directed towards their parents; and
* Clarification and simplification of the relationship between state and territory legislation, for example, birth certificates and IVF procedures and Commonwealth family law legislation (as well as Commonwealth migration legislation where it intersects with surrogacy).

Treatment for gender dysphoria

Up until the recent decision of the Full Family Court of Australia in *Re Kelvin*,[[33]](#footnote-33) the Family Court of Australia needed to provide authorisation for stage two hormone treatment for transgender children experiencing gender dysphoria. In *Re Kelvin* the Family Court held that in non-controversial cases families are no longer required to seek authorisation from the court for this treatment. The decision also clarifies that a determination of whether a child has competence to consent to stage two hormone treatment (i.e. whether they have *Gillick* competence) can be made by the treating medical practitioners, and a declaration from the court is not required. More recently, the Family Court’s decision in *Re Matthew*[[34]](#footnote-34) effectively extended the same principles to stage 3 treatment.

These are welcomed decisions and bring the law into closer alignment with medical science and the treatment of young people with gender dysphoria and will remove one of the many barriers faced by young transgender people in Australia seeking to transition to their innate gender. It will now be a simpler and less costly process.

Barriers continue to be faced, though, by children and young people whose decision to access treatment is not supported by one or both of their parents. The decision of *Re Isaac*,[[35]](#footnote-35) in which VLA represented ‘Isaac’, clarified that there is a court avenue available to a child, who is not supported by their parents, to be declared competent so that the child can then make the decisions about whether to proceed with medical treatment for gender dysphoria. The court process, though, is costly and often takes months while a young person is rapidly maturing. This can have a significant impact on a young transgender person’s mental health and wellbeing.

We would welcome consideration of this issue by the Commission and recommendations to address outstanding access to justice issues for young people who do not have the support of their parents to undergo treatment.

The Issues Paper also notes the issues related to medical intervention regarding intersex children and their lack of participation in this decision-making affecting them (often because of their young age). We do not have direct practice experience in this area currently, but do agree that these issues are very different to those that arise regarding young transgender persons proactively seeking access to treatment regarding gender dysphoria. We would support further consideration of the principles to ensure there is appropriate system or court oversight of these decisions.

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

In 2016-17, VLA’s Commonwealth family law services assisted 2,346 clients who disclosed a disability, or 19 percent of Commonwealth family law clients. This may be an underrepresentation of the number of VLA Commonwealth family law clients with a disability as 2,085 clients did not indicate yes or no to the question about disability at intake.

VLA’s experience suggests there are several ways the family law system can be improved for people with disability throughout their system journey. The family law system is not set up for people with disability and changes to court processes to take account of disability are usually made on a case-by-case basis with leave of the court. VLA urges that any changes to the family law system in relation to disability should consider mental illness and cognitive, neurological and physical disabilities.

In the first instance, it is important to improve the level of knowledge and understanding of disability held by all professionals in the system, including judicial officers, court staff and lawyers. This includes improving tolerance, understanding of ‘capacity to parent’, and skills to assess parental capacity informed by a sound understanding of disability.

Improving court procedures is also a critical aspect of improving accessibility for people with disability. An example of this is court documents, which are a core aspect of the family law court process. Yet for people who are blind this creates immense difficulties to engage in the process. In some situations, our lawyers report having to read aloud long affidavits to clients who are blind, which creates a question of how well clients are able to understand the documents and participate in the process. This is also relevant to clients with cognitive or neurological impairment who may struggle to maintain lengthy periods of concentration.

Improving the timeliness of reports from specialist services would greatly assist the court in determining capacity to parent and inform timely decision-making about care arrangements for children, in the interim or on a final basis. This is also important in situations where the state child protection agency, in Victoria the Department of Health and Human Services (DHHS), is involved in the family or where there are allegations of abuse, because DHHS reports can inform decision-making in the best interest of the child/ren. However, the reports are often inaccessible or delayed (enhanced information sharing across jurisdiction is discussed in our response to Question 33). Additional and more accessible and timely assessments from psychologists assessing parental capacity would also support timely and more informed decision-making.

Additionally, there needs to be greater investment in non-legal support services for families where there is disability, such as parenting programs, mental health services and interpreter services for families where there are parents who are deaf. Interpreter services are well established in the family law courts and usually easily accessible, however they are more difficult to access in FDR processes and in regional areas.

**Client story**

VLA assisted Bethany with a parenting matter after she separated from the father of the children. Bethany is deaf, as is the father and one of the children.

During the course of this matter, Bethany encountered multiple barriers to accessing the family law system, legal assistance, and support services. Bethany lives in a regional area but her lawyer is based in Melbourne (as that is where the case was first initiated), making it difficult to meet face-to-face. She primarily uses email or the National Relay Service to communicate with her lawyer and other parties, which is time consuming and contributes to delays. The need for multiple interpreters (as each party requires an interpreter) during court proceedings has also contributed to significant delays.

To discuss complex legal documents and proceedings, Bethany’s lawyer arranges video meetings with an interpreter present talking to the client over video. This can also be a time-consuming process.

In the proceedings, there were instances of miscommunication where Bethany felt she had been misinterpreted, and as a result misunderstood. She finds it difficult to make contact with non-legal support services, including contact centres, to access supports or to facilitate time with her children.

The process of using interpreters for people who are deaf is exacerbated when they also come from culturally and linguistically diverse backgrounds because interpreters available are usually trained in AUSLAN sign language. It is difficult to access interpreters for the sign language of the appropriate country of origin.

**Case study**

In this FDRS case, both parents are deaf and speak English as a second language.

The FDRS case manager put in place several measures to support the parents to participate in FDRS, including organising interpreters and support persons to attend the screening interviews and conducting these screening interviews in-person. The screening interview for the father required two sessions, and the father had to take time off work to attend each session.

Undertaking the screening interview with the mother was also difficult because she was caring for the three children and is more isolated from supports than the father. The National Relay Service was used to conduct the interview with the mother, which extended the time required to complete the interview.

Due to the limited availability of interpreters both parties have had access to justice issues throughout the process. For example, this matter has been adjourned twice because interpreters were not available at court.

Four interpreters were required for the FDRS mediation over 3.5 hours and the second mediation was cancelled at the last minute because the interpreter service needed to prioritise another matter. There was then a month-long wait to secure another interpreter for the mediation.

Women with disabilities experiencing family violence face specific barriers accessing the family law system, particularly those with an intellectual disability. Currently the network of services is complex, and it can be difficult to access services and supports that are face-to-face, including legal assistance. Face-to-face services need to be available at all stages of dispute, from the earliest stages to the court process and in both metropolitan and regional areas.

The introduction of a dedicated court-based case management function (proposed in our response to Question 31) could facilitate engagement in services for families where there is disability through warm referrals informed by a thorough assessment of needs. This could also help to address safety concerns where they exist as we envisage the case manager function to include risk assessment processes and implementing safety planning. Safety planning is critical given that women with disability are more likely to be victims of family violence or abuse.[[36]](#footnote-36)

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

Access to justice continues to be linked to the region and jurisdiction in which people live.[[37]](#footnote-37) VLA has 15 offices across Victoria, nine of those in regional areas. Our regional offices play a vital role in servicing the community, providing professional and timely advice to those living in rural and remote parts of Victoria.

**VLA’s Child Support Legal Service, an example of state-wide service provision**

VLA’s state-wide Child Support Legal Service is an example of service system design that responds to the needs of regional and remote communities.

In 2016-17, VLA assisted 1,595 clients with a child support matter. Clients lived across all but six of the 79 local government areas in Victoria

The service provides casework, advice services, including telephone advice, as well as community legal education and information kits on child support legal issues across Victoria.

Our child support cases tend to be complex and the parties may be entrenched in conflict. We assist clients with administrative processes available through Department of Human Services (DHS) (Child Support) to change assessments, object to decisions, draft agreements and enforce or discharge arrears. Grants of legal aid are also provided (subject to means and merits guidelines) to represent clients at the state Magistrates’ Court or Federal Circuit Court or at a review hearing before the Administrative Appeals Tribunal (AAT).

The majority of the child support legal work across the state is conducted by in-house VLA lawyers with specialist expertise in child support. We respond to applications across the state through our outreach service, which visits VLA offices at least bimonthly and most major regional centres quarterly or as required. Appointments by videoconference are available at some locations.

A state-wide response ensures that families receive the same child support legal services regardless of the location in which they live.

Through VLA’s role delivering legal assistance and as a statutory body that designs and arranges the provision of legal services, we see critical gaps in access to, and attainment of, justice in parts of Victoria. This is particularly evident in regional and rural areas, where there are ‘hotspots’ of high legal need,[[38]](#footnote-38) with people generally experiencing poorer access to justice, feeling isolated and finding it difficult to access legal assistance and other support services. Many regional areas have a lack of court registries and infrequent or no court sittings. The NLA submission comprehensively documents the access to justice issues in rural, regional and remote areas. Since 2017, VLA has been collaborating with Legal Aid NSW on an initiative to improve access to justice for communities, for example, along the border between Victoria and NSW.[[39]](#footnote-39)

VLA is concerned about how the family law system can provide an equivalent service regardless of where people live and replicate service delivery levels and intensity when the court is not a touch point. For example, VLA would like to see our proposed court-based case management approach (explored in our response to Question 31) available in metropolitan and regional and rural areas with the same service offering provided.

VLA supports the potential solutions identified in NLA’s submission and also suggests the Commission consider extending FASS to regional areas. At present, in Victoria FASS is only funded to be present in the permanent registries of the family law courts at Melbourne and Dandenong and does not provide its services to the court sitting on circuit in regional areas, which it does regularly at Ballarat, Bendigo, Geelong, Morwell, Mildura, Shepparton and Warrnambool as well as at Albury servicing Wodonga and surrounds.

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

The current family law system is inaccessible for many families due to the cost of legal representation and court documents and the complexity of navigating the family law system and rules. These barriers are well recognised and acknowledged in the Issues Paper.

Our response to Question 4 covered the importance of expanding the eligibility for legal aid to increase access to legal assistance for the most vulnerable. The NLA submission considers the cost of legal fees.

We continue our discussion of this issue in the following section.

### Availability of legal assistance

We reiterate the importance of legal assistance here. The Productivity Commission has explained that the ‘missing middle’ is a misnomer. The prohibitive cost of legal assistance is not only affecting middle income earners. Rather, the Productivity Commission concluded that the majority of low- and middle-income earners have limited capacity to manage large and unexpected legal costs.[[40]](#footnote-40) Yet the means test used by LACs is restrictive,[[41]](#footnote-41) and described the current situation like this:

The income tests [used by LACs] are below many established measures of relative poverty. It is not the case that people are ‘too wealthy’ to be eligible for legal assistance, but rather that they are ‘not sufficiently impoverished’.[[42]](#footnote-42)

The Productivity Commission concluded that there is a role for government in assisting these individuals to uphold their legal rights and resolve their civil (including family) law disputes.[[43]](#footnote-43) NLA’s submission provides further detail on the additional services that would be delivered by LACs from this injection of funding.

In addition, we are of the view that parenting disputes should be channelled to the family law service that is proportionate to the issues in dispute with the intensity of service provided to clients proportionate to the level of complexity and need. We see opportunities to reduce costs to parents by expanding eligibility for legally-assisted FDR which is a proven cost-effective process for resolving family law matters. VLA’s recommendations with respect to legally-assisted FDR are detailed in our response to Questions 21 and 24.

### Reports

Currently the cost of private expert reports is prohibitive for most families. Private paying parties have the benefit of being able to arrange a family report at any time during the proceedings and get updated reports as a family law matter progresses through the process.

VLA also finds it difficult to access reports for our clients because of the limited number of practitioners available to write reports at legal aid rates. In Melbourne, the cost of a private expert report can range from $3,400 to $8,000. The limited number of psychologists preparing reports at legal aid rates can also exacerbate court delays.

Options to address this could include:

* Introduction of fixed fees or scheduled fees for specific reports;
* Resourcing of more family consultants (paid at a market rate) based at the family law courts to prepare expert reports where parties do not have capacity to pay for a private expert report and a judicial officer determines that the additional information provided through an expert report will be important for resolving a matter in the best interests of the child/ren;
* The introduction of in-house psychiatrists and psychologists at the family law courts to prepare expert reports; and
* Harmonisation of the court rules to support the use of one agreed single expert (or panel of experts) to prepare a report.

Options to address this issue will also need to consider how an equivalent level of service and access is to be provided in regional areas.

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

As mentioned earlier, self-represented litigants are a feature of about half of all family law matters in the Federal Circuit Court, making it difficult to provide legal assistance to all individuals who cannot afford a private lawyer. Thus, improving access to, and engagement in, the family law system requires a system design that is not contingent on the ability of an individual to access a lawyer, whether privately funded or legally-aided.

### The Duty Lawyer service

VLA’s duty lawyer service provides assistance with discrete legal tasks to people who are at court for a hearing unrepresented. In 2016-17, VLA delivered 1,397 Commonwealth family law duty lawyer services. Judicial officers characterise the duty lawyer service as an invaluable service that assists with the day-to-day running of the court.

Duty lawyer service guidelines prioritise certain clients, including those who have a disability, experience cultural and/or language barriers, drug and/or alcohol issues, or homelessness, identify as Aboriginal or Torres Strait Islander, and/or who have experienced or are at risk of experiencing family violence. Due to the limited capacity of the duty lawyer service, duty lawyers are not always able to provide assistance on the day to every person who would benefit from the service.

This means that many clients who would benefit from additional support at court are not receiving this assistance. Further funding for LAC duty lawyer services would increase capacity and expand eligibility to those who are missing out on the service but would benefit from additional support.

### Court processes

In VLA’s experience, self-represented litigants in our family law system can have difficulty completing forms and applications, understanding what evidence is required to be put before the court, understanding legal terminology or legislation, or navigating the complex rules of the system. The mainly paper-based system is also inefficient and complex for self-represented litigants to understand and complete.

VLA considers it important for court processes to support parties at court and to provide simplified processes to improve accessibility. We encourage the Commission to consider:

* A shift from the current complex paper-based system to a more flexible online or technology-based system, with technology supports available to help people complete materials; but with ongoing in-person assistance available to those that may not be able to access technology-based solutions;
* Access to legal assistance (detailed in our response to Questions 4 and 10);
* Simplified application processes, forms and court rules (for more detail see our response to Question 20);
* The introduction of a case-management function at court (for more detail see our response to Question 31); and
* Improved disclosure requirements in property matters, changes to the forms for property matters to reduce reliance on affidavit material and to prompt disclosure, and the introduction of a simplified process for small property pools (for more detail see our response to Questions 17, 20 and 22).

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

VLA welcomes the Commission’s focus on improving support for people who do not have legal representation to resolve their family law problems.

We refer to our response to Question 11 and other questions and recommend the Commission consider:

* Simplification of the legislation, including rewording in plain English where appropriate or possible (for more detail see our response to Questions 14 and 20);
* Expansion of legally-assisted FDR to support more people without legal representation for litigation to resolve their legal problems without recourse to court (for more detail see our responses to Question 21 and 24);
* Upgraded information technology systems; and
* Implementation of the one court principle (for more detail see our response to Question 32).

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

VLA welcomes the focus of the Commission on making improvements to the physical environment of the family law courts. VLA’s practice experience highlights similar concerns to those raised in the Issues Paper and explored in the NLA submission.

In our view, several improvements to the design and environment of the courts would assist in making them more accessible and responsive to the needs of clients, particularly those with safety concerns. Any improvements need to consider the experience of particular groups at court.

VLA suggests the Commission consider recommendations to ensure:

* Parties can access assistance on arrival at court to navigate the physical layout of the court;
* Safe and separate entries and waiting rooms for parties, particularly those who have experienced or used family violence;
* Security stationed outside at the front of the court;
* Child-friendly spaces and waiting rooms, an example of which is the Cubby House initiative in the Broadmeadows and Melbourne Children’s Courts in Victoria which provide a safe, engaging and supported area for vulnerable children who must come to court; and
* Additional (and increased use of) remote access or witness facilities that are private and comfortable to allow more parties to give evidence away from the court or from court-based interview rooms, particularly if there are safety concerns or for parties living in regional and remote areas.[[44]](#footnote-44)

# Legal principles in relation to parenting and property

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

VLA notes the research findings of the Australian Institute of Family Studies (AIFS) that decisions made under Part VII of the Act require decision-makers to follow an eleven-step decision-making pathway.[[45]](#footnote-45) In recent years, this has led to recommendations for legislative reform to simplify the decision-making framework for interim parenting matters.[[46]](#footnote-46)

VLA supports calls to simplify the Act*,* and particularly Part VII. Any efforts to simplify the legislative framework should be tested against the objectives and principles established for the family law system. For example, efforts to simplify the legislation will need to balance the broadening of provisions, which can lead to wider judicial decision-making powers and the potential for appeals, with provisions that are prescriptive, and fail to encapsulate the experiences and needs of the broad range of families accessing the family law system.

In contributing to this discussion, VLA does not intend to propose to the Commission a revised decision-making pathway. Rather, the sections below outline the provisions of the Act that our practice experience suggests are the most important to retain, as well as where we have identified opportunities to clarify or add detail to the legislation to assist with better decision-making in the shadow of the court, by parents at FDR, and by judicial officers.

Specifically, our recommendations focus on:

* The continuation of the best interests of the child as the paramount consideration when deciding parenting matters;
* Updating and retaining section 60CC;
* Maintaining the philosophy of equal shared parental responsibility but reforming the legislation to clearly separate the concepts of parental responsibility and time spent with children; and
* Legislative amendments to reflect the court’s positive obligation to scrutinise consent orders.

### The best interests of the child and section 60CC

VLA supports the continuation of the best interests of the child as the paramount consideration when deciding parenting orders under Part VII of the Act. This is consistent with a family law system that is focused on the safety and wellbeing of children and adopts a child-centred approach to decision-making.

We note, though, that the term ‘best interests’ is legal jargon and the concept of best interests, and how it is applied in practice, may not be easily understood by parents. Our lawyers find section 60CC particularly useful when explaining to parents the factors the court will consider when deciding the best interests of the child. These factors also provide a parent with greater understanding of how a decision on this would be made, as well as encourage parents to seek more child-centred outcomes in their family law matter.

Section 60CC can also helpfully guide the many parents who decide the care arrangements for their children without recourse to FDR or the family law courts. We note, though, the gap between practice and community understanding of the best interests of the child principle. AIFS research found that many parents believe court decision-making is far too narrow and inflexible despite analysis of the case law not supporting this commonly held view. AIFS concluded that the best interests of the child requirement and the considerations provided in the legislation allow for ‘individualised’, ‘case-by-case decision-making’ and results ‘in a wide variety of arrangements being ordered, depending on the circumstances of the case’.[[47]](#footnote-47)

Such flexibility should be maintained going forward to ensure the family law system can be responsive to the range of families that rely on it, and it is VLA’s view that the considerations at section 60CC balance flexibility with guidance on the application of the best interests principle. AIFS’ finding suggests, more so, the need for more and improved legal education about the requirements of the legislation to dispel commonly held misunderstandings about family law (this is also discussed in our response to Question 3).

The requirement that judicial officers take into consideration the factors listed at section 60CC also assists with transparent decision-making and consistent application of the considerations underpinning the best interests principle if a matter requires judicial determination.

We do, though, see a benefit in the Commission reviewing the considerations currently provided in section 60CC with the intention of updating the section to reflect developments in the social science research. For example, at present the court is not required to consider a child’s stage of development. Such a consideration would require judicial officers to more explicitly turn their mind to research on the developmental needs of children and timeframes in childhood and adolescence. This would support more tailored and effective child-centred decision-making.

A review of section 60CC could also consider where plain language can be adopted to improve the accessibility of the legislation and, in doing so, support those without legal expertise to better understand the factors that are considered when determining the care arrangements for a child. For example, at section 60CC(2)(a), the benefit to the child of having a ‘meaningful relationship’ with both of the child’s parents is one of two primary considerations. There is no definition of ‘meaningful relationship’ in the legislation, and the case law has understood meaningful as ‘significant’, ‘important’, ‘of consequence’, ‘valuable’, ‘healthy’, ‘worthwhile’ or ‘advantageous’ relationships for the child. Whether the ‘quantity’ of time is an element of ‘meaningful’ is not clear, with mixed views in the case law. Case law will continue to play an important role, even if amendments to the legislation are made. However, to improve accessibility, steps could be taken to write the legislation in plain language where possible.

### Equal shared parental responsibility and time spent with the child

The concepts of equal shared parental responsibility and time spent with the child are confusing to parents. VLA’s practice experience is consistent with the research to date which has found that parents often conflate the two concepts and misunderstand equal shared parental responsibility to require equal shared time.

There have been calls to remove the presumption of equal shared parental responsibility. Most recently, this recommendation was made by the inquiry of House of Representatives Standing Committee on Social Policy and Legal Affairs into ‘A better family law system to support and protect those affected by family violence’. However, AIFS research has found ‘overwhelming support’ from parents, legal system professionals and service professionals for the philosophy of shared parental responsibility.[[48]](#footnote-48) This research provides insight into community values and expectations about post-separation parenting.

We note that most parents can reach agreement about the care arrangements for a child without recourse to the formal family law system and a determination on parental responsibility. Based on this practice experience, it is our view that the legislation should maintain the philosophy of equal shared parental responsibility to continue to facilitate the resolution of such parenting matters. This approach should, though, be confirmed by a review of the social science research on how decisions about parental responsibility can practically impact on children. Furthermore, any legislative changes should not inadvertently incentivise greater use of FDR or the court to decide parental responsibility.

As part of this analysis, the Commission could also consider legislative amendments to maintain the philosophy of equal shared parental responsibility but use alternative terminology that adopts plain language and reduces the current confusion.

In particular, we also recommend the Commission consider legislative reforms to clearly separate the concepts of parental responsibility and time spent with the child, to make clear that the decision about parental responsibility is separate to the decision about time spent. This will be important to address the current confusion that the amount of time spent with a child follows on automatically from a decision on parental responsibility.

Once a family law matter is at court, and requires judicial determination, equal shared parental responsibility may not be feasible nor in the best interests of the child.

Separate decisions on parental responsibility and time spent allows for creative family law orders that can respond to the needs of that child in the immediate term as well as guide the medium- and long-term relationship between parents, and the management of disputes that fall within parental responsibility as the child grows older.

**Client story**

VLA assisted Ellie with a parenting dispute where the facts raised questions about who should hold parental responsibility. Ellie separated from her former partner about 13 years prior, and this was the second time the father had initiated proceedings in the family law system. The father had not had a relationship with the children in the time since the separation.

In the two years following the father’s initiating application, little had happened at court as the matter was repeatedly adjourned. The matter was initially adjourned, with subsequent adjournments, so the father and children could attend family counselling to rebuild his relationships with the children. During this time the mother was unrepresented.

An agreement was finally reached with the assistance of the counsellor, with the intention of the parties to formalise the agreement in consent orders. The eldest child (who was at that time an older teenager) could spend time with the father as the child wished. The youngest child (who was at that time a young teenager) was to spend time with the father 4 times a year and to build up the length of time spent with him over the year. This agreement was not formalised in final orders, despite the original intention of the parties, as the father did not pursue this with his lawyer.

Over the following year, the father spent time with the youngest child only a couple of times and only for brief periods of time each occasion. The child was very upset while in the care of the father, which led to the father prematurely bringing an end to the time he spent with the child on each occasion.

Ellie first sought the assistance of the duty lawyer when it returned to court. She had not filed any documents despite the matter having been in the system for nearly two years. Ellie was assessed as eligible for a grant of aid to respond to the father’s application, and on the advice of her VLA lawyer she was no longer seeking that orders be made on the terms of the agreement made previously with the assistance of the counsellor. In the month before the hearing, her VLA lawyer prepared the documents to argue that it was appropriate for Ellie to have sole parental responsibility and the youngest child not spend any time with the father. The eldest child was shortly to turn 18 years old, and there was no need for final orders to be made in relation to parental responsibility for that child.

The father decided he would no longer pursue his application. In any event, Ellie’s VLA lawyer continued with the application for sole parental responsibility and sought final orders given the time already spent in the family law courts and that this was the father’s second application. The father ultimately agreed to the orders. Orders were also made that the youngest child spend time with the father as agreed by the parties, taking the child’s wishes into account. The court granted these orders, recognising the appropriateness of the mother having sole parental responsibility.

At present, the presumption of equal shared parental responsibility does not apply where there has been abuse or family violence and the presumption is rebutted where the court is satisfied on the evidence that it would not be in the best interests of the child for the child’s parents to have equal shared parental responsibility for the child. In VLA’s view, it is important and appropriate that the legislation include exceptions to the presumption. These help to maintain flexibility in the legislation.

Whether additional exceptions to the presumption should be included in the legislation could also be considered by the Commission when considering reforms to the current parental responsibility provisions.

We also recommend the Commission consider the relationship between the provisions on shared parental responsibility and time spent and the factors at section 60CC, and how the factors can more clearly and simply inform decision-making.

### Safer consent orders

There are, in general, two categories of consent orders currently entered into:

* Consent orders that are agreed between the parties, often through a mediation or dispute resolution process (rather than documenting the agreement reached by way of a parenting plan, the parties instead elect to file an application for consent orders with the court); and
* Consent orders that are agreed to by the parties after some litigation, this might be at the first court event or at any time prior to the final hearing.

In both cases, the court must be satisfied that any parenting orders are in the best interests of the child before the orders are made. Orders about property must be just and equitable.

Current case law requires judicial scrutiny to be applied to applications for consent orders. No matter how a consent order has been negotiated, consistent application of this judicial scrutiny, informed by knowledge of the dynamics of family violence, is vital to ensure any consent orders support the safety of family members who have experienced family violence.

In VLA’s experience there continues to be inconsistent application of this scrutiny by the court. Shortages of judicial time, resources and training no doubt contribute to these inconsistencies.

In *T & N*,[[49]](#footnote-49) the court states that ‘consent does not displace the obligation of [the] Court to make orders that are judged to be in the best interests of children’. VLA recommends the Commission consider the codification of this case law to reflect the court’s positive obligation to scrutinise consent orders to confirm they are in the best interests of the child. This would ensure greater judicial scrutiny, by providing a clearer direction to judicial officers to more closely and consistently examine the arrangement agreed by the parties, to ensure these arrangements are safe.

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

The Commission’s inquiry provides an important opportunity to review the legislative framework and processes in the family law system in recognition of the prevalence of family violence and associated complexity in proceedings. Our response to this question considers:

* The definition of family violence in the legislation; and
* The introduction of legislative provisions to enable the adoption of processes in the family law courts that are responsive to family violence, in particular early determinations about family violence and a legislative ban on direct cross examination in family violence situations.

### Definition of family violence

While there is no single definition of family violence across legislative frameworks responding to family violence at either the Commonwealth or state and territory level (such as the *Family Violence Protection Act 2008* (Vic)), our comparative analysis has identified common elements across state and territory legislative frameworks that include a definition of family violence. These common elements are:

* An expansive and inclusive reference to all forms of violence, i.e. physical, sexual, emotional, and financial;
* Recognition that repeated conduct of that nature is intended to exercise control;
* A focus on the behaviour of the perpetrator; and
* Inclusion of the impact of direct and indirect exposure to family violence on children and that indirect exposure includes situations where the primary caregiver is exposed to family violence.

These elements are largely reflected in the Act*.* Based on our experience in Victoria with the definition of family violence in the *Family Violence Protection Act 2008* and the comparative analysis (mentioned above), though, we are of the view that there would be benefit in expanding the definition of family violence in the legislation to capture all forms of physical abuse (not just assault), focus on the behaviour of the perpetrator (and not require a specific effect such as the victim feeling coerced, controlled or fearful), recognise the repetitive conduct of all forms of family violence (not just derogatory taunts) and that this repeated conduct is intended to exercise control, and recognise the impact of the violence on children and family functioning and that this can amount to family violence.[[50]](#footnote-50)

We also note that the Act*,* at present, distinguishes between child abuse and family violence. We believe there would be benefit in making clear that family violence, when perpetrated against a child or young person, is a form of child abuse. This further signals, in our view, the seriousness of the family law system’s response to family violence when the child or young person is the victim survivor and a child-centred approach to family violence. VLA asserts the need for children to be explicitly recognised as victims of family violence in their own right who require specialised and individual responses.

We note that there are varying approaches to the meaning of ‘family member’ in definitions of family violence across the jurisdictions. A broad approach is taken in Victoria. A family member under the *Family Violence Protection Act 2008* (Vic), is:

* A person who is, or has been, the relevant person’s spouse or domestic partner; or
* A person who has, or has had, an intimate personal relationship with the relevant person; or
* A person who is, or has been, a relative of the relevant person; or
* A child who normally or regularly resides with the relevant person or has previously resided with the relevant person on a normal or regular basis; or
* A child of a person who has, or has had, an intimate personal relationship with the relevant person.

We would support an equivalently broad meaning of ‘family member’ in the Actto ensure the broad range of families in Australia today are captured in the definition.

### Early determination (finding of fact) about family violence

Presently, there may be many months (even years) before an allegation of family violence made by a party in a family law proceeding is considered at final hearing and there is a determination about whether family violence had occurred. Without this finding, interim decisions – or final orders by consent between the parties and then approved as orders by the court – are made without information that is vital to ensuring safety. Although increasingly a court priority, safety currently remains the subject of later determination. We therefore recommend the introduction of earlier determinations about family violence in family law proceedings.

While section 67ZBB requires courts to take prompt action in relation to allegations of child abuse or family violence, in our experience, this is not by itself resulting in early findings in matters involving family violence allegations. Resourcing constraints, in particular a lack of judges to hear these interim matters, and an unavailability of the information required to make the decision at this early stage, contribute to there being few matters where findings are made at an early stage.

**Client story**

VLA assisted a client, Samantha, with several matters that began with a Protection Application in the Children’s Court of Victoria brought by the Department of Health and Human Services (DHHS).

There was a history of family violence in Samantha’s relationship with her former partner and there had been a number of family violence intervention orders (FVIOs) put in place and subsequently revoked as the couple reconciled.

After a concerning family violence incident, a full exclusion FVIO was put in place. The Protection Application in the Children’s Court led to the children being placed with Samantha with supervised time for the father, her former partner.

After a period of time, DHHS decided that the father was acting appropriately during supervision and that a protection order was no longer required. Samantha agreed given that there was still a full exclusion FVIO in place.

The father subsequently made a parenting application in the Federal Circuit Court. He was self-represented and continually would not attend court. The default position of the Federal Circuit Court was for him to spend time with the child. However, the case kept getting adjourned, so Samantha’s VLA lawyer could not present any of the evidence about the history or risk of family violence, which had been proven in the Children’s Court and Magistrates’ Court of Victoria. Therefore, Samantha’s lawyer was unable to rebut the presumption of shared time.

During the family court proceedings, the father breached the FVIO and began stalking Samantha. The protracted legal proceedings and FVIO breaches created further traumatisation. Had there been an earlier determination of family violence, interim arrangements would have taken family violence into account in the parenting orders and resolved the issues in a timelier manner.

It is also our experience that there is some reluctance currently to make a determination at an early stage about whether family violence occurred as alleged. This determination is often deferred because it would be resource intensive, requiring the hearing and testing of evidence, and there is concern about making an incorrect determination without enough evidence.

However, this deferral prolongs the risk to victim survivors of family violence and risks interim care arrangements that are unsafe for children. In addition, were determinations about family violence risk made earlier in family law proceedings, we anticipate there would be a significant reduction in the number of matters that reach final hearing, because in many cases the degree of the family violence perpetrated and its implications for future risk (and therefore the orders that are in the child’s best interests) is a primary issue in dispute at the final hearing. We anticipate that this earlier resolution of disputes with a focus on safety would also reduce the trauma to victim survivors and families arising from protracted litigation.

In our view the most effective way to prompt earlier findings of fact relating to family violence would be to include a stronger and more specific legislative requirement that family violence allegations be determined early, with this legislative change supported by increased resourcing to the family law courts to enable this earlier decision-making. This change would place enquiry about safety at the start and centre of the court’s task and increase the court’s impact in managing and responding to family violence risk.

The process

Under this proposed approach, a preliminary hearing focused on making findings of fact about family violence would be conducted early in the family law proceeding.

As an initial step, when family violence is alleged, we suggest that a decision should be made on the papers as to whether there is sufficient evidence capable of satisfying a court that family violence between the parties is a risk factor in the proceedings. The decision on the papers need not be a full risk assessment or determination of family violence fact, but instead merely identification of the presence of family violence risk factors.

Preliminary assessment of the evidence of family violence risk could be made by a Registrar (or the case management function we propose in our response to Question 31). This preliminary assessment could be informed, in part, by the presence of current or past family violence intervention orders, child protection authority and police records, and any other relevant evidence from the parties.

This decision on the papers would also inform whether a ban on direct cross-examination is imposed at the preliminary hearing that follows (akin to the ban that would apply at final hearing, discussed below).

After a preliminary hearing narrowed to a finding of fact about family violence, the matter would proceed to standard pre-hearing steps, and then to final hearing (if required). Direct cross-examination would be banned at the final contested hearing if family violence had been found at the preliminary hearing and the victim survivor of that violence had not waived the protection from direct cross-examination. We anticipate that earlier findings of fact about family violence would see many matters resolve earlier and would usefully change the nature (as well as decrease the number) of final contested family law hearings.

If preliminary hearings were implemented, standard interim procedural steps – including appointment of an ICL, referrals for family reports and/or family dispute resolution and use of the courts’ own motion powers of subpoena – would be informed by this early finding of fact about family violence.

### Legislative ban on direct cross examination in family violence situations

At present the Actdoes not provide family violence victim survivors protection against direct cross-examination by an ex-partner who has perpetrated family violence against them. Nor does it protect victim survivors from having to directly cross examine their ex-partner.

There are existing mechanisms to reduce the impact of direct cross-examination but in practice they have proven insufficient and under-utilised as they are subject to judicial discretion and do not outright prevent the practice, thus cannot be relied on for protection.

**Client story**

VLA assisted Jane in a parenting matter. Jane is a young woman with three children to a former partner who perpetrated violence against her. Jane has a diagnosed cognitive disability and additional vulnerabilities due to her experiences of family violence and sexual exploitation.

Significant findings of family violence against Jane’s former partner had previously been made in the Magistrates’ Court of Victoria and, after an appeal, the County Court.

He then initiated parenting proceedings in the Federal Circuit Court. Initially, he was represented but he was self-represented leading into the final contested hearing.

The final hearing was postponed because Jane’s lawyer raised concerns about the possibility of direct cross-examination of Jane by the perpetrator of violence against her.

The father said he would not cross-examine, however this was uncertain as he had changed his mind often in previous proceedings. Jane’s lawyer sought written confirmation.

Jane’s lawyer remained concerned about Jane’s vulnerability and the possibility of direct cross-examination. Jane was worried about having to face him at court and the questioning triggering her post-traumatic stress disorder. The lawyer prepared documentation and draft orders for measures to be put in place in case of direct cross-examination that would protect Jane from further traumatisation as much as possible during direct cross-examination. These measures included Jane providing evidence from a remote location, the father providing the questions beforehand in writing, and allowing Jane to have her support person with her during the cross-examination.

Jane’s VLA lawyer informed the father of the orders that she would seek at final hearing if he changed his mind and sought to directly cross-examine Jane. Ultimately the orders were not required as the matter settled by consent prior to the final hearing.

A solution to this issue must consider the complexity of family law contested hearings that run over multiple days, the documentation in family law proceedings, and the quality of documents particularly if prepared by self-represented litigants, the complicated instructions provided by parties and the need for detailed orders in response to families with complex needs.

Addressing this issue requires legislative change. To effectively eliminate direct cross-examination in family violence situations, the legislation needs to first ban it, and then replace it with a less harmful alternative that still allows evidence to be tested – according to the rules of procedural fairness – and supports the court’s ability to make informed decisions.

This certainty is important for fostering the confidence of family violence victim survivors, and the community more broadly, that the family law system is meeting community expectations about the protections that should be afforded to family violence victim survivors engaged in family law legal proceedings.

We support the introduction of a threshold for when direct cross-examination will not be permitted in a family law proceeding. For this threshold and its operation to effectively prevent family violence survivors from having to directly face perpetrators and question or be questioned by them, it is appropriate in our view that a range of previously made decisions should automatically trigger the cross-examination ban. This should include where:

* There is or has been a family violence intervention order (interim or final);
* There has been a Police Family Violence Safety Notice (or equivalent);
* Police have charged one party with a family violence offence against the other party (whether or not there was a conviction, and whether or not the charge was of physical violence); and/or
* There is or has been in place an injunction under the Act.

We note this is a broader range of circumstances than the list included in the *Exposure draft – Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017*. We recognise this may include some cases where the allegation of family violence is made by a primary aggressor against a primary victim or is otherwise ultimately found unproven. However, balancing the need to make this protection accessible, the outcome of the ban being in place, the resources involved in providing the protection, and the resources involved in determining whether the protection is available, we suggest that a lower threshold is appropriate.

If one of the above circumstances is not present, we are of the view that protection against direct cross-examination ought still to be available in any circumstances in which family violence is alleged.

This is because, in our experience, many family violence matters proceed to the family law courts without any of the proposed criteria for an automatic ban being met. For example, a woman who has fled extreme violence and has not reported the family violence to police may, once safe in refuge accommodation, not wish to apply for a family violence intervention order, fearing that issuing an application would place her at greater risk of further family violence.

To ensure that the protection is in place whenever it is needed, we support provisions enabling the court to exercise discretion not only upon a party’s application but also on the court’s own motion, and a requirement that the court consider its discretion to apply a ban on direct cross-examination in all proceedings in which family violence has been alleged.

The court’s power to exercise discretion on its own motion will be important, but its effectiveness depends on improved family violence awareness (by judicial officers and by the professionals informing or representing parties who might provide the evidence to support a ban), as evidenced by the fact that mechanisms to protect family violence victim survivors already exist but are not consistently used. This highlights the need for all professionals in the family law system to undertake regular training to properly understand the dynamics of family violence (our response to Questions 41 and 42 addresses this further).

Importantly, in applying the automatic ban on direct cross-examination or considering whether to put a ban in place, the decision-maker need not assess the risk of re-traumatisation in court. The assessment should be solely on the likelihood that family violence has occurred. The assumption can be made that if there has been any family violence before, there is a risk of re-traumatisation.

Consistent with a policy objective of reducing risk while balancing support for survivor agency, only the victim survivor should then be able to determine if they want to conduct direct cross-examination themselves, and/or be directly cross-examined. Consent should be determinative. The alleged perpetrator’s views need not be sought. (Of course, in instances where there are, for example, family violence intervention orders against both parties, both parties’ consent would be required to conduct any cross-examination, as both parties will be deemed family violence survivors.)

It is important that any waiver – full or partial – is for the protected person to decide with full information and without pressure to waive the protection. Accordingly, we suggest it be framed as an option to waive the ban, rather than as a request to consent to waiver. A party should not have a mechanism for requesting the consent of the other party to allow direct cross-examination.

Once the ban has been triggered, and direct cross-examination is not to occur, the question then arises of what alternative to direct cross-examination will be employed. We welcome and support the steps being taken by the Commonwealth Government to develop a model to ensure there is a process that enables best evidence to come before judicial decision-makers once a ban on direct cross-examination is ordered.

We note that the legislative provisions requiring early determination of family violence and the ban on direct cross examination will be important to ensuring the family law system is responding to family violence. They alone, though, will not be sufficient. Our perspective on how the family law system should comprehensively respond to family violence is summarised in our response to Question 23.

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

VLA supports legislative amendments to ensure the legislative framework recognises the individual experiences of people from different backgrounds, including Aboriginal and Torres Strait Islander peoples, people from culturally and linguistically diverse communities, and rainbow families. This requires language, at section 60CC for example, that is inclusive, does not discriminate,[[51]](#footnote-51) and recognises and values the diverse make up of families within Australia, including the range of people within a family who may take on parenting and caring roles for children. This includes parents in blended families and step families, same-sex parents,[[52]](#footnote-52) and families with multiple caregivers[[53]](#footnote-53) or kinship caring arrangements.

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

Like parenting disputes, most parents are able to resolve property matters without relying on formal family law processes, and research suggests that these property divisions are satisfactory to the majority of parents.[[54]](#footnote-54)

Where agreement cannot be met, though, it is extremely rare to obtain a property settlement in the family law system without a lawyer’s assistance. Legal aid is very limited for matters involving property, and private representation is prohibitively expensive for many.

We know property settlement can bring significant material relief to separated parties in financial hardship and support caring arrangements for children. A property settlement can be crucial to preventing entrenched poverty following the end of a relationship, particularly where there has been family violence. Women who are unable to reach an agreement with an ex-partner who has used family violence, as is common in family law matters, are often forced to leave the relationship with nothing and, as a result, are at greater risk of financial hardship and poverty than men post-separation.[[55]](#footnote-55) This can ultimately impact negatively on the safety, health and development of children.

The NLA submission outlines the current barriers to the resolution of property disputes. There is a need for low cost assistance to facilitate the division of property. Legislative reforms should be considered to support process changes to ensure more equitable property settlements post-separation (and our response to Question 20 will consider the process for resolving property disputes and make recommendations to address these accessibility issues).

The legislative changes considered below would be of benefit to all property matters considered by the family law courts including large property pools but are informed, particularly, by VLA’s practice experience assisting the most vulnerable.

While the research on family violence and its impact on property disputes is informed largely by the experience of heterosexual relationships post-separation, the discussion below and the recommendations made are also relevant to families where there was a primary carer of the child(ren) prior to separation, irrespective of the gender of the primary carer. These recommendations assist in making the resolution of property disputes more child-centred.

### Decision-making process for property disputes

Identifying the value of the property of the parties

Identifying the value of the asset pool represents a significant hurdle in many property disputes. It requires a full and detailed list of all the property, assets and debts.

There is an obligation on parties to make full and frank disclosure of their financial situation.[[56]](#footnote-56) This disclosure is absolute (but surprisingly the requirement is included in the rules not the legislation). Yet, failure to make proper disclosure can be a tactic used by parties in property disputes. Research by Women’s Legal Service Victoria found ‘obstructive former partners might withhold information about their financial situation to delay proceedings, elevate stress and increase legal fees’.[[57]](#footnote-57)

We would support additional measures to strengthen mandatory financial disclosure in family law property matters, as the ability of parties to resolve property disputes requires timely and accurate disclosure.

We believe there are lessons to be learnt from the child support regime in considering improvements to the property law regime in the family law system. In particular, we recommend that the Commission consider legislative reforms and supporting processes to provide family law court registrars with enhanced powers to make orders for disclosure as well as powers to request information from employers and third parties similar to those in the *Child Support (Registration and Collection Act)1988 (Cth).* For example, sections 16B enable a request for information from the Commissioner of Taxation. Sections 16C and 120 of the *Child Support (Registration and Collection Act)1988 (Cth)* provide other examples of such powers.

Failure to address the current disclosure challenges would also be a hurdle to the introduction of compulsory FDR for property disputes.

We also encourage the Commission to consider legislative reform to provide greater guidance on the date of asset pool valuation. While not specified in the Act*,* valuation is considered to be determined as at date of trial. This can have a perverse effect, with some parties attempting to delay matters if there is a financial advantage in doing so. One option is to value the asset pool ‘at the point of separation’. This would minimise disputes on whether windfalls, gifts and inheritances received by one party post-separation are to be included in the property pool.

Introduction of a presumption

At present the consideration by the family law courts of whether it is ‘just and equitable’ to make an order for the division of property post-separation provides little guidance to parties about the likely outcome of a property settlement. Furthermore, the requirement that the court consider the contributions (both direct and indirect) made by each party to the property pool during the relationship is a complicated step in the current decision-making process and provides no clear identifiable principles to guide parties in how the property may be split post-separation.

As a result, the Family Court of Australia website informs parties that:

There is no formula used to divide your property. No one can tell you exactly what orders a judicial officer will make. The decision is made after all the evidence is heard and the judicial officer decides what is just and equitable based on the unique facts of your case…The way your assets and debts will be shared between you will depend on the individual circumstances of your family. Your settlement will probably be different from others you may have heard about.[[58]](#footnote-58)

We would welcome the introduction in the legislation of guiding principles and/or presumptions distilled from the case law for deciding property matters, to simplify the process, and provide greater guidance to parties.

We note a range of options presented in the Issues Paper. Our preference is the introduction of ‘a presumption of equal contribution’. In our view, this presumption reflects the trend in the case law and recognises the equal status of parties in a relationship (irrespective of whether one parent has primarily made non-financial contributions, including caring for children).

The legislation should then provide a set of principles for departing from the presumption in certain circumstances. This has been described by the Family Law Council as an ‘adjustment stage’ and the purpose of such a stage is ‘to rectify inequalities’ that may arise from the application of the presumption in certain cases.[[59]](#footnote-59)

One scenario where it would be appropriate to adjust the asset split, for example, is in cases where the relationship was brief, and the parties clearly brought existing assets individually owned by each party into the relationship. Or there may be situations where there is an asset brought into the relationship (or acquired during the relationship) by one party and it is appropriate for that asset to be excluded from the ‘equal’ pool.

The factors currently provided in sections 79(4)(d) to (g) and 75(2) of the Act could also be a starting point for the Commission in the development of principles to be considered at the adjustment stage, noting though our comments below on the absence of provisions at present that require property division to take into account family violence.

Introduction of legislative provisions to take into account family violence in the division of property

Sections 79(4)(d) to (g) and 75(2) are silent on family violence. Despite this, the law does currently allow family law courts to take family violence into account in property division orders, albeit in a somewhat convoluted and opaque way.

The Full Court authority of *Kennon and Kennon[[60]](#footnote-60)* states that the financial consequences of family violence may be taken into account in determining property settlements under section 79(4) of the Actinsofar as they made the contributions of the victim more difficult (for example, inability to work due to an injury caused by an abusive partner) and give greater weight to those contributions.

While there are cases where family violence has been considered, there are relatively few. Specific legislative consideration of the impact of family violence, including on children, would clarify the ability for family violence to be taken into consideration in a property settlement.[[61]](#footnote-61) VLA therefore supports codification of family violence as a consideration to be taken into account in determining property division.

Consideration of debts in the asset pool

For many of VLA’s clients, debt is a key issue in property disputes. At present the family law courts can make orders and injunctions that affect third parties such as banks. Orders can also be made which transfer responsibility for a debt from one partner to another.

However, our practice experience is that the making of orders that fairly address debts in property disputes is being prevented by section 75(2)(ha), which requires the court to take into account ‘the effect of any proposed order on the ability of a creditor of a party to recover the creditor’s debt’, and by section 90AE(3)(b), which requires it to not be ‘foreseeable at the time that the order is made that to make the order would result in the debt not being paid in full’.

The expectation that the court can confidently anticipate the repayment of a debt when making an order is unrealistic; and cannot even be anticipated where the liability for the debt goes unchanged by a court order.

Unable to meet the requirements of sections 75(2)(ha) and 90AE(3)(b), the family law courts are making orders which do not alter the legal liability for the debt, but shift the responsibility for payment of the debt onto one party and that party is required to indemnify the other in the event of non-payment.

This is an inadequate work around in our view as it still exposes a party to future legal proceedings if the other party (with whom sits the responsibility for payment of the debt) defaults on the debt. In cases where there has been family violence, unsecured joint debts (if they remain in joint names) can be used by perpetrators of family violence as a means to continue to exert control over their former partner.

Thus, the current approach to debt in property division is contrary to the role and objectives we have proposed for the family law system (which we outlined in our response to Question 1), which should be providing certainty to parties and protecting all individuals’ rights to safety.

We would encourage the Commission to consider how the legislative framework can better facilitate the splitting, altering and transfer of debts in property disputes; with particular consideration given to debts incurred unilaterally in circumstances of economic abuse.

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

VLA notes the comment in the Issues Paper that spousal maintenance orders are rare, generally limited to cases involving high income families, and are made on an interim basis or for a limited period of time. VLA’s Commonwealth family law service provides legal assistance in spousal maintenance cases including for the enforcement of spousal maintenance orders. We note that the application of a means test means that VLA is assisting low-income parties. In 2016-17, VLA provided 640 spousal and child maintenance legal assistance services.[[62]](#footnote-62)

Research by AIFS has focused on the earning capacity of women post-separation and explores amendments that would limit the period of time for which spousal maintenance be ordered, and this is set by the period of time it would take for a woman to retrain or secure employment (where the relationship has impacted on a woman’s earning capacity).

Our practice experience shows that spousal maintenance remains important for particularly vulnerable parties post-separation. We note three other common post-separation scenarios where spousal maintenance is important: where one parent is caring for a child and unable to re-enter the workforce after separation due to caring responsibilities and thus relies on spousal maintenance to support them and the child; where family violence was used in the relationship and post-separation the victim survivor experiences health issues that impact their ability to seek employment; and where one party has a medical condition that does not enable them to work.

Therefore, VLA’s strong view, informed by our client experience, is that spousal maintenance is an important safeguard in the legislative framework and remains relevant in a modern family law system.

**Client story**

VLA assisted Sara after she fled family violence perpetrated by her former partner. Initially Sara was living in a refuge with her children and sought a family violence intervention order at the Magistrates’ Court of Victoria.

According to the final family law orders, the children are to live with Sara and spend time with their father, although one of the children has chosen not to spend time with their father.

Post-separation, Sara was not eligible for Centrelink benefits and undertook some casual work to support herself and the children. She receives little to no child support.

VLA made a spousal maintenance application on behalf of Sara. Sara required the assistance of an interpreter at the court hearing for the application.

In the proceedings, Sara’s ex-partner conceded that Sara needed financial assistance post-separation, but he argued that he did not have the means to make spousal maintenance payments. He swore a financial statement that he owned a small business but was not receiving any income from that business, he incurs weekly expenses that he cannot afford, owes payment on a debt, and owns no real property.

The children were receiving lavish gifts from their father. Sara advised her lawyer that her ex-partner held business interests overseas and received substantial sums of money from family and friends living overseas. He denied this. The court was unconvinced. The written evidence and evidence provided in cross-examination did not provide a clear picture to the court, as Sara’s ex-partner conceded at points that he received money from family and friends overseas and then at other points contradicted earlier comments. The court was concerned that Sara’s ex-partner was being evasive.

The court found that Sara’s ex-partner had access to significant amounts of money from overseas, and had received in excess of $250,000 in recent years. The court decided that Sara’s ex-partner had the financial resources to pay spousal maintenance and ordered an initial lump sum payment and then a weekly payment of $500.

However, the father has since been in arrears of the weekly payment. VLA has registered the payment with the Commonwealth Department of Human Services Child Support (DHS(CS)) but they have said they cannot do much at this stage, demonstrating the need for better enforcement of spousal maintenance when women are experiencing financial vulnerability.

**Client story**

VLA assisted Magda to obtain spousal maintenance in a situation where the parties had unequal capacity to earn. It was a short marriage, under 5 years, and the husband had used family violence against Magda during the relationship. Our client was the primary carer for the child of the relationship and was reliant on Centrelink payments.

The property pool consisted of a home with negative equity and the husband's superannuation.

At VLA’s Family Dispute Resolution Service – a grant was made under the special circumstances guideline as there were no children’s issues in dispute – the parties reached an agreement and orders were made for $20,000 of the husband's superannuation to be transferred to Magda's superannuation account and for Magda to receive spousal maintenance payments of $50 per week for a specified period. Child support payments were assessed by DHS(CS) in the usual way.

This was an outcome that promoted Magda’s economic recovery and increased her financial security.

**Client story**

VLA assisted Georgia who was in a de facto relationship for a couple of years and was pregnant with their first child at separation.

The father had used family violence against Georgia during the relationship. Georgia had moved to Australia from overseas. She experienced language barriers, was living in a refuge, and had limited financial support given her uncertain visa status following separation.

The only asset of any significant value was a small business, which the ex-partner valued at under $100,000.

VLA sought urgent spousal maintenance and obtained final consent orders for $100 per week, over and above the child support assessment, until the child begins school and Georgia retrains to gain employment. This outcome improved the quality of life and financial stability for Georgia and the very young child.

This inquiry provides an opportunity to consider any changes that may be needed to ensure the framework for determining spousal maintenance is responsive to the needs of the more vulnerable party in a family law proceeding in an updated legislative framework.

We recommend that the Commission consider two changes. First, that ‘capacity to earn’ be added to the factors to be taken into account when assessing spousal maintenance. This is informed by VLA’s practice experience. We witness the spousal maintenance process being abused by parties who have earning capacity but deliberately refrain from employment, so they do not have to pay maintenance. They then draw out proceedings until the other party elects to discontinue with the application.

Second, we reiterate our recommendation (set out in our response to Question 17) that family violence be codified at section 75(2) of the Act, so there is also specific legislative consideration of the impact of family violence when determining spousal maintenance cases.

We note the scope of the Commission’s terms of reference, and that child support is not under consideration by this inquiry. We would recommend, though, that the Commission consider an administrative process for spousal maintenance. From VLA’s experience delivering both family law and child support legal services, spousal maintenance decisions better align with the child support regime, including the special circumstances (administrative departure) process and an administrative process would redirect these matters away from the family law courts.

The Department of Human Services (Cth) (DHS) will also likely already have both parties’ financial details following the making of child support applications, which would assist with the making of spousal maintenance decisions without the need for bespoke family law orders in each case. The DHS could issue spousal maintenance assessments for fixed periods. The DHS could also assist with collection and enforcement of assessments, which would provide an easier and more accessible process, and avoid enforcement proceedings through the family law courts.

### Adult child maintenance

We note that the Issues Paper has not asked stakeholders to comment on the current legislative framework and process for determining adult child maintenance applications. We would recommend, though, that the Commission also consider an administrative process for adult child maintenance.

**Client story**

VLA assisted Phoebe, the mother of an adult child, Anna, following separation from the father. The father agreed that he should pay maintenance but did not accept the amount Phoebe was seeking was necessary to care for Anna, who lived with a disability that required 24-hour care.

Anna received Centrelink benefits but had no other sources of income. Due to her disability, Anna is not able to contribute financially for her care arrangements. Anna receives assistance through the National Disability Insurance Scheme (NDIS).

Phoebe was not seeking adult child maintenance for expenses covered by the NDIS such as psychologist, speech therapist, physiotherapy and other medical costs. Rather, she was seeking assistance for activities such as swimming, medications, equipment to assist with mobility, the cost of private health insurance, transport costs, and the costs of providing for Anna’s wellbeing at home (such as home heating which is important due to the nature of Anna’s disability).

Phoebe lives in public housing. She had not been able to engage in paid employment due to her caring responsibilities. Phoebe received a carer’s pension through Centrelink. The father’s combined income with his new partner exceeded $250,000.

The father claimed that Phoebe was exacerbating the expenses she was incurring. The court found that Anna’s disability was permanent and that an ongoing order for child adult maintenance of $400 a week was appropriate, and that the father had capacity to pay the amount, to assist Phoebe to care for Anna into the future.

Like spousal maintenance, an administrative process for adult child maintenance applications removes the requirement for bespoke orders in each case, redirects these matters away from the family law courts, and in doing so avoids placing an adult child in a position where they may oppose the view of one of their parents at court.

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

VLA does not have practice experience in this area to input into the Commission’s work on binding financial agreements.

# Resolution and adjudication processes

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

VLA’s practice experience highlights several barriers to timely and cost-effective resolution of family law disputes that can impact on the achievement of fair justice outcomes for families and increase safety risks for children.

Our submission recommends a suite of changes to family law court processes to improve the timeliness and cost effectiveness of the family law system. These proposed reforms also seek to give effect to the broader role, objectives and principles proposed in our response to Questions 1 and 2.

Our recommendations focus on the following themes of reform:

* Early and ongoing identification of legal and non-legal issues impacting on the resolution of a family law matter assisted by the introduction of a court-based case management function at the family law courts (discussed in detail in our response to Question 31);
* Greater use and resourcing of processes to assist judicial officers to make orders informed by all the relevant and available information including the section 11F memorandums and Family Reports process and greater use of subpoena powers (the former is discussed in detail in our responses to Question 31);
* Court processes that provide clear pathways for the determination of disputes including special lists, triaging of urgent matters, and judicial determination processes that are proportionate to the level of complexity and need;
* Support for families after the making of a final order to support compliance with the order; and
* Simplified application processes, forms and court rules.

The remainder of this section will look in detail at the third, fourth and fifth dot points in the summary above.

### Determination processes proportionate to the level of complexity and need - A small property stream

VLA proposes that the Commission consider a new stream for determining small property disputes in the Federal Circuit Court. A simplified small property stream would determine matters more quickly and cost-effectively than the current court process.

It would be an option available to parties where legally-assisted mediation has not resolved the dispute or the FDR service has assessed the matter as not suitable for mediation. It would make small property settlements accessible compared to the present situation; small property claims are among the least likely to be made in the current family law system because of an inability of one party to afford a lawyer.[[63]](#footnote-63)

A small property division or stream would need to be limited to claims of property up to a certain ceiling and allow for property pools that involve debts only, or primarily. It would be important, however, that the potential share of the property pool a party is likely to receive – their claim, rather than the total pool – is used to assess eligibility for the list to promote broader eligibility to the stream.

The new stream could function in a similar way to the current divorce list. For example:

* The determination would be narrowed to a single issue (that is, property division);
* Where there are associated children’s matters, these could proceed in the usual way in the family law courts and the matters could be dealt with concurrently, as well as retaining the option to hear the matters together in the way they are currently dealt with; and
* Decisions in this stream could be delegated to a registrar and could have a right of appeal in the usual way.

### Special Lists and Triage Processes

### Recovery orders

Our experience, particularly at the metropolitan registries of the family law courts, is that there can be delay in the hearing of recovery order applications; particularly where an information order is required (the current process takes 16 weeks).

Delay is exacerbated by uncertainty in whether a recovery order application will be assessed as urgent and listed accordingly. This creates concern for parents and it is difficult for lawyers to confidently advise parties on the possible outcomes of a recovery order application. Significantly, it can lead to changes in care arrangements that are not in the best interests of the child and not intended under the court order.

We recommend the Commission consider developing criteria for assessing the urgency of recovery order applications that would be applied consistently by Registrars so that the family law courts are prioritising urgent applications to mitigate the risks to the child and there is predictability for parties in the family law system.

Of relevance to the decision-making about urgency is:

* Safety and family violence and other risks to the child;
* The child’s age and stage of development;
* Significant disruption to the child’s care situation prior to the recovery application (with this criterion informed by the social science research on primary attachment);
* The impact on schooling; and
* The health of the child, and the impact on the care requirements arising from the health of the child (or a disability).

### Contravention Applications

The enforceability of orders can be an issue. The practice of our lawyers suggests, though, that contraventions (breaches of a family law order) can arise in two scenarios. The first type of contravention arises from the intentional behaviour of a party, resulting in a breach of a family law order. The second scenario commonly arises because the parents of a child do not fully understand the family law order that has been made and how it should work in practice going forward. We will consider each in turn.

We are concerned that the family law courts are not enforcing orders as readily or as promptly as is required to give parties confidence in the family law system. At metropolitan registries of the family law courts, in particular, there can be a long delay between the filing of a contravention application and the hearing of that application.

This impacts on children. Due to delay, the changed care arrangements arising from the contravention can develop into the status quo which is ultimately confirmed in final orders, despite the initial and interim care arrangements being determined to have been in the best interests of the child.

**Client story**

VLA assisted Jo, who was seeking the return of her two children. They were in the care of their father after not being returned to Jo following a visit with the father.

Given that the father had been spending some time with the children, it was difficult for Jo’s VLA lawyer to argue there was immediate risk to prioritise the recovery order.

In the meantime, the father notified the relevant State child protection agency, the Department of Health and Human Services (DHHS), of risk to the children in Jo’s care. The DHHS became involved in the family, however their involvement did not escalate to a child protection application in the Children’s Court of Victoria.

The father often did not attend court hearings or take the children to appointments, including the section 11F report interview. The court adjourned the matter multiple times because evidence of the alleged risk posed by Jo could not be tested.

Interim orders allowed the older child to see Jo at any time and placed restrictions on time Jo could spend with the younger child.

Jo said that the older child elected to live with her for a number of months but that she had not seen the younger child for almost a year, during the period of the DHHS investigation. Given that the older child had been living with Jo without this raising concern for the DHHS, Jo’s lawyer filed an application for change of residence to have the children live with her.

However, the father continues to avoid attending court or the family report interviews, so that the court cannot test the evidence of risk to the children. The delays and protracted proceedings have led to untested allegations against Jo and she is now considering withdrawing her application because she has been so exhausted and upset about the drawn out, and to date unsuccessful, process to secure time with her children.

We recommend a contravention list to streamline the hearing of contravention applications. We would also encourage the Commission to consider what other measures could be introduced to improve the process at court, including a greater role for registrars to triage urgent matters.

In the second scenario, it is not the intention of a party to not comply with the court order. Rather, the parties to the order may need assistance to understand the orders and implement the orders as intended, particularly following the finalisation of complex family law proceedings.

**Support for families after the making of a final order**

Section 65L of the Actanticipates that parties to family law orders may need assistance to understand the orders and implement the orders as intended, and provides family law courts with the power to make either or both of the following orders: an order requiring compliance with the parenting order, as far as practicable, to be supervised by a family consultant and an order requiring a family consultant to give any party to the parenting order such assistance as is reasonably requested by the party in relation to compliance with, and the carrying out of, the parenting order.

Our practice experience suggests that section 65L orders are rarely made; and this is likely at least partly due to insufficient resourcing of the family law consultants to undertake this work. We see a significant benefit to families from greater use of section 65L type orders supported by adequate resourcing to assist families in the immediate period following the making of final family law orders.

Whether this function should sit within the court structure or outside the court structure should be considered in a review of section 65L. If the function remains within the remit of the court, the support to families is undertaken with ‘court authority’. This may assist where there is disagreement between the parties on the interpretation of the order. On the other hand, retaining the function within the court remit may inadvertently create the impression to parties that the court process is not final and there may be an opportunity for arguments to be relitigated where one party is dissatisfied with the final order. In considering who is best placed to provide this function, consideration could also be given to the role of post-court parenting order programs.

### Simplified application processes, forms and court rules

We see a benefit in simplifying the application forms at court across a range of matter types. Improvements could also assist with a shift away from the family law courts’ heavy reliance on affidavit material, which presents a challenge in the jurisdiction given the number of self-represented litigants and impacts on the quality of information before a judicial officer.

For example, we recommend simplifying the application process for property matters. If parties could apply for a property settlement using a ‘tick-a-box’ style form, written in plain English, and which prompted parties to respond to specific questions (akin to a financial statement form) this would assist with improved disclosure. This information would facilitate triage, assist with determining the stream to list the matter, and assist with making of directions and orders in relation to the filing of affidavits, valuations and other documents.

We anticipate a review of all the family law court forms would identify additional opportunities to simplify court forms. We would encourage the Commission to also consider opportunities to enhance the use of technology to improve and simplify processes.

Practitioners working across both the Federal Circuit Court of Australia and the Family Court of Australia are required to use different forms and apply two different sets of court rules. We recommend the adoption of a single set of forms and rules for both courts as a principle in the first instance and different forms and rules only where a particular requirement of the Federal Circuit Court or the Family Court necessitates an altered approach.

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

VLA supports the Commission’s consideration of how courts can provide greater opportunities for parties involved in litigation to be diverted to other dispute resolution processes or services to facilitate earlier resolution of disputes. VLA’s practice experience suggests two useful and effective methods of diverting parties from the court system:

* Expanded access to legally-assisted FDR; and
* Improved integration between FDR services and the family law courts.

Our response to this question also explores the role FDR can play in Hague international child abduction matters, and our recommendations more generally to improve the Hague matter process.

### Expanding access to legally-assisted FDR

VLA supports greater use of legally-assisted FDR to facilitate earlier resolution of disputes. FDR is a qualitatively different process from court. It supports parties to resolve their parenting disputes through a child-centred, cost-effective process.

**Case study**

VLA’s FDRS case manager was advised by the mother in a parenting dispute that she was supportive of establishing contact between the father and the children but had several concerns including his previous drug use and poor mental health. The father had also previously breached, on multiple occasions, a family violence intervention order. The father had become homeless and was living out of his car.

FDRS interviewed the father to assess suitability for the service. He was clearly experiencing poor mental health but wanted to participate in mediation.

Both parties were legally represented. The first conference went very well. The parents made arrangements where the children could spend time with the father with the mother supervising the time.

It has now been a number of months since the first conference. Both parties are very happy with the current arrangements and are now looking to organise a second conference informed by a Kids Talk report, so they have insight into how the children are going post-separation.

Legally-assisted FDR achieves high rates of settlement and plays a key role in preventing matters from reaching court. In 2016-17, VLA’s FDRS delivered 1,044 conferences, with a settlement rate of 83 percent.[[64]](#footnote-64) The majority of conferences (70 percent) were early intervention FDR and 30 percent were litigation intervention FDR.

A legally assisted model, supported by case management for clients and mediation by experienced chairpersons, can expand eligibility of FDR to parents screened out of non-legally assisted models of FDR and support parents to resolve family law matters in the best interests of the children and without recourse to court. This includes parents who have been victims of family violence or where other risk factors have been identified but cannot be mitigated by a non-legally assisted FDR service provider (see our response to Question 24 for more information about the elements of the legally-assisted FDR model with regards to family violence).

We encourage the Commission to consider a redesigned family law system that:

* Expands access to legally-assisted FDR to provide access to safe FDR to families who are currently being screened out of, or otherwise not resolving their disputes at, non-legally-assisted FDR and resorting to court;
* Promotes greater use of legally-assisted FDR at all stages of disputes so that even if some issues in matters require court determination, others can be resolved at FDR through a referral from court back to the FDR service to attempt to resolve the outstanding issues in dispute;
* Introduces a FDR mechanism for property matters to prevent more matters relying on court processes for resolution. VLA stresses that FDR would only be appropriate for property matters if certain conditions are met, including parties meeting the disclosure requirements; and
* Provides opportunities to reduce costs to clients of resolving family law disputes, by strengthening and expanding legally-assisted FDR processes and improving court processes so there is timely resolution of matters.

These recommendations will be explored further in the remainder of this response and in our response to Questions 22 and 24.

**Improved integration between FDR and the family law courts**

VLA sees opportunities to better integrate the family law courts and FDR processes and enhance coordination between the FDR and court process in the earlier period of a family law proceeding. This would help with a move away from the very linear way a family law matter currently progresses through the family law system

For example, for matters screened out as inappropriate for FDR as parties are not able to negotiate freely without further information or due to the real fear a party has of the other party, commencing litigation may be the best course of action at that time. After the first return date, or on the viewing of subpoenaed documents or with the benefit of a family report offering important insights, the parties may be in a better position to negotiate safely. At this point the matter could be referred by the court to an FDR service.

Such an approach is responsive to the issues in dispute presenting at a certain point in time and would identify and use the decision-making process needed or best suited to resolving that issue. This revised approach would also better support parents to make decisions about their own children where possible, would be more cost effective and narrow court involvement to only the issues requiring judicial determination, and would avoid delays as parents wait for final hearing on all the issues where full final hearing could be avoided. We anticipate that this effort would also reduce the need for some matters to proceed to final hearing.

In proposing this model, we have considered what additional information an FDR service could provide to the court to facilitate a smooth transition of a family from the FDR service to the court; and consideration could be given to what information the family law courts could provide when a matter is referred from the court to FDR.

We continue to strongly support the confidentiality of FDR. Confidentiality provides parents with the confidence to share information with case managers, which is relevant to safety planning and also assists chairpersons to engage parties in difficult conversations and to test child-centred solutions, even if agreement is not ultimately reached. VLA’s second submission to the Family Law Council’s Terms of Reference on Families with Complex Needs comprehensively outlines VLA’s views on confidentiality.[[65]](#footnote-65)

There may be information, though, that an FDR service could provide to the family law courts to better flag identified risks and the issues needing judicial determination, with the consent of the parties. We would encourage the Commission to also consider, if this proposed improved coordination between FDR services and the family law courts is adopted, the balancing of information sharing with confidentiality so that the FDR process is not undermined but greater coordination between FDR services and the family law courts to support earlier resolution of disputes is facilitated.

We also note that there will continue to be cases where FDR is not suitable, and judicial determination will be required. We recommend that the Commission consider the strictness of section 10J so that FDR services can better flag safety risks to the family law courts. This would help the family law courts, via the case management function, to better issue-spot and triage, particularly where the issues identified would suggest the family law courts should be providing a higher intensity of service in response to the risks.

We emphasise that this flagging should be sufficiently high level to maintain the confidentiality of the FDR process. Furthermore, we strongly maintain our view that any risk flagging by an FDR service to the family law courts does not negate the need for the family law courts to introduce and implement improved risk assessment processes at court. Risk assessment at court is essential to ensure responsiveness to potential changes in risk arising from the transition to court proceedings.

The NLA submission also identifies strategies on improving coordination between FDR services and the family law courts, some of which have already been implemented by other LACs.

**Hague Matters and FDR**

The Hague *Convention on the Civil Aspects of International Child Abduction* (the Hague Convention) is implemented in Australia by section 111B of the Act*,* and the *Family Law (Child Abduction Convention) Regulations 1986* (the Regulations).

The Hague Convention seeks to secure the prompt return of a child wrongfully removed or retained in any contracting state and to ensure rights of custody and access under the law of one contracting state are effectively respected in the other contract state. It does so by providing parents with a pathway to apply for the child (if under 16 years of age) to be returned to Australia if the child is taken to another convention country without agreement or kept in a convention county longer than agreed; or if the reverse occurs and the child is brought to Australia without agreement or kept in Australia longer than agreed.

The general rule is that if a child is removed without agreement, or kept in a contracting state, they must be returned. In Australia the Commonwealth Central Authority (CCA)[[66]](#footnote-66) must take action to secure the return of a child under the Convention (by initiating proceedings in the Family Court of Australia on behalf of the requesting parent) if it receives an appropriate request that is in accordance with the Convention. A request may, for example: seek an amicable resolution of the differences, in relation to the removal or retention of the child, between the person making the request for the child’s return and the person opposing the child’s return; or seeking the voluntary return of the child.

In Victoria, there are between ten and fifteen Hague applications (where the requesting parent is overseas, and the child is in Victoria) per year. VLA is involved in Hague matters in a number of ways: when an ICL is appointed, when a matter is referred to our FDRS for mediation, and/or when the party to a Hague matter is eligible for a grant of legal aid. VLA also provides legal advice to parents seeking the return of their child from another country. This advice informs parents of their options under the Hague Convention and provides appropriate referrals. The following discussion and supporting recommendations are informed by this practice experience.

We focus our recommendations on the role of FDR in Hague disputes, the appointment and function of ICLs in Hague matters, the exercise of judicial discretion when deciding to return a child, and funding for LACs to assist parents in Hague matters. More generally, we recommend the Commission consider greater training for professionals involved in Hague matters given the technical and specialist nature of the work.

A practice of referring Hague matters to FDR has developed in Victoria. VLA’s FDRS delivers this service in many cases. The FDR is focused on preparing for the possible outcomes of the Hague matter and is conducted within the limited court timeframes in Hague cases, so that there is no delay in the court hearing the case. Parents are encouraged to view this immediate issue of the return or non-return of the child to the country they were living in with a child-centred lens.

In our experience, this provides parents with the opportunity to consider any conditions that should attach to a child’s return (if they agree to return, or if a court orders return of the child). Examples of conditions of return include payment of return travel for the child and primary carer to support the child’s emotional needs, a family violence intervention order in place in the country of return to protect the child’s primary carer, restraints against civil and criminal prosecution of the child’s primary carer and housing for the child and primary carer upon return.

In addition, through Hague FDR, parents have the opportunity to negotiate parenting arrangements beyond the Hague return issue and to share their views and discuss what is in the best interests of their child (including the impact of a court decision that the child ought to return or that the child need not return). This helps parents to address deep conflict and work to resolve the conflict by exploring multiple options and outcomes that are future focused while maintaining and restoring dignity.

The mediation service provided is intensive when compared with FDRS’ service in ‘domestic’ cases. Usually three four-hour mediations are required with two specialist mediators. We see great value in resourcing FDR for Hague matters, however, as FDR is a cost-effective approach for narrowing issues in dispute, considering possible conditions of return and where possible developing child-centred parenting arrangements following the return or no return.

Based on our experience, the role of the ICL is critical in Hague matters. The ICL forms an independent view based on evidence and makes submissions on courses of action the court may take and what is in the best interests of the child (within the confines of the Hague proceeding). The ICL assists with good decision-making at FDR and in court. The ICL also plays an important role in keeping the matter on track with skilful case management, legal analysis, and communication.

We would recommend removal of the exceptional circumstances requirement for the appointment of an ICL in Hague matters, and instead the law should apply the same threshold for ICL appointments used in domestic parenting matters.

We would also see benefit in codifying the role of the ICL in Hague matters in legislation, so the role and duties of the ICL in Hague matters is clear. Functions include: encouraging participation in voluntary mediation, research into each country’s legal systems and government functions where it impacts on the dispute, communicating with the CCA regarding arrangements for children and carers in the other country, liaising with judicial officers regarding the progress of mediation in general terms while preserving confidentiality, having the matter listed to seek interim or other orders, requesting judicial communication with a Hague Network Judge (about, for example, enforcement of orders in the other country), assisting parties to follow interim agreements, and following up on translating a mediation agreement into enforceable orders in court.

If a Hague application is proven, the court must order the return of the child. There are exceptions (defences) to return including where there is grave risk, an intolerable situation or a strong objection by the child. In such situations the court retains a discretion to return the child anyway, having regard to the overall objects of the Convention.

We understand judicial officers in Australia take different approaches when exercising this discretion. We see benefit in the legislation providing greater guidance to judicial officers when exercising this discretion. We recommend the Commission look at the practice of other jurisdictions to inform the development of guiding principles, within the overarching framework of the Convention, to promote consistency (albeit with appropriate flexibility depending on the facts of the case) and focus decision-making on the best interests of the child (within the confines of the Hague proceeding) and protecting children from harm. This should include requirements and processes for the child’s voice to be heard in the proceeding.

Finally, we see benefit in funding for LACs to conduct a greater number of legally-assisted mediations in Hague matters and to enable the provision of legal assistance to all parties in Hague matters. Hague matters are complex which makes them challenging for self-represented parties. The children at the centre of the dispute are particularly vulnerable and impacted by a significant disruption to their lives (relocation). It is appropriate that legal assistance is available to support parties to navigate through these matters and to adopt child-centred outcomes.

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

At present, family dispute resolution is available for property matters, albeit access to FDR can be limited. VLA’s FDRS, for example, is offered in a limited number of property matters that also involve children’s disputes. However, the legal aid system is not currently funded at a level that would allow legally assisted mediation to be extended beyond these cases.

**Case study**

FDRS assisted a family with a parenting and a property dispute. The family included teenage children. There had been a history of family violence.

Initially the father was difficult to contact and engage as he lived interstate. Instead of booking a teleconference, the father decided to pay for himself and his lawyer to travel to Melbourne.

The mediator described the conference as very successful. Both parties prioritised discussions of the issues in the parenting dispute before discussing the property matters. By the end of the first conference, the parties had resolved the parenting dispute and agreed to a parenting plan.

The financial and property matters were partially settled, and the parties’ lawyers intended to continue negotiation of the outstanding issues after the conference with the aim of reaching agreement before the final hearing. A second conference date was also scheduled to review the parenting plan and discuss the property dispute if agreement could not be reached.

Informed by our experience delivering FDR services and developing guidelines on eligibility for legally-aided services in a resource constrained operating environment, VLA is of the view that there is benefit in expanding access to FDR processes for small property matters. FDR could play a greater role in resolving property disputes, where possible, in a more cost-effective and timely way, and without recourse to family law courts.

To be effective, though, there would need to be full disclosure of financial assets (and debts) prior to mediation. The disclosure requirements were discussed in our response to Question 17 and are relevant here. Where a party is not voluntarily meeting the disclosure requirements and there has not been full and frank disclosure, it would not be appropriate to proceed with FDR as the power imbalance between the parties exacerbated by the absence of full disclosure cannot be mitigated.

In considering the introduction of compulsory FDR for property disputes, we are of the view that the Commission would need to consider a process for securing full and frank disclosure requirements (possibly expanded powers as proposed in our response to Question 17). This may require the family law courts to play a role to ensure full disclosure. Therefore, a pre-court section 60I equivalent would not be suitable to small property matters without adaptation.

In considering the process and timing of FDR for property matters, a referral to FDR once there had been full disclosure following the filing of an application at court is one option. While this scenario cannot be accurately characterised as a pre-court process, it may be necessary to ensure full disclosure; and it would still provide a more cost-effective resolution pathway, which is particularly relevant where the property pool is small.

Compulsory FDR for property matters would also require exceptions where it is unsafe or inappropriate to proceed with FDR. This is recognition, for example, that it is common for a party with a history of using family violence to refuse to agree to a reasonable property settlement, as a form of financial abuse.[[67]](#footnote-67) In these cases, court-based, enforceable orders are often required. We note, though, that legally-assisted FDR supported by case management expands access to FDR for victim survivors of family violence, and thus may still be appropriate in many small property pool cases. This is discussed further in our response to Question 24.

Where, though, it is not appropriate to proceed to FDR for the property matter, it is important that a simplified small property stream is available at court for determination of small property pool matters quickly and cost-effectively.

More generally, we are of the view that a legally-assisted model would be the preferred model for FDR of property matters. Legal advice will be important for parties to engage in mediation informed by the legislative provisions on property and the likely outcome in a property dispute if the matter were to be decided by the family law courts. We note that reforms to the legislative provisions governing property, including the introduction of a presumption into the legislation (as discussed in our response to Question 17), would also assist parties to negotiate at FDR, better informed about the possible outcome if the matter were to be decided by the family law courts.

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

We now know much more about the prevalence and impact of family violence in our community and its intersection with the family law system than at the beginning of the new family law system in 1975.

NLA data shows that family violence is a factor in most legally-aided cases before the family law courts; with around 79 percent of all legally-aided family law matters across the country in 2014–15 involving family violence.[[68]](#footnote-68) According to AIFS, 50 percent of all matters before the Family Court of Australia and 70 percent of matters before the Federal Circuit Court involve allegations of family violence.[[69]](#footnote-69)

In 2016, the Federal Circuit Court acknowledged the ongoing community concern about the court’s response to family violence and that the work of the courts could be enhanced and build on initial steps taken by the court in recent years.[[70]](#footnote-70) The community no longer accepts family law court processes that fall short of affording the necessary processes to support victim survivors of family violence to participate in family law court proceedings.

Our response to Question 15 proposes in detail two major changes that we strongly recommend should be introduced to make sure the family law courts are better responding to family violence:

* The introduction of an early determination (finding of fact) about family violence; and
* The introduction of a legislative ban on direct cross-examination in family violence situations.

Those changes are part of a package of reforms that we believe are necessary to improve the family law system’s response to family violence. Other measures include:

* Strengthening the definition of family violence in the *Family Law Act* (see our response to Question 15);
* Expanding access to safe, legally-assisted FDR (see our response to Question 24);
* Safer consent orders (see our response to Question 14);
* Identification of non-legal issues and a holistic response to family law disputes informed by early issue spotting (see our response to Question 31);
* Risk assessment and case management processes at court (see below);
* Extension of FASS to all court locations (see our response to Question 31);
* Legislative reform to take into account family violence in the division of property pools (see our response to Question 17);
* The introduction of a low-cost option for resolving small property pool disputes (see our response to Question 17);
* Changes to address systems abuse through contravention applications (see our response to Question 25);
* Implementation of the ‘one court’ principle to promote safety and lessen the burden on victim survivors who currently manage their matters across multiple jurisdictions with very different policy and legislative frameworks (see our response to Question 32);
* Improvement to information sharing that prioritises safety (see our response to Question 33);
* Training on family violence identification and response to all professionals in the family law system including judicial officers (see our response to Questions 41 and 42); and
* Physical changes to the court environment (see our response to Question 12) to improve safety at court.

### Risk assessment and a case management function at the family law courts

The Royal Commission into Family Violence emphasised that all parts of the service system have a role to play in identifying and knowing how to respond to family violence, including the family law system. The Royal Commission found risk assessment and management mechanisms ‘help[ed] practitioners identify whether a person might be at risk of experiencing family violence, determine the risk of the violence recurring or escalating, and initiate a tailored response aimed at reducing or mitigating that risk’.[[71]](#footnote-71)

We articulate in our response to Question 31 the need for a system of triage at the point of intake, with a single point of entry so that all applications to the family law courts are appropriately case-managed according to their complexity and level of risk.

VLA sees risk assessment as essential to this process operating effectively and determining the safety risk of families in the family law system so that the family law courts are appropriately responding to need. Families should be triaged through to a more thorough risk assessment if the initial assessment of an application deems family violence to be a risk factor. Children should have their own risk assessments that prioritises their safety and needs and provides a specialised, tailored response.

Ongoing risk assessment and safety planning is critical to effective risk management that recognises the dynamic nature of risk. Safety planning should involve referrals to non-legal support services as well as safety procedures for victim survivors at all stages of a family law proceeding including FDR, at the family law courts and at non-legal support services such as contact centres.

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

In 2016-17, VLA’s FDRS delivered 1,044 conferences. A history or risk of family violence was identified during the intake screening process for 88 percent of cases.

VLA’s legally-assisted FDR supported by a case management service model enables parents screened out of non-legally assisted FDR to resolve parenting disputes without recourse to court. This includes parents who have been victims of family violence or where other risk factors have been identified but cannot be mitigated by a non-legally assisted FDR service provider.

Our experience is that in matters involving family violence, a well-supported mediation process, with specialist lawyers and mediators, can be a positive experience for all parties, including victim survivors of family violence, and can result in an agreement about children that is safe and in the children’s best interests.

**Case study**

VLA's FDRS first met the mother when she was just beginning to come to terms with the family violence she had experienced from her former partner at the time of engaging with FDRS with the assistance of family violence support services.

The father acknowledged family violence had occurred in the past but would not recognise the possibility of its ongoing impact on the mother or their child.

To support the mother to engage in the FDRS process, the case manager provided her with thorough information about the process and what would be involved. The FDRS case manager supported her to engage in counselling and have her family violence worker present for the mediation conference. FDRS developed and implemented an extensive safety plan for the conference, with staggered arrival times and separate rooms to enable a shuttle conference to take place.

The chairperson assessed the mother’s willingness to initially try a joint conference with the father in the same room at the first mediation. With the support worker in attendance with mother, she agreed to try a joint conference initially. They began the joint conference and father laughed at some of mother’s comments. The mediator immediately terminated the joint conference. They subsequently participated in a productive and safe shuttle conference. The mother and the support worker agreed half way through that she could continue on without the support worker given she was doing so well. The mother reported that she felt empowered by the chairperson’s response to the father’s comments and that it was the first time she had felt her voice was being heard in the process.

The matter settled fully, with the option of a second mediation if required.

Where this type of legally supported mediation is not an option, matters involving family violence might be deemed ‘unsafe’ for mediation and families with complex needs and safety risks are left with litigation as their only option.

We support, therefore, increased access to and resourcing of legally-assisted FDR so that safe mediation options are available in more matters; including in regional, rural and remote areas which face significant access to justice issues due to a lack of court registries, infrequent or no court sittings.

FDRS case management and conferencing procedures are well regarded and can inform any model of legally-assisted FDR that is expanded and funded. There are three key components to the VLA FDRS model:

* Legal representation of parties;
* Individual case management for clients; and
* Experienced chairpersons facilitating conferences.

These components enable VLA to conduct FDR in circumstances where other FDR services might determine it inappropriate to proceed. Each of these components, in our view, are key to providing an FDR service that is accessible, safe and suitable for disputes including disputes involving family violence or abuse. Each will be considered in turn.

### Legally-assisted

FDRS provides a legally-assisted model of FDR. At least one party is legally aided throughout the dispute resolution process and all parties are encouraged to be legally represented. In cases where an invited party is ineligible for a grant of aid and is unable to afford a private lawyer, FDRS may arrange a lawyer from the Family Law Legal Service[[72]](#footnote-72) to represent that party. Legal representation in FDR helps address power imbalances for those in dispute and gives parents knowledge about the law and likely court outcomes so that they can make decisions that are in the best interests of their children.

Case management, assessment and intake

From VLA’s perspective, a primary purpose of the FDR assessment process is to determine the suitability of FDR as a tool for resolving a particular matter. This is quite different from eliciting information for use in actually determining the matter.

FDRS case managers conduct a screening interview with all parties to a dispute and use the information gathered to complete a risk assessment to determine whether it is appropriate for a conference to take place. In making an assessment, the case manager considers the matters set out in regulation 25(2) of the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008 (Cth),* including any history of family violence and the risk that a child may suffer abuse.

In the VLA FDRS assessment process, parties are encouraged to raise concerns about their emotional or physical safety with their case manager. Where risks are identified, the information obtained determines the appropriateness of progressing with FDR and if so, the safety planning required to enable FDR to progress safely.

Safety planning occurs when the case manager identifies potential risk issues for a client during or after a conference or identifies that a party may be at risk if their matter is assessed as unsuitable for an FDRS conference. The case manager will work with the affected party to provide information and resources so that the party can make a decision about their physical and emotional safety. The case manager will also provide relevant referrals to external organisations and develop a practical plan that the affected party can implement should they feel their safety is at risk.

As part of safety planning, the case manager will determine a suitable conference. For example, where risk issues are identified, but the matter is still suitable to proceed, a shuttle conference can be arranged. This is where parties do not have to see or speak to the other person directly. The FDR chairperson speaks to each party and their lawyer separately. Shuttle conferences can occur in the same building where each of the parties have a safe room in a separate area, or they can occur over the telephone.

Other measures can also be implemented to ensure the safety of the parties arriving and leaving the conference venue. For example, the case manager, in consultation with the affected person, can arrange separate arrival and departure times or for the party to be escorted to and from the conference by their lawyer or a trusted third party.

Experienced chairpersons

Chairpersons at VLA’s FDRS are qualified and well-trained. They are experienced at delivering child-centred mediation and working towards future focused resolutions. This is assisted by preparatory work that is child-centred, with the chairpersons and case managers working collaboratively to prepare a mediation.

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

### Contravention applications

Contravention applications are discussed in our response to Question 20. We note here that prompter scrutiny of contravention applications would better promote safety, particularly where the contravention application process is being misused and amounts to a form of abuse, including continued perpetration of family violence (for example, when a parent who has used violence is appearing at the wrong times for contact in order to distress the other parent).

In other instances, the application itself is brought as an attempt to exercise abusive control. This would include, for example, a contravention application by a parent who has used family violence because the victim survivor parent has dropped a child off 10 minutes late for contact.

A variation of the original family law order may be required to prevent further breaches; for example, if the perpetrator parent is abusing the right to phone contact with the child, the order may need to be amended to limit their contact to email, which is easier for the other parent to keep safe.

Our experience is that both types of contravention applications (those seeking to prevent abuse and those which are themselves abuse) have to be dealt with similarly by the court until the court has determined whether the application has merit. In our view, a triage process could help greatly to promptly assess applications to determine the appropriate response, so that meritorious applications can proceed promptly while abusive applications can be terminated promptly.

If the latter, it is also appropriate that the court is empowered to hold parents accountable for contravening the order without a reasonable excuse and to make other orders requiring the parent to comply with the court order.

A triage process might include a leave process where parties can apply for leave to bring a contravention/breach application and assessment by a registrar at first instance.

### Vexatious applications

The court needs improved processes to dismiss vexatious applications. We note that the *Family Law Amendment (Family Violence and Other Measures) Bill 2017* would strengthen and codify the power of the family law courts to dismiss unmeritorious cases and proceedings that are frivolous, vexatious or an abuse of process. VLA supports these changes and the NLA submission on the exposure draft Bill.[[73]](#footnote-73)

We welcome the opportunity presented by this Inquiry to consider the adequacy of the proposed changes, and any further enhancements that could be made to address, for example, the impact of multiple vexatious applications in different jurisdictions in addition the primary family law dispute. One option that could be considered is the strengthening of powers to make costs orders to respond to instances of misuse of court processes.

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

Please see our response to Questions 22 and 24.

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

VLA does not have practice experience in this area to input into the Commission’s work on the use of arbitration in family disputes. We support NLA’s response to this question which is informed, in part, by the experience of Legal Aid Queensland which provides an arbitration service in property matters.

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

VLA does not have practice experience in this area to input into the Commission’s work on online dispute resolution processes. We support NLA’s response to this question which is informed, in part, by the experience of the Legal Services Commission of South Australia which is currently trialling an online dispute resolution process. We note also our more general view, that there are opportunities to improve and enhance the use of online tools and other technology solutions to promote improved access to the family law system.

## Questions 29 and 30: Is there scope for problem solving decision-making processes to be developed within the family law system to help manage risk to children in families with complex needs? How could this be done?

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

VLA welcomes the Commission’s consideration of whether the adversarial court system offers the best process for supporting the safety of families and resolving matters in the best interests of children and the opportunities for less adversarial resolution of parenting and property disputes.

VLA notes the tension in the family law system which requires the application of a public law principle (best interests of the child) in a private law jurisdiction that resolves disputes between two private parties. At present the system can struggle to address this tension and make decisions based on the best available evidence and in the best interests of the child, including where a child is at risk of harm due to the conduct of one or both parents.

For this reason, VLA supports consideration by the Commission of ways to strengthen decision-making by introducing problem-solving processes and family-inclusive decision-making processes. From the experience in Victoria, the Neighbourhood Justice Centre is an example of a more inquisitorial approach that has achieved positive results. We support consideration of similar approaches by the Commission.

We also refer the Commission to other sections in our submission for recommendations for reform that support greater problem solving and family-inclusive decision-making processes, including recommendations to:

* Embed a child-centred approach in the family law system (see our response to Question 2);
* Improve child-inclusive processes to support child-centred decision making by parents at FDR and judicial decision-making at court informed by the best available information (see our response to Questions 34, 35 and 36);
* Expand access to legally-assisted FDR for complex cases (see our response to Question 21 and 24);
* Promote greater use of legally-assisted FDR at all stages of disputes so that even if some issues in matters require court determination, others can be resolved at FDR through a referral back to the FDR service and the convening of a further mediation to resolve the outstanding issues in dispute (see our response to Question 21);
* Introduce a FDR mechanism for property matters where the disclosure requirements can be met (see our response to Questions 21 and 22);
* Embed risk assessment and introduce case management of complex cases at court (see our response to Questions 24 and 31); and
* Improve information sharing and collaboration between jurisdictions so the best available evidence is before a judicial officer (see our response to Question 33).

We note strategies also being trialled or developed by other LACs that may assist the Commission’s thinking about enhanced problem-solving approaches. These are outlined in the NLA submission.

# Integration and collaboration

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

As mentioned, the complexity facing families within the family law system has been steadily increasing. While most disputes resolve before families enter the formal family law system, the cases that proceed to the family law courts are the most complex, often involving multiple risk factors including family violence, child abuse, mental illness, substance abuse and/or cognitive impairment issues, and are less likely to resolve without court decisions.

### Early identification of legal and non-legal needs

VLA’s practice experience demonstrates how families with complex needs may:

* Require support to identify and engage with relevant support services to address non-legal issues impacting on their family law matter; or
* Be unaware that the issues they are experiencing involve family law (or related legal needs) or could be resolved through a family law response.

Early issue spotting by community service organisations

Early identification of family law legal issues by community workers and subsequent provision of legal assistance at the early stage of a dispute would help many clients and their families to resolve their matter without the need for protracted legal proceedings.

VLA’s own Family Law Legal Aid Services Review in 2015 recommended that we do more to support community workers screen for family law issues and refer clients to legal advice and more generally review current referral pathways for legal help to improve access to family law services and improve early identification of legal and non-legal issues.

We are currently considering whether a web-based tool could support these improvements, rather than the more traditional model of a paper-based checklist or tool with heavy associated requirements to provide ongoing training to non-legal workers on its use. An online tool could be used by community workers and members of the public to screen for and identify family law, family violence and related legal matters (such as child protection) as well as non-legal issues (such as child abuse, alcohol or other drug use and mental health issues) and triage such issues by providing instant information and referrals.

VLA encourages the Commission to consider how greater use of technology-based tools could improve collaboration and referral processes to support families with complex needs to improve early identification of family law issues and the provision of timely assistance.

Early issue spotting of non-legal needs impacting family law matters

It is important for all professionals in the family law system to be aware of and able to spot non-legal issues parents may be experiencing (including family violence, mental health issues, or drug and alcohol problems) and refer appropriately, so the system can comprehensively respond to families with complex needs. This requires relevant training for all professionals in the family law system.

One way that VLA sees issue spotting currently occur is through our case-managed, legally-assisted FDRS. During this process, FDRS case managers conduct thorough screening interviews to assess suitability for FDR and identify legal and non-legal needs. FDRS case managers work with other services to link families into relevant supports and address underlying issues clients may be experiencing.

**Case study**

FDRS assisted a family with very complex legal and non-legal needs. The mother, father and child have physical and cognitive disabilities that require significant engagement with support services. The child lives with a grandparent. The dispute related to both the mother and the father’s (separate) contact with the child. There was a history of family violence and DHHS involvement.

It was very difficult for the case manager and chairperson to communicate with the family members throughout the process due to their special needs. Ordinarily, if the FDRS case manager cannot contact a party after a certain amount of time and effort, the file is closed. However, in this case the case manager was able to liaise extensively with support workers (who often had regular contact with the clients). This assisted FDRS to obtain information about the mother and father’s willingness to participate in mediation, updates about the arrangements and issues in dispute, concerns or safety issues (to inform the conference format), and practical logistics for the conference.

All family members required support and encouragement to engage and participate effectively in the FDR process. Mediation arrangements were adapted to accommodate the parties’ special needs, including the time and location of the mediation and method of participating. FDRS held multiple conferences with the family to try and reach a suitable outcome.

Without the support workers and effort by the lawyers involve in this case, this matter would probably not have gone to mediation. The support workers facilitated the mother’s attendance by telephone and her attendance at the lawyer’s office. They also lent support to their clients outside the legal framework – particularly important for the father, as his intellectual disability meant he struggled to understand the dispute and the legal issues. FDRS worked closely with the support workers in this matter, with multiple phone calls and emails back-and-forth.

Another example of how issue spotting occurs in the family law system is through the FASS model. FASS is delivered through LACs across Australia in selected family law court locations and delivered by VLA at the Melbourne and Dandenong registries of the Federal Circuit Court and Family Court. The service provides specialist duty lawyers (building on the existing duty lawyer service provided by LACs and community legal centres) and family violence support workers at court.

FASS helps people who have family law issues and a history or risk of family violence. The VLA Information Referral Officer links parties to the duty lawyer for assistance with their legal problem and makes referrals to relevant support workers and services co-located at the court to address non-legal needs.[[74]](#footnote-74)

**Client story**

Kate sought help after her ex-partner, the father of their newborn baby, had refused to return the baby to Kate for a number of days following an incident of family violence, in which Kate had been verbally abused and threatened by the father.

Kate was referred to FASS from a VLA regional office that did not have capacity to assist with the urgent application required in this matter. Kate attended FASS in the evening seeking a recover order for her newborn child.

Kate alleged that the father was often affected by drugs and had never spent significant periods of time looking after the child. The FASS duty lawyer completed a recover order application for Kate, which was filed that day, but the application was listed for the following week.

Kate also saw the family violence support worker at FASS after seeing the duty lawyer. The support worker provided the duty lawyer with additional information that had not been provided in the duty lawyer’s initial interview with Kate, including details of the significant family violence throughout the relationship.

Due to the significant family violence alleged and the age of the child, the FASS duty lawyer and the family violence support worker identified that the matter was urgent and could not wait a week to be heard. The additional information assisted with an application for review of the decision to list the matter the following week. The matter was re-listed for the following day.

The FASS duty lawyer arranged for Kate to be represented at Court the following day, and the judge suggested that the parties negotiate a voluntary return of the child to the mother that afternoon. The child was returned. The family violence support worker also referred Kate to her local family violence outreach provider with Kate’s consent, and a support worker from that local service was allocated to Kate within one week of the referral.

Early results from the pilot suggest that access to non-legal and legal assistance has expanded, and clients are being assisted with family violence legal needs and linked in to appropriate services to address non-legal needs. Subject to positive results from the pilot evaluation currently underway, VLA recommends expansion of FASS to all family law courts to assist in further improving integration of family law and family violence legal systems and facilitating access to non-legal support services for both parents and for children. In a full roll out, a FASS equivalent service should be available at all regional circuit court locations.

FASS is provided through one-off duty lawyer services at the court and therefore does not provide ongoing assistance and representation (although referrals can be made for ongoing assistance). Partner organisations in FASS have highlighted the benefits of ongoing assistance to more vulnerable clients. The limited service offering of the FASS model could be complemented by introducing a more intensive case management service within the family law courts to provide ongoing support for the most complex or vulnerable clients.

VLA recommends the Commission consider a comprehensive response to identifying non-legal issues impacting on family law matters informed by current good practice and identification of current gaps.

### Introducing a court-based case management approach

Extensive consultation with our family lawyers suggests that the absence of a dedicated case management role within the court means that families are not accessing relevant support services, there is a lack of coordinated response for children and families, and other roles in the system are taking on case management functions without the appropriate training or resources (such as Independent Children’s Lawyers).

Our experience suggests that a court-based case management[[75]](#footnote-75) model would be the most appropriate model for the court to implement to improve system navigation and engagement, timeliness of dispute resolution, and access to relevant support services.

If the court supports parents to address both legal and non-legal issues, in our experience a family is more likely to resolve their issues, address safety concerns for children, and create lasting and meaningful change in the lives of the children. There is also reduced likelihood that the legal dispute becomes protracted. This recommendation is central to VLA’s conceptualisation of a more efficient and effective family law system.

A case management model would assist families who require additional support to identify and engage with relevant services throughout the life of their family law dispute. The intensity of the service offering in a case management model would need to be proportionate to the level of need and vulnerability, so that the clients with the most complex issues receive the most intense level of service. A key focus of the case management approach also needs to be on timeliness and facilitating early information gathering to support effective judicial decision-making. To improve timeliness, the court could initiate case management for families with complex needs at the earliest stage of the court process.

In VLA’s view, a case management model should sit within the court. The court is a touch point for everyone in the formal family law system, regardless of whether they are legally aided, privately represented or self-represented. It is the role of the system to maximise the opportunity that the court as a touch point represents to ensure a holistic response for children and families with complex needs.

As recommended by the House of Representatives Standing Committee on Social Policy and Legal Affairs into ‘A better family law system to support and protect those affected by family violence’,[[76]](#footnote-76) a case management model that supports the most vulnerable families with complex needs would need to be supplemented by a broader triaging framework within the courts. The family law system should provide **‘**a single point of entry to the federal family law courts so that applications, depending on the type of application and its complexity, are appropriately triaged, and actively case managed to their resolution in an expedited time-frame’.[[77]](#footnote-77)

This broader framework would ensure that all applications to the family law courts go through a screening process so their specific legal and non-legal needs are responded to, including immediate safety planning and access to appropriate support services or other court-based services such as FASS.

Through this, families identified as having more complex needs could undergo a thorough assessment of their families’ needs to:

* Facilitate early ‘issue spotting’ that identifies the party’s legal and non-legal needs and relevant support services required, including interpreter requirements;
* As a priority, organise a risk assessment; risk assessments at court, including for children, are essential to ensure responsiveness to potential changes in risk arising from the transition to court proceedings, and assist with referrals to non-legal supports services (for further discussion on risk assessment see response to Question 23);
* Triage clients appropriately depending on the level of need and vulnerability, noting that many of these families will have complex needs;
* Implement safety planning if required; and
* Identify relevant information required to assist with judicial decision-making, including organising subpoenas and expert reports early, informed by the issue spotting and risk assessment.

Families who require one-off supports would be able to access a lower level of case management service or access other appropriate supports such as FASS. Families who require more intensive support to engage in the court process and with additional services would be able to access a higher level of case management support. This could include:

* Making or organising ongoing risk assessments in recognition of the dynamic nature of risk;
* Coordinating subpoenas and other appropriate documentation;
* Coordinating a multidisciplinary response to meet the needs of families, including supporting ongoing engagement with non-legal supports and having case coordination meetings;
* Implementing safety plans where plans envisage steps being taken by the court for each hearing date; and
* Providing ongoing case management to ensure matters are ready for the next hearing date, including more and better coordination with family dispute resolution services where a matter can return to FDR for an additional attempt at FDR.

VLA considers a case management approach the most appropriate for the family law system due to the range and complexity of issues facing families whose matters end up in court.

The lessons learnt from integrated models adopted in other jurisdictions could inform the Commission’s development of an approach to case management to implement in the family law system. One model in Victoria that the Commission could look at closely is the pilot Family Drug Treatment Court (FDTC) at the Broadmeadows Children’s Court.[[78]](#footnote-78) The FDTC works with parents seeking to have their children returned to their care from out-of-home-care following intervention by child protection practitioners due to the impact on the children of the parent’s drug use. In the FDTC matters follow a 12-month program chaired by a Children’s Court magistrate under which the matter returns regularly to court and the parent is supported by a multi-disciplinary team including drug and alcohol clinicians and a dedicated social worker, who work to secure support services for the parents including drug and alcohol counselling, housing and parenting programs. Parents also undergo regular drug testing. The goal is to reunify children with their parent if the parent successfully meet the goals in their individual Family Recovery Plan established by the FDTC.

Other models that may also be of interest from the Victorian context include: The Neighbourhood Justice Centre[[79]](#footnote-79) and the Family Violence Court Division at the Heidelberg and Ballarat Magistrates’ Courts of Victoria.[[80]](#footnote-80)

In exploring options for the introduction of an intensive case management approach in the family law system and locating relevant support services within the court precinct, we encourage the Commission to consider a model that is adaptable to regional areas where family law court registries may be less of a touch point for parties in family law matters to ensure consistent access for clients regardless of location.

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

VLA data shows that there is a small but significant number of clients with problems that cross over the Commonwealth family law, Victorian child protection and Victorian family violence jurisdictions.[[81]](#footnote-81) These clients may either be involved in concurrent court proceedings or sequential court proceedings in the separate jurisdictions.

The legal system remains confusing for families with issues that cut across jurisdictions. There are different processes and terminology in each of the jurisdictions and a risk of conflicting orders being made.[[82]](#footnote-82) Better integration of family court, child protection and family violence jurisdictions will promote safety and lessen the burden on victims who currently manage their matters across multiple jurisdictions with very different policy and legislative frameworks.

VLA actively participated in the work of the Family Law Council on this issue and supported the Council’s findings, and we are of the view that these recommendations should be central to the Commission’s approach to this issue.

### Implementing the ‘one court principle’

The Family Law Council recommended adoption of the ‘one court principle’ to improve the experience of families with legal issues that cross over multiple state and federal jurisdictions. The principle requires that:

‘At the earliest possible point in managing a case, the decision should be taken whether a matter proceeds under state or territory child welfare law or under the *Family Law Act*. Once that decision has been taken, in all but the most exceptional circumstances, the matter should proceed in the chosen court system’.[[83]](#footnote-83)

VLA supports the one court principle and understands several recommendations relating to the ‘one court principle’ are currently being progressed by the Council of Attorneys-General Family Violence Working Group; and Commonwealth and State Governments, in their respective jurisdictions, are introducing changes.

This is welcomed. We recommend, though, that the Commission consider mapping the work that has been undertaken to date, or is on foot, to identify any outstanding gaps following the Council’s comprehensive work on the issue. This will be important for ensuring this inquiry is not a missed opportunity to make any further recommendations that give full effect to the one court principle as part of comprehensive package of family law system reform.

For example, there would be benefit in the Commission considering the application of the one court principle when proceedings are adjourned in the family law courts for the state child protection agency (the Department of Health and Human Services (DHHS) in Victoria, for example) to investigate. In our experience, multiple adjournments are often required in the family law proceeding because DHHS investigations are not conducted within the period of the adjournment. We recognise this is due, in part, to the resource constrained environment in which the DHHS is operating. Nevertheless, delay causes frustration for parents and multiple adjournments result in unnecessary costs for the court and VLA (where one or both parents is legally aided) or the parties if privately represented.

In cases where a Notice of Risk, provided by sections 67Z and 67ZA of the Act, notifies the DHHS of a protective concern that has been disclosed during the proceedings and shares information about the protective concerns with the DHHS, decision-making by the family law courts can be strengthened by access to DHHS information about their investigation following the initial Notice of Risk (in the absence of family law court investigative powers).

There is lack of clarity, however, on the process followed by the DHHS once a Notice of Risk is submitted. There would be benefit in establishing a consistent and structured approach, for example, it could be a requirement that the DHHS provide a response to the family law courts following a Notice of Risk by a specific date post-notification.

Our proposed case management model could minimise delays if the case management function includes collaboration and coordination with the DHHS to address protective concerns in a timely way, support parents to navigate both systems, to access non-legal support services, to facilitate DHHS’ appearance at the family law court return date to present to the court the findings of its investigation, and collate information for the family law court to consider and address potential protective concerns through interim family law orders rather than the DHHS initiating separate proceedings in the Children’s Court of Victoria.

We also note the identification of the ‘resource and time capacity implications for state and territory courts of taking on additional family law work’ in the Issues Paper. The *Family Law Amendment (Family Violence and Other Measures) Bill 2017,* introduced into the Commonwealth Parliament in December 2017, is an example of this issue. The Bill clarifies the jurisdiction of the Children’s Court of Victoria and expands the jurisdiction of the Magistrates’ Court of Victoria. VLA welcomes these proposed amendments but our submissions on the Bill have emphasised the need to resource state and territory courts to respond to an increase in family law workload enabled by the Bill.[[84]](#footnote-84) We note the finding of the Senate Standing Committee on Legal and Constitutional Affairs that the Commonwealth Government intends to continue working with the states and territories to monitor the impacts of any increased burdens, should the bill be passed.[[85]](#footnote-85)

VLA agrees that there will be resource and time capacity implications associated with a modern family law system that sees state and territory courts undertaking more family law decision-making. We encourage the Commission to consider the resource requirements of reforms that give effect to the one court principle, including the resourcing by the Commonwealth of state and territory courts to undertake family law work consistent with the one court principle.[[86]](#footnote-86)

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

VLA welcomes the Commission’s focus on improving collaboration and information sharing between state and territory and federal courts and agrees with the summary of information sharing challenges and possible solutions identified in the Issues Paper.

In addition, we emphasise the potential benefit of enhanced information sharing to reduce the duplication of expert reports across jurisdictions. This has positive resource implications for the courts and can also reduce ongoing intervention into the family if appropriate. Duplication can lead to trauma for parents or children from re-telling their story and can exacerbate delays in finalising care arrangements, which creates anxiety and frustration for families.

VLA welcomes the work of the Council of Attorneys-General Family Violence Working Group to improve information sharing between jurisdictions, including the development of a national information-sharing regime and the provision of joint training for judicial officers across the family law and state and territory systems. Effective information sharing assists courts to make child-centred orders informed by all the relevant and available information. VLA supports enhanced information sharing between the courts, underpinned by principles of safety, to develop better co-ordinated responses for vulnerable children and families.

For information sharing to be appropriate, effective and contribute to more informed decision-making, VLA considers three factors to be important:

* Principles underpinning information sharing;
* Procedural and legislative change; and
* Knowledge and skills to understand and use information being shared.

### Principles for sharing

VLA considers it important to develop principles to underpin information sharing between the state and territory courts and the family law system. These would reinforce a culture of sharing that increases safety and engages families in appropriate supports.

Possible principles could include:

* Transparency: Clients are informed of how their information may be shared and consent is sought prior to the sharing of their information unless there is an immediate threat to safety;
* Safety: Safety is prioritised when sharing information. For example, sharing family violence related information with, and about, correctly identified victim survivors and perpetrators, is critical. The Victorian Royal Commission into Family Violence emphasised the serious consequences for safety that can follow if information is shared wrongfully with a perpetrator;[[87]](#footnote-87)
* Child-centred: Information sharing prioritises the needs and interests of children. This means information is shared to promote the safety, health and development, and cultural connection of children, and supports the involvement of children and young people in decisions that affect them
* Purpose: Information is shared for a specific reason or purpose;
* Relevance: The information shared is appropriate and pertinent to the case.[[88]](#footnote-88) For example, the fact of DHHS involvement in a family, the status of that involvement and independent evidence of any of the issues underlying DHHS’ involvement, would be relevant to the making of family law orders, but VLA would caution against the sharing of DHHS reports such as investigation or disposition reports prepared by child protection case workers and recorded on DHHS’ central information system as they comprise untested opinion. These are not ‘expert reports’, which we support being shared; and
* Collaborative: Information is shared in a coordinated way.

### Procedural and legislative change to support sharing of information between jurisdictions

There would be benefit in family law court rules clarifying when expert reports can be shared between jurisdictions. Expert reports prepared during child protection proceedings could also assist decision-making in subsequent family law court proceedings if a streamlined procedure was established for the sharing of such materials.

In Victoria this would include, for example, Children’s Court Clinic Reports which play an important role in ensuring the voice of children and young people are heard in proceedings. The sharing of these reports would enable the child’s voice to be heard in the family law court proceedings without requiring the child to re-tell their story. Currently in Victoria, only parties to the Children’s Court proceeding are allowed access to the reports and distribution of a report to an individual, or his or her lawyer, who is not a party to the proceeding will attract a penalty under the *Children, Youth and Families Act 2005* (Vic)*.* Sharing this information would require amendments to legislation at both the Commonwealth and state and territory level.

The co-located DHHS Liaison Officers at the Melbourne and Dandenong registries of the family law courts in Victoria assist with the sharing of information between the family law courts and child protection authorities. The liaison officers are also available to provide information to lawyers as to when the DHHS has involvement with a family or child. There are limitations to the current model, however, that would need addressing. Resources do not permit liaison officers to be co-located at the registry each day that the court sits. Furthermore, family law matters are heard in regional areas without access to this information point. Another important limitation in the current approach is reliance on lawyers or the court seeking information from the co-located DHHS Liaison Officer rather than points in a legal proceeding – such as DHHS involvement in the family or a new court application – triggering the sharing of information.

### Knowledge and skills to understand information being shared

If steps are taken to improve the sharing of reports between the family law courts and state and territory child protection and family violence courts, we would strongly recommend the provision of training to those working within the jurisdictions on the types of reports prepared in each jurisdiction and how they are used within the home jurisdiction to inform decision-making about unacceptable risk and best interests.

This knowledge about context is essential to informing the appropriate use of reports in decision-making. For example, as noted above DHHS reports in Victoria regularly include untested or unproven allegations and may be the subject of evidence contests in the Children’s Court of Victoria before final decisions of fact are made in a matter before the court.

# Children’s experiences and perspectives

## Questions 34, 35 and 36: How can children’s experiences of participation in court processes be improved?

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

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

VLA recognises the need for the family law system to be child-centred at each stage of the family law process, prioritising the needs and best interests of children. We support efforts to improve the participation of children and amplification of their views in the family law system, where appropriate. The United Nations Convention on the Rights of the Child requires the child to be provided with the opportunity to be heard in any judicial or administrative proceedings affecting the child either directly or through a representative.[[89]](#footnote-89)

As acknowledged in the Issues Paper, there are two main ways that the family law courts currently receive information on children’s views: through the appointment of an ICL and/or a report by a family consultant. Both are important processes, but they do not provide a direct path for the child to express a view in the parenting dispute.

We recommend the Commission review existing mechanisms for the court to hear children’s views and consider more direct processes for children to voice their experiences and opinion in parenting disputes once a matter is at court. The approach the family law system takes with respect to the participation of children should be informed by the social science research, as well as the increasing body of international law on the rights of the child; and we would encourage the Commission to look to this research and practices in other jurisdictions where they have been evaluated.

Regardless of the approach adopted, children's participation in family law court proceedings requires ‘flexibility to ensure that the level and kind of participation is suitable for the needs and capacities of the individual child’.[[90]](#footnote-90) This includes ensuring judicial discretion to make decisions about when a child’s participation may not be appropriate or safe.

Our response to this question focuses on four key ways children’s views and participation can be supported in court:

* Child-inclusive practices;
* Clarifying and strengthening ICL appointments;
* Judicial officers meeting with children; and
* Embedding the voice of the child in section 11F memorandums and Family Reports.

### Child-inclusive practice

The experience of VLA’s ICLs is informative to our discussion on child-inclusive practices. In 2016-17, 1,345 grants of assistance were made for the appointment of an ICL. VLA’s practice experience in the child protection jurisdiction also provides guidance to the safeguards to consider when developing a child-inclusive practice in the family law system. In 2016-17, VLA provided 8,206 grants of assistance for child protection matters, 3,207 of these grants were provided to clients under the age of 18. In the child protection jurisdiction, lawyers act on direct instruction for children 10 years and over. Lawyers explain to children the difference between participation, which enables their voice to be heard in the process, and their view determining the outcome. The skills required of the lawyer in this jurisdiction include to represent the child and ensure the child’s wishes are being communicated to the court without exposing the child to damaging allegations.

While we are not suggesting that a direct instruction model for children at the centre of parenting disputes should be adopted in the family law system, there are relevant lessons to be drawn from the work in the child protection jurisdiction as well as the experience of our ICLs and our Kids Talk program at FDRS (both discussed below) to inform changes that support a child-inclusive family law system including:

* The importance of providing, and making clear to, children that they have an opportunity to be involved in the process and to express their wishes to the extent that they wish to do so;
* Ensuring that where a child expresses a wish they understand that this wish will be taken into account, but that the responsibility to make the decision does not sit with the child and that the decision of their parents (at FDR) or the judicial officer (at Court) may not always align with the child’s wishes or preference;
* A strict age limit on when a child can participate in the process adds rigidity into the system. Processes that allow for all children to participate where they wish to do so and where it is safe and appropriate should be facilitated. The process for participation would be informed, in part, by the age and stage and wishes of the child;
* Children should only engage in the process if they wish to do so;
* Practitioners in the jurisdiction that meet with the child must be adequately trained in working with children and equipped with the skills to facilitate the engagement of children in the process; and
* It is important to be clear about the purpose of the child’s participation and how their views will be considered in the process, and that this is communicated clearly to the child to avoid setting unrealistic expectations and systems abuse.

### ICL appointments

*Re K* factors

An ICL appointment can be made in a family law court proceeding upon application by a party or on the court’s own initiative and in cases where the court considers it to be in the best interests of the child to do so, pursuant to section 68L of the Act.

In deciding whether to appoint an ICL, the court will consider factors provided in the 1994 decision of *Re K*.[[91]](#footnote-91)

VLA is of the view that the ICL appointment factors require renewed consideration, including whether additional factors should be considered in the appointment of an ICL, in line with the social science research relating to child development. The *Re K* factors have not kept up to date with increased understanding of changing social problems, the diverse needs of the broad range of families in the family law system, the complexity of issues facing families, or trauma-informed practice. They do not, for example, refer to family violence and its impact on children.

In considering the scenarios in which it would be beneficial for judicial decision-making to be assisted by an ICL, we also suggest that the Commission consider codifying the guidance on ICL appointments in the legislation.

Adequate resourcing would be needed to then meet the number of ICL appointments under the revised framework. We note the NLA submission here and comments on the limited funding for ICLs at present, which requires some LACs to prioritise funding for ICL grants to certain matter types.

Strengthening the purpose and functions of the ICL

In cases where the court appoints an ICL, the ICL is an independent representative and forms a view on the child’s best interests supported by admissible evidence. In doing so, ICLs assist judicial officers in family law proceedings to apply a public law principle in a private law jurisdiction: to make decisions based on the best available evidence and in the child’s best interests.

*Clarifying the role*

In the absence of a dedicated case management function at the family law courts, and exacerbated by the increasing complexity of family law matters requiring judicial determination and the number of self-represented litigants in the family law courts, VLA has observed that the role of the ICL has expanded to include case management duties, such as coordinating support services, expert reports, expert witnesses to give evidence and other key documents.

We recommend that the Commission look at how the role of the ICL has expanded and review the purpose of the ICL in the modern family law system.

For example, case management is an important function within the family law system. Assisting judicial officers to make decisions in the best interests of children where parents are self-represented is also important. It is a question, though, of which roles in the system are best placed to provide each these functions. As we have recommended in our response to Question 31, a case management function that sits within the court would holistically respond to the needs of a family rather than being fragmented across roles, structures and processes in the court system. We would recommend that the role of the ICL focus on being an independent representative of the child’s best interests to assist judicial decision-making in appropriate situations.

*Scoping the functions*

We do not have a concluded view on the appropriate scope of the functions of the ICL role, but we see benefit in the Commission considering the functions of a counsel-assisting model, used in other jurisdictions, and how these functions, incorporated into the ICL role, could address limitations in the court’s lack of investigative powers.

This would also support a shift to a more inquisitorial family law model in appropriate situations, where the counsel-assisting type functions could support judicial decision-making in the best interests of the child; particularly where the parties are not providing the relevant or necessary information to assist with this decision.

We also see opportunities to support further specialisation of ICLs so that support to judicial decision-makers is bolstered in cases, for example, where the child is Aboriginal or Torres Strait Islander.

VLA recommends that the Commission clearly articulate the functions involved in assisting the court to get and consider all the evidence – to make a decision in the best interests of the child and ensure a child’s participation in the proceedings – and determine the best way of undertaking each function.

*Meeting with children*

Section 6.2 of the ICL guidelines[[92]](#footnote-92) provides that it is expected that the ICL will meet the child unless the child is under school age or there is risk of systems abuse against the child.

The ICL will use their professional judgment to assess whether to meet with the child and the nature of that meeting. While in many cases the ICL will meet with the child to assist in forming a view about the best interests of a child, this practice varies. An ICL may choose only to meet with a child to introduce themselves and to explain their role. An ICL may consider that it is not desirable for an ICL to meet children who have already been extensively interviewed by doctors, counsellors, social workers, or psychologists. Where a child may be rejecting the non-resident parent and there are allegations that the child is aligned with the resident parent, there is a risk that the child may have been told what to say, and/or be unable to separate their views from those views held strongly by the resident parent, and that meeting with a child in these circumstances may cause pressure and anxiety.

**Case study**

A VLA ICL was appointed on behalf of Evie, who was a young teenager. The matter had been before the court for two years when Evie’s mother was hospitalised suffering from mental health issues and issues arising from drug use.

Evie’s mother addressed her drug use and found employment. Eventually the parties agreed to interim orders that provided for Evie to live week about with her parents, provided that Evie spent the week with her mother under the supervision of a relative.

There were some issues with Evie’s school attendance while living with her mother and her father found it hard to trust her mother given her previous drug use.

A family report was prepared, which recommended a shared care arrangement and that the parties attend parenting programs. The ICL issued drug screen tests, subpoenaed school attendance records, and met with Evie twice.

The ICL also referred the matter to VLA’s FDRS. The parties settled on a final basis at the mediation. This was due to a number of factors. Importantly, when the ICL had met with Evie, she had shared her wishes that she wanted the arrangements to stay the same and was happy. The final orders included some safeguards (restraint on drug use and requirements for school attendance) that addressed her father’s outstanding concerns.

When the ICL meets the child, good practice includes an explanation to the extent that is appropriate for the child regarding:

* The role of the ICL including the limitations of the role;
* The role of the judge;
* That the ICL can pass on to the judge and the parties any messages from the child about their wishes, but also that the child does not have to say anything;
* The court process (including any anticipated interlocutory stages);
* The other agencies that may be involved and the reasons for their involvement;
* How the ICL can be contacted; and
* That in some circumstances, what the child tells the ICL may have to be communicated to the court.

The ICL can meet with the child any time through the proceedings, and can arrange multiple meetings, including after final family law orders are made to explain the orders to the child; particularly where orders are made contrary to the wishes of the child. VLA considers this an important function of the ICL, and within the court structure more broadly, to ensure that children understand the decisions made about their living arrangements.

VLA recommends the Commission consider measures to support ICLs to further involve children in the process. This could include training so ICLs are confident in delivering this function of the role.

We note the NLA submissions comments also on training for ICLs.

### Judicial officers meeting with children

It is increasingly common in other jurisdictions for judicial officers to meet with children and young people to directly hear their views, as one way to give effect to the principle of child-centred decision-making. At present, our practice experience suggests that it is rare for judicial officers in family law proceedings in Victoria to meet with children.

Debate about this topic usually involves weighing up the ‘harm a child or young person may experience as a result of being involved in familial conflict, with the benefits to a child or young person of participating in decision-making about his or her life’.[[93]](#footnote-93) These are very similar considerations to those set out above regarding how the ICL performs their role and for supporting a child-inclusive family law system more generally.

We recommend that the Commission be guided by the social science research. We understand there is an increasing amount of research supporting the introduction of such a process, with the research suggesting that children in the family law system want to speak ‘directly to the person making the decision’[[94]](#footnote-94) and believe that children should have a say in family law matters.[[95]](#footnote-95)

This research suggests that judges should only meet directly with children when it is in the child’s bests interests, considering:

* Whether the child had expressed a wish to meet with the judge;
* The age and maturity of the child; and
* What might be gained by meeting with the child.[[96]](#footnote-96)

We are of the view that any model would require additional considerations, including:

* Discretion for judges not to meet with children if it is deemed to not be appropriate;
* Procedural fairness protections, such as the meeting taking place in the presence of a family consultant (a child welfare expert) who is then responsible for providing a report in open court on what transpired[[97]](#footnote-97) or having recordings or transcripts available for all parties;
* The child consenting to the meeting at all times;
* An explanation to the child that anything they say may be recounted to their parents and that confidentiality cannot be guaranteed; and
* An explanation to the child that their views will be taken into consideration but may not be directly reflected in the final decisions of the judge.

Whether judges should meet with children to hear the child’s views warrants further research also on the skills required of judicial officers to ensure a safe and constructive conversation.

We anticipate the social science research and comparative analysis would also assist in informing further thinking about who in the family system more generally is best placed to meet with children and young people, and at what point in the process.

### Section 11F memorandums and Family Reports

A section 11F Child Inclusive Conference Memorandum, is a limited assessment prepared by an in-house family consultant at the family law courts. It is a valuable source of information to support judicial decision-making in the best interests of the child at the beginning of a case or on an interim basis.

Where a section 11F Child Inclusive Conference is ordered, the family consultant will meet with the child or children of a parenting dispute individually. In most cases, the Family Consultant will also observe the child with the parents.

A Family Report is a more comprehensive report and is prepared by an in-house family consultant at the family law courts, or a private family consultant appointed by the court or engaged by the parties privately. A Family Report explores the issues in dispute and any wishes expressed by the child. The memorandum will also provide recommendations as to arrangements, and any other orders that would meet the children’s best interests and developmental needs to move the case forward.

**Case study**

A VLA ICL was appointed to a matter in which a father was seeking to spend time with his daughter.

Interim orders were made for supervised time and a psychiatric assessment to be completed. The psychiatric assessment confirmed that the father had a mental illness. A Family Report was also prepared recommending supervised time and for the father to access treatment services.

At this point the ICL arranged a first FDRS mediation to support the parents to have frank discussions about the recommendations of the Family Report, in an effort to progress resolution of the dispute. The parties reached agreement regarding private supervision of the father’s time with the child, that the father would engage with a specialist counsellor, and that the parents would review the arrangements in a further FDRS mediation six months later.

The second mediation was scheduled following the release of an updated Family Report. The father had made considerable progress and demonstrated greater insight into his mental illness. At the second mediation the parents discussed the father transitioning to supervised changeover and limited unsupervised time. An authority for the mother to speak with the father’s counsellor was also discussed so that if the father’s condition was deteriorating the counsellor could alert the mother.

The parents did not reach final agreement at the mediation but after a few days and an opportunity to reflection on the mediation, they consented to final orders on the same terms as those proposed at the second FDRS mediation.

In the Commission’s considerations of how to improve children’s participation in decision-making, we recommend greater resourcing of the section 11F process so reports are available in the cases that would benefit from them.

We also recommend consideration be given to a greater focus in section 11F memorandums and Family Reports on the voice of the child, similar to the approach taken in FDRS’ Kids Talk (see below). Such an approach would see social science experts, with skills in meeting with children, facilitating the inclusion of the child’s voice in the process.

There would also be benefit in reviewing the purpose, and thus content to be included, in these memorandums and reports.

In our experience, the reports have become heavily weighted to presenting a chronology of events from the perspectives of each party. We believe there is benefit in an enhanced focus on the child’s voice, observations of the family, reflections on the parents, and the making of recommendations about arrangements that will best meet a child’s future care, welfare and developmental needs.

At present the section of the report that contains information of this kind provides valuable psychological insights regarding the parties and the various issues and dynamics experienced by the families. The utility of these section 11F memorandum and Family Reports and the consent orders that are reached on the basis of the views expressed in them, would likely be greatly improved if this was a greater focus of the report.

More generally, our lawyers report that some report writer are unable or hesitant to draw stronger conclusions or explore the consequences that could arise from the care arrangements being considered for a child. For example, in some matters involving family violence the family report writer might caveat their views by noting that their recommendations will vary depending on whether allegations of family violence are accurate. An extract from a family report in a VLA case file is illustrative:

On the material at hand it is respectfully recommended that:

…

the child spend time with the father by agreement and failing agreement as follows [unsupervised contact including regular overnight contact with the father]

…

If the father is found to have breached the conditions of a current Intervention Order protecting [the mother], [as alleged,] the time with the child revert to [orders for supervised time].

It is therefore not uncommon for reports to express alternative proposals which are contingent on the finding by the court about the family violence allegations. Early determinations or findings of fact about family violence, which we have recommended in our response to Question 15, would assist report writers to recommend the safest arrangements in the best interests of children and in a more timely manner.

## Questions 37 and 38: How can children be supported to participate in family dispute resolution processes?

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

Child-centred and child-inclusive mediation practices that bring the child’s concerns, views and wishes to the attention of their parents or carers have been found to facilitate better outcomes for children post-separation.

We welcome the Commission considering how the system can best support children to participate in FDR processes. VLA strongly supports the participation of children in FDR processes if it is appropriate and safe to do so, based on our practice experience of successful child participation in FDR through Kids Talk. This is described below.

### Supporting children to participate in FDR: Kids Talk

Kids Talk is a current initiative funded by VLA and delivered by VLA’s legally-assisted FDRS. Kids Talk is a child-inclusive intervention, where it is assessed appropriate, that facilitates a child meeting with a child consultant.

In these meetings, children express views about their experience post-separation including their day-to-day lives, interactions between their parents, the impact of the separation on confidence, school performance and social relationships, adult behaviours that they feel have placed them at risk, and their feelings where there has been a breakdown in the relationship with any parent. The program provides parents and others (grandparents, step-parents and other extended family) with the opportunity to hear the views, concerns and wishes of their child.

The aim of Kids Talk is to increase parents’ and significant others’ capacity and openness to understand the child’s views, concerns and wishes. The child’s developmental, psychological and emotional needs form the basis of generating options and proposals at the FDR conference. Kids Talk aims to assist parents to manage their post separation relationship and parenting arrangements in a way that stabilises rather than undermines their child’s wellbeing and development. In 86 percent of cases where Kids Talk was used in 2016-17, the case settled.[[98]](#footnote-98)

**Case study**

FDRS assisted in a parenting dispute involving young children who resided predominantly with their mother.

The parents attended an FDRS mediation and the matter was fully settled with an agreement that the children spend alternate weekends with their father.

The matter subsequently returned to FDRS due to a breakdown in communication between the parents. The mother was worried about the children’s increasing anxiety about spending time with the father. The father advised that he had withdrawn his communication with the mother as he felt if he didn’t agree with her on issues, then it only resulted in arguments. The mother was becoming increasingly frustrated at the father’s lack of communication and what she viewed as lack of interest in the children.

The FDRS case manager assessed Kids Talk as suitable and the Kids Talk feedback was a focus of the next mediation. The father learnt about the children’s fears and nightmares and, informed by this, at the mediation he agreed to steps that he would take to support the children so that the children could enjoy the time they spent with him.

This also reassured the mother that the father was child-centred, and they agreed to continue the previous arrangements for the children to spend time with their father.

The lawyer for the mother acknowledged that the mediation had been very positive in that it addressed confusion and misunderstandings between the parents, and began to foster a shared understanding by the parents of the importance of communication to the success of post-separation parenting arrangements for their children.

The conference also supported the parents to put in place a structure to support ongoing decision-making outside of FDRS including continuing with mediation at a mainstream FDR service in the local area.

Assessing suitability

Kids Talk is currently delivered only for a small percentage (approximately six percent) of families engaged in FDRS each year. For children to participate in Kids Talk, FDRS requires the consent of all people with parental responsibility for the child. Assessment of suitability for Kids Talk generally rests on the child being of school age and a genuine willingness of the parents to take into account their children's perspective.

**Case study**

FDRS assisted the parents of a child under ten who lived with their father and periodically spent time with their mother, who had diagnosed mental health issues.

During court proceedings, the child had told their father that they did not want to spend any more time with their mother.

FDRS conducted an assessment of the suitability of the child engaging in Kids Talk. It was deemed suitable, however the mother did not want to consent to Kids Talk as she was afraid the child would tell the consultant that they no longer wanted to see their mother. The mother was supported by the FDRS case manager to understand the process of Kids Talk and its benefits, and mental health counselling and other supports were put in place prior to the conference. She agreed to her child participating in the process.

There was very positive feedback from the child consultant about the child's engagement in the process, and the mother was supported to hear the feedback in a safe environment.

It became evident that the child wanted to see their mother, as long as her mental health issues were not impacting on her capacity to engage with the child during their visits. With additional supports put in place, the parents agreed to a parenting plan and the parenting dispute was fully settled on an interim basis.

Indicators that suggest Kids Talk is inappropriate include where there may be a risk of harm to a child, where systems abuse may occur through multiple interviews of children by professionals regarding similar issues and where parents may have no capacity for child-centred reflection and action.

Assessment of suitability is not issues-based; families in Kids Talk often experience multiple and complex issues. Data from an evaluation of Kids Talk in 2012 showed that, of the matters reviewed:

* 60 percent involved mental health issues;
* 54 percent involved family violence;
* 40 percent involved family violence and mental health problems;
* 15 percent involved mental health problems, family violence and substance misuse;
* 40 percent involved issues of substance misuse;
* 7.6 percent of families had past child protection involvement;
* 4.6 percent of families were from culturally and linguistically diverse communities;
* 3 percent of cases facilitated extended family involvement; and
* 3 percent of cases involved parties who had literacy issues.[[99]](#footnote-99)

This data, combined with the high settlement rates of FDR where there is a Kids Talk component, shows the usefulness of Kids Talk in focusing decision-making on the needs of the children and reducing the likelihood of complex matters requiring court determination, or at least reducing the issues in dispute.

The benefits of Kids Talk

In an evaluation of Kids Talk an overwhelming majority of parents reported that their child’s participation in the initiative provided them with a better understanding of their children’s views and wishes as well as providing a framework to guide the proposals and outcomes considered in FDR.[[100]](#footnote-100)

Both FDR chairpersons and lawyers assisting clients at FDRS have reported that when a parent’s views are at odds with a Kids Talk report, they found the report useful in reality-testing the party’s proposals and encouraging more child-centred outcomes. Many lawyers and chairpersons involved in the evaluation recommended increased opportunities for Kids Talk to be used in the FDR process.

Providing an opportunity for families to be involved in Kids Talk opens the way for safe, secure and robust parenting arrangements for children informed by an understanding of the child’s experience and wishes, and can assist in uncovering risk factors impacting on the children which otherwise may not have been detected.[[101]](#footnote-101) Risk factors uncovered have included: physical and psychological abuse by a step-sibling, school truancy, and exposure to long term high conflict and trauma from a history of family violence. These risks had direct implications for the future care, wellbeing and safety of the children involved. The Kids Talk process enabled appropriate action to be taken to address these concerns, with positive steps taken to ensure the safety and wellbeing of the children concerned.

Case managers in the evaluation felt more families should have access to Kids Talk and some suggested that in cases where the child is 10 years and over an assessment for suitability should be routinely completed and participation encouraged more strongly in appropriate matters. Some case managers also felt that Kids Talk could be a useful intervention when cases are referred to FDRS from the family law courts, if assessed as suitable and where a Family Report would not be available.

Limitations and risks

There are some limitations to Kids Talk at present. These include:

* The power of one parent to not provide consent. It is important to reflect on whether or not the child’s right to be heard should or could override the need for consent from both parents, as is required presently;
* The view held by some professionals that participation of children in FDR processes may contribute to systems abuse, whereby the welfare of the child may be compromised if they are involved in multiple interviews or interventions by professionals;
* The possible burden of responsibility that a child may feel by participating, and the associated feelings of split loyalties or disloyalties; and
* Situations where a family is screened as suitable for Kids Talk but it becomes evident that one or both parties have limited capacity to constructively consider the child’s view, the child may then also be at risk in terms of safety and a compromised relationship with a parent.

These limitations and risks could be addressed through increased capacity in the program. Ongoing risk assessment by well-trained case managers throughout the Kids Talk process and the engagement of highly experienced child consultants also reduces the likelihood of systems abuse and supports appropriate safety planning at all times.

Training in child-inclusive mediation for all new family lawyers would also be important for ensuring lawyers are supporting parents to consider Kids Talk.

VLA recommends the Commission consider recommendations to remove barriers to children’s participation in child-inclusive FDR so that all separated families engaging in FDR are provided the opportunity to participate in discussions better informed by the experiences of their child post-separation and their child’s wishes.

## Question 39: What changes are needed to ensure that all children who wish to do so are able to participate in family law system processes in a way that is culturally safe and responsive to their particular needs?

VLA supports suggestions in the Issues Paper that ‘any reforms aimed at improving children’s experiences of participation in the courts and other dispute resolution processes should be sensitive and responsive to the fact that, like adults, the needs of individual children differ’; and may change.

**Case study**

FDRS initially assessed Kids Talk as suitable for a young teenager, Santi. Santi experienced mental health issues and was accessing counselling and mental health support services. Santi’s mental health had improved when FDR conducted the initial assessment. Both parents agreed that Kids Talk would be appropriate.

However, prior to the Kids Talk session, Santi’s mental health began to deteriorate. The school raised concerns about her health and implemented safety plans.

When the FDRS case manager called the mother to discuss the Kids Talk process, they decided that Santi’s mental health had deteriorated to a point where Kids Talk was no longer appropriate. The matter proceeded to an FDR mediation without Kids Talk, and then to a further mediation. Information about Santi’s experiences and health was considered during these conferences and the matter was fully settled.

All Kids Talk screening processes review the circumstances of the child and consider their best interests before determining suitability. This includes a specific focus on safety, particularly in matters where there is family violence or other complex issues.

VLA is currently working on improving the cultural safety and accessibility of our Kids Talk program by:

* Developing collaborative relationships between FDRS staff and Aboriginal and Torres Strait Islander and culturally and linguistically diverse community leaders and service providers;
* Providing culturally and linguistically diverse communities and Aboriginal and Torres Strait Islander agencies with information on Kids Talk;
* Providing ongoing training for case managers on cultural issues affecting parties’ participation in FDR processes including Kids Talk; and
* Including child consultants from culturally diverse backgrounds and those with specific knowledge of cultural norms on the child consultant panel.

VLA suggests that the Commission consider these changes when thinking about how to improve the cultural safety and responsiveness of mainstream child participation methods both at FDR and at the family law courts. VLA supports any changes to child-inclusive approaches in the family law system to be developed and improved collaboratively with Aboriginal and Torres Strait Islander, culturally and linguistically diverse and rainbow family communities to ensure their cultural safety.

## Question 40: How can efforts to improve children’s experiences in the family law system best learn from children and young people who have experience of its processes?

Like many other service delivery agencies, VLA is on a path of improvement to ensure our services are informed by the experiences of our clients. We support the Commission listening to and learning from children and young people with lived experience of the family law system.

Our own learnings to date have been informed, in part, by our Child Protection Legal Aid Services Review, which included a Young Persons Advisory Forum consisting of young people with lived experience of the child protection and out of home care systems. We recognise that young people with lived experience have a unique understanding of what works in the system, and what needs to be improved. We are, therefore, developing an ongoing Young Persons Advisory Forum model to inform our work and suggest the Commission consider this type of approach in its efforts to learn from children and young people who have experience of the family law system.

# Professional skills and wellbeing

## Question 41: What core competencies should be expected of professionals who work in the family law system? What measures are needed to ensure that family law system professionals have and maintain these competencies?

VLA supports the NLA submission, which outlines the core competencies for professionals working in the family law system and the measures needed to ensure professionals maintain these competencies.

We also note the breadth of research completed previously that has considered the professional skills and training that should be required of professionals working in the family law system and the measures needed to support this ongoing professional development.[[102]](#footnote-102)

We are of the view that the professionals working in the family law system should have a sound understanding of, and competence in:

* Family law, child protection and family violence legal frameworks;
* Family law processes including the constructive role professionals (particularly lawyers) can play in family dispute resolution;
* Child development;
* The impact of separation on children;
* Family violence;
* Trauma and the effects of trauma;
* Culturally safe and inclusive service delivery to people from different backgrounds, including Aboriginal and Torres Strait Islander peoples, people from culturally and linguistically diverse communities, and rainbow families;
* Disability;
* Mental health; and
* Drug and alcohol issues.

Information and training for professionals working in the family law system should be relevant to the work of professionals in the family law system, contextualised to the specific roles of the professionals involved, and cross-disciplinary to support a shared understanding and collaboration between professionals working in the family law system. With respect to the latter, VLA has experience with a multidisciplinary training initiative for the Victorian child protection system. This training initiative is jointly managed by the Children’s Court of Victoria, the (Victorian) Department of Health and Human Services, and Victoria Legal Aid. The initiative delivers professional development and provides an opportunity for practitioners to come together to learn, share ideas, understand each other’s roles and prepare for change or reform.

VLA also has extensive experience in the design and delivery of professional development on the nature and dynamics of family violence. We use this experience to illustrate some of the considerations that need to be taken into account when thinking about the competencies of professionals working in the family law system and the measures needed to ensure that they have and maintain these competencies.

Training in family violence

VLA supports compulsory and regular professional development for all family law professionals covering the nature and dynamics of family violence and trauma-informed practice applied in a family law setting.

Our view is that to create the necessary shared understanding of the nature of family violence, education needs to be more systematised, less fragmented, and more consistent.

VLA lawyers report that comments demonstrating an insufficient understanding of the dynamics of family violence are still regularly made in court in front of family violence victims. For example, professionals can lack understanding of the reasons a victim may return to a relationship in which family violence was used, dismissing family violence concerns because a victim returned to a relationship with a perpetrator in the past. VLA lawyers also report comments suggesting emotional and psychological violence and controlling behaviour is not viewed as seriously as physical family violence. These comments are made by judges and legal practitioners.

The view also persists that family violence allegations are commonly fabricated to support family law cases. This view persists among family law professionals as well as among the public, despite lack of evidence for the view and counter-evidence that family violence is under-reported.[[103]](#footnote-103)

VLA has developed a Client Safety Framework in response to persistent misconceptions about family violence and to address capability gaps identified in our workforce, which works with victims and perpetrators of family violence.

**VLA’s Client Safety Framework**

The Client Safety Framework was developed to increase our staff’s awareness and understanding of safety risk indicators. It promotes the safety of clients and their families by supporting our staff’s identification and response to family violence and suicide risk indicators.

By creating a tool that enhances and structures the professional judgement of our staff through training, VLA has created a new and innovative approach to family violence risk identification that is appropriate to the role of the legal professional. The Client Safety Framework is consistent with the set of ‘indicators’ of family violence set out in CRAF (Victorian Common Risk Assessment Framework) and is designed with VLA lawyers in mind, acknowledging that it is appropriate for lawyers to identify and respond to risk but not to comprehensively assess or manage risk.

We have now completed the delivery of the first round of Client Safety Framework training (covering current staff). Client Safety Framework sessions were attended by 328 VLA staff in 2016, including in all regional VLA offices and all teams based in Melbourne. Feedback from participants on these sessions was overwhelmingly positive: 98 percent of participants indicated their knowledge of safety risk indicators increased and 99 percent stated they are now able to respond to safety risk indicators.

While we believe that the Client Safety Framework is a positive development that has led to a more consistent approach within VLA as the largest family violence and family law legal service provider in the state, it has largely been limited to VLA staff thus far. It will be delivered to professionals in the Victorian FASS model, including community legal centre lawyers, and requests have also been received to train other professionals in the framework. Concerningly, there is no mandatory requirement for professionals working in the family law system to undertake this or similar training in family violence.

We are of the view that family violence education should be an academic requirement of the law degree and/or a professional legal training requirement of admission to practice as recommended by NLA, and that regular family violence education should be compulsory for all family law professionals, including judges, lawyers, registrars, family dispute resolution practitioners and family report writers.

It is also VLA’s experience from assisting children in families across the family law, family violence and child protection legal jurisdictions, that the professionals participating in this education need to include child protection practitioners and police. This was also noted by the Family Law Council in its recent report, which found that professionals involved in family violence, child protection or family law all need to understand each of the three jurisdictions.[[104]](#footnote-104)

We support the training recommendations of the Family Law Council focused on improving family violence competency, and recommend the Commission consider this existing work when developing skills and training recommendations.[[105]](#footnote-105)

## Question 42: What core competencies should be expected of judicial officers who exercise family law jurisdiction? What measures are needed to ensure that judicial officers have and maintain these competencies?

VLA supports the position of NLA that judicial officers should hold the equivalent core competencies as professionals working in the family law system (provided in our response to Question 41). The knowledge and skills of judicial officers in these competencies should be comprehensive and highly developed given the families presenting at the family law courts are those with the most complex needs.

These core competencies should be considered in the selection and appointment of judicial officers. This is particularly important in appointments to the Federal Circuit Court given 90 percent of filings to the Federal Circuit Court in 2016-17 were family law matters and recognition that family law is a specialist area requiring specialised judicial officers.[[106]](#footnote-106)

Ongoing training and professional development should also be a requirement of the role. This will ensure judicial officers remain abreast of the social science where it impacts on the legal issue in dispute as well as best practice across the competencies identified. We note and support NLA’s comments on ongoing training and professional development.

While knowledge, skills and experience are central to good judicial decision-making, we note that judicial officers also need time to read material, prepare for hearings and hear matters for there to be good decision-making based on the best available evidence. At present judicial officers are attempting to do this while responding to a demanding workload. Additional resourcing is needed to address the workload of judicial officers.

The House of Representatives Standing Committee on Social Policy and Legal Affairs inquiry into ‘A better family law system to support and protect those affected by family violence’ recommended review of the current resourcing of the family law courts, the importance of resourcing at a level that enables an appropriate number of judicial officers to hear family law matters, and the replacement of judicial officers in a timely manner upon retirement or cessation of their appointment.[[107]](#footnote-107)

Adequate resourcing of the family law courts is ultimately about ensuring good decision-making in family law matters and we would encourage the Commission to consider the resourcing requirements of the family law courts and how this will impact on the adoption of its law reform recommendations.

## Question 43: How should concerns about professional practices that exacerbate conflict be addressed?

It is VLA’s experience that lawyers can, and do, play a constructive role in family law matters. They manage client expectations through advice and ‘reality checking’, support clients to adopt a child-centred approach and maintain communication, promote negotiation and resolution of disputes pre-court, and encourage clients to agree to child-centred (in parenting matters) and fair (in property matters) consent orders.

VLA has also seen the role lawyers play in family dispute resolution significantly improve in the period following the establishment of our FDRS in 2004. Today, lawyers are largely playing a constructive role in mediations convened by VLA FDRS by encouraging clients to adopt a child- and future-focused approach to the discussion and supporting clients to explore options to resolve the dispute.

We note the concern raised in the Issues Paper about the practice of some lawyers in the family law system and how these practices can extend conflict between the parties. For legally aided matters, the risk of lawyer practice extending conflict, particularly in unmeritorious cases, is reduced as a result of VLA’s Commonwealth family law guidelines. For a party to be eligible for legal assistance in most family law matters funded by VLA, their matter must meet the requirements of the Commonwealth merits test. The merits test consists of three requirements:

* Legally and factually, the proposed action, application, defence or response for which the person seeks a grant of assistance is more likely than not to succeed;
* A prudent, self-funding litigant with limited financial resources would use their own finances to pay for the proposed action, application, defence or response for which they seek assistance; and
* The costs involved in granting assistance are justified by the likely benefit to the person seeking the grant of assistance.

The Commonwealth merits test must be satisfied at the start of the matter and throughout its duration. If at any point the test is no longer met, legal assistance ceases.

VLA does see opportunities, though, to improve the practice of lawyers in the family law jurisdiction. VLA’s Child Support Legal Service as well as our lawyers delivering property and spousal maintenance legal assistance, for example, have noticed an increase in matters where practitioners acting on behalf of parties appear to misuse legal processes or the court system to maintain a dynamic of abuse. For example, VLA has assisted clients where the other party has:

* Instigated adversarial proceedings when there was a simple and cost effective internal review or administrative process available;
* Delayed resolution of the matter by non-disclosure;
* Taken intimidating action (for example, personal service on a party on a weekend or in the evening when the party has a VLA lawyer on the record);
* Attempted to deliberately create and assert a conflict (which has resulted in VLA seeking an interim defended hearing on the issue, for example, with the party then withdrawing); or
* Deliberately brought an application known to be doomed to fail.

Training and ongoing professional development requirements are one tool for improving the quality of practices in the jurisdiction; and discussed in our response to Question 41. Where behaviour is particularly poor, other measures could be considered.

Options that the Commission could consider in its analysis of this issue are: strengthening costs orders to respond to instances of misuse of court processes and positive requirements for the family law courts to notify the Legal Services Commission where there has been a pattern of poor practitioner conduct.

Other options to promote good practice include: an addition to the Australian Solicitor Conduct Rules that a solicitor must not advise or engage in litigation that has the effect of perpetuating abuse, coercion or control against the other party or the introduction of a merits certificate (like that in the *Civil Procedure Act* *2010* (Vic)), which requires the legal practitioner to sign off on the merits of a case.

## Question 44: What approaches are needed to promote the wellbeing of family law system professionals and judicial officers?

Family law work is difficult work. The content of family law matters can be confronting and the provision of services to anxious, confused, frustrated and stressed clients can impact on the wellbeing of lawyers and legal assistants delivering family law legal services.

At VLA we have identified this risk of vicarious trauma and are responding through our health, safety and wellbeing policies, systems and supports. We have been establishing programs under which staff are required to participate in regular debriefing sessions. This is in addition to the Employee Assistance Program, professional supervision and mentoring arrangements.

Similar policies, systems and supports should be developed, resourced and implemented for all professionals including judicial officers working in the family law system.

# Governance and accountability

## Question 45: Should section 121 of the Family Law Act be amended to allow parties to family law proceedings to publish information about their experiences of the proceedings? If so, what safeguards should be included to protect the privacy of families and children?

VLA does not support amendments to section 121. We are strongly of the view that the public policy rationale for section 121 remains unchanged. It is important that the family law system protect the identity of parties and the children of parenting disputes given the nature and content of family law disputes. Furthermore, section 121 strikes an appropriate balance: it allows for the publication of information if the information does not identify the parties or children.

## Question 46: What other changes should be made to enhance the transparency of the family law system?

Transparency is important for fostering and maintaining community confidence in the family law system.  VLA’s recommendations to improve access to information about and understanding of the family law system (see our response to Question 3), simplification of the legislation including rewording the legislation in plain English where appropriate or possible (see our response to Questions 14 and 20), and implementation of the one court principle (see our response to Question 32) will also improve the transparency of the family law system.

## Question 47: What changes should be made to the family law system’s governance and regulatory processes to improve public confidence in the family law system?

VLA in principle supports a process for feedback and complaints in response to judicial behaviour as well as similar processes for all practitioners working in the family law system. Formal complaints processes improve transparency in the way complaints are dealt with, support consistency of practice and conduct, and provide an avenue for feedback that can assist with continual improvement.

We support NLA’s comments that any process would also need to balance accessibility without incentivising frivolous or vexatious complaints.

There are lessons that can be learnt from existing established schemes if the Commission is considering recommending a process for the family law system. For example, in 2017 an independent statutory corporation, the Judicial Commission of Victoria, dedicated to handling complaints about the conduct or capacity of judicial officers in Victorian courts was established. VLA also has a process for receiving complaints from Victorians who have been refused a grant of legal aid or about the actions of a VLA lawyer or service. Information provided in a complaint to VLA is used to resolve the complaint, check the compliance of lawyers with their obligations as legal aid practitioners, and as an opportunity to improve our services. The Legal Services Board and Commissioner is also able to receive complaints about Victorian lawyers.

1. Family Law Council, *Report on Parentage and the Family Law Act*, (December 2013), 8. [↑](#footnote-ref-1)
2. R. Weston and L. Qu, ‘Trends in family transitions, forms and functioning: Essential issues for policy development and legislation’ (May 2014) *Australian Institute of Family Studies - Families, policy and the law - Selected essays on contemporary issues for Australia,* Essay 2. [↑](#footnote-ref-2)
3. Family Law Council, *Report on Parentage and the Family Law Act*, above n 1, 2-3. [↑](#footnote-ref-3)
4. P. Parkinson, *Family Laws and Access to Justice* (Paper for United Nations Experts Group, New York, May 2015). [↑](#footnote-ref-4)
5. Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child protection Systems: Interim Report,* (June 2015), 96. [↑](#footnote-ref-5)
6. Ibid. [↑](#footnote-ref-6)
7. Ibid. [↑](#footnote-ref-7)
8. Ibid. [↑](#footnote-ref-8)
9. Family Law Council, *Litigants in person* (August 2000); Family Court of Australia*, Self-Represented Litigants: A Challenge* (December 2002). [↑](#footnote-ref-9)
10. About 66 percent of parents resolved matters without the assistance of family law services: L. Qu et al., *Post-separation parenting, property and relationship dynamics after five years* (Australian Institute of Family Studies, 2014), 44. [↑](#footnote-ref-10)
11. Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child protection Systems: Interim Report*, above n 5, 96. [↑](#footnote-ref-11)
12. Australian Law Reform Commission, *Review of the Family Law System Issues Paper,* (Australian Government 2018), 17. [↑](#footnote-ref-12)
13. Ibid. [↑](#footnote-ref-13)
14. G. Winkworth and M. McAthur, ‘Being “Child Centred” in Child Protection: What Does It Mean?’ (2006) 31(4) *Children Australia,* 13. [↑](#footnote-ref-14)
15. Cultural safety is defined as ‘an environment that is safe for people: where there is no assault, challenge or denial of their identity, of who they are and what they need. It is about shared respect, shared meaning, shared knowledge and experience, of learning, living and working together with dignity and truly listening’. See R. Williams, ‘Cultural safety; what does it mean for our work practice?’ (2008) 23(2) *Australian and New Zealand Journal of Public Health,* 213-214. [↑](#footnote-ref-15)
16. Commission for Children and Young People, *Cultural Safety for Aboriginal Children,* *Tip Sheet: Child Safe Organisations* < <https://ccyp.vic.gov.au/assets/resources/tipsheet-cultural-safety-aboriginal-children.pdf>>. [↑](#footnote-ref-16)
17. J. Atkinson, *Trauma-Informed Services and Trauma-Specific Care for Indigenous Australian Children* (Resource Sheet No 21, Closing the Gap Clearinghouse, 2013), 2. [↑](#footnote-ref-17)
18. See Recommendations 2 and 3 in the House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Report on* *Parliamentary inquiry into a better family law system to support and protect those affected by family violence* (December 2017), xxix. [↑](#footnote-ref-18)
19. Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No. 72, Canberra, 2014) Appendix H; Law Council of Australia, *The Justice Project* (Progress Report, March 2018), 9. [↑](#footnote-ref-19)
20. VLA has developed an online suite of teaching tools for secondary specialist school teachers working with students with a mild intellectual disability in years 8 to 12. More information is available at <http://www.legalaid.vic.gov.au/about-us/community-education-and-projects/learning-law>. It does not provide modules on family law. But the lessons learnt from this project (which is currently being evaluated) could inform the development of appropriate family law materials for people with disability including cognitive impairment and/or mental illness. [↑](#footnote-ref-20)
21. Australian Law Reform Commission, *Review of the Family Law System Issues Paper*, above n 12, 22. [↑](#footnote-ref-21)
22. Victoria Legal Aid, *Submission to the Access to Justice Review* (March 2016) <<http://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-access-to-justice-submission.pdf>>. [↑](#footnote-ref-22)
23. Productivity Commission, *Access to Justice Arrangements*, above n 19, 640-642. [↑](#footnote-ref-23)
24. Ibid, 63. [↑](#footnote-ref-24)
25. See also F. Allison et al., *Indigenous Legal Needs Project: NT Report* (James Cook University, 2012), 137. [↑](#footnote-ref-25)
26. This includes grants of aid, legal advice, duty lawyer and minor work legal assistance in our parenting disputes (including for FDR and court), child support and ICL programs. [↑](#footnote-ref-26)
27. See also: Fiona Allison et al. *Indigenous Legal Needs Project: NT Report*, above n 25, 137. [↑](#footnote-ref-27)
28. Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child protection Systems: Interim Report*, above n 5, 35. [↑](#footnote-ref-28)
29. VLA thanks Djirra for their assistance in the development of VLA’s recommendations in response to this question. [↑](#footnote-ref-29)
30. VLA does not have a specific grant guideline for annulments but will consider funding such matters under the Commonwealth special circumstances guideline, as outlined in the VLA Handbook for Lawyers. [↑](#footnote-ref-30)
31. VLA thanks InTouch for their assistance in the development of VLA’s recommendations in response to this question. [↑](#footnote-ref-31)
32. VLA thanks Rainbow Families Victoria for their assistance in the development of VLA’s recommendations in response to this question. [↑](#footnote-ref-32)
33. [2017] FamCAFC 258 (30 November 2017). [↑](#footnote-ref-33)
34. [2018] FamCA 161 (16 March 2018). [↑](#footnote-ref-34)
35. [2014] FamCA 1134 (17 December 2014). [↑](#footnote-ref-35)
36. P. Cox, *Violence against women: Additional analysis of the Australian Bureau of Statistics’ Personal Safety Survey 2012* (Horizons Research Report, Issue 1, Australia’s National Research Organisation for Women’s Safety, Sydney). [↑](#footnote-ref-36)
37. Law Council of Australia, *The Justice Project Progress Report* (2018), 8. [↑](#footnote-ref-37)
38. Victoria Legal Aid, *Hotspots of legal need* (Research Brief, 2014), 8. [↑](#footnote-ref-38)
39. Victoria Legal Aid, *Working with Legal Aid NSW in a cross-border project* (4 December 2017) <<https://www.legalaid.vic.gov.au/about-us/news/working-with-legal-aid-nsw-in-cross-border-project>>. [↑](#footnote-ref-39)
40. Productivity Commission, *Access to Justice Arrangements*, above n 19, 20. [↑](#footnote-ref-40)
41. Ibid, 30. [↑](#footnote-ref-41)
42. Ibid. [↑](#footnote-ref-42)
43. Ibid, 24. [↑](#footnote-ref-43)
44. Similar recommendations to improve the physical environment of Victorian Magistrates’ Courts were made by the Royal Commission into Family Violence. See Royal Commission into Family Violence, *Report and Recommendations* (Vol III, Chapter 16, 2016),172. [↑](#footnote-ref-44)
45. R. Kaspiew et al., *Evaluation of the 2006 family law reforms* (Australian Institute of Family Studies, 2009), 336. [↑](#footnote-ref-45)
46. House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Report on* *Parliamentary inquiry into a better family law system to support and protect those affected by family violence,* above n 18, 303. [↑](#footnote-ref-46)
47. R. Kaspiew et al., *Evaluation of the 2006 family law reforms*, above n 45, 360. [↑](#footnote-ref-47)
48. Ibid, 365. [↑](#footnote-ref-48)
49. [2003] FamCA 1129, [39]. [↑](#footnote-ref-49)
50. The latter is referenced, for example, in the National Domestic and Family Violence Benchbook at 10.1.8 available at <http://dfvbenchbook.aija.org.au/foundational-information/impact-of-domestic-and-family-violence-on-children-and-parenting-capacity/>. [↑](#footnote-ref-50)
51. We understand that the reference to a parent’s ‘lifestyle’ in the considerations provided in section 60CC is of concern to some rainbow families, and it should be removed from the legislation. [↑](#footnote-ref-51)
52. Language used should be inclusive and not discriminate against people according to their gender or the non-biological parenting role they hold in their family, for example, non-biological lesbian co-mothers continue to report experiences of being ‘treated as secondary figures in their children’s lives’. See, for example, F. Kelly et al., ‘Is There Still No Room for Two Mothers? Revisiting Lesbian Mother Litigation in Post-Reform Australian Family Law’ (2017) 31(1) *Australian Journal of Family Law* 1, 25. [↑](#footnote-ref-52)
53. From a child’s perspective, there may be one, two or three or more adults in their life that nurture them and look after their best interests. This can be particularly relevant in rainbow families. [↑](#footnote-ref-53)
54. R. Kaspiew and L. Qu ‘Property division after separation: Recent research evidence’ (2016) 30(3) *Australian Journal of Family Law* 1, 24. [↑](#footnote-ref-54)
55. Women’s Legal Service Victoria, *Small Claims, Large Battles* (Research Report, March 2018), 15. [↑](#footnote-ref-55)
56. *Federal Circuit Court Rules 2001* (Cth) r24.03(1)(a); *Family Law Rules 2004* (Cth) r13.04. [↑](#footnote-ref-56)
57. Women’s Legal Service Victoria, *Small Claims, Large Battles*, above n 55, 22. [↑](#footnote-ref-57)
58. Family Court of Australia, *Property and Finances after Separation,* (2016) <<http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/family-law-matters/property-and-finance/property-and-money-after-separation/property-and-finances-after-separation>> [↑](#footnote-ref-58)
59. Family Law Council, *Submission on the Discussion Paper, Property and Family Law: Options for change*, (1999) 60 and 62. [↑](#footnote-ref-59)
60. [1997] FamCA 27. [↑](#footnote-ref-60)
61. See, for example, the recommendation in Family Law Council, *Letter of Advice to the Attorney-General on Violence and Property Proceedings* (August 2001) <[www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Pages/Lettersofadvice.aspx](http://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Pages/Lettersofadvice.aspx)>. [↑](#footnote-ref-61)
62. This includes grants of aid, legal advice, legal information duty lawyer, and minor work legal assistance. [↑](#footnote-ref-62)
63. Women’s Legal Service Victoria, *Small Claims, Large Battles*, above n 55, 28. [↑](#footnote-ref-63)
64. The settlement rate is based on settlement of some or all issues in a dispute on an interim or ongoing basis. [↑](#footnote-ref-64)
65. Victoria Legal Aid, *Families with Complex Needs Submission to the Family Law Council’s Terms of Reference Number 2* (2015) <<https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-submission-to-the-family-law-councils-terms-of-reference-number-2.docx>>. [↑](#footnote-ref-65)
66. The regulations make provisions for the Commonwealth Attorney-General to appoint a Commonwealth Central Authority (CCA). [↑](#footnote-ref-66)
67. See Women’s Legal Service Victoria, *Stepping Stones: Legal barriers to economic equality after family violence* (Report on the Stepping Stones Project, 2015), 36; WIRE, *Relationship Problems and Money: Women talk about financial abuse* (Research Report, 2014), 34. [↑](#footnote-ref-67)
68. National Legal Aid, *COAG commitment welcomed as new DV figures released* (Media Release, 18 April 2016) <<https://www.nationallegalaid.org/resources/nla-media/>>. [↑](#footnote-ref-68)
69. R. Kaspiew et al., *Evaluation of the 2006 family law reforms,* above n 45, 314. [↑](#footnote-ref-69)
70. Federal Circuit Court of Australia, *Family law system needs more resources to deal with an increasing number of cases involving family violence* (Media Release, 2016) <<http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/about/news/mr200616>>. [↑](#footnote-ref-70)
71. Royal Commission into Family Violence, *Summary and Recommendations* (2016) above n 44, 19. [↑](#footnote-ref-71)
72. The Family Law Legal Service is a related organisation of the Women’s Legal Service Victoria. The Family Law Legal Service is currently involved in providing duty lawyer-type services at VLA FDRS. [↑](#footnote-ref-72)
73. National Legal Aid, *Submission to the Senate Standing Committees on Legal and Constitutional Affairs on the Family Law Amendment (Family Violence and Other Measures Bill 2017)* (16 February 2018) <<https://www.aph.gov.au/DocumentStore.ashx?id=7d4430c8-1f61-41ec-a83d-a6dbebf0b934&subId=563735>>. [↑](#footnote-ref-73)
74. See Victoria Legal Aid, *New integrated services to help address family violence start 1 May in Dandenong and Melbourne* (26 April 2017) <[www.legalaid.vic.gov.au/about-us/news/new-integrated-services-to-help-address-family-violence-start-1-may-in-dandenong-and-melbourne](http://www.legalaid.vic.gov.au/about-us/news/new-integrated-services-to-help-address-family-violence-start-1-may-in-dandenong-and-melbourne)>. [↑](#footnote-ref-74)
75. VLA envisages this approach to be broader than, but possibly include, judicial case management powers. [↑](#footnote-ref-75)
76. House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Report on* *Parliamentary inquiry into a better family law system to support and protect those affected by family violence,* above n 18,154. [↑](#footnote-ref-76)
77. Ibid. [↑](#footnote-ref-77)
78. Children’s Court of Victoria, *Family Drug Treatment Court* <<https://www.childrenscourt.vic.gov.au/jurisdictions/child-protection/family-drug-treatment-court>>. [↑](#footnote-ref-78)
79. The model at the Neighbourhood Justice Centre supports the development of effective working relationships between the various service providers, helping to build client trust in the court, and facilitating the client’s consent to workers sharing information with other services. An information sharing protocol between the court and services enables this model to operate effectively. [↑](#footnote-ref-79)
80. In our experience, the co-location of non-legal specialist services is a strength of this divisional court model. It maximises the benefits of the legal intervention by coordinating the justice system’s response to a family violence incident with the non-legal response. Applicant and respondent workers at the division court identify the non-legal needs of the respective parties and work with the parties to arrange the appropriate non-legal supports. For example, support workers link parties into counselling services, men’s behaviour change programs, alcohol and drug dependence services, and housing support services. This better supports long-term change by responding to the cluster of issues that a family presents with at court. In Victoria the development of the FASS pilot at the family law courts has drawn from this experience. [↑](#footnote-ref-80)
81. Victoria Legal Aid, *Families with Complex Needs Submission to the Family Law Council’s Terms of Reference Number 1* (2015) <<https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-families-with-complex-needs-submission-family-law-council-terms-of-reference.doc>>. [↑](#footnote-ref-81)
82. J. Jackson, *Wisdom from the West* (Paper prepared for the Family Law Conference, Sydney, 10 October 2014); J. Jackson, *Bridging the Gaps Between Family Law and Child Protection* (Research Report, The Winston Churchill Memorial Trust of Australia, 2011). [↑](#footnote-ref-82)
83. Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child protection Systems: Interim Report*, above n 5, 13. [↑](#footnote-ref-83)
84. Ibid, recommendation 15. [↑](#footnote-ref-84)
85. The Senate Legal and Constitutional Affairs Legislation Committee, *Report on the Family Law Amendment (Family Violence and Other Measures) Bill 2017* (2018), 17. [↑](#footnote-ref-85)
86. See Victoria Legal Aid, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Family Law Amendment (Family Violence and Other Measures) Bill 2017,* (16 February 2018) <<https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-submission-to-the-senate-legal-and-constitutional-affairs-legislation-committee.docx>>. [↑](#footnote-ref-86)
87. Royal Commission into Family Violence, *Summary and Recommendations* (2016) above n 44, 160. [↑](#footnote-ref-87)
88. For example, information about the making of a family violence intervention order or DHHS involvement in the family. These are indicators of dynamics within the family that are relevant to the making of an appropriate family law order. [↑](#footnote-ref-88)
89. United Nations *Convention on the Rights of the Child 1989,* Art 12 (2). [↑](#footnote-ref-89)
90. Australian Law Reform Commission, *Seen and heard: priority for children in the legal process*, (1997), 16.28. [↑](#footnote-ref-90)
91. *Re K* (1994) FLC, 92-461. [↑](#footnote-ref-91)
92. Family Court of Australia, *Guidelines for Independent Children’s Lawyer* (2013) <<http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/policies-and-procedures/guidelines-independent-childrens-lawyer>>. [↑](#footnote-ref-92)
93. ACT Children and Young People Commissioner, *Talking with children & young people about participation in family court proceedings*, (2013), 5. [↑](#footnote-ref-93)
94. P. Parkinson, J. Cashmore & J. ‘Single, Parents and Children’s Views on Talking to Judges in Parenting Disputes in Australia’ (2007) 21(1) *International Journal of Law, Policy and the Family,* 89. [↑](#footnote-ref-94)
95. ACT Children and Young People Commissioner, *Talking with children & young people about participation in family court proceedings*, above n 93, 17. [↑](#footnote-ref-95)
96. M. Fernando, ‘Children's direct participation and the views of Australian judges’ (2013) 92 *Family Matters*, 41. [↑](#footnote-ref-96)
97. Ibid, 42. [↑](#footnote-ref-97)
98. The settlement rate is based on settlement of some or all issues in a dispute on an interim or ongoing basis. [↑](#footnote-ref-98)
99. M. Harris, *An evaluation of Victoria Legal Aid's kids talk program 2007-2010,* (Victoria Legal Aid, 2012). [↑](#footnote-ref-99)
100. Ibid, 5. [↑](#footnote-ref-100)
101. Ibid. [↑](#footnote-ref-101)
102. See, for example, the discussion of industry planning in the Royal Commission into Family Violence, *Summary and Recommendations* (2016) above n 44, Vol 6, 171; House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Report on* *Parliamentary inquiry into a better family law system to support and protect those affected by family violence,* above n 18, 259. [↑](#footnote-ref-102)
103. Royal Commission into Family Violence, *Summary and Recommendations* (2016) above n 44, 200-201. [↑](#footnote-ref-103)
104. Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child protection Systems: Interim Report*, above n 5, chapter 9.2. [↑](#footnote-ref-104)
105. Ibid, Recommendations 11 and 12. [↑](#footnote-ref-105)
106. Federal Circuit Court of Australia, *Annual Report 2016-17* (2017), 21. [↑](#footnote-ref-106)
107. House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Report on* *Parliamentary inquiry into a better family law system to support and protect those affected by family violence,* above n 18, 288-289. [↑](#footnote-ref-107)