



# Australia's Family Law System

Submission to Joint Select Committee

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## Introduction

National Legal Aid (NLA), representing the directors of the eight Australian State and Territory legal aid commissions (LACs), welcomes the opportunity to contribute to the Joint Select Committee on Australia's Family Law System (the Inquiry).

This submission:

- Provides an Executive Summary including a list of recommendations.
- Addresses individually each of the Inquiry's terms of reference (TsoR).
- Provides information about NLA and LACs and LAC service delivery.

This submission also makes reference to the inquiry into family law by the Australian Law Reform Commission (ALRC), and the report of that inquiry, *Family Law for the Future - An Inquiry into the Family Law System*, March 2019, hereinafter referred to as "the ALRC Inquiry" and "the ALRC Report" respectively. The ALRC Report identifies related inquiries and reports about family law, family violence, and child protection laws in Australia and the findings, proposals, and recommendations arising from those inquiries and reports.<sup>1</sup>

NLA made comprehensive submissions to the ALRC Inquiry and to other inquiries where appropriate, and they are referred to, and relied on, in this submission.

[NLA submission to the ALRC Inquiry Issues Paper \(ALRC IP\) \(21/06/18\)](#)

[NLA submission to the ALRC Inquiry Discussion Paper \(ALRC DP\) \(03/12/18\)](#)

Where NLA perceives that the ALRC Report's recommendations may be particularly relevant to this Inquiry's Terms of Reference (TsoR), NLA has indicated this, together with either support for or reservation about the ALRC recommendations and the associated reasoning.

## About National Legal Aid and Australia's legal aid commissions

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

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

NLA aims to ensure that the protection or assertion of the legal rights and interests of people are not prejudiced by reason of their inability to:

- obtain access to independent legal advice
- afford the appropriate cost of legal representation

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<sup>1</sup> Australian Law Reform Commission, *Family Law for the Future - An Inquiry into the Family Law System*, Report 135 (2019) 66.

- obtain access to the federal and state and territory legal systems, or
- obtain adequate information about access to the law and the legal system.

In 2018-19 LACs provided in excess of 2 million services to people. One in five of the services requiring the skill of a lawyer were related to family violence, child protection, and/or family law matters.

*Attachment A* to this submission is the NLA Booklet (2019). The NLA Booklet contains information about NLA and LAC service delivery and includes a map illustrating the locations of LAC offices from which in-house and outreach services are delivered, as well as information about the type and the intensity of services delivered by LACs.

## Executive summary

The circumstances and personalities of the people who engage with the family law, family violence, and child protection systems are varied and can be complex, as can the nature of their dispute/s, and the number and complexity of their legal and non-legal needs.

Families will take different pathways through the system according to need. The vast majority of matters resolve without the need for judicial intervention.

Where matters are protracted this is likely to reflect underlying issues of complexity for the particular family, and/or lack of resourcing to help support early resolution of the matter.

Priorities must be safety and the capability to appropriately test allegations in contested matters.

Recent inquiries into the family law, family violence and child protection systems have produced a range of recommendations. Some of these recommendations are newly implemented or are the subject of developmental work ahead of intended implementation.

“NLA considers that the following are key to an accessible and responsive family law system:

- early and ongoing triage;
- increased referral to legally assisted models of dispute resolution;
- pro-active case management;
- improved competencies, training and professional development; and
- collaborative inter-disciplinary frameworks and practices.”<sup>2</sup>

Reform should continue with a focus on what is readily achievable to address existing issues.

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<sup>2</sup> National Legal Aid submission, Australian Law Reform Commission *Review of the family law system* Issues Paper No 48, 3.

## NLA Recommendations

### NLA Recommends that:

1. The National Domestic Violence Order Scheme/Information Sharing Platform include police orders and criminal convictions.
2. Legal assistance service providers are consulted in the further scoping/ development of information sharing platforms across the family law, family violence and child protection systems.
3. Recommendations 57 and 58 of the ALRC Report for expansion of the Family Advocacy and Support Services be implemented.
4. Funding be provided to support the maintenance of the Family Violence Law Help website into the future.
5. Recommendation 44 of the ALRC Report that the *Family Law Act 1975* be amended to include a specific duty for Independent Children's Lawyers (ICLs) to comply with the Guidelines for ICLs be implemented.
6. Funding be provided to Legal Aid Commissions (LACs) to ensure appropriate resourcing of ICLs representing the best interests of children in family law matters including for the expansion of a pool of Independent Children's Lawyers with experience in both Commonwealth family law and State/Territory based child protection laws.
7. Funding be provided to LACs to pilot a more structured model of case practice involving ICL and Social Scientist partnership, enhanced child participation and post order work.
8. The proposal made by ALRC Commissioner Faulks as an alternative to Recommendation 1 of the ALRC Report which recommends establishment of State and Territory family courts and eventual abolition of first instance federal family law courts be given further consideration.
9. Recommendation 25 of the ALRC Report that the *Family Law Act 1975* be amended to clearly set out the disclosure obligations of the parties and the consequences of breach be implemented.
10. Recommendation 39 of the ALRC Report that the *Family Law Act 1975* be amended to provide that in all parenting matters for final orders the courts must consider whether to make an order requiring the parties to see a Family Consultant for post order case management, and that the Family Consultant has the power to seek that the courts place a matter in a contravention list or to recommend that the court make additional orders directing a party to attend a post separation parenting program be implemented.

11. The *Family Law Act 1975* be amended to provide that an ICL can be appointed to work with an appointed Family Consultant to assist with post order case management and funding be allocated for this purpose.
12. Safety Audits be conducted at all family law courts premises including circuit locations and state magistrates courts where they are used for family law matters.
13. Funding be provided to Legal Aid Commissions as recommended by the Australian Government Productivity Commission in 2014 so that the Legal Aid Commission Means Tests can be relaxed for family law matters to enable more legally assisted family dispute resolution to be provided and for ongoing legal representation when necessary.
14. A requirement for mandatory pre-filing legally assisted family dispute resolution be introduced for property and financial matters unless certain exemptions apply and that legislation be amended accordingly.
15. Funding be provided to enable LACs to engage more social support workers in family law matters.
16. Recommendations 49-53 of the ALRC Report in relation to the performance and monitoring of professionals and the resolution of disputes be implemented.
17. Family Dispute Resolution involving property and financial issues be conducted by lawyers with family law property experience.
18. Child Support correspondence to clients include information in relation to relevant key concepts, time limits and referral contacts for legal assistance.
19. Consideration be given to amending Regulation 11 of the *Child Support (Assessment) Regulations 2018* to enhance existing administrative Child Support remedies.
20. Consideration be given to Child Support being able to administratively determine a presumption of parentage on the basis of DNA results obtained consistent with the requirements of Family Law Regulations.

## Terms of Reference

- a. ongoing issues and further improvements relating to the interaction and information sharing between the family law system and state and territory child protection systems, and family and domestic violence jurisdictions, including:
  - i. the process, and evidential and legal standards and onuses of proof, in relation to the granting of domestic violence orders and apprehended violence orders, and
  - ii. the visibility of, and consideration given to, domestic violence orders and apprehended violence orders in family law proceedings;

### Ongoing issues

- The flow of information between systems is not always timely.
- Poor information flow can impact adversely on time frames to achieve resolution.
- Time frames to resolution can potentially affect the outcome of a matter.
- There can be significant costs associated with obtaining information.

### Further improvements

Relevant developments include the:

- Council of Attorneys-General - National Information Sharing Framework.
- National Domestic Violence Order Scheme.
- Co-location of child protection officers in the federal family law courts, and information sharing technological solutions.
- National Family Advocacy and Support Service.
- National Family Violence and Cross-examination of Parties Scheme.

Further areas for action which would be likely to improve information sharing include:

- Improved support for and expansion of the Independent Children's Lawyers (ICL) role.
- Development of information sharing mechanisms for use by authorised legal professionals involved in working across the systems.

These developments and further areas for action are discussed below.

### Council of Attorneys-General National Information Sharing Framework

At its meeting on 29/11/19 the Council of Attorneys-General endorsed in principle a high-level National Strategic Framework for Information Sharing between the Family Law and Family Violence and Child Protection Systems. Participants agreed for the Council of Attorneys-General Family Violence Working Group to operationalise the National Framework over the course of 12 months and report back to CAG at the end of 2020.

**Recommendation 2 of the ALRC Report:** *The Australian Government should work with state and territory governments to develop and implement a national information sharing framework to guide the sharing of information about the safety, welfare, and wellbeing of families and children between the family law, family violence, and child protection systems. The framework should include:*

- *the legal framework for sharing information;*
- *relevant federal, state, and territory court documents;*
- *child protection records;*
- *police records;*
- *experts' reports; and*
- *other relevant information.*

NLA supports a National Strategic Framework. NLA is in a unique position, with LACs in each State and Territory working across all systems and a demonstrated capacity for co-ordination, to contribute to the operationalising of the Framework and other information sharing developments as considered appropriate.

#### National Domestic Violence Order Scheme

The National Domestic Violence Order Scheme (NDVOS) works to strengthen protections for victims of family violence and their families by automatically nationally recognising and enforcing Domestic Violence Orders issued from 25/11/17.

**Recommendation 3 of the ALRC Report:** *The Australian Government, together with state and territory governments, should consider expanding the information sharing platform as part of the National Domestic Violence Order Scheme to include family court orders and orders made under state and territory child protection legislation.*

NLA suggests that the NDVOS also include police orders and criminal convictions.

#### Co-location of child protection officers in the federal family law courts and information sharing technological solutions

The Australian Government has announced it intends co-location of state and territory child protection and other officials in family law court registries. It is also scoping a national technological solution to facilitate the prompt sharing of targeted information between the federal family law system, and state and territory child protection and family violence systems.<sup>3</sup>

<https://plan4womenssafety.dss.gov.au/initiative/co-location-of-state-and-territory-child-protection-and-other-officials-in-family-law-court-registries/>

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<sup>3</sup> Attorney-General for Australia the Hon Christian Porter MP, 'Strengthening Family Safety by Enhancing Communication between Family Law Courts and States and Territories' (Media Release, 5 March 2019), <https://www.attorneygeneral.gov.au/media/media-releases/strengthening-family-safety-enhancing-communication-5-march-2019>

LAC experience of co-located child protection officials has been positive.

### National Family Advocacy and Support Service

LACs provide the court based Family Advocacy and Support Service (FASS) which commenced national operation in early 2017.

FASS was established to provide free holistic legal and social support to families experiencing family violence, and to help them navigate court processes, including between the Commonwealth, and state and territory child protection and family violence systems. The FASS is provided to alleged/victims and alleged/perpetrators. The LACs contract with other providers to address issues of legal professional conflict as appropriate. [Family Violence Law Help](#), is an online resource developed by the LACs to complement FASS service delivery.

*Attachment B* to this submission is the Australian Government Attorney-General's Department information sheet 'Family Advocacy and Support Services'.

The independent evaluation of the FASS in 2018 by Inside Policy Pty Ltd was positive. It found that the FASS was often the first point where family violence was identified<sup>4</sup> and "that information sharing and management of clients across jurisdictions regularly occurred through the FASS with client consent. The key jurisdictions in which FASS clients commonly had matters were the family law courts, children's courts and state and territory courts exercising jurisdiction over family violence matters.

<https://www.ag.gov.au/Publications/Documents/fass-final-evaluation-report.pdf>

**Recommendation 57 of the ALRC Report:** *The Family Advocacy and Support Service's social support services should be expanded to provide case management to clients who are engaged with the family law system.*

**Recommendation 58 of the ALRC Report:** *The Australian Government should work with Legal Aid Commissions in each state and territory to expand the Family Advocacy and Support Service to court locations that have a demonstrable need and to ensure the provision of adequate and appropriate services.*

NLA supports expansion of the FASS subject to appropriate funding. Funding for FASS beyond 2022 is yet to be confirmed by the Commonwealth Attorney-General's Department. Family Violence Law Help was developed with seed funding from the Commonwealth Attorney-General's Department. Ongoing funding would support maintenance of up to date information for all states and territories into the future.

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<sup>4</sup> Inside Policy, *An Evaluation of the Family Advocacy and Support Services*, Final Report (2018), 4.



### Commonwealth Family Violence and Cross-examination of Parties Scheme

The Commonwealth Family Violence and Cross-examination of Parties Scheme (the Scheme) was introduced to support the new s.102NA *Family Law Act 1975* (Cth). The Scheme commenced operation in 03/19 and applies to cross-examinations occurring from 10/09/19. The Scheme is administered by LACs for the Commonwealth.

The new s.102NA and the Scheme help to support the identification of family violence in family law matters before the family law courts, particularly where one or more parties is not represented.

*Attachment C* to this submission is the Australian Government Attorney-General's Department Information Sheet: Changes to the *Family Law Act 1975* under the *Family Law Amendment (Family Violence and Cross-examination of Parties) Act 2018*.

The Scheme is separate to the State and Territory Statutory Legal Aid Fund schemes, as funding in those schemes is generally provided for situations where clients meet Legal Aid eligibility tests which relate to means and merits, matter type guidelines, and competing priorities.

There are currently significant risks to the viability of the Scheme as more matters than indicated by the independent research obtained by the Commonwealth have fallen within the parameters of the Scheme since it commenced operation, and the nature of some of those matters mean they are particularly complex and expensive.

### Independent Children's Lawyers and Independent Legal Representatives for Children

Independent Children's Lawyers (ICLs) are appointed in Commonwealth family law matters on the basis of the *Re K* Factors<sup>5</sup> in the most serious of matters involving risk to children. *Attachment D* to this submission is the *Re K* Factors.

Independent Legal Representatives (ILRs) for children are appointed in State/Territory based care and protection proceedings on the basis of respective legislative criteria.

A high proportion of matters where an ICL is appointed settle 'before trial', with an estimated national average settlement rate of those matters in 2018-19 of 60%. It is suggested that this settlement rate is particularly significant as these matters involve issues which are usually highly contested.

Guidance for the proper discharge of an ICL's obligations can be found in the [Guidelines for Independent Children's Lawyers](#) (2013).

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<sup>5</sup> *Re K* (1994) FLC 92-461.

The ICL is generally recognised as having three functions:

1. facilitating appropriate participation of the child;
2. evidence gathering; and
3. litigation management - playing an “honest broker” role in case management and settlement negotiation.<sup>6</sup>

Particularly relevant to this ToR is the ICL’s evidence gathering role which supports the family law court hearing the matter having all the evidence relevant to the best interests of the child/ren in the particular case. This is especially important where the parties are self-representing.

**Recommendation 44 of the ALRC Report:** *Section 68LA(5) of the Family Law Act 1975 (Cth) should be amended to include a specific duty for Independent Children’s Lawyers to comply with the Guidelines for Independent Children’s Lawyers, as promulgated from time to time and as endorsed by the family courts.*

NLA supports Recommendation 44. Key comments in the ALRC report about the recommendation were:

- 1) that statutory recognition would ensure that all ICLs understand the full scope of their obligations upon appointment to represent a child and how those obligations interact with the *Family Law Act*, and
- 2) that it is essential to the efficacy of the role in acting in the best interests of the child that there be adequate funding, both for the appointment of appropriately qualified lawyers and for ongoing training.<sup>7</sup>

NLA also proposes that:

- Adequate funding be provided to ensure that the best interests of children in these most complex and challenging family law matters are appropriately represented.
- Funding be provided for the piloting of a more structured model of case practice involving ICL and social scientist partnership, enhanced child participation, and post order work. NLA proposed such a model to the ALRC Inquiry IP.

Concerns expressed about ICL practice to the ALRC Inquiry were largely aimed at lack of direct engagement by ICLs with children, i.e. the participatory function. The ALRC report also said “There was support in submissions for the work of Independent Children’s Lawyers. However, many submissions also raised concerns about the quality of the work of Independent Children’s Lawyers, often seen to be a consequence of a combination of

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<sup>6</sup> See Rae Kaspiew et al, *Independent Children’s Lawyers Study* (Australian Institute of Family Studies, Final Report, 2nd edn, (2014) xi.

<sup>7</sup> Australian Law Reform Commission, *Family Law for the Future - An Inquiry into the Family Law System*, Report 135 (2019) 377.

workload issues and poor training (including a lack of cultural competency), both of which are linked to inadequate funding.”<sup>8</sup>

Ideally, funding would be adequate for the purpose and ICLs would be appointed in all childrens’ matters and not only those involving some of/the *Re K* factors. Funding related issues in connection with ICLs currently include:

- Rationing of ICLs by the LAC or by the courts being aware of the local LAC’s funding constraints.
- In divided legal professions,<sup>9</sup> aid may not be available for instructors (i.e. in those jurisdictions which have divided professions, the ICL).
- Ensuring availability of funding for all necessary events including multiple meetings with the child and appointment at the earliest appropriate time, and the ability to travel to a location best for the child.
- Ensuring funding for increasingly expensive experts.
- Legal Aid fee levels, such that the work is refused by experienced private ICL practitioners.
- Capacity to expand ICL training including the review of existing online training modules and the development of further modules.

Selection processes and audits were proposed by submissions to the ALRC Inquiry as methods to support quality going forward. NLA would support these processes although they are resource intensive and would need to be appropriately funded.

In relation to ICL training it is noted that where families are involved in proceedings in both the family law courts and the local child protection courts it would assist if the ICL and the ILR were the same person. This has been an issue to date in some jurisdictions, particularly in relation to private practitioner ICLs, because not all family law lawyers have experience in respective State and Territory child care and protection work. To be able to achieve a sufficient pool of appropriately trained ICLs with competence in State/Territory child care and protection work could reduce issues associated with the flow of information and achieve efficiencies in terms of funding and information sharing in matters across systems.

NLA considers that it is appropriate for ICLs to continue to represent children on a best interests basis, and that section 68LA of the Act sufficiently codifies the role of the ICL, but supports reviewing and codifying the *Re K* criteria for the appointment of an ICL.

#### Improved information sharing mechanisms for use by authorised legal professionals

Further development of electronic means of appropriate information sharing where legal professionals have authority from individuals to act, would expedite receipt of important information and reduce the cost of storing and transporting large volumes of files between

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<sup>8</sup> Ibid 374.

<sup>9</sup> The nature of the legal profession, divided, fused, fused but divided in practice, varies across the states and territories.

agencies, courts, and legal assistance service providers. LACs should have an integral role in such developments in collaboration with the courts and government agencies in the context of the operation of FASS at the family law courts and as statutory authorities with the largest family law, family violence, and child protection legal practices across the country.

**i. the process, and evidential and legal standards and onuses of proof, in relation to the granting of domestic violence orders and apprehended violence orders;**

The terminology re apprehended/domestic violence orders varies across the country. In this submission, NLA uses the language of 'domestic violence orders' to include all orders made by State and Territory courts to support personal protection, whether made by police, ex parte by the courts, interim, or final by consent with or without admission, or by the court following the hearing of evidence.

Whilst there are differences between the state and territory family violence systems, the common underpinning is that personal protection is the priority and that if allegations are in dispute, they can be tested at hearing with the balance of probabilities being the standard of proof, unless there are criminal prosecutions arising from the conduct in which case in the criminal prosecution the standard of proof is beyond reasonable doubt. These respective standards of proof are considered appropriate by NLA given the need to protect victims from risk of harm, and the risk to liberty of alleged perpetrators in criminal law proceedings, and ramifications arising in family law proceedings.

**ii. the visibility of, and consideration given to, domestic violence orders and apprehended violence orders in family law proceedings;**

NLA considers that the family law courts generally give appropriate consideration to apprehended/domestic violence orders whenever the family law courts are made aware of orders. The visibility of such orders is assisted by:

- Legal representation of the parties;
- FASS duty lawyer services;
- S. 102NA *Family Law Act 1975* and Commonwealth Family Violence and Cross-examination of Parties Scheme.

The FASS, s. 102NA *Family Law Act 1975*, and the Commonwealth Family Violence and Cross-examination of Parties Scheme, are described in more detail in the response to ToR a.

Legal representation

Legal representation is an effective way of ensuring all relevant matters including any domestic violence or child protection issues are brought to the attention of the family law courts at an early point in time.

It is commonly understood that many people are unable to afford the cost of ongoing legal representation. This issue is addressed by ToR d. It is noted here however that in 2014 the Australian Government Productivity Commission inquiring into Access to Justice Arrangements in Australia found that more people were living in poverty (14%) than were eligible for legal aid (8%).<sup>10</sup> People who cannot afford a private lawyer and who are ineligible for a Grant of Legal Aid will have no choice but to self-represent.

#### Other matters arising re information sharing from the ALRC Report

**Recommendation 1 of the ALRC Report:** *The Australian Government should consider options to establish state and territory family courts in all states and territories, to exercise jurisdiction concurrently under the Family Law Act 1975 (Cth), as well as state and territory child protection and family violence jurisdiction [sic], whilst also considering the most efficient manner to eventually abolish first instance federal family courts.*

NLA has reservations about abolition of the federal family law court system, the creation of new systems, and the associated expense. NLA notes Commissioner the Hon. J Faulks' dissenting view, alternative proposal, and associated reasoning.<sup>11</sup> NLA considers that whilst there are concerns about aspects of current systems, there are also aspects of the systems that work well and which should be preserved. NLA particularly agrees with the assessment that "the problems are essentially continuity, support, and the relieving of confusion..."<sup>12</sup> NLA also agrees that "it is hard to see however that all of this reorganisation would not be accompanied by significant Commonwealth and State expenditure", and may not achieve what is intended.

Commissioner Faulks' alternative proposal includes improved/triage functions at all courts, involving additional training for State Magistrates, and enhanced roles for family law court registrars and the Family Advocacy and Support Service (FASS), and files travelling electronically with the parties. The suggestion made is that this would provide a "workable plan (with less cost)".<sup>13</sup> Service providers have for many years been calling for increased resourcing to aspects of the system, and if particular pressure points were addressed, issues with the systems interface, appropriate information sharing, and delay in relation to information sharing and in the time taken to resolution, could be expected to resolve.

#### **NLA Recommends that:**

- 1. The National Domestic Violence Order Scheme/Information Sharing Platform include police orders and criminal convictions.**

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<sup>10</sup> Productivity Commission 2014, *Access to Justice Arrangements: Appendix H*, Inquiry Report No 72, Canberra, 1021-2.

<sup>11</sup> Australian Law Reform Commission, *Family Law for the Future - An Inquiry into the Family Law System*, Report 135 (2019) 139.

<sup>12</sup> Ibid 141.

<sup>13</sup> Ibid 143.

2. Legal assistance service providers are consulted in the further scoping/ development of information sharing platforms across the family law, family violence and child protection systems.
3. Recommendations 57 and 58 of the ALRC Report for expansion of the Family Advocacy and Support Services be implemented.
4. Funding be provided to support the maintenance of the Family Violence Law Help website into the future.
5. Recommendation 44 of the ALRC Report that the *Family Law Act 1975* be amended to include a specific duty for Independent Children's Lawyers (ICLs) to comply with the Guidelines for ICLs be implemented.
6. Funding be provided to Legal Aid Commissions (LACs) to ensure appropriate resourcing of ICLs representing the best interests of children in family law matters including for the expansion of a pool of Independent Children's Lawyers with experience in both Commonwealth family law and State/Territory based child protection laws.
7. Funding be provided to LACs to pilot a more structured model of case practice involving ICL and Social Scientist partnership, enhanced child participation and post order work.
8. The proposal made by ALRC Commissioner Faulks as an alternative to Recommendation 1 of the ALRC Report which recommends establishment of State and Territory family courts and eventual abolition of first instance federal family law courts be given further consideration.

- b. the appropriateness of family court powers to ensure parties in family law proceedings provide truthful and complete evidence, and the ability of the court to make orders for non-compliance and the efficacy of the enforcement of such orders;

#### **Truthful and complete evidence**

An appropriately funded legal system is the best system for supporting truthful and complete evidence, and ensuring that relevant issues are identified and addressed.

Lawyers advise clients about consequences of untrue or incomplete assertions made on oath or affirmation. Where a matter reaches hearing, the testing of party or witness assertions by lawyers who are skilled in cross-examination helps to uncover issues that might not otherwise have been brought to the surface. Judicial officers are attuned to the potential that the evidence of a party/witness might be less than full and frank.

#### **Incomplete evidence - non-disclosure**

Non-disclosure in financial matters can be associated with financial abuse. Financial abuse often co-exists with other forms of family violence.

Chapter 8 of the ALRC Report, 'Encouraging Amicable Resolution', addresses disclosure obligations in relation to property and financial proceedings as "fundamental to a fair and transparent process in negotiating agreements out of court or decision making in court."<sup>14</sup>

**Recommendation 25 of the ALRC Report:** *The Family Law Act 1975 (Cth) should be amended to clearly set out the disclosure obligations of parties, and the consequences for breach of those obligations.*

NLA supports the implementation of Recommendation 25 on the basis of the reasoning articulated in the ALRC Report, i.e. that "the disclosure obligations, and the consequences for breach of those obligations, should be set out transparently and accessibly in the Family Law Act. The provisions should make it clear that the obligations apply to FDR, arbitration and other facilitative dispute resolution processes, as well as court proceedings. They should also set out the corresponding duty of legal practitioners or family dispute resolution practitioners to advise parties of their duties."<sup>15</sup>

#### **Non-compliance and the efficacy of the enforcement of such orders**

Chapter 11 of the ALRC Report "Compliance with Children's Orders" addresses issues arising in connection with non-compliance including where non-compliance is deliberate.

**Recommendation 39 of the ALRC Report:** *The Family Law Act 1975 (Cth) should be amended to provide that:*

- *in all parenting proceedings for final orders, the courts must consider whether to make an order requiring the parties to see a Family Consultant for the purposes of receiving post-order case management; and*
- *the appointed Family Consultant has the power to seek that the courts place the matter in a contravention list or to recommend that the court make additional orders directing a party to attend a post-separation parenting program.*

NLA supports a discrete contravention and enforcement list operated by the family law court/s to assist a timely response to issues that arise in respect of the implementation of court orders. A Registrar could hear matters.

The ALRC Report suggested that a further issue for consideration in the context of compliance with children's matters was:

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<sup>14</sup> Australian Law Reform Commission, *Family Law for the Future - An Inquiry into the Family Law System*, Report 135 (2019), 276.

<sup>15</sup> Ibid.

- “whether the *Family Law Act* should provide that an Independent Children’s Lawyer can be appointed to work with an appointed Family Consultant to assist with post-order case management;”<sup>16</sup>

NLA supports this proposal subject to the provision of appropriate funding. Please refer to the response to ToR a. in relation to funding concerns in connection with ICLs.

Where contravention is alleged NLA agrees with the ALRC that arbitration would be inappropriate for use in children’s matters.<sup>17</sup> NLA is generally not supportive of arbitration for children’s matters, but is supportive of arbitration being available in property division matters.

#### Existing mechanisms

“The ALRC considers that the existing mechanisms available to the family courts, coupled with the enhanced case management powers underpinned by the recommended legislative provisions in relation to the overarching obligation of family law practice and procedure provisions, arm the family courts with sufficient power to enforce the disclosure obligations and to impose appropriate remedies when necessary.

It is also recommended that the costs consequences for failure to disclose be referred to expressly in the legislation.”<sup>18</sup>

#### **NLA Recommends that:**

- 9. Recommendation 25 of the ALRC Report that the Family Law Act 1975 be amended to clearly set out the disclosure obligations of the parties and the consequences of breach be implemented.**
- 10. Recommendation 39 of the ALRC Report that the Family Law Act 1975 be amended to provide that in all parenting matters for final orders the courts must consider whether to make an order requiring the parties to see a Family Consultant for post order case management, and that the Family Consultant has the power to seek that the courts place a matter in a contravention list or to recommend that the court make additional orders directing a party to attend a post separation parenting program be implemented.**
- 11. The Family Law Act 1975 be amended to provide that an ICL can be appointed to work with an appointed Family Consultant to assist with post order case management and funding be allocated for this purpose.**

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<sup>16</sup> Ibid 347.

<sup>17</sup> Ibid, see Rec 28.

<sup>18</sup> Ibid 278.



- c. beyond the proposed merger of the Family Court and the Federal Circuit Court any other reform that may be needed to the family law and the current structure of the Family Court and the Federal Circuit Court;**

### **Support for the proposed merger**

The Federal Circuit and Family Court of Australia Bill 2019, Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2019 have recently been referred to the Senate Legal and Constitutional Affairs Legislation Committee. The Committee is due to report by 20 November 2020. NLA will make a submission to the Committee Inquiry.

NLA has previously expressed support for the proposed merger of the Family Court of Australia and Federal Circuit Court of Australia on the basis that amendments that addressed the concerns identified in the NLA submission were made.

[NLA submission to the Senate Legal and Constitutional Affairs Committee Inquiry, Federal Circuit and Family Court of Australia Bill 2018, Federal Circuit and Family Court of Australia \(Consequential Amendments and Transitional Provisions\) Bill 2018](#)

The proposed merger could readily and inexpensively reduce confusion for people and produce efficiencies. It is understood that the family law courts are already developing a common set of Rules and Forms.

### **Beyond the proposed merger**

Beyond the proposed merger, NLA suggests that immediate priorities should be:

- Ensuring the safety of people accessing court premises, and particularly the physical suitability of court premises, and the conducting of safety audits at all family law court premises, including circuit locations and state magistrates courts, where they are used for family law matters.
- Adequate funding for legal assistance services where people are unable to afford legal representation. This issue is discussed under ToR d. below.

### **Safety of premises**

NLA made submissions in relation to safety and physical suitability of premises to each of the ALRC IP, ALRC DP, and 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*.<sup>19</sup>

[NLA submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs Inquiry into A better family law system to support and protect those affected by family violence](#)

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<sup>19</sup> National Legal Aid Submission House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (2017), 6.

### "Safety audit

NLA has previously raised particular concerns about the safety of court users at some registries, e.g. Alice Springs and Launceston. The premises at Newcastle and Wollongong are also of concern.

NLA recommends that there should be safety audits conducted at all family court premises, including circuit locations and state magistrates courts, where they are used for family law matters.

### Facilities for children

Safe and secure facilities for children are an important enabler for access to the family law system and participation in proceedings. An example of secure childcare facilities are those provided for the use of parties attending court at the Parramatta registry in NSW and the Family Court of Western Australia.

### Roaming security

NLA supports additional security measures at and around the courts, including roaming and stationary security posts as well as fixed airport style security.

### Safety planning

Physical environments that are designed and built for safety should be supported by processes that pro-actively screen for risk and respond accordingly. Where risk has been identified as an issue the court should pro-actively ensure safety planning for all future court events. E.g. remote attendance could be implemented to address particular safety concerns.”<sup>20</sup>

### **NLA Recommends that:**

**12. Safety Audits be conducted at all family law courts premises including circuit locations and state magistrates courts where they are used for family law matters.**

- d. the financial costs to families of family law proceedings, and options to reduce the financial impact, with particular focus on those instances where legal fees incurred by parties are disproportionate to the total property pool in dispute or are disproportionate to the objective level of complexity of parenting issues, and with consideration being given amongst other things to banning ‘disappointment fees’, and:**

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<sup>20</sup> National Legal Aid submission, Australian Law Reform Commission, *Review of the family law system*, Issues Paper No 48, 50.

- i. capping total fees by reference to the total pool of assets in dispute, or any other regulatory option to prevent disproportionate legal fees being charged in family law matters, and**
- ii. any mechanisms to improve the timely, efficient and effective resolution of property disputes in family law proceedings;**

#### Financial costs to families

Many people are not able to afford a private lawyer and are also not eligible for a Grant of Legal Aid for ongoing legal representation. They can experience emotional stress as a result of having to self-represent or in managing private legal fee related debt. NLA is also concerned that many people may agree to arrangements between themselves that are not safe or appropriate because they become financially and/or emotionally unable to continue to pursue their interests.

The financial costs to families of family law proceedings will bear a relationship to the ability of the individual parties involved to resolve issues appropriately and in a timely manner. Most matters settle without the need for an application to a court for a judge to make a determination, and in many matters the first filing with the court is for consent orders or consent is reached after proceedings have been filed but before the need for a judicial determination.

Proceedings which are protracted and expensive often involve the following features:

- Misuse of legal and court processes by some perpetrators of domestic violence to make multiple applications and complaints in multiple systems with the intention of interrupting, deferring, and/or prolonging proceedings either because they do not want to accept a previous decision that has been made, or because they wish to wear the victim down to the point of not pursuing matters, and/or are prepared to erode property rather than see any order in the victim's interests made.
- Self-representation causing delay, usually because either the litigant is overwhelmed and unsure how to proceed leading to adjournments due to lack of preparedness, or because of the sorts of behaviour described above sometimes including a refusal to accept proffered legal advice (often from a succession of lawyers) such that the person is self-representing.
- Delays because of slow information exchange in some locations due to work backlogs given the available resourcing. (See the response to ToR a.)

LACs have experience of applicants for legal aid who were initially self-funding a private lawyer but who have exhausted their resources and are no longer able to pay for a private lawyer, and are hoping Legal Aid can assist. Not being able to afford a private lawyer does not mean however that the applicant will necessarily be eligible for a Grant of Legal Aid for ongoing legal representation, and in many cases they will not be.

[NLA submission to the Law Council of Australia's Justice Project \(25/10/17\)](#)

As NLA advised the Law Council of Australia's Justice Project:

*"Grants of aid and dispute Resolution*

As the LCA is aware, the availability of dispute resolution and representation services are necessarily curtailed by limited funding. Grants of legal aid for representation and family dispute resolution are means tested and contribution to the cost of providing the assistance may be sought depending on an applicant's means. As the PC [Productivity Commission] has observed:

'The present means test used by the LACs are restrictive, reflecting the limited funds available... income tests 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'.

This straitening of criteria has created what the PC has termed 'the missing middle'. These persons are vulnerable, in need of legal assistance and generally cannot afford private fees, but are nevertheless ineligible for a grant of legal aid. Justice in these circumstances is no more than theoretically available to this group of people. NLA is of the view that this is a major access to justice issue as some people either have to self-represent, which is usually experienced as very stressful, or give up on their case potentially compromising safety and/or longer term health and well-being, as well as their rights and entitlements. A report by Community Law Australia has asserted that 'unresolved legal problems cause significant social, health and financial costs to individuals and the community'. The report also notes the findings of a 2012 survey conducted by the Australia Institute that indicated:

*88% of surveyed Australians agreed that "the legal system is too complicated to understand properly" and 83 per cent agreed that "only the very wealthy can afford to protect their legal rights."*<sup>21</sup>

Options to reduce financial impacts and to improve the timely, efficient and effective resolution of property disputes in family law proceedings

Options to reduce financial impacts are founded in timely appropriate resolution and final settlement. It is considered that such options include:

- Funding to relax LAC means tests so as to increase legal assistance: this would support the expansion of Legally Assisted Family Dispute Resolution (LAFDR) and reduce self-representation and increase early resolution rates.
- Introducing a pre-filing requirement of LAFDR for property matters.
- Improving triage and streaming of matters at the family law courts, particularly those the history of which indicates that more intensive judicial management may be needed.
- Technological developments such as online dispute resolution systems (ODRS).

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<sup>21</sup> National Legal Aid submission to the Law Council of Australia 'The Justice Project' (2017) 4.

### Funding to relax LAC means tests and increase LAC LAFDR

“Unrepresented litigants are more likely to take a matter to trial: The proportion of self-represented litigants increased sharply when matters that proceeded to trial were isolated from the proportion of unrepresented litigants in all matters.”<sup>22</sup>

“In an address to a legal aid forum in 1999, the then Chief Justice noted that the decline in legal aid funding had led to the negative effects of increased self-representation. These effects include:

- increased opportunities for delay;
- a reduction in settlement opportunities;
- an exacerbation of hostilities between the parties; and
- a reluctance to comply with orders or post separation arrangements.”<sup>23</sup>

In 2014 the Australian Government Productivity Commission found that there were more people living in poverty (14%) than eligible for legal aid (8%),<sup>24</sup> and estimated that an additional \$57 million per annum (\$60.8m with inflation) was required to relax the LACs’ means tests.<sup>25</sup> With such an expansion of funding NLA has estimated that 41,000 more grants of aid could be made for legally assisted FDR, or an additional 7,600 grants of aid could be made for legal representation.”<sup>26</sup>

*Attachment E* to this submission is Appendix H of the Productivity Commission report on its Inquiry into Access to Justice Arrangements. It contains the Productivity Commission’s specifications about funding.

LAC LAFDR achieves a national settlement rate in the order of 75-80% annually. LAC FDR is discussed in more detail under ToR e. the effectiveness of family law support services and family dispute processes.

A trial of LAC Lawyer-assisted Family Law Property Mediation for property matters up to \$500,000 funded by the Commonwealth Government, and referred to in the ALRC Report<sup>27</sup> commenced across the country in January 2020. Coinciding with this pilot/trial is the Small Claims Property pilot at four Federal Circuit Court Registries. The pilots/trials are to be evaluated by the Australian Institute of Family Studies. The evaluation will consider the program impact and social return on investment.

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<sup>22</sup> Australian Law Reform Commission, *Family Law for the Future - An Inquiry into the Family Law System*, Report 135 (2019) 80.

<sup>23</sup> Ibid 188.

<sup>24</sup> Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Appendix H, 2014) 1021-2.

<sup>25</sup> Ibid 1023.

<sup>26</sup> National Legal Aid submission, Australian Law Reform Commission *Review of the family law system* Issues Paper No 48, 41.

<sup>27</sup> Australian Law Reform Commission, *Family Law for the Future - An Inquiry into the Family Law System*, Report 135 (2019), 259.

*Attachment F* to this submission is the Australian Government Attorney-General's Department information sheet 'Women's Economic Security Package - Lawyer-assisted family law property mediation Legal Aid Commission trial'.

Legally assisted dispute resolution for property matters becoming a pre-filing requirement

Chapters 8 'Encouraging Amicable Resolution', 9 'Arbitration', and 10 'Case Management' of the ALRC Report address options which would be likely to reduce the financial impact of families of family law proceedings and improve resolution rates.

A main focus of Chapter 8 "Encouraging Amicable Resolution" was the provision of legally assisted/family dispute resolution. The ALRC was supportive of dispute resolution as a pathway for resolution of more matters. The ALRC recommended certificates should be issued in relation to property and financial matters as well as parenting matters as is currently the case.<sup>28</sup>

As indicated in the NLA submission to the ALRC Inquiry, NLA supports the introduction of mandatory pre-filing legally assisted dispute resolution in family property law matters, with appropriate exemptions, and the issue of certificates in relation to DR for use in filing.

**Recommendation 21 of the ALRC Report:** *The Family Law Act 1975 (Cth) should be amended to:*

- *require that parties take genuine steps to attempt to resolve their property and financial matters prior to filing an application for court orders; and*
- *specify that a court must not hear an application unless the parties have lodged a genuine steps statement.*

*A failure to make a genuine effort to resolve a matter should have costs consequences.*

NLA notes Recommendation 21 of the ALRC Report which would require the parties to have lodged a genuine steps statement before a court can hear an application,<sup>29</sup> but has some reservations that this recommendation will add an extra layer in proceedings without necessarily having achieved its stated intent. NLA also has some concerns about how the genuine efforts would be evidenced. Whilst lawyer led negotiation can resolve matters and achieve consent orders without the need for FDR, where it does not, it is considered that LAFDR should be a necessary next step, unless an exemption applies. NLA is not sure how genuine steps statements would be supported, e.g. where the genuine steps were lawyer negotiations, would the lawyer need to provide a supporting statement?

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<sup>28</sup> Australian Law Reform Commission, *Family Law for the Future - An Inquiry into the Family Law System*, Report 135 (2019), see esp. Rec 23 and p 267.

<sup>29</sup> Australian Law Reform Commission, *Family Law for the Future - An Inquiry into the Family Law System*, Report 135 (2019), 258.

### Improving triage and streaming of matters at the family law courts

“Triage at all points should consider the appropriateness of warm referral for LAC legally assisted FDR. LAC legally assisted FDR has been successful not only in resolving matters early, but also after filing and immediately pre-trial, thereby avoiding costs of hearing. The judgement in the matter of *Caine and Caine and Bannerman Solicitors* [2017] FCWA 118 is an example of such an outcome.<sup>30</sup> Triage could also identify legally assisted FDR for ICL matters and referrals to reportable therapeutic counselling rather than for family reports or Single Expert Witness (SEW) reports where appropriate.

NLA envisages that triage would be undertaken by court and LAC staff working together with triage being a component of the FASS service.

LACs are in a good position to undertake/further assist with triage as we understand eligibility for legal aid services including legally assisted FDR, and have FASS legal and social support staff including at the courts, and strong referral relationships with other providers. Additional resourcing may be required.”<sup>31</sup>

### Online Dispute Resolution

The Legal Services Commission of South Australia, on behalf of all LACs, has received seed funding from the Commonwealth Government to investigate the introduction of an ODRS for couples that are separating to assist them to resolve their family law disputes with less reliance on formal pathways.

Research undertaken as part of this project found that there is a broad appetite to use an online system in family law matters.

The ODRS tool will assist parties on a number of levels. It will educate users about their rights and obligations in relation to the settlement process. The tool will host some guiding statements, whilst a complimentary ODRS website will host a broader range of information in plain language. The website will also provide a central location from which users can branch out to access existing, credible, online resources in the family law space. The website will provide the ability to seek assistance in using the tool, and determining its suitability for a user’s situation.

Specifically with respect to property matters, the ODRS will help people identify their assets and liabilities and assist them to systematically work through areas of agreement and disagreement. The system will use technology (such as artificial intelligence or machine learning) to analyse risks and opportunities before recommending a course of action and could analyse the data provided and put forward opportunities for agreement, based on

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<sup>30</sup> See in particular the comments of O’Brien J [11-13].

<sup>31</sup> National Legal Aid submission, Australian Law Reform Commission *Review of the family law system* Issues Paper No 48, 23.

previous family law cases. This would offer some certainty that the settlement negotiated between parties is fair and equitable based on 'what others in the same situation did'.

The Artificial Intelligence (AI) used by the ODRS is being informed from the input of experienced legal aid lawyers based on randomised scenarios (with controlled variable ranges) that contain facts on each party's relationship, childcare duties, total assets, and personal contributions to the relationships. In doing so, the AI is able to learn from experienced family lawyers about which variables have the greatest impact on the suggested division of assets.

The tool recognises the need for safeguards and a number of safety devices are included to ensure the identity of the user is accurate and protected, as well as 'red flags' to identify circumstances where the user should be referred to other supports, e.g. family violence, overbearing behaviour. It is important that users feel safe in using the ODRS.

The tool is to be not-for-profit so that it can be used by as many people as possible who would otherwise not have access to courts or existing processes. Adequate funding is fundamental to success; the potential to harness digital developments is exciting but will fail if compromised and the program is too slow, difficult to navigate or not comprehensive.

A product launch is scheduled for early in 2020 and its implementation will continue to be monitored.

If it proves to be as successful as is hoped, it has the potential to allow a significant number of separating couples to resolve their disputes in a way which is quicker and less expensive than a court-based system and be able to deal with each other in a respectful way which should have positive benefits for their future dealings, especially as it affects their children.

#### Capping total fees by reference to the total pool of assets in dispute

In relation to the suggestion of capping total fees, any such capping would need to be relative not only to the total property pool but to the legal needs of two parties, in a situation where one party will usually have control of the bulk of the assets in dispute. How would the interests of the non-controlling party in accessing private legal assistance be addressed?

#### **NLA Recommends that:**

- 13. Funding be provided to Legal Aid Commissions as recommended by the Australian Government Productivity Commission in 2014 so that the Legal Aid Commission Means Tests can be relaxed for family law matters to enable more legally assisted family dispute resolution to be provided and for ongoing legal representation when necessary.**



**14. A requirement for mandatory pre-filing legally assisted family dispute resolution be introduced for property and financial matters unless certain exemptions apply and that legislation be amended accordingly.**

**e. the effectiveness of the delivery of family law support services and family dispute resolution processes;**

“Disadvantaged Australians are more susceptible to, and less equipped to deal with, legal disputes. Governments have a role in assisting these individuals. Numerous studies show that efficient government funded legal assistance services generate net benefits to the community.”

*Attachment A* to this submission is the NLA Booklet (2019). The NLA Booklet contains information about NLA and LAC service delivery and includes a map illustrating the locations of LAC offices from which in-house and outreach services are delivered, as well as information about the type and the intensity of services delivered by LACs.

LACs provide seamless family law support services for financially disadvantaged people who are eligible for a Grant of Legal Aid. An audit of LAC files identified family violence is a factor in 79% of legal aid Commonwealth family law matters. Legal representation services are provided only where necessary. “Legal assistance services are appropriate, proportionate and tailored to people’s legal needs and levels of capability.”<sup>32</sup> “Family or civil law disputes should be resolved through alternative dispute resolution processes rather than through litigation, where appropriate.”<sup>33</sup>

People who are not eligible for a Grant of Aid are still able to access information and advice services and depending on circumstances may be assisted by FASS or family lawyer duty services at court on the day.

LACs have a demonstrated capability in achieving effective and appropriate settlement in family law matters. This can be seen in the LAC functions of LAC LAFDR, the role of the ICL, and early indications from the new Family Violence and Cross-examination of Parties Scheme are that good settlement rates are being achieved in matters that were listed for hearing, thereby avoiding the significant emotional and financial costs associated with hearing.

In 2018-19:

- LACs delivered in excess of 2 million services to people;
- 8,116 LAFDR conferences were held with a national settlement rate of 77%;

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<sup>32</sup> Ibid 9(c).

<sup>33</sup> National Partnership Agreement on Legal Assistance Services 2015-2020, Clause B9.

- an estimated national average of 60% of those matters involving an ICL settled 'before trial'.

### Legally assisted FDR

"Legally assisted FDR is core work for LACs.

All LACs conduct legally assisted FDR programs, which have been developed and refined over many years.

Legally assisted FDR represents a legally informed, supported, timely and cost-effective alternative for many matters currently being dealt with in the court system, potentially reducing delays for parties and at the courts. For LAC legally assisted FDR to be available, one party is generally required to qualify for legal aid. All LACs have screening, intake, and referral processes to ensure triaging of matters to appropriate FDR and other services."<sup>34</sup>

"The LAC legally assisted FDR model increases access to FDR to a greater range of families by redressing imbalances of power. The LAC model involves:

- screening for risk and intake processes conducted by appropriately trained staff;
- linkage/referral to social support services where appropriate;
- the use of accredited family dispute resolution practitioners (FDRPs);
- safety planning including 'shuttle' and remote conferencing where appropriate; and legal representation.

Legal representation of parties serves a number of important functions, as follows:

- managing parties' expectations, and reality testing, by providing advice about the law and likely outcomes;
- focussing parties on the future and the best interests of their children;
- early resolution and diversion of matters from the family law courts;
- redressing power imbalance, supporting vulnerable parties, and promoting fairness;
- reduction of the risk of breach of orders by ensuring that parties understand the agreement they are entering into;
- identification of related issues and appropriate referrals to support services;
- ensuring that agreements reached are reduced into writing and are enforceable;
- contribution to the timeliness and efficiency of the justice system.

Notwithstanding a history of family violence, there are victims who express a desire to attempt FDR for a variety of reasons, including:

- to avoid the stress involved in court proceedings;
- to attempt to resolve matters without the lengthy timeframes usually involved in court processes, so providing earlier certainty;

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<sup>34</sup> National Legal Aid submission, Australian Law Reform Commission *Review of the family law system* Issues Paper No 48, 72.

- to have an opportunity to express to the other party in a safe environment, their concerns about the other party's behaviour and its impacts;
- to ensure the children's relationship with the other parent is appropriately maintained;
- to minimise conflict with the other party.

Participating in FDR for victims of domestic violence can be empowering.

LACs are well placed and willing to play a significant role in any expansion of legally assisted FDR if appropriately resourced.”<sup>35</sup>

#### Service delivery challenges - Legal Aid fee rates and rural, regional and remote areas

Representing disadvantaged people through complicated systems can be more time consuming and onerous than other representation work and compounded with low Legal Aid fee rates contributes to the withdrawal of the private legal profession from Legal Aid work. It is also relevant that many private legal practitioners are from small private firms and those firms have the additional pressures associated with operating a small business.

Relative to private market fee rates, Legal Aid fee rates are extremely low and this is creating a real problem of service viability in locations Australia-wide. In a number of locations there is increasing difficulty in attracting quality legal practitioners to conduct reasonable volumes of legally aided work. In some locations this has led to market failure where LACs have had to intervene to provide services directly. Without intervention to either increase fees or reduce services this poses a major threat to the viability of legal aid services into the future.

#### **NLA Recommendations:**

**See recommendations 2, 3, 4, 5, 6, 7, 8 and 13.**

#### **f. the impacts of family law proceedings on the health, safety and wellbeing of children and families involved in those proceedings;**

Recent inquiries into the family law system have confirmed that, as a consequence of the requirement for participation in family dispute resolution in child related disputes (with limited exceptions) means that the “core child related business” of family courts are families that are not only experiencing the breakdown of family relationships but also multiple issues including family violence, drug and alcohol abuse, mental health issues and child abuse.

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<sup>35</sup> National Legal Aid submission, Australian Law Reform Commission *Review of the family law system* Issues Paper No 48, 73.

These families have already experienced or are experiencing trauma which impacts on their health, safety and wellbeing and particularly that of their children. The complexity of their legal needs can vary as can the level of social (non legal) support they require. The more protracted the proceedings the greater the risk to the health, safety and wellbeing of those involved.

As previously noted, many families cannot afford the costs of legal representation and only the most impoverished will qualify for legal aid. ICLs play an important role in promoting and protecting the welfare of children, but, due to limited resources they are only appointed in matters where the court has been able to identify the most serious risk.

Where matters are protracted this is likely to reflect underlying issues of complexity for the family, lack of legal representation and/or a lack of resources to facilitate early resolution of the matter.

To minimise the impact of family law proceedings on the health, safety and wellbeing of children and their families, NLA refers to our responses to the previous TsoR and recommends that resources be provided to:

- (i) Ensure adequate funding for legal assistance services where people are unable to afford legal representation.
- (ii) Appoint ICLs to represent children in the context of both legal proceedings and family dispute resolution processes that are held in the context of child related proceedings to ensure that they are child focused and to facilitate the appropriate participation in the decision-making processes about arrangements for their care.
- (iii) Pilot a more structured model of case practice involving ICL and social scientist partnership, enhanced child participation and post order work.
- (iv) Expand FASS services to ensure free holistic legal and social support to families beyond family violence to include drug and alcohol abuse, mental health issues and child abuse recognising that family violence rarely occurs in isolation from these other issues. This would assist them to navigate court processes, including between the family law, child protection and family violence and to be referred for ongoing assistance in relation to their legal and non legal needs.
- (v) Ensure early and ongoing triage of the legal and non legal needs of families.
- (vi) Increase referral to legally assisted models of dispute resolution for both child related proceedings and financial matters including for families experiencing family violence.
- (vii) Enable pro active case management and timely case management and decision making by the courts.
- (viii) Improve training competencies and skill development of professionals in the family law system.
- (ix) Develop collaborative inter-disciplinary frameworks and practices.
- (x) Ensure the physical safety of people accessing courts.

**NLA Recommends that:**

**15. Funding be provided to enable LACs to engage more social support workers in family law matters.**

**See also recommendations 3, 6, 7, 8, 12 and 13.**

**g. any issues arising for grandparent carers in family law matters and family law court proceedings;**

[NLA submission to the Senate Standing Committee on Community Affairs Inquiry into Grandparents who take primary responsibility for raising their grandchildren \(March 2014\).](#)

NLA also gave evidence to the Inquiry (20/06/14).

[https://parlinfo.aph.gov.au/parlInfo/download/committees/commsen/b1ea26aa-ef3f-4ad3-8207-7a0793e440f6/toc\\_pdf/Community%20Affairs%20References%20Committee\\_2014\\_06\\_20\\_2633\\_Official.pdf;fileType=application%2Fpdf#search=%22committees/commsen/b1ea26aa-ef3f-4ad3-8207-7a0793e440f6/0000%22](https://parlinfo.aph.gov.au/parlInfo/download/committees/commsen/b1ea26aa-ef3f-4ad3-8207-7a0793e440f6/toc_pdf/Community%20Affairs%20References%20Committee_2014_06_20_2633_Official.pdf;fileType=application%2Fpdf#search=%22committees/commsen/b1ea26aa-ef3f-4ad3-8207-7a0793e440f6/0000%22)

The work in relation to information sharing between the family law, family violence and child protection systems, discussed above, should minimise some of the issues experienced by grandparent carers as it is not uncommon for grandparents to be involved in proceedings across jurisdictions.

Issues commonly seen by LACs in matters involving grandparents include:

- “Incapacity of one or both parents to care for the children. This is usually by reason of one or more factors such as mental health, substance abuse, child abuse, family violence, and homelessness.
- Children with particular needs by reason of disability/health conditions (eg asthma, autism, ADHD, dental conditions etc) and/or trauma, (eg speech therapy, occupational therapy, ongoing counselling etc).
- Involvement of the state/territory child protection authority (CPA). The CPA may have approached the grandparent/s to take on care of the child. Care and protection orders may not be considered appropriate or necessary by the CPA if the child/ren are living with the grandparents. In our experience the CPA will often suggest that the grandparent/s need/s to make application to the family law court for orders.
- Legal proceedings can be complex, and inter-related proceedings in multiple courts may be necessary, e.g. in the family law court for “live with” orders; in the state/territory local court for personal protection orders; in the state/territory care and protection jurisdiction court; and in a state/territory court with criminal jurisdiction if charges have been brought as a result of an alleged incident relevant to the issue of whom the child should live with.
- Ownership of assets, such that not all applicants pass means testing for a grant of legal aid, but are not able to afford private legal representation, with the consequence that

people are left to prepare, file, and negotiate complex and/or daunting legal proceedings either on their own or with very limited legal assistance, and are also likely to have to pay court filing fees.

The issues above are not limited to matters involving grandparents. It is the case, however, that the complete cohort of these issues is often found in matters in which grandparents are involved.

A further issue for grandparents, if they have to bring proceedings in the family court, is that they face the additional stress and potential volatility associated with initiating legal proceedings against their own child.”<sup>36</sup>

**NLA Recommendations:**

**See Recommendations 3 and 13.**

- h. any further avenues to improve the performance and monitoring of professionals involved in family law proceedings and the resolution of disputes, including agencies, family law practitioners, family law experts and report writers, the staff and judicial officers of the courts, and family dispute resolution practitioners;**

Chapter 13 of the ALRC Report “Building Accountability and Transparency” made six recommendations which could be expected to improve the performance and monitoring of professionals involved in family law proceedings.

NLA supports implementation of the recommendations set out below:

**Recommendation 49 of the ALRC Report:** *Section 115 of the Family Law Act 1975 (Cth) should be amended to expand the Family Law Council’s responsibilities to include:*

- *monitoring and regular reporting on the performance of the family law system;*
- *conducting inquiries into issues relevant to the performance of any aspect of the family law system, either of its own motion or at the request of government; and*
- *making recommendations to improve the family law system, including research and law reform proposals.*

**Recommendation 50 of the ALRC Report:** *The Family Law Council should establish a Children and Young People’s Advisory Board, which would provide advice and information about children’s experiences of the family law system to inform policy and practice.*

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<sup>36</sup> National Legal Aid submission, Senate Standing Committee on Community Affairs *Inquiry into Grandparents who take primary responsibility for raising their grandchildren* (March 2014) 3.

**Recommendation 51 of the ALRC Report:** *Relevant statutes should be amended to require that future appointments of all federal judicial officers exercising family law jurisdiction include consideration of the person's knowledge, experience, skills, and aptitude relevant to hearing family law cases, including cases involving family violence.*

**Recommendation 52 of the ALRC Report:** *The Law Council of Australia should work with state and territory regulatory bodies for legal practitioners to develop consistent requirements for legal practitioners undertaking family law work to complete annually at least one unit of continuing professional development relating to family violence.*

**Recommendation 53 of the ALRC Report:** *The Australian Government Attorney-General's Department should develop a mandatory national accreditation scheme for private family report writers.*

**Recommendation 54 of the ALRC Report:** *The Family Law Act 1975 (Cth) should be amended to:*

- *require any organisation offering a Children's Contact Service to be accredited; and*
- *make it an offence to provide a Children's Contact Service without accreditation.*

#### Family violence competency of legal practitioners

NLA notes that work is underway to improve the family violence competency of legal practitioners as referred to in the Council of Attorneys-General Communique November 2019, "Participants noted work underway to improve responses to family violence, including measures to increase the family violence competency of legal practitioners, assess the merits of expanding the exercise of family law jurisdiction by state and territory courts, and improve information sharing between the family law, child protection and domestic violence systems."<sup>37</sup>

#### Family dispute resolution practitioners in property law matters

In relation to the performance of FDRPs in dispute resolution involving property issues, NLA is of the view that "Lawyers conducting FDR involving property and financial issues should be the preferred position. Having lawyers conduct property FDR has numerous advantages including:

- the provision of a qualified, ready workforce;
- legal literacy;
- financial literacy;
- ability to assess fairness in the context of the law;
- ability to reality check parties in the context of the law; and

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<sup>37</sup> Council of Attorneys-General Communique November 2019  
<https://www.ag.gov.au/About/CommitteesandCouncils/Council-of-Attorneys-General/Pages/default.aspx>

- an understanding of how consent orders should be structured to ensure that orders are capable of being implemented and are enforceable.

If any new system requirements are to be introduced, then there should be a simple, no cost process for recognition of prior learning.”<sup>38</sup>

NLA is of the view that any accreditation must address adequate screening for, and understanding about, the dynamics of family violence which also apply frequently in property law matters.

**NLA Recommends that:**

- 16. Recommendations 49-53 of the ALRC Report in relation to the performance and monitoring of professionals and the resolution of disputes be implemented.**
- 17. Family Dispute Resolution involving property and financial issues be conducted by lawyers with family law property experience.**

**i. any improvements to the interaction between the family law system and the child support system;**

NLA notes the Australian Government Department of Social Services submission to the Joint Select Committee. This submission provides an overview of the child support system and addresses the issue of disputed care arrangements.

NLA supports the Objects of each of the *Child Support (Registration and Collection) Act 1988* and the *Child Support (Assessment) Act 1989* as benefitting children.

*Attachment G* to this submission sets out the Objects of both Acts.

“The introduction of the child support scheme in 1988, and ensuing reforms to it including the current child support program, have resulted in an increase in the understanding and acceptance of the financial responsibilities associated with children, and the support appropriately provided to those children. It is acknowledged that the program has some complexity. However, the circumstances of people are many and varied, and the program endeavours to take account of these. It is suggested that an administrative scheme capable of resolving everyone’s issues simply, particularly given the significant contests between some of the parties involved, is likely to be impossible. The current program is therefore considered by us to be generally effective and our following comments are provided in this context.”<sup>39</sup>

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<sup>38</sup> National Legal Aid submission, Australian Law Reform Commission, *Review of the family law system*, Issues Paper No 48, 71.

<sup>39</sup> National Legal Aid submission, House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into the Child Support Program*, 1.



NLA submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs Inquiry into the *Child Support Program* (June 2014).

LACs assist payers and payees with issues relating to child support. Our experience is that most people understand their responsibilities and endeavor to meet them as best they are able however we do see a minority of situations where it appears that people are willing to repeatedly change jobs, move addresses, transfer assets and structure their affairs to avoid paying child support. Unless Child Support can enforce using their administrative powers (deduction from wages, issuing Departure prohibition orders, etc) or seek an enforcement order over an asset, these “payers” deny the payee and child/ren their proper support.

Consistent with the Objects of the Acts, it is suggested that interaction between the family law system and child support systems could be improved by:

- reducing the need to apply to the family law courts where matters could be dealt with administratively; and
- facilitating timely applications to the family law courts in appropriate circumstances.

Reducing the need to apply to the family law courts where matters could be dealt with administratively

Once legislative time limits for administrative resolution of child support issues have expired a person is left with the option of initiating court proceedings involving complexity and cost or accepting a situation to their detriment.

LACs commonly advise people whose Child Support issue would have been capable of administrative resolution had the person been able to respond to the issue in a timely way. It is considered that increased early support would help people who may otherwise have difficulties understanding their situation and reduce the need to access the family law courts for resolution.

The Department of Human Services website has clear and accessible general information about the scheme, and forms that can be used to report changed circumstances. Clients can register to use a range of ‘self-service options’ to obtain current information about their account, to report changes and upload electronic forms. Clients can call Child Support to talk to trained staff with access to their electronic case records, and interpreters will be arranged where necessary.

Notwithstanding the above information and options, it is common for a significant cohort of our child support clients to instruct that they cannot understand the details of their individual case, and/or that they experienced difficulty when attempting to update information. Amongst this cohort of clients are people with disabilities and/or who have low levels of English literacy, and sometimes English is not their first language. Particular issues expressed are that they find Child Support correspondence confusing and that there can be long wait times for Child Support to answer telephone calls. There are also

complications in relation to understanding key concepts such as “provisional income”, “prescribed non-agency payments”, “adjusted taxable income (ATI)”, and incorrect assumptions about the extent to which Centrelink and Child Support can share or act upon information about changes in their circumstances and the need to promptly lodge an income tax return or declaration. When a telephone interpreter has been arranged there can be issues if the interpreter cannot see documents the subject of discussion and key concepts are not necessarily readily translatable into other languages.

The following suggestions in relation to child support communications may assist to support both payers and payees and efficiencies generally including reducing the need for interaction with the family law courts:

- Correspondence in individual matters could include improved information such as:
  - Explanation of key concepts such as ‘provisional income’, ‘prescribed non-agency payments’, and ‘adjusted taxable income (ATI)’. People do not always understand that their ‘income’ for child support purposes is not limited to their taxable income, that certain non-taxable payments are automatically assessed, and that lump sum payments may also be considered as property or a financial resource in the change of assessment process.
  - Notification of time limitations as well as the consequences for delay, e.g. when assessments are based on provisional incomes – because an income tax return has not been lodged, the covering letter does not clearly set out how that provisional income was worked out, what the ramifications of use of provisional income use might be, how to go about addressing any potential issues, or the applicable time limits.
  - Payer transaction statements could provide a breakdown of how much of a client’s child support payment relates to their next ongoing child support payment, arrears for a past period, or penalties.
  - Sharing of information between Centrelink and Child Support.
  - Referral points for legal assistance including to LACs.

Referral for legal assistance is considered particularly important as LACs are often able to help clients resolve matters quickly. In this regard, we note our appreciation of the Child Support “Solicitors’ Hotline” which, when operating as originally envisaged, provides efficient access to lawyers for Child Support for case-specific enquiries. Access to this Hotline greatly supports earlier resolution of issues.

Experience has been that sometimes Hotline staff have advised LACs that the service is not available for case-specific enquiries. As a result, LACs have sometimes had to call the main Child Support advice line while the client is present and wait in the queue for the call to be answered. This means that the LAC can provide free advice to less people and increases the overall cost of the LAC service to the taxpayer.

Suggested additional administrative remedies that could be considered:

i) Utilising Regulation 11 of the *Child Support (Assessment) Regulations 2018*

Regulation 11 of the *Child Support (Assessment) Regulations 2018* provides a limited exception to the general rule that prevents Child Support retrospectively replacing a provisional income with a lower taxable income. Regulation 11 may apply if the parent was unable, or unaware of the need to lodge their income tax return for the relevant year(s) AND provides their income information as soon as was reasonably practicable in the circumstances. If the parent was not an Australian resident for tax purposes, they must have provided their income information to Child Support within a reasonable period.

This Regulation has been applied by Child Support to practical effect in a number of matters in which LAC staff have been involved. It has avoided the need to initiate court proceedings. However, there has also been experience of “as soon as reasonably practicable” being read restrictively, such that administrative remedy could not be achieved. It is suggested that consideration could be given to amending Regulation 11 to the effect that where there has been delay the Registrar is empowered to make an administrative decision where satisfied that acting on this information would not cause undue hardship to the other party and/or the child.

ii) Accepting accredited DNA results without requiring declaration of parentage

LACs advise parties in relation to the parentage testing. Where parties have obtained a DNA result consistent with parentage testing procedures which are specified in the Family Law Regulations Part IIA, then it is suggested that Child Support should be able to administratively determine a “presumption of parentage” on the basis of the DNA results of rather than requiring an application to the Court for a declaration of parentage pursuant to s. 106A. Similarly, an administrative remedy should be possible where parentage testing compliant with the Family Law Regulations indicates that someone who was registered as a payer with Child Support is not the parent of the child. Amendment to s. 29(2) *Child Support (Assessment) Act 1989* would be required.

Facilitating timely applications to the family law courts in appropriate circumstances

LACs continue to have some concerns that that priority for enforcement matters brought before the court by Child Support appear to be mostly limited to cases where the debt has accumulated over a long period of time and only where the payer has an asset over which security for the debt may be obtained and orders may be made for sale of the property in the event the debt is not paid. The following situations remain of concern:

- where an asset may have been transferred to another person or entity for less than market value and the purpose of the transfer may include, to avoid payment or enforcement of child support;
- where an asset may have been purchased (either partly or wholly) in the name of another person or entity and the purpose of the purchase in that manner may include, to prevent enforcement action by Child Support;

- where the child support debtor is a sub-contractor, or operates a business and Child Support is unable to utilise its power to deduct from wages;
- where the child support debtor is owed tax refunds but refuses to lodge tax returns;
- where the child support debtor is paid by multiple employers, including itinerant workers;
- where employers fail to deduct from the child support debtor's wages.

Grants of Legal Aid for ongoing representation are not commonly available in child support matters. However, in some situations where no Child Support payments have been made over lengthy periods of time, and Child Support has not taken effective enforcement action, a Grant of Legal Aid has been made for enforcement action under s.113A of the *Child Support (Registration & Collection) Act 1989* and that enforcement action has been successful.

Applications for enforcement could have a powerful deterrent effect were they more widely utilised.

**NLA Recommends that:**

- 18. Child Support correspondence to clients include information in relation to relevant key concepts, time limits and referral contacts for legal assistance.**
- 19. Consideration be given to amending Regulation 11 of the *Child Support (Assessment) Regulations 2018* to enhance existing administrative Child Support remedies.**
- 20. Consideration be given to Child Support being able to administratively determine a presumption of parentage on the basis of DNA results obtained consistent with the requirements of Family Law Regulations.**

**j. the potential usage of pre-nuptial agreements and their enforceability to minimise future property disputes;**

Chapter 6 of the ALRC Report Property Division addressed binding financial agreements (BFAs) including pre-nuptial agreements and their enforceability, and articulated issues associated with their use.

NLA is not convinced that increased usage of BFAs would minimise future property disputes. "Of course, the nature of agreements of this type means that their terms will usually be more favourable, and sometimes much more favourable, for one party."<sup>40</sup>

NLA recognises though that BFAs play a role in:

- providing an alternative approach to settling property settlement disputes without engaging in family court litigation;

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<sup>40</sup> *Thorne v Kennedy* [2017] HCA 49 (8 November 2017) [56].

- promoting individual liberties and the freedom to contract (with appropriate safeguards),
- enabling parties to reach a property settlement in circumstances where the limitation periods under the Act may have expired; and
- family, estate and business planning.

As indicated in the NLA submission to the ALRC DP, NLA would support an amendment for setting aside an agreement where it would be unjust to enforce the agreement by reason of family violence.<sup>41</sup>

Family violence behaviours which are unanticipated at the time of committing to a relationship can have serious disabling ramifications, and redress from an abuser should be possible.

**k. any related matters.**

Please see concerns expressed in relation to the provision of legal services in rural, regional and remote areas in the response to ToR e.

## Conclusion

Thank you for the opportunity to provide a submission to this Inquiry.

We would be pleased to attend upon the Inquiry to give evidence.

Should you require any further information from us please be in touch with the NLA Secretariat

Yours sincerely,

Gabrielle Z Canny  
Director with the NLA Family Law Working Group  
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<sup>41</sup> National Legal Aid submission, Australian Law Reform Commission, *Review of the family law system*, Discussion Paper No 86, 21.



2019

National Legal Aid represents the directors of the 8 Australian State and Territory legal aid commissions.

This booklet describes the role of legal aid commissions in delivering legal assistance services.



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## Providing legal assistance

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8 legal aid  
commissions 

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in excess of 2.3 million services  
in 2017-18

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2017-18  
funding \$798.8 M

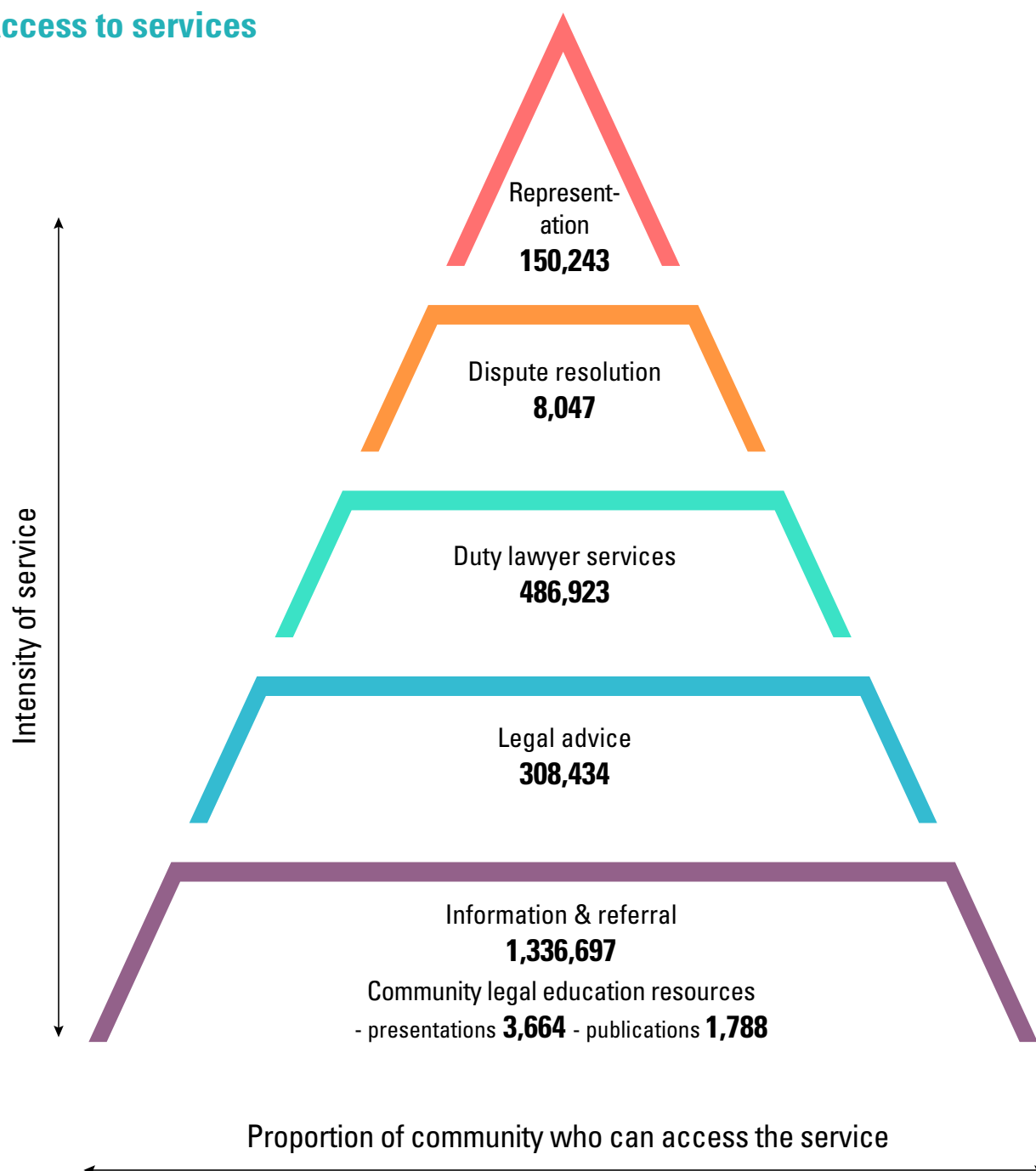
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78 offices around  
the country

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## Access to services

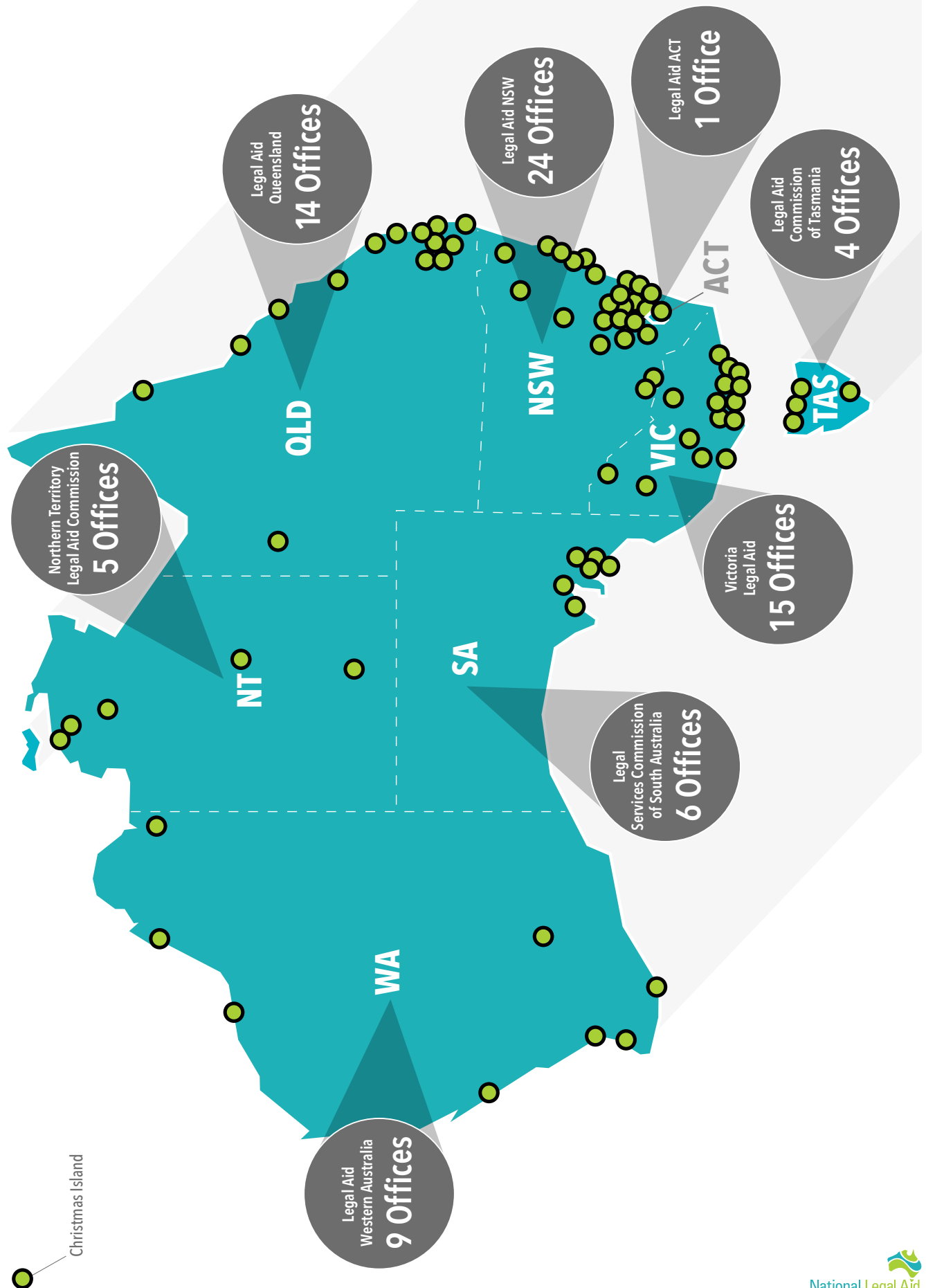


Sources: 2017-18 data National Legal Aid Statistics <https://nla.legalaid.nsw.gov.au/nlareports/>  
National Partnership Agreement on Legal Assistance Services 2015-2020 2017-18 data

### Notes:

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

## Reach across Australia



## Responsive legal assistance

Legal aid commissions (LACs) are the main providers of legal assistance services in Australia,<sup>1</sup> and provide nearly all the legal assistance representation services at courts and tribunals.

In 2017-18 LACs provided in excess of 2.3 million services (in all law types) to people across the country. These services were delivered from LAC offices and by way of outreach including through health justice partnerships.

### Background

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

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

### Legal representation services

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

### Duty lawyer services and family advocacy support services

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

Family Advocacy and Support Services (FASS) are provided at some registries of the family law courts<sup>4</sup> to assist families experiencing domestic violence as they move through the family law system. The FASS integrates duty lawyers with specialist family violence workers to help families navigate between the federal and state court systems and connect people with trauma-informed help such as risk assessments and safety planning.

<sup>1</sup> Productivity Commission 2014, Access to Justice Arrangements, Inquiry Report No. 72, Canberra vol 2 667.

<sup>2</sup> National Partnership Agreement on Legal Assistance Services 2015-2020, Clause B9.

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

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

## Responsive legal assistance (continued)

### Dispute resolution services

Dispute resolution services are provided as a necessary first step in all matters which are appropriate for such service delivery. All LACs operate programs which provide legally assisted models of dispute resolution conferences, and which achieve very high settlement rates, e.g. in 2017-18 the national average settlement rate was 77%. The LACs organise conferences, including providing the Chairperson for these conferences, and ensure parties who qualify for a grant of legal aid are legally represented.

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

### Legal advice, information and referral services

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

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

## Supporting an improved system

- 2.3 million services to the public
- Family dispute resolution – 77% national settlement rate
- Family Advocacy and Support Services

Implementation in March 2017 of the Family Advocacy and Support Service at the main registries of the family law courts.

Development of Family Violence Law Help website <https://familyviolencelaw.gov.au/>, a Family Violence and Family Law Community Legal Education Resource to complement the Family Advocacy and Support Service.

This national website houses family violence resources and information about the Family Advocacy and Support Service in each state and territory.

National Legal Aid gratefully acknowledges the support of the Commonwealth Attorney-General's Department for developing this resource.

- Independent children's lawyers

Dedicated website (<https://icl.gov.au/>) and suite of publications to provide information, news and resources to the public about the role of the independent children's lawyers in family law proceedings, and also the professional development and mentoring for those undertaking the role.<sup>5</sup>

- Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry

Providing legal assistance to disadvantaged consumers which was recognised by the Royal Commission as often of critical importance to the customer's position making a large difference to their situation.<sup>6</sup>

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

*What's the law?* was produced for national use in the Adult Migrant English Program (AMEP) and addresses 10 commonly experienced legal issues. The kit includes a DVD with 10 photo stories, information for teachers and activity sheets. The kit was evaluated in 2014 with teachers and in 2016 a research study, focusing on one of the *What's the law?* modules, found that it improved the participants understanding of the law. The study was published in 2018 in the *Journal of Law and Social Policy*.

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

<sup>5</sup> In response to the release of the Australian Institute of Family Studies Independent Children's Lawyers Study Final Report 2nd edition June 2014, and with NLA taking on sole responsibility for independent children's lawyer training as from May 2017.

<sup>6</sup> Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report (2019)* vol 1, 490-3.

## Supporting an improved system (continued)

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

### **Family law**

- Review of the family law system by the Australian Law Reform Commission (Sept 2017 to March 2019)
- Family Law Amendment (Parenting Management Hearings) Bill 2017, Senate Legal and Constitutional Affairs Committee Inquiry
- Family Law Amendment (Family Violence and Other Measures) Bill 2017 Exposure draft and public consultation paper and the Senate Legal and Constitutional Affairs Committee Inquiry
- Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017 Exposure draft and public consultation paper, Commonwealth Attorney-General's Department
- Parliamentary inquiry into a better family law system, House of Representatives Standing Committee on Social Policy and Legal Affairs

### **Elder abuse**

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

## Looking forward: working for fair justice

- Contributing to review of the National Partnership Agreement on Legal Assistance Services 2015-2020.
- Responding to the report on the Review of the family law system by the Australian Law Reform Commission.
- Online Dispute Resolution System project

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

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

- Lawyer-assisted family law property mediation - extending the LACs' successful legally-assisted family dispute resolution program to family law small property matters.

National Legal Aid gratefully acknowledges the support of the Commonwealth Attorney-General's Department for the delivery of this pilot.

- Participating in the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability.
- Supporting consumers following the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.
- Administering the Family Violence and Cross-examination of Parties Scheme for the Commonwealth.
- ICL training program

This program comprises online and face to face training modules and tested learnings.

National Legal Aid gratefully acknowledges the support of the Commonwealth Attorney-General's Department for developing this training.

- Responding to elder abuse.
- Hosting the International Legal Aid Group Conference 2021

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

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

## Working together: legal assistance service providers

Legal assistance in Australia is provided by four main groups of providers, each of which receives funding from either or both of the Commonwealth and respective State or Territory governments. The four main funded providers are:

- Legal aid commissions
- Aboriginal and Torres Strait Islander Legal Services
- Family Violence Prevention Legal Services
- Community legal centres.

“While all four providers offer a mix of services from legal education to casework for individuals and groups of clients, the targets for their services differ, as do their size. All four employ mixed service delivery models, with a focus on holistic services.”<sup>8</sup>

The mixed service delivery model involves the use of both in-house lawyers and private lawyers who are prepared to work for legal aid rates which are significantly less than market rates. In addition to the contribution made by private lawyers through the mixed service delivery model there are various schemes of pro bono assistance and volunteering.

### Relationships between legal assistance providers

Good relationships and co-operative arrangements exist between legal assistance service providers. These relationships and arrangements ensure that services are extended as far as possible, and that issues such as legal conflict are addressed. They also ensure that people receive the service most appropriate to their individual need.

Nationally, relationships and co-operation are supported by the Australian Legal Assistance Forum constituted by representatives of the peak bodies for all legal assistance providers.

<http://www.nationallegalaid.org/home/australian-legal-assistance-forum-alaf/>

Locally, providers also meet regularly for jurisdictional service planning purposes and to ensure that referral networks, including in relation to non-legal support for clients, are strong.

<sup>8</sup> Productivity Commission 2014, *Access to Justice Arrangements*, Inquiry Report No. 72, Canberra, p 665.



## Charter of National Legal Aid

### Membership

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

The LACs are independent statutory bodies that provide legal assistance services to the public, with a particular focus on the needs of people who are economically and/or socially disadvantaged. LACs provide in excess of 2 million legal services each year.

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

### Purpose

NLA's purpose is to:

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

### Beliefs

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

### Priorities

In 2019-2020 key priorities for NLA include:

- Achieving an increase in core funding to legal assistance service providers with that funding to be adjusted each year in accordance with the Consumer Price Index, so that more services can be delivered to people in need.
- Responding to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability.
- Working with government and service providers to ensure the most appropriate response following the release of the report of the Australian Law Reform Commission's Review of Family Law.
- Support for adequate funding for the Aboriginal and Torres Strait Islander legal services as the 'specialised legal assistance services for Aboriginal and Torres Strait Islander people'.<sup>9</sup>

### Strategies

NLA:

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

<sup>9</sup> Productivity Commission 2014, *Access to Justice Arrangements: Overview*, Inquiry Report No. 72, Canberra, 767.

## Charter of National Legal Aid (continued)

### Co-operation

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

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

### New Zealand

There is a strong alliance between NLA and Legal Aid Services New Zealand. The legal aid alliance facilitates the sharing of information, the showcasing of initiatives, and contributes to the development of best practice. A representative of Legal Aid Services NZ attends NLA meetings to discuss matters of mutual interest.

### Further information

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



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

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Australian Government  
Attorney-General's Department

## Family Advocacy and Support Services

### About the initiative

The Australian Government is funding legal aid commissions to establish integrated duty lawyer and family violence support services in family law court registries and other locations across Australia.

The key components of this initiative are:

- 1) Increasing the capacity of existing duty lawyer services in family law court registries.
- 2) Introducing integrated family violence support services to help families affected by family violence with matters before the family law courts.

The Australian Government will provide \$18.5 million over three years from 2016-2019 for the Family Advocacy and Support Services. This funding is part of the Government's \$100 million funding package to support the Third Action Plan of the *National Plan to Reduce Violence against Women and their Children 2010-2022*.

The sorts of services that may be offered by the Family Advocacy and Support Services are summarised below.

### Legal services

Legal services will focus on supporting clients and assisting the court to make evidence-based and safe decisions. Services may include:

- Screening and risk assessment for legally-assisted family dispute resolution in legal aid commission programs.
- Drafting urgent applications and representing in court for such matters, such as where there is a need for recovery of children, airport watch list orders to prevent children from being removed from Australia, and forced marriage matters.
- Gathering information and evidence about family violence, such as by issuing subpoenas or drafting applications for family and/or expert reports.
- Drafting notices of risk and supporting affidavit material where there are allegations of family violence.
- Drafting third party applications by grandparents or other family members where children are at ongoing risk of family violence and providing representation before the court where necessary.
- Drafting applications for the use of legislative provisions by the court for the protection of vulnerable witnesses giving evidence, and representing parties before the court where necessary.
- Providing advice and advocacy in relation to state family violence orders and state child protection orders, and their interaction with family law proceedings and family law orders.

### Family violence support workers

Family violence support workers will provide trauma-informed and high quality social support services to families affected by family violence so that non-legal issues (that elevate the risk of family violence, such as drug and alcohol use, mental health, and homelessness) are identified and addressed alongside their legal issues.

Support workers will also conduct safety planning and coordinate and advocate for additional referrals and services. They will ideally be co-located at the courts in line with the specialist Family Violence Court Division model in the Victorian context, recognised as best practice by the Victorian Royal Commission into Family Violence.

Unless it is not possible, the Commonwealth expects legal aid commissions to partner with established providers of domestic violence services, including outsourcing the family violence support worker roles to these organisations (rather than employing these workers in-house). This may include organisations already providing domestic violence support services in state courts. The aim here is to provide continuity of support to families affected by family violence as they move between the state and territory courts and the family law system.

### Joint roles

The lawyers and support workers will work together to provide services that help to bridge the gap between state and Commonwealth legal systems and processes, including Commonwealth family law, state domestic violence and state child protection jurisdictions.

Lawyers should have relevant experience across these various areas of law to provide advice and assistance to victims of family violence about child protection matters, as well as advocacy with police and private applications to obtain domestic violence orders in the state courts if needed.

Support workers will screen victims for diverse social needs and provide effective referrals to other specialist family violence, family support and services that can assist with child protection issues.

### **Third Action Plan**

This initiative is linked to National Priority Area 3: Greater support and choice, under the [Third Action Plan](#) of the *National Plan to Reduce Violence against Women and their Children 2010-2022*. Specifically, this initiative will implement Action 3.10, which reads:

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3.10: Enhance services in the family law system for families experiencing, or at risk of experiencing, violence.

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#### 3.10(a) Integrate legal and social support services to:

- assess risk and prepare safety plans
- deliver holistic services
- provide continuity of service for people moving between the state and federal systems
- better support groups that face additional barriers to accessing the family court system, such as Aboriginal and Torres Strait Islander women and women from culturally and linguistically diverse backgrounds.

### Family Law Council Final Report

This initiative also aligns with recommendation 1 of the Family Law Council's Final Report to the Attorney-General on [Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems](#) (June 2016).

#### Recommendation 1: Family safety services

The Australian Government consider ways of incorporating the expertise of specialist family violence services into the family law system to improve responses to families where there are issues of family violence or other safety concerns for children. This may include a combination of:

- 1) funding family violence services that provide embedded services in state and territory courts to continue to support clients with family violence issues when they move to the family law system to seek parenting or other orders;
- 2) embedding workers from specialist family violence services in the family courts and Family Relationship Centres;
- 3) creating a dedicated family safety service within the family law system.

### Service locations

The Family Advocacy and Support Services will be based, and wherever possible, primarily delivered at Family Law Courts Registries, but also other locations such as the nearby offices of legal aid commissions or partner organisations. The table below sets out the locations where the Family Advocacy and Support Services will support court users.

Service locations	
<b>NSW</b>	Sydney Family Law Courts Registry Parramatta Family Law Courts Registry Newcastle Family Law Courts Registry Wollongong Family Law Courts Registry
<b>Vic</b>	Melbourne Family Law Courts Registry Dandenong Family Law Courts Registry
<b>Qld</b>	Brisbane Family Law Courts Registry Cairns Family Law Courts Registry Townsville Family Law Courts Registry
<b>WA</b>	Family Law Court of Western Australia, Perth Family Law Court of Western Australia – Albany, Broome, Bunbury, Geraldton and Kalgoorlie country circuits
<b>SA</b>	Adelaide Family Law Courts Registry Family Law Courts – Mount Gambier circuit
<b>Tas</b>	Hobart Family Law Courts Registry Launceston Family Law Courts Registry Family Law Courts – Burnie circuit
<b>ACT</b>	Canberra Family Law Courts Registry
<b>NT</b>	Northern Territory Local Court in Katherine and Darwin

The services in the Northern Territory will be primarily delivered at the Darwin Local Court and the Katherine Local Court due to demand for services at these locations. Establishing the services at the local courts will allow the Family Advocacy and Support Services to engage with victims and perpetrators of family violence at an earlier stage.

## **Implementation & Evaluation**

The Commonwealth funding to support the Family Advocacy and Support Services is being provided through an intergovernmental agreement with the states and territories – the *Project Agreement for Family Advocacy and Support Services*.

The funding for the Family Advocacy and Support Services commences in 2016-17, meaning that legal aid commissions will be working to establish the new services as soon as practicable in 2017.

The Family Advocacy and Support Services will be independently evaluated to inform future Government decisions, prior to the expiry of the Project Agreement on 30 June 2019.

## **Enquiries**

If you have any questions for the Attorney-General's Department about the Family Advocacy and Support Services, enquiries can be addressed to the department's Legal Assistance Branch at [labcoord@ag.gov.au](mailto:labcoord@ag.gov.au).





Australian Government  
Attorney-General's Department

# Information Sheet: Changes to the *Family Law Act 1975* under the *Family Law Amendment (Family Violence and Cross-examination of Parties) Act 2018*

The *Family Law Amendment (Family Violence and Cross-examination of Parties) Act 2018* (the Act) received Royal Assent on 10 December 2018.

A copy of the Bill and Explanatory Memorandum can be obtained at [www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bId=r6152](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6152).

The Act bans personal cross-examination in family law proceedings involving allegations of family violence in specific circumstances, and requires the court to use other protections for victims where allegations of family violence are made but the specific circumstances do not apply.

## Commencement

The Act commenced on 10 March 2019. The amendments will apply to cross-examinations that occur six months after commencement of the amendments (10 September 2019), in proceedings instituted before or after that commencement. This is intended to ensure parties have adequate time to retain a legal practitioner and prevent any unnecessary delays to their court proceedings.

## Legislative ban on personal cross-examination

The Act amends the *Family Law Act 1975* by inserting a new 'Division 4—Cross-examination of parties where allegations of family violence' into Part XI of the Family Law Act. The new section 102NA — mandatory protection for parties in certain cases — prohibits personal cross-examination in family law proceedings where there is an allegation of family violence between two parties (new paragraph 102NA(1)(b)) and any of the following circumstances, set out in new paragraph 102NA(1)(c), apply:

- either party has been convicted of, or is charged with, an offence involving violence, or a threat of violence, to the other party
- a family violence order (other than an interim order) applies to both parties
- an injunction under sections 68B or 114 for the personal protection of either party is directed against the other party, or
- the court makes an order that the mandatory requirements apply to the cross-examination.

The court may make an order to prevent personal cross-examination on its own initiative or on the application of either the examining party, the witness party, or an independent children's lawyer (subsection 102NA(3)).

Where these conditions are met, new subsection 102NA(2) provides that the examining party must not cross-examine the witness party personally and the cross-examination must be conducted by a legal practitioner acting on behalf of the examining party. If the self-represented examining party does not have legal representation, they will not be permitted to cross-examine the other party.

New section 102NA applies to all parties to proceedings where there is an allegation of family violence between those parties and one or more of the circumstances are satisfied. This includes intervening parties, but only if the intervening party is involved in the allegation of family violence, whether as the alleged perpetrator or as the alleged victim.

## Commonwealth Family Violence and Cross-examination of Parties Scheme

The retention of a legal practitioner by parties subject to the ban on personal cross-examination will generally be facilitated according to the following process.

1. When a court is making directions for trial it will consider if a ban on cross-examination mandatorily applies or whether an order to ban personal cross-examination should be made under the Act. If the ban mandatorily applies and/or an order is made the parties will be informed of the implications of the ban and the steps that parties can take in light of the ban. That information will include the options of unrepresented parties retaining private legal representation, or making an application to the Commonwealth Family Violence and Cross-examination of Parties Scheme (the Scheme) administered by Legal Aid Commissions.
2. The court will provide the relevant Legal Aid Commission with a copy of any order or notation which confirms a ban on personal cross-examination applies and a copy of other relevant orders and directions, unless the affected party indicates they will obtain private representation or objects to their information being provided.
3. Prior to the next return date, and in any event within six weeks of the Legal Aid Commission receiving notice of a ban being in place, the Commission will confirm to the court whether an application has been made to the Scheme by any party, and if so, the status of the application/s.
4. If a party is to be assisted under the Scheme, the lawyer allocated to the matter will be required to file a Notice of Address for Service, thereby alerting the court that the party has obtained representation.
5. If any assistance under the Scheme is terminated for any reason, the Legal Aid Commission will inform the court as soon as practicable.
6. In the event a party becomes unrepresented after trial directions have been made, that party should promptly advise the court they are unrepresented.

### *Eligibility and contributions*

Access to the Scheme will not be means or merit tested. However, parties may be asked to contribute to the cost of their legal representation where appropriate, depending on their circumstances and ability to pay.

Conditions will apply to legal representation under the Scheme and ongoing representation is not automatic. If a party is no longer represented under the Scheme, and they do not retain a private legal practitioner, cross-examination will not take place as the ban will remain in place.

## Insertion of a new section 102NB – Court-ordered protections in other cases

The Act also provides that, if there is an allegation of family violence but personal cross-examination is not prohibited, the court must apply other appropriate protections.

New section 102NB states that if, in proceedings under the Family Law Act:

**Attachment C**

- a party intends to cross-examine another party personally,
- there is an allegation of family violence between the parties, and
- new section 102NA does not apply to prevent the party from personally cross-examining the other party

then the court must ensure that during cross-examination there are appropriate protections for the party who is the alleged victim of the family violence.

‘Protections’ in new section 102NB refers to the range of existing protections available to the court under the Family Law Act, the *Evidence Act 1995*, and the court’s general power to control proceedings. The [Family Violence Best Practice Principles](#) set out the available protections.

## **Re K Factors**

- (i) Cases involving allegations of child abuse, physical, sexual, psychological;
- (ii) Cases where there is apparently intractable conflict between parents;
- (iii) Cases where the child is apparently alienated from one/both parents;
- (iv) Where there are real issues of cultural/religious difference affecting the child;
- (v) Where the sexual preferences of either or both of the parents or some other person having significant contact with the child are likely to impinge upon the child's welfare;
- (vi) Where the conduct of either or both of the parents or some other person having significant contact with the child is alleged to be anti-social to the extent that it seriously impinges on the child's welfare;
- (vii) Where there are issues of significant medical, psychiatric, or psychological illness or personality disorder in relation to either party or a child or other person having significant contact with the child;
- (viii) Any case in which, on the material filed by the parents, neither seems a suitable custodian;
- (ix) Any case in which a child of mature years is expressing strong views, the giving of effect to which would involve changing a long standing custodial arrangement or a complete denial of access to one parent;
- (x) Where one of the parties proposes that the child will either be permanently removed from the jurisdiction or permanently removed to such a place within the jurisdiction as to greatly restrict or for all practicable purposes exclude the other party from the possibility of access to the child;
- (xi) Cases where it is proposed to separate siblings;
- (xii) Custody cases where none of the parties is legally represented;
- (xiii) Applications in the Court's welfare jurisdiction relating to the medical treatment of children where the child's are not adequately represented by one of the parties.

End.

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## H Eligibility for legal aid and the cost of extending it

This appendix describes the means test applied by legal aid commissions (LACs) to determine eligibility for grants of legal aid. Estimates of the number of households eligible for these services are discussed in section H.1. Section H.2 details the Commission's approach to estimating the additional cost associated with recommendation 21.4.

### H.1 Who is eligible for legal aid?

The LACs ration their services by means, merit and matter. The means tests determine a threshold of income and assets above which applicants are denied legal aid, or are required to make a contribution towards the cost of their case. Some types of legal aid services are not means tested, including minor assistance and information services (chapter 20). This appendix focuses on those services that are means tested — specifically the grants of aid that comprise the bulk of LAC expenditure on civil, including family matters.

The means tests vary considerably between LACs, but all comprise an income and assets test component. The LACs typically use a measure of disposable income — that is, one that takes into account tax and welfare transfers — for the purposes of administering the income test, although some jurisdictions assess gross income. Additional allowances are also often made for the number of dependants and household expenses. The income tests imposed by the different LACs for grants of legal aid are summarised in table H.1.

The assets test also varies considerably across legal aid providers, with different allowances for equity in housing, vehicles, businesses and other assets. Where an applicant's total assets exceed the threshold allowed, then they are usually expected to make a contribution towards the cost of their case. The assets test used by the LACs for grants of legal aid are summarised in table H.2.

**Table H.1 Summary of income test thresholds for which no further contribution is required<sup>a</sup>**

<i>Legal aid commission</i>	<i>Threshold of income, above which a contribution is required (net of allowances)</i>	<i>Allowance for children and dependants</i>	<i>Allowances for rental assistance and other household costs</i>	<i>Other allowances, notes</i>
Legal Aid New South Wales	\$213 per week	\$120 per week per dependant	\$320-\$455 per week	Net of income tax and Medicare levy, family tax benefits, carer allowance, rent assistance, NDIS amounts; up to \$250 per week in childcare costs; up to \$120 per week per child in child support payments
Victoria Legal Aid	\$255 per week	\$130 per week for first dependant, \$125 per week for each dependant thereafter	\$240 per week	Income tax, the Medicare levy, business expenses; up to \$240 per week in childcare costs; up to \$125-130 per week in child support payments
Legal Aid Qld	\$370-\$1 370 per week			Gross income measure that depends on number of children
Legal Services Commission of South Australia	\$342 per week	\$128 per week for first dependant, \$120 per week for each dependant thereafter	See note <sup>b</sup>	Allows a range of deductions for expenses such as tax, childcare and household expenses, but only up to a maximum level linked to the Henderson poverty line
Legal Aid WA	\$264 per week	\$99 for first dependant, \$93 for each dependant thereafter	\$260-\$390 per week	Net of income tax and the Medicare levy; \$148 per week in childcare costs; child support payments using the same scale as the allowance for children and dependants
Legal Aid Commission of Tasmania	\$450-\$1 005 per week			Gross income measure that depends on number of children
NT Legal Aid Commission	\$271 per week	\$101 for first dependant, \$96 for each dependant thereafter	Equal to rental 'cost of 2 bedroom flat in Darwin'	Net of income tax and Medicare levy; \$140.50 per week in childcare costs
ACT Legal Aid Commission	\$396 per week	\$185 for the first dependant, around \$174 for each dependant thereafter	\$450 per week	Net of income tax and Medicare levy; childcare costs up to \$208 per week

<sup>a</sup> In practice, most LACs require an initial contribution from clients for a grant of aid. This initial cost ranges from \$20 to \$110 depending on the jurisdiction and matter. <sup>b</sup> Equal to the 'childcare relief figure' set by the Commonwealth Department of Human Services for up to 50 hours (Legal Services Commission of South Australia 2014a).

*Sources:* Commission research based on Legal Aid NSW (2010a, 2010b); Victoria Legal Aid (2010a, 2010b, 2010c, 2010d); Legal Aid Queensland (2014); Legal Services Commission of South Australia (2014a, 2014b); Legal Aid WA (2010a, 2010b, 2010c); Legal Aid Commission of Tasmania (2003, 2010, 2014); Northern Territory Legal Aid Commission (2005); Legal Aid ACT (2013); Melbourne Institute of Applied Economics and Social Research (2014).

Table H.2 Summary of assets test thresholds for which no further contribution is required

<i>Legal aid commission</i>	<i>Threshold of assets, above which a contribution is required (net of allowances)</i>	<i>Home equity allowed<sup>a</sup></i>	<i>Vehicle equity allowed<sup>b</sup></i>	<i>Other allowances, notes</i>
Legal Aid New South Wales	\$100-\$1 500 depending on the matter	\$260 550 to \$521 000	\$15 100	Allowance is made for the reasonable value of household furniture, clothing and tools of trade; baby bonus and NDIS are exempt, as are lump sum compensation payments if the applicant and family members are not working; allowance of up to \$287 750 is allowed for farm or business equity
Victoria Legal Aid	\$865	\$300 000	\$11 280	Household furniture, clothing and tools of trade are excluded from assessable assets; allowance for farm/business equity between \$161 500 and \$336 500 depending on number of dependents; lump sum payments are excluded unless they affect the receipt of a Commonwealth benefit
Legal Aid Qld	\$930-\$1 880 <sup>c</sup>	\$146 000 <sup>d</sup>	\$16 000	Household furniture and tools of trade are exempt unless they are of 'exceptional value'
Legal Services Commission of South Australia	See note <sup>e</sup>	See note <sup>f</sup>	See note <sup>g</sup>	Household furniture, clothing, and tools of trade; equity in a farm or business up to assets limit under various Centrelink benefit tests
Legal Aid WA	\$950-\$1 900 <sup>c</sup>	\$299 614 to \$355 051	\$14 600	Household furniture, clothing, and tools of trade; equity in a farm or business between \$161 500 and \$346 000 depending on home ownership and partner status.
Legal Aid Commission of Tasmania	\$740-\$1 490 <sup>c</sup>	\$169 000 to \$215 750	\$11 500	Equity in a farm or business between \$118 000 and \$251 000 depending on home ownership and partner status
NT Legal Aid Commission	\$950-\$1 950 <sup>c</sup>	\$310 000	\$13 500	Household furniture, clothing, and tools of trade; some lump sum payments if the applicant and family members are not working
ACT Legal Aid Commission	\$1 100-\$2 200 <sup>c</sup>	\$507 250 <sup>h</sup>	\$16 315 <sup>g</sup>	Household furniture and effects that are not of exceptionally high value, clothing, tools of trade, lump sum compensation payments if the applicant and dependants are not working, lump sum child or spouse maintenance where the applicant is receiving a pension/benefit at a reduced rate. Between \$196 750 and \$421 500 in farm or business equity depending on home ownership and partner status

<sup>a</sup> Typically, these allowances are made for the principal home of the person applying for assistance, with any other real estate being counted against the net assessable assets allowed. Those aged over 60 years are often provided with more leeway in several jurisdictions. <sup>b</sup> Equity allowed is usually up to two vehicles, with any equity in additional vehicles being assessed as assets. <sup>c</sup> Varies by number of dependants. <sup>d</sup> Also allows for savings of up to this amount for the purpose of buying a home, provided that contracts were exchanged prior to knowledge of the legal problem. <sup>e</sup> The figure is set and updated in accordance with the weighted average of the Consumer Price Index and Average Weekly Earnings, with an allowance for dependants. <sup>f</sup> Up to the amount equal to the median value of an established home in Adelaide. <sup>g</sup> Equity allowed up to the published re-sale value for a 5 year old 6 cylinder family car. <sup>h</sup> Equity allowed up to a maximum equal to the median price of an established house in the ACT.

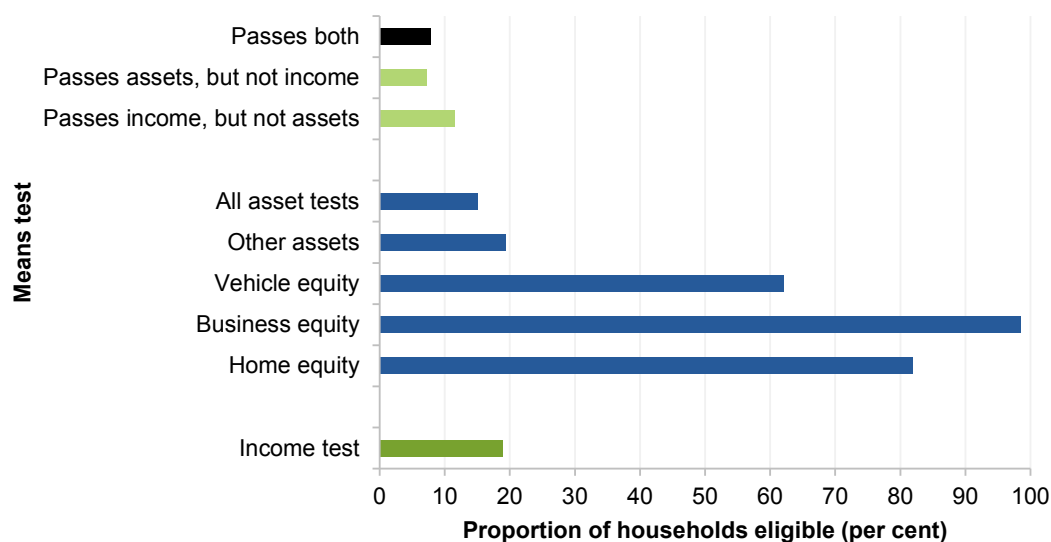
Source: As per table H.1.

## Few are eligible for legal aid

It is difficult to determine a ‘notional’ national means test given the way that eligibility requirements vary considerably between jurisdictions. That said, the Commission has derived such a notional national means test, in an effort to understand the proportion of households that would be eligible for legal aid without having to make a contribution. To do so, the Commission has used the ABS 2009-10 Household Expenditure Survey (HES), as this data source provides consistent information on a range of different income measures and assets. It does not, however, provide detail down to the level that LACs frequently consider — such as the value of tools and household furniture.

The Commission estimates that around 8 per cent of households across Australia are eligible for legal aid without having to make a contribution towards their costs. Based on the income test alone, around 19 per cent of households meet the ‘average’ LAC criteria, while 15 per cent of households meet the assets criteria alone. Figure H.1 summarises the results of the Commission’s estimates, and the assumptions used to derive it. It should be noted that the calculations are indicative only and rely on a number of assumptions, which, if incorrect, could significantly change the estimated proportion of eligible households.

Figure H.1 Estimated proportion of households eligible for legal aid<sup>a</sup>



<sup>a</sup> Based on an income test that allows for \$300 per week base income, \$150 per week per dependant under 15 years of age, \$300 per week per household in rental assistance, and \$100 per week per household for other household expenses; and an assets test that allows for \$500 000 in home equity for the place of residence, \$250 000 in business equity, \$15 000 in vehicle equity, and \$1000 for other assets. Other assets includes the value of accounts in financial institutions, private trusts, shares, debentures and bonds, residential property besides the place of residence, non-residential property, and ‘other assets not elsewhere classified’ by the Household Expenditure Survey.

*Data source:* Commission estimates based on ABS (*Household Expenditure Survey, 2009-10*, Cat. no. 6503.0, Confidentialised Unit Record File).



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Very different proportions of households are eligible for the different criteria of the assets test. Most households are not constrained by the allowances made for business and home equity — possibly because many households do not own businesses and rent their principal place of residence. The vehicle constraint is more binding, but still not applicable for most households. However, the low threshold for assessable assets means that the constraint on other assets — predominantly liquid assets — renders about 80 per cent of households ineligible for aid without making a contribution.

## **H.2 How much would it cost to provide more legal aid services?**

The Commission, in recommendation 21.4, proposes more funding be provided to legal assistance services for three purposes:

- to maintain existing frontline services that have a demonstrated benefit to the community
- to relax the means tests applied by the LACs and allow more households to be eligible to receive their grants of legal aid
- to provide grants of legal aid in areas of law where there is little assistance being currently provided, by either LACs or other legal assistance services.

The Commission estimates that the collective cost of this recommendation is around \$200 million per annum, and should continue as an interim arrangement until sufficient data can be collected to better inform funding of legal assistance services (chapters 21 and 25). This section describes in detail how these estimates were derived.

### **Providing funding to maintain existing frontline services**

Recent decisions taken in the 2013-14 Mid-Year Economic and Fiscal Outlook (MYEFO) Statement and 2014-15 Budget reduced funding to all four legal assistance providers (Australian Government 2013). The announced reductions in funding from MYEFO totalled around \$43 million over four years, and were designed to limit policy reform and advocacy activities:

The Government will achieve savings of \$43.1 million over four years by removing funding support for policy reform and advocacy activities provided to four legal assistance programmes. Funding for the provision of frontline legal services will not be affected. (Australian Government 2013, p. 119)

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The distribution of these changes in funding, over four years (2013-14 to 2016-17), comprised:

- a \$6.5 million reduction to the LACs
- a \$19.6 million reduction to the Community Legal Services Program (CLSP), directed to the community legal centres (CLCs)
- a \$13.3 million reduction to the Aboriginal and Torres Strait Islander Legal Services (ATSILS)
- a \$3.7 million reduction to the Family Violence Prevention and Legal Services (FVPLS) — however, this change in funding did not eventuate (table 20.4).

A further reduction of \$15 million to LACs was made in the 2014-15 Budget for that financial year.

However, these adjustments to funding should be considered against the wider context of additional funding that was provided in the 2013-14 Budget. In that budget, additional funds of \$30 million were provided to LACs over two years to undertake work in civil areas of law. (The subsequent \$15 million reduction in the 2014-15 Budget represented an early end to the provision of those funds.) An additional \$10.4 million for four years was also provided through the CLSP (table 20.4).

That said, many legal assistance services have stated that the changes to funding as part of the 2013-14 MYEFO and 2014-15 Budget have affected frontline services. For example, the National Aboriginal and Torres Strait Islander Legal Services stated in respect to the changes outlined in the MYEFO:

[I]mplementing the announced funding cuts cannot simply be done by removing dedicated law reform and advocacy positions. Given how law reform and advocacy work is shared amongst multiple people with responsibility in areas of frontline services, the implementation of the announced funding cuts will mean that cuts to frontline service delivery will have to be made. Furthermore, ATSILS allocate very few resources to law reform and advocacy work, and the size of the announced funding cuts far exceed what is spent in this area meaning that in order to implement such, other frontline services are going to have to be withdrawn. (sub. DR327, p. 2)

The Commission is satisfied that the changes to funding as part of the 2013-14 MYEFO and 2014-15 Budget have affected frontline legal services (chapter 21). The Commission considers that these adjustments to funding be altered, and funding restored to the LACs and ATSILS. The resulting total cost to the Commonwealth would be around \$34.8 million over four years (or around \$8.7 million per year). Consistent with recommendation 21.6, more information around appropriate funding levels should then be available to make a comprehensive assessment of what funding is needed for each legal assistance provider.

The case for returning CLSP funding back to the level of the 2013-14 Budget is not as strong. The additional funding provided in that budget comprised of new, additional funds as well as a transfer of funds previously allocated to other government programs (summarised in table 20.4). In practice, it appears that Environmental Defenders Offices

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(EDOs) benefited from the additional funding in the 2013-14 Budget, but then lost these gains, as well as funding for their operating budgets, as part of the 2013-14 MYEFO decisions.

Consequently, the Commission considers that the Commonwealth should provide funding for the operating costs of the EDOs (of around \$1 million per year, over four years), but does not see merit in restoring to the EDOs those additional funds that they received in the 2013-14 Budget. This adjustment, in conjunction with returning the other CLSP funding that was withdrawn in the 2013-14 MYEFO, would cost the Commonwealth a total of \$10.6 million over four years (or around \$2.6 million per year).

In total, the cost of these proposals is \$45.4 million over four years (or around \$11.4 million per year).

### **Providing additional funding to the LACs to relax their means tests**

The Commission has used a variety of data sources in order to cost the recommendation about relaxing the means tests applied by the LACs for civil (including family) matters. These include:

- unpublished administrative data from Victoria Legal Aid (VLA) on the number and average costs of services provided, by matter and method (grants of aid, duty lawyer services, minor assistance services, and information services)
- unpublished administrative data from Legal Aid New South Wales (LANSW) on the number of services provided by matter and method, along with the average cost of grants of aid fulfilled by private practitioners
- published data from the National Legal Aid (NLA) website, which shows the total expenses for each legal aid commission
- the ABS 2009-10 Household Expenditure Survey (HES), which provides information around the distribution of income and assets of households.

However, these data have some limitations. The data provided by the LACs contains some gaps. For example, the data from VLA only contains a sampling of costs for grants of legal aid (which make up the largest proportion of LAC expenditure) at private practitioner rates. Similarly, LANSW was only able to provide the average cost of grants of legal aid for private practitioner rates. This means that there are no data on the cost of providing 'in-house' grants of legal aid. To account for this, the Commission has calculated the total cost of grants of aid at private practitioner rates, then 'scaled down' the result by a factor equal to the number of grants of aid provided in-house as a share of total grants of aid. Such a method implicitly assumes the same ratio of in-house grants of aid to private practitioner grants in any costing calculation.

Another limitation is that LANSW was unable to provide cost estimates for providing duty lawyer services, minor assistance, and information services (but were able to provide the

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number of each). To cost these services, the VLA costs have been applied to the LANSW figure as they represent the closest substitute for which detailed data are available. Such a process is not ideal, but is consistent with cost-benefit analysis methods (Department of Finance and Administration 2006).

The data provided by VLA and LANSW have been used to derive the total costs of providing legal services for civil (including family) law matters in those jurisdictions for 2012-13. The resulting estimates, combined with the NLA data, allow for the proportion of costs associated with providing legal aid in those areas of law. This proportion was then applied nationally to determine an imputed total national cost for civil (including family) law services — around 35 per cent of total expenses.

The HES data have been used to plot a distribution of income and assets that, depending on where thresholds are drawn, define how many people are in scope for legal aid. A baseline case is first set by picking a representative income and assets test based on those estimated by the Commission to be eligible for a grant of legal aid (section H.1) — around 8 per cent of households. Changes to the means test allow for a new proportion of households eligible for legal aid to be estimated, and it is the proportionate change between this and the baseline case that determines the additional funding required (by applying it to the national total for civil, including family, law matters).

### Choosing a ‘baseline’ set of eligibility requirements

The Commission has used a simplified approach that considers equivalised household disposable income (box H.1) and a single, combined measure of net assets to determine changes in eligibility. This is a simpler approach than the means tests commonly employed by the LACs as it does not make different allowances for different assets. The choice of this approach has been made on the grounds that it is the limits on ‘other assets’ that are the main binding constraint, rather than the specific asset types commonly considered (figure H.1).<sup>1</sup>

An initial, or ‘baseline’ set of income and assets parameters is necessary in order to determine proportional changes in the number of households eligible for legal aid. This baseline set of income and net assets is chosen by examining the distribution of income and assets for those households found to be eligible under the ‘notional’ national parameters discussed in section H.1. This indicates that:

- a median equivalised disposable household income of approximately \$400 per week (or around \$20 000 per year)
- most households had net assets of less than \$150 000.<sup>2</sup>

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<sup>1</sup> In practice, moving towards a ‘pooled’ assets test is effectively equivalent to relaxing the most restrictive assets test first, and then the next most restrictive, and so forth.

<sup>2</sup> While there could be concerns that such a baseline would omit those that are ‘asset-rich’ and ‘income-poor’, such as some Age Pension recipients, it should be noted that those older than 65 comprise less than 3 per cent of VLA and LANSW clients, and so do not materially affect the costing estimates.

These parameters were used to calculate the baseline case, which in turn indicate that around 8 per cent of households are eligible for grants of legal aid.

#### **Box H.1      Equivalised disposable household income**

Comparing the relative wellbeing and economic resources of households is difficult because different households can have different compositions. Comparing the income of a single-person household to that of a couple, who are both employed, with several dependants can be misleading. Some adjustment is necessary to take account of different compositions of households for meaningful analysis.

One established method to do this is to use 'equivalence scales' — factors that control for different compositions of households — to weight income in order to make meaningful comparisons. Applying these equivalence scales means that the resulting 'equivalised' income can be viewed as an indicator of the economic resources available to a standardised household. This enables more accurate comparisons across households to be made.

The ABS HES contains equivalence scales based on a 'modified OECD' approach, and these scales are used by the Commission for its analysis.

*Source: ABS (Household Expenditure Survey, 2009-10, Cat no. 6305.0, Household Expenditure Survey User Guide, pp. 132–137).*

### **Increasing the number of households eligible for legal aid in civil including family matters**

As discussed in chapters 21 and 25, the Commission has recommended that, once further work has been done to improve the evidence base, further analysis and consideration should be given to the quantum of funds necessary to provide legal aid services for those where there is a net benefit from doing so.

At present, however, based on limited data, the number of households eligible for legal aid appears to be very low. Indeed, some means tests are below some common measures of poverty — such as the Henderson Poverty Line and the OECD Relative Poverty Line (described in box H.2). The Commission is not proposing to increase the means test to these levels, although notes that VLA has indicated that the latter benchmark may be an 'appropriate starting point' when determining future means tests:

We've acknowledged ... the OECD as a starting point, it's not an end point, and we recognise that there would be different ways to approach the question of financial eligibility or someone's lack of capacity to meet the full cost of their own legal representation for very severe life-affecting issues. (trans., p. 741)

There are many measures of disadvantage that consider factors beyond relative income, such as including combinations of assets, income and consumption, length of time in poverty, and broader measures of social exclusion (McLachlan, Gilfillan and Gordon 2013). Each of these has benefits and drawbacks when considered as a measure to determine eligibility for legal aid. For example, measures of deprivation — which look at

going without or being unable to afford particular goods and services — may be a poor measure to use to determine eligibility for legal aid as the deprivation in question may not be related to legal need.

### Box H.2 Measures of relative poverty

Two commonly used poverty lines are the Henderson Poverty Line and the OECD Relative Poverty Line.

- The Henderson Poverty Line defines benchmarks of poverty on the basis of equivalised disposable income for different household types. A recent estimate found that around 12.4 per cent of Australians were below this poverty line (Melbourne Institute of Applied Economics and Social Research 2013).
- The OECD Relative Poverty Line is defined as household income below 50 per cent of median equivalised household disposable income. Statistics from the OECD indicate that about 13.8 per cent of Australians were below this poverty line (OECD 2014). Another estimate, which used a different measure of equivalised disposable income and other assumptions, found that around 10.3 per cent of Australians were impoverished (McLachlan, Gilfillan and Gordon 2013).

However, these measures do not consider assets in their calculation. One measure that does — a measure of financial poverty (Headey, Krause and Wagner 2009) — considers both equivalised household income as well as a household's net worth. Households with less than \$200 000 or little in the way of liquid assets are considered to be poor. It was estimated in 2008 that around 13.7 per cent of the population was classified as poor under this measure.

Regardless of the relative poverty measure used, the proportion of the population considered poor is higher than the proportion of the population eligible for grants of legal aid from LACs under their means tests. This indicates that many households, despite being financially disadvantaged, may still fail the means tests for grants of legal assistance, or be required to make a contribution towards the cost of their case from a position of meagre resources.

An even smaller proportion would be likely to receive a grant of legal aid once the other methods of rationing are considered (chapter 21).

The choice of a measure of disadvantage to determine eligibility for legal assistance services should also be judged against the costs and benefits of providing services for different matters to those with other dimensions of disadvantage. While legal aid could be used to solve various legal needs, it may be the case that it is more cost effective to resolve those needs through, or in conjunction with, other services (which in turn may have their own means tests). Accordingly, more information is needed to best identify the measure or measures that should best be used to determine eligibility for legal aid. The recommendations in chapter 25 outline the best way to improve the evidence base in order to achieve this.

That said, there is clear evidence at present to suggest that legal assistance services are not fully meeting the legal needs of either the impoverished or the disadvantaged as intended, due to a lack of resources (chapters 21 and 22). A review of the National Partnership Agreement governing legal assistance services by the Allen Consulting Group found that



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present funding arrangements for LACs mean that legal aid is failing to provide services to the disadvantaged clients that need them:

Current arrangements do not equip legal aid commissions to provide grants of legal aid to all disadvantaged clients in all matters within stated service priorities, nor do the eligibility principles and service priorities draw a clear line between the types of matters and clients that should attract Commonwealth funded legal assistance services, and those where services should not be provided, or should be provided through other mechanisms. (2014, p. 113)

Given the low number of households eligible for grants of legal aid, and evidence to suggest that financially disadvantaged households may be ineligible, the Commission has calculated the cost of relaxing the means test, relative to the 'notional' national case described above. Because there is a lack of data at present to indicate what proportion of households should be eligible for assistance, the Commission has calculated the cost of increasing the means test (both income and assets) by 10 per cent, relative to the baseline case described above,<sup>3</sup> on the grounds that such a policy represents a reasonable interim arrangement. Such an increase would lead to around 10 per cent of households (or about 9 per cent of the population) being eligible for legal aid services in civil and family matters — a proportion that more closely matches the share of households experiencing relative poverty. Such a shift would also move the eligibility requirements closer towards means tests applied to some other government benefits.

The Commission estimates that increasing the means test by 10 per cent for civil (including family) matters would cost an additional \$57 million per year. The Australian Government should provide the bulk of this funding (given that this money would be used to assist clients in areas of Commonwealth law under existing guidelines). The Commission estimates that such a proposal would increase the number of people eligible for grants of aid in civil (including family) matters from around 1.4 million to 1.9 million.

### *Sensitivity testing the relaxing of the means test*

The accuracy of this additional cost can be tested for sensitivity by considering the estimated costs for different changes to the baseline case (table H.3). The sensitivity testing estimates a range of costs from \$38 million to \$122 million. The higher estimates represent cases where the baseline considered often comprises a very small number of households, which in turn leads to large proportional increases when the means test is increased. Conversely, the lower estimates result from smaller proportional changes in the number of households considered eligible.

One factor that should be noted is the small range of changes in estimates of cost within the income bands (the columns of table H.3). This indicates that once the 'other assets' test is relaxed, the binding variable that controls eligibility is primarily income. This highlights

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<sup>3</sup> That is, to an equivalised disposable household income of \$22 000 per year and total net assets of \$165 000.

the importance of relaxing the means test on other assets (or raising the general assessable asset limit) when increasing eligibility.

**Table H.3 Sensitivity testing of the cost of raising the means tests by around 10 per cent for civil and family matters<sup>a,b</sup>**

Change in net household assets	Change in equivalised net disposable household income				
	\$18 000 to \$20 000	\$19 000 to \$21 000	\$20 000 to \$22 000	\$21 000 to \$23 000	\$22 000 to \$24 000
	\$m	\$m	\$m	\$m	\$m
\$130 000 to \$142 500	116	84	56	38	39
\$140 000 to \$155 000	122	89	61	42	43
<b>\$150 000 to \$165 000</b>	113	84	<b>57</b>	39	40
\$160 000 to \$175 000	113	84	57	39	41
\$170 000 to \$187 500	112	85	59	40	42

<sup>a</sup> **Bold** denotes the Commission's preferred estimate. <sup>b</sup> The discreteness of the data does not always allow for an exact 10 per cent increase in income and assets measures, and so the proportional change in some categories may be greater than others.

Sources: Commission estimates based on unpublished VLA and LANSW data; ABS (*Household Expenditure Survey, 2009-10*, Cat. no. 6503.0, Confidentialised Unit Record File).

## Providing additional funding for grants of aid in civil matters

Increasing the means test for the present range of services offered would still leave considerable gaps in coverage because LACs do not offer grants of aid in many civil matters. Some areas of civil law are covered by the other legal assistance services, but the Commission has heard many instances where coverage has been 'wound back' or where LACs have suggested that there is unmet legal need in particular areas, but do not have the resources to cover it (chapter 21). For example:

Then there's looking at areas of law in which we're not adequately meeting unmet need. Particularly in the civil law space we accept that we will never be able to cover the field, but in running effective niche civil law practices which can spotlight systemic problems and tackle issues at their source ... we can contribute to the avoidance of legal problems for other people who will never actually be a client. (VLA, trans., p. 744)

However, when pressed on the extent of unmet legal need for civil (as well as family matters), no LAC was able to provide a concrete figure on the level of unmet need, or how much additional funding would be necessary to close the perceived 'gap' in legal services. The inquiry process revealed a number of anecdotes relating to unmet need in the civil



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space, but quantifying the costs of resolving that need and the benefits from doing so is not possible to do accurately on such evidence.

The observation that problems tend to be associated, or ‘cluster’, with family law matters suggests that more assistance is needed for other civil law matters. The *Legal Australia-Wide Survey* found that family problems often clustered with ‘credit and debt’ problems, and that those with family law problems also frequently had disputes in areas of consumer, criminal, government (including benefits), housing and rights (Coumarelos et al. 2012, pp. 88–89). Given that LACs have identified and provide services to those with family law matters, these data indicate that assistance is needed for other civil matters as well.

On this basis, the Commission has examined the option of increasing the number of (non-family) civil grants of aid to match the number of grants presently provided for family matters — an increase of around 40 000 grants, annually. This represents a substantial increase in the total grants of legal aid, given that (non-family) civil matters are not well covered by LACs at present.

The present lack of coverage in (non-family) civil matters makes it difficult to cost such a proposal with accuracy. Because the LACs do relatively little casework for civil (other than family) matters, the cost information provided by VLA and LANSW may not be a good indicator of the funding they would require if they were to increase their caseload in this area of law. Another issue is the relatively skewed nature of the other civil casework at present — some areas of civil law (besides family) receive a much greater number of grants of legal aid than others. However, while such data may be imperfect, it is the most reliable source that the Commission has had access to at this particular level of disaggregation.

The data about grants of legal aid undertaken by private practitioners provided to the Commission indicated that the cost of a grant of aid for a civil matter ranged from \$1923 (for matters relating to mental health in New South Wales) to \$24 988 (for consumer matters, including consumer credit, in New South Wales).<sup>4</sup> The weighted cost of a civil grant of aid currently undertaken by VLA and LANSW — based on their cost weighted by their incidence — is around \$3100.

Accordingly, the cost of providing an additional 40 000 grants of aid for civil matters is in the order of \$124 million. In practice, however, there are likely to be considerable savings in achieving this goal if LACs were able to use in-house lawyers to provide these grants instead of private practitioners. Governments should give consideration to recommendation 21.3 (relaxing the constraints around the use of in-house lawyers by the LACs) to allow such potential savings to be fully realised. State and territory governments should provide the bulk of this funding on the grounds that most of the civil matters (outside of family matters) relate to state and territory areas of law.

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<sup>4</sup> The number of grants of aid for consumer matters is relatively low in New South Wales, and the high average cost reported here reflects the effect of a few complex cases.

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### *Sensitivity testing the provision of additional grants of civil aid*

A lack of comprehensive cost data for grants of aid in civil matters means that it is difficult to provide an exact figure or confidence interval around the cost of providing these additional grants of aid. One method of sensitivity testing these additional grants of aid is to cost them at the private practitioner rates in the areas of civil law most commonly provided by VLA and LANSW. Two areas of law — financial matters and government matters — are currently provided more often than other civil matters (although they themselves are far less common than areas of family law). Costing an additional 40 000 grants of civil aid at those rates yields an estimate between \$80 million and \$130 million, respectively.

The Commission estimate of \$124 million is towards the higher end of this estimate, reflecting the relatively high cost of grants of aid in civil areas of law (outside of family law) where there are currently fewer cases undertaken by VLA and LANSW — such as migration, housing and human rights. An estimate towards the higher end of the band is considered credible as costs may rise if LACs expand into providing more services in these areas of law.

## **Summary**

The combined cost of these proposals is around \$192 million per year, comprising:

- \$11.4 million per year to maintain existing frontline services
- around \$57 million per year to relax the means tests for LACs
- around \$124 million per year to provide additional grants of aid in civil matters.

However, the Commission has recommended a funding increase of around \$200 million (recommendation 21.4), due to a number of sensitivities around the methodology employed. These include:

- the potential for a higher cost of providing private practitioner services than what is currently being paid at present (as an increase in the demand for the services has the scope to raise prices)
- concerns that increasing the means test could alter the ‘mix’ of problems faced by those seeking legal aid, and so alter the costs of grants of aid
- uncertainties around how the intensity, or number of problems per household, changes as the means tests are relaxed.

These factors highlight the need for greater data collection to better understand the cost drivers and legal problems facing those who need legal assistance services. The challenges of building such an evidence base are discussed in chapter 25.

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There is also a question as to which level of government should bear the cost of recommendation 21.4. Based on the present principle used under the current National Partnership Agreement — that ‘Commonwealth money should be attached to Commonwealth matters’ — the Commission estimates that around 60 per cent of the cost associated with recommendation 21.4 should be borne by the Commonwealth. This reflects the cost of changes in funding from MYEFO and the Budget, and the cost of additional family law matters from relaxing the means tests, which are largely Commonwealth responsibilities. The cost of providing grants of aid for these additional non-family civil matters would be more evenly shared between the Commonwealth and the states.



Australian Government  
Attorney-General's Department

# Women's Economic Security Package

## Lawyer-assisted family law property mediation – Legal Aid Commission trial

November 2018

### What is the measure?

- The Australian Government will provide \$10.3m in additional new funding for Legal Aid Commissions (LACs) in each state and territory to conduct a two year trial of lawyer-assisted mediation to help families divide their property after separation.
- The trial will be targeted at families with a property pool of up to \$500,000, excluding debt and will run from January 2020 to December 2021.
- Legal Aid lawyers will support clients through the mediation process, providing legal advice as required and empowering the parties to reach an agreement between themselves.
- Lawyers will also help their clients to document their agreement and file it with the court. If an agreement cannot be reached after mediation, lawyers will be able to continue to provide advice to clients about their options, and assist them through the court process.
- This trial will support separating couples who require legal advice to mediate and reach agreement on family law property splits, without having to go to court.

### Why is the Government funding this measure?

- The Government currently funds lawyer-assisted mediation services for parenting disputes, but not for property disputes.
- Property cases make up more than half of all new cases filed in the Family Court, and over a third of all new family law cases filed in the Federal Circuit Court, each year (Annual Report, 2016-17).
- A recent study conducted by the Australian Institute of Family Studies (AIFS) involving 10,000 separated parents, indicated that 57.5% of property matters have asset pools of less than \$500,000. The AIFS study also showed the average time to finalise property arrangements is 15 months.
- There is a growing backlog of cases in the family courts, and the delays for families are untenable.
- LACs have a high success rate in using lawyer-assisted mediation to help separated families resolve disputes about children. Similar success is anticipated under this trial.
- Last year, Legal Aid Commissions ran 7,636 mediations for family law disputes about children. In 77.3% of these cases, legal aid lawyers helped their clients reach a full or partial agreement without going to court.
- Lawyer-assisted mediation can help separating couples with more complex needs, for whom normal mediation would not be appropriate. For example, receiving legal advice during a mediation can support parties to reach an agreement in cases where there may have been a history of family violence, including financial abuse, or in cases where cultural factors might influence the negotiating capacity of the parties.
- Without affordable legal assistance, many people, especially women, are more likely to agree to inequitable settlements to avoid the stress and cost of going to court, or to abandon their property claims altogether. This trial will support women to make informed decisions about splitting their property after a relationship breakdown.

## What is the expected impact of the measure?

- The trial will include a more relaxed means and merit test than is currently required for a grant of legal aid, meaning more separating couples will be eligible to access the service.
- An estimated 650 couples across Australia are expected to benefit from lawyer-assisted mediation under the 2 year trial.
  - An estimated 100 couples per state in New South Wales, Victoria, Queensland, South Australia and Western Australia, and an estimated 50 couples each in the Australian Capital Territory, Tasmania and the Northern Territory.
- Over the medium term, there is likely to be a reduction in the number of new court filings for property cases (following the roll out of mediation for parenting matters, there was a 25% reduction in new court filings).

## Case study

Samira and Glen have separated after 14 years and need to divide their property. Samira thinks their property is worth less than \$500,000 (not including their debt), however it's complicated as Glen's brother owns a third of the family home. Samira can't afford a private lawyer and feels intimidated by Glen, because he knows more about their finances than she does, and since the separation he has been verbally abusive toward her. Samira is so anxious about the situation that she is considering walking away from the relationship with nothing, until she hears that her local Legal Aid Commission can give her legal advice on her options, and support her to mediate a property settlement with Glen. Her experienced legal aid lawyer represented her during the mediation conference, which meant Glen couldn't bully her. They were able to reach an agreement at mediation which Samira was happy with, but she was relieved to know that if they couldn't agree, she would have been supported by her legal aid lawyer through the court process. This meant she didn't have to accept an unfair agreement, and didn't have to go to court to divide their property.



## Australasian Legal Information Institute

### Commonwealth Consolidated Acts

## CHILD SUPPORT (REGISTRATION AND COLLECTION) ACT 1988 - SECT 3 Objects of Act

### CHILD SUPPORT (REGISTRATION AND COLLECTION) ACT 1988 - SECT 3

#### Objects of Act

(1) The principal objects of [this Act](#) are to ensure:

(a) that children receive from their parents the financial support that the parents are liable to provide; and

(b) that [periodic amounts](#) payable by parents towards the [maintenance](#) of their children are paid on a regular and timely basis; and

(c) that [Australia](#) is in a position to give effect to its obligations under international agreements or arrangements relating to [maintenance](#) obligations arising from family relationship, parentage or marriage.

(2) It is the intention of the Parliament that [this Act](#) shall be construed and administered, to the greatest extent consistent with the attainment of its objects, to limit interferences with the privacy of [persons](#).



## Australasian Legal Information Institute

### Commonwealth Consolidated Acts

## CHILD SUPPORT (ASSESSMENT) ACT 1989 - SECT 4 Objects of Act

### CHILD SUPPORT (ASSESSMENT) ACT 1989 - SECT 4

#### Objects of Act

(1) The principal object of [this Act](#) is to ensure that children receive a proper level of financial support from their [parents](#).

(2) Particular objects of [this Act](#) include ensuring:

(a) that the level of financial support to be provided by [parents](#) for their children is determined according to their capacity to provide financial support and, in particular, that [parents](#) with a like capacity to provide financial support for their children should provide like amounts of financial support; and

(b) that the level of financial support to be provided by [parents](#) for their children should be determined in accordance with the costs of the children; and

(c) that persons who provide ongoing daily care for children should be able to have the level of financial support to be provided for the children readily determined without the need to resort to court proceedings; and

(d) that children share in changes in the standard of living of both their [parents](#), whether or not they are living with both or either of them; and

(e) that Australia is in a position to give effect to its obligations under international agreements or arrangements relating to maintenance obligations arising from family relationship, [parentage](#) or marriage.

(3) It is the intention of the Parliament that [this Act](#) should be construed, to the greatest extent consistent with the attainment of its objects:

(a) to permit [parents](#) to make private arrangements for the financial support of their children; and

(b) to limit interferences with the privacy of persons.