



Joint Select Committee on Australia's Family Law System

Submission

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Family Youth and Children's Law – Victoria Legal Aid

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Contents

About Victoria Legal Aid	1
VLA's family law work	1
Executive Summary	3
Summary of recommendations.....	4
Response to the Terms of Reference.....	9
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	9
B. 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.....	13
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.....	16
D. Financial costs to families of family law proceedings	17
E. Effectiveness of the delivery of family law support services and family dispute resolution processes	22
F. Impacts of family law proceedings on the health, safety and wellbeing of children and families involved in those proceedings	26
G. Any issues arising for grandparent carers in family law matters and family law court proceedings	28
H. Any further avenues to improve the performance and monitoring of professionals	29
I. Any improvements to the interaction between the family law system and the child support system.....	31

About Victoria Legal Aid

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

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

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

We provide:

- Free legal information through our website, our Legal Help line, community legal education, publications and other resources;
- Legal advice through our Legal Help telephone line and free clinics on specific legal issues;
- Support to people through non-legal advocates in the Independent Mental Health Advocacy Service and the Independent Family Advocacy Service pilot.
- Minor assistance to help clients negotiate, write letters, draft documents or prepare to represent themselves in court;
- Grants of legal aid to pay for legal representation by a lawyer in private practice, a community legal centre or a VLA staff lawyer;
- A family mediation service for disadvantaged separated families; and
- Through the Community Legal Services Program, VLA administers funding to 33 community legal centres, Djirra, the Victorian Aboriginal Legal Service and the Federation of Community Legal Centres.

VLA's family law work

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

- Duty lawyer, legal advice, representation and information services including in child support, parenting disputes, child protection and family violence matters across the state, to children and to parents;
- Lawyer-assisted and child-inclusive family dispute resolution to help settle disputes without going to court (through our Family Dispute Resolution Service);
- Independent children's lawyers who promote the interests of children at risk;
- The Family Advocacy and Support Services (FASS) in Melbourne and Dandenong family law registries – providing specialist duty lawyers alongside specialist family violence support workers;

- A Family Violence to Family Law Continuity of Service Delivery pilot with community legal centres, offering a continuing legal service from when parents first appear at the Magistrates' Court for family violence intervention orders, through to addressing family law needs; and
- Legal advice and education in the community.

In the 2018-2019 financial year, the Family, Youth and Children's Law program provided¹

- services to over 42,000 clients (including over 2,300 Aboriginal or Torres Strait Islander clients) and;
- over 18,000 legal advice and minor assistance services, 21,000 duty lawyer services and 16,000 grants of legal assistance for ongoing representation.

¹ Victoria Legal Aid, *2018-2019 Annual Report Access to Justice for Victorians* (2019) p25
<<https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-2018-19-annual-report.pdf>>

Executive Summary

Victoria Legal Aid (VLA) envisions a family law system that is safe, accessible, inclusive, and that centres decision making on the best interests of children. In our role as a provider of legal assistance to vulnerable members of our community, and the largest family law service provider in Victoria, VLA sees on a daily basis opportunities to enhance the way that Australia's family law system operates to help separating families and support the best interests of children.

Improving the safety of our family law system

We see how the current family law system can fail to respond adequately to the needs of, or even exacerbate harm to, children and victims of family violence. We also see that the great majority of cases requiring the help of the courts are those where family violence has occurred. VLA makes recommendations to improve the safety of the family law system and promote better outcomes for the children of separating families. We recommend that a family law court intake, triage, risk assessment and case management process be introduced, as well as a model for early determinations about family violence in family law. This would improve the safety of the system by expediting decision making about family violence to much earlier in a family law dispute. In doing so, this would ensure that all decisions that the court makes about a matter are informed by findings of fact in relation to family violence.

Ensuring that the family law system is equipped to function effectively

VLA is also deeply concerned by the resource constrained environment that the family law system is currently operating in. We note that it is not uncommon for families to experience considerable delays at every point of interaction with the family law system. This can prolong conflict and compromise the safety of those involved in complex family law matters. From the moment of filing an application, to awaiting a first return date, to attending compulsory family dispute resolution, we see families experiencing delays. We also see that families do not receive enough information or support to be able to confidently navigate a complex system at a time in their lives where they are already overwhelmed.

VLA's response to this inquiry focusses strongly on the need to properly and sustainably support families and resource the family law system, from reducing wait times for support services to increasing the availability of family consultants and Registrars and ensuring that legal assistance is readily available to those who need it. VLA is of the view that the system will continue to run in a suboptimal way unless a long-term plan for sufficient investment in the family law system is implemented.

Improving responses to families with intersecting legal needs

A resource constrained environment is not only a frustration, but it can also pose a genuine safety risk. VLA sees that some of the families with the greatest challenges are the families who are most likely to need to navigate across our state child protection and family violence systems, as well as our federal family law system. VLA has recognised in its submissions to other recent family law inquiries that there should be a better response for families with intersecting legal issues.

Families who are at the centre of highly complex legal issues need to be prioritised by the court system. For this reason, in this submission we emphasise the need to enhance collaborative practice across each jurisdiction and embed safe principles of information sharing. VLA

welcomes a focus by the Joint Select Committee on this important area and encourages the Committee to prioritise reforms that are already well-evidenced and well-known to be able to promote better interaction across the child protection, family law and family violence legal systems.

Summary of recommendations by Term 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, 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**

Recommendation 1: Introduce a model for early determinations of family violence in family law proceedings. As a first step, legislative amendments could be made to the *Family Law Act 1975* (Cth) to require a relevant court to determine family violence allegations at the earliest practicable opportunity.

Recommendation 2: Develop information sharing protocols between the state child protection and family violence and Commonwealth family law jurisdictions that are underpinned by principles of safety.

- 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**

Recommendation 3: Introduce the following reforms to improve compliance in family law property proceedings:

- Amending the *Family Law Act 1975* (Cth) to clearly set out disclosure obligations of parties and the consequences for breach of those obligations.
- Strengthening the court's ability to address non-compliance.
- Strengthening the role of registrars to establish, monitor and enforce timelines for disclosure.
- Introducing an administrative mechanism for the family law courts to be provided with financial information from the Australian Tax Office.
- Introducing adverse adjustments to property divisions for parties who do not make full and frank disclosures.

Recommendation 4: Provide further resourcing to the family law courts for family law consultants to provide supervision and assistance to help families understand and comply with parenting orders.

Recommendation 5: Provide further resourcing to the family law courts to establish contravention lists at registries and regional circuit locations to allow for more contravention applications to be heard promptly.

Recommendation 6: Amend the *Family Law Act 1975* (Cth) to provide Registrars with the power to hear and determine contravention applications.

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*

Recommendation 7: Introduce a family law court intake, triage, risk assessment and case management process.²

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:*

- i. Capping total fees by reference to the total pool of assets in dispute, and 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 proceedings***

Recommendation 8: Simplify family law application processes, forms and rules.

Recommendation 9: Subject to the outcomes of the lawyer-assisted family law property mediation trial, ongoing funding should be provided to allow more vulnerable individuals to receive legal assistance to access a small property settlement post separation.

Recommendation 10: Subject to the outcomes of the small claims property pilot in the Federal Circuit Court of Australia (FCC), the FCC should be provided with more resources to operate small property court services at all FCC locations across Australia, including at regional circuit court locations.

Recommendation 11: Provide greater legislative guidance on family law property settlements.

Recommendation 12: Provide sufficient funding and indexation arrangements for Commonwealth legal assistance.

Recommendation 13: Adequately resource Legal Aid Commissions to fund Independent Children’s Lawyer appointments.

² We note the MYEFO announcement to pilot a screening and triage program for matters being considered by family law courts. While we wait for more details on the pilot, VLA is very supportive of this initiative.

E. The effectiveness of the delivery of family law support services and family dispute resolution processes

Recommendation 14: Build on the strengths of current family law support services by increasing resourcing to reduce waiting times and expand integrated practice models, considering the establishment of system navigator or case management roles in existing services and encouraging improved referral practice of clients to legal assistance.

Recommendation 15: Invest in expanding access to legally assisted FDR for families, including culturally-safe and specific services for Aboriginal and Torres Strait Islander families.

Recommendation 16: Promote greater use of legally assisted FDR at all stages of disputes, so that even if some issues require court determination, others can be resolved at FDR through a referral from court back to the FDR service.

Recommendation 17: Provide ongoing and sustainable funding for the Family Advocacy and Support Services (FASS) at the family law courts.

Recommendation 18: Expand the FASS to regional circuit locations.

F. The impacts of family law proceedings on the health, safety and wellbeing of children and families involved in those proceedings

Recommendation 19: Increase the availability of child inclusive FDR services through increasing resourcing and rolling out Kids Talk or similar models across FDR services.

Recommendation 20: Increase opportunities for children to express their views, concerns and wishes during family law court proceedings.

G. Any issues arising for grandparent carers in family law matters and family law court proceedings

VLA makes no recommendations to this term of reference.

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

Recommendation 21: Introduce core competencies for professionals working in the family law system.

Recommendation 22: Introduce compulsory and regular professional development for all professionals working in the family law system on the nature and dynamics of family violence.

I. Any improvements to the interaction between the family law system and the child support system

Recommendation 23: Amend the *Child Support (Assessment) Act* to ensure that child support can continue to be paid until a child ceases full time secondary education, even if this is beyond their 18th birthday.

Recommendation 24: Amend the *Child Support (Assessment) Act* to allow the Child Support Registrar to accept an application for administrative assessment of child support using accredited DNA evidence, without needing a declaration of parentage under s106A.

Recommendation 25: Amend the *Child Support (Assessment) Act* to allow the Child Support Registrar to end an administrative assessment of child support using accredited DNA evidence.

Recommendation 26: Introduce an administrative process for adult child maintenance payments.

Recommendation 27: That the Department of Human Services – Child Support (DHS CS) provides clear and timely reasons to receiving parents, while maintaining privacy obligations, on their decision to not enforce a child support debt.

Recommendation 28: Undertake the review of the child support formula, with a view to it being updated to reflect current costs of raising a child in Australia.

Recommendation 29: Where an individual is seeking review of child support arrears and has been wholly in receipt of Centrelink payments, the DHS CS should review the child support arrears administratively. This could be achieved by invoking the minimum annual rate of child support.

Recommendation 30: Require the Child Support Registrar to be served with applications in any State or Federal Court that purport to directly or indirectly relate to child support.

Recommendation 31: Empower the Child Support Registrar to take a proactive role to intervene in such litigation, to provide relevant and timely information to the Court about child support cases and monitor and provide statistics about patterns of systems abuse.

J. The potential usage of pre-nuptial agreement and their enforceability to minimise future property disputes; and

VLA makes no recommendations to this term of reference.

K. Any related matters

VLA makes no recommendations to this term of reference.

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

Response to the 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

Victoria Legal Aid (VLA) welcomes a focus by the Joint Select Committee (the Committee) into Australia's Family Law System on improving coordination, collaboration, and information sharing between the state and territory and federal systems. By effectively working together, each jurisdiction can help to reduce confusion and improve continuity for individuals and families and especially the children at the centre of these disputes.

VLA's submissions to several recent family law inquiries have highlighted system fragmentation as a critical issue that impacts on the ability of families to quickly, easily, and safely resolve their legal problems.³ VLA is supportive of introducing measures that will alleviate the burden on families to navigate multiple legal systems. We also strongly encourage the introduction of a model for early determinations of family violence that will help to address family violence concerns in the family law system.

The challenge of cross-jurisdictional legal issues for families

VLA assists clients with legal problems in the areas of family law, family violence and child protection. We see through our practice that there is a small but notable number of clients who have legal issues that cut across the family law, child protection and family violence jurisdictions.⁴ Families who have intersecting legal issues frequently also have an array of complex challenges in their lives, such as disability, mental illness or substance issues, that can compound their ability to navigate complicated legal systems. VLA's recommendations in this

³ Victoria Legal Aid, *Families with Complex Needs - Submission to the Family Law Council's terms of reference: Number 1* (April 2015) <<https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-families-with-complex-needs-submission-family-law-council-terms-of-reference.doc>> and Victoria Legal Aid, *Families with Complex Needs-Submission to the Family Law Council's terms of reference: Number 2* (October 2015) <<https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-submission-to-the-family-law-councils-terms-of-reference-number-2.docx>> , Victoria Legal Aid, *Submission to the Australian Law Reform Commission Review of the Family Law System Discussion Paper* (May 2018) <<https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-submission-to-the-alrc-review-of-the-family-law-system-discussion-paper.docx>> and Victoria Legal Aid, *Submission to the Australian Law Reform Commission Review of the Family Law System Issues Paper* (November 2018) <<https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-submission-alrc-review-of-family-law-system-issues-paper.docx>> and Victoria Legal Aid, *Submission to the Parliamentary Inquiry into a better family law system to support and protect those affected by family violence – A Better Family Law System* (2017) <<https://www.legalaid.vic.gov.au/node/610#a-better-family-law-system>>

⁴ Victoria Legal Aid, *Families with Complex Needs - Submission to the Family Law Council's terms of reference: Number 1* (April 2015) p9 <<https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-families-with-complex-needs-submission-family-law-council-terms-of-reference.doc>>

section are aimed at providing practicable solutions to improve the outcomes for families who are needing help across multiple jurisdictions and particularly for the children at the centre of these matters.⁵

Jane's story below demonstrates the challenges in protecting children when legal proceedings are commenced in multiple jurisdictions and information is not shared in a timely manner.

Jane's story

After a history of family violence and allegations that her former partner and the father of her children had sexually abused their children, Jane and the children relocated to regional Victoria.

Even after relocating, the father committed further acts of family violence resulting in the police taking out a family violence intervention order (FVIO). Despite the history of family violence, Jane facilitated contact with the children. On one visit, the father failed to return the children to her care. VLA assisted Jane to issue recovery proceedings in a federal family law court.

An interim arrangement was agreed to by consent where the children split their time between Jane and the father's care. Subsequent concerns emerged about the behaviour of the children in the father's care, and further allegations emerged that the father was continuing to sexually abuse the children. The Victorian Department of Health and Human Services (DHHS) initiated proceedings in the Children's Court of Victoria while the matter still being heard.

Revised interim family law orders were made that returned the children to Jane's care (with no contact for the father) and the matter was adjourned so that the Children's Court proceedings could run their course. The Children's Court permitted the younger children to continue living with their mother, but the older children were placed in out of home care. The father continued to seek time with the children.

When Jane experienced family violence again, at the hands of her new partner, DHHS became involved and the remaining children in Jane's care were placed in out of home care.

Final family law orders will come into effect when DHHS involvement ends. Jane would like the children to return to her care as she is no longer living with the new partner and she is undertaking counselling and following DHHS directions.

VLA makes three recommendations for improving interactions between the family violence, family law and child protection jurisdictions informed by our practice experience.

Early determinations (findings of fact) about family violence in the family law courts

Improving the family law system's response to family violence is critical. In the final report of its inquiry into Australia's family law system earlier this year, the Australian Law Reform Commission (ALRC) notes the prevalence of family violence in family law proceedings, with 60 per cent of separated parents reporting family violence, including physical hurt and emotional abuse, prior to or during separation. For parents in the family law courts, this proportion is higher, with 85 per cent reporting a history of emotional abuse and more than half reporting

⁵ Above n 4.

physical hurt from their former partner.⁶ Legal Aid data supports this, indicating that nearly 80 percent of legally aided matters in the family law system involve family violence.⁷

Our legal practice experience is that in many family law court cases experiences of family violence are still minimised, deemed 'historical', or irrelevant to decisions about care arrangements for children. Responsibility is also placed on victim survivors of family violence to 'prove' that family violence has occurred, and emotional, financial, and psychological violence and abuse is often not viewed as seriously as physical violence.

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

The family law system has a responsibility for ensuring that family violence victims are identified early, and risks are appropriately managed. Identifying, responding to and managing family violence in the early stages of a family law matter, both in the pre-litigation stages of a matter and after proceedings have been issued, is critical to ensuring the safety of victim survivors including children in the family law system and will also assist the court to manage matters involving family violence more efficiently and effectively.

Samantha's story illustrates the risks created when family violence is not managed early by family law courts, and the challenges that arise when information is not shared between jurisdictions.

Samantha's story

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

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

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

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

⁶ Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family Law System Final Report* (March 2019) p103-104 < https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_report_135.pdf >

⁷ National Legal Aid, *COAG commitment welcomed as new DV figures released* (Media Release, 18 April 2016) < <https://www.nationallegalaid.org/resources/nla-media/> >

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

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

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

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

Mya's story below demonstrates the benefits of earlier determinations to managing safety and efficiently resolving family law matters that involve family violence.

Mya's story

VLA supported Mya through both parenting and property proceedings in a federal family law court. Mya had experienced serious family violence during her marriage including being choked and having her finances controlled. When Mya sought to end the relationship, her husband self-harmed in front of her and their two children. After this event, an intervention order was made that prevented her husband from contacting her and the children.

VLA then assisted Mya with her family law application to determine the ongoing living and care arrangements for the children.

When Mya's case was first listed, the judge considered police and medical evidence of family violence and determined that the case should go straight to trial without any time between the children and their father in the interim. The judge expedited the final hearing so that the matter was listed for trial within six months of filing and ordered a family report to be completed by a family report writer with knowledge of family violence. At the final hearing, an order for the children to have no contact with their father was made in light of the considerable safety issues, and Mya was awarded a property settlement that has enabled her and the children to re-establish their lives free from family violence.

This example demonstrates the importance of judges being presented with the evidence of family violence early. As a result, Mya's case was actively managed by the courts and decisions about the safety of the children and Mya were able to be made early in family law proceedings minimising the risks of further trauma to Mya and the children.

Recommendation 1: Introduce a model for early determinations of family violence in family law proceedings. As a first step, legislative amendments could be made to the *Family Law Act 1975* (Cth) to require a relevant court to determine family violence allegations at the earliest practicable opportunity.

Enabling safe information sharing

VLA supports improved information sharing between the federal family law system and the state and territory child protection and family violence systems. Information sharing must, however, be underpinned by principles of safety.

In late 2018 VLA made recommendations to the ALRC's review regarding information sharing principles to help inform the future design of a national information sharing regime. These principles are set out in our submission to the [Australian Law Reform Commission \(ALRC\), Review of the Family Law System, Discussion Paper November 2018](#).⁸ We continue to support the development of a national information sharing scheme that takes these issues into account, including that there are safeguards against inappropriate or unsafe sharing of information, that the purposes for which sharing information is allowed and appropriate are clearly set out and that the scheme is procedurally fair and is culturally safe for Aboriginal and Torres Strait Islander peoples.

Recommendation 2: Develop information sharing protocols between the state child protection and family violence and Commonwealth family law jurisdictions that are underpinned by principles of safety.

B. 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.

As noted in section A above, introducing a model for the family law courts to make an early determination of family violence – which currently can take months or even years to be considered – would have multiple benefits, including ensuring relevant evidence is elicited and tested promptly and safety is enhanced.

VLA also sees opportunities for compliance and enforcement measures to be strengthened particularly in regard to property disclosures.

The practice of our lawyers suggests that contraventions of court orders can arise in two scenarios. The first type of contravention arises from the intentional behaviour of a party, resulting in a breach of a family law order, most typically in property proceedings. The second

⁸ See pages 43-46.

scenario commonly arises because the parent/s of a child do not fully understand the family law order that has been made and how it works in practice.

Improve compliance in family law property proceedings

Presently, identifying the value of the asset pool represents a significant hurdle in many family law property disputes. There is an obligation on parties to make full and frank disclosure of their financial situation;⁹ this disclosure is absolute.

Yet, in practice, failure to make proper disclosure often occurs in property disputes. We have outlined below in Term of Reference D how property settlements can provide economic security to vulnerable individuals, often women¹⁰ following a separation.

Our Family Dispute Resolution Service (FDRS) sees a lack of financial disclosure prior to mediation, which pushes parties to litigation where otherwise they may have been able to resolve the dispute without court proceedings.

While the court has the ability to deal with parties who fail to properly disclose, such as dismissing a non-compliant party's application or making costs orders at the conclusion of the matter, this is not helpful for parties who are unable to progress to final hearing, especially in small property disputes where finances are constrained.¹¹

VLA has previously recommended a suite of reforms that could support compliance in property proceedings.¹² We make those recommendations here also.

Recommendation 3: Introduce the following reforms to improve compliance in family law property proceedings:

- Amending the *Family Law Act 1975* (Cth) to clearly set out disclosure obligations of parties and the consequences for breach of those obligations.¹³

⁹ *Federal Circuit Court Rules 2001* (Cth) r24.03(1)(a); *Family Law Rules 2004* (Cth) r13.04.

¹⁰ The 2018 Women's Economic Security Statement recognised that women are more likely than men to face economic hardship following separation and that women affected by family violence may be especially vulnerable to economic stress. See Australian Government, *Greater Choice for Australian Women, Women's Economic Security Statement*, (November 2018) <<https://www.pmc.gov.au/sites/default/files/publications/womens-economic-security-statement-2018.pdf>>

¹¹ Women's Legal Service Victoria, *Small Claims Large Battles: Achieving economic equality in the family law system* (2018) <<https://womenslegal.org.au/files/file/WLSV%20Small%20Claims%2C%20Large%20Battles%20Research%20Report%202018.pdf>>

¹² Victoria Legal Aid, *Submission to the Australian Law Reform Commission Review of the Family Law System Discussion Paper* (May 2018) p20 <<https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-submission-to-the-alrc-review-of-the-family-law-system-discussion-paper.docx>> and Victoria Legal Aid, *Submission to the Parliamentary Inquiry into a better family law system to support and protect those affected by family violence – A Better Family Law System* (2017) p20 <<https://www.legalaid.vic.gov.au/node/610#a-better-family-law-system>>

¹³ This has also been recommended by the ALRC in its final report, see Recommendation 25, Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family Law System Final Report* (March 2019) p18 <https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_report_135.pdf>

- Strengthening the court's ability to address non-compliance.
- Strengthening the role of registrars to establish, monitor and enforce timelines for disclosure.
- Introducing an administrative mechanism for the family law courts to be provided with financial information from the Australian Tax Office and;
- Introducing adverse adjustments to property divisions for parties who do not make full and frank disclosures.

Supporting families to comply with parenting orders

Section 65L of the *Family Law Act* anticipates that parties to family law orders may need assistance to understand and implement the orders as intended. It provides family law courts with the power to make additional orders to enable this.

The court can make two types of such orders: an order requiring a family consultant to supervise compliance with a parenting order or an order requiring a family consultant to provide assistance to a parent to comply with a parenting order.

Our practice experience suggests that section 65L orders are rarely made. We see a significant benefit to families from greater use of section 65L type orders, but this would clearly need to be supported by adequate resourcing to assist families in the immediate period following the making of final family law orders.

Recommendation 4: Provide further resourcing to the family law courts for family law consultants to provide supervision and assistance to help families understand and comply with parenting orders.

Addressing intentional breaches of family law court orders

Where it is alleged that a party has intentionally breached court orders, currently, there are significant delays before a contravention application can be heard, which often leaves a complying parent without any options to enforce a court order.

The Melbourne registry of the Federal Circuit Court of Australia (FCC)¹⁴ is currently piloting a contravention list. Early indications are that the list is working effectively to streamline contravention hearings and improving enforcement of orders. This pilot is supported by greater use of Registrars to supervise contravention matters, which frees up judicial resources and provides for greater efficiency. However, the matter must still go before a judge for determination because registrars do not currently have power under the *Family Law Act* to make orders regarding enforcement.

Recommendation 5: Provide further resourcing to the family law courts to establish contravention lists at registries and regional circuit locations to allow for more contravention applications to be heard promptly.

Recommendation 6: Amend the *Family Law Act 1975* (Cth) to provide Registrars with the power to hear and determine contravention applications.

¹⁴ Victoria Legal Aid website, *Family Law contravention list pilot at FCC Melbourne Registry* (May 2018)
<<https://www.legalaid.vic.gov.au/about-us/news/family-law-contravention-list-pilot-fcc-melbourne-registry>>

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

VLA supports a court structure that ensures a single point of entry, streamlined processes and a single set of rules and forms (see also Term of Reference D below). Any proposed structural changes to the family law courts should also ensure that judges working within it hold specialist family law knowledge to support sound and informed decision making, as well as family violence competencies (see Term of Reference H further below).

Based on VLA's experience, we also are of the opinion that there are other more immediate reforms that could be introduced to help address delays and the complexity of the family law system. These reforms, such as improving access and navigation for families and early determinations of family violence in family law proceedings are discussed elsewhere in this submission.

One of the most important such reforms would be the introduction of an intake, triage, risk assessment and case management process for the family law courts.

Amongst other matters, this would ensure that risk assessments for families in the court system were undertaken on an ongoing basis, with safety planning put in place in response, and would also allow the court to identify which matters may require management such as expedited hearings or other measures depending on risk factors. We discussed these matters in more detail in our submission to the [ALRC's Review of the Family Law System](#)¹⁵ and make the same recommendations here.

Recommendation 7: Introduce a family law court intake, triage, risk assessment and case management process¹⁶, including:

- ongoing risk assessments for parties and for children;
- identifying matters that should be referred to preliminary hearings for early determinations of family violence, after identifying family violence as a risk factor and issue in dispute;
- ongoing case management to ensure matters are ready for hearing dates and parties have complied with disclosure obligations; and
- coordinating with and making referrals to Family Dispute Resolution where appropriate.

¹⁵ See p41-42.

¹⁶ We note the announcement in the MYEFO – 2019/20 for funding to the Federal Court of Australia to pilot a screening and triage program for matters being considered by family law courts. While we wait for more details on the pilot, VLA is very supportive of this initiative. p199, https://www.budget.gov.au/2019-20/content/myefo/download/MYEFO_2019-20.pdf

D. Financial costs to families of family law proceedings

Increasing delays and complexity have increased cost and stress for families involved in family law proceedings. This experience has been exacerbated by the declining availability over time of public legal assistance for family law matters.

Improve efficiencies by a simplified application processes, forms and courts rules

Simplified application forms and more streamlined court processes would help to reduce cost, time and resources for both the court and parties.

For example, a simplified approach rather than the current reliance on lengthy affidavit materials would save time, but also improve the quality of evidence before a judge given the high number of self-represented litigants in the jurisdiction who find it challenging to draft an affidavit.

In our submission to the [ALRC's Review of the Family Law System](#) we outlined examples of how to simplify and streamline court processes.

Recommendation 8: Simplify family law application processes, forms and courts rules.

Addressing the need for cost effective resolution of family law property disputes

Small property claims

VLA welcomes the Commonwealth Government's commitment towards simplifying the process for separating families to resolve their small property disputes.¹⁷ The Commonwealth's funding support for a two year trial of lawyer-assisted mediation in family law small property disputes and for a one year small property claims court pilot aim to test working together to provide separating families with a streamlined, cost-effective way of accessing a small property settlement.

In announcing each pilot, the Commonwealth also recognised that women are more likely than men to face economic hardship following separation and that women affected by family violence may be especially vulnerable to financial stress.¹⁸ For VLA clients in particular, a property settlement can be crucial to preventing entrenched poverty following the end of a relationship, particularly where there has been family violence.

Prior to the Commonwealth Government's funding for a mediation trial, VLA could only provide legal assistance for family law property matters in very limited circumstances. In our experience being able to quickly and affordably reach a fair property settlement can mean the difference between financially recovering from separation or the beginning of poverty. Layla's story below illustrates the importance of a small property settlement to the financial security of vulnerable women and children post separation.

Layla's story

¹⁷ Australian Government, *Greater Choice for Australian Women, Women's Economic Security Statement*, (November 2018) p6 <<https://www.pmc.gov.au/sites/default/files/publications/womens-economic-security-statement-2018.pdf>>

¹⁸ See above.

Our client Layla is the primary carer of her three-year-old child after she separated from the child's father. When Layla sought legal help, she was unemployed, experiencing mental illness, spoke limited English, and required an interpreter to communicate.

Layla's marriage had been arranged while she was living overseas. After Layla migrated to Australia to live with her husband, there was family violence in the relationship and a family violence intervention order was ultimately made to protect Layla.

At separation, Layla's husband had stable employment, \$60,000 in superannuation and owned a property in his name with equity valued at over \$50,000. Layla had little in the way of assets or income and had few family supports of her own.

VLA assisted Layla to apply for child support through the Commonwealth Department of Human Services¹⁹ (Child Support) and obtained consent orders to receive a superannuation split of nearly \$20,000 and \$50 per week spousal maintenance for two years. This made a significant difference to Layla being able to re-establish herself and her child post-separation.

Without legal representation, Layla would likely have not pursued her entitlements as there were no joint assets of the marriage and the husband had accrued significant credit card debts post separation.

We make three recommendations below for a more accessible way to obtain a small property division, with a focus on preventing the exposure of families to family violence.

Increasing the availability of legal assistance to help vulnerable parties access a small property settlement

As noted above, through funding from the Women's Economic Security Statement, in January 2020 all Legal Aid Commissions (LACs) will begin a new two-year pilot of legally assisted dispute resolution for separating couples who have a small amount of property to divide.

We anticipate that this pilot will help to demonstrate the need to give people legal help to fairly and safely reach an agreement about property without always needing to go to court. In some cases, for example where there is a recalcitrant party, going to court may be the only remaining option and it is important, given the complexity of litigation, that vulnerable people have access to ongoing legal representation in such cases.

In Victoria, under the two-year pilot, legal aid funded lawyers will provide legal assistance to support up to 100 eligible couples to divide small value property pools, through mediation at first instance and at court if necessary. The pilot is scheduled to run from January 2020 to December 2021 and there is recognition that the demand for it is likely to be high.

Recommendation 9: Subject to the outcomes of the lawyer-assisted family law property mediation trial, ongoing funding should be provided to allow more vulnerable individuals to receive legal assistance to access a small property settlement post separation.

Ongoing funding to operate a simplified small property court service

¹⁹ DHS refers to the Commonwealth Department of Human Services and DHHS refers to the Victorian Department of Health and Human Services throughout this submission.

There are certain circumstances where mediation may not be appropriate or effective and it will be necessary for a court to assist parties to reach a small property settlement. For example, there may be safety concerns or a serious imbalance in negotiating power, or one party may refuse to comply with voluntary property disclosure requirements. In these circumstances, parties will have no option but to go to court to reach a just and equitable settlement.

In recognising that taking such action can be prohibitively expensive, as noted above the Commonwealth Government is also providing additional resources to allow four Federal Circuit Court of Australia (FCC) Registries to operate a small property court service for a one year pilot.²⁰

The small property court stream will use a simpler and more cost-effective process to help separating couples divide their property assets. The aim is for this pilot to help address some of the cost impediments that separating couples commonly experience when attempting to resolve property disputes and should provide greater access to property settlements for vulnerable groups.

Recommendation 10: Subject to the outcomes of the small claims property pilot in the Federal Circuit Court of Australia (FCC), the FCC should be provided with more resources to operate small property court services at all FCC locations across Australia, including at regional circuit court locations.

Greater guidance in the law on property disputes

Greater legislative guidance on what to expect from a property settlement would help to reduce costs in property disputes. At present, the family law courts provide little guidance to parties about the likely outcome of a property settlement or on what factors the decision will be made.

The requirement that the court consider the contributions (both direct and indirect) made by each party to the property pool during the relationship is also complicated and provides no clear identifiable principles to guide parties in how the property may be split post-separation.

The current highly discretionary approach to property settlements is not affordable or useful for many Victorians, especially those who do not meet legal aid eligibility criteria and cannot afford the cost of private legal representation. Additional legislative guidance would help to clarify the decision-making process and provide parties with more confidence to negotiate in the shadow of the law.

VLA's submission to the [ALRC's Review of the Family Law System](#) provided more details on introducing legislative guidance in property matters.

Recommendation 11: Provide greater legislative guidance on family law property settlements.

Availability of family law legal assistance

Legal aid in Australia is a co-operative scheme between the Commonwealth and state governments to provide legal help to those who need it most. Family law legal assistance, as a

²⁰ Attorney General of Australia, *Pilot program to save time and money for separating families* (Media Release November 2019) < <https://www.attorneygeneral.gov.au/media/media-releases/pilot-program-save-time-and-money-separating-couples-29-november-2019>>

Commonwealth matter, has always been the responsibility of the Commonwealth to fund (by contrast to, for example, legal assistance in the majority of criminal defence or child protection matters, which are state-based).

Improving access to and engagement in the family law system for families requires more than just increasing legal assistance. It also requires system design that is not contingent on the ability of an individual to access a lawyer, whether privately funded or legally aided. For example, self-represented litigants are a feature of about half of all family law trials in the Federal Circuit Court of Australia (FCC). As such, it is important that processes to effectively support self-represented litigants to navigate the family law system (such as case management functions and simpler procedures) are embedded within the family law courts. We have discussed some of these in other sections of this submission.

Despite the above, it is also true that the Commonwealth has funded legal aid in recognition that many Australians will simply not be able to afford private legal representation if they face a legal problem, particularly family law disputes. The provision of family law legal aid is one of the key public policy mechanisms to respond to the financial cost of family law proceedings.

Increasing delays, complexity of matters and the cross-over between jurisdictions is contributing to increasing costs in family law proceedings. Commonwealth legal assistance funding has not kept pace with inflation and population growth, nor these specific drivers of increased costs in family law proceedings, for several years.

In the last financial year, Commonwealth legal assistance funding represented 30 per cent of total government funding VLA received for legal assistance (for both legal aid and community legal centres (CLCs)) in Victoria.²¹ Around two thirds of Commonwealth funding for legal aid in Victoria supports family law assistance. Commonwealth funding levels are now at a stage where the viability of providing legal assistance in core areas such as family law (which is largely family violence-related work) is very constrained. Access to publicly funded legal assistance is an essential element of a fair and accessible justice system. It is especially critical for the most vulnerable members of our society, who are more likely to have interactions with our legal system, and who are least resourced to be able to access the help they need.

Eligibility for legal assistance in Victoria is based on a combination of factors, one of which is a means test. VLA uses the means test to assess the financial situation of most people who apply for a grant of legal assistance and decide whether a person can afford the full costs of the legal services from a private lawyer. There is an increasing gap between those who qualify for legal assistance and those who are able to pay for a private lawyer²²: while 14% of Victorians live below the poverty line only 8% are eligible for legal assistance.²³

Aesha's story

²¹ Victoria Legal Aid, *2018-2019 Annual Report Access to Justice for Victorians* (2019) p30

<<https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-2018-19-annual-report.pdf>>

²² Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No. 72, Canberra, 2014) Appendix H, p 640-642 < <https://www.pc.gov.au/inquiries/completed/access-justice/report/access-justice-overview.pdf>>

²³ As above.

Aesha first sought the assistance of the VLA duty lawyer a federal family law court when she was seeking to regain the care of her daughter who was living with her paternal grandparents. Aesha was ineligible for legal assistance as she was narrowly outside of the means testing guidelines.

About 12 months later Aesha sought duty lawyer assistance again.

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

Aesha's circumstances had changed in the 12 months, and she had started addressing many of the concerns the court would have considered when determining where would be best for the child to live. Unfortunately, the court was unaware of any of this as Aesha had not filed any material. Aesha would have had a strong case to argue, had she had legal assistance to present the evidence to the court.

Other measures that VLA also currently has in place to manage limited legal aid funds for family law assistance include caps on funding per grant, eligibility criteria that a person must have a "substantial issue in dispute" and be a "priority client", and three separate tests about the merits of funding their case. A victim of family violence living below the poverty line will not necessarily be eligible for ongoing legal aid representation for family law in Victoria under the current guidelines.

Professional fees payable under grants are also low and there has been a large decline in the availability of family lawyers across Victoria willing to undertake legal aid work, particularly in regional areas.

The Commonwealth is currently in negotiations with the states and territories on national legal assistance funding for the next five years. The proposed funding levels would not be sufficient for VLA to maintain current service delivery levels. VLA is currently publicly consulting on cost-saving measures, including further reductions in service delivery in family law.

Our ability to fund Independent Children's Lawyers (ICLs) for Victorian children caught up in the family law system in particular is under pressure. The Commonwealth family law courts make appointments of ICLs in complex cases, usually involve allegations of harm, abuse or risk to children, and request that legal aid commissions fund these appointments. We have little control over the level of court appointments, and the Commonwealth has never provided specific funding for this purpose, with appointments having to be funded from general legal aid funding.

Recommendation 12: Provide sufficient funding and indexation arrangements for Commonwealth legal assistance.

Recommendation 13: Adequately resource Legal Aid Commissions to fund Independent Children's Lawyer appointments.

E. Effectiveness of the delivery of family law support services and family dispute resolution processes

The ALRC review examined this issue in detail. While we cannot comment on all aspects of support service and Family Dispute Resolution (FDR) delivery, there are several initiatives that could improve the accessibility of the family law system building on the existing network of family law support services across Australia.

We also have particular experience of directly delivering legally-assisted FDR through our in-house Family Dispute Resolution Service (FDRS) as well as directly administering and delivering integrated legal and non-legal support services at the family law court permanent registries in Victoria through the national Family Advocacy and Support Services (FASS).

Our experience is that both services have been highly effective and have become integral components of delivering both more efficient and cost-effective family law legal assistance as well as a more efficient and safer family law system generally. Family law support services and dispute resolution processes could be made more effective by expanding the availability of legally assisted FDR services in children's matters and by providing ongoing and sustainable support to FASS. Please refer to Term of Reference C for our recommendation on increasing the availability of legally assisted FDR services in property matters.

Creating an accessible system

The complexity of issues facing families within the family law system has been steadily increasing. The ability to obtain legal information and advice is essential to ensuring access to justice for all members of our community.

While most disputes resolve before families enter the formal family law system, the cases that proceed to the family law courts are the most complex, often involving multiple risk factors including family violence, child abuse, mental illness, substance abuse and/or cognitive impairment issues, and are less likely to resolve without court decisions. This means that there is a need for early identification of legal and non-legal issues and subsequent provision of assistance at the early stage of a dispute to help individuals and their families to access services and resolve their matter without the need for protracted legal proceedings.

Our submission to the [ALRC's Review of the Family Law System](#) we made several recommendations for using support services to help create a more accessible family law system.²⁴ These include better access to existing support services which are good quality but often resource-constrained with long waiting times (particularly in regional areas), basing system navigator or case management roles within existing family law support services to help clients make their way through the system, an increase in integrated practice initiatives such as the FASS (discussed further below) and Health-Justice Partnerships which help clients obtain a range of coordinated services to address inter-related needs, and earlier referrals of clients to legal assistance. More detail is set out in that submission.

Recommendation 14: Build on the strengths of current family law support services by increasing resourcing to reduce waiting times and expand integrated practice models,

²⁴ See p12-17.

considering the establishment of system navigator or case management roles in existing services and encouraging improved referral practice of clients to legal assistance.

Expanding the use of Legally Assisted Family Dispute Resolution (FDR)

Legally assisted FDR achieves high rates of settlement and plays a key role in preventing matters from reaching court, thus reducing cost, delay and stress for families. FDR is a qualitatively different process from court. It supports parties to resolve their parenting disputes through a conversation outside the adversarial court process using a facilitative approach with support offered by legal assistance.

Most FDR in Australia is undertaken without the parties being legally represented, and this is generally effective and appropriate. However, many cases will be appropriately screened by FDR services as unsuitable for mediation due to risks such as a history of family violence, safety risks for one or more parties or unequal ability to negotiate.

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

In 2018-19, VLA's FDRS delivered 1,010 conferences, with a settlement rate of 81 percent.²⁵ In the last two years, FDRS has had a higher percentage of cases referred from court – 38 percent of total conferences, compared with 30 percent in 2016-17. The settlement rate for these litigation intervention conferences was still high at 78 percent even with these matters having progressed to court proceedings already, whereas the early intervention conference settlement rate was even higher at 83 percent.²⁶ Based on case management assessments, a history or risk of family violence was present in approximately 90% of FDRS cases for the year 2018-2019.

Tran and Henry's Story

VLA supported Tran and Henry through legally assisted family dispute resolution (FDR). FDR occurred within days of a final court hearing being scheduled to occur. Some serious allegations were made that prompted the court to appoint an Independent Children's Lawyer (ICL) to the matter. The mediation was focussed on how the parents might best implement an equal shared care arrangement for their young child, including during the school holidays.

The parents were unable to agree on how shared care for their child would work, although they did agree on time being shared with each of them, as recommended in the family report.

Working together, the mediator and the ICL supported Tran and Henry to understand each other's perspective and find long-term solutions to overcome their co-parenting challenges.

When mediation commenced, neither Tran nor Henry believed that they would be able to resolve their parenting matter before the pending final hearing. However, with time to reflect,

²⁵ The settlement rate is based on settlement of some or all issues in a dispute on an interim or ongoing basis.

²⁶ Above n 20, p26.

and the support of the mediator, the ICL and the parties' lawyers, the parents were motivated to come up with and explore different options that helped them work through their dispute, and previous disagreements, step by step.

By the end of the mediation, Tran and Henry had successfully committed to a long-term plan to care for their child which allowed the child to continue participation in after school activities and have equal time with each parent during the school year.

Following legally assisted dispute resolution, the parties were able provide the judge with draft final parenting orders for their child, with just one issue left to resolve at the final hearing.

This example demonstrates the positive benefits of legally assisted FDR – enabling timely resolution, minimising costs to the court and the family law system and providing a forum for parents to work through issues and agree on a plan that reduces the risk of the further breakdown of their parental relationship.

Legally-assisted FDR in Australia is primarily available through Legal Aid Commissions in each state and territory. This means that eligibility for the service is currently constrained by limited legal aid resources, discussed in Term of Reference D.

Recommendation 15: Invest in expanding access to legally assisted FDR for families, including culturally-safe and specific services for Aboriginal and Torres Strait Islander families.

Recommendation 16: Promote greater use of legally assisted FDR at all stages of disputes, so that even if some issues require court determination, others can be resolved at FDR through a referral from court back to the FDR service.

Continuing and expanding the Family Advocacy and Support Services

The Family Advocacy and Support Services (FASS) operate successfully at both the Melbourne and Dandenong family law court registries in Victoria and provide integrated legal and non-legal supports to families affected by family violence.²⁷ In each FASS location in Victoria there are specialised VLA and alternate community legal centre duty lawyer services, two family violence non-legal support services (one for each party) and an Information Referral Officer (IRO) to triage FASS clients at court. The FASS is available five days a week.

FASS was established during the 2016-17 year through pilot funding provided by the Commonwealth Government to Legal Aid Commissions to establish FASS in each state and territory. In 2018 an independent evaluation commissioned by the Government made very positive findings about the effectiveness of the integrated service model present on the ground at court locations,²⁸ and funding was extended for a further three years to June 2022.

Angela's Story

²⁷ Inside Policy, *An Evaluation of the Family Advocacy and Support Service Final Report* (October 2018) p13

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

²⁸ As above. The evaluation found that 'the FASS was an effective and important program that fills a gap in legal and social service provision to family law clients with family violence matters.

Angela was brought to court late in the afternoon after being stopped at the airport from leaving Australia with her baby. Without her knowledge, Scott, Angela's ex-partner and father of the baby, had obtained an urgent court order to prevent her leaving the country after their separation.

Angela, Scott and their baby were not residents of Australia, however Scott split his time between Australia and another country where Angela lived.

During the relationship, Angela, her parents and baby had travelled to Australia from their country of origin on tourist visas for a short visit at the request and arrangement of Scott. The parties were together at this time.

Angela spoke no English and had only been in the country for a week before the relationship broke down. She used her savings to buy plane tickets for her, her parents and baby to return home, but at the airport they were stopped by the Australian Federal Police.

Angela was distraught and had travelled directly to the court from the airport. Through an interpreter Angela told the FASS duty lawyer about a history of significant family violence, including financial control and being assaulted when pregnant.

The FASS duty lawyer successfully negotiated an agreement with the father's lawyer for the removal of the airport watchlist order and the payment of travel costs, while the FASS family violence support worker supporting Angela arranged emergency accommodation for her and ensured Angela understood what was happening.

At court the next day Angela told the FASS duty lawyer that Scott had sent multiple messages throughout the night trying to find out where she was staying. He also threatened not to pay any travel costs unless Angela met him in person to hand over the money. Angela told the duty lawyer that the advice and support she had been given the previous day helped her to recognise that Scott was trying to coerce her, and she refused to meet him or disclose her address.

In delivering the judgment, the judge was very critical of the father's application and made the agreed orders. Angela is now safely in her home country with her parents and baby.

By working together, the FASS duty lawyer and FASS family violence support workers assisted Angela through a very stressful and foreign process, to achieve a safe outcome for herself and her baby.

While highly regarded, at present in Victoria FASS is only funded to be present in the permanent registries of the family law courts at Melbourne and Dandenong. This means FASS does not provide its services to the court sitting on circuit in regional areas, which it does regularly at Ballarat, Bendigo, Geelong, Morwell, Mildura, Shepparton and Warrnambool as well as at Albury servicing Wodonga and surrounds. This provides for inequitable access to important services and supports for families across Victoria. Both the ALRC's review of the

family law system²⁹ and the FASS Final Evaluation Report³⁰ recognised this and recommended that FASS be expanded to regional locations across Australia where the Federal Circuit Court of Australia (FCC) sits.

Further, as noted above FASS currently remains funded on a pilot basis only. VLA welcomed the announcement of an additional \$22.6 million over 2019 – 2022 to extend the FASS program.³¹ This provides for continuity of the program and will allow Legal Aid Commissions to continue to provide a high quality integrated service response to parents who need family law help who are also experiencing family violence. A commitment to ongoing sustainable funding of the FASS would ensure this essential service, which provides a tailored response to family violence victim survivors, can continue to operate.

Recommendation 17: Provide ongoing and sustainable funding for the Family Advocacy and Support Services at the family law courts.

Recommendation 18: Expand the Family Advocacy and Support Services to regional circuit locations.

F. Impacts of family law proceedings on the health, safety and wellbeing of children and families involved in those proceedings

A family law system that has the best interests of children at its centre is essential to enhancing the health, safety and wellbeing of all those who use the family law system.

Enhancing the participation and voices of children in family law proceedings

The United Nations Convention on the Rights of the Child requires children to be provided with the opportunity to be heard in any judicial or administrative proceedings affecting them either directly or through a representative.³² To enliven this international obligation, and to enhance family law proceedings for families and children VLA makes two recommendations. For a further explanation of each, please see our submission to the Issues Paper of the [ALRC's Review of the Family Law System](#).³³

Supporting children to participate in Family Dispute Resolution

Increasing children's participation in family dispute resolution (FDR) would give more separated families engaging in FDR the opportunity to participate in discussions informed by the voices of their children.

²⁹ Recommendation 58 states that "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" above n 12, p458.

³⁰ Above n 26, p11.

³¹ Attorney General for Australia, *Additional Funding for Family Violence Services* (18 December) Media Release <<https://www.attorneygeneral.gov.au/media/media-releases/additional-funding-family-violence-support-services-18-december-2018>>

³² United Nations, *Convention on the Rights of the Child 1989*, Art 12 (2).

³³ See p79- 91.

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

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

The aim of Kids Talk is to increase parents' and significant others' capacity and openness to understand the child's views, concerns and wishes. The child's developmental, psychological and emotional needs form the basis of generating options and proposals at the FDR conference. Kids Talk aims to assist parents to manage their post separation relationship and parenting arrangements in a way that stabilises rather than undermines their child's wellbeing and development.

Liam's Story

Following several years of shared parenting in accordance with family court orders, Liam's parents had a breakdown in communication and they re-initiated court proceedings to vary parenting arrangements.

The judge ordered that Liam participate in VLA's KidsTalk program prior to a family dispute resolution (FDR) conference to support his parents to reach a new parenting agreement.

Through KidsTalk, Liam was able to explain that he really enjoyed spending time with both households as well explaining some of his behaviours which suggested he was reluctant to spend time with one of his parents, which was not in fact the case. After KidsTalk, hearing Liam's experiences helped both parents to recognise the importance of working together to help Liam and shift their parenting approaches to be more child-focused and positive. At the FDR conference, they agreed to new parenting arrangements to ensure that Liam would see both parents on a regular basis and spend time across the two households.

At court Liam's parents submitted final consent orders to the judge avoiding the need for a final hearing. This saved precious court resources and meant Liam's parents can now parent him cooperatively, with a better understanding of Liam's and each other's perspective. Without KidsTalk, it would have been much less likely that Liam's parents heard directly from Liam thereby gaining insight into his feelings.

In 81 percent of cases where KidsTalk was used in 2018-19, the case settled³⁴ highlighting not only the benefits of increasing children's participation in its own right but also as a means to reduce delays and costs to families – both of which have significantly detrimental impacts on the wellbeing, safety and health of families and children involved.

³⁴ The settlement rate is based on settlement of some or all issues in a dispute on an interim or ongoing basis.

It is important to emphasise that the participation of children in FDR processes should only occur if it is appropriate and safe to do so. Our Kids Talk program includes screening, ongoing risk assessment, case management, and well-trained child consultants.

The key elements of the Kids Talk model could be adopted and rolled out in FDR programs more broadly to support the safe participation of children in FDR. We would also recommend additional resourcing of Kids Talk and similar programs to enable them to be more widely available for children and young people in Victoria where families are participating in FDR.

Recommendation 19: Increase the availability of child inclusive FDR services through increasing resourcing and rolling out Kids Talk or similar models across FDR services.

Enhancing children's voices during family law court proceedings

Increasing the use of child inclusive practices at court could help to enhance the wellbeing, safety and health of families and children using the family law system. As detailed above, being able to hear the views, concerns and wishes of children can help parents using FDR services to reach a child-centered agreement about future parenting arrangements. There are opportunities to better amplify the voices of children in court proceedings through family law consultant reports and where appropriate by judicial officers hearing directly from children.

Recommendation 20: Increase opportunities for children to express their views, concerns and wishes during family law court proceedings.

G. Any issues arising for grandparent carers in family law matters and family law court proceedings

The *Family Law Act* provides a mechanism for non-parent family members and carers to pursue outcomes in the best interests of children.

VLA's practice experience demonstrates that grandparents who are the primary carers of their grandchildren may seek family law orders as a way for their role as primary carer to be legally recognised. In VLA's experience, state child protection authorities may have provided advice to a grandparent who is now the primary carer of their grandchild to apply to the family law courts for family law orders as a way of allaying protective concerns and providing for administrative clarity about their role as the primary carer of a child.

VLA provides advice and assistance to grandparents and other family members who are impacted by family law disputes concerning children in their family. Assistance is often provided at outreach, duty and office locations or through our state-wide Legal Help telephone and webchat service. However, the availability of family law legal aid assistance for grandparents and carers is limited in light of the limited legal aid resources available for family law legal assistance more generally.

VLA is also supportive of changes to the *Family Law Act* to better consider cultural differences, and the diversity of families in Australia. VLA welcomes recommendation nine of the ALRC review into the family law system that provides for an amendment to the *Family Law Act* to

provide a definition of 'member of the family that is inclusive of any Aboriginal or Torres Strait Islander concept of family including grandparents.'³⁵

H. Any further avenues to improve the performance and monitoring of professionals

VLA has promoted the importance of introducing core competencies for professionals working in the family law system and in particular the need for regular professional development on the nature and dynamics of family violence.

As highlighted below, however, in order for many of the issues in the family law system to be resolved, adequately resourcing the family law system to fund core enabling functions is critical.

Adequately resourcing the family law system

Many of the current challenges in the family law system are a direct result of a lack of funding and resourcing. Delays, and poor decision-making processes that do not take into account safety and risk, are a consequence of inadequate resources to fund core enabling functions within the family law system.

For example, a lack of family consultants to support complex families and to undertake assessments is undermining the capacity of the family law system to manage safety. A lack of registrars also means that family law matters are not properly assessed and triaged. Lastly, inadequate supply of family lawyers in regional areas, at the same time that legal aid funding is reducing, compounds issues within the system and results in poorer outcomes for families living in regional areas.

VLA makes the following recommendations noting that challenges in the family law system are likely to persist unless sustainable and ongoing investments are made to meet demand.

Information and training for professionals working in the family law system

Information and training for professionals working in the family law system should be relevant to their work, contextualised to the specific roles of the professionals involved, and cross-disciplinary to support a shared understanding and collaboration between professionals working in the family law system.

Our recommendations on the training needs of professional working in the family law system is informed by our experience delivering multidisciplinary training in Victoria on both family violence, and child protection and our analysis of a body of research that considers the skills and training that professional working in the family law system should possess.

Accordingly, professionals in the family law system, should have a sound understanding of, and competence in:

- Family law, child protection and family violence legal frameworks;

³⁵ See Recommendation 9, Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family Law System Final Report* (March 2019) p16 < https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_report_135.pdf >

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

Recommendation 21: Introduce core competencies for professionals working in the family law system.

Training and ongoing professional development requirements are one tool for improving the quality of practices, however. where behaviour of a legal practitioner is particularly poor, other options that could be considered include:

- strengthening costs orders to respond to instances of misuse of court processes
- positive requirements for the family law courts to notify the relevant Legal Services Commission where there has been a pattern of poor practitioner conduct
- an addition to the Australian Solicitor Conduct Rules that a solicitor must not advise or engage in litigation that has the effect of perpetuating abuse, coercion or control against the other party.

Ensuring all professionals working in the family law system understand the dynamics of family violence

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

VLA lawyers continue to see an insufficient understanding of the dynamics of family violence in comments and decisions made in court, often to or in front of family violence victims. For example, judges, legal practitioners and family consultants can still dismiss family violence concerns because a victim returned to a relationship with a perpetrator, demonstrating a lack of understanding of the reasons why a victim may return to a relationship in which family violence was used. VLA lawyers also report dismissive comments made by other family law professionals regarding emotional and psychological violence and controlling behaviour suggesting it is still not viewed as seriously as physical family violence.

Recommendation 22: Introduce compulsory and regular professional development for all professionals working in the family law system on the nature and dynamics of family violence.

I. Any improvements to the interaction between the family law system and the child support system

VLA operates a dedicated child support legal service that provides assistance to parents with child support issues. There are only a few situations in which it is necessary for a person to apply to Court to resolve a child support dispute. VLA's recommendations to improve the interaction between the family law and child support system are aimed at reducing court involvement in child support matters and in doing so reducing costs to families, courts and Legal Aid Commissions.

VLA sees opportunities to minimise the need for families to have involvement with the court in relation to child support matters and in doing so reduce strain on the court and families.

Continuing child support throughout secondary school

Currently, when a child turns eighteen in year 11, a child support assessment will cease to be in force at the end of that secondary school year. To obtain further child support for completion of Year 12, a court application for an adult child maintenance order is required. Often, the cost of litigation will exceed the amount of child support that is payable for the final year of secondary schooling, however, the parent and child are significantly disadvantaged by the cessation in child support.

Recommendation 23: Amend the *Child Support (Assessment) Act*³⁶ to ensure that child support can continue to be paid until a child ceases full time secondary education, even if this is beyond their 18th birthday.

Using accredited DNA evidence to commence or end an administrative assessment

Before an application for administrative assessment of child support can be accepted by the Department of Human Services – Child Support (DHS CS), a parent seeking child support must be able to provide evidence of parentage³⁷. This requirement can be challenging to meet where a person is determined to be the parent through DNA testing but then refuses to sign a statutory declaration to acknowledge paternity.

Marta's story

DNA parentage testing in relation to a child, Jay, had been conducted through an accredited DNA facility as part of Children's Court proceedings over 15 months ago. VLA's client, Marta, was required to apply for child support. She provided evidence of parentage to DHS CS, however, her application was rejected as the other parent refused to acknowledge paternity, and the law currently does not enable DHS CS to accept the accredited DNA report.

VLA assisted Marta to file court proceedings. Marta said, "the child support process is really long". VLA's view is that this type of court proceeding impacts on limited legal aid funding and is an unnecessary burden on the court system.

Recommendation 24: Amend the *Child Support (Assessment) Act* to allow the Child Support Registrar to accept an application for administrative assessment of child support using accredited DNA evidence, without needing a declaration of parentage under s106A.

³⁶ An amendment to s151D(1)(b) of the *Child Support (Assessment) Act 1989* to "...whichever occurs later (replace 'first' with 'later') would ensure that the administrative assessment remains in place until the child ceases to be in full-time secondary education.

³⁷ Section 106A, *Child Support (Assessment) Act 1989*.

Conversely, once a party has been excluded as the parent of the child, they currently need to initiate court proceedings to end any administrative assessment of them to pay child support.

Recommendation 25: Amend the *Child Support (Assessment) Act* to allow the Child Support Registrar to end an administrative assessment of child support using accredited DNA evidence.

Reducing complexity for seeking adult child maintenance payments

Currently, if a parent wants child support to continue past the age of 18 for reasons of education or disability, they are required to apply to the family law courts for an adult child maintenance order. This can be a complex, lengthy and expensive process for a sole parent or the adult child to engage with.

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

Anna and Phoebe's story

VLA assisted Phoebe, the mother of an adult child, Anna, who has a disability requiring 24-hour care. Phoebe lives in public housing and is not able to engage in paid employment due to her caring responsibilities for Anna. Child support payments received by Phoebe through Child Support ceased when Anna turned 18.

Anna receives benefits and some assistance through the National Disability Insurance Scheme (NDIS) which covers expenses such as a psychologist, and some medical costs. However, on a carer's pension, Phoebe could not afford all of Anna's day to day living expenses and activities such as swimming, medications, equipment to assist with mobility, transport costs and home heating so she sought adult child maintenance.

The father agreed that he should pay maintenance but disputed the payment amounts.

The court found that Anna's disability was permanent and that an ongoing order for adult child maintenance of \$400 a week was appropriate for the out-of-pocket expenses not covered by NDIS, and for reasonable living expenses such as food, housing, utilities, clothing.

The ongoing child support that Anna's father will pay, will ensure that Phoebe can properly care for their daughter. Had an administrative process been in place, this would have been an easier process for Phoebe to navigate and would have likely avoided the matter going to court.

Recommendation 26: Introduce an administrative process for adult child maintenance payments.

Improving child support debt enforcement

Liana's story below demonstrates the inconsistencies in decision-making about when child support debts are enforced through the courts by the DHS CS. Not paying child support has a significant detrimental impact on the receiving parent who can be left in a financially precarious situation.

While maintaining their privacy obligations, DHS CS should provide more clarity to receiving parents about its decision not to enforce a child support debt. For example, DHS CS may be waiting for the

debt to accrue more before they take action to seize assets, but this must be communicated clearly to receiving parents to reduce their stress and anxiety.³⁸

Recommendation 27: That DHS CS provides clear and timely reasons to receiving parents, while maintaining privacy obligations, on their decision to not enforce a child support debt.

Liana's story

Liana approached VLA for assistance because her former partner and the father of her two children had not paid any child support for three years. Liana was owed approximately \$20,000 in unpaid child support by the father. Liana informed us that she had regularly provided updates to the DHS CS about the father's financial circumstances, but they had not acted on this information.

VLA wrote to DHS CS to request them to enforce the debt. DHS CS responded that they would not be pursuing enforcement without a reason why.

This was distressing for Liana who had struggled to raise the two children of the marriage on her own since separation. It was also unclear why DHS CS had made this decision given that DHS CS had enforced much smaller debts against payer parents in the past.

VLA complained to the Commonwealth Ombudsman on behalf of Liana following DHS CS's decision to not proceed with enforcement. The Ombudsman responded that DHS CS had not acted unreasonably, and Liana had no remaining avenues to pursue.

Three weeks later, DHS CS contacted Liana to inform her that they would be pursuing enforcement litigation against the father. While a positive outcome, it may still be some time before the debt is enforced and Liana receives much needed child support.

Updating the child support formula to reflect the current cost of raising children

The current formula for child support has not been updated in over 10 years and is set at a level which risks the capacity of single parents to meet the basic needs of children. The 2015 Parliamentary Inquiry into the Child Support Program³⁹ recommended that the Australian Government should review the child support formula to ensure the adequacy of calculated amounts and equity of the program for both payers and payees.

Recommendation 28: Undertake the review of the child support formula, with a view to it being updated to reflect current costs of raising a child in Australia.

Avoiding court and unnecessary costs for reviewing child support arrears

As discussed above, DHS CS uses an administrative formula to make a child support assessment. When a parent has not provided their income details to DHS CS, a default provisional income is applied.

³⁸ Section 113(2) of the *Child Support (Registration and Collection) Act* 1988 states "The Registrar may take such steps as the Registrar considers appropriate to keep the payee of a registered maintenance liability or carer liability informed of action taken by the Registrar to recover debts due to the Commonwealth under this Act in relation to the liability."

³⁹ House of Representatives Standing Committee on Social Policy and Legal Affairs Report, *From conflict to cooperation – Inquiry into the Child Support Program*, see Recommendation 5, p4
<https://www.dss.gov.au/sites/default/files/documents/08_2016/d16_7771679_approved_government_response_to_the_parliamentary_inquiry_into_the_child_support_program_1.pdf>

If the default amount does not reflect the payer's actual income, it can result in accumulated child support arrears over time and, once the payer becomes aware of this, they would need to lodge a Change of Assessment Application to DHS CS. The Change of Assessment application allows an amended income assessment to be made and backdated by up to 18 months from the date of application, provided the child support case is still active.

However, often a parent is not aware that a debt is accumulating because they assume that the Centrelink and Child Support functions under the DHS would have access to the same information about their circumstances. Therefore, if they become aware of accrued arrears outside these parameters (greater than 18 months), the paying parent cannot use the administrative Change of Assessment process and must apply for a departure application to the court, the average cost of which is \$4000.

The below case study illustrates the current process, and why VLA recommends that DHS CS should be able to review child support arrears administratively for a period when the payer is clearly wholly in receipt of Centrelink benefits.

Amy's story

Amy had accumulated child support arrears of \$4000 during a 10-month period. During this period, DHS CS had set Amy's income pursuant to the legislation at the default income of \$48,000 per annum, despite her being unemployed and in receipt of Centrelink benefits.

The administrative review process to amend this assessment via an application for a Change of Assessment was not an option for Amy as the time limit of 18 months had lapsed when she became aware of the arrears and sought legal advice.

Amy had experienced severe family violence during the relationship with the father, and since separation had been homeless after being kicked out of the family home. The father prevented her from regularly seeing the children and she feared pursuing legal action to enforce regular time. This caused Amy immense stress and anxiety, resulting in suicidal ideation.

Amy assumed that DHS CS was aware that she was only receiving Centrelink benefits as they were deducting child support from her Centrelink payment during the relevant period.

Amy's request for an administrative review was unsuccessful, leaving her with no other option than to seek a review through the Administrative Appeal Tribunal. However, the stress of doing so, as well as the cost of this likely being more than the actual child support debt, meant there was little point in Amy pursuing this avenue.

Amy was left with little option but to make an agreement to pay the debt, a very poor outcome for a vulnerable individual.

Recommendation 29: Where an individual is seeking review of child support arrears and has been wholly in receipt of Centrelink payments, the DHS CS should review the child support arrears administratively. This could be achieved by invoking the minimum annual rate⁴⁰ of child support⁴¹.

⁴⁰ The 2019 minimum annual rate is \$435 per annum.

⁴¹ Section 66, *Child Support (Assessment) Act 1989*.

An improved process for the Child Support Registrar to monitor and report on systems or process abuse

In VLA's experience, the child support system can be used to perpetuate systems and economic abuse. The Federal Circuit Court Rules 2001⁴² require that child support applications be served on the Child Support Registrar.⁴³ The client story below highlights where there are court proceedings issued in other courts in which a party raises child support issues, but they are not caught by the provision in the Federal Circuit Court Rules to serve the Child Support Registrar.

Libby's story

Our client Libby suffers from physical and cognitive disabilities and is the mother of two teenage children with special needs. Libby experienced emotional, verbal and physical abuse throughout the relationship with her former partner, and economic abuse post separation.

Initially post separation, child support was paid directly to Libby but when her former partner became more controlling, Libby registered the case for collection with DHS CS. Due to business debts the father went bankrupt, however, he resumed business as a sub-contractor. The father earned three times as much as Libby in the previous year. The child support debt owed by him had grown to \$19,000, by the time DHS CS found an income source and started collecting payments.

Within a month of DHS CS resuming collection of child support, Libby was served with court documents by a male process server one evening causing stress and fear to her and the children.

The father was seeking Libby's bank statements and tax returns for the past five years. He falsely asserted that the information Libby had provided to DHS CS about her income was inaccurate, and therefore his child support payments were too high.

The application was not served on the Child Support Registrar as it was issued in the Magistrates' Court and was not caught by the Federal Circuit Court Rules. VLA acted on behalf of Libby to oppose the application, which was dismissed as the court found that all reasonable enquiries had not been made by the father, who failed to exercise the appropriate review processes through the DHS CS; the Court would not exercise its discretion as a matter of public policy as there were more appropriate, non-litigious avenues available to pursue.

These types of cases illustrate that some parties seek to bypass the cost effective non-litigious, internal review processes through DHS CS by issuing court proceedings inappropriately, constituting an abuse of process, intimidatory behaviour and further family violence.

Vulnerable clients who are unaware of their legal rights have felt compelled to provide their personal financial documents when served with court applications.

Recommendation 30: Require the Child Support Registrar to be served with applications in any State or Federal Court that purport to directly or indirectly relate to child support.

⁴² Rule 25A.07, *The Federal Circuit Court Rules 2001*.

⁴³ The *Assessment Act* provides that the parties to a child support application should be the liable parent and the eligible carer. The Child Support Registrar does not need to be joined as a party but may intervene in the case if served with a copy of the application.

Recommendation 31: Empower the Child Support Registrar to take a proactive role to intervene in such litigation, to provide relevant and timely information to the Court about child support cases and monitor and provide statistics about patterns of systems abuse.

J. The potential usage of pre-nuptial agreement and their enforceability to minimise future property disputes

VLA does not have practice experience regarding pre-nuptial agreements thus makes no recommendations to this term of reference.

K. Any related matters

VLA makes no recommendations to this term of reference.