

SUBMISSION

Prepared by Springvale Monash Legal Service for the

Joint Select Committee on Australia's Family Law System



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Our organisation

Established in 1973, Springvale Monash Legal Service (SMLS) is a community legal centre that provides free legal advice, assistance, information and education to people experiencing disadvantage in our community. For all of our operation, we have located within the Local Government Area (LGA) of the City of Greater Dandenong. We have been addressing the needs of marginalised community members, the majority who reside within the City of Greater Dandenong, the city of Casey and the Shire of Cardinia.

SMLS operates a duty lawyer service at various courts in Victoria, including Dandenong Magistrates Court, the Children's Court and provides legal representation at courts and tribunals such as the Victorian Civil and Administrative Tribunal, Fair Work Commission, Federal Circuit Court, Family Court and VOCAT. For most of the 40 years in operation, SMLS has been running a clinical legal education program in conjunction with Monash University's Faculty of Law, whereby law students undertake a practical placement at the legal service as part of their undergraduate degree. Additionally, as a community legal centre, we offer legal assistance as well as an extensive community legal education program that is developed in response to feedback from the range of community engagement and community development activities that we are and have been involved in. For example SMLS has contributed to reforms in family violence laws and practices, access to civil procedure reforms, discrimination towards young community members in their use of public space and their interactions with the criminal justice system, as well as in highlighting the needs of refugees and asylum seekers, particularly unaccompanied humanitarian minors and women escaping family violence.

SMLS and Family Law

SMLS provides a full time duty lawyer service at the Dandenong Magistrates Court three days a week, positions funded by the Victorian Government. The majority of the clients seen are victims of family violence under the Family Violence Protection Act 2008 (VIC) (FVPA). The remaining clients are either respondents (i.e. perpetrators of family violence) or persons referred to SMLS for advice regarding parenting arrangements when an Intervention Order (IVO) is in place.

Family Law has been a priority area for SMLS since 1989, when we established a specialised Child Support clinic. We operate a dedicated family law clinic, and assist many clients with advice, casework and representation. Our staff have considerable expertise, appear in the Federal Circuit Court, the Family Court, and regularly instruct Barristers.

Clients are referred into the service for ongoing casework from one of our many advice/outreach sessions unless they are directly referred from our duty lawyer service or a partner organisation.

SMLS: Springvale Monash Legal Service

FDR: Family Dispute Resolution

VLA: Victoria Legal Aid

CLC: Community Legal Centre

LAFDR: Legally Assisted Family Dispute Resolution

ICL: Independent Children's Lawyer

Responses to Terms of Reference: Review of Australia’s Family Law System

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

SMLS has made submissions to several family law inquiries that have made recommendations responding to the fragmentation of the family law and family violence legal systems and its impact on families. ¹

We acknowledge that a regime for information sharing exists between the state and federal jurisdictions for family violence, child protection and family law. For example, the initiating application for parenting orders requires any intervention order to be attached so the judge is aware that is an issue.

A parent alleging family violence commencing or responding to proceedings in the family law jurisdiction must sign and have witnessed an affidavit setting out the facts of the parenting dispute, including any allegations of family violence.

The mandatory “notice of risk” form is the trigger for the state child protection agency to report on any risk to the children via reports received. The intervention orders can suspend any family law orders which place the children at further risk. This is a tool available to the magistrate hearing the intervention order if the children require protection.

Our organisation regularly sees clients at the intersection with family law system. Our lawyers provide duty lawyer services at the Dandenong Magistrates court every day, and the majority of the clients we assist at court also have family law issues. ² We assist both victim/survivors of family violence as well as perpetrators. Cross-jurisdictional legal issues can present huge challenges for families, especially where they may be experiencing disadvantage.

¹ Springvale Monash Legal System, Submission to the Australian Law Reform Commission Review of the Family Law System Issues Paper (November 2018) and Submission to the Australian Law Reform Commission Review of the Family Law System Discussion Paper (May 2018), and Submission to the Parliamentary Inquiry into a better family law system to support and protect those affected by family violence (2017)

² See for example: 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>

Recommendation 1

We strongly recommend the introduction of a model for early determinations of family violence that will help to address family violence concerns early in the family law system. Early identification is essential to ensuring the safety of victims (including children), as well as increasing the efficiency and effectiveness of the court.

We suggest that at the first mention, the judge decides to list the matter for a hearing on the family violence allegations. We note that there is already discretion to do so within the Family Law Act (s.69Z FLA).

We note that some judges have held separate hearings on the family violence issues before proceeding with the matter. This occurred with the affected person giving evidence in another room.

Recommendation 2

SMLS supports improved information sharing and collaboration between the child welfare agencies, the police and the family courts to protect children and family violence survivors. However, any improvements must include safeguards against inappropriate or unsafe sharing of information.

Child Protection

SMLS often sees clients where an intervention order stipulates that child arrangements can only be made through DHHS. This can interfere and postpone the child's ability to see a parent for long periods of time, which can be traumatic for families and children in particular.

Recommendation 3

SMLS recommends having child protection workers co-located at courts for family violence duty lists. This has been done previously at Dandenong Magistrates Court. Our duty lawyers found the co-location worked well in progressing the matter, to assist in determining whether the children were at risk. We understand that the magistrates are encouraging the return of this service which has since ceased.

Recommendation 4

We recommend that the role of enforcement agencies such as Child Protection in family law proceedings and the nature of their involvement in the case, be defined by the first mention.

(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;

In family law proceedings, robust processes determine how evidence is to be handled by the court. Family violence allegations are subject to cross-examination on the contents of their affidavit, and a judge will determine on the balance of probabilities whether the violence occurred. People entering the legal system, both those alleging violence and those denying it, must be able to believe they will get a fair hearing.

SMLS has been providing legal assistance to our community for over 45 years. We have assisted thousands of clients, both victim/survivors and alleged perpetrators of family violence. In our experience, it is extremely rare for people to intentionally bring false allegations before the court. SMLS is unaware of any credible evidence that suggests people are likely to fabricate allegations of family violence. The lack of empirical evidence to support the notion of false allegations of family violence confirms this. In contrast, our experience suggests that victims/survivors of family violence face significant difficulties when disclosing their experience to courts and travelling through the legal system.

It is important to note that the Family Law Act 1975 section 4AB gives examples of behaviour that may cause a family member to be fearful. This includes children being exposed to family violence by overhearing threats of death or injury, seeing or hearing an assault of a family member, comforting or providing help to a family member.

As noted in section above, family violence allegations raised in family law proceedings should be dealt with by a preliminary hearing at the first mention of the matter. Allowing the family court to make an early determination of family violence would have multiple benefits, including ensuring relevant evidence is brought forward promptly.

Property Settlements

Where we have seen instances of people providing incomplete evidence is during property settlements. SMLS is concerned about victim/survivors of family violence who are unable to reach an agreement with a perpetrator of family violence, who are often forced to leave a relationship with nothing. This contributes to the concerning rates of financial hardship, female homelessness, and generally the evidence that suggests women are at greater risk of poverty than men post-separation.

Despite an obligation for all parties to make full and frank disclosure of their financial situation, research indicates that ‘obstructive former partners might withhold information about their financial situation to delay proceedings, elevate stress and increase legal fees’.³ SMLS supports additional measures to strengthen mandatory financial disclosure to ensure timely resolutions. This could take the form of allowing family law court registrars to use enhanced powers to make orders for disclosure, as well as powers to request information from employers and third parties.

Currently, there are very few avenues for people experiencing disadvantage to get legal help in these matters. Community Legal Centres are not well resourced to provide legal assistance in property settlements, often resulting in victim/survivors not being able to afford the help they need to reach a resolution.

³ Women’s Legal Service Victoria, March 2018, Small Claims, Large Battles (Research Report) p22.

Recommendation 5

SMLS recommends that greater consideration be given to individuals to improve access to small claim property settlements. We recommend that an early resolution process be introduced for small claim property matters to be dealt with quickly and fairly. We also recommend increased resourcing of legal assistance providers to support victims/survivors of family violence with property disputes.

Recommendation 6

We recommend altering the Family Law Act to include the consideration given to potential reductions in employability and capacity to seek employment as a result of trauma relating to family violence for the purpose of determining spousal maintenance and alteration of property interests.

Compliance

There is a difference between not complying with a parenting order because of genuine fears that the welfare of the child is at risk, and a serious breach of an order where the parent refuses to make the child available without sufficient reasons. A child may be at immediate risk of harm by spending time with a parent when there is sufficient evidence to support that allegation. A parent may even be seen to be 'non protective' of a child they keep making available to spend time with a parent who puts that child at risk when they feel pressure to comply with parenting orders.

SMLS notes that there are existing powers in the Family Law Act that deal with non-compliance. In our experience, there are a variety of reasons why families do not comply with family court orders. Often, there are reasonable excuses for noncompliance, such as a child being ill and unable to visit one parent. In other cases, families do not fully understand how parenting orders work in practice. The legal system is bewildering and people who are not exposed to the jargon and complexity are not equipped to interpret formal orders without assistance.

Recommendation 7

SMLS recommends providing further resourcing to the family law courts for family law consultants to provide assistance helping families understand the reality of their parenting orders.

(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;

SMLS welcomes the consideration of reforms that enhance the effectiveness and efficiency of the family court. We note that any proposed reforms must consider resourcing and funding considerations. SMLS has witnessed the impact of persistent and long-term under-funding of the existing court system and legal services over many years by successive governments.⁴

SMLS is concerned that proposed structural changes to the family law courts does not ensure that judges and other court staff working within it hold specialist family law and family violence knowledge to support sound and informed decision making.

We also have concerns that the combined courts proposal will create a competition for scarce resources among conflicting demands, resulting in a loss of peripheral services (such as family report writers).

We refer to our submission to the Australian Law Reform Commission's Review of the family law system, as we have proposed many reforms that would improve outcomes for families and increase the efficiencies of the courts. (See appendix 'A' below).

In particular, our experience indicates that the family court listing before a senior registrar can be more efficient than the Federal Circuit Court. In the family court, the registrar can hear submissions from the parties on matters in dispute, then rule on those matters and give their reasons. This process can further refine the issues in dispute and consequently this encourages the parties to settle or mediate. A judge in the Federal Circuit Court with a busy duty list of over 20 cases often does not have that time. Frequently a judge can only hear 'discrete' matters on a duty list day for mention and substantive issues are adjourned for trial date in a year's time.

⁴ Productivity Commission, Access to Justice Arrangements (Inquiry Report No 72, 2014)

- (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, or any other regulatory option to prevent disproportionate legal fees being charged in family law matters, and**
 - ii. any mechanisms to improve the timely, efficient and effective resolution of property disputes in family law proceedings;**

It is clear that many parents cannot afford legal representation and legal aid is usually only available for parents with no or few assets and receiving commonwealth benefits. Duty lawyers in the family law courts cannot represent people in a trial and are only usually available to assist if the parent is consenting to parenting orders on the day. We know that clients have felt pressured to consent to orders on the day just to avoid prolonging the proceedings even if they consider it is not in the child’s best interest.

Access to legal assistance in the early stages of a dispute is in the best interest of families, including children, as it reduces escalation and families spend a shorter time in the legal system. This in turn leads to increased efficiencies overall. Access to legal advice and representation is essential in the early and appropriate resolution of matters and helps to ensure that families are properly informed. Our sector (including Legal Aid, Community Legal Centres, Aboriginal and Torres Strait Islander Legal Services and Family Violence Prevention Legal Services) have experienced many years of funding shortfalls and cuts. We compete for small amounts of funding that do not provide the resources to support all those in need in our community. Appropriate funding to the legal assistance sector is essential to improving accessibility to the family law system and reducing cost to clients.

‘In Victoria today you can be a victim of family violence living below the poverty line and still not necessarily be eligible for ongoing legal aid representation for family law. Even if you are eligible, you may struggle to find a family lawyer who does legal aid work. There are now huge swathes of regional Victoria and metropolitan Melbourne with no legal aid family lawyers left because the scheme has become too poorly funded to sustain a practice. This is also putting huge pressure on Victoria’s community legal centres, who have to turn away people walking in their door asking for family law assistance.’⁵

Recommendation 8

SMLS recommends the legal assistance sector be adequately funded.

⁵ Nicole Rich, 2019, ‘The legal aid crisis is real – and it’s families who are in the firing line’, The Guardian <https://www.theguardian.com/commentisfree/2019/dec/27/the-legal-aid-crisis-is-real-and-its-families-who-are-in-the-firing-line>

(e) the effectiveness of the delivery of family law support services and family dispute resolution processes; and

Legally assisted family dispute resolution - LAFDR

SMLS notes that going to court is a necessary option for some families. Many families have complex circumstances, for example, people who have experienced family violence, families where problematic drug addiction, alcohol abuse and/or mental health issues affects one or both adults or where there are allegations of child abuse. LAFDR may not resolve the dispute where there are entrenched positions and family violence. For many, as well as those where it has become a matter of urgency, going to court is essential.

Recommendation 9

SMLS would support FDR playing a greater role in the resolution of disputes if legislation ensured it was legally assisted, well supported, with expert lawyers and mediators who are trained in recognising and working with family violence as well as trauma informed, culturally competent and aware of challenges faced by diverse families and those with a disability. They must have a sound understanding of family law.

This way, LAFDR can achieve high rates of settlement and prevent matters from reaching court, thus reducing cost, delay and stress for families.

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

The impact of family law proceedings on the health, safety and wellbeing of children and families involved is significant. SMLS staff often remind each other that ‘in family law there are no winners, and the children are the losers’.

In our experience, the family court system can be harmful for at-risk children, due to the lengthy time parents spend litigating their matters and long delays in appointments with a family consultant. As a disputed ‘live with’ order is usually not dealt with until trial, parents can be in the system for over 2 years from the time the application is first heard in court. We have a number of matters that will have been in the court system for over 2 ½ years by the set trial date.

Children exposed to family violence can experience trauma and in some cases, require counselling from ongoing family violence. This can be addressed through parenting orders. The paramount principle of the child’s best interest is subject to whether a meaningful relationship with the other parent means they are likely to be at risk in their care.

Systems abuse

SMLS has witnessed how the systems abuse can be utilised in the family court.

Case Study: Sam

Sam had been a victim/survivor of family violence and was attempting to rebuild her life after a lengthy court process. Her ex-husband abused the family law system by filing successive contravention applications over a 6-month period, which tied our client up in having to attend multiple court hearings and defend each application as it arose. It was difficult for Sam to maintain employment as she constantly had to take days off to attend court. For each application, there was a reasonable excuse for non-compliance with the parenting orders. For example, the child was at school camp.

This systems abuse is detrimental to the recovery of victim/survivors, and can prevent them from rebuilding their lives, and even prevent them from sustaining employment due to multiple court dates. Individuals can be overwhelmed by affidavits initiated by perpetrators, and it can be very difficult to rebuild their lives while the legal process drags on so long.⁶ Perpetrators continue to control victims/survivors through the emotional and economic toll of ongoing court proceedings.

Recommendation 10

We recommend making changes to the Family Law Act, ensuring that after a prescribed number of failed contravention hearings, family violence perpetrators must seek the permission of the court before they proceed to seek further contravention hearings. This is emulated in the state based Family Violence Prevention Act.

Case Study - 'Alicia'

A family dispute resolution service referred Alicia to us after finding out she was self-represented in her proceedings against the father of their child. The father had withheld the child, who was 5 in December 2018.

The mother succeeded in a recovery order, however the child was returned to the father after she tested positive for cannabis. The parenting orders gave her limited time with her child only. We assisted her in obtaining interim orders for more time, but the father was resolute that no further time would be contemplated. We succeeded in obtaining funding for a further family report and the matter went to trial. The father's proposal was for sole parental responsibility, only spending limited time with Alicia. Alicia had undergone 16 consecutive clean drug tests as requested by the Independent Children's Lawyer. She proposed equal shared parental responsibility, the child live with her and spend regular time with the father. At trial, the father persisted in his allegations that the mother was still affected by drugs, despite all evidence to the contrary and that she should only have limited time with the child. He refused to negotiate.

He failed to demonstrate to the judge that he would facilitate a positive and meaningful relationship between the child and the mother. Conversely, the mother's evidence was to promote a relationship between the child and the father; that he was a good father and the child was safe and well looked after in his care.

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;

The Family Law system in Australia is complex and multifaceted. As with other specialist areas of law, tailored training is required in order to ensure practitioners understand the nature and impact of abuse in all its manifestations in the family violence and family law jurisdictions. This training should encompass judicial officers, Independent children's lawyers, family lawyers and Registrars.

SMLS continues to see an inadequate understanding of the dynamics of family violence in comments and decisions made in court. These comments and decisions are often very harmful to victims/survivors of family violence. For those who are sufficiently trained in family violence, it is well known that there are a variety of reasons why a victim/survivor may decide to remain living with a perpetrator of family

⁶ Smallwood, Emma, 'Stepping Stones: Legal Barriers to Economic Equality after Family Violence Report on the Stepping Stones Project', Women's Legal Service Victoria, September 2015

violence despite ongoing abuse.⁷ Despite this, judicial officers and family law professionals still dismiss family violence concerns because a victim/survivor returned to a relationship with a perpetrator, and partake in ‘victim blaming’ language.

Recommendation 11

We recommend that relevant regulatory bodies such as the Victorian Legal Services Board, in consultation with specialist family violence organisations develop and deliver a mandatory qualification/certification for family law professionals. We recommend this training include The National Domestic and Family Violence Bench Book and its use in the family law system, in addition to culturally appropriate responses to family violence.

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

It is important to note that most child support matters do not end up in proceedings in the family court system. SMLS has assisted clients in initiating proceedings in the Federal Circuit Court only because the Registrar for Child Support cannot vary a child support amount under special circumstances after 18 months has passed. (*s. Child Support (Assessment) Act 1979*).

For example, in June 2019 a parent discovers the amount they are paying, or being paid is incorrect under a child support assessment period that finished in June 2017. The parent seeking to vary the amount paid during that time is relying on special circumstances that are prescribed under the Act. The parent must commence proceedings seeking an order to vary the assessment. In our view, the Federal Circuit Court should not be the jurisdiction for commencing these proceedings that involve consideration of complex financial details of the parties. It ties up valuable court resources and we understand in the Melbourne registry a special listing day for these matters has been initiated.

In our experience, some of our family law clients are pressured to make children available to the other parent for additional time that may not be in the children’s best interests because of ‘care percentages’ in the formula prescribed by Child Support. Over a certain percentage of care by the other parent can reduce their liability to pay child support.

Some of our clients have instructed that the other parent has given misleading information to Child Support about the number of nights spent in each parent’s care, which can ultimately impact on the amount received by a parent for maintaining the children.

In addition, for children who have turned 18 but remain attending secondary school, parents have to commence proceedings in court in order to have the payments extend until the child finishes school.

Recommendation 12

Alternatively to Federal Circuit Court, these matters could be initiated in the Administrative Appeals Tribunal (AAT) where that jurisdiction already hears commonwealth administrative matters, including child support appeals.

⁷ For example: leaving an abuser is the most dangerous time for a victim of domestic violence, threats from an abuser that they will hurt or kill them, they will hurt or kill the children, they will win custody of the children, they will harm or kill pets or others, they will ruin their victim financially etcetera.

Recommendation 13

SMLS recommends that the Child Support (Assessment) Act 36 be altered to allow for child support to continue until a child completes their full time secondary education.

DNA evidence

SMLS has witnessed situations where a father has refused to acknowledge parentage statutory declaration to acknowledge paternity despite DNA evidence that confirms parentage. This results in the other parent having to commence court proceedings, as DHS Child Support requires the statutory declaration. In our view, this is unnecessary, and requires families to go to court who would otherwise not need to.

Recommendation 14

We recommend allowing the DHS Child Support registrar to accept applications for administrative assessment of child support without the requirement to provide a declaration of parentage if DNA evidence is available.

(k) any related matters.

The family law system is slow when proceedings are on foot. In order for improved outcomes for families, final hearings or trial dates need to be fixed within 6 months of the matter first coming to court, not in 2 or 3 years. Senior registrars could preside over parenting matters in the initial stages by directing the parties on the actual legal issues in dispute. They could refer the parties to mediation if appropriate. In addition, appointing a family consultant to meet with the parties within two months of the first hearing would allow many families to resolve matters earlier.

Recommendation 15

The Senior Registrar should have the ability to have a conference with the parties before the first court hearing to refine the matters actually in dispute.

Perpetrator intervention

SMLS is concerned with the lack of programs to support perpetrators of family violence. A system which allows both parties to access a range of support services, both legal and non-legal, in a timely manner is paramount to effectively address family violence. Perpetrator recidivism programs must be accessible, evidence based, therapeutic and culturally appropriate. Many services have a limited understanding of the Family Law process, and require more in depth training regarding legal process for family's impacted by family violence. Programs aimed at recidivist behaviour are often short term in nature, and cannot be expected to achieve strong outcomes within their current timeframes.

Recommendation 16

SMLS recommends further resourcing for accredited intervention programs for perpetrators of family violence.

Appendix 'A'

SUBMISSION

Prepared by Springvale Monash Legal Service for the
Australian Law Reform Commission:
Review of the family law system

Terms of Reference:

- The appropriate, early and cost-effective resolution of all family law disputes;
- The protection of the best interests of children and their safety;
- Family law services, including (but not limited to) dispute resolution services;
- Family violence and child abuse, including protection for vulnerable witnesses;
- The best ways to inform decision-makers about the best interests of children, and the views held by children in family disputes;
- Collaboration, coordination, and integration between the family law system and other commonwealth, state and territory systems, including family support services and the family violence and child protection systems;
- Whether the adversarial court system offers the best way to support the safety of families and resolve matters in the best interests of children, and the opportunities for less adversarial resolution of parenting and property disputes;
- Rules of procedure, and rules of evidence, that would best support high quality decision-making in family disputes
- Mechanisms for reviewing and appealing decisions
- Families with complex needs, including where there is family violence, drug or alcohol addiction or serious mental illness;
- The underlying substantive rules and general legal principles in relation to parenting and property;
- The skills, including but not limited to legal, required of professionals in the family law system;
- Restriction on publication of court proceedings;
- Improving the clarity and accessibility of the law; and
- Any other matters related to these terms of reference.
- I further request that the alrc consider what changes, if any, should be made to the family law system; in particular, by amendments to the family law act and other related legislation.

Acronyms:

SMLS: Springvale Monash Legal Service

FDR: Family Dispute Resolution

VLA: Victoria Legal Aid

CLC: Community Legal Centre

LAFDR: Legally Assisted Family Dispute Resolution

ICL: Independent Children's Lawyer

All names have been changed in the case studies, in order to protect the confidentiality of SMLS clients.

Objectives and principles

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

Objectives of the legislation should be to guide the process assisting families to resolve disputes relating to parenting and property, and;

- (a) To enhance the safety and wellbeing of children and to promote their opportunities to thrive as they develop;
- (b) To assist separated parents to make arrangements for the children post-separation;
- (c) To protect rights to physical safety for parties impacted by family violence;
- (d) To ensure separated couples achieve a fair division of their property and financial assets;
- (e) To uphold the United Nations Convention on the Rights of the Child; and
- (f) To regulate the separation and post- separation processes to ensure they are affordable and accessible for all families.

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

echoes the principals outlined in the discussion paper, the Family Law System should:

- Be child centred and trauma informed;
- Ensure equality of treatment for children regardless of their family structure;
- Foster ethical professional practices; and
- Promote a learning culture.

We also suggest the following principals:

The Family Law System should be:

- (a) Evidence based, informed by research and expertise
- (b) Accessible to all families
- (c) Culturally inclusive
- (d) Fair and equitable
- (e) Efficient and responsive

Parenting

- (a) Priority is to protect children whose parents have separated and where conflict about parenting arrangements has arisen;
- (b) Prioritise the protection from physical or psychological harm as being in the best interests of the children regarding parenting arrangements for separated parents;
- (c) If a child is in the care of a person who is not their parent, parenting arrangements should reflect the best interests of the child's need for protection from physical or psychological harm and the stability and routine that best suits the child's age, needs and stages of their development;
- (d) That parents co-operate and attempt to resolve their parenting dispute through mediation or facilitated negotiation provided it is safe to do so;

- (e) That parents who are financially disadvantaged have access to services to assist them with their parenting arrangements;
- (f) That the state courts and family courts share the authority to make parenting orders, where appropriate

Property

- (a) That division of property is fair and reflects each party's post separation circumstances;
- (b) That separated couples first attempt to resolve their division of property from the relationship at mediation or facilitated negotiation provided it is safe to do so;
- (c) That separated couples give full disclosure of their finances to each other

Access and engagement

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

- (a) SMLS supports the proposal of Navigation caseworkers as outlined in the issues paper. However, the position scope, skills required and qualifications must be adequately investigated and clearly prescribed. Ideally, this role would most resemble a caseworker, who would assist families through the family law system, providing both navigation, referrals and support. SMLS also recommends bi-lingual caseworkers are also made available, based on data reflecting main languages accessing the specific court. SMLS recognises that similar schemes exist at various courts. SMLS recommends a consistent approach to the implementation of navigation caseworkers, to ensure post code justice applies for all families.
- (b) Materials produced by courts and justice services are overly complex and act as a barrier to information for many families. SMLS recommends that all materials, including websites, be subject to 'plain language' tests to ensure they are accessible for those who have no legal training.
- (c) Magistrates' courts are often the first point of contact with the justice system for people experiencing family violence, and separating parents making arrangements for their children. By expanding the Magistrates Court services at selected Melbourne metropolitan and country courts to include a 'kiosk' service similar to the kiosk provided by the Family Law Pathways Network at the Dandenong Magistrates Court, we can improve the access to information regarding services for families. A kiosk service can guide clients to specific family court based services, such as the Family Law Advocacy and Support Service at the Federal Circuit Court in Dandenong, provide referrals and translated materials, as well as answer questions to guide families who are strangers to the system.
- (d) Interactive digital displays (touch screen progressive information) at the Magistrates Courts and Commonwealth Law Courts giving basic information about where to find help with resolving parenting issues (including ways to feel safe at court) could be made available. The information must be in plain English and avoid jargon as much as possible. These displays could also offer information in other languages.

- (e) Increased collaboration between courts and the community, including the development of culturally appropriate and tailored education programs and materials about family law and family violence. This also may include partnering with the legal assistance sector to build the ability of community service organisations to understand the court processes.

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

- (a) An essential step in assisting people to navigate the family law system is by increasing the availability of free legal information and advice.¹

Question 5: How can the accessibility of the family law system be improved for Aboriginal and Torres Strait Islander people?

Based on our experience, we note that a deep distrust of the family law system exists among Indigenous families in Australia, relating to the ongoing links between family law and the Child Protection system. This is in part due to the continuing impact of historical government policies of child removal and intervention in Indigenous families, in addition to the alarming statistics detailing the over-representation of Indigenous children in out-of-home care.² This connection impacts the likelihood of Indigenous families to accessing support and engaging with services. SMLS supports the need for legislative redesign and reform to recognise these experiences, and create fairer systems for Aboriginal and Torres Strait Islander families. SMLS believes that information and solutions regarding Question 5 be gathered from Aboriginal and Torres Strait Islander communities and families, and Aboriginal community controlled organisations.

Question 6: How can the accessibility of the family law system be improved for people from culturally and linguistically diverse communities?

- (a) Ensure increased cultural safety by improving the cultural competency of all practitioners and professionals working in the family law system.
- (b) Alter the FDR model to include increased flexibility so that extended family members can participate with greater decision making capacity
- (c) Increase the capacity of community legal centres to deliver Community Legal Education. One of the services historically provided by community legal centres is community legal education in the community where the legal centre is located. The educators are usually qualified in community development. These workers have the skills and networks in the community so they can target specific 'sub groups' in the

¹ Productivity Commission, Access to Justice Arrangements, 640-642

² Australian Institute of Family Studies, 2017, Child protection and Aboriginal and Torres Strait Islander children, Australian Institute of Family Studies
<https://aifs.gov.au/cfca/publications/child-protection-and-aboriginal-and-torres-strait-islander-children>

community. Effective community legal education involves working closely with representatives from a specific community and partner organisations, in order to ensure tailored, participatory, user centred and successful information delivery.

- (d) Develop culturally appropriate and accessible information about the family law system that is tailored to the needs of communities;
- (e) Empower families that have limited English literacy by simplifying the paper-based system. Build flexibility into the family law system so that courts are able to make allowances for non-written evidence.
- (f) The caseworkers mentioned above (see Question 3) should be experienced and skilled in working with CaLD families and communities.
- (g) SMLS regularly appears in the Federal Circuit Court regarding parenting matters. In some cases, the court has only been able to provide one interpreter for both parties. This can lead to a conflict of interest. SMLS recommends two interpreters are always available to ensure ethical practices.

Also, see question 3(a) and (b) regarding suggestions for CaLD communities.

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

- (a) Practical considerations to improve the experience of people with a disability include ensuring courts are equipped with facilities appropriate to people using wheel chairs and other mobility aides.

CASE STUDY

SMLS assisted a client called Kim who had a hearing disability. We requested that an ASLAN interpreter be made available, however despite a booking being made no interpreter arrived on the day of the hearing. Though the Registry was apologetic, they ultimately decided that they could not do anything further to assist. Kim had to rely on lip reading and the assistance of a relative.

- (b) Court hearings should not proceed unless a person is provided with the services required to ensure they understand the process.
- (c) As mentioned in Question 3, introducing a dedicated court-based case management function would increase the ability of individuals who have a disability to navigate the family law system. A case manager could provide safety planning advice as well as warm referrals to increase safety and holistic support.

Question 8: How can the accessibility of the family law system be improved for lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) people?

SMLS believes that information regarding this question be gathered from LGBTIQ organisations and individuals.

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

SMLS believes that information regarding this question be gathered from rural and remote organisations.

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

The current family law system is inaccessible for many individuals and families. The high cost of representation in addition to the preparation of court documents is more than many families in Australia can afford. The Issues Paper demonstrates how the current system creates barriers that may lead families to avoid addressing their legal problems, or settle prematurely, potentially placing vulnerable people and children at risk. Similarly, Victorian Legal Aid guidelines are even more stringent and a client may be prevented from accessing their services if they have a parent assisting them financially.

SMLS is concerned about the lack of services available for all families, in particular the ever increasing gap between people classified as 'disadvantaged' and those who are considered 'not sufficiently impoverished'.³

For example, a single parent with two children who earns \$45,000 per year after tax and has housing costs of just over \$10,000 per year, is not considered disadvantaged. Consequently this parent would not be able to access free legal advice and assistance.

CASE STUDY

SMLS assisted a Barry, a father without a grant of legal aid, while the mother, Liz, obtained a grant of aid and had private lawyers representing her. The matter involved complex family violence issues and allegations of mental health issues by both parties. After two hearings, Barry proposed to settle the matter by consent orders, which Liz agreed to with some minor amendments. However, despite this agreement, the private lawyer informed us that they only had funding for court appearances, and were not funded to negotiate consent orders. Barry and Liz had no choice but to attend on the next hearing date to finalise the matter, even though the parties were already in agreement.

Psychiatric reports can be expensive and delay court processes significantly. SMLS have assisted people employed on a casual basis who are denied a grant of aid from Legal Aid to get the reports required. People have to miss work at many stages throughout the family law system. SMLS assists clients who are ordered to obtain Psychiatric reports, despite an affidavit detailing their dire financial circumstances. The time taken resolving how to pay for these reports, increases anxiety and delays matters before the courts.

Other costs incurred during proceedings may include court ordered counselling for parents or children with no regard to the cost to the parent. As counselling is usually an interim order

³ Productivity Commission, December 2014 , Access to Justice Arrangements

the case may not progress if the parent cannot afford it and the counselling is not subsidised under Medicare.

CASE STUDY

At Court, Rachel was ordered to take her children to regular counselling. Part of the orders included a provision that the parents share the costs. Despite the risk of breaching the orders, Rachel's partner refused to pay his share of the costs of counselling. Rachel was unable to pay for the counselling required. She spent a lot of time finding support through not for profit organisations to cover the costs, she was very lucky that she ultimately found support, but this is rare and caused significant delays.

- (a) When a client has affidavit material before the court regarding their financial disadvantage and the court orders a psychiatric report, the order should include that Victoria Legal Aid arrange for the report to be made. This is similar to the way in which an order is made for an Independent Children's Lawyer to be appointed with funds from VLA.
- (b) SMLS recommends that the court should take into consideration the affordability of services outlined in the orders made.

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

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

Though recognising that self-represented litigants will always be participants in our legal system, SMLS believes it is crucial to fund legal assistance to decrease the number of people who are not legally represented. This is particularly relevant for families that have experienced (or at risk of) family violence or child abuse.

SMLS is concerned by research that indicates that matters involving unrepresented litigants are more likely to;

- Lack evidence about family violence protection orders and child safety concerns⁴
- Contribute to the risk of re-traumatisation of victims of family violence through the court⁵
- Risk direct cross examination of a victim of family violence by a perpetrator, or have other negative impacts on families through the impact on a self-represented victim-survivor having to directly cross-examine their alleged abuser.

SMLS recommends that funding of legal assistance service providers be increased in line with the recommendations from the Productivity Commission's report.⁶

⁴ R Hunter, A Genovese, A Chranowski & C Morris, August 2002 The changing face of litigation: Unrepresented Litigants in the Family Court of Australia, Law and Justice Foundation of NSW

⁵ Legal Aid NSW, June 2017, Parliamentary inquiry into a better family law system to support and protect those affected by family violence, Submission to the Standing Committee on Social Policy and Legal Affairs

Changes to the system that increase the accessibility for self-represented or un-represented litigants must be *in addition to* and not instead of the adequate funding of legal assistance service providers.

SMLS supports the suggestions in the issues paper such as:

- (a) Re-drafting court forms and instructions in plain English
- (b) Re-developing court websites to ensure they are user-friendly and that forms are easily searchable;
- (c) Simplifying the legislative framework and drafting provisions in plain English

We also support

- (d) The drafting of 'how to' guidelines in easy English and other languages
- (e) The introduction of a consistent case-management function at court (see answers to Question 3)
- (f) The introduction of a simplified process for small property claims
- (g) SMLS recommends that a Registry staff member is appointed to manage self-represented litigants file as a case manager. For example, the case manager can write to the parties before due dates for filing, make appointments with the respective parties to explain the documents they need and what information needs to be given to the court. The registry case manager can then refer the parties to a conciliation conference with a Registrar before the court date to determine if the matter can be resolved by consent orders. If the matter does not settle, the Registrar gives the parties a court 'kit' outlining the next steps the parties have to take and a list of the documents they need to prepare. The Registrar then refers the parties to the court's duty lawyer services to allocate a solicitor advocate to appear in court on the day.

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

- (a) A reception where people can access assistance on arrival at court to navigate the physical layout of the court;
- (b) The increased availability of interview rooms for the client and their lawyer to meet
- (c) Child-friendly spaces and waiting rooms
- (d) Separate entrance to the courts for parents required to bring their children into court for family consultant appointments
- (e) Safe waiting areas similar to the 'protected persons area' in the Dandenong Magistrates Court for clients to wait and to have access to their lawyer

Legal principles in relation to parenting and property

Question 14: What changes to the provisions in Part V11 of the Family Law Act could be made to produce the best outcomes for children?

We respond to this question in these sections:

⁶ Productivity Commission, December 2014, Access to Justice Arrangements

Table of Provisions in the legislation

(a) It makes sense to separate the provisions so that the subjects relating to only the children is in sequence, and draft separate provisions for items that are procedural (for example Commonwealth Information Orders, advisors obligations, family dispute resolution, family consultant reports, Commonwealth Information orders, Maintenance orders, Court's jurisdiction and contraventions). Therefore, Part VII will reflect the principles affecting children and parenting orders made under this division.

(b) We suggest the section dealing with family violence (sections 68N to 68T) be inserted after Section 60C so that family violence is considered by the court prior to the sections dealing with the critical factors in section 60CC regarding the child's best interests. Most SMLS family law clients are affected by family violence, and the court needs to follow the logical path when making parenting orders starting with whether family violence is an issue.

Parental Responsibility Provisions

The meaning of parental responsibility should remain. However, the application of this definition about making long term decisions for a child is difficult for parents to understand and comply with. Our experience is that most separating parents do not readily grasp its meaning. Therefore, contravention orders against a parent for failing to consult with the other parent about long term decisions is problematic.

(c) We submit that the principle of parental responsibility remain as a feature of parenting orders, but the legislation be amended to explain the realities of parental responsibility in the one place. For example, an order is made for equal shared parental responsibility under section 61DA. Sub section 5 could be inserted to stipulate this includes both parents making long term decisions so it is clear the orders stipulate who makes them. For example, both parents make the long term decisions about a child's education, health and religious/spiritual upbringing. The next sub-section can provide for sole parental responsibility and that only the parent with sole parental responsibility will be making those decisions. Effectively, this combines section 61DAC about joint decision making with 61DA and contains a new sub section dealing with sole parental responsibility.

Best Interests of Children

(d) Regarding paragraph 129, we submit that the multi-step pathway in *Goode & Goode* provides a clear decision making process when all factors relevant to the best interests of the child are considered.

Early determinations of Family violence

(e) In our experience, matters that remain in the courts for over 12 months are often due to entrenched positions regarding issues in dispute, such as allegations of family violence by one parent (or even cross allegations), or conflicting ideas about the children's views from family reports and independent children's lawyer.

(f) Safety concerns for children exposed to family violence and abuse can be ameliorated through court procedures once a matter has commenced. For example, where family violence is alleged and there is no finding of fact (as the respondent consented to an intervention order without admissions) or no recorded abuse/family violence by the Department of Health and Human Services for the child, that a preliminary hearing be held only on the family violence issue in dispute, before the court proceeds to make any parenting orders. If the court finds that family violence has occurred, the decision making pathway is clearer – the presumption of equal shared parental responsibility is rebutted, and the court will then decide what time the children will spend with that parent with assistance from an independent children’s lawyer and a family consultant regarding that time.

CASE STUDY

SMLS represented Diane, a mother requiring an urgent court hearing to vary parenting orders, after she obtained an intervention order against Jack, the father of the children. The intervention order alleged physical abuse of the children. We assisted in obtaining new parenting orders changing the “spend time” provisions with the father. After this, the intervention order was withdrawn by the police. Diane, struggling to cope, did not have the support and resources to proceed with her own application. At the next hearing in the Federal Circuit Court, Diane made further allegations about continuing family violence from Jack. Jack alleged the mother emotionally and psychologically abused the children. The court eventually made an order requesting that the Department of Health and Human Services (DHHS/Child Protection) intervene, however DHHS decided not to. The matter was transferred from the Federal Circuit Court to the Family Court, where it was set down for a trial date. The date was two years from the time the proceedings commenced.

What could have assisted this client would be a clearer pathway:

- The initiating application and Notice of Risk identifies serious allegations of family violence.
- At the first return date, the court sets a date for a contested hearing into the family violence issues, appoints an ICL and the parties attend an 11 F conference.
- At the contested hearing into the family violence issues, the court hears evidence from the family consultant and the parties, then makes a finding whether or not that on the balance of probabilities, the children are at risk from exposure to family violence.
- That finding gives an opportunity for the parties to resolve their parenting dispute with consent orders.
- If the children are found to be at risk from exposure to family violence and the parties are still in dispute a date for a trial is set.
- If there is no finding on family violence the parties are sent to a conciliation conference with a Registrar to attempt to resolve the matter without going to trial.

- That finding then determines the pathway for the judge to follow regarding parental responsibility and the children spending time with the parent they are not living with.

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

In our experience, the court has sometimes taken an inconsistent approach to family violence including:

- A decision that an assault on the mother was not ‘serious’ enough to prevent the child from being exposed to the abuser;
- Over reliance by the court on DHHS reports that do not identify the child is at risk despite a client deposing family violence;
- Orders made by the court for a parent to spend time with a child supervised by a relative who is unlikely to be ‘neutral’ where family violence is alleged
- Systems abuse can occur where a client alleges family violence and the respondent makes cross-application intervention orders and multiple contravention applications once parenting orders are made.

- (a) Section 4AB should include the definition of “systems abuse” Section 3.1.11 of the National Domestic and Family violence Benchbook for use by the judiciary.

“Research has also recognised that a party to proceedings in domestic and family violence related cases may use a range of litigation tactics to gain an advantage over or to harass, intimidate, discredit or otherwise control the other party. These tactics may be referred to in legislation and other bench books and by judicial officers as malicious, frivolous, vexatious, querulous, or an abuse of process.”⁷

- (b) We reiterate our recommendations regarding presumption of equal shared parental responsibility and parenting orders and a dedicated pathway for decision making in our section above.

Regarding paragraphs 134 to 139 of the Issues Paper:

- (c) Section 67ZC gives the court jurisdiction to make orders regarding intersex children and children with gender dysphoria. The issues surrounding such children are complex and should be clearly made by children who are “Gillick”⁸ competent or by parents without the authority of the court.
- (d) *Re Kelvin* was decided on appeal before the Full Court of the Family Court, noting that there were a number of intervenors including the Attorney-General’s Department and the State’s child protection department. Given that an appeal to the High Court may be made in future decisions considering the standing of intervenors in challenging

⁷ National Domestic and Family violence Bench Book, Section 3.1.11

⁸ *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112.

such decisions in the future, we recommend the principles of Re Kelvin be included in Section 67ZC.

- (e) SMLS recommends that we take a human rights based approach, adhering to the United Nations Convention on the Rights of the Child, to place the issue where it belongs – with the child, the parents and their treating medical practitioners. If the young person has the support of the treating medical practitioners, SMLS does not believe that the child needs to seek the leave of the court to pursue treatment provided the child is Gillick competent.

Independent Children’s lawyers

In our experience, the Independent Children’s Lawyers vary in their engagement with clients, sometimes waiting until quite late in the proceedings and only contacting them by phone.

- (f) SMLS suggests best practice guidelines be implemented in Section 67L, to recommend that the Independent Children’s Lawyer meet with the child after the first return date, so they can best determine the maturity and views of the child.

Division 12A principles

In our experience these principles are not fully considered in practice:

- (g) *The court to consider the needs of the child concerned and impact of the conduct of the proceedings on the child.* Often court ‘blow out’ times for progressive dates including setting down for a final hearing for up to two years (or more);
- (h) *Court to actively direct, control and manage the conduct of the proceedings.* This could be remedied by the decision making pathway we outlined above. This includes early submissions by the ICL and the family consultant report. If their recommendations are similar regarding parental responsibility and spending time, then the court should use its power under s 69ZR and determine a matter arising out of the proceedings and make an order regarding an issue arising out of the proceedings. The judge could do so after hearing submissions from all parties. For example, the court can make an order for parental responsibility and spending time (as it does in interim orders) after making a finding of fact and determining a matter.
- (i) *The proceedings conducted in a way that safeguards the child concerned from being subjected to abuse, neglect or family violence* – again, we refer to our recommendation above with findings of fact regarding family violence occurring early in the proceedings.
- (j) *Proceedings to be conducted without undue delay and with as little formality and legal technicality as possible.* This is not occurring due to long wait times for 11F conferences and other reports (psychiatric, reportable counselling). We suggest the court’s resources expand to include more judges and more family consultants. By

placing resources at the ‘front end’ of the proceedings, we can spare the families the stress of ongoing proceedings taking up to 3 years.

Contraventions

We have also seen systems abuse in various cases of family violence, where perpetrators seek multiple contravention hearings. This systems abuse is detrimental to the recovery of victims, can prevent them from rebuilding their lives, and even prevent them from sustaining

employment due to multiple court dates. Individuals can be overwhelmed by affidavits initiated by perpetrators, and it can be very difficult to rebuild their lives while the legal process drags on so long. Perpetrators continue to control women through the emotional and economic toll of ongoing court proceedings.⁹

CASE STUDY

Sara's husband Ahmed brought five contravention applications before the court within a five month period, the first being filed within one month of the first return date. The alleged 'breaches' occurred when the child was either in hospital or very ill. They included allegations accusing Sara of not sharing information with the Ahmed. Although four of the contravention applications were heard on the one day, none were proved as Sara had a reasonable excuse. We had raised the issue of 'systems abuse' before the Judge prior to the hearing dates, and submitted that Ahmed's continued filing of contravention applications was an abuse of process and vexatious.

- (k) We recommend making changes to the legislation to ensure that after a prescribed number of failed contravention hearings, family violence perpetrators must seek the permission of the court before they proceed to seek further contravention hearings. This is emulated in the state based Family violence Prevention Act.

Consent Orders

SMLS has seen several cases where individuals have signed parenting plans and consent orders that confer sole parental responsibility to one parent. Once legal advice has been sought, we discover that these orders have often been signed either under duress, or else clients are unable to understand what they have signed, due to limited English capacity, limited understanding of legal jargon, or not understanding the consequences of certain documents. Though not a common occurrence, the impact on affected families is significant.

CASE STUDY

Sharmila obtained an intervention order against her ex-husband Raj. Her husband had English speaking skills and she had limited English. Raj told her he wanted a divorce and would get his lawyer to draw up the paperwork. Sharmila attended the lawyer's office to sign the paperwork with another lawyer "appointed" by Raj for herself. She then signed what she believed to be an application for a divorce, which included the paperwork required for parenting orders by consent. Raj's lawyer then electronically submitted the application for consent orders, which were subsequently made.

⁹Smallwood, Emma, 'Stepping Stones: Legal Barriers to Economic Equality after Family violence Report on the Stepping Stones Project', Women's Legal Service Victoria, September 2015

The orders gave Raj sole parental responsibility for their children, that they live with him and only see Sharmila in limited circumstances. Sharmila had capacity and had primary care for the children prior to this.

Raj used the consent orders as the 'exception' to the intervention order preventing him from spending time with the children.

When it became clear to the mother what had occurred, and she had not seen the children for some months, she sought our assistance to make an application in the Federal Circuit Court to vary the consent order. She was able to reverse the orders for parental responsibility and time with Raj, so the children primarily lived with her while spending substantial and significant time with the father.

- (l) If consent orders are filed for sole parenting responsibility, a hearing should be held to examine the consent orders with both parties required to attend, in order to interrogate the orders, and determine if family violence has occurred.

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

SMLS is concerned about victim/survivors of family violence who are unable to reach an agreement with a perpetrator of family violence, who are often forced to leave a relationship with nothing. This contributes to the concerning rates of financial hardship, female homelessness, and generally the evidence that suggests women are at greater risk of and poverty than men post-separation.¹⁰ SMLS supports the increased resourcing of legal assistance providers to support victims of family violence with property disputes.

Despite an obligation for all parties to make full and frank disclosure of their financial situation, research indicates that 'obstructive former partners might withhold information about their financial situation to delay proceedings, elevate stress and increase legal fees'.¹¹ SMLS supports additional measures to strengthen mandatory financial disclosure to ensure timely resolutions. This could take the form of allowing family law court registrars to use enhanced powers to make orders for disclosure, as well as powers to request information from employers and third parties.

Factors discussed by section 75(2) of the Family Law Act include factors that indicate the financial capacity and future financial status of both parties in property division orders. SMLS believes that while someone may appear to have capacity to seek and maintain gainful employment, as a result of long term, serious family violence, may require significant amount of time to recover from such trauma before being able to seek employment. In addition, those who have experienced family violence are less likely to pursue property division orders due to the economic and emotional toll of court proceedings. It is important that the family

¹⁰ Women's Legal Service Victoria, March 2018, Small Claims, Large Battles (Research Report) p15.

¹¹ Women's Legal Service Victoria, March 2018, Small Claims, Large Battles (Research Report) p22.

law system becomes more accessible so that women (especially those who are unable to obtain legal assistance) have access to a property settlement.

We recommend altering the Family Law Act to include the consideration given to potential reductions in employability and capacity to seek employment as a result of trauma relating to family violence when making property orders.

SMLS recommends that greater consideration is given to individuals to improve access to small claim property settlements. We recommend that an early resolution process be introduced for small claim property matters to be dealt with quickly and fairly.

This includes a review of associated forms and evidence required at the Federal Circuit Court. Simplified documentation should be designed to make more accessible for parties to provide court with the information required to make a property settlement decision.

(a) Of the options outlined in the Issues Paper, our preference closely aligns with the 'presumption of equal contribution', recognising the equal status of parties in a relationship and non-financial contributions to the family such as caring for children.

Resolution and adjudication processes

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

Overall, having a 'case' management outcome at the first return date that requires strict timelines for filing documents, preparing reports and assessments and other evidential material. A registrar can preside at the first return date to make procedural orders and interim parenting orders.

Many disputes commence after intervention orders are made in the Magistrates Court. A Federal Circuit Court interactive visual display about parenting and property issues could be located at Dandenong, Frankston and Melbourne Magistrates Courts. This can include the information steering clients to mediation services and legal advice clinic sessions nearby. The display can make it clear that where appropriate, mediation should be attempted before asking the courts to intervene. The display could include services at the FCC including the FAAS programme and list nearby community legal centres and Legal Aid phone line assistance.

- (a) If the respondent has not filed and served docs by the hearing before the Registrar, the Registrar can order the respondent to file/serve by specific date or it will be referred to a judge for orders to be made in the best interests of the children.
- (b) There is a case for having community legal centre lawyers embedded in the court system to assist with drafting documents. We know from experience that duty lawyers on the day of the hearing are stretched and often lack the capacity to prepare applications, affidavits and Notice of Risks as well as drafting consent orders.

- (c) We suggest that the duty lawyer service include a separate duty lawyer only for drafting court documents for clients and having carriage of the matter through the proceedings.
- (d) We know from experience that the FAAS system has been efficient in assisting self represented litigants on the day. We recently represented a client where the other party had a duty lawyer prepare consent orders, which assisted the matter in progressing to the next stage. We also represented a client where on the first return date, the FAAS lawyer assisted in drafting consent orders for a self-represented litigant. The other party then obtained the assistance of another community legal centre and we negotiated final consent orders and drafted the required documents under the rules for consent during proceedings. Both parties were extremely happy with the result.
- (e) Many of our clients have more complex issues including mental health and addiction issues. We are also seeing more clients who are on temporary visas and have complex family law issues. We have anecdotal evidence from some clients that they have experienced significant barriers in accessing legal assistance. One of our clients was refused legal aid in this state because the father had taken the children without her permission to another state at least two years ago and refused to tell her where they were living. She was having difficulty with a direct application for a grant of assistance of legal aid to the state the children were living in. We assisted by commencing proceedings in her home state with a Commonwealth Information order. If the client had presented to a duty lawyer or been directed to a community legal service that does family law casework at the FCC, she could have commenced proceedings earlier.
- (f) We recommend that duty lists be separated into three categories – parenting orders only, financial orders only and parenting/financial combined. A registrar is appointed to oversee direction of the proceedings and the steps could look like this:

Parenting

- 11F before the first return date so the court has clear direction of a family consultant's recommendations
- At the first return date a Registrar hears submissions from the parties regarding the issues in dispute and makes interim orders.
- The Registrar sets a date for a child conciliation conference and makes orders regarding the progress of the case (i.e. ascertains if psychiatric reports are required, anger management or parenting programmes to be attended). This may not be appropriate for all parties where there are serious conflict issues between the parties and an ICL is to be appointed.
- At the parenting conciliation conference, the Registrar confirms the issues still in dispute and whether there has been compliance with the orders. If the parties agree to final orders, the Registrar with the assistance of the court prepares the orders for the parties signature.
- If the matter does not resolve the Registrar makes procedural orders with strict timelines for a final hearing. The matter is then referred to a case manager in the

court to monitor the timelines and communicate with the parties leading up the final hearing date.

- The matter then goes before a judge

Financial

- At the first return date, the matter is before a Registrar who makes orders for the required valuation of real property (if no independent valuation agreed on), superannuation, and specific assets to be identified. As valuations for real property are often protracted, the Registrar can make an order for an independent valuer on that date and the valuation be made by a set date and any valuation of a business required.
- The Registrar then sets a date for a conciliation conference after all the assets and financial resources are identified and valued if required.
- The parties are required to inform the Registrar of the matters still in dispute at the conciliation conference. The Registrar then refers the matter to arbitration for the matters in dispute and makes orders for undisputed property and financial resources, such as superannuation.
- If the parties do not succeed at arbitration, the matter is set down for a final hearing.

- (g) SMLS recommends that Registrar's powers be broadened to include interim procedural orders prior to first return date before judge.

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

Regarding paragraphs 167 and 168, refer to our response under Question 20.

Regarding paragraph 169, the issues around mediation are complex. Due to confidentiality issues, a family dispute practitioner cannot inform lawyers regarding discussions during mediation.

Our clients have sometimes had poor outcomes from a mediation service.

For example:

- Agreements that are not in the best interests of the children: minimal time with the parent they are not living with, far removed from substantial and significant time, giving power to a young child to determine when they would spend time with the other parent, parents coerced into signing parenting plan outside the FDR centre despite having an IVO in place, a parent's only contact with children through a smart phone 'app'.
- Power imbalances in place- where one party may agree to unfair terms to get a small 'win' so they can see their children at all, and agree to unnecessary restrictions on that time.
- Entrenched positions held by one of the parties, lacking the skills to have insight on the impact the conflict is having on a child;

- Parents who do not abide by the parenting plan, undermine the other parent’s meaningful relationship with a child and consequently applications made to court just to get time with the child
- (a) SMLS recommends parenting conciliation conferences with a Registrar where FDR has failed.
 - (b) We also recommend a separate duty list for ‘small claims’ and early dispute resolution opportunity through early conference conciliation.

Time Spent

The earlier determination of “time spent” with the other parent (whether supervised or overnight) should assist in decisions being more child-oriented. At the second hearing, a judge should have before them a report from DHHS regarding risk and an 11F report that recommends what time the children will spend with the parent they are not living with.

In our experience, clients achieve better outcomes from FDR if they have also received legal advice. For example, one of our clients was pressured into signing a parenting plan that varied the parenting orders. The changes resulted in the children not attending school for 5 weeks, as there was a clause specifying the children remain enrolled at a specific school, which was inaccessible due to lack of affordable housing options for the family.

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

- (a) SMLS recommends a legally-assisted model for FDR of property matters. Legal advice is important so parties to engage in mediation informed by the legislation. This would, of course, require exceptions where it is unsafe or inappropriate to proceed with FDR, such as situations of family violence. For FDR to be effective, there would need to be full disclosure of financial assets and debts prior to mediation. Where one party is not voluntarily meeting the disclosure requirements, it would not be appropriate to proceed with FDR as this indicates a serious power imbalance between the parties. If the ‘presumption of equal contribution’ is introduced into the legislation (see Question 17), this would also assist families to negotiate at FDR.
- (b) We recommend that greater consideration is given to individuals to improve access to small claim property settlements. We recommend that an early resolution process be introduced for small claim property matters to be dealt with quickly and fairly. This includes a separate and simplified small claims list is available at court.

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

- (a) Please refer to our response to question 14, that a preliminary hearing be held only on the family violence issue in dispute, before the court proceeds to make any parenting orders.
- (b) A legislative ban on direct cross-examination in family violence situations.
- (c) We recommend altering the Family Law Act to include consideration given to potential reductions in employability and capacity to seek employment as a result of trauma relating to Family violence when making property orders. (Question 17)
- (d) The provision of separate rooms for clients affected by family violence to have video access,
- (e) Regarding abuse of process against a party, legislative change to including an enhanced understanding of the definition of 'vexatious litigant' including amending the definition of 'vexatious proceedings' to including proceedings when, on the balance of probabilities, a person has engaged in 'systems abuse'. A judge making an order regarding a vexatious litigant sends a strong message to those committing systems abuse.
- (f) The provision of a consistent case management function at the family law courts
- (g) We recommend that relevant regulatory bodies such as the Victorian Legal Services Board, in consultation with specialist family violence organisations develop and deliver a mandatory qualification/certification¹² for all professionals in the family law system including judicial officers. We recommend this training include The National Domestic and Family violence Bench Book and its use in the family law system, identifying family violence, in addition to culturally appropriate responses to family violence.

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

- (a) In our experience, clients experiencing family violence do not trust the FDR system, even with a lawyer. Where family violence has the potential to be a risk for the child, a parent will usually not contemplate a mediated outcome. As FDR only leads to a parenting plan, SMLS has never had a client agree to a perpetrator spending time with a child, when the initial contact with the justice system is with DHHS Child Protection. DHHS make it clear to parents they need to continue to be protective.
- (b) LAFDR may not resolve the dispute where there are entrenched positions and family violence. SMLS has also rarely seen clients agree to counselling from the appropriate services where the other party affected by drugs/alcohol or mental health issues.
- (c) SMLS would only support LAFDR playing a greater role in the resolution of disputes involving family violence or abuse, if legislation ensured it was well-supported, with expert lawyers and mediators who are trained in recognising and working with family violence as well as trauma informed, culturally competent and aware of challenges faced by diverse families and those with a disability. They must have a sound understanding of family law.

¹² Such as a Certificate I

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

- (a) As stated above, we recommend making changes to the Family Law Act, ensuring that after a prescribed number of failed contravention hearings, family violence perpetrators must seek the permission of the court before they proceed to seek further contravention hearings. This is emulated in the state based Family violence Prevention Act.
- (b) We recommend introducing an enhanced understanding of the definition of 'vexatious litigant' including amending the definition of 'vexatious proceedings' to including proceedings when, on the balance of probabilities, a person has engaged in 'systems abuse'. A judge making an order regarding a vexatious litigant sends a strong message to those committing systems abuse.
- (c) SMLS recommends including "systems abuse" in the definition of family violence under Section 4AA.

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

In our experience, there are some parenting disputes that are not suitable for dispute resolution and conciliation even if the services are expanded.

(a) We submit that an expanded role for the court overseeing disputes with our previously mentioned Registrar and case worker allocated to steering the dispute through different stages. Only some disputes will be appropriate for mediation, whether a lawyer is representing the client or not.

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

We submit there is scope to use arbitration in parenting and property matters using a Registrar to initiate orders, accredited family lawyers to facilitate arbitration, but only after the probability of family violence is decided at an early stage. Legally aided arbitration must be available for financially disadvantaged clients.

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

We suggest that clients experiencing family violence, CALD clients and parents affected by complex mental health issues, family violence and drug/alcohol dependency are unsuited to online dispute resolution, particularly with the paramountcy principles of the best interests of the children. SMLS is concerned at the risk of online dispute resolution being used by one parent to coerce the other to agree to parenting arrangements that can place the children at risk.

Question 30: Should family inclusive decision-making processes be incorporated into the family law system? How could this be done?

SMLS welcomes the Commission's consideration of ways to improve outcomes for children and families by introducing family-inclusive decision-making processes. Any new processes should;

- (a) Be child-centred;
- (b) Be linked to an embedded and consistent case management function at court.
- (c) We also recommend improved information sharing and collaboration between jurisdictions, so the best available evidence is before a judicial officer.

Integration and collaboration

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

SMLS assists clients with complex needs and layers of legal and non-legal issues. We believe these clients would greatly benefit from increased collaboration and integrated services. While lawyers must maintain strict client privilege, in order to allow for better assessment of matters, a system should be in place where, if the client consents, information from primary agencies¹³ be available.

This would mean the matter would be in a better position before the first return date. If we could give the agencies our client's consent for this information, the agencies make their relevant reports available. Consequently an affidavit, a notice of risk and application for orders can be drafted with the benefit of that material which better informs the court at the first return date.

(a) As discussed above, a case management model at court would assist families who require additional support to identify and engage with relevant services throughout the cycle of their family law dispute. The service would be in proportion to the needs of the family, so that the clients with the most complex issues receive the help they need.

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

The legal system is extremely confusing for families with matters that cross multiple jurisdictions. There are different processes and legal jargon in each, as well as a risk of conflicting orders being made.

¹³ Primary agencies such as the Sexual Offences and Child Abuse Investigation team, Victoria Police and Child Protection

Child protection

In our experience, it is common that Child Protection has already investigated allegations prior to a client coming to us for assistance. This has resulted in a 'case plan' and sometimes child protection interim orders. Frequently the case plan or orders mean the child is already living with the protective parent or carer. However Child Protection will often tell the client they need to obtain family law orders on an urgent basis rather than remain in the child protection system.

- (a) We suggest that where there is clear evidence from Child Protection that recommends or orders a child live with one party and spend limited time with the other party, that the Children's Court proceed to make final orders for the child under the Family Law Act with magistrates given a clear pathway to follow in their decision making.
- (b) Following from (a) above, we suggest that the objectives in section 60B of the Family Law Act be inserted into The Children Youth and Families Act 2005 (Vic). Additionally, Section 60CC of the FLA, regarding the primary consideration of the benefit of a child having a meaningful relationship with both parents, but greater weight given to protecting the child from harm, should also be inserted, to guide the Magistrate in the Children's Court considering making any parenting orders.
- (c) We submit that if a child is already subject to a child protection order, that the matter remain solely in the Children's Court for any further orders. The matter should only be referred to the FCC for parenting orders if circumstances change. Children are able to be independently represented in the Children's Court and as orders are made in the child's best interests, it makes little sense for a family to then have to go through the family law process in the FCC

This process will prevent the families undergoing further stress so there is no duplication of children's interviews, counselling and referrals. There is efficiency in this approach, as Child Protection 'Child First' services can provide a referral pathway for access to services for mental health, drug, alcohol issues and anger management courses for parents.

Magistrates Court

Our family violence duty lists in the Dandenong Magistrates court often have between 50 – 60 cases on the one day. The majority of these will involve children and consequently there are no finding of fact on the day. In some cases, the parents do not intend to separate. In our experience, contested hearings are rare as the respondent usually consents without admissions.

- (a) We support the suggestion that FCC judicial officers and family court registry staff are located in the Magistrates Court. We suggest that once a family violence matter is heard by the Magistrate on the first return date, the Magistrate orders the parties to

return to their court for parenting orders and refers the parties to the on site FCC Registrar to facilitate a hearing before an FCC judicial officer to make interim parenting orders.

- (b) We strongly suggest that the outcomes for families and children at risk by having child protection workers co-located at courts for family violence duty lists. This has been done at Dandenong Magistrates Court before. Our duty lawyers found the co-location worked well in progressing the matter, to assist in determining whether the children were at risk. We understand that the magistrates are encouraging the return of this service which has since ceased.

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

- (a) We support cross-data bases in the federal and state courts for sharing family law orders, intervention orders and child protection orders. A magistrate with access to family law orders hearing an intervention order application is in a better position to make a decision regarding the children with this information readily accessible.
- (b) We have made submissions to magistrates in an intervention order hearing to suspend the family law orders where a child is at risk and the magistrate has refused, often citing the reason that they do not have a copy of the parenting orders, as many clients do not bring parenting orders to court for an intervention order hearing.
- (c) We support the recommendations cited in paragraphs 249 – 252 regarding information sharing.

Children's experiences and perspectives

Question 34: How can Children's experiences of participation in court processes be improved?

- (a) In our client's experiences, children should not participate in FDR, as in nearly all the cases our clients reported a negative view of the mediation process. Some of our clients have reported 'over counselling/treatment' of the children. Also, children can be 'invited' into the conflict by parents.
- (b) In our experience an ICL who sees the child early in the proceedings, can make a difference to the parties reaching an agreement earlier. The ICL can see the children at school, at their home or at their office.

In our experience, a family consultant who meets with children who are mature enough to express a view, is an effective way of making recommendations relating to the children. In our experience, once an ICL was involved our clients reported that once they saw the children, the children felt like they had been listened to.

- (c) Consequently, we suggest that the combination of a family consultant making recommendations and an ICL representing the children's views be retained as the only participation for children during court proceedings.

- (d) We suggest that the impact on children during the proceedings can be improved with tighter time frames for an 11F conference made before the first return date. If the matter resolves, the need for an ICL does not arise. Where there the dispute progresses, an ICL is appointed after the first return date who sees the child before the next mention.

Question 35: What changes are needed to ensure children are informed about the outcome of court processes that affect them?

Question 36: What mechanisms are best adapted to ensure children's views are heard in court proceedings?

We believe that the powers given to the ICL currently give wide scope to obtaining the children's views prior to order being made. Section 66LA specifies the ICL's role and 66M gives the ICL discretion to seek an order from the court, and that the child be made available for the ICL to do a report.

However some ICL's in our matters have asked to see the child without specific orders to do so. In our experience, an ICL who sees the child and then explains the orders, helps the child adjust to where they will be living and who they will be spending time with. Additionally, with the assistance of a report from a family consultant, they are in a good position to seek orders for therapeutic counselling, if it is required.

We do not support a child having the opportunity of writing to a judicial officer about their views as per the example given in paragraph 262. In our experience, children who are exposed to family violence and are aligned with one parent at the expense of spending time with the other are not always able to determine what is in their best interests. Also, they may be pressured by a parent to write something positive in that parent's favour.

(a) We reiterate the ICL and family consultants are best placed to convey the children's views to the court.

Question 37: How can children be supported to participate in family dispute resolution processes?

We see a possible role for family mediation for older children, say over the age of 10 where the parties have agreed to mediate. After intake and prior to the first mediated session, an FDR practitioner can meet with the parents and the child (if appropriate) with the focus on the child's views.

Question 38: Are there risks to children from involving them in decision-making or dispute resolution processes? How should these risks be managed?

We agree with the concerns raised in paragraph 271 regarding children's ongoing exposure through participation in mediation and/or proceedings.

In our experience, the clients who seek our help, often require assistance for their children who are caught in conflict between the parents prior to mediation or court proceedings.

However we also agree that children who participate are important sources of information about risk. We note that family consultants have a mandatory disclosure obligation if a child identifies abuse including family violence. For example, in one of our matters, a child disclosed exposure to family violence from a related family member which had previously been denied by the party responsible. The abuse was reported, the family consultant gave evidence regarding the incident and the court made parenting orders consistent with the family consultant's recommendations.

Professional skills and wellbeing

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

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

The Family Law system in Australia is complex and multifaceted. As with other specialist area of law, tailored training is required in order to ensure practitioners understand the nature and impact of abuse in all its manifestations in the family violence and family law jurisdictions. This training should encompass judicial officers, court staff and lawyers.

Specialist Training

(a) As stated above, we recommend that relevant regulatory bodies such as the Victorian Legal Services Board, in consultation with specialist family violence organisations develop and deliver a mandatory qualification/certification for lawyers practicing in family law. We recommend this training include The National Domestic and Family violence Bench Book and its use in the family law system, in addition to culturally appropriate responses to family violence.