

Aboriginal Legal Service of Western Australia Limited



Submission to the Australian Law Reform Commission's Issues Paper on the Review of the Family Law System

7 May 2018

About the Aboriginal Legal Service of Western Australia (ALSWA)

ALSWA is a community-based organisation, which was established in 1973. ALSWA aims to empower Aboriginal peoples and advance their interests and aspirations through a comprehensive range of legal and support services throughout Western Australia. ALSWA aims to:

- Deliver a comprehensive range of culturally-matched and quality legal services to Aboriginal peoples throughout Western Australia;
- Provide leadership which contributes to participation, empowerment and recognition of Aboriginal peoples as the First Peoples of Australia;
- Ensure that Government and Aboriginal peoples address the underlying issues that contribute to disadvantage on all social indicators, and implement the relevant recommendations arising from the Royal Commission into Aboriginal Deaths in Custody; and
- Create a positive and culturally matched work environment by implementing efficient and effective practices and administration throughout ALSWA.

ALSWA uses the law and legal system to bring about social justice for Aboriginal peoples as a whole. ALSWA develops and uses strategies in areas of legal advice, legal representation, legal education, legal research, policy development and law reform.

ALSWA is a representative body with executive officers elected by Aboriginal peoples from their local regions to speak for them on law and justice issues. ALSWA provides legal advice and representation to Aboriginal peoples in a wide range of practice areas including criminal law, civil law, family law, child protection and human rights law. Our services are available throughout Western Australia via 14 regional and remote offices and one head office in Perth.

Overview

Western Australia's Family Law system is unique; it is the only jurisdiction in Australia with a state Family Court. In the Family Court of Western Australia (FCWA), disputes involving married persons are dealt with under the *Family Law Act 1975* (Cth) (FLA) and disputes involving de facto partners are dealt with under the *Family Court Act 1997* (WA) (FCA).

Unlike the rest of Australia, the FCWA is independent from the federal family law courts (other than appeals to the Full Court of the Family Court of Australia). Because the FCWA is a state-based court, it is more easily able to collaborate with State agencies such as the Department of Communities (DOC) (responsible for administering child protection and family support services) and the Western Australia Police Service (WAPOL). These arrangements have enabled Western Australia to become a leader in the development of a collaborative approach to dealing with child welfare cases involving child protection concerns.

In 2008, the FCWA entered into a Memorandum of Understanding with DOC and Legal Aid Western Australia (LAWA), to assist in positioning the FCWA to deliver better outcomes for children whose families are affected by complex needs. The MOU provides procedures for the provision of information from DOC to the Court and, in 2009, a senior DOC officer was co-located with the Family Court Counselling and Consultancy Service (FCCCS). The officer has direct access to DOC's information about families and children and can liaise directly with Family Consultants and report to the Court.

Overall, ALSWA's view is that the key issue facing the family law system in Western Australia (and Australia generally) is lack of resourcing; the system itself – while not perfect – is appropriate and its staff at all levels are competent, conscientious and committed to high quality service delivery. The types of issues raised by the ALRC are predominately caused by a lack of resources across the system as a whole (eg, judicial resources, legal resources, family consultants, independent children's lawyers (ICLs) and suitably experienced expert witnesses etc, as well as a lack of appropriate alternative dispute resolution services. While the FCA and the FLA could be simplified and improved, this will achieve little in the absence of a significant investment in resources across the entire system.

With regard to the relationship between Aboriginal people and the family law system in Western Australia, ALSWA believes firstly that there is a critical need to improve the cultural competency of the system as a whole. Secondly, there is a need to change Aboriginal people's perception of the system so that it is seen by them as an effective option for resolving family and, in particular, child-related disputes. It is ALSWA's experience that many Aboriginal people view the FCWA as a 'white person's court' that is of no relevance to them. On the contrary, the FCWA has the potential to resolve child related disputes in a more culturally appropriate way than the traditional state-based child protection system. Aboriginal family members, who are caring for or who are willing to care for children in circumstances where it is not safe for those children to remain with their parents, should be enabled to more easily and effectively access the family law system so that children more often can remain with family, rather than being placed into long term foster care.

Objectives and Principles

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

In ALSWA's view the overall role of the family law system should be to provide a framework of interconnected pathways, or options, enabling parties to relationships – and where appropriate other significant persons – to safely and justly resolve disputes relating to their property and children, with a minimum of further personal stress, cost and delay.

The objectives of the family law system, broadly speaking, should include that it seek to:

- Be straightforward for lay people to navigate and to use.
- Be efficient and, as far as possible, free of lengthy delays.
- Be inexpensive and, where costs do arise, cost effective.

- Be attuned to complex needs and to risk or safety issues within families.
- Avoid re-traumatising its users and their children.
- Be inclusive of and to work with perpetrators of harmful acts or behaviours.
- Be culturally competent.
- Ensure that its decision makers continue to be committed to and capable of delivering a 'best practice' approach to family and child related judicial work.
- Prioritise the community's understanding of the value and importance of the system, and its potential as a problem-solving tool.

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

In ALSWA's view key principles to guide any 'redevelopment' of the family law system should include:

- The principle that the system should be responsive to the increasing presence of complex needs and risk issues in families including violence, abuse, mental health issues, addiction and others, and that it be capable of adapting to changing social patterns and community needs.
- The principle that the current model should be recognised as having positive attributes, and features that work well, and that those should, where appropriate, be retained and enhanced.
- The principle that any 'redevelopment' of the system must result in a system that reduces conflict, personal stress and costs more quickly and efficiently than presently occurs, and that the workings of the system itself do not traumatise its users.
- The principle that cultural diversity – which among the system's users is wide and ever increasing – must be accorded great importance and value.

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?

First, the community legal services sector is, in ALSWA's view, critical to the effective and widespread communication of information about family law related services. It is vital that funding be immediately and substantially increased to Legal Aid Commissions, Community Legal Centres and all Aboriginal and Torres Strait Islander Legal Services (ATSILS) to enable these services to deliver community legal education in family law in a coordinated manner that reaches as many communities as possible.

In relation to the Aboriginal people of Western Australia, many people live in regional and remote locations over vast areas, which can be very expensive and time consuming to reach and service; these challenges must be factored into funding allowances. Further, as much as possible, Aboriginal people should be engaged to assist in delivering information about the family law system to their local communities to ensure culturally appropriate service delivery.

Secondly, ALSWA notes that each state has a Family Law Pathways Network (FLPN) funded by the Commonwealth Attorney-General's Department. Each FLPN is comprised of members from agencies and service providers working in or close to the family law system including legal services, courts, police, child protection, counselling and dispute resolution services and in other areas. In ALSWA's view FLPNs could be further utilised and expanded, through increased funding, to improve access to and dissemination of information. For example, in Western Australia the WAFLPN holds regular events relevant to family law, including numerous events in regional locations. Some events are for professionals, while community members have been invited to others. Events specifically for the education of the community could be more frequent and more widespread, thereby improving access to information, with additional funding for FLPNs.

Other proposals ALSWA would support include:

- Generally improving access to and dissemination of information by more user friendly online materials, videos and via social media platforms.
- Considering the provision of information produced in Aboriginal languages, especially for regional and remote communities.
- The Issues Paper at [50] refers to National Legal Aid's development of a community legal education resource (including a website) about the interactions between family law, family violence and child protection systems – this is supported but must have information specifically tailored for Aboriginal people and should be developed in conjunction with ATSILS and other Aboriginal led organisations and service providers.

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

The Issues Paper discusses navigators and refers to the Neighbourhood Justice Centre model, which has a coordinator. Overall, ALSWA supports the idea of 'navigators' or support persons whose role should be affiliated with the FCWA (and the other family law courts in other jurisdictions), while ensuring any such service is culturally competent to assist Aboriginal court users, especially those who are not legally represented.

ALSWA also points to the following examples which, relevantly, offer useful models worthy of close consideration and potentially much greater expansion:

- In 2017 LAWAVE received additional funding to expand its existing duty lawyer service located within the FCWA complex, to better assist families affected by violence. The expanded service – Family Advocacy and Support Service (FASS) – includes two lawyers, a paralegal and a social worker. The social worker is able to assist either party with social support services (irrespective of whether the person is a victim or a perpetrator of alleged family violence). The model is promising because it includes a therapeutic support component (provided by the social worker) to work with parties, in addition to assistance with legal issues, and the service also travels with the FCWA to its circuit sittings in regional locations, and therefore has a regional presence.
- Previously, via WAFLPN, the FCWA had located onsite a kiosk-style service attended by an employee of WAFLPN. The attendant was able to provide

advice to court users, and other persons seeking information, including linking up with services such as counselling and support services, supervised contact services and legal services. The FCWA would refer parties to the kiosk after or during court proceedings, for further information and assistance. The physical space for the kiosk remains; however, funding and staffing issues have meant the service is currently suspended. In ALSWA's view there would be merit in providing a similar service at courts in other regional centres, while also adding some capacity for the attendant(s) to travel to surrounding communities.

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

- Increase funding to ATSILS to enable service provision for family law to be significantly expanded, especially in regional and remote areas. This should be achieved primarily through the recruitment of more lawyers experienced in family law and, where possible and appropriate, Aboriginal Court Officers based in regional locations with some experience in family law and child protection matters. Currently, ALSWA has only four lawyers to cover family law and child protection needs across the entire State. In 2013, ALSWA was provided with special funding sufficient for two regional family lawyers however, this funding was exhausted by 2015 and was not renewed.
- ALSWA's Youth Engagement Program model could be adapted for family law matters. Under this program, three Aboriginal diversion officers work with children appearing in the Perth Children's Court in relation to youth justice matters, and the diversion officers are frequently co-located in the Court. The officers provide case management, mentoring, referrals and support (similar to the social support component of the FASS model above). ALSWA recommends that funding be made available to establish a similar program – with Aboriginal social or support workers – within the ALSWA Family Law Unit and be considered for expansion with the other ATSILS around Australia, to assist clients to participate more fully in the family law system.
- Increase the cultural competency of people working throughout the family law system.
- Increase the number of Aboriginal people working in all family law courts, both generally, and in key roles such as family consultants and judicial officers.
- Increase the availability of and access to Aboriginal interpreter services.
- Fund Aboriginal community controlled dispute resolution services, the design of which should be led by persons from the local Aboriginal community, to ensure that the community are more likely to engage with and use such a service.
- ALSWA notes that the FCWA previously employed two Indigenous Family Liaison Officers (IFLO) working within the Family Court Counselling and Consultancy Service (FCCCS). The IFLOs would work specifically with Aboriginal families involved in child related cases and would support and inform both the Family Consultants and the Magistrates tasked with making decisions about those children. Currently in WA, only one Family Consultant with the FCCCS is Aboriginal. The IFLO positions, while broadly accepted as a

very positive and constructive initiative, were not funded on an ongoing basis and the positions ceased. They should be re-funded and expanded.

- With respect to funding generally, in addition to necessary increases, funding needs also to be stable and to have a degree of predictability, to enable legal services and other providers to not only recruit staff but to also retain them. This can help to minimise skills and experience developed and gained by those persons being lost when staff are forced to move on because funding has been exhausted, reduced or not renewed.

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

The Issues Paper refers to pilots of legally-assisted, culturally appropriate dispute resolution (LACAFDR) in eight Family Relationship Centres across Australia [72].

Western Australia has one of these pilots which is being conducted at and facilitated by the Perth Family Relationship Centre (managed and provided by Relationships Australia). The pilot employs an Aboriginal case worker and a CALD support worker. Although it is too early to comment on the effectiveness of this pilot, ALSWA believes the model has a lot of promise because it offers parties to disputes ongoing support from a case worker, a degree of cultural competency, and the opportunity to be legally represented throughout the dispute resolution process. Should the model be successful in delivering outcomes for children and families, it should be considered for rolling out across Australia and particularly in regional locations.

ALSWA otherwise repeats the responses provided to Question 5 above.

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

No particular case studies or comments are provided, other than to note that the either the Public Advocate or the Public Trustee can become involved in cases in the FCWA where a person may not have legal capacity or is affected by disability in some way. ALSWA believes that cooperation between these agencies, LAWA, ALSWA and the Court could likely be improved and that an MOU would be worth considering to establish protocols for more readily assisting persons affected by a relevant disability.

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

ALSWA does not have any specific case examples regarding LGBTIQ people.

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

- As per our responses provided to Questions 3, 4 and 5 above, significant increases in the resourcing of ATSILS, AFVPLS and CLCs is required, to enable

those services to have a greater presence and capacity to deliver family law information and assistance services in regional areas.

- Community legal service providers should be better resourced to deliver community legal education (CLE) in family law on an outreach basis that is regular and able to reach a wide section of the community. Family lawyers within ALSWA have minimal capacity to deliver CLE because the task of covering the entire State for legal proceedings alone is immense while staff levels are very low. Lawyers do travel to regional locations for Family Court circuit sittings; however, there is generally very little available time before, during or after court commitments to deliver CLE. Further, it is very expensive to fund travel to and accommodation in many parts of regional WA and without significant additional funding this would be unsustainable.
- Significantly improved training in family law is needed for many regional magistrates in Western Australia. Regional magistrates are part of the Magistrates Court of Western Australia and are not part of or associated with the FCWA. The majority of regional magistrates come from a background of having practiced overwhelmingly in criminal law and, ALSWA believes, this would be the position with many regional magistrates located in other Australian jurisdictions. All courts exercising family law jurisdiction should ensure that judicial officers receive comprehensive family law training and education.
- Increase the cultural competency of mainstream legal services (ie those that are not Aboriginal controlled, such as CLCs) working in regional and remote areas.

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?

In Western Australia, the cost of private expert reports is either borne by the parties to the case – where they have the means to pay – or by LAWA and increasingly, LAWA is requiring even legally aided parties to contribute to expert witness costs. In complex matters where the provision of a private report may be cost prohibitive, the FCWA should be in a position to order a report on its own motion, and should be provided with a dedicated budget for this purpose. It is noted that the Children’s Court of Western Australia has a budget for expert reports obtained in cases in its child protection jurisdiction.

In relation to expert witnesses engaged in child welfare matters, urgent consideration should be given to the courts, legal services providers, legal professional associations and relevant regulatory bodies (such as Psychologists’ Boards), partnering to establish panels of expert witnesses in each jurisdiction. Experts added to panels should be recognised and accepted within and by the family law system as having the requisite skills, qualifications, knowledge and experience to conduct expert assessments for the family law courts. Experts could also be noted as having particular areas of expertise. The court would, under this model, be able to refer a case to an expert on an established panel, similar to the way in which a liquidator is appointed to handle the affairs of an insolvent corporation. The relevant professions (eg psychology, psychiatry) should be encouraged to provide their services at a lower cost than ordinary full fee private services and subsidies could be considered. In ALSWA’s view a model of this kind could lead to significant reduction in delays and costs associated with expert reports.

Otherwise, methods of delivery of legal services are likely to change considerably over the coming years with the increasing prevalence of online-based services, increased competition between private legal services providers and even artificial intelligence. In addition, consumers have become increasingly more aware of choice of provider available to them, and their rights in relation to being informed about and challenging fees they are charged for legal services. It is submitted that these factors are likely to put some downward pressure on private legal costs.

In addition, the legal profession through its regulatory agencies, professional associations and adoption of best practice guidelines, can continue to be strongly encouraged to view costs reduction and minimisation as not only an important aim but a responsibility, especially in family law.

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

ALSWA has no specific comments in respect of court procedures at this time.

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

Options include:

- Providing additional resources to enable duty lawyer services located at family law courts to be expanded.
- Expanding and properly resourcing clinical legal education and assistance clinics. For example, SCALES (operated via the Murdoch University Law School) provides legal advice and assistance clinics with law students supervised by lawyers. SCALES operates in the Rockingham area and provides assistance in criminal, civil and family law. These types of clinics could be enhanced by also incorporating pro bono assistance from senior private practitioners and barristers.

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?

No comment.

Legal principles in relation to parenting and property

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

Issues raised by the ALRC (see Issues Paper [130]) include:

1. The effectiveness of the legislation in addressing safety concerns -
 - No comment at this time
2. Complexity and repetition of decision making -
 - ALSWA's observation is that while the legislative provisions of the FLA and FCA are lengthy, cumbersome and complex, in practice this does

not present the problems one might expect because judicial officers of the FCWA are well equipped to apply the law and they generally do so in a measured and practical way, and with an emphasis on efficient case management. In this role they are assisted greatly by the Family Consultants working within the Court, and by Independent Children's Lawyers.

3. Confusion created by presumption of equal shared parental responsibility -
 - o ALSWA would readily agree that the introduction of the presumption of equal shared parental responsibility caused widespread confusion in the public's mind, resulting in the misunderstanding that the presumption meant that children had to spend equal time in the care of each of their parents. In ALSWA's view, this misconception was the result of inadequate community explanation and education by government at the time the changes were introduced and it has never been sufficiently remedied, such that the misconception has persisted. The problem would be offset by improved education strategies and more accessible and understandable information for the community, particularly online. Further, it is arguable that the term 'parental responsibility' could be modified to better reflect what the term actually means at law (for example, 'parental decision-making responsibility'). This would also help to draw a sharper distinction from actual care arrangements for children.
4. Joint decision making about major long term issues can escalate conflict -
 - o ALSWA notes that the FCWA can and regularly does make orders specifying which long term issues for children require a joint decision-making approach and which do not. It is noted, however, that this is most often not done at the interim stage of proceedings, but only after a final hearing. Consideration could be given to such orders becoming more commonplace, in cases of high inter-parent conflict or where it is otherwise appropriate.
5. Insufficient weight given to views of children in proceedings -
 - o ALSWA disagrees that insufficient weight is given to the views of children. However, it is agreed that there are issues and concerns about how, and by whom, the views of children are to be best obtained and communicated to the court and the parties.

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

The Issues Paper raises concerns about the definition of family violence (eg, that it may not accommodate Aboriginal people and not be consistent with state or territory legislation that does not always require coercive or controlling behaviour (see [131]-[132])).

ALSWA notes that technically certain types of family violence might not be covered by the definition of family violence under the FLA and FCA. That definition is:

Violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (family member) or causes the family member be fearful.

ALSWA considers that there is a risk that this definition may not capture all forms of family violence in Aboriginal communities because there will not always be coercion or control, or the existence of fear. ALSWA further submits that for forms of violence that amount to criminal behaviour (eg, physical assault, sexual assault, damage, threats of violence, stalking) it should not be necessary to prove the existence of coercion, control or fear. However, for forms of family violence that may not amount to criminal behaviour (eg, economic abuse, emotional abuse) these elements are important to ensure that behaviour is appropriately characterised as family violence. For example, if a partner punches their partner in the face, this would amount to family violence irrespective of whether it was done to coerce or control, or to create fear in, the victim. However, if one partner controls the finances in a relationship this should only be capable of being characterised as family violence if it has been done in order to coerce or control the other partner.

Other matters canvassed in the Issues Paper [at 133] include:

1. Include 'abuse of process' as an example of family violence
 - o ALSWA notes that the court already has the power to respond to vexatious litigants; further, the docketing system in WA (where the same judicial officer generally manages and deals with a child-related proceeding throughout) offers additional protection in this regard because unnecessary applications will be more readily recognised and individually case managed.
2. Remove presumption of equal shared parental responsibility – no comment
3. More clearly prioritise protection of children from harm – no comment
4. More simplified decision making framework for interim orders – no comment
5. Separate dedicated pathway for cases involving family violence – no comment
6. The role of Independent Children's Lawyers under s 68LA
 - o ALSWA has no issue with the role of ICLs and the requirement that they act in the best interests of children. However, education and training of ICLs in WA is a key issue – training in cultural issues is required as, in our experience, there are very few ICLs that are genuinely equipped to properly understand cultural issues in Aboriginal families, particularly families from regional or remote areas. Further, there are no Aboriginal lawyers practising as ICLs in WA.
7. Principles for child-related proceedings – no comment
8. Court's powers re non-compliance with orders that affect children – no comment
9. Rules concerning making of consent orders – no comment

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

The Issues Paper refers to ATSI communities and CALD communities, as well as assisted conception processes and surrogacy. It is noted that the structure and

wording of the provisions of Part VII currently do focus heavily and predominantly upon biological and adoptive parents.

ALSWA reserves its position on this issue because, in our view, further research is required. There is a risk that if the definition of 'parent' is expanded too broadly, there will be unintended consequences (eg, new partners of separated parents applying for parenting orders). ALSWA notes that under s 65C of the FLA, a parenting order application may be made by either or both of the child's parents; the child; a grandparent of the child; or any other person concerned with the care, welfare or development of the child. Accordingly persons of significance who are not parents already have the ability to make an application to the court. ALSWA will carefully consider any suggestions for reform in this area.

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?

No comment

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

No comment

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

No comment

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?

ALSWA is interested in improving court processes for Aboriginal people using the family law courts. In this regard it is noted that different models have been trialled in courts in other states, including:

- Judge Sexton (Family Court of Australia, Sydney) has conducted an Indigenous list in the court at Sydney over recent years. Such an approach could be rolled out in other registries and courts.
- The Koori Family Hearing Day, held in the Family Division of the Broadmeadows Children's Court (child protection jurisdiction), is an instructive model to consider for alternative court processes for Aboriginal families. Proceedings are conducted in a 'roundtable' fashion, in the presence of a Magistrate and an Aboriginal Liaison Officer, with parties and family members being invited and encouraged to lead discussions, and lawyer involvement is less prominent:

Proceedings under the program will be conducted in a less formal manner with all parties seated around the bar table to encourage children to feel more comfortable and less intimidated by the court process – see

<https://www.premier.vic.gov.au/victoria-leads-the-way-with-koori-childrens-court/>

- In Western Australia, Child Dispute Conferences (CDCs) can in limited circumstances be convened at the FCWA by a family consultant, in the absence of the judicial officer, in an attempt to resolve disputes about children without the cost, complexity and delay associated with judicial intervention. ALSWA has recently represented a parent in whose case four Child Dispute Conferences were held over a 12 month period without the parties ever having to appear before the Magistrate. This approach allowed the parties to reach incremental agreements with respect to interim issues and has significantly progressed the case towards a final resolution. However, there are substantial delays with scheduling of CDCs due to insufficient resources. Additional family consultants would alleviate this problem and could enable expansion of the CDC to allow it to be available in more cases more often.
- Individual judicial officers should be encouraged to be mindful of adopting, whenever appropriate, more flexible or informal ways of conducting court proceedings. For example, in a recent case ALSWA acted for a young Aboriginal parent, where the other parent (also Aboriginal) was not represented, the child was very young, and both parents had lived sporadically in the household of the paternal grandparents. The grandparents therefore had significant involvement with the child and the parents. The presiding magistrate elected to conduct proceedings in a less formal conference style format having all parties seated around a table and including the grandparents in the discussions. ALSWA found this approach appropriate, and also successful, in the circumstances of the case.

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?

ALSWA agrees that there significant delays in FCWA (FCWA Annual Report states that the median time to trial for 'parenting only' matters is 91 weeks). Largely, these delays arise because judicial and other necessary resources are not adequate to cope with demand. Non-judicial dispute resolution processes should be better resourced, expanded and made more widely available wherever possible to assist in resolving issues not requiring judicial determination and progressing cases accordingly.

Options mentioned in the Issues Paper [171] include:

- triage approach -
The FCWA already uses a 'triage' approach through having a duty registrar, a duty magistrate and duty judge available each day to assess, prioritise and list urgent applications. In addition, for extremely urgent matters outside court hours, a magistrate is available to hear applications via telephone. In summary, if an urgent application is filed, the relevant judicial officer on duty will examine the papers and list the matter according to its demonstrated urgency.
- more streamlined case management – the use of a teamed docket system pairing judicial officers and registrars and family consultants -
The FCWA already uses this particular case management system.
- increased use of practice directions

ALSWA would support the increased use of practice directions however, as submitted above, increased resources must be provided to give practical effect to new initiatives or strategies.

- greater leadership from the bench to reduce delays -
ALSWA does not regard a lack of judicial leadership as a major cause of delays in the FCWA. The major cause of delay, in ALSWA's view, is simply that resources are not sufficient to cope with demand. There is some scope for judicial officers to 'make examples' of individual parties or legal professionals who have demonstrably wasted time or made matters more complicated, and this occurs from time to time. However the current Family Law Rules, and Family Law Council and Law Council of Australia *Best Practice Guidelines for Lawyers doing Family Law Work* (2010) make quite clear that the saving of time, costs and resources is an important consideration in all cases for the court, parties and legal professionals.
- greater use of orders diverting parties to mediation and other dispute resolution options -
ALSWA would support such a strategy provided such options actually exist, the parties genuinely consent and access to such options is not significantly delayed (ie there is no point if diversion to mediation or other dispute resolution options results in longer delays with the resolution of the case, and parties 'losing their place in the queue' for a subsequent hearing, should issues remain unresolved even after mediation.
- limiting availability of appeals from interim orders -
ALSWA does not agree that individuals should be divested of rights and avenues to appeal interim orders.

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

ALSWA refers to and repeats comments at various sections above regarding the better resourcing and expansion of alternative dispute resolution services.

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

The Western Australian Department of Justice Family Violence Service (FVS) maintains a presence at the District Court of Western Australia and Magistrates Court of Western Australia to support and assist victims. This service is not available at the FCWA despite the large number of cases involving family violence issues. Resources should be provided to enable specialist family violence workers from the FVS to be co-located at the FCWA.

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

ALSWA notes that the Coordinated Family Dispute Resolution (CFDR) pilot, conducted over two years from 2012 to 2013 at five sites including Perth, is an example of a sophisticated mediation model which should be considered for rolling out across Australia. The model applied to parenting cases involving family violence and involved extensive screening by Legal Aid WA's mediation unit, with each party being allocated a clinical case worker. If both parties were then willing to negotiate, each would work independently with their clinical case worker to positively resolve

the violence issues, and then work towards attending multiple conferences (with additional clinical support) to try to finally resolve past issues around family violence and reach agreements about their children. See CFDR evaluation report at:

<https://www.ag.gov.au/Publications/Documents/ArchivedFamilyLawPublications/CFDR%20Evaluation%20Final%20Report%20December%202012.PDF>

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

It is noted that various options are canvassed in the Issues Paper including proposed reforms to protect vulnerable witnesses from being cross-examined directly by the other party; powers to summarily dismiss applications without merit; and a trial of a 'counsel assisting model'.

ALSWA emphasises that any reforms in relation to addressing misuse or abuse of process must carefully take into account the circumstances of unrepresented parties (the numbers of which are increasing), including victims of family violence, in order to avoid such parties having applications dismissed because a 'stronger' party – who may be legally represented or better resourced – may be able to argue that applications are vexatious, frivolous or an abuse of process.

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?

- Consider funding and rolling out Coordinated Family Dispute Resolution, and similar models (as referred to under Question 24 above).
- Ensure that if the LACAFDR Pilot is successful (see Question 6 above), this model is sustainably funded and rolled out as widely as possible, and in a timely manner, with additional funding made available to community legal services to ensure that legal services have capacity to represent the parties.

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

ALSWA notes the Family Law Amendment (Parent Management Hearings) Bill 2017 which seeks to provide a forum for self-represented litigants in resolving less-complex family law disputes. The amendment proposes the establishment of Parenting Management Hearings to serve as a forum for resolving more simple family law matters. The panel will stand as a separate administrative body, and members are to be appointed by the Governor General. It is expected that members will have relevant qualifications and experience in working with matters associated with family law and dispute resolution. This Bill was referred to the Legal and Constitutional Affairs Legislation Committee and the Committee published its report on 26 March 2018. ALSWA is keenly interested to observe the commencement and operation of the proposed model. See:

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/ParentingManagement/Report

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

No comment

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

- ALSWA repeats the above references to the Indigenous List (Sydney Family Court) and Koori Hearing Day (Broadmeadows Children's Court) which adopt a more inquisitorial, less formal, inclusive approach with the focus on practical problem-solving and information sharing.
- The FCWA already uses a less adversarial approach in child-related proceedings (eg, not strictly bound by the rules of evidence; court can obtain records directly from police and child protection authority; court can inform itself in the way it thinks fit; less formality).
- Judicial officers need appropriate and ongoing training to give real effectiveness to the less adversarial approach.
- Consideration should be given to reviving the past individual case management programs for serious abuse cases (*Magellan* Program in FCA and *Columbus* Program in FCWA), see:
<http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/family-law-matters/family-violence/child-abuse-allegations/>
- Child protection workers could also be encouraged, and also better resourced, to enable them to attend hearings in the family law courts more often and whenever necessary, to better inform the court about child protection concerns.
- Preliminary work should commence towards a more progressive and therapeutic model where ideally, for example, health workers involved with a child could contribute information to the court (subject to concerns about confidentiality etc).

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

ALSWA agrees and submits that family inclusive decision-making is important for many Aboriginal families and, in fact, fundamental for some. Responsibility for children in Aboriginal families can often vest in different relatives, and to differing degrees, and accordingly it is proper that such persons be part of a conversation about the relevant children. Examples of this type of approach, while not common, have been observed more recently in the FCWA. ALSWA has represented parents in two cases, where the child in each case was considered to be at risk of harm for different reasons. In both cases, the presiding judicial officer adopted a less formal manner of dealing with the parents and invited family members to be included and to contribute to discussions about the welfare of the child in each case. While these were formal court events (and both interim hearings, not trials), the court on those occasions chose to adopt a less formal and more inclusive approach, in an effort to secure a more child-focussed outcome which, ALSWA believes, was successful.

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?

The Issues Paper [229] states that family law system clients engage with and use a range of different services including legal assistance services, housing, employment services, mental health services, drug and alcohol rehabilitation, counselling services, and parenting and/or behaviour change programs. Being educated about and navigating the multitude of different services, and knowing what services are best to use, is in ALSWA's experience extremely difficult for service users. Further, sharing of information between service providers from areas of treatment or practice is greatly hindered by various factors including confidentiality and privacy requirements, and (as the Issues Paper identifies) the tendency for services and agencies to work in 'silos'.

ALSWA agrees with these observations and suggests:

- The FASS model (discussed above) currently being piloted by LAWA, of social workers being co-located with lawyers, is a potentially excellent way to assist clients to learn about services available, navigate services and decide on the best and ensure clients have an appropriate case manager to deal with as many of the issues
- For Aboriginal communities, a FASS style service should be replicated – to be provided by ATSILS – so that Aboriginal social or support workers, preferably from or very familiar with the local area, are co-located with family lawyers and can work directly with clients.

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?

- Substantial work has been done in WA to address the movement of cases from the FCWA ('Part VII' cases) to the Children's Court (child protection cases) and back. This has included, for example, a formal procedure for the content of one court's case file to be sent to the other court where a case moves to the other court, and the Department for Communities (Child Protection) being more willing to see the FCWA as the appropriate forum to deal with cases involving child protection issues.
- WA is in a unique position in Australia to implement change because it has a state Family Court
- FCWA commissioned a report in 2011 in relation to the integration of the care and protection jurisdiction of the Children's Court and the parenting orders jurisdiction of the FCWA (Hands T and Williams V, *Report on the Intersection of the Family Law and Child Protection Jurisdictions in Western Australia*, July 2012 (unpublished, but referred to in Statutory Review below).
- The *Statutory Review of the Children and Community Services Act 2004* (November 2017) proposed a number of recommendations in relation to the intersection of the FCWA's parenting orders jurisdiction and the child protection jurisdiction of the Children's Court. These recommendations were:

- **Recommendation 27:** In principle, all child protection matters should be heard in a specialist division of the Family Court. This should occur as soon as is practicable after legislative, procedural, resourcing and practical issues have been addressed. Any future specialist division should be responsive to the cultural needs of Aboriginal people.
- **Recommendation 28:** The relevant legislation should be amended to enable the Department to apply for a protection order in the Family Court of Western Australia in respect of a child if the child or the child's siblings have previously been, or are currently the subject of, Family Court proceedings.
- **Recommendation 29:** The relevant legislation should be amended to give the Children's Court the power to transfer protection proceedings to the Family Court by the Court's own motion or on application of a party, if it is in the best interests of the child and (a) it is in the interests of justice; or (b) of convenience to the parties. This transfer should include the entirety of the file and any interim orders.
- **Recommendation 30:**
 - (1) The relevant legislation should be amended to enable the Children's Court to exercise family law jurisdiction:
 - (a) to make parenting orders in the course of protection proceedings, if all parties consent to the Children's Court hearing and determining the matter; and
 - (b) following a final hearing in which the Department's protection application is dismissed (or no order is made) or a protection order (supervision) is granted, to make any interim parenting orders necessary for the safety and wellbeing of a child until the Family Court can hear the matter.
 - (2) If the Children's Court makes a final parenting order, it should be automatically registered in the Family Court.
 - (3) If the Children's Court makes an interim parenting order, the matter in its entirety should be transferred to the Family Court.
- **Recommendation 31:** In the event of any inconsistency between the provisions of the Act and the *Family Court Act 1997* or the *Family Law Act 1975*, a court must, to the extent of the inconsistency, comply with the provisions of the Act.
- **Recommendation 32:** A protection order (special guardianship) made by the Children's Court should be automatically registered in the Family Court.
- **Recommendation 33:** The Family Court should be able to hear and determine an application for the variation, addition or substitution of conditions on a protection order (special guardianship).
- **Recommendation 34:** Any person who is entitled to make an application for parenting orders in the Family Court should be able to make an application to vary, add, or substitute conditions on a protection order (special guardianship). See: <https://www.dcp.wa.gov.au/ccsactreview/Pages/ccsactreview.aspx>

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

- This is already occurring in Western Australia (eg, on-site child protection officer within FCWA and established information sharing processes)

- Currently, CPFS are actively identifying child protection cases to be heard in the FCWA instead of the Children's Court

Children's experiences and perspectives

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

The ideal approach would be to appoint a lawyer for every child where the care arrangements for that child are substantially in dispute or the parents objectively can be seen to have little capacity to co-parent and conflict is high, or there are other complex needs or risk issues. Such practitioners should be required to undertake specific training and education around meeting and communicating with child clients, with an important objective being to improve the independent communication of information to the child about the court process, what it means and how it is likely to affect them. In ALSWA's view there is not a sufficient emphasis upon keeping children (particularly older children) informed and up to date. Children tend to be interviewed infrequently by ICLs (perhaps once or twice in the life of a case) and quite often the purpose of this is to ask them for any views they want to express, rather than focussing on empowering them with information.

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

Children are not always informed of court decisions independently and, most often, parents or other family members will inform them of outcomes (or often not inform them at all). Occasionally, a Family Consultant informs children of a particular outcome or proposed course of action affecting them at the direction of the judicial officer but no coordinated approach exists and it is *ad hoc*. Again, the inadequate number of Family Consultants means availability is very limited for this type of service.

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

As noted above, in Western Australia, children's views are communicated to the Court via ICLs, Family Consultants or private expert witnesses who are appointed by the Court to prepare a family report. The issue for ALSWA is to ensure the any practitioner performing this function is appropriately skilled, experienced and adept at ascertaining children's views, and also at communicating those views (and any concerns about those views) accurately to the Court.

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

The FCCCS is able to conduct child-inclusive Child Dispute Conferences in appropriate cases. These are generally reserved for less complex cases where disputes remain but serious risk issues such as abuse or violence are not involved, and the children are old enough to participate. ALSWA supports this model being better resourced and made more widely available.

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

The obvious risk, in our view, arising from involving children directly is that parents can react badly to what children have to say and it is the impacts of such reactions which need to be managed. This can only be effectively managed through experienced and skilled professionals working with the family recognising the risk of poor parental reaction and then working with parents and/or carers to be advised of children's views in a supported manner and, where appropriate, the court directing that parties not discuss certain matters with children. In serious cases, contact between a child and a highly distressed parent may need to be suspended while the parent is supported in being told of the child's views, and for a period thereafter. The system needs to be responsive to this need and while the FCWA is reasonably so, again, more resources to enable Family Consultants, ICLs or support workers to perform this function are needed.

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

Most importantly, cultural competency needs to be improved across the entire system and this should be an ongoing process. In particular, individuals likely to be working with children such as ICLs, family consultants, expert witnesses and contact service workers must receive comprehensive cultural training. If individuals are to be working with children from a particular community, it would be desirable that they have knowledge of that community's customs, traditions, views, and child rearing practices. This would by far be best achieved by prioritising the recruitment and retention of – for example – Aboriginal Family Consultants, Aboriginal Family Liaison Officers, and other relevant support workers. Further, opportunities should be created and promoted (for example through National Legal Aid and state Legal Aid Commissions) for more Aboriginal legal practitioners to practice in family law and to become ICLs.

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

Consideration should be given to ICLs and other professionals working with children in the family law system, providing anonymous feedback from their child clients as to the children's experiences of the system and its processes, after cases have concluded or as otherwise appropriate. An existing body could be identified (or a new body created) to gather, evaluate and report such feedback to the family law courts and important relevant service providers such as legal services and legal professional associations.

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?

- ALSWA refers again to the Family Law Council and Law Council of Australia *Best Practice Guidelines for Lawyers doing Family Law Work* (2010) – these

guidelines (although currently being reviewed) provide a framework for the conduct of family law work and in ALSWA's view these guidelines should be compulsorily integrated into ongoing training for lawyers, thereby becoming ingrained into everyday practice.

- Cultural competency needs to be prioritised not only for lawyers who represent clients from different backgrounds, but for all lawyers practising in family law on the basis that any practitioner could be involved in a case at any time with parties from different backgrounds. Lack of understanding around cultural differences – for example, different attitudes or values regarding parenting or language barriers, can lead to misunderstandings and issues being a source of increased conflict.

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?

All judicial officers, of any court, who are required to exercise family law jurisdiction at any time should be required to have competency in a broad range of areas including child development and health, forms of attachment (including multiple attachment eg in Aboriginal families), sibling relationships, addiction, mental health, violence and other related harms and the effects of various types of harms upon children and parents. For financial cases, judicial officers should understand the effects of financial abuse and control through financial means and the effects on parties and children of deprivation and lack of resources.

As submitted above, the situation in Western Australia is that regionally located magistrates of the general division of the Magistrates Court are required to routinely decide interim family law matters, sometimes involving very serious issues. ALSWA is of the view that broadly speaking these magistrates are not equipped to deal with family law cases in the manner that the magistrates and judges of the FCWA are able to do because of their specialised training and relevant career experience. It is vital to educate these judicial officers (and any others around Australia in the same situation) to an appropriately similar standard.

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

The courts have, on numerous occasions, expressed views about the conduct of lawyers contributing to increased conflict and, in ALSWA's view, this is to be commended and strongly encouraged. Examples of practitioners increasing conflict by engaging in unhelpful and inflammatory behaviours should be directly addressed in the courts' decisions and, where appropriate, there should be a willingness on the part of the courts to refer practitioners to legal services regulators. Legal services regulators should also be equipped to deal with issues specifically arising in family law matters.

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

In ALSWA's observation, the workloads judicial officers and many legal professionals – particularly in community legal services – are subject to, are extreme. Better resourcing of courts and legal services would enable work to be spread between more individuals thereby reducing some of this pressure.

ALSWA otherwise supports initiatives related to mental health awareness, and therapies, being made readily and widely available to professionals throughout the family law system.

Governance and accountability

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

ALSWA does not support changing the law relating to the publication of identifying details of parties or children. Transparency can be enhanced by increased publication of decisions with personal details removed, which is currently the practice of the family law courts in any event. Further, the media is generally free to report family law decisions provided identifying particulars are excluded.

Parties should be able to publish information about their experiences so long as their personal details and the details of the other parties are not published. That is to say, the publication of parties' experiences and outcomes of cases should not be discouraged, provided identities are protected. Such an approach would in our view encourage greater understanding, analysis and discussion in the community about the role, functions and performance of the family law system and it would assist the public to understand the complexity of the work the system deals with. This should result in better informed public debate and more beneficial reform.

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

No comment at this time.

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

ALSWA suggests that consideration be given to reforming or improving the process governing the appointment of judges. Judges should be identified and selected through an open and transparent recruitment process instead of the 'private' selection process currently observed in many jurisdictions, including Western Australia. This would be likely to encourage a wider cross-section of candidates to apply.



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