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National Legal Aid

25 May 2017

Inquiry into a better family law system
PO Box 6021
Parliament House
Canberra ACT 2600 fvlawreform@aph.gov.au

Dear Sir/Madam,

Re: Inquiry into a better family law system to support and protect those affected by family violence

Introduction

Thank you for the opportunity to make a submission to this important inquiry.

This submission provides:

1. Information about National Legal Aid (NLA) and legal aid commissions (LACs) and the extent of LAC legal and related service delivery to people affected by family violence (victims, alleged perpetrators, and their children).

2. A list of recommendations made by all LACs for a better family law system to support and protect those affected by family violence.

3. NLA's response to the Terms of Reference (TsoR), noting that NLA has had the benefit of seeing the Victoria Legal Aid (VLA) submission to the Inquiry which NLA generally endorses.

4. Information from previous inquiries and bodies of work where it is considered that it is particularly relevant to the terms of reference of this Inquiry.

It is made following the Commonwealth Government announcement of 9th May 2017 about Transforming the Family Law System ("the Government announcement").

1. About National Legal Aid and legal aid commissions

National Legal Aid (NLA) represents the directors of the eight state and territory legal aid commissions (LACs) in Australia. The LACs are independent statutory authorities established under respective state or territory enabling legislation. They are funded by state or territory and Commonwealth governments to provide legal assistance to disadvantaged people.

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

- obtain access to independent legal advice;
- afford the appropriate cost of legal representation;
- obtain access to the federal and state and territory legal systems; or
- obtain adequate information about access to the law and the legal system.

LAC service delivery

The LACs are the main providers of domestic violence legal services to financially disadvantaged people, and the biggest providers of legal assistance services in Australia.

The services provided by LACs are not limited to advice and information but extend to legally assisted family dispute resolution (FDR) where appropriate, 'at court' duty lawyer and social support services, and representation in contested proceedings in the Commonwealth family law courts and the domestic violence courts in the states and territories. LAC services are provided across the country from our offices and many outreach locations.

In the 2015-2016 financial year LACs provided a total of 2,204,427 services. One in five of the services requiring the skill of a legal practitioner were related to family violence, child protection, and/or family law matters.

Legal advice, information and duty lawyer services are free and not means tested but eligibility tests involving means, merit, and competing priorities in an environment of limited funds are applied to applications for a grant of aid for legal representation including FDR. Applicants who receive a grant of aid may be required to make a contribution, means dependent, towards the cost of providing legal assistance. Legal work on a grant of aid is undertaken either by a LAC in-house lawyer or by a private practitioner prepared to undertake legal aid work and whose name is on a LAC panel/list.

LACs also work co-operatively with the Aboriginal and Torres Strait Islander Legal Services, Aboriginal Family Violence Prevention Legal Services and community legal centres (CLCs) to reach as many people in need as possible.

Further detail about LAC service provision can be found at Attachment A to this submission.

2. List of recommendations made by all LACs for a better family law system to support and protect those affected by family violence.

1) Introduce a common set of rules and approaches, including in relation to court processes, across the courts exercising family law jurisdiction.
2) Address issues associated with supply of appropriately qualified interpreters.
3) Resource the undertaking of safety audits of court premises.
4) Subject to positive evaluation of the pilot, expand the Family Advocacy and Support Services (FASS) to provide early legal advice and non-legal support services to families at risk in all family law court locations. (As recommended in the VLA submission.)
5) Implement Productivity Commission Access to Justice Arrangements Inquiry Report recommendations 21.4 and 21.5 in relation to relaxing the LAC means tests and funding more grants of legal aid to fund civil legal assistance services, so as to reduce self-representation in family law involving family violence, increase the availability of LAC family dispute resolution (FDR), improve the quality of information provided to the family law courts, and improve the access by victims to civil law services such as housing, credit/debt and social security.
6) Provide increased resourcing to enable more use of existing effective mechanisms, including specifically: more judges for earlier decision-making, subpoenas, and more scrutiny of consent orders; more independent children's lawyers (ICLs); and more family consultants. (As recommended in the VLA submission).
7) Await outcome of the Public Consultation Paper *Amendments to the Family Law Act 1975 to respond to family violence*, December 2016.
8) Monitor development of the Parenting Management Hearings announced on the 9th May 2017.
9) Confirm in the *Family Law Act 1975* the court's positive obligation to scrutinise consent orders to confirm they are in children's best interests. (As recommended in the VLA submission).
10) That the Family Court and Federal Circuit Court issue a court practice note on maximising family violence survivors' protection from self-represented litigants using existing mechanisms. (As recommended in the VLA submission).
11) Extend relevant provisions in Part VII, Division 12A of the *Family Law Act* to apply in all family law proceedings. (As recommended in the VLA submission).
12) Implement exposure draft Family Law Amendment (Family Violence and Other Measures) Bill 2017 appeal provisions and monitor effectiveness. (As recommended in the VLA submission).
13) Implement a triage process for contravention applications, supported by new funding. (As recommended in the VLA submission).

14) Consider compulsory FDR for family property matters and create a new simplified family law court stream for small property claims.

15) Amend section 75(2) of the *Family Law Act* to add to the list of matters to be considered in family law property matters, the extent to which the financial circumstances of either party have been affected by family violence perpetrated by the other party. (As recommended in the VLA submission).

16) Implement the Family Law Council's training recommendations to improve family violence competency. (As recommended in the VLA submission).

17) Ensure family violence education is an academic requirement of the law degree and/or a professional training requirement of admission to practice, and for other professions relevant to working with family violence such as psychologists and social workers.

18) Prioritise creation of a national database of court orders. (As recommended in the VLA submission).

3. Response to Terms of Reference

Introduction

Considerable work has been done in the area of improving the family law system response to family violence in recent years. It is suggested that the following more recent national reports and consultation paper are particularly notable, and that there is on-going work arising out of them which is relevant to this Inquiry.

- *Amendments to the Family Law Act 1975 to respond to family violence* - Public Consultation Paper, December 2016 ("Family Law Amendment Family Violence Consultation Paper")
- *Family Violence - A National Legal Response*, Australian Law Reform Commission Report 114, November 2010
- *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems: Final Report - June 2016*, Family Law Council
- *Family Courts Violence Review*, Professor Richard Chisholm, 27 November 2009.

Over-arching

Common rules and approach

As a general and over-arching proposition it would be beneficial if there was a common set of rules and approaches, including in relation to court processes, across the courts exercising family law jurisdiction.

Interpreters

In some places there are issues associated with supply and availability and qualifications of interpreters.[1]

Term of Reference 1

How the family law system can more quickly and effectively ensure the safety of people who are or may be affected by family violence, including by:
a. facilitating the early identification of and response to family violence; and
b. considering the legal and non-legal support services required to support the early identification of and response to family violence;

Term of Reference 3

The effectiveness of arrangements which are in place in the family courts, and the family law system more broadly, to support families before the courts where one or more party is self-represented, and where there are allegations or findings of family violence;

[1] In relation to interpreters generally, please see Judicial Council on Cultural Diversity *Public Consultation Draft - Australian National Standards for Working with Interpreters in Courts and Tribunals*, (June 2016) and S Hale, *Interpreter Policies, Practices and Protocols in Australian Courts and Tribunals A National Survey*, (2011).

"Children would undoubtedly be much safer if through legal aid or otherwise the parties and the children were properly represented, and the number of judicial officers was such that each case could be given the attention it deserved, without causing unacceptable delays in the hearing of other cases."[2]

NLA suggests that this is an accurate statement and one that applies equally to the safety of the parties.

Court accommodation

In some locations there are significant concerns about the safety of court users, e.g. Alice Springs and Launceston. Concerns arise out of the size, and lay-out of the premises, e.g. one entry-exit point only and lack of safe rooms for victims. This can mean that victims and alleged perpetrators find themselves in a confined space and at close proximity to each other. Issues can be exacerbated on a busy duty day. It is suggested that these concerns should be addressed as a priority.

The Family Advocacy and Support Services

The Family Advocacy and Support Services (FASS) are funded pursuant to the Third Action Plan under the National Plan to Reduce Violence Against Women and Their Children 2010-2022.

The FASS is being implemented at the family law courts around the country from March 2017. It is a national scheme and provides both legal and non-legal domestic violence support services, and appropriate referrals, to people affected by family violence. Further information about the FASS can be found at Attachment A to this submission.

A main function of the FASS is to enable improved risk identification at the family law courts, and risk assessment and safety planning to be undertaken where appropriate, either at the family law courts or by referral.

A key aspect of the work of FASS lawyers was envisaged by LACs to be assisting self-representing litigants with completion of necessary documents including the Notice of Risk, (Case Information Affidavit in Western Australia), and to date this has been the experience.

The FASS is to be independently evaluated and it is expected that the evaluation will inform the future of the service, including whether or not it should be expanded.

[2] R Chisholm, *Family Courts Violence Review* (2009), 83

Reducing self-representation

The benefits of legal representation in domestic violence matters include:

- redressing power imbalance
- early appropriate resolution of matters
- reduction of the risk of breach of orders
- identification of related issues and appropriate referrals
- reduced stress for those involved
- improved timeliness, effectiveness and efficiency of the justice system.

NLA is of the view that the FASS is a significant response to the challenges faced by self-representing litigants and to the issues raised by TsoR 1 and 3 of this Inquiry.

However, as indicated in the VLA submission to this Inquiry, current levels of self-representation in family law proceedings by those who are the most financially disadvantaged in our society would be better addressed if the 2014 recommendations of the Australian Government Productivity Commission[3] (PC) about the need to relax the LAC means tests were adopted. As indicated by VLA, the PC's finding that there are more people living in poverty (14%) than are eligible for legal aid (8%) contextualises the extent of this need.[4]

Relaxation of the means test would enable grants of legal aid to be made to many more people to resolve their issues; including to increase access to LAC legally assisted family dispute resolution (FDR) wherever appropriate. The VLA submission describes legally assisted FDR and notes that each of Australia's LACs runs a similar legally assisted FDR service in its jurisdiction. These LAC services have very good settlement rates. In 2015-16 the full or partial settlement success rate nationally was 78%. Where legally assisted FDR is not appropriate or not successful then grants of legal aid provide for ongoing legal representation for those cases with merit.

It is also noted that the National Partnership Agreement on Legal Assistance Services 2015-2020, the agreement through which Commonwealth funding flows to the LACs and the CLCs, specifies that priority clients for LAC grants of aid include people experiencing financial disadvantage, people experiencing or at risk of family violence, children and young people, Aboriginal and Torres Strait Islander people, culturally and linguistically diverse people, older people, people in rural and remote areas and people with a disability or mental illness. It is not uncommon for applicants for legal aid to fall within multiple groups.

Recommendations 21.4 and 21.5 and Appendix H of the PC report are Attachment B to this submission. Appendix H provides the detail of the recommendations.

[3] Productivity Commission 2014, *Access to Justice Arrangements*, Inquiry Report No. 72, Canberra
[4] Ibid p 1021-1022.

As indicated by VLA some people choose to self-represent, "using the legal process to intimidate or harass a victim". This observation unfortunately reflects the experience of all LACs, noting that these litigants can be some of the most difficult and time consuming to work with, with features of such cases including voluminous correspondence, multiple matters across jurisdictions, complaints about professionals involved in cases, allegations that the other party/ies have not complied with orders, being themselves non-compliant with orders, and filing appeals. In addition to the psychological effect on the victim and children, the legal responses required to these behaviours are resource draining.

Better resourcing to the family law courts and the agencies which assist them to make difficult decisions in circumstances where there is always conflict and often a risk to safety

NLA is aware that there are concerns about inappropriate delays occurring in the family law courts in some places around the country. With a view to addressing such concerns, it is suggested that resourcing is required to enable each of:

i) the filing of court documents which appropriately identify family violence issues and their relevance to the matters in issue;
ii) timely investigations and responses, and
iii) earlier determinations in relation to family violence.

Documents that better identify the issues including family violence

The family law courts make investigations and decisions based on the best available evidence that they have. At least at the outset of matters this evidence will be documentary. The timely filing of documents which disclose alleged concerns appropriately and accurately is critical. In our experience self-representing parties are often not able to produce documents which accurately and succinctly reflect relevant factors without assistance.

The FASS aims to improve the quality of the information being provided to the family law courts, and this will be achieved to some extent, but the FASS is an "on the day" service and capacity is limited accordingly. Increased capacity for LACs to provide ongoing representation by relaxing the means tests for the most financially disadvantaged people in our community would assist, noting that LACs frequently assist people with very low levels of literacy, mental health issues, intellectual disability, and substance abuse concerns.

Timely investigations and response

As identified in the VLA submission, existing mechanisms, if properly resourced, should be sufficient to enable much better early investigation, e.g. increased appointment of ICLs, subpoenas, and more family consultants. The Government announcement that $10.7M has been allocated for additional family consultants is very much welcomed by NLA.

It is suggested that the state and territory child protection authorities across the country also have limited resources and big workloads and that this too will need to be addressed as part of responding to family violence. This would need to include funding for support services, as child protection workers need to be able to refer families for services to support families to provide a safe household for children. Increases in child protection services funding do also increase the workloads for children's courts and legal services in relation to child protection, and LACs would need to be funded accordingly.

To facilitate the capacity of child protection authorities to provide relevant evidence it is recommended that, where possible, family courts adopt the same processes in respect of their requests for information, particularly in respect of the issue of subpoena and the use of section 69ZW. Currently the variation in practice between the courts adds to the complexity for these authorities in respect of the provision of an appropriate and timely response. For example, in relation to section 69ZW, in some jurisdictions a written report is expected with, as a consequence, preference being given to the issue of subpoena at an early stage; whilst in contrast, in WA the child protection authority is required to provide documents that are already in existence from a defined list which ensures a timely response.

Early hearings to determine family violence issues

It would be beneficial if the family law courts were able to stream matters requiring prompt investigation and early determinations, including opportunity for evidence to be tested by cross-examination.[5]

The resources required for this purpose, even allowing for triaging into a particular stream of only the most serious cases, would be significant, and it is understood that such resourcing is not currently available to the family law courts. There would also be a down-stream effect on resources of legal assistance service providers.

More generally, in relation to the timely resolution of matters at the family law courts, the following are noted as potentially/relevant:

i) The proposal that the *Family Law Act 1975* be amended to expressly enable state and territory courts to hear family law matters.

This proposal was contained in the Family Law Amendment Family Violence Consultation Paper. That paper states "these amendments to the *Family Law Act* would reduce delays and better protect families by allowing more cases, particularly cases involving relatively simply family law issues, to be resolved in a single court, and in cases that are not suitable

[5] There will be challenges associated with this approach, e.g. how to manage matters which involve unresolved criminal law proceedings arising out of alleged family violence.

for resolution in a single court, allowing timely interim orders pending full consideration of the matter in the Federal Circuit Court of Australia or the Family Court of Australia."[6]

NLA's submission to the Family Law Amendment Family Violence Consultation Paper is Attachment C to this submission. In summary, while NLA supports clarifying that state and territory courts can hear family law matters, we also note that the policy intent is not that state and territory courts become the primary fora for resolving family disputes, rather that where a matter is already before a state or territory court for related legal issues, the judicial officer will have the jurisdiction to make family law orders. NLA is also mindful of the resourcing and training impacts of increasing the family law case workloads of state and territory courts, as well as the flow-on impacts for legal services in those courts, and this would need to be addressed.

ii) The Government's announcement that Parenting Management Hearings "an innovative forum for resolving simpler family law disputes between self-representing litigants"[7] will be established.

It is not yet clear to us how family violence considerations, which might not be obvious from the limited documents that will be required to be filed, will be triaged and managed in determining which matters are appropriate for Parenting Management Hearings.

If the Parenting Management Hearings can achieve resolution of simpler matters involving self-represented litigants as intended, then they might free up some of the resources of the family law courts to enable an earlier response to matters involving more complex issues.

NLA awaits more information about the parameters of these hearings and their evaluation in terms of both user experience and outcome, and whether there has been a beneficial effect for the system and its resourcing.

<u>Cross-examination</u>

NLA notes the Government's announcement that it will soon release, for public consultation, amendments to the *Family Law Act 1975* to ensure that victims are not put in the position of being personally cross-examined by alleged perpetrators, or required themselves to cross-examine their alleged perpetrator. NLA awaits the consultation and will participate in that consultation.[8]

[6] Australian Government Attorney-General's Department, *Amendments to the Family Law Act 1975 to respond to family violence*, Public Consultation Paper, (December 2016), 5.
[7] Attorney-General G Brandis, 'Transforming the Family Law System' (Media Release, 9 May 2017).
[8] In relation to suggestions of a Counsel Assisting Model, other LACs generally have greater reservations than VLA that this model would be viable in our adversarial family law system which is inter-partes, although noting it does permit the child to be independently represented by an ICL, with the ICL role ensuring that information relevant to decisions to be made about the child/ren, including in relation to family violence, is put before the court).

In the meanwhile, NLA notes that the family law courts operate in accordance with the Family Violence Best Practice Principles, and have the investigative tools referred to above (ICL role, family consultant role, ability to issue subpoenas). Judicial officers are also able to control cross-examination and the family law courts have remote witness facilities.

Term of Reference 2
The making of consent orders where there are allegations or findings of family violence, having regard to the legislative and regulatory frameworks, and whether these frameworks can be improved to better support the safety of family members, as well as other arrangements which may be put in place as alternative or complementary measures;

The VLA submission to this Inquiry addresses the different circumstances in which consent orders can be made, and the role that appropriate models of dispute resolution can play, and refers to the dilemma that can arise for victims in relation to whether or not to propose or agree to a particular settlement of matters.

The recommendations made are supported by all LACs.

Currently, the *Family Violence Best Practice Principles*, Edition 4, December 2016, Family Court of Australia and Federal Circuit Court of Australia, address the making of consent orders at Paragraph I. Explicit application would be beneficial ensuring understanding of consistent approach.

Relevant rules are Rule 10.15A Family Law Rules 2004 and Rule 13.04A Federal Circuit Rules 2001. It is suggested that a common set of rules and approach would be beneficial.

A focus on ensuring appropriate education and training of all professionals involved will also assist to ensure that agreements reached are appropriate in the circumstances.

The proposal to expressly enable state and territory courts to hear family law matters will, if enacted, be relevant.

Term of Reference 4
How the family law system can better support people who have been subjected to family violence recover financially, including the extent to which family violence should be taken into account in the making of property division orders;

As indicated in the VLA submission, issues in relation to property division in the family law system are generally that the cost of proceedings can be prohibitive, that legal aid for such proceedings is extremely limited, and that refusal to agree to a reasonable property settlement commonly reflects the existence of financial abuse.

A key issue in responding to family law property matters is ensuring that there has been appropriate disclosure. In the family violence context, non-disclosure can be a reflection of the existence of financial abuse and generally controlling behaviour.

Small property

Other LACs agree with VLA that there would be benefits in a "small property" stream, relying on the ability to compel appropriate disclosure.

The proposal in the Family Law Amendment Family Violence Consultation Paper that the state and territory courts be enabled to hear more property matters up to a certain amount is relevant. It is also not yet clear whether the Parenting Management Hearings might also determine matters in relation to property where the parties involved have some property.

Compulsory dispute resolution for property matters

From time to time the issue of whether the family law system should include compulsory dispute resolution in family law matters is raised.

NLA agrees as a matter of principle that there should be compulsory dispute resolution (DR) for property matters.

The present lack of ability to ensure full and proper disclosure about proprietary interests for DR purposes, with consequences for failure to do so, is consequently considered by NLA to be a significant consideration in developing any requirement for compulsory DR.

If a new DR property regime is to be introduced, then it must be supported by appropriate disclosure processes and by the provision of independent legal advice to each of the parties prior to attendance at FDR and prior to signing any terms of agreement. Funding will need to be provided to ensure legal representation/advice for impecunious parties.

It will also be necessary for legislation to provide for exceptions to compulsory DR in much the same way as there are exceptions to requirements for FDR in children's matters. It might be appropriate for there to be an exception for circumstances where there is an assessment that there has not been full disclosure and/or a failure of a party to engage, and a "not appropriate at this time" exception.

The courts should also be able to refer parties to DR at any stage of the proceedings. If a matter was unsuitable for DR at a pre filing stage due to valuation or disclosure issues it could be referred back when those matters are resolved.

NLA notes arbitration services in property law and in particular that LAQ has been providing arbitration services in family property law matters since 2001, and NLA suggests that this experience is instructive. LAQ's arbitration program deals with property applications where

the 'net pool' falls within the range of the assets test for obtaining a grant of aid. Both parties must be legally represented throughout the process and matters are only arbitrated by legal practitioners who meet the requirements as set out in the *Family Law Act 1975*. It is a process run 'on the papers' which assists to ameliorate power imbalance but which enables full discovery to occur through sworn material identifying assets and liabilities and quantifying value. It is a relatively quick and inexpensive process and which assists parties who cannot resolve their property division through mediation due to a lack of disclosure or agreement about value of assets. It is a consensual process and there is some diminution of numbers due to this often as a result of financial abuse and other forms of family violence.

In relation to the extent to which family violence should be taken into account in the making of property division orders, NLA is of the view that the approach in Kennon v Kennon [1997] FamCA 27; (1997) FLC 92-757 (1997) 22 Fam Lr1 (10 June 1997) is correct notwithstanding that it is expressed somewhat complicatedly. NLA supports VLA's recommendation that the legislation in relation to both property and spousal maintenance be amended to reflect this.

Term of Reference 5
How the capacity of all family law professionals—including judges, lawyers, registrars, family dispute resolution practitioners and family report writers—can be strengthened in relation to matters concerning family violence; and

NLA notes Recommendation 11 of the Family Law Council report *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems*, June 2016, about training programs for professionals working in the family law system. This recommendation is supported by NLA subject to the availability of resources required to implement it. Recommendation 11 is Attachment D to this submission.

The Australian Government's funding of the development of a National Domestic and Family Violence Bench Book "a national online resource for judicial officers aimed at promoting best practice and consistency in judicial decision making in cases involving family violence" is also noted,[9] as is the advice in the Family Law Amendment Family Violence Consultation Paper that the Government has agreed to fund training for judicial officers on family violence and family law which will "offer tailored support" (Commonwealth and state and territory), with modules to be rolled out in 2017-2018.[10]

The VLA submission recommends that family violence education be an academic requirement of the law degree and/or professional legal training. NLA agrees with this

[9] The content of this work has been informed by an expert advisory group including judges, legal practitioners, including an NLA representative, and academics.
[10] Australian Government Attorney-General's Department, *Amendments to the Family Law Act 1975 to respond to family violence*, Public Consultation Paper, (December 2016), 5.

recommendation and would extend it as an academic requirement to other professions such as psychologists and social workers.

Term of Reference 6
The potential for a national approach for the administration and enforcement of intervention orders for personal protection, however described.

A national register of protection orders was recommended by the ALRC in its report *Family Violence - A National Legal Response*. [11]

NLA supports a national register and confirms its relevance for the proposals contained in the Family Law Amendment Family Violence Consultation Paper as noted in the NLA submission to that consultation. (Attachment C to this submission).

Conclusion
Thank you for the opportunity to make this submission.

We would be pleased to attend the Inquiry and to give evidence as required, and/or to provide any further information the Inquiry would find useful.

Please do not hesitate to contact us.

Yours sincerely,

Dr Graham Hill
Chair

[11] ALRC *Family Violence - A National Legal Response*, Report 114, (October 2010), Recommendation 30-18.

Legal aid commission service delivery

Legal aid commission services - background

Legal aid commission services are provided consistently with the priorities specified by the inter-governmental National Partnership Agreement on Legal Assistance Services 2015-2020, and with the state and territory enabling legislation of the respective legal aid commissions.

Legal representation services

Legal representation services include legal representation in fully contested matters including the provision of Independent Children's Lawyers and Child Representatives as requested by the family law courts and child protection courts respectively, as well as full legal representation services for parties with matters predominantly in the family law, family violence, child protection, and criminal law courts.

Duty lawyer services

Duty lawyer services are provided in civil law courts and tribunals including the family law courts, the Administrative Appeals Tribunal and in as many local courts as possible including State/Territory family violence courts. "The presence of duty lawyer services on the day at court has been proven to contribute to the effectiveness and efficiency of the court process for both the client and the court or tribunal"[1]

Family Advocacy and Support Services

Family Advocacy and Support Services (FASS) provide integrated duty lawyer and family violence support services including to assist families affected by family violence with matters before the family law courts; legal advice and support to assist clients to engage with family law court processes safely; preparing notices of risk and applications to assist the court to make evidence-based and safe decisions; trauma-informed and high quality social support services, delivered by appropriately qualified personnel, so that clients' non-legal issues, particularly where they elevate the risk of family violence, are identified and responded to alongside legal issues; and assisting families to transition between, and manage matters across, the Commonwealth family law, state family violence and state child protection jurisdictions.

Dispute resolution services

Dispute resolution services are provided as a necessary first step in all matters which are appropriate for such service delivery. All legal aid commissions operate programs which provide legally assisted models of dispute resolution conferences, and which achieve very high settlement rates, eg. In 2015-2016 the national average settlement rate was 78%. Whenever settlement is achieved these services avoid the cost of resources associated with court proceedings, including the cost of court administration and hearing time.

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

Legal advice, information and referral services

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

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

End.

Excerpt from Productivity Commission Access to Justice Arrangements Inquiry Report

Recommendations

RECOMMENDATION 21.4

To address the more pressing gaps in services, the Australian, State and Territory Governments should provide additional funding for civil legal assistance services in order to:

• better align the means test used by legal aid commissions with that of other measures of disadvantage

• maintain existing frontline services that have a demonstrated benefit to the community

• allow legal assistance providers to offer a greater number of services in areas of law that have not previously attracted government funding.

The Commission estimates the total annual cost of these measures to the Australian, State and Territory Governments will be around $200 million. Where funding is directed to civil legal assistance it should not be diverted to criminal legal assistance.

RECOMMENDATION 21.5

For the medium and longer term, the Australian, State and Territory Governments should agree on priorities for legal assistance services and should provide adequate funding so that these priorities can be broadly realised. Such funding should be stable enough to allow for longer term planning, and flexible enough to accommodate the anticipated reduction in other sources of funding (particularly Public Purpose Funds or equivalents) in coming years. On an annual basis, the Australian, State and Territory Governments should publicly report on the extent of any failure to meet agreed coverage and priorities.

In determining legal assistance priorities, governments should consult with the Legal Assistance Forums in each state and territory.

H Eligibility for legal aid and the cost of extending it

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

H.1 Who is eligible for legal aid?

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

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

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

Table H.1 **Summary of income test thresholds for which no further contribution is required[a]**

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

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

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

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

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

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

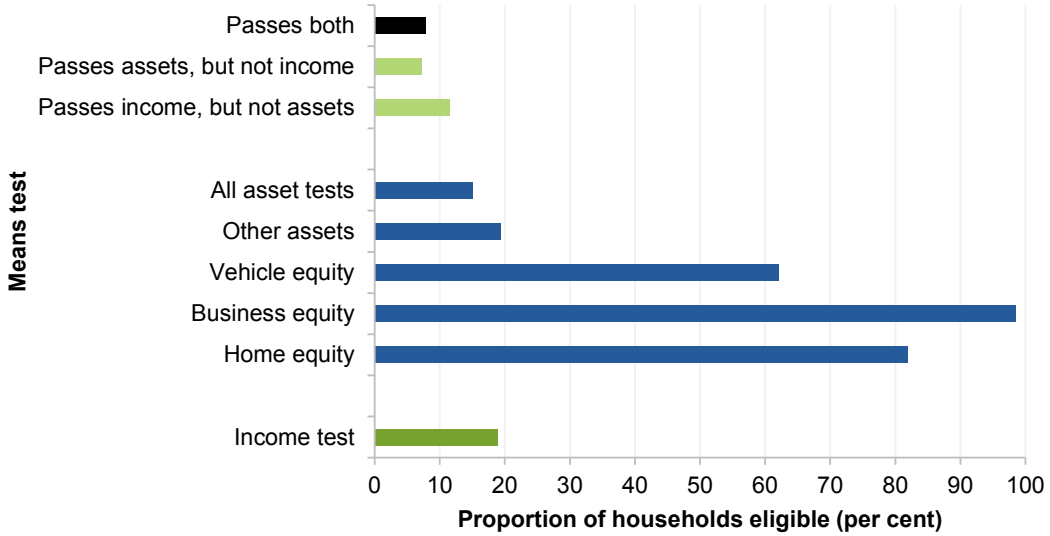
Source: As per table H.1.

Few are eligible for legal aid

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

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

Figure H.1 **Estimated proportion of households eligible for legal aid[a]**



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

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

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

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

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

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

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

Providing funding to maintain existing frontline services

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

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

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

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

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

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

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

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

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

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

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

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

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

Providing additional funding to the LACs to relax their means tests

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

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

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

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

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

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

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

Choosing a 'baseline' set of eligibility requirements

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

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

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

[1] In practice, moving towards a 'pooled' assets test is effectively equivalent to relaxing the most restrictive assets test first, and then the next most restrictive, and so forth.

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

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

Box H.1 Equivalised disposable household income

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

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

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

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

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

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

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

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

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

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

Box H.2 Measures of relative poverty

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

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

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

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

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

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

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

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

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

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

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

Sensitivity testing the relaxing of the means test

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

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

[3] That is, to an equivalised disposable household income of $22 000 per year and total net assets of $165 000.

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

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

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

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

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

Providing additional funding for grants of aid in civil matters

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

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

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

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

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

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

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

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

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

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

Sensitivity testing the provision of additional grants of civil aid

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

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

Summary

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

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

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

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

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

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

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14 February 2017

Public Consultation: Family violence amendments
Family Law Branch
Attorney-General's Department
3-5 National Circuit
Barton ACT 2600

familylawunit@ag.gov.au

Dear Sir/Madam,

Proposed amendments to the Family Law Act 1975 to respond to family violence

National Legal Aid (NLA) represents the directors of the eight state and territory legal aid commissions (LACs) in Australia. The LACs are independent statutory authorities established under respective state or territory enabling legislation. They are funded by state or territory and Commonwealth governments to provide legal assistance to disadvantaged people.

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

- obtain access to independent legal advice;
- afford the appropriate cost of legal representation;
- obtain access to the federal and state and territory legal systems; or
- obtain adequate information about access to the law and the legal system.

Introduction

NLA welcomes the opportunity to comment on the Amendments to the *Family Law Act 1975* to respond to family violence, Public Consultation Paper, December 2016 ('the Public Consultation Paper').

NLA generally supports the proposed amendments contained in the Family Law Amendment (Family Violence and Other Measures) Bill 2017: Exposure draft provisions.

Family law matters to be resolved by state and territory courts as appropriate

NLA supports legislative amendment that clarifies that state and territory courts are able to exercise family law jurisdiction.

NLA supports the Public Consultation Paper's indication that the policy intent behind the proposed changes is not that state and territory courts become the primary fora for resolving family disputes, but that where a matter is already before a state or territory court for related legal issues, the judicial officer will have the jurisdiction to make family law orders.

NLA is mindful that the existing demanding caseloads of state and territory courts would be likely to impact on the judicial officers' capacity to exercise family law jurisdiction powers on a regular basis.

The Public Consultation Paper advises that the Government has agreed to fund training of judicial officers about family law and family violence. NLA understands that this is consistent with recommendations arising out of each the Australian and New South Wales Law Reform Commissions' report *Family Violence – A National Legal Response (ALRC Report 114)*, *Final Report*, October 2010 ('the ALRC report'), and Family Law Council's report *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems: Final Report - June 2016* ('the Family Law Council report'). NLA expects that training would need to encompass the aspects of domestic and family violence, parenting orders, property settlements, and child support, with child support often a factor silently at play in negotiations about where children will live, and having both a direct and indirect relationship to property settlements. The importance of cultural competence is also noted.

If these amendments were likely to be promulgated NLA asks that the Commonwealth consult with NLA about the likely funding impacts of such changes for LACs.

NLA supports amendments to increase the monetary limit of family law property matters that can be determined by state and territory courts. However, NLA seeks to be further consulted when the regulations are being considered as to the proposed financial limit that would currently be the appropriate level for such determinations.

NLA is supportive of the proposed changes about parenting arrangement orders, subject to the above caveats. In particular, NLA sees the benefit of state and territory courts exercising child protection jurisdiction being able to exercise family law jurisdiction in circumstances where the welfare authority indicated they will withdraw child protection proceedings if appropriate family law orders that are in the best interests of the child are in place.

NLA refers to the recommendations of the ALRC report and the Family Law Council report for a national register/database of court orders about families accessible by all courts exercising family law, domestic violence and child protection jurisdictions. If these amendments are enacted NLA suggests that such a national register is even more critical. Careful consideration will need to be given to which organisations can access the register and if so, on what basis. The implementation of such a register would also need to be accompanied by a training program for judicial officers, lawyers and other organisations operating in the family law sector about the legal effects of orders, in particular family and domestic violence protection orders and child protection orders in the different state and territory jurisdictions.

NLA supports the suggestion in the Public Consultation Paper that short form judgments be provided wherever appropriate.

Strengthening the powers of courts to protect victims of family violence

Criminalising breaches of personal protection injunctions

NLA understands, from considering the draft legislation and the Public Consultation Paper, that the state and territory police services will receive and prosecute potential offences for breach of personal protection orders, as for other charges under Commonwealth legislation, and that these will be heard in the state and territory courts.

If there is a proposal that the federal family law courts should hear and determine charges under these proposed amendments NLA would seek to be further consulted about the proposed amendments.

Whilst NLA envisages that the majority of protection orders will continue to be made in the state and territory courts, NLA suggests that consideration be given to including in sections 68B and 114 of the *Family Law Act* provisions that mandate any personal protection injunctions made under those sections to be time limited, in the same way that domestic and family violence protection orders made under state and territory legislation are. In saying this NLA does not exclude the possibility that a personal protection injunction expressed to be for life may be appropriate in certain circumstances. This will ensure a measure of consistency between orders made under federal and state and territory legislation. Further, it will allow for parents to make alternative parenting arrangements in the future, once the time period of the personal protection injunction has elapsed, without the need to apply under the *Family Law Act* for the personal protection injunction to be varied.

There are concerns about the possibility of double jeopardy situations arising, in particular where one act or action may lead to potential charges for a criminal breach of a state or territory domestic and family violence protection order and a criminal breach of a family law personal protection injunction.

NLA notes that the criminalisation of personal protection orders will also potentially benefit victims of intended forced marriages, and suggests that the particular issue of forced marriages and any legislative response be the subject of further consideration by AGD.

Removal of 21 day time limit on state or territory courts' power to vary, discharge or suspend an order

NLA supports the proposal to amend the current 21 day time limit imposed by section 68T. We agree with the various reports which have recommended this issue be addressed as, in our practice experience, a 21 day period is not sufficient for a matter to be listed in the family law courts and an existing family law order considered and varied if required.

Currently, if after an interim order is made, the matter does not return to the relevant family law court within 21 days, there is confusion and uncertainty about parenting arrangements for children, and this can elevate and escalate safety concerns. The proposed amendment would ensure that family violence and family law orders about the one family remain consistent and endure or lapse together, while still providing judicial officers with the flexibility to determine

time frames, vary orders and relist matters to manage cases according to their particular circumstances.

Increasing the powers of the court to dismiss unmeritorious claims
NLA supports the proposal to clarify the power of courts to dismiss unmeritorious claims. This proposal falls under the heading 'Strengthening the powers of the courts to protect victims of family violence'; however, NLA suggests the proposed provisions would appropriately have application beyond matters where the risk issue is family violence between the parties.

Enabling the court to explain orders in a manner that supports the best interests of the child
NLA supports the proposal to amend section 68P to dispense with the requirement that the court must explain (or arrange to explain) the making of injunctions which are inconsistent with family violence orders to children protected by those orders.

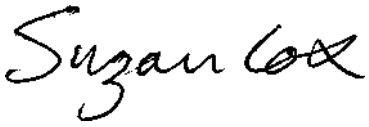
The proposed amendment relates to the explanation of orders and injunctions in a very limited context. Other mechanisms within the family law jurisdiction which enhance the participation of children and young people continue to be utilised, for example, through a child conferring with an Independent Children's Lawyer appointed in their case or through a child expressing their views to a family consultant, chapter 15 expert or other expert retained in the case.

Other amendments

Repeal obligation to perform marital services
NLA supports the proposal to repeal s. 114(2) on the basis of the rationale set out in the Public Consultation Paper.

Conclusion
Please do not hesitate to contact us if you require any further information.

Yours sincerely,



Suzan Cox QC
Chair

Family Law Council Report to the Attorney-General on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems: Final Report - June 2016 [Terms 3, 4 & 5]

Recommendations

Recommendation 11: Family violence competency

The ability of professionals working in the family law system to understand family violence dynamics be strengthened by training programs and, more specifically:

1) The Australian Government develop, in partnership with other stakeholders, a learning package for professionals working in the family law system that provides both minimum competencies and in-depth and technical content designed for a range of roles, including family dispute resolution practitioners, family report writers and family lawyers (including Independent Children's Lawyers).
2) There should be a specific family violence and child sexual abuse module in the National Family Law Specialist accreditation scheme at the examination phase, professional development phase and re-accreditation phase as a compulsory requirement of being accredited.
3) That Legal Aid Commissions across Australia should consider requiring their in-house lawyers as well all legal practitioners on their family law practitioner panels to demonstrate a sound awareness of family violence, trauma informed practice and an ability to work with victims of family violence.