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Family Law Council Secretariat  
c/o Attorney-General's Department  
3-5 National Circuit  
Barton ACT 2600

[flcreference@ag.gov.au](mailto:flcreference@ag.gov.au)

Dear Sir/Madam,

**Family Law Council Terms of Reference, Families with complex needs and the intersection of the Family Law and Child Protection Systems**

National Legal Aid (NLA) is writing to Family Law Council (FLC) following six of the legal aid commissions (LACs)<sup>1</sup> making submissions to FLC, and a teleconference of NLA's Family Law Working Group (FLWG) about the Terms of Reference "Families with complex needs and the intersection of the Family Law and Child Protection Systems" (TsoR).

Further to the making of submissions and during a FLWG teleconference, it became apparent that there was divergence of views amongst the individual LAC submissions in relation to some issues raised by some of the questions (attached) and commentary contained in the Discussion Paper (DP). Reasons for these differences were discussed and a common position reached as set out below.

We hope that you find the further comment helpful, and ask that you accept our apologies for the delay in providing it to you.

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<sup>1</sup> Legal Aid Western Australia, Victoria Legal Aid, Legal Aid NSW, Legal Aid Commission of Tasmania, Legal Services Commission of South Australia and Northern Territory Legal Aid Commission.

## Context

The questions in the Discussion Paper are asked in the context of the provisions of the *Family Law Act 1975* about:

- confidentiality of communications in family dispute resolution<sup>2</sup>;
- admissibility of communications in family dispute resolution and in referrals from family dispute resolution<sup>3</sup>;
- where a member of the court personnel, family counsellor, family dispute resolution practitioner or arbitrator suspects child abuse<sup>4</sup>, and
- evidence relating to child abuse or family violence<sup>5</sup>.

The questions are also asked on a background of:

- Different models of dispute resolution operated around the country, and different thresholds, in relation to both domestic violence and other matters, in connection with the availability, type and purpose of the service offered.
- Some parties being legally represented both in and/or around the dispute resolution process; and others being self-representing with or without legal advice and sometimes by choice.
- Fixed resources of the providers involved in family law matters, including the courts, the child protection authorities, family dispute resolution providers and legal assistance service providers.
- Some matters which reach court will have the benefit of the appointment of an independent children's lawyer, whereas others will not.

## LAC Services

LACs all operate legally assisted models of family dispute resolution, where at least one of the parties will be in receipt of a grant of legal aid. The respective enabling legislation of the individual LACs variously contain secrecy provisions about information concerning the affairs of others acquired by reason of employment and provisions about confidentiality and admissibility in FDR<sup>6</sup>.

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<sup>2</sup> S.10H

<sup>3</sup> S.10J

<sup>4</sup> S.67ZA

<sup>5</sup> S.69ZW

<sup>6</sup> E.g. S.92 Secrecy, and Part 5A Dispute Resolution, s.35D Confidentiality and 35E Admissibility, *Legal Aid Act 1977*, ACT.

LAC experience is that parties are often concerned that the information to be disclosed by them will not be provided or available to others including the other party/ies to the matter. This appears to support the perspective that if confidentiality is not preserved, that parties might not reveal information relevant to safety including in connection with screening and risk assessment.

### **Family Relationship Services: Confidentiality, information sharing, collaboration**

The DP seeks views including in relation to the provision of further information on s. 60I certificates and the potential amendment of the confidentiality provisions.

- We have concerns about increased risk to victims of violence, (and potentially to the service providers), as a result of further information being made available to both parties by service providers ahead of the institution of any proceedings.
- NLA supports amendment of the confidentiality provisions to the extent of deletion of the word “imminent” from sub-section 10H(4)(b)<sup>7</sup>, and inclusion of the word “safety”.
- Subject to the amendment in the above paragraph, NLA’s view is that the confidentiality provisions already provide for disclosure of communications by service providers in appropriate circumstances. Agencies which are sufficiently resourced should have the capacity to act on such communications as required.
- When proceedings are initiated, documents containing relevant information, including the compulsory notice of risk, will be filed.
- Screening should be an ongoing process and should be undertaken by the courts and other service providers in a timely manner as part of appropriate case management.
- A “not appropriate” s. 60I certificate should heighten alert by the court to the possibility of family violence.
- S. 69ZW of the *Family Law Act* (evidence relating to child abuse or family violence), and the admissibility provisions, enable the provision of certain admissions, disclosures, documents and information.

We would support more information on s. 60I certificates if it was useful to the court and the safety of family members would not be adversely affected. We are however unable to identify what this additional information, not already more appropriately available from other sources, might be. If further information is to be provided on s. 60I certificates, then the questions become who receives the information, who has a right to see and/or access it and how is it used? These questions seem to us to involve a number of vexed issues such as relying on untested information.

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<sup>7</sup> “(b) preventing or lessening a serious and imminent threat to the life or health of a person”.

Consequently, in relation to the suggestions that the confidentiality provisions be amended and that more information be provided on s. 60I certificates, we think it necessary to first determine whether confidentiality provisions are adversely affecting the ability of the courts to assess risk, and whether existing practices, processes, and understandings could not otherwise be addressed to help resolve any perceived and/or real issue/s, e.g. improved understanding of the existing legislative provisions and when information can be disclosed could be beneficial.

### **Risk Assessment in the family law system**

The DP seeks views about the potential benefits of a common/standardised risk assessment tool/s and about whether the family law system should have its own investigatory service.

It is considered that a common risk assessment tool may not be possible or appropriate given the different agency and provider imperatives and the contexts in which they operate. It is recommended that the “most practical approach would be to ensure risk assessment frameworks are in existence in the States and Territories, shared with relevant stakeholders in the family law system, and supported by appropriate interdisciplinary professional development to ensure they are understood and applied in practice”<sup>8</sup>.

In relation to the suggestion of a family law system investigatory agency, we have concerns both in relation to the extent that such an agency would need to interact with state and territory agencies, and the cost of establishing such an agency. Adequate resourcing of existing agencies, and service providers, such as legal aid commissions which provide ICLs, would appear to be a more practical and efficient alternative.

### **Conclusion**

Courts, agencies, and legal assistance service providers express concerns about resourcing and accordingly capacity to carry out their respective functions<sup>9</sup>. Our experience of the child protection and family law systems supports this concern.

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<sup>8</sup> LAW A submission, page 8.

<sup>9</sup> E.g. in the legal assistance context, and as the FLC is aware, the Productivity Commission in its report of its Inquiry into Access to Justice recommended an increase in funding of \$200 million per year to legal assistance service providers, with around \$57 million per year of this in connection with the need to relax the LACs’ means tests for civil law (i.e. including family law) matters.

In FLWG discussions about the DP and the individual LAC submissions, it was therefore impossible to avoid finite funding as a negative contributing factor in connection with the issue of identification of risk and the flow of information.

To ensure efficiencies it will be necessary to carefully determine if the problems which have been identified have an inherent basis rather than e.g. being the result of inadequate resourcing or incomplete understanding, and to then identify the most efficient and effective response that can be made. To help support safer outcomes, particularly for children, we believe however that a significant injection of resources across the front line response to families with complex needs is required.

Please do not hesitate to contact us if you require further information, including in relation to any of the nationally applicable recommendations made by individual LACs.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'G Canny', with a stylized, cursive script.

Gabrielle Z Canny  
Chair

- 1. How can the exchange of information between the family courts and family relationship services (such as family dispute resolution services, counselling services and parenting order programs) be improved and facilitated in a way that maintains the integrity of therapeutic service provision?**
  
- 2. What opportunities exist for ensuring the early assessment of risk to children in family law matters?**
  
- 3. How can services such as child protection departments, mental health, family violence, and drug and alcohol services make relevant information available to the courts to support decision-making in cases where families have complex needs?**
  
- 4. What services are needed to support families and children who use the family law system where child safety concerns are identified?**
  
- 5. How can interaction between the family courts and relevant services, including child protection departments, family violence, mental health services, drug and alcohol services and support services for Aboriginal and Torres Strait Islander families, be enhanced?**
  
- 6. What opportunities exist for developing integrated responses to families with complex needs who use the family law system?**
  
- 7. How might a more co-ordinated legal system for families with complex needs be created?**