

## **Families with Complex Needs**

**Submission to the Family Law Council's Terms of Reference**

**Number 2**

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## About Victoria Legal Aid

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

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

Our clients include people who are socially and economically disadvantaged; people with a disability or mental illness; children; the elderly; people from culturally and linguistically diverse backgrounds, and those who live in regional or remote areas. VLA can help people with legal problems relating to criminal matters, parenting disputes, child protection and family violence, immigration, social security, mental health, discrimination, guardianship and administration, tenancy and debt.

We provide:

- Free legal information through our website, our Legal Help phone line, community legal education, publications and other resources
- Legal advice through our Legal Help phone line and free clinics on specific legal issues
- Minor assistance to help clients negotiate, write letters, draft documents or prepare to represent themselves in court
- Grants of legal aid to pay for legal representation by a lawyer in private practice or a VLA staff lawyer
- A family dispute resolution service for disadvantaged separated families
- Funding to 40 community legal centres and support for the operation of the community legal sector.

## VLA's Family, Youth and Children's Law Program

VLA's Family, Youth and Children's Law Program aims to help people resolve family disputes to achieve safe, workable and child-focused parenting and care arrangements. This also involves helping parents to build their capacity to resolve future disputes without legal assistance.

The Program's core services include:

- Duty lawyer, legal advice, representation and information services in Commonwealth family law matters and at the Family Law Courts, including child support matters, parenting disputes and family violence matters
- Lawyer-assisted and child-inclusive family dispute resolution to help settle disputes without going to court
- Independent children's lawyers who promote the interests of children at risk and help judicial officers make good decisions
- Duty lawyer, legal advice, representation and information services to children and parents in the Children's and Magistrates' Courts of Victoria, including in child protection and family violence matters, and
- Legal advice and education in the community.

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## Executive Summary

This submission seeks to build on the recommendations in Victoria Legal Aid's (VLA) first submission to the Family Law Council's Terms of Reference. We propose an additional suite of recommendations informed by VLA's expertise and experience providing family dispute resolution services and representing clients throughout their family violence, child protection and/or family law matters. VLA's clients present with complex legal and non-legal needs. As such, we are well placed to comment on how the family law system assesses and responds to risk as a family progresses through the court, and how the family law system can better coordinate with non-legal service providers to assist parties seeking to address the underlying issues that impact on a child's safety.

### **The Interface between Family Dispute Resolution and the Family Law Courts**

The exchange of information between the Family Law Courts and family relationship services, including family dispute resolution services, is a key consideration under the Family Law Council's Terms of Reference.

Currently, disclosures at family dispute resolution (FDR) are confidential and inadmissible except in certain situations which are provided for under the *Family Law Act 1975* (Cth). It is VLA's experience that the confidentiality of the FDR process may encourage parties to disclose information they have not previously felt comfortable disclosing.

These disclosures are essential to the FDR risk assessment process. The information obtained determines the appropriateness of progressing with FDR and if so, the safety planning required to enable FDR to progress safely. Changes to confidentiality provisions may result in parties failing to raise safety concerns. This could expose parties and their children to further risk of harm if the matter progresses to FDR when it is unsafe or otherwise inappropriate to do so.

Exemptions to the confidentiality and inadmissibility of FDR already exist and are actively used, including by VLA's Family Dispute Resolution Service. These existing exemptions, together with the adoption of a suite of alternative measures, could ensure relevant information comes to the early attention of the court, without undermining the ability of FDR service providers to assess risk and ensure safety planning so that parties are not participating in FDR where it is not appropriate or safe to do so.

Alternative information sharing measures, such as greater use of the Co-located DHHS Liaison Officers and establishment of a database of family court, family violence and child protection orders, would improve the information available to the Family Law Courts where the DHHS has had some involvement with a particular family or child (including where there has been child protection proceedings) or where there is a history of family violence that has led to the making of a family violence intervention order in the State family violence jurisdiction.

Increased resourcing to the Family Law Courts so that judicial officers can adequately prepare for the first return date and interim hearings, ongoing training of judicial officers in identifying risk factors and changes to court practices could also assist the Family Law Courts to elicit relevant information earlier in court proceedings.

### **Ongoing and Timely Assessment of Risk**

As a matter proceeds through the court, it is essential that judicial officers in parenting disputes are making evidence-based decisions based on all the relevant and available information regarding the best interests of a child.

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This policy objective would be assisted by an increased investment in the independent children's lawyer (ICL) function – which already provides a service to the court akin to an investigatory body – so that an ICL can be appointed in all matters in which it would be beneficial to the child to do so.

There would also be benefit in reviewing, with the intention of updating and legislating, the matters in which an ICL will be appointed. Currently, ICL appointments are guided by a decision of the Family Court of Australia that dates back to 1994. A review will ensure that ICLs are appointed in the matters that would benefit most from an independent source of information on which to base decisions.

The section 11F (family consultant) report is also a valuable source of information in judicial decision-making. At present, not all matters that would benefit from a report are able to access the section 11F (family consultant) report process. We recommend increased resourcing of the report process to enable timelier and better targeted use of these reports.

Finally, the court may, on its own initiative issue a subpoena for production, to give evidence, or for production and to give evidence. This is an additional tool that is available to the court to ensure all the relevant information is available when making a decision. A practice direction would support greater use of the subpoena power to access information that may be of benefit in the decision-making process when neither party nor the ICL have provided or subpoenaed the information themselves.

## **Supporting Parents to Address Risk Factors**

In VLA's experience, families with complex needs are presenting to the Family Law Courts with a cluster of legal and non-legal problems. The non-legal issues are a factor in the court's assessment of a child's safety. If parents are supported to address both legal and non-legal issues, our experience is that a family's interaction with the family law system is more likely to lead to a lasting and meaningful difference in the lives of the children.

There is benefit in examining which programs are currently working well (and as such could benefit from further investment to expand access) and initiatives that have been tried in the past, and exploring new ways in which the family law system can better coordinate with non-legal service providers to assist more families to engage with such services.

A co-location model at the Family Law Courts could assist with both the early identification of non-legal issues and appropriate referrals to non-legal support services. Our experience with the Family Violence Court Division in Victoria suggests this is a model worthy of consideration.

Greater case management through case coordinators – to assist families to continue engaging with non-legal support services once family law orders are made and to coordinate the multiple service providers assisting the family – is also an option to consider piloting and evaluating.

Finally, timely engagement with non-legal support services is reliant on the availability of places to meet demand. In VLA's experience, demand for non-legal support services exceeds the places available. A particular issue is the lack of suitable non-legal services to persons from culturally and linguistically diverse communities and non-English speaking backgrounds as well as parents with special needs.

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## Summary of Recommendations

- Establish a database of orders that provides a single repository of family law, family violence and child protection orders that can be accessed by each of the relevant courts (the Family Law Courts, Magistrates' Courts and Children's Court) and by state child protection authorities.
- Consider expansion of the Co-Located Department of Health and Human Services (DHHS) Liaison Officers program.
- Conduct further research to examine the existence of information gaps between a party's affidavit material and disclosures at Family Dispute Resolution (FDR).
- If changes to the section 60I certificate are to be explored, that consideration be given to how any changes may inadvertently elevate the risk for a party to a matter and the children.
- Further and ongoing training for judicial officers in identifying risk factors to be considered at the early stages of a parenting dispute matter.
- A change in court practices so that parties may be questioned at an earlier stage about risk factors that may inform the making of an interim family law order.
- Increase resourcing to the Family Law Courts so that judicial officers are provided with adequate time to prepare for the first return date and interim hearings.
- Increase investment in the independent children's lawyers (ICL) function so that an ICL can be appointed in all matters in which it would be beneficial to the child to do so.
- Review, with the intention of updating and legislating, the framework for the appointment of ICLs.
- Increase resourcing of the section 11F (family consultant) report process to enable timelier and targeted use of section 11F (family consultant) reports.
- Issue a practice direction that supports greater use of the subpoena power to access information that may be of benefit in the decision-making process when neither party nor the ICL have provided or subpoenaed the information themselves.
- Assess the non-legal support programs that currently assist families in the family law system, and past initiatives, with the view to supporting further investment in successful programs in order to expand access.
- Explore a co-location model for non-legal service providers at the Family Law Courts, to assist more families to engage with these services.
- Consider piloting and evaluating a case coordinator model of non-legal service delivery at the Family Law Courts.
- Examine the accessibility of non-legal support services regularly used by families presenting with complex needs and the timeliness with which parents can engage with services.

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## Introduction

Victoria Legal Aid's (VLA) first submission to the Family Law Council welcomed the Council's investigation into ways in which the family law system can better support families with complex needs. The Terms of Reference are an important recognition of the persistent challenges for families arising from the intersection of the family law, family violence and child protection jurisdictions.

As noted in our first submission, improving the role of the legal system in protecting children in families with complex needs is not a new issue. Previous research has suggested that if policy makers were to re-imagine the legal system in Australia, it would be in the best interests of children and families, and more resource efficient, to establish a unified court that could address family law, family violence and child protection matters.

VLA's practice experience suggests that while most families do not experience legal problems that cut across the jurisdictions, a significant number do, and these are often families with complex needs and vulnerable children. For this reason, VLA supports the principle of a unified court to comprehensively address the challenges experienced by families with complex needs. Recognising the constitutional challenges in establishing a unified court, the significant change that this would encompass, and absent a reform agenda to deliver a unified court, VLA continues to recommend a strategy to drive changes that improve the system for families with complex needs short of establishing a unified court.

Similar to the approach taken in previous law reform and policy developments designed to improve the interface between the multiple jurisdictions, VLA's experience suggests that more can be done to consistently support families with complex needs short of establishing a unified court.

This submission seeks to build on the recommendations in our first submission. We propose an additional suite of recommendations informed by VLA's experience assisting clients with parenting disputes where family dispute resolution is attempted and additional non-legal supports would assist families presenting with complex needs.

These recommendations take into account the tension within family law. The *Family Law Act 1975* (Cth) (the Act) regulates private disputes which traditionally rely on parties to provide the 'relevant' information to judicial officers to make decisions about the care arrangements for children.

Yet, the legislative framework overlays private law with a requirement that the Family Law Courts make decisions with regard to the best interests of the child as the paramount consideration.<sup>1</sup> There may be a challenge in doing so when relying on the parties to provide the best available information.

This submission considers the assessment and response to risk as a family progresses through court. It then considers how the family law system can better coordinate with non-legal service providers to assist parties seeking to address the underlying issues that impact on a child's safety.

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<sup>1</sup> *Family Law Act 1975* (Cth), section 60CA.

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## The Interface between Family Dispute Resolution and the Family Law Courts

Section 60I of the Act requires parties to a parenting dispute to make a genuine effort to resolve a dispute by family dispute resolution (FDR) before seeking recourse before the Family Law Courts.

VLA established Roundtable Dispute Management, now VLA's Family Dispute Resolution Service (FDRS), in 2004, before the introduction of this legislative requirement. FDRS provides timely, legally-assisted family dispute resolution services to vulnerable people. It assists separated families to act in the best interests of their children by providing case management, which involves risk assessment; preparation and referrals to legal and non-legal support services; and, if assessed appropriate, by holding conferences facilitated by experienced chairpersons.

The FDRS case management and conferencing procedures are well regarded. FDRS case managers conduct a screening interview with all parties to a dispute and use the information gathered to complete a risk assessment to determine whether it is appropriate for a conference to take place. In making an assessment, the case manager considers the matters set out in regulation 25(2) of the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth), including any history of family violence and the risk that a child may suffer abuse.

FDRS provides a legally-assisted model of FDR. At least one party is legally aided throughout the dispute resolution process and all parties are encouraged to be legally represented. In cases where an invited party is ineligible for a grant of aid and is unable to afford a private lawyer, FDRS may arrange a lawyer from the Family Law Legal Service<sup>2</sup> to represent a party. Legal representation in FDR helps address power imbalances for those in dispute and give parents knowledge about the law and likely court outcomes so that they can make decisions that are in the best interests of their children.

Legal representation of parties, combined with individual case management for clients and experienced chairpersons facilitating conferences, enables VLA to conduct FDR in circumstances where other FDR services might determine it inappropriate to proceed. In 2014-15, VLA delivered 1,087 FDR conferences with a settlement rate of 86 per cent.<sup>3</sup> Most conferences occur at an early stage in a family law matter, avoiding the need to go to court. However, in appropriate matters conferences occur during court proceedings (called litigation intervention conferences) to help settle the dispute before a final hearing.

VLA's Commonwealth family law grant eligibility guidelines encourage early resolution of matters through dispute resolution. As such, VLA's family lawyers also have extensive experience supporting and representing clients at FDR.

The combined experience of delivering FDR services, legal advice and representation for parents engaging in FDR informs the following discussion of information sharing between FDR processes and the Family Law Courts, and our recommendations.

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<sup>2</sup> The Family Law Legal Service is a related organisation of the Women's Legal Service Victoria. The Family Law Legal Service is currently involved in providing duty lawyer-type services at VLA FRDS.

<sup>3</sup> Based on settlement of some or all issues in a dispute on an interim or ongoing basis.

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## Family Dispute Resolution

FDR is a qualitatively different process from court. It supports parties to attempt to resolve their own parenting dispute.

### Case Study

A FDR conference involved the parents of three children all under seven years of age. Both parents presented as low functioning and illiterate.

The children had been living with the mother since separation, until they were placed with the father due to concerns about the behaviour of the maternal grandfather (a convicted sex offender) with whom the mother and children lived.

The mother had misgivings about the father's drug use, however agreed to the arrangement at the time as she felt she had no choice given the serious concerns regarding the children's safety in the maternal grandfather's house and her inability to secure alternative accommodation. The Victorian child protection authority, the Department of Health and Human Services (DHHS),<sup>4</sup> had been involved with the family and had directed the parties not to bring the children into contact with the maternal grandfather.

In addition, both parties indicated that the oldest child had been diagnosed with a learning disability. There were problems with his behaviour, particularly his aggression towards the younger siblings. Both parents found this behaviour difficult to manage.

During the FDRS screening interview with a case manager, the mother indicated she was finding it difficult to secure the services of a lawyer. The case manager took additional steps to link the mother with a lawyer so that the mother could obtain legal advice prior to the conference and be represented at the conference.

In the conference, the parties were supported and assisted by their lawyers and the chairperson to work towards a child-focused parenting plan that allowed for the children to continue living with the father while maintaining frequent contact with the mother until such time as she secured suitable accommodation. It was agreed that when this occurred, the children's time with their mother would be extended to include overnight time.

There was further agreement that a second conference would take place when the mother was able to secure her own accommodation.

Pending the second conference, the parties agreed to arrange for counselling and other professional assistance for the oldest child. The father agreed to contact services with a view to ceasing his drug use, thereby addressing the mother's concerns.

The case manager provided the appropriate referrals to the parents to enable them to meet their obligations under the agreement. In addition, the case manager supported the parties to engage with these services.

Overall, the FDRS process enabled the parents to resolve their matter by agreement without resorting to litigation. Their agreement was child-focused and helped to preserve their goodwill towards each other.

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<sup>4</sup> As VLA's practice experience is within Victoria, this submission refers to the Department of Health and Human Services (DHHS) as the relevant child protection authority involved with families with complex needs.

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From VLA's perspective, a primary purpose of the FDR assessment process is to determine the suitability of FDR as a tool for resolving a particular matter. This is quite different from eliciting information to use in actually determining the matter.

When FDR is unsuccessful, decision-making shifts from the parties to the court. The Family Law Courts consider the evidence and determine an arrangement that is in the best interests of the child. The proposals and the preparedness of parents to explore those proposals are not relevant to this decision-making process.

## **Assessing the Suitability of Family Dispute Resolution**

In the VLA FDRS assessment process, parties are encouraged to raise concerns about their emotional or physical safety with their case manager. Where risks are identified, the information obtained determines the appropriateness of progressing with FDR and if so, the safety planning required to enable FDR to progress safely.

Safety planning occurs when the case manager identifies potential risk issues for a client during or after a conference or identifies that a party may be at risk if their matter is assessed as unsuitable for an FDRS conference. The case manager will work with the affected party to provide information and resources so that the party can make a decision about their physical and emotional safety. The case manager will also provide relevant referrals to external organisations and develop a practical plan that the affected party can implement should they feel their safety is at risk.

As part of safety planning, the case manager will determine a suitable conference. For example, where risk issues are identified, but the matter is still suitable to proceed, a shuttle conference can be arranged. A shuttle conference is where parties do not have to see or speak to the other person directly. The FDR chairperson speaks to each party and their lawyer separately. Shuttle conferences can occur in the same building where each of the parties have a safe room in a separate area, or they can occur over the telephone. Other measures can also be implemented to ensure the safety of the parties arriving and leaving the conference venue. For example, the case manager, in consultation with the affected person, can arrange separate arrival and departure times or for the party to be escorted to and from the conference by their lawyer or a trusted third party.

## **Confidentiality and Inadmissibility**

In some circumstances, the confidentiality of the FDR process may encourage parties to disclose information they have not previously felt comfortable disclosing. For example, during the assessment interview, a party will often seek assurances that the information collected is protected by confidentiality.

### **Case Study**

During the screening interview conducted by the VLA FDRS case manager, the mother disclosed severe family violence. After spending some time on the phone talking about the history of family violence with the case manager, the mother again asked whether the conversation was confidential.

After reassuring her of the confidentiality of the process, the mother disclosed that in addition to the physical, verbal and emotional abuse (which was to be included in her affidavit), she had been sexually assaulted by the father of the children. The mother stated she was receiving assistance from the Centre Against Sexual Assault but was not ready to report the sexual assault to the police.

The matter was assessed as not suitable for FDRS and a section 60I certificate issued.

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These disclosures are essential to the FDRS risk assessment process. We would caution against the recommendation by some stakeholders to amend sections 10H and 10J of the *Family Law Act 1975* (Cth), which set out the current confidentiality and inadmissibility provisions. Changes may result in parties failing to raise safety concerns. This could expose parties and their children to further risk of harm if the matter progresses to FDR when it is unsafe or otherwise inappropriate to do so.

The ability of parents to speak frankly is also a prerequisite for resolving disputes through mediation. Our practice experience suggests that parents are more inclined to engage in negotiations when they are confident that their openness to settle for something different than their original position will not be put before the court if FDR does not resolve the matter.

Any consideration of changes to confidentiality and inadmissibility provisions should, therefore, be alive to the unintended impact on the safety of parents and children.

This is particularly so given the current exemptions to the confidentiality and inadmissibility of FDR are actively used, and alternative measures could also be adopted to ensure relevant information comes to the early attention of the court. This is discussed below.

### **Current Use of Exemptions to Confidentiality and Inadmissibility of FDR**

Where the information disclosed suggests a risk to the child or a parent, and would be of benefit to the decision making by a judicial officer, existing VLA FDRS policies and procedures on responding to disclosures assist to make this information available to the court.

In matters where the information is assessed as sufficiently serious to require DHHS notification, VLA either encourages and supports parties to act protectively by notifying the DHHS, or otherwise makes a notification as required by law.

#### **Case Study**

VLA FDRS was assessing a matter for conference. The parents had one child who at various times had resided with both their mother and their father.

During the father's assessment interview with an FDRS case manager, he disclosed that he had recently had a significant seizure at home while his child – a ten year old diagnosed with autism – was in his care. The father's time with the child each weekend had been occurring unsupervised. After some prompting by the case manager, the father suggested in rather vague terms that the seizure may have been drug induced.

The father fell as a result of the seizure and significantly injured his head. This was more serious given that he had undergone a recent operation. The parents provided mixed reports as to the effect and the impact on the father's cognitive function.

When the case manager spoke to the mother it became clear the father had a history of substance abuse and had started using heroin again.

The case manager was concerned that the father may be drug affected during the child's visits given his history and also the recent fall. The mother had significant concerns and yet these concerns were not reflected in her proposal for care arrangements going forward.

The case manager told the mother that a notification may need to be made to the DHHS and encouraged her to contact the DHHS herself to make them aware of her concerns. In doing so, the

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case manager sought to support the mother to act protectively. The mother agreed to do so and made contact with the DHHS.

### **Case Study**

Three children had been living with their mother at the maternal grandmother's house since the parents' separation.

During the VLA FDRS assessment interview, the mother disclosed a history of family violence spanning the eleven year relationship. The father used physical violence against her and did so in front of the children. The mother had not previously disclosed the violence, preferring to deal with it privately – including by encouraging the father to attend a men's behaviour change program.

There were current family violence intervention orders (cross applications) in place. The order against the father included the children as affected family members. Both parents also had a history of drug use, with the children in the house.

The interview raised concerns about ongoing drug use by both parents and the likely harm caused to the mother and children by the father's violence. The case manager suggested to the mother that she may be in a better position to support her children if she felt supported herself. The case manager provided information about the supports available from various agencies, including the DHHS.

The mother was very receptive, and agreed to contact the DHHS herself and to update the case manager upon doing so. On the following day, the mother advised that she had indeed made the call to DHHS, and was being referred to a case worker.

In matters where the parent will not notify the DHHS despite encouragement to do so, the situation enlivens obligations under section 67ZA and considerations under section 10H of the Act. Section 67ZA creates an obligation on family dispute resolution practitioners to notify the relevant child welfare authority where, on reasonable grounds, the practitioner suspects that a child has been abused or is at risk of being abused. Under section 10H(4), a family dispute resolution practitioner may disclose a communication if the practitioner reasonably believes that the disclosure is necessary in response to the risks listed in section 10H(4) of the Act.

VLA FDRS advises parties of the exceptions to confidentiality and inadmissibility at the beginning of the FDR process and during the FDR conference itself, and will invoke the exceptions when necessary.

### **Case Study**

The parenting dispute concerned two children, aged seven and eleven, residing with their father. The main issue in dispute was the amount of time their mother was to spend with the children.

During the case manager's screening interview with the mother, the mother expressed concern that the children were being physically abused by their father. The mother said that she had seen the children covered in bruises and that the children had told her that the father physically assaults them on a regular basis.

The mother had not notified the DHHS and was unwilling to contact the DHHS at this time as she was scared the father would harm her if she made a notification.

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The case manager consulted with the mother's lawyer and the independent children's lawyer appointed in the matter. They were both unaware of the mother's concerns and were not able to provide the case manager with further information.

A formal notification was made to the DHHS in accordance with section 67ZA(2). In addition, a warm referral was made for the mother to a family violence support and counselling service.

Where the DHHS is notified (whether or not it then investigates or substantiates the risk), information about possible risk would be available to the court (even if not included in affidavit materials) if our previous recommendations on improved information sharing between the Family Law Courts and the DHHS were adopted.

In particular, greater use of the Co-Located DHHS Liaison Officers (currently located at the Melbourne and Dandenong registries of the Family Law Courts in Victoria) would provide information as to when the DHHS has had some involvement with a particular family or child. As proposed in our first submission, a new court application could trigger the sharing of information.

VLA's recommendation in its first submission to establish a single database of family court, family violence and child protection orders and proceedings on foot that can be accessed by each court registry of the Family Law Courts would also assist with better identification of risk at the first return date. A check of the database for previous child protection involvement with the family or a family violence intervention order against one of the parties would be an indicator of possible risk.

#### **Recommendations:**

- Establish a database of orders that provides a single repository of family law, family violence and child protection orders that can be accessed by each of the relevant courts (the Family Law Courts, Magistrates' Courts and Children's Court) and by state child protection authorities
- Consider expansion of the Co-Located DHHS Liaison Officers program.

#### **Other access to information disclosed at FDR**

Existing disclosure practices (supplemented by the above recommendations) do not address the scenario where information is disclosed at FDR but does not reach the threshold for notifying the DHHS or enlivening the exemptions to confidentiality.<sup>5</sup>

In this scenario, the challenge for the Family Law Courts at the early stage of proceedings has been characterised as not a lack of better information to inform risk, but rather the availability of that information to the courts in a timely and efficient manner.<sup>6</sup>

We would expect that information disclosed during the FDR assessment process is usually included in a party's affidavit material if the matter proceeds to court. However, reliance on affidavits from the parties, a notice of risk and a section 60I certificate may in some circumstances result in an incomplete picture of the issues at the first return date and at the interim hearing stage.

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<sup>5</sup> In this scenario, VLA will refer parties to Child FIRST for support. When doing so, we advise families that Child FIRST work alongside the DHHS and will make a notification if required.

<sup>6</sup> Dr. T. Altobelii and Chief Justice Bryant, 'Has Confidentiality in Family Dispute Resolution Reached its Use By Date', (Speech delivered at the Seen and Heard: Children and the Courts Conference, Canberra, 7-8 February 2015).

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The extent of this potential problem remains unclear, both in terms of the information gap between FDR and the court process and the frequency with which it occurs. There would be benefit in further research to explore whether there is in fact an information gap between what is provided during the assessment process in FDR services and the information included in a party's affidavit and notice of risk documents. This would provide a helpful evidence base to inform policy decisions on the issue of confidentiality in FDR.

It is also important to note, however, that the information provided by a parent during FDR is not proof that there is a risk to the child. VLA's FDRS does not test the veracity of information provided by parties.<sup>7</sup> We would therefore caution against reliance on the information provided (if confidentiality provisions were to be amended) as the best available evidence when the court is making a decision in the early stages of a matter.

Alternative measures could be adopted to assist the Family Law Courts to elicit relevant information earlier, negating the need to change the confidentiality and inadmissibility provisions relating to FDR. This would assist the Family Law Courts while maintaining the confidentiality of the FDR process, which in our experience is essential for delivery of a safe and effective FDR service. These alternative measures include:

- Further and ongoing training for judicial officers in identifying and appropriately responding to risk factors would assist with decision-making at the early stages of proceedings.
- Increased resourcing of the Family Law Courts to provide judicial officers with adequate time to screen court materials for risk factors prior to the first return date.
- A change in court practice (which would also need to be adequately resourced) to enable judicial officers to question parties at an early stage where risk factors have been identified but the judicial officer would benefit from further information in order to have greater confidence in the appropriateness of the interim order being made.

Previous research has explored changes to the section 60I certificate to better assist with risk identification at the first return date.<sup>8</sup> In some respects, the issuing of a section 60I certificate because the FDR practitioner is of the view that it would not be appropriate to conduct FDR already goes some way in doing this. A certificate on this ground may, however, be issued for a range of reasons. As in the scenario above, there may be significant concerns about the history of family violence. It may, though, be issued due to concerns about a parent's capacity to make child-focused decisions.

If the Council is to explore any changes to the certificate, consideration would need to be given to how any changes may inadvertently elevate the risk for a party to a matter (and the children) who is a victim of family violence or undermine a party's willingness to disclose family violence due to fear of this being signalled through the issuing of a certificate on this ground. The Australian Law Reform Commission (ALRC) has considered this issue and has recommended that changes not be made to

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<sup>7</sup> Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A national legal response* (ALRC Report 114, ALRC and NSWLRC, October 2010), 1039.

<sup>8</sup> See, for example, R. Chisholm, *Information Sharing and Confidentiality: Issues in Family Law and Child Protection Law* (Paper prepared for the Seen and heard: Children and the Courts Conference, Canberra, 7-8 February 2015).

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the certificate for these reasons.<sup>9</sup> The ALRC is also of the view that changes to the certificate would not negate the need for ongoing screening through subsequent legal proceedings.<sup>10</sup>

The measures discussed above (including greater information from the DHHS) would improve the information available to the court at the first return date without undermining the ability of FDR service providers to assess risk and safety plans so that parties are not participating in FDR where it is not appropriate or safe to do so. Further measures to assist the Family Law Courts at later stages of proceedings are also discussed further below in this submission.

### **Recommendations:**

- Conduct further research to examine the existence of information gaps between a party's affidavit material and disclosures at FDR.
- If changes to the section 60I certificate are to be explored, that consideration be given to how any changes may inadvertently elevate the risk for a party to a matter and the children.
- Further and ongoing training for judicial officers in identifying risk factors to be considered at the early stages of a parenting dispute matter.
- A change in court practices so that parties may be questioned at an earlier stage about risk factors that may inform the making of an interim family law order.
- Increase resourcing to the Family Law Courts so that judicial officers are provided with adequate time to prepare for the first return date and interim hearings.

## **Ongoing and Timely Assessment of Risk**

A distinguishing feature of the state child protection jurisdiction, when compared with the family law jurisdiction, is the role of an investigatory body (the DHHS) to identify risks to a child. The absence of a similar body in the family law system highlights the different approaches in public law and private law. Discussions on the benefits of establishing an investigatory body or service akin to that at the state level in the family law jurisdiction reflect the tension in adjudicating private law disputes between two parties where decision making requires paramount consideration of the best interests of a third party, the child.

It is essential that judicial officers in parenting disputes are making evidence-based decisions based on all the relevant and available information regarding the best interests of a child.

Rather than establishing an additional mechanism (such as a federal investigatory service), we believe that existing mechanisms in the family law system can assist in uncovering this information, supplementing the information provided by the parties to the dispute. In particular, we propose greater use of independent children's lawyers (ICLs), timely use of section 11F (family consultant) reports, and more regular use of subpoena powers by judicial officers. These steps can be taken early in the life of a proceeding and would better assist decision making at the interim hearing stage.

Additional resources would need to be allocated to expand the use of existing mechanisms. However, it is likely that introducing additional mechanisms such as a federal investigatory service would require even greater additional resources.

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<sup>9</sup> Australian Law Reform Commission and NSW Law Reform Commission, above n 7, 1052.

<sup>10</sup> Ibid, 1051.

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## Independent Children's Lawyers

ICLs assist judicial officers in Family Law Court proceedings to make decisions based on the best available evidence and in the child's best interests where a child is at risk of harm due to the conduct of one or both parents.

The role of the ICL is guided by the Act and the *Guidelines for Independent Children's Lawyers*.<sup>11</sup> Of relevance to this discussion is the role of the ICL under the Act to ensure matters relating to the child are properly drawn to the Court's attention. In addition, the *Guidelines for Independent Children's Lawyers* require the ICL to bring to the attention of the Court any facts which, when considered in context, seriously call into question the advisability of any agreed settlement.

In addition to seeking information from the DHHS and the police, for example, an ICL can also provide information to the Court on the non-legal support services a parent may be accessing outside the family law system (for example, drug and alcohol counselling or a men's behaviour change program). Parties will often provide this information to the court themselves, particularly where it is of benefit to their position. Where information about a parent's engagement with a support service may be of use to decisions in the best interests of the child but is not provided by a party to the dispute, it would be a significant shift in policy to require these services to provide information directly to the court. ICLs currently provide this information to the court.

In fulfilling these obligations, ICLs already provide a service to the court akin to an investigatory body.

### Case Study

An ICL was appointed in a parenting dispute over two children, a baby and a young teenager. Both children lived with their mother. Their father lived overseas and the only contact details for him were an email address and a telephone number.

The mother alleged a history of family violence but was reluctant to file detailed material on the alleged family violence. While the father indicated that he intended to oppose her application for parenting orders, the father did not file any material in response to the mother's allegations of family violence.

To assist the court to consider the issue of family violence, the ICL subpoenaed police documents which ultimately corroborated the mother's allegations. The ICL also liaised with the DHHS to check if any notifications had been made or investigations undertaken, of which there were neither.

The data shows that ICLs have been increasingly appointed to assist the Family Law Courts in this way. In 2004-5, an ICL was appointed in approximately one-fifth of parenting matters. This jumped to approximately one-third of matters in 2008-09.<sup>12</sup>

Legal Aid Commissions do not necessarily provide a grant of aid for an ICL in all matters where one is appointed, although the majority of ICL appointments are legally aided. It is VLA policy, for

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<sup>11</sup> Family Court of Australia, *Guidelines for Independent Children's Lawyers* (2013) <<https://www.law.unimelb.edu.au/files/dmfile/FinalOnlinePDF-2012Reprint.pdf>>.

<sup>12</sup> R. Kaspiew et al, 'Independent Children's Lawyers Study' (Final Report, Australian Institute of Family Studies, May 2013).

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example, to provide a grant of aid for an ICL where one is appointed by the court on the basis that one or more of the following three *Re K*<sup>13</sup> factors are present:

- Allegations of physical, sexual or psychological abuse that apparently have/have not been reported to the state welfare authorities and the police; or
- The child is allegedly alienated from one or both parents; or
- There are issues of significant medical or psychological illness or personality disorder in relation to either party or any other person having significant contact with the child.

The underlying rationale for the current VLA funding settings regarding ICLs is that this appropriately targets funding in a resourced constrained environment to the most difficult parenting dispute matters.

Nevertheless, a large number of matters continue to proceed through the Family Law Courts unassisted by an ICL, despite the facts of the dispute suggesting an ICL would assist judicial decision making.

Given that ICLs identify information that may assist the court in making evidence-based decisions in the best interests of the child, there would be benefit in resourcing the ICL function so that an ICL can be appointed to all matters in which it would be beneficial to do so. This approach also focuses investment in ICLs as a conduit for harnessing existing information, rather than requiring the creation of a new and additional bureaucratic structures, which has been examined previously and is again being explored under this Terms of Reference.

There would also be benefit in reviewing, with the intention of updating and legislating, the matters in which an ICL will be appointed. The *Re K* factors were proposed as guidance in a 1994 decision of the Family Court of Australia. These factors have continued to guide ICL appointments since 1994 without review. In large part, this has focused ICL appointments to the matters that benefit most from an ICL appointment. However, the *Re K* factors, for example, do not refer to family violence. We do not suggest that an ICL should be appointed in all matters where an accusation of family violence is made. This would be inconsistent with the targeting of a limited resource for cases in which the child's best interests truly require separate representation. However, we recommend a process for considering, updating and legislating a framework for the appointment of ICLs to ensure that ICLs are appointed in the matters that would benefit most from an independent source of information on which to base decisions.

#### **Recommendations:**

- Increase investment in the ICL function so that an ICL can be appointed in all matters in which it would be beneficial to the child to do so.
- Review, with the intention of updating and legislating, the framework for the appointment of ICLs.

### **Section 11F (Family Consultant) Reports**

Section 11F (family consultant) reports can provide an additional and important source of information to the Court.

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<sup>13</sup> (1994) FLC 92-416.

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## Case Study

VLA assisted a father in a recovery order application. The mother had entered the family home and removed one of four children from the home during the night. The mother also made very serious allegations of family violence and neglect against the father. It was the mother's view that the remaining three children were at grave risk in their father's care.

The court ordered that all four children and the parents attend a section 11F (family consultant report) appointment as a matter of urgency.

Through this process the children were able to tell the court that it was, in fact, their mother who was violent in the home. The oldest children were able to express their view that they were not ready to spend time with their mother.

The report recommended that the mother attend anger management classes and see a psychologist and that the whole family commence non-reportable family therapy.

The child who was taken by the mother was also returned to the family home and the four children immediately recommenced school; they had not been attending as the father was concerned that the mother would try to take them from the school yard if there were no court orders (the mother had done this previously).

The report process was useful in identifying the issues in dispute, assisting the parties to reach agreement on interim issues and identify appropriate referrals to non-legal support services.

The family acted on the recommended referrals and the case was referred back to the family dispute resolution process, as it had originally by-passed this step due to the urgency of the situation.

While an important mechanism currently available to the Family Law Courts, the section 11F (family consultant) report process is not sufficiently resourced to provide reports in a timely enough fashion for matters that have an element of urgency to them, nor in all the matters that would benefit from a report. At the Melbourne Registry of the Federal Circuit Court, for example, the number of reports that can be ordered each day is capped. This means that families who may benefit from the report process may not be able to engage in it.

The section 11F (family consultant) report is a valuable source of information in judicial decision-making. The process also assists in identifying non-legal supports that would be of benefit to a family. We recommend increased resourcing of the report process to enable timelier and targeted use of the reports in matters where further information would benefit the court, and ultimately the children at the centre of the parenting dispute.

## Recommendations:

- Increase resourcing of the section 11F (family consultant) report process to enable timelier and better targeted use of these reports.

## Subpoena Powers

Under rule 15.17 of the *Family Law Rules 2004*, the court may, on its own initiative, issue a subpoena for production, to give evidence, or for production and to give evidence. It is our understanding that this power is rarely used, yet it is available to judicial officers in situations where decision-making may benefit from information not provided by the parties. At the interim stage, this is an additional tool that is available to the court to ensure all the relevant information is available when making a decision.

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**Recommendations:**

- Issue practice direction that supports greater use of the subpoena power to access information that may be of benefit in the decision-making process when neither party nor the ICL have provided or subpoenaed the information themselves.

## Supporting Parents to Address Risk Factors

Families with complex needs are presenting to the Family Law Courts with a cluster of legal and non-legal problems. The non-legal issues are a factor in the court's assessment of a child's safety.

It is VLA's experience that timely access to non-legal support services can address safety concerns and in turn reduce the issues in dispute and the likelihood of protracted litigation.

### Case Study

VLA first assisted a father from a non-English speaking background when he was responding to a family violence intervention order application in the Magistrates' Court of Victoria. VLA then assisted the father to re-commence time with his eight year old child.

Both the father and mother required an interpreter to engage in court proceedings.

Both parents presented with complex needs. The father presented with an intellectual disability and a drug dependence. The father also lived with, and effectively acted as carer for, the paternal grandmother who had serious mental health issues.

The mother also required supports to ensure the child attended paediatric appointments, was accessing family violence counselling, and was on the waiting list for a post-separation parenting program.

Initially, the father spent supervised time with the child at a children's contact centre.

Since issuing family law proceedings, the father underwent an assessment of his intellectual capacity, received assistance for housing, and completed a men's behaviour change program tailored to his particular needs, drug and alcohol counselling, a post-separation parenting program, and a DHHS Disability Service program assisting people with an intellectual disability to learn how to perform important life skills such as cooking and cleaning.

Both parents have benefited from significant engagement in services for the range of non-legal issues impacting on their capacity to parent. The court process highlighted the non-legal issues impacting on the parenting dispute. Assisted by his lawyer, the father was linked into non-legal support services. This level of engagement would not have been possible without the assistance of the father's lawyer. It has enabled the child to now spend unsupervised time safely with the father.

As noted above, the section 11F report function is a mechanism currently used within the family law system to assist with the identification of non-legal issues and relevant services that may assist the parents (and children) to address those issues. As noted above, however, the section 11F process is not available to all families that would benefit from it.

Furthermore, once referrals are recommended (and in many cases form part of the family law order), many families would benefit from further assistance to identify a relevant service provider, navigate waiting lists, and receive ongoing support to continue participating in a program that is addressing their needs. If parents are supported to address both legal and non-legal issues, in our

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experience a family's interaction with the family law system is more likely to lead to a lasting and meaningful difference in the lives of the children.

## **Models for coordinating non-legal services in the family law system**

Parenting Order Programs (POP) currently assist parents to link in with support services to comply with a family law order and make arrangements with the parent for them to engage in a way that best suits the parent's particular needs.

### **Case Study**

An ICL was appointed in a parenting dispute over a nine-year-old child with autism. There was an alleged history of family violence by the father toward the mother and child. The child had expressed homicidal thoughts toward their father and had attempted suicide on a number of occasions resulting in hospitalisation. The child was seeing a psychiatrist, psychologist, and speech therapist.

The father wanted to spend time with the child despite the child's views towards their father. The child's anxiety levels heightened around court dates due to his views towards his father and his autism.

The parents were linked in with a Parenting Orders Program (POP). As part of that program, the child was linked in with a Supporting Children After Separation Program (SCASP).

The POP worker organised a number of meetings with the ICL, the SCASP worker, the psychiatrist, psychologist, speech therapist, and school principal to coordinate service delivery, share information where appropriate, and tailor service provision to the needs of the child. This provided an opportunity for all service providers to be aware of how court proceedings were progressing so that the care responded to the child's heightened needs around court dates.

The POP was also able to provide support and counselling to the father when he made the decision not to pursue time with the child.

POPs are an example of the important assistance non-legal support services provide to families in the family law system. However, POPs are not available across all of Victoria and are targeted at assisting families only once family law orders are made.

There is benefit in examining which programs are currently working well (and as such could benefit from further investment to expand access) and initiatives that have been tried previously,<sup>14</sup> and exploring new ways in which the family law system can better coordinate with non-legal service providers to assist more families to engage with such services. Families would benefit from assistance both in the early period of family law proceedings and with compliance after family law orders are made.

An alternative model worthy of consideration is the Family Violence Court Division model at the Heidelberg and Ballarat Magistrates' Courts of Victoria. In our experience, the co-location of non-legal specialist services is a particular strength of this divisional court model. It maximises the benefits of the legal intervention by coordinating the justice system's response to a family violence incident with the non-legal response. Applicant and respondent workers at the division court identify the non-legal needs of the respective parties and work with the parties to arrange the appropriate

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<sup>14</sup> See, for example, the Dandenong Project. Federal Magistrates Court of Australia, *Review of the Dandenong Project* (Report, Federal Magistrates Court of Australia, March 2012).

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non-legal supports. For example, support workers link parties into counselling services, men's behaviour change programs, alcohol and drug dependence services, and housing support services. This better supports long-term change by responding to the cluster of issues that a family presents with at court.

A co-location model at the Family Law Courts could greatly assist in facilitating access to non-legal support services for both parents (and for children). Co-located non-legal service providers could assist with both the early identification of non-legal issues (and make the appropriate referrals so that parties being to address the underlying issues that impact on a child's safety) and provide assistance with warm referrals to non-legal services where family law orders require it.

Once family law orders are made, some families would benefit from ongoing support to engage in non-legal support services. One option to consider is the introduction of case coordinators at the court to assist families with complex needs to continue engaging with non-legal support services and coordinate the multiple service providers assisting the family, amongst other case management functions. If this option is to be explored, we would recommend first piloting and evaluating a case management function.

#### **Recommendations:**

- Assess the non-legal support programs that currently assist families in the family law system, and past initiatives, with the view to supporting further investment in successful programs in order to expand access.
- Explore a co-location model for non-legal service providers at the Family Law Courts, to assist more families to engage with such services.
- Consider piloting and evaluating a case coordinator model of non-legal service delivery at the Family Law Courts.

### **Timely Access to Appropriate Non-Legal Support Services**

In VLA's experience, demand for non-legal support services exceeds the places available. In particular, VLA's clients experience long waiting lists for child contact centres, men's behaviour change programs, respite care, housing, drug and alcohol programs, parenting skills programs, and parenting order programs.

Timely engagement with non-legal support services is essential for resolving issues that impact on the safety of children. Where non-legal issues can be addressed, it also reduces the likelihood that the legal dispute becomes protracted. Timely engagement, though, is reliant on the availability of places to meet demand. For example, we understand that places in behaviour change programs in the Frankston catchment for all of 2015 were exhausted by June.

Services also should be available in different languages, delivered in a culturally sensitive way, and accommodate the special needs of parents – for example, parents with acquired brain injuries. Non-legal services should also be available to children and adolescents at the centre of parenting disputes who would benefit from engagement in mental health services.

A particular issue is the suitability of non-legal services to persons from culturally and linguistically diverse communities and non-English speaking backgrounds. There is a lack of programs available to parties to parenting disputes who do not speak English as a first language nor are interpreters available for these parties to participate in mainstream programs.

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## **Case Study**

VLA assisted the father in a parenting dispute in which the mother had made allegations of family violence. The mother was seeking sole parental responsibility for the children.

Due to the seriousness of the allegations, interim family law orders were made for the father to spend supervised time with the children.

The father did not speak English, was a newly arrived migrant and as such presented with little knowledge of the Australian legal system, was socially isolated, and was experiencing financial hardship as his visa did not permit him to work and he was not eligible for Centrelink benefits.

Due to his limited English, the father did not meet the eligibility criteria for access to supervised services at a children's contact centre (the rationale being that without an interpreter, the centre cannot ensure that he is not saying anything inappropriate to the children).

Fortunately, a centre offered him a place in a pilot program which provided parents with three supervised visits with an interpreter present at the cost of the centre. This pilot did not become available until seven months after the interim family law order was made. It was also the first time he had been able to spend time with the children since the mother had initiated proceedings 14 months prior.

After the pilot program finished, however, the father had limited options. The VLA lawyer worked with the father to explore his options. After three months, a family member agreed to supervise the visits, but this arrangement only lasted for four sessions. The Centre was able to arrange four additional visits.

Eighteen months later, the father is seeking to demonstrate to the court that the children are not at risk in his care, but this will be difficult to do given the limited opportunities to spend supervised time with the children.

A parenting dispute with similar facts, but with an English speaking father, would have taken six to eight months to reach the same point in the proceedings.

This lack of appropriate programs creates an access issue for people from a CALD background.

## **Recommendations:**

- Examine the accessibility of non-legal support services regularly used by families presenting with complex needs and the timeliness in which parents can engage with services.