



Women's Legal Services Australia

# Submission to House of Representatives Standing Committee on Social Policy and Legal Affairs

## Submission to the parliamentary inquiry into a better family law system to support and protect those affected by family violence

**Prepared by:**

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White Ribbon Australia

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## **ABOUT WLSA & ACKNOWLEDGMENTS**

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### **About WLSA**

Women's Legal Services Australia (**WLSA**) is a national network of community legal centres specialising in women's legal issues, which work to support, represent and advocate for women to achieve justice in the legal system. We seek to promote a legal system that is safe, supportive, non-discriminatory and responsive to the needs of women. Some of our centres have operated for over 30 years.

Our members provide free and confidential legal information, advice, referral and representation to women across Australia in relation to legal issues arising from relationship breakdown and violence against women. Our legal services are directed to vulnerable and disadvantaged women, most of whom have experienced family violence. Therefore, our primary concern when considering any proposed legal amendments is whether they will make the legal system fairer and safer for our clients – vulnerable women.

Our members' principal areas of legal service work are family violence (family violence intervention orders), family law, child protection and crimes compensation. Our members also deliver training programs and educational workshops to share our expertise regarding effective responses to violence and relationship breakdown.

Finally, both WLSA and its individual member services work to contribute to policy and law reform discussions, primarily focused on family violence, to ensure that the law does not unfairly impact on women experiencing violence and relationship breakdowns. We are informed by a feminist framework that recognises the rights of women as central.

### **Acknowledgments**

Firstly, we acknowledge the family violence victim survivors for whom we work, and in particular the family violence survivors who have shared their stories in this submission in the hope for positive change.

Secondly, this submission was created with the help and work of many wonderful women. In particular, we thank Estelle Petrie for her research on financial recovery following family violence, the research and editing work of Grace Shaw and Madeleine Barlow, and Emma Smallwood for her excellent report on economic abuse, *Stepping Stones*.

## LIST OF ABBREVIATIONS

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|         |   |
|---------|---|
| AIFS    | Australian Institute of Family Studies          |
| AFM     | Affected Family Member                          |
| ALRC    | Australian Law Reform Commission                |
| BFA     | Binding Financial Agreement                     |
| CALD    | Culturally and Linguistically Diverse           |
| CFDR    | Co-ordinated Family Dispute Resolution          |
| COAG    | Council of Australian Governments               |
| CRAF    | Common Risk Assessment Framework                |
| DVO     | Domestic Violence Order                         |
| FCA     | Family Court of Australia                       |
| FCC     | Federal Circuit Court                           |
| FDR     | Family Dispute Resolution                       |
| FLC     | Family Law Council                              |
| FVPLS   | Family Violence Prevention Legal Service        |
| ICL     | Independent Children’s Lawyer                   |
| NSWLRC  | New South Wales Law Reform Commission           |
| LGBTIQ+ | Lesbian Gay Bisexual Transgender Intersex Queer |
| RCFV    | Royal Commission into Family Violence           |
| VLA     | Victoria Legal Aid                              |
| WLSA    | Women’s Legal Services Australia                |
| WLSV    | Women’s Legal Service Victoria                  |

## INTRODUCTION & SUMMARY OF RECOMMENDATIONS

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### Introduction

*...if the family law system is to respond adequately to the high incidence of violence and abuse within separated families, provisions in the Family Law Act which treat family violence as an exception to the norm must be amended. The present treatment of cases involving violence as an exception to the mainstream family law pathway fails to recognise the prevalence and seriousness of violence permeating the family law system, resulting in unsuitable and unsafe parenting outcomes.<sup>1</sup>*

Reform to the *Family Law Act* aimed at improving the response of the family law system to family violence safety risks for children came into effect in June 2012. Until that point, the *Family Law Act* had placed equal importance on promoting a meaningful relationship between a child and both parents and protecting the child from any harm.<sup>2</sup> The Australian Institute of Family Studies (AIFS) 2015 evaluation of the 2012 amendments found that they had largely not achieved their objective of improving safety of the families and children.<sup>3</sup>

The Family Law Council (FLC) recently stated in its 2016 final report on *Families with Complex Needs and the Intersection of Family Law and Child Protection* that over 50% of children's matters in the family law courts involve family violence and other safety concerns for children.<sup>4</sup> In these cases, safety concerns often co-occur with other problematic issues such as substance misuse and parental mental illness.<sup>5</sup> Further, as AIFS identified in its 2015 Evaluation Report, safety risks for children and parents are often not identified within the family law system and so are not responded to.<sup>6</sup>

Given its exposure to families in crisis, one of the key responsibilities of the family law system should be to develop appropriate frameworks to keep women and children safe. To do so, the family law system must place safety and risk at the centre of all practice and decision-making. Currently barriers within the system place the lives of vulnerable children at risk and can re-traumatise women who have been victims of family violence. In order to create a system that places children's safety at its centre, reform must occur at a number of levels.

### References to historical reports and inquiries

Throughout this submission, we will be making frequent reference to previous relevant inquiries and references related to family violence and family law, which include the:

- 2016 FLC Final Report on *Families with Complex Needs and the Intersection of Family Law and Child Protection* (FLC 2016 Final Report);<sup>7</sup>

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<sup>1</sup> Dr Adiva Sifris & Anna Parker, "Family Violence and Family Law: Where to Now?" (2014) 4 *Fam L Rev* 3, 3. Available online at: <https://nicholeslaw.com.au/wp-content/uploads/2014/08/Family-Violence-Article.pdf>

<sup>2</sup> *Family Law Act 1975* (Cth) s 60CC.

<sup>3</sup> Kaspiew, R., Carson, R., Dunstan, J., Qu, L., Horsfall, B., De Maio, J., Moore, S., Moloney, L, Coulson, M & Tayton, S 2015, *Evaluation of the 2012 family violence amendments: synthesis report*, Australian Institute of Family Studies, Melbourne.

<sup>4</sup> FLC Final Report at 22, referring to: R. Kaspiew, R. Carson, J. Dunstan, L. Qu, B. Horsfall, J. De Maio, S. Moore, L. Moloney, M. Coulson and S. Tayton, *Evaluation of the 2012 family violence amendments: Synthesis report* (Australian Institute of Family Studies: 2015), 16-17.

<sup>5</sup> *Ibid.*

<sup>6</sup> Kaspiew et al, *Evaluation of the 2012 family violence amendments: synthesis report*, Australian Institute of Family Studies, Melbourne.

<sup>7</sup> Available online at: <https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Family-with-Complex-Needs-Intersection-of-Family-Law-and-Child-Protection-Systems-Final-Report-Terms-3-4-5.PDF>.

- 2015 FLC Interim Report on *Families with Complex Needs and the Intersection of Family Law and Child Protection (FLC 2015 Interim Report)*;<sup>8</sup>
- 2016 Victorian Royal Commission into Family Violence Report (**2016 RCFV Report**);<sup>9</sup>
- 2015 AIFS evaluation of the 2012 Family Law Act amendments (**2015 AIFS Evaluation Report**);<sup>10</sup>
- 2015 federal Senate Finance and Public Administration References Committee inquiry report titled *Domestic violence in Australia (2015 Senate Inquiry Report)*;<sup>11</sup>
- 2014 Productivity Commission Access to Justice Arrangements Inquiry Report (**2014 Productivity Commission A2J Report**);<sup>12</sup>
- 2010 joint report of the Australian Law Reform Commission (**ALRC**) and NSW Law Reform Commission titled *Family Violence – A National Legal Response (2010 ALRC/NSWLRC Report)*;<sup>13</sup>
- 2009 report of Professor Richard Chisholm titled *Family Courts Violence Review* report (**2009 Chisholm Report**);<sup>14</sup>
- 2009 FLC report titled *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues (2009 FLC Report)*.<sup>15</sup>

## SUMMARY OF RECOMMENDATIONS

### Early risk assessment

**Recommendation 1:** That the Australian Government, working with state and territory governments through the Council of Australian Governments (**COAG**), develop a national risk assessment framework for use by the family law court registry. We recommend that the Australian Government consider adopting an established state and territory risk assessment framework, i.e. the Victorian Common Risk Assessment Framework (**CRAF**) or the NSW Domestic Violence Assessment Tool, and that any national risk assessment framework should be:

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<sup>8</sup> Available online at: <https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Families-with-Complex-Needs-Intersection-of-Family-Law-and-Child-Protection-Systems%E2%80%93Interim-Report-Terms-1-and-2.pdf>

<sup>9</sup> Available online at: <http://files.rcfv.com.au/Reports/Final/RCFV-All-Volumes.pdf>.

<sup>10</sup> Available online at: <https://aifs.gov.au/publications/evaluation-2012-family-violence-amendments/export>.

<sup>11</sup> Available online at:

[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Finance\\_and\\_Public\\_Administration/Domestic\\_Violence/Report](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/Domestic_Violence/Report)

<sup>12</sup> Available online at: <http://www.pc.gov.au/inquiries/completed/access-justice/report>

<sup>13</sup> Available online at: <http://www.alrc.gov.au/publications/family-violence-national-legal-response-alrc-report-114>

<sup>14</sup> Available online at:

<https://www.ag.gov.au/FamiliesAndMarriage/Families/FamilyViolence/Documents/Family%20Courts%20Violence%20Review.doc>

<sup>15</sup> Available online at:

<https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Improving%20responses%20to%20family%20violence.pdf>.

- Consistent nationally
- Multi-method, multi-informant, while placing particular emphasis on the victim's own assessment of risk
- Culturally sensitive
- Supported by appropriate training

**Recommendation 2:** That the Australian Government, working with state and territory governments through the COAG, develop a risk assessment framework for use by family lawyers and family dispute resolution (**FDR**) practitioners that is consistent with, and/or an adapted version of, the risk framework used by the family court registry.

**Recommendation 3:** That the Australian Government adequately fund training of all family law professionals on this national risk assessment framework, and this includes court registry staff, family violence services, lawyers, FDR practitioners, family report writers, and judicial officers. (See also Recommendations 17 – 21 regarding training below.)

**Recommendation 4:** That the Australian Government amend the *Family Law Act* (and other legislation as required) to require that upon filing of any family law application, the following risk assessment process is undertaken as soon as practicable:

- That in all cases involving dependent children, a family consultant with specified family violence training who is embedded within the court registry undertake a risk assessment with respect to child safety and provide recommendations in relation to interim care arrangements for children.
- Where family violence is alleged or identified, that a referral of any adult affected family member be made to an embedded family violence support worker within the court registry.
- Where the affected family member is Aboriginal and/or Torres Strait Islander, a referral should be made to a specialised and culturally safe legal service such as a Family Violence Prevention Legal Service (**FVPLS**) or Aboriginal and Torres Strait Islander Women's Legal Service.
- That following receipt of such a referral, the family violence support worker undertake a risk assessment in relation to the adult affected family member(s), assisting her in preparing a safety plan, and making further referrals as necessary.

**Recommendation 5:** The Australian Government incorporates specialist family violence services into the family law system, and adequately funds these services, by:

- funding family violence services that provide embedded services in state and territory courts to continue to support clients with family violence issues when they move to the family law system to seek parenting or other orders; and/or
- embedding workers from specialist family violence services in the family courts and Family Relationship Centres.



### **Interaction of family law and child protection**

**Recommendation 6:** That the Australian Government encourage state and territory governments through COAG to introduce effective processes whereby where a child protection agency investigates protective concerns, locates a “viable and protective carer” and refers that carer to a family court to apply for a parenting order, the agency should, in appropriate cases:

- provide written information to a family court about the reasons for the referral;
- provide reports and other evidence; or
- intervene in the proceedings.

### **Legal assistance funding**

**Recommendation 7:** That the Australian Government, working together with the state and territory governments, implement recommendation 21.4 of the 2014 Productivity Commission A2J Report (see **Appendix A** for the full text of the recommendation).

In particular, that the Australian, state and territory governments make \$200 million additional annual funding (on 2014 levels) available to all legal assistance services, comprised of: CLCs, including specialist women’s legal services and programs; Family Violence Prevention & Legal Services; Aboriginal and Torres Strait Islander Legal Services; and Legal Aid Commissions.

This increase in funding should comprise specific increases in funding for family law matters.

**Recommendation 8:** That the Australian Government encourage Legal Aid Commissions to amend their funding guidelines in family law to promote greater access to legal aid for women who are victims of family violence.

### **Emphasis of decision-making on safety – not shared parenting**

**Recommendation 9:** Remove the language of “equal shared time”, “substantial and significant time” and “equal shared parental responsibility” from the *Family Law Act* to shift culture and practice towards a greater focus on safety and risk to children.

### **Working with Aboriginal and Torres Strait Islander and CALD clients**

**Recommendation 10:** That the Australian Government implement recommendations 16 and 17 of the 2016 FLC Final Report with respect to improving the family law system for clients from Aboriginal and Torres Strait Islander and Culturally and Linguistically Diverse Backgrounds (see **Appendix A** of this report for full set of these recommendations).

This includes implementing the recommendations from the Family Law Council’s 2012 reports on improving the family law system for clients from Aboriginal and Torres Strait Islander and Culturally and Linguistically Diverse Backgrounds.

### **Legally assisted dispute resolution**

**Recommendation 11:** That the Australian Government implement and fund a national legally assisted family dispute resolution program appropriate for family violence cases that

is supported by specialist family violence lawyers and family violence and trauma informed FDR practitioners. The role out of this program should be preceded by a legal needs analysis, to inform the Australian Government as to the scope of the service required to meet legal need. We further recommend that the Australian Government consider the Victoria Legal Aid Family Dispute Resolution Service and its partnership program with Family Law Legal Service, the Blacktown and Penrith Family Relationship Centres partnership with Women's Legal Service NSW and Western Sydney Community Legal Centre and the Co-ordinated Family Dispute Resolution pilot as three possible models for this program.

### **Self-represented litigants**

**Recommendation 12:** The Australian Government amend the *Family Law Act* to protect vulnerable witnesses from direct cross-examination by an abusive ex-partner, by:

1. Introducing a prohibition against personal cross-examination in matters where family violence is alleged, including:
  - a. Where it has been listed as a factor on the Form 4: Notice of Risk (which should be mandatory in both the FCA and the FCC in all family law initiating applications and responses seeking parenting orders).
  - b. It is alleged through the course of the proceeding.
2. In such cases, the court should order that lawyer (or alternatively an appropriately trained advocate), who is protected from liability, be funded by way of legal aid to act as a "mouthpiece" through which the alleged family violence perpetrator could ask questions of the affected family member in cross-examination.
3. If requested, any self-represented affected family member would also be able to be provided with a lawyer or advocate through which they may ask questions of the alleged perpetrator in cross-examination.
4. Where no lawyer or advocate is available, the judge presiding in the matter has the power to intervene to ask questions of the parties. See for example UK Family Court Revised Draft Practice Direction 12J, paragraph 28.

**Recommendation 13:** That the Australian Government consider amending the *Family Law Act* to prohibit direct cross examination in family law proceedings where the court otherwise determines that the person requires the protection of the court.

### **Financial recovery after family violence**

#### **Recommendation 14**

That the Australian Government amend the *Family Law Act* as follows:

- Amend s 79 to include a new subsection (s79 (4A)), directing the court to have regard to the effects of family violence on both parties' contributions. This would require the court to take family violence into account as a negative contribution by the perpetrator in addition to the requirement in Kennon's case to recognise where family violence has impacted on a victim's capacity to make contributions and to value those missed contributions.

- Amend s 75(2) to include a new paragraph in the list of factors the court considers when deciding an application for spousal maintenance. It would direct courts to consider the effect of family violence perpetrated in the relationship by either party on the financial circumstances of the parties.

**Recommendation 15:** The Australian Government amend the *Family Law Act* to include a requirement for an early resolution process in small claim property matters. This process should be a case management process upon application to the Court for a property settlement rather than a pre-filing requirement.

**Recommendation 16:** The Australian Government conduct a comprehensive audit of the Family Court of Australia (**FCA**) and the Federal Circuit Court (**FCC**) family law processes, in relation to both parenting and property disputes, with a view to increasing accessibility of the family law system. Such a review should include, as a minimum, consideration of:

- the application requirements and form of evidence currently required by the Court to determine a small property division
- the adequacy of current disclosure mechanisms to allow the Court to obtain the necessary financial information required to make a just and equitable property division
- the current fees charged by the Family Court and the Federal Circuit Court

#### **Training - judicial officers & court staff**

**Recommendation 17:** That the Australian Government funds, and together with the Judicial College of Australia develops, a continuing joint professional development program for judicial officers from the family courts and state and territory courts in which judicial officers preside over matters involving family violence. We recommend that this training package includes content on family violence (including recognising dynamics of family violence and unconscious bias), cultural competency, working with victims of trauma, family law (for state and territory judges) and child protection.

**Recommendation 18:** We recommend the Australian Government adopt recommendations 215 and 216 of the 2016 RCFV Report such that (215) material on the dynamics of family violence be included in general judicial officer training and (216) the comprehensive family violence learning and development program for court staff and magistrates in Victoria continue to be developed and expanded Australia-wide.

#### **Training - family law professionals (including ICLs and FDR practitioners)**

**Recommendation 19:** That the Australian Government fund and coordinate the development of a national, comprehensive family violence training program for family law legal professionals (including ICLs and FDR practitioners) and work with state and territory law institutes and bar associations to roll out the training.

#### **Training - re child protection and cultural competency**

**Recommendation 20:** The training modules for family law professionals referred to in Recommendations 17 to 19 above, and Recommendation 21 below include training on:

- The intersection of family law, child protection and family violence.
- Cultural competency in relation to working with Aboriginal and Torres Strait Islander clients, including training that builds an understanding of the multiple and diverse factors contributing to the high levels of family violence in Aboriginal communities, and an understanding of Aboriginal and Torres Strait Islander family structures and child rearing practices.
- Cultural competency in relation to working with clients of a culturally or linguistically diverse background (including working with interpreters).
- Working with Lesbian Gay Bisexual Transgender Intersex Queer (**LGBTIQ+**) families.
- Working with people with a disability.
- Working with vulnerable clients.
- Trauma-informed practice.

### **Family consultants**

**Recommendation 21:** The Australian Government, through the Attorney General's Department and in consultation with family violence and family law experts, coordinate the development of consistent training, an accreditation process and minimum standards for family consultants. In addition, that the training and accreditation process and minimum standards include a focus on capabilities in relation to understanding and identifying family violence, cultural competency and trauma-informed practice.

**Recommendation 22:** That Aboriginal and Torres Strait Islander litigants have access to adequately trained Aboriginal and Torres Strait Islander Family Consultants, and that adequate cultural awareness training be provided to all non-Aboriginal family consultants.

**Recommendation 23:** The Australian Government establish an oversight mechanism and complaints process to monitor and review the conduct of family consultants.

### **Administration & enforcement of the national DVO scheme**

**Recommendation 24:** That the Australian Government, through COAG, ensure that the national DVO scheme does not commence unless and until there are adequate measures in place to ensure police in all jurisdictions can access necessary information about DVOs 24 hours a day.

**Recommendation 25:** That the Australian Government and COAG keep relevant stakeholders, including the family violence and legal assistance sectors, updated on progress of roll out of the National DVO Scheme and changes in timeframes.

**Recommendation 26:** That the Australian Government fund training for state and territory police officers on family law and family violence to ensure there is a consistent national understanding of these matters. Training should include the formation of a national risk assessment and response framework that can be used by police nationally when responding to a family violence incident. Such a framework could, for example, draw upon the Victorian CRAF or the NSW DVSAT.

**Recommendation 27:** That the Australian Government work through COAG to encourage all state and territory police to introduce and enact consistent (or alternatively one national) *Code of Practice for the Investigation of Family Violence*, as in Victoria. That that/those Code(s) of Practice require that police receive appropriate and effective cultural awareness training for work with both Aboriginal and Torres Strait Islander and CALD communities.

**Recommendation 28:** That the Australian Government clarify the interaction between the criminalisation of breaches of family law safety injunctions and the proposed national DVO scheme.

## **1 – EARLY RISK IDENTIFICATION & ASSESSMENT, SUPPORT SERVICES & SAFETY**

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### **Early identification and risk assessment**

#### Background

There is a clear ethical and economic imperative to support families in the family law system to reduce family violence and other safety risks. Firstly, the presence of family violence increases the likelihood the family will need to use the family law system, and a more intensive and lengthy use of that system. Research has found that of the relatively small percentage of families that require the extensive use of mediation or courts to settle their disputes upon separation,<sup>16</sup> many have complex and co-occurring needs including family violence, child safety concerns, substance misuse and parental mental illness.<sup>17</sup> Unsurprisingly, parents who report a history of family violence or the presence of ongoing safety concerns take longer to sort out their arrangements.<sup>18</sup>

The identification of risks associated with family violence and other safety concerns is the first step toward supporting families to reduce or at least manage these risks. It could allow referrals to be made to appropriate support services, and could assist the court to put in place measures to ensure that the legal process is conducted as safely as possible. These factors could result in the legal process being more effective in assisting families to resolve their disputes earlier, reducing both the stress of litigation for the parties and the reliance on court resources. One family violence survivor who contacted a member service, “Rita” (not her real name) made the following comment about early risk assessment:

*Being assessed by a trained family violence expert before [going on with legal proceedings] ... would have potentially transformed my experience and thus could have completely changed the outcome of the interim orders.*

Yet as the Victorian Royal Commission into Family Violence (**RCFV**) noted in its 2016 report, “there is not a common risk assessment approach used across the federal family courts and state family violence system.”<sup>19</sup> The RCFV also noted that it had received submissions that highlighted the “inconsistent use of the screening processes for family dispute resolution between practitioners and that there is an emphasis on screening for physical violence over psychological abuse.”<sup>20</sup>

This is consistent with the 2015 AIFS Evaluation Report, which found that:

- After the 2012 reforms, many safety risks for children and parties were not being

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<sup>16</sup> One study found that approximately 7% of separating couples require the use of the courts to resolve their dispute. Lixia Qu, et al, ‘Post-Separation Parenting, Property and Relationship Dynamics After Five Years’ (Report, Australian Institute of Family Studies, Attorney-General’s Department, 2014).

<sup>17</sup> FLC Final Report at 22, referring to: R. Kaspiw, R. Carson, J. Dunstan, L. Qu, B. Horsfall, J. De Maio, S. Moore, L. Moloney, M. Coulson and S. Tayton, *Evaluation of the 2012 family violence amendments: Synthesis report* (Australian Institute of Family Studies: 2015), 16-17.

See also: Rae Kaspiw, Matthew Gray, Ruth Weston, Lawrie Moloney, Kelly Hand, and Lixia Qu and the Family Law Evaluation Team, *Evaluation of the 2006 Family Law Reforms*, Australian Institute of Family Studies, Melbourne, 2009.

<sup>18</sup> Rae Kaspiw, Matthew Gray, Ruth Weston, Lawrie Moloney, Kelly Hand, and Lixia Qu and the Family Law Evaluation Team, *Evaluation of the 2006 Family Law Reforms*, Australian Institute of Family Studies, Melbourne, 2009 p 65, 77-8.

<sup>19</sup> 2016 RCFV Report, Volume IV, Ch 24, page 209.

<sup>20</sup> *Ibid.*

picked up by within the family law system.<sup>21</sup>

- 48% of family law professionals surveyed disagreed with the proposition that the legal system has the capacity to screen adequately for family violence and child abuse.<sup>22</sup>
- Risk assessment practices in the family law system were inconsistent and required improvement.<sup>23</sup>
- Many family law professionals, and particularly lawyers, had no exposure to the risk assessment tool developed for use in family law processes, DOORS (Detection of Overall Risk Screen). Overall, DOORS had a mixed reception and limited take-up.<sup>24</sup>

We acknowledge the announcement of the FCA and FCC in June 2016 that they would be implementing a “new screening approach for family violence cases” in some cases, including “a pre-interview screening approach in all locations during the interim hearing stage”. The Courts stated that if additional funding was provided, this could be expanded “to all cases.” While this is a positive step, it is unclear whether this approach will meet current concerns about consistent and sufficient risk assessment in the family law system. We would welcome further information being released about this approach so that stakeholders including WLSA could consider it further.<sup>25</sup>

### Overwhelming support for early risk assessment and identification of violence

Over the years, there have been numerous recommendations made by academics, law reform bodies, and parliamentary committees, that the family law system build into its process a national and consistent risk assessment framework. Most recently, the Family Law Council made the following recommendations in support of early identification and risk assessment in the FLC 2016 Final Report:<sup>26</sup>

#### **Recommendation 1: Family safety services**

The Australian Government consider ways of incorporating the expertise of specialist family violence services into the family law system to improve responses to families where there are issues of family violence or other safety concerns for children. This may include a combination of:

- 1) funding family violence services that provide embedded services in state and territory courts to continue to support clients with family violence issues when they move to the family law system to seek parenting or other orders;
- 2) embedding workers from specialist family violence services in the family courts and Family Relationship Centres;

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<sup>21</sup> Only three in five parents said that the family legal service (lawyers, FDR, or FRC) they engaged with asked them about their experiences of family violence. Put in another way, “41% of parents [surveyed] indicated they had not been asked about family violence and 38% indicated they had not been asked about safety concerns.” 2015 AIFS Evaluation Report (FV), page 182.

Further, a significant minority of parents did not disclose family violence or child safety concerns. Disclosure of both of these issues was higher among parents who had experienced physical violence from the other parent at any time (64% disclosed family violence and 60% raised safety concerns). The disclosure rate was lower where the violence was emotional only. : 2015 AIFS Evaluation Report (FV), page 164.

<sup>22</sup> 2015 AIFS Evaluation Report (FV), at page 47, Table 4.1.

<sup>23</sup> Quoted at RCFV 2016 report, Volume IV, Ch 24, page 209.

<sup>24</sup> 2015 AIFS Evaluation Report (FV), at page 47, Table 4.3.

<sup>25</sup> Federal Circuit Court of Australia (20 June 2016), *Media Release - Family law system needs more resources to deal with an increasing number of cases involving family violence*. Available online at: <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/about/news/mr200616>

<sup>26</sup> FLC 2016 Final Report, 12.

3) creating a dedicated family safety service within the family law system.

**Recommendation 2: Early whole-of-family risk assessments**

Having regard to the issues of abuse, neglect and family violence and the need for such evidence to be broadly available to protect children, the Australian Government should incorporate a whole-of-family risk assessment process into the family law system that is non-confidential and admissible.

**Recommendation 3: Family lawyers and risk identification**

The Australian Government consult with the Family Law Section of the Law Council of Australia, legal practitioner regulation bodies, including National Legal Aid, and family law practitioners more broadly, to support the development of:

- 1) a simplified risk identification mechanism for parents and children for use by the legal profession
- 2) protocols and guidelines to assist practitioners to utilise strategies to ensure that risk is identified and managed effectively, including through warm referrals to specialised family violence services

While recommendations on family law was out of scope of the Victorian RCFV, the RCFV did note the importance and value of early risk assessment and made recommendations in relation to ensuring the effectiveness of the Victorian Common Risk Assessment Framework (**CRAF**).<sup>27</sup>

In the 2010 ALRC/NSWLRC Report, the ALRC referred with approval to calls for an early risk identification and assessment framework within the family law system made by Professor Richard Chisholm in the 2009 Chisholm Report, and by the FLC in its 2009 FLC Report.<sup>28</sup> This had also been recommended (and not implemented) by the federal House Standing Committee on Family and Community Affairs 2003 report titled *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements on the Event of Family Separation*.<sup>29</sup>

The ALRC/NSWLRC noted that in its 2009 FLC Report the FLC had “considered that it is essential that all people involved in the family law system screen for matters likely to impact on children and parenting, including, amongst other things, family violence” and “recommended that a consistent framework for screening and risk assessment be developed in accordance with principles adopted in the common knowledge base.”<sup>30</sup> In addition, the ALRC also recommended, at Recommendation 21-2, the introduction of risk assessment among FDR practitioners.<sup>31</sup>

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<sup>27</sup> Royal Commission into Family Violence 2016, *Report and recommendations*, RCFV, Victoria. Accessed: <http://www.rcfv.com.au/report-recommendations>.

<sup>28</sup> Family Law Council 2009, *Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues*, FLC. Accessed: <https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Improving%20responses%20to%20family%20violence.pdf>.

<sup>29</sup> Parliament of the Commonwealth of Australia 2003, *Every picture tells a story – report on the inquiry into child custody arrangements in the event of family separation*, House of Representatives, Standing Committee on Family and Community Affairs. Accessed: [www.aphref.aph.gov.au-house-committee-fca-childcustody-report-fullreport.pdf](http://www.aphref.aph.gov.au-house-committee-fca-childcustody-report-fullreport.pdf)

<sup>30</sup> Family Law Council 2009, *Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues*, FLC. Accessed: <https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Improving%20responses%20to%20family%20violence.pdf>. Referred to in 2010 ALRC/NSWLRC Report.

<sup>31</sup> ALRC/NSWLRC 2010, *Family violence – A national legal response: final report*, ALRC Report 114, NSWLRC Report 128. Accessed: [http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC114\\_WholeReport.pdf](http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC114_WholeReport.pdf)



In the 2009 Chisholm Report, Professor Chisholm found that there was a “powerful argument” for a “process of scrutiny and triage that applies to all cases, and seeks to identify any risk that requires urgent attention” with this not being limited to family violence cases.<sup>32</sup> In particular, Professor Chisholm stated that risk assessment by way of Form 4 Notices of Risk was “not working”, and that:<sup>33</sup>

it would be better to have a system of risk identification and assessment that applies to all parenting cases. This approach would reflect the best available thinking about these issues, and would reinforce a lot of measures that are already being taken by the courts to identify and deal with issues of violence as early as possible.[43]

We support this recommendation, and agree that the requirement to file a Notice of Risk does not ensure that the court is notified of all relevant risk factors. This could be for many reasons, including that a litigant is of low literacy and does not understand what is required of them, or is not aware of the scope of the legal definition of “family violence” as including financial and emotional abuse. The AIFS 2015 Evaluation Report confirmed this, finding that (a) 56% of lawyers and judicial officers found that no Notice of Risk was being filed in relevant parenting matters, and (b) 51% of surveyed lawyers disagreed that filing a Form 4 Notice resulted in safer parenting arrangements for parents and children.<sup>34</sup> The efficacy and consistency of use of Notices of Risk may also be affected by procedural differences between the FCA and the FCC. Currently, different forms are used in the FCA and the FCC, and there are different rules in relation to their use (Notices of Risk are mandatory in all proceedings in the FCC, but not in the FCA).<sup>35</sup>

#### What could the risk assessment process look like?

In the 2009 Chisholm Report, Professor Chisholm notes with approval the following comments from a conference of family law professionals, the Wingspread Conference:<sup>36</sup>

There was consensus among conference participants that families entering the court system should be screened for domestic violence...

There was consensus that, when cases of domestic violence are identified or when initial screening is insufficient to confirm or rule out the presence of domestic violence, families should be individually considered and referred to appropriate services and court processes. As a part of the screening and review process for each family, risk and protective factors should be identified and mitigated or supported, respectively.

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Recc 21-2 reads as follows: The Australian Government Attorney-General's Department should: (a) promote and support high quality screening and risk assessment frameworks and tools for family dispute resolution practitioners; (b) include these tools and frameworks in training and accreditation of family dispute resolution practitioners; (c) include these tools and frameworks in the assessment and evaluation of family dispute resolution services and practitioners; and (d) promote and support collaborative work across sectors to improve standards in the screening and assessment of family violence in family dispute resolution.

<sup>32</sup> 2009 Chisholm Report, page 72.

<sup>33</sup> Richard Chisholm 2009, *Family courts violence review – a report by Professor Richard Chisholm*, p. 6.

<sup>34</sup> Rae Kaspiew, Rachel Carson, Melissa Coulson, Jessie Dunstan and Sharnee Moore, “Evaluation of the 2012 family violence amendments: Responding to family violence A survey of family law practices and experiences” (2015) (hereinafter referred to as **AIFS 2012 Evaluation Report (Family Violence)**), Page 109-110, Tables 6.7 and 6.8. Available online at: <https://aifs.gov.au/publications/responding-family-violence/6-responding-harm-and-risk-harm>

<sup>35</sup> FCA notice here: <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/forms-and-fees/court-forms/form-topics/Family+Violence/form-nchild-abuse>

FCC notice here: <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/forms-and-fees/court-forms/form-topics/family+law/notice-risk>

<sup>36</sup> 2009 Chisholm Report 72-73.

...[C]onference participants supported, a multimethod, multiinformant approach to family assessment featuring increasingly intense inquiry as higher levels of conflict and abuse are uncovered. Indeed, effective screening may ultimately require use of a variety of screening tools, each developed for a specific purpose and for potential use at different stages of the proceeding. For example, while the initial focus of screening might concern lethality and safety, that initial inquiry might trigger a mental health or substance abuse assessment or a further screening to assess the appropriateness of participation in dispute resolution processes such as mediation.

Recent research evidence has shown the complexity involved in eliciting information about family violence and making assessments about the implications of that history.<sup>37</sup> Challenges include the differing subjective experiences of parties, with some targets and probably more perpetrators not recognising some behaviour as family violence.<sup>38</sup> This reinforces the need for the development of any screening and assessment tools and processes to be accompanied by training and professional development to support the exercise of sound clinical judgement is also critical (see also Part 5 of this submission).<sup>39</sup>

**Recommendation 1:** That the Australian Government, working with state and territory governments through the Council of Australian Governments (**COAG**), develop a national risk assessment framework for use by the family law court registry. We recommend that the Australian Government consider adopting an established state and territory risk assessment framework, i.e. the Victorian Common Risk Assessment Framework (**CRAF**) or the NSW Domestic Violence Assessment Tool, and that any national risk assessment framework should be:

1. Consistent nationally
2. Multi-method, multi-informant, while placing particular emphasis on the victim's own assessment of risk
3. Culturally sensitive
4. Supported by appropriate training

**Recommendation 2:** That the Australian Government, working with state and territory governments through the COAG, develop a risk assessment framework for use by family lawyers and family dispute resolution (**FDR**) practitioners that is consistent with, and/or an adapted version of, the risk framework used by the family court registry.

**Recommendation 3:** That the Australian Government adequately fund training of all family law professionals on this national risk assessment framework, and this includes court registry staff, family violence services, lawyers, FDR practitioners, family report writers, and judicial officers. (See also Recommendations 17 – 21 below.)

**Recommendation 4:** That the Australian Government amend the *Family Law Act* (and other legislation as required) to require that upon filing of any family law application, the following risk assessment process is undertaken as soon as practicable:

<sup>37</sup> Belinda Fehlberg et al, *Australian Family Law: the Contemporary Context* (2015, Second Edition, Oxford University Press), 149.

<sup>38</sup> Ibid.

<sup>39</sup> Elly Robinson and Lawrie Moloney, Family Violence: Towards a Holistic Approach to Screening and Risk Assessment in Family Support Services, Australian Family Relationships Clearinghouse Briefing No. 17, 2010.

1. That in all cases involving dependent children, a family consultant with specified family violence training who is embedded within the court registry undertake a risk assessment with respect to child safety and provide recommendations in relation to interim care arrangements for children.
2. Where family violence is alleged or identified, that a referral of any adult affected family member be made to an embedded family violence support worker within the court registry.
3. Where the affected family member is Aboriginal and/or Torres Strait Islander, a referral should be made to a specialised and culturally safe legal service such as a Family Violence Prevention Legal Service (**FVPLS**) or Aboriginal and Torres Strait Islander Women's Legal Service.
4. That following receipt of such a referral, the family violence support worker undertake a risk assessment in relation to the adult affected family member(s), assisting her in preparing a safety plan, and making further referrals as necessary.

**Recommendation 5:** The Australian Government incorporates specialist family violence services into the family law system, and adequately funds these services, by:

1. funding family violence services that provide embedded services in state and territory courts to continue to support clients with family violence issues when they move to the family law system to seek parenting or other orders; and/or
2. embedding workers from specialist family violence services in the family courts and Family Relationship Centres.

### **Improved engagement between child protection and the family law system**

A continuing theme in the family violence reports and inquiries is the interaction of the child protection and family law system. Currently, state and territory child protection agencies may locate a so called “protective carer”, and refer them to a family court to apply for a parenting order, without any further support. Without guidance and support, the applicant parent may be unclear on why the child protection agency referred them to the court, at best. At worst, they would not be able, without support, to put the application to the court such that they obtain the parenting orders that the agency deems are necessary to ensure the safety of the child/ren. This gap in the current system means that children are placed at risk of being returned to a parent who a child protection agency has deemed to be a risk. This provides, as stated in the 2010 ALRC/NSWLRC Report, a “powerful case for child protection services having more involvement in family court proceedings where they investigate allegations of child abuse and refer carers to family courts for orders”.<sup>40</sup>

We therefore support recommendation 19-3 of the 2010 ALRC/NSWLRC as follows.

**Recommendation 6:** That the Australian Government encourage state and territory governments through COAG to introduce effective processes whereby where a child protection agency investigates protective concerns, locates a “viable and protective carer”

<sup>40</sup> ALRC/NSWLRC Report, [19.135].

and refers that carer to a family court to apply for a parenting order, the agency should, in appropriate cases:

- provide written information to a family court about the reasons for the referral;
- provide reports and other evidence; or
- intervene in the proceedings.

We further note the RCFV Recommendation 137 that the Department of Health and Human Services support on a continuing basis the co-located child protection practitioner initiative in the Victorian registries of the Family Court of Australia and the Federal Circuit Court of Australia.<sup>41</sup>

### **Better funding to the legal assistance sector to meet unmet family legal need**

There is an ever-growing number of women who are family violence victims and who are falling through the cracks of the legal aid system. Women find themselves unable to access legal services due to the narrowing of community legal centre (CLC) intake guidelines and legal aid family law guidelines, and without the financial means to pay the fees of private family practitioners. The Federal Circuit Court (FCC) and Family Court of Australia (FCA)'s joint submission to the RCFV, for example, "acknowledged that a lack of adequate legal aid funding means that parties, who may be victims of family violence, may have to conduct family law litigation on their own, against the perpetrator of family violence."<sup>42</sup>

The FLC stated in its 2016 Final Report that in more than half of the parenting cases that come before the Family Court, one or both parties are unrepresented for some or all of the proceedings.<sup>43</sup> It went on to find that "more than half (52%) of the family law trials in the FCC in 2014/15 involved at least one parent who was unrepresented, and in 20% of these cases both parties were unrepresented."<sup>44</sup> In a 2000 Family Court report on self-represented litigants that drew on a questionnaire provided to court judges and registrars, in 59 per cent of cases involving one or more self-represented litigants, the self-represented litigant was considered to be disadvantaged by their lack of representation.<sup>45</sup>

This comes in the context of demand for legal assistance services far outstripping availability. In March 2016, Victoria Legal Aid reported that family violence and family law duty lawyers in Victoria were stretched and unable to meet the excessive demand for their services.<sup>46</sup> In 2014-2015, close to 160,000 people in legal need had to be turned away by

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<sup>41</sup> 2016 RCFV Report, Volume IV, Ch 24, p 219.

<sup>42</sup> 2016 RCFV Report, Volume IV, Ch 24, 197.

<sup>43</sup> 2016 FLC Final Report. Available online at: <https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Family-with-Complex-Needs-Intersection-of-Family-Law-and-Child-Protection-Systems-Final-Report-Terms-3-4-5.PDF>.

<sup>44</sup> Ibid, p. 22.

<sup>45</sup> Family Court of Australia 2003, *Self-represented litigants – a challenge: Project report December 2000-December 2002*, Family Court of Australia. Accessed: [http://www.familycourt.gov.au/wps/wcm/connect/54fe062f-3cd0-422c-9848-39b368c38fdb/SRL\\_A\\_Challenge.pdf?MOD=AJPERES&CONVERT\\_TO=url&CACHEID=ROOTWORKSPACE-54fe062f-3cd0-422c-9848-39b368c38fdb-lh-pOue](http://www.familycourt.gov.au/wps/wcm/connect/54fe062f-3cd0-422c-9848-39b368c38fdb/SRL_A_Challenge.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE-54fe062f-3cd0-422c-9848-39b368c38fdb-lh-pOue).

<sup>46</sup> Victoria Legal Aid, Submission to the Access to Justice Review (March 2016), page 38. Available online at: [https://engage.vic.gov.au/application/files/2614/8609/4221/Submission\\_67\\_-\\_Victoria\\_Legal\\_Aid.pdf](https://engage.vic.gov.au/application/files/2614/8609/4221/Submission_67_-_Victoria_Legal_Aid.pdf)

CLCs, largely due to a lack of resources.<sup>47</sup>

We commend recent announcements by the Government that funding cuts to the CLC sector, expected from 1 July 2017, will not proceed. We note, however that the Productivity Commission recommended in its 2014 Access to Justice Arrangements report that the legal assistance sector, including CLCs, should receive an annual \$200 million increase in funding.<sup>48</sup>

Increased legal assistance funding is necessary to support the proper function of the legal system, and so the rule of law, in family law matters and beyond. Adequate funding should be allocated across a number of services, including: CLCs, including specialist women's legal services and programs; Family Violence Prevention & Legal Services; Aboriginal and Torres Strait Islander Legal Services; and Legal Aid Commissions. Funding should be sufficient in order to provide a choice of legal services. This is necessary both for clients' sense of agency, and to ensure access to justice in cases where a conflict of interest arises.

**Recommendation 7:** That the Australian Government, working together with the state and territory governments, implement recommendation 21.4 of the 2014 Productivity Commission A2J Report (see **Appendix A** for the full text of the recommendation).

In particular, that the Australian, state and territory governments make \$200 million additional annual funding (on 2014 levels) available to all legal assistance services, comprised of: CLCs, including specialist women's legal services and programs; Family Violence Prevention & Legal Services; Aboriginal and Torres Strait Islander Legal Services; and Legal Aid Commissions.

This increase in funding should comprise specific increases in funding for family law matters.

**Recommendation 8:** That the Australian Government encourage Legal Aid Commissions to amend their funding guidelines in family law to promote greater access to legal aid for women who are victims of family violence.

### **Emphasis of decision-making on safety – not shared parenting**

The 2006 reforms of the Family Law Act introduced the “equal shared parental responsibility” (ESPR) presumption (rebuttable in cases of family violence) and the requirement that, if equal shared parental responsibility is ordered, the court *must* consider ordering equal time or substantial and significant time, if it is in the best interests of the child and it is workable.<sup>49</sup> The 2009 AIFS evaluation of the 2006 family law reforms stated this about the concept of ESPR:<sup>50</sup>

*A common misunderstanding is that equal shared parental responsibility allows for “equal” shared care time, and that if there is shared parental responsibility then a court will order*

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<sup>47</sup> Community Law Australia, ‘Budget cuts to legal assistance services hit vulnerable hardest’, Community Law Australia. Accessed: <http://www.communitylawaustralia.org.au/budget-cuts-to-legal-assistance-services-hit-vulnerable-hardest/>.

<sup>48</sup> Productivity Commission, “Access to Justice Arrangements: Productivity Commission Inquiry Report Overview” (2014) page 63, recommendation 21.4. Available online at: <http://www.pc.gov.au/inquiries/completed/access-justice/report/access-justice-overview.pdf>

<sup>49</sup> Family Law Act 1975 (Cth), s 65DAA.

<sup>50</sup> AIFS, “Executive summary: evaluation of the 2006 family law reforms” (2009) page E3 – E4. Available online at: <https://aifs.gov.au/sites/default/files/publication-documents/executivesummary.pdf>

*shared care time. This misunderstanding is due, at least in part, to the way in which the link between equal shared parental responsibility and time is expressed in the legislation.*

*This confusion has resulted in disillusionment among some fathers who find that the law does not provide for 50–50 “custody”. This sometimes can make it challenging to achieve child-focused arrangements in cases in which an equal or shared care-time arrangement is not practical or not appropriate. Lawyers were more concerned about this issue than family relationship service professionals. ...*

*There was also concern that the complexity of the new provisions, together with the presumption of [ESPR], have to some extent diverted attention from the primacy of the best interests of the child, particularly in negotiations over parenting arrangements.*

The 2012 reforms to the *Family Law Act* were aimed at improving the manner in which family law courts dealt with cases involving family violence and child abuse, and, in particular, confirming the primacy of children’s safety over other considerations including promoting a meaningful relationship with both parents. The concepts of ESPR and “equal time” remained in the *Family Law Act*. And AIFS again found, in its 2015 evaluation of the 2012 amendments that family law professionals considered that the ESPR presumption diverted focus away from the safety and best interests of the child:<sup>51</sup>

*Negative responses from a majority of the group responsible for interpreting and applying the Part VII framework on a day-to-day basis—judicial officers/registrars—suggest the presence of significant concerns that have not been resolved by the 2012 family violence reforms. Such concerns are consistent with a range of issues raised prior to the 2012 family violence reforms by practitioners and academics (Chisholm, 2009; Kaspiew et al., 2009) and that have continued to be of concern since (Chisholm, 2014; Rhoades, 2014). These issues include the complexity of the legislation and the way in which some provisions—such as the equal shared parenting presumption—are seen to divert focus away from children’s needs.*

The presumption of ESPR is not meant to apply in cases of violence and abuse because it is recognised that it would not be in the best interest of the children for an abuser to be involved in long-term decision-making about someone they have abused or exposed to family violence. However, currently, the family law system has difficulty identifying and assessing family violence risk early. For example, the 2015 AIFS Evaluation Report found that almost 3 in 10 separated parents interviewed said they had 'never been asked' about family violence or safety concerns when using dispute resolution, lawyers and courts to resolve parenting matters.<sup>52</sup>

Challenges to identifying family violence also arise in the current context where courts are overburdened, under-resourced, and judicial officers and family law professionals have only limited training on the dynamics of family violence (see also our Recommendations 17 – 21). A family violence survivor can also have difficulty putting all the necessary evidence of family violence to the court, particularly where she is fearful of her abuser during his direct cross-examination of her (see our Recommendations 12 - 13).

For all of these reasons, WLSA strongly supports the removal of the language of “equal shared time”, “substantial and significant time” and “equal shared parental responsibility” from the *Family Law Act* to shift culture and practice towards a greater focus on children’s

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<sup>51</sup> Kaspiew, R., Carson, R., Dunstan, J., Qu, L., Horsfall, B., De Maio, J., Moore, S., Moloney, L, Coulson, M & Tayton, S 2015, *Evaluation of the 2012 family violence amendments: responding to family violence*, pages 24-25. Available online at: <https://aifs.gov.au/sites/default/files/publication-documents/efva-rfv.pdf>

<sup>52</sup> Above n 21.

needs and their safety.

**Recommendation 9:** Remove the language of “equal shared time”, “substantial and significant time” and “equal shared parental responsibility” from the *Family Law Act* to shift culture and practice towards a greater focus on safety and risk to children.

### **Better supporting Aboriginal or Torres Strait Islander and culturally and linguistically diverse clients**

In 2012, the FLC was commissioned by the Attorney-General’s Department to produce reports on how to improve the family law system for Aboriginal and Torres Strait Islander clients, and culturally and linguistically diverse (**CALD**) clients. This was in response to research that showed that Aboriginal and Torres Strait Islander and CALD clients are underrepresented in the family law system. In two lengthy reports (the **2012 FLC Reports**),<sup>53</sup> the FLC found that Aboriginal and Torres Strait Islander and CALD families face a range of barriers when accessing legal, counselling and FDR services, and that if they did access the family law system, families from these backgrounds experienced specific and significant challenges. These findings echo the experience of our lawyers when working with Aboriginal and Torres Strait Islander and CALD clients.

A number of barriers identified by the FLC were common to both Aboriginal and Torres Strait Islander and CALD families, including a lack of access to services that engage in culturally sensitive practice, the lack of a culturally-diverse workforce and language and literacy issues.

In its 2016 Final Report, the FLC noted that similar proposals had been made to it in relation Aboriginal and Torres Strait Islander and CALD clients as had been done in its 2012 report consultations. These included measures such as the following, which WLSA support:

- embedding workers from Aboriginal and Torres Strait Islander services in the family courts and Family Relationship Centres as family liaison officers and Aboriginal Liaison Officers;
- working with Aboriginal and Torres Strait Islander communities and organisations to develop and deliver culturally appropriate post-separation parenting programs and family dispute resolution services;
- developing and resourcing tailored education programs about the family law and child protection systems for Aboriginal and Torres Strait Islander communities to enhance understanding of legal rights and awareness of how the family law system works; and
- ensuring ongoing cultural competency training for family law system professionals,

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<sup>53</sup> Family Law Council 2012, *Improving the family law system for Aboriginal and Torres Strait Islander clients*, Family Law Council. Accessed:

<https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Improving%20the%20Family%20Law%20System%20for%20Aboriginal%20and%20Torres%20Strait%20Islander%20Clients.pdf>.

Family Law Council 2012, *Improving the family law system for clients from culturally and linguistically diverse backgrounds*, Family Law Council. Accessed:

<https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Pages/FamilyLawCouncilpublishedreports.aspx>.

including judicial officers, that builds an understanding of the multiple and diverse factors contributing to the high levels of family violence in Aboriginal communities, and an understanding of Aboriginal and Torres Strait Islander family structures and child rearing practices.

As a result, the FLC recommended again that the Australian Government implement the recommendations from its 2012 Reports. In addition, the FLC made further recommendations in relation to Aboriginal and Torres Strait Islander clients (recommendation 16) and CALD clients (recommendation 17) that WLSA also supports. For the full text of the relevant recommendations in both the 2016 FLC Final Report and the 2012 FLC reports, please see **Appendix A**.

**Recommendation 10:** That the Australian Government implement recommendations 16 and 17 of the 2016 FLC Final Report with respect to improving the family law system for clients from Aboriginal and Torres Strait Islander and CALD backgrounds (see **Appendix A** of this report for full set of these recommendations).

This includes implementing the recommendations from the Family Law Council's 2012 reports on improving the family law system for clients from Aboriginal and Torres Strait Islander and CALD Backgrounds.



## 2 – CONSENT ORDERS

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### Background

It has been our member lawyers' experience that many women who have experienced family violence feel pressured to enter into consent orders that are not in the best interests of their child or do not adequately take into consideration family violence concerns. This aligns with the 2015 AIFS Evaluation Report findings that among parents who had experienced physical violence, only 41% reported that the court granted orders that protected their safety and/or their children's safety.<sup>54</sup> This may be due to one or more of a combination of factors, including: litigation stress and fatigue, a wish to keep the peace, a need for finalisation, fear of re-traumatisation (including through direct cross-examination by their abuser) and other matters. This has resulted in family violence survivors' experience of family law court proceedings being that "many of the consent orders...perpetuated rather than prevented the [perpetrator's] future control and abuse of the [survivor]".<sup>55</sup>

### Fear of direct cross-examination

In particular, it is our experience that family violence victim survivors have felt pressured to consent to court orders that do not adequately address family violence concerns, when they fear they will have to endure direct cross-examination by their abuser. A detailed discussion of how direct cross-examination of a family violence victim in family law proceedings undermines a focus on safety is provided at **Part 3** of this submission. In that part we recommend that the option for personal cross-examination of a family violence victim by her abuser in family law cases be prohibited, and we propose a mechanism by which this could be done.

### Specialised legally assisted dispute resolution necessary in family violence cases

Where family violence is identified in a family law proceeding, these matters are often screened out of non-legally assisted mediation due to safety concerns, which limits the opportunity for early resolution. Where the violence or other safety concerns are not identified early on by either the parties (particularly where they are self-represented), and/or by family law professionals, the family may proceed to non-legally assisted dispute resolution.<sup>56</sup> This carries with it a significant risk that power imbalances are perpetrated through the process, which in turn increases the risk that any resultant consent orders or agreements do not adequately take into consideration family violence or safety concerns.

Though there is a widespread belief that mediation in family violence cases is not appropriate we believe that a well-supported and safe mediation process, with expert lawyers and mediators who have a sound understanding of family violence and family law, can be an empowering process for a victim. Simply referring a matter into a complex court system rarely results in a good outcome for victims.

Where mediation or other alternative dispute resolution is allowed in family law matters, it is also important that the presiding decision-maker be satisfied that any agreement or consent

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<sup>54</sup> 2015 AIFS Evaluation Report, page 159.

<sup>55</sup> Rosemary Hunter, *Women's Experience in Court: The Implementation of Feminist Law Reforms in Civil Proceedings Concerning Domestic Violence*, Unpublished PhD thesis, Stanford University, 2005, p 773.

<sup>56</sup> See for example the 2015 AIFS Evaluation Report at 164-165, which stated that parents' experience was that only "52% of fathers and 44% of mothers who had experienced physical violence, and 44% of fathers and 41% of mothers who had experienced emotional abuse, reporting that an s 60I certificate was issued".

orders have been reached without undue pressure being placed on a party. This could be achieved through a certification process by the mediator.

Safe and supported mediation opportunities do currently exist, for example Victoria Legal Aid's Family Dispute Resolution Service (**VLA FDR service**). Through this service, Women's Legal Services Victoria (**WLSV**) provides legal representation in mediation. WLSV also does this through a partnership with the Melbourne Family Relationship Centre and FMC Mediation Centre. Similarly, Women's Legal Service NSW provides legal representation in mediation through a partnership with the Blacktown and Penrith Family Relationship Centres and Western Sydney Community Legal Centre.

Another, more intensive option for an appropriate family dispute mediation model is the Co-ordinated Family Dispute Resolution (**CFDR**) process, which was piloted in five sites in Queensland in 2012. The CFDR process involved "a case manager/family dispute resolution practitioner (FDRP), a specialist family violence professional (SFVP) for the person assessed to be the "predominant victim" in the language of the model, a men's support professional (MSP) for the person assessed to be the "predominant aggressor" (when they are male),<sup>57</sup> a legal advisor for each party and a second FDRP".<sup>58</sup>

The CFDR process was developed in response to "a perceived need in the family law system for a non-court based mechanism for resolving post-separation parenting disputes where there has been family violence" and "evidence demonstrat[ing] that a significant number of parents in this situation are using FDR". In such cases, there were concerns relating to safety, "whether it produces outcomes that reflect genuine (rather than coerced) agreements and whether these outcomes are in the best interests of children."<sup>59</sup>

We acknowledge that on 28 October 2016, federal Attorney General Brandis announced that \$6.2 million of \$100 million of funding for the Third Action Plan under the *National Plan to Reduce Violence Against Women and Their Children* has been allocated to piloting "enhanced models of family dispute resolution for vulnerable families".<sup>60</sup> While this is a positive step, it is unclear whether this amount of funding meets the legal need there is for legally assisted dispute resolution in family law, over what period of time this funding will last, and whether it is intended that services will be funded beyond the "pilot" stage.

**Recommendation 11:** That the Australian Government implement and fund a national legally assisted family dispute resolution program appropriate for family violence cases that is supported by specialist family violence lawyers and family violence and trauma informed FDR practitioners. The role out of this program should be preceded by a legal needs analysis, to inform the Australian Government as to the scope of the service required to meet

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<sup>57</sup> As explained further in 3.1.2, the party assessed as the "predominant aggressor" was male in 89% of cases and female in 5%; the determination was missing or uncertain in 6% of cases. Given the ethical issues that arise in dealing with participants from groups that contain small numbers (see further discussion in Chapter 1), the particularity of the experience of male "predominant victims" and female "predominant aggressors" is not explicitly explored in this report. However, where data were collected from individuals in these groups, it is reflected in relevant parts of the discussion.

<sup>58</sup> Attorney-General's Department (December 2012), *CDFR Evaluation Final Report*,. Available online at: <https://www.ag.gov.au/Publications/Pages/EvaluationOfAPilotOfLegallyAssistedAndSupportedFamilyDisputeResolutionInFamilyViolenceCasesFinalReport2012.aspx>

<sup>59</sup> Ibid.

<sup>60</sup> Attorney-General's Department (28 October 2016), Media Release, 'Third Action Plan to reduce family violence' .Available online: <https://www.attorneygeneral.gov.au/Mediareleases/Pages/2016/FourthQuarter/Third-action-plan-to-reduce-family-violence.aspx>

legal need. We further recommend that the Australian Government consider the Victoria Legal Aid Family Dispute Resolution Service and its partnership program with Family Law Legal Service, the Blacktown and Penrith Family Relationship Centres partnership with Women's Legal Service NSW and Western Sydney Community Legal Centre and the Co-ordinated Family Dispute Resolution pilot as three possible models for this program.

### **Property settlements**

In our experience family violence can have a significant impact on victim/survivor's ability to negotiate property settlements, and on the outcomes they achieve from this process. A detailed discussion of the inter-relationship between family violence, financial disadvantage and property proceedings is provided at **Part 4** of this submission. There we make recommendations in relation to how to better assist family violence survivors to achieve fairer property dispute outcomes.

### 3 – SELF-REPRESENTED LITIGANTS

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#### Prohibition against direct cross-examination of family violence survivors required

Currently, the *Family Law Act 1975* does not explicitly prohibit victims of family violence from being directly cross-examined by their abuser. Under the *Family Law Act*, the court can stop a witness from answering a question that is regarded as offensive, abusive or humiliating. However, if the court believes that it is “in the interests of justice” the question must be answered. The court is bound by its obligation to provide procedural fairness to both parties in a trial, and this in practice results in a hesitance to deny a party the right to cross-examine.

In a period of about three months over 2015-2016, WLSA asked women to respond to a survey about their experiences of the family law system. Of the 338 survey participants, 147 women said they had experienced direct cross-examination by their abuser in the family law courts, and shared their experience. Many women described feeling frightened, unsafe, re-traumatised, and intimidated. Some also expressed having physical symptoms of stress leading up to and following the event, including panic attacks, weight and hair loss, “*being physically sick*”, sleeplessness and post traumatic stress disorder (PTSD). A number of participants described the process as “*court sanctioned abuse*” - systems abuse, in other words.

Some direct responses include:

*“physically unable to talk, overwhelmed by feelings of fear/stress/anxiety, hyperventilating, feeling like I was going to be sick, shaking, experiencing symptoms similar to panic attack. afterwards – nightmares, shaking, feeling like again he had control and was controlling me”*

*“I felt as though the court was enabling my ex husband to re-abuse me but publically this time. I was so traumatised I lost 10 kilos and lost my hair.”*

*“I felt under extreme pressure, I was very anxious and I was trembling whilst I was under cross examination... I felt that the judge was unaware of the extreme stress I was under. I made mistakes when I was being cross examined because I felt so cloudy and confused.”*

In addition, 38 of the survey participants stated they had had to personally cross-examine their abuser. Additional themes emerged in their descriptions of this experience, including:

*“I was afraid to really question him and I felt when I tried the Judge continually silenced me”*

*“I was so scared because he has a look in his eye that still intimidates me, and I had the future safety of my child in jeopardy. I just wanted to get down on my knees and BEG the judge to allow me to protect my daughter. It’s so hard to appear calm and collected on the inside when you have so much hatred for the person who has hurt you and your child, and so much fear for what lies ahead. And also fear that he might show up at your house later and become violence because he’s mad at you standing up to him.”*

## **Effect that possible direct cross-examination may have on consent orders**

In addition, 77 participants responded that their family law dispute had settled by way of consent orders. Of that smaller group, 44 women said that the “prospect/fear of personal cross-examination by [their] ex-partner” was a factor in their decision to settle, and 33 said “other”. These “other” reasons included fears which related to the fear of cross-examination:

*“The judge pointed out that cross examining me may lead to further decline of my mental condition which could halt proceeding”*

*“I couldn’t go back in that room and face him”*

*“We agreed to my having custody of the children, I agreed to visitation with him, even though I was fearful [of] my safety and theirs. I knew I wouldn’t abide by all the orders, but I couldn’t keep going”*

In the next question, the participants were asked how significant the prospect or fear of direct cross-examination by their ex-partner was on their decision to settle prior to trial. Of the 60 women who responded, 41 women (68.3%) said that it was very significant, 6 women (10%) said it was of medium significance, and 13 women (21.7%) said it was one of many factors. These findings indicate that the fear of direct cross-examination can directly result in consent orders in family law matters involving family violence that endanger the safety of children and their parents.

Procedural fairness in legal proceedings should mean that the court puts in place measures to ensure that witnesses can provide their evidence comfortably, and without fear or intimidation. Such a process would allow the evidence the witness can provide to be brought before the court, and ventilated. This is likely why, in most state and territory jurisdictions, there are specific protections in place in criminal law to protect victims of sexual offences from direct cross-examination by an accused person. These protections prohibit direct cross-examination and require that an accused person have legal representation. Similar protections also exist in most state or territory family violence intervention order legislation, in various forms.

## **Support for an end to direct cross-examination of family violence survivors**

Numerous inquiries have considered the issue of direct cross-examination of family violence victims by their abusers and made relevant recommendations and comments, including:

- The 2016 FLC Final Report noted the problems with direct cross-examination, and called on the Australian Government to respond, at recommendation 8.<sup>61</sup>
- The family law roundtable at the 2016 COAG National Summit on Reducing Violence against Women and their Children recommended a ban on direct cross examination by a perpetrator in any family law or family violence proceeding.<sup>62</sup>
- The RCFV noted in its 2016 Report that it had received submissions on the trauma experienced by family violence survivors of being directly cross-examined by their abuser in the family law system, and noted that a lack of legal assistance funding

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<sup>61</sup> FLC 2016 Final Report, 114.

<sup>62</sup> 2016 RCFV Report, Summary & Recommendations, page 197-8.

may result in survivors being required to directly cross-examine their abusers.<sup>63</sup> It then went on to confirm that the responsibility of making amendments to the *Family Law Act* to remedy this was a matter for the Australian Government.<sup>64</sup>

- The 2016 COAG Advisory Panel noted in its Final Report that it was advised “the Commonwealth is considering the issue of cross examination in family law matters”. The COAG Advisory Panel “supports work to resolve this issue and looks forward to the outcomes”.<sup>65</sup>
- The 2015 Senate Inquiry Report noted receiving multiple submissions on the trauma of a family violence victim being directly cross-examined by her abuser, and how restricted legal assistance funding for family law matters contributed to this.<sup>66</sup>
- The 2014 Productivity Commission A2J Report recommended amending the *Family Law Act 1975* to restrict direct cross-examination of victims of violence by their alleged abuser in family law proceedings.<sup>67</sup>
- The 2010 ALRC/NSWLRC Report commented on:
  - The fear that family violence victims felt at disclosing family violence in their family law matters<sup>68</sup> and, in particular, the fear that where family violence allegations were otherwise unsubstantiated that this may compromise the credibility of that party in the proceeding.<sup>69</sup>
  - How giving evidence in a court was noted by the Victorian Law Reform Commission (**VLRC**) in a previous inquiry as “one of the most intimidating and distressing aspects of the legal system for people who have been subject to family violence”, that this trauma is heightened if the woman is required to give evidence in multiple proceedings,<sup>70</sup> and heightened again for women of Aboriginal and Torres Strait Islander or CALD backgrounds.<sup>71</sup>

The ALRC went on to make a recommendation that all state and territory family violence legislation, and legislation relevant to sexual crime proceedings, prohibit the respondent from personally cross-examining any person against whom the respondent is alleged to have used family violence<sup>72</sup> (and/or sexual violence).<sup>73</sup>

- In his 2009 Report, Professor Chisholm noted that “cross-examination of a victim by an unrepresented violent partner can be experienced as a continuation of the violence” and “[i]n such cases children are at risk, because they do not have the

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<sup>63</sup> Ibid.

<sup>64</sup> 2016 RCFV Report, Volume IV, Ch 24, page 2014.

<sup>65</sup> COAG Advisory Panel, Final Report, 2016, 51-52

<sup>66</sup> 2015 Senate Report, 117 and 123.

<sup>67</sup> Productivity Commission, Access to Justice Arrangements, No 72, 5 September 2014, Recommendation 24.2.

<sup>68</sup> 2010 ALRC/NSWLR Report, page 833. Available online:  
[https://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC114\\_WholeReport.pdf](https://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC114_WholeReport.pdf)

<sup>69</sup> Ibid.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid p. 864, Recommendation 18-3.

<sup>73</sup> Ibid 40-41.

protection of a well-informed judicial outcome”.<sup>74</sup> He went on to make a recommendation in relation to legal aid guidelines.

### Proposal for implementation

We also note, and support, the recent introduction of a draft bill by the UK parliament to prohibit direct cross-examination of family violence victims by their abusers in family law proceedings.<sup>75</sup> While the proposed UK legislation includes what may be an overly complex three-step test for triggering the protection,<sup>76</sup> the action it is taking to reduce the trauma of direct cross-examination is commendable.

We suggest a simpler mechanism that both protects vulnerable witnesses, ensures the rule of law, and at once reduces the uncertainty of the law, and so the administrative burden associated with its application, drawing on the existing Australian legislation, and in particular the Victorian *Family Violence Protection Act 2008*, sections 70 and 72.

We recommend, as set out in Recommendation 12 below, that where family violence is alleged and where the alleged perpetrator is self-represented, that the alleged perpetrator only be permitted to cross-examine by way of an advocate who acts as a mouthpiece for the purpose of asking questions. Further, where the alleged victim survivor requests, they may also cross-examine the alleged perpetrator with the assistance of an advocate.

It is hoped that such advocates, working together with judges and magistrates trained in family violence dynamics and trauma-informed practice who can limit any inappropriate questions of the alleged perpetrator, would reduce the current trauma of direct cross-examination for family violence survivors.

Other approaches to protecting vulnerable witnesses that we consider appropriate include:

- That the Australian Government provides additional funding to Legal Aid Commissions to ensure that no litigant in family law proceedings in which family violence is present is without a legal representative.
- That the Australian Government amend the *Family Law Act* to prohibit direct cross-examination of vulnerable witnesses by inserting protections similar to those set out in ss 70 and 72 of the Victorian *Family Violence Protection Act 2008*. In that legislation, the court can order that an unrepresented respondent obtain legal representation for the trial or final hearing. If that person is unable to organise legal representation, the court can order that Victoria Legal Aid (VLA) represent that person for the purposes of cross-examination. VLA must provide representation to a respondent or accused person if the court orders them to do so. This would require that the Australian Government ensure that Legal Aid Commissions receive adequate additional funding to meet the increase in demand for this service.

**Recommendation 12:** The Australian Government amend the *Family Law Act* to protect

<sup>74</sup> 2009 Chisholm Report, page 168-9.

<sup>75</sup> *Prisons and Courts Bill 2017* (UK), c 145, s 47. Available here: <https://www.publications.parliament.uk/pa/bills/cbill/2016-2017/0145/17145.pdf>

<sup>76</sup> Ibid.

vulnerable witnesses from direct cross-examination by an abusive ex-partner, by:

5. Introducing a prohibition against personal cross-examination in matters where family violence is alleged, including:
  - a. Where it has been listed as a factor on the Form 4: Notice of Risk (which should be mandatory in both the FCA and the FCC in all family law initiating applications and responses seeking parenting orders).
  - b. It is alleged through the course of the proceeding.
6. In such cases, the court should order that lawyer (or alternatively an appropriately trained advocate), who is protected from liability, be funded by way of legal aid to act as a “mouthpiece” through which the alleged family violence perpetrator could ask questions of the affected family member in cross-examination.
7. If requested, any self-represented affected family member would also be able to be provided with a lawyer or advocate through which they may ask questions of the alleged perpetrator in cross-examination.
8. Where no lawyer or advocate is available, the judge presiding in the matter has the power to intervene to ask questions of the parties. See for example UK Family Court Revised Draft Practice Direction 12J, paragraph 28.<sup>77</sup>

In the alternative, that the Australian Government either:

- Provides additional funding to Legal Aid Commissions to ensure that no litigant in family law proceedings in which family violence is present is without a legal representative.
- Amends the *Family Law Act* to prohibit direct cross-examination of vulnerable witnesses by inserting protections similar to those set out in ss 70 and 72 of the Victorian *Family Violence Protection Act 2008*.

**Recommendation 13:** That the Australian Government consider amending the *Family Law Act* to prohibit direct cross examination in family law proceedings where the court otherwise determines that the person requires the protection of the court.

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<sup>77</sup> Proposed revised Practice Direction 12J available here: <https://www.judiciary.gov.uk/wp-content/uploads/2017/01/PD12J-child-arrangement-domestic-violence-and-harm-report-and-revision.pdf>  
Current version: [https://www.justice.gov.uk/courts/procedure-rules/family/practice\\_directions/pd\\_part\\_12j\\_](https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_12j_)



## 4 – SUPPORTING FAMILY VIOLENCE SURVIVORS TO RECOVER FINANCIALLY

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### **Background: family violence cause financial hardship of women**

Relationship breakdown is well recognised as a common contributing cause of poverty in Australia, and women are most at risk of post-separation financial hardship.<sup>78</sup> In addition, research has demonstrated that family violence “significantly contributes to poverty, financial risk and financial insecurity for women, sometimes long after they have left the relationship”.<sup>79</sup> Research conducted by ANROWS in 2016 suggested that in cases where a woman was subjected to family violence over an extended period (i.e. at multiple points over the three year study) she was more likely to experience adverse economic outcomes, including a decreased likelihood of being in paid employment.<sup>80</sup>

### **Family violence makes it more likely that the victim receives an unfair property settlement**

A key aspect of financial recovery following family violence is the division of the family property following separation - property settlement. Property settlement can be reached by informal agreement, written agreement (including a Binding Financial Agreement), or court order (either by consent or as determined by a Judge). While research has found that only approximately 7% of separated parties resolved their property matter by a judicial decision, those families are more likely than not to have experienced family violence.<sup>81</sup>

In one three-year study of 60 parents who settled their parenting or property disputes by Fehlberg, Millward and Campo,<sup>82</sup> family violence was a factor in settlement in only seven cases. Of those seven cases two detailed case studies were provided, and in both cases the female family violence survivor received a minority share of the property pool. The first woman did so because she felt the fight would be too difficult and her primary concern was her children (she received only 13% of the property pool). The second was a recent migrant subjected to financial abuse by her husband, who made her take out large personal loans in her name to finance his business. She was unable to afford legal advice to dispute the property settlement (and so received none of the property pool). The writers described her

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<sup>78</sup> Pru Goward, Human Rights and Equal Opportunity Commission and Sex Discrimination Unit, *Striking the Balance: Women, Men, Work and Family : Discussion Paper 2005* (Sex Discrimination Unit, Human Rights and Equal Opportunity Commission, 2005) 54; Rosalie McLachlan et al, *Deep and Persistent Disadvantage in Australia: Productivity Commission Staff Working Paper* (Productivity Commission, 2013) 141.

<sup>79</sup> Rochelle Braaf and Barrett Meyering, 'Seeking Security: promoting women's economic wellbeing following domestic violence (2011), Sydney : Australian Domestic and Family Violence Clearinghouse <website?> , 3; See also Amanda George and Bridget Harris, 'Landscapes of Violence: Women Surviving Family Violence in Regional and Rural Victoria' (Report, Centre for Rural Regional Law and Justice, Deakin University School of Law, 2014) 35; Emma Smallwood, 'Stepping Stones: Legal Barriers to Economic Equality after Family Violence' (Report, Women's Legal Service Victoria, 2015), 6; National Council to Reduce Violence Against Women and Their Children (Australia), *Background Paper to Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and Their Children, 2009-2021* (Dept. of Families, Housing, Community Services and Indigenous Affairs, 2009) 44; Ilsa Evans, *Battle-Scars: Long-Term Effects of Prior Domestic Violence* (Centre for Women's Studies and Gender Research, Monash University, 2007) 24.

<sup>80</sup> Natasha Cortis and Jane Bullen, *Domestic Violence and Women's Economic Security Building Australia's Capacity for Prevention and Redress: Final Report* (ANROWS, 2016) 13 <<http://anrows.org.au/publications/horizons/domestic-violence-and-womens-economic-security-building-australia%E2%80%99s-capacity>>, 46.

<sup>81</sup> Lixia Qu, et al, 'Post-Separation Parenting, Property and Relationship Dynamics After Five Years' (Report, Australian Institute of Family Studies, Attorney-General's Department, 2014).

<sup>82</sup> Belinda Fehlberg, Christine Millward and Monica Campo, 'Post separation parenting arrangements, child support and property settlement: exploring the connections' (2010) 24 *Australian Journal of Family Law*.

case as follows:<sup>83</sup>

*Lynn [a pseudonym] said that her cultural background led her to believe that wives should be submissive to their husbands. She said she ‘didn’t know better’ or understand her legal rights until she spoke to other Australian mothers. All assets were in her husband’s name only, and she had received no property at all from the \$1.3 million pool (comprising real estate (\$1.2 million), his business (\$250,000) and a car, (\$20,000)). Lynn, however, was still paying off the personal loans, totalling \$22,000. She said she could not afford to seek legal advice to resolve these issues.*

Research has confirmed that women who have experienced family violence are more likely to accept unfair property settlements than other women.<sup>84</sup> For example, Sheehan and Smyth found that those who had experienced severe family violence were three times more likely to receive a minority share of property (being less than 40% of the pool).<sup>85</sup> They state that violence may create ‘a substantial power imbalance between the parties that disadvantages the victim of violence’ when negotiating a settlement.<sup>86</sup> Similarly, in Qu and others’ study, they hypothesised that those who have experienced abuse may be more likely to accept lower settlements due to fear of the other party or wanting to finish property negotiations as soon as possible.<sup>87</sup>

Family violence perpetrators may often use the family law system to continue abuse – ‘systems abuse’ – particularly by dragging out proceedings to force the other party into a settlement they want.<sup>88</sup> ‘Systems abuse’ is described by Smallwood as the exploitation of ‘rules or processes’ within financial and legal systems to control, financially damage or abuse another person.<sup>89</sup> It includes vexatious behaviour by the other party, controlling women ‘through the emotional and economic toll of ongoing court proceedings’.<sup>90</sup>

### **Family violence is not routinely acknowledged in the division of property**

The *Family Law Act* does not currently contain explicit reference to the relevance of violence in deciding property settlements. Section 79(4) of the *Family Law Act* sets out the contributions the Court must consider in determining the division of property, and includes financial, property, and family welfare (including as homemaker or parent) contributions.<sup>91</sup> The Court also takes into account additional factors when deciding a property division (often referred to as the “future needs factors”). These are set out in section 75(2) and include: (a)

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<sup>83</sup> Ibid, pp. 231-232.

<sup>84</sup> See for example Family Law Council’s advice to the Attorney-General.

<sup>85</sup> Grania R Sheehan and Bruce Smyth, ‘Spousal Violence and Post-Separation Financial Outcomes’ (2000) 14(2) *Australian Family Law Journal* 102, 11; women who experienced family violence were more likely to have left the family home, and this was associated with receiving a lower share of property: Qu et al, ‘Post-Separation Parenting, Property and Relationship Dynamics after Five Years’ (Report, Attorney-General’s Department, 2014), 106; Sheehan and Hughes, however, found no association between violence and share of property received, but they note that this may be because the single item measure of violence in the survey did not capture varying degrees of violence: Grania Sheehan and Jody Hughes, *Division of Matrimonial Property in Australia* (Australian Institute of Family Studies, 2001) Findings: Relationship context and other factors .

<sup>86</sup> Sheehan and Smyth, above n 86, 9.

<sup>87</sup> Qu et al, above n 86, 106.

<sup>88</sup> Owen Camilleri, Tanya Corrie and Shorna Moore, ‘Restoring Financial Safety :Legal Responses to Economic Abuse’ (Report, Good Shepherd Australia New Zealand and Wyndham Legal Service, 2015), 40-41.

<sup>89</sup> Smallwood, above n 82, 42.

<sup>90</sup> Ibid 42–43; See also Braaf and Barrett Meyering, above n 82, 57; George and Harris, above n 82, 36.

<sup>91</sup> The contributions include: (a) the financial contributions made, (b) contributions other than financial contributions made to the acquisition, conservation or improvement of the property; and (c) contributions to the welfare of the family, including any contribution made in the capacity of homemaker or parent.

[the parties'] age and health, (b) their income, property, financial resources and capacity for appropriate gainful employment, and (c) whether they have care of children.

Currently, the only way in which violence or abuse might be accounted for in a property settlement is by way of what is known as a "Kennon adjustment", named after the case of *Marriage of Kennon* (1997) 22 Fam LR 1. However, this mechanism for acknowledging the financial impact of violence is severely limited. Firstly, the language of sections 79 and 75 limit its scope. Therefore such an adjustment allows a judge to consider whether family violence impacted on the family violence victim's contributions to the relationship.<sup>92</sup> Further, the judge may consider the extent to which family violence has created future needs as defined under section 75(2).<sup>93</sup> However, such an adjustment cannot take into account that the perpetrator of violence may have made a 'negative contribution' to the relationship through violence (including the destruction of property) that should be considered in the assessment of contributions.

Secondly, it requires the victim of violence to prove a causal connection between violence and financial hardship. When considering a Kennon adjustment, family violence is only relevant insofar as it can be proved that it has had a financial impact on the parties. Therefore, victims of violence may be able to show that violence has occurred but fail to show how it affected their contributions. Again, the study by Easteal et al indicated that in 72% of matters the judge accepted violence had occurred, yet in only 42% of cases an adjustment was made.<sup>94</sup> While physical violence and its effects may be relatively easy to prove, proving intangible violence such as emotional violence or controlling behaviour, and its financial consequences, is more difficult.

Thirdly, despite the capacity to make Kennon adjustments, research indicates that in practice they are applied infrequently and their effect on the ultimate division of property is minor.<sup>95</sup> Middleton reported in 2002 that where Kennon arguments were made the majority were successful,<sup>96</sup> yet a more recent study by Easteal and others showed only a 42% success rate.<sup>97</sup> In this later study, where the percentage adjustment for family violence was specified the mean adjustment made was 7.3%.<sup>98</sup>

This is why in 2001 the FLC provided written advice to the Commonwealth Attorney General,<sup>99</sup> stating that the case of *In the Marriage of Kennon* (1997) created uncertainties in the law and calling for legislative amendment clarifying the relevance of violence in resolving property divisions. The FLC argues that the courts should be required to consider the effect of family violence in the property settlement process, and that in doing so the court should consider both the impact that the violence has on the victim, and the 'negative contribution' made by the perpetrator through being violent, for example through the wilful destruction of

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<sup>92</sup> *Marriage of Kennon* (1997) 22 Fam LR 1, 24.

<sup>93</sup> *Family Law Act 1975* (Cth) s 75(2); *Marriage of Kennon* (1997) 22 Fam LR 1, 23.

<sup>94</sup> Patricia Easteal, Catherine Warden and Lisa Young, 'The Kennon "Factor": Issues of Indeterminacy and floodgates.(Australia)' (2014) 28(1) *Australian Journal of Family Law* 1,, 11.

<sup>95</sup> Fehlberg et al, above n 37, 587; Sarah Middleton, 'Domestic Violence, Contributions and S. 75(2) Considerations: An Analysis of Unreported Property judgements.(Family Law Act 1975)(Australia)' (2001) 15(3) *Australian Journal of Family Law* 230; Ibid 9 ; Nell Alves-Perini et al, 'Finding Fault in Marital Property Law: A Little Bit of History Repeating?' (2006) 34(3) *Federal Law Review* 377, 387.

<sup>96</sup> Being 17 of 27 cases identified: Middleton, above n 96, 7.

<sup>97</sup> Easteal, Warden and Young, above n 95, 10.

<sup>98</sup> Ibid 12.

<sup>99</sup> Family Law Council, 'Letter of Advice: Violence and Property Proceedings', 14 August 2001.

property, where the party responsible would bear the loss.<sup>100</sup>

The FLC listed several provisions of Part VIII of the *Family Law Act* that should be changed, which WLSA supports, as below.

#### **Recommendation 14**

That the Australian Government amend the *Family Law Act* as follows:

- Amend s 79 to include a new subsection (s79(4A)), directing the court to have regard to the effects of family violence on both parties' contributions. This would require the court to take family violence into account as a negative contribution by the perpetrator in addition to the requirement in Kennon's case to recognise where family violence has impacted on a victim's capacity to make contributions and to value those missed contributions.
- Amend s 75(2) to include a new paragraph in the list of factors the court considers when deciding an application for spousal maintenance. It would direct courts to consider the effect of family violence perpetrated in the relationship by either party on the financial circumstances of the parties.

#### **Family law property settlements are inaccessible for women experiencing poverty**

In addition, there are numerous systemic barriers to a fair property settlement for women who have experienced family violence. Delay, prohibitive legal costs, the issue of joint debts and bureaucratic legal and welfare systems all limit the financial options of women who have experienced violence.<sup>101</sup>

These barriers may be amplified when you consider the intersection of violence against women and ensuring women from groups who are marginalised in society, such as Aboriginal and/or Torres Strait Islander women; CALD women; women with a disability; LGBTIQ+ communities; women living in a regional, remote or rural location; younger women; and older women are not further disadvantaged by the system. Particularly where the property pool is 'small' (i.e. less than \$100,000), women often walk away instead of pursuing a drawn out property settlement which might also provoke violence from their former partner.<sup>102</sup>

**Recommendation 15:** The Australian Government amend the *Family Law Act* to include a requirement for an early resolution process in small claim property matters. This process should be a case management process upon application to the Court for a property settlement rather than a pre-filing requirement.

**Recommendation 16:** The Australian Government conduct a comprehensive audit of the Family Court of Australia (**FCA**) and the Federal Circuit Court (**FCC**) family law processes, in relation to both parenting and property disputes, with a view to increasing accessibility of the family law system. Such a review should include, as a minimum, consideration of:

<sup>100</sup> Ibid 5.

<sup>101</sup> Camilleri, Corrie and Moore, above n 89, 39; Smallwood, above n 82, 35–47.

<sup>102</sup> Camilleri, Corrie and Moore, above n 89, 39; See also Fehlberg et al, above n 37, 588.

- the application requirements and form of evidence currently required by the Court to determine a small property division
- the adequacy of current disclosure mechanisms to allow the Court to obtain the necessary financial information required to make a just and equitable property division
- the current fees charged by the Family Court and the Federal Circuit Court

### **There are specific barriers to justice in small property pool matters**

There are also barriers to justice in relation to particular categories of property or debt that have a disproportionate impact in cases of small property pools. These include:

- **Joint debt** – Especially where creditors are major lenders and where debt is being used to continue family violence. Dividing joint debts after separation can be extremely difficult for women experiencing financial hardship and family violence. For example, while secured debts are generally deducted from the total asset pool and the net assets are divide between the parties, in the case of joint debts that are unsecured, typically both parties will continue to remain jointly and severally liable. When parties are jointly and severally liable the creditor can choose which person to pursue for the entirety of the debt. This can be an untenable situation for women attempting to cut ties with an abusive partner. Abuse is thus perpetuated through the medium of this lingering debt and the real threat to women’s credit ratings, which impedes on their economic recovery.

Section 90AE(a) of the *Family Law Act* expressly allows the Court to make an order directing a creditor of the parties to substitute one party for both parties in relation to the debt owed to the creditor, or order a third party creditor to sever the debt and apportion it in different amounts to the parties. However, the Court may only make the order if it is not foreseeable that the order would result in the debt not being paid in full and in all the circumstances it is just and equitable to make the order.

- **Superannuation splitting** – The superannuation of the family violence perpetrator may be the only sizeable asset in the property pool of a poor family. However, the process for obtaining an order to split one party’s superannuation is very complicated and difficult to navigate without legal assistance. Lawyers are disinclined to assist with obtaining a superannuation splitting order where super is the only asset in the property pool. In situations where a woman does not know the name of her former partner’s fund, and her partner refuses to make full disclosure of their assets, there is no process by which she can discover this information herself, and will be unable to obtain a splitting order.
- **Injunctions over property in the context of small asset pools** – In a small property pool, physical assets such as cars, caravans or jewellery might be the only sizeable assets in the pool. It is therefore important to have access to these through a property settlement. Without fast, simple and early access to the legal processes to prevent disposal of such assets, including removal of money from bank accounts, there may be nothing left over which women can obtain a property settlement.

## **Binding Financial Agreements**

The *Family Law Act* provides for parties to a marriage or de facto relationship to enter into a Binding Financial Agreement (**BFA**) about the financial arrangements should their marriage or de facto relationship break down. WLSA member lawyers are concerned that BFAs can in some circumstances be used as tools of financial abuse by family violence perpetrators. We therefore ask the Australian Government to consider whether it would be prudent to amend the *Family Law Act* to allow wider scope for BFAs to be set aside in cases of family violence, and to provide for broader setting aside clauses in cases of family violence.

We note the submission made by Women's Legal Service Queensland in response to the *Family Law Amendment (Financial Agreements and Other Measures) Bill 2015* in relation to BFAs. We confirm that WLSA members do not support amendments to the *Family Law Act* that would make it easier for a perpetrator of violence to use BFAs as a tool of financial abuse. Our practice knowledge tells us that challengeable BFAs are particularly used against CALD women who have limited or no English, little understanding of their legal rights, limited support and no understanding of the Australian legal system or laws.

## 5 – INCREASING THE FAMILY VIOLENCE UNDERSTANDING OF FAMILY LAW PROFESSIONALS

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### Background

The AIFS 2015 Evaluation Report found that 48% of family law professionals surveyed disagreed with the proposition that after the 2012 reforms, the family law system had the capacity to screen adequately for family violence and child abuse.<sup>103</sup> Professional attitudes of individuals play a significant role in shaping that capacity, and in determining whether legal responses to family violence are effective. The RCFV stated in its Report that the people with whom it consulted “emphasised how critical a magistrate’s skill and approach are to the outcome of a hearing, the victim’s safety, and a perpetrator’s level of accountability.”<sup>104</sup> One 2005 study of attitudes to family violence across state and federal jurisdictions suggested that individuals’ views may be more influential than the legal frameworks themselves in building capacity, and that therefore professional development in relation to family violence and child safety needs to be thorough and ongoing.<sup>105</sup>

In this part, “**family law professional**” includes lawyers (including independent children’s lawyers (**ICLs**)), FDR practitioners, family consultants, judicial officers, and court staff, unless otherwise specified.

### Family violence training required for all family law professionals

Numerous studies and inquiries have confirmed the importance of training and professional development in building the capacity of the family law system to respond to family violence, and our recommendations echo those findings. These include:

- The 2016 RCFV report, which recommended, among other things, that:<sup>106</sup>

#### Recommendation 215

The Judicial College of Victoria include material on the dynamics and complexities of family violence in other general programs offered to all judicial officers and Victorian Civil and Administrative Tribunal members, in addition to the specific family violence programs and resources provided to date [within 12 months].

#### Recommendation 216

The Victorian Government provide funding to continue the development of comprehensive family violence learning and development training covering family violence, family law and child protection for court staff and judicial officers [within 12 months].

- The FLC 2016 Final Report, which recommended:<sup>107</sup>

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<sup>103</sup> 2015 AIFS Evaluation Report (FV), at page 47, Table 4.

<sup>104</sup> 2016 RCFV Report, Volume VI, Ch 40, page 210.

<sup>105</sup> Belinda Fehlberg et al, *Australian Family Law: the Contemporary Context* (2015, Second Edition, Oxford University Press), 159, referring to: Rosemary Hunter, *Women’s Experiences in Court: The Implementation of Feminist Law Reforms in Civil Proceedings Concerning Domestic Violence*, Unpublished PhD thesis, Stanford University, 2005, p 305. See also Rosemary Hunter, ‘Narratives of Domestic Violence’ (2006) 28 *Sydney Law Review* 735, 773.

<sup>106</sup> 2016 RCFV Report, Summary & Recommendations, 104.

<sup>107</sup> Page 14-15.

### **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).

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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.

### **Recommendation 12: Joint professional development**

1) To ensure there is consistent and national training, the National Judicial College of Australia develop a continuing joint professional development program for judicial officers from the family courts and state and territory courts in which judicial officers preside over matters involving family violence to strengthen understanding of family law and family violence and the impact of trauma.

2) The Australian Government engage with relevant professional bodies within the child protection, family law and family violence systems with a view to encouraging collaboration in designing and delivering joint training opportunities aimed at strengthening cross-professional understanding.

- The 2015 Senate Inquiry Report, which recommended as follows:<sup>108</sup>
  - 9.71 The committee recommends the Commonwealth Government through the Attorney-General's Department, coordinate the development of consistent training for and evaluation of family consultants who write family reports for the Family Court alongside the development of a national family bench book by June 2017.
  - 9.72 The committee recommends the Commonwealth Government, through the Attorney-General's Department and COAG, facilitate the training of all judicial officers who preside over family violence matters, alongside the development of a national family bench book by June 2017.
- The 2009 Chisholm Report, which recommended that the (a) the Australian Government and other agencies consider how family law professionals “might be better educated in relation to issues of family violence”; (b) that family violence expertise be considered when making “significant appointments” in the family law system; and (c) that legal education bodies include family violence content into curricula, including in relation to safety risks for children.<sup>109</sup>

We note that in June 2016, the FCA and FCC issued a media release that called for further funding from the Australian Government to support its response to family violence, including

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<sup>108</sup> 2015 Senate Report, xi.

<sup>109</sup> 2009 Chisholm Report, Recommendations 4.3, 4.4, 4.6. Page 16. Available at: <https://www.ag.gov.au/FamiliesAndMarriage/Families/FamilyViolence/Documents/Family%20Courts%20Violence%20Review.pdf>



by way of training for judicial officers and court staff.<sup>110</sup> We acknowledge that in its December 2016 *Consultation paper—amendments to the Family Law Act 1975 to respond to family violence*, the federal Attorney General’s Department stated that in 2017-18 it intends to fund the development and roll out of two training modules “for judicial officers on family violence and family law which will build on the [National Domestic and Family Violence] Bench Book and offer tailored support to judicial officers”.<sup>111</sup> We support this positive step to support the family law judiciary. However, without knowing further details of this training, we cannot comment on whether this would be sufficient to allay concerns.

### **Training should include child protection and cultural competency components**

Given the interrelatedness of child protection, family law and family violence jurisdictions, we endorse the FLC’s statements in its 2016 Final Report, as follows:<sup>112</sup>

Council notes there is general consensus among practitioners and researchers that collaboration and cross-professional development between the family violence and child protection sectors is essential to improving outcomes for vulnerable children. Council considers that family law professionals should be included in this training.

In our lawyers’ experience, where conscious or unconscious bias of a decision-maker (this can be in relation to gender, race, sexuality, disability, etc) affects a family law outcome, this can have devastating consequences for the individual involved. See, for example, **Joanne’s story, below**. We therefore endorse the recommendations of the FLC in its 2016 Final Report in relation to ensuring that all family violence training of family law professionals includes a cultural competency component, including in relation to working with clients of Aboriginal and Torres Strait Islander, and CALD, backgrounds. Additionally, there should be training regarding working with LGBTIQ+ families and people with disabilities.

#### **Recommendations**

##### Regarding judicial officers & court staff

**Recommendation 17:** That the Australian Government funds, and together with the Judicial College of Australia develops, a continuing joint professional development program for judicial officers from the family courts and state and territory courts in which judicial officers preside over matters involving family violence. We recommend that this training package includes content on family violence (including recognising dynamics of family violence and unconscious bias), cultural competency, working with victims of trauma, family law (for state and territory judges) and child protection.

**Recommendation 18:** We recommend the Australian Government adopt recommendations 215 and 216 of the 2016 RCFV Report such that (215) material on the

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<sup>110</sup> Family Court of Australia, Media release- ‘Family law system needs more resources to deal with an increasing number of cases involving violence’ (June 20, 2016). Accessed: <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/media-releases/2016/mr200616>

<sup>111</sup> Attorney General’s Department, *Amendments to the Family Law Act 1975 to respond to family violence Public Consultation Paper* (December 2016), page 5. Available online at: <https://www.ag.gov.au/Consultations/Documents/amendments-family-law-act-respond-to-family-violence/Exposure-draft-on-family-violence-amendments-consultation-paper.pdf>

<sup>112</sup> FLC 2016 Final Report, at page 6.

dynamics of family violence be included in general judicial officer training and (216) the comprehensive family violence learning and development program for court staff and magistrates in Victoria continue to be developed and expanded Australia-wide.

Regarding family law professionals (including ICLs and FDR practitioners)

**Recommendation 19:** That the Australian Government fund and coordinate the development of a national, comprehensive family violence training program for family law legal professionals (including ICLs and FDR practitioners) and work with state and territory law institutes and bar associations to roll out the training.

Re broad and relevant skills, including child protection and cultural competency

**Recommendation 20:** The training modules for family law professionals referred to in Recommendations 17 to 19 above, and Recommendation 21, include training on:

- The intersection of family law, child protection and family violence.
- Cultural competency in relation to working with Aboriginal and Torres Strait Islander clients, including training that builds an understanding of the multiple and diverse factors contributing to the high levels of family violence in Aboriginal communities, and an understanding of Aboriginal and Torres Strait Islander family structures and child rearing practices.
- Cultural competency in relation to working with clients of a culturally or linguistically diverse background (including working with interpreters).
- Working with Lesbian Gay Bisexual Transgender Intersex Queer (**LGBTIQ+**) families.
- Working with people with a disability.
- Working with vulnerable clients.
- Trauma-informed practice.

**Family consultants (family report writers): formal accreditation and complaints mechanism required**

Background

Family consultants (also known as family report writers) provide expert evidence in family law proceedings by formulating recommendations for the court with respect to children. For example, a family consultant may provide recommendations on where a child should live, how decision-making about the child should occur and how much time a child spends with each parent.

Family consultants are ordinarily social workers or psychologists. Their recommendations carry significant weight in court and inform court decision-making with respect to children's arrangement. Despite the critical role that family consultants play in assessing risk to children, there is no formal process of accreditation, training or monitoring of family consultants.

In our lawyers' experience, a lack of training in domestic violence and child abuse has led to the following issues in family law cases:

- Inappropriate processes, practices and procedures: Family consultants are not required to follow a particular format for interviewing children who have witnessed or been the victims of domestic violence. This can lead to increased trauma for children and limited disclosure of abuse. We have cases of family consultants requesting both parents attend an interview at their offices at the same time, despite the existence of an intervention order illustrating a lack of risk assessment and safety planning in high risk cases.
- A lack of understanding of the dynamics and risks of family violence. This was recently confirmed by Moorabbin Court Magistrate Anne Goldsbrough, who told a national family violence conference she frequently read court reports from psychiatrists, psychologists and medical practitioners who clearly had little knowledge of family violence.<sup>113</sup> At that conference, Ms Goldsbrough said 70-80 per cent of people appearing before her for a specialist mental health sentencing list were perpetrators or victims of family violence. However, she went on to say that "in many of the reports I read, many of the imminent psychiatrists and psychologists, medical practitioners, in my humble opinion, display little idea about the dynamics and consequences of family violence."
- A consequent minimizing or not believing a domestic violence victim's story: Without a sound understanding of domestic violence, there is a risk that allegations of domestic violence may be dismissed or doubted. In some instances, victims' concerns have been described as being paranoid, an over-reaction or malicious. This can lead to unsafe decisions about contact and parenting arrangements. For example, we have reports by family consultants recommending that a parent have unsupervised access to a child despite the other parent raising concerns about past domestic violence and future risk to the child.
- In some instances, an under-stating of the risks and effects of family violence on children.
- A lack cultural competency in relation to working with people of an Aboriginal and Torres Strait Islander, and culturally or linguistically diverse, background. This includes in particular the ability to communicate effectively through interpreters and the ability to appreciate how culture may influence behaviour. Related to this, as in Joanne's case below, a lack of cultural competency may result in a preferencing of the other party's statement, which may have significant safety risks for the child involved.

We acknowledge the FCA/FCC response to this issue as at June 2016, in which the Courts noted that with additional funding they would introduce the following:<sup>114</sup>

- Broad ranging review of the role of family report writers – a methodologically sound

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<sup>113</sup> Powley, Katherine, 'Victorian magistrate says psychs have 'little idea' about family violence' *Herald Sun* (online) 15 February 2017 <http://www.heraldsun.com.au/news/victoria/magistrate-says-psychs-have-little-idea-about-family-violence/news-story/a9e95354714533804b3f5d67f84e643f>

<sup>114</sup> Federal Circuit Court of Australia (20 June 2016), *Media Release - Family law system needs more resources to deal with an increasing number of cases involving family violence*. Available online at: <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/about/news/mr200616>

and broad review is recommended to inquire into the family report process.

- Develop best practice family violence forensic assessment and reporting - Family report writers employed by the Courts are well trained in issues relating to family violence and bring considerable expertise in the interview and assessment of parents and children. With the aim of introducing a standardised approach nationally, including by external report providers, research and assessment of current practices should be undertaken.

### **Joanne's story – the consequences of perceived bias in a family report**

Joanne<sup>115</sup> was born in a South East Asian country, and she only speaks Khmer, a language that it is difficult to get interpreters for. She lives in Melbourne, and her sole income is a Centrelink benefit. She was referred to Women's Legal Service Victoria (**WLSV**) in relation to a parenting dispute with her ex-partner, Peter. He lives in regional Victoria and also requires a Khmer interpreter.

In about 2004, Peter and Joanne met overseas, where Joanne lived. For a few years, they would only see each other every 6-12 months when Peter visited from Australia. In about 2006, Joanne became pregnant with their son, Richard. In 2013, when Richard was 6 years old, the couple decided he should live with Peter so that he could be afforded the opportunities of life in Australia. Joanne could not accompany Richard to Australia for financial reasons.

In July 2016, Joanne and her daughter from a previous relationship, Chloe, came to live with Peter and Richard in regional Victoria. In late August 2016, Joanne left Peter with her two children, alleging physical and emotional family violence, and the three went to live in a refuge in Melbourne. Joanna and Chloe obtained Intervention Orders for their safety against Peter. The Department of Health & Human Services (**DHHS**) was involved briefly in relation to child protection matters, but determined that the children were safe with Joanne, who was deemed as protective.

Peter made an application to the Federal Circuit Court for an order for sole parental responsibility and for Richard to live with him in regional Victoria – the proceeding in which WLSV is now assisting Joanne. As part of this proceeding, the judge made an order for a family report (a section 11F Report or a Child Inclusive Memorandum to Court) by a family consultant.

In preparing her report, which was done in the courthouse, the family consultant spent about one hour with each of Joanne, Peter, and Richard. In the case of meetings with Joanne and Peter, this had to be done with the assistance of interpreters. Despite having only brief meetings with Richard and his two culturally diverse and non-English-speaking parents, and limited time to prepare the family report, the family consultant determined conclusively in her report that *“there are no indications that the claims of family violence are other than opportunistic to provide [Joanne] with options”*.

In the report, the family consultant does not give much weight to a record of interview with DHHS, although in it Richard reports that Peter had hit him, and that Peter had controlled Joanne since her arrival. The report contains a record of two observations of Richard with his father, which are described as *“poignant”* and emotionally *“tumultuous”*, but no observations of Richard with his mother. Although Peter is reported as having recently attempted to commit suicide by hanging (indicating grave mental health issues and

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<sup>115</sup> This story has been fully de-identified, and is provided with the consent of our client.

increased risk of violence in the Victorian Common Risk Assessment Framework) this is not explored in detail. Although her reasoning is unclear, the consultant concludes that Richard “has become a pawn in the parental conflict”, and recommends that Richard live with his father.

On the basis of this report, the court ordered that Richard live with his father, and see his mother every fortnight at Peter’s home in regional Victoria. It was ordered that Richard return to live with his father immediately from court. This left Joanne with little opportunity to say goodbye to Richard in court, and he was led sobbing away from her.

As Joanne is on Centrelink and has no car, she now travels many hours to Peter’s home from Melbourne by bus every fortnight to visit Richard. The dispute is ongoing.

Another family violence survivor, “Rita” (not her real name) described her experience with a family report writer to WLSV as follows:

*the family report writer insisted on arranging our first appointment as a joint mediation session. There was no risk assessment at all prior to meeting myself or my ex husband. When I refused to attend jointly, he exerted pressure on me to change my mind and only begrudgingly agreed to do separate appointments. He said he had never come across anyone who would not mediate in the room with their ex, in 35 years of practice.*

*despite my reluctance, he arranged my appointment so that my ex husband was present in the waiting room for about a third of the time. When my ex arrived, the report writer again put pressure on me to allow my ex into the room, saying that if we did not sort things out together today, we would be subjected to a 5 day trial that would cost \$100k. (We were not even at the stage of interim orders at this point and no where near trial.) ...*

*When I pointed out that I had a letter from my treating psychologist - which he had seen - saying that I should not mediate in the same room as my ex because of a) the issue of coercive control in the relationship and b) the panic attacks which I had experienced in the previous four weeks as a result of the abuse escalating, then the family report writer said “I don’t care.” ...*

*Towards the beginning of the session, the family report writer explained that he did not believe there was anything in my affidavit that indicated I had been subjected to family violence. He said that no one had seen us together and could verify abuse and that my doctor and my psychologist only believed what I had told them. It was made very clear to me that he felt that I had over reacted. He repeatedly used the phrase “it’s all he said, she said” and “you just don’t like each other very much”. ...*

*There was no acknowledgement or understanding that a woman subjected to family violence may often be suffering from anxiety and depression. Instead of asking “What has happened to this woman?”, he just asked “What is wrong with this woman?”*

As Dr Deborah Wilmoth writes, that in the experience of the Western Australia Board of Psychologists, complaints against psychologists in family court proceedings have been increasing.<sup>116</sup>

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<sup>116</sup> Deborah Wilmoth (December 2007) “Family Court psychological evaluations: how not to be part of the fallout”, *inPsych*, [https://www.psychology.org.au/inpsych/family\\_court/](https://www.psychology.org.au/inpsych/family_court/)

As presiding officer of the Western Australia Board of Psychologists, I have been increasingly concerned with the rising number of complaints being lodged against psychologists in relation to Family Court evaluations, a concern also shared by other Psychology Boards in Australia. At least in terms of Western Australia, many of the complaints centre on issues of the competency of the psychologist to provide such reports, the perceived bias of the psychologist, the methodology of the evaluation, and the existence of dual relationships (the psychologist as both expert witness and therapist).

#### Inadequate complaints mechanism for family consultants

There is no avenue for raising concerns with respect to family consultants or ensuring that they are appropriately trained to handle cases where there is domestic violence and risk to children.

The FCA website refers anyone with a complaint about a family consultant to either its complaints policy, or the equivalent FCC complaints policy.<sup>117</sup> However, the FCA complaints page states that its policy does not apply to expert witnesses, and that any issue with the contents of a family report should be tested by way of the court process.<sup>118</sup> The FCC complaints page states that the Regional Dispute Resolution Coordinator may be able to assist with a complaint about a family report writer, but to the extent that a litigant is unhappy with the content of a family report, this must be challenged by way of cross-examination. It further states that “If you wish to cross-examine the Family Consultant who prepared your Report you, or your lawyer, must write to the Family Consultant at least 14 days before the hearing.”<sup>119</sup>

Our experience working with family law litigants, many of whom have experienced family violence, is that a self-represented litigant will have difficulty effectively cross-examining a witness in a way that challenges their credibility. This would be particularly so where the expert witness is experienced in the court system, and the litigant is not, as is most often the case. Cross-examination is also not an appropriate mechanism by which to challenge the inadequate practice of a “repeat offender” – a family report writer who repeatedly shows a lack of understanding of the nature and dynamics of family violence and impact of trauma, as identified by WLS lawyers or other professionals in the family law system.

Another key inhibitor of making a complaint in relation to this group of practitioners is that section 121 of the *Family Law Act 1975* (Cth) prohibits publication or transmission of identifying information about parties in a family court proceeding. This has resulted in the Australian Association of Social Workers (**AASW**), out of what may be an abundance of caution, publishing a guidance note confirming it is “generally prohibited”, because of section 121, from receiving complaints about social workers that have acted as a family report writer in family law proceedings.<sup>120</sup>

In 2015, the Family Court released the *Australian Standards of Practice for Family*

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<sup>117</sup> See <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/publications/child+dispute+services/family-reports>

<sup>118</sup> Family Court of Australia, ‘Feedback and complaints policy’ (October 24 2016) <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/contact-us/feedback/complaints-policy>

<sup>119</sup> Federal Circuit Court of Australia, ‘Federal Circuit Court of Australia Complaints Policy’ (May 3 2016) <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/contact-us/feedback-complaints/complaints>

<sup>120</sup> See <https://www.aasw.asn.au/document/item/3863>

*Assessments and Reporting - February 2015*,<sup>121</sup> which we consider to be a good first step, however these standards are not binding on family consultants. We note that these Standards are not referred to in the current version of the FCA and FCC *Family Violence Best Practice Principles* (December 2016),<sup>122</sup> which are currently under-utilised and not well known.

### Our recommendations

We believe that there is considerable scope for an accreditation scheme to be introduced to oversee training and specialization of family consultants as well as undertaking ongoing monitoring and evaluation and managing a formal complaints process. This is particularly important if family consultants are to undertake a risk assessment with respect to child safety and provide recommendations in relation to interim care arrangements for children as we recommend above at Recommendation 4. This was supported in the 2016 FLC Final Report, as well as in the 2015 Senate Inquiry Report.<sup>123</sup>

An accreditation scheme could be modelled on the system that applies to Family Dispute Resolution Practitioners. The *Family Law (Family Dispute Resolution Practitioner) Regulations 2008* (Cth) (the **FDR Regulations**) include competency-based qualifications and outlines three different pathways to accreditation.

**Recommendation 21:** The Australian Government, through the Attorney General's Department and in consultation with family violence and family law experts, coordinate the development of consistent training, an accreditation process and minimum standards for family consultants. In addition, that the training and accreditation process and minimum standards include a focus on capabilities in relation to understanding and identifying family violence, cultural competency and trauma-informed practice.

**Recommendation 22:** That Aboriginal and Torres Strait Islander litigants have access to adequately trained Aboriginal and Torres Strait Islander Family Consultants, and that adequate cultural awareness training be provided to all non-Aboriginal family consultants.

**Recommendation 23:** The Australian Government establish an oversight mechanism and complaints process to monitor and review the conduct of family consultants.

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<sup>121</sup> Available online at: <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/policies-and-procedures/asp-family-assessments-reporting>

<sup>122</sup> Available online at: [http://www.familycourt.gov.au/wps/wcm/connect/cfd25561-39fb-49c4-83c1-2aff5cf6e4a1/FVBPP\\_edition4\\_December2016.pdf?MOD=AJPERES&CONVERT\\_TO=url&CACHEID=ROOTWORKSPACE-cfd25561-39fb-49c4-83c1-2aff5cf6e4a1-lyTuHJt](http://www.familycourt.gov.au/wps/wcm/connect/cfd25561-39fb-49c4-83c1-2aff5cf6e4a1/FVBPP_edition4_December2016.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE-cfd25561-39fb-49c4-83c1-2aff5cf6e4a1-lyTuHJt)

<sup>123</sup> *Recommendation 17: 9.71 The committee recommends the Commonwealth Government through the Attorney-General's Department, coordinate the development of consistent training for and evaluation of family consultants who write family reports for the Family Court alongside the development of a national family bench book by June 2017.*

## 6 – ADMINISTRATION & ENFORCEMENT OF A NATIONAL INTERVENTION ORDER SCHEME

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### Background

At present, if an affected family member (**AFM**) has an intervention order for personal protection (**DVO**) against a respondent made in a state or territory in Australia, and moves or travels to another state, they must register the DVO for it to be enforceable. This places an unnecessary burden and pressure on victims of family violence. The need for automatic recognition was recognised by the National Council to Reduce Violence against Women and their Children in 2009<sup>124</sup> and included as part of the *National Plan to Reduce Violence against Women and their Children 2010-2022*.<sup>125</sup>

In December 2015, COAG agreed each state and territory would introduce model laws to automatically recognise and enforce DVOs across Australia, including New Zealand orders registered in Australia. This is part of COAG's decision to develop a National Domestic Violence Order Scheme (**National DVO Scheme**). WLSA is supportive of this development and considers it an important step to ensure cross-jurisdiction victim safety.

While model laws have been enacted in each state and territory, they have not commenced operation. We understand that this is because the requisite interim national information sharing regime for police is yet to be established. The Australian Government has otherwise indicated a suitable information sharing system for the National DVO Scheme will be a number of years in the making.<sup>126</sup>

### Current issues

It is our understanding that at present, where a DVO is issued in one state or territory, interstate Police can only see that there exists a DVO between two parties, but are unable to see the conditions of the DVO. The interstate Police are required to contact the relevant Court where the DVO was issued to obtain the conditions.

In the everyday practice of police, our member lawyers have identified that in many cases, police are unable to correctly identify the primary aggressor in a family violence incident. There are many instances in which police wrongly identify the female victim as the perpetrator on the basis of the instructions of the primary aggressor, or, alternatively, assist the parties in issuing cross-applications for DVOs against each other. The consequence here is that victims are wrongly treated as accountable for the family violence incident, which can both endanger safety and be additionally traumatising.

We support the National DVO Scheme providing police officers with access to broader information about the DVO and the parties' history, in order to contextualise the family violence alleged and properly assess its dynamics.<sup>127</sup> This should include, for example:

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<sup>124</sup> National Council to Reduce Violence Against Women and their Children, *Time For Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009-2021*, March 2009, p 120. Accessed: [https://www.dss.gov.au/sites/default/files/documents/05\\_2012/the\\_plan.pdf](https://www.dss.gov.au/sites/default/files/documents/05_2012/the_plan.pdf)

<sup>125</sup> National Council to Reduce Violence Against Women and their Children, *National Plan to Reduce Violence against Women and their Children 2010-2022*, p 27. Accessed: [https://www.dss.gov.au/sites/default/files/documents/08\\_2014/national\\_plan1.pdf](https://www.dss.gov.au/sites/default/files/documents/08_2014/national_plan1.pdf)

<sup>126</sup> TimeBase, *National Domestic Violence Scheme: COAG Agreements* (May 19 2015) Available online at: <https://www.timebase.com.au/news/2015/AT185-article.html>

<sup>127</sup> Wangmann, J. (2009). *'She said...' 'He said...': Cross applications in NSW apprehended domestic violence order proceedings (Doctoral dissertation)*. University of Sydney, Sydney, NSW.



- Current and past DVOs
- Any breaches of past or current DVOs
- Police reports

In the absence of this information, there is an unacceptable risk that the National DVO scheme will result in the incorrect identification of the primary aggressor, and not result in any reduction in trauma for the victim of family violence, as is its intent.

We would encourage the Australian Government and COAG to provide clear and transparent updates to relevant stakeholders, including the family violence sector, about the progress of the scheme and updates on timeframes, so that the sector can support its rollout and provide necessary feedback on troubleshooting.

**Recommendation 24:** That the Australian Government, through COAG, ensure that the National DVO Scheme does not commence unless and until there are adequate measures in place to ensure police in all jurisdictions can access necessary information about DVOs 24 hours a day.

**Recommendation 25:** That the Australian Government and COAG keep relevant stakeholders, including the family violence and legal assistance sectors, updated on progress of roll out of the National DVO Scheme and changes in timeframes.

### Issues of enforcement

An ongoing issue reported by WLSA member lawyers is a lack of timely and effective police response to breaches of DVOs. Our clients frequently report failures of state and territory police to properly investigate and prosecute breaches of DVOs. In a comprehensive study conducted in 2006 involving Australian victims of family violence, victims indicated that police attitudes were variable towards domestic violence.<sup>128</sup> There was also a frequency in police negotiating DVO breach prosecutions with the victim by trying to create one charge instead of multiple.<sup>129</sup>

In light of this, it is of the utmost importance that breaches are responded to consistently nationally. Cross-border enforcement may become problematic here when, for example, there are differences across jurisdictions in police investigatory obligations and maximum penalties for breaches.<sup>130</sup>

In this regard, we support the streamlining of family violence legislative provisions to avoid any inconsistency or confusion in their application. This may be by way of reviewing DVO provisions to determine how they differ by way of enforcement, practice and terminology, or relying on existing reviews such as the ANROWS 2015 paper titled *Landscapes Domestic and family violence protection orders in Australia: An investigation of information sharing*

<sup>128</sup> Bagshaw, D., Thea, B., Wendt, S., Campbell, A., McInnes, E., Tinning, B., . . . Arias, P. F. (2010). *Family violence and family law in Australia: The experiences and views of children and adults from families who separated post-1995 and post-2006*. Canberra: Commonwealth Attorney General's Department.

<sup>129</sup> Bagshaw, D., Thea, B., Wendt, S., Campbell, A., McInnes, E., Tinning, B., . . . Arias, P. F. (2010). *Family violence and family law in Australia: The experiences and views of children and adults from families who separated post-1995 and post-2006*. Canberra: Commonwealth Attorney General's Department.

<sup>130</sup> *Domestic and family violence protection orders in Australia: An Investigation of information sharing and enforcement: State of Knowledge paper*, Australia's National Research Organisation for Women's Safety to Reduce Violence against Women & their Children December 2015 Issue 16

and enforcement.<sup>131</sup>

We further support the Australian Government investing in training state, territory and federal police in both family law and family violence. Training should include the formation of a national risk assessment and response framework that can be used by police when responding to alleged breaches of DVOs (and personal safety injunctions, if necessary). Such a framework could, for example, draw upon the Common Risk Assessment Framework (**CRAF**) used by Victoria Police, or the Domestic Violence Safety Assessment Tool (**DVSAT**) used by NSW Police.

Based on the experience of WLSA members' clients, sometimes police dismiss technology-facilitated stalking and abuse or tell women there is insufficient evidence to apply for a DVO or that the investigation process is too difficult or expensive. We also recommend regular training for all police about the law and the nature and dynamics of family violence include training in the gathering of evidence with respect to technology-facilitated stalking and abuse.

We further encourage the Australian Government to work through COAG to support all state and territory police to introduce and enact a *Code of Practice for the Investigation of Family Violence*, as in Victoria,<sup>132</sup> which has been widely recognised as good practice.<sup>133</sup> The *Code* requires for example, a full investigation of all reported contraventions, regardless of the perceived seriousness of the contravention, and prohibits cross-applications of DVOs.<sup>134</sup> We submit it would also be valuable to consider a national police dispatch protocol, which would allow police across the country to be able to read about previous relevant family violence incidents that occurred in any state or territory. This could ensure that all police attending a family violence incident have the relevant history between the parties to make informed decisions that ensures victim safety.<sup>135</sup>

### **Criminalisation of family law injunctions**

Finally, WLSA notes that the Australian Government in late 2016 announced its intention to amend the *Family Law Act* so as to criminalise breaches of personal protection injunctions. As it currently stands, breach of an injunction is a private matter between parties that can only be enforced if the aggrieved party (the victim) brings a civil enforcement action in a family court. This amendment would be beneficial for women who see an escalation of violence after the commencement of family law proceedings. It would mean that these women would not need to go to a new court to obtain an enforceable DVO.

We query how the injunction amendments will interact with the national DVO scheme and information sharing regime, to ensure police have access to the necessary information to ensure that all personal safety orders and injunctions can be effectively enforced. We request that the Australian Government clarify the relationship between the National DVO Scheme and the injunction amendments to determine whether, and to what extent, there will

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<sup>131</sup> Available online at: [http://media.aomx.com/anrows.org.au/s3fs-public/16\\_4.1%20Legal%20WEB\\_FINAL\\_0.pdf](http://media.aomx.com/anrows.org.au/s3fs-public/16_4.1%20Legal%20WEB_FINAL_0.pdf)

<sup>132</sup> Victoria Police, *Code of Practice for the Investigation of Family Violence* (3<sup>rd</sup> ed, 2014). Available online at: [https://www.police.vic.gov.au/content.asp?a=internetBridgingPage&Media\\_ID=464](https://www.police.vic.gov.au/content.asp?a=internetBridgingPage&Media_ID=464)

<sup>133</sup> Sentencing Advisory Council. (2013). *Family violence intervention orders and safety notices: Sentencing for contravention monitoring report*. Melbourne: SAC.

<sup>134</sup> Victoria Police, *Code of Practice for the Investigation of Family Violence* (3<sup>rd</sup> ed., 2014).

<sup>135</sup> Rollings, K., & Taylor, N. (2008). Measuring police performance in domestic and family violence. *Trends & Issues in Crime and Criminal Justice*, 367.

be any gaps or overlaps of services and resources.

**Recommendation 26:** That the Australian Government fund training for state and territory police officers on family law and family violence to ensure there is a consistent national understanding of these matters. Training should include the formation of a national risk assessment and response framework that can be used by police nationally when responding to a family violence incident. Such a framework could, for example, draw upon the Victorian CRAF or the NSW DVSAT.

**Recommendation 27:** That the Australian Government work through COAG to encourage all state and territory police to introduce and enact consistent (or alternatively one national) *Code of Practice for the Investigation of Family Violence*, as in Victoria. That that/those Code(s) of Practice require that police receive appropriate and effective cultural awareness training for work with both Aboriginal and Torres Strait Islander and CALD communities.

**Recommendation 28:** That the Australian Government clarify the interaction between the criminalisation of breaches of family law safety injunctions and the proposed national DVO scheme.

## **APPENDIX A – Full text of recommendations from other reports endorsed by WLSA**

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### **2016 FLC Final Report**

#### Recommendation 16: Aboriginal and Torres Strait Islander families

- 1) The Australian Government implement the recommendations made by the Family Law Council in its 2012 report *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients*.
- 2) Part VII of the *Family Law Act 1975* be amended to provide for the preparation of Cultural Reports, which may be included in Family Reports for Aboriginal and Torres Strait Islander children where a cultural issue is relevant, and for the Family Report to include a cultural plan which sets out how the child's ongoing connection with kinship networks and country may be maintained.
- 3) The Australian Government implement a process, including through amendments to the *Family Law Act 1975*, to support the convening of family group conferences for Aboriginal and Torres Strait Islander families in appropriate family law matters to assist informed decision-making in the best interests of the child, to allow them to be cared for within their own families and communities wherever possible, based on the Aboriginal and Torres Strait Islander Child Placement Principles.
- 4) The Australian Government consider a pilot of a specialised court hearing process in family law cases that involve an Aboriginal or Torres Strait Islander child to enhance cultural safety for Aboriginal and Torres Strait Islander families, including through the participation of Elders or Respected Persons who can provide cultural advice to the court in relation to the child or young person and a specially reconfigured courtroom design.
- 5) The Australian Government consult with Aboriginal and Torres Strait Islander representative institutions in the development of any reforms arising from Council's work that affects Aboriginal and Torres Strait Islander children.

#### Recommendation 17: Culturally and linguistically diverse families

- 1) The Australian Government implement the recommendations made by the Family Law Council in its 2012 report *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds*.
- 2) The Australian Government ensure that workers from Culturally and Linguistically Diverse-specific services are incorporated into the development of any court-based and family relationship sector-based integrated services model as recommended by Council in Recommendations 6 and 7.
- 3) The Australian Government implement a process, including through amendments to the *Family Law Act 1975*, to support the convening of family group conferences for families from culturally and linguistically diverse backgrounds in appropriate family law matters to assist informed decision-making in the best interests of the child, to allow children to be cared for within their own families and communities wherever possible.

### **2014 Productivity Commission A2J Report**

#### 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.

### **2012 FLC *Improving The Family Law System For Aboriginal And Torres Strait Islander Clients Report*<sup>136</sup>**

#### Recommendation 1: Community Education

The Australian Government works with family law system service providers and Aboriginal and Torres Strait Islander organisations to develop a range of family law legal literacy and education strategies for Aboriginal and Torres Strait Islander peoples. The strategies should:

- aim to inform Aboriginal and Torres Strait Islander peoples about: the formal justice system, legal responses to family violence and the rights and obligations of separated parents
- allow for education and information to be delivered in Indigenous languages, plain English and in formats that are appropriate to particular communities and age groups, and
- ensure that the information is continuously accessible and delivered in a culturally appropriate manner to Aboriginal and Torres Strait Islander peoples.

#### Recommendation 2: Promoting Cultural Competency

2.1 The Australian Government develops, in partnership with relevant stakeholders, a cultural competency framework for the family law system. The framework should cover issues of culturally responsive practice in relation to people from Aboriginal and Torres Strait Islander backgrounds. This development should take account of existing frameworks in other service sectors.

2.2 Cultural competency among family law system personnel be improved by:

2.2.1 Investing in the development of a flexible learning package (similar to the AVERT Family Violence Training Package) that can be adapted across settings and professional disciplines providing both minimum competencies and options for more in-depth development of skills and knowledge and encouraging its use across the sector by making it low cost and flexible in its delivery.

2.2.2 Commissioning the development of 'good practice guides' across settings to encourage Aboriginal and Torres Strait Islander culturally responsive service delivery for dissemination to individual practitioners through conferences, clearinghouses and national networks. Examples

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<sup>136</sup> Available online at:

<https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Improving%20the%20Family%20Law%20System%20for%20Aboriginal%20and%20Torres%20Strait%20Islander%20Clients.pdf>

might include the development of resources to support effective 10 approaches to meeting the needs of Aboriginal and Torres Strait Islander clients in family dispute resolution, children's contact centres and family reports.

2.2.3 Building Aboriginal and Torres Strait Islander cultural competency, and understanding of the application of relevant laws and policies (such as the Family Law Act) for Aboriginal and Torres Strait Islander clients, into professional development frameworks, Vocational Education and Training and tertiary programs of study across disciplines relevant to the family law system.

### Recommendation 3: Building Collaboration and Enhancing Service Integration

3.1 The Australian Government, in consultation with stakeholders, develop strategies to build collaboration between Aboriginal and Torres Strait Islander specific service providers and organisations and the mainstream family law system (courts, legal assistance and family relationship services). This should include support for Aboriginal and Torres Strait Islander organisations to provide advisory and other support for family law system services.

3.2 The Australian Government provides funding for:

3.2.1 The creation of a 'roadmap' of services (including relevant support services) for Aboriginal and Torres Strait Islander families in the family law system

3.2.2 Integration of the 'roadmap' into current government resources and initiatives which include the Family Relationship Advice Line and Family Relationships Online, and

3.2.3 Promoting a greater awareness of these resources and initiatives for Aboriginal and Torres Strait Islander families and relevant organisations.

### Recommendation 4: Early Assistance and Outreach

The Attorney-General's Department and the Department of Families, Housing, Community Services and Indigenous Affairs work with stakeholders, including mainstream and Aboriginal and Torres Strait Islander-specific service providers, to develop strategies that assist, as early as is possible, Aboriginal and Torres Strait Islander families experiencing relationship difficulties and parenting disputes. Such strategies should include the development of outreach programs by mainstream services within the family law system.

### Recommendation 5: Building an Aboriginal and Torres Strait Islander Workforce in the Family Law System

The Australian Government works with stakeholders to ensure a range of workforce development strategies are implemented across the family law system to increase the number of Aboriginal and Torres Strait Islander professionals working within family law system services. These strategies should include:

- scholarships, cadetships and support for education and training opportunities for Aboriginal and Torres Strait Islander professionals to work in the family law system
- consideration of the cultural and social experiences of potential Aboriginal and Torres Strait Islander professionals as professional attributes of significance in developing selection criteria for relevant positions
- funding for family law system services (courts, legal assistance and family relationship services) to proactively recruit, train and retain Aboriginal and Torres Strait Islander peoples, and

- resourcing and supporting service providers to develop mechanisms for continuing professional supervision, support and networking opportunities for Aboriginal and Torres Strait Islander professionals.

#### Recommendation 6: Family Consultants and Liaison Officers

The Australian Government provides funding for further positions for Indigenous Family Consultants and Indigenous Family Liaison Officers (identified positions) to assist the family law courts to improve outcomes for Aboriginal and Torres Strait Islander families, including by:

- increasing the information available to the courts about Aboriginal and Torres Strait Islander cultural practices and children's needs to courts through family reports (with reference to specific communities and cultures in specific cases)
- enhancing the ability of courts to meet the needs of Aboriginal and Torres Islander clients in court processes, and
- providing information to courts, and support and liaison to parties, in matters that may require urgent action.

The role of Indigenous Family Consultants and Indigenous Family Liaison Officers may be part of the job description of a person who is ordinarily placed in a Family Relationship Centre or an Aboriginal and Torres Strait Islander-specific service. An inter-agency agreement should require a Family Relationship Centre or Aboriginal and Torres Strait Islander service to provide the family law courts with access to the Indigenous Family Consultant and/ or Indigenous Family Liaison Officer on a clearly defined basis.

#### Recommendation 7: Access to Court, Legal and Family Dispute Resolution Services

To particularly address the difficulties in providing services to remote locations and gaps in service provision in other locations, the Australian Government instigates a review of the accessibility and appropriateness of court, legal and family dispute resolution services for Aboriginal and Torres Strait Islander peoples, including in regional and remote areas throughout Australia.

#### Recommendation 8: Interpreter services

8.1 The Australian Government develops a strategy for improving access to interpreter services in Aboriginal and Torres Strait Islander languages. This should be informed by a needs analysis addressing:

- the prevalent language groups
- the pool of available interpreters for particular language groups
- an assessment of which language groups require interpreters • initiatives to increase the pool in required areas, and
- developing regional lists of pools of interpreters with knowledge and understanding of family law derived either from training provided by local agencies or specialist legal interpreter accreditation developed or approved by National Accreditation Authority for Translators and Interpreters.

8.2 Training in family law should form a specialist component of accreditation for legal

interpreters.

8.3 The Australian Government works with stakeholders to develop a national protocol on the use of interpreters in the family law system. This should include:

8.3.1 Protocols to ensure that Aboriginal and Torres Strait Islander clients with language issues are made aware of their right to an interpreter, are asked whether they need an interpreter, and are provided with an interpreter if they are identified as in need of one, and

8.3.2 Protocols to guide the sourcing and selecting of interpreters.

#### Recommendation 9: Torres Strait Islander Customary Adoption (Kupai Omasker)

Action in relation to this issue should be deferred until the outcome of the Queensland Government inquiry into the practice of Kupai Omasker is known. If this inquiry does not lead to a resolution of the difficulties in this area, the Attorney-General may request that Council consider whether amendment to the Family Law Act is required to address this issue. If the inquiry recommends recognition of the practice of Kupai Omasker, and if the Queensland Government does not legislate to implement that recommendation, Council would welcome a reference from the Attorney-General on this issue.

#### **2012 FLC *Improving The Family Law System For Clients from Culturally and Linguistically Diverse Backgrounds Report*<sup>137</sup>**

##### Recommendation 1: Community Education

- 1.1 The Australian Government works with family law system service providers and migrant support organisations to develop a range of family law legal literacy and education strategies for people from culturally and linguistically diverse backgrounds.
- 1.2 The Australian Government and relevant agencies ensure that public resources that provide information about family law, including online legal information, be provided in a variety of community languages.
- 1.3 The Australian Government and relevant agencies ensure that clear, practical and culturally and linguistically appropriate information about the family law system's services, including the role of services, how to access them and what the client should expect from them, be disseminated through a wide variety of sources, including settlement services, national peak and lead organisations representing ethnic communities (such as the Federation of Ethnic Communities' Councils of Australia, the Forum of Australian Services for Survivors of Torture and Trauma and the Network of Immigrant and Refugee Women Australia) and mainstream health services.

##### Recommendation 2: Building Cultural Competency

- 2.1 The Australian Government develops, in partnership with relevant stakeholders, a cultural competency framework for the family law system. The framework should cover issues of culturally responsive practice in relation to people from culturally and linguistically diverse backgrounds. This development should take account of existing frameworks in other service sectors.
- 2.2 Cultural competency among family law system personnel be improved by:
  - 2.2.1 Investing in the development of a flexible learning package (similar to the *AVERT Family Violence Training Package*) that can be adapted across settings and

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<sup>137</sup> Available online at:  
<https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Pages/FamilyLawCouncilpublishedreports.asp>  
x



- professional disciplines providing both minimum competencies and options for more in-depth development of skills and knowledge and encouraging its use across the sector by making it low cost and flexible in its delivery.
- 2.2.2 Commissioning the development of 'good practice guides' for culturally responsive service delivery within individual service sectors. Examples might include 'cultural responsiveness in family report writing', 'culturally responsive Children's Contact Centres' and 'family dispute resolution with culturally diverse families'. Guides should be disseminated to individual practitioners through conferences, clearinghouses and national networks.
  - 2.2.3 Building cultural competency into professional development frameworks, Vocational Education and Training and tertiary programs of study across disciplines relevant to the family law system.
  - 2.2.4 Incorporating cultural competency into the core operational processes of all service agencies within the family law system.

### Recommendation 3: Enhancing Service Integration

- 3.1 The Australian Government, in consultation with stakeholders, develop strategies to build collaboration between migrant service providers and organisations and the mainstream family law system (courts, legal assistance and family relationship services), including through the establishment of referral 'kiosks' within the family law courts.
- 3.2 The Australian Government provides funding for:
  - 3.2.1 The creation of a 'roadmap' of services for culturally and linguistically diverse families in the family law system
  - 3.2.2 Integration of the 'roadmap' into current government resources and initiatives which include the Family Relationship Advice Line and Family Relationships Online, and
  - 3.2.3 Promoting a greater awareness for culturally and linguistically diverse families of these resources and initiatives.
- 3.3 The Australian Government, Family Relationships Services Australia, the Family Law Section of the Law Council of Australia, and State and Territory family law practitioner associations consider ways to support and improve information-sharing about successful practice initiatives that enhance collaboration, integration and referrals between family law system services.

### Recommendation 4: Workforce Development

- 4.1 A range of workforce development strategies be implemented across the family law system to increase the number of culturally and linguistically diverse personnel working within family law system services. Council recommends these strategies include:
  - 4.1.1 Scholarships and cadetships for professionals from culturally and linguistically diverse backgrounds to work in the family law system;
  - 4.1.2 Assistance for family relationship services to recruit and retain personnel from culturally and linguistically diverse backgrounds.
- 4.2 The Australian Government provides funding for Community Liaison Officers from culturally and linguistically diverse backgrounds to assist family relationship services to improve outcomes for families and children, including by enhancing the ability of family relationship services to meet the support needs of clients from culturally and linguistically diverse backgrounds in dispute resolution processes.
- 4.3 The Australian Government provides funding for Community Liaison Officers from culturally and linguistically diverse backgrounds to assist the family law courts to improve court outcomes for families and children from culturally and linguistically diverse backgrounds, including by:
  - 4.3.1 Assisting family report writers to present relevant cultural information;
  - 4.3.2 Enhancing the ability of the family law courts to meet the support needs of clients from culturally and linguistically diverse backgrounds in court processes.

#### Recommendation 5: Engagement and Consultation

The Australian Government provides support to courts, agencies and services in the family law system to engage with and collaborate with culturally and linguistically diverse communities in the development, delivery and evaluation of services, including support for the establishment of Community Advisory Groups.

#### Recommendation 6: Enhancing the use of Interpreters

- 6.1 Training in family law form a specialist component of accreditation for legal interpreters.
- 6.2 The Australian Government and relevant agencies develop a national protocol on the use of interpreters in the family law system. This should include:
  - 6.2.1 Protocols to ensure that clients with language difficulties are made aware of their right to an interpreter, are asked whether they need an interpreter, and are provided with an interpreter if they are identified as in need of one; and
  - 6.2.2 Protocols to guide the sourcing and selecting of interpreters.
- 6.3 The capacity of the family law system be improved by developing regional pools of interpreters with knowledge and understanding of family law derived either from training provided by local agencies or specialist legal interpreter accreditation developed or approved by the National Accreditation Authority for Translators and Interpreters.

#### Recommendation 7: Legislative Review

The Attorney-General's Department examine whether the provisions of Part VII of the *Family Law Act 1975* (Cth) adequately recognise the role of cultural connection in the development of all children.

#### Recommendation 8: Research and Monitoring

The Federation of Ethnic Communities' Councils of Australia's annual monitoring of the accessibility and equitability of government services be extended to include issues of access and equity in relation to services of the Australian family law system, including the family law courts and family relationship services.