

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

Prepared by  
**Women's Legal Services  
Australia**

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**Submission endorsed by:**

Australia's National Research Organisation for Women's Safety

Central Australian Women's Legal Service

Domestic Violence NSW

Elizabeth Evatt Community Legal Centre

Federation of Community Legal Centres (Victoria) Inc.

Mid North Coast Community Legal Centre

National Association of Community Legal Centres

North Queensland Women's Legal Service

No to Violence

People with Disability Australia

Rape and Domestic Violence Services Australia

SCALES Community Legal Centre

Shoalcoast Community Legal Centre

Western NSW Community Legal Centre

Women's Domestic Violence Court Advocacy Service NSW Inc.

Women's Health NSW

Women's Legal Centre (ACT and region)

Women's Legal Service NSW

Women's Legal Service Queensland

Women's Legal Service Tasmania

Women's Legal Service Victoria

## Table of Contents

<b>About WLSA</b>	<b>5</b>
<i>Approach to this submission</i>	6
<i>Terms and language used</i>	6
<i>Abbreviations</i>	7
<b>Objectives and principles</b>	<b>8</b>
<i>Ensuring safety</i>	8
<i>Accessibility and engagement</i>	11
<i>Fairness and recognition of diversity</i>	13
<b>Access and engagement</b>	<b>14</b>
<i>Access to information and navigation assistance</i>	14
<i>The needs of specific groups</i>	15
<i>Costs &amp; access to the family law system</i>	19
Legal assistance and legal costs	19
Family report writers	20
<i>Self-represented parties</i>	21
<i>Court environment</i>	22
Consideration of more regular closed court sittings	23
<b>Legal principles in relation to parenting and property</b>	<b>24</b>
<i>Parenting</i>	24
Parenting Orders	24
Family violence and parenting orders	25
<i>Definition of family violence</i>	26
<i>Arrangements for children and family diversity</i>	27
<i>Property</i>	28
<i>Spousal maintenance</i>	29
<b>Resolution and adjudication processes</b>	<b>29</b>
<i>Small property claims</i>	30
<i>Appropriate dispute resolution for family violence</i>	31
Parenting matters	31
Property matters	32
<i>Misuse of process</i>	32
Court power to dismiss	33
Limits on cross-examination	33
Subpoenaing of sensitive records	34
<i>Alternative dispute resolution processes</i>	36
<i>Technology</i>	36
<i>Problem solving decision-making processes</i>	36
<b>Integration and collaboration</b>	<b>37</b>
<i>Child abuse</i>	38
<b>Children’s experiences and perspectives</b>	<b>39</b>
<b>Professional skills and wellbeing</b>	<b>41</b>
Legal professionals	41
Family Report Writers	41

<i>Professional wellbeing</i>	44
<b>Governance and accountability</b>	<b>44</b>
<i>Transparency and privacy</i>	44
<i>Accountability and governance</i>	45
<b>Other issues not addressed in Issues Paper</b>	<b>46</b>
<i>Child Support</i>	46
<i>Women in prison</i>	46

## 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, particularly those who have lived with domestic and family violence. 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.

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.

## Approach to this submission

This submission provides WLSA's responses to many of the questions raised in the Issues Paper, in addition to some more general comments on key issues. At the end of this submission, WLSA has raised some further issues for the ALRC's consideration when developing the forthcoming Discussion Paper.

WLSA notes the ALRC's statement (Issues Paper, p. 13) that this inquiry builds on earlier reviews and that the ALRC will consider reports of those reviews and the publicly available submissions made to them. Accordingly, this submission refers where relevant to WLSA's more recent submissions to a range of inquiries and reviews. Rather than repeating all the information in those submissions, we have summarised WLSA's position on relevant issues and refer the ALRC to our published submissions for further information.

For ease of reference, a copy of the WLSA submission most commonly referenced here, our submission in 2017 to the inquiry by the House of Representatives Standing Committee on Social Policy and Legal Affairs into a better family law system to support and protect those affected by family violence, is provided at **Attachment A**. Also included at **Attachment B** is the *Supplementary submission to the Parliamentary inquiry into a better family law system regarding superannuation splitting in family law property settlements to the same inquiry*. At **Attachment C** is WLSA's submission to the Senate Legal and Constitutional Affairs Committee in response to the Family Law Amendment (Parenting Management Hearings) Bill 2017.

## Terms and language used

Consistent with the *Family Law Act* WLSA uses the term 'family violence' in this submission when referring to 'violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member), or causes the family member to be fearful.'

We note that some people who experience violence prefer the term 'victim' and others prefer the term 'survivor'. In this submission we use the term 'victim-survivor' which is intended to be inclusive of both victims and survivors.

In the large majority of cases, family violence is gendered, that is, it is perpetrated by men against women. We use gendered language in this submission. We acknowledge women can be perpetrators of violence.

## Abbreviations

AIFS	Australian Institute of Family Studies
ALRC	Australian Law Reform Commission
AVL	Audio-Visual Link
CALD	Culturally and Linguistically Diverse
CLC	Community Legal Centre
CLCNSW RRR	Community Legal Centres NSW Regional, Rural and Remote Network
COAG	Council of Australian Governments
DVO	Domestic Violence Order
FASS	Family Advocacy and Support Service
FCA	Family Court of Australia
FCC	Federal Circuit Court of Australia
FDR	Family Dispute Resolution
FLA	<i>Family Law Act 1975 (Cth)</i>
FLC	Family Law Council
FLC Final Report	Family Law Council, <i>Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems: Final Report</i> , June 2016
2013 FLC Report	Family Law Council, <i>Report on Parentage and the Family Law Act</i> , December 2013
FVPLS	Family Violence Prevention Legal Service
House of Representatives Committee 2017	House of Representatives Standing Committee on Social Policy and Legal Affairs, <i>A better family law system to support and protect those affected by family violence</i> , December 2017
ICL	Independent Children’s Lawyer
ICL Study Report	AIFS Independent Children’s Lawyer Study Final Report
NSWLRC	New South Wales Law Reform Commission
LGBTIQ+	Lesbian Gay Bisexual Transgender Intersex Queer
RCFV	Royal Commission into Family Violence (Victoria)
WLSA	Women’s Legal Services Australia
WLS NSW	Women’s Legal Service NSW
WLSV	Women’s Legal Service Victoria

## Objectives and principles

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

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

We agree in principle to the comments made at paragraph 38 of the Issues Paper regarding academics views *‘that a modern family law system has a number of key functions, including advancing the safety, healthy development and economic support interests of children, protecting adult rights to physical safety and equitable distribution of resources and regulating the processes for resolving post-separation problems to ensure they are affordable and cost-effective’*.

In our view the following principles should guide any redevelopment of the family law system:

1. Ensuring safety
2. Accessibility and engagement
3. Fairness and recognition of diversity

### Ensuring safety

Given the exposure of the family law system to families in crisis, one of the key responsibilities of the family law system must be to keep women and children safe. As the Family Law Council (FLC) stated in its 2016 final report on *Families with Complex Needs and the Intersection of Family Law and Child Protection*, over 50% of children’s matters in the family law courts involve family violence and other safety concerns for children.<sup>1</sup>

To protect women and children, the family law system must place safety and risk at the centre of all practice and decision-making. Current barriers within the system place the lives of vulnerable children at risk and can re-traumatise women who have been victims-survivors of family violence. Safety concerns are often present with other problems such as substance misuse and mental illness. Further, as AIFS identified in 2015, safety risks for children and parents are often not identified within the family law system, and so are not responded to.<sup>2</sup>

We clarify that protecting adults’ rights to safety should not be limited to physical safety but also acknowledge the right to be free from coercive and controlling behaviour through psychological and emotional abuse.

Children’s safety and wellbeing must be a paramount principle of any redevelopment of the family law system.

When focusing on the issue of children’s safety, it is important to recognise that children’s exposure to family violence cannot be isolated from the family violence perpetrated against their caregivers.<sup>3</sup> Harm perpetrated against the adult victim is also harm perpetrated against the child.<sup>4</sup> There are significant impacts on children exposed to family violence.<sup>5</sup>

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<sup>1</sup> FLC Final Report at p22, referring to: R Kaspiew, R Carson, J Dunstan, L Qu, B Horsfall, J De Maio, S Moore, L Moloney, M Coulson & S Tayton, *Evaluation of the 2012 family violence amendments: Synthesis report*, Australian Institute of Family Studies, 2015, pp. 16-17.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> R. Thiara & C. Harrison, *Safe not sorry: Supporting the campaign for safer child contact. Key issues raised by research on child contact and domestic violence*, Women’s Aid, UK, 2016, p5 accessed at:

The social science research also highlights that domestic violence and child abuse are interrelated<sup>6</sup> with research showing the co-existence of domestic violence and child physical abuse and domestic violence and child sexual abuse.<sup>7</sup> Social science research also highlights that child abuse by a father who has perpetrated family violence may start or intensify post separation as a way of punishing or deliberately causing the mother distress.<sup>8</sup>

Additionally, perpetration of family violence can impact on the adult victim-survivor's capacity to parent – a capacity which can improve when no longer subjected to family violence.<sup>9</sup> There is a growing recognition of the tactics that perpetrators of family violence use during litigation to reassert their power and control over the victim-survivor and intentionally disrupt the mother-child relationship.<sup>10</sup> A recent study in the US examined the risk of abuse of mothers through threats against their children comparing mothers who were separated to mothers still in a relationship with their abuser. The study found that separated mothers '*were four times more likely to report threats [by ex-partner] to take and threats to harm children*'.<sup>11</sup> The author expressed concern that '*Threats of indirect abuse involving the children allow the abuser to maintain power and control and to engage in controlling behaviour that is difficult for those charged with making welfare decisions about the future care of the children to identify*'.<sup>12</sup>

There needs to be better recognition that coercive and controlling behaviour can continue and can escalate post separation and that opportunities to spend time with children can provide the means to continue perpetrating such abuse, which in extreme cases can result in death.<sup>13</sup> As Lord Justice

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<https://warwick.ac.uk/study/cll/research/swell/ourwork/final-safe-not-sorry-for-web-jan-2016.pdf>; Women's Aid, *Nineteen Child Homicides: What must change so children are put first in child contact arrangements and the family courts*, (UK), 2015, pp 21-22.

<sup>5</sup> M. Macvean et al, *The PATRICIA Project: PATHways and Research IN Collaborative Inter-Agency Working: State of Knowledge paper*, (ANROWS), 2015 pp 8-9; Child Family Community Australia (CFCA), *Children's exposure to domestic and family violence*, CFCA Paper No. 36 – December 2015; R. Thiara & C. Harrison, *Safe not sorry: Supporting the campaign for safer child contact. Key issues raised by research on child contact and domestic violence*, Women's Aid, UK, 2016, p6.

<sup>6</sup> Richards, K, 'Children's exposure to domestic violence in Australia', *Trends and issues in crime and criminal justice*, Australian Institute of Criminology, no. 419, 2011.

K. Rendell, Z. Rathus, A. Lynch, *An unacceptable risk: A report on child contact arrangements where there is violence in the family*, 2002, p33.

<sup>7</sup> G. Bedi & C. Goddard, Intimate partner violence: What are the impacts on children? *Australian Psychologist* (2007) 42(1) p67; K. Rendell, Z. Rathus, A. Lynch, *An unacceptable risk: A report on child contact arrangements where there is violence in the family*, 2002, p42; R. Thiara & C. Harrison, *Safe not sorry: Supporting the campaign for safer child contact. Key issues raised by research on child contact and domestic violence*, Women's Aid, UK, 2016, p5.

<sup>8</sup> Cited in Lundy Bancroft, Jay Silverman, Daniel Ritchie, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* (2<sup>nd</sup> ed), 2012, p160.

<sup>9</sup> Peled cited in L. Bancroft, J. Silverman, D. Ritchie, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* (2<sup>nd</sup> ed), 2012, p105; R Kaspiew, B. Horsfall, L. Qu, M. Nicholson, C Humphreys, K. Diemer, J Dunstan, *Domestic and family violence and parenting: Mixed method insights into impact and support needs: Final report*, (ANROWS) 2017, p20.

<sup>10</sup> L. Hooker, R. Kaspiew, A. Taft, *Domestic and family violence and parenting: Mixed methods insights into impact and support needs: State of knowledge paper*, (ANROWS) 2016 p28, 30. See also: M. Coy, K. Perks, E. Scott & R. Tweedale, *Picking up the pieces: domestic violence and child contact*, UK, 2012, pp25-26, accessed at:

[http://rightsofwomen.org.uk/wp-content/uploads/2014/10/Picking\\_Up\\_the\\_Pieces\\_Report-2012I.pdf](http://rightsofwomen.org.uk/wp-content/uploads/2014/10/Picking_Up_the_Pieces_Report-2012I.pdf)

<sup>11</sup> B. Hayes, 'Indirect Abuse Involving Children During the Separation Process', *Journal of Interpersonal Violence*, 2015, p10.

<sup>12</sup> Ibid, p17. Similar concerns are raised in: R. Thiara & C. Harrison, *Safe not sorry: Supporting the campaign for safer child contact. Key issues raised by research on child contact and domestic violence*, Women's Aid, UK, 2016, p 16.

<sup>13</sup> K. Rendell, Z. Rathus, A. Lynch, *An unacceptable risk: A report on child contact arrangements where there is violence in the family*, 2002, p39; R. Thiara & C. Harrison, *Safe not sorry: Supporting the campaign for safer child contact. Key issues raised by research on child contact and domestic violence*, Women's Aid, UK, 2016, p6, 15,25; Women's Aid, *Nineteen Child Homicides: What must change so children are put first in child contact arrangements and the family courts*, (UK), 2015, p28.

Wall said in response to the first report by Women's Aid cataloguing 29 children's homicides<sup>14</sup> in England and Wales from 1994-2004 in the context of formal and informal contact arrangements with their father who had perpetrated family violence:

*It is, in my view, high time that the Family Justice System abandoned any reliance on the proposition that a man can have a history of violence to the mother of his children but, nonetheless, be a good father.*<sup>15</sup>

We also refer to the second such UK report *Nineteen Child Homicides: What must change so children are put first in child contact arrangements and the family courts*.<sup>16</sup> This report examined the 19 child homicides between 2005-2015 in which violent fathers killed their children during formal or informal contact visits. The Women's Aid reports emphasize that no one other than the perpetrator of the violence should be held accountable for the deaths of these children. However, the reports also highlight the systemic issues that must be addressed in the family law system and child protection system in the UK to ensure children's safety. Many of the issues raised in these reports are relevant for consideration in the Australian context.<sup>17</sup>

As Kaspiew et al note '*maintaining relationships between children and abusive fathers is likely to be harmful unless the abusive behaviour ends*'.<sup>18</sup>

WLSA has proposed a five-step plan, Safety First in Family Law, to create a family law system that keeps women and children safe and supports them to financially recover from family violence and separation.

- Step 1** – Develop a specialist response for domestic violence cases in family courts
- Step 2** – Reduce trauma and support those who are most at risk of future violence and death
- Step 3** – Intervene early and provide effective legal help for the most disadvantaged
- Step 4** – Support women and children to financially recover from domestic violence
- Step 5** – Strengthen the understanding of all family law professionals on domestic violence and trauma.

Details of problems in the family law system and proposed actions for each step are at <https://safetyinfamilylaw.org.au/the-solutions/>

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<sup>14</sup> H. Saunders, *Twenty-nine child homicides: Lessons still to be learnt on domestic violence and child protection (Twenty-nine child homicides)* (Women's Aid UK), 2004, accessed at:

[http://familieslink.co.uk/download/jan07/twenty\\_nine\\_child\\_homicides.pdf](http://familieslink.co.uk/download/jan07/twenty_nine_child_homicides.pdf)

<sup>15</sup> Lord Justice Wall cited in *Nineteen Child Homicides: What must change so children are put first in child contact arrangements and the family courts*, (UK), 2015, p 22.

<sup>16</sup> Women's Aid, *Nineteen Child Homicides: What must change so children are put first in child contact arrangements and the family courts*, (UK), 2015 accessed at: <https://1q7dqy2unor827bqjls0c4rn-wpengine.netdna-ssl.com/wp-content/uploads/2016/01/Child-First-Nineteen-Child-Homicides-Report.pdf>

<sup>17</sup> For example, in several cases, statutory child protection services were aware of domestic violence perpetrated against the mother but did not consider the children were at risk of significant harm; some professionals did not understand the dynamics of power and control and the heightened risks following separation; *Twenty-nine child homicides*, p 5-6, 16-29; *Nineteen Child Homicides* pp21-34.

<sup>18</sup> R Kaspiew, B. Horsfall, L. Qu, M. Nicholson, C Humphreys, K. Diemer, J Dunstan, *Domestic and family violence and parenting: Mixed method insights into impact and support needs: Final report*, (ANROWS) 2017 p13.

Women's Legal Service Victoria (**WLSV**) has recently published a report *Small Claims, Large Battles: Achieving economic equality in the family law system (Small Claims, Large Battles)* which makes 15 recommendations for reform to improve access to fair property settlements for disadvantaged women. WLSA endorses these recommendations. See report at:

<http://womenslegal.org.au/files/file/WLSV%20Small%20Claims%2C%20Large%20Battles%20Research%20Report%202018.pdf>

### Accessibility and engagement

Any redevelopment of the family law system should also have a focus on accessibility at its heart. This includes addressing issues of cost, delay, availability of services and funding for legal assistance. The principle of accessibility also requires a focus on cultural competency, accessibility for people with disability, and safety to ensure all people in our community can access and engage fully in the family law system.

In WLSA's view, ensuring accessibility of the family law system requires increased funding and resources to be injected across the family law system, including a significant investment in both generalist and specialist legal assistance services. Increased legal assistance funding is necessary to support the proper functioning of the legal system in family law matters.<sup>19</sup> WLSA notes the Productivity Commission recommended in 2014 that the legal assistance sector receive an annual \$200 million increase in funding for civil law, including family law.<sup>20</sup>

Funding for specialist women's legal services is vital to ensure women can access support and legal advice in a safe space from people who are trained to understand their unique needs. Staff of specialist women's legal services understand the dynamics of violence and impact of trauma and use principles of empowerment and client centred approaches. Specialist women's legal services seek to identify and challenge gender bias, recognise and respond to intersecting and compounding forms of discrimination and advocate for substantive equality. This makes these services well-placed to meet the needs of women, particularly those facing gender-based violence, discrimination, vulnerability or disadvantage.

WLSA also supports the National Family Violence Prevention Legal Services Forum recommendation of adequate funding of culturally safe, Aboriginal and Torres Strait Islander community controlled specialist legal services to assist Aboriginal and Torres Strait Islander women, and victims-survivors of family violence in particular, through the family law system. This is particularly important given Aboriginal and Torres Strait Islander victims-survivors of family violence often face complex barriers to safely disclosing violence, obtaining support and utilising the family law system.

Funding should also be sufficient in order to provide a choice of legal services, something that is necessary both for clients' sense of agency, and to ensure access to justice in cases where a conflict of interest arises. It is also important that there is funding for consistent advocacy across state and territory as well as federal systems.<sup>21</sup>

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<sup>19</sup> For example, a specific issue in 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, especially where the expert witness is experienced in the court system.

<sup>20</sup> Productivity Commission, *Access to Justice Arrangements: Productivity Commission Inquiry Report - Overview*, 2014, p. 63, Recommendation 21.4.

<sup>21</sup> Women subjected to family violence can be pressured into negotiating parenting plans at the local court when appearing as a witness for a civil protection order. This can have ramifications for both child and parent safety and wellbeing as inappropriate orders can be made about time spent with parents using abusive behaviours and unsafe contact and

WLSA has previously recommended<sup>22</sup>:

- that the Australian Government, working together with the state and territory governments, implement the Productivity Commission's 2014 recommendation for increased legal assistance funding;
- in particular, that the Australian, state and territory governments make \$200 million additional annual funding (on 2014 levels) available to all legal assistance services, comprising: community legal centres, 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;
- 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-survivors of family violence; and
- 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 and trauma-informed lawyers and family violence and trauma-informed FDR practitioners. The roll 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 support the National Family Violence Prevention Legal Services Forum recommendation that reforms directly related to Aboriginal and Torres Strait Islander people should be Aboriginal and Torres Strait Islander led and co-designed.

As well as additional funding of legal assistance services providers, there needs to be an increase of funding for other aspects of the family law system, including family dispute resolution (**FDR**), specialist social support services, contact services, family consultants, judicial officers and ongoing training for those working in the family law system as outlined in Questions 41 & 42.

Secondly, the system must operate to ensure accessibility and engagement of all families in the community. There are six fundamental requirements to ensuring that individuals have access to and can engage as fully as possible in the family law system:

- The system itself and all decision makers need to fully understand the effects of family violence and child abuse and its impact on adult victims-survivors and children, both in the parenting and property contexts;
- Those working in the family law system must be culturally competent in relation to:
  - working with Aboriginal and Torres Strait Islander people, including having an understanding of the multiple and diverse factors contributing to the high levels of family violence in Aboriginal and Torres Strait Islander communities and an understanding of Aboriginal and Torres Strait Islander family structures and child rearing practices as well as maintaining appropriate referral procedures, policies and relationships with Aboriginal Community Controlled Organisations;
  - working with people of a culturally linguistically and diverse background (including working with interpreters);
  - working with lesbian, gay, bisexual, transgender and queer (LGBTIQ+) families

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changeover arrangements can be made between the parents. Women can then be caught up within the child protection system as failing to have the appropriate measures in place to keep their children safe.

<sup>22</sup> WLSA submission to House of Representatives Committee 2017, Attachment A, Recommendations 7 & 8.

- Those working in the family law system must be disability aware;
- The system is based on this understanding which will ensure that processes and the application of the law takes into account the dynamics and impact of family violence and child abuse on adult victims-survivors and children and the need for ongoing training in family violence, child abuse and trauma informed practice, cultural competency and disability awareness;
- The safety of adult victims-survivors and children entering the system must be ensured when they are instituting and participating in family law proceedings, so that they can exercise their full legal rights and achieve a just outcome; and
- There must be adequate funding for legal advice and representation as required, with a priority for matters involving family violence and/or child abuse. This should include additional funding for family law and family violence duty services; specialist women’s legal services and programs; and specialist Aboriginal and Torres Strait Islander controlled legal service providers (including Family Violence Prevention Legal Services and Aboriginal and Torres Strait Islander Legal Services).

While the Issues Paper does not pose specific questions about all these requirements, WLSA believes that these requirements are critical in ensuring the family law system is accessible to all parties.

### Fairness and recognition of diversity

In WLSA’s view any re-development of the family law system should also be guided by an understanding and recognition of diversity, and a commitment to fairness which acknowledges and responds to structural inequalities and bias which impact individuals and families and related issues which may fall within the purview of the family law system.

Principles of fairness relate directly to women’s financial hardship following separation. For example, gendered issues, including the division of paid and caring labour, unequal and gendered remuneration practices in the community and the greater impact of family violence on women as compared to men, must be recognised and effectively responded to within the family law system to ensure fair outcomes. Research tells us that women are at greater risk of poverty than men, and women are more at risk of post-separation financial hardship.<sup>23</sup>

Addressing the systemic failures that cause complexity, delay and cost will significantly improve the overall financial situation of women post separation.<sup>24</sup> Reform to existing provisions dealing with property matters, and including a specific requirement for courts to consider family violence in property disputes (as discussed below) would also assist in this regard.<sup>25</sup>

Recognition of diversity is also important to ensuring the system is able to respond to different cultures and family structures effectively and respectfully. The impact of adopting a culture and diversity lens when re-developing the family law system would require consideration of how the following could be achieved:

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<sup>23</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) p54; Rosalie McLachlan et al, *Deep and Persistent Disadvantage in Australia: Productivity Commission Staff Working Paper* (Productivity Commission, 2013) p141.

<sup>24</sup> Women’s Legal Service Victoria, *Small Claims, Large Battles: Achieving Economic Equality in the family law system (Small Claims, Large Battles)* (2018) accessed at: <http://womenslegal.org.au/creating-change/small-claims%2c-large-battles.html>

<sup>25</sup> See WLSV, *Small Claims, Large Battles*, 2018.

- all individuals and families could access appropriate and effective services across the family law system;
- that appropriate expert evidence was available to the courts in relation to cultural issues; and
- a nuanced and inclusive concept of family was adopted in the system.

These issues are discussed in more detail below.

## Access and engagement

### Access to information and navigation assistance

**Question 3 In what ways could access to information about family law and family law related services, including family violence services, be improved?**

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

WLSA members as well as Community Legal Centres NSW Regional, Rural and Remote Network (**CLCNSW RRR**) raise the barrier of access to computers and the internet. This is an issue with respect to accessing information about family law and family law related services as well as with respect to filing documents. For example, divorce applications can now only be filed through e-filing or by making contact directly with the court to obtain a paper application form. Court orders (except appeals and consent orders) are now only available through the Commonwealth Courts Portal. WLSA recommends reversing this decision as many clients are not sufficiently computer literate or have access to computer or printing facilities.

Consideration should also be given to making computers available at courts with a court employed staff person to assist people to use the computers and help people file documents, similar to what is available in Centrelink offices. Computers could also be available to the public in other settings, such as community centres or libraries.

Material in written format on the family law court websites is often not accessible to those with low literacy levels or people with a disability. Alternative formats should be considered, including information available in easy English, in visual format with captioning, in Auslan, and in other languages.

There is also an important role for community legal education in helping people to identify legal issues early and how to get help. WLSA members engage in extensive community legal education activities, including through online webinars for community workers to help community workers identify where there may be legal issues and how to make referrals to legal services as well as face-to-face training. Further funding is required for community legal education in relation to family law.

We refer to the recently established Family Advocacy and Support Service (FASS). This is a service provided to people affected by family violence with family law issues. It is being piloted in family law registries across Australia. It consists of a duty lawyer as well as social support services. Some WLSA members help to provide FASS. It is early days but the early signs are encouraging that this is an effective way to help people affected by family violence to navigate their way through their family law issues and access non-legal support. Consideration of evaluation findings will be important as well as recognition that such a model needs to be responsive to the needs of the local people and so if rolled out each registry needs to consult locally about what is needed and may provide the service

differently. Equity of access to legal and support services in regional, rural and remote communities is also important.

### The needs of specific groups

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

As the Issues Paper notes at pp. 23-24, a range of reviews, including two FLC reviews in 2012 and 2016, have recognised that Aboriginal and Torres Strait Islander families face multiple barriers when accessing legal, counselling and family dispute resolution services, and that when those families did access the family law system, they experienced specific and significant challenges. These findings echo the experience of WLSA lawyers when working with Aboriginal and Torres Strait Islander clients.

The FLC in 2012 identified a number of barriers experienced by Aboriginal and Torres Strait Islander 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 (**FLC Final Report**), the FLC noted that its inquiry had received similar proposals in relation to Aboriginal and Torres Strait Islander families as in its 2012 review. These included measures such as:

- 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, 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 (addressed further below at Questions 41 and 42).

WLSA continues to support the implementation of these recommendations.

WLSA notes that the FLC Final Report made additional recommendations including: amending Part VII of the *Family Law Act* 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; implementing a process to support the convening of family group conferences for Aboriginal and Torres Strait Islander families in appropriate family law matters; consider a pilot of a specialised court hearing process in family law cases that involve Aboriginal and Torres Strait Islander families, including through the participation of Elders who can provide cultural advice.

We repeat our support of the National Family Violence Prevention Legal Services Forum recommendation that reforms directly related to Aboriginal and Torres Strait Islander people should be Aboriginal and Torres Strait Islander led and co-designed and endorse the recommendations made by the National Family Violence Prevention Legal Services Forum in their submission to this inquiry concerning Cultural Reports/plans, Aboriginal and Torres Strait Islander Family Consultants, Aboriginal and Torres Strait Islander Liaison Officers and hearings processes.

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

There have also been a range of reviews, including two FLC reviews in 2012 and 2016, recognising culturally and linguistically diverse (**CALD**) families face multiple barriers when accessing legal, counselling and family dispute resolution services, and that when those families did access the family law system, they experienced specific and significant challenges. These findings also echo the experience of WLSA lawyers when working with CALD clients.

The FLC in 2012 identified a number of barriers experienced by 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 its inquiry had received similar proposals in relation to CALD clients as in its 2012 review. These included measures such as:

- working with family law service providers and CALD services to develop clear, practical and culturally linguistically appropriate information about the family law system's services and how to access them which could be disseminated through a wide range of services that may be accessed by CALD clients. In addition, developing family law legal literacy and education strategies and provide information in a variety of community languages;
- ensuring ongoing cultural competency training for family law system professionals, including culturally responsive practice in relation to people from culturally and linguistically diverse backgrounds (addressed further below at Questions 41 and 42);
- A range of workforce development strategies to increase the number of CALD personnel working within family law system services; and
- increasing awareness about a right to an interpreter and training in family law be included in specialist accreditation for legal interpreters.

WLSA has previously recommended<sup>26</sup> that the Australian Government implement recommendations 17 of the 2016 FLC Final Report with respect to improving the family law system for clients from Culturally and Linguistically Diverse Backgrounds. This includes implementing the recommendations from the FLC's 2012 report as well as including CALD services in a court-based integrated services model and case managed integrated services in the family relationships sector; and implementing a process to support the convening of family group conferences for families from CLAD backgrounds in appropriate family law matters.

WLSA reiterates the importance of this recommendation being implemented.

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

People with disability and their advocates encourage us to consider the accessibility of the family law system in a number of ways: accessibility of buildings; accessibility with respect to the attitudes of those working within the family law profession which can inhibit the access of people with disability to the family law system; accessibility of information about the family law system.

People with disability and their advocates have advised us that accessibility of buildings can be improved in a number of ways. Buildings need to be wheel chair accessible. There needs to be better signage in family courts, for example, so people who are vision impaired can more easily

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<sup>26</sup> WLSA submission to House of Representatives Committee 2017, Attachment A.

access the courts. There need to be ways other than calling out the next case or matter for mention so that people who are Deaf or hard of hearing are aware when their matter has been called. There need to be more private spaces, interview rooms and safe rooms to ensure safety and privacy at court.

The attitudes and stereotypes held by those working in the family law system regarding people with disability and their capacity to parent can significantly impede access to the family law system for people with disability. Women with disability who have been subjected to family violence and their advocates have expressed concern to WLSA that often a woman's 'disability is on trial' in family law matters when the focus should be on recognising the perpetration of family violence, the impact of the perpetration of such violence and the best interests of the child. This is also reflected in WLSA members' experiences.

A lack of understanding of the accessibility needs for people with disability is another barrier. For example, we're aware of an instance when incorrect information has been provided to a Deaf person about the process for booking an Auslan interpreter and who would need to pay for the interpreter as well as a lack of consultation regarding the positioning of the interpreter in the court room which impacted on communication. We're also aware of an instance when a person with a vision impairment was offered the use of a hearing loop.

A key way to improve the accessibility of the family law system is through regular disability awareness training across a range of disabilities for all involved in the family law system.

With regards to accessibility of information about the family law system we refer to our response to Questions 3 & 4.

We further note limited access to a case guardian when one is required.

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

The complexity that can be involved in family formation for LGBTIQ+ people means that their engagement in the family law system can raise issues that are nuanced, complicated and often not well understood by professionals in the family law system.

WLSA members confirm that LGBTIQ+ people often face hurdles when seeking assistance from professionals involved in the family law system. In particular, lesbian parents who are not biologically related to their children often face barriers to being fully recognised as a parent.

It is common for clients to take additional efforts to find lawyers and service providers who understand the complexities that may be involved and will provide a quality service to LGBTIQ+ clients.

Therefore, WLSA firmly agrees with the suggestion mentioned in the Issues Paper at p.32 that training of lawyers, family consultants and other professionals involved in the family law system is needed to improve the quality and accessibility of services for LGBTIQ+ people generally, as well as to ensure appropriate responses to family violence in the context of LGBTIQ+ relationships.

In our view it would be appropriate for a needs analysis to be undertaken to identify gaps and ensure that the family law system is accessible and responsive to LGBTIQ+ people.

We recommend that an audit is undertaken by the courts and other service providers to see what changes can be implemented to ensure inclusivity. Small, simple changes, such as improving forms

to provide the option for a choice of preferred pronouns, are easy to implement and vital for transgender and intersex clients.

In relation to parenting matters, WLSA members believe that extensive changes are needed to ensure that Part VII of the *Family Law Act*, and in particular, the parentage provisions, recognise the diversity of Australian families today (addressed further below at Questions 14 & 16).

In relation to child-bearing expenses, we note that the language is limited to father's liabilities when not married to the mother and submit that this decision needs to be updated to be non-discriminatory.

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

WLSA members and the CLCNSW Regional, Rural and Remote Network (**CLCNSW RRR**) note that family law matters are often filed in the local court because there is either no Federal Circuit Court of Australia (**FCC**) sitting in the area or the next sitting is some time away. It is the experience of some WLSA members and CLCNSW RRR members that the local court magistrates refer these matters to the FCC which results in significant delay.

We refer to the Family Law Amendment (Family Violence and Other Measures) Bill 2017 currently in the Senate and the Government's intention to expand the jurisdiction of Local and Children's Courts, vesting specialist Children's Courts with the power to make orders under Part VII of the *Family Law Act* and removing the monetary limit of \$20,000 for state and territory courts to determine family law property matters. As stated in previous submissions, WLSA supports this subject to state and territory courts receiving sufficient additional resourcing and training to meet their increased family law caseload. WLSA also encourages the Federal Government to consider whether the specialisation of magistrates in family law would assist state and territory courts in more effectively meeting an increased family law caseload.<sup>27</sup>

WLSA members note the low frequency of sitting dates in RRR areas is contributing to delays. We note, for example, that the FCC sits 4-6 times per year in Dubbo. We recommend more sitting dates for current FCC in regional, rural and remote (**RRR**) areas.

WLSA members and CLCNSW RRR members are concerned by the large distances some people in RRR areas need to travel to access family courts and other aspects of the family law system. If public transport exists, it runs infrequently and so those wanting to access the family law system may have to stay overnight in the location where the family court or local court is sitting or FDR service is provided. This can be costly and is a barrier. Participating in FDR or family court proceedings via telephone can be difficult. Consideration should be given to:

- expanding the areas in which the FCC sits and face-to-face FDR is offered and the frequency of provision of such services,
- subsidising travel expenses for those with limited financial resources to attend court or face-to-face FDR, and/or
- establishing effective audio-visual link (**AVL**) facilities for clients to access, for example, in services in RRR where there is no court and in local courts in RRR areas to access family courts located elsewhere. This occurs for some FCC sittings in Mackay and has enabled more

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<sup>27</sup> WLSA, Submission to the Senate Legal and Constitutional Affairs Committee in response to the Family Law Amendment (Family Violence and Other Measures) Bill 2017, February 2018, Recommendation 12.1 accessed at: <https://www.aph.gov.au/DocumentStore.ashx?id=a55fa551-efe5-4163-b2ec-f1b40483f878&subId=563508>

frequent sittings of the court in Mackay. Safety would need to be considered in exploring AVL options, for example, to ensure both parties are not in the same AVL room or venue where the AVL facilities could be located.

Legal assistance service providers in RRR areas need to be better resourced to respond to family law legal need. The issue of one party accessing all the legal services in the area and conflicting out the other party was also raised as a concern.

WLSA members have also expressed great concern about the general lack of services available to help clients engage in their family law matters in regional, rural and remote areas. This includes access to interpreting services, FDR services, parenting courses, child contact services. WLSA members have described the challenges in being unable to obtain the appropriate level of interpreter for the completion of documents for CALD communities and people with disability. On occasions with urgent matters this has meant relying upon friends or family members to interpret and seeking leave of the court to file such affidavits. WLSA members also express concern that courts particularly in regional, rural and remote areas have very limited if any facilities available, such as safe rooms, which means victims-survivors of family violence are often waiting in close proximity to alleged perpetrators of such violence while they are waiting for their matter to be heard.

Concerns have also been expressed that in some RRR communities, there may be a reluctance to engage with necessary supports, such as interpreters, for fear there may be a conflict of interest or a fear confidentiality may be breached.

### Costs & access to the family law system

#### **Question 10 What changes could be made to the family law system, including to the provision of legal services and private reports, to reduce the cost to clients of resolving family disputes?**

##### Legal assistance and legal costs

WLSA is concerned by the large gap in the number of women who are able to access legal aid and those who can afford a private lawyer. We refer again to the Productivity Commission's recommendation of an additional \$200 million funding a year for legal assistance service providers for civil law matters, including family law. In our view, greater investment in legal assistance services has manifold benefits for the family law system, and provides excellent return on investment.<sup>28</sup> WLSA strongly supports the implementation of this recommendation to ensure access to justice across the community.

WLSA also supports the consideration of new and innovative approaches to save costs in property matters. One of the barriers identified to fair financial outcomes in the family law system for vulnerable and financially disadvantaged women in WLSV's *Small Claims, Large Battles* report, included the legal and administrative costs arising as a result of the complexity of the system which uncooperative former partners are able to manipulate. These factors often contribute to delays and increased legal costs. The experience of WLSA members is also that clients report negotiations and legal proceedings being drawn out intentionally by uncooperative former partners. This includes failure by a former partner to make proper financial disclosure, failure to respond to correspondence or the making of unreasonable offers which meant clients needed to initiate proceedings.<sup>29</sup> In one

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<sup>28</sup> On average, community legal centres (CLCs) have a cost benefit ratio of 1:18. See Julie Stubbs and Associates, *Economic Cost Benefit Analysis of Community Legal Centres*, 2012, p17 accessed at: [http://www.communitylawaustralia.org.au/wp-content/uploads/2012/08/Cost\\_Benefit\\_Analysis\\_Report.pdf](http://www.communitylawaustralia.org.au/wp-content/uploads/2012/08/Cost_Benefit_Analysis_Report.pdf)

<sup>29</sup> WLSV, *Small Claims, Large Battles*, 2018, p18.

case set out in the WLSV *Small Claims, Large Battles* report, notional legal costs represented 126% of the entitlement won. The costs of obtaining financial disclosure and also the complex and costly process for splitting superannuation were also highlighted in the report. The report includes 15 recommendations aimed at addressing these issues to ensure that the system can be made accessible and fair for vulnerable and financially disadvantaged women with small claims to settle.

#### Family report writers

WLSA members have had mixed experiences with both court employed family consultants and private family report writers. WLSA members report instances of both types of family report writers inadequately addressing family violence where there have been very high levels of family violence and instances of both types of family report writers failing to properly consider cultural issues.

We recommend establishing a national accreditation and monitoring scheme with mandatory training in family violence, child abuse and trauma informed practice, cultural competency and disability awareness.

We also endorse the National Family Violence Prevention Legal Services Forum recommendation for employment of Aboriginal and Torres Strait Islander Family Consultants within family law courts and processes and procedures initiated to ensure that all efforts are taken to ensure that, wherever possible, an Aboriginal or Torres Strait Islander Family Consultant is appointed in a case involving an Aboriginal or Torres Strait Islander child(ren). Noting these consultants should also have expertise in family violence and the complex barriers faced by Aboriginal and Torres Strait Islander victims/survivors, particularly women.

We note the *Australian Standards of Practice for Family Assessments and Reporting* were developed by the FCA, FCC and Family Court of Western Australia and published in 2015. These standards, designed to apply to family consultants and private family report writers, 'attempt to outline a minimum standard of practice when conducting family assessments and preparing reports'.<sup>30</sup> While these standards are a positive step in WLSA's experience they are not enforceable, again highlighting the need for a monitoring scheme as well as accreditation.

Common feedback about family reports from WLSA members includes that the reports often provide a general assessment rather than focus on specific issues such as family violence and clients often report that they were not asked many questions. There needs to be greater clarity and transparency with family report writers about why the family report is being sought and the issues identified that should be reported on.

There should be greater transparency about whether there are experts available for particular issues eg family violence, cultural issues, mental health issues, substance abuse etc.

WLSA members are also concerned about the cost of expert reports which can be prohibitive. We recommend increased resourcing of affordable/free court based report writing services.

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<sup>30</sup> FCA, FCC and Family Court of Western Australia, *Australian Standards of Practice for Family Assessments and Reporting*, 2015 p3.

## Self-represented parties

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

As noted above, WLSA believes it is crucial that funding for legal assistance be increased so as to decrease the number of litigants without legal representation, particularly where family violence or child abuse has occurred or is a risk. The FLC noted in 2016 that research has shown that cases involving unrepresented litigants *are 'significantly less likely to contain the kind of evidence needed to determine matters involving child safety concerns – such as evidence of child protection notifications and family violence protection orders – than cases where the parties are represented or partially-unrepresented'*.<sup>31</sup>

We also continue to be concerned by the impact of the threat of direct cross-examination by an alleged abuser on a family violence victim-survivor as well as the impact on a self-represented victim-survivor having to directly cross-examine their alleged abuser. For further discussion see Question 25.

The Issues Paper refers to some suggested measures that could improve the accessibility of the family law system for people who are not legally represented, at pp. 37-38:

- Court forms should be simplified and drafted in plain English;
- Court websites should be re-developed to ensure they are user-friendly and provide clear guidance in plain English on the family law process and requirements;
- The provisions of the *Family Law Act* should be updated and simplified;
- Developing specialist clinics within the courts or legal aid commissions to provide pro-bono training and advice for parties who self-represent, along the lines of Canada's National Self-Represented Litigants Project.

We support these suggestions, but emphasise that specialist clinics to provide pro-bono training and advice should be in addition to and not instead of the adequate funding of legal assistance service providers. Specialist clinics may provide assistance for some but not all self-represented litigants. Furthermore, the ad hoc nature of such clinics hold real limitations on the type of assistance that can be provided in the context of lengthy and complex litigation.

We note the National Family Violence Prevention Legal Services Forum does not support self-representation for Aboriginal and Torres Strait Islander parties, especially Aboriginal and Torres Strait Islander victims/survivors due to the complex barriers to accessing justice and safety which Aboriginal and Torres Strait Islander victims/survivors face. The National Family Violence Prevention Legal Services Forum maintains that Aboriginal and Torres Strait Islander victims/survivors have a right to culturally safe and specialist legal representation in family law matters and Aboriginal Community Controlled legal assistance services, such as FVPLS', must be appropriately resourced to deliver this vital service.

We also support the drafting of 'how to' guidelines in easy English and other languages.

In WLSV's *Small Claims, Large Battles* project the overwhelming majority of clients had left violent relationships and many faced ongoing violence and intimidation after separation.<sup>32</sup> Court processes,

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<sup>31</sup> FLC Final Report 2016, p. 22, referring to R Hunter, A Genovese, A Chranowski & C Morris, *The changing face of litigation: Unrepresented Litigants in the Family Court of Australia*, Law and Justice Foundation of NSW, August 2002, and Family Law Council, *Litigants in Person: A Report to the Attorney-General*, 2000, which noted this issue.

<sup>32</sup> WLSV, *Small Claims, Large Battles*, 2018, p.20.

including conciliation conferences with court registrars can offer important protections against vulnerable women agreeing to unfair settlements. Engagement in court processes however by vulnerable women is difficult without legal representation. We note the comments from some women in the *Small Claims, Large Battles* report:

*I think the whole system was personally [difficult, because of] the demand. It's very long and you're waiting [a long time] for someone to help you.*<sup>33</sup>

*... so I then made an attempt on my own to try and make an application in the Family Court and I did all the paperwork and got down there and for some reason my paperwork was non-compliant.*<sup>34</sup>

A simplified, streamlined court process should be available. Women facing multiple layers of disadvantage and who need to negotiate with obstructive, uncooperative or controlling former partners over a small pool of assets would benefit from recourse to a user-friendly but formal court process.<sup>35</sup>

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

We refer to our comments at Questions 3 & 4 about the integrated legal and social support provided at some courts to people affected by family violence with family law issues.

We also refer to the different ways WLSA members provide legal advice – through state wide telephone services; through outreaches to local community organisations; through accessible duty services to local and family courts; through health-justice partnerships and through FASS services. Services provided by WLSA members are often holistic and take an interdisciplinary approach with the support of allied professionals, such as social workers and financial counsellors, and can often assist clients with legal problems that clients are experiencing alongside their family law matters, which can improve clients' capacity to participate in the family law process.

We also support the WLS NSW proposal to '*develop guidelines for self-represented litigants on drafting affidavits about family violence, safety concerns and impact on parenting capacity to improve the quality of primary evidence of family violence*'.<sup>36</sup>

## Court environment

### **Question 13 What improvements could be made to the physical design of the family courts to make them more accessible and responsive to the needs of clients, particularly for clients who have security concerns for their children or themselves?**

WLSA emphasises the need for safe rooms and meeting rooms in all family court premises, including where shuttle mediation between separate rooms may be appropriate. Meeting rooms should be available for co-located services, such as FASS; for meetings between a lawyer and their client and the rooms should be large enough to accommodate the diversity of families. The location of safe rooms is also important. For example, they should not be located next to an area that alleged perpetrators may access, such as a Legal Aid duty office.

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<sup>33</sup> Ibid.

<sup>34</sup> Ibid, p21.

<sup>35</sup> Ibid p20.

<sup>36</sup> Carolyn Jones, *Sense and Sensitivity: Family Law, Family Violence and Confidentiality* (WLS NSW), 2016, Proposal 4.

The impact of feeling unsafe on women's participation in family law proceedings is significant. In 2015 WLSA undertook a national survey of women survivors of domestic violence in relation to being cross-examined by their abusers in family law proceedings or having to personally cross-examine them. WLSA's subsequent submission to the FLC inquiry<sup>37</sup> noted some women's comments on the lack of safety in the court precinct and the impact that had on them:

*It is very traumatizing event whether the abuser represents himself or not. Just waiting around a court for up to 8 hours in the same vicinity, getting stared at, threatened via hand gestures and verbally. Generally when no one's in ear shot. Not all courts are set up to protect victims adequately. Country courts don't have the space or room to put victims in until their case is heard.*

*I was just so frightened ... The safety arrangements are poor at best, making it more nerve wracking. It is hard to give evidence when you are so scared. Afterwards I felt unsafe, not just when leaving the court building but months afterwards.*

*I never got into the court room as my ex attacked me in the court waiting room. I was so terrified I could not come out of the toilet.*

Safety planning regarding entering and leaving buildings is important. It is important in some circumstances that security personnel are available, for example, to accompany a victim-survivor out of the building to their car.

If separate entrances to the court are made available, the timing of arrivals and departures would still need to be considered as would the accessibility of each entrance.

We also refer to our comments at Question 7 for further comments about the accessibility of buildings for people with disability.

Ensuring cultural safety is also important. This in part relates to the physical design of buildings as well as the cultural competency of people within those buildings as discussed further at Questions 41-42. For example, the presence of the Aboriginal and Torres Strait Islander flags, artwork, an Aboriginal and Torres Strait Islander liaison officer and Aboriginal and Torres Strait Islander services are important ways to try and ensure Aboriginal and Torres Strait Islander people feel welcome and safe.

The co-location of CALD services at courts is also important.

#### Consideration of more regular closed court sittings

WLSA believes a focus on trauma informed practice can help the family law system to respond appropriately to sensitive matters, including allegations of harm perpetrated against a parent and/or child. For example, consideration could be given to more regularly holding closed sittings for family law matters or more regularly providing procedural directions in Chamber where serious allegations have been raised. This could help limit further traumatising parties who may be triggered and distressed by hearing information, for example, about allegations of harm perpetrated against children relating to another matter in the duty list while they are waiting for their matter to be called.

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<sup>37</sup> WLSA submission in *Response to the Family Law Council Discussion Paper: Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems*, October 2015.

We acknowledge the principle of open justice<sup>38</sup> is intended to build public confidence in the justice system. We also note that published decisions from the family courts are published under pseudonyms to protect parties' and children's privacy and this also happens in matters involving closed sittings. Sometimes in family law matters issues that are raised – domestic violence, mental health, substance abuse – can be similar to the issues raised in a care and protection matter in the Children's Court, which is a closed court. WLSA would welcome further discussion about how the courts can continue to improve their trauma informed practice.

## Legal principles in relation to parenting and property

### Parenting

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

##### Parenting Orders

WLSA members agree with the concerns noted in the Issues Paper regarding the complexity and repetition within the decision-making framework of Part VII of the *Family Law Act*. The issue has been raised by WLSA and WLSA members in comments to several reviews, such as the Family Law Council's 2013 *Report on Parentage and the Family Law Act* and comments to the Family Law Amendment (Family Violence & Other Measures) Bill 2011.<sup>39</sup>

We note that the application of the Part VII framework to cases involving a dispute involving a non-parent can be even more complex. Many Judges resort to literary or historical comparisons in an attempt to describe the frustrations involved in stepping through the legislatively mandated steps. For example, Purdon-Sully FM described the process of '*attempting to navigate through the relevant parts of the Act including the relevant state legislation [as] involve[ing] a maze of windings and turns – the legal equivalent of a "Chemin de Jerusalem" type labyrinth*'.<sup>40</sup>

Not only is this frustrating, but it adds to the costs of preparing the case and increases the judicial workload in an already overstretched court system. Furthermore, the lack of adequate guidance in Part VII on the approach to be taken regarding non-parents has created additional uncertainty and inconsistency of outcomes in litigated cases.

Accordingly, WLSA welcomes a comprehensive review and revision of the Part VII decision-making framework.

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<sup>38</sup> Section 97(1) *Family Law Act 1975 (Cth)*

<sup>39</sup> Family Law Council (Australia), *Report on parentage and the Family Law Act* (2013) accessed at: <https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/family-law-council-report-on-parentage-and-the-family-law-act-december2013.pdf>; Women's Legal Services Australia, Submission on the Family Law Amendment (Family Violence & Other Measures) Bill 2011, 29 April 2011, 11-14, accessed at: <https://senate.aph.gov.au/submissions/committees/viewdocument.aspx?id=84937170-03e9-405c-a798-17f4d6020e40>

<sup>40</sup> *Lusito & Lusito* [2011] FMCAfam 55 (21 January 2011)

## Family violence and parenting orders

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

Due to the high prevalence of family violence in family law matters, the attraction of shared parenting to violent men as a way to exert ongoing power and control and the well-entrenched community misunderstanding that equal shared parental responsibility means equal time, WLSA recommends the removal of the presumption of equal shared parental responsibility and overall emphasis in the *FLA* on equal time and shared parenting.

The presumption of equal shared parental responsibility 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, the family law system has difficulty identifying and assessing the risk of family violence early.<sup>41</sup> Many victims-survivors can be unrepresented in court because of limited legal aid and many matters are settled in family dispute resolution, often without legal assistance. It is often difficult to prove violence/abuse to the satisfaction of the court because it occurs behind closed doors.

It is WLSA members' experience that women whose partners have exerted coercive controlling violence feel pressure to and do agree to consent orders for equal shared parental responsibility and then continue to have to manage a continuing relationship characterised by coercive controlling behaviour over shared decision making. Even in litigated outcomes where coercive controlling violence is present in a case, a sole parental responsibility order can be difficult to obtain.

Women who consent to an order for equal shared parental responsibility in the context of family violence often present to WLSA members with continuing parenting issues. In some cases they are responding to contravention orders, in other cases they are responding to ongoing issues relating to the exercise of shared parental responsibility, such as decisions about school enrolment; or travel overseas for school or sporting excursions or for short family holidays. Children continue to be distressed by impasses in decision making such as about disagreement in enrolment in high school. Where such issues require further litigation to resolve, and the consequent stress caused by delay and uncertainty in school enrolment, the presumption of equal shared parental responsibility has operated to impede a proper focus on the best interests of the child.

This issue is discussed further in our previous submission at **Attachment A**.<sup>42</sup>

WLSA notes that the recent House of Representatives committee report on family violence concluded that the design of Part VII *'fails to prioritise the safety of children in parenting matters involving family violence'*.<sup>43</sup> The Committee expressed concern based on evidence it had received that the presumption of equal shared parental responsibility *'is improperly being applied to many cases involving family violence and that is giving rise to court orders and consent orders which put*

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<sup>41</sup> For example, in 2015 the AIFS 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. Only three in five parents said that the family legal service they engaged with asked them about their experiences of family violence - *ibid*, p 182.

<sup>42</sup> WLSA's submission to the House of Representatives committee inquiry in 2017, Attachment A, pp21-23.

<sup>43</sup> House of Representatives Committee 2017, para 6.124.

people effected by family violence, including children, at unacceptable risk'.<sup>44</sup> The Committee recommended that the ALRC consider removal of the presumption.<sup>45</sup>

*A specialised legal pathway that incorporates the dynamics of violence be developed*

WLSA has long advocated that a separate and distinct legislative pathway be developed for cases involving family violence in the family law.

We reiterate the recommendations made in WLSA's five-step plan and our previous submission at **Attachment A** about the need for early and ongoing risk identification and assessment.

The dynamic of violence is all pervasive and issues of ongoing control and manipulation of the family are a reality. Difficult, hard decisions must be made by judges to limit contact, deny contact or limit decision-making around issues of parental responsibility in families where there is violence.

Assessments by professionals with clinical experience and expertise in family violence and child abuse and risk assessment need to guide the judiciary. Additionally, the long-term impacts on children being placed in the care of a perpetrator of violence must be thoroughly examined. There needs to be better recognition within the family law system that harm caused by perpetrating violence against the adult victim-survivor is also harm perpetrated against the child.

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

*Definition of family violence*

WLSA supports the current definition of family violence in the *FLA* which focuses on coercive and controlling behaviour and subjective fear.

We note the Issues Paper raises concerns about the absence of misuse of process as a form of abuse (p43).

WLSA members are concerned by the way family law proceedings can be misused to continue the perpetration of abuse. We are aware of matters involving significant family violence where there have been more than 14 sets of family law parenting orders made over a period of almost a decade, including several recovery orders in response to the father failing to return the children. In *WLSV Small Claims, Large Battles* report women expressed concern about the other party's failure to make financial disclosures in a timely manner without consequence.

As we have previously raised, we are also concerned by the ability of such provisions to be used against the primary victim-survivor.<sup>46</sup> Our support for including misuse of process within the definition of family violence is contingent upon the definition continuing to be focused on coercive and controlling behaviour. We also note this provision would need to be carefully drafted.

We note the FLC Final Report recommended the Federal Government commission research on what family law systems abuse occurs and how it can be prevented and support this recommendation.

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<sup>44</sup> House of Representatives Committee 2017, para 6.125.

<sup>45</sup> House of Representatives Committee 2017, Recommendation 19.

<sup>46</sup> WLSA, Submission to the Senate Legal and Constitutional Affairs Committee in response to the Family Law Amendment (Family Violence and Other Measures) Bill 2017, February 2018 at: <https://www.aph.gov.au/DocumentStore.ashx?id=a55fa551-efe5-4163-b2ec-f1b40483f878&subId=563508>

We further note that removal of the presumption of equal shared parental responsibility and overall emphasis in the *FLA* on equal time and shared parenting and so looking at each matter on a case-by-case basis should go a significant way to limiting opportunities for misuse of process as a form of abuse.

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

*Arrangements for children and family diversity*

WLSA generally supports all the recommendations made by the Family Law Council in its 2013 *Report on Parentage and the Family Law Act (the 2013 FLC Report)*, with the exception of parts of Recommendations 2 and 3.

The 2013 FLC Report provides a thorough and comprehensive discussion of the issues and problems with the *Family Law Act* in relation to parentage, and WLSA members made detailed submissions to the review. WLSA notes that the concerns raised by our members for that review continue to apply, and refer the ALRC to submissions made at that time.<sup>47</sup>

In relation to Recommendations 2 and 3, we reiterate concerns raised by WLSA members to the FLC parentage review in relation to the tendency for judicial officers to recognise a biological parent such as a sperm donor in cases where a donor-conceived child is born to a single woman or a lesbian couple. We are concerned that in such instances the lack of a male parent leads judicial officers to privilege biology in families not formed around biological relationships. We are concerned that this leads to discrimination on the basis of sexual orientation and marital status.

Accordingly, WLSA supports the first part of the FLC's Recommendation 2, to remove the reference to 'both' of the child's parents' in s 60B(1) and s 60CC(2)(a) of the *Family Law Act*, however, we do not support the second part which recommends amending references to 'parent' in decision making framework to include a reference to 'other significant adults'.

Nor do we support the first part of Recommendation 3. Whilst we agree that the definition of 'parent' in s 4 of the *Family Law Act* ought to be amended to be more inclusive of non-biological parents, WLSA members are concerned that the expansion of the concept of 'parent' to people who are not legal parents will result in an undermining of the parental status of single women and lesbian co-parents, noting that for most, non-parents such as sperm donors and step-parents play an important, but distinct role in a child's life.

WLSA does, however, support the second part of Recommendation 3, which would recognise people who are regarded as a parent of a child under Aboriginal tradition or Torres Strait Islander custom.

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<sup>47</sup> Women's Legal Services NSW, Submission to the Family Law Council in response to the Review of parentage laws, p2 accessed at: <https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/flc-submission-womens-legal-services-nsw-1july2013.pdf> Women's Legal Service Victoria submission accessed at: <https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/flc-submission-womens-legal-service-victoria-28june2013.pdf> ; Women's Legal Centre ACT, Submission to the Family Law Council in response to the Review of parentage laws.

## Property

### **Question 17 What changes could be made to the provisions in the Family Law Act governing property division to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes?**

In relation to promoting fair outcomes, research has consistently shown that family violence ‘significantly contributes to poverty, financial risk and financial insecurity for women, sometimes long after they have left the relationship’.<sup>48</sup> Research by ANROWS in 2016 suggested that a woman who was subjected to family violence over an extended period (i.e. at multiple points over the three year study) was more likely to experience adverse economic outcomes, including a decreased likelihood of being in paid employment.

WLSA has previously recommended<sup>49</sup> that the *FLA* be amended to take account of family violence in property matters by:

- inserting a new subsection (s 79 (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; and
- amending s 75(2) to include a new factor the court must take into account when deciding an application for spousal maintenance, that is, the effect of family violence perpetrated in the relationship by either party on the financial circumstances of the parties.

WLSA notes that both the ALRC and the FLC have previously recommended amendments to the *FLA* to require courts to consider the effects of family violence when determining both the contributions and future needs of parties to a marriage.<sup>50</sup> The House of Representatives Committee in 2017 made a similar recommendation.<sup>51</sup>

In relation to improving the clarity of the law, the Productivity Commission noted that the complexity of the *FLA’s* property provisions and associated court processes presents a particular barrier to justice.<sup>52</sup> The *FLA’s* approach to property settlement gives the court wide powers to adjust property as considered appropriate in the circumstances, provided the order is ‘*just and equitable*’. This makes it difficult for parties to ascertain what their obligations and entitlements are in relation to property matters.

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<sup>48</sup> R Braaf & B Meyering, *Seeking Security: promoting women’s economic wellbeing following domestic violence* 2011, Sydney: Australian Domestic and Family Violence Clearinghouse, p3. See also A George & B 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) p35; E Smallwood, *Stepping Stones: Legal Barriers to Economic Equality after Family Violence* (Report, Women’s Legal Service Victoria, 2015) p6; 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) p44; I Evans, *Battle-Scars: Long-Term Effects of Prior Domestic Violence* (Centre for Women’s Studies and Gender Research, Monash University, 2007) p24.

<sup>49</sup> WLSA submission to House of Representatives Committee 2017, Attachment A.

<sup>50</sup> FLC, *Violence and Property Proceedings*, 2001, [27]–[31]; ALRC *Equality Before the Law: Justice for Women* (Part 1), 1994, Recommendation 9.6. WLSA notes that the ALRC/NSWLRC’s report in 2010 *Family Violence – A National Legal Response* recommended a specific inquiry on this matter on the basis that it was beyond their terms of reference and detailed examination was necessary (paras 17.162-17.164, Recommendation 17-2).

<sup>51</sup> House of Representatives Committee 2017, Recommendation 13.

<sup>52</sup> Productivity Commission, *Access to Justice Arrangements*, 2014, p 874.

WLSA has previously recommended<sup>53</sup> that the Australian Government conduct a comprehensive audit of the Family Court of Australia and the Federal Circuit Court family law processes in relation to both parenting and property disputes. 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; and
- the current fees charged by the Family Court and the Federal Circuit Court.

WLSA also refers the ALRC to our supplementary submission in 2017 to the inquiry by the House of Representatives Standing Committee on Social Policy and Legal Affairs into a better family law system to support and protect those affected by family violence (**Attachment B**) and notes the final report's recommendations around how barriers to fair financial outcomes for outcomes can be addressed. In particular Recommendations 13, 14, 15, 16 and 17.

We refer to WLSV *Small Claims, Large Battles* report launched in March 2018 discussed above which WLSA endorses and supports. See further Question 11 and Question 22.

### Spousal maintenance

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

See WLSA's response to Question 17 above in relation to a proposed amendment to s 75(2) of the *FLA* to include consideration of the effect of family violence on the parties' financial circumstances.

For the reasons outlined in Question 17, it is also important that family violence is considered in the context of spousal maintenance orders.

We refer to the administrative system of child support and raise the possibility of a similar system to increase accessibility to spousal maintenance. We further note that international spousal maintenance orders can be registered with the Australian Child Support Agency and can then be enforced, for example, by garnisheeing wages.<sup>54</sup> We recommend consideration of a similar mechanism for the enforceability of Australian spousal maintenance agreements.

### Resolution and adjudication processes

**Question 20 What changes to court processes could be made to facilitate the timely and cost-effective resolution of family law disputes?**

**Question 21 Should courts provide greater opportunities for parties involved in litigation to be diverted to other dispute resolution processes or services to facilitate earlier resolution of disputes?**

WLSA believes it is important to create a process in family courts to manage family violence cases with an emphasis on early decision making, triaging and case-management.

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<sup>53</sup> WLSA submission to House of Representatives Committee 2017, Attachment A.

<sup>54</sup> Section 18A of the *Child Support (Registration and Collection) 1988 (Cth)*

WLSA has previously recommended<sup>55</sup> that the Australian Government amend the *FLA* (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 member is Aboriginal and/or Torres Strait Islander, a referral should be made to a specialised and culturally safe legal service such as a FVPLS.
- That following receipt of such a referral, the family violence support worker undertakes 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.

WLSA believes there is an important role for FDR and particularly for lawyer assisted FDR in circumstances of family violence discussed below at Questions 23-24. However, WLSA is concerned that FDR may proceed in circumstances where there is family violence and FDR is inappropriate which may lead to unsafe outcomes. This highlights the need for early and ongoing risk assessment by those with specialist expertise in risk assessment throughout the family law process.

See response to Question 22 below regarding proposals relating to small property claims.

We also note the Family Court of Australia Registrar Intervention Project being piloted in Brisbane, Melbourne and Sydney Registries. This initiative '*targets cases that have been waiting at least six months for a final hearing*'. Registrars identify appropriate cases for a case conference that will '*attempt to mediate or conciliate a resolution or narrow the issues between the parties*'. If matters do not resolve they do not lose their priority for a hearing date with a Judge. This project is expected to be evaluated in June 2018.

### Small property claims

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

For women experiencing disadvantage, the risk of poverty, homelessness and ongoing financial insecurity is heightened by the lack of fast, affordable pathways to resolve family law property disputes. Many women are simply walking away from their entitlement to a fair division of property.<sup>56</sup>

WLSA has previously recommended<sup>57</sup> that the *FLA* be amended 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.

As noted previously, WLSV's recently launched a report titled *Small Claims, Large Battles*. The report detailed findings of the Small Claims, Large Battles project which investigated the barriers to fair financial outcomes in the family law system for vulnerable and disadvantaged women, many of who

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<sup>55</sup> WLSA submission to House of Representatives Committee 2017, Recommendation 4, Attachment A.

<sup>56</sup> WLSV, *Small Claims, Large Battles* p3.

<sup>57</sup> WLSA submission to House of Representatives Committee 2017, Attachment A.

had experienced family violence. Free legal representation was provided to 48 women. The report made 15 recommendations for reform to law and policy to improve access to fair property settlements for disadvantaged women. The recommendations focus on:

- Streamlining court processes
- Improving financial disclosure
- Superannuation
- Dealing with joint debts
- Responding to family violence
- Improving access to property settlements

WLSA supports these recommendations.

### Appropriate dispute resolution for family violence

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

Refer to responses to Questions 1, 2, 11, 12, 13, 15, 20-21.

We also support less adversarial approaches such as the Less Adversarial Trial. See further our comments at Question 31.

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

##### Parenting matters

WLSA believes that a well-supported mediation process, with expert lawyers and mediators who are family violence and trauma informed, culturally competent and disability aware and have a sound understanding of family law, can be an empowering process for a victim-survivor of family violence. As outlined in more detail in WLSA's previous submission at **Attachment A**, matters where family violence is identified are often screened out of non-legally assisted mediation due to safety concerns. This 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. 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.

Legal assistance services have experience and expertise in non-adversarial forums such as lawyer assisted family dispute resolution, which with the necessary safeguards can be used appropriately in family violence matters.<sup>58</sup> Women's Legal Service Queensland helped to develop the Co-ordinated Family Dispute Resolution model - a model specifically designed for parenting matters involving family violence. Further, several WLSA members and Associate members, including Women's Legal Service NSW, Women's Legal Service Victoria, Women's Legal Service Queensland, North Queensland Women's Legal Service, Central Australian Women's Legal Service and Family Violence Prevention Legal Services provide representation in lawyer assisted family dispute resolution with particular expertise in matters relating to family violence and child abuse.

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<sup>58</sup> Rae Kaspiew, R. De Maio, J. Deblaquiere J. and Horsfall B. *Evaluation of a pilot of legally assisted and supported family dispute resolution in family violence cases*, (AIFS) December 2012

WLSA previously recommended<sup>59</sup> 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 family dispute resolution practitioners. The rollout 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 acknowledge the government has provided funding for FDR for Aboriginal and Torres Strait Islander people and CALD communities. It is essential that the communities affected participate and lead discussions about the reforms they wish to see and co-design these reforms. Where reforms are directly related to Aboriginal and Torres Strait Islander people they should be led and co-designed by Aboriginal and Torres Strait Islander people and community controlled organisations.

### Property matters

There are currently limited affordable FDR options available for property matters, despite the increased demand for property mediation.<sup>60</sup> This is partly a result of the fact that, unlike for parenting matters, FDR is not a pre-filing requirement.

While Legal Aid guidelines vary between states and territories there is limited access to legally assisted FDR in property disputes. For example, in Victoria while the Victoria Legal Aid guidelines provide for legally assisted FDR in property matters in practice, parenting matters are more likely to be funded than property matters. This means that, in effect, Victoria Legal Aid funded FDR is restricted to parties with a 'live' parenting matter.

### Misuse of process

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

We refer to our response to Question 15.

As discussed above at Question 15 WLSA believes that the removal of the presumption of equal shared parental responsibility and the removal of the overall emphasis in the *FLA* on equal time and shared parenting, as well as examining each case on a case-by-case basis should go a significant way to limiting opportunities for misuse of process as a form of abuse.

There were a number of causes for the delays experienced by women in the Small Claims, Large Battles project. For some women, negotiations and legal proceedings were drawn out intentionally by uncooperative former partners. This included failure by a former partner to make proper financial disclosure, failure to respond to correspondence or the making of unreasonable offers which meant our clients needed to initiate proceedings.

In some cases this appeared to be a result of parties, who had the means to do so, deliberately not obtaining legal representation.<sup>61</sup>

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<sup>59</sup> WLSA submission to the House of Representatives Committee 2017, Recommendation 11, Attachment A.

<sup>60</sup> Family & Relationship Services Australia, *Submission No 80 to the Parliament of Australia, Parliamentary Inquiry into a Better Family Law System to Support and Protect Those Affected by Family Violence*, May 2017, pp15–16.

<sup>61</sup> WLSV, *Small Claims, Large Battles*, 2018 p.18.

### Case study

*Miriam's ex-husband Mark initially failed to provide full and frank disclosure, making it difficult to provide comprehensive legal advice. WLSV assisted Miriam for several years, and after finally obtaining a property settlement by consent, Miriam faced further obstacles when Mark failed to transfer the property into her name. The delays caused by Mark increased the size of the debt owing on the property. Miriam was required to obtain further legal representation to enforce consent orders. There were significant delays in finalising the enforcement proceedings as a result of the bank not responding in a timely manner to requests to confirm the balance of the shortfall. Miriam was required to take additional time off work for court hearings at which Mark repeatedly requested adjournments.*

Source: *WLSV Small Claims, Large Battles*, 2018, p18

### Court power to dismiss

WLSA notes the Family Law Amendment (Family Violence and Other Measures) Bill 2017, which includes a range of measures aimed at improving the family law system's response to family violence, is currently before the Senate. While WLSA supports many of the reforms proposed in the Bill, we have some concerns about the proposal in proposed s 45A to expand the court's powers to dismiss proceedings that are frivolous, vexatious or an abuse of power. Further information is in our submission at **Attachment A**.

We continue to support the FLC recommendation on the commissioning of research into what family law systems abuse occurs and how it can be prevented, with such research to be considered before any amendments to summary dismissal powers are made.

### Limits on cross-examination

WLSA considers that further action on an issue of particular and longstanding concern is required, namely, the capacity for self-represented perpetrators of violence to personally cross-examine their victims, thus using the family law system to subject their former partners to further trauma. WLSA has previously recommended<sup>62</sup> that the *FLA* be amended to protect vulnerable witnesses from direct cross-examination by an abusive ex-partner as follows:

1. By 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); and
  - b. where family violence is alleged during the proceeding.
2. In such cases, the court should order that a 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.

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<sup>62</sup> WLSA submission to House of Representatives Committee 2017, Attachment A.

3. If requested, any self-represented affected family member should also be able to be provided with a lawyer or advocate through whom they may question 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).
5. Direct cross examination should also be prohibited in family law proceedings where the court otherwise determines that the person requires the protection of the court.

In comments on an exposure draft of provisions to address this issue,<sup>63</sup> WLSA raised three possible options for appointment for the purposes of cross-examination: an independent legally trained person; a ‘Counsel Assist’ model; and an expanded Independent Children’s Lawyer (ICL) role.<sup>64</sup>

WLSA continues to urge that limits on cross-examination by alleged perpetrators of violence and the victim-survivor having to directly cross-examine their abuser be introduced by way of amendments to the *FLA* and corresponding legislative amendments to the *Evidence Act* (WA). Legislative amendments should be underpinned by early and ongoing risk assessment processes in the court to appropriately identify matters where risks and evidence of family violence arise. WLSA also considers that access to on-going legal advice and representation for all parties involved in family law matters where the family has been impacted by family violence is an essential means of addressing this problem. We refer again to the Productivity Commission recommendation of an immediate additional \$200 million funding each year for legal assistance service providers for civil law, including family law.

#### Subpoenaing of sensitive records

We refer to the report produced by Women’s Legal Service NSW - *Sense and Sensitivity: Family Law, Family Violence and Confidentiality (Sense and Sensitivity)*. This report discusses the need for family law professionals to commit to adopting victim-survivor centric practices which should include guidelines for seeking least intrusive forms of evidence first.<sup>65</sup> This would acknowledge that improving responsiveness to victims-survivors of family violence includes preserving therapeutic relationships.

We note the Issues Paper makes reference to Practice Direction 2 of 2011 issued by the Family Court of Western Australia which *‘provides that a subpoena directed to a family counsellor will not be issued unless the subpoena “is accompanied by a letter certifying that reasonable efforts have been made” to discuss “the possible consequences of compliance with the subpoena, including the impact on the family or children involved” with the person against whom the subpoena is directed’*.

This sounds like a positive development. It would be helpful to hear further about how this is working in practice, including to see if it adequately addresses a focus on least intrusive source of evidence first.

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<sup>63</sup> WLSA submission on the Exposure draft – Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017, available at <https://www.ag.gov.au/Consultations/Pages/Family-violence-cross-examination-amendments.aspx>.

<sup>64</sup> See also the *FLC Final Report*, pp. 66-68.

<sup>65</sup> Carolyn Jones, *Sense and Sensitivity Family Law, Family Violence and Confidentiality* (Women’s Legal Service NSW), May 2016, Proposal 7-8 accessed at: <http://www.wlsnsw.org.au/wp-content/uploads/WLS-NSW-Sense-and-Sensitivity-web.pdf>

*Sense and Sensitivity* makes a number of proposals including:

*Proposal 7*

*Therapeutic records be subpoenaed and produced by following a guided, preferably prescribed, decision-making process to establish the necessity and importance of accessing these documents. The potential for further delay in proceedings is acknowledged, but in the absence of urgency the consequences of disclosure outweigh any delay.*

*Proposal 8*

*The decision making process about access to therapeutic records, whether ideally contained in the court rules or in the form of guidelines like the Family Violence Best Practice Principles, might include the following:*

- *A presumption that there is always potential for a detrimental impact on the therapeutic relationship when sensitive records are accessed, particularly in a litigation context.*
- *Clarification of the type of sensitive records to be protected.*
- *Acknowledgement that parties can seek production of their own therapeutic records with restrictions on access by a perpetrator as required.*
- *A requirement to seek leave to issue a subpoena for therapeutic records, reversing the onus from parties and professionals who would typically object to the subpoena production to the party seeking access, including ICLs. Parties retain the right to object to production even if leave is granted to issue the subpoena.*
- *A standard that leave to issue a subpoena only be granted if the records appear to be relevant to a fact in issue and there is no less intrusive source of the evidence available or there are circumstances of urgency, which may need to be defined.*
- *If records about therapeutic interventions with children are sought, the court must consider whether the consent of the child must be obtained or if an additional protection is required, such as the records only being viewed by the judge.*
- *Acknowledge that evidentiary rules will be relevant to the consideration of legitimate forensic purpose.*
- *A requirement for parties inspecting therapeutic records to sign an undertaking pursuant to 15A.12(2) as discussed in Sampson & Hartnett [2014] FCCA 99 at 19-20.*

*Proposal 10*

*Establish a service, similar to the Sexual Assault Communication Privilege Service [in NSW], to provide advice and representation for individuals and services wishing to object to subpoenas of therapeutic records in family law matters.*

WLSA recommends further discussion about how these proposals could be implemented.

## Alternative dispute resolution processes

**Question 26 In what ways could non-adjudicative dispute resolution processes, such as family dispute resolution and conciliation, be developed or expanded to better support families to resolve disputes in a timely and cost-effective way?**

See our response above to Question 24 in relation to legally assisted dispute resolution for victims-survivors of family violence.

## Technology

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

WLSA members and the CLCNSW RRR Network believe there could be a role for online call over in very limited circumstances, such as the granting of a divorce, particularly where there are no children. This would require suitable technology in the RRR areas that could be safely accessed.

WLSA members express a strong preference for face-to-face FDR processes, with the option of shuttle mediation. WLSA members comment it can be challenging for clients and everyone involved in an FDR process when the parties and mediators are all located in different areas and participating by phone. We also raise questions about whether a risk assessment can be adequately undertaken if the dispute resolution is online.

## Problem solving decision-making processes

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

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

**Question 31 How can integrated services approaches be better used to assist client families with complex needs? How can these approaches be better supported?**

WLSA supports the funding of the domestic violence unit and health justice partnership pilot programs under the Women's Safety Package. These programs bring together lawyers and social workers, and lawyers and health workers, to respond more effectively to the needs of women experiencing or who have experienced violence and who are navigating the family law system. These programs aim to reach the most vulnerable and disadvantaged women and their children, and address legal and non-legal need through holistic service provision. A number of our members deliver programs under this pilot, which is currently being evaluated by the Australian Government. The experience of members delivering these programs is that integrated legal and non legal services are well-placed to support vulnerable and disadvantaged women and facilitate their engagement with the legal system, including the family law system. WLSA supports the ongoing funding of these innovative programs beyond 2019, and an expansion of such services to meet the needs of women and children experiencing violence in all parts of Australia.

We also refer to our comments above at Question 4 about the benefit of similarly structured duty services through the FASS program.

WLSA supports less adversarial processes being used within the family courts. We note the Less Adversarial Trial (**LAT**) was introduced in 2006 following the trial of the Children's Cases Pilot Project.

The LAT is a judge-directed and controlled process for parenting and property matters which means *'the judge, rather than the parties or their lawyers, decides what information is put before the Court and how the trial is run'*. This model adopts a multidisciplinary approach with family consultants who are social workers or psychologists attending court on the first day of trial, following the filing of each party's parenting questionnaires (parenting and/or financial) to provide *'general expert evidence to the judge to help identify relevant issues in dispute'*. If a family report is required the judge will specify the nature of the report and wherever possible the family consultant who is present on the first day of trial will undertake the assessment. The judge may refer parties to *'a community-based service for further help or make orders about children that will run for a limited time, to see if they work'*.<sup>66</sup>

We note the Issues Paper refers to two different approaches to problem solving (p66):

- A hybrid model in which the court transfers the role of monitoring the parties' engagement with services to a registrar of the court or to a community-based family relationship agency.
- An administrative model, such as a non-judicial tribunal, such as proposed in Parenting Management Hearings.

WLSA recommends further exploration of the Registrar monitoring the parties' engagement with services.

WLSA has previously raised a number of concerns regarding Parenting Management Hearings. Our previous submission to the Senate Legal and Constitutional Affairs Committee in response to the Family Law Amendment (Parenting Management Hearings) Bill 2017 is attached. (**Attachment C**)

## Integration and collaboration

### **Question 32 What changes should be made to reduce the need for families to engage with more than one court to address safety concerns for children?**

Ideally, WLSA supports a specialist domestic violence court or specialist domestic violence list where all professionals within the system are domestic violence, child abuse and trauma informed, culturally competent and disability aware and the court can consider matters relating to intervention orders as well as family law.

Both the ALRC/NSWLRC report in 2010 and the FLC in 2015 and 2016 recommended significant amendments to provide better integration of child protection agencies' investigations in family law proceedings. WLSA has previously supported the ALRC/NSWLRC recommendation 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.<sup>67</sup> 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

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<sup>66</sup> Family Court of Australia, Less Adversarial Trials, March 2013 (brochure) accessed at: <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/publications/court-events/less-adversarial-trials>

<sup>67</sup> WLSA submission to House of Representatives Committee 2017, Recommendation 6, Attachment A.

- intervene in the proceedings.

More detail is in our previous submission at **Attachment A**.

## Child abuse

It is imperative that the family law system provides an effective mechanism to enable the disclosure of and investigation into safety concerns for children, including that a child may be being abused. The family courts' absence of an investigatory arm was investigated as part of the 2010 ALRC/NSWLRC *Family Violence – A National Legal Response Final Report* and at paragraph 19.95: the following concern was expressed:

*.....the Commissions are also concerned that the problems outlined above [the investigatory gap] have been identified for many years, that recommendations to deal with them have been made in numerous ways and that, in some locations at least, no solution has been found. The Commissions note the strength of support from stakeholders that this issue be dealt with effectively. In the interests of the children concerned, these problems should not be allowed to persist.*

WLSA supports the intent to improve the system described by Recommendation 19.1 of that report:

*Federal, state and territory governments should, as a matter of priority, make arrangements for child protection agencies to provide investigatory and reporting services to family courts in cases involving children's safety. Where such services are not already provided by agreement, urgent consideration should be given to establishing specialist sections within child protection agencies to provide those services.*

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

Efforts to improve responsiveness to family violence disclosures are welcomed but it is important that information sharing is not seen as the panacea.

If there is to be a database that each of the courts can access, issues of timeliness and currency of data would need to be considered. For example, it would need to be made clear to users that it should not be assumed that a lack of relevant information on a database necessarily reflected the latest circumstances.

If, for example, child protection agencies are providing a summary of information in their database the author of such a report needs to have the appropriate skills to analyse the information, be able to correctly identify the primary victim and aggressor and robust guidelines and training would be required to promote consistency in summary reports.

WLSA also raises concerns about privacy, particularly in relation to sensitive information and who would have access particularly in cases involving self-represented litigants.

WLSA supports the national register of intervention orders and recommends this information be available to all court systems in real time.

WLSA has previously recommended<sup>68</sup> 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 Common Risk Assessment Framework or the NSW Domestic Violence Safety Assessment Tool;
- 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 and NSW; and
- clarify the interaction between the criminalisation of breaches of family law safety injunctions and the proposed national DVO scheme.

WLSA also refers to our response to Question 25 and recommendations about guidelines for subpoenaing of least intrusive form of evidence first.

## Children's experiences and perspectives

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

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

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

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

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

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

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

WLSA acknowledges that fundamental to the *Convention on the Rights of the Child* is the right of children and young people to participate in decisions that affect them. While we are interested in children's experiences within the family law system we note this is not our area of expertise and look forward to engaging with issues raised by children and their advocates.

The National Children's Commissioner engages in extensive consultations with children and young people across Australia and notes in the 2015 *Children's Rights* report:

*The issue of family and domestic violence in the context of the family law system was consistently raised throughout my examination.*

*Key concerns about the family law system were:*

- *lack of understanding and inappropriate responses to family and domestic violence by*

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<sup>68</sup> WLSA submission to House of Representatives Committee 2017, Attachment A.

*those working in the family law system*

- *a conflict between the right of parental contact and the rights and best interests of the child*
- *court decisions which do not yet fully reflect the amendments to the Family Law Act in 2012*
- *the inappropriate use of mediation for some families.*<sup>69</sup>

Based on her consultation with children and young people, the Children's Commissioner recommended a review of the Magellan List and consideration of inclusion of matters involving family violence and abuse in the Magellan List.<sup>70</sup>

The National Children's Commissioner has also recommended Independent Children's Lawyers and family consultants be '*provided with specific training and resources on how to effectively communicate with children of various ages and maturity, and seek their views about family law matters that concern them.*'<sup>71</sup> WLSA supports this recommendation.

WLSA understands that the National Children's Commissioner is assisting the joint Family Court/Federal Circuit Court Children's Committee to engage in consultation directly with children and young people about their experiences of participating in court proceedings.<sup>72</sup> WLSA supports this.

WLSA notes that while a child can commence proceedings in the family courts,<sup>73</sup> a more common way that children can participate is through an independent children's lawyer. (ICL) When an ICL is appointed they are required to ensure any views expressed by the child are put before the court. They do not act as the child's direct legal representative, but rather provide their independent view of what is in the best interests of the child.

WLSA notes that a number of concerns were raised in the 2013 Australian Institute of Family Studies (AIFS) *Independent Children's Lawyer Study Final Report (ICL Study Report)*. These included the focus given to some issues in Family Reports at the expense of giving adequate focus to the presence of family violence; the weight given to these reports; and the seeming lack of critical analysis of such reports resulting in the reports often going untested.

A judicial officer who participated in the AIFS ICL Study noted, '*the over focus on the need to preserve the child/parent relationship, sometimes at the risk of minimising other issues of concern.*'<sup>74</sup> The judicial officer notes this as a '*failing with some report writers, which is then carried on by the ICL.*'

Similarly, a non-ICL lawyer commented '*Too often the ICL takes the easy way out and follows the recommendations of the family report writer, whereas it should be a further, more sustained, independent assessment. I have rarely seen a matter where the ICL has disagreed with the family report writer.*'<sup>75</sup>

Another comment: '*It concerns me that it is the family consultant's report that carries so much weight in children's matters [when they] often only spend a few hours with a family.*'<sup>76</sup>

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<sup>69</sup> Australian Human Rights Commission, *Children's Rights Report 2015*, p150.

<sup>70</sup> Ibid.

<sup>71</sup> Australian Human Rights Commission, *Submission to the Senate Legal and Constitutional Affairs Committee in response to the Family Law Amendment (Parenting Management Hearings) Bill 2017*, Recommendation 2.

<sup>72</sup> *Children's Rights Report 2015*, p 149.

<sup>73</sup> Section 69C of the *Family Law Act*

<sup>74</sup> AIFS, *Independent Children's Lawyer Study*, 2013, p134.

<sup>75</sup> Ibid, p130.

<sup>76</sup> Ibid, p130.

We note that untested Family Reports are often relied upon:

- by the ICL in coming to their decision; and
- by Legal Aid in determining legal aid funding decisions.

We recommend Family Report Writers who provide evidence in family law proceedings must be accredited. They must have clinical experience in working with victims-survivors of family violence and be bound by standards and there must be an effective mechanism for complaints.

## Professional skills and wellbeing

**Question 41 What core competencies should be expected of professionals who work in the family law system? What measures are needed to ensure that family law system professionals have and maintain these competencies?**

### Legal professionals

WLSA has previously recommended<sup>77</sup> that the Australian Government fund and coordinate the development of a national comprehensive family violence training program for family law legal professionals (including independent children's lawyers and family dispute resolution practitioners) and work with state and territory law institutes and bar associations to roll out the training.

WLSA recommended that the training modules for family law professionals should 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 as well as maintaining appropriate referral procedures, policies and relationships with Aboriginal Community Controlled Organisations
- cultural competency in relation to working with clients of a CALD 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 Report Writers

In the experience of WLSA members the following issues have arisen with respect to some family consultants and expert witnesses in family law proceedings, including:

- A lack of understanding of the dynamics and risks of family violence and child abuse and impact of trauma. This can result in inappropriate processes, practices and procedures, for example, parents being requested to attend an interview at their office at the same time, despite the existence of an intervention order. A lack of understanding of the dynamics of family violence and in particular identifying coercive and controlling behaviour can further result in the minimising or not believing a family violence victim-survivor's story. For

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<sup>77</sup> WLSA submission to House of Representatives Committee 2017, Attachment A.

example, some victims concerns about family violence have been described as paranoid, an over-reaction or malicious.

- A lack of cultural competency in relation to working with people of an Aboriginal or Torres Strait Islander or CALD background, particularly in their ability to communicate effectively through interpreters and to appreciate how culture may influence behaviour.
- In some instances, an under-stating of the risks and effects of family violence on children, and
- they may exhibit bias in relation to race, gender, or other attributes of one of the parties, and on that basis their report will give preference to the other party's point of view.<sup>78</sup>

In relation to family report writers, WLSA has recommended that:

- 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 report writers, and that the training and accreditation process and minimum standards include a focus on capabilities in relation to understanding and identifying family violence, child abuse, cultural competency and trauma-informed practice; As raised at Question 10, standards need to be enforceable.
- Aboriginal and Torres Strait Islander litigants have access to Aboriginal and Torres Strait Islander family report writers, and
- the Australian Government establish an oversight mechanism and complaints process to monitor and review the conduct of family report writers.<sup>79</sup>

Similar to legal professionals, WLSA has also recommend family report writers have ongoing training in:

- 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 CALD 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.

We acknowledge the FCA/FCC response to this issue in June 2016.<sup>80</sup>

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<sup>78</sup> See WLSA's 2017 submission to the Senate Community Affairs Reference Committee's inquiry on the complaints mechanism administered under the Health Practitioner Regulation National Law, available at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Community\\_Affairs/ComplaintsMechanism/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/ComplaintsMechanism/Submissions) . See also, WLSA submission to House of Representatives Committee 2017, Attachment A.

<sup>79</sup> WLSA submission to House of Representatives Committee 2017, Attachment A.

<sup>80</sup> Family Court of Australia, Federal Circuit Court of Australia, *Media Release: Family law system needs more resources to deal with an increasing number of cases involving family violence*, 20 June 2016 access at: <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/about/news/mr200616>

WLSA notes that the House of Representatives Committee unanimously recommended in 2017 that the Australian Government develop a national, ongoing, comprehensive and mandatory family violence training program for family law professionals, including court staff, family consultants, Independent Children’s Lawyers, and family dispute resolution practitioners.<sup>81</sup> The Committee recommended that this program includes content on:

- the nature and dynamics of family violence;
- working with vulnerable clients;
- cultural competency;
- trauma informed practice;
- the intersection of family law, child protection and family violence; and
- ‘The Safe and Together Model’ for understanding the patterns of abuse and impact of family violence on children.

The Committee also emphasised that that the quality and reliability of family reports must be improved. It recommended that the Australian Government develop a national accreditation system with minimum standards and ongoing professional development for family consultants modelled on the existing accreditation system for family dispute resolution practitioners. The Committee also recommended that a complaints mechanism be included where family consultants failed to meet the required standards.<sup>82</sup>

WLSA endorses those recommendations.

**Question 42 What core competencies should be expected of judicial officers who exercise family law jurisdiction? What measures are needed to ensure that judicial officers have and maintain these competencies?**

WLSA has previously recommended<sup>83</sup> 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. WLSA recommended that this training package include 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.

WLSA has also recommended<sup>84</sup> the Australian Government adopt Recommendations 215 and 216 of the 2016 Royal Commission into Family Violence Victoria (**RCFV**) Report, that is, that material on the dynamics of family violence be included in general judicial officer training, and that the comprehensive family violence learning and development program for court staff and magistrates in Victoria continue to be developed and expanded Australia-wide.

WLSA notes that the House of Representatives Committee recently recommended that the Australian Government develop a national and comprehensive professional development program for judicial officers in family courts and other courts that preside over matters involving family

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<sup>81</sup> House of Representatives Committee 2017, Recommendation 28.

<sup>82</sup> Ibid, Recommendation 30.

<sup>83</sup> WLSA submission to House of Representatives Committee 2017, Attachment A.

<sup>84</sup> WLSA submission to House of Representatives Committee 2017, Attachment A.

violence, the program to include similar components to those outlined above for other family law professionals.<sup>85</sup>

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

WLSA raises concerns about this question. In cases of family violence, including sexual assault as well as child abuse there may be very good reasons for the victim-survivor's legal representative to advocate strongly for a particular position that is in the best interests of the child. We would be concerned if this could be categorised as 'exacerbate[ing] conflict'.

### Professional wellbeing

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

As the Issues Paper notes at p. 86, the potential negative impacts on professionals in the family law system are well recognised. WLSA supports processes to ensure the wellbeing of all staff who are in contact with family law clients, particularly where there may be a history and/or risk of family violence or abuse.

One example in a WLSA member service<sup>86</sup> is the introduction of Reflective Practice sessions every six weeks, conducted on the premises by a qualified external professional. The sessions are an opportunity for legal and support staff to debrief, share skills and experiences, and care for their colleagues, and to assist in managing their mental health and emotional resilience. Participation is voluntary and all staff who have contact with clients are encouraged to attend. In addition, confidential employee counselling services are available to individual staff members.

We note addressing systemic problems within the system – such as appointing more judges and better funding of the legal assistance sector can assist in addressing court delays – delays which result in inefficiencies such as requiring additional updating affidavits as previous court documents need to be updated due to the passing of significant time.

WLSA also refers to Rape and Domestic Violence Services Australia's response to this question and endorses those comments.

## Governance and accountability

### Transparency and privacy

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

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

We acknowledge there are both benefits and barriers in the application of s 121 of the *FLA*. We recognise this section is intended to protect the privacy of parties and their children which is very important. We also note s 121 can impede advocacy and law reform when there are limits on

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<sup>85</sup> House of Representatives Committee 2017, Recommendation 27.

<sup>86</sup> Women's Legal Centre (ACT and Region).

parties' ability to discuss their matters which can be further disempowering for people engaging in the family law system.

Further, as the Issues Paper notes at p. 89, WLSA in a 2015 submission to a Senate committee inquiry into regulation of health practitioners recommended that section 121 be amended to make clear that disclosures of accounts of a family law proceeding for the purposes of making a complaint against a health practitioner under the Health Practitioner Regulation National Law are excluded from the prohibition on publication.<sup>87</sup>

The need for an express exemption responds to the publication by the Australian Association of Social Workers (AASW) of guidance that its ability to receive complaints about social workers that have acted as family report writers in family law proceedings is limited:

*The AASW's legal advice is that the publication or dissemination to the AASW of any part of Family Court proceedings which might identify parties and witnesses, or persons related to the proceedings would be an offence.*

*Irrespective of that position, section 121 of the Family Law Act also prohibits the AASW from disseminating the same information to members of the public or to a section of the public. This means that the AASW is unable to disseminate the information (e.g. to witnesses or investigators) for the purpose of investigating and determining the complaint.<sup>88</sup>*

We recommend providing exceptions to s 121 to clarify that information be shared with professional regulators to facilitate their investigatory functions

## Accountability and governance

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

WLSA notes that most states and territories in Australia have a domestic violence death review mechanism which makes recommendations about systems reform. It is important that states and territories urgently adopt statutorily established and securely funded specialist domestic and family violence death review units; or ensure that current units are statutorily based, securely funded and comply with best practice principles, including mandating agency responses to and public monitoring of implementation of review recommendations.

WLSA notes there is currently no systemic response to the deaths of adults or children who have had involvement with the family law system. Sometimes these deaths may be considered by coronial inquests, domestic violence death reviews or child death reviews. We recommend a national approach to family and domestic violence (both adults and children) be implemented to collate data at a state, territory and federal level; investigate system failure; make recommendations for immediate and long term systemic change; mandate state, territory and federal agency responses to and public monitoring of review mechanisms.

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<sup>87</sup> WLSA submission to the Senate Standing Committee on Community Affairs' inquiry on the complaints mechanism administered under the Health Practitioner Regulation National Law, 2017, accessed at: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Community\\_Affairs/ComplaintsMechanism/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/ComplaintsMechanism/Submissions).

<sup>88</sup> AASW, *Complaints relating to Social Workers and the Family Court of Australia & Federal Circuit Court of Australia*, accessed at: <https://www.aasw.asn.au/document/item/3863>

We also support the improvement of complaint mechanisms to investigate the behaviour of judicial officers.

## Other issues not addressed in Issues Paper

In addition to comments made above about funding and access to justice, WLSA raises the following matters for the ALRC's consideration.

### Child Support

We note with concern that child support was not discussed in the Issues Paper. While we acknowledge child support operates under separate legislation to the *FLA* we believe it is an important component of the family law system.

WLSA has previously recommended<sup>89</sup> that child support policy and practice reflect the following reality: financial abuse is a common feature of domestic violence; and that child support is a key platform where ongoing abuse can be perpetrated against adult victims-survivors and children.

WLSA also supports a legislative change to provide that '*the best interests of the child*' be the paramount consideration when making child support decisions. This would bring child support laws into a consistent broad policy framework with family law and other laws affecting children; and appropriately provide a focus on best outcomes for children.

WLSA also supports and endorses the National Council of Single Mothers and their Children policy on instituting state guaranteed payments of child support. Guaranteed payments would ensure surety of cash flow for mothers post separation and assist with financial security and planning. It would also sever the use of child support as an avenue to practice financial control and abuse.

We note in the 2014 House of Representatives Child Support inquiry the final report recommended the Australian Government examine the limited child support guarantee in other jurisdictions and consider the feasibility of trailing a limited guarantee in Australia.<sup>90</sup>

### Women in prison

WLSA notes that in the questions addressing improving the accessibility of the family law system for different groups, women in prison are absent from the list.

WLSA is concerned about the extent to which courts are informed of the pathways to prison for women. The high number of women in custody who have experienced child sexual abuse, sexual assault and family violence leads us to conclude that it is likely these issues have not been raised in court.

Aboriginal and Torres Strait Islander women represent 34% of the adult women prison population, at 30 June 2016.<sup>91</sup> Aboriginal and Torres Strait Islander people are incarcerated at 14 times the rate of non-Indigenous people.<sup>92</sup>

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<sup>89</sup> WLSA, Submission to House of Representatives Standing Committee on Social Policy and Legal Affairs on Child Support 2014 accessed at: <https://www.aph.gov.au/DocumentStore.ashx?id=501200c9-9c43-481c-9ceb-e918c8ea9241&subId=253451>

<sup>90</sup> House of Representatives Standing Committee on Social Policy and Legal Affairs, Inquiry into the Child Support Program, June 2015, Recommendation 25.

<sup>91</sup> Australian Bureau of Statistics, *Prisoners in Australia 2016* (8 December).

<sup>92</sup> Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators (2011)*, p 5, <http://www.pc.gov.au/research/ongoing/overcoming-indigenous-disadvantage/2011/key-indicators-2011-overview-booklet.pdf>

Lawrie's 2003 study of Aboriginal women in NSW prisons found that over 75% of Aboriginal women had being sexually assaulted as a child, just under 50% had been sexually assaulted as adults and almost 80% were victims-survivors of family violence.<sup>93</sup>

WLS NSW has previously advocated that imprisonment of women, and particularly pregnant women and women caring for children, should be as a last resort. Flexible and accessible, non-custodial alternatives to prison should be available, including in rural, regional and remote areas.

If there is no statutory risk of significant harm issues for the children and the issue is the absence of the mother when she enters custody, WLS NSW has previously recommended an alternative pathway to the child protection agency and the Children's Court. This is to reduce the stigma which is associated with Children's Court matters and the stress the mother and children may experience where there are no risks of significant harm issues. This can be done, for example, through an informal arrangement with a family member. It is important that such arrangements consider the best interests of children with respect to facilitating contact between the child and primary caregiver while the primary caregiver is in custody.

Several studies have found children's coping skills were enhanced and 'problematic behaviour' was reduced by maintaining contact with their incarcerated parents.<sup>94</sup> A 2016 report found that there was no evidence of harm to children residing with their mothers in prison.<sup>95</sup>

The report also found that mothers who participated in programs that allowed their children to live with them were less likely to return to prison than women who were separated from their children.<sup>96</sup> Our clients consistently tell us that maintaining a relationship with children while in prison is an important factor that can contribute to reducing recidivism. The report also found that mothers may be '*considerably more motivated to succeed*' in educational and substance misuse programs.<sup>97</sup>

WLSA supports these recommendations and welcomes consideration of how the family law system can be more accessible for primary caregivers in custody where there are no safety issues relating to children and it is in the best interests of the child.

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<sup>93</sup> Rowena Lawrie, 'Speak Out Speak Strong: Rising imprisonment rates of Aboriginal women' (2003) 5(24) *Indigenous Law Bulletin*.

<sup>94</sup> Julie-Anne Toohey (2012), 'Children and Their Incarcerated Parents: Maintaining Connections – How Kids' Days at Tasmania's Risdon Prison Contribute to Imprisoned Parent-Child Relationships', *The Australian and New Zealand Critical Criminology Conference 2012*, 33.

<sup>95</sup> University of Melbourne School of Health Sciences, Save the Children Australia Centre for Child Wellbeing and the Vanderbilt University Peabody Research Institute, *Literature Review of Prison-based Mothers and Children Program*, p3.

[http://assets.justice.vic.gov.au/corrections/resources/b5ef4e77-10e5-4a27-bbfd-9a5c3e9cdb69/mothersandchildren\\_programs.pdf](http://assets.justice.vic.gov.au/corrections/resources/b5ef4e77-10e5-4a27-bbfd-9a5c3e9cdb69/mothersandchildren_programs.pdf)

<sup>96</sup> *Ibid*.

<sup>97</sup> *Ibid* 4.