



Women's Legal Services Australia

# Submission in response to the family courts merger bills\*

Prepared by Women's Legal Services Australia  
(WLSA)

6 April 2020

\* Federal Circuit and Family Court of Australia Bill 2019 and Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2019

Women's Legal Services Australia

✉ PO Box 3496, Alice Springs NT 0871 📞 (08) 8952 4055

🌐 [www.wlsa.org.au](http://www.wlsa.org.au)

## Table of contents

Submission endorsements .....	3
About WLSA .....	4
Introduction and summary of recommendations .....	5
Need to increase specialisation in family law and family violence.....	6
The Government’s proposal .....	7
Preferred model.....	8
Family Law Appeals.....	9
Overarching purpose.....	11
Consultation .....	13
Immediate action prioritising safety first in family law .....	14

## Submission endorsements

This submission is endorsed by:

Australian Women Against Violence Alliance

Central Australian Women's Legal Service Inc

Central Coast Community Legal Centre

Community Legal Centres Australia

Community Legal Centres NSW

Domestic Violence NSW

Eastern Community Legal Centre

Elizabeth Evatt Community Legal Centre

Fitzroy Legal Service Inc

Katherine Women's Legal Service

Kingsford Legal Centre

Mid North Coast Community Legal Centre

Northern Rivers Community Legal Centre

North Queensland Women's Legal Service

Peninsula Community Legal Centre Inc

SCALES Community Legal Centre

Top End Women's Legal Service Inc

Western NSW Community Legal Centre Inc

Wirringa Baiya Aboriginal Women's Legal Centre

Women's Council for Domestic and Family Violence Services WA

Women's Health NSW

Women Lawyers' Association of NSW Inc

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

Women's Legal Service Western Australia

## About WLSA

Women's Legal Services Australia (**WLSA**) is a national network of community legal centres specialising in women's legal issues, which work to support, represent and advocate for women to achieve justice in the legal system. We seek to promote a legal system that is safe, supportive, non-discriminatory and responsive to the needs of women. Some of our centres have operated for over 35 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 marginalised 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 – marginalised and disadvantaged women.

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

Finally, both WLSA and its individual member services work to contribute to policy and law reform discussions, primarily focused on sexual and 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.

## Acknowledgement

We acknowledge the family violence victims-survivors with whom we work and whose voices and experiences inform our advocacy in the hope for positive change.

## Introduction and summary of recommendations

1. We thank the Senate Legal and Constitutional Affairs Committee for the opportunity to provide comment on the Federal Circuit and Family Court of Australia Bill 2019 and Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2019 (**Family Court Merger Bills**).
2. WLSA is concerned about the proposed family courts merger as outlined in the Federal Circuit and Family Court of Australia Bill 2019. We also raise concerns relating to the Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2019.
3. The majority of matters lodged in the family courts involve allegations of family violence.<sup>1</sup>
4. Given its exposure to families in crisis, one of the key responsibilities of the family law system, including the family courts, should be to develop appropriate frameworks to keep children and adult victims-survivors, primarily women, safe. To do so, the family law system must place safety and risk at the centre of all practice and decision-making.
5. Currently barriers within the family law system place the lives of vulnerable children at risk and can re-traumatise women who have been victims of family violence.
6. In order to create a system that places children's safety at its centre, reform must occur at a number of levels. There also must be increased specialisation in family law and family violence.
7. We support a single entry point to a specialist family court and the harmonisation of rules for family law matters, but we do not support the model proposed by the Government which would result in the abolition of a stand alone specialist superior Family Court.
8. Government commissioned inquiry after inquiry has recommended increasing specialisation of the family law system in family law and family violence. The safety of children and adult victims-survivors of family violence and ongoing consideration of risk must be foundational in the family law system. If the courts are to merge, we recommend retaining the specialist stand alone superior family court. Current Family Court Judges could be in Division 1 of this court. Current Judges in the Federal Circuit Court who primarily preside over family law matters could be moved across to Division 2 of the Family Court. Federal judges hearing family law matters would therefore be in a single specialist family court. This is a model proposed by the New South Wales Bar Association and recommended in the 2008 Government commissioned Semple Report.<sup>2</sup>

<sup>1</sup> Australian Law Reform Commission *Family Law for the Future: An inquiry into the Family Law System, 2019*, p103-104 (**ALRC review**)

<sup>2</sup> Des Semple, *Future Governance Options for Federal Family Law Courts in Australia: Striking the Right Balance* (2008)

9. The overarching purpose of legislation, policies and procedures relating to the family law system must not focus on efficiency alone, but must also consider the safety of children and adult victims-survivors of family violence.
10. There must also be adequate consultation on proposed models, legislation, policies and procedures which involves those who would be impacted. It is important this includes all legal assistance services providers and sexual and family violence experts.
11. We recommend:
  - 11.1 The Government's proposed model to merge the Family Court of Australia and the Federal Circuit Court of Australia into a single generalised court: the Federal Circuit and Family Court of Australia not proceed.
  - 11.2 If the family courts are to merge it be to a specialist family law and family violence court with increased specialisation in family law and family violence of judicial officers and other professionals working in the family law system. We support the model proposed by the New South Wales Bar Association and a legislative requirement of expertise of federal judicial officers presiding in family law matters to include family law and family violence.
  - 11.3 Specialisation in appeals continues with appeals generally heard by Family Court Appeal Division Judges.
  - 11.4 The current practice of an appeal generally being heard by "*3 or more Judges of the Family Court sitting together, where a majority of those Judges are members of the Appeal Division*" continues.
  - 11.5 The overarching purpose of any legislation, policies and procedures relating to the family law system must include the safety of children and adult victims-survivors of family violence.
  - 11.6 Adequate consultation on proposed models, legislation, policies and procedures which involves those who would be impacted, including the legal assistance sector and sexual and family violence experts.
  - 11.7 Further action be taken immediately to strengthen the family violence response in the family law system consistent with Women's Legal Services Australia's Safety First in Family Law Plan.

## Need to increase specialisation in family law and family violence

12. WLSA supports a single entry point to a specialist family court and the harmonisation of rules for family law matters so the system is easier to navigate. We understand this is a key reason why the Government is seeking to restructure the courts.

13. The Family Court of Australia has said “*common rules, forms and complementary case management systems*” ... “*can be achieved without legislative amendment*”.<sup>3</sup>
14. This is further reflected in the report by Chief Justice the Hon. Will Alstergren on the work of the Family Court in 2018-19 to implement “*a number of case management initiatives aimed at reducing the backlog of matters*” and work underway on the Rules Harmonisation project.<sup>4</sup>
15. The Federal Circuit Court of Australia has acknowledged the importance of a single point of entry and common case management system “*whether or not the enabling legislative framework is in place*”.<sup>5</sup>
16. Any reform should strengthen a system, including strengthening specialisation within the system.
17. Government commissioned inquiry after inquiry has recommended the strengthening of specialisation in family law and family violence in the family law system.<sup>6</sup>

### The Government’s proposal

18. The Federal Circuit and Family Court of Australia Bill 2019 proposes to merge the Family Court of Australia and the Federal Circuit Court of Australia into a single generalised court: the Federal Circuit and Family Court of Australia.
19. The proposal is for two divisions within this new court. Division 1 Judges from the Family Law Court of Australia would only hear family law matters. Division 2 Judges within the proposed merged court would hear matters across many areas of law, such as bankruptcy, trade practices, migration, industrial relations, as well as family law.
20. While Division 1 Judges would be required to have the “*knowledge, skills, experience and aptitude*” relevant to family law and family violence, there is no such requirement for Division 2 Judges.
21. We note the Government has tried to acknowledge that Judges expected to hear family law matters in Division 2 should have the knowledge, skills, experience and aptitude relevant to family law and family violence. However, this falls short of the Australian Law Reform

<sup>3</sup> Family Court of Australia, Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Federal Circuit and Family Court of Australia Bill 2018 and Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018, 14 December 2018, p1.

<sup>4</sup> Family Court of Australia Annual Report 2018-19, p4.

<sup>5</sup> Federal Circuit Court of Australia, Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Federal Circuit and Family Court of Australia Bill 2018 and Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018, 11 December 2018, p3

<sup>6</sup> ALRC, *Family Law for the Future: An inquiry into the Family Law System*, 2019, Recommendation 51; Standing Committee on Social and Legal Affairs, *A better family law system to support and protect those affected by family violence*, 2017, Recommendations 27-28; Family Law Council, *Improving the Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems*, 2016, Recommendations 11-12, 15(1); Queensland Special Taskforce in Domestic and Family Violence, *Not Now, Not Ever*, 2015, Recommendations 104 – 106, 109-110; Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients*, 2012, Recommendations 2.2, 8,2; Family Law Council, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds*, 2012, Recommendations 2.2, 6.1, 6.3; ALRC ad NSWLRC, *Family Violence – A National Legal Response*, 2010, Recommendations 16.9, 21.3, 22.5, 26.3, 31.1-31.5, 32.4.

Commission (**ALRC**) recommendation that requires all federal judicial officers appointed to make decisions in family law matters having experience in family law and family violence.<sup>7</sup>

22. Clause 11 relating to the appointment of Division 1 Judges states:

*(2) A person is not to be appointed as a Judge unless:*

*(b) by reason of knowledge, skills, experience and aptitude, the person is a suitable person to deal with family law matters, including matters involving family violence*

23. Clause 111 relating to appointment of Division 2 Judges states:

*(2) A person is not to be appointed as a Judge unless:*

*(b) by reason of knowledge, skills, experience and aptitude, the person is a suitable person to deal with the kinds of matters that may be expected to come before the person as a Judge of the Federal Circuit and Family Court of Australia (Division 2)*

*(3) To avoid doubt, for the purposes of paragraph (2)(b), if the kinds of matters that may be expected to come before a person as a Judge of the Federal Circuit and Family Court of Australia (Division 2) are family law matters, the person, by reason of their knowledge, skills, experience and aptitude, is a suitable person to deal with those matters, including matters involving family violence.*

### Preferred model

24. The New South Wales Bar Association has proposed a model of reforming the family courts which strengthens specialisation.

25. Current Family Court Judges would be in Division 1 of the Family Court. Federal Circuit Court Judges who currently primarily hear family law matters would move to Division 2 of the Family Court.<sup>8</sup> This means federal judges hearing only family law matters would be in a single stand alone specialist family court. This court would also be supported by other specialist workers, including family consultants (social workers and psychologists) and other social support.

26. A stand-alone specialist family court provides greater security in the long-term around specialisation and so greater security for those who have experienced family violence, predominantly children and women.

27. We support this model, which has been endorsed by 115 organisation, academics and practitioners, including Aboriginal and Torres Strait Islander community controlled organisations, sexual and family violence peaks and services, health peaks and services, disability peaks and services, community organisations, academics and legal experts.<sup>9</sup>

<sup>7</sup> Australian Law Reform Commission *Family Law for the Future: An inquiry into the Family Law System, 2019*, Recommendation 51.

<sup>8</sup> New South Wales Bar Association, *A Matter of Public Importance: Time for a Family Court of Australia 2.0*, July 2018 accessed at: [https://nswbar.asn.au/docs/mediareleasedocs/Family\\_Court\\_MR2.pdf](https://nswbar.asn.au/docs/mediareleasedocs/Family_Court_MR2.pdf)

<sup>9</sup> [Joint Open Letter](#) to Attorney-General the Hon Christian Porter, Concerns about proposed family court merger, 11 November 2019, signatures updated December 2019.



28. We also recommend legislating to require that judicial appointments have adequate family violence and family law expertise.<sup>10</sup>

### **Recommendation 1**

The Government's proposed model to merge the Family Court of Australia and the Federal Circuit Court of Australia into a single generalised court: the Federal Circuit and Family Court of Australia not proceed.

### **Recommendation 2**

If the family courts are to merge it be to a specialist family law and family violence court with increased specialisation in family law and family violence of judicial officers and other professionals working in the family law system. We support the model proposed by the New South Wales Bar Association and a legislative requirement of expertise of federal judicial officers presiding in family law matters to include family law and family violence.

## **Family Law Appeals**

29. Currently, family law appeals are generally presided over by Family Court Judges in the Appeal Division of the Family Court of Australia<sup>11</sup> and often by a Full Court defined as "3 or more Judges of the Family Court sitting together, where a majority of those Judges are members of the Appeal Division".<sup>12</sup>
30. For example, section 94AAA (3) of the *Family Law Act 1975* (Cth) relating to appeals to the Family Court from the Federal Circuit Court and Magistrates Court of Western Australia states:

*The jurisdiction of the Family Court in relation to an appeal under subsection (1) or (1A) is to be exercised by a Full Court unless the Chief Justice considers that it is appropriate for the jurisdiction of the Family Court in relation to the appeal to be exercised by a single Judge.*

31. An Appeal Division acknowledges the importance of specialisation in complex family law and related matters. Further, given the complexity in law and context, including that the majority of family law court proceedings involve allegations of family violence and that decisions can have significant, long term impacts on the lives of families, we believe it is important that specialisation in family law appeals continue. This is in both the continuing of a specialist Appeal Division with the Family Court of Australia and the number of Appeal

<sup>10</sup> ALRC review, Recommendation 51.

<sup>11</sup> Section 21A of the *Family Law Act 1975* (Cth)

<sup>12</sup> Section 4 of the *Family Law Act 1975* (Cth). See also, for example, s94AAA (3) of the *Family Law Act 1975* (Cth) relating to appeals to the Family Court from the Federal Circuit Court and Magistrates Court of Western Australia: "(3) *The jurisdiction of the Family Court in relation to an appeal under subsection (1) or (1A) is to be exercised by a Full Court unless the Chief Justice considers that it is appropriate for the jurisdiction of the Family Court in relation to the appeal to be exercised by a single Judge.*"

Division Judges presiding generally being “3 or more Judges of the Family Court sitting together, where a majority of those Judges are members of the Appeal Division”.

32. The Government’s proposed model is that there be no Appeal Division within Division 1 such that all Division 1 Judges are able to preside over appeals.
33. Further, appeals would generally be heard by a single Judge unless “the Chief Justice considers that it is appropriate for the appellate jurisdiction of the Federal Circuit Court and Family Court of Australia (Division 1) in relation to the appeal to be exercised by a Full Court”.<sup>13</sup>
34. The justification for this proposed change appears to be on the grounds of efficiency based on the Government commissioned PwC *Review of the efficiency of the operation of the federal courts* undertaken over a 6 week period in early 2018 and a comparison that the majority of Federal Court appeals from the Federal Circuit Court are heard by a single Judge.<sup>14</sup>
35. There are significant shortcomings with the PwC report. PwC acknowledges that they did not “look at the detailed processes associated with case management”<sup>15</sup>, had difficulties in “substantiating the extent of variation in complexity of cases between the two courts”<sup>16</sup> and did not consider “practical barriers to implementation” of their recommendations.<sup>17</sup> They recommended further collection and analysis of data.<sup>18</sup> They also expressed the view that increased specialisation could have a potential impact of “reducing number of appeals/number of transfers”.<sup>19</sup> Significantly, they indicated there is a risk of a “negative impact on litigants and parties to the family law system through the implementation process” which could be mitigated if stakeholders to the family law system are consulted on specific proposals to identify “where parties will be most affected.”<sup>20</sup>
36. There are also differences in the types of matters undertaken by the Family Court of Australia Appeal Division compared to the Full Court of the Federal Court of Australia.
37. Section 28A (2B) of the *Family Law Act* provides that Judges in the Appeal Division can preside over General Division matters. However, PwC states the general practice of the Appeals Division Judges is to sit on appeals only, citing only one Appeal Division Judge sitting on two General Division cases in 2016-17.<sup>21</sup>
38. In the *Family Court of Australia Annual Report 2018-19* the Chief Justice of the Family Court of Australia, Chief Justice the Hon. Will Alstergren, acknowledges the increased role of Appeals Division Judges undertaking trial working and of “Appeal Division judges continuing

<sup>13</sup> Cl 32(2)(ii) of the Federal Circuit and Family Court of Australia Bill 2019

<sup>14</sup> PWC, *Review of the efficiency of the operation of the federal courts*, April 2018, p44.

<sup>15</sup> PWC, *Review of the efficiency of the operation of the federal courts*, April 2018, p53.

<sup>16</sup> PWC, *Review of the efficiency of the operation of the federal courts*, April 2018, p47.

<sup>17</sup> Ibid, p56.

<sup>18</sup> Ibid, p69.

<sup>19</sup> Ibid p59.

<sup>20</sup> Ibid p69.

<sup>21</sup> Ibid, p44

*to undertake trials and conduct duty lists in Brisbane, Sydney, Newcastle and Townsville and Cairns*".<sup>22</sup>

### **Recommendation 3**

Specialisation in appeals continues with appeals generally heard by Family Court Appeal Division Judges.

### **Recommendation 4**

The current practice of an appeal generally being heard by *"3 or more Judges of the Family Court sitting together, where a majority of those Judges are members of the Appeal Division"* continues.

## **Overarching purpose**

39. WLSA is concerned by the overarching purpose provisions in the Federal Circuit and Family Court of Australia Bill<sup>23</sup> and related requirement of parties to act consistently with the overarching purpose which fail to consider the safety of children and adult survivors.<sup>24</sup>
40. These provisions are modelled on s 37M and s 37N of the *Federal Court of Australia Act 1976* in reference to *"civil law practice and procedure"*. No such provisions appear in the *Family Law Act 1975*.
41. Clause 67 relates to Division 1 of the proposed Federal Circuit and Family Court of Australia and states:
  - 1) *The overarching purpose of the family law practice and procedure provisions is to facilitate the just resolution of disputes:*
    - (a) *according to law; and*
    - (b) *as quickly, inexpensively and efficiently as possible*
42. This is mirrored for Division 2 of the proposed Federal Circuit and Family Court of Australia at clause 190.
43. Clause 68 which is mirrored for matters in Division 2 in clause 191 states:
  - (1) *The parties to a civil proceeding before the Federal Circuit and Family Court of Australia (Division 1) must conduct the proceeding (including negotiations for settlement of the dispute to which the proceeding relates) in a way that is consistent with the overarching purpose.*
  - (2) *A party's lawyer must, in the conduct of a civil proceeding before the Federal Circuit and Family Court of Australia (Division 1) (including negotiations for settlement) on the party's behalf:*

<sup>22</sup> *Family Court of Australia Annual Report 2018-19*, p5.

<sup>23</sup> See clause 67 and 190 of the Federal Circuit and Family Court of Australia Bill 2019

<sup>24</sup> See clause 68 and 191 of the Federal Circuit and Family Court of Australia Bill 2019

*(a) Take action of the duty imposed on the party by subsection (1); and*

*(b) Assist the party to comply with the duty.*

...

*(4) In exercising the discretion to award costs in a civil proceeding, the Federal Circuit and Family Court of Australia (Division 1) or a Judge must take account of any failure to comply with the duty imposed by subsection (1) or (2).*

*(5) Without limiting the exercise of that discretion, the Federal Circuit and Family Court of Australia (Division 1) or a Judge may order a party's lawyers to bear costs personally.*

44. We note the ALRC recommended the inclusion of an overarching purpose of family law practice and procedure to *“facilitate the just resolution of disputes according to law, as quickly, inexpensively and efficiently as possible, and with the least acrimony so as to minimise harm to children and their families”*.<sup>25</sup>
45. The ALRC also recommended introducing a corresponding statutory duty on parties, lawyers and third parties to *“co-operate amongst themselves, and with the courts, to assist in achieving the overarching purpose”*.<sup>26</sup>
46. WLSA does not support these recommendations.
47. An emphasis on *“efficiently”* can detract from proper attention to risk and safety.
48. WLSA is deeply concerned that the strong focus on resolution of disputes as *“quickly, inexpensively and efficiently as possible”* will lead to pressure being exerted on families experiencing or at risk of experiencing family violence to agree to unsafe outcomes that are not in the best interests of children.
49. The focus should be on safety and reducing risk and not primarily on financial efficiencies.
50. If there is to be the inclusion of an overarching purpose in family law practice and procedure it must include safety.
51. Further, the safety of children and adult victims-survivors should be foundational in any legislation, policies and procedures relating to the family law system.

### **Recommendation 5**

The overarching purpose of any legislation, policies and procedures relating to the family law system must include the safety of children and adult victims-survivors of family violence.

<sup>25</sup> ALRC review, Recommendation 30.

<sup>26</sup> ALRC review, Recommendation 31.

## Consultation

52. We note with concern the proposed changes to the power to make Rules of Court.
53. Section 123 of the *Family Law Act* and s 81 of the *Federal Circuit Court of Australia Act* provide “*the Judges, or a majority of them, may make Rules of Court not inconsistent with this Act*”.
54. Clause 76 and 217 of the Bill propose “*the Chief Justice may make Rules of Court*”.
55. Clause 77 and 218 outline the consultation process.

(1) *...the Chief Justice must be satisfied that there has been appropriate consultation with other Judges.*

However,

(2) *The fact that consultation does not occur does not affect the validity or enforceability of a Rule of Court.*

56. After a period of two years after commencement of this provision, the power to make Rules of Court will revert to Rules to be made by “*the Judges, or a majority of them*”.<sup>27</sup>
57. Clause 77(3) and 218(3) make clear this provision does not limit the consultation requirements outlined in s 17 of the *Legislation Act 2003*.
58. Section 17 of the *Legislation Act* requires the rule maker to be satisfied “*appropriate*” consultation that is “*reasonably practicable*” be undertaken.
59. In determining “*appropriateness*” the rule maker may consider drawing on the knowledge of those with relevant expertise and ensuring that “*persons likely to be affected by the proposed instrument had an adequate opportunity to comment on its proposed content*”.
60. It is important that Judges and the legal profession are consulted on Rules of Court and that consultation with the legal profession includes all legal assistance service providers. In addition to legal aid commissions this must include Aboriginal and Torres Strait Islander community controlled legal services such as Family Violence Prevention Legal Services and Aboriginal and Torres Strait Islander Legal Services and community legal centres, including specialist women’s legal services.
61. Aboriginal and Torres Strait Islander community controlled organisations and community members are best placed to provide feedback on potential impact on Aboriginal and Torres Strait Islander families.
62. Specialist women’s legal services have expertise in sexual and family violence and trauma informed practice and working with marginalised women.

<sup>27</sup> Part 4 Schedule 1 Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Act 2019

63. We also recommend consultation with people with disability, LGBTIQ communities, people living in regional, rural and remote areas and refugee and migrant communities.
64. It is important the family law system is accessible for all.

### **Recommendation 6**

Adequate consultation on proposed models, legislation, policies and procedures which involves those who would be impacted, including the legal assistance sector and sexual and family violence experts.

## **Immediate action prioritising safety first in family law**

65. WLSA commends the Government on a number of key reforms to date, including:
  - 65.1 Passing the *Family Law Amendment (Family Violence and Cross-examination of Parties) Act 2018*, prohibiting direct cross-examination of victim-survivors by their alleged abuser in family law matters;
  - 65.2 November 2018 Women’s Economic Security Package reforms to support women and their families to recover financially after separation;
  - 65.3 Council of Attorneys-General Family Violence Working Group progressing work on a range of issues including information sharing and improving family violence competency;
  - 65.4 2019 Mid-Year Economic and Fiscal Outlook announcement of family law reforms including additional funding for specialist family violence case management, risk assessments and pilots in the family law courts.
66. Despite these significant areas of reform, further work is urgently required to improve the safety of children and women involved in the family law system.
67. We recommend further action be taken now to increase family violence specialisation in the family law system through the implementation of Women’s Legal Services Australia’s Safety First in Family Law Plan.<sup>28</sup> A copy of this Safety First Plan is enclosed.
68. WLSA’s Safety First in Family Law Plan is supported by research, evidence and key recommendations from past inquiries and reviews into family law, including the recent ALRC review. It has been endorsed by over 100 organisations and practitioners.

<sup>28</sup> Women’s Legal Services Australia, Safety First in Family Law Plan, October 2019 accessed at: [http://www.wlsa.org.au/uploads/campaign-resources/Safety\\_First\\_in\\_Family\\_Law\\_Plan.pdf](http://www.wlsa.org.au/uploads/campaign-resources/Safety_First_in_Family_Law_Plan.pdf)

69. The Safety First in Family Law Plan includes:

1. Strengthen family violence response in the family law system
2. Provide effective legal help for the most disadvantaged
3. Ensure family law professionals have a real understanding of family violence
4. Increase access to safe dispute resolution models
5. Overcome the gaps between the family law, family violence and child protection systems

70. Further work is urgently required:

1. Introducing effective ongoing court based family violence risk assessment practices.<sup>29</sup>
2. In early determination of family violence – we note the Court already has the power to make an early determination.<sup>30 31</sup> How can it be supported to use the existing power more?
3. Increasing family violence competency of all professionals in the family law system.<sup>32</sup>
4. Removing the presumption of equal shared parenting responsibility from the *Family Law Act* to shift culture and practice towards a greater focus on safety and risk to children.<sup>33</sup>
5. Promoting reliance on less intrusive forms of evidence than protected confidences.<sup>34</sup>
6. Increasing accessibility of the family courts for all users.<sup>35</sup>

### Recommendation 7

Further action be taken immediately to strengthen the family violence response in the family law system consistent with Women’s Legal Services Australia’s Safety First in Family Law Plan.

<sup>29</sup> See House of Representatives Standing Committee on Social Policy and Legal Affairs, *Inquiry into a better family law system to support and protect those affected by family violence*, 2017, (**SPLA Inquiry**) Recommendation 2, 3; ALRC review, Recommendation 34.

<sup>30</sup> Section 69ZR of the *Family Law Act 1975*

<sup>31</sup> See SPLA Inquiry, Recommendation 7; ALRC review, Recommendation 34, paragraph 10.111.

<sup>32</sup> See SPLA Inquiry, Recommendation 27, 28, 30; ALRC review, Recommendation 52.

<sup>33</sup> See SPLA inquiry, Recommendation 19; ALRC review, Recommendation 8.

<sup>34</sup> See SPLA Inquiry, Recommendation 9; ALRC review, Recommendation 37.

<sup>35</sup> See SPLA Inquiry, Recommendation 24, 24, 30; ALRC review, Recommendation 9, 45, 46, 47, 48, 50, 53, 54.



# Safety First *in family law*

Five steps to  
creating a family  
law system that  
keeps women and  
children safe

## Step 1

Strengthen family  
violence response in the  
family law system

### What happens now?

- › The family law system has difficulty identifying and determining family violence early
- › The family law courts do not have case management processes specifically designed for family violence cases (other than serious child abuse)
- › Women subjected to coercive controlling violence feel pressure to agree to parenting arrangements and consent orders. They have to manage the risk of family violence without proper court oversight
- › There is little protection against perpetrators subpoenaing sensitive records in family law
- › For women experiencing disadvantage, ongoing financial insecurity is heightened by the lack of fast, affordable pathways to resolve family law property disputes
- › The presumption of equal shared parental responsibility is being improperly applied in many cases involving family violence

### WHAT'S THE SOLUTION?

- › Strengthen family violence response through a specialist family violence pathway or specialist family violence family law courts
- › Introduce effective ongoing court based family violence risk assessment practices
- › Promote and resource the early determination of family violence, through a family violence informed case management process and the early testing of evidence of family violence
- › Promote reliance on less intrusive forms of evidence than protected confidences
- › Implement WLSV's Small Claims, Large Battles report recommendations
- › Remove the presumption of equal shared parenting responsibility from the Family Law Act to shift culture and practice towards a greater focus on safety and risk to children

## Step 2

Provide effective  
legal help for the most  
disadvantaged

### What happens now?

- › Many women facing significant disadvantage and barriers are unable to get the legal help they need
- › Private legal representation in family law is expensive and free legal assistance in family law, for the most disadvantaged, is difficult to access
- › There are entrenched barriers in the family law system that make accessing the system particularly difficult for Aboriginal & Torres Strait Islander women, migrant and refugee women, including women on temporary visas, women with disabilities, LGBTQ communities, women in regional, rural and remote communities and women in prison

### WHAT'S THE SOLUTION?

- › Boost funding to community legal centres, including specialist women's legal services, National Family Violence Prevention Legal Services, Aboriginal and Torres Strait Islander legal services and legal aid commissions to enable legal representation for disadvantaged and high risk families in the family law system
- › Create a nationally consistent specialist legal aid funding pathway for family law property and parenting cases involving family violence
- › Expand the Aboriginal and Torres Strait Islander list in consultation with local Aboriginal and Torres Strait Islander communities, with designated Aboriginal and Torres Strait Islander liaison positions
- › Implement the recommendations from the Family Law Council's 2012 and 2016 Families with Complex Needs reports about improving the family law system for Aboriginal and Torres Strait Islander and migrant and refugee families
- › Fund specialist programs to assist LGBTQ people accessing family law courts
- › Increase the frequency and duration of Federal Circuit Court of Australia sittings in regional, rural and remote areas





### Step 3

Ensure family law professionals have real understanding of family violence

#### What happens now?

- ▶ The family violence capabilities of professionals in the family law system are inconsistent
- ▶ Professionals in the family law system are not required to be trained in family violence, working with victims-survivors of trauma, cultural competency, LGBTQ awareness or disability awareness
- ▶ Family report writers and children's contact services are not all subject to accreditation or monitoring.

#### WHAT'S THE SOLUTION?

- ▶ Embed the principle and practice of accessibility in the family law system
- ▶ The Australian Government fund options to ensure regular and consistent training on family violence, cultural competency, LGBTQ awareness and disability awareness for all professionals in the system, including for family law judicial officers, lawyers and interpreters. This training be developed so that it is comprehensive, ongoing and tailored. It also must address unconscious bias and the unique needs and experiences of diverse communities
- ▶ Establish a national accreditation and monitoring scheme for all for professionals who prepare family reports and for children's contact services. The scheme include mandatory training on family violence, working with victims-survivors of trauma, cultural competency, LGBTQ awareness and disability awareness
- ▶ Legislate to ensure that judicial appointments have adequate family violence and family law expertise

### Step 4

Increase access to safe dispute resolution models

#### What happens now?

- ▶ Family violence cases are often screened out of non-legally assisted dispute resolution due to safety concerns, therefore they have little opportunity for early resolution
- ▶ Legally assisted dispute resolution has been tried and tested as an effective alternative dispute resolution model for resolving parenting and property disputes for family violence victims-survivors. Due to inadequate funding, victims-survivors have limited access legally assisted dispute resolution

#### WHAT'S THE SOLUTION?

- ▶ Implement and fund a national legally assisted family dispute resolution program, appropriate for family violence cases (property and parenting), that is supported by specialist family violence and trauma informed lawyers and family dispute resolution practitioners
- ▶ Roll out a mediation model with specialist family violence and trauma informed lawyers and social workers based on the 2012 Co-ordinated Family Dispute Resolution pilot program
- ▶ The Australian Government fund culturally tailored models of family dispute resolution which are co-designed and led by Aboriginal and Torres Strait Islander communities and organisations and migrant and refugee communities and organisations

### Step 5

Overcome the gaps between the family law, family violence and child protection systems

#### What happens now?

- ▶ There is not an effective integration between the family law system and other federal, state and territory systems, including family support services and the family violence and child protection systems, to keep women and children safe
- ▶ Victims-survivors, whose legal problems arise in the context of family violence and relationship breakdown, regularly deal with multiple pieces of legislation and several different jurisdictions

#### WHAT'S THE SOLUTION?

- ▶ The Australian Government, and state and territory governments, develop an appropriate framework that crosses over the family law system and other federal, state and territory systems, including family support services and the family violence and child protection systems. The framework is seamless from the point of view of those who engage with it and prioritises the safety of women and children. The framework is guided by the steps outlined in this plan

