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Submissions to the
Joint Select Committee on
Australia's Family Law System

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1. About Aboriginal Family Law Services (WA)

The Aboriginal Family Law Services (WA) is committed to being a leader in the provision of family violence legal services, support and education for Aboriginal and Torres Strait Islander people in Western Australia (WA) who have experienced, or, who are experiencing family and sexual violence. (**Please note:** The term Aboriginal is used herein to refer to both Aboriginal and Torres Strait Islander people wherever relevant.)

Funded by the Department of the Prime Minister and Cabinet (DPMC) under the national Family Violence Prevention Legal Service (FVPLS) Program, we are the largest FVPLS provider in Australia. The FVPLS program provides specialist legal services in the area of family violence matters. It aims to 'prevent, reduce and respond to incidents of family violence and sexual assault among Aboriginal people'.^[1] Fourteen services are funded nationally to provide these services to 31 rural and remote locations.

Services are delivered in six regions across WA covering the West Kimberley, East Kimberley, Gascoyne, Midwest, Goldfields, and Pilbara regions. 47% of the state's Aboriginal population resides in these regions.^[2]

Offices are located in Broome, Carnarvon, Geraldton, Kalgoorlie, Kununurra, and Port Hedland. From these locations outreach services extend to over 30 remote townships and Aboriginal communities. The corporate services office located in Perth provides strategic, management support to all regional offices including finance, human resources, administration, quality assurance, and compliance functions.

2. Introduction

The Aboriginal Family Law Services (WA) (**"AFLS"**) welcomes the opportunity to contribute towards the Joint Select Committee's Inquiry of the Australian Family Law System (**"the Inquiry"**).

Aboriginal Family Law Services (WA) provides professional legal assistance to Aboriginal peoples that have experienced or are experiencing domestic and / or sexual violence.

3. Background Information

Statistically Aboriginal women fare much worse compared to non-Aboriginal women in relation to the prevalence and impact of family and domestic violence:

- There is a higher use of restraining orders compared to the non-Aboriginal population due to higher instances of violence.
- Aboriginal women are statistically more prone to hospitalization and death because of family and domestic violence (35^[3] times and 10^[4] times respectively).

Violence is now so systemic that it is the exception to have a matter without family and domestic violence. This means in the Aboriginal context, more people have their lives at risk of homicide than not.

^[1] Productivity Commission (2014) Access to Justice Arrangements Draft Report, p 29

^[2] Aboriginal and Torres Islander Census counts 2011 – Australian Bureau of Statistics
<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2075.0main+features32011>

^[3] Australian Institute of Health and Welfare (2006) Family violence among Aboriginal and Torres Strait Islander peoples
<http://www.aihw.gov.au/workarea/downloadasset.aspx?id=6442458606>

^[4] Family Violence Prevention Legal Services – Research and Needs Analysis Report, 16 July 2013, Nous Group

It is relevant to note that while Aboriginal people make up 3.1% of the Western Australian population, the Kimberley population is closer to 50%.^[5] The Kimberley has the highest increase in Domestic Violence, showing a 5-year increase of 79% in Domestic Violence Incident Reports ("DVIR") completed by police. These figures do not specify ethnicity so it is unknown how many of these DVIR relate to Aboriginal people.

In that same 5-year span, hospitalizations related to family and domestic violence have increased for men and women by an average of almost 46%. Homicides have doubled. The number of perpetrators charged with assault and sexual assault has decreased by 19% and 29% respectively. The number of perpetrators charged with breaches of a restraining order, including police orders has increased by 45%.

In at least half of all family violence fatalities the perpetrator had already been jailed in the past for manslaughter, aggravated assault, sexual assault or unlawful wounding. 60% had had contact with the justice system prior to killing their victim.⁶

Alcohol is also associated with increased severity of family violence incidents, both by perpetrator and victim. For Aboriginal people, around 65% of family violence incidents include alcohol⁷. However, evidence does not support that alcohol causes family violence, there is only a correlation. That is, alcohol might increase frequency and intensity of family violence by a perpetrator, but the perpetrator still engages in violence whether intoxicated or not.

It is the perpetrator's attitude towards a victim that underpins controlling and violent behavior. Commencing the Inquiry on the basis that allegations of sexual and domestic violence in the Family Court are false, not only dismiss the realities, but may also normalise the attitudes that cause family violence and consequently, may indirectly condone it.

Victims of family violence rely on the Family Court for safe outcomes and a legal mechanism to appropriately end a harmful relationship with a violent partner.

This social crisis has a significant impact on children. It is the jurisdiction of the Family Court to deal with this trauma and make best practice decisions for the children and litigants. This requires highly specialized judicial officers with years of experience practicing family law and ongoing training in family violence, trauma informed practice and keeping abreast of current research on medium and long term effects of family and domestic violence on children.

Further ramifications of family and domestic violence on Aboriginal women and communities are visible through other indicators:

- Aboriginal people are overrepresented in the child protection system with Aboriginal children making up 53% of children in out of home care in WA.⁸
- The percentage of Aboriginal compared to non-Aboriginal children in care by region (including metro) in WA varies from 20% (Peel) to 100% (East Kimberley).⁹
- Aboriginal people are overrepresented in the prison system, comprising 40 percent of the total prison population, with the adult female prisoner population over 50 percent.¹⁰

⁵ Western Australia's Family and Domestic Violence Prevention Strategy to 2022: Achievement Report to 2013

⁶ Ombudsman Western Australia, *Investigation into issues associated with violence restraining orders and their relationship with family and domestic violence fatalities*, 19 November 2015

⁷ Ibid.

⁸ Department for Child Protection and Family Support, November 2015-2016 Annual Report

⁹ Department for Child Protection and Family Support, November 2014

¹⁰ Australian Bureau of Statistics (ABS), 4512.0 - Corrective Services, Australia, September Quarter 2014 (4 December 2014) (Table 14)

4. The Inquiry into Australia's Family Law System

AFLS supports and endorses the recommendations to the Inquiry submitted by: -

- 1 Law Council of Australia; and
- 2 Rape and Domestic Violence Services Australia.

As mentioned in the Law Council of Australia's - Family Law Section initial report to the Joint Select Committee, the scope of the Terms of Reference in the Inquiry do not appear to cohesively reflect the holistic impact of family and domestic violence, demonstrated as recently as this year, through empirical research and full consultation between the Australian Law Reform Commission and stakeholders.

AFLS proposes the Inquiry will benefit from the Committee considering the: -

- 1 60 recommendations of the Australian Law Reform Commission's ("**ALRC**") 2019 Family Law for the Future: An Inquiry into the Family Law System – Final Report ("**ALRC 2019 Report**");
- 2 House of Representatives Standing Committee on Social Policy and Legal Affairs report A Better Family Law System to Support and Protect Those Affected by Family Violence ("**House of Representatives 2017 Report**").

AFLS fully supports the recommendation of the Law Council of Australia – Family Law Section that at minimum, Committee Members of this Inquiry complete family violence awareness training prior to the Inquiry commencing.

Recommendation 1: all participating Committee members and Senators complete family violence awareness training before concluding the Inquiry.

Additionally, AFLS makes the following recommendations: -

Recommendation 2: All victims of family violence be legally represented whether it be for negotiation, mediation, children's issues, financial issues, property settlement and other matters to prevent perpetrators using the system to impose further abuse by not cooperating, causing delay and other inappropriate behaviours to further control their victims.

Recommendation 3: Perpetrators be held accountable and not benefit from their acts of violence nor cause detriment to the legal outcomes for their victim.

Recommendation 4: Include a requirement that all Family Law practitioners, including Judicial officers, Lawyers, Independent Children's Lawyers, Court Counsellors and expert witnesses be trained in working with victims of family violence, risk assessments and emotionally based trauma and to maintain continuing professional development in the field of Family violence during practice in the jurisdiction each year.

Recommendation 5: Mandate reference be made to the National Domestic and Family Violence Bench Book ("**NDFVBB**") in all Family Court judgements involving family and domestic violence and include provision for the NDFVBB to be relied upon in evidence by either party or their legal representative's or the Independent Children's Lawyer during proceedings.

Recommendation 6: In WA utilise the regional courts to accept filing of Family Court Matters, to ensure original documents are filed on time and to train staff in knowing what needs to be filed for Family Court matters.

Recommendation 7: Reinstate Family Court circuits in regional WA that ceased due to funding restraints.

Recommendation 8: Create a specialised and culturally sensitive Indigenous Court within the Family Court to preside over both children and property matters involving Aboriginal litigants, and their families, with the presiding Magistrate at minimum, skilled and experienced in regional cultures and issues specific to Aboriginal communities.

Recommendation 9: Create a specialist court within the WA Family Court to deal with Department of Communities child protection matters and take those civil matters out of the Children's Court in WA.

Recommendation 10: Amend the Act to require language appropriate interpreters during hearings for Aboriginal people who speak English as a second or subsequent language, to ensure litigants are not disadvantaged or discouraged from relying on the Family Court.

Property Issues

Recommendation 11: Exempt matters with a small asset pool below a specified amount from the rules of evidence (in the same way as children's matters) to prevent impecunious persons in financial disputes without financial resources being denied either access to the law or benefit from applying to the law. Matters with small asset pools due to a high ratio of debts to assets, also be included in exemption provision to reduce hardship.

Recommendation 12: Include provision to mandate for the Australian Taxation office to release information upon request, in relation to superannuation interests and tax returns for family law litigants, in a way similar to the current requests permitted by the Act for details of party's superannuation interests held by the Trustee of the party's superannuation fund.

Recommendation 13: Apply the principle of *Kennon and Kennon* [1997] FamCA 27 ("Kennon") to cause an equitable property settlement outcome to victims of Family Violence by recognising the damage caused to victims by adjusting outcomes in favour of the victim proportionately to the violence, pain and harm inflicted.

Children Issues

Recommendation 14: Include an early triage risk assessment immediately a matter is filed in the Family Court to screen for complex needs such as drug abuse, family violence, and mental health challenges etc. Once a matter is identified as complex, transfer the matter into a specialist list so appropriate attention is provided to both perpetrators and victims, according to circumstances of each case.

Recommendation 15: All Independent Children lawyers ("ICL") appointed to represent a Child have contact with the child as soon as practicable after engagement and if the child is of an age to speak, to talk directly to the child with an interpreter if required. Without reference to the child's maturity, characteristics, individuality, and the context of the child's circumstances, it is not possible for an ICL to competently formulate a tailored opinion about the child's best interests. This is particularly important with Aboriginal Children whose cultural context may not be accurately or appropriately reflected by either or both of the disputing parties.

Recommendation 16: Preclude Single Expert Witnesses being engaged without clearly defined parameters for involvement, including but not limited to, training in working with family violence, demonstrated skills and understanding in legal principals such as hearsay, conflict

of interests, collusion and importance of remaining independent and unduly influenced by bias when forming their professional opinions and advice in proceedings.

Recommendation 17: Reflect child rearing practices common amongst all Aboriginal Communities, including the importance and participation of extended family members and acknowledge the trauma experienced by children taken from their families, communities, and country when only the principals of western attachment theory and the nuclear family are applied to placement of Aboriginal children.

Recommendation 18: Include legislated reference to the established psychological understandings about childhood Attachment and Developmental Trauma, as a primary factor to be considered by the Court when deciding what is in the child's best interest. This is succinctly detailed in peer-reviewed research published by Doctor [Bruce Perry](https://attachmentdisorderhealing.com/how-your-brain-works-101/). (*Neurosequential Model of Therapeutics (NMT)*) <https://attachmentdisorderhealing.com/how-your-brain-works-101/>

Recommendation 19: Include Aboriginal family members appropriate to the child's community of origin when engaging in family law mediation and Family Court proceedings.

Recommendation 20: Include reference to Foetal alcohol syndrome disorder ("FASD") in the Act and the specific considerations that need to be factored into account, including the importance of Judicial Officers being adequately informed and trained in understanding the issues unique to children diagnosed with this condition.

For Aboriginal communities the prevalence and impact of family and domestic violence is understood in terms of loss of connection to family, culture and self.

This submission by AFLS is not exhaustive. AFLS wishes to provide further relevant information to the Committee as the Inquiry progresses.

Carefully informed and considered statutory reform, resources and sustained effort is needed to break the endemic cycle of violence.