

NATIONAL FAMILY VIOLENCE PREVENTION LEGAL SERVICES

WORKING TO ACHIEVE IMPROVED JUSTICE OUTCOMES FOR ABORIGINAL AND TORRES STRAIT ISLANDER
VICTIMS/SURVIVORS OF FAMILY VIOLENCE AND SEXUAL ASSAULT

National Family Violence Prevention Legal Services Forum
submission to the Committee for Social Policy and Legal Affairs:

PARLIAMENTARY INQUIRY INTO A BETTER FAMILY LAW SYSTEM TO PROTECT THOSE AFFECTED BY FAMILY VIOLENCE

May 2017

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1 Introduction

The National Aboriginal Family Violence Prevention Legal Services Forum (**'National FVPLS Forum'**) welcomes the opportunity to provide a submission to the Committee for the Parliamentary Inquiry into a better family law system to protect those affected by family violence.

Aboriginal and Torres Strait Islander people experience family violence at disproportionately higher rates than other Australians – with women and children representing the overwhelming majority of victims/survivors. Aboriginal and Torres Strait Islander women have been found to be the most legally disadvantaged group in Australia¹. In comparison with other Australian women, Aboriginal and Torres Strait Islander women are 34 times more likely to be hospitalised as a result of family violence² and 10 times more likely to be killed as a result of violent assault.³

Family violence is a leading contributor to Aboriginal and Torres Strait Islander women's homelessness, poverty, criminalisation, incarceration, mental and physical ill health, drug and alcohol abuse and the removal of Aboriginal and Torres Strait Islander children⁴. These consequences of family violence create substantial barriers for Aboriginal and Torres Strait Islander women accessing the family law system – and the legal system more broadly – and increase Aboriginal and Torres Strait Islander women's vulnerability to violence and exacerbate its impacts.

Family Violence Prevention Legal Services (**'FVPLSs'**) provide culturally safe and specialised services and supports, including frontline legal assistance to Aboriginal and Torres Strait Islander victims/survivors of family violence through our holistic, wrap-around service model. Family law is a key practice area for FVPLSs, along with family violence and child protection law. For our clients, family law matters arise in the context of family violence that presents unique barriers and challenges for accessing the family law system.

While, Aboriginal and Torres Strait Islander victims/survivors of family violence are over-represented in child protection, criminal and civil jurisdictions, Aboriginal and Torres Strait Islander people typically under-utilise the family law system. For many Aboriginal and Torres Strait Islander communities there is a perception that the family law system is culturally insensitive and fear of child removal and child protection intervention acts as a major barrier to Aboriginal victims/survivors accessing family court processes.

¹ Aboriginal and Torres Strait Islander Commission (ATSIC), Submission to the Senate Legal and Constitutional References Committee, Parliament of Australia, Inquiry into Legal Aid and Access to Justice, 13 November 2003, 4.

² Australian Institute of Health and Welfare, Family Violence among Aboriginal and Torres Strait Islander people, 2006, page 66 available at <http://www.aihw.gov.au/publication-detail/?id=6442467912>.

³ The Australian Productivity Commission, Overcoming Indigenous Disadvantage – Key Indicators 2014, 2014, page 4.93, table 4A.11.22 available at <http://www.pc.gov.au/research/ongoing/overcoming-indigenous-disadvantage/key-indicators-2014/key-indicators-2014-report.pdf> 2 Australian Institute of Health and Welfare, Family Violence among Aboriginal and Torres Strait Islander people, 2006, page 66 available at <http://www.aihw.gov.au/publication-detail/?id=6442467912>.

⁴ 4 National Mental Health Commission, The Mental and Social and Emotional Wellbeing of Aboriginal and Torres Strait Islander Peoples, Families and Communities (2013) 17; Australian Institute of Health and Welfare, Specialist Homelessness Services 2011-2012 (2012) 13, 38. <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129542529>.

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In order for the Family Law system to support and protect those affected by family violence the system needs to understand the historical and ongoing inter-generational trauma Aboriginal people have suffered since first colonisation.

Family violence is not a contemporary concept it is symptomatic of the entire history of colonisation throughout Australia. Colonisation has impacted every aspect of Aboriginal peoples' lives since the first fleets landed. This includes collective dispossession from traditional lands and culture, impacts on kinship systems, erosion of languages, usurping gender roles, collective institutionalisation, and dramatic adverse impacts on health, financial and education.

Reporting family violence to the police and accessing the family law system can offer protection to victims/survivors of family violence. However, this is less accessible to Aboriginal and Torres Strait Islander women for a plethora of reasons. Those reasons are elaborated on at page [x] below and include long held distrust of police, people in authority and the justice system. Historical contact between Aboriginal people and the justice system has resulted in families being separated, children taken away, men incarcerated and deaths in custody. Additionally, the prevalence of the police not taking Aboriginal victims' complaints seriously, for example, calling it a "family matter" has deterred Aboriginal victims/survivors from accessing the justice system for their protection.

The following submission raises a number of issues of importance to Aboriginal and Torres Strait Islander victims/survivors of family violence which we ask the Committee to consider.

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2 Recommendations

In Summary, the National FVPLS Forum recommends:

Recommendation 1: Improved measures of early identification of Aboriginality within the family law system, which are accompanied by strong referral pathways to specialized, culturally safe legal services like FVPLSs.

Recommendation 2: Increased, secure and long-term resourcing of holistic, culturally safe service models like FVPLSs to address the multitude of barriers experienced by Aboriginal and Torres Strait Islander victims/survivors within the family law system.

Recommendation 3: Adequate, secure and long-term investment in culturally safe community legal education and outreach programs for Aboriginal and Torres Strait Islander women and their communities which are developed at a regional level in response to identified local issues.

Recommendation 4: Increased, comprehensive cultural awareness and family violence training for Judges, Magistrates, Independent Children's Lawyers, Family Dispute Resolution practitioners, court staff and mainstream legal and non-legal support services.

This training should incorporate specific content on both family violence and the particular barriers faced by Aboriginal women accessing justice and supports.

Recommendation 5: Appropriate investment in appropriately trained and qualified interpreters for Aboriginal and Torres Strait Islander people that prioritises the provision of face-to-face interpretation and only uses telephone interpretation in urgent circumstances.

Recommendation 6: There should be a requirement that all Aboriginal and Torres Strait Islander people who have been victims of family violence be legally represented in the family law courts. At a minimum, this should mandate the Court being satisfied that a victim has had legal advice prior to the Court accepting consent orders for consideration.

Recommendation 7: Development of practices and procedures that ensure Aboriginal and Torres Strait Islander victims/survivors of family violence – predominantly women – have access to appropriately resourced and specialised Aboriginal legal service providers, such as FVPLSs, for culturally safe and holistic advice and representation prior to, during and following participating in Family Dispute Resolution and/or obtaining Consent Orders.

Any entry by Aboriginal and Torres Strait Islander women into family dispute resolution should be facilitated through an Aboriginal legal service provider with expertise in family law and supporting victims/survivors of family violence.

Recommendation 8: That the development of Aboriginal-specific family dispute resolution processes take place in partnership with Aboriginal communities and Aboriginal Community Controlled Organisations with expertise in assisting victims/survivors of family violence. This should be a condition of any funding contracts related to piloting and delivering such models.

Recommendation 9: That access to ongoing, culturally safe legal representation for Aboriginal and Torres Strait Islander victims/survivors of family violence be prioritised and supported through the family law court:

- (a) reviewing and strengthening existing referral pathways for Aboriginal and Torres Strait Islander parties to culturally safe services and supports;
- (b) developing and formalising referral protocols with FVPLSs

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Recommendation 10: The National FVPLS Forum supports the recommendations 14 through 17 made by WLSA as follows:

- 14:** *That the Australian Government amend the Family Law Act as follows:*
- *Amend s 79 to include a new subsection (s79(4A)), directing the court to have regard to the effects of family violence on both parties' contributions. This would require the court to take family violence into account as a negative contribution in addition to the effect it may have in enhancing the victim's contributions.*
 - *Amend s 75(2) to include a new paragraph in the list of factors the court considers when deciding an application for spousal maintenance. It would direct courts to consider the effect of family violence perpetrated in the relationship by either party on the financial circumstances of the parties.*
- 15:** *The Australian Government amend the Family Law Act to include a requirement for an early resolution process in small claim property matters. This process should be a case management process upon application to the Court for a property settlement rather than a pre-filing requirement.*
- 16:** *The Australian Government introduce of a unique process for small claim property matters to be dealt with quickly and fairly.*
- 17:** *The Australian Government conduct a comprehensive audit of the Family Court and the Federal Circuit Court with a view to increasing accessibility of the family law system. Such a review should specifically look at:*
- *the application requirements and form of evidence currently required by the Court to determine a small property division*
 - *the adequacy of current disclosure mechanisms to allow the Court to obtain the necessary financial information required to make a just and equitable property division*
 - *the current fees charged by the Family Court and the Federal Circuit Court."*

Recommendation 11: Inclusion of cultural awareness training as part of the package of training delivered to the judiciary, along with specific training in relation to Aboriginal and Torres Strait Islander peoples' interaction with the family law system and the unique needs and barriers faced by Aboriginal victim/survivors of family violence.

Recommendation 12: Comprehensive and regular cultural awareness training for Family Consultants, Registrars and court staff.

Recommendation 13: Support measures for victims/survivors to be able to give evidence from a remote location, whether within the Court complex or off-site.

Recommendation 14: Legislative prohibitions on victims/survivors being cross examined by the perpetrator in family law proceedings be developed as a matter of priority.

Recommendation 15: That Aboriginal and Torres Strait Islander liaison officers, Aboriginal and Torres Strait Islander Family Consultants and Aboriginal and Torres Strait Islander registrars are employed within Family Law Courts.

Recommendation 16: Development of and compliance with a practice direction which specifies that in cases involving Aboriginal or Torres Strait Islander parties or children there is a preference for the Family Consultant engaged in the matter to be an Aboriginal or Torres Strait Islander professional and, where this is not possible, a requirement that family reports in these cases must only be prepared by Family Consultants who have undergone cultural awareness training.

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Recommendation 17: COAG develop and implement a national family violence order scheme as a matter of priority. The design and development of this scheme should include widespread consultation including with Aboriginal and Torres Strait Islander communities and Aboriginal Community Controlled Organisations with expertise in assisting victims/survivors of family violence.

Recommendation 18: The National FVPLS Forum re-affirms recommendations 10-14 of our submission to on the *Family Law Amendment (Family Violence and Other Measures) Bill 2017* as follows:

- “10. That the Federal Government fund training for state, territory and federal police in relation to the creation of a new criminal offence for breaching a personal protection injunction and responding appropriately to breaches. This should include comprehensive and informed cultural-competency training relating to the unique considerations that will be present in cases involving Aboriginal and Torres Strait Islander parties.*
- 11. The Federal Government and state, territory and federal Police should work together to establish transparent and consistent police protocols and codes of conduct around responding to reports of family violence, including breaches of family violence orders and family law personal protection injunctions. This should include guidance for police around appropriately identifying and assessing risk, as well as cultural competency elements such as a code of conduct for responding to and respecting the rights of Aboriginal and Torres Strait Islander victims/survivors.*
- 12. The Federal Government investigate methods for strengthening referral pathways between police who respond to a family violence incident involving Aboriginal and Torres Strait Islander victims/survivors, and culturally safe legal assistance services such as FVPLSs.*
- 13. The Federal Government provide additional funding to FVPLSs to meet increased demand for culturally safe legal assistance and community education resulting from these proposed amendments.*
- 14. The Bill be amended to clarify the interaction between the proposed criminalisation of personal protection injunctions and state and territory family violence orders, including their respective enforcement and the admissibility of evidence across jurisdictions.*
- 15. Implementation of these amendments be aligned with on-going work concerning a national DVO scheme.”*

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3 About the National FVPLS Forum

The National FVPLS Forum is comprised of 14 Family Violence Prevention Legal Services (FVPLSs) member organisations across the country that provide culturally safe legal assistance and support to Aboriginal and Torres Strait Islander victim/survivors of family violence – predominantly women and children. They also deliver essential community legal education and early intervention and prevention activities.

The Forum was established in May 2012 and works in collaboration across its member FVPLS services to increase access to justice for Aboriginal and Torres Strait Islander victims/survivors of family violence.

National Forum members are:

- Aboriginal Family Violence Prevention and Legal Service Victoria (Melbourne HO, Mildura, Gippsland, Barwon South West)
- Aboriginal Family Law Service Western Australia (Perth HO, Broome, Carnarvon, Kununnura, Geraldton, Kalgoorlie, Port Hedland)
- Aboriginal Family Legal Service Southern Queensland (Roma)
- Binaal Billa Family Violence Prevention Legal Service (Forbes)
- Central Australian Aboriginal Family Legal Unit Aboriginal Corporation (Alice Springs HO, Tennant Creek)
- Family Violence Legal Service Aboriginal Corporation (Port Augusta HO, Ceduna, Pt Lincoln)
- Many Rivers Family Violence Prevention Legal Service (Kempsey)
- Marninwarnitkura Family Violence Prevention Unit WA (Fitzroy Crossing)
- Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council Domestic and Family Violence Service (Alice Springs, NPY Tri-state Region)
- Queensland Indigenous Family Violence Legal Service (Cairns HO, Townsville, Rockhampton, Mount Isa, Brisbane)
- Southern Aboriginal Corporation Family Violence Prevention Legal Service (Albany, WA)
- Thiyama-li Family Violence Service Inc. NSW (Moree HO, Bourke, Walgett)
- Warra-Warra Family Violence Prevention Legal Service (Broken Hill)
- North Australian Aboriginal Family Legal Service (Darwin HO, Katherine)

About the Family Violence Prevention Legal Services (FVPLS) Program

FVPLSs provide frontline legal assistance services, early intervention/prevention and community legal education activities to Aboriginal and Torres Strait Islander victims/survivors of family violence.

FVPLSs were established in recognition of:

- the gap in access to legal services for Aboriginal and Torres Strait Islander victims/survivors of family violence and sexual assault;
- the high number of legal conflicts within Aboriginal and Torres Strait Islander Legal Services (ATSILS); and
- high rates of family violence in Aboriginal and Torres Strait Islander communities.

FVPLSs have adopted holistic, wrap-around service delivery models that prioritise legal service delivery while recognising and addressing the multitude of interrelated issues that our clients face. The primary function of FVPLSs is to provide legal assistance, casework, counselling and

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court support to Aboriginal and Torres Strait Islander adults and children who are victims/survivors of family violence.

FVPLS lawyers provide legal assistance in the four core areas of:

- family violence law;
- child protection;
- family law; and
- victims of crime assistance.

FVPLSs also provide culturally safe community legal education and early intervention/prevention activities. Where resources permit, some FVPLS units also provide additional assistance in other civil law issues arising from family violence such as Centrelink, Child Support, infringements and police complaints.

Ninety per cent of FVPLS clients are Aboriginal and Torres Strait Islander women and children. Family violence is complex and the issues our clients face are complex. Our clients live with intergenerational trauma, removal of children, family violence-driven homelessness, discrimination, poverty, mental health issues, disability, lower levels of literacy and numeracy, as well as a range of other cultural, legal and non-legal issues.

FVPLSs play an important role within the family law system and within family violence and child protection systems at the State and Territory level. FVPLSs provide vital, culturally safe legal representation and associated support to Aboriginal and Torres Strait Islander clients throughout the life of their legal matter and frequently assist clients to identify their multiple legal issues and navigate the corresponding multiple jurisdictions (such as family violence matters in Magistrates Courts, child protection matters in the Children's Court and Family Law parenting or other matters in the Family Law Courts).

Aboriginal and Torres Strait Islander victims/survivors of family violence face a wide array of complex and compounding barriers to reporting family violence, accessing the family law system and accessing culturally safe support. These barriers include:

- Inter-generational trauma from the legacy of Australia's colonial history, including oppression through legal and government systems, the Stolen Generations and policies of forced assimilation leading to a profound mistrust in police and the legal system;
- Fear of child protection notifications and child removal initiated by family law proceedings;
- Lack of understanding of legal rights and options concerning family law and how to access supports;
- Poor police responses and discriminatory practices within police in relation to the enforcement of family violence orders leading to a lack of faith in the capacity of court orders to provide protection and compliance;
- Mistrust of mainstream legal and support services to understand and respect the needs, autonomy and wishes of Aboriginal and Torres Strait Islander victims/survivors;
- Risk of renewed or escalating violence and threats by the perpetrator (and/or his supporters) to re-exert control over the victim/survivor;
- Community pressure or backlash for 'breaking up the family' and/or utilising the Western legal system which, for many, is intrinsically linked with the over-policing and over-incarceration of Aboriginal and Torres Strait Islander peoples and the removal and

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cultural dislocation of Aboriginal and Torres Strait Islander children from their families and communities;

- Poverty and social isolation;
- Lack of cultural competency and indirect discrimination across the support sector, including for example discriminatory practices within police and child protection agencies, lack of culturally appropriate housing options, alienating and deterrent communication and client/patient approaches by medical, legal, community services and other professionals.

Aboriginal legal service providers are best placed to respond to these unique and complex barriers.

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4 Early risk identification & assessment, support services & safety

Early identification of Aboriginality

The early identification of family violence needs to be accompanied by the early identification of Aboriginality in family law proceedings. In addition to the barriers faced by family violence victims/survivors seeking to access the family law system, Aboriginal and Torres Strait Islander victims/survivors of family violence – predominantly women - face multiple and interrelated barriers to accessing justice. This includes a profound mistrust of the legal system and mainstream services, and an increased likelihood of disengaging from the family law system without appropriate and culturally safe supports.⁵ It is therefore critical that the early identification of Aboriginality is accompanied by strong referral pathways to specialised, culturally safe Aboriginal legal service providers such as FVPLSs.

Access to Culturally Safe Support

Aboriginal and Torres Strait Islander people have a right to access culturally safe legal representation and support; they have a right to be serviced by an Aboriginal Community Controlled Organisation. Given the history between Aboriginal people and Australia's legal system it is crucial that Aboriginal people have their own distinct voice. Cultural safety is more than just cultural awareness; it is the capacity to improve outcomes by incorporating culture into the delivery of services and has a responsibility requiring commitment to a 'whole of organisation' approach in which culture is not only recognised but the understanding, valuing and celebrating of culture underpins the organisation at its very core.

The role of culturally safe representation from Aboriginal legal service providers is particularly important in the context of family law matters where the Family Law Act requires compliance with specific legislative provisions concerning the cultural rights of Aboriginal and Torres Strait Islander children.⁶ Aboriginal legal service providers, such as FVPLSs, who specialise in representing Aboriginal and Torres Strait Islander clients through culturally safe, family violence-specific service models are best placed to assist Aboriginal and Torres Strait Islander victims/survivors to avail themselves of these rights and ensure comprehensive, culturally sensitive and relevant evidence is put before the Court regarding the cultural rights and needs of Aboriginal and Torres Strait Islander children. In this way, representation by an Aboriginal legal service provider, such as an FVPLS, is a critical safeguard to ensuring that Aboriginal peoples' fundamental human rights as Indigenous peoples are upheld within the family law system.

⁵ For further discussion of the barriers faced by Aboriginal and Torres Strait Islander victims/survivors of family violence see: the National FVPLS Forum, Submission to the Special Rapporteur on Violence against Women, 2017, pp 6-8, available at: http://www.nationalfvpls.org/images/files/National_FVPLS_Submission_to_the_Special_Rapporteur_on_Violence_against_Women_-_...pdf; FVPLS Victoria, Submission to the Royal Commission into Family Violence, 2015, pp 23-26, available at: <http://fvpls.org/images/files/FVPLS%20Victoria%20submission%20to%20Royal%20Commission%20-%20FINAL%20-%202015Jul15.pdf>; FVPLS Victoria, 2010 Policy Paper Series 2010, available at: <http://fvpls.org/Policy-and-Law-Reform.php#PolicyPapersSubmissions>. See also: Indigenous Legal Needs Project. 2013. Submission to Productivity Commission's Inquiry into Access to Justice Arrangements, pp.5-11.

⁶ *Family Law Act 1975* (Cth) ss 60B(3), 60CC(3)(h), 60CC(5), 60CC(6) and 61F.

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Measures to strengthen referrals for Aboriginal and Torres Strait Islander victims/survivors to services such as FVPLSs are needed to provide vital support that is culturally safe and specialised prior to and throughout family law matters. This includes establishing and/or strengthening referral protocols within Magistrates Courts, police, and mainstream legal and support systems who engage with Aboriginal victims/survivors of family violence.

Aboriginal Community Controlled Organisations with family violence expertise are best placed to address the multiple and interrelated barriers faced by Aboriginal and Torres Strait Islander victims/survivors, and to provide culturally safe support and early intervention/prevention programs to both respond to and prevent family violence.

These early intervention/prevention programs counter the significant lack of awareness among Aboriginal and Torres Strait Islander women about their legal rights and options in relation to family law matters occurring in the context of family violence.

Among many Aboriginal and Torres Strait Islander victims/survivors of family violence, there is a lack of knowledge about the operation of the legal system which obstructs access to all elements of the family law system including access to legal assistance, family relationship services and the possibility of legal aid. While there are a number of organisations (such as FVPLSs) providing community legal education services, insufficient and insecure funding means organisations are unable to provide comprehensive services and meet the level of need across vast distances and diverse communities.

Access is a particularly pressing issue in remote communities where Aboriginal-specific or culturally appropriate legal and family services are inaccessible. In remote – and indeed urban and metropolitan areas – Aboriginal and Torres Strait Islander victims/survivors may not have access to cars or other available and affordable transport. They may also only have access to public phones or shared mobile phones which deny them the privacy needed to safely access legal and support services for family violence-related family law issues.

Furthermore, FVPLSs must be adequately resourced to receive referrals. FVPLSs are already at capacity in many locations around the country and currently have no funding certainty beyond June 2018. Around the country, FVPLSs report being forced to turn away 30-40% of women contacting our services due to a lack of resources. FVPLS require increased, long-term secure funding to address the current level of unmet need for culturally safe family law assistance and would require additional funding to absorb the increased demand on services resulting from stronger referral procedures.

Language barriers and inability to access court interpreters.

In certain communities and regions within Australia, language and communication create barriers for Aboriginal and Torres Strait Islanders accessing the family law system. By way of example, more than 100 Aboriginal languages and dialects are spoken in WA alone and 60% of Aboriginal people in that state speak one of those 100 as their primary language. This can mean that advice received and outcomes of proceedings may not be conveyed in a way that is understood. Indeed even where Aboriginal and Torres Strait Islander people speak English fluently and/or as a first language, the complex legal language often used in legal documents and forms can lead to disengagement from the system – particularly for clients with limited education. The use of interpreters can help break down these barriers. Currently there are only a limited number of trained and qualified interpreters⁷. Strategies need to be implemented to

⁷ See for example, National Legal Aid, *Submission to Family Law Council: Indigenous and Culturally and Linguistically Diverse clients in the family law system* (2011).

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attract, recruit and accredit more Aboriginal and Torres Strait Islander interpreters. Adequate training and funding must also be provided to relevant service providers and agencies involved in the legal system to promote and accommodate the use of interpreters.

There is also a need for greater awareness of the need for interpreters for hearing impaired Aboriginal people. Hearing loss can result in the same communication barriers as those produced by language and literacy difficulties. Given the high rate at which Aboriginal and Torres Strait Islander peoples suffer from hearing loss, often resulting from high rates of middle ear infections⁸, this is an issue that must be addressed.

In many remote communities where FVPLSs work, Courts and services often rely on telephone interpreter services. Given the role of non-verbal communication within many Aboriginal and Torres Strait Islander communication styles, telephone interpretation may significantly disadvantage Aboriginal and Torres Strait Islander people and lead to misunderstandings or ignorance of important client instructions or evidence. The National FVPLS Forum therefore recommends that telephone interpreter services only be used in urgent circumstances and that adequate resourcing permit courts, legal and other support services to ensure a priority for face-to-face interpretation for Aboriginal and Torres Strait Islander people.

For further discussion of the importance of adequately resourcing FVPLSs to receive referrals and to deliver essential culturally safe early intervention and prevention programs, see the below reports:

- National FVPLS Forum, Submission to the Family Law Branch of the Attorney-General's Department, Amendments to the *Family Law Act 1975* to Respond to Family Violence ('Amendments to the *Family Law Act 1975*'), February 2017, pp. 3, 9.
- Aboriginal Family Violence Prevention and Legal Service Victoria ('FVPLS Victoria'), Submission to the Royal Commission into Family Violence ('RCFV'), March 2015, pp. 24, 34-5.

Recommendations:

The National FVPLS Forum recommends:

1. Improved measures of early identification of Aboriginality within the family law system, which are accompanied by strong referral pathways to specialized, culturally safe legal services like FVPLSs.
2. Increased, secure and long-term resourcing of holistic, culturally safe service models like FVPLSs to address the multitude of barriers experienced by Aboriginal and Torres Strait Islander victims/survivors within the family law system.
3. Adequate, secure and long-term investment in culturally safe community legal education and outreach programs for Aboriginal and Torres Strait Islander women and their communities which are developed at a regional level in response to identified local issues.
4. Appropriate investment in appropriately trained and qualified interpreters for Aboriginal and Torres Strait Islander people that prioritises the provision of face-to-face interpretation and only uses telephone interpretation in urgent circumstances.

⁸ SCRGSP (Steering Committee for the Review of Government Service Provision), *Overcoming Indigenous Disadvantage: Key Indicators 2016*, (Productivity Commission, 2016).

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5 Consent Orders

Our frontline experience informs us that family law proceedings can be a trigger for the re-emergence or escalation of family violence and can create unsafe situations for Aboriginal and Torres Strait Islander women. Family law proceedings can instigate threats, abuse and/or violent assaults during changeovers pursuant to parenting orders, as well as instances of family violence intended to intimidate Aboriginal and Torres Strait Islander women into dropping or settling their family law matters.

In many instances, our members report that consent orders (as opposed to a parenting plan or prolonged family law litigation) are the most appropriate option for Aboriginal and Torres Strait Islander victims/survivors, offering legally enforceable, protection of the parenting arrangements put in place between the parties without the need for lengthy court proceedings and potential re-traumatisation through cross-examination and trial. By contrast, parenting orders – as a non-enforceable agreement – can present a further opportunity for a perpetrator to harass, enact ‘revenge’, or exert control over a family violence victim/survivor through repeatedly breaching or requesting to re-negotiate the terms of the plan – prolonging the need for ongoing contact and tension. In these circumstances, it is very difficult for a victim/survivor to enforce the terms of a parenting plan or hold a perpetrator accountable without risking further violence or intimidation. This difficulty can cause women to lose heart and disengage from the system or, alternatively, to submit to arrangements outside of the agreed parenting plan that put women and their children at further risk of violence and harm.

In this context, culturally safe and specialised legal representation from Aboriginal services such as FVPLSs are essential. Without such representation, Aboriginal victims/survivors of family violence would, in most instances, be unable to apply for consent orders and effectively enforce their rights and safety, nor the safety of their children. Alternatively, where the other party initiated negotiations over Consent Orders for example through Family Dispute Resolution, the lack of culturally safe and specialised legal representation may contribute to Aboriginal and Torres Strait Islander victims/survivors feeling pressured into accepting Consent Orders which are against their interests and inadequate to protect their safety and that of their children.

Family Dispute Resolution

It is important to note that the process of negotiating Consent Orders will often take place during, or result from, Family Dispute Resolution (‘FDR’) and it is therefore pertinent in this discussion to consider Aboriginal and Torres Strait Islander peoples’ experiences of FDR. A number of FVPLSs hold the view that in most cases of family violence, Family Dispute Resolution, whether legally assisted or not, is not appropriate nor in the interests of Aboriginal victims/survivors and their children.⁹ Nevertheless, legally-assisted FDR can be a more attractive prospect than protracted proceedings for some clients and in a number of jurisdictions FDR is a pre-requisite to obtaining a grant of legal aid.

It is therefore critical that Aboriginal and Torres Strait Islander people – victims/survivors of family violence and women in particular – have access to holistic, culturally safe and specialised legal representation in advance, during and after any FDR processes. FVPLS clients have reported feeling pressured and/or intimidated into participating in FDR and unaware of their right to say no. Aboriginal and Torres Strait Islander women may also be less likely to challenge an assessment

⁹ See for example, FVPLS Victoria, *Improving Accessibility of the Legal System for Aboriginal and Torres Strait Islander Victims/Survivors of Family Violence and Sexual Assault*, Policy Paper Series, June 2010, p 12. Available at: <http://fvpls.org/images/files/FVPLS%20Policy%20Paper%203.pdf>

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that a lawyer is not required and slip through Family Relationship Centre screening processes in which they do not feel safe to disclose family violence or ask for a lawyer. The National FVPLS Forum therefore strongly recommends that entry to FDR should be through Aboriginal Community Controlled Organisations like FVPLSs with appropriate expertise and resourcing in FDR.

The importance of culturally safe and specialist legal representation within FDR is essential for Aboriginal and Torres Strait Islander women, particularly those who have experienced family violence because FDR presumes an equal playing field in which both parties have the capacity to put their views forward freely and effectively, without fear or censorship. This is simply not the reality in situations of family violence which inevitably involve power imbalance, coercion and fear. Evidence shows that separation is a time of increased risk for family violence victims/survivors and many of our clients report ongoing fear, intimidation and anxiety around negotiating family law matters with their former abuser.

In addition, evidence indicates that women are often disadvantaged by power imbalances within mediation (such as FDR) and face a number of 'process imbalances'¹⁰ which make them more likely to capitulate and accept poorer - or in the case of family violence, less safe settlements than they may otherwise have achieved. The National FVPLS Forum posits that this may be even more so for Aboriginal and Torres Strait Islander women who have experienced family violence given they face additional, complex and compounding barriers (as outlined above) which further curtail their capacity to equally participate and be understood in FDR processes.

Accordingly, it is essential that Aboriginal and Torres Strait Islander victims/survivors of family violence are referred to culturally safe and specialised legal representation, such as from an FVPLS, to assist them in deciding whether or not to access FDR and indeed throughout the life of their matter.

It is also critical that mainstream FDR be culturally appropriate and that all FDR staff have access to cultural awareness training which incorporates specific content on both family violence and the particular barriers faced by Aboriginal women accessing justice and supports. This training is essential and should run alongside comprehensive cultural awareness and family violence training for judges, lawyers, court staff and mainstream services to ensure the rights and needs of Aboriginal and Torres Strait Islander victims/survivors are understood, respected and promoted throughout the process of obtaining Consent Orders or participating in legally assisted FDR.

The FDR process itself is derived from Western communication and conflict resolution styles which may be alienating or culturally inappropriate for Aboriginal and Torres Strait Islander families. The National FVPLS Forum understands that under the Third Action Plan for the *National Plan to Reduce Violence Against Women and Their Children*, the Federal Government has recently made grants available to Family Relationship Centres to apply to develop and pilot FDR-models for Indigenous and culturally and linguistically and diverse groups. While NFVPLS welcomes resourcing to support improved cultural competence and accessibility of the family law system, it

¹⁰ Field, R., 'Family Law Mediation: Process Imbalances Women Should be Aware of Before They Take Part' (1998) 14 QULT. With respect to women and/or family violence victims/survivors receiving poorer outcomes through family law settlement negotiations more generally, see: Sheehan, G., & Smyth, B., 'Spousal violence and post-separation financial outcomes' (2000) *Australian Journal of Family Law*, 14, 102-118; Fehlberg, B., Millward, C., and Campo, M., 'Post separation parenting arrangements, child support and property settlement: exploring the connections' (2010) 24 *Australian Journal of Family Law*; Camilleri, O., Corrie, T., and Moore, S., (2015), *Restoring Financial Safety: Legal Responses to Economic Abuse*, 39-41; Rosemary Hunter, R., (2005) *Women's Experience in Court: The Implementation of Feminist Law Reforms in Civil Proceedings Concerning Domestic Violence*, Unpublished PhD thesis, Stanford University.

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is critical that any moves to develop Aboriginal-specific FDR processes take place in partnership with Aboriginal communities and Aboriginal Community Controlled Organisations with expertise in family law and assisting Aboriginal and Torres Strait Islander victims/survivors of family violence. Meaningful partnership must involve more than inviting an Aboriginal or Torres Strait Islander mediator or service into the standard FDR process. Rather, the development of a culturally safe FDR process would entail rigorous reflection, consideration and consultation on the potential re-design of all aspects of the mediation process.

Recommendations:

The National FVPLS Forum recommends:

5. Increased, comprehensive cultural awareness and family violence training for Judges, Magistrates, Independent Children's Lawyers, Family Dispute Resolution practitioners, court staff and mainstream legal and non-legal support services. This training should incorporate specific content on both family violence and the particular barriers faced by Aboriginal women accessing justice and supports. Development of practices and procedures that ensure Aboriginal and Torres Strait Islander victims/survivors of family violence – predominantly women – have access to appropriately resourced and specialised Aboriginal legal service providers, such as FVPLSs, for advice and representation prior to, during and following participating in Family Dispute Resolution and/or obtaining Consent Orders.
6. There should be a requirement that all Aboriginal and Torres Strait Islander people who have been victims of family violence be legally represented in the family law courts. At a minimum, this should mandate the Court being satisfied that a victim has had legal advice prior to the Court accepting consent orders for consideration.
7. Any entry by Aboriginal and Torres Strait Islander women into family dispute resolution should be facilitated through an Aboriginal legal service provider with expertise in family law and supporting victims/survivors of family violence.
8. That the development of Aboriginal-specific family dispute resolution processes take place in partnership with Aboriginal communities and Aboriginal Community Controlled Organisations with expertise in assisting victims/survivors of family violence. This should be a condition of any funding contracts related to piloting and delivering such models.

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6 Self-represented Litigants

Aboriginal and Torres Strait Islander women have been found to be the most legally disadvantaged group in Australia¹¹. It is therefore paramount that Aboriginal and Torres Strait Islander women have culturally safe and specialist legal representation from services like FVPLSs when accessing the family law system, particularly in the context of family violence. Given the experiences of marginalisation, barriers and mistrust of courts Aboriginal and Torres Strait Islander women must have ongoing legal representation throughout their family law matter in order to advocate equally and effectively on their and their children's behalf and have their rights respected and protected, including their cultural rights and rights to safety.

Duty lawyer services are wholly insufficient for Aboriginal and Torres Strait Islander victims/survivors of family violence with proceedings in the family law system. FVPLS clients often have multiple, complex legal and social issues which underlie or complicate their family law matter and necessitate ongoing, at times intensive, support and advice between court dates to appropriately address and resolve family law issues and ensure compliance with court orders. It is virtually impossible for a mainstream duty lawyer in a once-off, or intrinsically time-pressured, environment to build the rapport and trust necessary to overcome the barriers faced by an Aboriginal or Torres Strait Islander victim/survivor in order to obtain full instructions and provide culturally competent, detailed yet readily understood advice – nor allay the intimidation, anxiety and cultural alienation frequently reported by our clients in attending the Family Law Courts.

Historically poor experiences with the justice system for Aboriginal and Torres Strait Islander peoples, coupled with a lack of trust in the courts to be culturally understanding, creates significant barriers to accessing justice, as outlined above. To ensure Aboriginal and Torres Strait Islander victims/survivors have access to legal advice and representation, measures to strengthen referral pathways to specialised, culturally safe legal services like FVPLSs are essential.

For further discussion on the importance of culturally safe and competent legal representation and advice for Aboriginal and Torres Strait Islander victims/survivors of family violence, see the below reports and submissions:

- FVPLS Victoria's 2010 Policy Paper series, Paper 3, pp. 5-6.
- FVPLS Victoria, Submission to the Royal Commission into Family Violence, March 2015, pp. 24, 26.
- National FVPLS Forum, Submission to the Family Law Council reference on Families with Complex Needs, March 2015, pp. 7-8.
- National FVPLS Forum, Submission to the Family Law Branch of the Attorney-General's Department, Amendments to the *Family Law Act 1975*, February 2017, p. 9.

¹¹ Aboriginal and Torres Strait Islander Commission (ATSIC), Submission to the Senate Legal and Constitutional References Committee, Parliament of Australia, Inquiry into Legal Aid and Access to Justice, 13 November 2003, 4.

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Recommendation:

The National FVPLS Forum recommends:

9. That access to ongoing, culturally safe legal representation for Aboriginal and Torres Strait Islander victims/survivors of family violence be prioritised and supported through the family law court:
 - (a) reviewing and strengthening existing referral pathways for Aboriginal and Torres Strait Islander parties to culturally safe services and supports;
 - (b) developing and formalising referral protocols with FVPLSs.

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7 Financial Recovery

A number of our members report that clients who attend their services are not fully aware of their financial entitlements in family law proceedings. There are significant financial impacts of separation/divorce on Aboriginal and Torres Strait Islander mothers who have experienced family violence. These impacts include relocating, counselling, re-establishing homes, and caring responsibilities impacting on employment and income.

Our members report that high levels of poverty, welfare dependence and a lack of affordable or culturally appropriate housing impact Aboriginal and Torres Strait Islander women's ability to flee from family violence and maintain economic independence from the perpetrator.

The process of property settlement, and the division of family property, can be grounds for continued abuse and control by perpetrators of family violence. Women who have experienced family violence are more likely to accept unfair property settlements than non-victim/survivors of family violence.¹² NFVPLS posits that this is an even greater risk for Aboriginal and Torres Strait Islander women given the additional barriers they face in accessing the legal system, as detailed above. It is essential that Aboriginal and Torres Strait Islander victims/survivors receive culturally safe, legal advice and representation in any proceedings related to financial recovery. Unfortunately, however, a lack of resourcing has forced FVPLSs to prioritise services for parenting matters over property matters in family law leaving many clients without sufficient representation. NFVPLS reiterates recommendation 2 concerning the need for increased resourcing for FVPLSs and supports the Productivity Commission's recommendation of a \$200million funding boost across the legal assistance sector.¹³

For a discussion of improvements to property settlement in cases of family violence, we refer the Committee to the submission and recommendations made by Women's Legal Services Australia's to this inquiry.

¹² See for example Family Law Council's advice to the Attorney-General, cited in Women's Legal Services Australia, submission to the Parliamentary Inquiry into a Better Family Law System to support and protect those affected by family violence, April 2017, 34.

¹³ Productivity Commission, Access to Justice Arrangements, 2015, p 738-39.

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Recommendation:

10. The National FVPLS Forum supports the recommendations 14 through 17 made by WLSA as follows:

“14: That the Australian Government amend the Family Law Act as follows:

- *Amend s 79 to include a new subsection (s79(4A)), directing the court to have regard to the effects of family violence on both parties’ contributions. This would require the court to take family violence into account as a negative contribution in addition to the effect it may have in enhancing the victim’s contributions.*
- *Amend s 75(2) to include a new paragraph in the list of factors the court considers when deciding an application for spousal maintenance. It would direct courts to consider the effect of family violence perpetrated in the relationship by either party on the financial circumstances of the parties.*

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

(Continued)

16: The Australian Government introduce of a unique process for small claim property matters to be dealt with quickly and fairly.

17: The Australian Government conduct a comprehensive audit of the Family Court and the Federal Circuit Court with a view to increasing accessibility of the family law system. Such a review should specifically look at:

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

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8 Strengthening capacity of family law professionals

The National FVPLS Forum strongly recommends the inclusion of cultural awareness training as part of training packages delivered to the judiciary, along with specific training in relation to Aboriginal peoples' interaction with the family law system and the unique needs and barriers faced by Aboriginal victim/survivors of family violence. These inclusions to judicial training are vital to ensure Judges understand and appropriately apply the legislative provisions and obligations towards Aboriginal children under the Family Law Act, but doing so would also assist the justice system to be responsive to the needs of Aboriginal and Torres Strait Islander people, especially Aboriginal and Torres Strait Islander victims/survivors of family violence. This would be a critical step in addressing the intimidation and mistrust of the family law system felt by Aboriginal and Torres Strait Islander victims/survivors of family violence and their communities.

In addition, it is essential that Family Consultants, Registrars and other registry staff also undergo cultural awareness training that includes a specific focus on the unique needs and barriers faced by Aboriginal victims/survivors of family violence. The role of Family Consultants is discussed further below.

Our clients regularly inform FVPLS staff of the intimidating nature of the family law courts and a perceived lack of respect for Aboriginal and Torres Strait Islander cultural needs.

"... I am an Aboriginal woman and I was told to go to court and listen to the Western law ... this felt all wrong to me ... they did not know me or my culture." – Quote from an Aboriginal victim/survivor

The intimidation faced by many Aboriginal and Torres Strait Islander victims/survivors who access the family law system could be minimised if victims/survivors were able to give evidence from a remote location, whether from within the Court complex or off-site (along with ensuring culturally safe and specialised legal representation).

The National FVPLS Forum also strongly supports the introduction of legislative prohibitions on victims/survivors being cross examined by the perpetrator in family law proceedings. We have been pleased to see recent Federal Government announcements committing to the development and introduction of such provisions and we urge the Government to proceed with this issue as a matter of priority. We note that mechanisms exist within various other jurisdictions which facilitate this even in circumstances where the perpetrator is self-represented and otherwise ineligible for legal aid. For example, the Family Violence Protection Act 2008 (Vic)¹⁴ provides that a respondent (alleged perpetrator of family violence) is prohibited from cross-examining the alleged victim of family violence and where the respondent is not legally represented the Court must inform the respondent that he or she is not permitted to personally cross-examine the victim and grant an adjournment to enable the respondent to obtain legal representation. If the respondent does not subsequently obtain legal representation then Victoria Legal Aid is required to provide representation solely in order to undertake the cross-examination. Such a model could be adapted to the Family Court setting with relative ease.

The experiences of Aboriginal and Torres Strait Islander victims/survivors of family violence involved in family court proceedings could also be significantly improved through the employment of Aboriginal and Torres Strait Islander liaison officers, Aboriginal and Torres Strait Islander Family Consultants, and Aboriginal and Torres Strait Islander registrars within Family

¹⁴ Family Violence Protection Act 2008 (Vic), ss 70 and 71.

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Law Courts to provide culturally appropriate support, referral pathways and, as appropriate, act as a conduit for communication in a culturally sensitive manner.

The re-introduction of Aboriginal and Torres Strait Islander family consultants is particularly important. Family Consultants (or report writers as sometimes described) have a pivotal role in family law proceedings through being charged with interviewing the parties and children and preparing a report for the Court which sets out the circumstances of the family, the wishes of the parties and the children, and makes recommendations to the Court about what arrangements would be in the best interests of the children. This is typically the key way in which children participate in family law proceedings. Given the significance of this role and the significant weight judges frequently give to the reports produced by family consultants, it is critical that these positions are not only culturally competent and free from unconscious bias, but that they have the capacity to build trust and rapport with Aboriginal and Torres Strait Islander parties to elicit and truly understand the full picture of their needs, culture, context and language or communication style. While a well-trained non-Aboriginal professional may be able to produce a culturally competent family report, there would be enormous value (for both the parties and the Court) in Aboriginal and Torres Strait Islander families having the opportunity to engage with an Aboriginal or Torres Strait Islander Family Consultant who could offer an unrivalled depth of shared understanding, accessibility and cultural insight to the entire process.

For further discussion on strengthening the capacity of family law professionals, see the following submission:

- National FVPLS Forum, Submission to the Family Law Branch of the Attorney-General's Department, Amendments to the *Family Law Act 1975*, February 2017, pp. 11-12.
- FVPLS Victoria, Submission to the Family Law Council reference on Families with Complex Needs, pp. 8, 10.
- FVPLS Victoria's 2010 Policy Paper series, Paper 3, pp. 10-11.

Recommendation:

The National FVPLS Forum recommends:

- 11.** Inclusion of cultural awareness training as part of the package of training delivered to the judiciary, along with specific training in relation to Aboriginal and Torres Strait Islander peoples' interaction with the family law system and the unique needs and barriers faced by Aboriginal victim/survivors of family violence.
- 12.** Comprehensive and regular cultural awareness training for Family Consultants, Registrars and court staff.
- 13.** Support measures for victims/survivors to be able to give evidence from a remote location, whether within the Court complex or off-site.
- 14.** Legislative prohibitions on victims/survivors being cross examined by the perpetrator in family law proceedings be developed as a matter of priority.
- 15.** That Aboriginal and Torres Strait Islander liaison officers, Aboriginal and Torres Strait Islander Family Consultants and Aboriginal and Torres Strait Islander registrars are employed within Family Law Courts.
- 16.** Development of and compliance with a practice direction which specifies that in cases involving Aboriginal or Torres Strait Islander parties or children there is a preference for the Family Consultant engaged in the matter to be an Aboriginal or Torres Strait Islander professional and, where this is not possible, a requirement that family reports in these cases must only be prepared by Family Consultants who have undergone cultural awareness training.

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9 National approach to Family Violence Orders

The National FVPLS Forum welcomes reforms that ensure greater protection for Aboriginal and Torres Strait Islander victims/survivors of family violence.

FVPLSs who operate across or near interstate borders report significant issues assisting clients to ensure that family violence orders are recognised and enforced across state borders. Not only are interstate laws with respect to family violence orders widely divergent in application, in some instances the terms of interstate family violence orders can be contradictory and incapable of being enforced across borders. This puts victims/survivors and their children at increased risk if moving or travelling interstate.

Accordingly the National FVPLS Forum strongly supports a national and uniform family violence order system which ensures all Aboriginal and Torres Strait Islander victims/survivors have the requisite protection, including throughout family law proceedings, of family violence orders with national recognition and enforcement.

It must be noted however that for any family violence order scheme to be effective, orders must be appropriately enforced by police services. FVPLS clients frequently report poor police responses that minimise, trivialise or deny family violence experienced by Aboriginal and Torres Strait Islander people - women in particular - and fail to act appropriately on breaches of family violence orders.

For further discussion on a national approach to Family Violence Orders, including through the newly proposed family law personal protection injunctions and their relationship to issues of administration and enforcement of state-based intervention orders, see the following submission:

- National FVPLS Forum, Submission to the Family Law Branch of the Attorney-General's Department, Amendments to the *Family Law Act 1975*, February 2017, p. 16.

Recommendation:

17. COAG develop and implement a national family violence order scheme as a matter of priority. The design and development of this scheme should include widespread consultation including with Aboriginal and Torres Strait Islander communities and Aboriginal Community Controlled Organisations with expertise in assisting victims/survivors of family violence.

18. The National FVPLS Forum re-affirms recommendations 10-14 of our submission to on the *Family Law Amendment (Family Violence and Other Measures) Bill 2017* as follows:

"10. That the Federal Government fund training for state, territory and federal police in relation to the creation of a new criminal offence for breaching a personal protection injunction and responding appropriately to breaches. This should include comprehensive and informed cultural-competency training relating to the unique considerations that will be present in cases involving Aboriginal and Torres Strait Islander parties.

11. The Federal Government and state, territory and federal Police should work together to establish transparent and consistent police protocols and codes of conduct around responding to reports of family violence, including breaches of family violence orders and family law personal protection injunctions. This should include guidance for police around appropriately identifying and assessing risk, as well as cultural competency elements such as a code of conduct for responding to and respecting the rights of Aboriginal and Torres Strait Islander victims/survivors.

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(Continued)

12. The Federal Government investigate methods for strengthening referral pathways between police who respond to a family violence incident involving Aboriginal and Torres Strait Islander victims/survivors, and culturally safe legal assistance services such as FVPLSs.

13. The Federal Government provide additional funding to FVPLSs to meet increased demand for culturally safe legal assistance and community education resulting from these proposed amendments.

14. The Bill be amended to clarify the interaction between the proposed criminalisation of personal protection injunctions and state and territory family violence orders, including their respective enforcement and the admissibility of evidence across jurisdictions.

15. Implementation of these amendments be aligned with on-going work concerning a national DVO scheme.”

10 Appendix 1: Any further relevant reports to source.

- National FVPLS Forum – [2017 submission to the Attorney General Department “AMENDMENTS TO THE FAMILY LAW ACT 1975 TO RESPOND TO FAMILY VIOLENCE”](#)
- National FVPLS Forum – [2015 submission to the Family Law Council “FAMILIES WITH COMPLEX NEEDS & THE INTERSECTION OF THE FAMILY LAW AND CHILD PROTECTION SYSTEMS”](#)
- FVPLS Victoria – [2010 Policy Paper series Paper 3 “Improving accessibility of the legal system for Aboriginal and Torres Strait Islander victims/survivors of family violence and sexual assault” Section 1 pp. 5-31](#)
- FVPLS Victoria – [2015 submission to the Royal Commission into Family Violence](#)