WOMEN'S LEGAL SERVICE NSW

31 January 2020

The Hon Kevin Andrews MP
Chair
Joint Select Committee on Australia's Family Law System

By email: familylaw.sen@aph.gov.au

Dear the Hon Kevin Andrews,

Australia's Family Law System

1. Women's Legal Service NSW (WLS NSW) thanks the Joint Select Committee on Australia's Family Law System for the opportunity to comment on the inquiry into Australia's Family Law System.

2. WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims support, care and protection, human rights and access to justice.

3. WLS NSW has an Indigenous Women's Legal Program (**IWLP**). This program delivers a culturally safe legal service to Aboriginal women in NSW and has been operating for over 19 years. We provide an Aboriginal legal advice line, participate in law reform and policy work, and provide community legal education programs and conferences that are topical and relevant for Aboriginal and Torres Strait Islander women.

4. An Aboriginal Women's Consultation Network guides the IWLP. It meets quarterly to ensure we deliver a culturally appropriate service. The members include regional

community representatives and the IWLP staff. There is a representative from the Aboriginal Women's Consultation Network on the WLS NSW Board.

Our work in family law

5. We provide legal advice, assistance and representation in family law and related issues through our telephone advice lines; apprehended violence order list days at Local Court; outreaches at women's health centres, family relationship centres and women's correctional centres.

6. This work is also a key part of the work of IWLP – with lawyers and community access workers working together to support Aboriginal women to engage in the family law system. This includes supporting and representing clients through the Indigenous list operating in the Federal Circuit Court in the Sydney Registry.

7. Another important part of the work of IWLP is in community development and community education across NSW. A key component of this is focused on raising awareness within the Aboriginal community about the importance of early access to legal advice and accessing the family law system.

Overview

8. Both the 2017 House of Representatives Standing Committee on Social Policy and Legal Affairs in their inquiry into a better family law system to support and protect those affected by family violence, (**SPLA inquiry**) and the Australian Law Reform Commission *Family Law for the Future: An inquiry into the Family Law System* (**ALRC review**) reports acknowledge the chronic lack of funding for the family law system and the need for immediate additional investment. This includes funding for additional judges, additional family consultants, legal assistance services, lawyer assisted dispute resolution services, specialist family violence support services, accredited contact centres and family violence and other training.[1]

9. The ALRC review made 60 recommendations including about structural reform, children's matters, property matters, increasing efficiencies, compliance with parenting orders, support services in the courts and increasing transparency and accountability in the family law system (including strengthening family violence competency). While family

[1] 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 1, 4, 24, 25, 31, 32;

violence is considered, the ALRC review falls short in ensuring safety in family law is foundational.

10. The majority of matters lodged in the family courts involve allegations of family violence.[2] The current system is not set up to deal with the volume nor complexity and time it takes to adequately and appropriately deal with matters involving family violence.

11. Women's Legal Services Australia (**WLSA**), of which WLS NSW is a member, has recently updated its *Safety First in Family Law Plan*[3] following the Government's actioning of some of its recommendations and to incorporate key recommendations from the SPLA inquiry and ALRC review.

12. WLSA's five step plan calls for the Government to:

    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 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

13. We recommend the Australian Government fully implement WLSA's *Safety First in Family Law Plan* immediately to make the family law system safer for children and adult family violence survivors, who are primarily women.

14. We note the Select Committee has stated they *"will have in place safeguards to protect people who have experienced family violence or trauma to ensure no further harm is caused to vulnerable people"*.[4] It is important that family violence survivors who would like to participate in this inquiry feel safe and supported to engage. We strongly

[2] Australian Law Reform Commission *Family Law for the Future: An inquiry into the Family Law System, 2019*, p103-104 (**ALRC review**)

[3] Women's Legal Services Australia, *Safety First in Family Law Plan*, 2019, accessed on 16 January 2020 at: http://www.wlsa.org.au/uploads/campaign-resources/Safety_First_in_Family_Law_Plan.pdf

[4] Joint Select Committee on Australia's Family Law System, *Media Release*, 22 January 2020.

encourage committee members to undertake family violence and trauma informed practice training, particularly before witnesses are called.

15. In summary we recommend:

15.1 Immediate investment of additional resources into the family law system, including for additional judges, additional family consultants, legal assistance services, lawyer assisted dispute resolution services, specialist family violence support services, accredited contact centres and ongoing family violence and other training.

15.2 The Australian Government fully implement Women's Legal Services Australia's Safety First in Family Law Plan.

15.3 The development of an information sharing framework focused on agency and safety for victims-survivors of family violence in consultation with specialist family violence experts and legal assistance services.

15.4 Ongoing training for all working in the justice and family law systems including recognising the nature, dynamics and impacts of family violence and misidentification of the primary victim; recognising unconscious bias; working with people who have experienced trauma, understanding perpetrator behavior and avoiding collusion; cultural competency and Lesbian, Gay, Bisexual, Transgender, Intersex, Queer (**LGBTQ**) awareness and disability awareness.

15.5 Introducing effective ongoing court based family violence risk assessment practices.

15.6 Resourcing early determination of family violence through a family violence informed case management process, including the early testing of evidence of family violence.

15.7 Implementing Women's Legal Service Victoria's *Small Claims, Large Battles* recommendations.

15.8 If the family courts are to merge, the New South Wales Bar Association's model be adopted which retains a stand-alone specialist superior family court and increases family law and family violence specialisation. Family Court Judges would be in Division 1 of the Family Court of Australia. Federal Circuit Court Judges who are hearing family law matters would move across to Division 2 of the Family Court of Australia.

15.9 The expansion of the Indigenous list, including to regional, rural and remote areas, noting the need to consult locally with Aboriginal and Torres Strait Islander communities and organisations about what is needed and how it can be implemented.

15.10 Increasing the areas, frequency and duration of Federal Circuit Court of Australia sittings in regional, rural and remote areas.

15.11 People who have experienced family violence be able to access safe rooms and meeting rooms when attending court.

15.12 Courts have the technology to enable those who have experienced family violence to give evidence remotely, such as through video or audio link.

15.13 The removal of the presumption of equal shared parental responsibility.

15.14 Subject to the outcome of respective evaluations of the lawyer-assisted mediation and court project for resolving family law property cases, these initiatives be rolled out across the country with the necessary funding.

15.15 Amending s 75 and s 79 of the *Family Law Act 1975 (Cth)* to enable the courts to consider the effect of family violence perpetrated in the relationship by either party on the financial circumstances of the parties and the effects of family violence on both parties' contributions.

15.16 Implementing and funding 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.

15.17 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.

15.18 The Australian Government urgently increase 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.

15.19 Promoting reliance on least intrusive forms of evidence first rather than evidence of "protected confidences".

15.20 Section 65C of the *Family Law Act* be amended to give standing to members of the child's Aboriginal and Torres Strait Islander kinship group as recognised by the Aboriginal or Torres Strait Islander community to which the child or young person belongs in order to facilitate the recognition of appropriate and necessary kinship care arrangements.

15.21 The definition of "parent" includes a provision that recognises that a parent "*may include a person who is regarded as a parent of a child under Aboriginal tradition or Torres Strait Islander custom"* as recommended by the Family Law Council.

15.22 In relation to grandparent carers:

15.22.1 The NSW Statutory Declaration for Informal Relative Caregivers should be accepted by all state and federal agencies and be valid for 12 months.

15.22.2 A community awareness campaign about financial and non-financial support available for grandparents and how to establish grandparents as the primary caregivers of children be developed with the active participation of grandparents.

15.22.3 Special processes to provide adequate functional recognition of the particular child rearing and kinship practices within Aboriginal and Torres Strait Islander communities as outlined by the Family Law Council in 2004 described as Option 2.

15.22.4 Access to culturally safe mediation.

15.23 Embedding the principle and practice of accessibility in the family law system.

15.24 Establishing a national accreditation and monitoring scheme for all professionals who prepare family reports and for children's contact services. The scheme includes mandatory training on family violence, working with victims-survivors of trauma, cultural competency, LGBTQ awareness and disability awareness.[5]

[5] SPLA Inquiry, Recommendation 30; ALRC review, Recommendation 53, 54

15.25 Legislating to ensure that judicial appointments have adequate family violence and family law expertise.[6]

15.26 Child support policy and practice reflect the following reality: financial abuse is a common feature of domestic violence; and that child support is a key platform where ongoing abuse can be perpetrated against adult victims-survivors and children, as recommended by WLSA.

15.27 Child Support legislation be amended to provide for the best interest of the child to be the paramount consideration in child support decisions.

15.28 Trialling a State guaranteed child support payment, consistent with the Child Support inquiry recommendation.

a. Ongoing issues and further improvements relating to the interaction and information sharing between the family law system and state and territory child protection systems, and family and domestic violence jurisdictions, including:

i. the process, and evidential and legal standards and onuses of proof, in relation to the granting of domestic violence orders and apprehended violence orders, and

ii. the visibility of, and consideration given to, domestic violence orders and apprehended violence orders in family law proceedings;

16. Efforts to improve responsiveness to family violence disclosures are welcomed but it is important that information sharing is not seen as the panacea. Information sharing "*will not solve systemic problems such as delays or inexperience in responding to family violence".*[7]

17. We recommend the development of an information sharing framework focused on agency and safety for victims-survivors of family violence in consultation with specialist family violence experts and legal services.

6 ALRC review, Recommendation 51

7 Carolyn Jones, *Sense and Sensitivity: Family law, Family Violence and Confidentiality* (Sydney: Women's Legal Service NSW, 2016) p 40.

18. We are supportive of the national register of intervention orders and that it be extended to also include family law and child protection orders. We recommend this information be available to all court systems in real time.

19. If relevant professionals in the family violence and child protection systems should have access to the Commonwealth Courts Portal, we recommend they should be restricted to accessing orders only.

20. We note the Australian Law Reform Commission also recommended *"child protection records", "police reports", "experts' reports" and "other relevant information"* be included in a national information sharing framework.[8] Caution should be exercised in the implementation of an information sharing framework consistent with the framework of agency and safety.

21. Noting the recent *Family is Culture Report* which is critical of child protection records,[9] it is important the author of any records proposed to be shared has the appropriate skills and training, including, for example, to correctly identify the primary victim and aggressor and in response-based practice.

22. Response-based training can help services to ensure their language does not *"obscure or mutualise violence, mitigate perpetrator responsibility and/or blame/pathologise the victim*".[10]

23. We are concerned that expert reports are untested, can carry weight, and that facts may have changed in the intervening period from when that expert report was drafted. While there may be an opportunity to subpoena the author to give evidence in proceedings and for the report to be challenged through cross-examination, there also seems to be the possibility of information sharing extending beyond the courts without the benefit of testing the evidence.

24. It is also important any information sharing framework has a process to correct incorrect information such as who is identified as the primary aggressor and primary victim.

---

8 ALRC Review, Recommendation 2

9 *Family is Culture Final Report - Independent Review into Aboriginal Out-Of-Home-Care in NSW*, 2019, p 386-387 accessed at: https://www.familyisculture.nsw.gov.au/__data/assets/pdf_file/0011/726329/Family-Is-Culture-Review-Report.pdf

10 See, for example, Centre for Response Based Practice, accessed at: https://www.responsebasedpractice.com and Safe and Together: https://safeandtogetherinstitute.com/

Incorrect information which can not be amended can impact on a victim-survivor's safety and subsequent policing and other agency responses.

Response to ToR a(i)

25. The majority of ADVO applications in NSW are made by police.

26. For an apprehended domestic violence order (**ADVO**) to be made under s 16 of the *Crimes (Domestic and Personal Violence) Act* NSW, the court generally must be satisfied on the balance of probabilities that the person in need of protection has reasonable grounds to fear, and in fact fears the commission of a domestic violence offence against them or intimidation or stalking *"sufficient to warrant the making of the order".*

27. It is our clients' experience that the evidential and legal standards and onuses of proof are satisfactory. However, there can be issues in the implementation of the law.

28. Our clients regularly report to us that they face barriers in obtaining an ADVO via police, reporting police request corroborating evidence such as witness accounts, photographs or text messages before they are willing to make an application for an AVO. This is particularly the case in circumstances where the violence amounts to intimidation rather than being physical in nature. This does not take into consideration that domestic violence often takes place in the home with no witnesses other than children. Our clients' experiences are echoed in the feedback from service providers who also work with women experiencing violence.

29. WLS NSW has undertaken an exploratory study of our work representing women who were defendants in ADVO proceedings. Results of this review showed in 2010:

    - Two-thirds of our clients defending ADVOs reported they were victims of violence in their relationships.
    - Fewer than 40% of these clients had a final ADVO made against them when the case came before the court.
    - Many of the women defending ADVOs reported that when police had been called after a violent incident, they felt that their version of events had not been viewed as credible compared with the other party, due to the circumstances of their heightened stress and anxiety.

- Other women reported that they believed the other party had deliberately initiated ADVO proceedings as a further mechanism of controlling their behaviour, by giving them the ability to threaten them with reports to police in the future.

- In the majority of cases where women were defending ADVOs, the other party's complaint related to a single incident only. In several of these cases injuries to the other party could be indicative of self-defence, such as scratching or biting on the arm or hand.[11]

30. The NSW Coroner has commented on *"the importance of viewing domestic violence holistically, as episodes in a broader pattern of behaviour rather than as incidents in isolation of one another"*.[12] The Domestic Violence Death Review Team has recommended the NSW Police Force reviews how it captures data on domestic violence so that police can *"view the incident holistically and in the context of the history of the parties and relationship"* and *"make informed decisions as to what action to take in the context of the incident they are dealing with"*.[13]

31. The issue of incorrect identification of the primary victim and aggressor also highlights the need for training and specialisation in responding to domestic violence and sexual assault.

32. We recommend ongoing training for all working in the justice and family law systems including recognising the nature, dynamics and impacts of family violence and misidentification of the primary victim; recognising unconscious bias; working with people who have experienced trauma, understanding perpetrator behavior and avoiding collusion; cultural competency and LGBTQ awareness and disability awareness.

[11] Julia Mansour, *Women Defendants to AVOs: What is their experience of the justice system,* (Women's Legal Service NSW, Sydney, 2014) accessed at: http://www.wlsnsw.org.au/wp-content/uploads/womendefAVOsreport.pdf

[12] NSW Government, *NSW Domestic Violence Death Review Team Report 2015-17,* Sydney, 2017, page v

[13] Ibid, Recommendation 2.1.

Response to ToR a(ii)

33. An ADVO can be one indication that family violence is a relevant factor and may form part of the evidence in family law proceedings. However other factors may influence the weight given to an ADVO, including:

    - The specific circumstances giving rise to the ADVO;
    - Whether the ADVO was made by consent and without admission;
    - Whether there were associated criminal proceedings and a finding and/or pleading of guilt to the offence(s).

34. These factors are addressed at s 60CC(3)(k) of the *Family Law Act 1975* Cth ***(FLA)*** which states that where a family violence order applies or has applied to a child or family member, any relevant inferences can be drawn taking into account:

    i. the nature of the order,

    ii. the circumstances in which it was made,

    iii. any evidence admitted into proceedings for the order,

    iv. any findings made by the court in, or in proceedings for the order,

    v. and any other relevant matter.

35. It is our experience, which is also borne out in research, that women often minimise and under report their experience of domestic and family violence.[14]

36. In 2016, two-thirds of men and women who experienced physical assault by a male did not report the most recent incident to police.[15]

37. It is therefore likely that in many instances, family violence may be present even when there is no existence of an ADVO, as the violence has not been reported.

---

[14] Michael Flood, "He hits, she hits: assessing debates regarding men's and women's experiences of domestic violence." *Family Matters*, Autumn 2012, p. 114; Lorraine Radford and Marianne Hester, *Mothering Through Domestic Violence*, (London, 2006), p 116.

[15] Australian Bureau of Statistics' (ABS) *2016 Personal Safety Survey* (PSS).

38. It is our experience in family law matters that an absence of an ADVO may be given weight by the court without understanding the barriers to reporting to police. This is in spite of the family courts *Family Violence Best Practice Principles* clearly stating, with reference to case law, that evidence of family violence does not require *"independent verification",* such as police or medical report *"for a court to be satisfied that it has occurred"*.[16]

39. For example, in several of our matters involving serious physical violence perpetrated by men against women over a lengthy period of time, including a history of strangulation, which is a high risk factor for homicide, the women have not reported the violence to police. Poor policing responses to domestic violence were key reasons in a lack of report to police. In some instances, this has been a failure to record a report of violence in the Police COPS system and take action on the first report, such as seeking an ADVO. In other cases, women have been incorrectly identified as the primary aggressor in circumstances when they were the primary victim. It is also our experience that police regularly fail to take action on breaches of ADVOs. A poor policing response impacts on the willingness of a victim-survivor of domestic violence to report again to police.

40. Barriers to reporting can also stem from fear on the part of the victim-survivor of the perpetrator.

41. Other barriers to reporting violence include a fear of the legal systems and processes, especially if they are required to give evidence as a witness. Giving evidence *"can be one of the most intimidating and distressing aspects of the legal system for people who have been subject to family violence".*[17]

42. A ban on direct cross-examination in family law proceedings in certain circumstances relating to family violence commenced in relation to hearings from 10 September 2019. This is a positive step and we welcome the Australian Government's recent commitment of an additional $2 million for the pilot.

43. It is also important that other protections to promote the safety of family violence survivors giving evidence are also exercised. These include, for example, giving evidence by audio or visual link – s 102C(1) of the *FLA*; requiring the court to ban the

[16] Family Court of Australia and Federal Circuit Court of Australia, *Family Violence Best Practice Principles.* 2016, p 7.

[17] Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), paragraph 11.1.

asking of offensive questions – s 101 of the *FLA*; disallowing certain questions, such as misleading questions – s 41 of the *Evidence Act 1995*; a screen so a victim-survivor can not see the alleged perpetrator; victims-survivor having a support person present; closing of court to the public or excluding specific people.

44. We believe the courts would benefit from a greater understanding of barriers to reporting to police and obtaining an ADVO.

b. the appropriateness of family court powers to ensure parties in family law proceedings provide truthful and complete evidence, and the ability of the court to make orders for non-compliance and the efficacy of the enforcement of such orders;

Truthful and complete evidence

45. The family courts have adequate powers to ensure parties in family law proceedings provide truthful evidence.

46. Comments have been reported in the media to suggest women fabricate violence.

47. This is not our experience.

48. Rather our experience over more than 35 years, which is also borne out in the research, is that women minimise the violence they experience and are reluctant to report the violence for the reasons outlined above. [18]

49. We also refer to the comments made by the Law Council of Australia in their submission to this inquiry relating to this issue at paragraphs 29 to 43 and concur with these comments.

50. In terms of providing complete evidence, women may delay disclosures or full disclosures of violence during family law proceedings for many reasons:

- They may fear the perpetrator
- They may not realise their evidence is relevant

[18] Michael Flood, "He hits, she hits: assessing debates regarding men's and women's experiences of domestic violence." *Family Matters*, Autumn 2012, p. 114.

- It takes time to build trust and feel safe to disclose violence, particularly sexual violence and violence used to control and humiliate
- They fear not being believed
- Women often minimise the violence perpetrated against them

51. It is important evidence is understood through a complex trauma lens.

52. This requires having an understanding of the effects and impact of trauma on those who have experienced violence including sexual violence and the impact of trauma on memory, including why victims-survivors may provide inconsistent statements.[19]

53. It also requires an understanding of why women do not leave violent relationships in which primarily men perpetuate violence against them.

54. In particular, we refer to the framework of social entrapment drawn from the New Zealand Family Violence Death Review Committee and applied in *Transforming legal understandings of intimate partner violence* which explains barriers to women leaving violent relationships.

55. This framework has three dimensions:

    1. *The social isolation, fear and coercion that the predominant aggressor's coercive and controlling behaviour creates in the victim's/survivor's life;*
    2. *the lack of effective systemic safety options; and*
    3. *the exacerbation of these previous two dimensions by the structural inequities associated with gender, class, race and disability.*[20]

56. Tarrant et al describes it as follows:

> *A social entrapment framing asks us to document the predominant aggressor's pattern of abusive behaviour and understand how it constrains the primary*

[19] Haskell, L. and Randall, M. *The Impact of Trauma on Adult Sexual Assault Victims*, (Canada: Justice Canada, 2019), p 5 accessed at: https://www.justice.gc.ca/eng/rp-pr/jr/trauma/trauma_eng.pdf

[20] Stella Tarrant, Julia Tolmie, & George Giudice, *Transforming legal understandings of intimate partner violence* (Research report 03/2019, Sydney: ANROWS, 2019) p 17.

victim's/survivor's ability to resist the abuse, while simultaneously considering the wider operations of power in her life.[21]

57. We believe the Committee would benefit by hearing expert evidence from sexual and family violence experts as well as social science researchers, including from Australia's National Research Organisation for Women's Safety (**ANROWS**) and the Australian Institute for Family Studies (**AIFS**).

Early determination of family violence

58. Courts currently have the power to make determinations, findings and orders at any stage of proceedings, including early determinations of family violence.[22] The Family Law Council notes this practice *"is not widespread"* and recommends it occur more consistently.[23] Timely decisions with safety and the best interests of the child at the centre are important as they are child focused.

59. WLS NSW and WLSA have long advocated for court-based comprehensive family violence screening and ongoing risk assessment to ensure the ongoing safety of adult family violence survivors and their children. This is also recommended by the SPLA inquiry and ALRC review. [24]

60. We also support WLSA's recommendation to "*resource early determination of family violence through a family violence informed case management process, including the early testing of evidence of family violence".*[25] This is supported by the SPLA inquiry and ALRC review.[26]

61. For early determination of family violence to be effective it is vital that all family law system professionals have expertise in family violence, sexual violence, trauma informed practice, child development, cultural competency, LGBTQ awareness and disability awareness. It is also imperative that assessments be undertaken by professionals with

21 Ibid, p17-18.

22 Section 69ZR of the *FLA*

23 Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems, Final Report*, June 2016, p 128.

24 SPLA Inquiry, Recommendation 2, 3; ALRC review Recommendation 34

25 Women's Legal Services Australia, *Safety First in Family Law*, 2019, Step 1.

26 SPLA Inquiry, Recommendation 7; ALRC review Recommendation 34, paragraph 10.111

clinical experience and expertise in family violence, sexual violence, child abuse, risk assessment and child development, guiding the judiciary.

62. It is also important there are safeguards in place in circumstances where family violence is not identified or recognised early on in proceedings so that this does not cause a later impediment to the consideration of and findings relating to family violence.

63. We note the Government's announcement in December 2019 of:

> *$13.5 million over three years from 2019-20 to the Federal Court of Australia to pilot a screening and triage program for matters being considered by family law courts, with three interconnected processes: screening parenting matters for family safety risks at the point of filing; triaging matters to an appropriate pathway based on the identified level of risk; and maintaining a specialist list to hear matters assessed as involving a high risk of family violence.*[27]

64. We welcome this commitment, noting the vital importance of family violence screening and risk assessment and differential case management. We look forward to further information about the pilot, including the role of ongoing risk assessment.

Improving mandatory financial disclosure

65. Women's Legal Service Victoria has undertaken research and an analysis of their casework in relation to small property claims.

66. The report found significant non-compliance with mandatory financial disclosure requirements on the part of family violence perpetrators.

67. We refer to and endorse Women's Legal Service Victoria's *Small Claims, Large Battles* recommendations, including:

- *The Australian Government, in consultation with the Federal Circuit Court and Family Court of Australia, promote early resolution of small property disputes through a streamlined case management process available upon application to the court, with simplified procedural and evidentiary requirements (Recom 1)*

[27] Commonwealth Government, *Mid-Year Economic Fiscal Outlook 2019-20*, December 2019, p 199.

- *The Australian Government, in consultation with the Federal Circuit Court and Family Court of Australia, consider how best to strengthen mandatory financial disclosure that will enable family violence victims and decision makers to access the necessary financial information needed to resolve small claims matters efficiently and fairly,* including the ATO providing information to the courts and adverse adjustments to property divisions for parties who do not make full and frank disclosure (Recom 4)

- *The Australian Government provide an administrative mechanism for the release of information about the identity of a former partner's superannuation fund and its value* (Recom 5)

Non-compliance with parenting orders

68. We support the ALRC review recommendation that the *FLA* be amended to require parties in contested matters to meet with a Family Consultant to assist them to understand their final orders.[28]

69. We suggest the below ALRC review recommendation be explored further:

> That the *FLA* be amended to provide in all parenting proceedings for final orders, the court must consider whether to make an order requiring the parties to see a Family Consultant for the purposes of receiving post-order case management with the Family Consultant having the power to seek the court places a matter in a contravention order list or to recommend the court make additional orders.[29]

70. We note s 65L of the *FLA* already provides Family Consultants with the power to supervise or assist compliance with parenting orders.

71. The ALRC review acknowledges that Family Consultants need to be resourced to undertake this role.[30]

72. We believe there is benefit in a preventative approach to the contravening of parenting orders and it is important that all parties understand the orders.

---

28 ALRC review, Recommendation 38.

29 ALRC review, Recommendation 39.

30 ALRC review at paragraph 11.30.

73. However, it is also important there is an understanding as to the reasons for non-compliance with parenting orders.

74. Rhoades found in her study of 100 Family Court files involving contravention of parenting order applications listed for hearing in 2000 that the majority of contraventions were in relation to orders reached by consent rather than judicially determined orders and that many of the orders had been *"'agreed to' even though the resident parent had concerns about the contact arrangements and/or their own safety at the time".*[31] Further, the most common reason for limiting contact was "*concern about the child's safety and the other parent's capacity to care for the child during contact periods".* In the *"vast majority of cases the arrangements needed to be changed, rather than enforced"* and many of the orders were subsequently varied.[32]

75. Rhoades research also found that *"disputes frequently involved a mix of 'relationship' issues, rather than simply a dispute about contact".*

76. It is important that a compliance framework is not misused to perpetrate systems abuse.

77. Rhoades' further research following the introduction of a compliance framework in the *FLA* in December 2000 included questionnaires with parents and services providing the parenting programs. The service providers, recognising the need for arrangements about children to be flexible, were critical of the *"static model"* of orders and parents asserting their *"entitlements"* and *"rights"* instead of considering the needs and best interests of the child.[33]

78. While Rhoades research is not recent, the issues she raises remain valid.

79. In 2016, Uniting and CatholicCare Victoria Tasmania were funded for a Parenting Orders Program Enforcement pilot in Paramatta and Dandenong and Geelong respectively.

80. The aim of the pilot was to support separated families with dependent children with interim or final parenting orders in place. The orders included those made by consent and those judicially determined. Participation in the program was aimed at families where it was deemed likely the parties would return to court to dispute orders due to

---

31 We note this initial research was prior to the introduction of a compliance scheme in 2001.Helen Rhoades, 'Contact enforcement and parenting programmes - policy aims in confusion?' *Child and Family Law Quarterly*, 16(1) 2004, p 2.

32 Ibid.

33 Ibid, p 11.

"entrenched conflict, including family violence" with the aim of diverting parents from making contravention applications.[34]

81. The evaluation report highlights some positive results, noting improvements in *"reciprocal respect for parties"*, "*wellbeing for adults … and child wellbeing*" and *"personal safety and reduced exposure of children to violence*".[35]

82. The evaluation included a small sample with only 20% of the original number of participants completing the follow up survey 10 weeks into the program. The service providers commented this was too early into the program and recommended follow up at a later point in time in future programs.

83. Care needs to be taken in the use of language. *"Family Violence"* should not be described as "*entrenched conflict"* or *"high conflict"* as this minimises, masks and mutualises family violence rather than holding the perpetrator of family violence accountable.

84. Careful consideration needs to be given as to whether or not those who have experienced family violence should be included in a program such as those described above. In the event they are included, it is imperative there are comprehensive screening and ongoing risk assessment processes and safeguards in place and the professionals working in the program are family violence and trauma informed; culturally competent, LGBTQ aware and disability aware. These issues were not discussed in the evaluation report.

c. beyond the proposed merger of the Family Court and the Federal Circuit Court any other reform that may be needed to the family law and the current structure of the Family Court and the Federal Circuit Court;

Family court merger

85. We support a single entry point to the family courts and common rules so the family law system is easier to navigate. This was recommended in the SPLA inquiry.[36]

---

34 Elizabeth Clancy, Reima Pryor, David Skvarc, Anna Nekonokuro, *Parenting Orders Program Enforcement Pilot Evaluation Report,* (Centre for Family Research and Evaluation, 2017) p 3.

35 Ibid.

36 SPLA inquiry, Recommendation 5.

86. However, we do not support the Government's proposed merger of the Family Court of Australia and Federal Circuit Court of Australia which would abolish a stand-alone specialist superior family court.

87. The safety of children and adult victims-survivors of family violence must be foundational in the family law system, including structures, case management processes and overarching purpose[37].

88. The need for increased specialisation of courts in family law and family violence to improve decisions and outcomes for children is supported by many inquiries.[38] [39] This is discussed further at term of reference h.

89. If the courts are to merge, we support the New South Wales Bar Association's model which retains a stand-alone specialist superior family court and increases family law and family violence specialisation.[40] Family Court Judges would be in Division 1 of the Family Court of Australia. Federal Circuit Court Judges who are hearing family law matters would move across to Division 2 of the Family Court of Australia.

90. These concerns are shared by over 115 individuals and organisations including Aboriginal and Torres Strait Islander community controlled organisations, sexual and family violence

[37] We do not support ALRC review Recommendation 30 and accompanying Recommendation 31 relating to overarching purpose as it fails to adequately consider safety.

[38] ALRC review, Recommendation 51; SPLA inquiry, 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 and NSWLRC, *Family Violence – A National Legal Response*, 2010, Recommendations 16.9, 21.3, 22.5. 26.3, 31.1-31.5, 32.4.

[39] See Women's Legal Services Australia, *Safety First in Family Law Plan*, Step 1 accessed at: http://www.wlsa.org.au/uploads/campaign-resources/Safety_First_in_Family_Law_Plan.pdf

[40] 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

peaks and services, health peaks and services, disability peaks and services, community organisations, academics and legal experts.[41]

Other reforms

Expansion of the Indigenous list

91. The WLS NSW's Indigenous Women's Legal Program (**IWLP**) regularly supports and represents clients through the Indigenous list operating in the Federal Circuit Court of Australia (**FCCA**) in the Sydney Registry. Clients report feeling more included in the process when seated at the one table, including with the Judge and being directly asked questions by the Judge.

92. Based on our experience in the Indigenous list, WLS NSW supports the expansion of the Indigenous list, including to regional, rural and remote areas, noting the need to consult locally with Aboriginal and Torres Strait Islander communities and organisations about what is needed and how it can be implemented. This is supported by the ALRC review.[42]

93. The WLS NSW IWLP team also recommends that each Indigenous list or each Court if more than one Indigenous list is required at a court be guided by an Aboriginal and Torres Strait Islander Advisory Committee.

94. All professionals working with Aboriginal and/or Torres Strait Islander clients must be culturally safe and undertake ongoing accreditation and training in cultural safety. This includes judicial officers, court staff, lawyers including Independent Children's Lawyers and family report writers.

95. We refer to the Family Law Council's (**FLC**) 2012 report: *Improving the Family Law System for Aboriginal and Torres Strait Islander clients* and the Family Law Council's *Families with Complex Needs and the Intersection of the Family Law and Child Protection systems* report. We support implementation of the recommendations, including embedding Aboriginal and Torres Strait Liaison Officers in each family court registry;

[41] Open letter to the Hon Christian Porter, Concerns about proposed family court merger**,** signatures updated December 2019, accessed: http://www.wlsa.org.au/uploads/submission-resources/Letter_to_AG_re_concerns_about_family_court_merger_%28f_021219%29.pdf

[42] ALRC review Recommendation 34, 45

funding for Aboriginal and Torres Strait Islander Family Consultants;[43] building an Aboriginal and Torres Strait Islander Workforce in the family law system; a focus on accessible and culturally responsive community education about family law, care and protection and family violence; promoting cultural competency across the family law system, including through ongoing training. The SPLA inquiry supported these recommendations.[44]

96. It is important that there be a number of Aboriginal and Torres Strait Islander Liaison Officers/Community Access Officers working within each Court. We believe that it is important that there be both male and female Aboriginal and Torres Strait Islander Community Access Workers and that there be representatives from different communities to best facilitate community participation in the Court process.

97. We believe it is extremely important that the Indigenous list be adequately resourced so that there can be regular list days and to ensure that there is sufficient time to deal with each matter.

98. It is our experience that many of the matters in the Indigenous list involve serious and complex issues, including family violence. Accordingly, it is essential that the whole family law system, including the Indigenous list is able to effectively incorporate and respond to risk and safety concerns.

Increased access to family courts in regional, rural and remote areas

99. We refer to WLSA's submission to the ALRC review which was developed with input from Community Legal Centres NSW Regional, Rural and Remote Network and raised the following issues:[45]

    - Family law matters in regional, rural and remote areas are often filed in the Local Court as there is no FCCA sitting in that area or because the next sitting is

[43] Noting the importance of all family consultants also being sexual and family violence and trauma informed.

[44] SPLA Inquiry, Recommendation 24.

[45] WLSA, *Submission to the ALRC Review*, May 2018, p18-19 accessed at: https://www.alrc.gov.au/wp-content/uploads/2019/08/family-law_-45._womens_legal_services_australia_wlsa_submission.pdf

some time away. Rather than addressing the matter, Local Court Magistrates regularly refer the matter to the next FCCA sitting, resulting in further delays.

- The FFCA sits limited times a year in regional, rural and remote (**RRR**) areas. For example, the FCCA only sits 4-6 times per year in Dubbo.
- Those attending FCCA RRR sittings often have to travel significant distances. Consideration should be given to expanding the areas and duration for which the FCCA sits in RRR areas as well as increasing access to family dispute resolution services. Consideration should also be given to establishing effective audio-visual link (**AVL**) facilities for clients to access, for example, in services in RRR areas where there is no court and in local courts in RRR areas to access family courts located elsewhere. Safety would need to be considered in exploring AVL options, for example, to ensure both parties are not in the same AVL room or venue where the AVL facilities could be located.
- The need for increased access to a range of services in RRR areas including interpreting services, lawyer assisted family dispute resolution services, parenting courses, child contact services.
- Access to safe rooms at court in RRR areas.

Safety for those who have experienced family violence

100. We recommend victims-survivors of family violence be able to access safe rooms and meeting rooms when attending court.

101. We commend the Family Court of Australia and the Federal Circuit Court of Australia for their commitment to:

i. develop a list of minimum requirements for court premises to ensure safety for all court users

ii. undertake an audit of all court premises, including circuit locations to identify gaps in minimum requirements, and

iii. analyse audit results and make recommendations to courts' administration to address the gaps in minimum requirements.[46]

102. Further, courts need to have the technology to enable those who have experienced family violence to give evidence remotely, such as through video or audio link. Where there are currently no safe rooms at court, a party should be able to give evidence from an alternate location. Consideration should be given to the alleged victim-survivor giving evidence in the court room and the alleged perpetrator giving evidence from an alternate location. This is consistent with the *COAG Advisory Panel on Reducing Violence against Women and their Children – Final Report*.[47]

Removal of presumption of equal shared responsibility

103. The term "equal shared parental responsibility" (**ESPR**) is confusing and often misunderstood. The ALRC acknowledges that it is likely that the strong community perception that there is a presumption of equal shared care is "*in part a result of the explicit link drawn between the presumption of equal shared parental responsibility and the requirement to consider equal time or substantial and significant time*".[48]

104. The ALRC review recommends repealing the requirement to consider equal or substantial and significant time.[49]

105. The SPLA inquiry supports removal of ESPR.[50]

106. We believe the removal of the presumption of equal shared parental responsibility is a minimum requirement to help shift the strong culture that has developed in favour of equal shared parental decision making and time with the children even in cases where it is not safe to do so.

---

[46] Family Court of Australia and Federal Circuit Court of Australia, *Family Violence Plan*, April 2019 accessed at: http://www.familycourt.gov.au/wps/wcm/connect/d08448b5-c7e6-451d-8613-c8f77820195a/FV_Plan_2019a.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE-d08448b5-c7e6-451d-8613-c8f77820195a-mLuDbAN

[47] Commonwealth of Australia, Department of the Prime Minister and Cabinet, *COAG Advisory Panel on Reducing Violence against Women and their Children - Final Report,* 2016, Recommendation 2.3 and p 52.

[48] Australian Law Reform Commission, *Review of the Family Law System* (Discussion Paper 86, Australian Law Reform Commission, October 2018) 53.

[49] ALRC review, Recommendation 8.

[50] SPLA inquiry, Recommendation 19.

107. Families are unique. It is important that decisions are made on a case by case basis rather than a presumptive basis, so as to respond to particular needs.

108. It is for this reason we also oppose the property presumptions recommended in the ALRC review.[51]

d. the financial costs to families of family law proceedings, and options to reduce the financial impact, with particular focus on those instances where legal fees incurred by parties are disproportionate to the total property pool in dispute or are disproportionate to the objective level of complexity of parenting issues, and with consideration being given amongst other things to banning 'disappointment fees', and:

i. capping total fees by reference to the total pool of assets in dispute, or any other regulatory option to prevent disproportionate legal fees being charged in family law matters, and

ii. any mechanisms to improve the timely, efficient and effective resolution of property disputes in family law proceedings;

109. The family law system is chronically underfunded which is significantly contributing to delays. Interim hearings have become a solid feature of our court system in response to delays, adding complexity and cost to an already complex and stretched system.

110. As raised above, there is a need for urgent additional and ongoing funding for judicial officers, family consultants, legal assistance services, lawyer assisted dispute resolution services, specialist domestic and family violence services, accredited contact centres and family violence and other training. It is vital that everyone working in the family law system is family violence and trauma informed, culturally safe and LGBTQ aware and disability aware. This is discussed further below at term of reference h.

[51] ALRC review, Recommendation 12, 13, 16. We further oppose Recommendation 42(ii) relating to a presumption of costs order if a person is found to have contravened an order.

Fair and early resolution of property matters

111. It is well established that relationship breakdown can result in financial disadvantage, with women more likely to experience poverty.[52]

112. Research also highlights that family violence *"significantly contributes to poverty, financial risk and financial insecurity for women, sometimes long after they have left the relationship".*[53]

113. Research indicates that women who have experienced family violence are more likely to accept an unfair property settlement than other women.[54]

114. We refer to the work of Women's Legal Service Victoria in *Small Claims, Large Battles*, in highlighting the need for improved mechanisms for the early resolution of small property claims, including through alternative dispute resolution and court processes.

115. We welcome the Government's announcements of:

- $5.9 million in new funding to federal family courts to conduct a two year trial of simpler and faster court processes for resolving family law property cases with an asset pool of up to $500,000 (excluding debt) which commences January 2020 in Melbourne, Brisbane, Parramatta, Adelaide.
- $3.3 million in new funding for the Australian Taxation Office to develop an electronic information-sharing system to give the family law court improved visibility of parties' superannuation assets when making property orders, due to commence by June 2020.

---

52 Rosalie McLachlan et al, *Deep and Persistent Disadvantage in Australia: Productivity Commission Staff Working Paper, (*Productivity Commission, 2013), p 141.

53 Rochelle Braaf and Barrett Meyering, *Seeking Security: promoting women's economic wellbeing following domestic violence*, (Australian Domestic and Family Violence Clearinghouse, Sydney, 2011).

54 Family Law Council, *Letter of Advice to the Attorney-General: Violence and Property Proceedings*, August 2001, p3 accessed at: https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Violence%20and%20Property%20Proceedings.pdf

- $10.3 million to Legal Aid Commissions for a two year trial of lawyer-assisted mediation for property matters with asset pools of up to $500,000 (excluding debt), in each state and territory which commences in 2020.

116. Subject to the outcome of respective evaluations of the lawyer-assisted mediation and court project for resolving family law property cases, we recommend these initiatives be rolled out across the country with the necessary funding.

117. Consistent with the Family Law Council's Letter of Advice to the then Attorney-General in August 2001, we further recommend:

i. Amend s 79 of the *FLA* to include a new subsection (s 79 (4A)), directing the court to have regard to the effects of family violence on both parties' contributions.

This would require the court to take family violence into account as a negative contribution by the perpetrator in addition to the requirement in *Marriage of Kennon* (1997) 22 Fam LR 1 to recognise where family violence has impacted on a victim's capacity to make contributions and to value those missed contributions.

ii. Amend s 75(2) of the *FLA* to direct courts to consider the effect of family violence perpetrated in the relationship by either party on the financial circumstances of the parties.

This would require the courts to consider family violence in relation to spousal maintenance.

e. the effectiveness of the delivery of family law support services and family dispute resolution processes;

Family dispute resolution processes

118. In our experience lawyer assisted family dispute resolution in matters involving family violence undertaken by lawyers and family dispute resolution practitioners who are family violence and trauma informed, culturally safe, LGBTQ aware and disability aware are more likely to result in safe and sustainable outcomes without the need to go to court.

119. WLS NSW has been working in partnership with Western Sydney Community Legal Centre and the Family Relationship Centres at Penrith and Blacktown for over a decade.

120. The community legal centres provide legal advice clinics and lawyer assisted family dispute resolution at these Family Relationship Centres. Lawyer assisted family dispute

resolution is generally provided in matters where otherwise the Family Relationship Centre would have deemed the case as being inappropriate for family dispute resolution and issued a section 60I certificate.

121. It is important that victims-survivors of family violence are able to access family violence and trauma informed lawyer assisted family dispute resolution processes, so they have options other than going to court to resolve their family law matters.

122. With all professionals involved in the family dispute processes being family violence and trauma informed, parties' expectations and proposals are reality tested through this lens.

123. Further, processes are responsive to the needs of the clients. For example, in some cases involving family violence, a short-term agreement on a few issues may be reached before a longer-term agreement is negotiated. The benefits of such an approach is that it helps to build the trust of both parties in the process and there is an oversight mechanism to monitor how the short-term agreement goes and assess ongoing safety.

Case study 1: Value of lawyer assisted family dispute resolution

Martha+ and John+ were married for 10 years. They have 3 children under 10 years. During their relationship John perpetrated physical and psychological abuse against Martha.

John is living with his parents in a 3 bedroom home.

Martha stopped the children's contact with their father a few months after separation for a number of reasons. John came from a non-Hague country and she feared he would take the children overseas and she would not see them again. She was also concerned that there was no bedding for the children when they went to stay with John. She claimed John was taking illicit drugs and was concerned that he physically disciplined the children.

Before contacting WLS NSW, Martha and John had tried family dispute resolution without lawyers and had been unable to reach an agreement.

*At the lawyer assisted family dispute resolution (**LAFDR**) Martha was able to express the following about the children's father:*

* *her fears about him taking their children to a non-Hague country;*

* *her concerns about proper sleeping arrangements for the children;*

∗ her concerns about the way he communicated with her and about her to the children (denigrating her);

∗ concerns about his illicit drug use.

By being able to safely talk about the issues she felt were exposing the children to risk and negotiate an agreement in a safe context, Martha was able to agree to overnight time with the father for a trial period of 6 months because at the LAFDR the father agreed:

∗ to purchase bedding for the children;

∗ to purchase extra clothes for the children - previously he had demanded she provide this and not returned the clothes at the end of the visit;

∗ to communicate with the mother by text - no phone calls except if there is an emergency;

∗ to share the costs for activities the children want to participate in;

∗ not to travel overseas;

∗ not to use illicit substances while the children are in his care.

Martha and John were able to reach agreement because it was only temporary. Both parties agreed in 6 months' time they would come back to discuss how the children were going and whether there should be any changes to the arrangements. This allowed time to build trust and assess the safety of the children and Martha in these parenting arrangements.

If these parties did not have access to LAFDR, Martha would have been faced with choosing to go through the court system or to have an unsafe arrangement for their children.

+ Not their real names.

Case study 2: ***Value of lawyer assisted family dispute resolution***

Leonie+ and Colin+ were together for 10 years and separated a few years ago. Colin

perpetrated violence against Leonie throughout their relationship.

They have two children under 5.

Leonie was concerned that Colin was not providing a safe place for the children to spend time with him - he made furniture in his home and left large pieces of wood and nails and chemicals around the home. He was also a heavy drinker.

With the support of a lawyer, Leonie had the confidence to raise the issues she was worried about. She also felt the process held Colin accountable. He agreed to build the furniture in the garage and keep the chemicals locked away in the garage. He also agreed not to drink in the presence of the children or while they were in his care and to ensure that other people around the children did not drink to excess. By his agreeing to this in the presence of the lawyers, family dispute resolution practitioner and herself, Leonie felt she could trust the process. She also had confidence in the process because she knew they would be coming back after 3 months to check to see how things were going with the children and the agreement.

+ Not their real names.

124. In our experience LAFDR significantly increases the likelihood that parties will reach a safe parenting arrangement for children and the adult survivor of violence and divert matters away from the court system.

125. We support WLSA's' recommendations in its *Safety First in Family Law Plan*:

i. *Implement and fund a nationally 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.*

ii. *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.*[55]

[55] Women's Legal Services Australia, *Safety First in Family Law Plan*, Step 4.

Family law support services

126. The Government funds Family Advocacy and Support Services (**FASS**) in each state and territory for people affected by family violence. Parties can access this service for free legal advice and support services.

127. We acknowledge the benefit in clients receiving the assistance of a duty solicitor at court, for example, to provide legal advice, drafting of a recovery order application and undertaking first mention appearance as well as providing access to family violence and other support services.

128. However, the FASS and the Early intervention Unit (**EIU**) are not funded to provide ongoing representation.

129. Funding for full legal representation of disadvantaged clients in family law matters, including for wrap around services, access to litigation and family dispute resolution (**FDR**) is imperative and can not be substituted for duty services such as the FASS and EIU. The benefits of funding for full legal representation of disadvantaged clients include continuity of legal representation by someone who has a thorough understanding of the matter. Certainty of legal representation may also assist the wellbeing of disadvantaged clients and so help them give the best possible evidence they can give.

130. We endorse the 2014 Productivity Commission recommendation for the Government to urgently increase 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.[56]

[56] The Australian and State and Territory Governments provide an urgent additional investment of $200 million per year for civil and family law legal assistance services with further ongoing additional investment required - Productivity Commission, *Access to Justice Arrangements*, 2014, Recommendation 21.4. See also WLSA's *Safety First in Family Law Plan*, Step 2.

f. the impacts of family law proceedings on the health, safety and wellbeing of children and families involved in those proceedings;

131. Family law proceedings are expensive, stressful and can be traumatic for children and all parties, and particularly for a party who has experienced family violence.

132. Delays in family law proceedings can have a significant impact on both children and adult family violence survivors' physical and mental health, compounding trauma, particularly where family violence survivors have been engaged in proceedings for years.

133. In Laing's research, women survivors of family violence experienced the process of engagement with the family law system as *"exacerbating and compounding the traumatic impacts of having lived with domestic violence and the ongoing effects of post-separation violence*".[57] This is particularly so for parties engaged in the family law system over many years.

134. Family law processes can be misused for the purposes of continuing abuse. One example of this is the subpoenaing of sensitive records, such as counselling records, which are also known as "protected confidences".

135. Women's Legal Service NSW has published a paper, *Sense and Sensitivity: Family Law, Family Violence and Confidentiality* which discusses the need for family law professionals to commit to adopting victim-centric practices which should include guidelines for seeking least intrusive forms of evidence first. This would acknowledge that improving responsiveness to victims-survivors of family violence includes preserving therapeutic relationships and protecting against misuse of court processes.

136. This is recommended in both the SPLA inquiry and ALRC review.[58] It is included in Step 1 of WLSA's *Safety First in Family Law Plan*.

137. A mother's mental health issues resulting from the trauma of family violence, compounded by lengthy family law proceedings may be used against her during family law proceedings to assert she lacks the necessary parenting capacity to support her children.

---

[57] Lesley Laing, 'Secondary Victimisation: Domestic Violence Survivors Navigating the Family Law System," *Violence Against Women* 23(11), 2017, p 1321.

[58] SPLA Inquiry, Recommendation 9; ALRC review Recommendation 37

138. However, research shows that there have been significant improvements in mothers' parenting six months after separation if the family violence stops.[59]

139. The key is to limit opportunities for the continued perpetration of family violence, including by way of family law and other legal processes rather than to punish the mother for the trauma response she displays as a result of the violence and legal proceedings.

140. Victims of family violence are 10 times more likely to have legal issues than others and 16 times more likely to have family law issues than others.[60] It is therefore likely they are engaged in other legal processes at the same time as engaging in the family law system, further compounding their stress and trauma.

141. This also highlights the vital importance of early access to free holistic legal assistance from specialist family violence and culturally safe lawyers to help survivors of family violence resolve their legal issues early if possible.

142. Separation is a time of high risk, including for lethal violence perpetrated by males against a former female intimate partner.[61]This again highlights the vital importance of comprehensive family violence screening and ongoing risk assessment in the family law system by family violence experts to ensure the safety of women and their children. It also highlights the vital importance in reducing delays in decision-making.

143. Many inquiries, including the ALRC review, acknowledge that children want to be heard in family law proceedings.

---

[59] G. Holden et al cited in Lorraine Radford and Marianne Hester, *Mothering Through Domestic Violence*, (London, 2006), p 144.

[60] Christine Coumarelos, "Quantifying the legal and broader life impacts of domestic and family violence," *Justice Issues*, Paper 32, (Law and Justice Foundation of NSW, 2019) accessed at: http://www.lawfoundation.net.au/ljf/site/articleIDs/61BD5751775FA93B852584090007B5B9/$file/JI_32_DFV_legal_needs.pdf

[61] Between 10 March 2008 and 30 June 2014, there were 78 intimate partner homicides in NSW which occurred in a context of domestic violence (66 women and 12 men). Actual or intended separation was a characteristic in 50% of all intimate partner homicides. See, *NSW Domestic Violence Death Review Team Report 2015-17* page xiv accessed at: https://www.parliament.nsw.gov.au/lc/papers/DBAssets/tabledpaper/WebAttachments/72106/2015-2017_DVDRT%20REPORT%20PDF.pdf

144. We acknowledge that children have the right to participate in decisions that affect them.[62]

145. Further consideration needs to be given to how the views of children can be effectively heard by the court, including further accountability of the role of the Independent Children's Lawyer (**ICL**).

146. We have had some very positive experiences with ICLs as well as some experiences where ICLs have expressed a reluctance to meet with children to hear their views and explain the process and outcome.

147. The 2014 AIFS study of ICLs found that despite the Guidelines for Independent Children's Lawyers outlining an expectation that ICLs generally meet and speak with the children they represent, this often did not happen. Further, when ICLs were asked to rate the importance of different aspects of their role, including children's participation, evidence gathering, and balancing and managing litigation, including assisting to facilitate agreement between parties, children's participation was considered the least significant.[63]

148. It is important that ICLs are adequately resourced and trained, including regular and ongoing comprehensive training in family violence, trauma informed practice, cultural safety, LGBTQ awareness and disability awareness. Training is also required in child development and how to engage with children.

149. At a minimum, we support the ALRC Review recommendation that the *FLA* be amended to include a specific duty for ICLs to comply with the Guidelines for Independent Children's Lawyers.[64]

g. any issues arising for grandparent carers in family law matters and family law court proceedings;

150. In the context of Aboriginal and Torres Strait Islander communities, 'grandparent' does not adequately recognise kinship.

---

62 *Convention on the Rights of the Child, ratified by Australia on 17 December 1990,* Articles 9(2), 12.

63 Rae Kaspiew, Rachel Carson, Sharnee Moore, John De Maio, Julie Deblaquiere and Briony Horsfall, *Independent Children's Lawyer Study*, (AIFS, 2nd edition, 2014) p 29-31 (41-43).

64 ALRC Review, Recommendation 44.

151. The ALRC recommended s 4(1AB) of the *FLA* be amended to provide a definition of member of the family that is inclusive of any Aboriginal and Torres Strait Islander concept of family that is relevant in the particular circumstances of the case.

152. We support this recommendation, but further action is also required.

153. Section 65C of the *FLA* sets out who may apply for a parenting order, with standing being limited to parents, the child, grandparents, or a *"person concerned with the care, welfare or development of the child"*.

154. Where a person is not a parent or grandparent of the child, the person does not have an automatic right to seek orders, rather the Court must determine whether or not the applicant is a *"person concerned with the care, welfare or development of a child".*

155. In the case of Aboriginal and Torres Strait Islander children, there may be people in the child's kinship group other than parents and grandparents, who ought to be able to bring an application for parenting orders, but for whom the need to seek leave creates an unnecessary hurdle. An application may be appropriate where the parents are not in a position to care for the child – perhaps to avoid state child protection proceedings, or it may be needed to ensure that the unique kinship obligations and child rearing practices of Aboriginal and Torres Strait Islander cultures are carried out.

156. Therefore, in order to facilitate the recognition of appropriate and necessary kinship care arrangements, WLS NSW recommends that s 65C of the *FLA* be amended to give standing to members of the child's Aboriginal and Torres Strait Islander kinship group as recognised by the Aboriginal or Torres Strait Islander community to which the child or young person belongs.

157. Further, the definition of "parent" should include a provision that recognises that a parent "*may include a person who is regarded as a parent of a child under Aboriginal tradition or Torres Strait Islander custom"* as recommended by the Family Law Council.[65]

158. We note that when determining who is a parent under Aboriginal tradition or Torres Strait Islander custom, the court is likely to need to have access to experts capable of providing guidance on the relevant customs and traditions of the child's kinship group/s. It is essential that such evidence is provided by people who have the necessary cultural

[65] Family Law Council, *Report on Parentage and the Family Law,* 2013, Recommendation 3.

knowledge and understanding and are able to speak on behalf of the tribe belonging to the kinship group.

159. The Family Law Council refers to the Victorian Children's Koori Court and recently reinstated Queensland Murri Courts involving the Aboriginal community in the court process *"through the participation of Elders and Respected Persons who provide cultural advice to the judge or magistrate in relation to the young person's situation"*.[66]

160. WLS NSW Indigenous Women's Legal Program team advocates for the importance of the participation of Elders and Respected Persons to provide cultural advice to the judge or magistrate in regard to family law matters. For example, this could take the form of a Council of Elders that could be established in each family court registry. We support further consultation with Aboriginal and Torres Strait Islander people and Aboriginal and Torres Strait Islander organisations about this proposal and reiterate that any reforms impacting upon Aboriginal and Torres Strait Islander people must be led and co-designed with Aboriginal and Torres Strait Islander people.

161. We refer to our submission dated 24 March 2014 to the Senate Community Affairs Reference Committee Inquiry into Grandparents who take primary responsibility for raising their grandchildren. A copy of this submission is **attached.**

162. In that submission we raised practical challenges to grandparents having informal care arrangement. We recommended:

i. The NSW Statutory Declaration for Informal Relative Caregivers should be accepted by all state and federal agencies and be valid for 12 months.

ii. A community awareness campaign about financial and non-financial support available for grandparents and how to establish grandparents are the primary caregivers of children be developed with the active participation of grandparents.

iii. Special processes to provide adequate functional recognition of the particular child rearing and kinship practices within Aboriginal and Torres Strait Islander communities as outlined by the Family Law Council in 2004 described as Option 2.

iv. Access to culturally safe mediation.

---

66 Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection systems, Final Report,* 2016, p 99 (p107) and p149 (p158).

h. any further avenues to improve the performance and monitoring of professionals involved in family law proceedings and the resolution of disputes, including agencies, family law practitioners, family law experts and report writers, the staff and judicial officers of the courts, and family dispute resolution practitioners;

163. Step 3 of WLSA's *Safety First in Family Law Plan* focuses on ensuring family law professionals have real understanding of family violence. It is informed by the recommendations in the SPLA Inquiry and ALRC review.

164. Step 3 includes:

i. Embed the principle and practice of accessibility in the family law system.[67]

ii. 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.[68]

iii. Establish a national accreditation and monitoring scheme for all for professionals who prepare family reports and for children's contact services. The scheme includes mandatory training on family violence, working with victims-survivors of trauma, cultural competency, LGBTQ awareness and disability awareness.[69]

iv. Legislate to ensure that judicial appointments have adequate family violence and family law expertise.[70]

165. For the family law system to operate safely and effectively it must be adequately resourced. Delays are largely a result of under resourcing and impact on the safety of children and adult survivors.

67 SPLA Inquiry, Recommendation 24, 24; ALRC review Recommendation 9, 45, 46, 47, 48, 50.
68 SPLA Inquiry, Recommendation 27, 28, 30; ALRC review Recommendation 52.
69 SPLA Inquiry, Recommendation 30; ALRC review Recommendation 53, 54.
70 ALRC review, Recommendation 51.

i. any improvements to the interaction between the family law system and the child support system;

166. We support WLSA's recommendation that *"child support policy and practice reflect the following reality: financial abuse is a common feature of domestic violence; and that child support is a key platform where ongoing abuse can be perpetrated against adult victims-survivors and children"*.[71]

167. We refer to our submission dated 13 June 2014 to the House of Representatives Standing Committee on Social Policy and Legal Affairs Parliamentary Inquiry into the Child Support system (**Child Support inquiry**).

168. We repeat our recommendation that the Child Support legislation be amended to provide for the best interest of the child to be the paramount consideration in child support decisions. This would bring child support laws into a consistent broad policy framework with family law and other laws affecting children; and appropriately provide a focus on best outcomes for children.

169. We note the final report recommended the Australian Government examine the limited child support guarantee in other jurisdictions and consider the feasibility of trailing a limited guarantee in Australia.[72]

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

171. We support the National Council of Single Mothers and their Children recommendation for a State guaranteed child support payment to be piloted.

---

[71] WLSA, *Submission to House of Representatives Standing Committee on Social Policy and Legal Affairs Parliamentary Inquiry into the Child Support system*, 2014, accessed at: https://www.aph.gov.au/DocumentStore.ashx?id=501200c9-9c43-481c-9ceb-e918c8ea9241&subId=253451

[72] House of Representatives Standing Committee on Social Policy and Legal Affairs, *Inquiry into the Child Support Program,* June 2015**,** Recommendation 25.

j. the potential usage of pre-nuptial agreements and their enforceability to minimise future property disputes; and

172. We do not have practice experience in the use of pre-nuptial agreements and so provide no comment.

k. any related matters

173. We make no recommendations relating to this term of reference.

We would welcome the opportunity to give evidence at a hearing.

Yours faithfully,
Women's Legal Service NSW

Philippa Davis
Principal Solicitor

Dixie Link-Gordon
Senior Community Access Officer