



## SUBMISSION

Standing Committee on Social Policy and Legal  
Affairs Inquiry into Family, Domestic and Sexual  
Violence

24 July 2020



## Contents

About Women’s Legal Service Victoria .....	3
Acknowledgement .....	4
Executive Summary.....	5
Summary of Recommendations.....	7
Part A –All forms of violence against women, including but not limited to, coercive control and technology-facilitated abuse .....	9
Part B: Integrated socio-legal models addressing the complex needs of the victim-survivors.....	13
Part C: Improving the family law system’s response to family violence .....	17
Early judicial determination of family violence in the family law system .....	17
Remove presumptions in the family law system .....	19
Remove presumption of equal shared parental responsibility .....	19
Legally Assisted Family Dispute Resolution (LAFDR) in family violence matters.....	20
Financial Recovery of family violence for victim-survivors in the family law system.....	22
Simplifying superannuation splitting in the family law system .....	24

## About Women's Legal Service Victoria

Women's Legal Service Victoria is a not-for-profit organisation that has been providing free legal services to women since 1982. We work with women experiencing disadvantage to address legal issues arising from relationship breakdown or violence.

Women's Legal specialises in family violence, family law, child protection, and victims of crime assistance – recognising the intersection between the jurisdictions. We do this by:

### **Providing legal advice and representation to women**

- Full legal representation (through to final hearing, if necessary) and daily duty lawyers services
- Integrated and holistic practice, with in-house financial counselling and social work support, and outreach to 20 family violence partner organisations
- Health Justice Partnership with Monash Health providing legal, social work and financial counselling help to women during pregnancy who are experiencing family violence and at risk of child protection intervention, with the aim of their baby remaining with them (where this in the baby's best interests) once discharged from hospital
- Video conferencing service delivery to clients in regional and remote locations, and through the Magistrates' Court pilot of video conferencing in Family Violence Intervention Order matters (LINK program)

### **Campaigning for law and policy that respects and promotes the rights of women**

- Integrating our legal and policy practices to identify systemic issues and solutions
- Advocating policy and law reform that improves women's safety and socio-economic wellbeing

### **Delivering professional & community development, and prevention of violence against women programs**

- Building capacity of legal and family violence professionals to identify and respond appropriately to legal need
- Undertaking community development and legal education that strengthens women's ability to make informed decisions about their relationships
- Leading workplace prevention of violence against women across the legal and justice workforce

## Acknowledgement

WLSV's response to the terms of reference and the recommendations for reform, outlined in this submission, are based on the lived experiences of the women we represent. The submissions and recommendations have also been informed by the experiences of our lawyers, who have been and are working on a daily basis to protect the safety of women and their children in the justice system at both the state and national level.

## Executive Summary

WLSV supports a whole of government approach to family violence that is safe, just, supportive, non-discriminatory and responsive to the needs of women and their children in accessing justice. A holistic and integrated service and justice system response can provide pragmatic and meaningful support for individual victims to protect their safety and financial and emotional security. It can also contribute to broader social and cultural shifts to transform community attitudes about family violence and the issues of gender inequality, male privilege, and socio-economic power imbalances that underpin it.

We advocate an intersectional understanding of and approach to family violence be applied across the service system, government and non-government entities. Applying an intersectional lens recognises that experiences of family violence are impacted and compounded by disadvantage on the basis of gender identity, race, sexuality, religion, ethnicity, age, disability, socio-economic status.

This submission focuses on terms of reference (c) (d) and (e).

Part A focuses on the justice system role in responding to coercive control, and contends that coercive control should not be criminalised. This section of the submission is jointly made by Eastern Community Legal Centre, WEstjustice, Peninsula Community Legal Centre, Seniors Rights, Victorian Aboriginal Legal Service, and Women's Legal Service Victoria, as it reflects our shared standpoint. There is insufficient evidence that the creation of new coercive control offences achieves its intended aims. In addition, laws to criminalise coercive control is an overly simplistic response to a complex problem and, in fact, is likely to have adverse consequences for victim survivor safety and perpetrator accountability, as well as disproportionately and detrimentally impacting disadvantaged population groups.

Part B explains how integrated socio-legal models can address the complex needs of victim survivors and how our unique service delivery model operates in practice to effectively address these needs. Family violence and trauma informed social workers, financial counsellors and lawyers, embedded into community legal services, are able to address multiple issues and support which can significantly reduce the trauma, stress, anxiety and financial hardship that clients may be experiencing. Specialist Women's Legal Services, are also able to provide innovative, integrated services in family violence, family law and child protection and successfully fill the cross jurisdictional gaps between the different systems.

Part C focuses on recommendations for systemic reforms aimed at improving the safety and financial security of women and children in the family law system. Reform of the family law system and improving the family violence response of the system must be prioritised by the Federal Government in 2020. Inaction will only lead to more women and children falling

through the cracks and having to manage all the safety risks themselves, without system oversight. Our reform priorities and recommendations outlined in this part include:

- The early judicial determination of family violence in the family law courts;
- Remove presumptions in family law and the presumption of equal shared parental responsibility from the Family Law Act 1975 ;
- Expand and improve upon existing models of Legally Assisted Family Dispute Resolution (LAFDR) in family violence matters ;
- Support and implement recommendations from *WLSV's Small, Claims, Large Battles report*<sup>1</sup>.

These reforms are in line with Women's Legal Service Australia's Safety First in Family Law 2 plan which we endorse and support. Last year the Australian Government agreed to support and fund the safety proposals outlined in step 1 of WLSA's safety first in family law plan. The reforms were announced at the end of last year, as part of the MYEFO, and will go some way to working towards safer and fairer outcomes in the family law system. The announcement included a funding commitment of \$13.5million towards running family violence risk screening pilots across four family law court registries to trial family violence risk assessments, case management and specialist family violence lists over the next two years. We encourage the Committee to recommend the expansion and roll out of these pilots across all family law court registries from next year.

We also recommend that the risk screening pilots (named the "Lighthouse project") be expanded to include a model of the early judicial determination of family violence. In February this year, we wrote to the Attorney General, the Honourable Christian Porter, calling on the Government to expand the pilots in this way. During the pandemic, we have also been working closely with the family law courts to improve the safety of women and children navigating the family law system in Australia. We welcome the establishment of a special COVID-19 list where parenting matters related to COVID-19 can be urgently listed and dealt with within 72 hours. This list is for urgent matters, including family violence, which are related to COVID-19. The effective operation of the COVID-19 family law list and any similar list, however, depends largely on it being supported by access to specialist legal advice and representation.

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<sup>1</sup><https://www.womenslegal.org.au/files/file/WLSV%20Small%20Claims%2C%20Large%20Battles%20Research%20Report%202018.pdf>

<sup>2</sup> [http://www.wlsa.org.au/uploads/campaign-resources/Safety\\_First\\_in\\_Family\\_Law\\_Plan.pdf](http://www.wlsa.org.au/uploads/campaign-resources/Safety_First_in_Family_Law_Plan.pdf)

## Summary of Recommendations

### Recommendation 1: Shared definition and response to family violence as coercive control

- 1.1 We recommend that states and territories draw on the Victorian Family Violence Protection Act (2008) as an example of defining and responding to coercive control through state legislation so that there is a consistent understanding and legislated definition of family violence, in all its forms, nationally.
- 1.2 We recommend a shared definition and understanding of family violence as coercive control, nationally. The definition should form the basis of training and education for all justice system stakeholders along with system improvements that support implementation, to move beyond incident-based response and improved responses to patterns of controlling and coercive behaviour
- 1.3 We recommend that coercive control *not* be criminalised. Should the introduction of coercive control offences be considered, the efficacy of offences introduced elsewhere must first be proven. Investigation of efficacy must be examined in broad terms and include: impact on help-seeking, victim survivor experience of the court system, victim survivor safety and well-being, and perpetrator accountability

### Recommendation 2: Integrated socio-legal models to address the complex needs of victim-survivors

- 2.1 The Australian Government should support specialist women's legal services to deliver integrated socio-legal services which meet the complex needs of victim survivors so that they can be safe, supported and financially secure.

### Recommendation 3: Early judicial determination of family violence

- 3.1 The Australian Government, in consultation with the family law Courts, promote the early determination of family violence, through a family violence informed case management process and the testing of evidence of family violence early.
- 3.2 The Australian Government adequately fund the courts exercising family law jurisdiction to conduct early judicial fact finding hearings.
- 3.3 The Australian Government explore and fund options to ensure regular and consistent education and training on family violence for all professionals in the system, including for family law judicial officers.
- 3.4 The Australian Government, in consultation with the family law courts, consider how the judicial scrutiny of consent orders can be improved through the early identification of family violence and decision making. One option to consider is Registrars in the family courts responsible for scrutinising consent applications conduct risk assessments and family violence investigations as part of the process.

#### Recommendation 4: Remove presumptions in the family law system

- 4.1 The Australian Parliament introduce and support legislation that would remove the presumption of equal shared parental responsibility and the language of equal shared time from Part VII of the Family Law Act.
- 4.2 Any proposals to introduce legislative presumptions into the Family Law Act, to determine property and financial cases be opposed

#### Recommendation 5: Expand existing models of Legally Assisted Family Dispute Resolution (LAFDR) in family violence matters

- 5.1 The Australian Government expand existing models of Legally Assisted Family Dispute Resolution (LAFDR) in family violence matters
- 5.2 The Australian Government resource Legal Aid Commissions to broaden LAFDR availability for priority clients. This would enable to access existing models of LAFDR, with better outcomes for the most vulnerable
- 5.3 A nationally consistent risk assessment framework apply to all LAFDR models to ensure that safety risks are effectively identified and managed throughout the process

#### Recommendation 6: Improve the financial security of women after relationship breakdown

- 6.1 The Australian Government continue to support and work towards the implementation of recommendations from WLSV's Small, Claims, Large Battles report
  - 6.1.1 Streamlining court processes for small claims ( recommendations 1-3)
  - 6.1.2 Improving financial disclosure in property matters (recommendation 4)
  - 6.1.3 Supporting the simplification of the superannuation splitting system (recommendations 5-8)
  - 6.1.4 Dealing with joint debts in the court system more effectively (recommendation 9)
  - 6.1.5 Responding to family violence in property matters (recommendations 10-12)

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## Part A –All forms of violence against women, including but not limited to, coercive control and technology-facilitated abuse

This part focuses on the justice system role in responding to coercive control, and contends that coercive control should *not* be criminalised. It focuses on term of reference (e).

Family violence can cause serious, enduring and cumulative physical and psychological harm, particularly to women and children, as well as long-term financial detriment. All forms of family violence are complex, and often, perpetrators use multiple forms of coercive behaviour to control their victims.

### **This is a shared position**

This section of the submission by Women’s Legal Service Victoria is jointly made by Eastern Community Legal Centre, WEstjustice, Peninsula Community Legal Centre, Seniors Rights, Victorian Aboriginal Legal Service, and Women’s Legal Service Victoria, as it reflects our shared standpoint that coercive control should not be criminalised.

### **Coercive control *not* be criminalised**

There is insufficient evidence that the creation of new coercive control offences will improve the safety of women and children experiencing or at risk of family violence. Laws to criminalise coercive control are an overly simplistic response to a complex problem. They are and are likely to have adverse consequences for victim survivor safety and perpetrator accountability, as well as disproportionately and detrimentally impacting disadvantaged population groups.

### **Foundations of our submission**

As community legal practitioners with extensive experience working with victim survivors of family violence, we offer valuable insight into what the criminalisation of coercive control means in practice and its viability in improving victim safety and perpetrator accountability. Our submission is informed by academic and practice-based evidence, including findings from Victoria’s Royal Commission into Family Violence.

### **Justice system response to coercive control**

Coercive control has long been understood as a defining feature of domestic and family violence. It is the pervasiveness of coercive and controlling behaviour that victims frequently refer to as the most enduring and damaging abuse they experience.

Debate on justice system responses to coercive control centres around how we understand and therefore respond to the nature of family violence; that is, to move beyond incident-based interventions and better respond to family violence as patterns of behaviour characterised by coercive control.

Victoria’s Royal Commission into Family Violence found:

*“Ignoring patterns of controlling behaviour and focusing only on physical violence trivialises the abuse victims endure and traps them in violence. It can also have lethal consequences”<sup>3</sup>*

Collectively as community legal organisations, we strongly advocate justice system reform to improve upon incident-based approaches to family violence and respond to the patterns of coercive and controlling behaviour that underpin it.

### **Coercive control in existing law**

The law in Victoria recognises that coercive control is family violence, and it is a central feature of the Family Violence Protection Act (2008). Victoria’s response to family violence is widely recognised as world leading, with policy settings requiring comprehensive assessment and response by all relevant stakeholders, including justice stakeholders.

In its definition of family violence, Victoria’s Family Violence Protection Act (2008) recognises that family violence includes ‘threatening and coercive behaviour’ and ‘behaviour that in any other way controls or dominates a family member and causes them to feel fear for their safety or wellbeing or for that of another person’. Recognition of coercive control in the Victorian legislation ensures a person is held criminally accountable where a Family Violence Intervention Order is breached.

Victoria’s Royal Commission into Family Violence considered the introduction of new offences. The Commission found that new offences often has only a symbolic effect that does not result in changes in practice, as:

*“Whatever laws we have will be only as effective as those who enforce, prosecute and apply them. Improving these practices—through education, training and embedding best practice and family violence expertise in the courts—is likely to be more effective than simply creating new offences.”<sup>4</sup>*

The critical gap in Victoria’s justice system response to family violence identified by the Commission was not incapacity of existing laws to respond to coercive control; but rather, the absence of a shared understanding of family violence as coercive control. This, the Commission found, leads to victims being ignored or disbelieved when they seek help.<sup>5</sup>

We advocate that the existing and complementary civil and criminal legislative environment in Victoria strikes the right balance to account for the socio-legal complexities of family violence. Victoria’s Family Violence Protection Act (2008) provides an example of defining and

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<sup>3</sup> State of Victoria, Royal Commission into Family Violence: Summary and recommendations, Parl Paper No 132 (2014–16), p.25

<sup>4</sup> Ibid, p.27

<sup>5</sup> Ibid, p.27

responding to coercive control through state legislation that other states could draw on so that there is a consistent understanding and legislated definition of family violence, in all its forms, nationally.

### **Victim survivor safety and perpetrator accountability**

The safety of victims and accountability of perpetrators of violence are the paramount concerns in all responses to family violence. Yet, a criminal law response is not always the most effective way of ensuring victim survivor safety and holding perpetrators accountable. There is no compelling evidence that the symbolic effect of criminalisation and the criminal justice response necessarily and in-and-of-itself leads to a change in perpetrator behaviour or improved safety for women<sup>6</sup>. In fact, it may be detrimental. For instance, where there are criminal consequences it may have the effect of women being less likely to report for fear of repercussions<sup>7</sup>, and further, it is argued that a coercive control offence is more likely to be used against and criminalise women victims<sup>8</sup>. The criminal justice system can present barriers to help-seeking and engagement in justice responses to family violence, which can be further compounded by socio-economic disadvantage:

*“The more criminal law seeks to intervene on behalf of women, the more challenges it poses for them – hurdles to negotiate – and experiences are contingent on variables such as class, ethnicity and cultural background.”<sup>9</sup>*

As community legal services, we are concerned that a criminal offence of coercive control may fundamentally and adversely change the court experience for victim survivors of family violence, due to the burden of proof required. As compared to judgement on the basis of the balance of probability, the criminal justice system’s burden of in the prosecution of criminal offending proof requires substantially greater victim involvement in court proceedings, and would depend upon the capacity of the complainant to withstand rigorous cross-examination. This potentially presents another obstacle, rather than enhancement, to family violence victim survivors’ engagement with the justice system.

What is required to improve justice system responses to coercive control is improved understanding of coercive control as family violence and, where coercive control is reflected in existing legislation, legal actors exercising their existing responsibilities<sup>10</sup>. Embedding best practice and family violence expertise across the justice system requires training and

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<sup>6</sup> Barlow, Johnson, Walklate and Humphreys (2019), Putting Coercive Control into Practice: Problems and possibilities, in *British Journal of Criminology* (2020) 60, 260-179, Advance Access publication 22 July 2019

<sup>7</sup> Nancarrow (2019), *Unintended Consequences of Domestic Violence Law: Gendered aspirations and racialized realities*, Palgrave Macmillan, Switzerland

<sup>8</sup> Goodmark (2018), *Decriminalizing Domestic Violence: A balanced policy approach to intimate partner violence*, University of California Press

<sup>9</sup> Walklate & Fitz-Gibbon. (2019), The Criminalisation of Coercive Control: The Power of Law?, in *International Journal for Crime, Justice and Society*, 8(4):94-104)

<sup>10</sup> Douglas (2018), *Legal Systems Abuse and Coercive Control*, *Criminology & Criminal Justice*, Vol. 18(1) 84–99

education of all justice system stakeholders – including police, legal practitioners, judicial officers and court staff – and system improvements that support implementation.

### **Inadequate evidence of efficacy**

There is currently no compelling evidence that laws criminalising coercive control internationally have been effective in enhancing victim survivor safety and perpetrator accountability. Laws introduced in the United Kingdom and in Scotland have resulted in very few successful prosecutions to date<sup>11</sup>. When this is considered in light of the compelling concerns surrounding probable adverse consequences, we are of the view that, on balance, the creation of laws to criminalise coercive control are detrimental to safety and accountability outcomes and offer no clear benefits that would justify their introduction.

## **Recommendation 1: Shared definition and response to family violence as coercive control**

- 1.1 We recommend that states and territories draw on the Victorian Family Violence Protection Act (2008) as an example of defining and responding to coercive control through state legislation so that there is a consistent understanding and legislated definition of family violence, in all its forms, nationally.
- 1.2 We recommend a shared definition and understanding of family violence as coercive control, nationally. The definition should form the basis of training and education for all justice system stakeholders along with system improvements that support implementation, to move beyond incident-based response and improved responses to patterns of controlling and coercive behaviour
- 1.3 We recommend that coercive control *not* be criminalised. Should the introduction of coercive control offences be considered, the efficacy of offences introduced elsewhere must first be proven. Investigation of efficacy must be examined in broad terms and include: impact on help-seeking, victim survivor experience of the court system, victim survivor safety and well-being, and perpetrator accountability

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<sup>11</sup> Barlow, Johnson & Walklate (n.d.), *Policing Responses to Coercive Control*, School of Law, Lancaster University, Lancaster; and Barlow, Johnson, Walklate & Humphreys, Putting Coercive Control Into Practice: Problems and possibilities, in *British Journal of Criminology* (2020) 60, 260-179, Advance Access publication 22 July 2019

## Part B: Integrated socio-legal models addressing the complex needs of the victim-survivors

A victim survivor can easily become overwhelmed with multiple issues she needs to deal with and also the justice system response which may exacerbate stress, avoidance and anxiety. Unresolved issues may snowball out of control, contributing to further distress, and potentially contribute to further legal issues. Family violence and trauma informed social workers, financial counsellors and lawyers embedded into community legal services can address multiple issues and support which can significantly reduce the trauma, stress, anxiety and financial hardship that clients may be experiencing. Collaboration between embedded family violence and trauma informed lawyers, social workers and financial counsellors strengthens the legal service's capacity to support clients experiencing family violence.

Specialist Women's Legal Services, are able to provide innovative, integrated services in family violence, family law and child protection and successfully fill the cross jurisdictional gaps between the different systems. Specialist family violence lawyers and social service professionals (including social workers and financial counsellors) are readily able to identify interconnected life issues and provide early assistance before issues reach crisis point. Given that it can be incredibly dangerous for a victim survivor to separate from a violent partner, it is essential for early intervention to include a specialised family violence legal response

Integrating services can provide a seamless service for victim-survivors. Working together as a team, social service and legal professionals can provide assistance in a co-ordinated way therefore addressing the complex range of issues that women experiencing family violence have to deal with.

WLSV's financial counsellors, social workers, lawyers, policy and training staff have been working as part of a multi-disciplinary team since 2015. WLSV first employed a family violence financial counsellor to deliver services to family violence/family law clients who experienced financial hardship post-separation in 2014. WLSV's financial counsellors and social workers work together to assist clients with Centrelink, housing, banking and other financially related issues and alongside lawyers acting on behalf of clients in family violence and family law proceedings to ensure clients are safe and supported in the justice system and beyond.

In 2014 WLSV set up a project called *Stepping Stones* to investigate the barriers to financial recovery that family violence victims were facing. The *Stepping Stones* project delivered its final report to the Attorney-General in September 2015. The two year project assisted 170 women to reduce their collective debt by over \$250K. Since then, WLSV has continued to employ financial counsellors and social workers to assist to reduce the financial hardship of women post-separation and to improve their emotional wellbeing.

### **WLSV's LINK community – a virtual socio-legal model**

Building on this integrated model and with the support of Federal Government funding<sup>12</sup>, WLSV launched an online specialist domestic violence unit (DVU) in March 2018 (Link Community). Link Community utilises a video conferencing platform to deliver integrated and wrap-around services to vulnerable women experiencing family violence, across five local government areas (LGAs). The LGAs include Latrobe, Horsham, Southern Grampians, Outer Western Melbourne and South Eastern metropolitan Melbourne regions. WLSV selected the regions due to the high level of family violence and disadvantage these communities experience.

The LINK Community model builds on collaborative partnerships with five Family Violence (FV) agencies across the target LGAs: Berry Street (Grampians and Ballarat regions), Grampians Community Health Centre, Quantum, Windermere and Women's Health West. This collaboration aims to improve the ability of WLSV to provide legal services to women in these LGAs and builds family violence agencies' capacity to meet the needs of women requiring specialist family violence and family law representation.

To build the capacity of the partners in the program, WLSV provides funding, training and assistance to the agencies to support women who have experienced family violence and who require ongoing legal representation in matters arising from family violence.

The evaluation found that the Project brought about many benefits for clients. Through ready access to free, high quality legal (and financial and social work) services, and being supported by their family violence worker at the same time, clients were found to gain a better understanding of their rights, options and next steps, and experience improved wellbeing and a sense of empowerment to move forward. Women reported feeling supported, cared for and understood by the professionals assisting them while their legal and financial issues were addressed.<sup>13</sup>

Martha's story below demonstrates the positive impact integrated and wrap-around services can have on addressing all of the needs of a victim survivor. Martha was able to access social housing through social worker support, have the family violence related debt waived by a financial service provider through financial counselling support and enforce her rights in family law proceedings through the legal assistance she received.

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<sup>12</sup> funded by the Attorney-General's Department (AGD) under the Specialist Family Violence Legal Services Program

<sup>13</sup> WLSV can provide a copy of the evaluation on request by the Committee

## Martha's story

*Martha was pregnant with her second child to Graham whose violent and controlling behaviour was identified by the Department of Health and Human Services (DHHS) as a risk to her and her first child, Nikki. With the assistance of the WLSV duty lawyer at the Children's Court, the intervention by DHHS resulted in a court order that Nikki remain in Martha's care and any time between Nikki and Graham had to be supervised. The police obtained an intervention order which excluded Graham from coming into contact with Martha or Nikki other than in accordance with the Children's Court order.*

*When Martha attended hospital for the birth of her premature baby, Graham found out and attended the hospital in breach of the intervention order. Child protection responded by removing Nikki from Martha's care. WLSV again assisted Martha at court where the Magistrate expressed concern regarding Martha's safety. WLSV, through its social work support, found suitable safe accommodation for Martha and as a result Martha and Nikki were reunited. WLSV's social worker was also able to support Martha emotionally through the court process and help her to develop a safety plan. The baby was not yet ready for release from hospital.*

*During the relationship Graham had also successfully pressured Vikki into applying for a significant personal loan in her name to buy a car, which she received no benefit for. After the relationship ended Graham refused to cover the loan repayments or return the car. WLSV's financial counsellor was successful in applying to the bank for a waiver of the debt in her name based on the circumstances of economic abuse.*

## Embedding family violence financial counsellors into legal services

Family violence financial counsellors, who are embedded into legal services, are able to provide advice and advocacy for women experiencing family violence dealing with family violence related debts or financial hardship. Family violence trained financial counsellors are accredited professionals who have an extensive knowledge of a range of areas of law and policy, including consumer credit law, debt enforcement practices, the bankruptcy regime, industry hardship policies and government concession frameworks. Their services are free, independent and confidential. Financial counsellors can provide information, support and advocacy with such things as credit card, personal loans debts, grants and concessions, utility bills, mortgage default, unpaid fines or insufficient income. While regularly interacting with banks, finance companies and energy companies in relation to their clients' debts, financial counsellors, working in community legal centres also have a history of challenging unfair practices in the courts, in law reform campaigns and media campaigns. Through this advocacy over the last four decades, the sector has influenced laws and practices relating to credit, debt collection and utility hardship programs and was active in establishing industry ombudsman schemes.

The Victorian Government has, to date, committed to funding 21 full-time equivalent specialist family violence financial counsellor positions (in addition to the general financial

counselling program). In Victoria, all financial counsellors have received training in identifying family violence and economic abuse. Additional family violence training has been provided to the specialist family violence financial counsellors.

From July 2017 – June 2019 the 11 (initially funded) specialist family violence financial counselling positions assisted almost 6,000 people. A stark picture of financial disadvantage became clear when analysing client data:

- 98% were financially disadvantaged, despite the fact that there are no income restrictions on eligibility to receive specialist family violence financial counselling; and
- 69% were in receipt of Centrelink payments, compared to 49% of all clients of generalist financial counselling services.

Recognising the positive outcomes of the socio-legal model, the Financial Counselling Foundation recently providing three-year funding for 10 family violence financial counsellor positions throughout Australia. The majority of positions funded will be placed within community legal services which work with family violence victim survivors. The Foundation *“hopes that these 10 one-off grants in other jurisdictions, will encourage those other Governments to make these new positions permanent after the Foundation’s funding ceases”*.<sup>14</sup>

### **Embedding social workers into legal services**

Embedding social workers into specialist women’s legal services allows for a holistic approach in addressing client needs beyond their legal problems. Legal issues are not the only issues women experiencing family violence have to deal with. Social workers have the skills to be able to assess all her needs and what may be impacting on her capacity to fully engage in the legal process. For example access to adequate housing, addiction issues, involvement with child protection, family of origin trauma, grief, loss, parenting, poverty are some of the issues that may impact the legal issues she is facing. Social workers are able build relationships with victim-survivors while at the same time build connections and improve understanding of her lived experience between the lawyers assisting her, financial counsellors and also with other service professionals. The role of a social worker, in the socio-legal model, is to coordinate these collaborations between the different professionals assisting her so that all of her safety and financial needs are being addressed for a safe and secure recovery. Many victim survivors of family violence are often traumatised by their experience and the legal process can be re-traumatising for many women. Social workers embedded into a legal service can play an important role in assisting both the lawyer and client through the justice system journey which can be a traumatic experience. The emotional support that social workers provide during, and sometimes beyond, the legal process assists the lawyer in achieving safe and

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<sup>14</sup> <https://www.financialcounsellingfoundation.org/funded-projects>



financially supportive outcomes.

WLSV's support WLSA's recommendation in its submission to this inquiry which recommends the roll out of DVU's on a national basis.

## Recommendation 2: Integrated socio-legal models to address the complex needs of victim-survivors

- 2.1 The Australian Government should support specialist women's legal services to deliver integrated socio-legal services which meet the complex needs of victim survivors so that they can be safe, supported and financially secure.

## Part C: Improving the family law system's response to family violence

### Early judicial determination of family violence in the family law system

WLSV strongly advocates for family violence to be determined early in the family law courts, a recommendation adopted in the final report of the parliamentary inquiry into "*A better family law system to support and protect those affected by family violence*" (the SPLA report)<sup>15</sup>. Women's Legal Services Australia and key stakeholders in Victoria, including Victoria Legal Aid are campaigning with WLSV to promote these necessary reforms.

We refer the Committee to our submission to the ALRC review into the family law system<sup>16</sup> and to the Joint Select Committee Inquiry into the Family Law System that is currently underway. The submissions explain why the early judicial determination of family violence is needed to ensure safe outcomes for women and children in the system.<sup>17</sup>

An early determination of family violence will assist the court in determining what is in the child's best interest, particularly to avoid the risk of any harm to the child.

Despite the number of applications before the courts alleging family violence, judges are only exercising their power to test the evidence and determine family violence allegations early on in a minority of cases. In the early stages of a matter, generally procedural issues are dealt with and interim orders are made, often by consent, pending the hearing of evidence. The evidence of family violence, which is central to a case, is not tested and a finding of on the facts is not made until the final hearing. Given the current delays in the family law courts, the final hearing of evidence may take place between eighteen months

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<sup>15</sup> House of Representatives Standing Committee on Social Policy and Legal Affairs, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (2017)

<sup>16</sup> <https://www.alrc.gov.au/inquiry/review-of-the-family-law-system/submissions-7/>

<sup>17</sup> [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Family\\_Law\\_System/FamilyLaw](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Family_Law_System/FamilyLaw)

and three years, in some cases, from the date of the initial application to court. Given the long wait for a final hearing and judicial decision, family violence is often hidden from view during this time.

We refer the Committee to Nyala's case. In Nyala's case, despite the existence of a final FVIO being granted in the Magistrate's court to protect Nyala and her child from the violent actions of Steve, the family court ordered that the child's time with the father be supervised by the paternal grandmother and/or maternal uncle, once a fortnight. It was not until the final hearing, where family violence allegations were properly tested that the court ordered that the violence perpetrator should spend no time with the child to protect the child from any harm.

An early determination of the family violence allegations which would involve testing the evidence, should ensure the burden of managing safety and risk concerns is not placed entirely on the family violence victim.

WLSV acknowledges that crucial to successful implementation of this reform, all practitioners working in the system, including Judges, need to understand the dynamics of family violence and the impact that trauma can have on victims.

Concerns were expressed in the media, after the Joint Select Committee Inquiry into the Family Law System was announced, that women fabricate allegations of family violence perpetrated against them, in order to achieve an outcome through the family law system which effectively excludes men from the family or restricts the time fathers spend with their children. This is far from the reality experienced by our clients. WLSV has formed the conclusion that the Committee should take the opportunity, when considering these statements, to review how the family courts currently determine family violence in family law proceedings. WLSV notes that the presence of family violence intervention orders can and are taken into account by judges considering parenting matters but that the mere presence of an order will not necessarily determine the outcome. Judges exercise their discretion under the Family Law Act and will take into account many forms of evidence to work out what is in the best interests of a child. In any event the early judicial determination of family violence will address any concerns people may have about how allegations of family violence are considered in the family law courts.

### Recommendation 3: Early judicial determination of family violence

- 3.1 The Australian Government, in consultation with the family law Courts, promote the early determination of family violence, through a family violence informed case management process and the testing of evidence of family violence early.

- 3.2 The Australian Government adequately fund the courts exercising family law jurisdiction to conduct early judicial fact finding hearings.
- 3.3 The Australian Government explore and fund options to ensure regular and consistent education and training on family violence for all professionals in the system, including for family law judicial officers.
- 3.4 The Australian Government, in consultation with the family law courts, consider how the judicial scrutiny of consent orders can be improved through the early identification of family violence and decision making. One option to consider is Registrars in the family courts responsible for scrutinising consent applications conduct risk assessments and family violence investigations as part of the process.

### Remove presumptions in the family law system

It is WLSV's strong view that presumptions in family law can lead to unsafe and unfair outcomes. WLSV supports the discretionary nature of decision making in family law which places a greater emphasis on what is in the best interests of a child or children in parenting matters and fair financial outcomes in property matters.

Decisions about children and property should be made on a case-by case basis in the best interest of the child and by placing a greater focus on safety and risks to children, and not on parental rights. The majority of matters involving the application of family law after relationship breakdown are negotiated in the "shadow of the law" without any real court involvement. It has been well established by academic research that the presumption of equal shared parental responsibility has been misinterpreted in the community as meaning 50-50 equal time, even where family violence is present.

WLSV does not support other presumptions being introduced into the Family Law Act and urges the Committee to reject presumptions in family law.

### Remove presumption of equal shared parental responsibility

WLSV strongly supports the removal of the presumption of equal shared parental responsibility.

The references in the Family Law Act to "equal time" and "equal shared parental responsibility" inappropriately privilege the expectations of parents and some community members over the best interests of children, and their safety. As noted above, it can also place undue pressure on victims of family violence to allow children to spend time with an abusive parent. The story highlighted below demonstrates how this plays out in agreement making, particular for interim orders made by consent.

Equal time does not apply in cases where family violence is established in a proceeding. However, because it is often difficult to “prove” violence/abuse to the satisfaction of the Court, the presumption and consideration of equal time is sometimes still applied when the child has been abused or exposed to family violence. This can result in courts making orders/agreements that include shared parenting provisions which unnecessarily put women and their children at risk of further harm from a perpetrator they are trying to escape. The following example was provided by one of our lawyers:

*“When representing a young 19 year old single mother in a LAFDR process, I discovered, before the LAFDR took place, that she had agreed to an arrangement with the father of the child, that up until the child turned 1 she would be the primary carer of the infant and upon the child turning 1 the arrangement would be that the child would spend one week on and one week off with the father. When I quizzed her about this arrangement she simply said they both agreed to this because they believed that “the law says that it has to be equal time for both parents”. The reason for the LAFDR process was that the infant’s father was seeking to formalise the arrangement in either a parenting plan or via consent orders. Fortunately with the assistance of the lawyers, the arrangement reverted back to something more appropriate for the needs of the infant child, which included short periods of time with the secondary attachment figure (in this case the father) and the ongoing primary care giving with the primary attachment figure (in this case the mother).*

#### Recommendation 4: Remove presumptions in the family law system

- 4.1 The Australian Parliament introduce and support legislation that would remove the presumption of equal shared parental responsibility and the language of equal shared time from Part VII of the Family Law Act.
- 4.2 Any proposals to introduce legislative presumptions into the Family Law Act, to determine property and financial cases be opposed

#### Legally Assisted Family Dispute Resolution (LAFDR) in family violence matters

Legally-assisted family dispute resolution processes should play a greater role in the resolution of disputes involving family violence or abuse for both property and parenting matters. We strongly support the expansion of a legally assisted family dispute resolution (LAFDR) model as a form of alternative dispute resolution in the family law system.

WLSV has been providing legal representation in mediation services since 2009 and has developed a sophisticated understanding of the benefits of legally assisted dispute resolution through this experience. WLSV provides legal representation through a number of services including Victoria Legal Aid’s Family Dispute Resolution Service (VLA FDR service) as well as

through a partnership with the Melbourne Family Relationship Centre and the FMC Mediation Centre.

There is a common belief within the family law sector that FDR is inappropriate in cases where there is family violence and litigants are self-represented. However, mediation through FDR is not solely the domain of self-represented litigants. The experience of WLSV in providing Legally Assisted FDR (LAFDR) is that with the support of trauma-informed mediators and lawyers, potential power imbalances between parties can be addressed. Family violence cases can be safely and effectively be supported in the mediation process.

Based on our experience, we can identify advantages of a LAFDR model as follows:

- it is cost effective and can often be the only avenue available to parties who do not want to or cannot access court processes
- the confidentiality of the process and the supportive assistance of a legal adviser has enabled parties to engage in a meaningful way in negotiating and reaching a resolution;
- legal assistance can easily and quickly dispel the myths of equal shared time;
- it allows parties to disclose allegations of family violence and for such allegations to be recognised and managed by legal representatives and skilled FDR practitioners because safety concerns can be discussed freely;
- it allows dialogue to open up because parties feel safer, with proper support, in admitting to past behaviour and agreeing to change behaviour.
- Parties can raise or take into account vulnerabilities such as mental health issues and drug and alcohol issues;
- LAFDR can be done safely by shuttle conference either over the phone or in safe rooms and therefore is able to provide access to vulnerable clients in regional areas who wouldn't otherwise have access to legal representation and support;
- it can be child inclusive and responsive to the needs of families.

A VLA report published in 2012 highlighted the value of lawyer-assisted family dispute resolution in the VLA's Roundtable Dispute Management service and supports our experience of LAFDR. The report titled, "*Thinking Outside the Square: the role of lawyers in Roundtable Dispute Management*"<sup>18</sup> found clients valued the ongoing legal advice and reality checking provided by lawyers. The report also found that clients felt their lawyers supported them through by explaining the process and options and advocating important points when needed. This was particularly helpful for clients who experience additional complex factors such as family violence.

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<sup>18</sup> <https://www.legalaid.vic.gov.au/about-us/news/recognising-role-of-lawyers-in-family-dispute-resolution>

The AIFS evaluation of the CFDR pilots, in 2012 also provides useful insights into how a multidisciplinary approach to the LAFDR model could be developed.

Relevant to any discussion around LAFDR is the access to legal representation for family violence victims in the family law system and an increase in government funding for LAFDR models. There is a growing number of family violence victims who are falling through the ever growing cracks of the legal aid system. Women find themselves unable to access legal aid due to the narrowing of the legal aid family law guidelines and who are without the financial means to pay the fees of private family practitioners.

WLSV's Small Claims, Large Battles report includes recommendations that the Australian Government fund an expansion of existing models of legally assisted Family Dispute Resolution, to give greater access to vulnerable parties seeking property settlements.

### Recommendation 5: Expand existing models of Legally Assisted Family Dispute Resolution (LAFDR) in family violence matters

- 5.1 The Australian Government expand existing models of Legally Assisted Family Dispute Resolution (LAFDR) in family violence matters
- 5.2 The Australian Government resource Legal Aid Commissions to broaden LAFDR availability for priority clients. This would enable to access existing models of LAFDR, with better outcomes for the most vulnerable
- 5.3 A nationally consistent risk assessment framework apply to all LAFDR models to ensure that safety risks are effectively identified and managed throughout the process

### Financial Recovery of family violence for victim-survivors in the family law system

Awareness of economic abuse in all its forms has been increasing over the past five years. Economic abuse seriously compromises women's ability to exercise autonomy and decision-making. The element of control is always a factor in economic abuse and it predominantly happens alongside other forms such as physical, emotional and sexual violence. However, it is often not understood as a significant physical security risk. The risk of economic abuse is often minimised, and it often will not satisfy a family violence interim intervention order on its own.

Economic abuse is almost a universal experience for women reporting to family violence services. Of the total number of women across Australia who access family violence services, around 85% would say that they had had some level of financial abuse as part of the coercive control in a relationship.<sup>8</sup> Economic abuse can take various forms (controlling all finances, not allowing oversight or input into financial decisions, not providing the basic necessities,

interfering with employment, generating debt in her name with no benefit to her, refusing to contribute financially to joint loans, etc).

The way that health, housing, access to services, including legal services, and women's economic independence impact on the ability of women to escape domestic violence

WLSV's research has demonstrated that improving the timely, efficient and effective resolution of financial issues for women experiencing family violence improves the ability of women to gain financial independent and financially recover.

As outlined above, In 2014 WLSV set up a project called *Stepping Stones* to investigate the barriers to financial recovery that family violence victims were facing. The *Stepping Stones* project delivered its final report to the Attorney-General in September 2015. The two year project assisted 170 women to reduce their collective debt by over \$250K. Since then, WLSV has continued to employ financial counsellors and social workers to assist to reduce the financial hardship of women post-separation and to improve their emotional wellbeing.

Following on from the success of the Stepping Stones project, in 2016, the Small Claims, Large Battles project was established to investigate and document the experience of vulnerable women seeking family law property settlements. Throughout the project, approximately 48 women were able to access free legal assistance, with the support of pro-bono law firms, to resolve their family law small property disputes. The final report highlighted the fact that the length, cost, difficulty and complexity of accessing fair financial entitlements through the family law system makes it virtually inaccessible for many women who need financial security the most, (such as women already experiencing poverty).

WLSV's Small Claims, Large Battles report includes 15 recommendations for reform which will improve the timely, efficient and effective resolution of property disputes in family law proceedings. WLSV's recommends the Committee support the 15 recommendations including:

- Streamlining court processes ( recommendations 1-3)
- Improving financial disclosure (recommendation 4)
- Superannuation (recommendations 5-8)
- Dealing with joint debts (recommendation 9)
- Responding to family violence (recommendations 10-12)
- Role of state and territory courts (recommendation 13)
- Transfer of property and enforcing orders (recommendation 14 and 15)

These reforms are crucial for ensuring that the system is fair for women seeking fair financial outcomes after relationship breakdown so that they can financially recover from the relationship. AIFS research has demonstrated that family violence has had a negative impact on property settlement outcomes. In one study, women who reported experiencing severe

abuse were approximately three times more likely to receive less than 40% of the property pool.

WLSV commends the Australian Government for committing to implement key recommendations from the report. This commitment was announced in the Women's Economic Security Statement (WESS) in November 2018<sup>19</sup>. The Australian Government announced<sup>20</sup>, the funding of three key recommendations from WLSV's Small Claims, Large Battles project:

- \$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).
- \$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
- \$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.

Subject to the outcomes of the lawyer-assisted family law property mediation trial, ongoing funding should be provided to allow more vulnerable individuals to receive legal assistance to access a small property settlement post separation.

Subject to the outcomes of the small claims property pilots in the Federal Circuit Court of Australia (FCC), over the next 2 years, the FCC should be provided with more resources to operate small property court services at all FCC locations across Australia, including at regional circuit court locations

### Simplifying superannuation splitting in the family law system

WLSV's Small Claims, Large battles report highlighted the barriers that women are facing accessing small entitlements to superannuation after relationship breakdown through the family law system. The majority, 87%,<sup>21</sup> of women assisted in the Small Claims, Large Battles project experienced financial abuse. The two main barriers are financial disclosure and the complexity of the system itself. The first barrier was addressed in the WESS announcement outlined above. The ATO is currently designing the information sharing system with the

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<sup>19</sup> <https://www.ag.gov.au/FamiliesAndMarriage/Families/Pages/supporting-women-to-recover-financiallyafter-separation.aspx>

<sup>20</sup> Joint Select Committee on Australia's Family Law System Submission 701

<sup>21</sup> <https://www.womenslegal.org.au/files/file/WLSV%20Small%20Claims%2C%20Large%20Battles%20Research%20Report%202018.pdf> p.10



courts, however this work has stalled. We refer to the Committee to an ABC report that was aired on ABC radio on 23 July this year which outlined why the Government needs to press ahead with the reform agenda.<sup>22</sup>

Over the past year WLSV has been working closely with key stakeholders in the superannuation industry including the Australian Institute of Superannuation Trustees (AIST), Women in Super and HESTA, to address the second barrier – the complexity of the system. Progress is being made. Key to these reforms are the implementation of recommendations 5-8 of the Small Claims, Large Battles report, to simplify the superannuation splitting in Australia. In September last year, an industry roundtable was held to discuss the reforms and how the superannuation industry could develop and endorse a simplified template order. WLSV is continuing to lead the industry towards reform, in partnership with AIST, Women in Super and HESTA, this year. Staff from the Attorney General’s Department (Family Law division) are also assisting WLSV to progress these reforms and judges in the Federal Circuit Court of Australia have been providing valuable input. The superannuation industry has to date agreed, in-principle, to a standardised superannuation splitting draft order template and procedural fairness letter.

We invite the Committee to seek an update from WLSV prior to the final report of the Committee being handed down.

### Recommendation 6: Improve the financial security of women after relationship breakdown

- 6.1 The Australian Government continue to support and work towards the implementation of recommendations from WLSV’s Small, Claims, Large Battles report
  - 6.1.1 Streamlining court processes for small claims ( recommendations 1-3)
  - 6.1.2 Improving financial disclosure in property matters (recommendation 4)
  - 6.1.3 Supporting the simplification of the superannuation splitting system (recommendations 5-8)
  - 6.1.4 Dealing with joint debts in the court system more effectively (recommendation 9)
  - 6.1.5 Responding to family violence in property matters (recommendations 10-12)

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<sup>22</sup> <https://www.abc.net.au/news/2020-07-23/superannuation-scheme-to-protect-domestic-violence-survivors-no/12473102>