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The Australian Law Reform Commission
Level 40, MLC Tower
19 Martin Place
SYDNEY NSW 2000

By Email: familylaw@alrc.gov.au

Dear Executive Director

Review of the Family Law System – Submission in Response to Issues Paper

Gowland Legal thanks the Australian Law Reform Commission (ALRC) for the opportunity to comment on the *Review of the Family Law System* Issues Paper.

Our submission is **enclosed**.

Yours faithfully
Gowland Legal

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Encl:

INTRODUCTION

1. Gowland Legal thanks the Australian Law Reform Commission (ALRC) for the opportunity to comment on the *Review of the Family Law System*.
2. Gowland Legal is a law firm in Sydney's Inner West. The objective of our practice is to provide client-focused legal advocacy and support. The heart of our practice is "*Client's first. Always.*"
3. I, Lyndal Gowland, Principal Solicitor of Gowland Legal, have worked extensively with community legal centres including 5 years at Redfern Legal Centre as well as with Indigenous legal services across remote and regional Australia. I also have substantial experience of working directly with Family Dispute Resolution Practitioners (FDRPs). I was employed for 2 years as the solicitor attached to a Family Relationship Centre to assist the FDRPs. Further, I hold a Masters in Family Law.
4. A significant proportion of the work Gowland Legal does involves providing family law services to women and children who have experienced domestic violence.
5. The focus of this submission will be on the need to better protect children and victims of domestic violence in the Family Law system. We note that overwhelmingly victims of domestic violence are women.
6. Gowland Legal supports the five key steps of the Safety First in Family Law Plan, prepared by the Women's Legal Service (WLS).
7. In this submission, based on our extensive experience with domestic violence matters in the Family Law System, Gowland Legal will make the following recommendations:

Recommendation 1: That procedures are implemented early in the Court process to identify and assess risk in matters that involve domestic violence.

Recommendation 2: That the safety of the children be the paramount consideration in family law matters.

Recommendation 3: That self-represented litigants be prohibited from cross-examination.

Recommendation 4: That the Family Law System supports victims of domestic violence rather than victim-blaming.

Recommendation 5: That Family Dispute Resolution (FDR) is not imposed where there are genuine legal issues at stake that cannot be resolved without an authoritative ruling from a judge.

Recommendation 6: That financial hardship experienced by victims of domestic violence is recognised and that the law is amended to reflect this.

Recommendation 7: That more training is provided to all family law professionals in relation to domestic violence and trauma.

Recommendation 8: That measures are put in place to assist the Child Support Agency (CSA) in correctly identifying and recovering child support payable.

Recommendation 9: That evidence from the (CSA) and the Australian Taxation Office (ATO) be allowed to be admitted.

Recommendation 10: That a complaints process be established for FDRPs.

SUBMISSIONS

Recommendation 1: Early Risk Identification and Risk Assessment

8. In our experience a high proportion of family law matters that are litigated involve domestic violence.
9. The identification of risks associated with domestic violence is the first step towards supporting families to reduce and manage these risks. It could allow referrals to be made to appropriate support services and could assist the court to put in place measures to ensure that the legal process is conducted as safely and equitably as possible.
10. Gowland Legal recommends that the Australian Government, working with state and territory governments through the Council of Australian Government (COAG), develop a national risk assessment framework for use by the Family Law Court Registry. We recommend that the Australian Government consider adopting an established state and territory risk assessment framework, and that any national assessment framework should be:
 - a. Consistent nationally;
 - b. Multi-method, multi-informant, while placing particular emphasis on the victim's own assessment of risk;
 - c. Culturally sensitive, and
 - d. Supported by appropriate training.
11. Gowland Legal also recommends that the Australian Government incorporates specialist domestic violence services into the Family Law System.

Recommendation 2: Safety of Children to Be the Paramount Consideration

12. The 2006 reforms of the *Family Law Act* introduced the "equal shared parental responsibility" (ESPR) presumption and the requirement that, if ESPR is ordered, the court must consider ordering equal time or substantial and significant time, if it is in the best interests of the child and it is workable.
13. The presumption of ESPR is not meant to apply in cases of violence and abuse because it is recognised that it would be not be in the best interests of the children for an abuser to be involved in long-term decision-making about someone they have abused or exposed to domestic violence. However, currently, the Family Law System has difficulty identifying and assessing domestic violence risk early. Further, the challenges to identifying domestic violence also arise in the current context where Courts are overburdened, under-resourced, and judicial officers and family law professionals have only limited training on the dynamics of domestic violence.

14. It is for these reasons that Gowland Legal strongly supports and recommends the removal of the language of “equal shared time,” “substantial and significant time” and “equal shared parental responsibility” from the *Family Law Act* to shift the culture and practice towards a greater focus on children’s needs and their safety.

Recommendation 3: Self-Represented Litigants

15. It is our experience that perpetrators of domestic violence use legal harassment to bully, intimidate and abuse the victim through the Family Law System.
16. An example of legal harassment is a perpetrator of domestic violence representing themselves in Family Law Proceedings and subsequently being able to cross-examine the victim. Their ability to do this does not protect victims from the effects of being directly confronted from their perpetrator, and therefore facilitates the continuation of abuse and re-victimisation. Despite the current safe-guards put in place, such as the Family Violence Best Practice Principles, when a judicial officer intervenes in cross-examination to prevent improper questioning, the Court does not have the power to protect the cross-examined party from the effects of direct personal confrontation. The removal of this unnecessary trauma on the victim by implementing prohibitions on cross-examination by a perpetrator, would put victims in a better position to use the Family Law Courts effectively and achieve better outcomes for themselves and their children.
17. Gowland Legal recommends that a prohibition be introduced against personal cross-examination in matters where violence is alleged. In such cases, the court should order that a lawyer be funded by way of Legal Aid to act as a “mouthpiece” through which the perpetrator could ask questions of the affected family member in cross-examination. Further, if requested, a self-represented victim would also be able to be provided with a lawyer through which they may ask questions of the perpetrator in cross examination.

Recommendation 4: Victim Blaming

18. It is our view that in cases where domestic violence is present, it is common that rather than holding the perpetrator of the violence to account, the victim is punished for not acting in a protective manner.
19. It is often the case that if a victim is unable to leave a violent relationship within a suggested and often arbitrary timeframe, they will be viewed as failing to act protectively over the children. It is therefore the victim who is unfairly seen as responsible for dealing with the consequences of violence in a child protection context. This view fails to recognise that when a victim leaves a relationship, it is one of the most dangerous times of the relationship and requires planning and support.

20. Gowland Legal recommends that early intervention strategies should be developed to include early intervention services working with victims of domestic violence to strengthen their protective parenting capacities.

Recommendation 5: Family Dispute Resolution

21. Our experience is that FDR, while appropriate and effective in some cases, is not always suitable, especially when matters are of a serious nature.
22. For example, it is our view that matters cannot be mediated when they relate to what is in the best interests of the children, where the children's safety is in question. This instead requires judicial intervention and a ruling founded on a clear and deep understanding of the law. Further, it is our view that two parties to FDR do not necessarily meet on truly equal terms. FDR presents a significant power imbalance, especially for women who are victims of domestic violence.
23. Discussions that take place during FDR are usually confidential and not admissible in later legal proceedings. Confidentiality in FDR presents a problem when there is a power imbalance. For example, when a woman is subject to a power imbalance, confidentiality provides her no protection from a failure on the part of the other party to disclose information, and no protection from their disclosure of false information. Further, lack of information as to the true state of the family's financial affairs may contribute to a woman's decision not to pursue a more equitable outcome, or a woman may decide to compromise on financial issues in order to ensure she obtains residence of the children, without knowing the full extent of the compromise she is making.
24. Problems may also arise where family law disputes are resolved in FDR and are therefore not subject to the public interest standards developed by the Courts in relation to, for example, the best interests of the children and domestic violence. It is of particular concern that FDR privatises issues of violence and has no means of properly protecting a victim of violence. In FDR the perpetrator of violence may feel further empowered by the private context the process affords their violent behaviours. Therefore, FDR may be facilitating the continuation of the cycle of abuse which is clearly interests of the children.

25. FDR practitioners (FDRPS) are required to be neutral, however in our experience this is rarely the case. It is widely reported in social science that true neutrality is almost impossible to attain. The misconception that FDRPs are neutral is problematic as it may form the parties' basis of trust in both the FDRP and the process. This trust is ill-considered when a FDRP uses their control over the process to create more opportunities for a certain option to be explored, or to steer the parties around obstacles and into the desired direction of thought.

Case Study

We recently attended a Court-ordered FDR.

The FDRP accepted the father's agenda for the FDR, in opposition to the mother's strong disagreement.

The mother agreed to attend mediation solely for property issues. However, the father wanted parenting/shared care and property.

During the FDR there was overt bias by the FDRP. Firstly, the FDRP imposed the father's agenda upon the mother and continually tried to pressure her into accepting a shared care arrangement. It was clear that the FDRP did not know the relevant law in relation to the children's best interests. Secondly, after asking both parties for their issues, the FDRP only identified the father's issues as relevant for the session. Thirdly, the FDRP caused a halt when the father did not want to discuss the property any further, advising the mother that there was no further time to discuss property issues, despite having an addition 45 minutes left in the FDR. Fourthly, the FDRP advocated that the law and social science supported the father's shared care proposal. This resulted in a power imbalance.

No agreement was reached on the day.

26. It is particularly fraught when the mediator is a perpetrator themselves. For example, in one of our matters we acted for a mother where the father was the other party and the father's part time occupation was an FDRP. The father was a perpetrator of violence and he consistently put his needs before the child's needs. The father breached confidentiality and in affidavit material he disclosed the contents of the FDR and he abused his knowledge of the family law systems to adversely affect the mother and their children.
27. Further, it cannot be ignored that FDRPs have personal goals and professional ambitions to achieve successful resolutions in FDR. This has the potential for parties to be coerced into acquiescing during FDR, despite the outcome not being the most equitable outcome and in the best interests of the children.
28. The voluntary nature of FDR must also be called into question. For example, parties may accept FDR despite the power imbalance, as a result of economic pressures,

such as prohibitively high legal costs but ineligibility for Legal Aid, or a desire to channel whatever resources they have into the children and housing instead of into litigation costs. The new focus on FDR in the family law context, found in Parts III and VIII of the *Family Law Act*, merely heightens the pressure parties are under to agree to participate in mediation, even though mediation may not be the most appropriate path and has the potential to be extremely disadvantageous to their interests. Further, where a party is receiving Legal Aid, their attitude during FDR to compromise are part of the assessment as to whether they are deserving of continued Legal Aid. This could lead to the party compromising to something that is not in the best children's best interests.

29. Gowland Legal recommends that FDR is not imposed where there are genuine legal issues at stake that cannot be resolved without an authoritative ruling from a judge.
30. However, where FDR may be appropriate, Gowland Legal recommends that a national legally-assisted FDR program for domestic violence cases that is supported by specialist domestic violence lawyers as well as domestic violence and trauma informed FDRPs is implemented and funded.

Recommendation 6: Financial Recovery Following Domestic Violence

31. In our experience victims of domestic violence often experience significant financial hardship.
32. Victims of domestic violence often experience financial abuse during the relationship, which commonly continues post-separation.
33. Research has confirmed that women who have experienced domestic violence are more likely to accept unfair property settlements than other women.
34. The *Family Law Act* does not currently contain explicit reference to the relevance of violence in deciding property settlements. Currently, the only way in which violence or abuse might be accounted for in a property settlement is by way of a "Kennon adjustment." However, this mechanism for acknowledging the financial impact of violence is severely limited. Firstly, the language of sections 79 and 75 limits its scope. Therefore, such an adjustment allows a judge to consider whether domestic violence impacted on the domestic violence victim's contributions to the relationship. Further, the judge may consider the extent to which domestic violence has created future needs as defined under section 75(2). However, such a judgment cannot take into account that the perpetrator of violence may have made a 'negative contribution' to the relationship through violence that should be considered in the assessment of contributions.

Secondly, it requires the victim to prove a causal connection between violence and financial hardship. This is problematic as proving intangible violence such as emotional violence or controlling behaviour, and its financial consequences, is more difficult.

Thirdly, research indicates that in practice they are applied infrequently and their effect on the ultimate division of property is minor.

35. Gowland Legal recommends that the Australian Government amend the *Family Law Act* as follows:

- a. Amend Section 79 to include a new subsection (s79(4A)), directing the Court to have regard to the effects of domestic violence on both parties' contributions. This would require the court to take domestic violence into account as a negative contribution by the perpetrator in addition to the requirement in Kennon's case to recognise where domestic violence has impacted on a victim's capacity to make contributions and value those missed contributions, and
- b. Amend s 75(2) to include a new paragraph in the list of factors the court considers when deciding an application for spousal maintenance. It would direct courts to consider the effect of domestic violence perpetrated in the relationship by either party on the financial circumstances of the parties.

Recommendation 7: Proper Training Be Given to Judicial Officers, Court Staff and Family Law Professionals

36. It is our experience that judicial officers, court staff and family law professionals require further training in the areas of domestic violence.
37. It is also our experience that when conscious or unconscious bias of a decision maker, report writer or FDR practitioner affects a family law outcome, this can have devastating consequences for the individual involved, especially in relation to domestic violence matters.
38. Gowland Legal recommends that the Australian Government funds, and together with the Judicial College of Australia develops, a continuing joint professional development program for judicial officers from the family courts and state and territory courts in which judicial officers preside over matters involving domestic violence. We recommend that this training package includes content on domestic violence (including recognising dynamics of domestic violence and unconscious bias), cultural competency, working with victims of trauma, family law (for state and territory judges) and child protection.
39. We also recommend that the Australian Government fund and co-ordinate the development of a national, comprehensive domestic violence training program for family law legal professionals (including ICLs and FDR practitioners) and work with state and territory law institutes and bar associations to roll out the training.

Recommendation 8: Child Support

40. We note that child support was not referenced in the Issues Paper.
41. We draw your attention to child support, because in our experience this is a significant issue in Family Law proceedings, which can disadvantage victims of domestic violence.
42. One area of concern is that in our experience perpetrators of domestic violence often mislead the CSA as to their income and resources, and therefore are not required to pay the actual rate of child support. For example, they will provide the CSA with an income that is far less than what they have provided on their Financial Statement filed in Court.
43. Gowland Legal recommends that parties be able to provide the CSA with any evidence before the Family Law Courts as supporting evidence in relation to the other party's true income.

Recommendation 9: Evidence

44. Currently subpoenas are not able to be issued to the CSA and the ATO.
45. In our experience this is very problematic as often perpetrators of domestic violence do not provide full and frank financial disclosure. Subpoenaed material from the CSA and the ATO would be beneficial in obtaining evidence as to the perpetrators true financial position. This evidence is integral in aiding an equitable outcome as well as an outcome that is in the children's best interests. In addition, such comprehensive financial evidence expedites outcomes and facilitates negotiated outcomes, especially in property settlements.
46. Gowland Legal therefore recommends that subpoenas are able to be issued to the CSA the ATO.

Recommendation 10: Complaints Process

47. FDRPs can play a critical role in the Family Law System.
48. Despite the FDRPs critical role and the impact they may have on outcomes in relation to the best interests of the children, there is currently no avenue for raising concerns with respect to FDRPS or ensuring that they are appropriately trained to handle cases in particular where there is domestic violence and risk to children.
49. Gowland Legal recommends that the Australian Government through the Attorney General's Department and in consultation with domestic violence and family law experts, coordinate the development of consistent training, an accreditation process and minimum standards for FDRPs. In addition, that the training and accreditation

process and minimum standards include a focus on capabilities in relation to understanding and identifying domestic violence and trauma-informed practice.

50. Further, Gowland Legal recommends that the Australian Government establish an oversight mechanism and complaints process to monitor and review the conduct of FDRPs.