

ANROWS

AUSTRALIA'S NATIONAL RESEARCH
ORGANISATION FOR WOMEN'S SAFETY
to Reduce Violence against Women & their Children

The Executive Director

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

By email: info@alrc.gov.au

Re. Submission on review of the Family law system

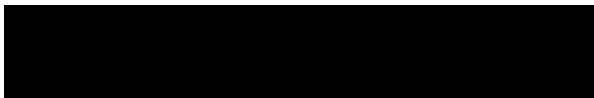
Dear Executive Director

Australia's National Research Organisation for Women's Safety ("ANROWS") is pleased to make a submission on the review of the family law system to the Australian Law Reform Commission and we very much appreciate the extension granted to make this submission.

The submission addresses questions 4-9 and 11-12 set out under the overarching theme 'Access and Engagement', as well as each of the questions set out under 'Integration and Collaboration'. Much of our response is informed by key findings from research commissioned by ANROWS.

Please do not hesitate to contact me should you require further information about the content of ANROWS' submission.

Yours sincerely



Dr Heather Nancarrow
Chief Executive Officer

30 May 2018

Review of the Family Law System

Submission to the Australian Law Reform Commission to ensure the family law system meets the needs of families and effectively addresses family violence and child abuse

May 2018

ANROWS

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Introduction

Australia's National Research Organisation for Women's Safety Limited ("ANROWS") is an independent, not-for-profit organisation established as an initiative under Australia's National Plan to Reduce Violence against Women and their Children 2010-2022 ("National Plan"). ANROWS is jointly funded by the Commonwealth and all state and territory governments of Australia. ANROWS was set up with the purpose of establishing a national level approach to systematically address violence against women and their children. Our mission is to deliver relevant and translatable research evidence which drives policy and practice leading to a reduction in the incidence and impacts of violence against women and their children.

Every aspect of our work is motivated by the right of women and their children to live free from violence and in safe communities. We recognise, respect and respond to diversity among women and their children and we are committed to reconciliation with Aboriginal and Torres Strait Islander Australians.

Our strategic goals include:

1. Delivering high quality, innovative and relevant research.
2. Ensuring the effective dissemination and application of research findings.
3. Building, maintaining and promoting collaborative relationships with and between stakeholders.
4. Being an efficient, effective and accountable organisation.

To achieve these goals, we work with a wide range of stakeholders. These include: funders; policy-makers; domestic, family and sexual violence service providers and practitioners; primary prevention organisations; peak bodies; and researchers.

ANROWS is pleased to have the opportunity make a submission to the Australian Law Reform Commission ("ALRC"). In this submission, we focus our attention on how the family law system and family law related services can be improved to assist victim-survivors of domestic and family violence. This will involve discussing ways to improve accessibility for victims from vulnerable populations namely, Aboriginal and Torres Strait Islander people, culturally and linguistically diverse communities, people with disability, Lesbian, gay, bisexual, transgender, intersex and queer ("LGBTIQ") people, people living in rural, regional and remote areas, and self-represented litigants. Much of ANROWS's response to the ALRC's Terms of Reference is drawn from ANROWS commissioned research undertaken since its establishment in 2010 as a not-for-profit organisation under the National Plan.

PART 1: Access & engagement

Question 4)

How might people with family law related needs be assisted to navigate the family law system?

System navigation assistance: A gendered approach

Research demonstrates that domestic and family violence are common issues that arise during marital separation, and that perpetrators often use the family law system to reassert their power and control over the victim through a range of litigation tactics (Macvean et al., 2015; Humphreys & Healey, 2017; Kaspiew et al., 2017). The potential for system abuse highlights the need for the family law system to apply a gendered approach that holds perpetrators accountable for their acts of violence, and places an emphasis on the safety and wellbeing (emotional, psychological and physical) of victims while navigating the family law system (Breckenridge, 2015). The application of a gendered approach to assist victims with navigating the family law system involves:

- Facilitating the early identification of, and response to, domestic and family violence; and
- Considering the legal and non-legal support services required to support the early identification of, and response to, domestic and family violence.

How these two key recommendations assist victims of domestic and family violence with family law related needs in navigating the family law system, are discussed in further detail below.

a) Facilitating early identification of, and response to, domestic and family violence

Where allegations or findings of domestic and family violence exist in instances of family breakdown and separation, the family law system must ensure that family courts put an end to the litigation tactics of perpetrators by facilitating the early identification of, and response to, domestic and family violence (Humphreys & Healey, 2017). This can be achieved by increasing the availability of family law duty lawyers including other non-legal service providers (i.e. social support services). This aligns with the proposed gender approach which brings to focus the safety and wellbeing of victims while navigating the family law system.

b) Considering the legal and non-legal support services required to support the early identification of, and response to, domestic and family violence

In order to assist victims of domestic and family violence in navigating the family law system, it is crucial that the family law system assume that, in the majority of cases that present before the family courts—66% (Brown et al., 2001) and 61.6% (Bagshaw et al., 2010)—domestic and family violence forms one

aspect of family breakdown or separation disputes. This includes family court proceedings relating to the division of property.

Taking this into account, it is essential that the family law system consider the following legal and non-legal support services to facilitate early identification of, and response to, family and domestic violence to assist victims in navigating the family law system:

- Increase availability of family law duty lawyers including other non-legal service providers (i.e. social support services);
- Increase the availability of free or low cost advice on financial and property matters after separation;
- Implement a default child protection approach that applies the principles of child protection services by developing protocols that have a positive impact on the family court arena and mitigate post-separation child abuse;
- Increase recognition by Australian Family Law courts of the relevance of family violence in property division under the *Family Law Act 1975* (Cth) (Fehlberg & Millward, 2014);
- Train legal and non-legal court staff including family law duty lawyers to raise awareness about family violence issues, and improve the capacity of staff to assist women affected by violence.

Question 5)

How can the accessibility of the family law system be improved for Aboriginal and Torres Strait Islander people?

Aboriginal and Torres Strait Islander people

ANROWS research suggests that Indigenous-led initiatives are most effective in improving the engagement of Aboriginal and Torres Strait Islander people with the family law system including domestic violence related services (Blagg et al., 2018; Olsen & Lovett, 2016). To improve accessibility of the family law system for Aboriginal and Torres Strait Islander people, the family law system must take into account the following (Olsen & Lovett, 2016):

- Indigenous family violence is, in part, attributed to the breakdown of traditional culture and kinship practices (Olsen & Lovett, 2016). Therefore, the rebuilding of these family and kinship ties plays a central role in developing responses to Indigenous family violence.
- The effectiveness of generalised services and programs is dependent upon how they are operated, namely whether this is in a culturally sensitive way and/or in partnership with Indigenous organisations (Olsen & Lovett, 2016).
- The criminal justice system, through specific domestic violence legislation, is often used as the means for dealing with Indigenous family violence. However, for some Indigenous

communities a criminal justice response to Indigenous family violence is not considered appropriate. In such instances Indigenous sentencing courts are preferred as they allow for Indigenous Elders and community representatives to participate in the law and order process aimed at healing relationships and rehabilitating offenders (Olsen & Lovett, 2016). Although the family law system is not part of the criminal justice system and its primary purpose is not to deal with domestic violence, these factors are sometimes conflated in the perspective and experience of Aboriginal and Torres Strait Islander peoples (and others).

That said, the following recommendations are identified as key in improving accessibility of the family law system including domestic and family violence services (Blagg et al., 2018; Olsen & Lovett, 2016):

- Developing trauma informed practice that acknowledges the intergenerational impact and legacy of government policies such as removing children from their families (Blagg et al., 2018);
- Increasing inclusion and visibility of Indigenous artefacts displayed in family courts, including Elders flanking the Judge (Blagg et al., 2018).
- Allowing Elders and other respected persons to be at the center of intervention and devising diversionary programs for Aboriginal and Torres Strait Islander clients (Blagg et al., 2018).
- A need to recognise that domestic violence is not merely an exceptional form of harm, attached to male power, but often derives from other sites of Indigenous crisis response such as suicide, mental health, drug and alcohol abuse, and inter-generational trauma (Blagg et al., 2018);
- Innovations in court practices, particularly the family court, that simplify proceedings and ensure victim safety. Such practices would also need to be mobile and flexible to ensure applicability to regional and remote parts of Australia. The Integrated Domestic Violence Court's "one family/one judge" response (Neighbourhood Justice Centre, Collingwood) provides an effective and positive example (Blagg et al., 2018).

Question 6)

How can the accessibility of the family law system be improved for people from culturally and linguistically diverse communities?

Culturally and linguistically diverse communities

Much of ANROWS's research on culturally and linguistically diverse communities focuses on the experiences of immigrant and refugee women. In addressing the barriers, and improving accessibility of the family law system for those from culturally and linguistically diverse communities, the following recommendations are identified as key:

- Reducing pressures experienced throughout the system from police officers, courts, domestic and family violence services, child protection and legal services (Vaughan et al., 2016);

- Reducing costs associated with assisting immigrant and refugee women and their children, particularly those with no income who require assistance for complex legal, immigration and protection matters (Vaughan et al., 2016);
- In instances where immigrant and refugee women are living in regional areas, there is a need for increasing the availability of interpreters and migration legal services including pro-bono migration legal services, as geographical isolation and limited transport options compound the difficulties connected to accessing the family law system (Vaughan et al., 2016);
- Ensuring that court and legal materials and/or forms (hard-copy and online) provide clear and accurate information about the rights of immigrant and refugee women as they navigate complex legal systems for family violence, family law and immigration matters (Vaughan et al., 2016);
- Supporting the availability, and training, of interpreters to avoid inaccurate interpretations in court settings and unlawful disclosure of confidential information with the families and communities of victims (Vaughan et al., 2016). This includes understanding vocabulary limitations, taboos and providing counselling support for vicarious trauma or the re-traumatising of interpreters (Vaughan et al., 2016); and
- Putting appropriate measures in place so as to prevent the abuse of the family law system by perpetrators of violence as an intimidation tactic (Vaughan et al., 2016).

Question 7)

How can the accessibility of the family law system be improved for people with disability?

People with disability

Women with disability face significant challenges in accessing justice in relation to violence that they experience (Maher et al., 2018). A majority of the cases captured in our research were instances of domestic and family violence, broadly defined, meaning they occurred within a family or caring context (Maher et al., 2018). Research highlights that violence for people with disability takes many forms such as withholding required medications or aids, limiting access to disability support services or mainstream service providers, and threats related to women's mothering and care-giving roles (Maher et al., 2018). This is significant given that avenues to seek justice are complex, and justice services may not effectively support the access of women with disability (Maher et al., 2018).

Taking the above into account, the research recommends that accessibility to the family law system for people with disability can be improved by:

- Listening to the voices of women with disability and believing them, as this brings to focus women's own accounts. Responses that trivialise women's disclosures, or the violence they experience deny their legal capacity, and access to supports and services (Maher et al., 2018);

- Understanding that women with disability face particular and sustained challenges in achieving everyday safety and security (Maher et al., 2018). Without a secure living situation in which women with disability can feel confident, referrals and other forms of support to access the family law system have little chance of succeeding (Maher et al., 2018);
- Creating awareness around the legislative frameworks that often diminish the legal capacity of women with disability (Maher et al., 2018). This is routinely denied or inhibited, and appropriate communicative methods are generally not offered (Maher et al., 2018). Consequently, agency to act as full citizens before the law is not accorded to women with disability (Maher et al., 2018).
- Recognising the detrimental impact of “siloes” knowledges operating within the family law system, and legal system more broadly (Maher et al., 2018). While the impacts of assumptions and siloes knowledges vary according to different sectors and service agencies: the outcome is that women’s access to justice is often contingent on partial knowledge, insights, skills and service delivery models (Maher et al., 2018).
- Developing and providing cross sectoral training packages to address the current “siloes” knowledges and expertise around support for women with disability to access justice within the family law system (Maher et al., 2018). Such training will need to embed knowledge about how the experiences of violence at the intersections of gender, disability, indigeneity, cultural diversity and other forms of social disadvantage impact access to justice (Maher et al., 2018).

Question 8)

How can the accessibility of the family law system be improved for lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) people?

LGBTIQ people

With the recent legislative marriage reforms, it is important that the family law system adapts to provide an adequate and gender neutral forum for addressing domestic and family violence, family law and child protection matters (Macvean et al., 2015). Although, there is currently limited research available on domestic and family and violence behaviours within the LGBTIQ community, as part of our commitment to policy-relevant empirically grounded research, ANROWS has commissioned research entitled, *Developing and testing LGBTIQ programs for perpetrators and survivors of domestic and family violence* (Kolstee et al., 2018).

The literature currently suggests that stressors associated with belonging to a sexual minority group have been found to interact with the negative impacts of domestic and family violence to exacerbate vulnerabilities, increase risk for complex trauma, and create additional barriers to service access including the family law system (Stiles-Shields & Carroll, 2015). These barriers exist at societal,

institutional and individual levels, and include inequitable and ambiguous legislation; judgemental and prejudiced social and cultural attitudes; inadequate theories of domestic and family violence dynamics; heterosexist language; implicit and explicit attitudes of clients, staff and legal authorities; lack of understanding; stigma; risks of outing; community ties; and re-victimisation (Calton et al., in press; Duke & Davidson, 2009; Simpson & Helfrich, 2007; Simpson & Helfrich, 2014).

Therefore, in order to improve LGBTIQ accessibility of the family law system, implementation of the following is necessary:

- amending court forms and other family law related forms and applications to expand the gender categories from male or female, and provide an option for preferred pronouns. Such prevents the continued use of heterosexist language and allows for inclusivity;
- informing judicial officers, lawyers, family consultants and other professionals involved in the family law system about contemporary social and cultural norms, and address outdated and inadequate theories of domestic and family violence dynamics; and
- reforming the parental provisions contained in Part VII of the *Family Law Act 1975* (Cth) to recognise the greater diversity of family structures in contemporary Australia.

Question 9)

How can the accessibility of the family law system be improved for people living in rural, regional and remote areas of Australia?

People living in rural, regional and remote areas

ANROWS research identifies the following as key in improving accessibility of the family law system for people living in rural, regional and remote parts of Australia:

- Embedding family law services within their local community contexts (Wendt et al., 2017). This can be achieved by providing additional staff training to support local family law services in meeting their family law workloads and outreach casework;
- Providing adequate levels of staffing and funding to enable local family law service providers to reach across large distances; and
- Investing in a range of responses to domestic and family violence that move beyond crisis response and accommodation (Wendt et al., 2017). For example, expanding the areas in which the Federal Circuit Court of Australia sits including increasing the provision and frequency of face-to-face family dispute resolution services.

Question 11)

What changes can be made to court procedures to improve their accessibility for litigants who are not legally represented?

Question 12)

What other changes are needed to support people who do not have legal representation to resolve their family law problems?

Self-represented litigants

Two recent ANROWS studies (Kaspiew et al., 2017; Taylor et al., 2016) have found that, in instances where there are allegations or findings of domestic and family violence, the existing arrangements to support families before the courts where one or more parties are self-represented were not effective. Both studies also found that a majority of victims of domestic and family violence have negative experiences with the family court system, which is largely attributed to three broad factors:

- safety issues;
- further coercion or re-traumatising; and
- traumatising legal process.

In many cases, these negative experiences resulted in “[n]ot all participants rais[ing] their experiences of family violence with family law system professionals” (Kaspiew et al., 2017, p. 193).

Future research

As part of ANROWS’ commitment to policy-relevant empirically grounded research, we have commissioned research entitled, *Exploring the impact of self-representation by perpetrators and victims of domestic/family violence and sexual assault in different legal settings*. This research will examine the impact of self-representation by one or both parties in family law proceedings involving allegations of family violence.

The project will consider all the potential issues that flow from self-representation including potential delays, frivolous claims, cross-examination, inappropriate questioning of other witnesses, use of proceedings to control or intimidate a victim, the capacity to effectively present and test evidence, and the possibility of adverse outcomes. It will also seek to assess the use of tools, services and other measures that have been developed to assist self-represented litigants with a particular focus is on the needs of parties experiencing family violence. The project aims to:

- Generate new knowledge regarding the impact of self-representation on participants' experiences of the family law process where the victim and/or the perpetrator of the violence are self-represented;
- Document current practice in family law courts when one or both parties are without legal representation and the matter involves allegations of family violence;
- Identify strengths, deficiencies or gaps in current practice; and
- Provide recommendations that seek to respond directly to the issues, concerns and practices that are documented in the research.

PART 2: Integration & collaboration

Question 31)

How can integrated services approaches be better used to assist client families with complex needs? How can these approaches be better supported?

Question 32)

What changes should be made to reduce the need for families to engage with more than one court to address safety concerns for children?

Integrated services and safety concerns

Victims of domestic and family violence have diverse and complex needs, and for this reason often require multiple services (Breckenridge et al., 2016). As a consequence, integrated service delivery is identified as key (Breckenridge et al., 2016). Research has identified three key factors as essential in facilitating collaborative and integrative approaches between domestic and family violence services and child protection to assist families with complex needs and address safety concerns (Connolly et al., 2017):

- integrated service focus;
- democratising practices; and
- partnership supportive collaboration.

a) Integrated service focus

The integrated service focus recognises that, at the very minimum, good collaboration across child protection and specialist domestic and family violence services is critical but must include broader family support services (Connolly et al., 2017). Such collaboration is essential to safe decision-making and practice for women and children within the family law system more broadly. The following core principles emerge from the research as key in informing effective integrated service provision:

- Focusing on enhancing victim's emotional, psychological and physical safety either in the short or longer term;
- Minimising secondary victimisation – for example, requiring women to recount their stories to multiple services—by improving capacity of legal and non-legal family court staff;
- Ensuring perpetrators are held accountable for their actions;
- Facilitating responsive and prompt decision-making; and
- Shifting away from the presumption of shared parental responsibility contained in the *Family Law Act 1975* (Cth), to a case-by-case approach in the child's best interests;

b) Democratising practices

Democratising collaborative processes ensures the right expertise is around the table, promotes shared and equal investment in safe outcomes for women and children including the importance of diversity in collaborative representation and the promotion of equal voices, both in decision-making and in the ongoing development of collaborative partnerships (Connolly et al., 2017). In a family law context, democratising practices translates to legal and non-legal services operating within the family law system in a collaborative and non-hierarchical manner, with a focus on the safety needs and inclusivity of women and their children in decision-making processes.

c) Partnership supportive collaboration

Partnership supportive collaborations focused on the safety needs of women and their children allows for effective information sharing and risk assessment (Connolly et al., 2017). However, information sharing within the family law system must be focused on perpetrator risk and history, as this prevents compromising the safety of women and their children (Connolly et al., 2017). Taking this into account, information sharing must be based on a victim-centred approach that requires the victim's informed consent. Such ensures that the victim has a clear understanding of what information will be shared, when it will be shared, and with whom it will be shared (Jones, 2016).

Question 33)

How can collaboration and information sharing between the family courts and state and territory child protection and family violence systems be improved?

Collaboration and information sharing improvements

ANROWS research highlights that two key factors are essential to improving collaborative partnerships between the family law system, state and territory child protection and domestic and family violence system (Connolly et al., 2017):

- a need to focus on the issues of safety for victims and children; and
- shifting attention to the risks of the perpetrator's use of violence to the safety and well-being of children and their mothers.

The application of these two key factors is recommended for Domestic Violence Protection Orders (DVPOs), where currently there remains considerable variance in the terminology, scope of behaviours and types of relationships covered, range of conditions on court orders, approaches to aiding and abetting breaches of orders, breach penalties, and local police and court practice (Australian Government Solicitor, 2009; The Australian Law Reform Commission & The NSW Law Reform Commission, 2010; Jeffries, Bond, & Field, 2013; Wilcox, 2010). Such differences compromise the safety of victims and children, and impede collaboration and information sharing between the family law system, state and territory child protection and domestic and family violence system. Consequently, improving collaboration and information sharing between these systems requires the following changes:

- Allowing further training in domestic and family violence, information-sharing, and privacy laws, including enforcing existing legislation for professionals in support services and agencies (Taylor et al., 2017).
- Reducing the impact of decisions made under the *Family Law Act 1975* (Cth) on the enforcement of DVPOs by addressing the intersecting and competing interests of child protection and DVPO legislation, and family law orders and decisions (Taylor et al., 2017).
- Establishing specific legislation that facilitates the process of information-sharing between states and territories on DVPOs (Taylor et al., 2017), and across legal jurisdictions.
- Establishing an integrated system response across jurisdictions which allows the development of protocols for courts and service delivery agencies to share information about family violence matters (Taylor et al., 2017).
- Ensuring that information-sharing protocols and guidelines place an emphasis on the safety of women and their children within an ethical framework (Taylor et al., 2017).

Concluding remarks

ANROWS commends the points of discussion raised by the Australian Law Reform Commissions' Issues Paper on reviewing the family law system. We appreciate this opportunity to contribute to the Commission's deliberations on this important social issue.

Domestic and family violence, with its multiple impacts, is a complex problem that requires a sophisticated, evidence-informed, concerted and integrated approach. Although there is a need for jurisdictional consistency, this is not to say that all instances of domestic and family violence should be treated the same. Indeed, people who have experienced or are experiencing domestic and family violence have diverse backgrounds and circumstances, and any assistance or attempts by the family law system to meet their needs must reflect this diversity. By drawing from ANROWS research evidence, this submission discusses how the family law system is able to achieve this better in its processes and outcomes.

In essence, ANROWS proposes that in order to improve the overall efficiency and effectiveness of the family law system a shift in focus to a more gendered approach is required to better facilitate early identification of, and response to, domestic and family violence in the family law system. Such an approach places the safety and well-being of victims' and their children at the centre of the process, and holds perpetrators accountable for their acts of violence.

ANROWS remains strongly committed to delivering relevant, accurate and translatable research evidence which drives reforms through policy and practice to reduce the incidence and impact of violence against women and their children. We would be very pleased to further assist the Commission, if required.

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