

Joint submission in response to the Australian Law Reform Commission's Review of the Family Law System Issues Paper

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The National Aboriginal and Torres Strait Islander Women Alliance, Harmony Alliance: Migrant and Refugee Women for Change and Australian Women Against Violence Alliance welcome the opportunity to make a submission to the Australian Law Reform Commission on the review of the family law system.

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About National Women's Alliances

AWAVA, NATSIWA and Harmony Alliance are three of the six National Women's Alliances funded by the Australian Government to bring together women's organisations and individuals across Australia to share information, identify issues and contribute to solutions, ensuring women's voices are heard in decision-making processes.

National Aboriginal and Torres Strait Islander Women Alliance (NATSIWA) is focusing to ensure that service delivery and access to the Family Law courts take in consideration the importance of culture to Aboriginal and Torres Strait Islander peoples and especially for women when acting in the best interest of the child. There has now been a shift in how many Aboriginal and Torres Strait Islander people are accessing the Family Law Court, and the courts are to take in consideration how they are going to meet the needs and how the courts can ensure that information is provided so that there are no barriers regarding culture and language when accessing the legal system. The courts need to review the problems of Aboriginal and Torres Strait Islander peoples and women of how there is limited access to the Family Law Courts and to raise the confidence on how they can access the Family Law court and utilise services offered by the courts.

Harmony Alliance: Migrant and Refugee Women for Change's purpose is to provide a national inclusive and informed voice on the multiplicity of issues impacting on experiences and outcomes of migrant and refugee women, and to enable opportunities for women from migrant and refugee backgrounds to directly engage in driving positive change.

Australian Women Against Violence Alliance (AWAVA)'s focus is on responding to and preventing violence against women and their children. AWAVA's role is to ensure that women's voices and particularly marginalised women's voices are heard by Government, and to amplify the work of its member organisations and Friends and Supporters. AWAVA's members include organisations from every State and Territory in Australia, representing domestic and family violence services, sexual assault services, and women's legal services, as well as organisations representing Aboriginal and Torres Strait Islander women, young women, women educators, women in the sex industry and other groups. AWAVA's lead agency is the Women's Services Network (WESNET).

List of acronyms

AAT	Administrative Appeals Tribunal
AWAVA	Australian Women Against Violence Alliance
CALD	People from culturally and linguistically diverse backgrounds
CCS	Children's Contact Services
FASS	Family Advocacy Support Services
FDR	Family Dispute Resolution
ICL	Independent Children Lawyers
JCCD	Judicial Council on Cultural Diversity
LGBTIQ	People who identify as gay, lesbian, bisexual, transgender, intersex or queer
WDVCAS	Women Domestic Violence Court Advocacy Service
WLSA	Women's Legal Services Australia

Q2. What principles should guide any redevelopment of the family law system?

The redevelopment of the family law system should be underpinned by principles of accessibility, fairness, responsiveness, prioritising of safety and recognition of diversity. We believe that the principle of safety and wellbeing for victims/survivors of violence and children should be a paramount consideration in any reforms to the family law system. We elaborate more on the principle of safety throughout this submission.

In relation to the principles of the recognition of diversity and fairness, the family law system needs to be able to respond to structural inequalities that impact families within and outside the scope of family law. For instance, there is distrust in the court system from Aboriginal and Torres Strait Islander people due to the significantly higher incarceration rates, and distrust in the child protection authorities due to the history of the Stolen Generations and racial bias that persists to the present day. Similarly, it has been reported that refugee women are reluctant to seek help from the police due to potential history of abuse, torture and trauma inflicted on them by government agencies.¹ There is a strong need for systemic changes aimed at mitigating and improving access and fairness of outcomes for diverse families. We elaborate more on the required training and competencies of family law professionals and the judiciary in response to questions 41 and 42 of this submission.

Any reforms to the family law system should not come at the expense of the already under-resourced system and sector. To be successful, major reforms will need to abandon the assumption that changes can be made with little or no funding. Instead, sustainable, adequate and long-term resourcing must be provided.

Lastly, it is vital to ensure comprehensive training in trauma-informed care, the nature and dynamics of domestic and family violence, sexual assault, cultural competency and intersectionality at all layers of the court, from the bottom to the top.

We refer you to a number of previous reports made on required improvements and reforms in the family law system:

- 2017 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. Recommendations for an accessible, equitable and responsive family law system which better prioritises safety of those affected by family violence;²
- 2016 Family Law Council Final Report on Families with Complex Needs and the Intersection of Family Law and Child Protection;³

¹ inTouch Inc. Multicultural Centre Against Family Violence. (2010). I lived in fear because I knew nothing: Barriers to the justice system faced by CALD Women experiencing family violence. Melbourne: InTouch; Rees, S., & Pease, B. (2006). *Refugee settlement, safety and wellbeing: Exploring domestic and family violence in refugee communities*. Melbourne: Immigrant Women's Domestic Violence Service; Rees, S., & Pease, B. (2007). Domestic violence in refugee families in Australia: Rethinking settlement policy and practice. *Journal of Immigrant and Refugee Studies*, 5(2), 1-19.

² Available online at:

https://www.apf.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/FVlawreform/Report

³ Available online at: <https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Family-with-Complex-Needs-Intersection-of-Family-Law-and-Child-Protection-Systems-Final-Report-Terms-3-4-5.PDF> .

- 2015 Family Law Council Interim Report on Families with Complex Needs and the Intersection of Family Law and Child Protection;⁴
- 2016 Victorian Royal Commission into Family Violence Report;⁵
- 2015 Australian Institute of Family Studies evaluation of the 2012 Family Law Act amendments;⁶
- 2015 Federal Senate Finance and Public Administration References Committee inquiry report titled Domestic violence in Australia;⁷
- 2014 Productivity Commission Access to Justice Arrangements Inquiry Report;⁸
- 2010 Joint report of the Australian Law Reform Commission and NSW Law Reform Commission titled Family Violence – A National Legal Response;⁹
- 2009 report of Professor Richard Chisholm titled Family Courts Violence Review report;¹⁰
- 2009 FLC report titled Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues .¹¹

We also refer you to the forthcoming final report of the Justice Project by the Law Council of Australia resulting from a comprehensive, national review into the state of access to justice in Australia.¹²

We commend to you the five-step plan Safety First in Family Law¹³, which was developed by Women’s Legal Services Australia with the goal of creating a family law system that keeps women and children safe. Steps include the following measures:

- Step 1** – Develop a specialist response for domestic violence cases in family courts
- Step 2** – Reduce trauma and support those who are most at risk of future violence and death
- Step 3** – Intervene early and provide effective legal help for the most disadvantaged
- Step 4** – Support women and children to financially recover from domestic violence
- Step 5** – Strengthen the understanding of all family law professionals on domestic violence and trauma.

We also endorse the submission by Women’s Legal Services Australia in response to the issues paper of this inquiry.

⁴ Available online at: <https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Families-with-Complex-Needs-Intersection-of-Family-Law-and-Child-Protection-Systems%E2%80%93Interim-Report-Terms-1-and-2.pdf>

⁵ Available online at: <http://files.rcfv.com.au/Reports/Final/RCFV-All-Volumes.pdf>

⁶ Available online at: <https://aifs.gov.au/publications/evaluation-2012-family-violence-amendments/export>.

⁷ Available online at:

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/Domestic_Violence/Report

⁸ Available online at: <http://www.pc.gov.au/inquiries/completed/access-justice/report>

⁹ Available online at: <http://www.alrc.gov.au/publications/family-violence-national-legal-response-alrc-report-114>

¹⁰ Available online at:

<https://www.ag.gov.au/FamiliesAndMarriage/Families/FamilyViolence/Documents/Family%20Courts%20Violence%20Review.doc>

¹¹ Available online at:

<https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Improving%20responses%20to%20family%20violence.pdf> .

¹² Law Council of Australia (2017) The Justice Project. People who Experience Family Violence. Consultation Paper. For more information <https://www.lawcouncil.asn.au/justice-project>

¹³ See <https://safetyinfamilylaw.org.au/the-solutions/>

Q3-4. Q3. In what way could access to information about family law and family related services, including family violence services, be improved?
Q4. How might people with family law related needs be assisted to navigate the family law system?

Materials in plain English

The complexity of the family law system makes it difficult to navigate for anyone who is not legally represented. One of the ways to improve the accessibility of information in courts is to produce resources (including visual flowcharts), outlining step-by-step guidelines about what to expect in court. These resources should cover court processes from the initial filing through to receiving a decision and should be published in plain English. This is particularly important when litigants have to deal with multiple systems concurrently like family law and child protection, or family law and migration law.

Forms used in courts need to be written in plain text to ensure that people who do not have English as their first language and people with low literacy skills are able to fill them out by themselves especially when they are self-represented. For example, the wording of question 56 in the Initiating Application form¹⁴ reads, “If relying on a cross-vesting law, specify the Territory law relied on.” Questions such as this can be challenging to understand and answer correctly for unrepresented litigants, especially from culturally and linguistically diverse backgrounds.

Courts could also use creative and accessible ways of conveying information such as audio-visual material, radio, etc.

Availability of information about court processes in different languages

The Senate report on support and protection of people affected by family violence confirms “inadequate provision of information in languages other than English in legal and non-legal services, police stations, online application lodgement systems, and at courts”.¹⁵ The Family Court or Federal Circuit Courts do not offer any fact sheets or publications in other languages than English. They do, however, offer to use LawTermFinder¹⁶, which allows searches of the key terminology used in courts only in Arabic, Simplified Chinese, Traditional Chinese, Korean, Spanish, and Vietnamese.¹⁷

The 2016 Census found that about 21% of Australians reported speaking a language other than English at home. Among other most common languages (varying by states and territories) are Hindi, Punjabi, Sinhalese, Thai, Urdu, Nepali, Bengali, Tamil, Persian and others. Given the complexity of the family law system especially for self-represented litigants, it is necessary to ensure that court resources are translated into different languages. It is also important that court resources in different languages are available both online and in printed version. Resources both in English and other languages need to

¹⁴ Access the form here: http://www.federalcircuitcourt.gov.au/wps/wcm/connect/328454a4-ab15-4eac-8b43-af333d0db0f4/Initiating_App_FORM_1115V2.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKS_PACE-328454a4-ab15-4eac-8b43-af333d0db0f4-lZTKhrp

¹⁵ Standing Committee on Social Policy and Legal Affairs (2017) A better family law system to support and protect those affected by family violence. Submissions by Access Community Services, InTouch, The Humanitarian Group

¹⁶ See <http://lawtermfinder.mq.edu.au/>

¹⁷ For example: <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/forms-and-fees/court-forms/form-topics/family+violence/form-nchild-abuse> see the bottom of the page.

take into account the various degrees of literacy of court users, and be written in a simple and understandable way for people to navigate the family law system.¹⁸

Standards for translators

There have been some positive changes at the policy level in regard to standards for engaging interpreters in courts and tribunals. For instance, the Judicial Council on Cultural Diversity has developed Recommended National Standards for Working with Interpreters in Courts and Tribunals¹⁹, and the NSW Education Centre Against Violence is running training courses for interpreters on interpreting for people who have experienced sexual²⁰ and family violence.²¹

Little attention, however, has been paid to standards for written translations. There is no consistency into which languages information is translated. Anecdotal evidence suggests that the quality of translations varies sometimes due to difficulties in explaining some legal terms or the general lack of standards for translation in the realm of family violence, family law, and child protection.

There is little awareness that resources to be translated from English to other languages need to be written specifically for translation. This includes using plain English, avoiding jargon or providing more detailed explanations for concepts that potentially may not be in use in other languages.

We support recommendation 160 of the Victorian Royal Commission into Family Violence that the Australian Government together with the National Accreditation Authority for Translators and Interpreters Ltd, works to ensure that accreditation and testing processes and approval of translator and interpreter courses require an understanding of the nature and dynamics of family violence. Furthermore, we recommend that the Attorney's General Department, in consultation with the specialist women's sector, and cultural and linguistically diverse communities develops national standards and a terminology resource containing translations and explanations of key concepts in the areas of family violence, sexual assault, family law and child protection. This resource needs to be available in all major languages spoken in Australia.²²

Interpreters

We refer you to the Recommended National Standards for Working with Interpreters in Courts and Tribunals developed by JCCD.²³ We recommend championing them in the family law system to ensure consistency. Access to interpreters is essential for access to justice.

We also would like to raise several other issues in relation to interpreters. Various reports²⁴ have noted that female victims/survivors need to have a choice of having female interpreters in matters involving

¹⁸ See the National Domestic and Family Violence Bench Book for more: <http://dfvbenchbook.aija.org.au/fair-hearing-and-safety/interpreters-and-translators/>

¹⁹ JCCD (2017) Recommended National Standards for Working with Interpreters in Courts and Tribunals. Available at: <http://jccd.org.au/wp-content/uploads/2018/02/JCCD-Interpreter-Standards.pdf>

²⁰ For the course description visit: <https://swecav.hss.health.nsw.gov.au/ECAVWebsite/Home/Details/159>

²¹ For the course description visit: <https://swecav.hss.health.nsw.gov.au/ECAVWebsite/Home/Details/180>

²² We refer you to the resource developed by the Centre for Culture, Ethnicity and Health as an example https://www.ceh.org.au/glossary-terms-child-family-relationship-services/?sf_action=get_data&sf_data=all&_sft_category=multilingual-resources

²³ JCCD (2017) Recommended National Standards for Working with Interpreters in Courts and Tribunals. Available at: <http://jccd.org.au/wp-content/uploads/2018/02/JCCD-Interpreter-Standards.pdf>

²⁴ Women's Legal Service Victoria Creating meaningful access to justice for Culturally and Linguistically Diverse (CALD) women: preliminary investigation into the use of interpreters in family violence matters [http://www.womenslegal.org.au/files/file/Family%20Violence%20Interpreter%20Report%20-%20Final%20draft\(1\).pdf](http://www.womenslegal.org.au/files/file/Family%20Violence%20Interpreter%20Report%20-%20Final%20draft(1).pdf) ; Standing Committee on Social Policy and Legal Affairs (2017) A better family law system to support and protect those affected by family violence.

family violence. This choice needs to be presented explicitly to victims/survivors, rather than being available on request. In addition, staff responsible for booking an interpreter should ensure that they are booking a female interpreter for a female client to maximise safety.

We also would like to emphasise the use of telephone interpreters especially in instances when interpreting in person is not available. Anecdotal evidence from service providers suggests that when an interpreter is not at court, especially at the time of the first court hearing/listing, the court proceeds without one. Often an interpreter is not booked for that first hearing because many parties do not attend at that point. If they do though, there needs to be an interpreter available as an option. The court needs to be equipped with a telephone to use for that purpose. Additionally, using a telephone interpreter is useful for getting an interpreter for the second party if one has not been booked.

It is noted that the Family Violence Best Principles for the Federal Circuit Court and the Family Court do not list best practice of working with interpreters among other principles when reviewing family violence matters.²⁵ We believe that the Recommended National Standards for Working with Interpreters in Courts and Tribunals should be listed there as best practice.

Accessibility of courts

There are a number of steps that could be taken to improve courts accessibility, including:

- Having dedicated court staff available to answer questions from the public. This requires sufficient funding and resourcing of courts, together with appropriate training for staff (see responses to questions 41 and 42 of this submission);
- Holding community education forums, in collaboration with relevant service providers, to increase understanding of and trust in the court system, in particular for Aboriginal and Torres Strait Islander people and people from culturally and linguistically diverse backgrounds;
- Creating partnerships with key organisations and services e.g. police multicultural liaison and domestic violence officers;
- Enabling women to visit safe rooms for education on court processes;
- Providing special training to court registries, who are the first point of contact for many women, and are therefore an important touchpoint for distributing information and setting the tone for their experience
- Noting the limitation of caseworkers' or navigators' capacity to assist individuals or families through every step of a court process.

Physical safety in courts

There is a great need to improve physical safety in courts. Courts are often accessible through one entrance/exit, forcing victims/survivors to face perpetrators or stay with them in the same line or waiting areas. Perpetrators can often use that as an opportunity to further harass, intimate, threaten and exercise power over victims/survivors.²⁶

Courts should be sufficiently resourced to provide separate waiting areas, separate entry and exit points, safe rooms, dedicated areas for children, separate interview rooms, and possibility of video-link attendance of hearings. The latter is particularly important for women in rural, regional and

²⁵ See: <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/reports-and-publications/publications/family-law/family-violence-best-practice-principles> and <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/publications/family+violence/family-violence-best-practice-principles>

²⁶ Law Council of Australia. The Justice Project (2017) People who Experience Family Violence. Consultation Paper.

remote areas as long distances to travel to attend hearings constitute another barrier for them to access justice. Remote witness video links, for example from safe places such as women’s refuges as seen in Victoria, should be a priority as this will enhance witness evidence due to feeling less intimidated and scared.

Early risk assessments

A Notice of Risk Assessment is mandatory in the Federal Circuit Court.²⁷ In the Family Court of Australia and the Family Court of Western Australia, a notice of risk is to be completed where a risk of harm, including a risk of family violence is alleged by a party.²⁸ There are still gaps in consistent management of risk and use of the Notice of Risk because of the procedural difference between the Family Court of Australia and Federal Circuit Court of Australia. Additionally, the assessment of risk is not undertaken prior to the first court event. More family consultants need to be trained in this area. Further, information sharing between child protection, police and the family law systems needs to be improved.

In their submission to the 2017 parliamentary inquiry, WLSA reports that “the requirement to file a Notice of Risk does not ensure that the court is notified of all relevant risk factors.”²⁹ This may have severe implications. Consider a situation when a litigant themselves has a limited understanding of what constitutes family violence. They may not include some manifestations of family violence when completing the form, thus putting themselves under further risk and not disclosing the history of family violence. If in future they decide to disclose it, such cases are often seen with suspicion.³⁰

Thus, we support WLSA’s recommendations calling on the Australian Government to develop a national risk assessment framework for use by the family law court registry. Any national risk assessment framework should be:

- Consistent nationally;
- Multi-method, multi-informant, while placing particular emphasis on the victim’s own assessment of risk;
- Culturally sensitive; and
- Supported by appropriate training.

Additionally, a risk assessment framework for use by family lawyers and family dispute resolution (FDR) practitioners should be developed and should be consistent with and/or an adapted version of the risk framework used by the family court registry.

It is important to note that the development of the national risk assessment framework will require sufficient resourcing and training of all family law professionals including court registry staff, family violence services, lawyers, FDR practitioners, family report writers, and judicial officers.

²⁷ <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/forms-and-fees/court-forms/form-topics/family+law/notice-risk> in accordance with the Section 69ZQ of the Family Law Act.

²⁸ Law Council of Australia (2017) The Justice Project. People who Experience Family Violence. Consultation paper.

²⁹ Women’s Legal Service Australia (2017) Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs. Submission to the parliamentary inquiry into a better family law system to support and protect those affected by family violence.

³⁰ Standing Committee on Social Policy and Legal Affairs (2017) A better family law system to support and protect those affected by family violence.

We also support WLSA's recommendation that the development of the national risk assessment framework will require amending the Family Law Act "to require that upon filing of any family law application, the following risk assessment process is undertaken as soon as practicable:

- *That in all cases involving dependent children, a family consultant with specified family violence training who is embedded within the court registry undertake a risk assessment with respect to child safety and provide recommendations in relation to interim care arrangements for children.*
- *Where family violence is alleged or identified, that a referral of any adult affected family member be made to an embedded family violence support worker within the court registry.*
- *Where the affected family member is Aboriginal and/or Torres Strait Islander, a referral should be made to a specialised and culturally safe legal service such as a Family Violence Prevention Legal Service (FVPLS) or Aboriginal and Torres Strait Islander Women's Legal Service.*
- *That following receipt of such a referral, the family violence support worker undertakes a risk assessment in relation to the adult affected family member(s), assisting her in preparing a safety plan, and making further referrals as necessary.*³¹

It is important to note that most remote areas do not have specific Family Violence Prevention Legal Services (FVPLS) or Aboriginal and Torres Strait Islander Women's Legal Services. Instead, most services in remote areas are provided by Legal Aid or Aboriginal Legal Services. Thus, it is vital that sufficient funding and resources are available for the establishment and/or expansion of Family Violence Prevention Legal Service (FVPLS) or Aboriginal and Torres Strait Islander Women's Legal Service to provide a greater choice and service for Aboriginal and Torres Strait Islander Women in all areas.

Q5. How can the accessibility of the family law system be improved for Aboriginal and Torres Strait Islander people?

Accessibility of the family law system for Aboriginal and Torres Strait Islander people can be difficult and complex. One of the ways to improve the accessibility is to employ at least one Aboriginal and Torres Strait Islander liaison officer in every Family Law Court. This role is needed in order to:

- address the lack of knowledge of the court process for Aboriginal and Torres Strait Islander clients;
- assist with complex issues that can arise;
- assist with cultural issues that can arise;
- assist with the understanding the legal process;
- assist with referrals;
- mitigate the general distrust in the legal system;
- assist Aboriginal and Torres Strait Islander clients for whom English is not their first language;
- improve the court's knowledge of kinship and cultural obligations,

³¹ Women's Legal Service Australia (2017) Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs. Submission to the parliamentary inquiry into a better family law system to support and protect those affected by family violence.

The forms and requirements of forms for the Family Court needs to be simpler. At present if forms are not provided when going to court, it can jeopardise a case. The forms and requirements of forms can be too long and too complex to understand, especially when legal requirements are needed, for example:

- affidavits
- if there is an appeal
- financial questionnaire
- disclosures
- consent orders.

There needs to be more information and awareness of the importance of legal representation and the right to have legal advice. For example, if Aboriginal and Torres Strait Islander legal services are not able to represent a person because of conflict of interest, information needs to be provided about alternative legal services. Aboriginal and Torres Strait Islander people need to know that they can access Legal Aid and Legal Aid service providers, and a list of service providers should be presented to clients who are unrepresented, or where there is a conflict of interest in a family law matter.

The *Family Law Act 1975* (the Act) requires clients to obtain a certificate from a registered family dispute resolution practitioner before they file an application for an order in relation to a child under Part VII of the Act.³² During this process there needs to be Aboriginal and Torres Strait Islander mediators trained and available to do the mediation, because if matters can be settled during mediation this will avoid the need to go to court – a course of action that may, for understandable reasons, be feared.

More Indigenous report writers need to be employed by the Family Courts, because if both parties cannot reach an agreement for a parenting order, the Courts will then make Court Orders. For the judge and parties to decide on what arrangements are best for the child/children, a Family Report document will be prepared by a Family Report writer or a Family Consultant. This involves the report writer or the consultant speaking with the parents and child/children in relation to what the parent wants and what the child/children want and why. During this process, there can be a breakdown in translation due to lack of cultural awareness and sensitivity, and misinformation, or the view of the non-Indigenous report writer differing from that of the client. This report is one of the most critical documents presented in the court when determining the final outcomes of where the child/children are to reside. Some Aboriginal and Torres Strait Islander parents are unaware of importance of this report.

It should be compulsory for all Independent Children Lawyers and Legal Aid Grant Officers to be trained in cultural awareness. Training for Grants Officers will provide them with an understanding of some of the complex issues that the client faces when assessing a grant of aid. Independent Children's Lawyers need to have compulsory training to better understand the child/ren's cultural background and cultural needs. An individual approach needs to be considered, as not all Aboriginal and Torres Strait Islander children are the same and there can be different needs associated. Training will be able to provide Independent Children Lawyers with a better understanding on how to support and recommend outcomes for the child's best interests. Lastly, there is a need to ensure that all Family Law Courts or Circuits have security.

³² Family Law Court of Australia - <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/publications/getting-ready-for-court/compulsory-family-dispute-resolution-court-procedures-and-requirements>

We also refer you to the 2016 FLC Final Report on Families with Complex Needs and the Intersection of Family Law and Child Protection³³ and recommendations made by the Judicial Council on Cultural Diversity (JCCD) in the National framework to improve accessibility to Australian courts for Aboriginal and Torres Strait Islander women and migrant and refugee women.³⁴

Q6. How can the accessibility of the family law system be improved for people from culturally and linguistically diverse backgrounds?

The family law system must aim to strengthen its response to the needs of culturally, linguistically and religiously diverse (CALD) communities by improving its capacity as well as program design. Women from culturally and linguistically diverse backgrounds can face specific forms of violence which are directly related to their cultural practices and complex family structures, such as dowry associated violence and early and forced marriage. Financial and decision making dominance by the man/husband in strong patriarchal community hierarchies in some CALD groups, as well as community understanding of ownership of women and children by the husband, impact the woman's sense of agency and hence her ability to advocate for herself and her children. It is, however, important to recognise diversity within CALD communities, to address existing stereotypes about culture and/or religion, and prevent overgeneralisation of experiences i.e. avoid attributing particular experiences as normative to the whole community and using the language of 'all community members' or 'all women' without acknowledging diversity and complexity within the CALD community.

Building the cultural competence of family law professionals would help ease the number of barriers that women from culturally and linguistically diverse backgrounds currently face when navigating the legal system. Specific training to deliver knowledge of cultural norms and how these affect family dynamics and awareness of specific cultural practices (for example, wailing, pulling at one's own hair as part of help seeking behaviour and misinterpreting these as mental illness) are essential to develop a supportive system for victims/survivors. The need for capacity development of translators and interpreters cannot be underestimated, as well as the availability of relevant information in languages other than English.

These are essential components of the review of the family law system that will ultimately deliver an integrated, culturally-appropriate legal system for all.

We also recommend the following improvements that are necessary to ensure the accessibility of courts:

- Courts and tribunals should engage Cultural Liaison Officers, establish Cultural Diversity Committees, introduce multicultural plans, and actively recruit employees from migrant and refugee backgrounds.
- Courts and tribunals should review the appropriateness of signage, brochures, services, procedures for engagement of interpreters, and support for vulnerable witnesses, to ensure they are accessible to all.
- Women from culturally and linguistically diverse backgrounds should be consulted meaningfully when developing products and procedures designed for and about them.

³³ Available online at: <https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Family-with-Complex-Needs-Intersection-of-Family-Law-and-Child-Protection-Systems-Final-Report-Terms-3-4-5.PDF> .

³⁴ Judicial Council on Cultural Diversity (2017) National framework to improve accessibility to Australian courts for Aboriginal and Torres Strait Islander women and migrant and refugee women

- Courts and tribunals should schedule regular activities to engage women from migrant and refugee background, such as stakeholder meetings, court open days and tours, and community education forums.
- Court staff should receive compulsory cultural capability training.
- Courts work to make legal documents and support resources more approachable through the use of clear and simple language, and translation of key materials into major languages.
- Alternatives to questioning in courtrooms be offered, in order to provide contextual safety and enable women to feel more comfortable in disclosing information.

We ask that courts be supported to implement these recommendations, and note the importance of evaluation processes to test the effectiveness of such changes.

We also reiterate the points made in response to questions 3 and 4 of this submission in relation to interpreters. We strongly recommend that JCCD's Recommended National Standards for Working with Interpreters in Courts and Tribunals be adopted by the Family Court, and other relevant courts and tribunals. Judicial officers, legal practitioners, police officers, and court support staff must be trained in the appropriate skills and processes for interpreter engagement (including via telephone and videolink) and best practice use in legal proceedings.

We also refer you to the 2016 Family Law Council Final Report on Families with Complex Needs and the Intersection of Family Law and Child Protection³⁵ and recommendations made by the Judicial Council on Cultural Diversity (JCCD) in the National framework to improve accessibility to Australian courts for Aboriginal and Torres Strait Islander women and migrant and refugee women.³⁶

Q10. What changes could be made to the family law system, including to the provision of legal services and private reports, to reduce the costs to clients of resolving family disputes?

Concession fee in courts

Access to free legal advice and representation is limited. The Productivity Commission's 2014 report on access to justice stated that "there are more people living in poverty (14 per cent) than are financially eligible for legal aid (8 per cent)".³⁷ Legal Aid's eligibility criteria excludes the majority of people who are on the margin of the required earning.³⁸

The costs of the family law system are prohibitive for those who do not qualify for free legal help. For example, the costs of filing an Application for Divorce in the Federal Circuit Court is \$865; initiating application for parenting and financial orders is \$660. The daily hearing fee excluding the first hearing (which is \$605 non-refundable) is \$605. No concessions are available unless an applicant is a recipient

³⁵ Available online at: <https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Family-with-Complex-Needs-Intersection-of-Family-Law-and-Child-Protection-Systems-Final-Report-Terms-3-4-5.PDF> .

³⁶ Judicial Council on Cultural Diversity (2017) National framework to improve accessibility to Australian courts for Aboriginal and Torres Strait Islander women and migrant and refugee women

³⁷ Productivity Commission, Access to Justice Arrangements: Productivity Commission Inquiry Report, No. 72, 2014, Volume 2, pp. 1021-1022.

³⁸ Women's Legal Services Australia (2017) Submission to the Parliamentary Inquiry into the better family law system to support and protect those affected by family violence; Standing Committee on Social Policy and Legal Affairs (2017) A better family law system to support and protect those affected by family violence. Report.

of a number of payments from Centrelink. To be able to pay a concession fee in the application for divorce, both parties must be eligible for concession. There are no compassionate grounds for concession in the fee such as family violence.³⁹ This is particularly problematic in the context of family violence as many victims/survivors may, on one hand, experience financial abuse and, on the other hand, have no finances of their own and/or be ineligible for Centrelink payments because of their partner's earnings or assets.

In instances where a victim/survivor has to navigate the family law and migration systems simultaneously, the costs are increased. Women on partner visas and a small number of others, in situations when their relationships break down due to family violence, are eligible to stay permanently in Australia by accessing family violence provisions through the Department of Home Affairs. We refer you to AWAVA's submission to the Department of Immigration and Border Protection providing a more detailed analysis of the issue⁴⁰ but for the purposes of this submission we will highlight one issue.

One of the major issues in applying for family violence provisions is that the assessment of genuineness of relationships precedes assessment of family violence allegations. Often in this process, absence of joint finances or the 'failure' to present socially as a couple is seen as evidence that the relationship is non-genuine, when in fact these may be manifestations of violence, coercion and control. If the Department is not satisfied that relationships are genuine, family violence allegations are not considered. Women are able to appeal that decision in the Administrative Appeals Tribunal (AAT). While there are no costs to apply for family violence provisions under the Migration Act (directly to the Department of Home Affairs), the application for an appeal in the AAT costs around \$1700. This does not include the cost of migration advice which cannot be provided by the same family lawyer. Compounding these cost issues are the costs of family lawyers (some charge up to \$600 per hour), family court, and migration costs. Combined with the other barriers that women from culturally and linguistically backgrounds face, it can become impossible to leave violent relationships.

Women in regional, rural and remote areas face even more financial barriers due to the need to travel long distances to attend court hearings.⁴¹

It is also important to note that women already are entering the family law system with financial debts. The Stepping Stones report highlights that among women assisted by Women's Legal Service Victoria, "43% were dealing with joint debts, and 85% were dealing with debts in their sole name. Of these women, 25% had a debt that was accrued by an abusive partner against their wishes, without their knowledge, without understanding or under duress".⁴²

All of the above highlights the need to review the costs of court proceedings, expand the eligibility criteria for fee concessions, increase funding to the Family Court and Federal Circuit Court and increase funding to Legal Aid in order to increase representation of financially disadvantaged people. We elaborate further on Legal Aids' funding below.

³⁹ See: <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/forms-and-fees/fees-and-costs/fees>

⁴⁰ Australian Women Against Violence Alliance (2017) Submission to the Department of Immigration and Border Protection in response to the public consultation on visa simplification <https://awava.org.au/2017/10/12/submissions/submission-department-immigration-border-protection-visa-simplification>

⁴¹ Law Council of Australia (2017) The Justice Project. People who Experience Family Violence. Consultation Paper. Law Council of Australia

⁴² Smallwood, E. (2015) Stepping Stones: Legal barriers to economic equality after family violence, Women's Legal Service Victoria, Melbourne.

Q11-12. Q11. What changes can be made to court procedures to improve their accessibility for litigants who are not legally represented?
Q.12. What other changes are needed to support people who do not have legal representation to resolve their family law problems?

Need for a specialised legal aid grants pathway in family law for victims/survivors of family violence

We have indicated the limitations of free legal assistance in the response to question 10. The lack of a specialised legal aid grant pathway for victims/survivors of domestic violence, particularly in family law matters, is a major concern because of the existing gender bias.⁴³ When viewed as a whole, funding allocated to legal assistance services favours criminal law matters.⁴⁴ As males have significantly higher rates of being charged with criminal offences that could result in imprisonment, they are more likely than women to seek assistance in criminal law matters and, as a result, there are more male legal aid applicants.⁴⁵ In 2013, a study found 75% of the highest users of Legal Aid in NSW were men and all participants in the study had accessed criminal law services.⁴⁶ On the other hand, women are more likely to require assistance in relation to being a victim/survivor of domestic and family violence, particularly in the family law system and/or civil law system, which typically affect female legal aid applicants. And while the high number of women killed in the context of domestic violence provides a strong case that loss of liberty and life arguments apply, which can be as pertinent in family law matters as they are in criminal law matters, their gender-specific legal needs are not prioritised and are therefore not met.

Challenges for women in obtaining legal aid are also evident in the application of Legal Aid Commissions' family law policies and guidelines. For example, some women's legal services have reported cases of legal aid grants being terminated if a party does not agree with the recommendations made by a family report writer who has been appointed to comment on the care, welfare and development of a child in a family law matter (covered in the following section).⁴⁷ In addition, the provision of legal aid is dependent on the stringent guidelines of each state and territory that may fail to take into account the nuances of a woman in cases of violence. For example, the provision of legal aid is often based upon a client meeting a requisite means test⁴⁸, precluding women who have a small level of financial support from family members or charities from receiving legal aid.

There should be a separate and additional specialised domestic violence pathway for legal aid grants, particularly for family law and care and protection matters. Such a pathway could make the legal aid application process more effective and could have public interest benefits in having legal aid policies and guidelines that work best to eliminate violence against women. Currently, women's legal services

⁴³ WLSA submission to senate inquiry – Domestic Violence and gender inequality 12 April 2016, pg 7

⁴⁴ Productivity Commission, Access to Justice Arrangements – Productivity Commission Draft Report, April 2014, pg 627.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ WLSA submission to the Productivity Commission's Access to Justice Inquiry, 4 November 2013, p.18.

⁴⁸ Legal Aid New South Wales. Criminal Law Matters: when legal aid is available: Apprehended Domestic Violence Orders: <http://www.legalaid.nsw.gov.au/for-lawyers/policyonline/policies/4.-criminal-law-matters-when-legal-aid-is-available/4.4.-apprehended-domestic-violence-orders#4.4.1%20Applicants%20in%20Apprehended%20Domestic%20Violence%20Orders>

and other community legal services spend a considerable amount of time advising and advocating for women who have been refused legal aid, including helping them to appeal such decisions.

It is also important to note that not having legal representation means more expensive and longer proceedings. The Law Council of Australia states, “that court delays and the number of court appearances ‘significantly drives’ up the cost of legal representation for parties in family law proceedings: ‘people spend less when they are in the system for less time’”.⁴⁹

Expanding the Family Advocacy and Support Service (FASS)

Further to the issues raised above, more broadly there needs to be better mechanisms for early identification of violence, risk assessment and support in family law matters, including placing specialists in family court registries.⁵⁰ Additionally, there needs to be an emphasis on early decision making, triaging and case management of domestic violence cases in the family courts.

Family Advocacy and Support Service (FASS) has been funded under the Third Action Plan of the National Plan to Reduce Violence Against Women and their Children to provide a holistic service (a duty lawyer and a social worker) for people affected by family violence to navigate the family law system. Four locations have been piloted.⁵¹ The evaluation of the service is forthcoming⁵², yet the anecdotal evidence from workers highlights great effectiveness of their support.

Case study

Family Advocacy and Support Services (FASS) Family Law Court Parramatta

Yasmina* came to the Family Court in Sydney to see a duty solicitor. She had recently fled interstate from the perpetrator of violence against her. She had planned to take her daughter with her, but the perpetrator found out and stopped their daughter from leaving. She received advice from the duty solicitor and was referred to FASS social support. The support worker completed a risk assessment (DVSAT) and assisted Yasmina in safety planning, counselling referrals and financial assistance. A couple of weeks later, Yasmina returned to FASS social support because she was served papers from the perpetrator who was initiating parenting orders in Victoria. Yasmina was supported by a duty solicitor and spent the day in court in the safe room with FASS social support. She was informed that she would need to travel back to her home state to attend future court events. FASS social support assisted Yasmina in safety planning when returning to Victoria, and completed a “warm” referral to the relevant FASS service in that area. Once Yasmina moved back

⁴⁹ Ms Wendy Kayler-Thomson, Chair, Family Law Section, Law Council of Australia, *Committee Hansard*, Canberra, 30 May 2017, p. 10. – in the report on the better family law system.

⁵⁰ WLSA. 2016. Safety First in family law: Five steps to creating a family law system that keeps women and children safe 1a (Policy flier). See: http://www.womenslegal.org.au/files/file/SAFETY%20FIRST%20POLICY%20PLATFORM.MAY%202016_FINAL.pdf See also Family Court of Australia and Federal Circuit Court of Australia, Family law system needs more resources to deal with an increasing number of cases involving family violence, 20 June 2016 at: http://www.federalcircuitcourt.gov.au/wps/wcm/connect/84136241-45e6-4cbe-8e48-9274daa0c2d3/mr200616.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE-84136241-45e6-4cbe-8e48-9274daa0c2d3-lmuDF38

⁵¹ <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/news/mr170517>

⁵² We refer you to the forthcoming evaluation of the court support services, due in July 2018, performed by the Cth government.

there, the FASS service in Victoria contacted Yasmina, provided information about local domestic violence services and continued to support her throughout the court matter.

*Names and details of the case have been changed for the purpose of confidentiality

FASS are co-located with the Women Domestic Violence Court Advocacy Services (we elaborate more on their role below). This means that they can support women across the local and family court jurisdictions in the 4 trial areas in NSW. We believe FASS should be expanded and co-located in courts in order to ensure the best outcomes for women and children.

We recommend that FASS be expanded and rolled out more broadly. Additionally, FASS could replicate the model of ‘prosecutor clinics’ to create another avenue for parties affected by family violence to connect with support services. ‘Prosecutor clinics’ are held by domestic violence support services in the local court jurisdiction across NSW ahead of hearings. The clinics are co-run under an MOU between prosecutors, Police and WDVCSs. At these clinics women are provided with information about the court process and the law. The clinics can serve to reduce anxiety and allow women to feel more prepared for their matter. The FASS service may be able to replicate this model within the family law system if provided with the resources and cooperation from the relevant registry.

Women’s Domestic Violence Court Advocacy Services in local and district courts

Women Domestic Violence Court Advocacy Service NSW (WDVCAS) is the peak, state-wide body representing the 29 individual WDVCS services across New South Wales, who support women and their children who are experiencing domestic and family violence.⁵³

The WDVCS services support women who are seeking legal protection from domestic violence in the local and district courts. They support women and children at risk of harm or serious harm who are referred directly from police following an incident of domestic or family violence regardless of legal intervention. In 2016, WDVCS clients in NSW had more than 35,000 children under 16 in their care.⁵⁴

The work of WDVCS services at the level of local and district courts is essential given that their clients may be entering the family law system as well. To bridge the gaps between the local and family courts and provide holistic service, an overarching support is required. WDVCS are advocating for the expansion of their service to provide case management allowing clients to be supported by one overarching service throughout their journey within the family law system.

We also reinforce the call by the WDVCS for better funding and resourcing as well as the replication of the model in other states and territories. Currently, FASS are operating only in several locations and WDVCS are NSW based. There are similar services in other states and territories but they are not as integrated as the Court Advocacy Services are with the justice system. We refer you to the forthcoming evaluation of the court support services, due in July 2018, performed by Allwood Associates.

Systemically there needs to be more thorough training at the local level about how the family court system/process fits in, to ensure that the first response is thorough enough to protect children until the family court process begins.

⁵³ Women’s Domestic Violence Court Advocacy Service NSW is a member of AWAVA’s advisory group. For more, see <http://www.wdvcasnw.org.au>

⁵⁴ Read more about the impact of the WDVCS work at <https://wdvcasnetwork.worldsecuringsystems.com/Publications/WDVCAS.Service.Stats.2014-2017.pdf>

The role of specialist women's service in the family law system

AWAVA continues to advocate for substantial increases in funding and greater safeguards for the role of the specialist women's services, which are at the forefront of the efforts to respond to and eliminate violence against women.⁵⁵ The work of specialist women's services, including women's legal services, is underpinned by a gendered understanding of violence⁵⁶. They are focused on women and children's safety⁵⁷, providing gender and cultural safety, working from a client-centred, trauma-based, empowering framework⁵⁸, supporting women to navigate complex systems, recognising children as clients in their own right, and working towards greater gender equality recognising the complexity of intersectionality and that women are best qualified to decide their pathway to recovery from violence and trauma⁵⁹.

Across the full range of services responding to violence against women, there is increasing demand, in part because of increased community awareness and condemnation of this violence.⁶⁰ While immediate increases to services is required, international and Australian evidence is clear that not just 'any old service' will do: ill-equipped services that lack well-trained staff discourage help-seeking, prevent disclosure of abuse and may inadvertently increase the risks for victims/survivors or lead them to return to abusive situations⁶¹.

⁵⁵ AWAVA Policy Brief on the role of specialist women's services in Australia's response to violence against women and their children 2016 <https://awava.org.au/2016/04/07/research/role-specialist-womens-services-australias-response-violence-women-children>

⁵⁶ Queensland sexual assault services (2010) The Right to Choose Enhancing best practice in responding to sexual assault in Queensland <http://www.communitydoor.org.au/sites/default/files/Right%20to%20choose%20final%20pdf%20with%20covers.pdf>; Nichols, A. (2011) 'Gendered Organizations: Challenges for Domestic Violence Victim Advocates and Feminist Advocacy', *Feminist Criminology*, 6(2), 111-113. The United Nations General Assembly (1993) 'Declaration on the Elimination of Violence Against Women' recognises that violence against women is a cause and consequence of gender inequality and states that services should be delivered based on this understanding. G.A. res 48/104, 1993 (DEVAW) <http://www.un.org/documents/ga/res/48/a48r104.htm> article 4 (g).

⁵⁷ Victorian Government Department of Human Services (2012) Family Violence Risk Assessment and Risk Management Framework and Practice Guides 1-3, Edition 2 http://www.dhs.vic.gov.au/_data/assets/pdf_file/0010/718858/1_family_violence_risk_assessment_risk_management_framework_manual_010612.PDF; Domestic Violence Victoria (2006) Code of Practice for Specialist Family Violence Services for Women and Children: Enhancing the safety of women and children in Victoria, http://www.dhs.vic.gov.au/_data/assets/pdf_file/0003/580908/code-of-practice-domestic-violence-vic-2006.pdf

⁵⁸ Allen, N., Larsen, S., Trotter, J. and Sullivan, C. M. (2012) 'Exploring the Core Service Delivery Processes of an evidence-based community advocacy program for women with abusive partners', *Journal of Community Psychology* 14(1), 1-18.

⁵⁹ Zweig, J.M. and Burt, M.R. (2007) 'Predicting women's perceptions of domestic violence and sexual assault agency helpfulness: What matters to program clients?' *Violence against Women*, 13, 1149-1178; Council of Europe, Combating violence against women: minimum standards for support services (2008) [http://www.coe.int/t/dg2/equality/domesticviolencecampaign/Source/EG-VAW-CONF\(2007\)Study%20rev.en.pdf](http://www.coe.int/t/dg2/equality/domesticviolencecampaign/Source/EG-VAW-CONF(2007)Study%20rev.en.pdf) See also existing Australian standards documents (notes 40 to 43).

⁶⁰ AWAVA Policy Brief on the role of specialist women's services in Australia's response to violence against women and their children 2016 <https://awava.org.au/2016/04/07/research/role-specialist-womens-services-australias-response-violence-women-children>; ACOSS (2012) Australian Community Sector Survey 2012, http://www.sectorconnect.org.au/assets/pdf/resources/resourcepg/advocacy/ACOSS_Community_Sector_Report_2012.pdf

⁶¹ Zweig, J.M. and Burt, M.R. (2007) 'Predicting women's perceptions of domestic violence and sexual assault agency helpfulness: What matters to program clients?' *Violence against Women*, 13, 1149-1178; Stone, J. and Clifton, B. (2005) 'Sexual Assault Resource Centre: Client mental health survey', *ACSSA Newsletter*, No.9

Lack of funding to specialist women's and community legal services creates additional barriers for women subjected to violence. Women often have limited capacity to obtain access to justice because of financial barriers, and are often unable to access legal information, advice and/or representation due to the high cost of private legal representation⁶². Domestic Violence NSW's Practitioners' Survey indicates that often, women who are working casually or part-time, and where there is property to the relationship, do not meet financial eligibility criteria to access free legal assistance from Legal Aid⁶³. It is also difficult for women to obtain pro bono assistance, as it is not a particularly attractive area for lawyers working in family law⁶⁴. Given the lack of access to free specialist and/or legal services, when self-representing in family courts, women are at risk of unsuccessful settlements as well as further re-traumatisation and abuse.

Women's legal services, specialist Aboriginal and Torres Strait Islander and multicultural legal services have the skills and knowledge to work effectively with victims/survivors, but need to be resourced to scale up their work in response to demand. This scaling-up needs to occur in the context of broader funding and capacity increases across the legal assistance sector and specialist domestic and family violence services sector, together with other related services (such as sexual assault services) that support victims/survivors in the family law system.

We recommend that the Australian Government incorporates specialist women's services into family law systems, and adequately funds these services, by:

- funding specialist women's services that provide embedded services in state and territory courts to continue to support clients with family violence issues when they move to the family law system to seek parenting or other orders;
- embedding workers from specialist women's services in the family courts and Family Relationship Centres; and
- rolling out and better resourcing of Family Advocacy and Support Services within the family law system and Women Domestic Violence Court Advocacy Service within local and district courts.

Ban of direct cross-examination

AWAVA has made a submission to a consultation on the ban of direct cross-examination endorsing WLSA's submission. AWAVA's submission can be accessed [here](#). The Bill has not been yet introduced to Parliament. Considering the impact on victims/survivors of direct cross-examination by their

November 2005, p 15; Women's Resource Centre (2007) Why Women Only? The value and benefits of by women, for women, services, London, UK <http://thewomensresourcecentre.org.uk/wp-content/uploads/whywomenonly.pdf>; Chung, D., Colley, D. and Zannettino, L. (2004) Effective Integrated Approaches in the Delivery of Services and Responses for Women Experiencing Domestic Violence, Research and Education Unit on Gendered Violence, University of South Australia, Adelaide and Partnerships Against Domestic Violence, Canberra; Zannettino, L. (2006) Better Outcomes for the Protection of Children Affected by Domestic Violence: Developing Interagency Collaboration between Child Protection and Domestic Violence Services: A Research Report, Research and Education Unit on Gendered Violence in partnership with the Department for Families and Communities, South Australia; Irwin, J., Waugh, F. and Bonner, M. (2006) 'The inclusion of children and young people in research on domestic violence', Communities, Children and Families in Australia, 1(1), pp.17-23.

⁶² Women's Legal Services Victoria Submission Domestic Violence in Australia pg 5, Productivity Commission, Access to Justice Arrangements – Inquiry report No. 72, 3 December 2014

⁶³ Domestic Violence NSW Practitioner Survey Respondent – Parliamentary inquiry into a better family law system.

⁶⁴ National Pro Bono Resource Centre, Pro bono legal services in family law and family violence, Understanding the limitations and opportunities (Final Report) October 2013

abuser, as well as the fact that the quality of evidence to the court is undermined when such dynamics are present, we welcomed the Government's commitment to ban direct cross-examination in family court cases involving family violence. We are urging the implementation of the legislation.

Q14 What changes to the provisions in Part VII of the Family Law Act could be made to produce the best outcomes for children?

The 2011 amendments to the Family Law Act, including the expansion of the definition of family violence and the prioritising of safety over a meaningful relationship with both parents, were necessary and positive steps in effective legal responses to family violence. However, the presumption of equal shared parental responsibility remains and The *Family Law Act 1975 (Cth)* states that when making a Parenting Order, the Court must apply a presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility for the child⁶⁵. This means that parents must consult with each other and share responsibility for decisions about major long term issues in regard to the children. Although the presumption is not meant to apply in cases of domestic and family violence, women and children are still negatively impacted by the presumption because it is often hard to identify or prove this violence to the standard required by the Courts. This is problematic particularly in situations where domestic and/or family violence may not be properly identified, for example where a victim of violence is unrepresented.

As each family is unique, rather than focusing on presumptions, decisions about children should be made on a case-by case basis in the best interest of the child and placing a greater focus on safety and risks to children. Consequently, the wording of the presumption should be considered for alteration⁶⁶.

Q15. What changes could be made to the definition of family violence, or other provisions regarding family violence, in the Family Law Act to better support decision making about the safety of children and their families?

Section 4AB of the Family Law Act defines family violence in the following way:

- (1) *For the purposes of this Act, family violence means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member), or causes the family member to be fearful.*
- (2) *Examples of behaviour that may constitute family violence include (but are not limited to):*
 - (a) *an assault; or*
 - (b) *a sexual assault or other sexually abusive behaviour; or*
 - (c) *stalking; or*
 - (d) *repeated derogatory taunts; or*
 - (e) *intentionally damaging or destroying property; or*
 - (f) *intentionally causing death or injury to an animal; or*
 - (g) *unreasonably denying the family member the financial autonomy that he or she would otherwise have had; or*

⁶⁵ Family Law Act 1975 (Cth) s 61DA

⁶⁶ WLSA (2016) Safety First in family law: Five steps to creating a family law system that keeps women and children safe 1d

- (h) unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support; or
- (i) preventing the family member from making or keeping connections with his or her family, friends or culture; or
- (j) unlawfully depriving the family member, or any member of the family member's family, of his or her liberty.⁶⁷

The definition as it stands does not encompass all the manifestations of violence, and thus creates a risk of inconsistent approaches in judgements. It has been argued that some judicial officers may not have consistent approaches to defining family violence. For instance, some judicial officers view violence as physical and one-off events rather than as part of a complex pattern of violent or abusive behaviours.⁶⁸

We would like to highlight the importance of drawing on feminist approaches in conceptualisation of violence against women. The use of a feminist approach ensures that violence against women, including sexual violence, is understood in terms of power dynamics and social structures, rather than treated as purely individual experiences. A feminist framework locates violence against women and children as occurring within a patriarchal society where male dominance and privilege are normalised.⁶⁹

In order to expand the definition, we recommend including the following forms of abuse that constitute family violence:

(a) Reproductive coercion

The term reproductive coercion is used to define a range of male partner pregnancy-controlling behaviours. These behaviours can include birth control sabotage (where contraception is deliberately thrown away or tampered with), threats and use of physical violence if a woman insists on condoms or other forms of contraception, emotional blackmail coercing a woman to have sex or to fall pregnant, or to have an abortion as a sign of her love and fidelity, as well as forced sex and rape.⁷⁰

Brisbane-based non-for-profit organisation Children by Choice has noted that women from culturally and linguistically diverse backgrounds are over-represented among women subjected to reproductive coercion, with up to one in five CALD contacts reporting this form of abuse.⁷¹

⁶⁷ See: http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s4ab.html

⁶⁸ Westmarland, N. and Kelly, L., 'Naming and Defining 'Domestic Violence': lessons from research with violent men', (2016) 112 *Feminist Review* 113; Fehlberg, Belinda et al, and Juliet Behrens, *Australian Family Law – The Contemporary Context* (Oxford University Press, 2015).

⁶⁹ Australian Women Against Violence Alliance (2016) Policy Brief The role of specialist women's services in Australia's response to violence against women and their children <http://awava.org.au/2016/04/07/research/role-specialist-womens-services-australias-response-violence-women-children>

⁷⁰ E Miller, M Decker, H McCauley, D Tancredi, R Levenson, J Waldman, P Schoenwald, J Silverman, 'Pregnancy Coercion, Intimate Partner Violence and Unintended Pregnancy' (2010) 81 *Contraception* 316.

⁷¹ Children by Choice Assoc Inc (2014) Domestic violence in Australia. Submission to the Finance and Public Administration References committee. Available at <https://www.childrenbychoice.org.au/factsandfigures/reproductivecoercion>

(b) Technology-facilitated abuse

Manifestations of technology-facilitated abuse range from recording of intimate images where a victim/survivor does not have a safe option not to consent, to stalking, installing hidden applications to track woman's location⁷² or to obtain access to her email or messages, (cyber)bullying and harassment, threats to coerce her into not giving evidence, impersonation through apps on smart phones to withdraw from the proceedings, and the use of communications technologies to enable a sexual assault and/or to coerce a victim into an unwanted sexual act.⁷³

Technology-facilitated abuse has become a common tool of perpetrators of domestic and family violence to threaten, harass and/or control both current and former partners.⁷⁴ In terms of sexual violence in both intimate partner and non-intimate partner relationships, technology is another weapon with which assault is perpetrated. Manifestations of technology-facilitated sexual violence include non-consensual sharing of intimate images, online sexual harassment, technology-facilitated sexual assault and coercion, sexual exploitation, broadcasting sexual assaults online etc.

In the area of domestic and family violence, technology-facilitated abuse is widespread. The national survey of technology-facilitated abuse drawing on the experience of family violence practitioners across Australia⁷⁵ stated that almost all survey respondents (98 per cent) indicated that they had clients who had experienced technology-facilitated stalking and abuse. Another survey of survivors who had received unwanted contact from a partner or ex-partner via the phone or internet found that 80 per cent had been abused via text messages, while Facebook was the next most commonly used technology.⁷⁶

Research has found that this violence, including the non-consensual sharing of intimate images, or the threat of sharing such images, can traumatise and isolate victims and constitutes a major barrier to the full enjoyment of social life and autonomy.⁷⁷ Online interactions now constitute a major dimension of social life for many people, and the unauthorised sharing of intimate images can traumatise and isolate victims, which is often the intention of those who share the images. Furthermore, the non-consensual sharing of intimate images, or the threat to share such images, is increasingly used as a tactic of control in abusive relationships and in the perpetration of sexual assault. More generally it also manifests and reaffirms the means of maintaining male privilege and power.

⁷² See <http://www.smartsafe.org.au/disturbing-new-trend-domestic-violence-offenders-use-car-tracking>

⁷³ Anastasia Powell & Nicola Henry (2016): Policing technology-facilitated sexual violence against adult victims: police and service sector perspectives, *Policing and Society*, DOI:10.1080/10439463.2016.1154964

⁷⁴ Henry, N., Powell A. (2015) Beyond the 'sext': Technology facilitated sexual violence and harassment against adult women. *Australian & New Zealand Journal of Criminology*. Vol. 48(1) 104–118

⁷⁵ Woodlock, Delanie (2015) ReCharge: Women's Technology Safety, Legal Resources, Research and Training, Women's Legal Service NSW, Domestic Violence Resource Centre Victoria and WESNET, Collingwood.

⁷⁶ Woodlock, Delanie (2013) Technology-facilitated Stalking: Findings and Recommendations from the SmartSafe Project, Domestic Violence Resource Centre Victoria, Collingwood
<http://www.smartsafe.org.au/sites/default/files/SmartSafe-Findings-Booklet.pdf>

⁷⁷ Australian Women Against Violence Alliance (2016) Policy Brief Access to justice for women and children living with or at risk of violence.

(c) Cultural and spiritual abuse

The National Domestic and Family Violence Bench Book⁷⁸ drawing on Australian and international research indicates the need to recognise spiritual and cultural abuse as a form of domestic and family violence that may be part of a broader and complex pattern of behaviours experienced by a victim.⁷⁹

Spiritual and cultural abuse are means by which a perpetrator can exercise dominance, control or coercion over a victim who is especially vulnerable due to their spirituality or cultural identity. Behaviours may include any form of domestic and family violence and may involve the perpetrator (but are not limited to the examples provided below):⁸⁰

- belittling the victim's spiritual or cultural worth, beliefs or practices;
- denying the victim access to their spiritual or cultural community;
- preventing the victim from wearing clothing prescribed by spiritual or cultural practices;
- asserting his entitlement to a dowry from the victim's family, or punishing the victim or her family for what is claimed to be an insufficient dowry;
- forcing the victim to undergo partial or total removal of her external genitalia, or be subjected to any other injury to her genital organs for reasons that are not medically warranted (sometimes referred to as female genital mutilation or FGM);
- compelling the victim to keep the abuse secret by threatening that disclosure will result in the victim being disbelieved, shunned and shamed by their spiritual or cultural community.

It is often reported that women from culturally and linguistically backgrounds are less likely than the general population to recognise particular types of behaviours such as yelling, criticising or forcing the partner to have sex, as 'always' constituting domestic violence.⁸¹ Another study has found that often people use the terms family conflict and family violence interchangeably.⁸²

(d) Systems abuse

The Australian Institute of Family Studies has reported that perpetrators are using a range of techniques to gain an advantage over or to harass, intimidate, discredit or otherwise control the other party.⁸³ Tactics include "seeking to control the victim before, during or after separation may make

⁷⁸ See National Domestic and Family Violence Book <http://dfvbenchbook.aija.org.au/understanding-domestic-and-family-violence/cultural-and-spiritual-abuse/>

⁷⁹ Cares, Alison, and Gretchen Cusick (2012) Risks and Opportunities of Faith and Culture: The Case of Abused Jewish Women 27(5) *Journal of Family Violence* 427.

⁸⁰ See: Department of Communities, Child Safety and Disability Services (QLD), '[Domestic and Family Violence and Its Relationship to Child Protection](#)' (Practice Paper, October 2012); Bent-Goodley, Tricia B, and Dawnovise N Fowler, 'Spiritual and Religious Abuse: Expanding What Is Known About Domestic Violence' (2008) 21 *Journal of Women and Social Work* 282; Dehan, Nicole, and Zipi Levi, 'Spiritual Abuse: An Additional Dimension of Abuse Experienced by Abused Haredi (Ultraorthodox) Jewish Wives' (2009) 15(11) *Violence Against Women* 1294; Knickmeyer, Nicole, Heidi Levitt and Sharon Horne, 'Putting on Sunday Best: The Silencing of Battered Women within Christian Faith Communities' (2010) 20(1) *Feminism Psychology* 94.

⁸¹ See: VicHealth (2009) National Survey on Community Attitudes to Violence Against Women; Cavallaro, Lisa, '*I Lived in Fear because I Knew Nothing: Barriers to the Justice System Faced by CALD Women Experiencing Family Violence* (InTouch Multicultural Centre Against Family Violence, Victoria Law Foundation, 2010).

⁸² Rees S., Pease B. (2006) Refugee Settlement, Safety and Wellbeing: Exploring Domestic and Family Violence in Refugee Communities. Immigrant Women's Domestic Violence Service, Victorian Health Promotion Foundation (VicHealth).

⁸³ Kaspiew, Rae, et al, '[Evaluation of the 2012 Family Violence Amendments](#)' (Synthesis Report, Australian Institute of Family Studies, 2015)

multiple applications and complaints in multiple systems (for example, the courts, Child Support Agency, Centrelink) in relation to a protection order, breach, parenting, divorce, property, child and welfare support and other matters with the intention of interrupting, deferring, prolonging or dismissing judicial and administrative processes, which may result in depleting the victim's financial resources and emotional wellbeing, and adversely impacting the victim's capacity to maintain employment or to care for children.⁸⁴ Some other examples include the perpetrator failing to appear in court, repeatedly seeking adjournments, or appealing decisions on tenuous grounds.⁸⁵ In some instances, perpetrators are issuing subpoenas for medical records⁸⁶ or choosing to directly cross-examine the victim/survivor.

Other research has also indicated that "a court's failure to respond adequately or appropriately to a victim's allegations of domestic and family violence may constitute a form of abuse that is secondary to that already being experienced by the victim."⁸⁷ The Standing Committee on Social Policy and Legal Affairs provides a range of examples when family violence claims were dismissed by judiciary officers, family report writers and how women were advised not to include family violence in their applications.

Child protection services' involvement can also be a source of trauma for victims/survivors because of the possibility of child removal despite the family violence.⁸⁸

We recommend expanding the definition of family violence to incorporate systems abuse, to ensure dismissal of claims without merits while ensuring that this does not punish victims/survivors who have made a mistake in a form, for instance, and to provide better training for judicial officers on the nature of family violence incorporating all the manifestations indicated above. We also support the recommendation by the Family Law Council to commission the research into where family law systems abuse occurs and how it can be prevented. This recommendation has also been made by WLSA.

Q22. How can the current dispute resolution process be modified to provide effective low-cost options for resolving small property matters?

Property Settlements

In a determination of a property settlement under the *Family Law Act 1975* the court must take into account each party's net assets and the financial and non-financial contributions of each party to the asset pool⁸⁹. Future needs are also considered by the Court in their decisions. Women are currently disadvantaged in three key ways in obtaining a fair property settlement.

⁸⁴ Kaspiew, Rae, 'Violence in Contested Children's Cases: An Empirical Exploration' (2005) 19 *Australian Journal of Family Law* 112; Laing, Lesley, 'It's Like this Maze You Have Make Your Way Through': Women's Experiences of Seeking a Domestic Violence Protection Order in NSW (Faculty of Education and Social Work, University of Sydney, 2013); Cameron, Prue, '[Relationship Problems and Money: Women Talk about Financial Abuse](#)' (Research Report, Wire Women's Information, 2014).

⁸⁵ Standing Committee on Social Policy and Legal Affairs (2017) A better family law system to support and protect those affected by family violence.

⁸⁶ See section on additional issues in this submission for more on subpoenas.

⁸⁷ National Domestic and Family Violence Bench book, <http://dfvbenchbook.aija.org.au/understanding-domestic-and-family-violence/systems-abuse/>; Standing Committee on Social Policy and Legal Affairs (2017) A better family law system to support and protect those affected by family violence.

⁸⁸ Australian Law Reform Commission and New South Wales Reform Commission, Family Violence: A National Legal Response, ALRC Final Report No 114, NSWLRC Final Report No 128 (2010)

⁸⁹ Family Law Act 1975 s79(4)

Firstly, the family law system is lengthy and legalistic for women with low income or assets – particularly where they have been victims of family violence. This results in many women walking away from a property settlement entirely. This contributes to the financial hardship that disproportionately impacts women following relationship breakdown.

Secondly, the impacts of family violence are not adequately taken into account in property settlements. Family violence is not specifically identified as a relevant consideration in property matters in the *Family Law Act*. While case law exists, this is not always considered in determining the adjustment in a negotiation, which is the way most matters are finalised. As a result, women who have been subjected to domestic violence may have their actual contributions reflected unfairly. The court must take into account additional factors based on the future needs of the parties, including their age, health, income, property, financial resources, and capacity for gainful employment and having care of children. There should be a legislative requirement for the court to consider the impact of family violence when determining a property division as consistent with the Family Law Council’s 2001 advice to the Attorney General.⁹⁰

Thirdly, abusive men are frequently reported as engaging in protracted litigation and in some cases vexatious or abusive behaviour. An example of this type of systems abuse is failure to disclose relevant financial documents during the discovery stages of family law proceedings. The *Family Law Rules 2004*⁹¹ require parties to make full and frank disclosure of their financial circumstances. However, perpetrators frequently engage in deceitful and controlling behaviours, avoiding disclosure obligations. For example, a common behaviour reported by women is an ex-partner hiding their income due to their self-employment⁹² or withholding other financial information in order to lessen the property settlement or spousal maintenance their ex-partner would otherwise be entitled to.⁹³ We also refer you to the Stepping Stones: Legal barriers to economic equality after family violence (Women’s Legal Service Victoria)⁹⁴ report, Small Claims, Large Battles: Achieving economic equality in the family law system (Women’s Legal Service Victoria)⁹⁵ and the Economic Security for Survivors of Domestic and Family Violence: Understanding and measuring the impact (Good Shepherd Australia New Zealand)⁹⁶ report.

⁹⁰ WLSA. 2016. Safety First in family law: Five steps to creating a family law system that keeps women and children safe 4b.

⁹¹ Family law Rules 2004 Rule 13.04. See: http://www.austlii.edu.au/au/legis/cth/consol_reg/flr2004163/s13.04.html

⁹² Women’s Legal Services Australia (WLSA) Submission to House of Representatives Standing Committee on Social Policy and Legal Affairs on Child Support. 2014, p 12. See: http://www.wlsa.org.au/uploads/submission-resources/WLSA_Child_Support_Submission.pdf

⁹³ Ibid page 10

⁹⁴ Smallwood, E. (2015) Stepping Stones: Legal barriers to economic equality after family violence, Women’s Legal Service Victoria, Melbourne

⁹⁵ Women’s Legal Service Victoria (2018) Small Claims, Large Battles: Achieving economic equality in the family law system

⁹⁶ Tanya Corrie (2016) Economic Security for Survivors of Domestic and Family Violence: Understanding and measuring the impact. Good Shepherd Australia New Zealand
https://www.goodshep.org.au/media/1421/financial-security-for-survivors-of-domestic-and-family-violence_march2016.pdf

Q33. How can collaboration and information sharing between the family courts and state and territory child protection and family violence systems be improved?

Improved information sharing

Child protection and family law systems often do not work in a synchronised manner. In prioritising the safety and well-being of children, child protection systems may neglect the needs of a victim/survivor. The family law system, in turn, may not have sufficient resources targeted at children and youth. Furthermore, there is a reluctance to engage with child protection services that may place the responsibility on the victim to protect children from the perpetrator, while not taking the bigger picture and impact of family violence into account. Current gaps between the two systems may result in children being returned to a perpetrator.⁹⁷

There is a need to produce resources in plain English and have them translated (as indicated in this submission in response to questions 3 & 4), outlining the intersection of child protection and family law systems, including the roles of key players (eg. police, courts, child protection agency etc).

There should be an effective mechanism for information sharing developed between the child protection and family law systems. Decisions regarding children should be made in the best interests of a child where safety of the child is paramount. Child protection services need better training on family violence and cultural competency to prevent them from reinforcing the unjust barriers, marginalisation and control exercised against mothers who are victims/survivors of domestic and family violence (particularly Aboriginal and Torres Strait Islander mothers).

Improving Accessibility of Children's Contact Services

Children's Contact Services (CCS) were introduced to provide safe, impartial environments and services to separating, high conflict families where issues such as family violence, child abuse, sexual abuse allegations, substance abuse, mental health issues and parenting capacity are of concern.

Domestic Violence Victoria (DV Vic) raises concerns in relations to the quality, accessibility and availability of contact centres for supervised contact. In their submission they state that their clients "experience prolonged waiting times for contact services of five months or more, and that the expense of private contact centres make them inaccessible."⁹⁸ This may result in further risks for the safety of mothers and children when they have to arrange contact with fathers outside of contact services, especially when they have parenting orders requiring that contact. These issues have been also raised by others within AWAVA's membership network.

We support DV Vic's position that children's contact services need to be included in the broader review of the family law system.

Accreditation of Children's Contact Services

Additionally, the Australian Children's Contact Services Association (ACCSA) in their submission has raised a number of concerns in relation to the operation of private children's contact services.⁹⁹

⁹⁷ Standing Committee on Social Policy and Legal Affairs (2017) A better family law system to support and protect those affected by family violence. Report; Women's Legal Services Australia (2017) Submission to the parliamentary inquiry into a better family law system to support and protect those affected by family violence.

⁹⁸ Domestic Violence Victoria (2018) Submission to the Review of the Family Law System: Issues Paper.

⁹⁹ Australian Children's Contact Services Association (2018) Submission to the Review of the Family Law System: Issues Paper

There has been a set of baseline practice and administrative¹⁰⁰ standards developed for CCSs that underline the operation for 65 funded service around Australia. These include:

- requirements in relation to governance;
- management of data and confidentiality;
- qualification entry expectations for staff;
- training and development of staff requirements;
- supervision of staff;
- thorough intake and assessment procedures;
- child focused practices including familiarisation sessions;
- safe dedicated supervision sites;
- critical incident procedures;
- an understanding of contemporaneous note-taking; and
- client access to a complaints procedure.

In the last few years a large number of privately operated businesses have opened that function without any regulation, accreditation or accountability.

The Australian Children's Contact Services Association (ACCSA) has raised a number of concerns in relation to the operation of private CCSs. The list below is not exhaustive:

- Supervision being conducted in crowded public domains such as shopping centres, parks and/or commercial play centres where there is no capacity to monitor conversations, possibility of abduction or provide privacy and confidentiality. In the context of family violence this provides further opportunities for perpetrators to exercise power, control and abuse victims/survivors or children themselves.
- No intake and assessment processes, no risk management and no assessment of a services' ability to safely supervise the situation presented
- Inadequate number of staff to family member ratios.
- Instances of private CCSs staff attending supervised contacts with no identification provided to parents.

Such practices create further risks for the safety of families and contributes to the traumatisation through their processes. Additionally, there are no avenues to lodge a complaint about those services.

We are supporting ACCSA in their recommendations that FDR practitioners and judges should be referring families to CCSs that are accredited. We also support a broader roll-out of the accreditation system for CCSs.

¹⁰⁰ See <https://www.dss.gov.au/our-responsibilities/families-and-children/programs-services/family-support-program/family-and-children-s-services/program-guidelines-and-related-information/fsp-administrative-approval-requirements?HTML>

Q41-42. Q41. What core competences should be expected of professionals who work in the family law system? What measures are needed to ensure that family law system professional have and maintain these competences? And Question 42. What core competencies should be expected of judicial officers who exercise family law jurisdiction? What measures are needed to ensure that judicial officers have and maintain these competencies?

Core competencies of professionals and judicial officers in the family law system

Given the complexity of the family law system and the diversity of people interacting with it, there needs to be an emphasis on early decision making, triaging and case management of domestic violence cases in the family courts¹⁰¹. The Family Law Court has found that Aboriginal and Torres Strait Islander people and people from culturally and linguistically diverse backgrounds face a range of additional barriers when accessing legal, counselling and family dispute resolution services¹⁰². The Third Action Plan of the National Plan to Reduce Violence against Women and their Children has also indicated a commitment to improving the quality and accessibility of services for women from culturally and linguistically diverse backgrounds and for Aboriginal and Torres Strait Islander women. In the family law system, there is a need to extend this commitment to people who identify as LGBTIQ as well.

Thus, there should be a particular focus placed on training programs developed and delivered for judicial officers, court staff and family lawyers including Independent Children Lawyers (ICLs) and Family Dispute Resolution (FDR) practitioners in the areas of intersection of family law and family violence, cultural competency in relation to working with Aboriginal and Torres Strait Islander clients, clients of a culturally and linguistically diverse background (including working with interpreters), working with vulnerable clients, trauma-informed practices and working with clients from LGBTIQ communities.

¹⁰¹ WLSA. 2016. Safety First in family law: Five steps to creating a family law system that keeps women and children safe 1a (Policy flier). See:

http://www.womenslegal.org.au/files/file/SAFETY%20FIRST%20POLICY%20PLATFORM.MAY%202016_FINAL.pdf See also Family Court of Australia and Federal Circuit Court of Australia, Family law system needs more resources to deal with an increasing number of cases involving family violence, 20 June 2016 at: http://www.federalcircuitcourt.gov.au/wps/wcm/connect/84136241-45e6-4cbe-8e48-9274daa0c2d3/mr200616.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE-84136241-45e6-4cbe-8e48-9274daa0c2d3-lmuDF38

¹⁰² Family Law Council 2012, *Improving the family law system for Aboriginal and Torres Strait Islander clients*, Family Law Council. Accessed: <https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Improving%20the%20Family%20Law%20System%20for%20Aboriginal%20and%20Torres%20Strait%20Islander%20Clients.pdf>. Family Law Council 2012, *Improving the family law system for clients from culturally and linguistically diverse backgrounds*, Family Law Council. Accessed: <https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Pages/FamilyLawCouncilpublishedreports.aspx>.

Results from the DVNSW Practitioners' Survey¹⁰³ indicated that in many cases there is lack of acknowledgement of domestic or family violence history. One of the respondents suggested:

Rulings are made based on an assumption of equal power between the parties rather than the fixed imbalance of power that pre-dates and persists through the court process. This leaves victims further vulnerable to system abuse by wealthy and highly educated perpetrators. Victims are judged on their emotional presentation at court, ignorant of the impact of domestic violence.

The same applies to property settlement matters, where often the history of domestic violence is not taken into account as a major factor influencing woman's ability to equally participate and acquire property. Where DV is ignored, as an aspect in property matters, women may be forced into settlements regarding property that will leave them at a significant disadvantage, compared to the offender.¹⁰⁴

All participants in court processes, judges, lawyers and court staff should have a thorough understanding of the nature and dynamics of domestic and family violence, such as an understanding of the tactics a perpetrator may utilise within the court system to perpetuate a pattern of dominance and control. Increased knowledge regarding gender bias and the nature of family violence amongst staff in the judicial system can assist in holding perpetrators to account, and, ensure that victims are treated in a consistent manner¹⁰⁵.

Further, the training of staff within the judicial system should account for the specific needs of Aboriginal and Torres Strait Islander and CALD women that have been subjected to domestic violence. A consultation report prepared by the Judicial Council on Cultural Diversity (JCCD) identified a need for cultural competency training for staff who interact with Aboriginal and Torres Strait Islander women who have been subjected to domestic violence, in order to improve their understanding of the dynamics of family violence within Aboriginal and Torres Strait Islander communities¹⁰⁶. Similarly, a second report prepared by JCCD identified that CALD women who experience family violence may have different experiences to non-CALD women which require comprehensive cultural competency training for court staff that interact with them, for example instances of dowry-related violence, forced marriage and female genital mutilation.¹⁰⁷

We recommend that the training includes the following topics:

- the nature and dynamics of family violence;
- working with vulnerable clients;
- cultural competency (working with Aboriginal and Torres Strait Islander people and people from culturally and linguistically diverse backgrounds);
- working with people who identify as LGBTIQ;

¹⁰³ Domestic Violence NSW Practitioner Survey Respondent – Parliamentary inquiry into a better family law system.

¹⁰⁴ Ibid.

¹⁰⁵ Wakefield S & Taylor A (2015) Judicial education for domestic and family violence. ANROWS Landscapes 02/2015. At: anrows.org.au/publications/landscapes/judicial-education-for-domestic-and-family-violence-state-knowledge-paper (see footnote 155 of the COAG advisory panel report below)

¹⁰⁶ Judicial Council of Cultural Diversity (2016) The Path to Justice: Aboriginal and Torres Strait Islander Women's Experience of the Courts., page p 41

¹⁰⁷ Judicial Council of Cultural Diversity (2016) The Path to Justice: Migrant and Refugee Women's Experience of the Courts., p 31

- intersectionality of clients' needs that includes recognition of structural inequalities arising from the interconnectedness of gender, age, sexuality, disability, culture, religion, race and/or other experiences;
- trauma informed practice;
- the intersection of family law, child protection and family violence;
- technology facilitated abuse; and
- the intersection of family violence and family law in property determinations that includes:
 - the financial impacts of family violence
 - the nature and impacts of economic abuse.¹⁰⁸

Additional resources, such as videos, factsheets and toolkits regarding these topics could also be provided to support judicial officers better understand the barriers to justice, and to access information and resources of relevance to the context of their work.

Accreditation of Family Report Writers and Independent Single experts

A family report writer may be appointed in family law proceedings to provide a report about the family, key issues and make recommendations about arrangements for the children. These reports are written by family consultants who are qualified social workers or psychologists; family reports can also be commissioned privately. These assessments play a critical role in the decision-making process of the court¹⁰⁹ and can influence whether or not legal aid funding for a parent should be continued.¹¹⁰

Although only one piece of evidence, family reports are influential and can be determinative in cases involving allegations of abuse, where there may not be any other independent evidence or verification of allegations in dispute. While family consultants are qualified social workers or psychologists, there is no requirement for clinical experience in or a thorough understanding of the nature and dynamics of domestic and family violence.¹¹¹ Poor practices have resulted, for example, in joint interviews with child victims and perpetrators of domestic violence. A lack of expertise in the nature and understanding of domestic and family violence can lead to the making of unsafe decisions by the report writer and misunderstandings of the concerns raised by victims of past domestic violence.¹¹² This may also have devastating implications for court outcomes, putting women and children at unnecessary risk.

As recommended by the final report of the 2015 Senate Inquiry into Domestic Violence in Australia¹¹³ and in the final report of the COAG Advisory Panel on Reducing Violence against Women and their Children,¹¹⁴ the introduction of a formal accreditation scheme, equipping family report writers with

¹⁰⁸ Smallwood, E. (2015) Stepping Stones: Legal barriers to economic equality after family violence, Women's Legal Service Victoria, Melbourne.

¹⁰⁹ WLSA submission to senate inquiry – Domestic Violence and gender inequality 12 April 2016, p. 19-20

¹¹⁰ Ibid

¹¹¹ The publication of the *Australian Standards of Practice for Family Assessments and Reporting* by the Family Court of Australia, the Federal Circuit Court of Australia and the Family Court of Western Australia in 2014, which provides guidance on the expected levels of knowledge and understanding of family violence for family assessors is noted.

¹¹² Ibid

¹¹³ Senate Standing Committees in Finance and Public Administration, Domestic Violence in Australia, 20 August 2015, Recommendation 17.

¹¹⁴ Council of Australian Governments Advisory Panel on Reducing Violence against Women and their Children (COAG Advisory Panel), Final Report. 2016. Recommendation 1.4 See: <https://www.coag.gov.au/sites/default/files/files/COAGAdvisoryPanelonReducingViolenceagainstWomenandtheirChildren-FinalReport.pdf>

appropriate, mandatory training would help support report writers to better understand and work with victims of violence and trauma, ensuring decisions are better informed, safer and more appropriate.¹¹⁵

Accreditation for single experts in family law proceedings commissioned privately is also required. In addition to accreditation with respect to a thorough understanding of the nature and dynamics of domestic and family violence, both family report writers and single experts should be accredited with respect to cultural competency in working with Aboriginal and Torres Strait Islander families, refugee and migrant families and LGBTIQ families.

Additional issues not raised directly by the questions:

Appoint more judges, registrars and family consultants

Lack of sufficient funding creates pressure on judges and delays in courts. The Law Council of Australia reports that “it is not uncommon for there be 30 or more cases before a judge on the first hearing date, which gives each case about 10 minutes.”¹¹⁶ Appointing more judges will improve the early identification of risks. Increase in appointments should be accompanied by sufficient training outlined in this submission in response to questions 41 and 42.

Employing Aboriginal and Torres Strait Islander Liaison Officers in Family Courts

Out of the total number of 95 employees in the Family Court of Australia, only one employee is identified as Aboriginal and/or Torres Strait Islander.¹¹⁷ The situation in the Federal Circuit Court is similar. There are only 7 Aboriginal and/or Torres Strait Islander staff members among 560 employees.¹¹⁸

The Family Law Council’s Interim Report on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems¹¹⁹ has highlighted the need for the government to provide funding for the employment of Aboriginal and Torres Strait Islander family liaison officers. We support that recommendation.

Employing Multicultural Liaison Officers in family courts

As indicated in the response to question 6 of this submission, courts and tribunals should engage Cultural Liaison Officers, establish Cultural Diversity Committees, introduce multicultural plans, and actively recruit employees from migrant and refugee backgrounds.

Protection of Sexual Assault Communications

Sexual assault communications are communications made in the course of a confidential relationship between a counsellor and a person who has had sexual assault perpetrated against them.¹²⁰ These communications can include a broad range of counselling and therapeutic records such as, for example, sexual assault counselling notes, case notes or medical files in sexual assault trials. The

¹¹⁵ Ibid

¹¹⁶ Law Council of Australia (2017) Parliamentary inquiry into a better family law system to support and protect those affected by family violence.

¹¹⁷ Family Court of Australia, 2016-2017 Annual Report.

¹¹⁸ Federal Circuit Court of Australia, 2016-2017 Annual Report

¹¹⁹ Family Law Council (2015) Families with Complex Needs and the Intersection of Family Law and Child Protection Systems, Interim report.

<https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Families-with-Complex-Needs-Intersection-of-Family-Law-and-Child-Protection-Systems%E2%80%93Interim-Report-Terms-1-and-2.pdf>

¹²⁰ ALRC (2010), *Family Violence – A National Legal Response*, p. 1257

disclosure of such information can be extremely traumatic and harmful for victims of sexual assault in sexual assault legal proceedings; not only can it undermine the integrity of counselling and therapeutic relationship and have long-term implications for the survivor/victim, it also has the potential to lead to deductions and assumptions about the “moral worthiness” of sexual assault survivors/victims in reports of sexual assault.¹²¹ This can lead to the unnecessary withdrawal of sexual assault complaints and discourage sexual assault survivors/victims from reporting sexual offence. The potential outcomes of disclosing such information in court proceedings is recognised as being contrary to public interest¹²² with advocates highlighting that counselling is not designed to investigate allegations of crime or produce evidence as it does not have an investigative or forensic purpose; it is therefore not relevant to a sexual offence trial.¹²³

In response to the growing practice of subpoenas for sexual assault communications, on-going reform of sexual assault laws has included legislation to protect sexual assault communications of sexual assault complainants by limiting access to, and, use of such communications. Every state and territory now has specific legislation protecting counselling communications in sexual violence proceedings, with some variations.¹²⁴ While models of such legislation differ across jurisdictions they are commonly referred to as the Sexual Assault Communications Privilege (SACP).¹²⁵ SACP has been considered by a number of law reform bodies, which have generally reaffirmed that the privilege is in the public’s interest.¹²⁶ In some jurisdictions such as NSW, there are services that support sexual assault victims to claim the privilege when their confidential records are subpoenaed.¹²⁷ Nevertheless, there are serious shortcomings nation-wide in terms of the operation of the privilege in practice.

There are two major challenges that hinder the enforcement of the privilege. The first challenge is that those who may be affected by the disclosure of the communication in sexual assault trials often need information and legal representation to enable them to claim or seek to enforce this privilege; without representation in criminal proceedings, people may not be in a position to do this.¹²⁸

The second challenge arises from the privilege not being respected in practice. For instance, the Victorian Law Reform Commission (2004) found that the legislation has not prevented subpoenas being issued and, in most jurisdictions, defence lawyers are still able to issue a subpoena requiring a

¹²¹ Heath, M. (2005) *The law and sexual offences against adults in Australia*, ACSSA Issues No. 4, <https://aifs.gov.au/publications/law-and-sexual-offences-against-adults-australia>

¹²² Hon Jeff Shaw MLC, Second Reading Speech, Evidence Amendment (Confidential Communications) Bill 1997 (NSW Hansard, Legislative Council, 22 May 1997, pp. 1120-1121 <http://23.101.218.132/prod/parlment/hansart.nsf/V3Key/LC19971022003?open&refNavID=>

¹²³ Heath, M. (2005) *The law and sexual offences against adults in Australia*. See section on Protection of counselling communications, <https://aifs.gov.au/publications/law-and-sexual-offences-against-adults-australia/protection-counselling-communications>

¹²⁴ *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s54; *Criminal Procedure Act 1986* (NSW), s296–396; *Evidence Act 1939* (NT) s56; *Evidence Act 1929* (SA) s67D–67F; *Evidence Act 2001* (Tas) s 127B; *Evidence Act 1958* (Vic) Division 2A s32B–32G; *Evidence Act 1906* (WA) s 19A–19L; Victims of Crime Assistance and Other Legislation Amendment Act. 2017 (Qld). On variations between the State and Territory laws (to 2012) see Jilliard, A., Loughman, J. and MacDonald, E. (2012), ‘From Pilot Project to Systemic Reform: Keeping sexual assault victims’ counselling records confidential’, *Alternative Law Journal*, 37(4), pp. 254-258.

¹²⁵ For an outline of these models, see Heath, M. (2005) *The law and sexual offences against adults in Australia*, section on Protection of counselling communications, <https://aifs.gov.au/publications/law-and-sexual-offences-against-adults-australia/protection-counselling-communications>

¹²⁶ Australian Law Reform Commission [ALRC] (2009), *Making Inquiries: A New Statutory Framework*, Report 111, section 3.20 <http://www.alrc.gov.au/report-111>

¹²⁷ Sexual Assault Communications Privilege Service NSW website <http://www.legalaid.nsw.gov.au/what-we-do/civil-law/sexual-assault-communications-privilege-service>

¹²⁸ ALRC (2010), *Family Violence – A National Legal Response*, p. 1257

person to produce counselling communications. Rather, the onus of the protection of privileged material lies on the recipient of a subpoena that seeks counselling records, such as, for example, a private counsellor who has to oppose the subpoena. In some instances, such as those highlighted by the Centres against Sexual Assault, a private counsellor may be compelled to pay lawyers to oppose subpoenas requesting their files at considerable expense; a burden which private counsellors may simply not be able to meet.¹²⁹

In its report *Sense and Sensitivity: Family Law, Family Violence, and Confidentiality* Women's Legal Service NSW has found that "many sexual assault services, women's health centres and other counsellors rarely object to the production of sensitive counselling and therapeutic records despite a desire by the client and/or the service provider to do so." The report further stated that this is largely due to a lack of knowledge or fear of the legal process and limited resources to attend court events to speak to the objection. For example, a private counsellor or therapist would have to give up at least part of a day of work to attend court. This is compounded if the service is not located near the relevant court registry.¹³⁰ As a result, subpoenas are frequently used to "require counsellors to attend and give evidence or produce notes" and "[p]rivate counsellors who are unaware that the law protects confidential counselling communications may produce records, rather than appearing in court to resist a subpoena".¹³¹

Furthermore, the fact that complainants frequently do not receive notice that a subpoena has been issued or that a party seeks to use evidence of their counselling records until it is too late raises further concerns about the level of awareness of the legislation among private counsellors who may be unaware of the provisions and the protection they provide. Western Australia is the only jurisdiction to bring in legislative changes that would prevent the burden of responding to a subpoena from resting on the service or counsellor, in which a person can only be required to produce a document with the court's agreement.

In 2009 WLS NSW initiated and co-ordinated the SACP Pilot project in with the Office of the Director of Public Prosecutions, law firms Ashurst, Clayton Utz and Freehills, and the NSW Bar Association.¹³² The project aimed to: provide a temporary measure to meet the legal service needs of some complainants; demonstrate how a victim's advocate model of legal service delivery could work in Australia; identify the extent and nature of legal need in relation to privilege claims; and gather information about the day-to-day operation of the privilege which we could use as evidence for the need to change.¹³³ Representation through the project successfully resulted in preventing or limiting access to victims' confidential records in 91 per cent of subpoenas.¹³⁴ Reports from the Office of the Director of Public Prosecutions, NSW (ODPP) stated that complainants involved in the SACP Pilot gave 'very positive' feedback about the assistance they had received and acknowledged that that the SACP Pilot increased awareness of the privilege and the complainant's rights. As well as amendments to the Criminal Procedure Act, the SACP Pilot resulted in the establishment of the Sexual Assault Communications Privilege Service (SACP Service) within Legal Aid NSW in 2012. The SACP Service

¹²⁹ Heath, M. (2005) The law and sexual offences against adults in Australia, section on Protection of counselling communications.

¹³⁰ Women's Legal Service NSW (2016), *Sense and Sensitivity: Family Law, Family Violence, and Confidentiality* <http://www.wlsnsw.org.au/wp-content/uploads/WLS-NSW-Sense-and-Sensitivity-web.pdf>

¹³¹ Victorian Law Reform Commission (2004) *Sexual Offences: Final Report*, section 4.74 http://www.lawreform.vic.gov.au/sites/default/files/FinalReport_0.pdf

¹³² Jilliard, A., Loughman, J. and MacDonald, E. (2012), 'From Pilot Project to Systemic Reform: Keeping sexual assault victims' counselling records confidential', *Alternative Law Journal*, 37(4), pp. 254-258.

¹³³ ALRC (2010), *Family Violence – A National Legal Response*, p. 1257

¹³⁴ Jilliard, Loughman and MacDonald (2012), 'From Pilot Project to Systemic Reform'.

continues to provide legal advice and representation to victims of sexual assault and other "protected confiders" who want to prevent or restrict the disclosure of sensitive sexual assault communications in court, as well as assisting complainants who wish to consent to the release of private documents in an informed way.¹³⁵ The service also provides education and training to the legal profession, police, sexual assault counsellors, medical records staff and other health professionals to promote awareness of the privilege.¹³⁶

WLS NSW advocates for the establishment of a service, similar to the SACP Service, to provide advice and representation in family law and child protection matters for individuals and services wishing to object to subpoenas of sensitive records.¹³⁷ Other organisations have also expressed views about how to improve the operation of the privilege in practice for sexual assault complainants. For example, Women's Legal Service Queensland, in their submission to the ALRC Family Violence – A National Legal Response, supported the development of processes to better enable unrepresented people to assert the privilege. The Canberra Rape Crisis Centre supported absolute protection of communications unless the complainant consents to their production and NASASV suggested that measures should target third parties who hold confidential records to ensure that they are informed about the communications privilege.¹³⁸

Efforts to improve information-sharing in relation to family law and domestic and family violence should be pursued within a framework that is victim-centric, supports informed consent and is more responsive to disclosures of violence, as detailed in WLS NSW's 2016 report *Sense and Sensitivity: Family Law, Family Violence, and Confidentiality*.¹³⁹

Thank-you once again for the opportunity to contribute a submission to the issues paper. We welcome the opportunity to discuss the issues further. For further information or to discuss the content of this submission, please contact representatives of the Alliances using the details below.

Yours faithfully,

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¹³⁵ Sexual Assault Communications Privilege Service NSW website <http://www.legalaid.nsw.gov.au/what-we-do/civil-law/sexual-assault-communications-privilege-service>

¹³⁶ Sexual Assault Communications Privilege Service NSW website <http://www.legalaid.nsw.gov.au/what-we-do/civil-law/sexual-assault-communications-privilege-service>

¹³⁷ Sexual Assault Communications Privilege Service NSW website <http://www.legalaid.nsw.gov.au/what-we-do/civil-law/sexual-assault-communications-privilege-service>

¹³⁸ ALRC (2010), Family Violence – A National Legal Response, p. 1257

¹³⁹ Women's Legal Service NSW (2016), Sense and Sensitivity