

DOMESTIC
VIOLENCE
VICTORIA

Australian Law Reform Commission

Review of the Family Law System:
Issues Paper

Submission

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Unless otherwise indicated, the quotes and examples in this submission can be attributed to these DV Vic members and partners.

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List of Abbreviations

ACCO	Aboriginal Community Controlled Organisation
ALRC	Australian Law Reform Commission
CALD	Culturally & Linguistically Diverse
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
DV Vic	Domestic Violence Victoria
LGBTI	Lesbian, Transgender, Bi-sexual, Transgender and Intersex
SPLA	House of Representatives Standing Committee on Social Policy and Legal Affairs
WLSA	Women's Legal Services Australia
WLSV	Women's Legal Service Victoria

Executive Summary

Family violence and family law intersect frequently. This renders it vital that a modern family law system be family violence and trauma-informed, striving at every angle to protect women and children, and not collude with the perpetration of further family violence and its effects. To this end, the current family law system has not kept pace with the contemporary rights and needs of women and children, nor present-day knowledge and understanding about the nature and dynamics of family violence. The current review of the family law system provides a welcome opportunity to enhance and adapt the family law system to be responsive to family violence in a way that keeps women and children targeted by perpetrators of family violence safe, while also ensuring fair and just outcomes for all parties.

A contemporary family law system should **seek to enshrine not only the rights of children, but also gender equality and the rights of women in its objectives and principles.** Therefore, DV Vic proposes that the objectives and principles of the family law system should broadly reflect a rights-based approach, including encouraging gender equality and promoting and protecting the rights of women and girls.

DV Vic strongly encourages **the central principle of the right to safety for children as paramount** - the objectives and principles of the *Act* should prioritise the safety and well-being of children congruent with the *Convention on the Rights of the Child*.

DV Vic members note that **the adversarial model used in the current family law system is one of the most significant barriers to access and engagement for survivors of family violence.** The adversarial model replicates the power imbalance of family violence and colludes in the coercion and control of women experiencing family violence. It is a space that advantages perpetrators of family violence and disempowers survivors. Correspondingly, the culture of the family law system is experienced as hostile towards survivors of family violence.

DV Vic feels that **a specialist and holistic psychosocial case management mechanism** based on pre-existing models would provide the most significant enhancement to accessibility and engagement within the family law system for survivors of family violence.

Evidence has shown that legally-assisted and supported family dispute resolution has improved outcomes for survivors of family violence including children, with many describing the process as safe and empowering. Based on emerging evidence such as this, **DV Vic believes that further exploration and expansion of inquisitorial models of family law is warranted.**

DV Vic believes that the combination of a suitably resourced inquisitorial model, funded legal representation where required, and a holistic case management service providing specialised non-legal family violence support would enable substantial improvements in the family law experience for all parties.

Importantly, an inquisitorial model would remove the opportunity for survivors of family violence to be directly cross-examined by self-represented and violent former partners, or to have to directly cross-examine him herself. DV Vic **urges the government to progress the draft *Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017* banning direct cross-examination in family violence cases, introducing the legislation into the Parliament for its urgent passage.**

DV Vic refers to and endorses the recommendations of the WLSV report on achieving economic equality in the family law system. Additionally, we firmly believe that **the assets limit for funded legal representation should be increased** to enable a wider range of survivors of family violence to be legally represented in the family law system.

Overwhelmingly, DV Vic supports **the eradication of the ‘equal shared parental responsibility’ and ‘equal shared time’ principles and associated practices.** This principle, and decisions informed by it, is leveraged by perpetrators of family violence to continue to control and dominate their former partner’s life, and is a significant deterrent for women experiencing family violence to leave the relationship

If the family law system is to be family violence and trauma informed, it will recognise in its principles, processes and decisions that **children cannot have a meaningful relationship with both parents, if the child’s father is using violence against the child’s mother.**

To assist with strengthening principles related to family violence and parenting and property matters, DV Vic **supports calls for a review of the definition of family violence** in the *Family Law Act 1975 (Cth)* and believes this is an opportunity to develop a consistent, national definition embedded in legislation.

In addition to what has already been outlined, **DV Vic calls for greater information sharing and collaboration between legal and non-legal supports for women and children who are experiencing family violence and going through family law proceedings.** Non-legal support services based within and outside the family court can provide valuable assistance in family law cases, particularly where family violence is occurring.

The Royal Commission into Family Violence in Victoria found that the fragmentation between state courts and federal family law courts was ‘a source of considerable concern.’ In light of this, the Royal Commission made a series of recommendations related to reducing the fragmentation in jurisdictions through integrated and coordinated legal responses to family violence. In particular, DV Vic supports models of information sharing and management of proceedings that lend themselves to **a specialist ‘one court’ model for reducing fragmentation in responding to family violence within the justice system.** This specialist family violence court model would be supported by the case management service proposed in earlier sections, which would assist parties to proceedings to understand and navigate the different and intersecting jurisdictions pertaining to their matters.

Nonetheless, DV Vic **cautions against further embedding a reliance on criminal justice outcomes for the determination of fact of family violence in family law proceedings** through a ‘one court’ model. Criminal justice in family violence is flawed and an unreliable indicator of whether family violence has occurred and/or is currently occurring, so should not be seen as the arbiter of truth in regard to family violence in civil matters, including in the family court.

In line with the above, **DV Vic also supports improved integration between child protection, children’s court proceedings and family law proceedings.**

Achieving the principle of child safety as the paramount concern requires the family law system to **better recognise that harm caused by perpetrating family violence against an adult is also harm perpetrated against the child.** In gathering evidence of the harm to children of family violence, the family law system **must take into account not only physical harm and risk to children from family violence, but also the psychological, emotional, cognitive, social and developmental impact that arises from witnessing, directly experiencing, and/or being used as a tactic to perpetrate family violence.**

DV Vic members advocate for pathways for children to express their views directly to judicial officers in child-friendly spaces, as well as for inquisitorial models that are more inclusive of children and shield them from having to participate in adversarial style proceedings.

A commitment to inclusivity of children and to child rights speak to **a commitment to cultural rights for Aboriginal and Torres Strait islander children.** Research has shown that Aboriginal children identify

staying connected to their culture and traditions is important to them, that Aboriginal cultural traditions is what makes them strong.

DV Vic member's question the qualifications, training and supervision of contact centre staff – particularly within high-cost, private contact centres - and **recommend that they be included in a broader review of service delivery and a new model of regulation/accreditation and accountability within the family law system.**

Calls for improvements in the knowledge and understanding of family violence by professional stakeholders in the family law system have been made consistently over the last two decades. **DV Vic posits that the enduring nature of the lack of knowledge and understanding of family violence amongst professionals in the family law system despite efforts to address this, is because any previous training has failed to fundamentally disrupt the misogynist culture of the family law system, and due to a lack of accountability mechanisms for professionals in this setting.**

In response to this, DV Vic expands its call for **comprehensive and ongoing family violence capacity building *at all levels of the family law system***

The capacity development program should **include strategies and systems for reducing the stigma of vicarious trauma experienced by professionals working in the family law system, supported by long-term investment in the development & implementation of a model for mitigation of vicarious trauma that creates a culture of family violence knowledge, self-awareness, self-care, peer support & accountability.**

For the purposes of transparency and accountability, **DV Vic supports reforms to the *Family Law Act 1975 (Cth)* that increase the accountability of judicial officers operating within the family law system.** Outcomes from complaints should be reflected in the regulatory environment of the family law system, including judicial training, accreditation requirements, and qualifications and experience required for roles. However, while DV Vic welcomes greater accountability and transparency within the family law system, we **strenuously caution that any changes to mechanisms of accountability, transparency and complaints have sufficient safeguards for survivors of family violence.**

Introduction

Family violence and family law intersect frequently - over half of the matters heard in family court jurisdictions in Australia involve allegations of family violence, including child abuse¹ - making family violence 'central to the work of the federal family law courts.'² Research has shown that family violence was a factor in 79% of family law cases receiving legal aid.³ This renders it vital that a modern family law system be family violence and trauma-informed, striving at every angle to protect women and children, and not collude with the perpetration of further family violence and its effects. To this end, the current family law system has not kept pace with the contemporary rights and needs of women and children, nor present-day knowledge and understanding about the nature and dynamics of family violence. The current review of the family law system provides a welcome opportunity to enhance and adapt the family law system to be responsive to family violence in a way that keeps women and children targeted by perpetrators of family violence safe, while also ensuring fair and just outcomes for all parties.

Domestic Violence Victoria (DV Vic) endorses the ALRC's statement that this review of the family law system will take into consideration and build on earlier reviews and reports that have outlined proposals and recommendations related to the intersection between family violence and family law. Therefore, this submission does not intend to comprehensively re-examine all of what is already known to be problematic within the current system, nor the solutions that have already been proposed. Instead, it will highlight the priority issues for DV Vic members as signposts for where reform of the family law system can have most impact for survivors of family violence.

About Domestic Violence Victoria

As the peak body for specialist family violence services in Victoria, DV Vic is an autonomous, non-government organisation whose membership consists of over 80 state-wide and regional specialist family violence agencies across Victoria, which provide a variety of services to women and children who have experienced family violence. Our members also include community and women's health agencies, some local governments and other community service agencies. As the recognised representative of the specialist family violence sector in Victoria, DV Vic is the key stakeholder organising, advocating for, and acting on behalf of the specialist family violence sector. In this role, DV Vic holds a central position in the Victorian integrated family violence system and its governance structures.

Since our establishment in 2002, DV Vic has been a leader in driving innovative policy to strengthen sectoral and system response to family violence, as well as building workforce capacity and representing the family violence sector at all levels of government. DV Vic provides policy advice and advocacy to the Victorian Government about family violence response and systems reform, and drives best practice through our role in the development and support of the statewide Risk Assessment and Management Panels (RAMPs) and other specialist practice programs.

¹ Carline, A. & Easteal, P. 2014. *Shades of Grey – Domestic and Sexual Violence Against Women: Law Reform and Society*, Routledge, Oxford.

² Royal Commission into Family Violence. 2016. *Summary and recommendations*, Victorian Government Printer, Melbourne, p.32.

³ Rich, N. 2017. *Time for new ideas and true change in family law system review*, Victorian Legal Aid, retrieved 27 April 2018, < <https://www.legalaid.vic.gov.au/about-us/news/time-for-new-ideas-and-true-change-in-family-law-system-review> >

Key terms and concepts

Family violence

DV Vic recognises family violence as defined in the *Family Violence Protection Act 2008* (Vic). Further to this, DV Vic understands family violence to be a pattern of intimidation, violence and abuse used to gain coercive control over and dominate the other person. In particular, DV Vic recognises that family violence goes beyond physical violence, encompassing ‘a wide range of controlling, coercive and intimidating behaviours’⁴ including sexual, emotional/psychological, economic, social, and spiritual violence and abuse.

As the most common form of family violence,⁵ this submission predominantly focuses on intimate partner violence. However, DV Vic knows that family violence occurs across all cultures and backgrounds, and is perpetrated by family members and other carers in a range of power relationships with victims.

Gendered analysis of family violence

DV Vic applies an overtly gendered analysis to family violence and family law throughout this document, based on the evidence that the most significant determinant of family violence is gender and gender inequality. Gender refers to ‘the socially constructed roles, behaviours, activities, and attributes that a given society considers appropriate for men and women.’⁶ In this sense, DV Vic sees that women and children’s personal and individual experience of family violence and the family law system reflects the patriarchal social structure that dominates societies.

Intersectionality

DV Vic recognises that gender intersects with a range of other structural oppressions experienced by women and children. This interconnectedness of structural oppressions exposes women experiencing violence to overlapping forms of discrimination and marginalisation, which exacerbates the risk and impact of family violence for women who are members of particularly marginalised groups.

In this submission, DV Vic acknowledges that gender and gender inequality overlap with the social construction of disability, race, ethnicity, culture, religion, colonisation, socioeconomic status, sexual identity, age, and geographic location to create diverse and complex experiences of family violence and family law for women as individuals and groups. For many groups of women experiencing transecting social divisions, multiple sites of oppression increases the risk of family violence and results in more frequent and severe experiences of family violence and discrimination within the systemic response.

Social structures also combine in ways that rationalise, reinforce and excuse men who use violence against women,⁷ affording some groups of men more freedom to use violence against women while

⁴ Our Watch. nd. Facts and Figures, retrieved 1 May 2018, < <https://www.ourwatch.org.au/understanding-violence/facts-and-figures> >

⁵ Ibid; Phillips, J. & Vandenbroek, P. 2014. *Domestic, family and sexual violence in Australia: an overview of the issues*, Parliament of Australia, retrieved 8 May 2018, < https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1415/ViolenceAust >; WHO. 2012. *Understanding and addressing violence against women: Intimate partner violence*, retrieved 8 May 2018, < http://apps.who.int/iris/bitstream/handle/10665/77432/WHO_RHR_12.36_eng.pdf;jsessionid=2B307B852D750300012863FFA15683E8?sequence=1 >

⁶ WHO. 2017. *What do we mean by ‘sex’ and ‘gender’?*, retrieved 8 May 2018, < <http://apps.who.int/gender/whatisgender/en> >

⁷ Laing, L. & Humphreys, C. 2013. *Social work and domestic violence: Developing critical and reflective practice*, Sage, London, p.8.

others are more strongly penalised and disadvantaged in the systemic responses to perpetrators of family violence.

This submission speaks to a largely generic and therefore white, European-Australian experience. However, DV Vic requests that it be read through a lens of intersectionality that takes as a given the cumulative discriminatory, traumatic and difficult experience of family violence and the family law system for women who are survivors of family violence who experience intersecting forms of oppression and marginalisation. DV Vic advocates for specialised and diverse responses to support and assist women in these circumstances.

Victim/survivor

The terms 'victim,' 'survivor,' and 'victim-survivor' have been used interchangeably throughout this document to refer to women, children and others who have experienced or are experiencing family violence in any of its forms. Likewise, the term perpetrator is used to refer to individuals who are using violence against a family member.

In accordance with the gendered nature of family violence, survivors are referred to as women and children and perpetrators are referred to as men. However, DV Vic acknowledges that men and members of gender and sexually diverse communities are also survivors of family violence.

Objectives and principles

It is noted in the issues paper that 'Australian social and family life have changed a great deal' since the current family law system began operation with the commencement of the *Family Law Act 1975 (Cth)*.⁸ This is rightly noted as justification for reviewing the objectives, role, functions and principles upon which the family law system is built. To this end, DV Vic broadly supports the introduction of principles that reflect the intent of those listed in points 43 and 44 of the *Issues Paper*.⁹

Convention on the Elimination of All Forms of Discrimination against Women

Amongst the changes listed is recognition of broadened diversity of family structures and methods of family formation compared to when the *Family Law Act 1975 (Cth)* was established, as well as changes in who and the types of experiences those who access the family law system bring to it, such as increasing reports of family violence. Not referred to in the paper is the increasing recognition of the rights of women and the responsibility to enable gender equality, and how this has and continues to impact in the family law space. An increase of family violence cases within the family law system is directly related to changes in the recognition of the rights of women and gender power relations over the last 40 years. Therefore, a contemporary family law system should **seek to enshrine not only the rights of children, but also gender equality and the rights of women in its objectives and principles**. As a state party to *Convention on the Elimination of All Forms of Violence Against Women (CEDAW)*,¹⁰ Australia is legally obliged to ensure that its policies, laws and systems respect, protect, promote and fulfil the rights of women based on CEDAW.¹¹ Therefore, we propose that the objectives and principles of the family law system should broadly reflect a rights-based approach, including encouraging gender equality and promoting and protecting the rights of women and girls. Embedding these as duties within the objectives and principles of the family law system would reflect an understanding of the pervasive

⁸ ALRC. 2018. *Review of the Family Law System: Issues Paper*, ALRC, Sydney, p.17.

⁹ *Ibid.*, p.20.

¹⁰ United Nations. 1979. *Convention on the Elimination of All Forms of Discrimination against Women*, retrieved 3 May 2018, < <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx> >

¹¹ IWRAW Asia Pacific. 2014. *CEDAW Quick and Concise: The principle of state obligation*, UN Women, retrieved 26 April 2018, < <https://www.youtube.com/watch?v=umETapJ4b8o> >

injustices experienced by women and girls from diverse contexts and backgrounds in marriage and the family,¹² while also underpinning transformation of current culture within family law which privileges the rights and entitlements of men/fathers over those of women/mothers. This culture is demonstrated by comments made by family court judicial officers and reported by DV Vic members such as:

'... I can't make orders that evict him (a man with a disability perpetrating family violence) from the marital home ... if this will make his life harder ...'

This comment privileges men's needs that arise from them perpetrating family violence, over the rights of women to be safe. If the obligations of the state under CEDAW were to be made more fundamental to the role, function and principles of the family law system, then the system could be made more accountable for discriminatory acts such as these that don't enshrine the rights of women and children in that they expose them to the perpetration of family violence.

Principle of safety – children and adults

Comments of this ilk also point to the importance of making **the right to safety a key pillar and function of the family law system, that overrides all other rights**. DV Vic strongly encourages the central principle of the right to safety for children as paramount - the objectives and principles of the Act should prioritise the safety and well-being of children congruent with the *Convention on the Rights of the Child*.¹³ This implies a requirement for an inherent understanding that family law processes and decisions that expose children to a perpetrator of family violence does not meet the objective of protecting children and promoting their welfare. In addition, the central principle of safety should also be extended to include adults and particularly women experiencing family violence.

Broadening what is understood as family

Congruent with the above, the principles to be applied by the court in the exercise of their jurisdiction under the *Family Law Act 1975 (Cth)* should **remove references to the need to preserve and protect the institution of marriage and protect and assist family as the natural and fundamental unit of society**. This notion is based on an idea of marriage and the traditional nuclear family as a superior unit of society, yet it is a space where harm and injustice frequently prevail. It enshrines cultural messages to women that they must strive to keep the family intact regardless of the costs to them.¹⁴ These principles suggest to women that they should consider tolerating family violence for the benefit of sustaining family.¹⁵

Instead, the principles should focus on **broadening recognition of the variety of safe and nurturing living situations for children**, while also contributing to the establishment of equality between women and men, as well as the expansion of discourses related to mothering/femininity and fathering/masculinity. Correspondingly, the principles should focus on **preserving the safety and rights of all parties in a system that recognises the intersectionality of gender and other structural and historical disadvantages and discriminations** against women, women with disabilities, women who are Aboriginal and Torres Strait Islander, women from culturally and linguistically diverse (CALD), and LGBTI women, including how

¹² Balchin, C. 2009. *Last but not least: CEDAW and family law*, 50.50 gender, sexuality and social justice, retrieved 26 April 2018, < <http://www.deakin.edu.au/students/studying/study-support/referencing/harvard> >

¹³ United Nations. 1989. *Convention on the Rights of the Child*, retrieved 3 May 2018, < <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx> >

¹⁴ Wendt, S. & Zannettino, L. 2015. *Domestic Violence in Diverse Contexts: A re-examination of gender*, Routledge, London.

¹⁵ Ibid.

these groups have been disadvantaged within the family law system. It should focus on accountability for people who have caused harm and who are likely to cause harm to children and adults in the future.

Access and engagement

Limitations of an adversarial model

DV Vic members note that **the adversarial model used in the current family law system is one of the most significant barriers to access and engagement for survivors of family violence.** This resonates with the findings of the House of Representatives Standing Committee on Social Policy and Legal Affairs (SPLA) that ‘the current adversarial system is inappropriate for resolving family law disputes, particularly those involving family violence.’¹⁶ The adversarial model **replicates the power imbalance of family violence and colludes in the coercion and control of women experiencing family violence.**¹⁷ It is a space that advantages perpetrators of family violence and disempowers survivors, as reflected by one DV Vic member:

‘The adversarial system doesn’t work. Perpetrators thrive in this environment. It’s incumbent on the parties to provide evidence to the judge in a context where she is already traumatised and will be more traumatised by the family law experience that exposes her to further coercion and control. It’s unreasonable.’

In recent communication with a family member of a survivor of violence, language of battle and combat is used to describe how the adversarial system fails to deliver justice to survivors of family violence:

‘... my sister didn’t want to leave because she was too weakened from the abuse and dreading standing up to him in a court battle. She knew that she had no chance against him and would tell us so.’

The adversarial system is combative in nature, deterring survivors of family violence from participating in it, to settle early, and/or to not raise their experience of family violence at all in order to preserve their own safety and well-being and that of their children. As a result, the current family law system frequently fails to deliver justice to survivors of family violence.

Culture of the family law system

Correspondingly, the culture of the family law system is experienced as hostile towards survivors of family violence. It is a space where women experiencing family violence feel as though they are ‘put on trial’ and are making vexatious allegations of family violence to ‘gain an advantage’ or achieve parental alienation of the other party:

‘Women are just walking away because it is too hard. They are going to be cross-examined on their experience of family violence, it’s worse than the criminal court. So, they don’t do it. They settle, and they lose out.’

¹⁶ House of Representatives Standing Committee on Social Policy and Legal Affairs. 2017. *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*, Parliament of the Commonwealth of Australia, retrieved 27 April 2018, <http://parlinfo.aph.gov.au/parlInfo/download/committees/reportrep/024109/toc_pdf/Abetterfamilylawssystemtosupportandprotectthoseaffectedbyfamilyviolence.pdf;fileType=application%2Fpdf>, p. 48.

¹⁷ Dr Heather Nancarrow, Chief Executive Officer, Australia’s National Research Organisation for Women’s Safety, *Committee Hansard*, Sydney, 31 July 2017, p. 6.

'Women are often uncomfortable putting everything in the affidavit, but the court won't listen to information outside of the affidavit. So, women amend the affidavit and then they're accused of fabricating evidence. They can't win.'

This is a weakness of a system that relies on determination of fact in family violence. This is compounded by a lack of knowledge and understanding of family violence, risk, and trauma, which leads family law professionals to make poor judgements based on uninformed and discriminatory worldviews. Consequentially, women experiencing family violence frequently withdraw from or settle their cases.

DV Vic members can recount numerous stories of clients for whom this attitude towards family violence has resulted in being advised by their legal representation not to mention their experience of family violence in the family law proceedings:

'For many women, they are advised not to talk about family violence. They're told that it will complicate things or be seen as a fabrication.'

'Clients are told, 'We're going for a simple property settlement, so let's not mention the family violence.'"

'Lawyers just think that case law on family violence and property makes it not worth it to raise family violence.'

'Lawyers can't handle women's emotions, they advise them not to be emotional in court. They say to them, 'You'll look crazy in court.' And you know what? They probably will because that is the culture of the court in relation to family violence, that the women saying this are crazy.'

'Do lawyers advise women with disabilities experiencing family violence to settle early? There's no data, but many people in the system think that having a witness with a disability is a disadvantage in the case and advise them not to go ahead.'

DV Vic members are also aware that some lawyers are concerned about the negative impact of protracted cases on survivors of family violence and their children, particularly in parenting order proceedings. Rather than address the structural issues that create these concerns, lawyers will advise women to not disclose her experience of family violence, encourage them to settle early and/or consent to unfavourable orders to preserve their own well-being.

This is compounded when the court does not recognise some types of family violence, such as perpetrator use of child exploitation material, impairment-based and disability-based violence, or intimate partner violence against sex workers – and the high rates of violence experienced by women in these and other marginalised groups.

These examples speak to a culture where experiences of family violence are viewed with suspicion and victims of family violence are seen as vexatious, unreliable and/or deceitful. In the current culture of the family law system, the victim's experience of family violence is seen as an inconvenience to the family law system and legal strategy, and is treated as though it can be separated from the family law proceedings. These attitudes and behaviours contribute to the stigma and discrimination that surrounds women experiencing family violence, particularly for especially at risk and marginalised survivors of family violence who are also sex workers, women in prison, women with disabilities,

Aboriginal and Torres Strait Islander, from CALD backgrounds, and/or LGBTI. This and other related ‘conundrums’ and recommendations for solutions are comprehensively captured in the SPLA report.¹⁸

This marginalisation of family violence within the family law system results in poorer family law outcomes for women and children who are survivors of family violence and dangerously reinforces the message that experiences of family violence are insubstantial, private matters that are not relevant to family law. This is magnified by the marginalised role non-legal support services have within the family law system, as reported by DV Vic members:

‘Lawyers don’t respect support workers. They’re not a party to proceedings so they’re not seen as essential or helpful by lawyers or the court.’

‘Women’s Legal, they get it. But the private legal profession sees non-legal case workers as a nuisance, as people who make the process difficult for them.’

‘Lawyers don’t appreciate the advocacy of case workers who are trying to change the culture in family law. They just want to get the standard order out, and case workers get in the way of that.’

These examples point towards a culture within the family law system that is legal practitioner-led and centred, rather than family violence informed and rights-based.

Information and navigation

Other factors also create significant barriers for survivors of family violence. Survivors of family violence can be distrustful of legal processes due to recurring victim blaming and discrimination. This is compounded for Aboriginal and Torres Strait Islander women who experience inter-generational trauma as a result of colonisation and the experience of the Stolen Generations, and for survivors of family violence from CALD backgrounds based on their experience of a lack of safety and justice within the legal systems in their country of origin.

Court processes currently are confusing, intimidating and too daunting, particularly for survivors of family violence from CALD backgrounds who do not understand the Australian judicial system and cannot access resources and information provided in English only. The family law and court system is fragmented, and information desks are often attended by security personnel only, who are unable to assist survivors of family violence to navigate the building, services, and/or access information.

The physical design of the court building, courtrooms, dispute-resolution spaces and waiting areas are clinical, intimidating, and frequently do not reflect best practice in safety for survivors of family violence. Court design commonly does not meet universal access standards, exacerbating the barriers that women who have experienced family violence and who have a disability face in accessing the family court. The lack of signage and availability of information in languages other than English makes navigating the court facility itself difficult for survivors of family violence of culturally and linguistically diverse backgrounds. Additionally, there are frequent issues with interpreter-facilitated access to information and services – both AUSLAN and other languages.

Psychosocial case management service

DV Vic feels that a **specialist and holistic psychosocial case management mechanism** based on pre-existing models - rather than a new ‘navigator’ service – would provide the most significant enhancement to accessibility and engagement within the family law system for survivors of family violence. Upon initiating contact with the family law system through to finalisation of matters, each

¹⁸ House of Representatives Standing Committee on Social Policy and Legal Affairs, 2017, pp. 51-54.

party would be allocated a case manager who would work alongside their client to coordinate and broker the family law system while also providing practical and emotional support throughout the entire journey. This would include referrals to other internal and external services as required. The service would be free, voluntary and available to all family law system users regardless of their financial situation. Any users who initially decline the service could be re-referred at any time or stage in their journey through the system. The case management service would be independent of but, based within the family law system. It would have a collaborative relationship with a **single point of entry to the family law system** and the administrative processes within the system, sitting across all courts and therefore assisting with coordination of all related court matters, as well as triage, **early and ongoing risk assessments of family violence, and management of family violence risk.**

While the case management service would be generic and able to respond to the variety of needs of users of the system, it would place **a high priority on being family violence and trauma-informed, and understanding the intersection between gender, family violence and other forms of structural oppression including the social construction of disability, race and ethnicity, and sexuality.** It should also include a team of **specialist family violence case managers**, as well as **specialist non-legal Aboriginal and Torres Strait Islander case workers and cultural liaison workers.** The case managers would provide non-legal support that complements any legal support being provided, including brokerage funds that assists survivors of family violence with transport and other expenses arising from family violence (similar to flexible support packages in Victoria). As a demonstration of genuine engagement, this model would be co-designed with the non-legal support sector – including specialist family violence services, Aboriginal Community Controlled Organisations (ACCOs), disability agencies, organisations working with CALD communities, and LGBTI organisations.

DV Vic members also believe a service like this would benefit from **a peer support program**, where for example, women who have experienced family violence and who work in the sex industry, and who have experience of the family law system, could be trained as peer support workers to assist other women in the sex industry to navigate their journey through the family law process. This would be of equal value to women experiencing family violence from CALD backgrounds, particularly survivors of forced marriage being able to support and broker services for other women passing through the family law system with similar experiences.

DV Vic recommends building the model based on the strengths and successes of the Neighbourhood Justice Centre Victoria and Family Advocacy and Support Service models, as well as the Applicant/Respondent Support Worker program in the Magistrates' Court of Victoria, identified through a qualitative evaluation of these programs. The model would include working in partnership with legal support services to deliver a holistic package of support to clients, as well as having close links (referral protocols and shared case management) with external services such as the local specialist family violence service, Aboriginal Community Controlled Organisations, and culturally and linguistically diverse services. While this service would require significant resourcing, it would coordinate and amalgamate the numerous non-legal support services already adjacent to the family law system. DV Vic is confident it would create remarkable efficiencies in other areas of the system and significantly enhance the well-being of all participants in the family law system, including contributing to overseeing the overall family violence risk assessment and risk management responsibility the family law system (see also Integration and Collaboration).

An inquisitorial model

Though the models are complex, **evidence has shown that legally-assisted and supported family dispute resolution has improved outcomes for survivors of family violence including children, with many**

describing the process as safe and empowering.¹⁹ Based on emerging evidence such as this, and the view of some DV Vic members that the legal pathway is not always the best way to pursue claims, **DV Vic believes that further exploration and expansion of inquisitorial models of family law is warranted.**²⁰ While we remain cautious about proposed models such as the parent management hearings and call for more comprehensive research into an effective model, we do believe that more inquisitorial approach to family law would have the potential for:

- Use in relation to both property and parenting matters.
- Inquiries being made by a collaborative, multi-disciplinary panel, representative of diverse communities and professions.
- An expanded range of evidence being able to be considered in inquiries into family law and family violence matters and decision-making, commissioned by the multi-disciplinary panel.
- Decisions being able to be made without the encumbrance of findings of fact.
- Early determinations of family violence, and focus on current and future risk.
- Strengthened and ongoing risk assessment and risk management.
- Efficient and effective interim and iterative decision-making as circumstances change.
- Family-inclusive decision-making processes.
- More child-inclusive and sensitive processes and decisions.
- Elevating cultural rights for Aboriginal and Torres Strait Islander children.
- Intensive support provided to parents and children.
- Client choice in whether to have a legal or non-legal advocate.
- Eliminating direct cross-examination by self-represented parties in cases involving family violence.
- Better informed and safer family law decisions where family violence is occurring, made by a well-resourced and informed multi-disciplinary panel using a gendered lens and trauma-informed model.
- An increase in matters being resolved expeditiously.
- Better use of interpreters and translators.
- Reducing the expense of family law proceedings.
- Reduction in administration.
- More accountability from decision-makers.
- More amenable to restorative justice approaches which may be more suitable to some survivors of family violence.

In this model, costs related to preparing reports for the panel would be met directly by the family law system or by the service providing the reports. **DV Vic believes that the combination of a suitably resourced inquisitorial model, funded legal representation where required, and a holistic case management service providing specialised non-legal family violence support would enable substantial improvements in the family law experience for all parties.**

¹⁹ Kaspiew, R., De Maio, J., Deblaquiere, J. & Horsfall, B. 2012. *Evaluation of a pilot of legally assisted and supported family dispute resolution in family violence cases: Final report*, Australian Institute of Family Studies, retrieved 1 May 2018, <
<https://www.ag.gov.au/Publications/Documents/ArchivedFamilyLawPublications/CFDR%20Evaluation%20Final%20Report%20December%202012.PDF> >

²⁰ Beyond being used to divert self-represented litigants from the family court.

Importantly, an inquisitorial model would remove the opportunity for survivors of family violence to be directly cross-examined by self-represented and violent former partners, or to have to directly cross-examine him herself. Direct cross-examination in family law cases involving family violence has been well-established as re-traumatising and harmful for survivors of family violence.²¹ DV Vic endorses the recommendations made by the SPLA in regard to the prohibition of direct cross-examination in cases involving family violence, and **urges the government to progress the draft *Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017* banning direct cross-examination in family violence cases, introducing the legislation into the Parliament for its urgent passage.**²²

Physical design and signposting

Numerous suggestions have been made previously advising on the establishment of simplified, inclusive and accessible information and signposting for people from diverse communities entering the family law system, including the use of new and emerging technology solutions and more frequent use of video-conferencing particularly for survivors of family violence at risk and/or in regional, rural and remote settings where access to information and resources are fewer. Careful attention and investment must also be given to improving access to materials in plain English as well as other languages, and interpreters and translators (for both verbal and written translation) for people from Aboriginal and Torres Strait islander communities, CALD communities and those with a visual or hearing impairments to access throughout their journey through the family law system, putting in place systems that avoid further traumatisation, financial burden and delays for women experiencing family violence who are members of these communities. Similarly, there are plentiful arguments and evidence that suggests improvements to the physical environment of the family court related to family violence, including:

- Separate entrances for survivors and perpetrators of family violence.
- Safe waiting areas.
- Family violence and trauma-informed security personnel in public spaces, including outside the court.
- Child-friendly spaces (see also Children’s Experiences and Perspectives).
- Sufficient and reliable remote witness facilities.
- Community-based and less intimidating physical appearance.
- Signs in multiple languages.

DV Vic supports evaluation and expansion of the Neighbourhood Justice Centre Victoria court environment model as a starting point for improving the physical environment of the family court.

Increased funding for legal representation

Further, it is well established that participating in the family law system is prohibitively expensive for survivors of family violence who have been left with limited financial resources because of family

²¹ Family Law Council. 2016. *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems – Final Report*, Commonwealth of Australia, retrieved 23 April 2018, < <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> >; House of Representatives Standing Committee on Social Policy and Legal Affairs, 2017; Productivity Commission. 2014. *Access to Justice Arrangements: Productivity Commission Inquiry Report, No. 72, 2014, Volume 2*, Commonwealth of Australia, retrieved 1 May 2018, < <https://www.pc.gov.au/inquiries/completed/access-justice/report/access-justice-volume2.pdf> >

²² House of Representatives Standing Committee on Social Policy and Legal Affairs, 2017.

violence, and can lead to long-term impoverishment of survivors of family violence, including children.²³ For many women who experience intersecting forms of oppression, the cost of legal fees exceeds the value of assets owned by both parties. In response to this and alongside our other recommendations, **DV Vic refers to and endorses the recommendations of the WLSV report on achieving economic equality in the family law system.**²⁴ Additionally, we firmly believe that **the assets limit for funded legal representation should be increased** to enable a wider range of survivors of family violence to be legally represented in the family law system. In particular, we draw attention to the benefits to the family law system of **increasing family violence specific funding to legal aid and community legal centres, specifically women’s legal services, legal services for women from CALD communities, and Aboriginal Family Violence Prevention Legal services.** We firmly believe that action must be taken on funding legal representation to address the particularly chronic issue of being ‘conflicted out’ of legal aid or community legal support in rural and regional areas. Additionally, we believe it is urgent that women from CALD backgrounds with temporary migration status are able to access fully-funded legal representation for family law matters.

Legal principles in relation to parenting and property

Equal shared parental responsibility and equal shared time

Overwhelmingly, DV Vic supports **the eradication of the ‘equal shared parental responsibility’ and ‘equal shared time’ principles and associated practices.** We believe this is a widely misunderstood concept²⁵ that has colluded with the perpetration of family violence by forcing women and children to be continuously exposed to family violence and abuse through contact with the perpetrator. While the presumption of equal shared parental responsibility is not supposed to apply in circumstances involving family violence, in practice this is not the case due to the vast number of women advised not raise their experience of family violence in family law proceedings and/or because of the difficulties in establishing her experience of family violence as ‘fact’. This has an impact even in cases of consent orders, where women who are survivors of family violence are unaware and/or do not understand that they are not required to consent to shared parenting and equal shared time.

This principle, and decisions informed by it, is leveraged by perpetrators of family violence to continue to control and dominate their former partner’s life, and is a significant deterrent for women experiencing family violence to leave the relationship:

*... increasing emphasis on shared parenting and the difficulty of achieving post-separation parenting arrangements that protect women and children from ongoing violence and abuse, may strongly influence a woman’s decision to stay in a relationship if she judges that her children will be safer with her present to protect them than if they are ordered to spend long periods of time alone with perpetrator of abuse.*²⁶

It also sends the message that family violence does not have a harmful impact on children, and that perpetrators do not need to be held to account for their behaviour or the very significant impacts of it on their children.

²³ Ibid; WLSV. 2018. *Small Claims, Large Battles: Achieving economic equality in the family law system*, WLSV, Melbourne.

²⁴ WLSV, 2018.

²⁵ ALRC. 2018; WLSA. 2018. *Australian Law Reform Commission Review of the Family Law System: Advocacy Guide*, WLSA, Canberra.

²⁶ Laing & Humphreys, 2013, p.66.

Legal principles in relation to parenting **should be focused on the rights of children to safety and the elimination of harm to them, based on increasing evidence that ‘maintaining a relationship between children and abusive fathers is likely to be harmful unless the abusive behaviour ends.’**²⁷ Regardless of views on parental rights, it is contrary to the rights and best interests of children for the family law system to collude with exposing children to ongoing violence, or for children to be used as a tactic to further perpetrate violence against their mother, through order allowing contact based on the principle that it is in the best interests of children for their parents to have equal shared parental responsibility. More simply put:

‘You can’t have children at the centre of the system AND have 50/50 shared parenting. The two principles contradict one another.’

If the family law system is to be family violence and trauma informed, it will recognise in its principles, processes and decisions that **children cannot have a meaningful relationship with both parents, if the child’s father is using violence against the child’s mother.** If a need to protect the child from harm caused by family violence is established – that is, family violence has been established - this effectively prohibits contact with the perpetrator of the family violence until the perpetrator’s behaviour has changed. In these cases, it would be interesting to see what powers the court can develop to refer men who use family violence to men’s behaviour change interventions as a pre-condition to having any access to their children.

Definition of family violence

To assist with strengthening principles related to family violence and parenting and property matters, DV Vic **supports calls for a review of the definition of family violence** in the *Family Law Act 1975 (Cth)* and believes this is an opportunity to develop a consistent, national definition embedded in legislation. DV Vic supports **retaining a requirement for coercive and controlling behaviour**, as this is a key element of the dynamics of family violence. We agree with proposals to develop a definition that includes abuse of family law processes and psychological abuse, and add that the harm to children of being exposed to family violence should also be included.²⁸ However, strengthening the definition alone will not improve recognition of family violence, and while non-exhaustive lists of examples of violence can be a useful aide-memoir they can sometimes be more detrimental to understanding the tactics and forms of family violence if implementers of the law do not have a good understanding of the nature and dynamics of family violence and restrict their understanding of family violence to only those examples listed.

Three specific examples of this arose in DV Vic’s consultation for this submission. Firstly, family violence experienced by women who work in the sex industry. This type of family violence may take the form of the perpetrator forcing their partner into and/or not allowing them to leave the sex industry, taking their partner’s earnings from sex work, disclosing or threatening to disclose that their partner or former partner has been in the sex industry as a means of controlling them, using their partner’s involvement in the sex industry as leverage for emotional and verbal abuse, and/or coercing their partner into unwanted sex by accusing her of wanting to have sex with clients but not him:

‘Partners of women in the sex industry use their involvement as a means to threaten them in relation to the family law system, such as to take away their children and paying child support.’

²⁷ Kaspiew, R., Horsfall, B., Qu, L., Nicholson, J. M., Humphreys, C., Diemer, K., Nguyen, C. D., Buchanan, F., Hooker, L., Taft, A., Westrupp, E. M., Cookin, A. R., Carson, R. & Dunstan, J. 2017. *Domestic and Family Violence and parenting: Mixed methods insights into impact and support needs: Final Report*, ANROWS, Sydney, p.13.

²⁸ See *Family Violence Protection Act 2008 (Vic)*, §5.(1b).

The second example is accessing online child abuse material. The system regularly fails to see and understand this as a form of family violence, of which children are secondary victims. As a result, the risk and harm to children of ongoing contact with a father who has perpetuated online child sexual exploitation through accessing child abuse material is minimised.

Finally, the justice system in general fails to recognise forced marriage as family violence, related to both children and adults as victims.

With a strong understanding of family violence, **all of these types of behaviour and experience can be identified as family violence within the current definition in the *Family Law Act 1975 (Cth)***. However, the gaps in knowledge and understanding of family violence, prejudices and discrimination against women in the sex industry, and poor cultural competence result in repeated failings to recognise these behaviours as family violence. To resolve this, DV Vic recommends that the definition focuses on broad categories of violent behaviour used to gain coercive control of a member of a person's family, and that implementation of the definition is supported by rigorous family violence capacity development that enables the different types and tactics of family violence to be easily identified during family law proceedings (See also Professional skills and wellbeing).

Discrimination against higher risk and/or marginalised groups

In relation to the welfare jurisdiction of the *Family Law Act 1975 (Cth)*, DV Vic joins other disability and human rights organisations in recognising forced sterilisation as a violation of human rights and a form of violence against women, and calls for **'a prohibition on involuntary or forced sterilisation of girls unless there is a serious threat to life'**²⁹ to be reflected in a new version of the legislation.

Additionally, DV Vic calls for **greater education and awareness within the family law system of discrimination against women in at risk and marginalised groups in relation to parenting matters**. For example, women in the sex industry, women in prisons and women with disabilities. The family law system uses a deficit-based approach in relation to disability and parenting and should transition to focusing on the capacities of women with disabilities as mothers, creating options and services that support women with disabilities who are experiencing family violence to strengthen their parenting away from the perpetrator of family violence. The court must be aware of how perpetrators of family violence will target impairment to discredit mothers with disabilities as a tactic of family violence, and take steps to mitigate this:

'They'll say things like, 'You should see how much medication she's on, she doesn't even know what she's talking about,' as a way to undermine and gain control of her.'

'When there is family violence and he says, 'What will she do without me?' the solution isn't to force her to stay in the relationship by giving the children to him, but to put supports in place to address her right to safety and to parent with a disability.'

The family law system must not be distracted by the challenges society creates for mothers with disabilities when the real source of danger to children of women with disabilities is the family violence being perpetrated against her.

Reducing the financial burden of accessing family law

A link has been established between family violence and financial insecurity for women which demonstrates that the nature and effects of family violence means 'many survivors do not have the economic resources to leave violence, or if they do leave, they lack the resources to maintain an

²⁹ ALRC, 2018, p.45.

adequate standard of living post-separation.³⁰ Accordingly, many women affected by family violence are considerably disadvantaged in family law property matters. Research has shown that they are more likely to experience an unfair outcome and suffer long-term financial hardship.³¹ WLSV found that ‘power imbalances and ongoing violence or intimidation make them fearful of seeking their share of property through the family law system.’³² Like other areas of the family law system, perpetrators of violence are leveraging principles and processes in property matters to extend their coercion and control over former partners.

In response to this, DV Vic endorses the recommendations of WLSV in their research report *Small Claims, Large Battles*,³³ particularly those in relation to family violence:

- The Australian Government amend the *Family Law Act 1975* to enable courts to:
 - a. To have regard to the effects of family violence on both parties’ contributions,
 - b. Include the effects of family violence in the list of s75(2) factors relevant to determining property interests and awarding spousal maintenance.
 - c. Make orders which ensure that no party financially benefits from family violence they have perpetrated.
 - d. Improving access to property settlements.
- The Australian Government fund an expansion of existing models of legally assisted Family Dispute Resolution, to give greater access to vulnerable parties seeking property settlements.
- The Australian Government resource Legal Aid Commissions to broaden availability of funding for priority client to pursue small property matters.

In cases of family violence, property and parenting matters are often indistinguishable from each other, therefore DV Vic agrees with proposals to simplify and streamline property disputes, as well as including the principle of the best interests of the child as the paramount principle in deciding property matters. We further add that the issues should be considered together preferably through an inquisitorial approach, with legal assistance and non-legal case management support as outlined earlier in this document. We hope that this will assist with more timely recognition of the role family violence plays in property disputes and will mitigate delays and the expense of using the family law system for survivors of family violence, particularly through early identification, close monitoring of, and intervention in vexatious use of the family law system by men using family violence.

Communications privilege for confidential counselling records

A transition to an inquisitorial model that incorporates legal and non-legal support, has an eye to misuse of process by perpetrators of family violence and commits to no longer colluding with the perpetration of family violence, should leave little room for the harmful practice of subpoenaing family violence confidential counselling and case notes. The sharing of these records can place survivors of violence including children at greater and ongoing risk of harm from perpetrators of family violence, while simultaneously damaging the relationship between the support service (for example, the specialist family violence service) and the survivor of violence at a time when it is vital to them. Seeking

³⁰ Corrie, T. 2016. *Economic security for survivors of domestic & family violence: Understanding and Measuring the Impact*, Good Shepard Australia New Zealand, p. 9, retrieved 1 May 2018, < https://www.goodshep.org.au/media/1421/financial-security-for-survivors-of-domestic-and-family-violence_march2016.pdf >

³¹ Kaspiew, R. & Qu, L. 2016. ‘Property division after separation: Recent research evidence,’ *Australian Journal of Family Law*, vol.30, no.3.

³² WLSV, 2018, p.6.

³³ Ibid, p.8.

counselling records exposes survivors of family violence to further trauma and may deter them from seeking psychosocial support.³⁴ The majority of specialist family violence services in Victoria have a policy of contesting subpoenas for confidential case notes and are often successful. However, the process of challenging the subpoenas is expensive and time consuming, taking resources away from frontline support to survivors of family violence. Therefore, **DV Vic recommends that all confidential counselling records related to family violence and sexual assault be subject to absolute privilege.** The precedent for this has already been established in relation to sexual assault counselling records at the state level – Tasmania has established absolute privilege and other states have established qualified privilege - leaving the Commonwealth jurisdiction as the only one that does not have any form of communications privilege in relation to gender-based violence against women.³⁵

Integration and collaboration

Earlier in this submission, a case management model was outlined which DV Vic recommends as a starting place for improving integration and collaboration within the family law system. This model should include case management for both parties, including by case managers with specialist family violence focus (for both perpetrators and victims) and shared/collaborative case management where clients are also being supported by specialist family violence services outside the family law system. Recommendations have also been made earlier in the document regarding transitioning to a more inquisitorial system, which would lend itself more easily to integrated and collaborative ways of working. The combination of these two mechanisms would gain ground in closing gaps and addressing fragmentation in the family law system, reducing opportunities for family law processes and outcomes to collude with the perpetration of family violence and improving the experience of survivors of family violence from all backgrounds.

Collaboration between legal and non-legal supports

In addition to what has already been outlined, **DV Vic calls for greater information sharing and collaboration between legal and non-legal supports for women and children who are experiencing family violence and going through family law proceedings.** It is the experience of specialist family violence services that they are marginalised by lawyers when mutual clients are using the family law system:

‘Unless there is a personal relationship, lawyers are not working with case workers. So case workers don’t get access to any information or are not able to share things that could be useful in the family court.’

‘They [lawyers] don’t appreciate that the case worker can emotionally support and contain the client, that this will lead to better outcomes overall.’

Non-legal support services based within and outside the family court can provide valuable assistance in family law cases, particularly where family violence is occurring. Consideration should be given to recognising them as parties to the proceedings in an inquisitorial model. A development such as this may also assist to address one of the most challenging aspects of family law proceedings for specialist family violence services – subpoenas for confidential counselling records by the opposing party (see Legal principles in relation to property and parenting). With this in mind, DV Vic supports one streamlined approach to collaborative psychosocial case management across the family law system through adaptation and expansion of the Family Advocacy and Support Service, incorporating the best performing elements of other models that demonstrate good outcomes. The case management service

³⁴ Rights Advocacy Project. 2018. *Protecting survivors’ most sensitive information: A sexual assault counselling privilege for family law*, Liberty Victoria, Melbourne.

³⁵ Ibid.

can develop and implement a range of methods and interventions for working with individuals, children and families who are subject to the family law system.

‘One court’ model

Each year, numerous families where family violence is occurring participate in multiple court jurisdictions. The Royal Commission into Family Violence in Victoria found that the fragmentation between state courts and federal family law courts was ‘a source of considerable concern.’³⁶ In light of this, the Royal Commission made a series of recommendations related to reducing the fragmentation in jurisdictions through integrated and coordinated legal responses to family violence. These included the development of an information sharing protocol between courts and court jurisdictions, the expansion of powers of Magistrate’s Courts under the *Family Law Act 1975 (Cth)*, better sharing of information with survivors and perpetrators of family violence about the powers of various court jurisdictions, and professional learning and development. DV Vic endorses all these recommendations in this submission to the review of the family law system.

In particular, we support models of information sharing and management of proceedings that lend themselves to **a specialist ‘one court’ model for reducing fragmentation in responding to family violence within the justice system**. This would include further broadening the jurisdictional powers of state courts under the *Family Law Act 1975 (Cth)*, to ensure that family law matters related to family violence can be heard at the state level. It would also require a common administration process and processes for information sharing between courts and jurisdictions, several elements of which have already been identified by the Family Law Council and the Royal Commission, and which are endorsed by DV Vic.³⁷ This specialist family violence court model would be supported by the case management service proposed in earlier sections, which would assist parties to proceedings to understand and navigate the different and intersecting jurisdictions pertaining to their matters. Once well-established, DV Vic believes that a model of this sort will mitigate a significant proportion of the confusion, stress and conflicting information and outcomes survivors of family violence experience within the legal system. It should also reduce the costs of family law matters, administrative duplication, and delays in court hearings and outcomes while increasing consistency in processes and decisions. We believe a ‘one court’ model that reduces fragmentation between various jurisdictions will reduce opportunities for perpetrators of family violence to exploit gaps in the system, and will therefore increase the safety and well-being of women and children who are experiencing family violence. It will also address many obstacles that exclude survivors of family violence who experience cumulative barriers to accessing the family law system – such as Aboriginal and Torres Strait Islander women, women from CALD backgrounds, and women with disabilities.

Nonetheless, DV Vic **cautions against further embedding a reliance on criminal justice outcomes for the determination of fact of family violence in family law proceedings** through a ‘one court’ model. Criminal justice in family violence is flawed and an unreliable indicator of whether family violence has occurred and/or is currently occurring, so should not be seen as the arbiter of truth in regard to family violence in civil matters, including in the family court. Further, better alignment between criminal and family law matters is required so as proceedings in one jurisdiction are not delayed, dependent upon or become a barrier to, proceedings in another. **A lack of alignment is distressing for women and children experiencing family violence, increasing the risk they experience and preventing access to the protections of the law:**

³⁶ Ibid, p.32.

³⁷ Family Law Council, 2016; Royal Commission into Family Violence, 2016.

'In my case the Police informed me that I could not take the matter to the Family Court because it would jeopardise their investigation into my ex-husband's use of child exploitation material and chat rooms with minors. That is, my civil case would interfere with their criminal case. This delayed court intervention by about eight months. This had other implications for me and my child, as I needed to apply for a DVO at local court. The police had said not to disclose the investigation to anyone, especially my ex-husband. My lawyer called the court Registrar and explained the situation. The Registrar did not allow a note to be put on the case giving me a dispensation from disclosing the criminal investigations in court where my ex-husband would have learnt about the active police investigation. This meant, twice, I was prevented from applying for a DVO when my ex-husband was stalking me and threatening me.'

Integration with child protection mechanisms

In line with the above, **DV Vic supports improved integration between child protection, children's court proceedings and family law proceedings.** Laing found that 'too many women are now finding themselves shifting from being designated as 'the failure to protect mother' to that of the 'alienating mother.'³⁸ This is a reflection of both the fragmentation between family and children's courts, as well as the construction of survivors of family violence as 'bad mothers' who create false stories of family violence. Child protection has a role in investigating family violence against children in family law settings and should be a source of evidence in family law proceedings, based on their assessments of the impact the family violence is having on children.³⁹ Child protection and family law outcomes must be complementary and mutually reinforcing, which would be assisted by better integration between the two jurisdictions. **Better integration and coordination between the two courts will also mitigate conflicting messages sent to survivors of family violence related to contact between fathers who are using family violence and their children.** However, the success of this model relies on addressing limitations related to family violence practice within the broader child, youth and families service system.

Children's experience and perspectives

Children's right to be safe from family violence

As stated in other parts of this submission, **a child's right to be safe and live a life free from violence should be a primary principle guiding the family law system.** Achieving this principle requires the family law system to **better recognise that harm caused by perpetrating family violence against an adult is also harm perpetrated against the child.**⁴⁰ Family violence is a form of child abuse, and child abuse is a form of family violence. Knowing this, the family law system must realise that children are no safer if separation allows ongoing and unsupervised access to violent fathers.⁴¹

DV Vic is concerned that in the majority of cases where family violence has been established and is ongoing, granting supervised and/or unsupervised contact to the father using the violence is an example of the court privileging the rights of men using family violence over those of women and children who are experiencing family violence:

'How can the court order access with the perpetrator of family violence when the woman and children are residing in a family violence refuge?'

³⁸ Laing, L. 2010. *No way to live: Women's experiences of negotiating the family law system in the context of domestic violence*, retrieved 2 May 2018, <
<https://ses.library.usyd.edu.au/bitstream/2123/6255/1/No%20way%20to%20live%20final%20report.pdf> >

³⁹ Laing & Humphreys, 2013.

⁴⁰ Kaspiew et al., 2017.

⁴¹ Radford, L. & Hester, M. 2006. *Mothering Through Domestic Violence*, Jessica Kingsley, London.

To address this, DV Vic refers back to the opening section of this submission calling on the family law system to integrate principles safety to children, gender equality and being family violence and trauma informed into the strategic framework of the family law system, coupled with a focus on cultural transformation within the family law system and a whole of system approach to capacity development related to family violence (see Professional skills and wellbeing).

In gathering evidence of the harm to children of family violence, the family law system **must take into account not only physical harm and risk to children from family violence, but also the psychological, emotional, cognitive, social and developmental impact that arises from witnessing, directly experiencing, and/or being used as a tactic to perpetrate family violence.** This assessment of risk and harm to children should focus on current and future risk. In doing this, the culture of disbelief of mothers must be transformed:

'The Magellan list ... you know they call that the 'Mad Mother's' list, right?'

'I feel like no-one is concerned about the safety of my kids because he didn't do contact offences and that I'm this crazy lunatic for thinking there is a link between looking and acting.'

These comments from DV Vic members capture how mothers have been constructed as unreliable in relation to reports of family violence and child abuse within the current culture of the family law system. It points towards a culture in which risk and harm to both women and children is not taken seriously and needs to be urgently addressed.

Inclusion of children and young people

DV Vic members have a strongly expressed belief that a child-centred and risk informed approach to **children's experiences and perspectives in family law should take into consideration children's directly expressed wishes and views:**

'Don't force teenagers to see dad. Honour what they are saying is best for them.'

'Forcing them to see a violent father when they don't want to does more harm than a period of time with no contact with dad.'

'Young people deserve autonomy. If the family court doesn't listen to them it just teaches them they don't have any control of their life. Does this sound familiar? Yes, it is just like the dynamics of family violence.'

DV Vic members do not believe that Independent Children's Lawyers nor family consultants or external report writers are adequately representing the voices of children in family law proceedings. Members have expressed concerns about the weight of their opinion in family law proceedings given their low knowledge and skills related to family violence, risk assessment and risk management, and working with children:

'The Independent Children's Lawyer often doesn't even talk to the child. Many of them have no experience working with children, and no psychosocial training.'

'Family consultants, what models and tools are they using to assess risk to children?'

'They [family consultants] commonly believe women make false reports of family violence and coach the child.'

As a result of these experiences, DV Vic members advocate for pathways for children to express their views directly to judicial officers in child-friendly spaces, as well as for inquisitorial models that are more

inclusive of children and shield them from having to participate in adversarial style proceedings. This should be paired with approaches with parents that build their capacity to listen to and take on board the views and experiences of their children, via child specialists placed within the proposed family law psychosocial case management service.

DV Vic and its members understand that in cases involving family violence, **the wishes of the child cannot be considered in a vacuum and must be part of a broader assessment of risk.** We recognise the fine balance between providing opportunities for children to be heard and burdening them with the responsibility of ‘choosing’ between their parents, community and culture. We acknowledge as well, the imperative to manage the risk to the adult survivor of family violence that may arise from information shared by a child. Nonetheless, **we recommend that greater efforts are made within the family law system to collaborate with family violence child specialists to create ways for proceedings to empower and encourage autonomy of children who are survivors of family violence.** We are confident that safe ways of being inclusive of children and their views, giving them opportunities to speak directly with decision makers in innovative, child-friendly and therapeutic ways and spaces, as well as decision-makers being accountable to children through explaining their decisions to them directly, are possible:

‘For children from CALD backgrounds, giving evidence in family law settings about forced marriage, we would so value narrative-based, non-adversarial methods for hearing from them directly. Even just being able to write to the judge in their own language would be progress.’

While reflecting on how family law can be inclusive of children, DV Vic members also shared thoughts on how the physical environment of the family court affects children’s experiences and could be improved:

‘If children are at the centre, then show that in the court. Have child-friendly spaces for them to hang out in.’

‘How good would it be if the family court had a therapeutic childcare space?’

The discussion about child-friendly spaces also identified a need for private spaces for women to breastfeed.

A commitment to inclusivity of children and to child rights speak to **a commitment to cultural rights for Aboriginal and Torres Strait islander children.** Research has shown that Aboriginal children identify staying connected to their culture and traditions is important to them, that Aboriginal cultural traditions is what makes them strong.⁴² Keeping Aboriginal children and young people connected to their communities and cultural identity is essential to their wellbeing.⁴³ Listening to children’s voices and being culturally competent requires the family law system to elevate cultural rights in their consideration of safety and well-being for children exposed to family violence.

Child contact centres

An issue that significantly affects children’s experiences of family law is the quality, accessibility and availability of contact centres for supervised contact. Clients of DV Vic members experience prolonged waiting times for contact services of five months or more, and that the expense of private contact

⁴² Commissioner for Children and Young People. 2011. ‘Aboriginal children and young people speak out about culture and identity: Policy Brief,’ *Speaking out about wellbeing*, retrieved 3 May 2018, < <https://www.ccp.vic.gov.au/media/1305/policy-brief-wellbeing-research-aboriginal-children-on-culture-and-identity-june-2011.pdf> >

⁴³ Commission for Children and Young People. nd. *Cultural Safety for Aboriginal Children*, retrieved 3 May 2018, < <https://ccyp.vic.gov.au/assets/resources/tipsheet-cultural-safety-aboriginal-children.pdf> >

centres make them inaccessible. In some cases, mothers of children who have experienced family violence have been asked to supervise contact themselves:

'There are long waiting lists, what are women supposed to do in the meantime?'

'As the non-offending partner, why do I have to police this?'

Women in regional and rural areas report having to travel long distances to access the nearest contact centre, at a significant expense to them:

'It's almost impossible [to access a contact centre] in Melbourne. If you're in a rural area, there's no hope.'

Of greatest concern is the quality of service being provided by contact centres, and the family violence literacy of staff providing supervised access:

'Are they doing a good job? I had one client whose child came home, the perpetrator had put a threatening note to her in the kid's bag. How did this happen on supervised contact?'

DV Vic member's question the qualifications, training and supervision of contact centre staff – particularly within high-cost, private contact centres - and **recommend that they be included in a broader review of service delivery and a new model of regulation/accreditation and accountability within the family law system.**

Professional skills and wellbeing

Capacity building for the transformation of organisational culture

Calls for improvements in the knowledge and understanding of family violence by professional stakeholders in the family law system have been made consistently over the last two decades. As stated in the *Issues Paper*, consultations, reviews and research into the family law system consistently finds evidence of deficiencies and gaps in skills and knowledge related to gender, family violence, trauma, risk assessment and risk management.⁴⁴ These deficiencies related to family violence are exacerbated by a further lack of knowledge and understanding of intersectionality, particularly in relation to Aboriginal and Torres Strait Islander culture, experiences of trauma and the impact of colonisation, diverse cultural, linguistic and faith communities, disability (including mental illness and addiction), issues affecting LGBTI communities, women working in the sex industry, forced marriage, and child exploitation and child abuse.

Despite the evidence and previous investment in training and professional development of family law professionals, concerning practices related to family violence persist at every level of the family law system. DV Vic members can recount numerous examples that demonstrate family law professionals' lack of knowledge, understating and/or skills for responding to family violence:

'Training is needed for frontline staff at the family court. The counter staff have no consideration for what our clients are thinking and feeling, and they shut them down. The clients go in to apply for a divorce and without even paying any attention to what is going on for them, the counter staff tell her she has to serve this on him. Of course, the client freaks out. The court staff don't have any understanding of people's experience of family violence, and they never explain to our clients what their options are for service.'

⁴⁴ ALRC, 2018, pp. 82-85.

'The court and private assessors such as psychologists have a lack of understanding of the impact of child exploitation material on non-offending parents. The non-offending parent may already be experiencing trauma from discovering their partner has accessed child exploitation material, or perpetrated other forms of online sex offending with children, and the subsequent criminal proceedings. The non-offending parent is now faced with the Family Court.'

'Lawyers believe that once the court case is over, it is all over. They don't get that the family violence keeps going for her.'

In particular, DV Vic members have significant concerns about the lack of requirement for demonstrated knowledge and understanding of family violence by family consultants and external report writers, and are troubled by the level of influence their poorly informed reports have on family court decisions:

'The court-appointed family therapist, who is writing the report that court will base their whole decision on ... they never understand family violence.'

'The report writers, not only do they not understand family violence, but they don't have the skills and knowledge to assess and manage family violence risk. They have both parties come to the office at the same time! What does that say about their understanding of risk and safety?!'

'There's a culture in the court that these 12 or so family report writers, they know the judge and what they want to hear – sometimes the judge will ask for a specific writer. The judge wants to hear that the kids can see dad, that there's no problem there. So that is what the report writers put in the report. They have no credibility when it comes to family violence, none at all.'

'Judges want to hear that an equal relationship with both parents is in the child's best interests – they're dead set on that. So that is what the report writer delivers to them.'

'They don't have a family violence lens. They don't believe women, they think they are full of shit. So, the woman has to walk into court knowing that the consultant hasn't believed her, so no-one will believe her.'

Members feel that professionals that make up the family law system – particularly judges and report writers - especially do not understand the effects of family violence on children. A particular example of this was the courts' understanding of the use of child exploitation material as family violence and a source of risk for children:

'Accessing child abuse material is not seen as family violence, it's not seen as creating any secondary victims. So insofar as the court does any risk assessment related to family violence, they do not see the risks to children from their father having accessed child abuse material. So, they allow contact with him, and leave it to the mum to police it.'

Each of the examples provided in this section demonstrate continuing gaps in family violence and trauma-informed knowledge and practice at different levels of the family law system, which has a detrimental effect on survivors of family violence, their access to justice and engagement with their rights under family law. **DV Vic posits that the enduring nature of the lack of knowledge and understanding of family violence amongst professionals in the family law system despite efforts to address this, is because any previous training has failed to fundamentally disrupt the misogynist culture of the family law system, and due to a lack of accountability mechanisms for professionals in this setting.**

In response to this, DV Vic expands its call for **comprehensive and ongoing family violence capacity building at all levels of the family law system** (judicial, legal professionals, administrative, non-legal/psychosocial, report writers, interpreters, contact centres and so on) that:

- Is coordinated across levels and professions.
- Includes mandatory training, coaching, mentoring, and accompanying tools and resources.
- Is tilted towards transformation of institutional culture throughout the family law system.
- Reflects the established knowledge-base on gendered, intersectional feminist analysis of family violence and includes trauma-informed theory and practice and whiteness theory/cultural competence.
- Includes training on communicating and working with children from a variety of backgrounds.
- Is developed and implemented in collaboration with specialist family violence experts.
- Includes evaluation of outcomes and impact, and an integrated evidence-based learning approach.
- Includes a focus on developing self-awareness, vicarious trauma mitigation, and self-care
- Is linked to an accreditation scheme for family law professionals.
- Is linked to monitoring and regulation of the family law system via an independent body.
- Is a pre-requisite for entry into employment, promotion and appointment, including future appointment to the bench.
- Is fully funded and resourced.

Precedents for a long-term, comprehensive approach to capacity development related to family violence have been established in Victoria following the Royal Commission into Family Violence.⁴⁵ Recognising the impact of the significant gaps and deficiencies in identifying and responding to family violence, the Royal Commission found a need for a 10-year industry plan. This plan will develop the capacity of numerous professions and community groups that have a role in preventing and/or intervening in family violence at four different tiers. Alongside this, a comprehensive, whole of organisation family violence capacity development program is being developed and implemented across the Victorian child protection system, with the objective of improving knowledge and practice related to perpetrator accountability and improving responses and support for survivors of family violence. Additionally, as a result of the Royal Commission, Victoria Police are establishing a Centre for Excellence to tackle cultural change and capacity building related to gender, family violence and sexual assault throughout the organisation. Building on these models and using the bank of knowledge and research that continues to emerge from the Australian Institute of Family Studies and Australia's National Research Organisation for Women's Safety and other specialist family law and family violence policy and research bodies, it is recommended that a similar model be explored for the family law system.

Vicarious trauma mitigation

Vicarious trauma has a negative impact on individual well-being and is a workplace health and safety responsibility. Additionally, 'untreated vicarious trauma can adversely affect the ethical judgment' of family law professionals as a result of 'diminished levels of competence.'⁴⁶ It can erode compassion, causing **family law professionals to have empathy fatigue for survivors of family violence.**⁴⁷ Together

⁴⁵ Royal Commission into Family Violence, 2016.

⁴⁶ Izzo, E. 2008. *Vicarious Trauma: The Impact of Controlled Empathy*, Self-Growth, retrieved 27 April 2018, < http://www.selfgrowth.com/articles/Vicarious_Trauma_The_Impact_of_Controlled_Empathy.html >

⁴⁷ Diehm, R. & Roland, D. 2015. 'The impact of secondary exposure to trauma on mental health professionals,' *InPsych*, vol. 37, retrieved 27 April 2018, < <https://www.psychology.org.au/inpsych/2015/february/diehm> >;

with gender inequality and family violence discrimination, stigma, and victim blame, this has consequences for how survivors of family violence are served within the family law system. The capacity development program should **include strategies and systems for reducing the stigma of vicarious trauma experienced by professionals working in the family law system, supported by long-term investment in the development & implementation of a model for mitigation of vicarious trauma that creates a culture of family violence knowledge, self-awareness, self-care, peer support & accountability.** The model should be based on the successes and lessons learned identified in the evaluations of existing institutional vicarious trauma mitigation programs, such as the Royal Commission into Institutional Responses to Child Sexual Abuse.

Governance and accountability

Independent accountability mechanism

Survivors of family violence have a right to expect that judicial officers within the family law system will 'behave impartially, courteously, ethically and to the highest standards of judicial conduct.'⁴⁸ When this does not occur, it can have a detrimental impact on their recovery from family violence, prolonging trauma and other effects. Calls for transparency and accountability measures for judicial officers have often been deflected by an insistence on the independence and impartiality of the judiciary. However, it is the view of DV Vic that this has resulted in a lack of trust, confidence in, and respect for the family law system by survivors of family violence:

'I know that they have to be independent, but is it fair that judges who do not understand family violence, and whose attitudes and beliefs actually collude with family violence, have absolute power in these settings?'

For the purposes of transparency and accountability, **DV Vic supports reforms to the *Family Law Act 1975 (Cth)* that increase the accountability of judicial officers operating within the family law system.** To this end, **DV Vic supports an independent judicial complaints mechanism for family law proceedings,** similar to those which have been established in a number of Australian state jurisdictions and/or as a function of the overarching family law governance body outlined within point 312 and 313 of the *Issues Paper*⁴⁹ but devoid of any conflict of interest. The independent body should have the power to examine complaints about the conduct, capability, and capacity of family law judicial officers and other professional stakeholders within the family law system such as solicitors, report writers, and non-legal support workers. The body should have the power to examine inappropriate remarks within the various family law settings as well as other professional settings such as training, workshops and meetings. Complaints to the independent body should be able to be lodged by parties to family law proceedings or anyone else acting in a professional capacity related to the family law system. For example, a DV Vic member clearly recalls a family law judge saying the following at a meeting:

'By the way she (survivor of family violence) spoke to me in the court, I could see she was capable of giving as good as she got in that relationship.'

And this from another DV Vic member:

"'Feeling heavy" Vicarious trauma and other issues facing those who work in the sexual assault field,' ACSSA Wrap, no.4 2007, AIFS, retrieved 27 April 2018, < <https://aifs.gov.au/publications/feeling-heavy/what-vicarious-trauma> >

⁴⁸ Judicial Commission of NSW. nd. *Complaints about judicial officers*, Judicial Commission of NSW, retrieved 26 April 2018, < <https://www.judcom.nsw.gov.au/complaints/> >

⁴⁹ ALRC, 2018, p. 92.

‘A woman [working in the sex industry] had engaged a lawyer to assist with a case relating to family violence – this case was specifically about a person perpetrating family violence on the woman by attempting to ‘out’ her and discredit her. At the end of the case, the lawyer requested payments in sexual services.’

Comments and experiences like these, which demonstrate an alarming disregard for the dynamics of family violence, its impact on women’s agency and ethics, and reinforce gender inequality and the oppression of women, should be subject to accountability mechanisms whether made by family law judicial officers in their professional capacity inside or outside the court. Professionals supporting survivors of family violence who experience unethical or poor practice should be able to lodge complaints on their behalf if the client feels unable to do so themselves.

We note in particular that family consultants employed by the court as well as external report writers who are a party to family law proceedings should fall within the scope of this independent monitoring and complaints mechanism. We are not confident that the ‘appropriate avenue’⁵⁰ for addressing concerns about the quality of the reports presented to court is via cross-examination, due to the issues and concerns raised earlier in the submission regarding the quality of legal representation experienced by survivors of family violence and the demonstrated evidence that the court lacks a comprehensive understanding of the nature, dynamics and effects of family violence.

Outcomes from complaints should be incorporated in the regulatory environment of the family law system, including judicial training, accreditation requirements, and qualifications and experience required for roles. The outcomes should also be able to be shared with any professional body with a responsibility for regulating the profession of the agent, to enable the professional body to take any disciplinary actions required, as well as the media.

Need for safeguards

While DV Vic welcomes greater accountability and transparency within the family law system, we **strenuously caution that any changes to mechanisms of accountability, transparency and complaints have sufficient safeguards** so as to not expose survivors of family violence, including children, to further trauma or vexatious revelation of the details of their family law proceedings and/or the details of the family violence.

Conclusion

The experience of survivors of family violence in the family law system must be improved, and the current review of the family law system provides the most significant opportunity yet to achieve this. There is a growing body of evidence that shows what does and does not work in family law in relation to family violence – this submission has highlighted the priority and most concerning issues for members of DV Vic and has pointed to innovative ways forward to address them. At the centre of all the recommendations contained herein is the need to fundamentally transform the culture of the family law system to one that recognises and respects the experiences of women and children living with family violence and contributes to outcomes that hold the safety of women and children, and accountability of perpetrators, as central pillars of the system.

⁵⁰ Ibid, p.92.