

**Australian Law Reform Commission**

**Review of the Family Law System**

**Inquiry Submission**

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# Introduction

There are many aspects of the operation of the federal family law system that need reform. The focus of this submission is upon provision of supportive, safe family law processes for **women and their children who have experienced family violence**. I have focused on family violence because I believe it is the area in most urgent need of reform. Family violence in the family law system is an issue in which I have recently conducted academic work (as a consultant to the Victorian Royal Commission into Family Violence in 2015, writing on the intersection of family violence and family law). This submission also draws upon a submission I wrote for the Castan Centre for Human Rights for the Parliamentary inquiry into a better family law system to support and protect those affected by family violence, Standing Committee on Social Policy and Legal Affairs, House of Representatives (2017).

I am an Associate Professor of law at Monash University, working across the areas of family law, family violence, non-adversarial justice, dispute resolution, gender, child protection and constitutional law. I have particular expertise in use of informal processes such as mediation, Family Dispute Resolution and Family Group Conferencing in family law, family violence and child protection contexts. I am currently Deputy Director of the Australian Centre for Justice Innovation at Monash and, with Associate Professor Janice Richardson, co-convener of the Monash's Feminist Legal Studies Group. I am a former director of FMC Mediation and Counselling Victoria, a service provider under the Family Relationship Services Program in Victoria. I’m the co-author of *Non-Adversarial Justice* (2nd ed, 2014), *Bargaining in the Shadow of the Law? The Case of Family Mediation* (2011) and the author of many academic articles. I edit the ADR Research Network blog and tweet regularly under the handle @BeckyBatagol. In 2015, I worked as a research consultant to the Royal Commission into Family Violence. I have also consulted to the Victorian Law Reform Commission on child protection processes.

This submission makes recommendations for change to enable the Australian family law system to better provide supportive, safe legal processes for women and their families who have experienced family violence. The submission is structured around key themes. I have noted how these themes intersect with the questions asked by the Australian Law Reform Commission in the *Review of the Family Law System: Issues Paper* (March 2018).

I would, of course, be very happy to be contacted, formally or informally, by researchers at the Commission regarding the issues raised in this submission. The submission skims over subject matters in which I have expertise, especially in use of informal processes in family law and family violence contexts, and I’d be happy to speak further about these areas.

# Summary of Recommendations

The question numbers next to each recommendation relates to the questions contained in the Australian Law Reform Commission, *Review of the Family Law System: Issues Paper* (March 2018).

**This submission recommends**

1. **That the Commonwealth government do all that is necessary to support State and Territory magistrates and children’s court judges to exercise family law powers in cases on family violence. Measures recommended include**
2. **Compensation for state and territory governments for state courts hearing federal cases (Question 32)**
3. **Requirements for service providers under the Family Relationships Services Programme to establish durable links with courts and service providers in the state family violence system to create clear referral pathways for families experiencing family violence who have their family law matters heard within the state courts (Question 31).**
4. **That the Commonwealth Parliament urgently amend section 46(1) *Family Law Act 1975* to increase the $20,000 limit on property disputes able to be heard by State and Territory magistrates’ courts. The jurisdictional limit for hearing family law property disputes should mirror the upper limit on civil dispute able to be heard by State and Territory magistrates’ courts (Question 17).**
5. **That the Commonwealth government, through the Council of Australian Government’s Council of Attorneys-General, urgently lead the development of a nationally consistent family violence risk assessment tool which should be used by State, Territory and federal courts, lawyers, government and non-government service providers (Question 31).**
6. **That**
   1. **Service providers under the federal Family Relationships Services Programme including services such as family relationship centres, family dispute resolution (FDR), family counselling, children's contact services, parenting Orders Programme, the Post Separation Cooperative Parenting Programme and the Supporting Children After Separation Programs, be able to access the national order reference systems in cases of family violence as necessary (Question 33);**
   2. **The national order reference system should include criminal law, child protection, family violence and family law orders and judgments from all State, Territory and federal courts (Question 33).**
7. **That** 
   1. **All family consultants should undergo high-quality family violence training;**
   2. **All family consultants must use a high-quality family violence risk assessment tool such as the Victorian Common Risk Assessment Framework (CRAF);**
   3. **A non-court complaints process should be introduced for the review of the conduct of family consultants (Question 41).**
8. **That the Commonwealth Parliament urgently amend the *Family Law Act 1975* to ensure that perpetrators of family violence do not personally cross-examine victims of family violence in family law proceedings (Question 25).**
9. **That the federal Attorney-General provide adequate legal aid funds to allow for the legal representation of victims and perpetrators of family violence for the purpose of cross-examination of victims in family law cases (Question 25).**

# Family Violence in the Australian Family Law System

Family violence, including intimate partner violence, is a common problem with serious health, social and economic consequences for women, their families and communities.[[1]](#footnote-1) Family violence is not merely an isolated phenomenon – in 2012, an estimated 17 per cent of Australian women had experienced violence committed by their partner against them.[[2]](#footnote-2) The incidence of family violence is certainly higher within the family law system with a major Australian Institute of Family Studies (AIFS) evaluation finding that two thirds of separated mothers and half of separated fathers reported family violence by their partner.[[3]](#footnote-3) In that study, 72% of mothers and 63% of fathers reported that their children had witnessed the violence. Because of known difficulties reporting and sustaining allegations of family violence in court, the incidence of allegations of family violence made before the family courts are lower, with allegations of family violence and/or child abuse present in around 50% of Family Court of Australia cases, 70% of Federal Circuit Court cases and 65% of Family Court of Western Australia cases since 2006.[[4]](#footnote-4)

The Productivity Commission has noted that obtaining access to justice in the family law system is most difficult for complex cases involving family violence.[[5]](#footnote-5) The constitutionally entrenched fragmentation of the Australian legal system for families is a key source of difficulty in family law disputes which involve allegations of family violence. Such disputes can’t usually be neatly divided into public and private aspects.[[6]](#footnote-6) Parties who have experienced family violence must use multiple federal and state systems to obtain legal orders necessary for safety and dispute resolution (including the state family violence, criminal and child protection systems and the federal family law system).[[7]](#footnote-7) The Productivity Commission noted in 2014 that

The interaction and overlap between jurisdictions can result in multiple proceedings and inconsistent orders, which can cause unsafe and traumatic situations for parents and children. The current court structure means that parties often will have to institute or be engaged in proceedings in various legal forums in order to have all of their issues determined.[[8]](#footnote-8)

Parties in cases where there are allegations of family violence are more likely to use courts and legal services for family law matters.[[9]](#footnote-9) Separated parents who have experienced family violence may be more likely to choose to attend Family Dispute Resolution (FDR) services (including Family Relationship Centres) than other less formal services. The AIFS *Evaluation of the 2012 Family Violence Reforms* found that the use of FDR was “strongly associated” with the experience of family violence, and that parents, especially mothers, who also reported experiencing the conditions of fear, coercion and control as a result, were more likely to be using FDR services as their main pathway to sort out parenting arrangements.[[10]](#footnote-10) Significantly higher proportions of mothers (71% using FDR) than fathers (48% using FDR) reported having experienced fear, coercion and control before/during separation.[[11]](#footnote-11)

The AIFS *Evaluation of the 2012 Family Violence Reforms* found that parents who reported safety concerns did not necessarily feel that their concerns were managed effectively during FDR.[[12]](#footnote-12) Similarly, in Carson, Fehlberg and Millward’s 3-year longitudinal study of separated parents, the parents who were most likely to be dissatisfied with the process and outcomes of FDR as well as with the quality of the services they had received, were those parents who reported an uncooperative, controlling and/or violent partner/ex-partner, a hostile post-separation relationship or an absence of the ability to negotiate and compromise.[[13]](#footnote-13)

# Supporting Access to Justice for Families with Complex Disputes

This issue relates to question 32 in the Commission’s Issues Paper on changes to reduce the need for families to engage with more than one court to address safety concerns and question 31, regarding an integrated services approach to assist families with complex needs.

The fragmentation of jurisdiction over family life in the Australian federation is most acute in cases of family violence which involve relationship breakdown. Over the years, a range of solutions have been proposed to overcome the constitutional limitations in a federal system including;

* State referral of powers to the federal family courts (eg over children whose parents are not married or property of unmarried partners)
* Establishing a single family law court (‘unified family court’) to deal with all matters relating to family law and violence
* Joint appointment of judges by the federal and state parliaments
* Expanding the jurisdiction of the federal family courts so that they have the power to make child protection orders and more effective family violence orders
* Giving state and federal courts corresponding jurisdictions so that they can decide cases under both systems.[[14]](#footnote-14)

My view is that solutions which support the flexible application of both Commonwealth and State/Territory jurisdiction in a single court (whether federal or state) should be encouraged. The diverse and complex nature of family matters means that family members should be encouraged to resolve the breadth of their matters in whichever forum they arrive at, whether that be the two federal family courts (Family Court of Australia and the Federal Circuit Court), a State/ Territory Magistrates’ Court or a Children’s Court. Such an approach means improving the powers and capacity of the federal family courts to deal with matters under State/Territory law and of State/Territory judges in lower courts to deal with federal family law disputes.

### Increasing the Powers of Federal Judges through Accrued Jurisdiction (Question 32)

There is potential for the Family Court of Australia and the Federal Circuit Court themselves to increase the powers of the judges in those courts to exercise powers under state law though the doctrine of accrued jurisdiction. Accrued Jurisdiction allows a federal court to hear and determine disputes that arise under non-federal law. The Family Court of Australia has narrowly interpreted its own powers to exercise state jurisdiction under this doctrine.[[15]](#footnote-15) With the Honourable Nahum Mushin, I am currently supervising a higher degree by research student, Mr Daniel Matta. Mr Matta’s Monash University SJD thesis, *The Intersection of Private Family Law and Non-Federal Claims: An Examination the Family Court of Australia’s Accrued Jurisdiction* will be submitted later in 2018. With his permission, I have quoted the abstract of Mr Matta’s thesis below.

This thesis undertakes an examination of accrued jurisdiction as it has been applied in the Family Court of Australia (‘Family Court’). Accrued Jurisdiction allows, in appropriate cases, a federal court to hear and determine disputes that arise under non-federal law, for example, state law or the common law. The Family Court is often although not always, required to consider matters that impact its decisions which are not specifically addressed in the *Family Law Act 1975* (Cth) (‘FLA’). Through an examination of the history, interpretation and application of accrued jurisdiction, this thesis will explore how the Family Court, as a specialist court, has grappled with cases that go beyond the traditional limits of family law disputes governed by the FLA.

The cases considered in this thesis illustrate that the Family Court has taken a narrow approach to interpreting the jurisprudence surrounding its accrued jurisdiction in a majority of cases. An example where this arises is the intersection of private, or federal, family law which is governed by the FLA and public family law such as child protection and welfare that is legislated by the various states and territories.

A further, although more limited, area of fragmentation in public and private family law arises within the *parens patriae* jurisdiction. The *parens patriae* jurisdiction provides state Supreme Courts with very broad powers to make orders for the welfare of children. This thesis will further examine this far-reaching, yet rarely exercised, jurisdiction including its historical roots and how it can be applied by the Family Court to make orders for the care and protection of children.

This thesis argues, based upon the jurisprudence of the High Court, that accrued jurisdiction, in its application by the Family Court is no different to that of the Federal Court. This thesis further argues that where accrued jurisdiction properly arises in a matter, there is no discretion to exercise it. This thesis concludes that, in appropriate cases, the Family Court must apply its accrued jurisdiction to hear an entire matter with both federal and non-federal claims.

The potential application of the findings in this thesis are far reaching and may apply to any proceeding arising out of Part VII and Part VIII of the FLA including claims for damages, negligence, surrogacy and child protection or welfare orders.[[16]](#footnote-16)

I believe that the implication of Mr Matta’s work is that there is potential for both federal family courts in areas such as child protection to determine the entirety of a matter under both federal and state law. The power to do so rests solely in the hands of the judges of Family Court of Australia and the Federal Circuit Court, and in those judges being bolder in how they interpret their own powers. Using accrued jurisdiction to deal with the whole of a dispute under state and federal law would be more congruent with existing High Court authority[[17]](#footnote-17) and with the approach of the other Chapter III court, the Federal Court of Australia. In my view based upon the work of Mr Matta, it would be not only possible but desirable for judges of the federal family courts to use the doctrine of accrued jurisdiction to determine the entirety of matters before them, under both federal and state law. Such an approach would reduce the need for family law litigants to also attend state courts for connected disputes.

### Supporting State and Territory Magistrates to Determine Family Law Disputes (Question 32)

The Australian and NSW Law Reform Commissions concluded in 2010 that the best option for dealing with jurisdictional fragmentation was to work within existing constitutional limits without creating new courts.[[18]](#footnote-18) The approach of the Victorian Royal Commission into Family Violence was to work within constitutional limits by encouraging and supporting local judges in the Victorian Magistrates’ and Children’s Courts to exercise latent family law powers so that family violence, child protection and family law matters could be dealt with by a single judge.[[19]](#footnote-19) The Royal Commission argued that the exercise of family law powers by Magistrates would enable families who have experienced family violence to resolve their legal issues in the state system more safely without having to navigate multiple court systems.[[20]](#footnote-20) Five specialist family violence courts are currently being created in Victoria which will exercise wide family law and family violence powers. Children’s Courts will also be able to exercise family law powers when making child protection decisions.

State and Territory Magistrates have limited powers under the *Family Law Act 1975* to make orders in relation to family law parenting and property disputes. Currently, these powers are rarely used. Local level magistrates are often reluctant to exercise their powers under the Family Law Act for a range of reasons, including the complexity of family law parenting provisions following the 2006 reforms, a lack of time in busy local courts, a lack of competency in family law amongst the local magistracy and Family Law Act provisions which make state orders ineffectual.[[21]](#footnote-21)

There is much the Commonwealth needs to do to enable State and Territories to fully use the potential for local magistrates and children’s courts to exercise comprehensive jurisdiction in cases of family violence. I believe that enhancing the ability of State and Territory judges to make family law orders will better support and make safe the many families who have experienced both family violence and relationships breakdown. It will improve access to justice for those who have experienced family violence.

One issue faced by and State and Territory governments who wish to consolidate family law and family violence or child protection jurisdiction within their own courts is that they are effectively taking on case load from the federal family courts without compensation. With busy lists and tight funding for family violence and child protection matters, the additional cost requirements imposed by increased family law load on the local courts will be prohibitive for many jurisdictions. Given that increased exercise of family law powers by the State and Territory courts is expected to reduce the caseload burden on the federal family courts, some form of payment by the Commonwealth is appropriate. The Royal Commission into Family Violence suggested that the Victorian government should negotiate with the Commonwealth to explore how the Commonwealth could compensate that State for hearing federal family law cases.[[22]](#footnote-22)

**1 a. I recommend that the Commonwealth government do all that is necessary to support State and Territory magistrates and children’s court judges to exercise family law powers in cases on family violence. Measures recommended include compensation for State and Territory governments for State courts hearing federal cases (Question 32).**

### Federal-State Support Service Connections (Question 31)

Most family dispute are resolve outside the courts. Federal-state connections must extend to the support service level so that the jurisdictional cracks in the Australian constitutional framework can be papered over by seamless and integrated service delivery. This relates to question 31 in the Australian Law Reform Commission, *Review of the Family Law System: Issues Paper* (March 2018) relating to integrated services approaches.

As State and Territory magistrates in jurisdictions such as Victoria increasingly exercise federal family law powers, existing family law support services provided under the Family Relationships Services Programme administered by the federal Department of Social Services must be accessible for litigants with family law matters heard in the state system. Services under the Family Relationships Services Programme include family relationship centres, family dispute resolution (FDR), family counselling, children's contact services, parenting Orders Programme, the Post Separation Cooperative Parenting Programme and the Supporting Children After Separation Programme. These federally-funded services are currently oriented to the federal family court system and durable links have not generally been established between local service providers under the Family Relationships Services Programme and local courts who exercise family law powers.

For families experiencing both relationship breakdown and family violence, the lack of clear referral pathways between FDR providers and state courts means raises the danger that litigants will get lost between systems and will not be able to navigate the gaps between the federal jurisdictions. Consequently, there is an imperative on programs under the Family Relationships Services Programme to establish links with both state courts which exercise federal family law powers and family violence services for victims and perpetrators which operate under the state family violence systems.

**1 b. I recommend that the Commonwealth government do all that is necessary to support state and territory magistrates and children’s court judges to exercise family law powers in cases on family violence. Measures recommended include requirements for service providers under the Family Relationships Services Programme to establish durable links with courts and service providers in the state family violence system to create clear referral pathways for families experiencing family violence who have their family law matters heard within the state courts (Question 31).**

# Property Orders in State and Territory Magistrates’ Courts (Question 17)

This recommendation relates to question 17 of the Australian Law Reform Commission in the *Review of the Family Law System: Issues Paper* (March 2018), changes to the provision of the Family Law Act on property division. In this section I focus on the ability of families who have experienced family violence to obtain an order relating to property division for low-value disputes from State and Territory Magistrates’ Courts during their family violence intervention order proceedings. This is way to help provide legal remedies for people who have been subjected to family violence and to help them recover financially.

The Royal Commission into Family Violence noted the importance of obtaining a fair property split in assisting victims of family violence to regain stability following separation, yet victims of family violence are often put at disadvantage is family law property settlements.[[23]](#footnote-23) Women’s Legal Service Victoria’s *Small Claims, Large Battles* 2018 report noted that in cases of family violence, “Economic abuse left the women with limited financial resources to take action to seek a property settlement, while power imbalances and ongoing violence or intimidation made them fearful of seeking their share of property through the family law system.”[[24]](#footnote-24)

Obtaining legal advice and resolution of family law property disputes at a cost that is affordable and proportionate to the value of assets in dispute is a problem, particularly for low value (including net debt) property disputes.[[25]](#footnote-25) Research by the Productivity Commission has shown that parties with asset pools under $40,000 (low asset pool range) and between $40,000 and $139,000 (low-medium range) were less likely to use lawyers to help them to resolve their family law financial dispute than those with more assets, because of the high cost of legal representation.[[26]](#footnote-26) Parties in the low and low to medium asset pool range are much less likely to use Family Dispute Resolution or court services to resolve their dispute than those with more assets.[[27]](#footnote-27) This means it is much less likely that an agreement will be made to divide property and raises questions about the appropriateness of agreements or outcomes arrived at in these cases.[[28]](#footnote-28)

To help victims of family violence more easily obtain resolution of their family law financial disputes, the Royal Commission into Family Violence recommended that Victorian Magistrates’ Courts use their existing powers under the Family Law Act to resolve family law property disputes in that court, at the same time as family violence intervention orders and parenting orders are made.

Section 46(1) Family Law Act 1975 limits State and Territory magistrates’ courts to determining contested family law property disputes where the total value of property is under $20,000. This amount has been increased only once, from $1,000 to $20,000 in 1988.[[29]](#footnote-29)

Royal Commission into Family Violence and the Family Law Council recommended that the Commonwealth Parliament increase the jurisdictional limit on state and territory magistrates’ level courts hearing family law property disputes.[[30]](#footnote-30)

The proposed amendment to section 46(1) *Family Law Act 1975* contained in item 10 of the *Exposure Draft of the Family Law Amendment (Family Violence and Other Measures) Bill 2017* is acceptable, providing that the amount set in the regulations mirrors the upper financial jurisdictional limit on civil disputes able to be heard by State and Territory magistrates’ courts. The Bill, however, remains to be introduced into Parliament, despite clear imperatives for a range of provisions in the Bill.

**2. I recommend that the Commonwealth Parliament urgently amend section 46(1) Family Law Act 1975 to increase the $20,000 limit on property disputes able to be heard by State and Territory magistrates’ courts. The jurisdictional limit for hearing family law property disputes should mirror the upper limit on civil dispute able to be heard by State and Territory magistrates’ courts.**[[31]](#footnote-31)

# Nationally Consistent Risk Assessment Tool (Question 31)

The issue of the development of a risk assessment tool is central to the safety of family law processes in cases of family violence. It could relate to a number of questions but probably best relates to question 31 of the Australian Law Reform Commission, *Review of the Family Law System: Issues Paper* (March 2018) on integrated services approaches for families with complex needs. A nationally consistent risk assessment tool and process would enable the family law system to more quickly and effectively ensure the safety of people who are or may be affected by family violence, including by facilitating the early identification of and response to family violence.

The Third Action Plan under the *National Plan to Reduce Violence against Women and their Children 2010-2022* commits the Commonwealth to developing and implementing National Risk Assessment and Safety Management Principles for victims and perpetrators of violence, based on evidence, including the risks that are present for children and other family members who experience or are exposed to violence.[[32]](#footnote-32) At present ANROWS, Australian’s national family violence research organisation, is developing national risk assessment principles and the project is expected to be delivered shortly. The principles are meant to be conceptual in nature rather than a specific tool to be used directly by professionals for risk assessment. ANROWS states:

The National Risk Assessment Principles that ANROWS are developing are expected to: be relevant to, and appropriate for, front line workers/first responders assisting victims of family and domestic violence (FDV) who operate at different levels in multiple sectors and from multiple disciplines; reflect best-practice and be informed by the latest national and international practitioner and academic research; complement and build on the work undertaken in other jurisdictions and/or by ANROWS; and be developed in consultation with key stakeholders.[[33]](#footnote-33)

However, principles are not the same as a risk assessment tool. A key way of ensuring safety in family violence cases is a validated, comprehensive and consistent risk assessment tool to accurately identify the existence of family violence and determine the appropriate response. Such a tool could be immediately used by professionals from all disciplines to accurately and consistently identify the presence of family violence in any case. In 2017, the House of Representatives Standing Committee on Social Policy and Legal Affairs recommended that “a nationally consistent, multi-method, multi-informant, culturally sensitive risk assessment tool” to be used “across sectors, between jurisdictions and among all professionals working within the family law system.”[[34]](#footnote-34) The Committee emphasised the important of a national risk assessment tool rather than just national principles on managing family violence risk.

At present there are multiple risk assessment tools used across the various state and federal legal and social service systems. This creates the dangerous potential for family violence cases to go unidentified or for a lack of responsiveness to family violence in some systems, creating safety risks for victims and their families. The Coroner in the Luke Batty Inquest in Victoria noted the problem of risk assessment tools for family violence that were not validated, that were uncoordinated, not uniform in approach and which were not routinely shared between service providers and agencies.[[35]](#footnote-35) The evidence in that case was that no single agency in the state family violence or federal family law system held or assessed all of the information for the purposes of conducting risk assessments and managing the risk posed by Greg Anderson, who ultimately killed his son.[[36]](#footnote-36)

Risk assessment practices used across the family law system are inconsistent and require improvement.[[37]](#footnote-37) The ANROWS developed risk assessment principles will go some way towards coordination of a new approach but it is not the same as a specific risk assessment tool. There is no consistently used family violence risk assessment tool used across the federal family law system. The Detection of Overall Risk Screen (DOORS) was developed for the federal family law system but is not used by all family law professionals, especially family lawyers.[[38]](#footnote-38) The DOORS tool is very different to that used in state family violence systems such as the Common Risk Assessment Framework (CRAF) used in Victoria.

The Royal Commission into Family Violence noted that the problem of inconsistent risk assessment tools at federal and State/ Territory level should be addressed by the Commonwealth.[[39]](#footnote-39) The Royal Commission recommended that the Victorian government, through the Council of Australian Government’s Law, Crime and Community Safety Committee, pursue the development of a national family violence risk assessment framework with consistent use of this tool by State, Territory and federal courts, lawyers, government and non-government service providers.[[40]](#footnote-40) Since the disbanding of the Law, Crime and Community Safety Committee in 2017, responsibility for a nationally consistent risk assessment process should rest with the Council of Attorneys-General (CAG). CAG assists the Council of Australian Governments by developing a national and Trans-Tasman focus on maintaining and promoting best practice in law reform. To date, the Communiques of CAG do not indicate any attention to this matter.[[41]](#footnote-41)

The development of a nationally consistent family violence risk assessment tool is a matter for urgent priority. This national reform should be led by the Commonwealth government through the Council of Australian Government’s Council of Attorneys-General. Such a tool should be based upon the ANROWS developed national risk assessment principles.[[42]](#footnote-42) As the Luke Batty case shows, poor risk assessment practices can mean that crucial information received by one agency is not shared, which can have devastating consequences for the safety of women and children affected by violence. The development of a revised CRAF tool in Victoria, which is currently underway has the potential to provide a best-practice model for a validated risk assessment tool which could be used nationally.[[43]](#footnote-43) Importantly, the tool should be used in all social support service services that work with families, not just federal and state courts.

**3. I recommend that the Commonwealth government, through the Council of Australian Government’s Council of Attorneys-General, urgently lead the development of a nationally consistent family violence risk assessment tool which should be used by State, Territory and federal courts, lawyers, government and non-government service providers (Question 31).**

# Information Sharing between State/Territory and Federal service providers (Question 33)

This matter relates to question 33 of the Australian Law Reform Commission, *Review of the Family Law System: Issues Paper* (March 2018) on how collaboration and information sharing between the federal family law and state child protection and family violence systems can be improved.

Information sharing is necessary for adequate risk assessment in family violence cases. Access to orders made by other courts is not routinely provided to all State/Territory and federal courts or other service providers. Information sharing is crucial to allowing state and federal courts and service providers to accurately identify and safely manage risks for victims of family violence and their children.[[44]](#footnote-44) Lack of information sharing is often a cause for delay in both state/territory courts and federal family violence courts as courts stand down matters to determine what orders have been made by other courts.

The Royal Commission into Family Violence recommended that the Victorian government, through the Council of Australian Government’s Law, Crime and Community Safety Committee, pursue the creation of a national database for family violence, child protection and family law orders, judgments, transcripts, and other court documents that is accessible to each of the relevant State, Territory and federal courts and other agencies as necessary.[[45]](#footnote-45) The Royal Commission noted that information exchange should extend beyond provision of court orders and should be accessible to state child protection authorities and police forces.[[46]](#footnote-46)

The Council of Australian Government’s Law, Crime and Community Safety Committee (now Council of Attorneys-General) agreed in 2016 to work towards a national starting date for the national domestic violence order scheme.[[47]](#footnote-47) The Committee had earlier stated that an objective of the National Domestic Violence Order Information Sharing System is to prototype the technical solution to improve the lack of national coordination and information sharing of domestic violence orders and related court orders across systems and between jurisdictions.[[48]](#footnote-48) In November 2017 the National Domestic Violence Order Scheme was launched which will mean that family violence intervention orders issued in any Australian State or Territory will be automatically recognised and enforceable nationwide.[[49]](#footnote-49) This scheme is supported by the Interim Order Reference Solution which is a secure web portal which allows local courts across Australia to access intervention order information held in the National Police Reference System, run by the Australian Criminal Intelligence Commission.[[50]](#footnote-50) It is intended that this system will be in place “until a dedicated and comprehensive national information sharing system, the National Order Reference System (NORS) is delivered at the end of 2019.”[[51]](#footnote-51) It is commendable that an information sharing system is being implemented. The need for this scheme is urgent.

### Access to Information by federal family support service providers

Access to intervention order information held by agencies and courts will be necessary to ensure the safety of victims of family violence and their families, not just for the courts, but for other service providers who work in and around the justice system. Family law service providers who will need access to intervention order information include service providers under the federal Family Relationships Services Programme including services such as family relationship centres, family dispute resolution (FDR), family counselling, children's contact services, parenting Orders Programme, the Post Separation Cooperative Parenting Programme and the Supporting Children After Separation Program. The need for safety in family support service provision in the federal family law system trumps the potential privacy needs of perpetrators of family violence. The Royal Commission noted that information exchange should extend beyond provision of court orders and should be accessible to state child protection authorities and police forces also.

The necessity for family support services in the federal family law system under the Family Relationships Services Programme to access the national intervention order scheme is immediate and strong. The AIFS Evaluation of the 2012 Family Violence Reforms found that the use of FDR was “strongly associated” with the experience of family violence, and that parents, especially mothers, who also reported experiencing the conditions of fear, coercion and control as a result, were more likely to be using FDR services as their main pathway to sort out parenting arrangements.[[52]](#footnote-52) Significantly higher proportions of mothers (71% using FDR) than fathers (48% using FDR) reported having experienced fear, coercion and control before/during separation.[[53]](#footnote-53) Without access to the Interim Order Reference Solution, or after 2019, the National Order Reference System, Family Relationships Services will need to depend on on unreliable self-reporting of the presence of intervention and other orders by parties, which creates a safety risk for participants.

### Information on a broad range of court orders

It will also be necessary for the full range of family violence, family law and child protection orders issued by state magistrates courts, children’s courts the two federal family courts to be stored in the National Order Reference System from 2019. The Australian Criminal Intelligence Commission has stated that, “The new system is being designed so it can be used as a base platform for sharing information about other types of orders, including bail, parole and warrants.”[[54]](#footnote-54) It is desirable that a broad range of orders and judgments from the many state and federal courts whose jurisdiction touches upon family violence should be included in the National Order Reference System, including intervention orders, criminal law matters, child protection and family law orders to ensure that all courts and service providers have up-to-date and accurate information on the outcomes of legal proceedings. In the family law system, this will better ensure the safety of victims of family violence who are also separating and who must use family law processes.

**4. I recommend that**

1. **Service providers under the federal Family Relationships Services Programme including services such as family relationship centres, family dispute resolution (FDR), family counselling, children's contact services, parenting Orders Programme, the Post Separation Cooperative Parenting Programme and the Supporting Children After Separation Programs, be able to access the national order reference systems in cases of family violence as necessary (Question 33);**
2. **The national order reference system should include criminal law, child protection, family violence and family law orders and judgments from all State, Territory and federal courts (Question 33).**

# Family Consultants (Question 41)

This section responds to question 41 on core competencies of professionals in the family law system. It focuses especially on the practices of family consultants (either private report writers or employed by the Family Court of Australia and the Federal Circuit Court).

Family Consultants are psychologists and/or social workers who specialise in child and family issues after separation and divorce. Family consultants may be ‘in-house‘, employed by the courts, or private practitioners engaged by the family courts pursuant to Regulation 7 of the *Family Law Regulations 1984*. Under the Family Law Act 1975, family consultants have numerous roles in child-related proceedings, including the provision of advice to the family courts on ‘such matters relevant to the proceedings as the court thinks desirable.’[[55]](#footnote-55) Family consultants interview children and their parents/carers and provide reports to the court on what orders will be in the best interests of the children. Information provided to the consultant is not privileged and can be reported to the courts.[[56]](#footnote-56) The family courts use the evidence given by family consultants on a wide range of matters to assist with determining what orders should be made.[[57]](#footnote-57)

The preparation of family reports is governed by the 2015 Australian Standards of Practice for Family Assessment and Reporting. These provide minimum standards and best practice guidelines for family assessments in family law matters that are applicable to both court-based family consultants and family report writers engaged under Regulation 7.[[58]](#footnote-58) At present, family consultants are not required to undergo family violence training.[[59]](#footnote-59)

Poor identification, understanding and responsiveness to family violence by family consultants raises the real potential for the commission of further family violence during the report-writing process or following inappropriate parenting orders made in reliance upon the family report. Multiple submissions made to the Victorian Royal Commission into Family Violence alleged that family consultants did not understand the nature and dynamics of family violence and minimised the violence in their case.[[60]](#footnote-60) The Royal Commission heard stories of both parents being asked to attend for an assessment by family consultants at the same time (despite the existence of a family violence intervention order preventing such contact) and victims of family violence being viewed suspiciously by family consultants for raising allegations of family violence.[[61]](#footnote-61)

The only way to challenge the evidence of a family consultant is to cross-examine the consultant when they are called as a witness to the case.[[62]](#footnote-62) This action is beyond the financial and legal capability of many victims of family violence who may feel that the consultant did not adequately take into account the nature and existence of violence in their case.

**5. I recommend that**

1. **All family consultants should undergo regular, mandatory, high-quality family violence training**
2. **All family consultants must use a high-quality family violence risk assessment tool such as the Victorian Common Risk Assessment Framework (CRAF)**
3. **A non-court complaints process should be introduced for the review of the conduct of family consultants (Question 41)**

# Cross-Examination of Victims of Family Violence by Perpetrators (Question 25)

This matter relates to question 25 on how to avoid misuse of family law processes as a form of abuse.

At present, unrepresented perpetrators of family violence are still able to cross-examine their victim of family violence in federal family law proceedings. Direct cross-examinations of victims can be used by perpetrators to further commit family violence and most certainly result in significant trauma for victims.[[63]](#footnote-63) The family courts have acknowledged that a lack of legal aid funding means that such cross examinations do occur.[[64]](#footnote-64)

The Productivity Commission recommended in 2014 that the Family Law Act should be amended to include provisions restricting personal cross-examination by those alleged to have used violence along the lines of provisions that exist in State and Territory family violence legislation.[[65]](#footnote-65) Draft legislation has been prepared which would protect vulnerable witnesses from direct cross examination by perpetrators of violence against them.[[66]](#footnote-66) However the Bill has not yet been introduced into Parliament, despite recommendation in 2017 from the Standing Committee on Social Policy and Legal Affairs, House of Representatives that this be done urgently.

Personal cross-examination of victims of family violence by perpetrators is totally unacceptable. The occurrence of such an event is tantamount to the courts and the family law system collaborating in further acts of family violence against the victim.

In Victoria’s family violence system, there are provisions which regulate the cross-examination of protected witnesses in state courts.[[67]](#footnote-67) Essentially, these provisions mean that where a respondent is self-represented, the court must order legal aid representation for the purpose of cross-examination. These provisions provide a good model of practice for how the federal family law system could operate.

**I recommend that**

**6. The Commonwealth Parliament urgently amend the *Family Law Act 1975* to ensure that perpetrators of family violence do not personally cross-examine victims of family violence in family law proceedings (Question 25);**

**7. That the federal Attorney-General provide adequate legal aid funds to allow for the legal representation of victims and perpetrators of family violence for the purpose of cross-examination of victims in family law cases (Question 25).**

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