



**Submission to the Australian Law Reform Commission regarding the review of the family law system**

Submitted by:	Victorian Women Lawyers Association Inc
Submitted online to:	The Executive Director Australian Law Reform Commission GPO Box 3708 Sydney NSW 2001
VWL Contact:	Michelle Berry President (03) 9603 3154



### **About us**

Victorian Women Lawyers ("**VWL**") is the peak body for women lawyers in Victoria. VWL is a voluntary association that promotes and protects the interests of women in the legal profession and provides a network for information exchange, social interaction and continuing education and reform within the legal profession and broader community. Since 1996, VWL has advocated for the equal representation of women and promoted the understanding and support of women's legal and human rights by identifying, highlighting and eradicating discrimination against women in the law and in the legal system, and achieving justice and equality for all women.

VWL's Law Reform Committee aims to empower female lawyers in achieving a satisfying and successful professional life by actively participating in law reform through making submissions to inquiries and hosting events. We have drawn on input from the professional experience of our membership in preparation for this submission.

### **Terms of Reference**

The Terms of Reference ask the Australian Law Reform Commission ("**ALRC**") to consider the need for reform in relation to areas that include:

1. appropriate early and cost-effective resolution of all family law disputes;
2. the protection of the best interests of children and their safety;
3. the best ways to inform decision makers about the best interests of children and their views;
4. family violence and child abuse, including protection for vulnerable witnesses;  
and
5. laws in relation to parenting and property division after separation.

## 1. An overview and women in the family law system

VWL welcomes the opportunity to make a submission to the ALRC in relation to the review of the *Family Law Act 1975* (Cth) ("**the Act**"). VWL submits that review of the Act is long overdue, noting that this is the first comprehensive review since its enactment in 1976. The ALRC Issues Paper raises a large number of important questions in its Terms of Reference. VWL has elected to narrow its focus in this submission to issues that are of particular importance to women and issues our membership believe are critical to protecting women who are exposed to the family law system. At the outset, VWL seeks to highlight the importance of individuals receiving competent legal advice to ensure both protection and procedural fairness are afforded to parties, particularly in circumstances of additional vulnerabilities such as family violence. The navigation of the legal system for women with family law disputes is unnecessarily complex, yet has a broad and far reaching impact upon their lives. Research indicates that women (and their children) are most at risk of further suffering after separation, particularly financial suffering.<sup>1</sup> Unfortunately, it is the case that women leaving relationships frequently have few financial resources on which they are able to rely as a result of having been primarily responsible for caring for children. As Weston and Smyth eloquently put it, separation "often exposes the economic vulnerability of women hidden by marriage".<sup>2</sup> The suffering experienced by separated women is often exacerbated if they are a victim of family violence.<sup>3</sup> Unfortunately, one in four Australian women experience violence perpetrated by an intimate partner.<sup>4</sup>

Delay, complexity, and unaffordability associated with the family law system currently act as barriers to access for women, especially those who face multiple layers of disadvantage such as financial hardship, cultural factors, or family violence.<sup>5</sup> The current lack of resources of the Family Court of Australia and the Federal Circuit Court ("**the Family Law Courts**") combined with high demand from the Australian community to have their matters resolved by the Family Law Courts means that many families face a wait of approximately two to three years before trial. Arguably, the system is in crisis and has been unable to keep up with demand for some time. The current family law system provides a strong framework for resolution of family law disputes, however its effectiveness is contingent on sufficient funding and resources. Adequate financial support and resourcing will consequently reduce delays. VWL is considerably concerned that the appointment of judicial officers has not been able to sustain pace with the complexity and sheer number of cases being commenced in the Family Law Courts. Of further concern is the fact that the Family Law Courts urgently require additional family consultants to prepare family reports and additional registrars to assist with the procedural administration of matters.

---

<sup>1</sup> Pru Goward, Human Rights and Equal Opportunity Commission and Sex Discrimination Unit, *Striking the Balance: Women, Men, Work and Family: Discussion Paper* 2005 (Sex Discrimination Unit, Human Rights and Equal Opportunity Commission, 2005) 54; Rosalie McLachlan et al, *Deep and Persistent Disadvantage in Australia: Productivity Commission Staff Working Paper* (Productivity Commission, 2013) 141.

<sup>2</sup> Ruth Weston and Bruce Smyth, 'Financial Living Standards after Divorce' [2000] *Family Matters* 10, 10.

<sup>3</sup> Pru Goward, above n 1.

<sup>4</sup> Australia's National Research Organisation for Women's Safety (ANROWS), *Violence against women in Australia: Additional analysis of the Australian Bureau of Statistics' Personal Safety Survey, 2012* (2015) <<http://anrows.org.au/file/1356>>.

<sup>5</sup> Women's Legal Service Victoria, *Small Claims, Large Battles: Achieving economic equality in the family law system*, (2018).



## 2. Objectives and principles

The Family Court of Australia ("**the Family Court**") was created to administer the Act and operate as a specialist problem-solving jurisdiction for family disputes. This specialist court was designed to incorporate informal judicial processes and a collaborative "one-stop shop" of legal and in-house counselling services. Underpinning these innovations was a vision of a "helping court" which assists families to separate amicably, through an emphasis on counselling and conciliation rather than litigation.<sup>6</sup> As the then Prime Minister, Gough Whitlam stated:

*Here will be a court, the expressly stated purpose of which is to provide help, encouragement and counselling to parties with marital problems, and to have regard to their human problems, not just their legal rights.<sup>7</sup>*

The Federal Circuit Court of Australia ("**the Federal Circuit Court**") was established in 1999 with a view to provide an accessible and simple alternative to the Family Court and to relieve the workload of the Family Court. It was intended that the Federal Circuit Court would act in a more informal manner as opposed to the Family Court and would use streamlined procedures. However, as demand for the Federal Circuit Court increased and resources and funding have not kept up with demand, the purpose of the Court has been compromised.

Modern family law policymakers should maintain the roles, functions, and objectives implemented in the Family Law Courts at the time of their inception. In particular, VWL considers that the fundamental objectives should promote the health and safety of children, protect individuals from family violence, encourage early resolution, resolve family law matters in a cost-effective manner, ensure cultural and linguistic sensitivity, and protect children from consequences of prolonged family conflict. Most importantly, VWL submits that the system should be accessible, adequately resourced, and functioning efficiently.

## 3. Access and engagement

### 3.1 Accessibility for marginalised communities

VWL considers that legal assistance is central for people to appropriately navigate the family law system at all stages of their matter. We recognise that there are barriers inherent to certain communities, especially women, which significantly impede access to the family law system, including lack of affordability, language, cultural and familial structures, geographic and physical related accessibility.

VWL recognises the extreme importance of improving accessibility for communities such as those who are Aboriginal and Torres Strait Islanders ("**ATSI**"), culturally and linguistically diverse ("**CALD**"), people who experience disabilities, the Lesbian, Gay, Bisexual, Transgender, Intersex and Queer ("**LGBTIQ**") and those in rural, regional and remote areas of Australia ("**RRR Areas**"). Often a family can experience multiple layers of challenges simultaneously. Hence, it is imperative to consider simplification of the

---

<sup>6</sup> Helen Rhoades, *The "helping court": Exploring the therapeutic justice origins of the Family Court of Australia*, (2011) 2 Fam L Rev 17.

<sup>7</sup> Commonwealth of Australia, Parliamentary Debates, House of Representatives, 28 November 1974, (Prime Minister Whitlam), 4322.



Family Law Courts processes so as to address the challenges faced by marginalised communities and to enable early intervention and meaningful and appropriate resolutions.

### 3.1.1 *ATSI communities*

VWL acknowledges the ongoing hardship ATSI people experience since colonisation, dispossession of land and the separation of children from families through historic government policies of child removal.<sup>8</sup> The lived experiences of ATSI people present complex needs that the family law system must support with appropriate expertise. VWL emphasises the importance of having processes in the family law system aligned with the values of ATSI people to meet the needs of their cultural history. VWL support the following recommendations for culturally safe and accessible services:

- the development of court hearing processes in the Family Law Courts similar to those of the Koori and Murri Court that recognise the lived experiences of ATSI people;
- strategies to support the development of an ATSI workforce across the family law system, including the appointment of Indigenous counsellors, family dispute resolution practitioners and judicial officers; and
- a greater use of cultural healing and trauma-recovery approaches that are grounded in Indigenous knowledge.<sup>9</sup>

### 3.1.2 *CALD communities*

Accessibility to the family law system for CALD communities, including the newly arrived or refugee communities, can be hindered by the communities' limited English language, knowledge and understanding of the family law system.<sup>10</sup> CALD communities also experience other significant barriers, such as their immigration status, social isolation and a preference to resolve their family matters privately or with community leaders. Such barriers must be addressed in order to promote greater access to the family law system for these communities. To this end, VWL is supportive of the recommendations set out in the Family Law Council's 2012 submission to Indigenous and Culturally and Linguistically Diverse Clients in the Family Law System Inquiry.<sup>11</sup>

### 3.1.3 *Disabled communities*

Those who experience a disability, in particular people with intellectual disabilities, may also experience a communicative barrier. To overcome this barrier, there needs to be

---

<sup>8</sup> Department of Prime Minister and Cabinet, *Closing the Gap: Prime Minister's Report 2017*, (2017).

<sup>9</sup> Aboriginal and Torres Strait Islander Healing Foundation, *Bringing Them Home 20 Years On: An Action Plan for Healing* (2017); Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (2016).

<sup>10</sup> Family Law Council, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds* (2012) ch 2, 31-33.

<sup>11</sup> *Ibid.*



increased funding for training and equipping family law professionals with methods to engage parents and children with disabilities.<sup>12</sup>

An additional issue faced by those who suffer from a disability is the complicated process of accessing a litigation/case guardian ("**guardian**").<sup>13</sup> The increasing unavailability of those willing to be appointed as a guardian in family law matters, and cost of those who are, is concerning. In circumstances that a family law litigant does not already have a guardian appointed under State or Territory legislation, substantial issues can arise. This is due to the fact that in some matters there will be no person, entity or authority available to be appointed as a guardian.<sup>14</sup> Arguably, this relates to the availability of funds to meet the guardian's legal costs.<sup>15</sup> For example, if a grant of Legal Aid is not obtained, the guardian can become personally liable for legal costs, should they seek legal advice.<sup>16</sup> Further issues may be experienced if the family law litigant then looks to an entity or authority for the appointment of a guardian. As stated in *Willshire & Willshire* [2009] FamCAFC 130:

*Unfortunately it is a common occurrence for there to be no person, entity or authority available to take such an appointment. Presumably for State entities such as Public Trustees or Public Advocates it is a question of costs, but they are the obvious choice to take up such an appointment where there is no available alternative.*<sup>17</sup>

As noted by the then Chief Justice Bryant to the ALRC Inquiry into Equality, Capacity and Disability in Commonwealth Laws,<sup>18</sup> it is extremely unfortunate that the Family Law Courts may be required to dismiss applications of family law litigants due to the unavailability of a suitable guardian.

### 3.1.4 LGBTIQ Families

The family law system must adapt to a rise in LGBTIQ families and provide LGBTIQ-focused services, particularly since same-sex marriage is now permitted in Australia. By investing in LGBTIQ-focused training for family law professionals, it will allow the family law system to be more responsive towards the LGBTIQ community's unique needs and family structures.<sup>19</sup>

The court process currently requires litigants to detail whether they are "male" or "female" on many court forms. VWL is supportive of such forms being amended to offer

---

<sup>12</sup> Office of the Public Advocate (Vic), *Whatever Happened to the Village, the Removal of Children from Parents with a Disability* (December 2013) 20; Law Society of NSW, *Letter to Attorney-General: Case Guardians and Litigation Guardians in the Family Court of Australia and the Federal Circuit Court of Australia*, (2015).

<sup>13</sup> The *Federal Circuit Court of Australia Rules 2001* (Cth) use the term 'litigation guardian', as compared to 'case guardian' in the *Family Law Rules 2004* (Cth).

<sup>14</sup> *Willshire & Willshire* [2009] FamCAFC 130.

<sup>15</sup> Diana Bryant AO. Submission in Response to the Australian Law Reform Commission. Issues Paper 44: *Equality, Capacity and Disability in Commonwealth Laws* (17 January 2014).

<sup>16</sup> *Ibid.*

<sup>17</sup> *Willshire & Willshire* [2009] FamCAFC 130, 55.

<sup>18</sup> Diana Bryant AO, above n 15.

<sup>19</sup> House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (2017), rec 25, 252.



alternatives for the LGBTQ community, such as inclusion of an additional option of “unspecified”.

### 3.1.5 RRR Areas

People living in RRR Areas face unique challenges with respect to accessing the family law system. People living in RRR Areas often experience higher needs, yet have fewer services available to them as opposed to their urban counterparts. The disadvantage experienced by those suffering from geographical barriers is often exacerbated by the cultural and poverty barriers which are common among those living in RRR Areas. This has the flow on effect of preventing them from seeking legal advice and accessing the court system. More particularly, those in RRR Areas have far less access to family law specialists and experts who can provide advice, reports and evidence in court hearings.<sup>20</sup> Further, conflict of interest is prevalent in RRR Areas, as there are limited legal firms, accredited family law specialists and community legal centres. This has a significant impact upon the ability for people in RRR Areas to obtain legal advice.

### 3.1.6 Recommendations for marginalised communities

VWL submits that additional funding and resources would assist to overcome issues associated with accessibility to the family law system for marginalised communities. More specifically, the following would be of tremendous value to those facing barriers to obtaining a fair outcome in their family law matter:

- partnerships and service integration of legal and family violence response services so as to improve awareness of the types of violence experienced by people from these communities;<sup>21</sup>
- engagement and collaboration with communities in the development, delivery and evaluation of services including planning and dispute resolution processes;<sup>22</sup>
- culturally sensitive and responsive family assessment reports where children are involved;<sup>23</sup>
- embedding workers from community services in the Family Law Courts and Family Relationship Centres as liaison officers;<sup>24</sup>
- ensuring cultural competency among professionals in the family law system through training to deal with intergenerational conflict;<sup>25</sup> and

---

<sup>20</sup> Australian Law Reform Commission, *Managing Justice: A review of the federal civil justice system*, Report No. 89 (January 2000), 5.80.

<sup>21</sup> COAG Advisory Panel on Reducing Violence against Women and their Children, *Final Report* (2016), 11, 37.

<sup>22</sup> House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 19, rec 25; Family Law Council, above n 9.

<sup>23</sup> Family Law Council, above n 9.

<sup>24</sup> Family Law Council, above n 9; House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 19, rec 25.

<sup>25</sup> House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 19, 244–5; Judicial Council on Cultural Diversity, *The Path to Justice: Migrant and Refugee Women’s Experience of the Courts* (2017) 44.



- community education about family law and family law services.<sup>26</sup>

### 3.2 Lack of affordability hindering access to the system

Lack of affordability detrimentally impacts upon access to the family law system. Women can experience financial instability for extended periods of time in an attempt to fund legal representation.<sup>27</sup> Women are often required to remain in unstable housing, are more reliant on welfare benefits, and usually struggle to enter or return to the workforce during this difficult period.

VWL submits that the simplest manner in which parties' legal costs can be reduced is by reducing the delays in the court system. The increased demand for engagement with the family law jurisdiction must be addressed with appropriate measures to reduce delays. The manner in which this can be achieved is further discussed later in this submission.

VWL is also supportive of investment in community legal centres to improve access to the family law system and refers to the report entitled '*the Economic Value of Community Legal Centres*' which sets out the advantages of doing so.<sup>28</sup>

### 3.3 Self-represented litigants

In 2013, Victoria Legal Aid amended their eligibility guidelines which had an enormous impact upon parties seeking legally aided assistance for their family law matters. This change affected priority clients, those at risk of family violence, risk of homelessness or physically or mentally disabled, as it restricted their ability to obtain legal representation should the other party not have legal representation at the Final Hearing stage.<sup>29</sup> These restrictions resulted in increased numbers of unrepresented parties in the Family Law Courts, which consumes more court time given self-represented litigants often do not understand many of the concepts and procedures.

Self-representation can further burden court resources as self-represented litigants are more likely to be unprepared for hearings, raise irrelevant issues, have difficulty complying with necessary procedures or exhibit high-conflict behaviour and file meritless claims. In response, the already overburdened and under-resourced courts have had to make available resources to allow self-represented litigants to help themselves, including the appointment of self-represented litigant coordinators and the development of self-help packs and other "how to" court literature.<sup>30</sup> Arguably, this has not greatly improved the problems associated with self-represented litigants and has, in fact,

---

<sup>26</sup> House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 19, rec 25.

<sup>27</sup> Women's Legal Service Victoria, above n 5.

<sup>28</sup> Nicholas Edgerton and Emma Partridge, "the Economic Value of Community Legal Centres", *the Institute for Sustainable Futures for Combined Community Legal Centres Group NSW and National Association of Community Legal Centres* (2006).

<sup>29</sup> Mutha-Merrennege, Pasanna, "Insights into Inequality: Women's Access to Legal Aid in Victoria". In Asher Flynn and Jacqueline Hodgson (eds), *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need*, Hart Publishing, 255 - 268.

<sup>30</sup> Kathy Laster and Ryan Kornhauser, "The Rise of 'DIY' Law: Implications for Legal Aid" (2016) 'DIY Law and Legal Representation: Some Consequences of the Rise of Amateurism and the De-valuing of Expertise'. In Asher Flynn and Jacqueline Hodgson (eds), *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need*, Hart Publishing, 124.





potentially encouraged more parties to represent themselves thereby exacerbating the problem.<sup>31</sup>

We note that the Law Council of Australia has long advocated for the following:

1. harmonising the sets of rules for both the Family Court and the Federal Circuit Court;
2. having only one set of forms for the Family Court and Federal Circuit Court; and
3. revising, including renumbering, the Act to ensure it is more user-friendly.

VWL supports such proposals and considers that these amendments to court procedure are likely to improve accessibility, not only for self-represented litigants, but also for family law practitioners.

The Family Law Council have previously made a recommendation to pilot a “Counsel Assisting model”. VWL has concerns regarding whether such a pilot program would achieve what it sets out to achieve. Consistent with the approach set out in this submission, VWL considers that the current family law system is sufficient to achieve fair outcomes for both children and parents involved in family law disputes, however, it is reliant on increased funding, and accordingly, increased resources. VWL’s view is that investment into the current system would be better use of funds, as opposed to expending funds to pilot new programs such as the Counsel Assisting model.

#### **4. Legal principles in relation to parenting and property**

##### **4.1 Part VII of the Act**

VWL acknowledges that there is a real need for simplification of Part VII of the Act. The parenting provisions within the Act are logistically difficult to navigate, even for skilled lawyers. In particular, VWL has concerns regarding the complexity and repetition within Part VII of the Act.

##### **4.1.1 Issues with parenting provisions**

The main concern raised by our members with respect to Part VII of the Act is the degree of repetition in the present framework. This repetition is experienced by both the judiciary when being required to address various matters several times throughout their judgment and by lawyers when preparing affidavits for trial.<sup>32</sup> An example of this is the requirement to consider the best interests of the child in both sections 60CC and 65DAA of the Act. Section 60CC also considerably overlaps with and contradicts section 60B with respect to the benefit of a meaningful relationship with parents, and protection from violence and abuse.<sup>33</sup>

---

<sup>31</sup> Ibid, 133-134.

<sup>32</sup> Helen Rhoades, ‘Rewriting Part VII of the Family Law Act’ (2015) 24(3), *Australian Family Lawyer*, Volume 3.

<sup>33</sup> Richard Chisholm AM, ‘Rewriting Part VII of the Family Law Act: A modest proposal’ (2015) 24(1) *Australian Family Lawyer*, Volume 1.



In addition, dividing relevant matters for consideration into primary and additional categories, as the Act currently does, results in many defective outcomes for families within the community. The legislation is drafted so as to require the Family Law Courts to consider the best interests of the child as a paramount consideration. In order to do so, the court must consider various matters which are relevant to the child's best interests, as opposed to giving more weight to some matters over others.

Members have also indicated that they often face issues with section 61DA, being the presumption of equal shared parental responsibility. The problems arise from clients and self-represented litigants mistakenly assuming equal shared parental responsibility equates to equal time in a parenting arrangement.

VWL also notes that our members have concerns with respect to the operation of section 60I of the Act. The court can only determine a parenting matter in circumstances that the applicant has filed a certificate that they have attended Family Dispute Resolution ("**FDR**"), unless an exception applies.<sup>34</sup> While VWL acknowledges that the process aims to encourage parties to preserve harmonious relationships and focus on their children, there are some issues which arise during the compulsory process.<sup>35</sup> More specifically, women frequently experience disadvantage such as power imbalances and undue pressure which can lead to unfair and inadequate parenting arrangements which jeopardises the safety of children.<sup>36</sup> The process, therefore, can restrict women's access to the court system, and thereby, deny their access to justice.<sup>37</sup>

An additional issue associated with the section 60I requirement is that FDR is required to occur quite quickly after separation.<sup>38</sup> This means that parties are generally not emotionally equipped to consider their matter, and hence, the process may take place prematurely.<sup>39</sup> Moreover, the manner in which FDR is conducted, being behind closed doors, means that it lacks transparency and issues experienced frequently by women, such as power imbalances and undue pressure, often go unrecognised.<sup>40</sup> It has also been demonstrated that forcing parties to deal directly with their ex-spouse can cause significant distress for many women.<sup>41</sup> Lastly, the compulsory requirement has the potential to deter women from seeking legal advice before entering into an agreement at FDR.

---

<sup>34</sup> The *Family Law Act 1975* (Cth), section 60I(7).

<sup>35</sup> House of Representatives Standing Committee on Family and Community Affairs, Parliament of the Commonwealth of Australia, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation* (2003), 61.

<sup>36</sup> Tania Sourdin, 'Resolving Disputes without Courts' (Article, Monash University, March 2012), 53.

<sup>37</sup> *Ibid*, 10.

<sup>38</sup> Anna Parker, 'Section 60I: Problems with its Operation and Proposals for Reform' (2014) 24(1), *Australian Family Lawyer*, Volume 1.

<sup>39</sup> Mike Emerson, 'Lawyers and Mediation – Bridging the Divide' (Article presented at the Vietnam Family Law Conference, September 2011), 21; Patrick Parkinson, 'Keeping in Contact: the Role of Family Relationship Centres in Australia (2006) 18 *Child and Family Law Quarterly* 157, 173.

<sup>40</sup> Cameron Green, 'ADR: Where Did the 'Alternative' Go? Why Mediation Should Not be a Mandatory Step in the Litigation Process' (2010) 12 *ADR Bulletin* 54, 56.

<sup>41</sup> Mike Emerson, above n 39, 6.



#### 4.1.2 *Recommended approach to parenting matters*

VWL supports the adoption of the “Chisholm model”,<sup>42</sup> put forward by Professor Richard Chisholm with respect to parenting orders and parental responsibility. Such a model involves consideration of the following principles in parenting matters:

- parenting arrangements should advance the child’s best interests, and should be age appropriate;
- it is beneficial for children to maintain relationships with parents and extended family, provided such involvement does not expose them to inadequate parenting, abuse, violence or continuing conflict;
- parenting arrangements should not expose a child, parent or other family member to abuse or violence; and
- the rights of children as stated in the United Nations Convention on the Rights of the Child should be upheld.<sup>43</sup>

Of particular importance, VWL promotes Chisholm’s approach with respect to the removal of the two-tiered division of relevant considerations in parenting matters, namely connection between parental responsibility and care arrangements, and the shared parental responsibility presumption.<sup>44</sup>

Such an approach avoids the wordiness and repetition that is currently evident in the parenting provisions. Adoption of this framework would allow for a simplified parenting decision framework to be applied by judges of the Family Law Courts. Such a mechanism would assist in addressing the need for court decisions to be delivered in a timely and considered fashion to ensure the Family Law Courts serve the best interests, safety and welfare of Australian children and their families. This would have the flow on effect of significantly improving the capacity of the Family Law Courts to triage and determine family law cases more efficiently. As a result, the Family Law Courts can then appropriately respond to the complex needs of Australian families.

With respect to section 60I specifically, VWL submits that the following approach would afford protection for vulnerable women and would better promote the interests of children:

- that there be an amendment with regard to the timing of the requirement for participation in FDR to require parties to have filed a certificate prior to trial; and
- that the legislation be appropriately amended to allow for judicial consideration of the appropriateness of FDR having regard to the best interests of the children.<sup>45</sup>

---

<sup>42</sup> Richard Chisholm AM, above n 33.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

<sup>45</sup> Anna Parker, above n 38.

## 4.2 Family violence

As raised earlier in this submission, the research literature demonstrates that family violence is a common issue for women in intimate relationships. As a result, the family law system must ensure that the Family Law Courts are adequately equipped to afford women and their children appropriate intervention and assistance in family law matters.

VWL considers that, as previously submitted;

*...early identification and response to family violence could be facilitated through the Courts' adoption of triage practices at the initial filing stage of matters. The aim of this process could be to assess and determine a possible family violence history and exposure to risk of a party and children in matters. The triage process could further streamline existing federal family law obligations, procedures, and forms.<sup>46</sup>*

VWL further considers that education would be instrumental to ensuring that the judiciary and practitioners are aware and informed of developments in family violence research, risk assessments, and scope of external support services.<sup>47</sup> The manner in which this can be done is discussed in further detail later in this submission.

There is also a need for increased information sharing between different agencies with respect to family violence, such as between the State courts, police and the family law system.

## 4.3 Provisions in the Act governing property division

While VWL acknowledges that women are assuming a greater role within the workforce, it is still often the case that the earning capacity of men is far greater than that of women. This is largely due to the fact that marriage often negatively impacts upon women's earning capacity as they predominantly occupy unpaid homemaking and parenting roles.<sup>48</sup> The process of obtaining property orders in the family law system can be emotionally draining, expensive, and very time-consuming for litigants.

### *4.3.1 Property settlements*

Although acknowledging that there are some deficiencies and areas in need of reform, VWL supports retaining a discretionary system for the alteration property interests. It is important to maintain such a discretionary system because each family is different, and accordingly every set of facts are different.

Firstly, our members wish to highlight that the separate property provisions relating to married and de facto couples should be merged and any outstanding inconsistencies should be resolved as far as possible (subject to the constitutional limitations due to the referral of powers). As they are currently drafted, the property provisions relating to married and de facto couples are disjointed and largely repetitive. VWL submits that

---

<sup>46</sup> Victorian Women Lawyers, *Submission to the Parliamentary inquiry into a better family law system to support and protect those affected by family violence* (2017), 3.

<sup>47</sup> *Ibid*, 5.

<sup>48</sup> Grania Sheehan and Jody Hughes, 'The Division of Matrimonial Property in Australia' [2000] *Family Matters* 28; Ruth Weston and Bruce Smyth, above n 2, 10.

there would be great benefits from a merger of the relevant provisions and renumbering of same.

With respect to the suggestion in the ALRC Issues Paper that a community of property regime be adopted to guide property settlement matters, VWL submits that this would complicate matters further. The consequence of doing so would result in extensive case law becoming largely irrelevant. Additionally, VWL notes that such a regime is likely to have a detrimental impact on the social and financial position of women and children in Australia.<sup>49</sup>

WVL notes the suggestion in the ALRC Issues Paper that the interests of children should be a consideration in determining property settlements. It is submitted, however, that such a principle should not be a paramount consideration in the determination of altering property interests. The rationale for this being that the needs of children are able to be better addressed through the mechanisms of child support and spousal maintenance. Further, in accordance with the Act, any alteration of property interests must be "just and equitable" and consideration must be given to the future needs of each party, which in turn addresses final parenting arrangements.

WVL emphasises that the child support system is unnecessarily complex, even for skilled lawyers. Further, the system frequently disadvantages women as the obligations imposed by the system are often far too low to address the children's needs and the costs borne by the primary carer.<sup>50</sup>

In relation to the codification of *Kennon & Kennon*,<sup>51</sup> VWL submits that this would provide clearer guidance about how family violence should be considered when determining property settlements. VWL acknowledges that family violence is a major issue of public concern and codification of this principle could be an important preventative measure against family violence. The test as set out in *Kennon & Kennon* is a high threshold which arguably requires clearer guidance with respect to its application. It is important, however, to consider the adverse and unintended effects in which codification may have, being increased costs for litigants, compounded delays experienced by the Family Law Courts, and an increase in the number of Family Violence Intervention Orders that would be contested. In order to overcome some of these issues, VWL would, in the alternative, support inclusion of family violence as a relevant consideration in sections 79 or 75(2) of the Act, as opposed to codification of *Kennon & Kennon*.

#### 4.3.2 Superannuation

Although superannuation is often one of the most significant assets for parties, there is usually a large disparity between the balance of men and women's superannuation.<sup>52</sup>

---

<sup>49</sup> Lynch, Angela & Rathus, Zoe & Field, Rachael. (1999). The Future of Family Law Property Settlement in Australia: A 50:50 Split or a Community of Property Regime? Some Issues for Women. *QUT Law Review*, 15.

<sup>50</sup> R Patrick, K Cook and A Taket, 'Multiple Barriers to Obtaining Child Support: Experiences of Women Leaving Violent Partners' (2007) 45 *Just Policy: A journal of Australian social policy*, 21, 23.

<sup>51</sup> *Kennon & Kennon* [1997] FamCA 905.

<sup>52</sup> Australian Bureau of Statistics, 'Household Wealth and Wealth Distribution, Australia, 2011–12' (Cat No. 6554.0, ABS, 2013) 4; Chris Ketter and Sam Dastyari, 'A Husband Is Not a Retirement Plan': Achieving Economic Security for Women in Retirement (Australian Senate Economics Reference Committee, 2016) 60.



VWL understands that many women are unable to obtain a fair property settlement due to the complex procedures involved in a superannuation split. It is for this reason that VWL supports the recommendation made by Women's Legal Service Victoria in their report, "*Small Claims, Large Battles: Achieving economic equality in the family law system*",<sup>53</sup> that additional assistance should be afforded to unrepresented parties to allow them to draft orders for a superannuation splitting order.

The legal complexity often experienced with superannuation splitting orders often stem from the following:

- the requirement to have the trustee name of the superannuation fund when drafting splitting orders; and
- the fact that discovering the superannuation fund of a former spouse can be a complex and costly process.<sup>54</sup>

Simplification of superannuation splitting should especially be addressed for accumulation funds, which are most common among separating parties. Other mechanisms for reforms in the sphere could involve superannuation funds being required to implement standard superannuation splitting orders for accumulation funds. VWL does, however, acknowledge that simplification of self-managed superannuation funds and pensions in the payment phase would be difficult. This is due to issues such as the need to value the interest and tax implications.

A further issue of concern for some of our members relates to litigants being required to confirm that they have considered Part VIII B of the Act when completing an Application for Consent Orders. Instead, litigants could be provided with a simplified version of the contents of Part VIII B which would not be as dense. This is also applicable to the requirement of having to read Part VII of the Act.

#### 4.3.3 *Spousal maintenance*

VWL supports the inclusion of family violence as a relevant factor for determination of and need for spousal maintenance applications. However, evidence that one party has obtained a Family Violence Intervention Order should not be prima facie evidence of the existence of family violence.

Our members are further supportive of any proposed development of a system of administrative determination for spousal maintenance claims, similar to that of child support whereby a formula could be adopted. This would be of particular benefit for matters which involve small asset pools as it would have the effect of making spousal maintenance more accessible. For example, as demonstrated by research conducted by Women's Legal Service Victoria, few litigants with small asset pools are in a position to pursue an application for spousal maintenance because the cost of doing so outweighs the advantage reaped by the litigant.<sup>55</sup> Alternatively, VWL is supportive of a process whereby matters are triaged by a registrar who is in a position to efficiently consider urgent spousal maintenance claims.

---

<sup>53</sup> Women's Legal Service Victoria, above n 5.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid.



#### 4.3.4 Financial agreements

In circumstances where parties effectively agree to "oust" the jurisdiction of the Family Law Courts to make any orders to adjust their property in accordance with the provisions of the Act, VWL supports the strict requirements associated with financial agreements that are currently imposed by the Act. This is especially so because the agreements are made without oversight of the court and inevitably involve one party, usually a woman, who is in a weaker bargaining position. VWL notes, that unfortunately the use of financial agreements in circumstances whereby one party is in a weaker bargaining position is impossible to avoid.

With respect to family violence, VWL does not consider that it should not be a new and separate ground to set aside a financial agreement as there is potential for this to result in a correspondingly significant increase in litigation. Rather, we submit that the principles of duress, undue influence and unconscionable conduct, which are currently grounds under section 90K upon which litigants are able to set aside a financial agreement, sufficiently address the interaction between parties entering into a financial agreement and family violence. Further, matters such as *Thorne v Kennedy (2017) 350 ALR 1* arguably confirm that equitable doctrines protect disadvantaged parties.

Members have highlighted that there is currently uncertainty with respect to sections 90E and 90U of the Act when specifying that "no" or "nil" spousal maintenance is payable. Commonly, agreements are drafted to provide for parties to each pay a nominal amount to the other in settlement of their respective claims, although no money exchanges hands as the payments are offset by each other. The *Family Law Amendment (Financial Agreements and Other Measures) Bill 2015* which was introduced to the Senate in 2015 dealt with this issue, however, VWL understands that this Bill has not progressed.

## 5. Resolution and adjudication processes

### 5.1 Small property claims

A less adversarial system which focuses on early resolution of property matters could provide a speedier pathway to resolving small and negative pool property disputes.<sup>56</sup> Women in particular often face multiple layers of disadvantage when being required to negotiate a property settlement with their former partner. It is specifically this segment of the community who would benefit from recourse to a user-friendly but prescribed court process. This can be achieved by the implementation of a streamlined case management process with a registrar. To an extent, such a process already exists within the court structure, however, proper case management processes must be utilised and there are currently lack of resources to effectively enable this. VWL supports the position of Women's Legal Service in this regard, that this streamlined process should involve simplified procedural and evidentiary requirements.<sup>57</sup> Essential to its success, the streamlined process requires an increase in the number of judges and registrars available to hear family law matters, thereby resulting in the faster resolution of disputes and thus lower legal fees for parties given they retain legal services for shorter periods of time.

---

<sup>56</sup> Emma Smallwood, 'Stepping Stones: Legal Barriers to Economic Equality after Family Violence' (Report, Women's Legal Service Victoria, 2015) 6.

<sup>57</sup> Women's Legal Service Victoria, above n 5.



Our members are not supportive of the recommendation that the jurisdiction and powers of State and Territory Magistrates' Courts be expanded to allow them to exercise powers under the Act. There are already difficulties due to the "split" federal family law system. If jurisdiction and power is expanded at the State level, the family law system has the potential to further diverge.

A more appropriate manner to resolve small property claims if a streamlined case management system is not endorsed would be through the use of arbitration. This is further discussed later in this submission.

### 5.2 Dispute resolution for cases involving family violence

Parties who have experienced family violence can be better supported through introduction of integrated family law court services across all jurisdictions and expansion of legally-assisted FDR processes. VWL recommends the national roll out of a model reflective of the integrated family law court services introduced in 2017 and delivered through the Family Law Courts in Dandenong and Melbourne.<sup>58</sup> Through the integrated family law court service model, parties have access to family violence support workers and specialist lawyers, providing a one-stop shop for legal assistance and social support.

VWL supports the Women's Legal Services Australia submission to the *SPLA Family Violence Report* that a "well-supported and safe mediation process, with expert lawyers and mediators who have a sound understanding of family violence and family law, can be an empowering process for a victim (of family violence)".<sup>59</sup> We stress the importance of legal representation and advice for parties who have experienced family violence as access to justice requires that people are aware of their legal entitlements.<sup>60</sup>

### 5.3 Alternative Dispute Resolution

VWL supports the further development of non-adjudicative dispute resolution processes to resolve disputes in a timely and cost-effective way. More resources and funding is required to be allocated towards dispute resolution processes to increase their effectiveness and appropriateness. Alternative Dispute Resolution ("**ADR**") can, in some circumstances, limit a woman's access to the court system and legal advice by directing them into less formal processes.<sup>61</sup> Hence, mechanisms must be in place to avoid the adverse impact in which ADR may have on women in particular.

Currently, the Family Law Courts provide opportunities for parties to be diverted to other dispute resolution processes, with the aim of being more efficient and cost-effective than litigation. For example, as discussed earlier in this submission, prior to commencing any parenting proceedings whereby parties seek an order under Part VII of the Act, they are required to meet specific pre-action procedures which require them to attend FDR

---

<sup>58</sup> Legal Aid Victoria, *New Integrated Family Law Court services coming to Dandenong and Melbourne* (2016) <<https://www.legalaid.vic.gov.au/about-us/news/new-integrated-family-law-court-services-coming-to-dandenong-and-melbourne>>.

<sup>59</sup> Women's Legal Services Australia, Submission No 6 to House of Representatives Standing Committee on Social Policy and Legal Affairs Committee, *Inquiry into A Better Family Law System* (April 2017), 25.

<sup>60</sup> Anna Parker, above n 38.

<sup>61</sup> Parliament of Victoria Law Reform Committee, 'Inquiry into Alternative Dispute Resolution and Restorative Justice' (Report, May 2009), 63.





before they can file their application unless an exception applies.<sup>62</sup> This is for the purpose of encouraging parties to make a genuine effort to resolve their dispute before commencing litigation. However, as this submission notes, more funding and resources are required to be invested into more streamlined ADR processes and active case management schemes. In particular, VWL supports the notion of additional funding for the expansion of existing models of legally assisted FDR in order to provide increased accessibility for vulnerable parties, especially women, to seek fair property settlements.

VWL is of the view that additional resources should also be invested to support counsellors available at court to provide front-line relationship services and help parties to negotiate agreements. These pre-litigation stages are extremely crucial because should the parties be successful, then the parties can avoid lengthy and costly litigation.

VWL also considers that arbitration can be used to effectively resolve small property pools and less complex parenting matters, or those which require a particular interim issue to be determined efficiently. Thus, VWL would be in support of a national roll out of a model reflective of the arbitration process used by Legal Aid Queensland for small property claims.<sup>63</sup> Additionally, Courts should more readily make orders referring parties out to arbitration. We do note, however, that before there is an increase in use of arbitration, procedural barriers including the limited scope to appeal against an arbitrator's decision need to be addressed.

#### 5.4 Technology-assisted mechanisms

Improved technology will undoubtedly increase accessibility to the family law system. However, as submitted earlier in our submission, the current family law system provides a strong framework for resolution of family law disputes. It is for this reason that VWL does not support the creation of online dispute resolution processes, particularly where they prevent or deter parties from obtaining legal advice.

### **6. Integration and collaboration**

#### 6.1 Integrated services

It is insufficient to treat circumstances of family law issues as individualistic and isolated issues. Rather, the broader community context must be recognised. Research demonstrates that the most effective approach to meet the needs of those in the community involves holistic service delivery being a combined legal, health, social and other community services approach.<sup>64</sup> It is, therefore, important to acknowledge that those who access the family law system do not experience issues in a vacuum. If we are in a position to acknowledge the interrelationship between the issues being experienced, it is possible to address such issues more broadly.

The provision of a more integrated service will greatly assist the navigation of the complex system during a stressful period to ensure individuals are able to obtain legal assistance at the earliest opportunity and access to social services from support workers

---

<sup>62</sup> The *Family Law Act* 1975 (Cth), section 60I.

<sup>63</sup> Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 2, 2014), 24.7.

<sup>64</sup> Mary Anne Noone & Kate Digney, *Improving Access to Justice: The Key Features of an Integrated Legal Services Delivery Model* (2010), 11.



co-located at the court.<sup>65</sup> There is a clear need for the Family Law Courts to provide referrals to services and prioritise involvement of and access to legal and non-legal supports.<sup>66</sup> More specifically, the Family Law Courts should expand on the existing partnerships with support services, such as those which provide financial or housing support, in order to develop a referral framework.<sup>67</sup> There are already a number of agencies which work alongside one another, such as the Family Safety Model developed by Relationships Australia, which uses a case manager role attached to men's behaviour programs. VWL encourages the government to draw upon the approach used in the Family Safety Model when considering improved case managed integrated services models in family law. Further, VWL notes that proposals for effective integration of services have been set out in the Final Report prepared by the Family Law Council in 2016.<sup>68</sup>

## 6.2 Cross-jurisdictional collaboration

VWL is concerned about the interaction between State and Commonwealth courts, particularly in circumstances of family violence protection orders. An example of the issues with the intersection between the Family Law Courts is that most State courts do not require an affidavit to be filed when seeking a family violence protection order. Hence, respondents are often unaware of the specific allegations made against them.<sup>69</sup> VWL submits that consideration of increasing powers of the Family Law Courts with respect to Family Violence Intervention Orders would assist in overcoming the issues currently being experienced in this sphere, although it is noted that this could have the detrimental impact of exacerbating delays already experienced by the Family Law Courts.

## **7. Children's experiences and perspectives**

### 7.1 Children and young people in the Family Law Courts

VWL acknowledges that children who participate in the family law system have complex needs and experiences. Research suggests that some of the main areas of concern for children are that they wish to be heard,<sup>70</sup> that their information has been delivered to the Family Law Courts in a timely fashion (as delays can mean their view may change from when it is given to the date of the court hearing),<sup>71</sup> and being informed of issues that impact upon them.<sup>72</sup> A review to streamline the experience of children, while maintaining safety and maximising opportunities to be heard and well informed may be required. However, VWL is also conscious that involvement of children in court proceedings can be harmful if there are not adequate protections, taking into consideration the children's ages and stages of development.

---

<sup>65</sup> Victoria Legal Aid, above n 50.

<sup>66</sup> Victorian Women Lawyers, above n 40, 4.

<sup>67</sup> Ibid.

<sup>68</sup> Family Law Council, 'Reports on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems Final Report' (30 June 2016).

<sup>69</sup> Caroline Jenkins, 'Family violence - the relationship (and the tensions) between intervention orders and orders pursuant to the Family Law Act' (2016) 25(2) *Australian Family Lawyer*, volume 25.

<sup>70</sup> Judy Cashmore and Patrick Parkinson, "Children's participation in family law disputes, the views of children, parents, lawyers and counsellors", *Family Matters* 2009 Number 82, 16.

<sup>71</sup> ACT Children & Young People Commissioner, *Talking with children & young people about participation in family court proceedings* (August 2013), 10.

<sup>72</sup> Ibid, 25.



Central to the effectiveness of achieving the best outcomes and experiences for children exposed to the system, are Independent Children's Lawyers and section 11F family consultants. Both sets of professionals are particularly valued by the Family Law Courts. VWL supports the view that providing services to support these mechanisms and expand these services, will achieve a more positive experience, and a more streamlined process for families.

## 7.2 Children's views

VWL considers that the current guidelines for consideration of children's views are sufficient and do not require dramatic alteration. However, VWL would not be opposed to the exploration of a mechanism similar to the Scottish F9 form, where children can write directly to a judge should they wish to do so. While guidelines for this practice have been recommended, such a process would mean professionals with skills in assisting children through the process, interview techniques and other factors, would assist this process. This may address some safety concerns, where children feel they are unable to speak freely to those representing them, and having such information heard in court. Having direct access to a judge ensures confidentiality on behalf of the child. This may also alleviate concerns where Independent Children's Lawyers are at risk of being in a position where information given to them in confidence by the child, needs to be expressed to the court in the child's "best interests".

## **8. Professional skills and wellbeing**

### 8.1 Core competencies and training

The ALRC Issues Paper highlights a clear focus on the need to investigate how family lawyers respond to matters involving family violence and child abuse and how, if necessary, these responses can be improved. While many of the core competencies required of family lawyers are the same as those required of other legal practitioners, VWL considers that the constant exposure to matters involving family violence and child abuse require specialist skillsets.

#### *8.1.1 Family Violence Competency*

VWL believes that it is vital that family lawyers possess robust skills with respect to identifying family violence in order to effectively advise clients who may be a victim or perpetrator of family violence. Given the nature of the society in which we now live, such a skillset is essential as the likelihood of being required to advise a client involved in family violence is quite high. In 2016, it was reported that family violence was an issue in 79% of legal aid family law cases, and that 21% of women in regional, rural and remote areas and 15% of women in capital cities had experienced violence at the hands of a partner.<sup>73</sup>

In Australian law schools, family violence is generally taught as part of elective family law units, or during criminal law units, which tend to focus on the law of assault rather than on civil protection orders available for victims of family violence. Law graduates wanting to work in family law tend to learn "on the job" as a result of interaction with

---

<sup>73</sup> Dr C James and Dr N Ross, "Did he ever hit you? Exploring the attitudes of lawyers in the assessment of the seriousness of threats and violent histories in domestic violence cases" *Australian Journal of Family Law* (2016) 30 AJFL 3, 2.



clients or via optional training seminars. This can lead to a lack of confidence and skills in identifying family violence and/or assessing risk.<sup>74</sup>

In response to the Family Violence Courts Review, programs such as the detection of overall risk screen ("**DOORS**") framework were developed. If adopted widely and used appropriately, it is believed that such frameworks have the potential to improve the risk detection and assessment abilities of lawyers, particularly when developing ongoing parenting arrangements.<sup>75</sup> The DOORS framework, for example, which can be completed by clients via an online application or on paper, is a screening tool designed to assist professionals to detect and evaluate risks before they escalate. However, it has been identified that DOORS and similar practice-wide screening tools have not been widely adopted.<sup>76</sup> A possible explanation for this is the fact that the framework is reasonably long and complex.

In a survey of family violence screening tools, it was found that there are a wide variety of approaches when it comes to identifying family violence. Some organisations regularly use screening tools as part of initial interviewing protocols, others use assessment forms developed by social workers and some had undertaken DOORS training.<sup>77</sup> However, where screening processes were lacking, lawyers had to rely on spontaneous disclosures and monitoring body language when assessing whether to raise issues of family violence with clients.<sup>78</sup> Many respondent lawyers, in a 2016 study conducted by Drs James and Ross, believe that more formal training in risk assessment should be made available, with some suggesting that it should be mandatory.<sup>79</sup>

VWL acknowledges that screening processes are not the sole method for identifying family violence for family lawyers, nor can they guarantee that all family lawyers will be able to identify family violence where present. It is certainly true that, even in supportive environments with targeted questions under a screening framework, some women will not disclose instances of family violence, meaning screening processes may not alert practitioners to the presence of family violence.<sup>80</sup>

VWL supports the suggestion that all junior family law practitioners be required to participate in training on screening processes that help to identify those clients experiencing family violence.

### 8.1.2 Cultural Competency

CALD communities experience heightened complexity when attempting to navigate the family law system. Of particular concern are the heightened rates of family violence and child abuse in ATSI communities.

The NSW Department of Health identified a number of factors that have increased Aboriginal families' vulnerability to family violence, including dispossession from land and traditional culture, the breakdown of community kinship systems, racism and

---

<sup>74</sup> Ibid, 3.

<sup>75</sup> B Fehlberg et al, *Australian Family Law: The Contemporary Context*, Oxford University Press (2015), 151.

<sup>76</sup> Dr C James and Dr N Ross, above n 73, 4.

<sup>77</sup> Ibid, 8.

<sup>78</sup> Ibid, 9.

<sup>79</sup> Ibid, 17.

<sup>80</sup> Ibid, 4.



vilification, economic exclusion and entrenched poverty, inadequate housing, the effects of institutionalism and child removal policies, inherited grief and trauma and the loss of traditional Aboriginal female roles, male roles and status.<sup>81</sup> Additionally, kinship networks lead to a close-knit community, leading women experiencing family violence to be reluctant to report the violence, as it will impact a wide circle of people.<sup>82</sup> The NSW Government identified that “barriers to seeking support services, and the likelihood of receiving inadequate or inappropriate responses, mean Aboriginal women are increasingly vulnerable to the risks and effects of violence.”<sup>83</sup>

VWL submits that the difficulties experienced by CALD communities in the family law system need to be addressed through better education and guidance for practitioners in the family law system. In particular, we recommend the development of an additional document to be read alongside the *Best Practice Guidelines for lawyers doing family law work* (“**the Guidelines**”) that provides more in-depth information to aid cultural competency. The Guidelines currently contain a section on ATSI people, but it should be more informative to reflect the nation’s growing understanding of cultural complexities affecting clients involved in family law matters. The Guidelines provide information on the different resources and referral programs available to assist family lawyers in reaching satisfactory and safe outcomes for their clients.

### 8.1.3 Competencies expected of judicial officers

Section 22 of the Act restricts judicial appointments to the Family Court to those legal practitioners and/or judges who are suitable people to deal with matters of family law “by reason of training, experience and personality”. Whilst this only applies to the appointment of Family Court judges, it is clear that Parliament recognised the importance of decision makers presiding over family law matters having a sound understanding of the complexities involved in this area of the law. VWL recommends that the relevant authority, whether it be the State or Federal Government, ensure that all courts involved in matters of family law have judicial officers available with an understanding of family and an eagerness to work in that field. This will ensure a diversity of knowledge within all courts and will allow family law matters to be listed before a judicial officer with an understanding of family law, family violence and child abuse.

While judicial officers are not involved in the same processes as family lawyers, it is important that they possess similar core competencies as family lawyers when determining family law matters. This will aid judicial officers in their reasoning about the matters and lead to more satisfactory and safe outcomes for parties.

The effectiveness of resources such as the Family Violence Bench Book available through the Judicial College of Victoria is largely untested.<sup>84</sup> We recommend that courts in which family law, family violence and child abuse matters are heard review the extent to which judicial officers use and benefit from such resources. The results of such a

---

<sup>81</sup> NSW Department of Health, *NSW Aboriginal Family Health Strategy 2011 – 2016*, 8.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*, 7.

<sup>84</sup> *Family Violence Bench Book*, available at <http://www.judicialcollege.vic.edu.au/eManuals/FVBBWeb/index.htm#34143.htm>, Judicial College of Victoria, Melbourne (accessed 1 May 2018).



review will assist in determining what resources and measures might be of assistance to judicial officers to improve understanding in this area of law.

VWL further recommends that the Judicial College of Australia, in collaboration with their State counterparts, further develop continuing professional development programs for judicial officers hearing matters involving family law, family violence and child abuse. While judicial officers cannot be compelled to participate in training following their appointment to the bench, those officers interested in developing their skills who participate in these programs should be the first point of contact when a matter of family law comes before their court.

## 8.2 Professional wellbeing

There is little research focusing on the effects that threats or violence by clients have on family lawyers, nor on experiences of vicarious trauma by family lawyers. Drs James and Ross questioned lawyers in their 2016 study about threats and received a large number of responses describing incidents involving clients, former clients or other parties that involved assaults, threats to kill, abuse, physical intimidation, stalking and destruction of property.<sup>85</sup> The majority of respondents, however, reported that they were not frightened by these experiences, suggesting good resilience and an ability to manage situations so as to not negatively impact their wellbeing.<sup>86</sup> Approximately 93% of respondents reported having access to duress alarm systems as well as processes for debriefing and responding to events such as policies for dealing with threatening behaviour.<sup>87</sup> Many of these lawyers, despite having access to such services, did not use them, citing time pressure at work, a fear of appearing weak and a preference to debrief with peers than with a professional counsellor.<sup>88</sup>

The Law Institute of Victoria ("**LIV**") in its 2014 report, "*Mental Health and the Legal Profession: a Preventative Strategy*", has noted that since 2007 there has been growing awareness throughout the legal profession that lawyers are more likely to experience depression and anxiety than the general population, which has led to an overarching acceptance that mental wellbeing is an industry and profession-wide issue requiring actions from a range of professional associations.

Legal professionals in Victoria have access to a range of services designed to assist in overcoming mental health concerns, such as BarCare (the Victorian Bar's health crisis counselling service), the Wellbeing and the Law Foundation (available for LIV members and encompassing the LIV Member Employee Assistance Program, a 24 hour support service for LIV members) and various programs provided by employers. Those employed by these services are trained in recognising symptoms of vicarious trauma, as this is one of the main concerns for lawyers practising in various jurisdictions.

While these programs are available, there is acceptance of the need for additional mental health services within the profession. VWL submits that specialised services such as employee assistance programs that employ counsellors with experience in identifying symptoms of vicarious trauma would be largely beneficial within family law industry.

---

<sup>85</sup> Dr C James and Dr N Ross, above n 73, 18.

<sup>86</sup> Ibid.

<sup>87</sup> Ibid, 19.

<sup>88</sup> Ibid.



## **9. Governance and accountability**

### **9.1 Section 121 of the Act**

VWL submits that section 121 of the Act should not be removed from the legislation, nor should it be substantially amended. In particular, VWL opposes any amendment that would allow the media to report upon family law proceedings and specifically name parties to such proceedings. We do, however, acknowledge that there is some concern that the provision does not allow people to share their experiences of the Family Law Courts publicly, particularly victims of family violence. Given it is possible for victims to share their experiences in an anonymised fashion, it is our position that protection of the privacy and dignity of the parties and their children should remain paramount.

## **10. Concluding remarks**

The current family law system is robust and effective and should not require any new crafting or radical re-development. While the system does not require drastic overhaul, there are clearly significant issues currently being experienced with its effective operation. Such issues, VWL submits, can be addressed through increasing resources and funding to particularly address:

- a) the increased number of people using the Family Law Courts and delays caused by this increased usage;
- b) the need for court decisions that are both timely and considered to ensure the Family Law Courts serve the best interests, safety and welfare of Australian children and their families;
- c) ensuring that the ever-evolving diversification of family structures and methods of family formation are supported by the family law system; and
- d) improving access to justice through ensuring pro-bono services are adequately funded and resourced.

VWL welcomes the opportunity to be further consulted about the issues raised in this submission.

**Michelle Berry**  
President  
Victorian Women Lawyers

**Hayley Chester & Alex Dworjanyn**  
Law Reform Committee Co-Chairs  
Victorian Women Lawyers